

# IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant(s),  
vs.

Case No: C092174  
SC No: 61734

STATE OF NEVADA,  
Respondent(s),

# RECORD ON APPEAL VOLUME 7

ATTORNEY FOR APPELLANT  
ROY D. MORAGA # 31584  
PROPER PERSON  
1200 PRISON RD.  
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT  
STEVEN B. WOLFSON, ESQ.  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NEVADA 89101

I N D E X

<u>VOLUME:</u>	<u>PAGE NUMBER:</u>
1	1 - 220
2	221 - 441
3	442 - 662
4	663 - 882
5	883 - 1101
6	1102 - 1320
7	MINUTES

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	01/10/2006	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1117 - 1120
3	10/03/1991	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	442 - 442
4	03/05/1996	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	757 - 758
4	02/20/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	702 - 704
4	03/11/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	764 - 766
3	10/03/1991	AFFIDAVIT IN SUPPORT OF OF REQUEST TO PROCEED IN FORMA PAUPERIS	443 - 445
4	02/20/1996	AFFIDAVIT OF DEFENDANT	705 - 706
4	03/11/1996	AFFIDAVIT OF PETITIONER	767 - 768
6	01/10/2006	AFFIDAVIT OF PETITIONER	1121 - 1122
5	04/30/1998	AFFIDAVIT OF ROY D. MORAGA	887 - 888
5	09/27/2004	AFFIDAVIT OF ROY D. MORAGA	1061 - 1062
1	06/13/1990	AMENDED INFORMATION	118 - 121
3	11/13/1991	AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	461 - 463
4	07/31/1992	ANSWER IN OPPOSITION TO MOTION FOR RETURNING SEIZED PROPERTY	670 - 680
4	10/29/1996	CASE APPEAL STATEMENT	859 - 861
5	06/15/1998	CASE APPEAL STATEMENT	910 - 911
5	09/28/1998	CASE APPEAL STATEMENT	947 - 948
5	02/18/2004	CASE APPEAL STATEMENT	1044 - 1045
6	02/10/2005	CASE APPEAL STATEMENT	1102 - 1103
6	03/02/2007	CASE APPEAL STATEMENT	1214 - 1216
6	03/05/2007	CASE APPEAL STATEMENT	1219 - 1220
6	09/18/2012	CASE APPEAL STATEMENT	1317 - 1318

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
7	11/09/2012	CERTIFICATE OF COPY AND TRANSMITTAL OF RECORD	
5	02/25/2002	CERTIFICATE OF INMATE'S INSTITUTIONAL ACCOUNT	968 - 968
5	01/17/1997	CERTIFICATE OF MAILING	886 - 886
4	08/05/1996	CERTIFICATE OF MAILING OF MOTION TO WITHDRAW AS COUNSEL	830 - 830
1	12/28/1989	CRIMINAL BINDOVER	1 - 11
3	01/27/1992	CRIMINAL SETTING SLIP	469 - 469
1	06/27/1990	DESIGNATION OF RECORD ON APPEAL	140 - 141
3	11/13/1991	DESIGNATION OF RECORD ON APPEAL	464 - 465
3	02/13/1992	DESIGNATION OF RECORD ON APPEAL	471 - 471
4	10/07/1996	DESIGNATION OF RECORD ON APPEAL	849 - 850
5	06/13/1998	DESIGNATION OF RECORD ON APPEAL	907 - 908
5	09/22/1998	DESIGNATION OF RECORD ON APPEAL	944 - 945
6	02/10/2005	DESIGNATION OF RECORD ON APPEAL	1104 - 1105
7	11/09/2012	DISTRICT COURT MINUTES	
3	02/20/1992	EX PARTE APPLICATION FOR PREPARATION OF TRANSCRIPTS	472 - 472
5	02/09/2004	EX PARTE MOTION FOR EXCESS FEES	1030 - 1036
4	02/20/1996	EX PARTE MOTION FOR FEES FOR EXPERT SERVICES	707 - 711
5	09/27/2004	EXTRAORDINARY WRIT OF MANDAMUS	1063 - 1069
3	10/03/1991	FINANCIAL CERTIFICATE	446 - 447
6	01/10/2006	FINANCIAL CERTIFICATE	1123 - 1124
6	02/08/2007	FINDING OF FACT AND CONCLUSIONS OF LAW	1201 - 1206
4	09/06/1996	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	833 - 838
6	08/13/2012	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1275 - 1281
1	01/09/1990	INFORMATION	12 - 14
1	03/15/1990	INSTRUCTIONS TO THE JURY	42 - 66
1	07/07/1990	JUDGMENT OF CONVICTION (JURY TRIAL)	146 - 147
1	03/13/1990	JURY LIST	41 - 41



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	06/04/1990	MOTION AND NOTICE OF MOTION TO AMEND INFORMATION	85 - 117
4	02/20/1996	MOTION AND NOTICE OF MOTION TO COMPEL, PRODUCTION OF SEMAN AND BLOOD	712 - 726
1	02/05/1990	MOTION AND NOTICE OF MOTION TO ENDORSE NAMES ON INFORMATION	31 - 34
5	10/18/2004	MOTION AND ORDER FOR FAILURE TO PROSECUTE AND REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT	1075 - 1082
6	02/22/2006	MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING	1169 - 1173
6	03/05/2007	MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL	1221 - 1222
5	06/01/1998	MOTION FOR ENLARGEMENT OF TIME	905 - 906
4	04/11/1996	MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	791 - 794
3	10/03/1991	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	448 - 448
4	02/20/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	727 - 727
4	03/05/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	759 - 759
4	03/11/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	769 - 769
5	02/25/2002	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	969 - 971
6	01/10/2006	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1125 - 1126
4	08/26/1993	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS; MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE JAIL TIME CREDITS AND AFFIDAVIT OF PETITION	683 - 693
6	08/06/2012	MOTION FOR RECONSIDERATION	1257 - 1270
5	12/16/2003	MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	996 - 1006
4	07/21/1992	MOTION FOR RETURNING SEIZED PROPERTY	667 - 669
4	03/11/1996	MOTION FOR RETURNING SEIZED PROPERTY	770 - 773

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
3	01/02/1992	MOTION TO APPOINT COUNSEL FOR APPEAL	466 - 468
5	04/30/1998	MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	889 - 890
5	02/25/2002	MOTION TO PRESERVE EVIDENCE AND ORDER	972 - 980
5	08/06/1998	MOTION TO STRIKE	918 - 924
2	09/26/1991	MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VII	439 - 441
5	10/31/2002	MOTION TO VACATE AND/OR AMEND JUDGMENT	982 - 987
4	04/09/1996	MOTION TO WITHDRAW AS COUNSEL	785 - 788
4	08/02/1996	MOTION TO WITHDRAW AS COUNSEL	826 - 829
5	10/19/2004	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1083 - 1088
6	09/13/2007	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1241 - 1248
4	10/30/1995	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	698 - 701
5	04/30/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	949 - 951
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	952 - 959
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	960 - 967
6	05/02/2005	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	1113 - 1116
3	10/04/1991	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - REMAND	454 - 458
1	06/27/1990	NOTICE OF APPEAL	142 - 143
3	10/30/1991	NOTICE OF APPEAL	460 - 460
4	09/27/1996	NOTICE OF APPEAL	847 - 848
5	06/13/1998	NOTICE OF APPEAL	909 - 909
5	09/22/1998	NOTICE OF APPEAL	946 - 946

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	02/17/2004	NOTICE OF APPEAL	1038 - 1039
6	02/10/2005	NOTICE OF APPEAL	1106 - 1106
6	03/02/2007	NOTICE OF APPEAL	1217 - 1218
6	09/17/2012	NOTICE OF APPEAL	1312 - 1316
6	02/22/2006	NOTICE OF CHANGE OF ADDRESS	1174 - 1174
6	02/13/2007	NOTICE OF ENTRY OF DECISION AND ORDER	1207 - 1213
6	08/21/2012	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1282 - 1289
4	04/17/1996	NOTICE OF ENTRY OF ORDER	796 - 799
4	09/20/1996	NOTICE OF ENTRY OF ORDER	839 - 846
4	10/28/1996	NOTICE OF ENTRY OF ORDER	851 - 858
5	05/29/1998	NOTICE OF ENTRY OF ORDER	901 - 904
5	07/07/1998	NOTICE OF ENTRY OF ORDER	914 - 917
6	04/08/2005	NOTICE OF ENTRY OF ORDER	1109 - 1112
5	02/26/2002	NOTICE OF HEARING - CRIMINAL	981 - 981
3	10/03/1991	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	449 - 453
4	03/05/1996	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	760 - 763
1	06/29/1990	ORDER	144 - 145
1	08/02/1990	ORDER	148 - 149
4	08/17/1992	ORDER	681 - 682
6	03/30/2005	ORDER	1107 - 1108
3	02/10/1992	ORDER APPOINTING COUNSEL	470 - 470
6	03/23/2007	ORDER DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1239 - 1240
5	06/30/1998	ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME	912 - 913
5	01/07/2004	ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1028 - 1029

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	10/05/2012	ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER	1319 - 1320
5	05/28/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY OR IN ALTERNATIVE CORRECT ILLEGAL SENTENCE	899 - 900
5	08/27/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO STRIKE	942 - 943
3	10/23/1991	ORDER FOR APPOINTMENT OF COUNSEL	459 - 459
5	11/21/2002	ORDER FOR APPOINTMENT OF COUNSEL FOR POST- CONVICTION RELIEF	988 - 988
5	02/11/2004	ORDER FOR PAYMENT OF EXCESS FEES	1037 - 1037
6	01/12/2006	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	1162 - 1162
2	09/13/1991	ORDER FOR PRODUCTION OF INMATE	437 - 438
6	04/21/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1186 - 1187
6	05/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1188 - 1189
6	06/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1199 - 1200
4	08/27/1996	ORDER FOR TRANSCRIPTS	832 - 832
6	01/27/2006	ORDER GRANTING DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER DENYING DEFENDANT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL	1167 - 1168
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	473 - 474
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	475 - 476
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	477 - 478
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	479 - 480
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	481 - 482
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	483 - 484
2	01/09/1991	ORDER RELEASING EVIDENCE	435 - 435
1	06/13/1990	ORDER TO AMEND INFORMATION	122 - 122

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	02/15/1990	ORDER TO ENDORSE NAMES ON INFORMATION	39 - 40
4	04/17/1996	ORDER TO WITHDRAW AS ATTORNEY OF RECORD	800 - 801
2	01/09/1991	PETITION FOR RELEASE OF EVIDENCE	436 - 436
4	02/20/1996	PETITION FOR WRIT OF HABEAS CORPUS (POST- CONVICTION)	728 - 748
6	01/10/2006	PETITION FOR WRIT OF HABEAS CORPUS (POST- CONVICTION)	1127 - 1161
1	05/16/1990	PRE-SENTENCE INVESTIGATION REPORT (UNFILED) CONFIDENTIAL	75 - 84
1	03/15/1990	PROPOSED VERDICT	71 - 74
3	02/26/1992	RECEIPT OF COPY	485 - 485
3	02/26/1992	RECEIPT OF COPY	486 - 486
3	02/28/1992	RECEIPT OF COPY	487 - 487
3	03/02/1992	RECEIPT OF COPY	488 - 488
3	03/02/1992	RECEIPT OF COPY	489 - 489
4	08/27/1993	RECEIPT OF COPY	694 - 694
5	12/17/2003	RECEIPT OF COPY	1007 - 1007
4	04/09/1996	RECEIPT OF COPY AND CERTIFICATE OF MAILING	789 - 790
4	04/15/1996	RECEIPT OF COPY OF MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	795 - 795
4	08/05/1996	RECEIPT OF COPY OF MOTION TO WITHDRAW AS COUNSEL	831 - 831
5	01/05/2004	REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1023 - 1027
6	08/28/2012	REPLY TO STATE'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION	1290 - 1297
6	05/24/2006	REPLY TO STATE'S RESPONSE AND OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1190 - 1198
5	01/05/2005	REPLY TO STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS AND MOTION TO DISMISS	1099 - 1101

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	01/13/1997	REPORTER'S TRANSCRIPT OF APRIL 17, 1996	862 - 866
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 12, 1996	867 - 871
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 21, 1996	872 - 875
1	01/24/1990	REPORTER'S TRANSCRIPT OF DECEMBER 26, 1989	15 - 30
3	03/04/1992	REPORTER'S TRANSCRIPT OF FEBRUARY 15, 1990	490 - 491
1	02/12/1990	REPORTER'S TRANSCRIPT OF JANUARY 11, 1990	35 - 38
6	03/12/2007	REPORTER'S TRANSCRIPT OF JANUARY 23, 2006	1223 - 1226
5	05/04/2004	REPORTER'S TRANSCRIPT OF JANUARY 5, 2004	1046 - 1052
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 15, 1996	876 - 877
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 19, 1996	878 - 882
1	06/13/1990	REPORTER'S TRANSCRIPT OF JUNE 13, 1990 (UNFILED)	123 - 139
6	03/12/2007	REPORTER'S TRANSCRIPT OF JUNE 26, 2006	1227 - 1233
1	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUED)	150 - 220
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUATION)	221 - 264
3	03/27/1992	REPORTER'S TRANSCRIPT OF MARCH 12, 1990	520 - 657
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 13, 1990	265 - 387
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 15, 1990	388 - 434
5	01/13/1997	REPORTER'S TRANSCRIPT OF MARCH 6, 1996	883 - 885
3	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 7, 1990	658 - 662
4	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 9, 1990	663 - 664
5	05/14/2004	REPORTER'S TRANSCRIPT OF MAY 11, 1998	1057 - 1060
5	05/04/2004	REPORTER'S TRANSCRIPT OF NOVEMBER 13, 2002	1053 - 1056
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 11, 1991	492 - 494
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 14, 1991	495 - 499
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 21, 1991	500 - 511
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 9, 1991	512 - 514
3	03/04/1992	REPORTER'S TRANSCRIPT OF SEPTEMBER 23, 1991	515 - 519

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	05/26/1992	REQUEST FOR RECORDS	665 - 666
6	08/28/2012	REQUEST TO FILE EXHIBIT 1	1298 - 1311
4	09/29/1993	SECOND AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	695 - 697
5	11/27/2002	STATE'S OPPOSITION TO DEFENDANT'S MOTIO TO VACATE AND/OR AMEND JUDGMENT	989 - 993
6	03/16/2007	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1234 - 1238
5	12/26/2003	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1008 - 1022
6	02/27/2006	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR TRANSPORT	1175 - 1178
4	04/01/1996	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SEMAN AND BLOOD, PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO PROCEED IN FORMA PAUPERIS	774 - 784
5	05/08/1998	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	891 - 898
6	08/09/2012	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER	1271 - 1274
6	01/19/2006	STATE'S OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL	1163 - 1166
6	05/16/2012	STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1249 - 1256
6	02/27/2006	STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1179 - 1185
5	08/17/1998	STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE	925 - 941
5	12/15/2004	STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS	1089 - 1098
4	06/27/1996	STATE'S SUPPLEMENTAL OPPOSITION TO PETITIONER'S FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	816 - 822

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	06/11/2003	STIPULATION AND ORDER	994 - 995
4	05/20/1996	SUBSTATION OF ATTORNEYS	802 - 803
4	07/16/1996	SUPPLEMENT REPLY AND OPPOSITION FOR WRIT OF HABEAS CORPUS	823 - 825
5	09/27/2004	SUPPLEMENTAL ACT	1070 - 1074
4	02/20/1996	SUPPLEMENTAL BRIEF AND POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	749 - 756
5	02/17/2004	SUPPLEMENTAL BRIEF TO STATES OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1040 - 1043
4	06/13/1996	SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	804 - 815
1	03/15/1990	VERDICT COUNT I	67 - 67
1	03/15/1990	VERDICT COUNT II	68 - 68
1	03/15/1990	VERDICT COUNT III	69 - 69
1	03/15/1990	VERDICT COUNT VI	70 - 70



THE SEALED PORTION  
OF THESE MINUTES  
WILL FOLLOW VIA  
U.S. MAIL.

**DISTRICT COURT  
CLARK COUNTY, NEVADA****Felony/Gross Misdemeanor****COURT MINUTES****April 25, 2012**

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89C092174

The State of Nevada vs Roy D Moraga

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**April 25, 2012****8:30 AM****Status Check****HEARD BY:** Cadish, Elissa F.**COURTROOM:** RJC Courtroom 15B**COURT CLERK:** Keith Reed**RECORDER:** Jessica Kirkpatrick**REPORTER:****PARTIES****PRESENT:**Ferreira, Amy L.  
State of NevadaAttorney  
Plaintiff**JOURNAL ENTRIES**

- Court stated findings noting after the change of venue the Deft's case was calendared in Department V on a civil calendar in error, and was then recalendared in Department VI and ORDERED, Deft's Pro Per Motion for Judicial action GRANTED; matter set for hearing regarding the Deft's Petition For Writ Of Habeas Corpus; state's response to be filed by June 13th; Deft's Motion For Appointment Of Counsel CONTINUED.

NDC

7-16-12 HEARING: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS...DEFT'S EXPARTE MOTION FOR APPOINTMENT OF COUNSEL

CLERK'S NOTE: The above minute order has been distributed to: Roy D. Moraga #31584, Love Lock Correctional Center, 1200 Prison Road, Love Lock NV. 89419

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

July 16, 2012

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89C092174

The State of Nevada vs Roy D Moraga

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July 16, 2012

8:30 AM

All Pending Motions

HEARD BY: Cadish, Elissa F.

COURTROOM: RJC Courtroom 15B

COURT CLERK: Keith Reed

RECORDER: Jessica Kirkpatrick

REPORTER:

**PARTIES****PRESENT:**Rinetti, Dena I.  
State of NevadaAttorney  
Plaintiff

**JOURNAL ENTRIES**

- HEARING: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS...DEFT'S EXPARTE MOTION FOR APPOINTMENT OF COUNSEL

In the absence of the Deft., Court advised there will not be any argument. Court stated findings and ORDERED, Deft's Petition For Writ of Habeas Corpus and Exparte Motion For Appointment of counsel DENIED.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Roy D. Moraga #31584, Ely State Prison, POB 1989, Ely Nv., 89301

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Felony/Gross Misdemeanor**

**COURT MINUTES**

**August 27, 2012**

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89C092174

The State of Nevada vs Roy D Moraga

---

**August 27, 2012**

**8:30 AM**

**Motion**

**HEARD BY:** Cadish, Elissa F.

**COURTROOM:** RJC Courtroom 15B

**COURT CLERK:** Keith Reed

**RECORDER:** Jessica Kirkpatrick

**REPORTER:**

**PARTIES**

**PRESENT:**

Rinetti, Dena I.  
State of Nevada

Attorney  
Plaintiff

**JOURNAL ENTRIES**

- In the absence of the Deft., Court noted there will not be any argument. Court stated findings noting the Deft. is seeking reconsideration of the ruling of July 16th due to his absence and ORDERED, Deft's Pro Se Motion For Reconsideration DENIED; there was no argument in the Deft's absence, and no basis for reconsideration.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Roy D. Moraga #31584. Love Lock Correctional Center, 1200 Prison Road, Love Lock Nv. 89419

# Certification of Copy and Transmittal of Record

State of Nevada }  
County of Clark } SS:

Pursuant to the Supreme Court order dated September 28, 2012, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the above referenced case. The record comprises six volumes with pages numbered 1 through 1316.

STATE OF NEVADA,

Plaintiff(s),

vs.

ROY D. MORAGA,

Defendant(s),


Case No: C092174

Dept No: VI

now on file and of record in this office.

**IN WITNESS THEREOF**, I have hereunto  
Set my hand and Affixed the seal of the  
Court at my office, Las Vegas, Nevada  
This 9 day of November 2012.

Steven D. Grierson, Clerk of the Court

  
Barbara J. Gutzmer, Deputy Clerk

# IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant(s),  
vs.

Case No: C092174  
SC No: 61734

STATE OF NEVADA,  
Respondent(s),

# RECORD ON APPEAL VOLUME 6

ATTORNEY FOR APPELLANT  
ROY D. MORAGA # 31584  
PROPER PERSON  
1200 PRISON RD.  
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT  
STEVEN B. WOLFSON, ESQ.  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NEVADA 89101

I N D E X

<u>VOLUME:</u>	<u>PAGE NUMBER:</u>
1	1 - 220
2	221 - 441
3	442 - 662
4	663 - 882
5	883 - 1101
6	1102 - 1320

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	01/10/2006	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1117 - 1120
3	10/03/1991	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	442 - 442
4	03/05/1996	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	757 - 758
4	02/20/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	702 - 704
4	03/11/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	764 - 766
3	10/03/1991	AFFIDAVIT IN SUPPORT OF OF REQUEST TO PROCEED IN FORMA PAUPERIS	443 - 445
4	02/20/1996	AFFIDAVIT OF DEFENDANT	705 - 706
4	03/11/1996	AFFIDAVIT OF PETITIONER	767 - 768
6	01/10/2006	AFFIDAVIT OF PETITIONER	1121 - 1122
5	04/30/1998	AFFIDAVIT OF ROY D. MORAGA	887 - 888
5	09/27/2004	AFFIDAVIT OF ROY D. MORAGA	1061 - 1062
1	06/13/1990	AMENDED INFORMATION	118 - 121
3	11/13/1991	AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	461 - 463
4	07/31/1992	ANSWER IN OPPOSITION TO MOTION FOR RETURNING SEIZED PROPERTY	670 - 680
4	10/29/1996	CASE APPEAL STATEMENT	859 - 861
5	06/15/1998	CASE APPEAL STATEMENT	910 - 911
5	09/28/1998	CASE APPEAL STATEMENT	947 - 948
5	02/18/2004	CASE APPEAL STATEMENT	1044 - 1045
6	02/10/2005	CASE APPEAL STATEMENT	1102 - 1103
6	03/02/2007	CASE APPEAL STATEMENT	1214 - 1216
6	03/05/2007	CASE APPEAL STATEMENT	1219 - 1220
6	09/18/2012	CASE APPEAL STATEMENT	1317 - 1318



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
7	11/09/2012	CERTIFICATE OF COPY AND TRANSMITTAL OF RECORD	
5	02/25/2002	CERTIFICATE OF INMATE'S INSTITUTIONAL ACCOUNT	968 - 968
5	01/17/1997	CERTIFICATE OF MAILING	886 - 886
4	08/05/1996	CERTIFICATE OF MAILING OF MOTION TO WITHDRAW AS COUNSEL	830 - 830
1	12/28/1989	CRIMINAL BINDOVER	1 - 11
3	01/27/1992	CRIMINAL SETTING SLIP	469 - 469
1	06/27/1990	DESIGNATION OF RECORD ON APPEAL	140 - 141
3	11/13/1991	DESIGNATION OF RECORD ON APPEAL	464 - 465
3	02/13/1992	DESIGNATION OF RECORD ON APPEAL	471 - 471
4	10/07/1996	DESIGNATION OF RECORD ON APPEAL	849 - 850
5	06/13/1998	DESIGNATION OF RECORD ON APPEAL	907 - 908
5	09/22/1998	DESIGNATION OF RECORD ON APPEAL	944 - 945
6	02/10/2005	DESIGNATION OF RECORD ON APPEAL	1104 - 1105
7	11/09/2012	DISTRICT COURT MINUTES	
3	02/20/1992	EX PARTE APPLICATION FOR PREPARATION OF TRANSCRIPTS	472 - 472
5	02/09/2004	EX PARTE MOTION FOR EXCESS FEES	1030 - 1036
4	02/20/1996	EX PARTE MOTION FOR FEES FOR EXPERT SERVICES	707 - 711
5	09/27/2004	EXTRAORDINARY WRIT OF MANDAMUS	1063 - 1069
3	10/03/1991	FINANCIAL CERTIFICATE	446 - 447
6	01/10/2006	FINANCIAL CERTIFICATE	1123 - 1124
6	02/08/2007	FINDING OF FACT AND CONCLUSIONS OF LAW	1201 - 1206
4	09/06/1996	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	833 - 838
6	08/13/2012	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1275 - 1281
1	01/09/1990	INFORMATION	12 - 14
1	03/15/1990	INSTRUCTIONS TO THE JURY	42 - 66
1	07/07/1990	JUDGMENT OF CONVICTION (JURY TRIAL)	146 - 147
1	03/13/1990	JURY LIST	41 - 41

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	06/04/1990	MOTION AND NOTICE OF MOTION TO AMEND INFORMATION	85 - 117
4	02/20/1996	MOTION AND NOTICE OF MOTION TO COMPEL, PRODUCTION OF SEMAN AND BLOOD	712 - 726
1	02/05/1990	MOTION AND NOTICE OF MOTION TO ENDORSE NAMES ON INFORMATION	31 - 34
5	10/18/2004	MOTION AND ORDER FOR FAILURE TO PROSECUTE AND REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT	1075 - 1082
6	02/22/2006	MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING	1169 - 1173
6	03/05/2007	MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL	1221 - 1222
5	06/01/1998	MOTION FOR ENLARGEMENT OF TIME	905 - 906
4	04/11/1996	MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	791 - 794
3	10/03/1991	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	448 - 448
4	02/20/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	727 - 727
4	03/05/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	759 - 759
4	03/11/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	769 - 769
5	02/25/2002	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	969 - 971
6	01/10/2006	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1125 - 1126
4	08/26/1993	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS; MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE JAIL TIME CREDITS AND AFFIDAVIT OF PETITION	683 - 693
6	08/06/2012	MOTION FOR RECONSIDERATION	1257 - 1270
5	12/16/2003	MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	996 - 1006
4	07/21/1992	MOTION FOR RETURNING SEIZED PROPERTY	667 - 669
4	03/11/1996	MOTION FOR RETURNING SEIZED PROPERTY	770 - 773

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
3	01/02/1992	MOTION TO APPOINT COUNSEL FOR APPEAL	466 - 468
5	04/30/1998	MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	889 - 890
5	02/25/2002	MOTION TO PRESERVE EVIDENCE AND ORDER	972 - 980
5	08/06/1998	MOTION TO STRIKE	918 - 924
2	09/26/1991	MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VII	439 - 441
5	10/31/2002	MOTION TO VACATE AND/OR AMEND JUDGMENT	982 - 987
4	04/09/1996	MOTION TO WITHDRAW AS COUNSEL	785 - 788
4	08/02/1996	MOTION TO WITHDRAW AS COUNSEL	826 - 829
5	10/19/2004	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1083 - 1088
6	09/13/2007	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1241 - 1248
4	10/30/1995	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	698 - 701
5	04/30/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	949 - 951
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	952 - 959
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	960 - 967
6	05/02/2005	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	1113 - 1116
3	10/04/1991	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - REMAND	454 - 458
1	06/27/1990	NOTICE OF APPEAL	142 - 143
3	10/30/1991	NOTICE OF APPEAL	460 - 460
4	09/27/1996	NOTICE OF APPEAL	847 - 848
5	06/13/1998	NOTICE OF APPEAL	909 - 909
5	09/22/1998	NOTICE OF APPEAL	946 - 946

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	02/17/2004	NOTICE OF APPEAL	1038 - 1039
6	02/10/2005	NOTICE OF APPEAL	1106 - 1106
6	03/02/2007	NOTICE OF APPEAL	1217 - 1218
6	09/17/2012	NOTICE OF APPEAL	1312 - 1316
6	02/22/2006	NOTICE OF CHANGE OF ADDRESS	1174 - 1174
6	02/13/2007	NOTICE OF ENTRY OF DECISION AND ORDER	1207 - 1213
6	08/21/2012	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1282 - 1289
4	04/17/1996	NOTICE OF ENTRY OF ORDER	796 - 799
4	09/20/1996	NOTICE OF ENTRY OF ORDER	839 - 846
4	10/28/1996	NOTICE OF ENTRY OF ORDER	851 - 858
5	05/29/1998	NOTICE OF ENTRY OF ORDER	901 - 904
5	07/07/1998	NOTICE OF ENTRY OF ORDER	914 - 917
6	04/08/2005	NOTICE OF ENTRY OF ORDER	1109 - 1112
5	02/26/2002	NOTICE OF HEARING - CRIMINAL	981 - 981
3	10/03/1991	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	449 - 453
4	03/05/1996	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	760 - 763
1	06/29/1990	ORDER	144 - 145
1	08/02/1990	ORDER	148 - 149
4	08/17/1992	ORDER	681 - 682
6	03/30/2005	ORDER	1107 - 1108
3	02/10/1992	ORDER APPOINTING COUNSEL	470 - 470
6	03/23/2007	ORDER DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1239 - 1240
5	06/30/1998	ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME	912 - 913
5	01/07/2004	ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1028 - 1029

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	10/05/2012	ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER	1319 - 1320
5	05/28/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY OR IN ALTERNATIVE CORRECT ILLEGAL SENTENCE	899 - 900
5	08/27/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO STRIKE	942 - 943
3	10/23/1991	ORDER FOR APPOINTMENT OF COUNSEL	459 - 459
5	11/21/2002	ORDER FOR APPOINTMENT OF COUNSEL FOR POST- CONVICTION RELIEF	988 - 988
5	02/11/2004	ORDER FOR PAYMENT OF EXCESS FEES	1037 - 1037
6	01/12/2006	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	1162 - 1162
2	09/13/1991	ORDER FOR PRODUCTION OF INMATE	437 - 438
6	04/21/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1186 - 1187
6	05/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1188 - 1189
6	06/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1199 - 1200
4	08/27/1996	ORDER FOR TRANSCRIPTS	832 - 832
6	01/27/2006	ORDER GRANTING DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER DENYING DEFENDANT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL	1167 - 1168
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	473 - 474
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	475 - 476
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	477 - 478
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	479 - 480
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	481 - 482
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	483 - 484
2	01/09/1991	ORDER RELEASING EVIDENCE	435 - 435
1	06/13/1990	ORDER TO AMEND INFORMATION	122 - 122

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	02/15/1990	ORDER TO ENDORSE NAMES ON INFORMATION	39 - 40
4	04/17/1996	ORDER TO WITHDRAW AS ATTORNEY OF RECORD	800 - 801
2	01/09/1991	PETITION FOR RELEASE OF EVIDENCE	436 - 436
4	02/20/1996	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	728 - 748
6	01/10/2006	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1127 - 1161
1	05/16/1990	PRE-SENTENCE INVESTIGATION REPORT (UNFILED) CONFIDENTIAL	75 - 84
1	03/15/1990	PROPOSED VERDICT	71 - 74
3	02/26/1992	RECEIPT OF COPY	485 - 485
3	02/26/1992	RECEIPT OF COPY	486 - 486
3	02/28/1992	RECEIPT OF COPY	487 - 487
3	03/02/1992	RECEIPT OF COPY	488 - 488
3	03/02/1992	RECEIPT OF COPY	489 - 489
4	08/27/1993	RECEIPT OF COPY	694 - 694
5	12/17/2003	RECEIPT OF COPY	1007 - 1007
4	04/09/1996	RECEIPT OF COPY AND CERTIFICATE OF MAILING	789 - 790
4	04/15/1996	RECEIPT OF COPY OF MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	795 - 795
4	08/05/1996	RECEIPT OF COPY OF MOTION TO WITHDRAW AS COUNSEL	831 - 831
5	01/05/2004	REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1023 - 1027
6	08/28/2012	REPLY TO STATE'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION	1290 - 1297
6	05/24/2006	REPLY TO STATE'S RESPONSE AND OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1190 - 1198
5	01/05/2005	REPLY TO STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS AND MOTION TO DISMISS	1099 - 1101

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	01/13/1997	REPORTER'S TRANSCRIPT OF APRIL 17, 1996	862 - 866
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 12, 1996	867 - 871
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 21, 1996	872 - 875
1	01/24/1990	REPORTER'S TRANSCRIPT OF DECEMBER 26, 1989	15 - 30
3	03/04/1992	REPORTER'S TRANSCRIPT OF FEBRUARY 15, 1990	490 - 491
1	02/12/1990	REPORTER'S TRANSCRIPT OF JANUARY 11, 1990	35 - 38
6	03/12/2007	REPORTER'S TRANSCRIPT OF JANUARY 23, 2006	1223 - 1226
5	05/04/2004	REPORTER'S TRANSCRIPT OF JANUARY 5, 2004	1046 - 1052
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 15, 1996	876 - 877
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 19, 1996	878 - 882
1	06/13/1990	REPORTER'S TRANSCRIPT OF JUNE 13, 1990 (UNFILED)	123 - 139
6	03/12/2007	REPORTER'S TRANSCRIPT OF JUNE 26, 2006	1227 - 1233
1	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUED)	150 - 220
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUATION)	221 - 264
3	03/27/1992	REPORTER'S TRANSCRIPT OF MARCH 12, 1990	520 - 657
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 13, 1990	265 - 387
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 15, 1990	388 - 434
5	01/13/1997	REPORTER'S TRANSCRIPT OF MARCH 6, 1996	883 - 885
3	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 7, 1990	658 - 662
4	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 9, 1990	663 - 664
5	05/14/2004	REPORTER'S TRANSCRIPT OF MAY 11, 1998	1057 - 1060
5	05/04/2004	REPORTER'S TRANSCRIPT OF NOVEMBER 13, 2002	1053 - 1056
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 11, 1991	492 - 494
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 14, 1991	495 - 499
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 21, 1991	500 - 511
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 9, 1991	512 - 514
3	03/04/1992	REPORTER'S TRANSCRIPT OF SEPTEMBER 23, 1991	515 - 519

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	05/26/1992	REQUEST FOR RECORDS	665 - 666
6	08/28/2012	REQUEST TO FILE EXHIBIT 1	1298 - 1311
4	09/29/1993	SECOND AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	695 - 697
5	11/27/2002	STATE'S OPPOSITION TO DEFENDANT'S MOTIO TO VACATE AND/OR AMEND JUDGMENT	989 - 993
6	03/16/2007	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1234 - 1238
5	12/26/2003	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1008 - 1022
6	02/27/2006	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR TRANSPORT	1175 - 1178
4	04/01/1996	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SEMAN AND BLOOD, PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO PROCEED IN FORMA PAUPERIS	774 - 784
5	05/08/1998	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	891 - 898
6	08/09/2012	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER	1271 - 1274
6	01/19/2006	STATE'S OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL	1163 - 1166
6	05/16/2012	STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1249 - 1256
6	02/27/2006	STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1179 - 1185
5	08/17/1998	STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE	925 - 941
5	12/15/2004	STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS	1089 - 1098
4	06/27/1996	STATE'S SUPPLEMENTAL OPPOSITION TO PETITIONER'S FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	816 - 822



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	06/11/2003	STIPULATION AND ORDER	994 - 995
4	05/20/1996	SUBSTATION OF ATTORNEYS	802 - 803
4	07/16/1996	SUPPLEMENT REPLY AND OPPOSITION FOR WRIT OF HABEAS CORPUS	823 - 825
5	09/27/2004	SUPPLEMENTAL ACT	1070 - 1074
4	02/20/1996	SUPPLEMENTAL BRIEF AND POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	749 - 756
5	02/17/2004	SUPPLEMENTAL BRIEF TO STATES OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1040 - 1043
4	06/13/1996	SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	804 - 815
1	03/15/1990	VERDICT COUNT I	67 - 67
1	03/15/1990	VERDICT COUNT II	68 - 68
1	03/15/1990	VERDICT COUNT III	69 - 69
1	03/15/1990	VERDICT COUNT VI	70 - 70

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3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6

*Shirley A. Morgan*  
CLERK

7 STATE OF NEVADA, )

8 Plaintiff(s), )

9 vs. )

10 ROY D. MORAGA, )

11 Defendant(s), )  
12

) Case No: C92174

) Dept No: VIII  
13

14 CASE APPEAL STATEMENT

15 1. Appellant(s): ROY D. MORAGA

16 2. Judge: LEE A. GATES

17 3. All Parties, District Court:

18 Plaintiff, THE STATE OF NEVADA

19 Defendant(s), ROY D. MORAGA

20 4. All Parties, Appeal:

21 Appellant(s), ROY D. MORAGA

22 Respondent, THE STATE OF NEVADA

23 5. Appellate Counsel:

24 *Appellant/Proper Person*  
25 Roy D. Moraga #31584  
26 P.O. Box 1989  
27 Ely, NV 89301  
28

*Respondent*  
David Roger, District Attorney  
200 S. 3<sup>rd</sup> St.  
Las Vegas NV 89101  
(702) 455-4711

1 6. District Court Attorney, Appointed

2 7. On Appeal, N/A

3 8. Forma Pauperis, Granted

4 9. Date Commenced in District Court: 12/28/89

5 Dated This 10 day of February 2005.

6 Shirley B. Parraguirre, Clark County Clerk

7  
8 By:



9 Robin J. Mills, Deputy Clerk

10 200 South Third Street

11 PO Box 551601

12 Las Vegas, Nevada 89155-1601

13 (702) 455-4409  
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CO92174

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

ROY D. MORAGA  
Defendant

FEB 10 2 02 PM '05

CASE NO. C 92-174  
Dept. NO. V III  
CLERK

vs.  
THE STATE OF NEVADA  
Plaintiff.

Designation of Record of Appeal

To: The Clerk of the Court.

Please take Notice that the Following is the designation of Record on Appeal in the Above-entitled Case as follows.

1. Any and All records, files and documents file in the Above-entitled case.
2. Any and All Transcripts and or records of the Proceedings in the Above-entitled Case.
3. Requested Appointment of Appeal Counsel, on this 8th day of February 2005, and would like any and All information regarding Appointment of Appeal Counsel.

Respectfully Submitted  
Roy D. Moraga

ROY D. MORAGA\* 31584  
ESP P.O. Box 1989  
Ely, NEVADA 89301

FEB 10 2005

CLERK OF COURT

812

## CERTIFICATE OF SERVICE

I, the undersigned, do hereby Certify that on the 8th day of February, 2005 I Placed a Copy of the Designation of Appeal in the United States Mail Addressed AS follows.

Clerk, of the Court  
Eighth Judicial District  
CLARK County Courthouse  
200 So. Third Street  
LAS VEGAS, NV 89155-1601

David Roger,  
CLARK County District Attorney  
Attention Appellate Division  
200 So. Third St  
LAS VEGAS, NV 89155-2211

Supreme Court Clerk  
Supreme Court building  
Capitol Complex  
CARSON City, NV 89710

193

3

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

FEB 10 2 02 PM '05

THE STATE OF NEVADA,  
Plaintiff,

CASE NO. C 92-1170

*E. Pangione*  
CLERK

vs.

Dept No. VIII

ROY D. MORAGA,

Defendant.

Notice of Appeal

To: THE State of NEVADA

David Roger, District Attorney, Clark County, Nevada  
And Department VIII of the Eighth Judicial District  
Court of the State of Nevada, In And For the County of  
Clark.

NOTICE is hereby given that ROY D. MORAGA, Presently  
incarcerated in the Nevada State Prison, Appeals to the  
Supreme Court of the State of Nevada From the judgment  
entered against Said defendant on the 31st day of  
January, 2005, Whereby he was denied his Motion to  
VACATE AND or Amend Judgment, Motion and Order to  
Transport AND Produce inmate For Hearing AND Found  
to be an habitual Criminal; AND Sentenced to Serve  
10 years on Count I, 10 years Count II C.S. Count III  
C.S. AND life without the Possibility of Parole.

DATED this 8th day of February 2005.

by. *Roy D. Moraga*  
Defendant.

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FILE:

MAR 30 12 29 PM '05

*Shirley M. Higgins*  
CLERK

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DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY D. MORAGA,

Petitioner,

vs.

JACKIE CRAWFORD, et al.,

Respondents.

Case No. C92174

Dept. VIII

ORDER

Hearing Date: January 31, 2005  
Hearing Time: 9:00 a.m.

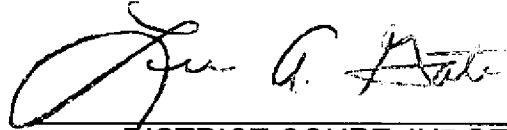
MORAGA's proper person Motion For Order For Failure To Prosecute and Reinstate Motion To Vacate and/or Amend Judgment came on for hearing on January 31, 2005. In addition, MORAGA's proper person Extraordinary Writ Of Mandamus also came on for hearing at the same time on January 31, 2005. MORAGA, in proper person, was not present, being an inmate in the custody of the Nevada Department of Corrections, at Ely State Prison, Ely, Nevada. Respondents were represented by legal counsel, BRIAN SANDOVAL, Attorney General of Nevada, by his Deputy, D. Greg Whicker. Upon reviewing the Motion and pleadings and papers on file herein, the Court finds and rules as follows:

For the reasons set forth in State's Response To Extraordinary Writ Of Mandamus, MORAGA is not entitled to relief he requests. Now therefore,

IT IS HEREBY ORDERED that Defendant's Motion For Order For Failure To Prosecute is DENIED; and

1 IT IS FURTHER ORDERED that MORAGA's Extraordinary Writ of Mandamus is also  
2 DENIED.

3 DATED this 29 day of March, 2005.

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6 DISTRICT COURT JUDGE

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Submitted this 25<sup>th</sup> day of March, 2005 by:

BRIAN SANDOVAL  
Attorney General

By:



Rene L. Hulse  
Senior Deputy Attorney General  
Nevada Bar No. 3778  
555 East Washington, Ave. #3900  
Las Vegas, NV 89101  
(702) 486-3420  
Attorneys for Plaintiff



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NEO

BRIAN SANDOVAL  
Attorney General  
By: RENE L. HULSE  
Senior Deputy Attorney General  
Criminal Division  
Nevada Bar No. 3778  
555 E. Washington Avenue, Suite 3900  
Las Vegas, Nevada 89101  
(702) 486-3420

FILED

2005 APR -8 P 3:32

*[Handwritten signature]*

Attorney for Respondents

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

ROY D. MORAGA,  
  
Petitioner,  
  
vs.  
  
JACKIE CRAWFORD, et al.  
  
Respondents.

CASE NO.: C92174

DEPT. NO.: VIII

NOTICE OF ENTRY OF ORDER

TO: ROY D. MORAGA, Petitioner;

**PLEASE TAKE NOTICE** that an **ORDER** was entered in the above-entitled action on the 30<sup>th</sup> day of March, 2005, a copy of which is attached hereto.

**DATED** this 8<sup>th</sup> day of April, 2005.

BRIAN SANDOVAL  
Attorney General

By: *[Signature of Rene L. Hulse]*  
RENE L. HULSE  
Senior Deputy Attorney General

**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on the 8<sup>th</sup> day of April, 2005, I served the foregoing *NOTICE OF ENTRY OF ORDER* by mailing a copy thereof addressed to:

Roy D. Moraga, #31584  
Ely State Prison  
P. O. Box 1989  
Ely, Nevada 89301

  
An Employee of the Office of the Attorney General

Attorney General's Office  
555 E. Washington, Suite 3900  
Las Vegas, NV 89101

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4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA

*Liberty, California*  
CLERA

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8 ROY D. MORAGA,

9 Petitioner,

10 vs.

11 JACKIE CRAWFORD, et al.,

12 Respondents.  
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Case No. C92174

Dept. VIII

15  
16 ORDER

Hearing Date: January 31, 2005  
Hearing Time: 9:00 a.m.

17 MORAGA's proper person Motion For Order For Failure To Prosecute and Reinstate  
18 Motion To Vacate and/or Amend Judgment came on for hearing on January 31, 2005. In  
19 addition, MORAGA's proper person Extraordinary Writ Of Mandamus also came on for  
20 hearing at the same time on January 31, 2005. MORAGA, in proper person, was not present,  
21 being an inmate in the custody of the Nevada Department of Corrections, at Ely State Prison,  
22 Ely, Nevada. Respondents were represented by legal counsel, BRIAN SANDOVAL, Attorney  
23 General of Nevada, by his Deputy, D. Greg Whicker. Upon reviewing the Motion and  
24 pleadings and papers on file herein, the Court finds and rules as follows:

25 For the reasons set forth in State's Response To Extraordinary Writ Of Mandamus,  
26 MORAGA is not entitled to relief he requests. Now therefore,

27 IT IS HEREBY ORDERED that Defendant's Motion For Order For Failure To Prosecute  
28 is DENIED; and

1 IT IS FURTHER ORDERED that MORAGA's Extraordinary Writ of Mandamus is also  
2 DENIED.

3 DATED this 29 day of March, 2005.

4  
5 LEE A. GATES

6 DISTRICT COURT JUDGE  
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12 Submitted this 25<sup>th</sup> day of March, 2005 by:

13 BRIAN SANDOVAL  
14 Attorney General

15 By:

Rene L. Hulse  
16 Rene L. Hulse  
17 Senior Deputy Attorney General  
18 Nevada Bar No. 3778  
555 East Washington, Ave. #3900  
Las Vegas, NV 89101  
(702) 486-3420  
Attorneys for Plaintiff  
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IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 44885 2 3 50 PM '05

District Court Case No.

*Shirley E. Hargrave*  
C092174  
CLERK

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 this appeal DISMISSED."

Judgment, as quoted above, entered this 1st day of April, 2005.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 26th day of April, 2005.

Janette M. Bloom, Supreme Court Clerk

By:

*J. Richards*  
Chief Deputy Clerk

JUDGMENT ENTERED

MAY 10 2005

CE-02

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44685

FILED

APR 01 2005

ORDER DISMISSING APPEAL

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
CHIEF DEPUTY CLERK

This is a proper person appeal from a decision of the district court to deny a "motion and order for failure to prosecute and reinstate motion to vacate and/or amend judgment" and a motion for transport of prisoner. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Our review of this appeal reveals a jurisdictional defect. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists.<sup>1</sup> No statute or court rule provides for an appeal from a decision denying the aforementioned motions. Accordingly, we

ORDER this appeal DISMISSED.

*Rose* J.  
Rose

*Gibbons* J.  
Gibbons

*Hardesty* J.  
Hardesty

<sup>1</sup>Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

cc: Hon. Lee A. Gates, District Judge  
Roy D. Moraga  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 44685

District Court Case No. C092174

REMITTITUR

TO: Shirley Parraguirre, Clark County Clerk

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

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

DATE: April 26, 2005

Janette M. Bloom, Clerk of Court

By: J. Richards  
Chief Deputy Clerk

cc: Hon. Lee A. Gates, District Judge  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Roy D. Moraga

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 4-28-05.

NORRETA CALDWELL  
County Clerk

DEPUTY

05-06742



205.

1 **AFF**  
2 Roy Moraga  
3 Inmate No. 31584  
4 Ely State Prison  
5 P.O. Box 1989  
6 Ely, NV 89301  
7 *In Proper Person*

FILED  
JAN 10 10 02 AM '06  
*Shirley S. Ferguson*  
CLERK

8 EIGHTH JUDICIAL DISTRICT COURT  
9 CLARK COUNTY, NEVADA

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11 ROY D. MORAGA,  
12 Petitioner,  
13 vs.  
14 E.K. McDANIEL, et al.,  
15 Respondents.

CASE NUMBER: C92174  
DEPARTMENT: VIII

**AFFIDAVIT IN SUPPORT OF MOTION  
FOR LEAVE TO PROCEED IN FORMA  
PAUPERIS AND FOR APPOINTMENT  
OF COUNSEL**

16 I, Roy D. Moraga, being first duly sworn, depose and say that I am the petitioner in the above-  
17 entitled case; that in support of my request to proceed without being required to prepay fees, costs, or  
18 give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding  
19 or to give security therefor, and that I believe I am entitled to redress.

20 I further swear that the responses which I have made to the questions and instructions below  
21 relating to my ability to pay the cost of proceeding in this Court are true:

- 22 1. Are you presently employed? Yes \_\_\_\_ No ☒  
23 a. If the answer is yes, state the amount of your salary or wages per month  
24 and give the name and address of your employer.

25 N/A  
26 \_\_\_\_\_  
27 \_\_\_\_\_  
28 \_\_\_\_\_

RECEIVED  
JAN 10 2006  
COUNTY CLERK

S11

- 1 b. If the answer is no, state the date of your last employment and the amount  
2 of the salary and wages per month which you received.  
3 ✓ 1989  
4 \_\_\_\_\_  
5 \_\_\_\_\_
- 6 2. Have you received within the past twelve months any income from a business, profession  
7 or other form of self-employment, or in the form of rent payments, interest, dividends,  
8 or other source?  
9 Yes \_\_\_\_\_ No ✓
- 10 a. If the answer is yes, describe each source of income, and state the amount  
11 received from each during the past twelve months.  
12 N/A  
13 \_\_\_\_\_  
14 \_\_\_\_\_
- 15 3. Do you own any cash or checking or savings account (include any funds in prison  
16 accounts)? Yes \_\_\_\_\_ No ✓
- 17 a. If the answer is yes, state the total value of the items owned.  
18 N/A  
19 \_\_\_\_\_  
20 \_\_\_\_\_
- 21 4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property  
22 (excluding ordinary household furnishings and clothing)? Yes \_\_\_\_\_ No ✓
- 23 a. If the answer is yes, describe the property and state its approximate value.  
24 N/A  
25 \_\_\_\_\_  
26 \_\_\_\_\_  
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5. List the persons who are dependent upon you for support and state your relationship to those persons.

N/A  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dated this 4th day of January, 2006.

Roy D. Moraga  
Roy Moraga  
Inmate No. 31584  
Ely State Prison  
P.O. Box 1989  
Ely, NV 89301  
*In Proper Person*

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That on January 4th, 2006, he served a copy of the foregoing by personally mailing said copy

Clark County District Attorney  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, Nevada 89155

Roy D. Moraga  
Roy D. Moraga

Roy MORAGA # 31584  
ESP P.O. Box 1989  
ELY, Nevada 89301  
In Pro Per

C 92174

EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY D. MORAGA  
Petitioner

CASE NO. C92174 AM '06  
Dept. 8  
Shirley E. Hargreaves  
CLERK

vs.

E.K. McDaniel, et al.,

Respondents.

AFFIDAVIT OF PETITIONER

I, Roy Daniels MORAGA, being First duly Sworn under Penalty of Perjury, deposes and Avers that:

1. That I am the Petitioner in the Above-entitled CASE.
2. That I am incarcerated at Ely State Prison, Ely Nevada.
3. That I am a Laymen of the Law, cannot Litigate this CASE without Legal Counsel.
4. That I make this Affidavit in Support of All Pleadings, AND motion in this CASE.

I understand that a False Statement in this Affidavit shall Subject me to Penalties For Perjury.

Further, Your Affiant Sayeth Naught.

Roy D. Moraga # 31584  
ESP P.O. Box 1989  
ELY, NEVADA 89301

Executed this 4th day of JANUARY 2006 at Ely State Prison under Penalty of Perjury Pursuant to the Provisions of NRS 208.165

Roy D. Moraga # 31584  
ESP P.O. Box 1989  
ELY NEVADA 89301  
Petitioner Pro se

SU

IN CONCLUSION, Petitioner includes by reference thereto, All exhibits, Affidavit AND Arguments heretofore Furnished this Honorable Court in these Proceedings, AS Fully AND to the Same extent that they would have were they Set Forth hereafter, in this Place.

CERTIFICATE OF MAILING

E.K. McDaniel  
Ely State Prison  
P.O. Box 1989  
ELY, NEVADA 89301

CLARK COUNTY District Attorney  
Regional Justice Center  
200 Lewis Ave  
LAS VEGAS NEVADA 89155

Roy D. Moraya

1 CASE NO. C921742 DEPT. NO. 8

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8 IN THE MATTER OF

9 Roy D. MORAGA # 31584 FINANCIAL  
(NAME & NUMBER PRINTED) CERTIFICATE

10

11 Roy D. Moraga # 31584  
(SIGNATURE & NUMBER)

12

13 ON MOTION FOR LEAVE TO PROCEED

14 IN FORMA PAUPERIS 1

15 I hereby certify that the Petitioner herein has the sum of

16 \$ .08 on account to his credit at the institution

17 where he is confined. I further certify that Petitioner likewise

18 has the following securities to his credit according to the

19 records of said institution:

20 \$ 200.00 in savings

21

22 DATED this 22nd day of December, 2005.

23

24 BY: Radh Arret Tech II  
25 Nevada Department of Corrections  
26 Inmate Services Accountant  
27 Authorized Officer of Institution

RCUD IN SER'05DEC22

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JAN 10 2006

COUNTY CLERK

1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that he is a person of such age and discretion as to be competent  
3 to serve papers.

4 That on January 4th, 2006, he served a copy of the foregoing by personally mailing said copy  
5 to:

6  
7 E.K. McDaniel  
8 Ely State Prison  
9 P.O. Box 1989  
10 Ely, Nevada 89301

11 Clark County District Attorney  
12 Regional Justice Center  
13 200 Lewis Ave.  
14 Las Vegas, Nevada 89155  
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ROY D. MORAGA



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Shirley S. Pangione  
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MOT  
Roy Moraga  
Inmate No. 31584  
Ely State Prison  
P.O. Box 1989  
Ely, NV 89301  
In Proper Person

EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

1-23-04

ROY D. MORAGA,  
  
Petitioner,  
  
vs.  
  
E.K. McDANIEL, et al.,  
  
Respondents.

CASE NUMBER: C92174  
DEPARTMENT: VIII

MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS AND FOR  
APPOINTMENT OF COUNSEL

COMES NOW, the Petitioner, in proper person, pursuant to N.R.S. §12.015, and respectfully moves this Honorable Court for an Order granting Petitioner leave to proceed in the above-entitled action in forma pauperis, without requiring Petitioner to pay or provide security for the payment of costs of prosecuting this action. Petitioner's affidavit in support of this request and financial certificate is attached hereto.

Petitioner further requests that counsel be appointed to represent him in this proceeding pursuant to NRS 34.750 and 34.820.

Dated this 4th day of January, 2006.

Roy D. Moraga  
Roy Moraga  
Inmate No. 31584  
Ely State Prison  
P.O. Box 1989  
Ely, NV 89301  
In Proper Person

RECEIVED

JAN 10 2006

COUNTY CLERK

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1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that he is a person of such age and discretion as to be competent  
3 to serve papers.

4 That on January 4th, 2006, he served a copy of the foregoing by personally mailing said copy  
5 to:

6  
7 E.K. McDaniel  
8 Ely State Prison  
9 P.O. Box 1989  
10 Ely, Nevada 89301

11 Clark County District Attorney  
12 Regional Justice Center  
13 200 Lewis Ave.  
14 Las Vegas, Nevada 89155  
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Roy D. Moraga

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Roy Moraga  
Inmate No. 31584  
Ely State Prison  
P.O. Box 1989  
Ely, NV 89301  
In Proper Person

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JAN 13 10 00 AM '06  
Ely State Prison  
CLERK

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

ROY D. MORAGA,	)	
	)	PETITION FOR WRIT OF HABEAS
Petitioner,	)	CORPUS (Post-Conviction)
	)	(NRS 34.720, et seq.)
vs.	)	
	)	Case No. C92174
E.K. McDANIEL, et al.,	)	Dept. No. 8
	)	
Respondent.	)	
_____	)	

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

RECEIVED  
JAN 09 2006  
COUNTY CLERK

- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.
- (7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

## PETITION

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, ELY, NEVADA.**
2. Name and location of court which entered the judgment of conviction under attack: **EIGHTH JUDICIAL DISTRICT COURT OF NEVADA,  
COUNTY OF CLARK, LAS VEGAS, NEVADA.**
3. Date of judgment of conviction: **July 7, 1990**
4. Case Number: **C92174**
5. (a) Length of sentence:  
    **Count I (Burglary): To ten years.**  
    **Count II (Burglary): To ten years, consecutive to Count I**  
    **Count III (Sexual Assault): Life with possibility of parole, consecutive to**  
        **Count II**  
    **Count IV (Sexual Assault): Habitual criminal with three prior felony**  
        **convictions in 1977, 1983 and 1988, life without**  
        **possibility of parole, consecutive to Count III.**  
  
    (b) If the sentence is death, state any date upon which execution is scheduled for? **N/A**
6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion: **No.**  
  
    If "YES", list crime, case number and sentence being served at this time. **N/A**
7. Nature of offense involved in conviction being challenged: **Two counts of burglary and two counts of sexual assault.**
8. What was your plea? **Not guilty.**
9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: **N/A**
10. If you were found guilty after a plea of not guilty, the finding was made by a jury or judge without a jury? **Jury.**
11. Did you testify at trial? **Yes.**

12. Did you appeal from the judgment of conviction? **Yes.**

13. If you did appeal, answer the following:

FIRST DIRECT APPEAL

- a. Name of Court: **Nevada Supreme Court**
- b. Case Number: **21488**
- c. Result: **Judgment affirmed, remanded for re-sentencing**
- d. Date of Result: **September 17, 1991**

DIRECT APPEAL FOLLOWING RE-SENTENCING

- a. Name of Court: **Nevada Supreme Court**
- b. Case Number: **22901**
- c. Result: **Judgment affirmed**
- d. Date of Result: **October 4, 1995**  
(Attach copy of order or decisions if available)

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

15. 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.**

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

- (a) As to any petition, application or motion, give the same information:
  - 1. Name of court: **Eighth Judicial District Court of Nevada, County of Clark**
  - 2. Nature of proceeding: **Petition for Writ of Habeas Corpus (Post-Conviction)**
  - 3. Grounds raised:
    - A. **VIOLATION OF FOURTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, ILLEGAL DETAINMENT AND VIOLATION OF DUE PROCESS. PETITIONER WAS ARRESTED ON DECEMBER 5, 1989 AND WAS UNNECESSARILY DETAINED FOR 210 HOURS WITHOUT BEING BROUGHT BEFORE A MAGISTRATE. NOT UNTIL DECEMBER 14, 1989 WAS PETITIONER BROUGHT IN PERSON BEFORE A JUDGE AT THE INITIAL ARRAIGNMENT WITHOUT A PROBABLE CAUSE HEARING.**
    - B. **ILLEGALLY ADJUDICATED HABITUAL CRIMINAL. STATE FAILED TO PROVE BEYOND REASONABLE DOUBT THAT PETITIONER'S SENTENCE SHOULD BE ENHANCED PURSUANT TO STATE LAW. NOT ALL OF THE CERTIFIED COPIES OF THE CONVICTIONS SUBMITTED**

TO THE DISTRICT COURT WERE THOSE OF PETITIONER. TRIAL JUDGE WENDELL DID NOT INTEND FOR PETITIONER'S SENTENCE TO RUN CONSECUTIVELY.

- C. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. FAILURE TO FILE MOTION TO SUPPRESS EVIDENCE (REGARDING PERSONAL PROPERTY TAKEN PRIOR TO ARREST).
- D. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. FAILURE TO INVESTIGATE AND TO QUESTION WITNESSES AND CALL WITNESSES TO TRIAL.
- E. DURING PETITIONER'S TESTIMONY, TRIAL COUNSEL ALLOWED THE COURT TO BE MISLED BY QUESTIONS PETITIONER DID NOT UNDERSTAND. AT NO TIME DID PETITIONER INTEND THAT HE CLAIMED TO HAVE HAD SEXUAL INTERCOURSE WITH THE VICTIM BY "INSERTING HIS PENIS IN HER VAGINA." AT TIME OF TRIAL THIS QUESTION WAS NOT DEFINED THE SAME TO PETITIONER AS IT WAS TO VICTIM.
- F. AT TIME OF TRIAL PETITIONER HAD ONLY AN EIGHTH GRADE EDUCATION AND SEXUAL INTERCOURSE HAS A DIFFERENT MEANING TO MANY PEOPLE. WHEN VICTIM WAS ASKED THE SAME QUESTION, THE COURT MADE HER MEANING CLEAR TO JURY AND COURT.
- G. VIOLATION OF FOURTH AND FOURTEENTH AMENDMENTS, ILLEGAL DETAINMENT AND VIOLATION OF DUE PROCESS. PETITIONER WAS ARRESTED DECEMBER 5, 1989 AND WAS NOT BROUGHT BEFORE A MAGISTRATE OR JUDGE UNTIL DECEMBER 14, 1989 FOR 210 HOURS, THUS VIOLATING THE 72-HOUR PERIOD PROVIDED FOR IN NEVADA'S STATUTE FOR A PROBABLE CAUSE DETERMINATION.
- H. PETITIONER WAS ILLEGALLY ADJUDICATED AS A HABITUAL CRIMINAL IN THAT THE STATE FAILED TO PRODUCE PROOF THAT PETITIONER HAD THREE VALID, PRIOR FELONY CONVICTIONS. TRIAL COUNSEL FAILED TO OBJECT TO CERTIFIED COPIES OF PETITIONER'S OTHER CONVICTIONS.
- I. PETITIONER'S RIGHT TO COUNSEL IS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION. INEFFECTIVE ASSISTANCE OF COUNSEL:
- J. TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S CONDUCT

WHEN THE STATE VIOLATED ITS OWN INITIAL APPEARANCE STATUTE.

- K. TRIAL COUNSEL WOULD NOT INVESTIGATE PETITIONER'S CASE AND WOULD NOT QUESTION WITNESSES ON PETITIONER'S BEHALF.
- L. TRIAL COUNSEL DID NOT ADEQUATELY CROSS-EXAMINE WITNESSES AND ALLOWED PETITIONER TO BE MISLED IN ESSENTIAL QUESTIONS WHICH HAD SUBSTANTIAL AND INJURIOUS EFFECT IN DETERMINING THE JURY'S VERDICT.
- M. TRIAL COUNSEL TOLD PETITIONER HE WAS GOING TO PRISON REGARDLESS OF WHETHER HE WAS INNOCENT OR NOT.
- N. TRIAL COUNSEL REFUSED TO FILE A MOTION TO SUPPRESS EVIDENCE.
- O. PETITIONER HAD INFORMED THE LOWER COURT THERE WAS A CONFLICT OF INTEREST BETWEEN HIM AND TRIAL COUNSEL. PETITIONER ATTEMPTED TO HAVE TRIAL COUNSEL REMOVED BY MOTION TO COURT BUT THE COURT STILL APPOINTED MR. HILLMAN TO REPRESENT PETITIONER ON APPEAL.
- P. APPELLATE COUNSEL APPEALED ONLY ONE ISSUE
- Q. MORAGA IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION BASED ON THE POINTS RAISED IN MR. MORAGA'S PROPER PETITION AND THE POINTS RAISED IN THIS SUPPLEMENT.
- R. MORAGA WAS HELD FOR 210 HOURS WITHOUT BEING BROUGHT BEFORE A MAGISTRATE FOR A PROBABLE CAUSE DETERMINATION.
- S. MORAGA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS:
- T. TRIAL COUNSEL FAILED TO OBJECT TO CERTIFIED COPIES OF MORAGA'S OTHER CONVICTIONS THAT CONTAINED ERRORS ON THE FACE OF THE DOCUMENTS.
- U. TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE WARRANTLESS SEARCH THAT LED TO THE DISCOVERY OF THE APARTMENT KEY.



V. TRIAL COUNSEL FAILED TO INTERVIEW WITNESSES THAT WERE LISTED BY MORAGA AND TO CALL SUCH WITNESSES TO TESTIFY AT TRIAL CONCERNING THE LACK OF SEXUAL ABILITY OF MORAGA WHILE INTOXICATED. THESE WITNESSES COULD HAVE TESTIFIED THAT THEY HAD SEEN MORAGA AND HAWK ENGAGED IN MAKING OUT WHEN THEY FIRST MET. WITNESSES COULD TESTIFY TO THE NATURE AND EXTENT OF MORAGA'S KNEE INJURY WHICH REQUIRED HIM TO WEAR A BRACE AND THAT HE COULD NOT HAVE POSSIBLY PERFORMED THE PHYSICAL ACTS DESCRIBED BY HAWK AT TRIAL.

W. TRIAL COUNSEL FAILED TO PREPARE MORAGA TO TESTIFY AND DISCUSS THE TYPES OF QUESTIONS THAT WOULD BE ASKED OF HIM. MORAGA, A MAN OF LIMITED EDUCATION, DID NOT UNDERSTAND SEX TO NECESSARILY INCLUDE PENILE PENETRATION AND HE THEREFORE ANSWERED THE QUESTIONS PUT TO HIM INAPPROPRIATELY. MORAGA DID NOT UNDERSTAND WHEN QUESTIONED WHETHER HE WOULD HAVE SEX WITH A WOMAN WITHOUT HER PERMISSION AND THEREFORE ANSWERED THE QUESTION IN SUCH A FASHION AS TO ADMIT THE COMMISSION OF THE CRIME CHARGED.

X. TRIAL COUNSEL FAILED TO HAVE DNA TESTING PERFORMED ON THE SEMEN AND BLOOD SAMPLES TO ESTABLISH THAT MORAGA WAS NOT THE SOURCE OF THE SEMEN FOUND IN VAGINAL VAULT OF THE ALLEGED VICTIM.

4. Did you receive an evidentiary hearing on your petition, application or motion? **No**
5. Result: **Petition denied**
6. Date of Result: **July 19, 1996**
7. If known, citations of any written opinion or date of orders entered pursuant to such result: **Findings of Fact, Conclusions of Law and Order**

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

1. Name of court: **United States District Court (CV-N-03-0220-LRH(RAM))**
2. Nature of proceeding: **Fourth Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. §2254**
3. Grounds raised:

I. **After Mr. Moraga's Original Sentence Was Vacated, Mr. Moraga Was Re-sentenced to a**

**Greater Amount of Time in Violation of His Rights to Due Process and Freedom from Cruel and Unusual Punishment under the Fifth and Fourteenth Amendments to the United States Constitution.**

- II. Mr. Moraga's Sentencing as an Habitual Criminal Denied Him His Due Process Rights under the Fifth and Fourteenth Amendment to the United States Constitution.**
  - III. The Reasonable Doubt Instruction Given During the Trial Improperly Minimized the State's Burden of Proof. As a Result, Mr. Moraga's Conviction and Sentence Are Invalid under the Federal Constitutional Guarantees of Due Process, and a Fair Trial under the Fifth, and Fourteenth Amendments to the Constitution.**
  - IV. Insufficient Factual Support Existed to Support a First Degree Murder Conviction in Violation of Mr. Moraga's Fifth, Sixth and Fourteenth Amendment Rights.**
  - V. Defense Counsel's Numerous Failures Prior to and During Trial Denied Mr. Matylinsky His Right to the Effective Assistance of Counsel in Violation of the Sixth and Fourteenth Amendments to the United States Constitution.**
    - A. Failure to investigate witnesses;**
    - B. Failure to prepare Mr. Moraga for testimony; and**
    - C. Failure to test blood and semen.**
- 4. Did you receive an evidentiary hearing on your petition, application or motion? **No.**
  - 5. Result: **Returning to state court to present claims found to be unexhausted by the federal court.**
  - 6. Date of Result: **Order administratively closing case entered November 15, 2005.**
  - 7. If known, citations of any written opinion or date of orders entered pursuant to such result: **November 15, 2005.**

- (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? **Yes**
- (1) First petition, application or motion? **Notice of Appeal of Petition for Writ of Habeas Corpus (Case No. 29321)**  
Citation or date of decision: **April 19, 1999**
- (2) Second petition, application or motion? **N/A**
- (3) Third or subsequent petition, application or motion? **N/A**
- (e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.) **N/A**
17. 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:
- Which of the grounds is the same: **Ground One**  
The proceedings in which these grounds were raised: **Petition for Writ of Habeas Corpus filed in the United States District Court.**  
I am raising these grounds because: **Appellate counsel failed to adequately raise this claim in terms of a constitutional violation and it has been found to be unexhausted by the federal court.**
18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have 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 presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length. **N/A**
19. 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? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.) **The federal court has found this ground to be unexhausted and has afforded me the opportunity to return to state court to exhaust this claim.**

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? **Federal post-conviction proceeding has been administratively closed pending exhaustion of claims asserted in this petition and return to the United States District Court.**  
If yes, state what court and the case number. **United States District Court for the District of Nevada, CV-N-03-0220-LRH(RAM)**
21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:  
**At Preliminary Hearing, Trial and Direct Appeal: Roger R. Hillman**  
**On Direct Appeal Following Re-Sentencing: Mark B. Bailus**
22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? **No.**
23. 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.

#### **GROUND ONE**

**AFTER MR. MORAGA'S ORIGINAL SENTENCE WAS VACATED, MR. MORAGA WAS RE-SENTENCED TO A GREATER AMOUNT OF TIME IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

After his conviction, the trial court sentenced Mr. Moraga to one term of life without parole. Although Mr. Moraga was convicted on four different counts, based on the prosecutor's recommendation, the judge imposed the habitual criminal enhancement and gave one overarching sentence. Following his conviction, Mr. Moraga appealed the conviction on the basis that he felt there was insufficient evidence to support the guilty verdict. He did not raise an issue with regard to the sentence structure.

Nevertheless, in its order of remand, the Nevada Supreme Court held sua sponte that there


was a problem with his sentence. The court indicated that the district court did not have the authority to impose one sentence where there were multiple offenses. The case was remanded for a new sentencing. Despite numerous requests for a remand to the trial judge who actually heard the case, a new judge re-sentenced Mr. Moraga. Instead of one sentence of life without, Mr. Moraga received consecutive sentences of ten years, ten years, life with parole and life without parole.

Mr. Moraga had a due process right under the Fifth and Fourteenth Amendments and a right under the to not be punished vindictively simply because he had challenged his conviction. This significantly harsher sentence was imposed solely to punish Mr. Moraga for exercising his right to an appeal. Mr. Moraga should not have received a more severe sentence because he appealed the judgment in his case.

#### CONCLUSION

WHEREFORE, petitioner prays that the court grant petitioner a hearing regarding the issues raised in this brief and grant relief to which he may be entitled in this proceeding.

EXECUTED at ELY, Nevada on this 4th day of January, 2006.

  
Roy D. Moraga  
Inmate No. 31584  
Ely State Prison  
P.O. Box 1989  
Ely, NV 89301  
*In Proper Person*

### VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Roy D. Moraga  
ROY D. MORAGA

**CERTIFICATE OF SERVICE BY MAIL**

I, ROY D. MORAGA, hereby certify pursuant to N.R.C.P. 5(b), that on this 4<sup>th</sup> day of January, 2006, I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

E.K. McDaniel  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

Clark County District Attorney  
200 S. Third Street  
Las Vegas, Nevada 89155

  
ROY D. MORAGA

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

No. 21488

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

C92174  
FILED

AUG 27 1991

Chief of Supreme Court  
By Q. B. [Signature]  
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a judgment of conviction pursuant to a jury verdict of two counts of burglary and two counts of sexual assault in violation of NRS 200.364, 200.366 and 205.060. The district court adjudicated appellant a habitual criminal and sentenced him to a single term of life imprisonment in the Nevada State Prison without the possibility of parole.

Appellant's sole contention on appeal is that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

In particular, we note that the victim's daughter testified that on December 5, 1989, she discovered that her watch, apartment key, and some other items were missing. She had heard a noise the night before. The same day, appellant gave the daughter's watch to his ex-girlfriend as a present. A key to the apartment was found among appellant's belongings. Although the victim had locked the door to the apartment, later that day the victim saw appellant standing in her bedroom hallway. We then heard her father...



the apartment. This evidence supports the conclusion that appellant twice entered the apartment, once with intent to commit larceny, once with intent to commit the felony of sexual assault.


In addition, we note that the victim testified that when she woke up and saw appellant in her bedroom hallway, she screamed out the bathroom window for help. Appellant grabbed her mouth and threw her on the bed. Following a struggle, appellant inserted his penis into her vagina against her will. After she showered, he again threw her on the bed and inserted his penis into her vagina against her will. Medical evidence revealed the presence of semen and sperm in her vagina. The victim immediately called for help. Appellant bragged about his deeds to a worker at the apartment complex as he left. This evidence supports the conclusion that appellant twice subjected the victim to sexual penetration against her will.

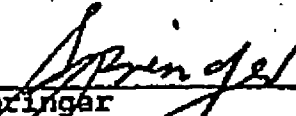
The jury could reasonably infer from the evidence presented that appellant committed two counts of burglary and two counts of sexual assault. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).


Finally, we note that appellant's sentence is erroneous. Appellant was convicted of four separate offenses (in addition to which he was adjudicated a habitual criminal), yet he received a single sentence. Although the district court has discretion to dismiss a count of habitual criminality, see NRS 207.010(4), the district court does not have discretion to impose but one sentence for multiple primary offenses. Cf. Barrett v. State, 105 Nev. 361, 775 P.2d 1276 (1989). Our

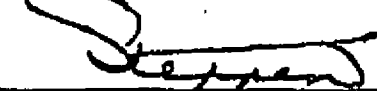
defendant is convicted, there should be a corresponding sentence. Accordingly, we remand this case to the district court for resentencing of appellant.

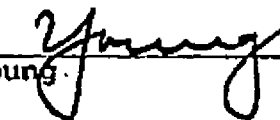
It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Mowbray

  
\_\_\_\_\_, J.  
Springer

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Steffen

  
\_\_\_\_\_, J.  
Young

cc: Hon. Michael J. Wendell, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Rex Bell, District Attorney  
Morgan D. Harris, Public Defender  
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 22901

**FILED**

OCT 04 1995

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL


This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts each of burglary and sexual assault. At appellant's sentencing hearing, the district court adjudicated him a habitual criminal and, as a result, sentenced him to a term of life in the Nevada State Prison without the possibility of parole. The habitual criminal adjudication was based on three prior felony convictions: (1) a 1977 conviction for aggravated assault in Arizona; (2) a 1983 conviction for attempted aggravated assault in Arizona; and (3) a 1988 conviction for third degree burglary in Arizona.


Appellant points out that two of the prior convictions list the name "Roy Daniels Moraga" and that the other lists the name "Roy Daniel Moraga" and asserts that the state presented convictions that may not apply to him. Appellant, however, failed to object to these prior convictions on the basis of identity. "[A]n unexcused failure to object in the trial court to the State's failure to make an affirmative showing of the validity of the prior convictions relied upon to enhance a penalty under NRS 207.010 preclude[s] the raising of this objection for the first time on appeal." Baymon v. State, 94 Nev. 370, 372, 580 P.2d 943, 944 (1978) (citing Thomas v. State, 93 Nev. 565, 571 P.2d 113 (1977)).

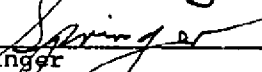
Moreover, we conclude that the state adequately proved that appellant received the three prior convictions. See NRS

207.010; Jackson v. State, 97 Nev. 179, 625 P.2d 1165 (1981). The prior convictions presented by the state do not, on their face, "raise a presumption of constitutional infirmity," and the district court was entitled to use these convictions for sentence enhancement purposes. McAnulty v. State, 108 Nev. 179, 181, 826 P.2d 567, 569 (1992). Accordingly, we

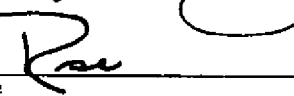
ORDER this appeal dismissed.

  
Steffen, C. J.

  
Young, J.

  
Springer, J.

  
Shearing, J.

  
Rose, J.

cc: Hon. Jack Lehman, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Stewart L. Bell, District Attorney  
Cherry, Bailus & Kelesis  
Loretta Bowman, Clerk

ORIGINAL

FILED 5

SEP 6 12 50 PM '96

*James L. Bell*  
CLERK

1 ORDR  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA, )

10 Plaintiff, )

11 -vs- )

12 ROY MORAGA, )  
13 #938554 )

14 Defendant(s). )

Case No.. C92174  
Dept. No. X  
Docket K

15 FINDINGS OF FACT, CONCLUSIONS OF

16 LAW AND ORDER

17 DATE OF HEARING: 7/19/96

18 TIME OF HEARING: 9:00 A.M.

19 THIS CAUSE having come on for hearing before the Honorable Jack Lehman, District Judge,  
20 on the 19th day of July, 1996, the Petitioner not being present, represented by DAVID SCHIECK, ESQ.,  
21 the Respondent being represented by STEWART L. BELL, District Attorney, by and through VICKI  
22 J. MONROE, Deputy District Attorney, and the Court having considered the matter, including briefs,  
23 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the  
24 following findings of fact and conclusions of law:

25 FINDINGS OF FACT

26 1. Defendant was arrested for the December 5, 1989, sexual assault and rape of a woman  
27 in her home. Defendant plead not guilty and a jury trial was had wherein Defendant was found guilty  
28

5  
[CEST]

1 of two counts of Burglary and two counts of Sexual Assault. Thereafter on June 30, 1990, Defendant  
2 was sentenced to life in the Nevada State Prison without the possibility of parole after being  
3 adjudicated a habitual criminal. Defendant's direct appeal to the Nevada Supreme Court was denied  
4 on August 27, 1991. However, the Court remanded Defendant's case to the District Court for  
5 resentencing. The Supreme Court concluded that the District Court had erroneously imposed one  
6 sentence for multiple offenses.

7       2. On October 21, 1991, Defendant was resentenced in Department X of the Eighth  
8 Judicial District to ten years for each of the Burglary counts, to run consecutive to each other, and  
9 consecutive to a sentence of life imprisonment without the possibility of parole for Count III - Sexual  
10 Assault. Defendant was adjudicated a habitual criminal as to Count IV and sentenced to another  
11 consecutive term of life imprisonment without the possibility of parole. Defendant then appealed the  
12 second sentencing, specifically contesting the validity of the judgments of conviction used to  
13 adjudicate him a habitual criminal. The Nevada Supreme Court denied the same on October 4, 1995.

14       3. On December 5, 1989, between the hours of 1:30 a.m. and 5:30 a.m., Defendant  
15 entered the victim's residence located at 1000 Dumont, Apartment 227, Las Vegas. Once inside,  
16 Defendant took a woman's Seiko watch and approximately \$25 from a coffee table in the living room,  
17 an unknown amount of cash from the victim's bedroom dresser, and a key to the apartment which was  
18 laying on a table near the front door. Defendant then left the apartment. At approximately 7:30 a.m.,  
19 the victim returned to find the items missing. Las Vegas Metropolitan Police were contacted and a  
20 report of the entry submitted.

21       4. Approximately noon of the same day, the victim (a 46 year-old female) was awakened  
22 by Defendant knocking at her front door. After informing Defendant that he had awakened her and  
23 asking him to leave, the victim returned to her room. Almost two hours later, the victim was  
24 awakened by a noise, only to find Defendant outside her bedroom on the stairs. Defendant grabbed  
25 the victim and after a brief struggle, the victim was able to momentarily free herself. However,  
26 Defendant regained his hold and pushed the victim down the stairs. Thereafter Defendant raped the  
27 victim, instructed her to shower and raped her again. When Defendant exited the room, the victim  
28 contacted her daughter and requested her to contact the police.

5. Around 2:15 p.m., LVMPD detained Defendant at in the 900 block of Sierra Vista and after a positive identification by the victim, he was arrested and transported to the Clark County Detention Center.

## II

### CONCLUSIONS OF LAW

6. Defendant, for the first time in his collateral attack, challenges the length of time he was incarcerated before he was brought before a magistrate. Specifically, after remaining silent on the issue in appealing from two judgments of conviction, Defendant now alleges that he was incarcerated some 210 hours before his initial arraignment, and that no probable cause determination was made. Defendant did not preserve this issue below or raise it in his direct appeal and as such, it has been waived. NRS 34.810(1) provides in part:

The court shall dismiss a petition if the court determines that:

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

- (1) Presented to the trial court;
- (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or
- (3) 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.

NRS 34.810(3) imposes the burden upon the defendant of proving specific facts that demonstrate good cause for his failure to present such a claim in earlier proceedings and of showing actual prejudice to the defendant. Accordingly, the waiver of claims doctrine mandates the dismissal of Defendant's instant claim. Kimme v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). Defendant's Petition is barren as to why his allegations surrounding probable cause determination were not raised in either of his direct appeals.

7. Defendant took the stand at trial and offered a defense of "consent" to the charges of

1 Sexual Assault. An excerpt from his offered testimony is as follows:

2 PROSECUTOR: Basically, Mr. Moraga, what you are saying to  
3 us is you are really confirming everything  
4 everybody already testified to. You are just  
5 saying that the sex that happened between you  
6 and Ms. Hawk was with her consent; is that  
7 right?

8 DEFENDANT: That's right. (3 ROA 550).

9 8. Any issues of identification that DNA testing might hope to resolve has been rendered  
10 moot by offering the defense of "consent" to the sexual assault. Moreover, Defendant has waived  
11 this issue by (1) not preserving it below and (2) not raising the identification in his direct appeal  
12 pursuant to NRS 34.810.

13 9. Nor was Defendant's counsel ineffective for not testing DNA evidence at the time of  
14 trial. In People v. Kaurish, 802 P.2d 278, 298 (Cal. 1990),<sup>1</sup> a habeas petitioner claimed  
15 ineffective representation because his counsel failed to independently test dried stains on  
16 impounded clothing. Counsel therein did not know that a time limit existed for testing the  
17 material, such that the test results would be reliable: counsel admitted that he did not learn of the  
18 time limit until one year after the clothing was impounded. As such, the integrity of any future  
19 testing was jeopardized. The California Supreme Court refused to find any prejudice inured to  
20 that defendant. The Court noted that more was required than speculation that timely testing  
21 would have shown a favorable result: there must have been a *reasonable probability* that such  
22 evidence would be produced. Kaurish, at 298. No such reasonable probability can be gleaned  
23 from the record herein.

24 10. In his last appeal from the judgment of conviction entered on remand, Defendant  
25 specifically challenged the validity of his habitual criminal status. The Nevada Supreme Court  
26 specifically denied his contentions and in a Order Dismissing Appeal, affirmed the District Court's  
27 conclusion that Defendant was a habitual criminal and the State had met its burden beyond a  
28 reasonable doubt. As such, that Order becomes the law of the case and forecloses Defendant's  
successive attempt at relief on this issue. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

<sup>1</sup> cert denied, Kaurish v. California, 502 U.S. 837, 112 S.Ct. 121 (1990).



1 Defendant duplicates his complaints surrounding his adjudication as a habitual criminal. The Supreme  
2 Court confirmed that adjudication and, therefore, the Supreme Court's ruling, issued on Defendant's  
3 direct appeal, became the law of this case and forecloses Defendant's ability to revive this claim.

4 11. The United States Supreme Court has clearly established the appropriate test for  
5 determining whether a defendant received constitutionally defective counsel. A defendant's burden  
6 is two-fold. First, a convicted defendant must show that his counsel's performance was objectively  
7 deficient such that counsel was not functioning as the 'counsel' envisioned by Sixth Amendment  
8 guarantees. Second, the defendant must show that the deficient performance prejudiced the defendant  
9 in a way that effectively deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687,  
10 104 S.Ct. 2052, 2064 (1984). Defendant is unable to show any prejudice inured by his assertion that  
11 his trial counsel should have moved to suppress a key that was found as the result of a warrantless  
12 search. Defendant cannot show that the outcome of his trial would have been different with the  
13 suppression of the house key.

#### 14 CONCLUSION

15 Based on the forgoing Findings of Fact and Conclusions of Law, Defendant's Petition for Writ  
16 of Habeas Corpus (Post-Conviction) is DENIED.


#### 17 ORDER

18 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall  
19 be, and it is, hereby denied.

20 DATED this 28th day of August, 1996.

21  
22   
23 DISTRICT JUDGE 

24 STEWART L. BELL  
25 DISTRICT ATTORNEY  
Nevada Bar #000477

26 BY   
27 VICKI J. MONROE  
28 Deputy District Attorney  
Nevada Bar #003776

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RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Findings of Fact is hereby acknowledged this

6 day of August, 1996.

David M. Schieck  
ATTORNEY FOR DEFENDANT

BY David M. Schieck / ntt  
302 E. Carson #600 11:15 A  
Las Vegas, NV 89101, Nevada

kollins/kl

ORIGINAL

FILED

May 28 9 48 AM '98

*Original*

1 ORDR  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 435-4711  
8 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

-vs-

11 ROY D. MORAGA,  
12 #0938554

13 Defendant.

Case No. C92174  
Dept No. VIII  
Docket M

15 ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY  
16 OR IN THE ALTERNATIVE TO CORRECT ILLEGAL SENTENCE

17 DATE OF HEARING: 05/11/98  
18 TIME OF HEARING: 9:00 A.M.

19 THIS MATTER having come on for hearing before the above entitled Court on the 11th  
20 day of May, 1998, the Defendant not being present, and not represented by counsel, the Plaintiff  
21 being represented by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS,  
22 Deputy District Attorney, and the Court having heard the arguments of counsel and good cause  
23 appearing therefor,

24 //  
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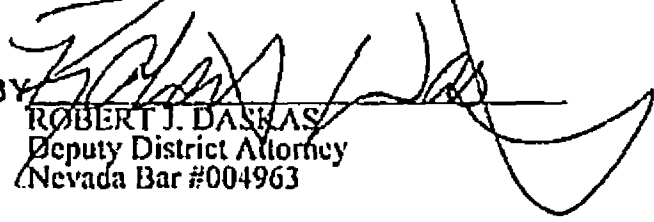
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IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Modify or in the Alternative Correct Illegal Sentence, shall be, and it is denied.

DATED this 20 day of May, 1998.

  
DISTRICT JUDGE

STEWART L. BELL  
DISTRICT ATTORNEY  
Nevada Bar #000477

BY   
ROBERT J. DASKAS  
Deputy District Attorney  
Nevada Bar #004963

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

No. 33099

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

MAR 02 1999

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying appellant's motion to strike. Appellant filed a motion to correct an illegal sentence in the district court. The state filed an opposition, and the district court denied the motion. Appellant then filed a motion to strike the state's opposition. The district court denied the motion to strike, and this appeal followed.

Our review of this appeal reveals a jurisdictional defect.. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists. *Castillo v. State*, 106 Nev. 349, 792 P.2d 1133 (1990). No statute or court rule provides for an appeal from an order denying a motion to strike. Accordingly, we conclude that we lack jurisdiction to consider this appeal, and we

ORDER this appeal dismissed.<sup>1</sup>

*Maupin*  
Maupin J.

*Agosti*  
Agosti J.

*Becker*  
Becker J.

cc: Hon. Lee A. Gates, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Stewart L. Bell, District Attorney  
Roy D. Moraga  
Shirley Parraguirre, Clerk

<sup>1</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

IN THE SUPREME COURT OF THE STATE OF NEVADA

C92174

No. 29321

ROY MORAGA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

APR 20 1999

JANETTE H. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
CHIEF DEPUTY CLERK

No. 32542

ROY D. MORAGA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

ORDER DISMISSING APPEALS

Docket No. 29321 is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 32542 is a proper person appeal from a district court order denying appellant's motion to modify or correct an illegal sentence. We elect to consolidate these appeals for disposition. NRAP 3(b).

On July 7, 1990, the district court convicted appellant, pursuant to a jury verdict, of two counts of burglary and two counts of sexual assault. The court sentenced appellant to life without the possibility of parole. On direct appeal, this court upheld appellant's conviction but remanded to the district court for resentencing on the ground that the district court had failed to sentence appellant for each of the four primary offenses.<sup>1</sup> Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991).

a consecutive term of life with the possibility of parole for one of the counts of sexual assault. The court also adjudicated appellant as a habitual criminal, sentencing him to a consecutive term of life without the possibility of parole for the second count of sexual assault. This court dismissed appellant's appeal from the amended judgment of conviction.<sup>2</sup> Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995).

On February 20, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant subsequently obtained counsel to represent him, and counsel filed supplemental documents in support of appellant's petition. The state opposed appellant's petition, and the district court denied the petition. Appellant's subsequent appeal is docketed in this court as Docket No. 29321.

On April 30, 1998, appellant filed a proper person motion to modify or correct an illegal sentence in the district court. The state opposed appellant's motion. The district court summarily denied the motion. Appellant's subsequent appeal is docketed in this court as Docket No. 32542.

#### Appellant's Habeas Corpus Petition

Appellant claims that the district court should have held an evidentiary hearing on several claims that he presented in his habeas corpus petition. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) (stating that a defendant pursuing post-conviction relief is entitled to an evidentiary hearing if he or she alleges a claim supported by sufficient factual allegations that, if true, would entitle the defendant to

First, appellant claims that he was not taken before a magistrate for a timely probable cause determination after his arrest. See NRS 171.178; Powell v. State, 113 Nev. 41, 930 P.2d 1123 (1997). We conclude that the district court properly rejected appellant's claim because appellant failed to allege sufficient facts to support a showing of prejudice or cause for his failure to previously raise this claim. See NRS 34.810(1)(b), (3); see also Strickland v. Washington, 466 U.S. 668 (1984); Powell, 113 Nev. 41, 930 P.2d 1123; Huebner v. State, 103 Nev. 29, 731 P.2d 1330 (1987).

Next, appellant claims that his counsel was ineffective for failing to object to certified copies of prior convictions that were introduced by the state in seeking appellant's adjudication as a habitual criminal. In his petition, appellant explained that inconsistencies in these documents revealed that the prior convictions did not all pertain to the same individual.

We agree with the state that this claim is effectively precluded by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). On appeal from the amended judgment of conviction, appellant pointed out that two of the prior convictions named "Roy Daniels Moraga" and the third listed "Roy Daniel Moraga." Appellant claimed that all of the prior convictions might not apply to him. This court noted that appellant's counsel had failed to make an appropriate objection, but this court further concluded: "[T]he state adequately proved that appellant received the three prior convictions. The prior convictions presented by the state do not, on their face, 'raise a presumption of constitutional infirmity,' and the district court was entitled to use these



evidence of the victim's apartment key, which was seized from appellant. Appellant failed to support this claim with sufficient factual allegations that demonstrate that police obtained the key as a result of an illegal search or seizure. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Additionally, appellant's counsel in the district court and on appeal has failed to articulate any valid basis for suppression of the evidence. Finally, even assuming that counsel would have been successful in a motion to suppress the key, we do not perceive any prejudice to appellant in light of the persuasive evidence of his guilt. See Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, appellant was not entitled to an evidentiary hearing on this claim nor is he entitled to relief as a matter of law, which he also requests.

Appellant also claims that his counsel did not interview witnesses to prepare for trial. Appellant claims that if counsel had done so, he would have uncovered evidence to show that appellant had been seen "making out" with the victim when they first met and that appellant was incapable of sexual intercourse while intoxicated. Appellant failed, however, to name the witnesses who would have allegedly supported these allegations. Thus, we conclude that appellant failed to support his claim with sufficient supporting factual allegations to warrant an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Next, appellant claims that his counsel did not properly prepare him for questioning at the trial. Appellant complains that he "did not understand sex to necessarily include penile penetration and therefore he answered questions inappropriately" and that he "did not understand when questioned

the meaning of "sex" and that he admitted to having consensual sexual intercourse with the victim.

Appellant next claims that his counsel failed to request testing of blood and semen samples to ascertain whether appellant had sexual intercourse with the victim. We perceive no prejudice to appellant, even assuming that counsel acted unreasonably in failing to obtain testing of the samples. See Strickland v. Washington, 466 U.S. 668 (1984).

Finally, appellant claims that the reasonable doubt instruction in this case, which was based on the former version NRS 175.211, was constitutionally deficient. See 1967 Nev. Stat., ch. 523, § 194, at 1427-28. Appellant acknowledges that he failed to raise this claim below. Nevertheless, appellant claims that the error is of constitutional magnitude, and he requests this court to consider it. We decline to consider appellant's claim because of his failure to raise it below and the absence of plain constitutional error. See Ramirez v. Hatcher, 136 F.3d 1209 (9th Cir. 1998), cert. denied, 119 S.Ct. 415 (1998); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

#### Appellant's Motion to Correct or Modify an Illegal Sentence

The district court has authority to grant a motion to correct an illegal sentence or a motion to modify a sentence only if the sentencing court misapprehended a material fact about the defendant's criminal record that worked to the defendant's extreme detriment or if the defendant's sentence is facially illegal. See Edwards v. State, 112 Nev. 704, 707-08, 918 P.2d 321, 323-24 (1996). A sentence is facially illegal if the sentence exceeds the statutory maximum or if the sentencing court otherwise lacked jurisdiction to impose the sentence. Id.

was aware that it had discretion not to adjudicate appellant as a habitual criminal after the state produced proof of appellant's prior convictions.

We conclude that the district court did not err in denying appellant's motion because his claim fell outside the very narrow scope of issues cognizable in a motion to correct an illegal sentence or a motion to modify a sentence. There is nothing in the record to suggest that the sentencing court relied on misinformation about appellant's criminal record or that the court lacked jurisdiction to impose the sentences in the instant case. As noted above, the state produced proper proof of appellant's prior convictions before the court adjudicated appellant as a habitual criminal. Further, appellant's sentences were within statutory limits.

Conclusion

Having reviewed the records on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief in these matters. Accordingly, we

ORDER these appeals dismissed.<sup>3</sup>

Maupin J.  
Maupin

Agosti J.  
Agosti

Becker J.  
Becker

cc: Hon. Jack Lehman, District Judge  
Hon. Lee A. Gates, District Judge  
Attorney General  
Clark County District Attorney  
State Public Defender  
Roy D. Moraga  
Clark County Clerk

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FILED

JAN 7 11:25 AM '04

*Christina Hinds*  
CLERK

1 ORDR

2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 ERIC JORGENSEN  
6 Chief Deputy District Attorney  
7 Nevada Bar #001802  
8 200 South Third Street  
9 Las Vegas, NV 89155-2211  
10 (702) 455-4711  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 ROY D. MARAGA,  
14 #938554

15 Defendant.

Case No. C92174  
Dept No. VIII

17 ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE  
18 UNDER NEVADA OPEN RECORDS ACT

19 DATE OF HEARING: 1/5/04  
20 TIME OF HEARING: 9:00 A.M.

21 THIS MATTER having come on for hearing before the above entitled Court on the  
22 5th day of January, 2004, the Defendant not being present, represented by CHRISTINA  
23 HINDS, Esq., the Plaintiff being represented by DAVID ROGER, District Attorney, through  
24 ERIC JORGENSEN, Chief Deputy District Attorney, and the Court having heard the  
25 arguments of counsel and good cause appearing therefor,

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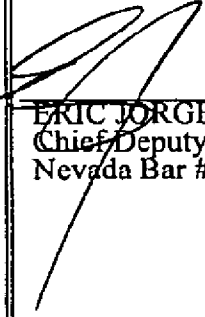
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1 IT IS HEREBY ORDERED that the Defendant's Motion for Release of DNA  
2 Evidence Under Nevada Open Records Act, shall be, and it is denied.

3 DATED this 7 day of January, 2004.

4  
5 Lee A. Gates  
6 DISTRICT JUDGE *SC*

7  
8 DAVID ROGER  
9 DISTRICT ATTORNEY  
10 Nevada Bar #002781

11   
12 ERIC JORGENSEN  
13 Chief Deputy District Attorney  
14 Nevada Bar #001802  
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3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

2006 JAN 12 : A 11: 38

5 ROY D. MORAGA,

6 Petitioner,

7 vs.

8 E.K. MCDANIEL,

9 Respondent,

*[Signature]*  
CLERK

Case No: C92174

Dept No: 8

ORDER FOR PETITION FOR  
WRIT OF HABEAS CORPUS

11 Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on  
12 January 10, 2006. The Court has reviewed the petition and has determined that a response would assist  
13 the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and  
14 good cause appearing therefore,

15 **IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order,  
16 answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS  
17 34.360 to 34.830, inclusive.

18 **IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's  
19  
20 Calendar on the 29 day of March, 200 6, at the hour of  
21  
22 9 o'clock \_\_\_\_\_ a.m./~~p.m.~~ for further proceedings.

*[Signature]*

District Court Judge

JAN 2 2006

208  
OPPS

1 DAVID ROGER  
2 Clark County District Attorney  
3 Nevada Bar #002781  
4 TALEEN R. PANDUKHT  
5 Chief Deputy District Attorney  
6 Nevada Bar #005734  
7 200 Lewis Avenue  
8 Las Vegas, Nevada 89155-2212  
9 (702) 671-2500  
10 Attorney for Plaintiff

19  
**FILED**

JAN 19 2 01 PM '06

*Cheryl S. Higgins*  
CLERK

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA, )

10 Plaintiff, )

11 -vs- )

12 ROY D. MORAGA,  
13 #0938554 )

14 Defendant. )

CASE NO: C92174

DEPT NO: VIII

15 STATE'S OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL

16 DATE OF HEARING: 01/23/06

TIME OF HEARING: 9:00 AM

17 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
18 TALEEN R. PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached  
19 Points and Authorities in Opposition to Defendant's Motion for Appointment of Counsel.

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

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COUNTY CLERK

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On December 5, 1989, Defendant, Roy Moraga, was arrested for the sexual assault  
4 and rape of a woman in her home. Defendant pled not guilty and a jury trial was had  
5 wherein Defendant was found guilty of two (2) Counts of Burglary and two (2) Counts of  
6 Sexual Assault. On June 30, 1990, Defendant was sentenced to life without the possibility of  
7 parole after being adjudicated a habitual criminal. Defendant's direct appeal was denied on  
8 August 7, 1991. However, the Court remanded Defendant's case to the District Court for re-  
9 sentencing. The Supreme Court concluded that the District Court had erroneously imposed  
10 one sentence for multiple offenses.

11 On October 21, 1991, Defendant was re-sentenced to ten years for each of the  
12 Burglary counts (Counts I-II), to run consecutive to each other. Defendant also received a  
13 consecutive term of life imprisonment with the possibility of parole after five years for  
14 Count III – Sexual Assault. Defendant was adjudicated a habitual criminal as to Count IV  
15 (Sexual Assault) and sentenced to a consecutive term of life imprisonment without the  
16 possibility of parole. An Amended Judgment of Conviction was filed on November 13,  
17 1991. Defendant appealed the second sentencing. The Nevada Supreme Court denied the  
18 same on October 4, 1995.

19 On February 20, 1996, Defendant filed a post-conviction petition for a writ of habeas  
20 corpus. On September 6, 1996, the District Court denied Defendant's petition. On April 30,  
21 1998, Defendant filed a motion to correct an illegal sentence. On May 20, 1998, the District  
22 Court denied Defendant's motion, and Defendant appealed the denial of both the petition and  
23 the motion. On April 20, 1999, the Nevada Supreme Court denied Defendant's appeals.

24 On December 16, 2003, Defendant filed a motion in District Court for the release of  
25 DNA evidence. On January 7, 2004, the District Court denied the motion and Defendant  
26 appealed. The Nevada Supreme Court treated the motion as a successive writ of petition for  
27 habeas corpus. On September 20, 2004, the Nevada Supreme Court denied Defendant's  
28 appeal. The Supreme Court found that Defendant's motion was procedurally barred and



1 Defendant failed to demonstrate good cause and prejudice.

2 On January 12, 2006, Defendant filed another petition for writ of habeas corpus. On  
3 January 10, 2006, Defendant filed the instant Motion for Appointment of Counsel. The State  
4 responds as follows.

5 **ARGUMENT**

6 **I.**

7 **DEFENDANT IS NOT ENTITLED TO  
8 APPOINTMENT OF AN ATTORNEY**

9 In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court  
10 ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings.  
11 In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court  
12 similarly observed that “[t]he Nevada Constitution...does not guarantee a right to counsel in  
13 post-conviction proceedings, as we interpret the Nevada Constitution’s right to counsel  
14 provision as being coextensive with the Sixth Amendment to the United States  
15 Constitution.”

16 NRS 34.750 provides, in pertinent part:

17 “[a] petition may allege that the Defendant is unable to  
18 pay the costs of the proceedings or employ counsel. If the court  
19 is satisfied that the allegation of indigency is true and the petition  
20 is not dismissed summarily, the court may appoint counsel at the  
21 time the court orders the filing of an answer and a return. In  
22 making its determination, the court may consider whether:

- 23 (a) The issues are difficult;  
24 (b) The Defendant is unable to comprehend the  
25 proceedings; or  
26 (c) Counsel is necessary to proceed with  
27 discovery.”

28 (emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining  
whether to appoint counsel. McKague specifically held that with the exception of NRS  
34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one  
does not have “[a]ny constitutional or statutory right to counsel at all” in post-conviction  
proceedings. Id. at 164. The Nevada Supreme Court has observed that a Defendant “must  
show that the requested review is not frivolous before he may have an attorney appointed.”  
Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former

1 statute NRS 177.345(2)).

2 Defendant fails to meet the threshold showing that his third successive Petition for  
3 Writ of Habeas Corpus will not be dismissed summarily as it is procedurally barred.  
4 Defendant also has not demonstrated that his contentions have any merit from which he  
5 would benefit by having the assistance of an attorney. The presence of an attorney will not  
6 advance Defendant's successive frivolous attempts to seek meritless relief. Defendant is not  
7 entitled to the appointment of counsel. The Court should exercise its discretion to deny  
8 Defendant's motion.

9 CONCLUSION


10 For all the foregoing reasons, Defendant's Motion for Appointment of Counsel should  
11 be denied.

12 DATED this 1/18/06 day of January, 2006.

13 Respectfully submitted,

14 DAVID ROGER  
15 Clark County District Attorney  
16 Nevada Bar #002781

17 BY

  
18 TALEEN R. PANDUKHT  
19 Chief Deputy District Attorney  
20 Nevada Bar #005734

21 CERTIFICATE OF MAILING

22 I hereby certify that service of the above and foregoing was made this 18th day of  
23 January, 2006, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

24 ROY MORAGA, #31584  
25 ELY STATE PRISON  
26 P.O. BOX 1989  
27 ELY, NEVADA 89301

28 BY M. Warner  
Secretary for the District Attorney's Office

mmw/SVU

46

FILED

2006 JAN 27 P 2:13

clerk

1 **ORDR**  
2 **DAVID ROGER**  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 **TALEEN R. PANDUKHT**  
6 Deputy District Attorney  
7 Nevada Bar #005734  
8 200 Lewis Avenue  
9 Las Vegas, NV 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 **THE STATE OF NEVADA,**  
11 **Plaintiff,**

12 **-vs-**

13 **ROY D. MORAGA,**  
14 **#0938554**

15 **Defendant.**

Case No. C92174  
Dept No. VIII

17 **ORDER GRANTING DEFENDANT'S PRO PER MOTION FOR**  
18 **LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER**  
19 **DENYING DEFENDANT'S PRO PER MOTION FOR**  
20 **APPOINTMENT OF COUNSEL**

21 **DATE OF HEARING: 1/23/06**  
22 **TIME OF HEARING: 9:00 A.M.**

23 **THIS MATTER** having come on for hearing before the above entitled Court on the  
24 23rd day of January, 2006, the Defendant not being present, In Proper Person, the Plaintiff  
25 being represented by DAVID ROGER, District Attorney, through TRACEY J. BRIERLY,  
26 Deputy District Attorney, and the Court having heard the arguments of counsel and good  
27 cause appearing therefor,  
28

///

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JAN 27 2006  
COUNTY CLERK

**IT IS HEREBY ORDERED** that the Defendant's Pro Per Motion for Leave to Proceed in Forma Pauperis, shall be, and it is **GRANTED**.

**IT IS HEREBY ORDERED** that the Defendant's Pro Pcr Motion for Appointment of Counsel, shall be, and it is **DENIED**.

DATED this 27 day of January, 2006.

Lee A. Gates  
DISTRICT JUDGE sc

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

Taleen R. Pandukht  
TALEEN R. PANDUKHT  
Deputy District Attorney  
Nevada Bar #005734

ct/SVU

211

MOTN  
 ROY DANIELS MORAGA #31584  
 NEVADA State Prison  
 Post Office Box 607  
 CARSON City, NEVADA 89702  
 Petitioner Pro se

C92174 21

DISTRICT COURT  
 CLARK COUNTY, NEVADA

ROY D. MORAGA,  
 Petitioner,

CASE NO: C 72174  
 Dept. NO: 8  
 CLERK

vs.

E. K. MCDANIEL, et al.

Date of Hearing:

Respondent(s)

Time of Hearing:

MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING

Comes now the Petitioner, ROY D. MORAGA, Pro se, and Pursuant to Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (Nev., 2002); United States v. Gagnon, 470 U.S. 522, 526-27 (1985); and the Confrontation and Due Process Clauses of the NEVADA Constitution (Art. 1, § 8) AND the U.S. Constitution (5th, 6th & 14th Amendments), hereby moves this Honorable Court for an Order to transport and Produce Petitioner for the MARCH 29, 2006 hearing on his Petition for Writ of Habeas Corpus (Post-Conviction Relief).

This Motion is made and based upon the papers and Pleadings on file in this case and the Attached Points and Authorities.

Dated this \_\_\_\_\_ day of February 2006.

Respectfully Submitted

Roy D. Moraga  
 ROY D. MORAGA #31584  
 Petitioner Pro se

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FEB 29 2006

COUNTY CLERK

## POINTS AND AUTHORITIES

ON JANUARY 12, 2006, Petitioner's Writ of habeas Corpus was Filed.

At the Court's Order a hearing ON MARCH 29, 2006 At the hour of 9 O'clock A.M. (Post-Conviction Relief) See Exhibit "A" the Order.

For the reasons set forth below, Petitioner Asserts his right to be personally Present At the MARCH 29, 2006 hearing on his Petition, AND hereby moves the Court For AN Order to transport AND produce Petitioner For the hearing.

## ARGUMENT

I. The Absence of Petitioner At The Hearing Would Violate His Rights Under the Confrontation AND Due Process Clauses of the U.S. Constitution (5th, 6th & 14th Amendments)

The Nevada Supreme Court held that: (1) the presence of the Petitioner For habeas Corpus relief is required, by Statute, ~~At~~ ANY evidentiary hearing Conducted on the merits of the Claims Asserted in the Petition, AND (2) the Failure of the trial Court to provide For the presence of the Petitioners At the evidentiary hearing WAS NOT harmless.

In Gebers v. State, 118 Nev. 500, 50 P.3d 1092 AND IN Kirksey v. State, 923 P.2d 1102 (NEV. 1996), they wrote:

"The right to be present is rooted in the Confrontation Clause, AND the Due Process Clause of the Federal Constitution. The CONFRONTATION Aspect Arises When the proceeding involves the presentation of evidence. United States v. Gagnon, (Citations omitted). The due Process Aspect has been recognized only to the extent that a Fair and just hearing would be thwarted by the defendant's Absence. Id."

## Discussion

[1] NRS 34.770(1) Provides that, in Post-conviction habeas Corpus Proceedings, the judge "shall determine whether an evidentiary hearing is required." Under NRS 34.770(3), "[i]f the judge... determines that an evidentiary hearing is required, he shall grant the writ AND shall set a date for the hearing." Such a writ "does not entitle a Petitioner to be discharged from the custody or restraint under which he is held... [but] requires only the production of the petitioner to determine the legality of his custody or restraint." [FN4] "The Writ must be directed to the person who has the Petitioner in custody... Commanding him to have the body of the petitioner produced before the district court..." [FN5] A petitioner "brought before the <sup>Judge</sup> on the return of the writ may deny or controvert any of the material facts or matters set forth in the return or answer, deny the sufficiency thereof, or allege any \* 504 fact to show either that his imprisonment or detention is unlawful or that he is entitled to his discharge." [FN6] Thus, it is clear that the provisions of NRS Chapter 34 require the presence of the petitioner at any evidentiary hearing conducted on the merits of the claims asserted in a Post-Conviction petition for a writ of habeas Corpus. Such an evidentiary hearing conducted without first providing the petitioner an opportunity to be present violates the provisions set forth in NRS Chapter 34.

FN4. NRS 34.390(2).

FN5. NRS 34.400; see also NRS 34.440 (upon service of the writ, the person to whom the writ is directed shall bring the body of the party in custody according to the command of the writ).

Kirksey, 923 P.2d at 1115. See Also Rule 44 of the Supreme Court Rules ("Nothing in these rules shall be so construed as to prevent any person from appearing in his own behalf in any court in this state except the Supreme Court.")

State and Federal Constitutional guarantees of due process of law require at a minimum notice of intended judicial action and an adequate opportunity to be heard before judicial action can be taken. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 377 (1971) ("Absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("the fundamental requisite of due process of law is the opportunity to be heard."); Browning v. Dixon, 954 P.2d 741, 743 (Nev. 1998). Entering an order without complying with minimum standards of notice and an opportunity to be heard is beyond the court's jurisdiction. E.g., Sheriff, Nye County v. Davis, 787 P.2d 1214 (Nev. 1990); Lane v. District Court, 760 P.2d 1245 (Nev. 1988).

Failure to produce petitioner at the hearing to argue his motion would deny him the opportunity to rebut whatever argument the state may make, and would deny him the opportunity to offer his own testimony in support of his petition. Petitioner's absence at the hearing would thus violate his rights under the Due Process and Confrontation Clauses of the Nevada Constitution (Art. 1, § 8), and the U.S. Constitution (5th, 6th & 14th Amendments).

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WHEREFORE, based upon the foregoing, Petitioner prays this Honorable Court for an Order to transport and produce him for the MARCH 29, 2006 hearing on his Petition for Writ of Habeas Corpus (Post-Conviction Relief).

Dated this \_\_\_\_\_ day of February, 2006.

Respectfully Submitted,

Roy D. Moraga

ROY D. MORAGA # 31584

Petitioner Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on February \_\_\_\_\_ 2006, he served a copy of the foregoing by personally mailing said copy to:

Clark County District Attorney

Regional Justice Center

200 Lewis Ave.

Las Vegas, Nevada 89155

Roy D. Moraga

ROY D. MORAGA

(See Attached Exhibit)

(See Attached Proposed Order to Transport)

RECEIVED  
FEB 7 2006  
COUNTY CLERK

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Dated this \_\_\_\_\_ day of February 2006.

Respectfully Submitted,  
Roy D. Moraga  
NSP P.O. Box 607  
CARSON City, Nevada 89702  
Petitioner Pro Se

Comes Now Petitioner, Pro Se, and Respectfully gives  
this Honorable Court Notice of Change of Address.  
This Notice is made upon the Motion and Order to  
transport and produce inmate for hearing in the above-entitled  
Action.

CLARK COUNTY, NEVADA  
DISTRICT COURT  
FEB 22 2:13 PM '06  
CASE NO. 03-177  
Dept. No. 8  
CLERK  
Roy D. Moraga, Petitioner,  
vs.  
E.K. McDaniel, et al (Respondents)  
NOTICE OF CHANGE  
OF ADDRESS

Petitioner Pro Se

**E-FILE LITE  
ORIGINAL**

ELECTRONICALLY FILED  
02/27/2006 01:46:02 PM

*Shirley Chamagun*  
CLERK

**OPPS**  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
Deputy Name  
Deputy District Attorney  
Nevada Bar #00Deputy Bar  
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-

ROY D. MORAGA,  
#0938554

Defendant.

CASE NO: C92174

DEPT NO: VIII

**STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR TRANSPORT**

DATE OF HEARING: 03/22/06

TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
TALEEN R. PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached  
Points and Authorities in Opposition to Defendant's Motion for Transport.

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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On December 5, 1989, Defendant, Roy Moraga, was arrested for the sexual assault  
4 and rape of a woman in her home. Defendant pled not guilty and a jury trial was had  
5 wherein Defendant was found guilty of two (2) Counts of Burglary and two (2) Counts of  
6 Sexual Assault. On June 30, 1990, Defendant was sentenced to life without the possibility of  
7 parole after being adjudicated a habitual criminal. Defendant's direct appeal was denied on  
8 August 27, 1991. However, the Court remanded Defendant's case to the District Court for  
9 resentencing. The Supreme Court concluded that the district court had erroneously imposed  
10 one sentence for multiple offenses. Remittitur was issued on September 17, 1991.

11 On October 21, 1991, Defendant was resntenced to ten years for each of the  
12 Burglary counts (Counts I-II), to run consecutive to each other. Defendant also received a  
13 consecutive term of life imprisonment with the possibility of parole after five years for  
14 Count III - Sexual Assault. Defendant was adjudicated a habitual criminal as to Count IV  
15 (Sexual Assault) and sentenced to a consecutive term of life imprisonment without the  
16 possibility of parole. An Amended Judgment of Conviction was filed on November 13,  
17 1991. Defendant appealed the second sentencing. The Nevada Supreme Court denied the  
18 same on October 4, 1995. Remittitur issued on October 24, 1995.

19 On February 20, 1996, Defendant filed a post-conviction petition for a writ of habeas  
20 corpus. On September 6, 1996, the district court denied Defendant's petition. On April 30,  
21 1998, Defendant filed a motion to correct an illegal sentence. On May 20, 1998, the district  
22 court denied Defendant's motion, and Defendant appealed the denial of both the petition and  
23 the motion. On April 20, 1999, the Nevada Supreme Court denied Defendant's appeals.

24 On December 16, 2003, Defendant filed a motion in district court for the release of  
25 DNA evidence. On January 7, 2004, the district court denied the motion and Defendant  
26 appealed. The Nevada Supreme Court treated the motion as a successive writ of petition for  
27 habeas corpus. On September 15, 2004, the Nevada Supreme Court denied Defendant's  
28 appeal. The Supreme Court found that Defendant's motion was procedurally barred and

1 Defendant failed to demonstrate good cause and prejudice. On November 15, 2005,  
2 Defendant's federal Petition for Writ of Habeas Corpus was denied and remanded for failure  
3 to exhaust his claims in state court.

4 On January 10, 2006, Defendant filed a Petition for Writ of Habeas Corpus. On  
5 February 22, 2006, Defendant filed the instant motion. The State responds as follows.

6 **ARGUMENT**

7 **I.**

8 **DEFENDANT HAS NOT ESTABLISHED SUFFICIENT GROUNDS**  
9 **TO JUSTIFY AN ORDER TO PRODUCE THE PRISONER.**

10 A defendant must be present at those hearings in which the Court deems it necessary  
11 to expand the record. See Gebers v. State, 118 Nev. 500 (2002). In the instant matter,  
12 Defendant has not shown, nor is there is any need, for the court to receive evidence or take  
13 testimony from any party before ruling on Defendant's petition. In addition, there is no need  
14 for Defendant to testify and present evidence, because all of Defendant's factual and legal  
15 allegations are contained in the petition he filed on January 10, 2006. Therefore, there is no  
16 justification for an order to produce Defendant for the hearing scheduled for March 29, 2006.

17 **CONCLUSION**

18 For all the foregoing reasons, Defendant's Motion for Transport should be DENIED.

19 DATED this 27th day of February, 2006.

20 Respectfully submitted,

21 DAVID ROGER  
22 Clark County District Attorney  
23 Nevada Bar #002781

24 BY /s//TALEEN R. PANDUKHT  
25 TALEEN R. PANDUKHT  
26 Chief Deputy District Attorney  
27 Nevada Bar #005734  
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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 27th day of February, 2006, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROY D. MORAGA, #31584  
NSP  
P.O. BOX 607  
CARSON CITY, NEVADA 89702

BY M. Warner  
Secretary for the District Attorney's Office

mmw/SVU

214

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*Shirley Panagun*  
CLERK

1 RSPN  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 TALEEN R. PANDUKHT  
6 Chief Deputy District Attorney  
7 Nevada Bar #005734  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff  
12  
13  
14

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA, )

10 Plaintiff, )

11 -vs- )

12 ROY D. MORAGA,  
13 #0938554 )

14 Defendant. )

CASE NO: C92174

DEPT NO: VIII

15 STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT  
16 OF HABEAS CORPUS (POST-CONVICTION)

17 DATE OF HEARING: 03/29/06

18 TIME OF HEARING: 9:00 AM

19 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
20 TALEEN R. PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached  
21 Points and Authorities in Response to Defendant's Petition for Writ of Habeas Corpus (Post-  
22 Conviction) and in Support of the State's Motion to Dismiss.

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

26 //

27 //

28 //

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On December 5, 1989, Defendant, Roy Moraga, was arrested for the sexual assault  
4 and rape of a woman in her home. Defendant pled not guilty and a jury trial was had  
5 wherein Defendant was found guilty of two (2) Counts of Burglary and two (2) Counts of  
6 Sexual Assault. On June 30, 1990, Defendant was sentenced to life without the possibility of  
7 parole after being adjudicated a habitual criminal. Defendant's direct appeal was denied on  
8 August 27, 1991. However, the Court remanded Defendant's case to the District Court for  
9 resentencing. The Supreme Court concluded that the district court had erroneously imposed  
10 one sentence for multiple offenses. Remittitur was issued on September 17, 1991.

11 On October 21, 1991, Defendant was resentenced to ten years for each of the  
12 Burglary counts (Counts I-II), to run consecutive to each other. Defendant also received a  
13 consecutive term of life imprisonment with the possibility of parole after five years for  
14 Count III - Sexual Assault. Defendant was adjudicated a habitual criminal as to Count IV  
15 (Sexual Assault) and sentenced to a consecutive term of life imprisonment without the  
16 possibility of parole. An Amended Judgment of Conviction was filed on November 13,  
17 1991. Defendant appealed the second sentencing. The Nevada Supreme Court denied the  
18 same on October 4, 1995. Remittitur issued on October 24, 1995.

19 On February 20, 1996, Defendant filed a post-conviction petition for a writ of habeas  
20 corpus. On September 6, 1996, the district court denied Defendant's petition. On April 30,  
21 1998, Defendant filed a motion to correct an illegal sentence. On May 20, 1998, the district  
22 court denied Defendant's motion, and Defendant appealed the denial of both the petition and  
23 the motion. On April 20, 1999, the Nevada Supreme Court denied Defendant's appeals.

24 On December 16, 2003, Defendant filed a motion in district court for the release of  
25 DNA evidence. On January 7, 2004, the district court denied the motion and Defendant  
26 appealed. The Nevada Supreme Court treated the motion as a successive writ of petition for  
27 habeas corpus. On September 15, 2004, the Nevada Supreme Court denied Defendant's  
28 appeal. The Supreme Court found that Defendant's motion was procedurally barred and



1 Defendant failed to demonstrate good cause and prejudice. On November 15, 2005,  
2 Defendant's federal Petition for Writ of Habeas Corpus was denied and remanded for failure  
3 to exhaust his claims in state court.

4 On January 10, 2006, Defendant filed the instant Petition for Writ of Habeas Corpus.  
5 The State responds as follows.

6 **ARGUMENT**

7 **I.**

8 **DEFENDANT'S PETITION IS TIME-BARRED**

9 NRS 34.726 provides:

10 (1) Unless there is good cause shown for delay, a petition that  
11 challenges the validity of a judgment or sentence must be filed within 1 year of  
12 the entry of the judgment of conviction or, if an appeal has been taken from the  
13 judgment, within 1 year after the Supreme Court issues its remittitur. For the  
14 purposes of this subsection, good cause for delay exists if the petitioner  
15 demonstrates to the satisfaction of the court:

- 16 (a) That the delay is not the fault of the petitioner; and  
17 (b) That dismissal of the petition as untimely will unduly prejudice  
18 the petitioner.

19 Defendant's Amended Judgment of Conviction was filed November 13, 1991. The  
20 Nevada Supreme Court issued its remittitur from Defendant's direct appeal of the Amended  
21 Judgment on October 24, 1995. The instant Petition was filed on January 10, 2006. Thus,  
22 pursuant to NRS 34.726(1), Defendant's Petition was untimely filed. See Downing v. State,  
23 Docket No. 42905 (Order of Affirmance, August 23, 2004), where the Nevada Supreme  
24 Court found Defendant's third Petition for Writ of Habeas Corpus similarly untimely  
25 ("Appellant filed his petition more than six years after this court issued the remittitur from  
26 his direct appeal."). Defendant provided no justification for the delay, and he fails to show  
27 that he will be prejudiced if this Petition is dismissed. Due to the fact that Defendant filed  
28 his Petition more than ten years after the Nevada Supreme Court's issuance of its remittitur  
from his direct appeal of his amended judgment of conviction and failed to show good cause  
for his failure to abide by the statute, his Petition must be dismissed. Pellegrini v. State, 117  
Nev. 860, 34 P.3d 519, 525 (2001).

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1 The Nevada Supreme Court has stated that to establish good cause, a defendant must  
2 demonstrate that some impediment external to the defense prevented him from complying  
3 with the procedural bar that has been violated. Lozada v. State, 110 Nev. 349, 353, 871 P.2d  
4 944, 946 (1994). The Court reaffirmed this holding in Crump v. Warden, 113 Nev. 293,  
5 934 P.2d 247 (1997). The Court went on to say that once the State has raised procedural  
6 grounds for dismissal, the burden then falls on the defendant "to show that good cause exists  
7 for his failure to raise any grounds in an earlier petition and that he will suffer actual  
8 prejudice if the grounds are not considered." Id. at 302, 934 P.2d at 253 (citation omitted).  
9 The Court explained that in order to establish prejudice, the defendant must show "not  
10 merely that the errors of trial created possibility of prejudice, but that they worked to his  
11 actual and substantial disadvantage, in affecting the state proceedings with error of  
12 constitutional dimensions." Id. (citing Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710,  
13 716 (1993)).

14 Defendant alleges no circumstances or justification for his non-compliance with the  
15 procedural bar which would amount to good cause. Defendant's sole allegation supporting  
16 the timeliness of his Petition is the federal court's alleged affording of the opportunity to  
17 exhaust claims presented in federal court. However, remand from federal court to exhaust  
18 state remedies is not good cause to overcome state procedural bars. See Shumway v. Payne,  
19 223 F.3d 982, 988-989 (9th Cir. 2000). Defendant also fails to establish actual prejudice.  
20 Pursuant to NRS 34.726, Defendant's Petition should be dismissed.

## 21 II.

### 22 DEFENDANT'S PETITION IS SUCCESSIVE AND DEFENDANT 23 FAILS TO DEMONSTRATE GOOD CAUSE

24 Defendant's instant Petition should be dismissed pursuant to NRS 34.810 as it is  
25 successive. Pertinent portions of NRS 34.810 state:

26 2. A second or successive petition must be dismissed if the judge or  
27 justice determines that it fails to allege new or different grounds for relief and  
28 that the prior determination was on the merits or, if new and different grounds  
are alleged, the judge or justice finds that the failure of the Defendant to assert  
those grounds in a prior petition constituted an abuse of the writ.

1           3. Pursuant to subsections 1 and 2, the petitioner has the burden of  
2 pleading and proving specific facts that demonstrate:

3           (a) Good cause for the petitioner's failure to present the claim or for  
4 presenting the claim again; and

5           (b) Actual prejudice to the petitioner.

6           Defendant filed his initial Petition on February 20, 1996. The Petition was denied on  
7 the merits and the denial affirmed by the Nevada Supreme Court on April 20, 1999.  
8 Consequently, the instant Petition filed on January 10, 2006 is a successive petition. To  
9 avoid the procedural default under NRS 34.810, Defendant has the burden of pleading and  
10 proving specific facts that demonstrate both good cause for his failure to present his claim in  
11 earlier proceedings and actual prejudice. NRS 34.810(3); Hogan v. Warden, 109 Nev. 952,  
12 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Director, 104 Nev. 656, 659, 764 P.2d  
13 1303,1305 (1988).

14           In order to show good cause, Defendant has the burden of demonstrating that there  
15 was an impediment external to the defense which prevented him from complying with the  
16 state procedural default rules. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946  
17 (1994). Good cause for the delay is defined as "a substantial reason; one that affords a legal  
18 excuse." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). In order to  
19 establish prejudice, a petitioner must demonstrate that the alleged errors worked to his actual  
20 and substantial disadvantage. Hogan, 109 Nev. at 959, 860 P.2d at 716.

21           Defendant has failed to make such a showing of either good cause or prejudice in his  
22 Petition. Defendant's allegation concerning the federal court's remand to exhaust claims is  
23 insufficient to establish good cause. Remand from federal court to exhaust state remedies is  
24 not good cause to overcome state procedural bars. See Shumway v. Payne, 223 F.3d 982,  
25 988-989 (9th Cir. 2000). In addition, no prejudice is demonstrated by Defendant.  
26 Defendant's Petition should be dismissed pursuant to NRS 34.810.

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III.

DEFENDANT'S PETITION IS PRECLUDED BY  
LACHES UNDER NRS 34.800

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction..." The statute also requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The State pleads laches in the instant case.

Defendant's Amended Judgment of Conviction was filed November 13, 1991. The Nevada Supreme Court issued its remittitur from Defendant's direct appeal of the Amended Judgment on October 24, 1995. The instant Petition was filed on January 10, 2006. Since over ten (10) years have elapsed between the remittitur from Defendant's direct appeal of the amended judgment of conviction and the filing of the instant Petition, NRS 34.800 directly applies in this case.

NRS 34.800 was enacted to protect the State from having to re-prove matters that have become ancient history. In Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), the Court explained: "The lengthy passage of time between conviction and a subsequent challenge is a factor which by itself unduly works to the advantage of a felon belatedly seeking relief from conviction. Memories of the crime may diminish and become attenuated. The facts and circumstances of the offense may be impossible to reconstruct." All of the concerns that the Court expressed in Groesbeck are issues in this matter where more than ten years have passed between the underlying conviction and the filing of this petition- witnesses may have left the area, memories may have faded – any number of material issues may be harder to prove. At this date the State is severely prejudiced by Defendant's delayed claims presented in his Petition.

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1 Defendant's Petition, therefore, should be dismissed.

2 CONCLUSION

3 For all the foregoing reasons, Defendant's Petition for Writ of Habeas Corpus (Post-  
4 Conviction) should be DISMISSED.

5 DATED this 27th day of February, 2006.

6 Respectfully submitted,

7 DAVID ROGER  
8 Clark County District Attorney  
9 Nevada Bar #002781

10 BY /s//TALEEN R. PANDUKHT  
11 TALEEN R. PANDUKHT  
12 Chief Deputy District Attorney  
13 Nevada Bar #005734

14 CERTIFICATE OF MAILING

15 I hereby certify that service of the above and foregoing was made this 27th day of  
16 February, 2006, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

17 ROY D. MORAGA, #31584  
18 NSP  
19 P.O. BOX 607  
CARSON CITY, NEVADA 89702

20 BY M. Warner  
21 Secretary for the District Attorney's Office

22  
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28 mmw/SVU

ORIGINAL

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OPI  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
TALEEN R. PANDUKHT  
Chief Deputy District Attorney  
Nevada Bar #005734  
200 Lewis Avenue  
Las Vegas, Nevada, 89155-2211  
(702) 671-2500  
Attorney for Plaintiff

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*Shirley - Maguire*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROY D. MORAGA,  
#0938554

Defendant.

Case No. C92174

Dept No. VIII

ORDER FOR PRODUCTION OF INMATE  
ROY D. MORAGA, BAC # 31584

DATE OF HEARING: 05/01/06  
TIME OF HEARING: 9:00 A.M.

TO: BILL DANAT, Warden, Nevada State Prison

TO: Bill Young, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID ROGER, District Attorney, through TALEEN R. PANDUKHT, Chief Deputy District Attorney, and good cause appearing therefore,

IT IS HEREBY ORDERED that BILL DANAT, Warden of Nevada State Prison shall be, and is, hereby directed to produce ROY D. MORAGA, defendant in Case No. C92174, on a charge of Sexual Assault wherein THE STATE OF NEVADA is the Plaintiff, inasmuch

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COUNTY CLERK

1 as the said defendant is currently incarcerated in the Nevada State Prison located in Carson  
2 City, Nevada, and his presence will be required in Las Vegas, Nevada, commencing on  
3 05/01/06, at the hour of 9:00 o'clock A.M. and continuing until completion of the  
4 prosecution's case against the said Defendant.


5 IT IS FURTHER ORDERED that Bill Young, Sheriff of Clark County, Nevada, shall  
6 accept and retain custody of the said defendant in the Clark County Detention Center, Las  
7 Vegas, Nevada, pending completion of said matter in Clark County, or until the further  
8 Order of this Court; or in the alternative shall make all arrangements for the transportation of  
9 the said defendant to and from the Nevada Department of Corrections facility which are  
10 necessary to insure the defendant's appearance in Clark County pending completion of said  
11 matter, or until further Order of this Court.

12 DATED this 21 day of April, 2006.

13  
14   
15 DISTRICT JUDGE   
16

17 DAVID ROGER  
18 Clark County District Attorney  
19 Nevada Bar #002781

20 BY

  
21 TALEEN R. PANDUKHT  
22 Chief Deputy District Attorney  
23 Nevada Bar #005734  
24  
25  
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mmw/SVU

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*Original  
Dated*

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*Shirley B. Pungione*  
CLERK

OPI  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
TALEEN R. PANDUKHT  
Deputy District Attorney  
Nevada Bar #005734  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2211  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,  
  
-vs-  
  
ROY D. MORAGA, #0938554  
  
Defendant.

CASE NO: C92174  
DEPT NO: VIII

ORDER FOR PRODUCTION OF INMATE  
ROY D. MORAGA, BAC #31584

DATE OF HEARING: 5/31/06  
TIME OF HEARING: 9:00 A.M.

TO: DWIGHT W. NEVEN, Warden of the High Desert State Prison;  
TO: Bill Young, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID ROGER, District Attorney, through TALEEN R. PANDUKHT, Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that DWIGHT W. NEVEN, Warden of the High Desert State Prison shall be, and is, hereby directed to produce ROY D. MORAGA, in Case No. C92174, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said ROY D. MORAGA is currently incarcerated in the High Desert State Prison located in Indian Springs, Nevada and his presence will be required in Las Vegas, Nevada commencing

COUNTY CLERK  
MAY 05 2006  
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1 on 5/31/06, at the hour of 9:00 o'clock A.M. and continuing until completion of the  
2 prosecution's case against the said Defendant.

3 IT IS FURTHER ORDERED that Bill Young, Sheriff of Clark County, Nevada,  
4 shall accept and retain custody of the said ROY D. MORAGA in the Clark County Detention  
5 Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or until the  
6 further Order of this Court; or in the alternative shall make all arrangements for the  
7 transportation of the said ROY D. MORAGA to and from the Nevada State Prison facility  
8 which are necessary to insure the ROY D. MORAGA's appearance in Clark County pending  
9 completion of said matter, or until further Order of this Court.

10 DATED this 4 day of May, 2006.

11  
12 Lee A. Gates  
13 DISTRICT JUDGE

14  
15 DAVID ROGER  
16 DISTRICT ATTORNEY  
Nevada Bar #002781

17 BY Taleen R. Pandukht  
18 TALEEN R. PANDUKHT  
19 Deputy District Attorney  
Nevada Bar #005734

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21  
22  
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28 ct/SVU

1 **OPPS**

2 Roy Moraga

3 Inmate No. 31584

4 High Desert State Prison

5 *In Proper Person*

FILED

MAY 24 11 53 AM '06

*Shirley S. Benjamin*

EIGHTH JUDICIAL DISTRICT COURT CLERK

CLARK COUNTY, NEVADA

8 ROY D. MORAGA,

9 Petitioner,

10 vs.

11 E.K. McDANIEL, et al.,

12 Respondents.

CASE NUMBER: C92174

DEPARTMENT: 8

**REPLY TO STATE'S RESPONSE AND**  
**OPPOSITION TO MOTION TO**  
**DISMISS PETITION FOR WRIT OF**  
**HABEAS CORPUS (POST-**  
**CONVICTION)**

Hearing Date: May 31, 2006

Time of Hearing: 9:00 a.m.

Petitioner, Roy D. Moraga, in proper person, opposes the motion to dismiss Petitioner's petition for writ of habeas corpus (post-conviction). This opposition is based upon the attached points and authorities and all pleadings and papers on file herein.

Dated this 21<sup>st</sup> day of May, 2006.

*Roy Moraga*  
 Roy Moraga  
 Inmate No. 31584

*In Proper Person*

**RECEIVED**  
 MAY 24 2006  
 COUNTY CLERK

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1 POINTS AND AUTHORITIES

2 I.

3 PROCEDURAL HISTORY

4 Mr. Moraga was arrested on December 5, 1989. Pursuant to an Information filed on January 9,  
5 1990, Mr. Moraga was charged with two counts of burglary and two counts of sexual assault. Deputy  
6 Public Defender Roger R. Hillman was appointed to represent Mr. Moraga.

7 A three-day jury trial commenced on March 12, 1990. The jury found Mr. Moraga guilty of all  
8 four counts. At the June 13, 1990 sentencing hearing, Mr. Moraga was adjudged a habitual criminal,  
9 and Mr. Moraga was sentenced to a term of life without the possibility of parole.

10 On a timely direct appeal of the judgment of conviction, attorney Hillman raised one issue,  
11 namely, THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY. The  
12 Nevada Supreme Court sua sponte remanded the case to district court for resentencing noting that Mr.  
13 Moraga had received a single sentence for four offenses. Mr. Moraga was resentenced on October 21,  
14 1991 to two, consecutive ten-year terms (burglaries), a consecutive term of life with the possibility of  
15 parole (sexual assault), and a consecutive life without the possibility of parole (habitual criminal).

16 On appeal of the Amended Judgment of Conviction filed on November 13, 1991, Mr. Moraga  
17 raised the following claim on direct appeal: STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT  
18 THAT APPELLANT'S SENTENCE SHOULD BE ENHANCED PURSUANT TO THE HABITUAL CRIMINAL STATUTE.  
19 The Nevada Supreme Court dismissed the appeal on October 4, 1995.

20 Mr. Moraga mailed on February 12, 1996 a proper person Petition for Writ of Habeas Corpus  
21 (Post-Conviction) which was filed on February 20, 1996. Mr. Moraga filed a proper person  
22 Supplemental Brief and Points and Authorities in Support of Petition for Writ of Habeas Corpus on  
23 February 20, 1996. David M. Schieck was retained by Mr. Moraga to represent him on post-conviction.  
24 Mr. Schieck, on June 13, 1996, filed a Supplemental Points and Authorities in Support of Petition for  
25 Writ of Habeas Corpus. A post-conviction hearing was held on July 19, 1996. Mr. Moraga was not  
26 present at the hearing but was represented by Mr. Schieck. The court denied the petition.

27 On Mr. Schieck's withdrawal from the case, the court appointed Richard Palma of the Special  
28 Public Defender's Office to represent Mr. Moraga on appeal of his post-conviction. Mr. Palma filed an

1 Opening Brief with the Nevada Supreme Court.

2 On August 30, 1998, Mr. Moraga filed a proper person Motion to Modify or in the Alternative  
3 Corrcct Illegal Sentence with the Eighth Judicial District Court Clerk on April 30, 1998. The court  
4 denied Mr. Moraga's motion, finding that the motion lacked legal foundation as an examination of the  
5 record showed four prior convictions which satisfies the criteria for habitual criminal status. The court  
6 further found that defendant had exhausted the argument in appeals, all of which were denied. Mr.  
7 Moraga filed a proper person Notice of Appeal on the Eighth Judicial District Court's denial of his  
8 motion to correct illegal sentence which would later be docketed under Case No. 32542 of the Nevada  
9 Supreme Court.

10 On April 19, 1999, the Nevada Supreme Court issued Order Dismissing Appeals under Case No.  
11 29321 (post-conviction appeal) and Case No. 32542 (appeal on denial of motion to modify or correct  
12 illegal sentence). Remittitur issued on May 18, 1999.

13 On February 5, 2002, Mr. Moraga filed a proper person Motion to Preserve Evidence and Order  
14 with the Eighth Judicial District court. Attorney Cristina Hinds was appointed to represent Mr. Moraga.  
15 Ms. Hinds filed a Motion for Release of DNA Evidence Under Nevada Open Records Act on December  
16 16, 2003. Ms. Hinds argued at the hearing on the motion on Mr. Moraga's behalf. The court denied the  
17 motion. The denial of the motion was appealed to the Nevada Supreme Court. The Nevada Supreme  
18 Court denied the appeal.

19 Mr. Moraga filed his first pro se Petition for Writ of Habeas Corpus with the United States  
20 District Court on September 14, 1999 under Case No. CV-N-99-507-DWH (RAM). Following  
21 appearance by various attorneys on his behalf and the filing of three supplements to his petition, on  
22 November 3, 2003, the Law Offices of the Federal Public Defender was appointed to represent Mr.  
23 Moraga in federal court. Counsel filed a Fourth Amended Petition and following briefing, the United  
24 States District Court found Mr. Moraga's mixed petition contained exhausted and unexhausted claims.  
25 Pursuant to an order issued by the United States District Court, counsel's motion for a stay and abeyance  
26 was granted to allow Mr. Moraga the opportunity to exhaust his unexhausted claims in state court. This  
27 matter follows.

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II.

ARGUMENT

**Claim in Issue:** GROUND ONE: AFTER MR. MORAGA'S ORIGINAL SENTENCE WAS VACATED, MR. MORAGA WAS RE-SENTENCED TO A GREATER AMOUNT OF TIME IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Moraga is entitled to litigate this petition and the claim as pled in his currently pending petition for writ of habeas corpus. Mr. Moraga's petition is not procedurally barred, as he has demonstrated good cause and will be unduly prejudiced from the denial of this petition. Mr. Moraga concedes that the petition is successive; however, as he has shown adequate cause for failure to present this claim until now and obvious actual prejudice that would ensue should he not be allowed to litigate these claims. Pursuant to Nev. Rev. Statute §34.810(3), a petitioner may overcome a successive petition with proof of specific facts that demonstrate good cause for the petitioner's failure to present the claim previously and actual prejudice would unduly prejudice the petitioner should he not be allowed to present the claim. Finally, pursuant to NRS § 34.800, Mr. Moraga can rebut the presumption of prejudice raised as the State has plead laches.

**A. Mr. Moraga Has Demonstrated Good Cause**

The Nevada Supreme Court has determined good cause exists when an impediment external to the defense prevented the petitioner from complying with state procedural rules. Harris v. Warden, 114 Nev. 956 (1998); Pellegrini v. State, 117 Nev. 860, 886-87 (2001); Lozada v. State, 110 Nev. 349, 353 (1994). An impediment external to the defense may be illustrated by a showing "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Murray v. Carrier, 477 U.S. 478, 488 (1986)(citations omitted).

Failure of appellate counsel to raise this claim in an adequate manner violated Mr. Moraga's constitutional right to effective assistance of appellate counsel. In the context of procedural default, ineffective assistance of appellate counsel can be used to excuse a claim's procedural default only if the claim of ineffectiveness is, itself exhausted. Mr. Moraga filed a timely petition for post-conviction relief on the Amended Judgment of Conviction and therefore his claim of ineffective assistance of counsel was properly presented to this Court. If that claim had merit, the denial of relief by this Court would

1 constitute an impediment external to the defense that would excuse Mr. Moraga's default in presenting  
2 the same claim in a successive petition. Lozada v. State, 110 Nev. 349, 353 (1994). A defendant must  
3 demonstrate that counsel's performance fell below an objective standard of reasonableness and that  
4 counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v.  
5 Washington, 466 U.S. 668 (1984). Here, counsel had no tactical or strategic justification within the  
6 range of reasonable competence for their failure to properly represent Mr. Moraga by properly raising  
7 this claim. Mr. Moraga was prejudiced by his lawyer's performance. A reasonable likelihood exists that  
8 but for his lawyer's deficient performance, Mr. Moraga would have had a more favorable outcome on  
9 appeal.

10 On appeal from the initial Judgment of Conviction and the sentence imposed by the trial court  
11 of one term of life without parole, the Nevada Supreme Court sua sponte held there was a problem with  
12 Mr. Moraga's sentence. The case was remanded for a new sentencing. Although numerous requests had  
13 been made for a remand to the original trial judge, a new judge resentenced Mr. Moraga. Mr. Moraga's  
14 sentence was changed from one life without sentence to consecutive sentences of ten years, ten years,  
15 life with parole and life without parole for the four counts on which he was convicted.

16 Thereafter, court appointed attorney Bailus filed Appellant's Opening Brief on October 5, 1992  
17 challenging the Amended Judgment of Conviction. Under Nevada Supreme Court Case No. 22901. The  
18 brief raised one issue: STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT'S  
19 SENTENCE SHOULD BE ENHANCED PURSUANT TO THE HABITUAL CRIMINAL STATUTE. Appellate counsel  
20 failed to identify the instant claim and failed to present the claim as a constitutional violation.

21 Further, as a pro se litigant, Mr. Moraga is entitled to the benefit of any doubt as to "good cause."  
22 Mr. Moraga attempted to litigate issues he identified which were filed in his February 12, 1996 post-  
23 conviction petition and in his supplemental brief. Mr. Moraga then retained David M. Schieck to  
24 represent him on post-conviction. Mr. Schieck filed supplemental points and authorities in support of  
25 the post-conviction petition. Again, the instant claim was not identified and counsel failed to present  
26 the claim as a constitutional violation.

27 A post-conviction hearing was held on July 19, 1996. Mr. Moraga was not present at the hearing.  
28 The hearing consisted of the judge's recital of the petition claims followed by the court's ruling denying

1 the petition. Mr. Moraga's retained counsel did not attempt to make a record or argue the claims in the  
2 petition.

3 Counsel Richard Palma was appointed to represent Mr. Moraga on the appeal of his post-  
4 conviction. Appellate counsel failed to identify this claim and present it as a federal violation.

5 Counsel's failures have actually and substantially disadvantaged Mr. Moraga. Counsel's failures  
6 may be "imputed to the state." Coleman v. Thompson, 501 U.S. at 753-54 (ineffectiveness of counsel  
7 in violation of the Sixth Amendment can constitute the type of "external impediment" that satisfies the  
8 'cause' requirement because the Sixth Amendment itself requires that responsibility for the default be  
9 imputed to the State) quoting Murray v. Carrier, 477 U.S. at 488. "Where a petitioner defaults a claim  
10 as a result of the denial of the right to the effective assistance of counsel, the State, which is responsible  
11 for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state  
12 interests that federal habeas review entails." Id. at 2566-67.

13 In Coleman, the Court emphasized agency law principles. As a matter of "well-settled principles  
14 of agency law," a principal may not be held liable for the acts of an agent when the agent breaches the  
15 relationship or acts outside the scope of the agency relationship. Id. If an attorney is acting outside the  
16 scope of the agency relationship, a client is not bound by the attorney's acts. See Jamison v. Lockhart,  
17 975 F.2d 1377, 1380 (8th Cir. 1992) (quoting Coleman, 501 U.S. at 754). Therefore, if an attorney is  
18 not "acting," or failing to act in furtherance of the litigation," a petitioner does not have to "bear the risk  
19 of attorney error." Coleman, 501 U.S. at 753 (quoting Carrier, 477 U.S. at 488).

20 Counsel's failures clearly meet the Strickland v. Washington, 466 U.S. 668 (1984) test for  
21 establishing ineffective assistance of counsel. But for counsel's inadequate representation of Mr.  
22 Moraga, there is a reasonable probability that the outcome would have been different.

23 The ineffective assistance of appellate counsel constituted a factor external to the defense which  
24 impeded Mr. Moraga's ability to comply with state procedural rules. Under Coleman, defense counsel's  
25 inactions must be deemed something external to Mr. Moraga and thus "cause." "Prejudice" as used in  
26 the procedural default context equates to a "harmful error" concept. See Brecht v. Abrahamsom, 113  
27 S.Ct. 1710 (1993); Kotteakos v. United States, 328 U.S. 750 (1946). The incompetence of Mr. Moraga's  
28 counsel is Mr. Moraga's cause to surmount any default; that Mr. Moraga was prejudiced by counsel's

1 errors is obvious from the State's attempts to deny Mr. Moraga any meaningful review of his  
2 constitutional grounds for relief.

3 **B. Mr. Moraga Will Be Unduly Prejudiced From Denial Of This Petition**

4 Mr. Moraga adequately demonstrates prejudice as the failure to consider this claim would  
5 amount to a "fundamental miscarriage of justice." Pellegrini v. State, 117 Nev. 860 (2001). This claim  
6 demonstrates the violation of Mr. Moraga's right to due process when the Nevada Supreme Court sua  
7 sponte remanded the case for resentencing. After failed attempts to remand the case back to the original  
8 trial judge, a new judge resentenced Mr. Moraga to a harsher sentence. Mr. Moraga had a due process  
9 right under the fifth and Fourteenth Amendments to not be punished vindictively simply because he had  
10 challenged his conviction. This harsher sentence was imposed to punish Mr. Moraga for exercising his  
11 right to an appeal. Mr. Moraga should not have received a more severe sentence because he appealed  
12 the judgment in his case.

13 **C. Mr. Moraga Can Easily Rebut the Laches Presumption.**

14 "Laches is an equitable doctrine. Its application must be considered on the facts of each case,  
15 based upon the reasonableness of the party's behavior under the circumstances." Strahan v. Blackburn,  
16 750 F.2d 438, 441 (5<sup>th</sup> Cir)(citations omitted); see also, Jessup v. United States Parole Comm., 889 F.2d  
17 831, 834 (9<sup>th</sup> Cir. 1989). The mere passage of time has affected neither the state's ability to respond to  
18 Mr. Moraga's allegations. Mr. Moraga's delay in filing the current petition was reasonable in light of  
19 the circumstances and is not within his control. The state has not shown that any transcripts, records,  
20 evidence, and witnesses are unavailable. The state has not been and is not prejudiced by any delay in  
21 the filing of Mr. Moraga's petition.

22 Other than stating that ten years have elapsed since the date of judgment, the state provides no  
23 specifics as to why the doctrine of laches should specifically apply to the instant matter. While asserting  
24 that in "many cases" evidence "has been lost or destroyed because of the lengthy passage of time," A  
25 general allegation that memories may have faded or that memories of the crime may be diminished is  
26 insufficient to support a finding that the state has been prejudiced. NRS § 34.800 creates a "rebuttable  
27 presumption" of prejudice to the state, not an insurmountable one.  
28



EXECUTED at ELY, Nevada on this 21<sup>ST</sup> day of May, 2006.



Roy D. Moraga  
Inmate No. 31584  
High Desert State Prison  
P.O. Box 650  
Indian Springs, NV 89070-0650  
*In Proper Person*

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That on May 21<sup>st</sup>, 2006, he served a copy of the foregoing by personally mailing said copy to:

Clark County District Attorney  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, Nevada 89155

  
Roy D. Moraga

220  
1 **OPI**  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 TALEEN R. PANDUKHT  
6 Deputy District Attorney  
7 Nevada Bar #005734  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2211  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 ROY D. MORAGA, #0938554

16 Defendant.

CASE NO: C92174  
DEPT NO: VIII

**ORDER FOR PRODUCTION OF INMATE  
ROY D. MORAGA, BAC #31584**

**DATE OF HEARING: 6/26/06  
TIME OF HEARING: 9:00 A.M.**

19 **TO: DWIGHT W. NEVEN, Warden of the High Desert State Prison;**

20 **TO: Bill Young, Sheriff of Clark County, Nevada**

21 Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID  
22 ROGER, District Attorney, through TALEEN R. PANDUKHT, Deputy District Attorney,  
23 and good cause appearing therefor,

24 **IT IS HEREBY ORDERED** that DWIGHT W. NEVEN, Warden of the High Desert  
25 State Prison shall be, and is, hereby directed to produce ROY D. MORAGA, in Case No.  
26 C92174, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said ROY D.  
27 MORAGA is currently incarcerated in the **High Desert State Prison located in Indian**  
28 **Springs, Nevada and his presence will be required in Las Vegas, Nevada commencing**

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**JUN 05 2006**

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1 on 6/26/06, at the hour of 9:00 o'clock A.M. and continuing until completion of the  
2 prosecution's case against the said Defendant.

3 IT IS FURTHER ORDERED that Bill Young, Sheriff of Clark County, Nevada,  
4 shall accept and retain custody of the said ROY D. MORAGA in the Clark County Detention  
5 Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or until the  
6 further Order of this Court; or in the alternative shall make all arrangements for the  
7 transportation of the said ROY D. MORAGA to and from the Nevada State Prison facility  
8 which are necessary to insure the ROY D. MORAGA's appearance in Clark County pending  
9 completion of said matter, or until further Order of this Court.

10 DATED this 5 day of June, 2006.

11  
12   
13 DISTRICT JUDGE

14  
15 DAVID ROGER  
16 DISTRICT ATTORNEY  
17 Nevada Bar #002781

18   
19 BY

20 TALEEN R. PANDUKHT  
21 Deputy District Attorney  
22 Nevada Bar #005734  
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28 ct/SVU

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ORDR  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
TALEEN R. PANDUKHT  
Chief Deputy District Attorney  
Nevada Bar #005734  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

ROY D. MORAGA,  
#0938554

Defendant.

CASE NO: C92174

DEPT NO: VIII

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DATE OF HEARING: 06/26/06  
TIME OF HEARING: 9:00 AM

THIS MATTER having come on for hearing before the Honorable Lee Gates, District Judge, on the 26th day of June, 2006, the Pro Per Petitioner being present, the Respondent being represented by DAVID ROGER, District Attorney, by and through SUMMER TANASI, Deputy District Attorney, and the Court having heard the arguments of counsel and taking the matter under advisement until July 6, 2006, the Court makes the following findings of fact and conclusions of law:

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CLERK OF THE COURT

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## FINDINGS OF FACT

1  
2 1. On December 5, 1989, Defendant, Roy Moraga, was arrested for the sexual assault  
3 and rape of a woman in her home.

4 2. The Defendant pled not guilty and a jury trial was had wherein the Defendant was  
5 found guilty of two (2) Counts of Burglary and two (2) Counts of Sexual Assault.

6 3. On June 30, 1990, the Defendant was sentenced to life without the possibility of  
7 parole after being adjudicated a habitual criminal.

8 4. The Defendant's direct appeal was denied on August 27, 1991. However, the  
9 Court remanded the Defendant's case to the District Court for resentencing. The Supreme  
10 Court concluded that the district court had erroneously imposed one sentence for multiple  
11 offenses.

12 5. Remittitur was issued on September 17, 1991.

13 6. On October 21, 1991, the Defendant was resentenced to ten years for each of the  
14 Burglary counts (Counts I-II), to run consecutive to each other. The Defendant also received  
15 a consecutive term of life imprisonment with the possibility of parole after five years for  
16 Count III – Sexual Assault. The Defendant was adjudicated a habitual criminal as to Count  
17 IV (Sexual Assault) and sentenced to a consecutive term of life imprisonment without the  
18 possibility of parole.

19 7. An Amended Judgment of Conviction was filed on November 13, 1991.

20 8. The Defendant appealed the second sentencing. The Nevada Supreme Court  
21 denied the same on October 4, 1995.

22 9. Remittitur issued on October 24, 1995.

23 10. On February 20, 1996, the Defendant filed a post-conviction petition for a writ of  
24 habeas corpus.

25 11. On September 6, 1996, the District Court denied the Defendant's petition.

26 12. On April 30, 1998, the Defendant filed a motion to correct an illegal sentence.

27 13. On May 20, 1998, the District Court denied the Defendant's motion and the  
28 Defendant appealed the denial of both the petition and the motion.

14. On April 20, 1999, the Nevada Supreme Court denied the Defendant's appeals.

15. On December 16, 2003, the Defendant filed a motion in district court for the release of DNA evidence.

16. On January 7, 2004, the district court denied the motion and the Defendant appealed. The Nevada Supreme Court treated the motion as a successive petition for writ of habeas corpus.

17. On September 15, 2004, the Nevada Supreme Court denied the Defendant's appeal. The Supreme Court found that the Defendant's motion was procedurally barred and the Defendant failed to demonstrate good cause and prejudice.

18. On November 15, 2005, the Defendant's federal Petition for Writ of Habeas Corpus was denied and remanded for failure to exhaust his claims in state court.

19. On January 10, 2006, the Defendant filed a Petition for Writ of Habeas Corpus.

20. On February 27, 2006, the State filed a Response and Motion to Dismiss the Petition for Writ of Habeas Corpus, in which it affirmatively pled laches.

**21. The Defendant's Pctition is time barred.**

**22. The Defendant's Petition is successive.**

23. The Defendant has failed to set forth good cause for the late filing of a successive petition.

24. The Defendant has not overcome the statutory presumption that the late filing of the instant petition has prejudiced the State.

## CONCLUSIONS OF LAW

1. NRS 34.726 provides:

(1) Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

(a) That the delay is not the fault of the petitioner; and

(b) That the dismissal of the petition as untimely will unduly prejudice the petitioner.

//

1           2. The Nevada Supreme Court has stated that to establish good cause, a defendant  
2 must demonstrate that some impediment external to the defense prevented him from  
3 complying with the procedural bar that has been violated. *Lozada v. State*, 110 Nev. 349,  
4 353, 871 P.2d 944, 946 (1994). The Court reaffirmed this holding in *Crump v. Warden*, 113  
5 Nev. 293, 934 P.2d 247 (1997). The Court went on to say that once the State has raised  
6 procedural grounds for dismissal, the burden then falls on the defendant "to show that good  
7 cause exists for his failure to raise any grounds in an earlier petition and that he will suffer  
8 actual prejudice if the grounds are not considered." *Id.* at 302, 934 P.2d at 253 (*citation*  
9 *omitted*). The Court explained that in order to establish prejudice, the defendant must show  
10 "not merely that the errors of trial created possibility of prejudice, but that they worked to his  
11 actual and substantial disadvantage, in affecting the state proceedings with error of  
12 constitutional dimensions." *Id.* (*citing Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710,  
13 716 (1993)).

14           3. Remand from federal court to exhaust state remedies is not good cause to overcome  
15 state procedural bars. *See Shumway v. Payne*, 223 F.3d 982, 988-989 (9th Cir. 2000).

16           4. Pertinent portions of NRS 34.810 state:

17                   2. A second or successive petition must be dismissed if the judge or  
18 justice determines that it fails to allege new or different grounds for relief and  
19 that the prior determination was on the merits or, if new and different grounds  
are alleged, the judge or justice finds that the failure of the Defendant to assert  
those grounds in a prior petition constituted an abuse of the writ.

20                   3. Pursuant to subsections 1 and 2, the petitioner has the burden of  
21 pleading and proving specific facts that demonstrate:

22                       (a) Good cause for the petitioner's failure to present the claim or for  
presenting the claim again; and

23                       (b) Actual prejudice to the petitioner.

24           5. To avoid the procedural default under NRS 34.810, Defendant has the burden of  
25 pleading and proving specific facts that demonstrate both good cause for his failure to  
26 present his claim in earlier proceedings and actual prejudice. NRS 34.810(3); *Hogan v.*  
27 *Warden*, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); *Phelps v. Director*, 104 Nev.  
28 656, 659, 764 P.2d 1303, 1305 (1988).



1       6. In order to show good cause, defendant has the burden of demonstrating that there  
2 was an impediment external to the defense which prevented him from complying with the  
3 state procedural default rules. *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946  
4 (1994).

5       7. Good cause for the delay is defined as "a substantial reason; one that affords a legal  
6 excuse." *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

7       8. In order to establish prejudice, a petitioner must demonstrate that the alleged errors  
8 worked to his actual and substantial disadvantage. *Hogan*, 109 Nev. at 959, 860 P.2d at 716.

9       9. NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
10 exceeding five years between the filing of a judgment of conviction, an order imposing a  
11 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the  
12 filing of a petition challenging the validity of a judgment of conviction...." The statute also  
13 requires that the State plead laches in its motion to dismiss the petition. NRS 34.800.

14       10. NRS 34.800 was enacted to protect the State from having to re-prove matters that  
15 have become ancient history. In *Groesbeck v. Warden*, 100 Nev. 259, 260, 679 P.2d 1268,  
16 1269 (1984), the Court explained: "The lengthy passage of time between conviction and a  
17 subsequent challenge is a factor which by itself unduly works to the advantage of a felon  
18 belatedly seeking relief from conviction. Memories of the crime may diminish and become  
19 attenuated. The facts and circumstances of the offense may be impossible to reconstruct."

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and is, hereby DISMISSED.

DATED this 7 day of February, 2007.

  
DISTRICT JUDGE

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

BY   
TALEEN R. PANDUKHT  
Chief Deputy District Attorney  
Nevada Bar #005734

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*Charles J. Short*  
CLERK OF THE COURT

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DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY D. MORAGA,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C92174  
Dept No: VIII

NOTICE OF ENTRY OF  
DECISION AND ORDER

PLEASE TAKE NOTICE that on February 8, 2007, 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 13, 2007.

CHARLES J. SHORT, CLERK OF THE COURT

By:

*Brandi J. Wendel*  
Brandi J. Wendel, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 13 day of February 2007, I placed a copy of this Notice of Entry of Decision and Order in:

The bin(s) located in the Office of the County Clerk of:  
Clark County District Attorney's Office  
Attorney General's Office - Appellate Division

☒ The United States mail addressed as follows:

Roy D. Moraga # 31584  
P.O. Box 650  
Indian Springs, NV 89070

*Brandi J. Wendel*  
Brandi J. Wendel, Deputy Clerk

1 **ORDR**  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 TALEEN R. PANDUKHT  
6 Chief Deputy District Attorney  
7 Nevada Bar #005734  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

3  
FILED  
FEB 8 2 27 PM '07  
CLERK OF THE COURT

7  
8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,  
11 Plaintiff,

12 -vs-

13 ROY D. MORAGA,  
14 #0938554

Defendant.

CASE NO: C92174

DEPT NO: VIII

15 FINDINGS OF FACT AND CONCLUSIONS OF LAW

16 DATE OF HEARING: 06/26/06  
17 TIME OF HEARING: 9:00 AM

18 THIS MATTER having come on for hearing before the Honorable Lee Gates, District  
19 Judge, on the 26th day of June, 2006, the Pro Per Petitioner being present, the Respondent  
20 being represented by DAVID ROGER, District Attorney, by and through SUMMER  
21 TANASI, Deputy District Attorney, and the Court having heard the arguments of counsel  
22 and taking the matter under advisement until July 6, 2006, the Court makes the following  
23 findings of fact and conclusions of law:

24 //

25 //

26 //

//

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CLERK OF THE COURT

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S2

## FINDINGS OF FACT

1  
2 1. On December 5, 1989, Defendant, Roy Moraga, was arrested for the sexual assault  
3 and rape of a woman in her home.

4 2. The Defendant pled not guilty and a jury trial was had wherein the Defendant was  
5 found guilty of two (2) Counts of Burglary and two (2) Counts of Sexual Assault.

6 3. On June 30, 1990, the Defendant was sentenced to life without the possibility of  
7 parole after being adjudicated a habitual criminal.

8 4. The Defendant's direct appeal was denied on August 27, 1991. However, the  
9 Court remanded the Defendant's case to the District Court for resentencing. The Supreme  
10 Court concluded that the district court had erroneously imposed one sentence for multiple  
11 offenses.

12 5. Remittitur was issued on September 17, 1991.

13 6. On October 21, 1991, the Defendant was resentenced to ten years for each of the  
14 Burglary counts (Counts I-II), to run consecutive to each other. The Defendant also received  
15 a consecutive term of life imprisonment with the possibility of parole after five years for  
16 Count III - Sexual Assault. The Defendant was adjudicated a habitual criminal as to Count  
17 IV (Sexual Assault) and sentenced to a consecutive term of life imprisonment without the  
18 possibility of parole.

19 7. An Amended Judgment of Conviction was filed on November 13, 1991.

20 8. The Defendant appealed the second sentencing. The Nevada Supreme Court  
21 denied the same on October 4, 1995.

22 9. Remittitur issued on October 24, 1995.

23 10. On February 20, 1996, the Defendant filed a post-conviction petition for a writ of  
24 habeas corpus.

25 11. On September 6, 1996, the District Court denied the Defendant's petition.

26 12. On April 30, 1998, the Defendant filed a motion to correct an illegal sentence.

27 13. On May 20, 1998, the District Court denied the Defendant's motion and the  
28 Defendant appealed the denial of both the petition and the motion.

1 14. On April 20, 1999, the Nevada Supreme Court denied the Defendant's appeals.  
2 15. On December 16, 2003, the Defendant filed a motion in district court for the  
3 release of DNA evidence.  
4 16. On January 7, 2004, the district court denied the motion and the Defendant  
5 appealed. The Nevada Supreme Court treated the motion as a successive petition for writ of  
6 habeas corpus.  
7 17. On September 15, 2004, the Nevada Supreme Court denied the Defendant's  
8 appeal. The Supreme Court found that the Defendant's motion was procedurally barred and  
9 the Defendant failed to demonstrate good cause and prejudice.  
10 18. On November 15, 2005, the Defendant's federal Petition for Writ of Habeas  
11 Corpus was denied and remanded for failure to exhaust his claims in state court.  
12 19. On January 10, 2006, the Defendant filed a Petition for Writ of Habeas Corpus.  
13 20. On February 27, 2006, the State filed a Response and Motion to Dismiss the  
14 Petition for Writ of Habeas Corpus, in which it affirmatively pled laches.  
15 21. The Defendant's Petition is time barred.  
16 22. The Defendant's Petition is successive.  
17 23. The Defendant has failed to set forth good cause for the late filing of a successive  
18 petition.  
19 24. The Defendant has not overcome the statutory presumption that the late filing of  
20 the instant petition has prejudiced the State.

### 21 CONCLUSIONS OF LAW

22 1. NRS 34.726 provides:

23 (1) Unless there is good cause shown for delay, a petition that  
24 challenges the validity of a judgment or sentence must be filed within 1 year of  
25 the entry of the judgment of conviction or, if an appeal has been taken from the  
26 judgment, within 1 year after the Supreme Court issues its remittitur. For the  
27 purposes of this subsection, good cause for delay exists if the petitioner  
28 demonstrates to the satisfaction of the court:

- (a) That the delay is not the fault of the petitioner; and
- (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

//

1           2. The Nevada Supreme Court has stated that to establish good cause, a defendant  
2 must demonstrate that some impediment external to the defense prevented him from  
3 complying with the procedural bar that has been violated. *Lozada v. State*, 110 Nev. 349,  
4 353, 871 P.2d 944, 946 (1994). The Court reaffirmed this holding in *Crump v. Warden*, 113  
5 Nev. 293, 934 P.2d 247 (1997). The Court went on to say that once the State has raised  
6 procedural grounds for dismissal, the burden then falls on the defendant "to show that good  
7 cause exists for his failure to raise any grounds in an earlier petition and that he will suffer  
8 actual prejudice if the grounds are not considered." *Id.* at 302, 934 P.2d at 253 (*citation*  
9 *omitted*). The Court explained that in order to establish prejudice, the defendant must show  
10 "not merely that the errors of trial created possibility of prejudice, but that they worked to his  
11 actual and substantial disadvantage, in affecting the state proceedings with error of  
12 constitutional dimensions." *Id.* (*citing Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710,  
13 716 (1993)).

14           3. Remand from federal court to exhaust state remedies is not good cause to overcome  
15 state procedural bars. *See Shumway v. Payne*, 223 F.3d 982, 988-989 (9th Cir. 2000).

16           4. Pertinent portions of NRS 34.810 state:

17                 2. A second or successive petition must be dismissed if the judge or  
18 justice determines that it fails to allege new or different grounds for relief and  
19 that the prior determination was on the merits or, if new and different grounds  
are alleged, the judge or justice finds that the failure of the Defendant to assert  
those grounds in a prior petition constituted an abuse of the writ.

20                 3. Pursuant to subsections 1 and 2, the petitioner has the burden of  
21 pleading and proving specific facts that demonstrate:

22                     (a) Good cause for the petitioner's failure to present the claim or for  
presenting the claim again; and

23                     (b) Actual prejudice to the petitioner.

24           5. To avoid the procedural default under NRS 34.810, Defendant has the burden of  
25 pleading and proving specific facts that demonstrate both good cause for his failure to  
26 present his claim in earlier proceedings and actual prejudice. NRS 34.810(3); *Hogan v.*  
27 *Warden*, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); *Phelps v. Director*, 104 Nev.  
28 656, 659, 764 P.2d 1303, 1305 (1988).

1           6. In order to show good cause, defendant has the burden of demonstrating that there  
2 was an impediment external to the defense which prevented him from complying with the  
3 state procedural default rules. *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946  
4 (1994).

5           7. Good cause for the delay is defined as "a substantial reason; one that affords a legal  
6 excuse." *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

7           8. In order to establish prejudice, a petitioner must demonstrate that the alleged errors  
8 worked to his actual and substantial disadvantage. *Hogan*, 109 Nev. at 959, 860 P.2d at 716.

9           9. NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
10 exceeding five years between the filing of a judgment of conviction, an order imposing a  
11 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the  
12 filing of a petition challenging the validity of a judgment of conviction...." The statute also  
13 requires that the State plead laches in its motion to dismiss the petition. NRS 34.800.

14           10. NRS 34.800 was enacted to protect the State from having to re-prove matters that  
15 have become ancient history. In *Groesbeck v. Warden*, 100 Nev. 259, 260, 679 P.2d 1268,  
16 1269 (1984), the Court explained: "The lengthy passage of time between conviction and a  
17 subsequent challenge is a factor which by itself unduly works to the advantage of a felon  
18 belatedly seeking relief from conviction. Memories of the crime may diminish and become  
19 attenuated. The facts and circumstances of the offense may be impossible to reconstruct."

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and is, hereby DISMISSED.

DATED this 7 day of February, 2007.

  
DISTRICT JUDGE

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

BY   
TALEEN R. PANDUKHT  
Chief Deputy District Attorney  
Nevada Bar #005734

mmw/SVU

1 ASTA  
2 Roy D. Moraga  
3 Inmate # 31584  
4 Ely State Prison  
5 P. O. Box 1989  
6 Ely, NV 89301

7 In Proper Person

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*Chaf*  
CLERK OF THE COURT

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

10 ROY D. MORAGA,

11 Petitioner,

12 v.

13 THE STATE OF NEVADA, et al.,

14 Respondent.

Case No. C92174  
Dept. No. 8

15 CASE APPEAL STATEMENT

16 1. Name of petitioner filing this case appeal statement:

17 Roy D. Moraga

18 2. Identify the judge issuing the order appealed from:

19 Honorable Lee A. Gates, Dept. 8, Clark County District Court.

20 3. All parties to the proceedings in the district court:

21 Roy D. Moraga, Petitioner; The State of Nevada, Respondent.

22 4. All parties involved in this appeal:

23 Roy D. Moraga, appellant; The State of Nevada, appellee.

24 5. Set forth the name, law firm, address and telephone number of all counsel on appeal and  
25 party or parties whom they represent:

26 David Roger  
27 Clark County District Attorney  
28 200 Lewis Avenue  
Las Vegas, NV 89155-2212  
Counsel for the State of Nevada

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CLERK OF THE COURT

1 Roy D. Moraga  
2 Inmate # 31584  
3 Ely State Prison  
4 P. O. Box 1989  
5 Ely, NV 89301  
6 In proper person

7 6. **Whether petitioner/appellant was represented by appointed or retained counsel in the**  
8 **district court:**

9 Mr. Moraga appeared in the instant case in proper person. He requested, but was denied,  
10 appointment of counsel.

11 7. **Whether petitioner/appellant is represented by appointed or retained counsel on appeal:**

12 Mr. Moraga has not been appointed counsel on the appeal of this case and is filing, concurrent  
13 with the filing of the instant Notice of Appeal and Case Appeal Statement, a Motion for  
14 Appointment of Counsel on Appeal.

15 8. **Whether petitioner/appellant was granted leave to proceed in forma pauperis, and the date**  
16 **of entry of the district court order granting such leave:**

17 a) With respect to his Motion for Leave to proceed in Forma Pauperis and Petition for Writ  
18 of Habeas Corpus (Post-Conviction) filed on January 10, 2006, Mr. Moraga was granted  
19 in forma pauperis pursuant to a January 23, 2006 hearing, at which he was not present.  
20 The court's granting of the in forma pauperis motion is reflected in its court minutes and  
21 in the January 23, 2006 hearing transcript which has been ordered for transcription.

22 9. **Date proceedings commenced in the district court (e.g., date complaint, indictment,**  
23 **information or petition was filed):**

- 24 a) Petition for Writ of Habeas Corpus filed February 20, 1996.  
25 b) Petition for Writ of Habeas Corpus filed January 10, 2006.

26 Dated this 28th day of February, 2007.

27   
28 ROY D. MORAGA  
In Proper Person

1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that he is a person of such age and discretion as to be competent  
3 to serve papers.

4 That on Feb. 28th, 2007, he served a copy of the foregoing by personally  
5 mailing said copy to:

6 David Roger  
7 Clark County District Attorney  
8 Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

E. K. McDaniel, Warden  
Ely State Prison  
P. O. Box 1989  
Ely, NV 89301

9  
10 Clerk of the Court  
11 Eighth Judicial District Court  
12 Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155

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16 ROY D. MORAGA, Petitioner  
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1 NOAS  
2 Roy D. Moraga (#31584)  
3 Ely State Prison  
4 P.O. Box 1989  
5 Ely, NV 89301  
6 In Proper Person

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*Chaf. SRS*  
CLERK OF THE COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

10 ROY D. MORAGA,  
11 Petitioner,  
12 vs.  
13 STATE OF NEVADA, et al.,  
14 Respondent.

Case No. C92174  
Dept. No. VIII

NOTICE OF APPEAL

15 NOTICE IS HEREBY GIVEN that the Petitioner, Roy D. Moraga, appeals to the Nevada  
16 Supreme Court from the Findings of Fact, Conclusions of Law and Order, entered and served in this  
17 action on the 13<sup>th</sup> day of February, 2007.

18  
19 Dated this 28<sup>th</sup> day of February, 2007.

22 By: *Roy D. Moraga*  
23 ROY D. MORAGA  
24 In Proper Person

27 RECEIVED

28 MAR 02 2007

CLERK OF THE COURT

918

1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that he is a person of such age and discretion as to be competent  
3 to serve papers.

4 That on Feb. 28th, 2007, he served a copy of the foregoing by personally mailing  
5 said copy to:

6 Clerk, Eighth Judicial District Court  
7 Regional Justice Center  
8 200 Lewis Avenue, 3<sup>rd</sup> Floor  
9 Las Vegas, NV 89155

10 David Roger  
11 Clark County District Attorney  
12 Regional Justice Center  
13 200 South Lewis Avenue  
14 Las Vegas, NV 89155

15 E. K. McDaniel, Warden  
16 Ely State Prison  
17 P. O. Box 1989  
18 Ely, NV 89301  
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ROY D. MORAGA

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CLAYTON COURT

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Case No: C92174  
Dept No: VIII

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- Respondent*  
David Roger, District Attorney  
200 Lewis Ave.  
Las Vegas, NV 89101  
(702) 671-2700

1 6. District Court Attorney, Appointed

2 7. On Appeal, N/A

3 8. Forma Pauperis, Granted

4 9. Date Commenced in District Court: December 28, 1989

5 Dated This 5 day of March 2007.

6 Charles J. Short, Clerk of the Court

7  
8 By:



9 Robin J. Mills, Deputy Clerk  
10 200 Lewis Ave  
11 PO Box 551601  
12 Las Vegas, Nevada 89155-1601  
13 (702) 671-0512  
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1 MOT  
2 Roy D. Moraga  
3 Inmate # 31584  
4 Ely State Prison  
5 P. O. Box 1989  
6 Ely, NV 89301  
7 In Proper Person

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*Chris [Signature]*  
CLERK OF THE COURT

8 EIGHTH JUDICIAL DISTRICT COURT  
9 CLARK COUNTY, NEVADA

10 ROY D. MORAGA,  
11 Petitioner,

12 vs.

13 THE STATE OF NEVADA, et al.,  
14 Respondents.

3-19-07  
CASE NUMBER: C92174  
DEPARTMENT: 8

**MOTION FOR APPOINTMENT OF  
COUNSEL ON APPEAL**

15 COMES NOW, the Petitioner, in proper person, and respectfully requests that he be appointed  
16 counsel to represent him on appeal of these proceedings pursuant to NRS 34.750 and 34.820.

17 Dated this 28th day of February, 2007.

18  
19  
20 *Roy D. Moraga*  
21 ROY D. MORAGA  
22 In Proper Person

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MAR 5 - 2007

1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that he is a person of such age and discretion as to be competent  
3 to serve papers.

4 That on Feb. 28<sup>th</sup>, 2007, he served a copy of the foregoing by personally  
5 mailing said copy to:

6 David Roger  
7 Clark County District Attorney  
8 Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

E. K. McDaniel, Warden  
Ely State Prison  
P. O. Box 1989  
Ely, NV 89301

9  
10 Clerk of the Court  
11 Eighth Judicial District Court  
12 Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155

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16 ROY D. MORAGA  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

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ORIGINAL

CLERK OF THE COURT

THE STATE OF NEVADA,

PLAINTIFF,

VS.

CASE NO: C092174

ROY MORAGA,

DEFENDANT.

REPORTER'S TRANSCRIPT

OF

DEFT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA  
PAUPERIS AND FOR APPOINTMENT OF COUNSEL

BEFORE THE HONORABLE JUDGE LEE A. GATES  
DISTRICT COURT JUDGE  
DEPARTMENT VIII

DATED MONDAY, JANUARY 23, 2006

FOR THE PLAINTIFF: TRACEY BRIERLY, ESQ.

REPORTED BY: SONIA L. RILEY, CCR NO. 727

UNCERTIFIED ROUGH DRAFT TRANSCRIPT

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 TRACEY BRIERLY, ESQ.  
4 DISTRICT ATTORNEY'S OFFICE  
5 200 Lewis Avenue  
6 Las Vegas, Nevada 89155  
7 (702) 671-2501

8  
9 DEFENDANT NOT PRESENT

10 \* \* \* \* \*

11

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UNCERTIFIED ROUGH DRAFT TRANSCRIPT

1 LAS VEGAS, NEVADA; MONDAY, JANUARY 23, 2006  
2 P R O C E E D I N G S  
3 \* \* \* \* \*  
4 **THE COURT:** Roy Moraga.  
5 Defendant's Pro Per Motion for Leave to  
6 Proceed Informa Pauperis is granted, and since this  
7 is his third or fourth successive petition, the  
8 Court is going to deny the appointment of an  
9 attorney.  
10 Send a copy of the minute order to the  
11 defendant.  
12 (WHEREUPON, THE PROCEEDINGS WERE  
13 CONCLUDED.)  
14 \* \* \* \* \*  
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UNCERTIFIED ROUGH DRAFT TRANSCRIPT

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REPORTER'S CERTIFICATE

STATE OF NEVADA)  
: SS  
COUNTY OF CLARK)

I, SONIA L. RILEY, CERTIFIED COURT  
REPORTER, DO HEREBY CERTIFY THAT I TOOK DOWN IN  
STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE  
BEFORE-ENTITLED MATTER AT THE TIME AND PLACE  
INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES  
WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY  
DIRECTION AND SUPERVISION AND THE FOREGOING  
TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE  
RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS  
HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO  
SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF  
CLARK, STATE OF NEVADA.

-----  
SONIA L. RILEY, CCR 727

MAR 12 11 29 AM '07

CR. [Signature]  
CLERKDISTRICT COURT  
CLARK COUNTY, NEVADA**ORIGINAL**

THE STATE OF NEVADA, )

PLAINTIFF, )

VS. )

CASE NO: C092174

ROY MORAGA, )

DEFENDANT. )

## REPORTER'S TRANSCRIPT

OF

ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

BEFORE THE HONORABLE JUDGE LEE A. GATES  
DISTRICT COURT JUDGE  
DEPARTMENT VIII

DATED MONDAY, JUNE 26, 2006

FOR THE PLAINTIFF: SUMMER TANASI, ESQ.

FOR THE DEFENDANT: IN PROPRIA PERSONA

REPORTED BY: SONIA L. RILEY, CCR NO. 727

SONIA L. RILEY, INC. (702) 526-1298

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 SUMMER TANASI, ESQ.  
4 DISTRICT ATTORNEY'S OFFICE  
5 200 Lewis Avenue  
6 Las Vegas, Nevada 89155  
7 (702) 671-2501

8 FOR THE DEFENDANT: IN FORMA PAUPERIS

9 \* \* \* \* \*

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SONIA L. RILEY, INC. (702) 526-1298



1 LAS VEGAS, NEVADA; MONDAY, JUNE 26, 2006

2 P R O C E E D I N G S

3 \* \* \* \* \*

4 **THE COURT:** State of Nevada vs. Roy D.  
5 Moraga.

6 All right, sir. This is your motion.

7 **THE DEFENDANT:** What motion?

8 **THE COURT:** Don't you have a petition for  
9 writ?

10 You're Moraga?

11 **THE DEFENDANT:** Yes.

12 **THE COURT:** Roy D.?

13 **THE DEFENDANT:** Yes.

14 **THE COURT:** This is the time for your  
15 argument on your petition. That's why you're here.

16 **THE DEFENDANT:** Okay. Well, I thought the  
17 State went first.

18 **THE COURT:** What now?

19 **THE DEFENDANT:** I thought the State went  
20 first. I didn't know.

21 **THE COURT:** You go first. You're the one  
22 who is filing this claiming your rights have been  
23 violated.

24 **THE DEFENDANT:** None of my attorneys have  
25 done any motions for me.

1           **THE COURT:** You're representing yourself.

2           **THE DEFENDANT:** When I was represented on  
3 my petition, the ineffective assistance of counsel,  
4 I tried to get them to bring in issues on my  
5 habitual criminal, and they wouldn't do it. I've  
6 tried everything from doing motions myself, and the  
7 Court still denied me. Then not too long ago in  
8 2004, I did a motion to vacate my judgment of  
9 conviction, and again your Honor --

10           **THE COURT:** Have you ever thought maybe it  
11 didn't have any merit?

12           **THE DEFENDANT:** They hired attorneys on my  
13 case, but they won't do anything for me. They just  
14 keep denying me.

15           **THE COURT:** You know why they deny it,  
16 because it was denied before, because they found  
17 your petition didn't have any merit. It even went  
18 up to the Supreme Court, and you can't keep filing  
19 these successive petitions.

20           **THE DEFENDANT:** Back at my direct appeal,  
21 the attorneys that they gave me refused to do  
22 anything I asked them, and when I filed my own  
23 motions, then the Court kept telling me, "Well, you  
24 have an attorney. That's what he's there for," but  
25 if he's not doing it, how am I going to get it in?

1 How am I going to get any kind of action out of the  
2 Court when the attorneys won't file any motions for  
3 me? They just -- they just won't do it. Like I  
4 said, on my motion to vacate, you gave me Christina  
5 Hinds to do that motion, and she did some other  
6 thing -- Nevada Open Records Act -- and nobody asked  
7 her to do that, but she did it anyway, and they've  
8 been doing this for over 16 years, and I can't get  
9 anybody to do anything.

10 **THE COURT:** Sixteen years, huh. When are  
11 you coming up for parole? Do you get parole?

12 **THE DEFENDANT:** No. They gave me a  
13 habitual criminal on a misdemeanor and two felonies.  
14 That's life without, and they're trying to impose  
15 the new case law in 2001 saying that life without  
16 means life without. Shouldn't I be under the  
17 grandfather clause, because I was convicted back in  
18 '89?

19 **THE COURT:** I agree.

20 **THE DEFENDANT:** They're not doing it.  
21 They're refusing to let me go to parole, refusing me  
22 everything. I can't get any attorney to do anything  
23 for me. I've done everything I can, and I'm still  
24 getting denied.

25 **THE COURT:** State?

1                   **MS. TANASI:** Thank you, Judge.

2                   The Supreme Court issued its remittitur  
3 from the defendant's direct appeal of the Amended  
4 Judgment of Conviction in 1995. This petition was  
5 filed in 2006, therefore, the petition is time  
6 barred, Judge, by the law. Furthermore, remand from  
7 federal court is not good cause for the delay. The  
8 State would be severely prejudiced, Judge, if you  
9 would allow that. It doesn't give him a reason to  
10 overcome State procedural bars because of coming  
11 down from federal court. As your Honor already  
12 mentioned, this petition is successive. It was  
13 already denied back in 1996, now this is his next  
14 petition citing the same thing. That too should be  
15 denied, Judge. In this case, the State is pleading  
16 laches. Over ten years has elapsed between the  
17 first -- between the judgment of conviction filing  
18 and this instant petition, Judge, therefore, the  
19 State would be severely prejudiced by it, and we  
20 submit it on that and our written motion, Judge,  
21 which we have given to the Court.

22                   **THE COURT:** I'll take it under advisement.  
23 Thank you.

24                   (WHEREUPON, THE PROCEEDINGS WERE  
25 CONCLUDED.)

SONIA L. RILEY, INC.           (702) 526-1298

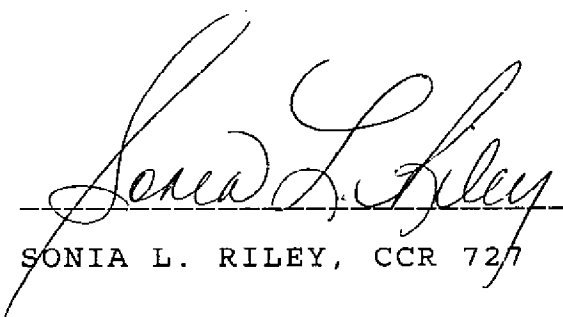
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REPORTER'S CERTIFICATE

STATE OF NEVADA)  
:SS  
COUNTY OF CLARK)

I, SONIA L. RILEY, CERTIFIED COURT  
REPORTER, DO HEREBY CERTIFY THAT I TOOK DOWN IN  
STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE  
BEFORE-ENTITLED MATTER AT THE TIME AND PLACE  
INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES  
WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY  
DIRECTION AND SUPERVISION AND THE FOREGOING  
TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE  
RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS  
HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO  
SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF  
CLARK, STATE OF NEVADA.

  
SONIA L. RILEY, CCR 727

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CLERK OF THE COURT

**OPPS**  
**DAVID ROGER**  
Clark County District Attorney  
Nevada Bar #002781  
**TALEEN PANDUKHT**  
Chief Deputy District Attorney  
Nevada Bar #005734  
200 South Third Street  
Las Vegas, Nevada 89155-2212  
(702) 455-4711  
Attorney for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,  
Plaintiff,

-vs-

ROY MORAGA,  
# 0938554

Defendant.

CASE NO: C092174

DEPT NO: VIII

**STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR  
APPOINTMENT OF COUNSEL**

DATE OF HEARING: March 19, 2007  
TIME OF HEARING: 9:00 a.m.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached  
Points and Authorities in Opposition to Defendant's Motion to Appoint Counsel.

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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On December 5, 1989, Defendant, Roy Moraga, was arrested for the sexual assault  
4 and rape of a woman in her home. The Defendant pled not guilty and a jury trial was had  
5 wherein the Defendant was found guilty of two (2) Counts of Burglary and two (2) Counts of  
6 Sexual Assault. On June 30, 1990, the Defendant was sentenced to life without the  
7 possibility of parole after being adjudicated a habitual criminal.

8 The Defendant's direct appeal was denied on August 27, 1991. However, the Court  
9 remanded the Defendant's case to the District Court for re-sentencing. The Supreme Court  
10 concluded that the District Court had erroneously imposed one sentence for multiple  
11 offenses. Remittitur was issued on September 17, 1991.

12 On October 21, 1991, the Defendant was resentenced to ten years for each of the  
13 Burglary counts (Counts I-II), to run consecutive to each other. The Defendant also received  
14 a consecutive term of life imprisonment with the possibility of parole after five years for  
15 Count III – Sexual Assault. The Defendant was adjudicated a habitual criminal as to Count  
16 IV (Sexual Assault) and sentenced to a consecutive term of life imprisonment without the  
17 possibility of parole. An Amended Judgment of Conviction was filed on November 13,  
18 1991.

19 The Defendant appealed the second sentencing. The Nevada Supreme Court denied  
20 the same on October 4, 1995. Remittitur issued on October 24, 1995. On February 20, 1996,  
21 the Defendant filed a post-conviction Petition for Writ of Habeas Corpus. On September 6,  
22 1996, the District Court denied the Defendant's Petition. On April 30, 1998, the Defendant  
23 filed a Motion to Correct an Illegal Sentence. On May 20, 1998, the District Court denied  
24 the Defendant's Motion and the Defendant appealed the denial of both the Petition and the  
25 Motion.

26 On April 20, 1999, the Nevada Supreme Court denied the Defendant's appeals. On  
27 December 16, 2003, the Defendant filed a motion in District Court for the release of DNA  
28 evidence. On January 7, 2004, the District Court denied the motion and the Defendant

1 appealed. The Nevada Supreme Court treated the motion as a successive petition for writ of  
2 habeas corpus. On September 15, 2004, the Nevada Supreme Court denied the Defendant's  
3 appeal. The Supreme Court found that the Defendant's motion was procedurally barred and  
4 the Defendant failed to demonstrate good cause and prejudice.

5 On November 15, 2005, the Defendant's federal Petition for Writ of Habeas Corpus  
6 was denied and remanded for failure to exhaust his claims in state court. On January 10,  
7 2006, the Defendant filed a Petition for Writ of Habeas Corpus. On February 27, 2006, the  
8 State filed a Response and Motion to Dismiss the Petition for Writ of Habeas Corpus, in  
9 which it affirmatively pled laches. The Petition was denied on July 06, 2006.

10 On March 5, 2007, the Defendant filed the instant Motion for Appointment of  
11 Counsel on Appeal. The State responds as follows.

## 12 ARGUMENT

### 13 **I. DEFENDANT IS NOT ENTITLED TO APPOINTMENT OF AN** 14 **ATTORNEY**

15 In *Coleman v. Thompson*, 501 U.S. 722 (1991), the United States Supreme Court  
16 ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings.  
17 In *McKague v. Warden*, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court  
18 similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in  
19 post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel  
20 provision as being coextensive with the Sixth Amendment to the United States  
21 Constitution."

22 NRS 34.750 provides, in pertinent part:

23 "[a] petition may allege that the Defendant is unable to  
24 pay the costs of the proceedings or employ counsel. If the court  
25 is satisfied that the allegation of indigency is true and the petition  
26 is *not dismissed summarily*, the court may appoint counsel at the  
27 time the court orders the filing of an answer and a return. In  
28 making its determination, the court may consider whether:

- (a) The issues are difficult;
- (b) The Defendant is unable to comprehend the proceedings; or
- (c) Counsel is necessary to proceed with discovery." (emphasis added).



1 Under NRS 34.750, it is clear that the court has discretion in determining whether to  
2 appoint counsel. *McKague* specifically held that with the exception of NRS 34.820(1)(a)  
3 [entitling appointed counsel when petition is under a sentence of death], one does not have  
4 "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. *Id.*  
5 at 164.

6 The Nevada Supreme Court has observed that a Defendant "must show that the  
7 requested review is not frivolous before he may have an attorney appointed." *Peterson v.*  
8 *Warden, Nevada State Prison*, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS  
9 177.345(2)). The State submits that the appointment of counsel would be a waste of public  
10 funds to appoint counsel for an appeal of the Defendant's procedurally barred post  
11 conviction relief. As such, the Defendant has failed to make the requisite showing for the  
12 appointment of counsel and his request should be denied.

13 **CONCLUSION**

14 Based on the aforementioned arguments, the State respectfully requests that this court  
15 DENY Defendant's Motion for Appointment of Counsel.

16 DATED this 16<sup>th</sup> day of March, 2007.

17 Respectfully submitted,

18 DAVID ROGER  
19 Clark County District Attorney  
Nevada Bar #002781

20  
21 BY /s/ TALEEN PANDUKHT  
22 TALEEN PANDUKHT  
23 Chief Deputy District Attorney  
24 Nevada Bar #005734  
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**CERTIFICATE OF MAILING**

I hereby certify that service of the above and foregoing was made this 16<sup>th</sup> day of March, 2007, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROY D. MORAGA, BAC#31584  
ELY STATE PRISON  
P.O. BOX 1989  
ELY, NV 89301

BY /s/ HOWARD CONRAD  
Secretary for the District Attorney's Office

hjc/SVU

1 **ORDR**  
 2 **DAVID ROGER**  
 3 Clark County District Attorney  
 4 Nevada Bar #002781  
 5 **DANIELLE PIEPER**  
 6 Deputy District Attorney  
 Nevada Bar #008610  
 200 Lewis Avenue  
 Las Vegas, NV 89155-2212  
 (702) 671-2500  
 Attorney for Plaintiff

**FILED**

MAR 23 4 34 PM '07

*[Signature]*  
 CLERK OF DISTRICT COURT

**ORIGINAL**

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,  
 Plaintiff,

-vs-

ROY MORAGA,  
 #0938554

Defendant.

Case No. C092174  
 Dept No. VIII

**ORDER DENYING DEFENDANT'S MOTION FOR**  
**APPOINTMENT OF COUNSEL**

DATE OF HEARING: March 19, 2007  
 TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 19th day of March, 2007, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by DAVID ROGER, District Attorney, through DANIELLE PIEPER, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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MAR 23 2007

CLERK OF THE COURT

IT IS HEREBY ORDERED that the DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL, shall be, and is **DENIED**.

DATED this 21 day of March, 2007.

Lee A Gates  
DISTRICT JUDGE

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

*Danielle Pieper*  
DANIELLE PIEPER  
Deputy District Attorney  
Nevada Bar #008610

## hjc/SVU

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 49049

FILED

2007 SEP 13 P 2:13

District Court Case No. C092174

*Chaf*  
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 the district court AFFIRMED."

Judgment, as quoted above, entered this 16th day of August, 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 11th day of September, 2007.

Janette M. Bloom, Supreme Court Clerk

By: *H. Crockett*

Chief Deputy Clerk

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SEP 13 2007

CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49049

**FILED**

**AUG 16 2007**

ORDER OF AFFIRMANCE

JANE T. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On July 7, 1990, the district court convicted appellant, pursuant to a jury verdict, of two counts of burglary and two counts of sexual assault. The district court sentenced appellant to serve a single term of life without the possibility of parole in the Nevada State Prison. On direct appeal, this court upheld appellant's conviction but remanded to the district court for resentencing on the ground that the district court failed to sentence appellant for each of the four primary offenses.<sup>1</sup>

After resentencing, the district court entered an amended judgment of conviction.<sup>2</sup> The district court sentenced appellant to serve two consecutive terms of ten years for the burglary counts and a

<sup>1</sup>Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991).

<sup>2</sup>On September 29, 2003, the district court entered a second amended judgment of conviction granting appellant with 180 days of credit for time served.

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SEP 13 2007

CLERK OF THE COURT

SUPREME COURT  
OF  
NEVADA

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07-18083

consecutive term of life with the possibility of parole after five years for one of the sexual assault counts. The district court also sentenced appellant as a habitual criminal to a term of life without the possibility of parole for the remaining sexual assault count. This court dismissed appellant's appeal from the amended judgment of conviction.<sup>3</sup> The remittitur issued on October 24, 1995.

On February 20, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant, with the assistance of counsel, subsequently filed a supplement to the petition. The State opposed the petition and supplement. On September 6, 1996, the district court denied appellant's petition. This court affirmed the district court's order on appeal.<sup>4</sup>

On January 10, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that the petition was procedurally time barred and successive. Moreover, the State specifically pleaded laches. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 8, 2007, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed that his constitutional due process rights were violated because his sentence after resentencing

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<sup>3</sup>Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995).

<sup>4</sup>Moraga v. State, Docket Nos. 29321, 32542 (Order Dismissing Appeals, April 20, 1999).

exceeded his original sentence. Specifically, appellant alleged that the increased sentence was a result of vindictive punishment for challenging his convictions.

Appellant filed his petition more than ten years after this court issued the remittitur from his appeal from the amended judgment of conviction. Thus, appellant's petition was untimely filed.<sup>5</sup> Moreover, appellant's petition constituted an abuse of the writ because appellant could have raised his claim in his prior petition.<sup>6</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>7</sup> Good cause must be an impediment external to the defense.<sup>8</sup> In the event that good cause is not shown, a petitioner may be entitled to a review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.<sup>9</sup> A petitioner may meet this standard upon a colorable showing that he is actually innocent of the crime.<sup>10</sup> Finally, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>11</sup>

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<sup>5</sup>See NRS 34.726(1).

<sup>6</sup>See NRS 34.810(2).

<sup>7</sup>See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

<sup>8</sup>See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

<sup>9</sup>See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>10</sup>See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

<sup>11</sup>See NRS 34.800(2).



In an attempt to excuse his procedural defects, appellant first argued that he filed the untimely petition in an effort to exhaust his claim in state court. Exhausting state remedies does not constitute good cause to support the filing of an untimely petition.

Second, appellant argued that his appellate counsel's failure to raise his claim on appeal from the amended judgment of conviction constituted an impediment external to the defense. Appellant failed to demonstrate that an impediment external to the defense prevented him from raising his claim within the statutory time period. Appellant's claim was reasonably available to him when he filed his first post-conviction petition for a writ of habeas corpus, and appellant failed to demonstrate that interference by officials prevented him from raising the claim in his first petition.<sup>12</sup>

Third, appellant asserted that failure to consider his claim would result in a fundamental miscarriage of justice. Appellant's claim that his new sentence violated his due process rights lacked merit. In North Carolina v. Pearce, the United States Supreme Court held that "[d]ue process of law, . . . , requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."<sup>13</sup> Unless the reason for increasing a sentence affirmatively appears on the record, a presumption arises that a greater sentence has been imposed for a vindictive purpose.<sup>14</sup>

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<sup>12</sup>See Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

<sup>13</sup>395 U.S. 711, 725 (1969) overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794 (1989).

<sup>14</sup>Id. at 726.

However, the presumption of vindictiveness does not apply where there is no reasonable likelihood of actual vindictiveness on the part of the sentencing authority, and in such a case the defendant must prove actual vindictiveness.<sup>15</sup> Here, there is no basis for a presumption of vindictiveness. Appellant did not successfully challenge his convictions, rather appellant's case was remanded because the district court erroneously sentenced appellant to a single sentence although appellant was convicted of four separate offenses. As this court noted in the order of remand, Nevada laws anticipate that a corresponding sentence be imposed for each offense a defendant is convicted of.<sup>16</sup> Appellant failed to demonstrate that the district court was acting vindictively when it imposed the new sentence on remand. Therefore, appellant failed to demonstrate that his due process rights were violated. Because appellant's claim lacked merit, appellant failed to demonstrate that a fundamental miscarriage of justice would result by failing to consider his claim.

Finally, in response to the State's plea of laches, appellant claimed that the State would not be unduly prejudiced by the delay in filing his petition because the State cannot demonstrate that any transcripts, witnesses, evidence or records necessary for reviewing his claim are unavailable. Appellant further argued that the delay in filing his petition was not unreasonable because he was not responsible for the

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<sup>15</sup>Smith, 490 U.S. at 799-800.

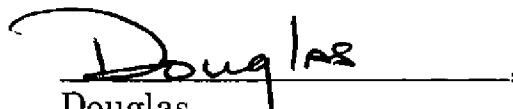
<sup>16</sup>Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991).

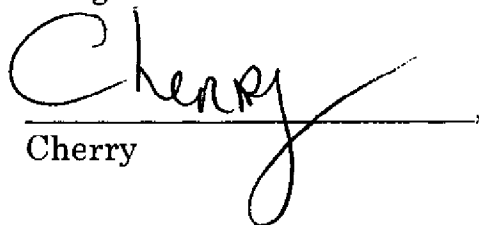
delay. We conclude that this falls short of overcoming the presumption of prejudice to the State.

Based upon our review of the record on appeal, we conclude that the district court did not err by dismissing appellant's petition, and we affirm the order of the district court. Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>17</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>18</sup>

  
Gibbons J.

  
Douglas J.

  
Cherry J.

cc: Hon. Lee A. Gates, District Judge  
Roy D. Moraga  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>17</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>18</sup>We have reviewed the document that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon that submission is warranted.

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 49049

District Court Case No. C092174

**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: September 11, 2007

Janette M. Bloom, Clerk of Court

By: *J. Crockett*  
Chief Deputy Clerk

cc: Hon. Lee A. Gates, District Judge  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Roy D. Moraga

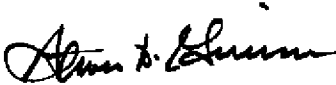
**RECEIPT FOR REMITTITUR**

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on SEP 13 2007  
**BRANDI J. WENDEL**

Deputy District Court Clerk

07-18584

  
CLERK OF THE COURT

**RSPN**  
**STEPHEN B. WOLFSON**  
Clark County District Attorney  
Nevada Bar #001565  
**JAMES R. SWEETIN**  
Chief Deputy District Attorney  
Nevada Bar #005144  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,	)	
	)	CASE NO: <b>C-89-092174-1</b>
Plaintiff,	)	
	)	DEPT NO: <b>VI</b>
-vs-	)	
	)	
ROY MORAGA,	)	
#0938554	)	
	)	
Defendant.	)	

**STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION**  
**FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

DATE OF HEARING: JULY 16, 2012  
TIME OF HEARING: 8:30 am

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

This Response and Motion to Dismiss 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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1                                    **STATEMENT OF THE CASE**

2                                    **POINTS AND AUTHORITIES**

3            An Information was filed on January 9, 1990 charging Roy Moraga (hereinafter  
4    "Defendant") as follows: Counts 1 and 2: BURGLARY (Felony- NRS 205.060) and Counts  
5    3 and 4: SEXUAL ASSAULT (Felony- NRS 200.364, 200.366). On March 15, 1990, a jury  
6    found Defendant guilty as charged on all counts. An Amended Information was filed on June  
7    13, 1990 wherein the State sought punishment as a habitual criminal based on Defendant's  
8    three prior felony convictions.

9            In addition to a \$20 Administrative Assessment Fee, Defendant was sentenced on  
10   June 13, 1990 to Life without the Possibility of Parole. The Judgment of Conviction was  
11   filed on July 7, 1990.

12           Defendant filed a Notice of Appeal on June 27, 1990. The Nevada Supreme Court  
13   filed its Order of Remand for Re-sentencing on August 27, 1991. Remittitur issued on  
14   September 17, 1991.

15           On October 21, 1991, Defendant was re-sentenced as follows: \$25 Administrative  
16   Assessment Fee; Count 1: ten (10) years in the Nevada Department of Prisons (NDP); Count  
17   2: ten (10) years in NDP to run consecutive with count 1; Count 3: Life with the Possibility  
18   of Parole after five (5) years in NDP to run consecutive to count 2; and Count 4: habitual  
19   criminal treatment under NRS 207.010(2) to Life without the Possibility of Parole to run  
20   consecutive to count 3. The Amended Judgment of Conviction was filed on November 13,  
21   1991. Defendant was later given one hundred and eighty (180) days credit for time served.

22           Defendant filed a Notice of Appeal from the Amended Judgment of Conviction on  
23   October 30, 1991. The Nevada Supreme Court filed its Order Dismissing the Appeal on  
24   October 4, 1995. Remittitur issued on October 24, 1995.

25           On February 20, 1996, Defendant filed a Pro Per Petition for Writ of Habeas Corpus.  
26   The State filed its Opposition on April 1, 1996. Defendant filed a Supplemental Petition on  
27   June 13, 1996. The State filed its Opposition to the Supplement on June 27, 1996. Defendant  
28   filed a Reply on July 16, 1996. The district court filed its Findings of Fact and Conclusions

1 of Law Denying the Petition on September 6, 1996. Defendant filed a Notice of Appeal on  
2 September 27, 1996.

3 Defendant filed a Motion to Modify Sentence or Correct Illegal Sentence on April 30,  
4 1998. The State filed its Opposition on May 8, 1998. The district court filed its Order  
5 Denying the Motion on May 28, 1998. Defendant filed a Notice of Appeal on June 13, 1998.

6 The Nevada Supreme Court filed its combined Order of Affirmance of both the  
7 Petition for Writ of Habeas Corpus and the Motion to Modify Sentence on April 20, 1999.  
8 Remittitur issued on May 18, 1999.

9 Defendant filed a Second Petition for Writ of Habeas Corpus on January 10, 2006.  
10 The State filed its Response and Motion to Dismiss on February 27, 2006. Defendant filed a  
11 Reply on May 24, 2006. The district court filed its Findings of Fact and Conclusions of Law  
12 denying the Petition on February 8, 2007. Defendant filed a Notice of Appeal on March 2,  
13 2007. The Nevada Supreme Court filed its Order of Affirmance on August 16, 2007.  
14 Remittitur issued on September 11, 2007.

15 The instant Third Petition for Writ of Habeas Corpus was filed on November 4, 2011.  
16 The State's Response and Motion to Dismiss follows:

17 **ARGUMENT**

18 **I. DEFENDANT'S PETITION IS TIME BARRED UNDER**  
19 **NEVADA REVISED STATUTE 34.726.**

20 Defendant's Third Petition for Writ of Habeas Corpus is time barred with no good  
21 cause shown for delay. Pursuant to NRS 34.726:

- 22 1. Unless there is good cause shown for delay, a petition that  
23 challenges the validity of a judgment or sentence must be  
24 filed within 1 year of the entry of the judgment of  
25 conviction or, if an appeal has been taken from the  
26 judgment, within 1 year after the Supreme Court issues its  
remittitur. For the purposes of this subsection, good cause  
for delay exists if the petitioner demonstrates to the  
satisfaction of the court:

- 27 (a) That the delay is not the fault of the  
28 petitioner; and

1 (b) That dismissal of the petition as untimely  
2 will unduly prejudice the petitioner.

3 Defendant's petition does not fall within this statutory time limitation. The Supreme Court  
4 of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v.  
5 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001). As per the language of the statute, the  
6 one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of  
7 conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114  
8 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). In the instant case, Defendant filed a  
9 direct appeal. Thus, the one-year time bar began to run from the date the Supreme Court  
10 issued Remittitur – September 17, 1991. The instant Petition was not filed until November  
11 4, 2011. This is over nineteen (19) years beyond the one year time frame.

12 Additionally, the one-year time limit for preparing petitions for post-conviction relief  
13 under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 53 P.3d 901  
14 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late  
15 despite evidence presented by the defendant that he purchased postage through the prison  
16 and mailed the Notice within the one-year time limit.

17 Furthermore, the Nevada Supreme Court has held that the district court has *a duty* to  
18 consider whether a defendant's post-conviction petition claims are procedurally barred. State  
19 v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070 (2005). The Court found that  
20 "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is  
21 mandatory," noting:

22 Habeas corpus petitions that are filed many years after  
23 conviction are an unreasonable burden on the criminal justice  
24 system. The necessity for a workable system dictates that there  
must exist a time when a criminal conviction is final.

25 121 Nev. at 231, 112 P.3d at 1074. Additionally, the Court noted that procedural bars  
26 "cannot be ignored [by the district court] when properly raised by the State." 121 Nev. at  
27 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district  
28 courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.



1 In this case, Defendant filed the instant Petition for Writ of Habeas Corpus outside of  
2 the one-year time limit. Remittitur on Defendant's direct appeal issued on September 17,  
3 1991. Defendant did not file the instant Petition until November 11, 2011, which is over the  
4 one (1) year time prescribed in NRS 34.726. Absent a showing of good cause for this delay,  
5 Defendant's claim must be dismissed because of its tardy filing.

## 6 **II. DEFENDANT'S PETITION IS SUCCESSIVE**

7 Defendant's instant third Petition should be dismissed pursuant to NRS 34.810 as it is  
8 successive. Pertinent portions of NRS 34.810 state:

- 9 2. A second or successive petition must be dismissed if the  
10 judge or justice determines that it fails to allege new or  
11 different grounds for relief and that the prior  
12 determination was on the merits or, if new and different  
13 grounds are alleged, the judge or justice finds that the  
14 failure of the Defendant to assert those grounds in a prior  
15 petition constituted an abuse of the writ.
- 16 3. Pursuant to subsections 1 and 2, the petitioner has the  
17 burden of pleading and proving specific facts that  
18 demonstrate:
- 19 (a) Good cause for the petitioner's failure to present  
20 the claim or for presenting the claim again; and
  - 21 (b) Actual prejudice to the petitioner.

22 NRS 34.810. The district court denied Defendant's first habeas petition on the merits on  
23 September 6, 1996. Notably, the Nevada Supreme Court subsequently affirmed the district  
24 court's denial of Defendant's Petition and remittitur issued on May 18, 1999. Defendant  
25 should have raised any and all grounds in his first petition and his failure to do so is an abuse  
26 of the writ as enunciated in NRS 34.810(2). Because Defendant's first petition was filed and  
27 decided on the merits, the instant petition is a successive petition pursuant to NRS 34.810(2).  
28 To avoid procedural default under NRS 34.810, Defendant has the burden of pleading and  
proving specific facts that demonstrate both good cause for his failure to present his claims  
in earlier proceedings and actual prejudice. NRS 34.810(3); Hogan v. Warden, 109 Nev.  
952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Director, 104 Nev. 656, 659, 764 P.2d  
1303, 1305 (1988). As noted infra, Defendant has not demonstrated any such good cause,

1 and consequently Defendant has not met that burden. Absent a showing of good cause,  
2 Defendant's petition should be dismissed pursuant to NRS 34.810.

3 **III. DEFENDANT HAS NOT SHOWN GOOD CAUSE FOR THE**  
4 **DELAYED FILING OF A SUCCESSIVE PETITION.**

5 In the instant Petition, Defendant has not established good cause for the delay in filing  
6 a late, successive Petition. "Generally, 'good cause' means a 'substantial reason; one that  
7 affords a legal excuse.'" Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)  
8 *quoting* Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). "In order to  
9 demonstrate good cause, a petitioner must show that an impediment external to the defense  
10 prevented him or her from complying with State procedural default rules." Hathaway, 71  
11 P.3d at 506 *citing* Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001);  
12 Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105  
13 Nev. 63, 66, 769 P.2d 72, 74 (1989). An impediment external to the defense can be  
14 demonstrated by a showing "that the factual or legal basis for the claim was not reasonably  
15 available to counsel or that some interference by officials made compliance impracticable."  
16 Hathaway, 71 P.3d at 506.

17 In this case, Defendant has not given any legally relevant excuse for failure to file his  
18 Petition in a timely manner. Defendant has not stated any facts that would show good cause  
19 for not filing his Petition in the required time frame. Instead, Defendant re-alleges the same  
20 argument that he was improperly adjudicated a habitual criminal. This argument was already  
21 rejected by the Nevada Supreme Court on appeal from the denial of his Motion to Modify  
22 Sentence/Correct Illegal Sentence. Order Dismissing Appeal, April 20, 1999, pg. 5.  
23 Defendant has also stated no facts that would show he would be in any way prejudiced by  
24 having to comply with the procedural time bar. In so much as Defendant may be claiming  
25 "actual innocence" as good cause, his bare allegation is not sufficient to meet the criteria set  
26 forth in Calderon v. Thompson, 523 U.S. 538, 559 (1998). Defendant must submit new  
27 evidence in his habeas proceeding in light of which no reasonable juror would have  
28 convicted him. Id. In this case, Defendant has failed to include any new evidence to establish

1 his innocence. He merely recites the same arguments that his sentence is illegal, that have  
2 already been raised and rejected. Therefore, since the Defendant cannot show good cause or  
3 actual prejudice for failing to comply with the one year time limit and re-raising claims, the  
4 instant Petition should be dismissed.

5 **IV. DEFENDANT'S PETITION IS BARRED BY LACHES PURSUANT TO**  
6 **NRS 34.800**

7 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period  
8 exceeding five years between the filing of a judgment of conviction, an order imposing a  
9 sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the  
10 filing of a petition challenging the validity of a judgment of conviction..." The statute also  
11 requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The  
12 State pleads laches in the instant case.

13 As noted, supra, remittitur on Defendant's Direct Appeal issued on September 17,  
14 1991. Since more than five (5) years have elapsed between the issuance of remittitur and the  
15 filing of Defendant's instant Petition, NRS 34.800 directly applies in this case.

16 NRS 34.800 was enacted to protect the State from having to go back years later to re-  
17 prove matters that have become ancient history. There is a rebuttable presumption of  
18 prejudice for this very reason and the doctrine of laches must be applied in the instant matter.  
19 If courts required evidentiary hearings for long delayed petitions such as in the instant  
20 matter, the State would have to call and find long lost witnesses whose once vivid  
21 recollections have faded and re-gather evidence that in many cases has been lost or destroyed  
22 because of the lengthy passage of time. Based on the State's arguments above, this Court  
23 should summarily deny the instant petition according to the doctrine of laches pursuant to  
24 NRS 34.800, as the delay of more than five (5) years in filing is unexcused.

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**CONCLUSION**

For the foregoing reasons, the Defendant's late Petition for Writ of Habeas Corpus Post Conviction should be DISMISSED.

DATED this 16TH day of May, 2012.

Respectfully submitted,

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

BY /s/ JAMES R. SWEETIN  
JAMES R. SWEETIN  
Chief Deputy District Attorney  
Nevada Bar #005144

**CERTIFICATE OF MAILING**

I hereby certify that service of the above and foregoing, was made this 16th day of May, 2012, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROY MORAGA, BAC#31584  
LOVELOCK CORRECTIONAL CENTER  
1200 PRISON ROAD  
LOVELOCK, NV 89419

/s/ HOWARD CONRAD  
Secretary for the District Attorney's Office

hjc/SVU

CASE NO. 89C02174  
Dept. NO. 60 CO92174  
Hearing: 08.27.12

25

02S

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED

ROY D. MORAGA,

AUG-06-2012

Petitioner,

*Ch. F. Blum*  
CLERK OF COURT

- VS -

ROBERT LEGRAND, Warden  
Respondent.

MOTION FOR  
RECONSIDERATION

Comes NOW Petitioner, ROY D. MORAGA, in Pro Per,  
AND MOVES this Court to GRANT his MOTION For  
reconsideration.

This motion is made AND based upon ALL the  
pleadings, Attached Points AND Authorities.

POINTS AND AUTHORITIES

On December 8, 2010, Petitioner Filed his Writ  
OF habeas Corpus (PCR), AND Pursuant to AN  
Actual INNOCENCE Claim, Newly Discovered  
evidence NRS 34.360, NRS 34.500(2)(3) et seq.  
On July 16, 2012 at 8:30 AM this Court held a  
hearing on petitioner's Writ of habeas Corpus (PCR),  
AND his EX Parte Motion For Appointment of  
Counsel, Petitioner WAS Absent For the hearing, AND  
Petitioner WAS NOT represented at the hearing by  
Counsel. IN Violation of Petitioner's Confrontation  
AND Due Process Clauses of the Nevada Constitution  
(Art 1 § 8) AND the U.S. Constitution 5th, 6th & 14th  
Amendments.)

RECEIVED

AUG 03 2012

CLERK OF THE COURT

89C02174  
MOT  
Motion  
1921803



(1)

"The right to be present is rooted in the Confrontation Clause, and the Due process Clause of the Federal Constitution. The Confrontation Aspect Arises when the proceeding involves the presentation of evidence. United States v. Gagnon, (Citations omitted). The Due process Aspect has been recognized only to the extent that a Fair and just hearing would be Thwarted by the Defendant's Absence. I.d." State and Federal Constitutional guarantees of due process of Law require at a minimum Notice of intended judicial Action and an Adequate opportunity to be heard before judicial Action can be taken. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 377 (1971) ("Absent a countervailing State interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.") Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("the fundamental requisite of Due process of Law is the Opportunity to be heard.") Browning v. Dixon, 954 P.2d 741, 743 Nev. (1998), Entering an Order without complying with minimum standards of Notice and an Opportunity to be heard is beyond the Court's jurisdiction. E.g., Sheriff Nye County v. Davis, 287 P.2d 1214 (Nev. 1970); Lane v. District Court, 760 P.2d 1245 (Nev. 1988).

Failure to produce petitioner at the hearing to Argue his motion would deny him the Opportunity to rebut whatever the State may make, and would deny him the Opportunity to offer his own Testimony in Support of his petition. Petitioner's Absence at the hearing would thus Violate his right under the Due process and Confrontation Clause of the Nevada Constitution (Art. 1 § 8), and the U.S. Constitution (5th, 6th & 14th Amendments).

As in petitioner's case he was denied his Constitutional rights when this Court held the hearing without allowing him "MORAGA" to offer his own Testimony, or to give MORAGA the Opportunity to be heard. Therefore MORAGA'S Motion For Reconsideration must be Granted As a Matter of Law and Re-set a New hearing and Order to Transport and Produce MORAGA For the hearing on his Writ of habeas Corpus - (PCR) Pursuant to his Actual Innocence Claim, Newly Discovered evidence - NRS 34.360, NRS 34.500(2)(3) et Seq.

Habeas Corpus §118 Actual innocence - evidence. Petitioner States: In Order to be Credible, a Claim of Actual Innocence must be based upon reliable evidence not presented at Trial. DNA evidence exists in this Factual Situation to exonerate MORAGA, and Release him From Custody.

PURSUANT to the United States Supreme Court Opinion in District Attorneys Office for the third Judicial District et al v. Osborne (2009). Where the Court Addressed the issue of "Newly Available DNA Testing that will prove them to be Actual Innocent." Id. As in this case Osborne, Supra in Addressing post-Conviction Statutes, A (State) prisoner may Challenge his Conviction when "there exists evidence of material facts, not previously presented and heard by the Court, that requires Vacation of the Conviction or Sentence in the interests of Justice. At MORAGA'S Trial Linda T. Errichetto of the Las Vegas Metropolitan Police Department Forensic expert witness for the State Testified under Oath that "MORAGA CANNOT be excluded As a possible Source of the Semen on the Swab." But what MS. Errichetto Failed to Say under Oath is that She Never Tested the Semen to See who the evidence belonged to. In Jimenez v. The State of Nevada, 918 P.2d 687 The Court granted the defendant's petition for post-Conviction relief and because the State Violated its Constitutional duty to inform the defendant of material exculpatory evidence it possessed and of material evidence to the impeachment of its informant witness that lied under Oath, like Jimenez MORAGA'S CASE MUST Also be Set Aside for the State using perjured Testimony, a Conviction obtained by Such Testimony is "Fundamentally Unfair."

(4)



For the record MORAGA would include NRS 199.130 to my case "False Affidavit or Complaint to Effect Arrest or Search is guilty of perjury which is a Category D Felony, I want to pursue Actions upon MS. Errichetto for lying under Oath.

In the States Argument they state that "Defendant's petition is Time barred under NRS 34.726. But what the State failed to say is if MORAGA can show a Miscarriage of justice the State cannot use Time barred as a defence. MORAGA claims he is in fact Actual innocence of this crime. See: Kuhlmann v. Wilson, 427 U.S. 436.

"The Miscarriage of justice exception Applies where a petitioner is "Actual innocent" of the Crime of which he was convicted or the penalty which was imposed.

As I stated before MS. Errichetto's Testimony caused the False Testimony that effected the judgment of the jury, and a Judicial review of MORAGA'S Claim of Actual innocence is properly Analyzed in Terms of procedural Due process. This court MUST Approve MORAGA'S petition under my Newly Available DNA Testing - New PCR/STR Test that shall exonerate MORAGA of Sexual Assault, under the provisions of NRS 34.500(2)(3).

MORAGA Further States that back in 1920 the PCR/STR Test did not exist to exonerate me, it was not until I received the Osborne case in 2010, I Filed my Petition for writ of habeas Corpus (PCR) under

(5)

Newly Discovered evidence, Actual innocence claim.  
The States that MORAGA's petition is Successive.

"A Successive petition must be dismissed if it Fails to Allege New or different grounds For relief." IN MORAGA's petition he Alleged that he is Actual innocent of the crime charged, AND that the PCR/STR Test Shall exonerate me, this is in Fact Newly, or different grounds for relief, that Along with ms. Errichetto's Testimony prejudiced MORAGA's case by lying under Oath, As is "A habeas petitioner must Show Cause and prejudice before a court will reach the merits of a Successive, Abusive, or defaulted Claim. Even if he cannot meet this Standard a Court may hear the merits of Such Claim if failure to hear them would result in a miscarriage of justice, in MORAGA's case his Claim Must be exempt From otherwise Applicable Time Limits if "Newly Discovered evidence pursued with Due Diligence, "establishes by Clear and Convincing evidence that I am innocent." See: District Attorneys Office for third Judicial District V. Osborne, 557 U.S. (2009).

IN MORAGA's case, the requested Tests were Technologically impossible at the Time of my Trial in 1990 and therefore is Subject to Newly discovered evidence As the DNA Testing is AN Act and event that is Subject to take place Afterwards AND therefore MORAGA is entitled to discharge pursuant  
(6)

to NRS 34.500(2)(4). IN MORAGA'S CASE CONSISTENT WITH THE RULE UNDER NRS 34.500(3) THE DISCOVERY OF THE NEW DNA TESTING TECHNOLOGY IS FOR GOOD CAUSE. See: Bracy v. Gamley, 520 U.S. 899, 908-909 (1997). It is further stated that the state claims that MORAGA'S petition is barred by Laches pursuant to NRS 34.800. The state wants this court to believe that in order for MORAGA'S petition to be granted an evidentiary hearing for delayed petition is that the state would have to call and find long lost witnesses whose vivid recollections have faded and re-gather evidence that in many cases has been lost or destroyed because of the lengthy passage of time. IN MORAGA'S petition IF I AM GRANTED AN evidentiary hearing the only witnesses needed is MS. Errichetto AND MORAGA, and the evidence that was preserved in JANUARY 7, 2004, if the state lost or destroyed the semen then this court must exonerate MORAGA because he was in fact innocent of this crime, therefore laches must not apply to MORAGA'S CASE, AS time barred, there is not any bar under statute's AS the state wants this court to believe. UNDER NEVADA LAW PROVIDES MORAGA CAN PURSUE DNA TESTING UNDER STATUTE OF HABEAS CORPUS procedures. PURSUANT TO Mitchell v. State, 149 P.3d 33 (2006) STATES: Even when a petitioner CANNOT show good cause sufficient to overcome the bars to an untimely or successive petition,

(7)

habeas relief may still be granted if the petitioner can demonstrate that a Constitutional Violation has probably resulted in the Conviction of one who is Actually Innocent.

Actual innocence means Factual innocence, Not mere legal insufficiency. The Conviction of a petitioner who was Actually innocent would be a Fundamental miscarriage of justice Sufficient to overcome the procedural bars to an untimely or Successive petition. This rule must Apply to MORAGA'S CASE because he is Factually innocent of the crime of Sexual Assault that can be proven by Approving the PCR/STR DNA Test on the Semen.

"The State Claims that NRS 34.800 would prejudice the State, AND if they had to retry the CASE." AGAIN MR. MORAGA does NOT WANT to be retried Nor did I ASK to be retried. All I want is For this Court to grant an evidentiary hearing in Order to prove once and for All that I AM Actual innocence of the Crime Against me.

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DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY J. MORAGA,

Petitioner,

-VS-

ROBERT LEGRAND, Warden

Respondent.

NOTICE OF MOTION

TO: ROBERT LEGRAND, Warden AND Respondent(s)

You and each of you will take notice that Petitioner in the above-entitled Action will bring his Motion For Reconsideration before the above-entitled Court and department, for hearing the same on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ M., or as soon thereafter as the Court may deem just and proper.

Dated this 27th day of July 2012.

Roy J. Moraga

Roy J. MORAGA # 31584

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Petitioner IN Pro Per

CERTIFICATION OF SERVICE BY MAIL

I do certify that I mailed a True and Correct Copy of the foregoing Notice of Motion to the below Address(es) on this 27th day of July, 2012, by placing same in the U.S. Mail via prison law library staff, pursuant to N.R.C.P. 5(b):

Steve B. Wolfson, Esq.  
Clark County District Attorney  
200 Lewis Ave.  
Las Vegas, Nev. 89155-2212

Steven D. Grice, Clerk  
Clerk of the Court  
200 Lewis Ave. 3rd Fl.  
Las Vegas, NV. 89155-1160

Roy D. Moraga\* 31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89419

Roy D. Moraga  
Roy D. Moraga\* 31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89419  
Petitioner IN Pro Per

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby Affirm that the Preceding  
Notice of Motion does Not contain the Social  
Security Number of Any person.

Dated this 27th day of July 2012.

Roy D. Moraga

Roy D. MORAGA #31584

Petitioner In Pro Per

WHEREFORE, based upon the foregoing, Petitioner prays this Honorable Court to Grant his Motion for Reconsideration on his petition for writ of habeas corpus (Post Conviction Relief).

Dated this 27th day of July 2012.

Respectfully Submitted,

Roy D. Moraga

Roy D. MORAGA # 31584

Petitioner IN Pro Per

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on July 27th 2012, I served a copy of the foregoing by personally mailing said copies to:

Steven B. Wolfson,

Clark County District Attorney

200 Lewis Ave

LAS VEGAS, NEV. 89155-2212

Steven D. Grierson,

Clerk of the Court

200 Lewis Ave. 3rd Fl.

LAS VEGAS, NEV. 89155-1160

Roy D. Moraga

Roy D. MORAGA # 31584



AFFIRMATION PURSUANT TO NRS. 239B. 030

The undersigned does hereby Affirm that the Preceding  
Motion For Consideration does Not Contain the  
Social Security Number of ANY person.

Dated this 27th day of July 2012.

Roy D. Moraga

Roy D. MORAGA # 31584

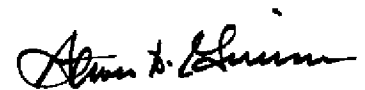
Petitioner In Pro Per

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ROY D. MORAGA #31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419





CLERK OF THE COURT

**OPPS**

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
JAMES R. SWEETIN  
Chief Deputy District Attorney  
Nevada Bar #005144  
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-

ROY MORAGA,  
#0938554

Defendant.

CASE NO: **C-89-092174-1**

DEPT NO: **VI**

**STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER**

DATE OF HEARING: AUGUST, 27, 2012  
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Reconsider.

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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 An Information was filed on January 9, 1990 charging Roy Moraga (hereinafter  
4 "Defendant") as follows: Counts 1 and 2: BURGLARY (Felony- NRS 205.060) and Counts  
5 3 and 4: SEXUAL ASSAULT (Felony- NRS 200.364, 200.366). On March 15, 1990, a jury  
6 found Defendant guilty as charged on all counts.

7 In addition to a \$20 Administrative Assessment Fee, Defendant was sentenced on  
8 June 13, 1990 to Life without the Possibility of Parole. The Judgment of Conviction was  
9 filed on July 7, 1990.

10 Defendant filed a Notice of Appeal on June 27, 1990. The Nevada Supreme Court  
11 filed its Order of Remand for Re-sentencing on August 27, 1991. Remittitur issued on  
12 September 17, 1991.

13 On October 21, 1991, Defendant was re-sentenced as follows: \$25 Administrative  
14 Assessment Fee; Count 1: ten (10) years in the Nevada Department of Prisons (NDP); Count  
15 2: ten (10) years in NDP to run consecutive with count 1; Count 3: Life with the Possibility  
16 of Parole after five (5) years in NDP to run consecutive to count 2; and Count 4: as a  
17 habitual criminal under NRS 207.010(2) to Life without the Possibility of Parole to run  
18 consecutive to count 3. The Amended Judgment of Conviction was filed on November 13,  
19 1991. Defendant was later given one hundred and eighty (180) days credit for time served.

20 Defendant filed a Notice of Appeal from the Amended Judgment of Conviction on  
21 October 30, 1991. The Nevada Supreme Court filed its Order Dismissing the Appeal on  
22 October 4, 1995. Remittitur issued on October 24, 1995.

23 On February 20, 1996, Defendant filed a Pro Per Petition for Writ of Habeas Corpus.  
24 The State filed its Opposition on April 1, 1996. Defendant filed a Supplemental Petition on  
25 June 13, 1996. The State filed its Opposition to the Supplement on June 27, 1996. Defendant  
26 filed a Reply on July 16, 1996. The district court filed its Findings of Fact and Conclusions  
27 of Law Denying the Petition on September 6, 1996. Defendant filed a Notice of Appeal on  
28 September 27, 1996.

1 Defendant filed a Motion to Modify Sentence or Correct Illegal Sentence on April 30,  
2 1998. The State filed its Opposition on May 8, 1998. The district court filed its Order  
3 Denying the Motion on May 28, 1998. Defendant filed a Notice of Appeal on June 13, 1998.

4 The Nevada Supreme Court filed its combined Order of Affirmance of both the  
5 Petition for Writ of Habeas Corpus and the Motion to Modify Sentence on April 20, 1999.  
6 Remittitur issued on May 18, 1999.

7 Defendant filed a Second Petition for Writ of Habeas Corpus on January 10, 2006.  
8 The State filed its Response and Motion to Dismiss on February 27, 2006. Defendant filed a  
9 Reply on May 24, 2006. The district court filed its Findings of Fact and Conclusions of Law  
10 denying the Petition on February 8, 2007. Defendant filed a Notice of Appeal on March 2,  
11 2007. The Nevada Supreme Court filed its Order of Affirmance on August 16, 2007.  
12 Remittitur issued on September 11, 2007.

13 Defendant filed a Third Petition for Writ of Habeas Corpus on November 4, 2011.  
14 The State filed a Response and Motion to Dismiss on May 16, 2012. Defendant's Petition  
15 was denied on July 16, 2012. Defendant filed the instant Motion to Reconsider on August 6,  
16 2012. The State's Opposition to Defendant's Motion to Reconsider follows.

### 17 **ARGUMENT**

#### 18 **I. DEFENDANT'S MOTION TO RECONSIDER IS NOT PROPERLY** 19 **BEFORE THE COURT.**

20 Defendant's Motion to Reconsider is not properly before this Court and should be  
21 denied. The Eighth Judicial District Court Rules provide that "[n]o motion once heard and  
22 disposed of may be renewed in the same cause, nor may the same matters therein embraced  
23 be reheard, unless by leave of the court granted upon motion therefore, after such notice of  
24 such motion to the adverse parties." EJDRC 2.24(a). Defendant failed to obtain leave of the  
25 court to file this motion, and therefore, his motion should be denied

26 Additionally, Defendant has not shown that the Court overlooked or misapprehended  
27 any material issue of fact or law; therefore, there is no reason for the Court to reconsider its  
28 denial of Defendant's late successive petition. See, NRAP 40(a)(1).

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**CONCLUSION**

Based on the foregoing arguments, the State respectfully requests this Honorable Court to deny Defendant's Motion.

DATED this 9th day of August, 2012.

Respectfully submitted,

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

BY /s/ JAMES R. SWEETIN  
JAMES R. SWEETIN  
Chief Deputy District Attorney  
Nevada Bar #005144

**CERTIFICATE OF MAILING**

I hereby certify that service of the above and foregoing, was made this 9th day of August, 2012, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROY MORAGA, BAC#31584  
LOVELOCK CORRECTIONAL CENTER  
1200 PRISON ROAD  
LOVELOCK, NV 89419

/s/ HOWARD CONRAD  
Secretary for the District Attorney's Office

hjc/SVU

ORIGINAL

FILED

AUG 13 8 58 AM '12

*Ann L. Quinn*  
CLERK OF THE COURT

1 **ORDR**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001516  
5 JAMES R. SWEETIN  
6 Deputy District Attorney  
7 Nevada Bar #005144  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7  
8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,  
11 Plaintiff,

12 -vs-

13 ROY D. MORAGA,  
14 #0938554

15 Defendant.

CASE NO: C-89-092174-1  
DEPT NO: VI

16  
17 **FINDINGS OF FACT, CONCLUSIONS OF**  
18 **LAW AND ORDER**

19 DATE OF HEARING: July 16, 2012  
20 TIME OF HEARING: 8:30 A.M.

21 THIS CAUSE having come on for hearing before the Honorable ELISSA F.  
22 CADISH, District Judge, on the 16th day of July, 2012, the Petitioner not present, the  
23 Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and  
24 through DENA RINETTI, Chief Deputy District Attorney, and the Court having considered  
25 the matter, including briefs, and documents on file herein, without argument, now therefore,  
the Court makes the following findings of fact and conclusions of law:

26 //  
27 //  
28 //

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FFCO  
Findings of Fact, Conclusions of Law and ( 1930375



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CLERK OF THE COURT

AUG 03 2012

RECEIVED

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7 1. NRS 34.726(1) provides:

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18 (Emphasis added).

19 2. NRS 34.810 states:

20 2. A second or successive petition must be dismissed if the judge  
21 or justice determines that it fails to allege new or different  
22 grounds for relief and that the prior determination was on the  
23 merits or, if new and different grounds are alleged, the judge or  
24 justice finds that the failure of the Defendant to assert those  
25 grounds in a prior petition constituted an abuse of the writ.

26 3. Pursuant to subsections 1 and 2, the petitioner has the burden  
27 of pleading and proving specific facts that demonstrate:

- 28 (a) Good cause for the petitioner's failure to present the claim or  
for presenting the claim again; and  
(b) Actual prejudice to the petitioner.

1 To avoid procedural default under NRS 34.810, Defendant has the burden of  
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- 15 8. In the absence of good cause, a Petitioner may only defeat the procedural bars by  
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- 26 11. NRS 34.750 provides, in pertinent part:  
27 [a] petition may allege that the Defendant is unable to pay the  
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satisfied that the allegation of indigency is true and the petition is  
*not dismissed summarily*, the court may appoint counsel at the

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3 (a) The issues are difficult;

4 (b) The Defendant is unable to comprehend the proceedings; or

5 (c) Counsel is necessary to proceed with discovery.

6 (Emphasis added).

7 12. The Nevada Supreme Court has observed that a petitioner "must show that the  
8 requested review is not frivolous before he may have an attorney appointed." Peterson  
9 v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former  
10 statute NRS 177.345(2)).

11 13. The relevant portions of NRS 34.800 provide:

12 (1) A petition may be dismissed if delay in the filing of the  
13 petition:

14 (b) Prejudices the State of Nevada in its ability to conduct a  
15 retrial of the petitioner, unless the petitioner demonstrates that a  
16 fundamental miscarriage of justice has occurred in the  
17 proceedings resulting in the judgment of conviction or  
18 sentence...

19 (2) A period exceeding five years between the filing of a  
20 judgment of conviction...and the filing of a petition challenging  
21 the validity of the judgment of conviction creates a rebuttable  
22 presumption of prejudice to the State.

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1 ORDER

2 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas  
3 Corpus (Post-Conviction) shall be, and is, dismissed.

4 DATED this 9 day of August, 2012.

5   
6 DISTRICT JUDGE

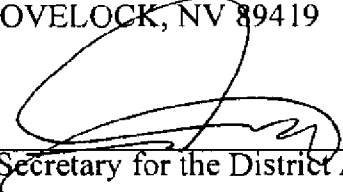
7 STEVEN B. WOLFSON  
8 DISTRICT ATTORNEY  
9 Nevada Bar #001565

10 BY  for  
11 DENA RINETTI  
12 Chief Deputy District Attorney  
13 Nevada Bar #009897  
14  
15

16 NOTICE OF SERVICE

17 I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these  
18 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the 2nd day of  
19 AUGUST, 2012, to:

20 ROY MORAGA, BAC#31584  
21 LOVELOCK CORRECTIONAL CENTER  
22 1200 PRISON ROAD  
23 LOVELOCK, NV 89419

24   
25 Secretary for the District Attorney's Office  
26  
27  
28

hjc/SVU

1 NEO



CLERK OF THE COURT

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

4  
5 ROY D. MORAGA,

6 Petitioner,

Case No: 89C092174

Dept No: VI

7 vs.

8 THE STATE OF NEVADA,


9 Respondent,

**NOTICE OF ENTRY OF FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
ORDER**

10  
11 **PLEASE TAKE NOTICE** that on August 13, 2012, the court entered a decision or order in this matter, a  
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you  
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is  
15 mailed to you. This notice was mailed on August 21, 2012.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

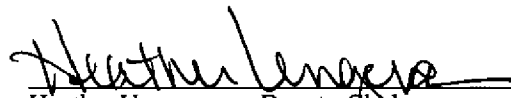
17 By:   
18 Heather Ungermann, Deputy Clerk

19 **CERTIFICATE OF MAILING**

20 I hereby certify that on this 21 day of August 2012, I placed a copy of this Notice of Entry of Decision and  
21 Order in:

22 The bin(s) located in the Office of the District Court Clerk of:  
23 Clark County District Attorney's Office  
Attorney General's Office – Appellate Division

- 24 ☒ The United States mail addressed as follows:  
25 Roy D. Moraga # 31584  
26 1200 Prison Rd.  
Lovelock, NV 89419

27   
28 Heather Ungermann, Deputy Clerk

ORIGINAL

FILED

AUG 13 8 58 AM '12

*Shirley L. Quinn*  
CLERK OF THE COURT

1 **ORDR**  
2 **STEVEN B. WOLFSON**  
3 **Clark County District Attorney**  
4 **Nevada Bar #001516**  
5 **JAMES R. SWEETIN**  
6 **Deputy District Attorney**  
7 **Nevada Bar #005144**  
8 **200 Lewis Avenue**  
9 **Las Vegas, Nevada 89155-2212**  
10 **(702) 671-2500**  
11 **Attorney for Plaintiff**

12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 **THE STATE OF NEVADA,**  
15 **Plaintiff,**

16 **-vs-**

17 **ROY D. MORAGA,**  
18 **#0938554**

19 **Defendant.**

**CASE NO: C-89-092174-1**

**DEPT NO: VI**

20 **FINDINGS OF FACT, CONCLUSIONS OF**

21 **LAW AND ORDER**

22 **DATE OF HEARING: July 16, 2012**  
23 **TIME OF HEARING: 8:30 A.M.**

24 **THIS CAUSE having come on for hearing before the Honorable ELISSA F.**  
25 **CADISH, District Judge, on the 16th day of July, 2012, the Petitioner not present, the**  
26 **Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and**  
27 **through DENA RINETTI, Chief Deputy District Attorney, and the Court having considered**  
28 **the matter, including briefs, and documents on file herein, without argument, now therefore,**  
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30 **//**  
31 **//**  
32 **//**

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Findings of Fact, Conclusions of Law and  
1930376



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CLERK OF THE COURT

AUG 03 2012

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(Emphasis added).

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**13. The relevant portions of NRS 34.800 provide:**

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- (2) A period exceeding five years between the filing of a judgment of conviction...and the filing of a petition challenging the validity of the judgment of conviction creates a rebuttable presumption of prejudice to the State.

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DATED this 9 day of August, 2012.

BY:  for  
 DENA RINETTI  
 Chief Deputy District Attorney  
 Nevada Bar #009897

I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the 2nd day of AUGUST, 2012, to:

LOVELOCK, NV 89419



Secretary for the District

7

DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY D. MORAGA,  
Petitioner,

FILED

AUG 28 2012

*John J. Blum*  
CLERK OF COURT

-VS-

ROBERT LEGRAND, Warden  
Respondent

89C092174  
ROPP  
Reply to Opposition  
1945231



REPLY TO STATE'S OPPOSITION TO PETITIONER'S  
MOTION FOR RECONSIDERATION

COMES NOW, Petitioner, ROY D. MORAGA, in Pro  
Se, Replies to State's opposition.

This reply is made and based upon all papers,  
pleadings, documents filed in this case and the  
Attached Points and Authorities.

POINTS AND AUTHORITIES

ON December 8, 2010, Petitioner Filed his Writ  
of habeas Corpus (PCR), AND Pursuant to AN  
Actual INNOCENCE Claim, Newly Discovered  
evidence, NRS 34.360, NRS 34.500(2)(3) et Seq.

ON July 16, 2012 at 8:30 AM this Court held a  
hearing on Petitioner's writ of habeas Corpus-PCR,  
AND his EX-Parte Motion For Appointment of Counsel.

Petitioner WAS Absent For that hearing. The State  
WAS represented by James R. Sweetin, Chief Deputy  
District Attorney. Both were denied.

ON August 6, 2012, Petitioner's Motion for reconsider-  
ation WAS Filed.

ON August 9th, 2012, The State Filed there Opposition to  
Petitioner's Motion For reconsideration.

(1)

8

CLERK OF THE COURT

AUG 27 2012

RECEIVED

This reply Commence:

THE State Claims that the E.J.D.C.R. 2.24(a) Should Apply to petitioner's Case. "[N]O Motion once heard and disposed of may be renewed in the Same Cause, nor may the Same matters therein embraced be reheard, unless by leave of the Court granted upon motion to the Adverse parties. What the State Failed to State under Rule 2.24(b) is "A party Seeking reconsideration of a ruling of the Court, other than any order which may be Addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a Motion for Such relief within 10 days After Service of Written Notice of the order or judgment unless the time is shortened or enlarged by Order. A motion for rehearing or reconsideration Must be Served, Noticed, Filed and heard as is any other motion." This Court Never issued, or Served Petitioner with Such Order or Notice of any Judgment. Therefore Petitioner's Motion for reconsideration Must be granted pursuant to N.R.C.P. 50(b), 52(b), 59 or 60 because Petitioner Filed his request for relief within the 10 days required for Such motion. Also see Rule 40 Case Notes: Circumstances warranting rehearing: Rehearing of a prior determination of this Court is warranted only when "the Court overlooked or misapprehended a material matter" or "in Such other circumstances as will promote substantial justice."

(2)

IN re DUNLEAVY, 104 NEV. 784, 769 P.2d 1271 (1988).

As in Petitioner's case, the claim of Actual Innocence and Newly Discovered evidence Along with the Violation of Petitioner's Confrontation and Due process Clauses of the NEVADA Constitution (Art 1 § 8) and the U.S. Constitution 5th, 6th & 14th Amendments. Petitioner was Never given the Meaningful Opportunity to be heard, the State, and James R. Sweetin wants this Court to disregard the Constitutional rights of Petitioner by violating his Due process rights, and Substantive due process. "Such may be broadly defined as the Constitutional guarantee that no person shall be Arbitrarily deprived of his life, liberty or property: the essence of Substantive due process is protection from Arbitrary and unreasonable Action". BABINEAUX v. JUDICIARY COMMISSION, La., 341 So.2d 396, 400. It is Also Stated that the Due process of Law implies the right of the person Affected thereby to be present before the Tribunal which pronounces judgment upon the question of life, liberty, or property, in its most Comprehensive Sense; to be heard, by testimony or otherwise, and to have the right of Controverting, by proof, every material Fact which bears on the question of right in the matter involved, If any question of fact or liability be Conclusively presumed Against him, this is Not due process of Law.

(3)



An orderly proceeding wherein a person is Served with Notice, Actual or Constructive, and protect his rights before a court having power to hear and determine the case. KAZUBOWSKI V. KAZUBOWSKI, 45 Ill.2d 405, 259 N.E.2d 282, 290. This phrase means that no person shall be deprived of life, liberty, property or of any right granted him by Statute.

That's what this court did in Petitioner's Writ of habeas Corpus - PCR - denied him his due process of Law by not allowing Petitioner his right to give Testimony at the hearing on July 16th 2012. It is further stated that there is NO Bar on an Actual Innocence Claim. Petitioner can show a miscarriage of justice by allowing him to have the DNA Testing done pursuant to "NEW PCR/STR Test," that shall exonerate MORAGA. The State wants this court to believe that it did not overlook or misapprehend any material issue of fact or law; therefore, there is no reason for the court to reconsider its denial of Petitioner's late successive petition. Sec: NRAP 40(a)(1). For the record: under NEVADA Law provides that Petitioner can pursue DNA Testing under Statute of habeas Corpus procedures. Pursuant to Mitchell v. State, 149 P.3d 33 (2006) States: "Even when a petitioner cannot show good cause sufficient to overcome the Bar to an untimely or successive

(4)

Petition, habeas relief may still be granted if the petitioner can demonstrate that a Constitutional Violation has probably resulted in the conviction of one who is Actual Innocent. Petitioner MORAGA is in FACT Actual Innocent and the New PCR/STR DNA Test Shall exonerate me.

WHEREFORE Petitioner request this Court to grant him relief and re-set a hearing on petitioner's writ of habeas Corpus (PCR) Dated this 20th day of August 2012.

Submitted by,

Roy D. Moraga

Roy D. MORAGA # 31589

Petitioner IN Pro Se

CERTIFICATE OF SERVICE

The undersigned hereby Certifies that he is a person of Such Age and discretion as to be competent to Serve papers.

that on August 20, 2012, I mailed a copy of the foregoing by personally mailing said copies to:  
Steven B. Wolfson,  
Clark County District Attorney  
200 Lewis Ave.  
LAS VEGAS, NV 89155-2212

Steven D. Grierson,  
Clerk of the Court  
200 Lewis Ave. 3rd FL.  
LAS VEGAS, NV 89155-1160

Roy D. Moraga  
Roy D. MORAGA #31584

Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89919  
Petitioner - IN Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby ~~certify~~ Affirm that the preceding Reply to State's opposition to petitioner's motion for reconsideration does not contain the Social Security Number of any person.

Dated this 20th day of August 2012.

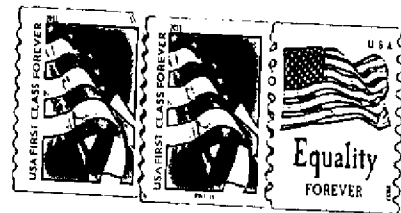
Roy D. Moraga  
Roy D. MORAGA #31584

(6)

Request to File

EXhibit 1

Roy D. MORAÑA #31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89419



CASE NO. 10 1124  
Dept. No. 5

DISTRICT COURT  
CLARK COUNTY, NEVADA  
ROY D. MORAGA,  
Petitioner

FILED

AUG 28 2012

*John J. Blum*  
CLERK OF COURT

-VS-  
ROBERT LEGRAND, Warden  
Respondent:

REQUEST TO FILE  
EXHIBIT 1

Petitioner, Roy D. MORAGA, in pro se, Submits his exhibit (1) in support of the habeas Corpus proceedings herein, to be made part of the records, that the Clerk of the court failed to file.

Dated this 20th day of August 2012.

Submitted by

Roy D. Moraga

Roy D. MORAGA # 31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89419

89C092174  
REQT  
Request  
1945236



14

## CERTIFICATE OF SERVICE

The undersigned hereby Certifies that he is a person of Such age AND discretion as to be competent to serve papers.

that on August 20, 2012, he Served a Copy of the foregoing by personally mailing said Copies to:

Steven B. Wolfson,  
Clark County District Attorney  
200 Lewis Ave.  
LAS VEGAS, NV 89155-2212

Steven D. Grierson,  
Clerk of the Court  
200 Lewis Ave. 3rd FL.  
LAS VEGAS, NEV. 89155-1160

Roy D. Moraga  
Roy D. MORAGA #31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89419  
Petitioner IN Pro Se

AFFIRMATION PURSUANT TO NRS 239 B. 030

The undersigned does hereby Affirm that the  
Preceding Exhibit (L) does not contain the  
Social Security Number of any person.  
Dated this 20th day of August 2012.

Roy D. Moraga

Roy D. MORAGA #31584  
Petitioner IN Pro Se



EXhibit 1

MOTN  
ROY D. MORAGA # 31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev 89419

DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY D. MORAGA,

Petitioner,

CASE NO. CO 92179

Dept. No. 5

- vs -

ROBERT LEGRAND, Warden, Date of hearing:

Respondent(s). Time of hearing:

MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING

Comes Now the Petitioner, Roy D. MORAGA, Pro Per, AND Pursuant to Gebbers v. STATE, 118 Nev. 500, 50 P.3d 1092 (Nev. 2002); United States v. GAGNON, 470 U.S. 522, 526-27 (1985); and the CONFRONTATION AND DUE PROCESS CLAUSES of the NEVADA CONSTITUTION (Art. I, § 8) AND the U. S. CONSTITUTION (5th 6th & 14th Amendments), hereby MOVES this Honorable Court for an Order to Transport and Produce Petitioner for the July 16th 2012 hearing on his Petition for writ of habeas Corpus (Post-Conviction Relief).

This motion is made and based upon the papers and pleadings on file in this case and Attached Points and Authorities.

Dated this 3rd day of June 2012.

Respectfully Submitted,

Roy D. Moraga

ROY D. MORAGA # 31584

Exhibit (1) Petitioner IN Pro Per

RECEIVED  
JUN 08 2012  
CLERK OF THE COURT

### POINTS AND AUTHORITIES

ON December 8, 2010, Petitioner's writ of habeas Corpus was filed in Lovelock's Pershing County. At the court's order the case was ordered back to Clark County, ON April 29, 2011 the Clark County's District Court Accepted Jurisdiction of this case.

For the reasons set forth below, Petitioner Asserts his right to be personally Present at the July 16, 2012 hearing on his petition, and hereby moves the court for an Order to Transport and produce petitioner for the hearing.

### ARGUMENT

I. The Absent of Petitioner at the Hearing would Violate his Rights under the Confrontation AND Due Process Clauses of the U.S. Constitution (5th, 6th & 14th Amendments)

The Nevada Supreme Court held that: (1) the presence of the petitioner for habeas Corpus relief is required, by Statute, at any evidentiary hearing conducted on the merits of the claims asserted in the petition, and (2) the failure of the Trial Court to provide for the presence of the petitioners at the evidentiary hearing was not harmless.

IN Giebers v. State, 118 Nev. 500, 50 P.3d 1092 and IN Kirksey v. State, 923 P.2d 1102 (NEV. 1996), they wrote:

(2)

"The right to be present is rooted in the Confrontation Clause, AND the Due Process Clause of the Federal Constitution, The Confrontation Aspect Arises when the proceeding involves the presentation of evidence, UNITED STATES V. GAGNON (Citations omitted). The Due Process Aspect has been recognized only to the extent that a fair and just hearing would be Thwarted by the defendant's Absence. Id."

### DISCUSSION

[1] NRS 34.770(1) Provides that, in Post-Conviction habeas corpus proceedings, the Judge "shall determine whether an evidentiary hearing is required." UNDER NRS 34.770(3); [i]f the judge... determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing." Such a writ "does not entitle a Petitioner to be discharged from the custody or restraint under which he is held... [but] requires only the production of the petitioner to determine the legality of his custody or restraint." [FN4] "The writ MUST be directed to the person who has the petitioner in custody... COMMANDING him to have the body of the petitioner produced before the district court..." [FNS] A Petitioner "brought before the Judge on the return of the writ may deny or controvert any of the material facts or matters set forth in the return or answer, deny the sufficiency thereof, or allege any "504 FACT to show either that his imprisonment or detention is

(3)

UNLAWFUL or that he is entitled to his discharge."

[FN6] Thus, it is clear that the provisions of NRS Chapter 34 require the presence of the petitioner at any evidentiary hearing conducted on the merits of the claims asserted in a Post-Conviction petition for a writ of habeas corpus. Such an evidentiary hearing conducted without first providing the petitioner an opportunity to be present violates the provisions set forth in NRS Chapter 34.

FN4. NRS 34.390(2).

FAL5. NRS 34.400; See also NRS 34.440 (upon service of the writ, the person to whom the writ is directed shall bring the body of the party in custody according to the command of the writ). Kicksey, 923 P.2d at 1115. See also Rule 44 of the Supreme Court Rules ("Nothing in these rules shall be so construed as to prevent any person from appearing in his own behalf in any court in this state except the Supreme Court.")

State and Federal Constitutional guarantees of due process of law require at a minimum notice of intended judicial action and an adequate opportunity to be heard before judicial action can be taken. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 377 (1971) ("Absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.")

(4)

GRANNIS V. ORDEAN, 234 U.S. 385, 394 (1914)

("the fundamental requisite of due process of law is the opportunity to be heard.");

Brownish v. Dixon, 954 P.2d 741, 743 (Nev. 1998),

Entering an Order without complying with minimum standards of notice and an opportunity to be heard is beyond the court's jurisdiction. E.g., Sheriff

Nye County v. Davis, 787 P.2d 1214 (Nev. 1990);

Lane v. District Court, 760 P.2d 1245 (Nev. 1988).

Failure to produce petitioner at the hearing to argue his motion would deny him the opportunity to rebut whatever the state may make, and would deny him the opportunity to offer his own testimony in support of his petition. Petitioner's absence at the hearing would thus violate his right under the due process and confrontation clause of the Nevada Constitution (Art. 1 § 8), and the U.S. Constitution (5th, 6th & 14th Amendments).

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(5.)

WHEREFORE, based upon the foregoing, Petitioner prays this Honorable Court For AN Order to transport and produce him for the July 16, 2012 hearing on his Petition For writ of Habeas Corpus (Post-Conviction Relief).

Dated this 3rd day of June 2012.

Respectfully Submitted,

Roy D. Moraga

Roy D. MORAGA # 31584

Petitioner In Pro Per

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on June 4th 2012, he served a copy of the foregoing by personally mailing said copies to:

STEVEN B. WOLFSON,  
Clark County District Attorney  
200 Lewis Ave  
LAS VEGAS, NEV. 89155-2212

STEVEN D. GRICERSON,  
Clerk of the Court  
200 Lewis Ave. 3rd Floor  
LAS VEGAS, NEV. 89155-1160

Roy D. Moraga

Roy D. MORAGA

(See Attached proposed Order to Transport)  
(6)

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby Affirm that the Preeding  
Motion and Order to Transport and Produce inmate  
For hearing does NOT contain the Social Security  
Number of ANY person

Dated this 4th day of June 2012.

Roy D. Moraga  
Roy D. MORAGA # 31584  
Petitioner IN Pro Per



DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY D. MORATA,  
Petitioner.

-VS-

ROBERT LEGRAND, Warden  
Respondent

NOTICE OF MOTION

TO: ROBERT LEGRAND, Warden and Respondent(S)  
You and each of you will take notice that Petitioner  
in the Above-entitled Action will bring his Motion  
For Reconsideration before the Above-entitled  
Court and Department, for hearing the same on  
the        day of       , 20  , at               M.,  
or as soon thereafter as the Court may deem just and  
proper.

Dated this 27th day of July 2012.

Roy D. Morata

ROY D. MORATA\*31584

Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nevada 89419  
Petitioner In Pro Per

CERTIFICATION OF SERVICE BY MAIL

I do certify that I mailed a True and Correct Copy of the foregoing Notice of Motion to the below Addressee(s) on this 27th day of July, 2012, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCF 5(b):

Steve B. Wolfson, Esq.  
Clark County District Attorney  
200 Lewis Ave.  
Las Vegas, Nev. 89155-2212

Steven D. Emerson,  
Clerk of the Court  
200 Lewis Ave. 3rd Fl.  
Las Vegas, NV. 89155-1160

Roy D. Moraga 31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89719

Roy D. Moraga  
Roy D. Moraga 31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89719  
Petitioner In Pro Per

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby Affirm that the Preceding Notice of motion does not contain the Social Security Number of any person.

Dated this 22th day of July 2012.

Roy D. Moraga  
Roy D. MORAGA 31584  
Petitioner IN Pro Per

CASE NO. 89C092174  
Dept. NO. VI

FILED 3

SEP 17 2012

DISTRICT COURT  
CLARK COUNTY, NEVADA

*John D. Blum*  
CLERK OF COURT

ROY D. MORAGA,  
Petitioner,

- vs -

ROBERT LEGRAND, Warden,  
Respondent.

89C092174  
NOASC  
Notice of Appeal (criminal)  
1981117



NOTICE OF APPEAL

NOTICE IS GIVEN that Petitioner, Roy D. MORAGA, in Pro se, hereby Appeals to the Nevada Supreme Court the Findings of Fact & Conclusions of Law and Order denying/dismissing Petition for Writ of habeas Corpus, Motion for Reconsideration, which was Filed/entered on the 21st, 22th day of August 2012.

Dated this 10th day of September 2012.

*Roy D. Moraga*

Roy D. MORAGA #31584

Lovelock Correctional Center

1200 Prison Road

Lovelock, Nevada 89419

Petitioner In Pro Se

CLERK OF THE COURT

SEP 17 2012

RECEIVED

CERTIFICATE OF SERVICE

I do certify that I mailed a True and Correct Copy of the Forgoing NOTICE OF APPEAL to the below Address(es) on this 10th day of September 2012, by placing same in the U.S. MAIL via prison law library staff:

Steven D. Grierson,  
County Clerk  
200 Lewis Ave., 3<sup>rd</sup> Floor  
LAS VEGAS, NV 89155-1160

Steven B. Wolfson  
Clark County District Attorney  
200 Lewis Ave.  
LAS VEGAS, NV 89155-2212

Roy J. MORAGA<sup>#</sup> 31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, NEVADA 89419

~~Roy J. Moraga~~  
Roy J. MORAGA<sup>#</sup> 31584  
Lovelock Correctional Center  
1200 Prison Road  
Lovelock, Nev. 89419  
Petitioner IN Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby Affirm that the  
preceding NOTICE OF APPEAL Filed in District  
Court Case NO. 89CO92174 does Not contain  
the Social Security Number of Any Person.  
Dated this 10th day of September, 2012.

Roy D. Moraga

Roy D. MORAGA #31584

Petitioner IN Pro Se

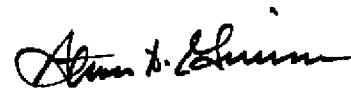


ROY J. MARRA #31584  
 Lovelock Correctional Center  
 1200 Prison Road  
 Lovelock, Nevada 89419

RECEIVED

SEP 10 2012





CLERK OF THE COURT

1 ASTA

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3  
4 **DISTRICT COURT**  
5 **CLARK COUNTY, NEVADA**  
6

7 STATE OF NEVADA,

8 Plaintiff(s),

9 vs.

10 ROY D. MORAGA,

11 Defendant(s).  
12

Case No: 89C092174  
Dept No: VI

13  
14 **CASE APPEAL STATEMENT**  
15

- 16 1. Appellant(s): Roy D. Moraga  
17 2. Judge: Elissa Cadish  
18 3. Appellant(s): Roy D. Moraga

19 Counsel:

20 Roy D. Moraga #31584  
21 1200 Prison Rd.  
22 Lovelock, NV 89419

- 23 4. Respondent: The State of Nevada

24 Counsel:

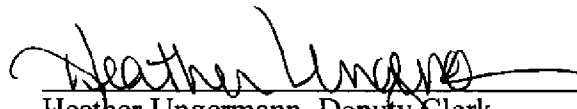
25 Steven B. Wolfson, District Attorney  
26 200 Lewis Ave.  
27 Las Vegas, NV 89101  
28 (702) 671-2700

5. Respondent's Attorney Licensed in Nevada: Yes  
6. Appellant Represented by Appointed Counsel In District Court: Yes

- 1 7. Appellant Represented by Appointed Counsel On Appeal: N/A  
2 8. Appellant Granted Leave to Proceed in Forma Pauperis: Yes, September 9, 1993 &  
3 January 23, 2006  
4 9. Date Commenced in District Court: December 28, 1989  
5 10. Brief Description of the Nature of the Action: Criminal  
6 Type of Judgment or Order Being Appealed: Writ of Habeas Corpus  
7 11. Previous Appeal: Yes  
8 Supreme Court Docket Number(s): 21488, 22901, 29321, 32542, 33099, 42828, 44685,  
9 49049  
10 12. Child Custody or Visitation: N/A  
11

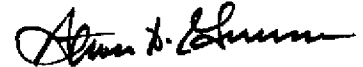
12 Dated This 18 day of September 2012.

13 Steven D. Grierson, Clerk of the Court  
14

15   
16 Heather Ungermann, Deputy Clerk  
17 200 Lewis Ave  
18 PO Box 551601  
19 Las Vegas, Nevada 89155-1601  
20 (702) 671-0512  
21  
22  
23  
24  
25  
26  
27  
28

1 **ORDR**

2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 JAMES R. SWEETIN  
6 Chief Deputy District Attorney  
7 Nevada Bar #005144  
8 200 Lewis Avenue  
9 Las Vegas, NV 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff



CLERK OF THE COURT

7 **DISTRICT COURT**  
8  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,  
11 Plaintiff,

12 -vs-

13 ROY MORAGA,  
14 #0938554

15 Defendant.

Case No. **C-89-092174-1**

Dept No. **VI**

16  
17 **ORDER DENYING DEFENDANT'S**

18 **MOTION TO RECONSIDER**

19  
20 DATE OF HEARING: AUGUST 27, 2012  
21 TIME OF HEARING: 8:30 A.M.

22 THIS MATTER having come on for hearing before the above entitled Court on the  
23 27TH day of August, 2012, the Defendant not being present, IN PROPER PERSON, the  
24 Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through KRISTA  
25 BARRIE, Deputy District Attorney, and the In the absence of the Deft., Court noted there  
26 will not be any argument.

//

//

//


RECEIVED  
SEP 07 2012  
CLERK OF THE COURT

1 Court stated findings noting the Deft. is seeking reconsideration of the ruling of July  
2 16th due to his absence and **ORDERED**, Deft's Pro Se Motion For Reconsideration  
3 DENIED.

4 DATED this 3 day of ~~September~~<sup>October</sup>, 2012.

5  
6   
7 \_\_\_\_\_  
8 DISTRICT JUDGE

9 STEVEN B. WOLFSON  
10 DISTRICT ATTORNEY  
11 Nevada Bar #001565

12  for  
13 KRISTA BARRIE  
14 Deputy District Attorney  
15 Nevada Bar #0010310  
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hjc/SVU

# IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant(s),  
vs.

Case No: C092174  
SC No: 61734

STATE OF NEVADA,  
Respondent(s),

# RECORD ON APPEAL VOLUME 5

ATTORNEY FOR APPELLANT  
ROY D. MORAGA # 31584  
PROPER PERSON  
1200 PRISON RD.  
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT  
STEVEN B. WOLFSON, ESQ.  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NEVADA 89101

I N D E X

<u>VOLUME:</u>	<u>PAGE NUMBER:</u>
1	1 - 220
2	221 - 441
3	442 - 662
4	663 - 882
5	883 - 1101
6	1102 - 1320

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	01/10/2006	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1117 - 1120
3	10/03/1991	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	442 - 442
4	03/05/1996	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	757 - 758
4	02/20/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	702 - 704
4	03/11/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	764 - 766
3	10/03/1991	AFFIDAVIT IN SUPPORT OF OF REQUEST TO PROCEED IN FORMA PAUPERIS	443 - 445
4	02/20/1996	AFFIDAVIT OF DEFENDANT	705 - 706
4	03/11/1996	AFFIDAVIT OF PETITIONER	767 - 768
6	01/10/2006	AFFIDAVIT OF PETITIONER	1121 - 1122
5	04/30/1998	AFFIDAVIT OF ROY D. MORAGA	887 - 888
5	09/27/2004	AFFIDAVIT OF ROY D. MORAGA	1061 - 1062
1	06/13/1990	AMENDED INFORMATION	118 - 121
3	11/13/1991	AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	461 - 463
4	07/31/1992	ANSWER IN OPPOSITION TO MOTION FOR RETURNING SEIZED PROPERTY	670 - 680
4	10/29/1996	CASE APPEAL STATEMENT	859 - 861
5	06/15/1998	CASE APPEAL STATEMENT	910 - 911
5	09/28/1998	CASE APPEAL STATEMENT	947 - 948
5	02/18/2004	CASE APPEAL STATEMENT	1044 - 1045
6	02/10/2005	CASE APPEAL STATEMENT	1102 - 1103
6	03/02/2007	CASE APPEAL STATEMENT	1214 - 1216
6	03/05/2007	CASE APPEAL STATEMENT	1219 - 1220
6	09/18/2012	CASE APPEAL STATEMENT	1317 - 1318

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
7	11/09/2012	CERTIFICATE OF COPY AND TRANSMITTAL OF RECORD	
5	02/25/2002	CERTIFICATE OF INMATE'S INSTITUTIONAL ACCOUNT	968 - 968
5	01/17/1997	CERTIFICATE OF MAILING	886 - 886
4	08/05/1996	CERTIFICATE OF MAILING OF MOTION TO WITHDRAW AS COUNSEL	830 - 830
1	12/28/1989	CRIMINAL BINDOVER	1 - 11
3	01/27/1992	CRIMINAL SETTING SLIP	469 - 469
1	06/27/1990	DESIGNATION OF RECORD ON APPEAL	140 - 141
3	11/13/1991	DESIGNATION OF RECORD ON APPEAL	464 - 465
3	02/13/1992	DESIGNATION OF RECORD ON APPEAL	471 - 471
4	10/07/1996	DESIGNATION OF RECORD ON APPEAL	849 - 850
5	06/13/1998	DESIGNATION OF RECORD ON APPEAL	907 - 908
5	09/22/1998	DESIGNATION OF RECORD ON APPEAL	944 - 945
6	02/10/2005	DESIGNATION OF RECORD ON APPEAL	1104 - 1105
7	11/09/2012	DISTRICT COURT MINUTES	
3	02/20/1992	EX PARTE APPLICATION FOR PREPARATION OF TRANSCRIPTS	472 - 472
5	02/09/2004	EX PARTE MOTION FOR EXCESS FEES	1030 - 1036
4	02/20/1996	EX PARTE MOTION FOR FEES FOR EXPERT SERVICES	707 - 711
5	09/27/2004	EXTRAORDINARY WRIT OF MANDAMUS	1063 - 1069
3	10/03/1991	FINANCIAL CERTIFICATE	446 - 447
6	01/10/2006	FINANCIAL CERTIFICATE	1123 - 1124
6	02/08/2007	FINDING OF FACT AND CONCLUSIONS OF LAW	1201 - 1206
4	09/06/1996	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	833 - 838
6	08/13/2012	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1275 - 1281
1	01/09/1990	INFORMATION	12 - 14
1	03/15/1990	INSTRUCTIONS TO THE JURY	42 - 66
1	07/07/1990	JUDGMENT OF CONVICTION (JURY TRIAL)	146 - 147
1	03/13/1990	JURY LIST	41 - 41



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	06/04/1990	MOTION AND NOTICE OF MOTION TO AMEND INFORMATION	85 - 117
4	02/20/1996	MOTION AND NOTICE OF MOTION TO COMPEL, PRODUCTION OF SEMAN AND BLOOD	712 - 726
1	02/05/1990	MOTION AND NOTICE OF MOTION TO ENDORSE NAMES ON INFORMATION	31 - 34
5	10/18/2004	MOTION AND ORDER FOR FAILURE TO PROSECUTE AND REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT	1075 - 1082
6	02/22/2006	MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING	1169 - 1173
6	03/05/2007	MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL	1221 - 1222
5	06/01/1998	MOTION FOR ENLARGEMENT OF TIME	905 - 906
4	04/11/1996	MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	791 - 794
3	10/03/1991	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	448 - 448
4	02/20/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	727 - 727
4	03/05/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	759 - 759
4	03/11/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	769 - 769
5	02/25/2002	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	969 - 971
6	01/10/2006	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1125 - 1126
4	08/26/1993	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS; MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE JAIL TIME CREDITS AND AFFIDAVIT OF PETITION	683 - 693
6	08/06/2012	MOTION FOR RECONSIDERATION	1257 - 1270
5	12/16/2003	MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	996 - 1006
4	07/21/1992	MOTION FOR RETURNING SEIZED PROPERTY	667 - 669
4	03/11/1996	MOTION FOR RETURNING SEIZED PROPERTY	770 - 773

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
3	01/02/1992	MOTION TO APPOINT COUNSEL FOR APPEAL	466 - 468
5	04/30/1998	MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	889 - 890
5	02/25/2002	MOTION TO PRESERVE EVIDENCE AND ORDER	972 - 980
5	08/06/1998	MOTION TO STRIKE	918 - 924
2	09/26/1991	MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VII	439 - 441
5	10/31/2002	MOTION TO VACATE AND/OR AMEND JUDGMENT	982 - 987
4	04/09/1996	MOTION TO WITHDRAW AS COUNSEL	785 - 788
4	08/02/1996	MOTION TO WITHDRAW AS COUNSEL	826 - 829
5	10/19/2004	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1083 - 1088
6	09/13/2007	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1241 - 1248
4	10/30/1995	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	698 - 701
5	04/30/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	949 - 951
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	952 - 959
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	960 - 967
6	05/02/2005	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	1113 - 1116
3	10/04/1991	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - REMAND	454 - 458
1	06/27/1990	NOTICE OF APPEAL	142 - 143
3	10/30/1991	NOTICE OF APPEAL	460 - 460
4	09/27/1996	NOTICE OF APPEAL	847 - 848
5	06/13/1998	NOTICE OF APPEAL	909 - 909
5	09/22/1998	NOTICE OF APPEAL	946 - 946

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	02/17/2004	NOTICE OF APPEAL	1038 - 1039
6	02/10/2005	NOTICE OF APPEAL	1106 - 1106
6	03/02/2007	NOTICE OF APPEAL	1217 - 1218
6	09/17/2012	NOTICE OF APPEAL	1312 - 1316
6	02/22/2006	NOTICE OF CHANGE OF ADDRESS	1174 - 1174
6	02/13/2007	NOTICE OF ENTRY OF DECISION AND ORDER	1207 - 1213
6	08/21/2012	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1282 - 1289
4	04/17/1996	NOTICE OF ENTRY OF ORDER	796 - 799
4	09/20/1996	NOTICE OF ENTRY OF ORDER	839 - 846
4	10/28/1996	NOTICE OF ENTRY OF ORDER	851 - 858
5	05/29/1998	NOTICE OF ENTRY OF ORDER	901 - 904
5	07/07/1998	NOTICE OF ENTRY OF ORDER	914 - 917
6	04/08/2005	NOTICE OF ENTRY OF ORDER	1109 - 1112
5	02/26/2002	NOTICE OF HEARING - CRIMINAL	981 - 981
3	10/03/1991	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	449 - 453
4	03/05/1996	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	760 - 763
1	06/29/1990	ORDER	144 - 145
1	08/02/1990	ORDER	148 - 149
4	08/17/1992	ORDER	681 - 682
6	03/30/2005	ORDER	1107 - 1108
3	02/10/1992	ORDER APPOINTING COUNSEL	470 - 470
6	03/23/2007	ORDER DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1239 - 1240
5	06/30/1998	ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME	912 - 913
5	01/07/2004	ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1028 - 1029

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	10/05/2012	ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER	1319 - 1320
5	05/28/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY OR IN ALTERNATIVE CORRECT ILLEGAL SENTENCE	899 - 900
5	08/27/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO STRIKE	942 - 943
3	10/23/1991	ORDER FOR APPOINTMENT OF COUNSEL	459 - 459
5	11/21/2002	ORDER FOR APPOINTMENT OF COUNSEL FOR POST- CONVICTION RELIEF	988 - 988
5	02/11/2004	ORDER FOR PAYMENT OF EXCESS FEES	1037 - 1037
6	01/12/2006	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	1162 - 1162
2	09/13/1991	ORDER FOR PRODUCTION OF INMATE	437 - 438
6	04/21/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1186 - 1187
6	05/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1188 - 1189
6	06/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1199 - 1200
4	08/27/1996	ORDER FOR TRANSCRIPTS	832 - 832
6	01/27/2006	ORDER GRANTING DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER DENYING DEFENDANT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL	1167 - 1168
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	473 - 474
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	475 - 476
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	477 - 478
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	479 - 480
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	481 - 482
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	483 - 484
2	01/09/1991	ORDER RELEASING EVIDENCE	435 - 435
1	06/13/1990	ORDER TO AMEND INFORMATION	122 - 122

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	02/15/1990	ORDER TO ENDORSE NAMES ON INFORMATION	39 - 40
4	04/17/1996	ORDER TO WITHDRAW AS ATTORNEY OF RECORD	800 - 801
2	01/09/1991	PETITION FOR RELEASE OF EVIDENCE	436 - 436
4	02/20/1996	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	728 - 748
6	01/10/2006	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1127 - 1161
1	05/16/1990	PRE-SENTENCE INVESTIGATION REPORT (UNFILED) CONFIDENTIAL	75 - 84
1	03/15/1990	PROPOSED VERDICT	71 - 74
3	02/26/1992	RECEIPT OF COPY	485 - 485
3	02/26/1992	RECEIPT OF COPY	486 - 486
3	02/28/1992	RECEIPT OF COPY	487 - 487
3	03/02/1992	RECEIPT OF COPY	488 - 488
3	03/02/1992	RECEIPT OF COPY	489 - 489
4	08/27/1993	RECEIPT OF COPY	694 - 694
5	12/17/2003	RECEIPT OF COPY	1007 - 1007
4	04/09/1996	RECEIPT OF COPY AND CERTIFICATE OF MAILING	789 - 790
4	04/15/1996	RECEIPT OF COPY OF MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	795 - 795
4	08/05/1996	RECEIPT OF COPY OF MOTION TO WITHDRAW AS COUNSEL	831 - 831
5	01/05/2004	REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1023 - 1027
6	08/28/2012	REPLY TO STATE'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION	1290 - 1297
6	05/24/2006	REPLY TO STATE'S RESPONSE AND OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1190 - 1198
5	01/05/2005	REPLY TO STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS AND MOTION TO DISMISS	1099 - 1101

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	01/13/1997	REPORTER'S TRANSCRIPT OF APRIL 17, 1996	862 - 866
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 12, 1996	867 - 871
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 21, 1996	872 - 875
1	01/24/1990	REPORTER'S TRANSCRIPT OF DECEMBER 26, 1989	15 - 30
3	03/04/1992	REPORTER'S TRANSCRIPT OF FEBRUARY 15, 1990	490 - 491
1	02/12/1990	REPORTER'S TRANSCRIPT OF JANUARY 11, 1990	35 - 38
6	03/12/2007	REPORTER'S TRANSCRIPT OF JANUARY 23, 2006	1223 - 1226
5	05/04/2004	REPORTER'S TRANSCRIPT OF JANUARY 5, 2004	1046 - 1052
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 15, 1996	876 - 877
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 19, 1996	878 - 882
1	06/13/1990	REPORTER'S TRANSCRIPT OF JUNE 13, 1990 (UNFILED)	123 - 139
6	03/12/2007	REPORTER'S TRANSCRIPT OF JUNE 26, 2006	1227 - 1233
1	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUED)	150 - 220
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUATION)	221 - 264
3	03/27/1992	REPORTER'S TRANSCRIPT OF MARCH 12, 1990	520 - 657
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 13, 1990	265 - 387
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 15, 1990	388 - 434
5	01/13/1997	REPORTER'S TRANSCRIPT OF MARCH 6, 1996	883 - 885
3	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 7, 1990	658 - 662
4	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 9, 1990	663 - 664
5	05/14/2004	REPORTER'S TRANSCRIPT OF MAY 11, 1998	1057 - 1060
5	05/04/2004	REPORTER'S TRANSCRIPT OF NOVEMBER 13, 2002	1053 - 1056
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 11, 1991	492 - 494
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 14, 1991	495 - 499
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 21, 1991	500 - 511
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 9, 1991	512 - 514
3	03/04/1992	REPORTER'S TRANSCRIPT OF SEPTEMBER 23, 1991	515 - 519

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	05/26/1992	REQUEST FOR RECORDS	665 - 666
6	08/28/2012	REQUEST TO FILE EXHIBIT 1	1298 - 1311
4	09/29/1993	SECOND AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	695 - 697
5	11/27/2002	STATE'S OPPOSITION TO DEFENDANT'S MOTIO TO VACATE AND/OR AMEND JUDGMENT	989 - 993
6	03/16/2007	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1234 - 1238
5	12/26/2003	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1008 - 1022
6	02/27/2006	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR TRANSPORT	1175 - 1178
4	04/01/1996	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SEMAN AND BLOOD, PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO PROCEED IN FORMA PAUPERIS	774 - 784
5	05/08/1998	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	891 - 898
6	08/09/2012	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER	1271 - 1274
6	01/19/2006	STATE'S OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL	1163 - 1166
6	05/16/2012	STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1249 - 1256
6	02/27/2006	STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1179 - 1185
5	08/17/1998	STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE	925 - 941
5	12/15/2004	STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS	1089 - 1098
4	06/27/1996	STATE'S SUPPLEMENTAL OPPOSITION TO PETITIONER'S FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	816 - 822

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	06/11/2003	STIPULATION AND ORDER	994 - 995
4	05/20/1996	SUBSTATION OF ATTORNEYS	802 - 803
4	07/16/1996	SUPPLEMENT REPLY AND OPPOSITION FOR WRIT OF HABEAS CORPUS	823 - 825
5	09/27/2004	SUPPLEMENTAL ACT	1070 - 1074
4	02/20/1996	SUPPLEMENTAL BRIEF AND POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	749 - 756
5	02/17/2004	SUPPLEMENTAL BRIEF TO STATES OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1040 - 1043
4	06/13/1996	SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	804 - 815
1	03/15/1990	VERDICT COUNT I	67 - 67
1	03/15/1990	VERDICT COUNT II	68 - 68
1	03/15/1990	VERDICT COUNT III	69 - 69
1	03/15/1990	VERDICT COUNT VI	70 - 70



98  
ORIGINAL

DISTRICT COURT

FILED IN OPEN COURT

CLARK COUNTY, NEVADA JAN 13 1997 19

LORETTA BOWMAN, CLERK

BY Harry Noble Deputy

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. C092174

DEPT NO. X

DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

WEDNESDAY, MARCH 6, 1996

RECORDER'S TRANSCRIPT RE:

DEFENDANT'S PRO PER PETITION FOR WRIT OF HABEAS CORPUS

DEFENDANT'S PRO PER MOTION FOR FEES  
FOR EXPERT SERVICE

DEFENDANT'S PRO PER MOTION TO COMPEL PRODUCTION  
OF SEMEN/BLOOD

DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS

APPEARANCES:

FOR THE STATE: CRAIG HENDRICKS, DDA

FOR THE DEFENSE: DAVID M. SCHIECK, ESQ.

RECORDER/TRANSCRIBER  
Sharleen Nicholson

CE11

1 LAS VEGAS, NEVADA: WEDNESDAY, MARCH 6, 1996 AT 9 A.M.

2 THE COURT: Next is C92174. State of Nevada v. Roy D.  
3 Moraga. Let the record reflect the absence of the defendant  
4 who I guess is in Nevada State Prison. Mr. Schieck  
5 representing him; Mr. Hendricks for the State.

6 It's my understanding you're requesting a  
7 continuance until the 13th. Is that right, Mr. Hendricks?

8 MR. HENDRICKS: Since I don't have the file that's  
9 probably correct, Your Honor.

10 MR. SCHIECK: Your Honor, if I could. I was just  
11 retained. Mr. Moraga filed all these motions in proper  
12 person. What I would like to do is file a supplemental  
13 pleading setting forth his contentions in a more concise  
14 manner.

15 THE COURT: Sure.

16 MR. SCHIECK: And then the State can respond to that.

17 THE COURT: How much time do you want?

18 MR. SCHIECK: If I could have 30 days to do that because  
19 I need to get all his files from him.

20 THE COURT: Okay. Then I'll -- why don't I give you four  
21 weeks to do that and then give the State two weeks after that  
22 to respond. So we'll have the hearing in -- then if you want  
23 to say anything in court in response to what the State files,  
24 Mr. Schieck, you can do so.

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MR. SCHIECK: Thank you, Your Honor.

THE COURT: We'll have the hearing in about six weeks.

THE CLERK: April 17th, 9 a.m.

THE COURT: Okay. That's it.

MR. SCHIECK: Thank you, Judge.

THE COURT: Alright.

(Whereupon, the Court heard unrelated matters  
and the instant matter was continued to  
April 17, 1996 at 9 a.m.)

\* \* \* \* \*

ATTEST: Full, true and accurate transcript.

  
SHARLEEN NICHOLSON  
Special Recorder

ORIGINAL

DISTRICT COURT

FILED IN OPEN COURT  
CLARK COUNTY, NEVADA JAN 17 1997

19  
LORETTA BOWMAN, CLERK  
BY Nancy Noble Deputy

STATE OF NEVADA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ROY MORAGA, )  
)  
Defendant. )

CASE NO. C92174  
DEPT NO. X  
DOCKET K

CERTIFICATE OF MAILING

The undersigned transcriber/special recorder received the Request for Transcript on January 3, 1997. It contained incorrect information. A new request was received thereafter from the State Public Defender requesting transcription of the following proceedings:

3/6/96	-- 3 pages	4/17/96	-- 5 pages
7/15/96	-- 2 pages	7/19/96	-- 5 pages
8/12/96	-- 5 pages	8/21/96	-- 4 pages

I do hereby certify that a true and accurate copy of the transcripts requested in the above-entitled case were transmitted to the Supreme Court on January 17, 1997.

DATED this 17th day of January, 1997.

Sharleen Nicholson  
SHARLEEN NICHOLSON  
Transcriber/Special Recorder

CEST

Roy D. MORAGA 31584  
P.O. Box 19  
ELY, NEVADA 89301  
In Pro Per

District Court  
Clark County, Nevada

FILED

State of Nevada

APR 30 9 45 AM '98

Plaintiff

CASE NO: 892174

vs.

Dept NO: VICECLERK

Roy D. MORAGA

Docket NO:

Defendant

Affidavit of Roy D. MORAGA

State of Nevada

County of White Pine ss.

Roy D. MORAGA being first duly sworn under penalty of Perjury, deposes and avers that:

1. He is the Defendant in the Above entitled CASE; that he makes this Affidavit in Support of his opposition to defendant's motion to Modify or in the Alternative Correct Illegal Sentence.
2. That on or About June 16, 1990 the Prosecuting Attorney stated to the Judge that because I had three Felony Conviction I had to get life without the Possibility of Parole.
3. Then the judge gave me life without Parole.
4. Then on or About Oct. 1991 I was remanded back, and the Prosecuting Attorney told the judge that he had to give me life without the Possibility of Parole.
5. That there was no hearing of anykind to enter a habitual Criminal Adjudication the Prosecuting Attorney asked for it and the judge gave it to me.

Submitted By;

Subscribed and Sworn to Before me

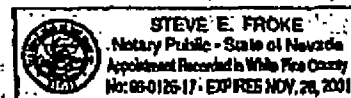
Roy D. Moraga

This 21<sup>st</sup> day of April 1998

Steve E. Froke

Notary Public

in and for the County of White Pine  
State of Nevada



CE91

COUNTY CLERK

APR 30 1998

RECEIVED

Certificate of Mailing

I hereby Certify that on the 23rd day of April 1998, I deposited a copy of the above and foregoing in the United States mail, Elly, Nevada White Pine County, Nevada, Addressed as follows:

Loretta Bowman  
County Clerk  
P.O. Box 551601  
Clark County Courthouse  
200 S. Third Street  
Las Vegas Nevada 89155-1601

Office of The District Attorney  
200 S. Third Street  
P.O. Box 552212  
Las Vegas, Nevada 89155-2211

Roy D. Moraga  
Roy D. MORAGA  
#31584  
P.O. Box 1759  
Elly, Nevada 89301

Roy D. MORAGA #31584  
P.O. Box 1787  
Elko, Nevada 89301  
In Pro Per

District Court  
Clark County, Nevada

FILED

APR 30 9 45 AM '98

State of Nevada

*Little D...*

Plaintiff

CASE NO: C92179

vs

Dept NO: VIII

Roy D. MORAGA

Docket NO:

Defendant

5-11-98

Motion to Modify or in The  
Alternative Correct Illegal Sentence

Comes now Roy D. MORAGA, in Propria Persona,  
and Respectfully Moves this Honorable Court for an  
Order to Modify or in The Alternative Correct Illegal  
Sentence.

This Motion is made and based upon NRS 176.  
555 and Supported by the Following Points  
and Authorities, and Attached Affidavit.

Dated This 23rd day of April 1998.

Respectfully Submitted  
Roy D. Moraga

COUNTY CLERK

APR 30 1998

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CE11

## Points AND Authorities

N.R.S. 176.555 Correction of illegal Sentence.  
Illegal Sentence may be Corrected at Any time.

(Added to N.R.S. by 1967, 1443)

Moreover, it may be an Abuse of discretion for the Court to enter a habitual Criminal Adjudication when the Convictions Used to Support the Adjudication are Nonviolent and remote in time.

Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990).

N.R.S. 207.010, the operative part of the Statute,

"Every Person Convicted in this State of any Crime, of any Felony, who has previously been three times Convicted . . ."

The way I read it, it Says " . . . Shall be Punished by imprisonment in the State Prison for life with or without the Possibility of Parole " . . . Clark v. State, N.R.S. 207.010(4) (Emphasis Added.)

It appears likely, or at least Strongly Possible, that the trial Court thought that once three Convictions were established, Clark "Shall be Punished," and that the only discretion Allowable was between life with the Possibility of Parole or life without the Possibility of Parole.<sup>3</sup> As Noted Above, however, it was incumbent upon the trial Court to weigh properly whether the habitual Criminality Court should have been dismissed Pursuant to the discretion Conferred by N.R.S. 207.010(4), based upon what looks Very much like a Misunderstanding on the Part of the trial judge, we have decided to send this case back for resentencing, Clark v. State, 851 P.2d 426 (Nev 1993)



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**ORIGINAL**

9

1 **OPPS**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

FILED

MAY 8 2 35 PM '98

*For the Defendant*

DISTRICT COURT  
CLARK COUNTY, NEVADA

CLERK

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 ROY D. MORAGA,  
12 #0938554

13 Defendant.

Case No. C92174  
Dept. No. VIII  
Docket M

14  
15 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO MODIFY  
16 OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE

17 DATE OF HEARING: 05/11/98  
18 TIME OF HEARING: 9:00 A.M.

19 COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through  
20 VICKI J. MONROE, Chief Deputy District Attorney, and files this State's Opposition to  
21 Defendant's Motion to Modify or in the Alternative Correct Illegal Sentence.

22 ///

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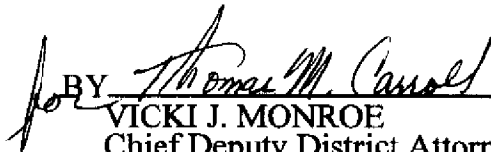
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1 This opposition is made and based upon all the papers and pleadings on file herein, the  
2 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
3 deemed necessary by this Honorable Court.

4 DATED this 8<sup>th</sup> day of May, 1998.

5 Respectfully submitted,

6 STEWART L. BELL  
7 DISTRICT ATTORNEY  
8 Nevada Bar #000477

9 BY   
10 VICKI J. MONROE  
11 Chief Deputy District Attorney  
12 Nevada Bar #003776

13 **STATEMENT OF FACTS**

14 On December 5, 1989, between 1:30 a.m. and 5:30 a.m., Defendant entered his victim's  
15 (a forty-six year old female) residence and stole a Seiko watch, \$25.00 from the living room, an  
16 unknown amount of U.S. currency from the bedroom dresser, and a key to the apartment. The  
17 Defendant then left. The victim returned at 7:30 a.m. and discovered the items were missing.  
18 She contacted police and submitted a report.

19 At approximately 12:00 p.m. the same day, the Defendant awakened the victim by  
20 knocking on her front door. She answered the door and told the Defendant to leave. Two hours  
21 later, the victim was awakened by a noise and found the Defendant standing outside of her  
22 bedroom. She screamed for help and the Defendant covered her mouth with his hand and threw  
23 her down on the bed. They struggled and the victim was able to free herself. However, the  
24 Defendant again restrained her and threw her down the stairs. He then forcibly inserted his penis  
25 into her vagina, instructed her to shower, and then forcibly inserted his penis into her vagina  
26 again. Thereafter, the Defendant left the residence. On his way out, he bragged about what he  
27 had just done to a worker at the apartment complex. The victim immediately called for help.  
28 Police found and detained the Defendant at 2:15 p.m. that day. Subsequently, the victim  
positively identified him as the man who broke into her apartment and raped her. Police arrested

1 the Defendant and transported him to the Clark County Detention Center. Thereafter, medical  
2 evidence revealed the presence of semen in the victim's vagina.

3 During his interview, on May 9, 1990, at the Clark County Detention Center, the  
4 Defendant stated that he had done nothing wrong, the victim lied, and that he saw nothing wrong  
5 with forcing women to have sexual relations with him. He added, "I just roll over and do." He  
6 also acknowledged that he was a member of the Mexican Mafia gang. At trial, the Defendant  
7 pled not guilty to two counts of Burglary and two counts of Sexual Assault and offered a defense  
8 of consensual sex. The jury found the Defendant guilty of all counts.

### 9 STATEMENT OF THE CASE

10 On December 5, 1989, police arrested the Defendant for the crimes of Burglary and  
11 Sexual Assault. The Defendant pled not guilty to two counts of Burglary and two counts of  
12 Sexual Assault and a trial was held. On March 15, 1990, the jury returned a verdict of guilty and  
13 on June 30, 1990, the court adjudicated Defendant a habitual offender and sentenced him to life  
14 in prison without the possibility of parole. The Defendant appealed his conviction to the  
15 Supreme Court of Nevada and his appeal was denied on August 27, 1991.

16 The Court also remanded the case to district court for resentencing because the Defendant  
17 had received an erroneous sentence. The Supreme Court stated that the Defendant was  
18 convicted of four separate offenses but only received a single sentence. The Court reasoned that  
19 although the district court had discretion to dismiss a count of habitual criminality, it did not  
20 have discretion to impose one sentence for multiple primary offenses. On October 21, 1991, the  
21 court resentenced Defendant as follows: Count I - ten years in the Nevada Department of  
22 Prisons; Count II - ten years in the Nevada Department of Prisons, sentence to run consecutive  
23 to Count I; Count III - life in the Nevada Department of Prisons with the possibility of parole  
24 after Defendant has actually served five years, sentence to run consecutive to Count II; Count  
25 IV - that on a motion by the State and granted by the Court to amend the Information to allege  
26 Defendant be treated as a Habitual Criminal pursuant to NRS 207.010(2), that he be sentenced

27 ///

28 ///

1 to life in the Nevada Department of Prisons without the possibility of parole, sentence to run  
2 consecutive to Count III. The second amended judgment of conviction was filed on September  
3 29, 1993.

4 The Defendant appealed the second sentencing, specifically contesting the validity  
5 of the judgment of conviction used to adjudicate him a habitual criminal. The Supreme Court  
6 of Nevada denied Defendant's second appeal on October 4, 1995.

7 Thereafter, the Defendant submitted a Petition in Support of Writ of Habeas Corpus. On  
8 July 19, 1996, the Court denied Defendant's petition. On April 30, 1998, Defendant filed a  
9 Motion to Modify or in the Alternative Correct Illegal Sentence in proper person.

#### 10 **ARGUMENT**

#### 11 **DEFENDANT MAY NOT MODIFY OR CORRECT HIS SENTENCE AS** 12 **HE DID NOT RECEIVE AN ILLEGAL SENTENCE.**

13 The Defendant argues that the court may have abused its discretion in adjudicating him  
14 a habitual offender if his prior convictions were non-violent and remote in time. First of all,  
15 Defendant fails to cite any authority for which this argument relies on. (Defendant's Motion,  
16 p. 2). Additionally, Defendant's criminal history reveals that on March 14, 1973, he was  
17 convicted of felony Burglary. On August 13, 1976, he was convicted of felony Aggravated  
18 Assault. On January 1, 1983, he was convicted of felony Attempt Aggravated Assault. On  
19 January 16, 1988, he was convicted again of felony Burglary.

20 NRS 207.010 provides in pertinent part:

21 Unless the person is prosecuted pursuant to NRS 207.012 or  
22 207.014, a person convicted in this state of (b) any felony, who has  
23 previously been three times convicted, whether in this state or  
24 elsewhere, of any crime which under the laws of the situs of the  
crime or of this state would amount to a felony.....is a habitual  
criminal and shall be punished for a category A felony by  
imprisonment in the state prison:

- 25 (1) For life without the possibility of parole;  
26 (2) For life with the possibility of parole, with eligibility for parole  
beginning when a minimum of 10 years has been served ; or  
27 (3) For a definite term of twenty-five years, with eligibility for  
parole beginning when a minimum of 10 years has been served.

28 ///

1 Clearly, The Defendant earned his status as a habitual offender. An examination of his  
2 criminal record indicates that he had four prior felony convictions. As such, the Defendant is  
3 eligible for habitual criminal status under the statute. Additionally, felony Burglary and Assault  
4 can hardly be considered non-violent crimes. In fact, the Defendant's commission of a burglary  
5 in the instant case resulted in the repeated rape of a young woman. Hence, the Defendant's  
6 argument is seriously without merit.

7 The Supreme Court of Nevada has held that a motion to modify a sentence is limited in  
8 scope to sentences based on mistaken assumptions about a defendant's criminal record which  
9 work to the defendant's extreme detriment. Edwards v. State, 112 Nev. 704, 918 P.2d 321  
10 (1996). See also State v. District Court, 100 Nev. 90, 677 P.2d 1044 (1984); The Pre-Sentence  
11 Report submitted by the Department of Parole and Probation accurately reflects Defendant's  
12 prior criminal record. Thus, the Defendant's sentence was not predicated upon any *mistaken*  
13 assumption regarding his criminal record. In fact, the Defendant does not contest this.  
14 Consequently, there exists no legal ground by which the Defendant may modify his sentence.

15 Moreover, the court is without jurisdiction to modify sentence if a mistake or false  
16 assumption did not contribute to the Defendant's sentence. The Supreme Court of Nevada ruled  
17 that:

18 If a sentencing court pronounces sentence within statutory limits,  
19 the court will have jurisdiction to modify, suspend, or other wise  
20 correct that sentence IF it is based upon materially untrue  
assumptions or mistakes which work to the extreme detriment of the  
defendant.

21 State v. District Court, 100 Nev. 90, 677 P.2d 1044 (1984). As previously illustrated, the  
22 Defendant's sentence was not based upon any untrue assumption or mistake regarding his  
23 criminal record. Additionally, the Defendant even admits to the events that unfolded regarding  
24 entering his victim's home and engaging in sexual intercourse with her. (3 ROA 550). Because  
25 Defendant's sentence was not based on erroneous information, the court lacks jurisdiction to  
26 modify sentence.

27 The Supreme Court of Nevada also ruled that issues concerning the validity of a  
28 conviction or sentence must be raised in habeas proceedings. State v. Edwards, 112 Nev. 704,

1 918 P.2d 321, 324 (1996). The Court adopted the reasoning in State v. Meier, 440 N.W.2d 700,  
2 703 (N.D. 1989) stating that:

3 We have observed that defendants are increasingly filing in district  
4 court documents entitled "motion to correct illegal sentence" or  
5 "motion to modify sentence" to challenge the validity of their  
6 convictions and sentences in violation of the exclusive remedy  
7 provision detailed in NRS 34.724(2)(b), in an attempt to circumvent  
8 the procedural bars governing post-conviction petitions for habeas  
relief under NRS chapter 34. We have also observed that the  
district courts are often addressing the merits of issues regarding the  
validity of convictions or sentences when such issues are presented  
in motions to modify or correct allegedly illegal sentences without  
regard for the procedural bars the legislature has established.

9 Id. Most, importantly, the Court ruled that if a motion to correct an illegal sentence or to modify  
10 a sentence raises issues outside of the very narrow scope of the inherent authority recognized in  
11 this Opinion, the motion should summarily be denied. Id. In the case at bar, the Defendant  
12 previously submitted a Petition for Writ of Habeas Corpus which was denied on July 19, 1996.  
13 He cannot couch his arguments in a Motion to Modify or Correct Illegal Sentence to achieve  
14 now what he could not achieve before. Additionally, the Defendant already argued in one of his  
15 two appeals that the State failed to produce three valid prior felony convictions by which he  
16 could be considered a habitual offender. However, the Defendant lost this argument and both  
17 appeals were dismissed. To conclude, because the Defendant may not use the vehicle of a  
18 motion to supplement a habeas petition, his motion must therefore be denied. Even assuming  
19 arguendo that his motion is properly submitted, the Defendant's case fails on the merits. The  
20 court's classification of the Defendant as a habitual offender falls well within the parameters of  
21 NRS 207.010, as previously demonstrated. Thus, Defendant's sentence was correctly and justly  
22 imposed in accordance with the laws of Nevada.

23 Furthermore, the State also submits that the Defendant's motion should not be reviewed  
24 on the merits based on the Doctrine of the Law of the Case. The Supreme Court of Nevada  
25 applied the doctrine in Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), whereby the defendant  
26 claimed on appeal that he entered into an involuntary plea. However, the same claim had  
27 previously been denied on a petition for post-conviction relief. The Court held that the first  
28 ruling became the law of case and the defendant could not later revive the issue. Additionally,

1 in Darnell v. State, 98 Nev. 518, 654 P.2d 1009 (1982), the Court held that the law of the first  
2 appeal is the law of the case on all subsequent appeals in which the facts are substantially the  
3 same. Also, in Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990), the defendant challenged  
4 a death penalty sentence pursuant to a petition for post-conviction relief. The Court noted that  
5 the same issue had been raised on direct appeal and in citing Hall, held that the prior ruling  
6 represents the law of the case and will not be disturbed. Id. at 841, 801 P.2d at 1389. Most  
7 recently, in Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992), the defendant renewed an  
8 argument on appeal that was also previously raised and denied in a petition for post-conviction  
9 relief. The Supreme Court would not address the issue again because it previously rejected  
10 defendant's argument as meritless.

11 The foregoing authority controls the instant case. The Defendant contested the validity  
12 of his habitual offender status on appeal subsequent to his second sentencing. However, the  
13 Supreme Court denied his appeal. Thus, the Court's ruling became the law of the case and the  
14 Defendant cannot revive the issue under the guise of a motion to modify or correct illegal  
15 sentence. Consequently, his motion is without merit and a denial thereof is warranted.

#### 16 **CONCLUSION**

17 The Defendant's motion to modify or correct illegal sentence lacks legal foundation and  
18 is seriously without merit. The Defendant contests the validity of the habitual offender status  
19 relied upon during sentencing. However, an examination of the Defendant's criminal record  
20 reveals that he satisfies the requisite criteria for habitual criminal status pursuant to NRS  
21 207.012. Thus, the Defendant received an appropriate sentence within the realm of the statute.  
22 Additionally, the Defendant has previously exhausted this argument in the form of appeals and  
23 a petition for post-conviction relief, which were all denied. The Defendant now submits a

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1 motion in another attempt to contest his sentence. His argument is belied by the record and has  
2 already been ruled upon numerous times. As such, the State respectfully requests denial of  
3 Defendant's motion.

4 DATED this 8<sup>th</sup> day of May, 1998.

5 Respectfully submitted,

6 STEWART L. BELL  
7 DISTRICT ATTORNEY  
8 Nevada Bar #000477

9 BY Thomas M. Carroll

10 VICKI J. MONROE  
11 Chief Deputy District Attorney  
12 Nevada Bar #003776

13 CERTIFICATE OF MAILING

14 I hereby certify that service of the above and foregoing was made this 5<sup>th</sup> Day of  
15 May, 1998, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

16 ROY D. MORAGA BAC# 31584  
17 ELY STATE PRISON  
18 PO BOX 1989  
19 ELY, NV 89301

20 BY Shelton

21 Secretary for the District Attorney's Office  
22  
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May 28 9 48 AM '98

*Handwritten signature*

1 **ORDR**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 ROY D. MORAGA,  
12 #0938554

13 Defendant.

Case No. C92174  
Dept No. VIII  
Docket M

15 ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY  
16 OR IN THE ALTERNATIVE TO CORRECT ILLEGAL SENTENCE

17 DATE OF HEARING: 05/11/98  
18 TIME OF HEARING: 9:00 A.M.

19 THIS MATTER having come on for hearing before the above entitled Court on the 11th  
20 day of May, 1998, the Defendant not being present, and not represented by counsel, the Plaintiff  
21 being represented by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS,  
22 Deputy District Attorney, and the Court having heard the arguments of counsel and good cause  
23 appearing therefor,

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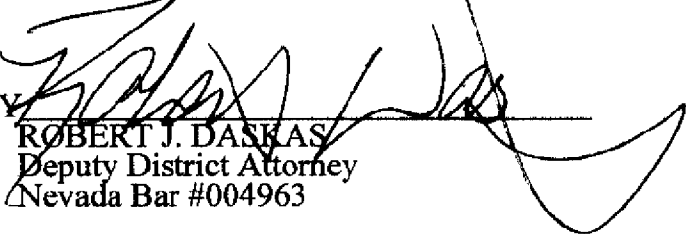
*Handwritten initials*

1 IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Modify or in the  
2 Alternative Correct Illegal Sentence, shall be, and it is denied.

3 DATED this 20 day of May, 1998.

4  
5   
6 DISTRICT JUDGE

7  
8 STEWART L. BELL  
9 DISTRICT ATTORNEY  
10 Nevada Bar #000477

11 BY   
12 ROBERT J. DASKAS  
13 Deputy District Attorney  
14 Nevada Bar #004963  
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*Lucretia L. Looman*

CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

1 NEOJ  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 ROY D. MORAGA  
13 #0938554

14 Defendant.

Case No. C92174  
Dept. No. VIII  
Docket M

15 NOTICE OF ENTRY OF ORDER

16 TO: ROY D. MORAGA, Defendant in proper person

17 YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled  
18 action, a copy of which is attached hereto.

19 DATED this 29th day of May, 1998.

20 STEWART L. BELL  
21 DISTRICT ATTORNEY  
22 Nevada Bar #000477

23 BY

*Thomas J. Moreo*

24 THOMAS J. MOREO  
25 Chief Deputy District Attorney  
26 Nevada Bar #002415  
27  
28

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1 CERTIFICATE OF MAILING

2 I hereby certify that service of the NOTICE OF ENTRY OF ORDER was made  
3 the 28<sup>th</sup> day of May, 1998, by depositing a copy in the U.S. Mail, postage prepaid, addressed  
4 to:

5 ROY D. MORAGA #31584  
6 ELY STATE PRISON  
7 PO BOX 1989  
8 ELY, NV 89301

9 BY   
10 Secretary for the District Attorney's Office  
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*Handwritten signature*

**ORDR**  
STEWART L. BELL  
DISTRICT ATTORNEY  
Nevada Bar #000477  
200 S. Third Street  
Las Vegas, Nevada 89155  
(702) 455-4711  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,

-vs-

ROY D. MORAGA,  
#0938554

Defendant.

Case No. C92174  
Dept No. VIII  
Docket M

ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY  
OR IN THE ALTERNATIVE TO CORRECT ILLEGAL SENTENCE

DATE OF HEARING: 05/11/98  
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 11th day of May, 1998, the Defendant not being present, and not represented by counsel, the Plaintiff being represented by STEWART L. BELL, District Attorney, through ROBERT J. DASKAS, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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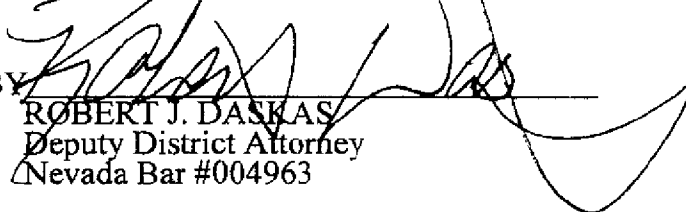
//

1 IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Modify or in the  
2 Alternative Correct Illegal Sentence, shall be, and it is denied.

3 DATED this 20 day of May, 1998.

4  
5   
6 DISTRICT JUDGE

7  
8 STEWART L. BELL  
9 DISTRICT ATTORNEY  
10 Nevada Bar #000477

11 BY   
12 ROBERT J. DASKAS  
13 Deputy District Attorney  
14 Nevada Bar #004963  
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ROY D. MORAGA 31584  
PO Box 17  
ELY NEVADA 89301  
IN PRO PER

District Court **FILED**  
Clark County, Nevada

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ROY D. MORAGA

Defendant

Letitia D. ...

CASE NO. C92174

vs

Dept NO: XIII

The State of Nevada

Docket NO: M

Plaintiff

Motion For Enlargement of Time

NOW Comes Roy D. MORAGA, before this honorable Court and moves for an Enlargement of Time.

In the above entitled case to response to the States Opposition to Defendant's Motion to Modify or in the Alternative Correct Illegal Sentence.

Defendant, AN LAYMAN AT LAW request AN enlargement of time of 30 days to Allow time to get Access to the LAW Library, by Placing request one week before in Order to receive access Monday, Tuesday and Wednesdays (AM ONLY).

Wherefore Defendant Prays that the Court grant this motion.

Defendant, Pursuant to NRS 208.165 under Penalties of Perjury, deposes that the Foregoing of this Motion are true and correct to the best of his knowledge.

Roy D. Moraga  
Roy D. MORAGA  
P.O. Box 1989  
ELY, NEVADA 89301

RECEIVED

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COUNTY CLERK

Certificate of Mailing

I hereby certify that service of the above  
and foregoing was made this 18th day of may  
1998, by depositing a copy in the Ely State Prison  
mail addressed to:

Loretta Bowman  
County Clerk  
Clark County Courthouse  
P.O. Box 551601  
200 S. Third Street  
Las Vegas, Nevada 89155-1601

Office of the District Attorney  
200 S. Third Street  
P.O. Box 552212  
Las Vegas Nevada 89155-2211

Roy D. Moraga  
Roy D. MORAGA  
#31584  
P.O. Box 1987  
Ely, Nevada 89301



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DISTRICT COURT **FILED**

CLARK COUNTY, NEVADA **JUN 13 10 50 AM '98**

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Roy D. MORAZA,

Petitioner,

vs.

The State of Nevada

Respondent.

Lonetta D. Brown  
CLERK

CASE NO. C92174

DEPT. NO. VIII

DOCKET NO. M

DESIGNATION OF RECORD ON APPEAL

COMES NOW, Roy D. MORAZA, Petitioner/Appellant  
in the above entitled matter and designates the following as the  
Record on Appeal.

Each and every Document, Return, Pleading and Paper  
heretofore filed with the Clerk of the Court in Case Number  
C92174, Department Number VIII, on Docket Number M.

DATED this 9th day of June, 1998.

Roy D. Moraza  
Roy D. Moraza  
Petitioner/Appellant  
Ely State Prison  
P.O. BOX 1989  
Ely, Nevada 89301

COUNTY CLERK

JUN 13 1998

///  
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///

CERTIFICATE OF SERVICE

I, Roy D MORABA, hereby certify that I am the  
Petitioner/Appellant in the above entitled matter, and that on the  
9th day of JUNE, 1998, I served a true and correct copy of  
the foregoing NOTICE OF APPEAL and DESIGNATION OF RECORD ON APPEAL  
by mailing same to:

Nevada State Supreme Court  
Supreme Court Building  
Capitol Complex  
Carson City NV 89710

Clerk, of the District Court  
Eighth Judicial District Court  
200 South Third Street  
Las Vegas NV 89101

District Attorneys' Office  
Clark County Courthouse  
200 South Third Street  
Las Vegas NV 89101

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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JUN 13 10 56 AM '98

Roy D. MORAGA,

Petitioner,

vs.

The State of Nevada

Respondent.

Loretta Sumner

CLERK

CASE NO.

C92124

DEPT. NO.

VIII

DOCKET NO.

14

NOTICE OF APPEAL

Notice is hereby given that, Roy D. MORAGA,

Petitioner in the above entitled action, hereby appeals to the  
Supreme Court of Nevada from the Order  
Denied Motion to Modify or in the  
Alternative Correct Illegal Sentence, entered in this action on  
the 20th day of MAY, 1998.

DATED this 9th day of JUNE, 1998.

Roy D. Moraga  
Roy D. MORAGA  
Petitioner/Appellant  
Ely State Prison  
P.O. BOX 1989  
Ely, Nevada 89301

RECEIVED

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*For the Court*

District Court  
Clark, County, Nevada

Case No. C92174

Department VIII

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant(s),

**CASE APPEAL STATEMENT**

1. Appellant(s): ROY D. MORAGA

2. Judge: LEE A. GATES, DISTRICT COURT JUDGE

3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), ROY D. MORAGA

4. All Parties, Appeal:

Appellant(s), ROY D. MORAGA

Respondent, THE STATE OF NEVADA


5. Appellate Counsel: PROPER PERSON, P.O. BOX 1989  
ELY, NEVADA 89301

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THE STATE OF NEVADA, Stewart L. Bell, District  
Attorney, 200 South Third Street, Las Vegas, Nevada 89155 (702) 455-4711, Counsel for  
Respondent

- 6. District Court, APPOINTED
- 7. On Appeal, N/A
- 8. Forma Pauperis: N/A
- 9. Date Commenced in District Court: December 29, 1989
- DATED this 15 day of June 1998

LORETTA BOWMAN  
CLARK COUNTY CLERK

By   
CLAUDETTE PORTER  
DEPUTY CLERK  
200 South Third Street  
PO Box 551601  
Las Vegas, Nevada 89155-1601  
(702) 455-4409

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**ORIGINAL**

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1 **ORDR**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

**FILED**

JUN 30 12 58 PM '98

*Lonette L. Johnson*

DISTRICT COURT  
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 ROY D. MORAGA,  
12 #938554

13 Defendant.

Case No. C92174  
Dept No. XIII  
Docket G

14  
15 **ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT**  
16 **OF TIME**

17 **DATE OF HEARING: 06/17/98**  
18 **TIME OF HEARING: 9:00 A.M.**

19 THIS MATTER having come on for hearing before the above entitled Court on the 17th  
20 day of June, 1998, the Defendant not being present, in proper person, the Plaintiff being  
21 represented by STEWART L. BELL, District Attorney, through ROBERT DASKAS, Deputy  
22 District Attorney, and the Court having heard the arguments of counsel and good cause  
23 appearing therefor,

24 //

25 //

26 //

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CE31

1 IT IS HEREBY ORDERED that the Defendant's Motion for Enlargement of Time, shall  
2 be, and it is hereby DENIED.

3 DATED this 22 day of June, 1998.

4   
5 \_\_\_\_\_  
6 DISTRICT JUDGE

7  
8 STEWART L. BELL  
9 DISTRICT ATTORNEY  
10 Nevada Bar #000477

11 BY  for \_\_\_\_\_  
12 ROBERT DASKAS  
13 Deputy District Attorney  
14 Nevada Bar #004963

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28 gmr

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*Loretta Bowman*

CLERK

1 **NEOJ**  
2 **STEWART L. BELL**  
3 **DISTRICT ATTORNEY**  
4 **Nevada Bar #000477**  
5 **200 S. Third Street**  
6 **Las Vegas, Nevada 89155**  
7 **(702) 455-4711**  
8 **Attorney for Plaintiff**

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

11 **THE STATE OF NEVADA,**

12 **Plaintiff,**

13 **-vs-**

14 **ROY D. MORAGA**  
15 **#938554**

16 **Defendant.**

Case No. C92174  
Dept. No. XIII  
Docket G

17 **NOTICE OF ENTRY OF ORDER**

18 **TO: ROY D. MORAGA, Defendant in proper person**

19 **YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled**  
20 **action, a copy of which is attached hereto.**

21 **DATED this 7 day of July, 1998.**

22 **STEWART L. BELL**  
23 **DISTRICT ATTORNEY**  
24 **Nevada Bar #000477**

25 **BY**

26 *Thomas J. Moreo*  
27 **THOMAS J. MOREO**  
28 **Chief Deputy District Attorney**  
**Nevada Bar #002415**

CE31



CERTIFICATE OF MAILING

I hereby certify that service of the NOTICE OF ENTRY OF ORDER was made  
the 7 day of July, 1998, by depositing a copy in the U.S. Mail, postage prepaid, addressed  
to:

ROY D. MORAGA #31584  
P.O. BOX 1989  
ELY, NV 89301

BY   
Secretary for the District Attorney's Office

gmr

1 **ORDR**

2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

**FILED**

**JUN 30 12 58 PM '98**

*Loretta L. Lawrence*

CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 ROY D. MORAGA,  
12 #938554

13 Defendant.  
14

Case No. C92174  
Dept No. XIII  
Docket G

15 ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT  
16 OF TIME

17 DATE OF HEARING: 06/17/98  
18 TIME OF HEARING: 9:00 A.M.

19 THIS MATTER having come on for hearing before the above entitled Court on the 17th  
20 day of June, 1998, the Defendant not being present, in proper person, the Plaintiff being  
21 represented by STEWART L. BELL, District Attorney, through ROBERT DASKAS, Deputy  
22 District Attorney, and the Court having heard the arguments of counsel and good cause  
23 appearing therefor,

24 //

25 //

26 //

27 //

28 //

1 IT IS HEREBY ORDERED that the Defendant's Motion for Enlargement of Time, shall  
2 be, and it is hereby DENIED.

3 DATED this 27 day of June, 1998.

4  
5 **MARK GIBBONS**

6 **DISTRICT JUDGE**

7  
8 STEWART L. BELL  
9 DISTRICT ATTORNEY  
Nevada Bar #000477

10  
11 BY *Robert Daskas*  
12 ROBERT DASKAS  
13 Deputy District Attorney  
14 Nevada Bar #004963  
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OF THE ORIGINAL ON FILE

JUN 30 '98

gmr

*Joelle*  
-2- CLERK

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Roy D. MORABA 31584  
P.O. Box 1989  
ELY, NEVADA 89301  
IN Pro Per

FILED

District Court  
Clark County Nevada

State of Nevada

Plaintiff,

CASE NO: C92174

092174

v.

Dept NO: VIII

Roy D. MORABA

Docket NO:

Defendant.

Motion to Strike

8-18-98

Comes Now Roy D. MORABA, in Propria Persona, AND Respectfully Moves this Honorable Court For a Motion to Strike.

This Motion is Made AND based upon Rule 12(b) AND 12(F) AND Supported by the Following Facts, Points AND Authorities AND Attached Affidavit.

Dated this 27th day of July 1998

Respectfully Submitted,

Roy D. Moraga

Roy D. MORABA 31584

P.O. Box 1989

ELY, NEVADA 89301

RECEIVED

AUG 06 1998

COUNTY CLERK

( 1. )

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## Supporting Facts

ON or ABOUT June 30, 1990 the Court Adjudicated Defendant a habitual Offender by revealing his Criminal history. At trial the State only Submitted (3) Prior Convictions; (1) August 13, 1976 Aggravated Assault, (2) January 1, 1983 Attempt Assault AND (3) January 16, 1988 Burglary. ON April 30, 1998 defendant Filed A Motion to Modify or in the Alternative Correct Illegal Sentence. IN response the State is NOW raising (4) Prior Convictions A Burglary ON March 14, 1973 Some 25 years later AND the District Court States "ON examination of the record Shows (4) Prior Convictions Which Satisfies the Criteria For habitual Criminal Status Pursuant to N.R.S. 207.012."

Therefore defendants Motion was denied ON MAY 5, 1998 at 9:00 am.

Rule 12(F) States in Part; the Court MAY Order Stricken From any Pleading any insufficient defence or any redundant, immaterial, impertinent, or Scandalous Matter.

The Plaintiff makes various Assertions of Fact regarding the defendant's Alleged Prior Felony Convictions.

The Plaintiff does NOT Concede the existence of Such Prior Convictions, Since NONE of them CAN be Found to exist in ANY Previous Court of Competent jurisdiction. None of the "Facts" relating to the Alleged Prior Felony Convictions Are entitled to a Presumption of Correctness. (Supporting Facts Conts)

## Supporting Facts Conts

Therefore in the interests of Justice and under NEVADA LAW, Prior Convictions for Nonviolent Property Crimes, though reprehensible will not warrant harsh Sanction Available under habitual Criminality Statute.

N.R.S. 207.010.(5) Walker v. Deeds, 50 F.3d 670.

Rule 12(b) How Presented. Every defense, in Law or fact, to a Claim for relief in any Pleading, whether a Claim, Counter Claim, Cross-Claim, or Third-Party Claim; shall be Asserted in the responsive Pleading thereto if one is required, except that the following defenses may at the option of the Pleader be made by Motion; (1) lack of Jurisdiction over the Subject Matter Appearing on the Face of the Pleading, (2) lack of Jurisdiction over the Person, (3) insufficiency of Process, (4) insufficiency of Service of Process, (5) Failure to State a Claim upon which relief can be granted, (6) Failure to join a Party under Rule 19.

A Motion Making any of these defenses shall be made before Pleading if a Further Pleading is Permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive Pleading or Motion, except defenses numbered (2)-(4) are waived if joined with one or more defenses other than defenses (2)-(4), or by Further Pleading after denial of such defenses. if a Pleading sets forth a Claim for relief to which the Adverse Party is not required to serve a responsive Pleading, he may assert "cont"

At the trial any defense in Law or Fact to that Claim For relief, IF, on a Motion Asserting the defense numbered (5) to dismiss For Failure of the Pleading to State a Claim upon which relief can be granted, matters Outside the Pleading are Presented to and not excluded by the Court, the Motion Shall be treated as one For Summary judgment and disposed of as Provided in Rule 56, and All Parties Shall be given reasonable Opportunity to Present All material made Pertinent to Such a Motion by Rule 56.

(As Amended; effective September 27, 1971.)

Furthermore the defendant's August 13, 1976 Conviction of Aggravated Assault Case NO: CR 95949 is AN UNCONSTITUTIONAL Conviction based upon the Plea Arraignment Set Forth. (12) IF record of Prior Conviction used for enhancement has not raised Presumption of Constitutional infirmity, defendant is Free to Present evidence tending to rebut Presumption of regularity Afforded to the Conviction, (13) If defendant can establish by Preponderance of evidence that Prior Conviction is Constitutionally infirm, that Conviction may not be used to enhance Sentence. Dressler v. State, Cite as 819 P.2d 1288 (Nev. 1991). (13)

Therefore defendant's January 16, 1988 burglary Conviction can not be used to enhance because it is a NON-VIOLENT and a Property Crime and will Not Warrant harsh Sanction Under habitual Criminality Statute. NRS. 207.010.(5) and Walker v. Deeds, 50 C2J 170

### Conclusion

The defendant's Motion to Strike Should be granted in the interests of Justice and that the Motion to Modify or in the Alternative Correct Illegal Sentence Should Also be granted AS A Matter of NEVADA LAW.

ON MAY 8, 1998 the State filed its Opposition to defendant's Motion to Modify or in the Alternative Correct Illegal Sentence 3 days before the hearing of MAY 11, 1998. ON this Motion AND under Rule 12(b)(4) INSUFFICIENCY OF Service of Process.)

The State denied the defendant time to respond to the States Opposition, defendant's Motion for Enlargement of time in Order to respond to States Opposition was Also denied.

The defendant Could have rebutted All of the States evidence of the Presumptively UNCONSTITUTIONAL Conviction that was inherently Prejudicial.

As Such Defendant respectfully requests that All of the defendant's Motion(s) be Granted.

Dated this 22<sup>nd</sup> day of July 1998.

Respectfully Submitted  
Roy D. Moraga  
ROY D. MORAGA #31584  
P.O. Box 1987  
ELY, NEVADA 89301



ROY D. MORAGA \* 31584

P.O. Box 1989

ELY, NEVADA 89301

In Pro Per

District Court  
Clark County Nevada

State of Nevada

Plaintiff,

CASE NO: C92174

-v-

Dept NO: VIII

Roy D. MORAGA

Docket NO:

Defendant.

Affidavit of Roy D. MORAGA

State of Nevada

County of White Pine

:ss

Roy D. MORAGA being First duly Sworn  
Under Penalty of Perjury, deposes and Avers that;

1. He is the defendant in the Above-entitled  
Case.

2. That the Foregoing of this Motion are true and  
Correct to the best of his Knowledge.

Subscribed and Sworn to before me

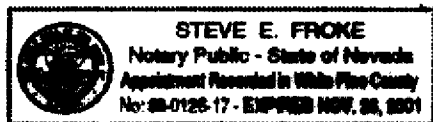
This 27th day of July, 1988

Steve E. Froke

Notary Public

in and For the County of White Pine

State of Nevada



Submitted by:

Roy D. Moraga 7-27-98

Certificate of Mailing

I hereby Certify that Service of the  
Above AND Foregoing was Made this 22<sup>nd</sup> day  
of July, 1998 by depositing A Copy in  
the Ely State Prison Mail Addressed to;

Loretta Bowman  
County Clerk  
P.O. Box 551601  
200 S. third Street  
LAS Vegas, NV 89155-1601

by: Roy D. Moraga  
Roy D. MORAGA 31584  
P.O. Box 1989  
Ely, Nevada 89301

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FILED

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*Patricia S. ...*

CLERK

1 RSPN  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROY D. MORAGA,  
#938554

Defendant.

Case No. C92174  
Dept. No. VIII  
Docket M

STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE

DATE OF HEARING: 08/18/98  
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through VICKI J. MONROE, Chief Deputy District Attorney, and files this State's Response to Defendant's Motion to Strike.

This response 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.

DATED this 17<sup>th</sup> day of August, 1998.

Respectfully submitted,

STEWART L. BELL  
DISTRICT ATTORNEY  
Nevada Bar #000477

BY

*V. J. Monroe*  
VICKI J. MONROE  
Chief Deputy District Attorney  
Nevada Bar #003776

CE31

1                    STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE

2                    STATEMENT OF ISSUES

3    **1. Whether The District Court Should Deny The Defendant's Motion To Strike Because**  
4    **The Method By Which The Defendant Is Utilizing To Challenge His Prior Sentence Is**  
5    **Improper.**

6    **2. Whether The District Court Should Deny The Defendant's Motion To Strike Because**  
7    **the Issues Raised Are Both Barred By The Doctrine Of Law Of The Case And Lack Merit.**

8                    STATEMENT OF THE CASE

9            Roy Moraga, hereinafter the defendant, was convicted on March 15, 1990, after a jury  
10    trial, of two counts of burglary and two counts of sexual assault. On June 30, 1990, the District  
11    Court adjudicated the defendant as a habitual offender and sentenced him to life in prison  
12    without the possibility of parole. After the defendant appealed his conviction to the Nevada  
13    Supreme Court, that Court affirmed the defendant's convictions. (See Exhibit 1, Supreme Court  
14    Opinion 8/27/91). However, the Supreme Court reversed the District Court's sentence as  
15    erroneous and remanded the case back for re-sentencing. (See Exhibit 1).

16            On October 21, 1991, the defendant was resentedenced in Department X of the Eighth  
17    Judicial District to ten (10) years for each of the burglary counts, to run consecutive to each other  
18    and a consecutive sentence of life imprisonment with the possibility of parole for one of the  
19    sexual assault convictions. The District Court also adjudicated the defendant as a habitual  
20    offender as to the second conviction for sexual assault and sentenced him to a consecutive term  
21    of life imprisonment without the possibility of parole under NRS 207.010(2). The defendant  
22    then appealed the district court's sentence to the Nevada Supreme Court. The defendant  
23    challenged the district court's adjudication of him as a habitual offender. The defendant  
24    contended that the judgments of conviction used to adjudicate him as a habitual offender were  
25    invalid. On October 4, 1995, the Nevada Supreme Court denied the defendant's appeal. The  
26    Court found that the defendant's status as a habitual offender was sufficiently proved through  
27    evidence that the defendant had been convicted: 1) in 1977 for aggravated assault in Arizona;  
28    2) in 1983 for attempted aggravated assault in Arizona; and 3) in 1988 for third degree burglary  
in Arizona. (See Exhibit 2, Supreme Court Order 10/4/95).

1 The defendant then filed a petition for habeas corpus seeking post-conviction relief. As  
2 part of that petition, the defendant argued, for the second time, that he was improperly  
3 adjudicated and sentenced as a habitual criminal. The District Court, Department X, denied the  
4 petition. Specifically, the Court ruled that the defendant was properly adjudicated and sentenced  
5 as a habitual offender and that his claim to the contrary was barred by the doctrine of law of the  
6 case. (See Exhibit 3, District Court's Findings of Fact and Conclusions of Law 9/6/96).

7 On April 30, 1998, now in Department VIII, the defendant filed a motion to modify or  
8 in the alternative to correct an illegal sentence. For the third time, the defendant included a  
9 challenge to his previous sentence of life in prison without the possibility of parole based on the  
10 District Court's prior adjudication of him as a habitual offender under NRS 207.010. On May  
11 20, 1998, this Court denied the defendant's motion. On August 6, 1998, the defendant filed the  
12 instant motion to strike.

### 13 ARGUMENT

#### 14 I

#### 15 **THE DISTRICT COURT SHOULD DENY THE DEFENDANT'S MOTION TO STRIKE** 16 **BECAUSE THE METHOD BY WHICH THE DEFENDANT IS UTILIZING TO** **CHALLENGE HIS PRIOR CONVICTION IS IMPROPER**

17 The defendant has filed a motion to strike under the Nevada Rules of Civil Procedure.  
18 See Nev. R. Civ. Pro. 12(f). The defendant's motion is convoluted. A plain reading of the  
19 document fails to reveal exactly what the defendant is attempting to strike. However, the most  
20 likely interpretation appears to be that the defendant's motion is yet another attack on the validity  
21 of his conviction as a habitual offender.

22 The defendant's attempt to invoke the rules of civil procedure to invalidate his prior  
23 conviction as a habitual offender should be summarily dismissed. The procedural method by  
24 which the defendant has attempted to collaterally challenge his conviction is improper. NRS  
25 34.780 states that the Nevada Rules of Civil Procedure only apply to petitions for habeas corpus  
26 "to the extent that they are not inconsistent with NRS 34.360 to 34.830." In Mazzan v. State,  
27 109 Nev. 1067, 1073, 863 P.2d 1035, 1038 (1993), the Nevada Supreme Court noted that a  
28 habeas corpus proceeding is unique as it is both a civil and criminal procedure.

1 Thus, the provisions of NRS 34.780 expressly limit the extent to  
2 which civil rules govern post-conviction habeas proceedings. We  
3 cannot turn to the rules of civil procedure for guidance when NRS  
4 Chapter 34 has already addressed the matter at issue. Therefore,  
the cited legislation does not nullify the fundamental proposition  
that habeas corpus is a special statutory remedy which, being  
neither civil nor criminal, is unique unto itself.

5 Id.

6 A motion to strike is inconsistent with the procedures provided by Chapter 34 and as such  
7 is not a proper method by which to challenge a prior denial of a petition for post-conviction  
8 relief or, as in the instant case, a denial of a motion to correct an illegal sentence. Moreover, the  
9 defendant's motion does not comply with the rules of civil procedure. Rule 12(f) allows a  
10 motion to strike: 1) upon motion made by a party before responding to a pleading; 2) upon  
11 motion made by a party within twenty days after the service of the pleading upon him; or 3) upon  
12 the court's own initiative. None of the above are applicable to the instant scenario. The  
13 defendant is not responding to a pleading that has been filed by an opponent. Rather, he is  
14 invoking the rules of civil procedure in an attempt to have this Court review its prior order  
15 denying his request to reverse his prior adjudication as a habitual offender. A proper method to  
16 challenge this Court's prior order is either a motion to reconsider or an appeal to the Nevada  
17 Supreme Court. Neither of these appropriate options were utilized by the defendant. As such,  
18 this Court should summarily deny the defendant's motion.

## 19 II

### 20 **THE DISTRICT COURT SHOULD DENY THE DEFENDANT'S MOTION** 21 **BECAUSE THE ISSUES RAISED ARE BOTH BARRED BY THE DOCTRINE OF** **LAW OF THE CASE AND LACK MERIT**

22 The defendant challenges the validity of the district court's prior determination that  
23 the defendant was a habitual offender by arguing that a 1976 conviction for aggravated  
24 assault was invalid because of a deficient plea agreement and that a 1988 burglary conviction  
25 could not be used to enhance his sentence because it was a non-violent offense.

26 The doctrine of law of the case prevents this Court from further considering the issue  
27 of the validity of the defendant's conviction and sentence as a habitual offender under NRS  
28 207.010. It has long been the rule in Nevada that "the law of a first appeal is the law of the

1 case on all subsequent appeals in which the facts are substantially the same.” Hall v. State,  
2 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) quoting, Walker v. State, 85 Nev. 337, 455 P.2d  
3 34 (1969); See also Bejarno v. State, 106 Nev. 840, 801 P.2d 1388 (1990); Paine v. State,  
4 110 Nev. 609, 877 P.2d 1025 (1994). The Nevada Supreme Court has also previously held  
5 that:

6 When an appellate court states a principle or rule of law  
7 necessary to a decision, the principle or rule becomes the law of  
8 the case and must be followed throughout its subsequent  
9 progress, both in the lower court and upon subsequent appeal.  
10 LoBue v. State ex rel. Dep't Hwys., 92 Nev. 529, 532, 554 P.2d  
11 258, 260 (1976). Upon remand, the lower court can take only  
such actions as conform to the judgment of the appellate  
tribunal. Id., 554 P.2d at 260. Therefore, in this dispute, the  
district court's remarks violated the law of the case and  
constituted reversible error. Id., 554 P.2d at 260.

12 Wickliffe v. Sunrise Hospital, Inc., 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1989).

13 The reasoning for this doctrine was enunciated by the Fifth Circuit; the doctrine “affords  
14 courts the security of consistency within a single case while at the same time avoiding the  
15 wastefulness, delay, and overall wheel-spinning that attends piecemeal consideration of  
16 matter which might have been previously adjudicated.” U.S. v. Connell, 6 F.3d. 27, 30 (5th  
17 Cir. 1993).

18 The defendant has failed to overcome application of this doctrine because the  
19 underlying facts on which the Nevada Supreme Court determined that the defendant's  
20 conviction was valid (in its decision on October 4, 1995) have not changed. (See Exhibit 2).  
21 In that opinion, the Nevada Supreme Court considered the defendant's conviction and  
22 sentence on direct appeal. The Court concluded that “the State adequately proved the  
23 appellant received the three prior convictions.” In addition, the defendant raised the exact  
24 same challenge in his initial petition for habeas corpus. The District Court specifically found  
25 that the defendant's conviction was valid. (See Exhibit 3). Most recently, the defendant  
26 once again raised the argument in his motion to correct an illegal sentence. The defendant's  
27 claims were rejected for a third time, albeit now by Department VIII. Clearly, the  
28 defendant's claims should be once again summarily dismissed. See Hall v. State, 91 Nev.

1 314, 535 P.2d 797 (1975)("The doctrine of law of the case cannot be avoided by a more  
2 detailed and precisely focused argument subsequently made after reflection upon the  
3 previous proceedings.").

4 Furthermore, the substance of the claims raised by the defendant lack merit. The  
5 defendant's claim that a 1976 conviction for aggravated assault in Arizona is invalid is a bare  
6 allegation unsupported by any facts. In Hargrove v. State, 100 Nev. 498, 686 P.2d 222  
7 (1984), the Nevada Supreme Court held that a post-conviction petition that was devoid of  
8 any specific facts did not entitle the petitioner to either an evidentiary hearing or any post-  
9 conviction relief. In that case, the defendant's allegation that "certain witnesses could  
10 establish his innocence ... was not accompanied by the witness' names or descriptions of  
11 their intended testimony." Id. at 502, at 225. Likewise, the instant motion does not contain  
12 any facts supporting the allegations contained therein. Moreover, a proper challenge to the  
13 validity of that conviction would be to file a petition for habeas corpus with the district court  
14 in Arizona responsible for convicting the defendant.

15 The defendant's contention that his 1988 burglary conviction could not be properly  
16 utilized as a prior conviction for purposes of the habitual offender statute because it was a  
17 non-violent offense similarly is devoid of any merit. NRS 207.010 allows for the imposition  
18 of a sentence as a habitual offender based on a procedure whereby the district court finds that  
19 a defendant has previously been convicted of three felonies. See NRS 207.010(1)(b). There  
20 is no limitation in the statute that the felony must be a violent offense. Moreover, a review of  
21 the defendant's record reveals the fact that he has been convicted of numerous felonies that  
22 have, by their very nature, been violent offenses<sup>1</sup>. As such, the defendant's motion should be  
23 summarily rejected.

---

24  
25 <sup>1</sup> These include a 1973 conviction for burglary in California, a 1977 conviction for aggravated assault in  
26 Arizona, a 1983 conviction for attempted aggravated assault in Arizona, a 1988 conviction for burglary in Arizona  
27 and the instant two convictions, in 1990 in Nevada, for burglary and two convictions for sexual assault out of  
28 which came the defendant's sentence as a habitual offender. See Pre-Sentence Report of 5/16/90.



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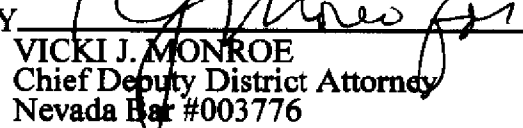
CONCLUSION

Based on the subsequent points and authorities, the State respectfully requests this Court deny the defendant's motion to strike.

DATED this 17<sup>th</sup> day of August, 1998.

Respectfully submitted,

STEWART L. BELL  
DISTRICT ATTORNEY  
Nevada Bar #000477

BY   
VICKI J. MONROE  
Chief Deputy District Attorney  
Nevada Bar #003776

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 17<sup>th</sup> day of August, 1998, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROY D. MORAGA #31584  
P.O. BOX 1989  
ELY, NV 89301

BY   
Secretary for the District Attorney's Office

TF/gmr

**BACK ON CALL**  
**FOR Resentencing OF APPELLANT**  
IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

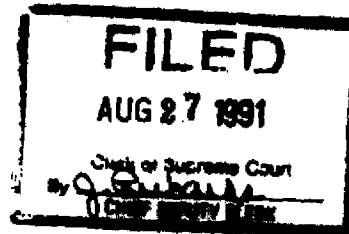
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

EXHIBIT <sup>21488</sup> 1



ORDER OF REMAND

This is an appeal from a judgment of conviction pursuant to a jury verdict of two counts of burglary and two counts of sexual assault in violation of NRS 200.364, 200.366 and 205.060. The district court adjudicated appellant a habitual criminal and sentenced him to a single term of life imprisonment in the Nevada State Prison without the possibility of parole.

Appellant's sole contention on appeal is that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

In particular, we note that the victim's daughter testified that on December 5, 1989, she discovered that her watch, apartment key, and some other items were missing. She had heard a noise the night before. The same day, appellant gave the daughter's watch to his ex-girlfriend as a present. A key to the apartment was found among appellant's belongings. Although the victim had locked the door to the apartment, later that day the victim saw appellant standing in her bedroom hallway. He then raped her twice. Appellant's fingerprints were found on a can of hairspray in the bathroom. Neither the victim nor her daughter had given appellant permission to enter

the apartment. This evidence supports the conclusion that appellant twice entered the apartment, once with intent to commit larceny, once with intent to commit the felony of sexual assault.


In addition, we note that the victim testified that when she woke up and saw appellant in her bedroom hallway, she screamed out the bathroom window for help. Appellant grabbed her mouth and threw her on the bed. Following a struggle, appellant inserted his penis into her vagina against her will. After she showered, he again threw her on the bed and inserted his penis into her vagina against her will. Medical evidence revealed the presence of semen and sperm in her vagina. The victim immediately called for help. Appellant bragged about his deeds to a worker at the apartment complex as he left. This evidence supports the conclusion that appellant twice subjected the victim to sexual penetration against her will.

The jury could reasonably infer from the evidence presented that appellant committed two counts of burglary and two counts of sexual assault. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

Finally, we note that appellant's sentence is erroneous. Appellant was convicted of four separate offenses (in addition to which he was adjudicated a habitual criminal), yet he received a single sentence. Although the district court has discretion to dismiss a count of habitual criminality, see NRS 207.010(4), the district court does not have discretion to impose but one sentence for multiple primary offenses. Cf. Barrett v. State, 105 Nev. 361, 775 P.2d 1276 (1989). Our criminal laws anticipate that, for each offense of which a

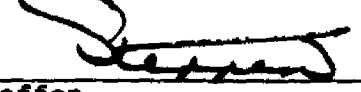
defendant is convicted, there should be a corresponding sentence. Accordingly, we remand this case to the district court for resentencing of appellant.

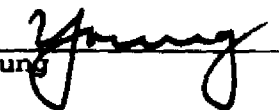
It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Mowbray

  
\_\_\_\_\_, J.  
Springer

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Steffen

  
\_\_\_\_\_, J.  
Young

cc: Hon. Michael J. Wendell, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Rex Bell, District Attorney  
Morgan D. Harris, Public Defender  
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

EXHIBIT 2901 2

FILED

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JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER DISMISSING APPEAL

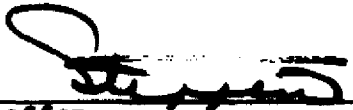
This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts each of burglary and sexual assault. At appellant's sentencing hearing, the district court adjudicated him a habitual criminal and, as a result, sentenced him to a term of life in the Nevada State Prison without the possibility of parole. The habitual criminal adjudication was based on three prior felony convictions: (1) a 1977 conviction for aggravated assault in Arizona; (2) a 1983 conviction for attempted aggravated assault in Arizona; and (3) a 1988 conviction for third degree burglary in Arizona.

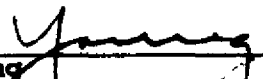
Appellant points out that two of the prior convictions list the name "Roy Daniels Moraga" and that the other lists the name "Roy Daniel Moraga" and asserts that the state presented convictions that may not apply to him. Appellant, however, failed to object to these prior convictions on the basis of identity. "[A]n unexcused failure to object in the trial court to the State's failure to make an affirmative showing of the validity of the prior convictions relied upon to enhance a penalty under NRS 207.010 preclude[s] the raising of this objection for the first time on appeal." *Baymon v. State*, 94 Nev. 370, 372, 580 P.2d 943, 944 (1978) (citing *Thomas v. State*, 93 Nev. 565, 571 P.2d 113 (1977)).


Moreover, we conclude that the state adequately proved that appellant received the three prior convictions. See NRS

207.010; Jackson v. State, 97 Nev. 179, 625 P.2d 1165 (1981).  
The prior convictions presented by the state do not, on their  
face, "raise a presumption of constitutional infirmity," and the  
district court was entitled to use these convictions for sentence  
enhancement purposes. McAnulty v. State, 108 Nev. 179, 181, 826  
P.2d 567, 569 (1992). Accordingly, we

ORDER this appeal dismissed.

  
\_\_\_\_\_, C. J.  
Steffen

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Springer

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Rose

cc: Hon. Jack Lehman, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Stewart L. Bell, District Attorney  
Cherry, Bailus & Kelesis  
Loretta Bowman, Clerk

1 **ORDR**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

FILED

SEP 6 12 50 PM '96

*James L. ...*  
**EXHIBIT** 3 "

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 ROY MORAGA,  
11 #938554

12 Defendant(s).  
13

Case No.. C92174  
Dept. No. X  
Docket K

14 **FINDINGS OF FACT, CONCLUSIONS OF**

15 **LAW AND ORDER**

16 DATE OF HEARING: 7/19/96

17 TIME OF HEARING: 9:00 A.M.

18 THIS CAUSE having come on for hearing before the Honorable Jack Lehman, District Judge,  
19 on the 19th day of July, 1996, the Petitioner not being present, represented by DAVID SCHIECK, ESQ.,  
20 the Respondent being represented by STEWART L. BELL, District Attorney, by and through VICKI  
21 J. MONROE, Deputy District Attorney, and the Court having considered the matter, including briefs,  
22 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the  
23 following findings of fact and conclusions of law:  
24

25 **FINDINGS OF FACT**

26 1. Defendant was arrested for the December 5, 1989, sexual assault and rape of a woman  
27 in her home. Defendant plead not guilty and a jury trial was had wherein Defendant was found guilty.  
28

1 of two counts of Burglary and two counts of Sexual Assault. Thereafter on June 30, 1990, Defendant  
2 was sentenced to life in the Nevada State Prison without the possibility of parole after being  
3 adjudicated a habitual criminal. Defendant's direct appeal to the Nevada Supreme Court was denied  
4 on August 27, 1991. However, the Court remanded Defendant's case to the District Court for  
5 resentencing. The Supreme Court concluded that the District Court had erroneously imposed one  
6 sentence for multiple offenses.

7 2. On October 21, 1991, Defendant was resentenced in Department X of the Eighth  
8 Judicial District to ten years for each of the Burglary counts, to run consecutive to each other, and  
9 consecutive to a sentence of life imprisonment without the possibility of parole for Count III - Sexual  
10 Assault. Defendant was adjudicated a habitual criminal as to Count IV and sentenced to another  
11 consecutive term of life imprisonment without the possibility of parole. Defendant then appealed the  
12 second sentencing, specifically contesting the validity of the judgments of conviction used to  
13 adjudicate him a habitual criminal. The Nevada Supreme Court denied the same on October 4, 1995.

14 3. On December 5, 1989, between the hours of 1:30 a.m. and 5:30 a.m., Defendant  
15 entered the victim's residence located at 1000 Dumont, Apartment 227, Las Vegas. Once inside,  
16 Defendant took a woman's Seiko watch and approximately \$25 from a coffee table in the living room,  
17 an unknown amount of cash from the victim's bedroom dresser, and a key to the apartment which was  
18 laying on a table near the front door. Defendant then left the apartment. At approximately 7:30 a.m.,  
19 the victim returned to find the items missing. Las Vegas Metropolitan Police were contacted and a  
20 report of the entry submitted.

21 4. Approximately noon of the same day, the victim (a 46 year-old female) was awakened  
22 by Defendant knocking at her front door. After informing Defendant that he had awakened her and  
23 asking him to leave, the victim returned to her room. Almost two hours later, the victim was  
24 awakened by a noise, only to find Defendant outside her bedroom on the stairs. Defendant grabbed  
25 the victim and after a brief struggle, the victim was able to momentarily free herself. However,  
26 Defendant regained his hold and pushed the victim down the stairs. Thereafter Defendant raped the  
27 victim, instructed her to shower and raped her again. When Defendant exited the room, the victim  
28 contacted her daughter and requested her to contact the police.



5. Around 2:15 p.m., LVMPD detained Defendant at in the 900 block of Sierra Vista and after a positive identification by the victim, he was arrested and transported to the Clark County Detention Center.

## II

## CONCLUSIONS OF LAW

6. Defendant, for the first time in his collateral attack, challenges the length of time he was incarcerated before he was brought before a magistrate. Specifically, after remaining silent on the issue in appealing from two judgments of conviction, Defendant now alleges that he was incarcerated some 210 hours before his initial arraignment, and that no probable cause determination was made. Defendant did not preserve this issue below or raise it in his direct appeal and as such, it has been waived. NRS 34.810(1) provides in part:

The court shall dismiss a petition if the court determines that:

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

(1) Presented to the trial court;

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or

(3) 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.

NRS 34.810(3) imposes the burden upon the defendant of proving specific facts that demonstrate good cause for his failure to present such a claim in earlier proceedings and of showing actual prejudice to the defendant. Accordingly, the waiver of claims doctrine mandates the dismissal of Defendant's instant claim. Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). Defendant's Petition is barren as to why his allegations surrounding probable cause determination were not raised in either of his direct appeals.

7. Defendant took the stand at trial and offered a defense of "consent" to the charges of

1 Sexual Assault. An excerpt from his offered testimony is as follows:

2 PROSECUTOR: Basically, Mr. Moraga, what you are saying to  
3 us is you are really confirming everything  
4 everybody already testified to. You are just  
5 saying that the sex that happened between you  
6 and Ms. Hawk was with her consent; is that  
7 right?

8 DEFENDANT: That's right. (3 ROA 550).

9 8. Any issues of identification that DNA testing might hope to resolve has been rendered  
10 moot by offering the defense of "consent" to the sexual assault. Moreover, Defendant has waived  
11 this issue by (1) not preserving it below and (2) not raising the identification in his direct appeal  
12 pursuant to NRS 34.810.

13 9. Nor was Defendant's counsel ineffective for not testing DNA evidence at the time of  
14 trial. In People v. Kaurish, 802 P.2d 278, 298 (Cal. 1990),<sup>1</sup> a habeas petitioner claimed  
15 ineffective representation because his counsel failed to independently test dried stains on  
16 impounded clothing. Counsel therein did not know that a time limit existed for testing the  
17 material, such that the test results would be reliable: counsel admitted that he did not learn of the  
18 time limit until one year after the clothing was impounded. As such, the integrity of any future  
19 testing was jeopardized. The California Supreme Court refused to find any prejudice inured to  
20 that defendant. The Court noted that more was required than speculation that timely testing  
21 would have shown a favorable result: there must have been a *reasonable probability* that such  
22 evidence would be produced. Kaurish, at 298. No such reasonable probability can be gleaned  
23 from the record herein.

24 10. In his last appeal from the judgment of conviction entered on remand, Defendant  
25 specifically challenged the validity of his habitual criminal status. The Nevada Supreme Court  
26 specifically denied his contentions and in a Order Dismissing Appeal, affirmed the District Court's  
27 conclusion that Defendant was a habitual criminal and the State had met its burden beyond a  
28 reasonable doubt. As such, that Order becomes the law of the case and forecloses Defendant's  
successive attempt at relief on this issue. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

---

<sup>1</sup> cert denied, Kaurish v. California, 502 U.S. 837, 112 S.Ct. 121 (1990).

1 Defendant duplicates his complaints surrounding his adjudication as a habitual criminal. The Supreme  
2 Court confirmed that adjudication and, therefore, the Supreme Court's ruling, issued on Defendant's  
3 direct appeal, became the law of this case and forecloses Defendant's ability to revive this claim.

4 11. The United States Supreme Court has clearly established the appropriate test for  
5 determining whether a defendant received constitutionally defective counsel. A defendant's burden  
6 is two-fold. First, a convicted defendant must show that his counsel's performance was objectively  
7 deficient such that counsel was not functioning as the 'counsel' envisioned by Sixth Amendment  
8 guarantees. Second, the defendant must show that the deficient performance prejudiced the defendant  
9 in a way that effectively deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687,  
10 104 S.Ct. 2052, 2064 (1984). Defendant is unable to show any prejudice inured by his assertion that  
11 his trial counsel should have moved to suppress a key that was found as the result of a warrantless  
12 search. Defendant cannot show that the outcome of his trial would have been different with the  
13 suppression of the house key.

#### 14 CONCLUSION

15 Based on the forgoing Findings of Fact and Conclusions of Law, Defendant's Petition for Writ  
16 of Habeas Corpus (Post-Conviction) is DENIED.


#### 17 ORDER

18 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall  
19 be, and it is, hereby denied.

20 DATED this 28<sup>th</sup> day of August, 1996.

21  
22   
23 DISTRICT JUDGE 

24 STEWART L. BELL  
25 DISTRICT ATTORNEY  
Nevada Bar #000477

26 BY   
27 VICKI J. MONROE  
28 Deputy District Attorney  
Nevada Bar #003776

ORIGINAL

24

FILED

AUG 27 1 46 PM '98

*Loretta L. Loomis*

CLERK

1 **ORDR**  
2 **STEWART L. BELL**  
3 **DISTRICT ATTORNEY**  
4 **Nevada Bar #000477**  
5 **200 S. Third Street**  
6 **Las Vegas, Nevada 89155**  
7 **(702) 455-4711**  
8 **Attorney for Plaintiff**

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 **THE STATE OF NEVADA,**

10 **Plaintiff,**

11 **-vs-**

12 **ROY D. MORAGA,**  
13 **#938554**

14 **Defendant.**

Case No. C92174  
Dept No. ~~VIII~~ ~~XIII~~  
Docket M 6

15 **ORDER DENYING DEFENDANT'S PRO PER MOTION TO STRIKE**

16 **DATE OF HEARING: 08/18/98**  
17 **TIME OF HEARING: 9:00 A.M.**

18 **THIS MATTER** having come on for hearing before the above entitled Court on the 18th  
19 **day of August, 1998,** the Defendant not being present, represented in proper person, the Plaintiff  
20 **being represented by STEWART L. BELL,** District Attorney, through LISA LUZAICH, Deputy  
21 **District Attorney,** and the Court having heard the arguments of counsel and good cause  
22 **appearing therefor,**

23 //

24 //

25 //

26 //

27 //

28 //

CE19

IT IS HEREBY ORDERED that the Defendant's Motion to Strike, shall be, and it is hereby DENIED.

DATED this 25 day of August, 1998.

DISTRICT JUDGE

**STEWART L. BELL**  
**DISTRICT ATTORNEY**  
**Nevada Bar #000477**

BY Lisa Luzaich  
LISA LUZAICH  
Deputy District Attorney  
Nevada Bar #005056

gmr

126

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

SEP 22 11 44 AM '98

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*Loetta D. Brown*  
CLERK

Roy D. MORAGA,

Petitioner,

vs.

State OF NEVADA,

Respondent.

CASE NO. C92174

DEPT. NO. ~~111~~ 10

DOCKET NO. \_\_\_\_\_

DESIGNATION OF RECORD ON APPEAL

COMES NOW, Roy D. MORAGA, Petitioner/Appellant  
in the above entitled matter and designates the following as the  
Record on Appeal.

Each and every Document, Return, Pleading and Paper  
heretofore filed with the Clerk of the Court in Case Number  
C92174, Department Number VIII, on Docket Number \_\_\_\_\_.

DATED this 15th day of September, 1998.

*Roy D. Moraga*  
31584  
Petitioner/Appellant  
Ely State Prison  
P.O. BOX 1989  
Ely, Nevada 89301

///  
///  
///

RECEIVED  
SEP 22 1998

SEP 22 1998

CLERK

CERTIFICATE OF SERVICE

I, Roy O. MORAGA, hereby certify that I am the  
Petitioner/Appellant in the above entitled matter, and that on the  
15th day of September 1998, I served a true and correct copy of  
the foregoing NOTICE OF APPEAL and DESIGNATION OF RECORD ON APPEAL  
by mailing same to:

Nevada State Supreme Court  
Supreme Court Building  
Capitol Complex  
Carson City NV 89710

Clerk, of the District Court  
Eighth Judicial District Court  
200 South Third Street  
Las Vegas NV 89101

District Attorneys' Office  
Clark County Courthouse  
200 South Third Street  
Las Vegas NV 89101

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DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

SEP 22 11 44 AM '98

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ROY D. MORAGA,  
Petitioner,  
vs.  
State of Nevada,  
Respondent.

Loretta Bournon  
CLERK

CASE NO. C92174  
DEPT. NO. ~~155~~ 10  
DOCKET NO. \_\_\_\_\_

NOTICE OF APPEAL

Notice is hereby given that, ROY D. MORAGA,  
Petitioner in the above entitled action, hereby appeals to the  
Supreme Court of Nevada from the Order  
Motion To Strike-Denied, entered in this action on  
the 18th day of August, 1998.

DATED this 15th day of September, 1998.

Roy D. Moraga  
# 31584  
Petitioner/Appellant  
Ely State Prison  
P.O. BOX 1989  
Ely, Nevada 89301

///  
///  
///

RECEIVED  
SEP 22 1998  
COUNTY CLERK

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FILED

SEP 28 2 46 PM '98

  
CLERK

District Court  
Clark, County, Nevada

Case No. C92174

Department IV (C)

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant(s),

**CASE APPEAL STATEMENT**

1. Appellant(s): ROY D. MORAGA

2. Judge: DON P. CHAIREZ

3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), ROY D. MORAGA

4. All Parties, Appeal:

Appellant(s), ROY D. MORAGA

CE31

/C92174

Respondent, THE STATE OF NEVADA

5. Appellate Counsel: Proper Person, ROY D. MORAGA, P.O. BOX 1989, ELY  
STATE PRISON, ELY, NEVADA 89301, Appellant

THE STATE OF NEVADA, Stewart L. Bell, District  
Attorney, 200 South Third Street, Las Vegas, Nevada 89155 (702) 455-4711, Counsel for  
Respondent

6. District Court, APPOINTED

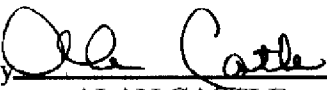
7. On Appeal, N/A

8. Forma Pauperis: N/A

9. Date Commenced in District Court: 12/28/89

DATED this 28<sup>th</sup> day of September, 1998.

LORETTA BOWMAN  
CLARK COUNTY CLERK

By   
ALAN CASTLE  
DEPUTY CLERK  
200 South Third Street  
PO Box 551601  
Las Vegas, Nevada 89155-1601  
(702) 455-4409

148

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

APR 30 1 36 PM '99  
No. 33099

District Court Case No. C92174

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 this appeal dismissed."

Judgment, as quoted above, entered this 2nd day of March, 1999.

IN WITNESS WHEREOF, I have subscribed my name  
and affixed the seal of the Supreme Court at my Office  
in Carson City, Nevada, this 30th day of March, 1999.

Janette M. Bloom, Supreme Court Clerk

By:

J. Ribando  
Chief Deputy Clerk

jw

1657

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 33099

**FILED**

MAR 02 1999

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. Smith*  
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying appellant's motion to strike. Appellant filed a motion to correct an illegal sentence in the district court. The state filed an opposition, and the district court denied the motion. Appellant then filed a motion to strike the state's opposition. The district court denied the motion to strike, and this appeal followed.

Our review of this appeal reveals a jurisdictional defect. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists. *Castillo v. State*, 106 Nev. 349, 792 P.2d 1133 (1990). No statute or court rule provides for an appeal from an order denying a motion to strike. Accordingly, we conclude that we lack jurisdiction to consider this appeal, and we

ORDER this appeal dismissed.<sup>1</sup>

*Maupin*  
Maupin J.

*Agosti*  
Agosti J.

*Becker*  
Becker J.

cc: Hon. Lee A. Gates, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Stewart L. Bell, District Attorney  
Roy D. Moraga  
Shirley Parraguirre, Clerk

<sup>1</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

**ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.**

**District Court Case No. C92174**

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

JUN 1 1 35 PM '99 No. 29321

District Court Case No. C92174

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 these appeals dismissed."

Judgment, as quoted above, entered this 20th day of April, 1999.

IN WITNESS WHEREOF, I have subscribed my name  
and affixed the seal of the Supreme Court at my Office  
in Carson City, Nevada, this 18th day of May, 1999.

Janette M. Bloom, Supreme Court Clerk

By:

J. Richards  
Chief Deputy Clerk

jw

CE43

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 29321

**FILED**

APR 20 1999

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 32542

ORDER DISMISSING APPEALS

Docket No. 29321 is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 32542 is a proper person appeal from a district court order denying appellant's motion to modify or correct an illegal sentence. We elect to consolidate these appeals for disposition. NRAP 3(b).

On July 7, 1990, the district court convicted appellant, pursuant to a jury verdict, of two counts of burglary and two counts of sexual assault. The court sentenced appellant to life without the possibility of parole. On direct appeal, this court upheld appellant's conviction but remanded to the district court for resentencing on the ground that the district court had failed to sentence appellant for each of the four primary offenses.<sup>1</sup> Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991).

After resentencing, the district court entered an amended judgment of conviction. The court sentenced appellant to two consecutive ten-year terms for the burglary offenses and

<sup>1</sup>This court noted: "Although the district court has discretion to dismiss a count of habitual criminality, see NRS 207.010(4), the district court does not have discretion to impose but one sentence for multiple primary offenses."

a consecutive term of life with the possibility of parole for one of the counts of sexual assault. The court also adjudicated appellant as a habitual criminal, sentencing him to a consecutive term of life without the possibility of parole for the second count of sexual assault. This court dismissed appellant's appeal from the amended judgment of conviction.<sup>2</sup> Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995).

On February 20, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant subsequently obtained counsel to represent him, and counsel filed supplemental documents in support of appellant's petition. The state opposed appellant's petition, and the district court denied the petition. Appellant's subsequent appeal is docketed in this court as Docket No. 29321.

On April 30, 1998, appellant filed a proper person motion to modify or correct an illegal sentence in the district court. The state opposed appellant's motion. The district court summarily denied the motion. Appellant's subsequent appeal is docketed in this court as Docket No. 32542.

Appellant's Habeas Corpus Petition

Appellant claims that the district court should have held an evidentiary hearing on several claims that he presented in his habeas corpus petition. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) (stating that a defendant pursuing post-conviction relief is entitled to an evidentiary hearing if he or she alleges a claim supported by sufficient factual allegations that, if true, would entitle the defendant to relief). We disagree. We will address each of appellant's claims in turn.

---

<sup>2</sup>On September 29, 1993, the district court entered a second amended judgment of conviction granting appellant 180 days credit for time served.



First, appellant claims that he was not taken before a magistrate for a timely probable cause determination after his arrest. See NRS 171.178; Powell v. State, 113 Nev. 41, 930 P.2d 1123 (1997). We conclude that the district court properly rejected appellant's claim because appellant failed to allege sufficient facts to support a showing of prejudice or cause for his failure to previously raise this claim. See NRS 34.810(1)(b), (3); see also Strickland v. Washington, 466 U.S. 668 (1984); Powell, 113 Nev. 41, 930 P.2d 1123; Huebner v. State, 103 Nev. 29, 731 P.2d 1330 (1987).

Next, appellant claims that his counsel was ineffective for failing to object to certified copies of prior convictions that were introduced by the state in seeking appellant's adjudication as a habitual criminal. In his petition, appellant explained that inconsistencies in these documents revealed that the prior convictions did not all pertain to the same individual.

We agree with the state that this claim is effectively precluded by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). On appeal from the amended judgment of conviction, appellant pointed out that two of the prior convictions named "Roy Daniels Moraga" and the third listed "Roy Daniel Moraga." Appellant claimed that all of the prior convictions might not apply to him. This court noted that appellant's counsel had failed to make an appropriate objection, but this court further concluded: "[T]he state adequately proved that appellant received the three prior convictions. The prior convictions presented by the state do not, on their face, 'raise a presumption of constitutional infirmity,' and the district court was entitled to use these convictions for sentence enhancement purposes." Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995) (citations omitted).

Appellant further claims that his counsel was ineffective for failing to file a motion to suppress the

evidence of the victim's apartment key, which was seized from appellant. Appellant failed to support this claim with sufficient factual allegations that demonstrate that police obtained the key as a result of an illegal search or seizure. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Additionally, appellant's counsel in the district court and on appeal has failed to articulate any valid basis for suppression of the evidence. Finally, even assuming that counsel would have been successful in a motion to suppress the key, we do not perceive any prejudice to appellant in light of the persuasive evidence of his guilt. See Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, appellant was not entitled to an evidentiary hearing on this claim nor is he entitled to relief as a matter of law, which he also requests.

Appellant also claims that his counsel did not interview witnesses to prepare for trial. Appellant claims that if counsel had done so, he would have uncovered evidence to show that appellant had been seen "making out" with the victim when they first met and that appellant was incapable of sexual intercourse while intoxicated. Appellant failed, however, to name the witnesses who would have allegedly supported these allegations. Thus, we conclude that appellant failed to support his claim with sufficient supporting factual allegations to warrant an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Next, appellant claims that his counsel did not properly prepare him for questioning at the trial. Appellant complains that he "did not understand sex to necessarily include penile penetration and therefore he answered questions inappropriately" and that he "did not understand when questioned whether he would have sex with a woman without her permission and therefore answered the question as to admit the commission of the crime charged erroneously." After reviewing appellant's trial testimony, we conclude that appellant's claims are devoid of merit. Appellant's testimony demonstrated that he understood

the meaning of "sex" and that he admitted to having consensual sexual intercourse with the victim.

Appellant next claims that his counsel failed to request testing of blood and semen samples to ascertain whether appellant had sexual intercourse with the victim. We perceive no prejudice to appellant, even assuming that counsel acted unreasonably in failing to obtain testing of the samples. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Finally, appellant claims that the reasonable doubt instruction in this case, which was based on the former version NRS 175.211, was constitutionally deficient. See 1967 Nev. Stat., ch. 523, § 194, at 1427-28. Appellant acknowledges that he failed to raise this claim below. Nevertheless, appellant claims that the error is of constitutional magnitude, and he requests this court to consider it. We decline to consider appellant's claim because of his failure to raise it below and the absence of plain constitutional error. See *Ramirez v. Hatcher*, 136 F.3d 1209 (9th Cir. 1998), cert. denied, 119 S.Ct. 415 (1998); *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

#### Appellant's Motion to Correct or Modify an Illegal Sentence

The district court has authority to grant a motion to correct an illegal sentence or a motion to modify a sentence only if the sentencing court misapprehended a material fact about the defendant's criminal record that worked to the defendant's extreme detriment or if the defendant's sentence is facially illegal. See *Edwards v. State*, 112 Nev. 704, 707-08, 918 P.2d 321, 323-24 (1996). A sentence is facially illegal if the sentence exceeds the statutory maximum or if the sentencing court otherwise lacked jurisdiction to impose the sentence. Id. at 708, 918 P.2d at 324.

In his motion, appellant argued, pursuant to *Clark v. State*, 109 Nev. 426, 851 P.2d 426 (1993), that he was improperly adjudicated as a habitual criminal. Appellant specifically alleged that the record did not reflect that the district court

was aware that it had discretion not to adjudicate appellant as a habitual criminal after the state produced proof of appellant's prior convictions.

We conclude that the district court did not err in denying appellant's motion because his claim fell outside the very narrow scope of issues cognizable in a motion to correct an illegal sentence or a motion to modify a sentence. There is nothing in the record to suggest that the sentencing court relied on misinformation about appellant's criminal record or that the court lacked jurisdiction to impose the sentences in the instant case. As noted above, the state produced proper proof of appellant's prior convictions before the court adjudicated appellant as a habitual criminal. Further, appellant's sentences were within statutory limits.

Conclusion

Having reviewed the records on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief in these matters. Accordingly, we

ORDER these appeals dismissed.<sup>3</sup>

Maupin J.  
Maupin

Agosti J.  
Agosti

Becker J.  
Becker

cc: Hon. Jack Lehman, District Judge  
Hon. Lee A. Gates, District Judge  
Attorney General  
Clark County District Attorney  
State Public Defender  
Roy D. Moraga  
Clark County Clerk

<sup>3</sup>We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted. Further, we conclude that briefing and oral argument are unwarranted in appellant's proper person appeal. See *Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 29321

District Court Case No. C92174

**REMITTITUR**

TO: Honorable Shirley Parraguire, Clark County Clerk

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

Certified copy of Judgment and copy of Order.

Receipt for Remittitur.

DATE: May 18, 1999

Janette Bloom, Clerk of Court

By: J. Richards

Chief Deputy Clerk

cc: Hon. Jack Lehman, District Judge  
Attorney General  
Clark County District Attorney  
State Public Defender

**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 MAY 27 1999

**NORRETA CALDWELL**

Deputy County Clerk

jw

150.

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Jul 1 1 35 PM '99 No. 32542

District Court Case No. C92174

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 these appeals dismissed."

Judgment, as quoted above, entered this 20th day of April, 1999.

IN WITNESS WHEREOF, I have subscribed my name  
and affixed the seal of the Supreme Court at my Office  
in Carson City, Nevada, this 18th day of May, 1999.

Janette M. Bloom, Supreme Court Clerk

By:

J. Richards  
Chief Deputy Clerk

jw

CE43

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 29321

**FILED**

APR 20 1999

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
CHIEF DEPUTY CLERK

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 32542

ORDER DISMISSING APPEALS

Docket No. 29321 is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 32542 is a proper person appeal from a district court order denying appellant's motion to modify or correct an illegal sentence. We elect to consolidate these appeals for disposition. NRAP 3(b).

On July 7, 1990, the district court convicted appellant, pursuant to a jury verdict, of two counts of burglary and two counts of sexual assault. The court sentenced appellant to life without the possibility of parole. On direct appeal, this court upheld appellant's conviction but remanded to the district court for resentencing on the ground that the district court had failed to sentence appellant for each of the four primary offenses.<sup>1</sup> Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991).

After resentencing, the district court entered an amended judgment of conviction. The court sentenced appellant to two consecutive ten-year terms for the burglary offenses and

<sup>1</sup>This court noted: "Although the district court has discretion to dismiss a count of habitual criminality, see NRS 207.010(4), the district court does not have discretion to impose but one sentence for multiple primary offenses."

a consecutive term of life with the possibility of parole for one of the counts of sexual assault. The court also adjudicated appellant as a habitual criminal, sentencing him to a consecutive term of life without the possibility of parole for the second count of sexual assault. This court dismissed appellant's appeal from the amended judgment of conviction.<sup>2</sup> Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995).

On February 20, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant subsequently obtained counsel to represent him, and counsel filed supplemental documents in support of appellant's petition. The state opposed appellant's petition, and the district court denied the petition. Appellant's subsequent appeal is docketed in this court as Docket No. 29321.

On April 30, 1998, appellant filed a proper person motion to modify or correct an illegal sentence in the district court. The state opposed appellant's motion. The district court summarily denied the motion. Appellant's subsequent appeal is docketed in this court as Docket No. 32542.

#### Appellant's Habeas Corpus Petition

Appellant claims that the district court should have held an evidentiary hearing on several claims that he presented in his habeas corpus petition. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) (stating that a defendant pursuing post-conviction relief is entitled to an evidentiary hearing if he or she alleges a claim supported by sufficient factual allegations that, if true, would entitle the defendant to relief). We disagree. We will address each of appellant's claims in turn.

---

<sup>2</sup>On September 29, 1993, the district court entered a second amended judgment of conviction granting appellant 180 days credit for time served.



First, appellant claims that he was not taken before a magistrate for a timely probable cause determination after his arrest. See NRS 171.178; Powell v. State, 113 Nev. 41, 930 P.2d 1123 (1997). We conclude that the district court properly rejected appellant's claim because appellant failed to allege sufficient facts to support a showing of prejudice or cause for his failure to previously raise this claim. See NRS 34.810(1)(b), (3); see also Strickland v. Washington, 466 U.S. 668 (1984); Powell, 113 Nev. 41, 930 P.2d 1123; Huebner v. State, 103 Nev. 29, 731 P.2d 1330 (1987).

Next, appellant claims that his counsel was ineffective for failing to object to certified copies of prior convictions that were introduced by the state in seeking appellant's adjudication as a habitual criminal. In his petition, appellant explained that inconsistencies in these documents revealed that the prior convictions did not all pertain to the same individual.

We agree with the state that this claim is effectively precluded by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). On appeal from the amended judgment of conviction, appellant pointed out that two of the prior convictions named "Roy Daniels Moraga" and the third listed "Roy Daniel Moraga." Appellant claimed that all of the prior convictions might not apply to him. This court noted that appellant's counsel had failed to make an appropriate objection, but this court further concluded: "[T]he state adequately proved that appellant received the three prior convictions. The prior convictions presented by the state do not, on their face, 'raise a presumption of constitutional infirmity,' and the district court was entitled to use these convictions for sentence enhancement purposes." Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995) (citations omitted).

Appellant further claims that his counsel was ineffective for failing to file a motion to suppress the

evidence of the victim's apartment key, which was seized from appellant. Appellant failed to support this claim with sufficient factual allegations that demonstrate that police obtained the key as a result of an illegal search or seizure. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Additionally, appellant's counsel in the district court and on appeal has failed to articulate any valid basis for suppression of the evidence. Finally, even assuming that counsel would have been successful in a motion to suppress the key, we do not perceive any prejudice to appellant in light of the persuasive evidence of his guilt. See Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, appellant was not entitled to an evidentiary hearing on this claim nor is he entitled to relief as a matter of law, which he also requests.

Appellant also claims that his counsel did not interview witnesses to prepare for trial. Appellant claims that if counsel had done so, he would have uncovered evidence to show that appellant had been seen "making out" with the victim when they first met and that appellant was incapable of sexual intercourse while intoxicated. Appellant failed, however, to name the witnesses who would have allegedly supported these allegations. Thus, we conclude that appellant failed to support his claim with sufficient supporting factual allegations to warrant an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Next, appellant claims that his counsel did not properly prepare him for questioning at the trial. Appellant complains that he "did not understand sex to necessarily include penile penetration and therefore he answered questions inappropriately" and that he "did not understand when questioned whether he would have sex with a woman without her permission and therefore answered the question as to admit the commission of the crime charged erroneously." After reviewing appellant's trial testimony, we conclude that appellant's claims are devoid of merit. Appellant's testimony demonstrated that he understood

the meaning of "sex" and that he admitted to having consensual sexual intercourse with the victim.

Appellant next claims that his counsel failed to request testing of blood and semen samples to ascertain whether appellant had sexual intercourse with the victim. We perceive no prejudice to appellant, even assuming that counsel acted unreasonably in failing to obtain testing of the samples. See Strickland v. Washington, 466 U.S. 668 (1984).

Finally, appellant claims that the reasonable doubt instruction in this case, which was based on the former version NRS 175.211, was constitutionally deficient. See 1967 Nev. Stat., ch. 523, § 194, at 1427-28. Appellant acknowledges that he failed to raise this claim below. Nevertheless, appellant claims that the error is of constitutional magnitude, and he requests this court to consider it. We decline to consider appellant's claim because of his failure to raise it below and the absence of plain constitutional error. See Ramirez v. Hatcher, 136 F.3d 1209 (9th Cir. 1998), cert. denied, 119 S.Ct. 415 (1998); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

#### Appellant's Motion to Correct or Modify an Illegal Sentence

The district court has authority to grant a motion to correct an illegal sentence or a motion to modify a sentence only if the sentencing court misapprehended a material fact about the defendant's criminal record that worked to the defendant's extreme detriment or if the defendant's sentence is facially illegal. See Edwards v. State, 112 Nev. 704, 707-08, 918 P.2d 321, 323-24 (1996). A sentence is facially illegal if the sentence exceeds the statutory maximum or if the sentencing court otherwise lacked jurisdiction to impose the sentence. Id. at 708, 918 P.2d at 324.

In his motion, appellant argued, pursuant to Clark v. State, 109 Nev. 426, 851 P.2d 426 (1993), that he was improperly adjudicated as a habitual criminal. Appellant specifically alleged that the record did not reflect that the district court

was aware that it had discretion not to adjudicate appellant as a habitual criminal after the state produced proof of appellant's prior convictions.

We conclude that the district court did not err in denying appellant's motion because his claim fell outside the very narrow scope of issues cognizable in a motion to correct an illegal sentence or a motion to modify a sentence. There is nothing in the record to suggest that the sentencing court relied on misinformation about appellant's criminal record or that the court lacked jurisdiction to impose the sentences in the instant case. As noted above, the state produced proper proof of appellant's prior convictions before the court adjudicated appellant as a habitual criminal. Further, appellant's sentences were within statutory limits.

Conclusion

Having reviewed the records on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief in these matters. Accordingly, we

ORDER these appeals dismissed.<sup>3</sup>

Maupin, J.  
Maupin

Agosti, J.  
Agosti

Becker, J.  
Becker

cc: Hon. Jack Lehman, District Judge  
Hon. Lee A. Gates, District Judge  
Attorney General  
Clark County District Attorney  
State Public Defender  
Roy D. Moraga  
Clark County Clerk

<sup>3</sup>We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted. Further, we conclude that briefing and oral argument are unwarranted in appellant's proper person appeal. See *Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 32542

District Court Case No. C92174

**REMITTITUR**

TO: Honorable Shirley Parraguirre, Clark County Clerk

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

Certified copy of Judgment and copy of Order.

Receipt for Remittitur.

DATE: May 18, 1999

Janette Bloom, Clerk of Court

By:

J. Richards  
Chief Deputy Clerk

cc: Hon. Lee A. Gates, District Judge  
Attorney General  
Clark County District Attorney  
Roy D. Moraga

**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 MAY 27 1999.

NORRETA CALDWELL

Deputy

County Clerk

jw

FILED

JUSTICE COURT, LAS VEGAS TOWNSHIP

FEB 25 11 17 AM '02

CLARK COUNTY, NEVADA

*Shirley ... King*  
CLERK

Roy MORAGA

PLAINTIFF,

CASE NO.

C92174  
Dept 8

Vs.

DEFENDANT,

**CERTIFICATE OF INMATE'S  
INSTITUTIONAL ACCOUNT**

3-11-02

I, The Undersigned, hereby certify that the Plaintiff, \_\_\_\_\_

Roy MORAGA, NDOP NO. 31584, has an accessible  
balance of \$ 29, and a non-accessible savings account  
balance of \$ 200.00.

I further certify that said Plaintiff owes Departmental  
charges in the amount of \$ 42.92, and that he has no securiti-  
es to his credit according to the records of the Southern  
Desert Correctional Center, Indian Springs, Nevada where he is  
confined.

DATED this 25<sup>th</sup> day of JANUARY, 2002.

*Janet R. ...*

Institutional Officer's Signature and Title  
Southern Desert Correctional Center  
Post Office Box 208  
Indian Springs, Nevada 89070

NDOP NO. 3/584, SDCC  
Post Office Box 208  
Indian Springs, Nevada 89070

FILED 2174

FEB 25 11 17 AM '02

Plaintiff - In Propria Persona

*Shelly Williams*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

Roy MORAGA  
Plaintiff,

CASE NO. 192174  
DEPT NO.  
DOCKET

vs.

Employers Insurance Company  
of Nevada

MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

Date of Hearing: 3-11-02

Defendant.

Time of Hearing:

COMES NOW the Plaintiff, Roy MORAGA,  
in and through his proper person, pursuant to NRS 12.015, and  
respectfully moves this Honorable Court for an Order granting  
Motion leave to proceed in forma pauperis in the above-  
entitled action without requiring the prepayment of costs or  
provisions of security for costs and official fees, and costs of  
prosecuting this action.

This Motion is made and based upon the above referenced  
Statute, attached Affidavit of Roy MORAGA and the accompanying  
Certificate of Inmate's Institutional Account.

DATED this 11th day of February, 2002.

Roy Moraga  
Plaintiff - In Propria Persona

COUNTY CLERK

FEB 25 2002

RECEIVED

AFFIDAVIT OF IN SUPPORT OF MOTION  
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NEVADA )  
                              ) ss.  
COUNTY OF CLARK )

I, ROY MORAGA, do hereby swear under penalty  
of perjury that the assertions of this affidavit are true, that:

1. I am the PLAINTIFF in the above-entitled action.

2. I make this affidavit in support of my motion to proceed  
in the above-entitled action without being required to prepay  
fees, costs or give security therefor.

3. Because of my poverty, I am unable to pay the costs of  
said proceedings or to give security to cover such costs or fees.

4. I believe that I am entitled to the relief sought in the  
action filed herein.

5. I am unemployed and confined in prison, and have been  
unemployed since my confinement in the Nevada State Prisons.

6. I have not received within the past 12 months ( )  
months, nor do I anticipate receiving, any money from any of the  
following sources: business; rent payments; interests or  
dividends; pensions; annuities or life insurance payments; gifts  
or inheritance; or from any other source.

7. Other than my prison commissary account, which currently  
has the balance reflected on the attached Certificate of Inmate's  
Institutional Account, I do not own any other cash, nor do I have  
any checking or savings accounts.

8. I do not own any real estate, stocks, bonds, notes,  
automobiles or other valuable property.

.....



1 9. I also have the following persons dependent upon me for  
2 support:

3  
4 However because of my poverty I am unable to provide any support.

5 10. I understand that a false statement in this affidavit  
6 will subject me to penalties for perjury.

7 Further, your affiant sayeth naught.

8  
9 Roy Moray  
10 NDOP NO. 31584  
11 Post Office Box 208, SDCC  
12 Indian Springs, Nevada 89070

- In Propria Persona

13 EXECUTED this 11th day of February, 2008.  
14 at Southern Desert Correctional Center, Indian Springs, Nevada  
15 under penalty of perjury pursuant to the provisions of NRS  
16 208.165.

17  
18 Roy Moray  
19 NDOP NO.  
20 Post Office Box 208, SDCC  
21 Indian Springs, Nevada 89070

- In Propria Persona

155  
Roy MORAGA 1584  
S.D.C.C. P.O. Box 208  
Indian Springs, NV 89070  
In Pro Per

FILED

District Court  
Clark County, Nevada  
FEB 25 11 17 AM '02

C92174  
Dept 8

ROY MORAGA  
PLAINTIFF

*Subscribed and sworn to*  
CLERK

3-11-02

vs.

CLAIM NO: 19900682027

Employers Insurance  
Company of Nevada  
Defendant

Hearing NO: LHE 2000C-4639-DH  
Appeal NO: LEA 2000/C-0832-ES

Motion To Preserve Evidence

AND Order

Comes Now The Plaintiff, Roy MORAGA, in and through his Proper Person, respectfully moves this Honorable Court for an Order to Preserve Evidence in the above-entitled Action.

This Motion is made and based upon the attached Memorandum and the Affidavit, EXH(S) of Plaintiff Attached hereto and expressly incorporated herein, and upon all Pleadings and Papers Accompanying this Motion.

Dated this 11th day of February 2002

Respectfully Submitted by:

Roy Moraga  
Plaintiff-In Propria Persona

39

RECEIVED

FEB 21 2002

COUNTY CLERK



Notice of Motion

1  
2 To: Employers Insurance Company of Nevada

3 To: Dr. James Manning

4       you, and Each of you, will Take Notice that the  
5 undersigned will bring the above and foregoing Motion on for  
6 hearing before the Court at the Courtroom of the above—  
7 entitled Court on the 16th day of February, at      o'clock  
8      m, of said day, in Department      of said Court.

9                               Respectfully Submitted by:

10                              Roy Morrison # 31584

11                              Plaintiff-In Propria Persona  
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**EMPLOYERS INSURANCE COMPANY  
OF NEVADA**  
A Mutual Company

1700 W. Charleston Boulevard, P.O. Box 26929, Las Vegas, Nevada 89126-0929

January 29, 2002

Roy Moraga  
#31584  
S.d.c.c Po Box 208  
Indian Springs, NV 89070

Rc: Injured Worker: Roy Moraga  
Claim No.: 19900682027  
Injured: 11/09/1989

Dear Mr. Moraga:

The Employers Insurance Company of Nevada is in receipt of your letter of January 22, 2002, regarding your claim and transportation to your appointments.

I aware that due to your current situation you are not able to arrange for transportation. I refer you to you my letter of November 9, 2001, in which I recommended that you contact the prison infirmary to have them schedule your appointment. They will schedule your appointment and they will make the appropriate arrangements for your transportation.

As there are many steps in scheduling your appointments, due to your incarceration. It is easier for the prison to schedule your appointments as well as make the appropriate custody arrangements for your appointments.

The Employers Insurance Company of Nevada will authorize payment for any medical treatment that is required, pending prior approval.

If you have any questions, please contact our customer service center at 1-888-682-6671.

Sincerely,

Curtiss Y. Lewis  
Claims Adjuster-704/ RM



**EMPLOYERS INSURANCE COMPANY  
OF NEVADA**  
A Mutual Company

1700 W. Charleston Boulevard, P.O. Box 26929, Las Vegas, Nevada 89126-0929

November 9, 2001

Roy Moraga #31584  
S.D.C.C. P.O. Box 208  
Indian Springs, NV 89070

Re: Injured Worker: Roy Moraga  
Claim No.: 19900682027  
Injured: 11/09/1989

Dear Mr. Moraga:

Thank you for your recent letter regarding which benefits you are currently entitled. Be advised that you are only entitled to receive medical benefits, as you are currently incarcerated.

NRS 616C.475 Amount and duration of compensation; limitations.

2. Except as otherwise provided in NRS 616B.185 and 616B.186, an injured employee or his dependents are not entitled to accrue or be paid any benefits for a temporary total disability during the time the injured employee is incarcerated. The injured employee or his dependents are entitled to receive such benefits when the injured employee is released from incarceration if he is certified as temporarily totally disabled by a physician or chiropractor.

As it relates to your surgery as recommended by Dr. James Manning. As you are currently incarcerated and due to security reasons I recommend that you contact the Prison Infirmary and have them schedule any medical appointments that you may need, including your surgery. For your convenience, Dr. James Manning office is located at 701 S. Tonopah, Las Vegas and the phone number is 388-1008.

Please provide a copy this letter to the Infirmary Staff, for your file and the scheduling of your appointment.

If you have any questions, please contact our customer service center at 1-888-682-6671.

Sincerely,

Curtiss Y. Lewis  
Claims Adjuster-701/ RM

cc: Western States Contracting Inc

Paper Mail

Affidavit of Plaintiff

1 State of Nevada,  
2 County of Clark, ss.

3 I, Roy MORAGA, do hereby Swear under Penalty of  
4 Perjury, that the Assertions of this Affidavit are true:

5 1. That I am the Plaintiff in the Above-entitled Action.

6 2. That I make this Affidavit in Support of my Motion  
7 to Preserve Evidence and Order Submitted herewith and  
8 on File with this Court.

9 3. That I am without means to Afford Counsel (see  
10 Motion to Proceed In Form Pauperis and Affidavit I  
11 Support accompanying that Motion.)

12 Roy Moraga  
13 N.D.O.P. NO: 31584  
14 S.D.C.C.P.O. Box 208  
15 Indian Springs, NV 89070  
16 Plaintiff-In Propria Persona

17 Executed this 14th day of February 2002 at the Southern  
18 Desert Correctional Center, Indian Springs, Nevada  
19 Under Penalty of Perjury, Pursuant to N.R.S. 208.165

20 Roy Moraga  
21 Plaintiff-In Propria Persona  
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## Summary

1 ON or about October 15th 2001 the Appeals Officer  
2 reopened my Claim For medical Treatment on my left knee  
3 what I need this Court to do is grant the Order to  
4 Preserve my knee After Surgery in Order to Show  
5 there was Medical Malpractice done at the hands of  
6 Dr. Higgins that took Place in 1990.

7 This will be my 2ed Surgery and with this evidence  
8 I will be entitled to all appropriate benefits Provided  
9 by N.R.S. 616

10 Respectfully Submitted by:

11 Roy Moraga #31584

12 P.O. Box 208 - S.D.C.C.

13 Indian Springs, NV 89070  
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Certificate of Service

1 I, The undersigned, hereby Certify, Pursuant to N.R.L.P. 5(b),  
2 that on this 11th day of February 2002

3 I Served the Foregoing Motion to Preserve Evidence by  
4 Mailing a true AND Correct Copy(s) thereof in a sealed  
5 envelope, upon which postage was Fully Prepaid, Addressed to:

6  
7 Employers Insurance Company  
8 of Nevada  
9 1700 W. Charleston Boulevard  
10 P.O. Box 26929  
11 Las Vegas, NV 89126-0929  
12

13 Dr. James B. Manning  
14 701 S. Tonopah  
15 Las Vegas, Nevada 89106  
16

17 Roy Moraga #31584  
18 Declarant  
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**EMPLOYERS INSURANCE COMPANY  
OF NEVADA**

A Mutual Company

1700 W. Charleston Boulevard, P.O. Box 26929, Las Vegas, Nevada 89126-0929

January 29, 2002

Roy Moraga  
#31584  
S.d.c.c Po Box 208  
Indian Springs, NV 89070

Rc: Injured Worker: Roy Moraga  
Claim No.: 19900682027  
Injured: 11/09/1989

Dear Mr. Moraga:

The Employers Insurance Company of Nevada is in receipt of your letter of January 22, 2002, regarding your claim and transportation to your appointments.

I am aware that due to your current situation you are not able to arrange for transportation. I refer you to my letter of November 9, 2001, in which I recommended that you contact the prison infirmary to have them schedule your appointment. They will schedule your appointment and they will make the appropriate arrangements for your transportation.

As there are many steps in scheduling your appointments, due to your incarceration. It is easier for the prison to schedule your appointments as well as make the appropriate custody arrangements for your appointments.

The Employers Insurance Company of Nevada will authorize payment for any medical treatment that is required, pending prior approval.

If you have any questions, please contact our customer service center at 1-888-682-6671.

Sincerely,

Curtiss Y. Lewis  
Claims Adjuster-704/ RM



**EMPLOYERS INSURANCE COMPANY  
OF NEVADA**  
A Mutual Company

1700 W. Charleston Boulevard, P.O. Box 26929, Las Vegas, Nevada 89126-0929

November 9, 2001

Roy Moraga #31584  
S.D.C.C. P.O. Box 208  
Indian Springs, NV 89070

Re: Injured Worker: Roy Moraga  
Claim No.: 19900682027  
Injured: 11/09/1989

Dear Mr. Moraga:

Thank you for your recent letter regarding which benefits you are currently entitled. Be advised that you are only entitled to receive medical benefits, as you are currently incarcerated.

NRS 616C.475 Amount and duration of compensation; limitations.

2. Except as otherwise provided in NRS 616B.185 and 616B.186, an injured employee or his dependents are not entitled to accrue or be paid any benefits for a temporary total disability during the time the injured employee is incarcerated. The injured employee or his dependents are entitled to receive such benefits when the injured employee is released from incarceration if he is certified as temporarily totally disabled by a physician or chiropractor.

As it relates to your surgery as recommended by Dr. James Manning. As you are currently incarcerated and due to security reasons I recommend that you contact the Prison Infirmary and have them schedule any medical appointments that you may need, including your surgery. For your convenience, Dr. James Manning office is located at 701 S. Tonopah, Las Vegas and the phone number is 388-1008.

Please provide a copy this letter to the Infirmary Staff, for your file and the scheduling of your appointment.

If you have any questions, please contact our customer service center at 1-888-682-6671.

Sincerely,

Curtiss Y. Lewis  
Claims Adjuster-701/ RM

cc: Western States Contracting Inc

Paper Mail

156

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FEB 26 10 45 AM '02

STATE OF NEVADA , )  
PLAINTIFF, )  
VS )  
ROY D. MORAGA , )  
DEFENDANT, )  
\_\_\_\_\_ )

*Shirley B. Parraguirre*  
CLERK

CASE #: 89-C-092174

DEPT #: VII

NOTICE OF HEARING-CRIMINAL

The MOTION TO PRESERVE EVIDENCE AND ORDER previously set 3/11/2002, has been VACATED.

I hereby certify that on February 26, 2002

I placed a copy of NOTICE OF HEARING - CRIMINAL

IN: ☒ STEWART BELL attorney's folder  
located in the Office of the County Clerk

☒ PRO PER  
The United States mails addressed as follows:  
ROY D. MORAGA #31584  
PO BOX 208  
INDIAN SPRINGS, NV 89070

**SHIRLEY B. PARRAGUIRRE**  
*Shirley B. Parraguirre*  
**NICOLE HOLLOWOOD, DEPUTY**  
\_\_\_\_\_  
Deputy County Clerk

FEB 26 2002

RECEIVED

FEB 26 2002

COUNTY CLERK

513

Original

158

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OCT 31 10 13 AM '02

MOTN

ROY DANIELS MORAGA #31584  
Southern Desert Correctional Center  
Post Office Box 208  
Indian Springs, Nevada 89070

Defendant pro se

DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY DANIELS MORAGA,

Defendant.

) Case No. C92174

) Dept. No. VIII

) Docket M

) Date of Hearing:

) Time of Hearing:

11-13-02

MOTION TO VACATE AND/OR AMEND JUDGMENT

COMES NOW the Defendant, ROY DANIELS MORAGA, pro se, and pursuant to Warden v. Peters, 429 P.2d 549 (Nev.1967); FRCP Rule 60(b)(4); NRCP 60(b)(3); and the Due Process and Double Jeopardy Clauses of the U.S. Constitution (5th and 14th Amendments), hereby moves this Honorable Court to vacate and/or amend the Amended Judgment of Conviction in the above-entitled case.

This motion is made and based upon the papers and pleadings on file in this case and the attached Points and Authorities.

DATED this 28th day of October, 2002.

Respectfully submitted,

Roy Moraga  
Roy D. Moraga #31584  
Defendant pro se

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POINTS AND AUTHORITIES

STATEMENT OF FACTS

On June 13, 1990, Defendant was convicted, pursuant to a jury verdict, of two counts of burglary and two counts of sexual assault. The district court adjudicated Defendant a habitual criminal and sentenced him to a single sentence of life without the possibility of parole. The Judgment of Conviction was filed on July 7, 1990. On direct appeal, the Nevada Supreme Court found that the sentence was erroneous, as Defendant should have received a sentence for each of his four convictions, and his case was remanded to the district court for resentencing. Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991).

On October 21, 1991, Defendant was sentenced to two consecutive ten-year terms for the burglary offenses and a consecutive term of life with the possibility of parole for one of the counts of sexual assault. The court also adjudicated Defendant a habitual criminal, sentencing him to a consecutive term of life without the possibility of parole for the second count of sexual assault. For the reasons set forth below, the Amended Judgment of Conviction is void, and Defendant respectfully asks that it be vacated and/or amended.

ARGUMENT

In Warden v. Peters, 429 P.2d 549 (Nev.1967), the Nevada Supreme Court held:

"..courts which make a mistake in rendering a judgment which works to the extreme detriment of the defendant will not allow it to stand uncorrected. In a situation such as this, where, as discussed below, the court has inherent power to reconsider a judgment for good cause shown, we hold that such an issue may be raised by a motion to vacate judgment."

1 Id., 429 P.2d at 551. Also, Rule 60(b) of the Nevada Rules of Civil  
2 Procedure, which was modeled after Rule 60(b) of the Federal Rules of  
3 Civil Procedure, provides in pertinent part:

4 On motion and upon such terms as are just, the  
5 court may relieve a party or his legal  
6 representative from a final judgment, order, or  
7 proceeding for the following reasons....(3) the  
8 judgment is void....

9 NRCP Rule 60(b)(3); FRCP Rule 60(b)(4). The Nevada Supreme Court has  
10 held that relief from a void judgment should be sought in the trial  
11 court under the provisions of NRCP 60(b) rather than by an appeal.  
12 Osman v. Cobb, 360 P.2d 258 (Nev.1961). Although motions pursuant to  
13 NRCP 60(b) are generally required to be made within a reasonable time  
14 and to be adjudicated according to the district court's discretion, a  
15 moving party on a motion brought pursuant to NRCP 60(b)(3) is not  
16 required to make the motion within a reasonable time or to show  
17 existence of a meritorious defense, and the court has no discretion  
18 in adjudicating the motion. Garcia v. Ideal Supply Co., 874 P.2d 752  
19 (Nev.1994).

20 I. DISTRICT COURT'S IMPOSITION OF CONSECUTIVE SENTENCES UPON  
21 RESENTENCING UNCONSTITUTIONALLY INCREASED DEFENDANT'S  
22 TERM OF IMPRISONMENT IN VIOLATION OF DUE PROCESS

23 Generally, a defendant cannot be resentenced to a longer term of  
24 imprisonment without violating the Due Process Clause. See North  
25 Carolina v. Pierce, 395 U.S. 711, 721 (1969). A trial court may not  
26 impose a longer sentence to penalize the defendant for seeking a new  
27 trial, nor may a defendant be placed in "apprehension of....a  
28 retaliatory motivation on the part of the sentencing judge." Id., at  
725. If a longer sentence is imposed at the resentencing, the reasons  
for the increased sentence must "affirmatively appear" on the

1 record, and these reasons "must be based upon objective information  
2 concerning identifiable conduct on the part of the defendant  
3 occurring after the time of the original sentencing proceeding."  
4 *Id.*, at 726. See also Wasman v. United States, 468 U.S. 559, 570-72  
5 (1984)(at second sentencing proceeding, court considered conviction  
6 between first and second sentencing in imposing a more severe  
7 sentence). In the instant case, Defendant's original sentence was a  
8 single sentence of life without the possibility of parole. Upon  
9 remand, the district court properly imposed sentences for each of  
10 Defendant's four convictions; however, by imposing them to run  
11 consecutively, the court improperly increased Defendant's term of  
12 imprisonment, and no reasons for the increased sentence  
13 "affirmatively appear" on the record. As such, and since there was no  
14 "identifiable conduct" on the part of Defendant "occurring after the  
15 time of the original sentencing proceeding" upon which to base an  
16 increase in Defendant's sentence, the subsequent increase violated  
17 the Due Process Clause of the U.S. Constitution.

18 **II. DISTRICT COURT'S IMPOSITION OF CONSECUTIVE SENTENCES UPON**  
19 **RESENTENCING INCREASED THE SEVERITY OF THE TOTAL**  
20 **SENTENCING PACKAGE IN VIOLATION OF DOUBLE JEOPARDY**

21 A court may increase the severity of a sentence when an  
22 appellate court finds the first sentence invalid. Nevertheless, the  
23 court may not increase the severity of the total sentencing package.  
24 See Stewart v. Scully, 925 F.2d 58, 65 (2nd Cir.1991) (double  
25 jeopardy barred modification of unlawful sentence of 10 to 20 years  
26 to 8 to 24 years because defendant had legitimate expectation of  
27 finality in maximum term). If a defendant success-fully appeals part  
28 of a multi-count conviction, the court may increase the sentence for

1 increase the sentence for the remaining counts but may not exceed the  
2 total original sentence or act vindictively. See, e.g., U.S. v.  
3 Pimienta-Redondo, 874 F.2d 9, 16 (1st Cir.1989) (en banc) (on remand,  
4 trial court may increase sentence on one count after second count  
5 vacated because presumption of vindictiveness unwarranted because  
6 original sentence was not exceeded); U.S. v. Busic, 639 F.2d 940, 950  
7 (3rd Cir.1981) (on remand, trial court may increase sentence on some  
8 counts, knowing that other counts no longer available for  
9 sentencing, as long as possible maximum total sentence does not  
10 exceed original sentencing package); U.S. v. Lopez, 706 F.2d 108, 109  
11 (2nd Cir.1983) (per curiam) (defining "bright line rule" allowing  
12 courts to correct illegal sentences if no prejudice to defendant; no  
13 double jeopardy violation when defendant's total sentencing  
14 package, including number of years, prospects for parole and  
15 calculation of "good time" remained unchanged because no prejudice  
16 resulted from resentencing). In the case at bar, Defendant had a  
17 legitimate expectation of finality in the maximum term of  
18 imprisonment originally imposed, and he was prejudiced by the  
19 imposition of consecutive sentences that exceeded the total of the  
20 original sentence. A presumption of vindictiveness exists due to the  
21 increase in the overall length of Defendant's term of imprisonment  
22 without justification. As such, the unjustified increase  
23 constitutes a violation of the Double Jeopardy Clause of the U.S.  
24 Constitution.

25 / / /

26 / / /

27 / / /



1 WHEREFORE, based upon the foregoing, Defendant prays this  
2 Honorable Court VACATE the Amended Judgment of Conviction and Order  
3 that a new Amended Judgment of Conviction be filed wherein the  
4 sentences are imposed to run CONCURRENTLY.

5 DATED this 28th day of October, 2002.

6 Respectfully submitted,  
7

8 Roy D. Moraga  
9 Roy D. Moraga #31584  
10 Defendant pro se

11 CERTIFICATE OF MAILING

12 I, ROY DANIELS MORAGA, do hereby certify that I mailed a true and  
13 correct copy of the foregoing MOTION TO VACATE AND/OR AMEND JUDGMENT  
14 to the following:

15 DISTRICT ATTORNEY'S OFFICE  
16 200 South Third Street, Suite 701  
17 Post Office Box 552212  
18 Las Vegas, Nevada 89155-2212

19 DATED this 28th day of October, 2002.

20  
21 By: Roy D. Moraga  
22 Roy D. Moraga #31584  
23 Defendant pro se  
24  
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FILED

Nov 21 3 43 PM '02

*Shirley A. Hargis*  
CLERK

1 **ORDR**  
2 **CRISTINA HINDS, ESQ.**  
3 Nevada Bar No. 7014  
4 525 S. 6<sup>th</sup> St.  
5 Las Vegas, Nevada 89101  
6 (702) 940-1234  
7 Attorney for Defendant

8 **IN THE EIGHTH DISTRICT COURT**  
9 **OF THE STATE OF NEVADA FOR THE COUNTY OF CLARK**

10 THE STATE OF NEVADA,

11 Plaintiff

12 vs.

13 ROY D. MORAGA

14 Defendant.

CASE NO.: C092174  
DEPT. NO.: VIII

15 **ORDER FOR APPOINTMENT OF COUNSEL**  
16 **FOR POST-CONVICTION RELIEF**

17 IT IS HEREBY ORDERED that CRISTINA HINDS, ESQ. counsel for the Defendant, ROY  
18 D. MORAGA, is appointed as of November 18<sup>th</sup>, 2002 by virtue of this court to represent the above  
19 defendant as the attorney of record for the Defendant's Post-Conviction relief pursuant to SCR 250  
20 (2)(f).

21 Dated this 21 day of November, 2002.

22 Respectfully Submitted,

23 *Cristina Hinds*  
24 CRISTINA HINDS, ESQ.  
25 Nevada Bar No. 7014  
26 525 S. Sixth Street  
27 Las Vegas, NV 89101  
28 (702) 940-1234

*John G. Tate*  
DISTRICT COURT JUDGE

FILED

Nov 27 10 51 AM '02

*Shirley E. Langston*  
CLERK

OPPS

STEWART L. BELL  
Clark County District Attorney  
Nevada Bar #000477  
DOUGLAS HERNDON  
Chief Deputy District Attorney  
Nevada Bar #004286  
200 South Third Street  
Las Vegas, Nevada 89155-2211  
(702) 455-4711  
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROY D. MORAGA,  
#0938554

Defendant.

CASE NO: C92174

DEPT NO: VIII

STATE'S OPPOSITION TO DEFENDANT'S MOTIO TO VACATE  
AND/OR AMEND JUDGMENT

DATE OF HEARING: 12/2/02

TIME OF HEARING: 9:00 a.m.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney,  
through DOUGLAS HERNDON, Chief Deputy District Attorney, and hereby submits the  
attached Points and Authorities in Opposition to Defendant's State's Opposition To  
Defendant's Motion To Vacate

And/Or Amend Judgment.

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.

RECEIVED  
NOV 27 2002  
CLERK

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 Roy Moraga, hereinafter Defendant, was convicted on March 15, 1990, after a jury  
4 trial, of two counts of burglary and two counts of sexual assault. On June 30, 1990, the  
5 District Court adjudicated the Defendant as a habitual offender and sentenced him to life in  
6 prison without the possibility of parole. After the Defendant appealed his conviction to the  
7 Nevada Supreme Court, that Court affirmed the Defendant's convictions. (*See*, Supreme  
8 Court Opinion 8/27/91). However, the Supreme Court reversed the District Court's sentence  
9 as erroneous and remanded the case back for re-sentencing.

10 On October 21, 1991, the Defendant was re-sentenced in Department X of the Eighth  
11 Judicial District to ten (10) years for each of the burglary counts, to run consecutive to each  
12 other and a consecutive sentence of life imprisonment with the possibility of parole for one  
13 of the sexual assault convictions. The District Court also adjudicated the Defendant as a  
14 habitual offender as to the second conviction for sexual assault and sentenced him to a  
15 consecutive term of life imprisonment without the possibility of parole under NRS  
16 207.010(2). The Defendant then appealed the District Court's sentence to the Nevada  
17 Supreme Court. The Defendant challenged the District Court's adjudication of him as a  
18 habitual offender. The Defendant contended that the judgments of conviction used to  
19 adjudicate him as a habitual offender were invalid.

20 On October 4, 1995, the Nevada Supreme Court denied the Defendant's appeal. The  
21 Court found that the Defendant's status as a habitual offender was sufficiently proved  
22 through evidence that the Defendant had been convicted: 1) in 1977 for aggravated assault in  
23 Arizona; 2) in 1983 for attempted aggravated assault in Arizona; and 3) in 1988 for third  
24 degree burglary in Arizona. (*See*, Supreme Court Order 10/4/95).

25 The Defendant then filed a Petition for Writ of Habeas Corpus (Post-Conviction). As  
26 part of that petition, the Defendant argued, for the second time, that he was improperly  
27 adjudicated and sentenced as a habitual criminal. The District Court, Department X, denied  
28 the petition. Specifically, the Court ruled that the Defendant was properly adjudicated and

1 sentenced as a habitual offender and that his claim to the contrary was barred by the doctrine  
2 of law of the case. (See, District Court's Findings of Fact and Conclusions of Law 9/6/96).

3 On April 30, 1998, in Department VIII, the Defendant filed a motion to modify or in  
4 the alternative to correct an illegal sentence. For the third time, the Defendant included a  
5 challenge to his previous sentence of life in prison without the possibility of parole based on  
6 the District Court's prior adjudication of him as a habitual offender under NRS 207.010. On  
7 May 20, 1998, this Court denied the Defendant's motion.

8 On October 31, 2002, the Defendant filed the instant Motion to Vacate and/or Amend  
9 Judgment.

### 10 ARGUMENT

11 All post-conviction motions except proper motions to modify or to correct illegal  
12 sentences must be made through a Petition for Writ of Habeas Corpus pursuant to NRS  
13 34.735. Under NRS 176.555, a motion to correct an illegal sentence is limited to the "facial"  
14 legality of a sentence. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321 (1996). A  
15 sentence is facially illegal if it is at variance with the controlling sentencing statute or if the  
16 court acted without proper jurisdiction. Id. A motion to correct an illegal sentence  
17 "cannot...be used as a vehicle for challenging the validity of a judgment of conviction or  
18 sentence based on alleged errors occurring at trial or sentencing." Id. In Edwards, the  
19 Nevada Supreme Court held that it lacked jurisdiction to entertain an appeal that, although  
20 styled as a motion to correct a sentence, in reality sought to challenge not the facial legality  
21 of the sentence but the evidence introduced during the sentencing hearing. Id., at 709. The  
22 present motion is not a proper motion to correct an illegal sentence because it does not attack  
23 a facially illegal sentence per Edwards.

24 Furthermore, the doctrine of law of the case prevents this Court from further  
25 considering the issue of the validity of the Defendant's conviction and sentence as a habitual  
26 offender under NRS 207.010. It has long been the rule in Nevada that "the law of a first  
27 appeal is the law of the case on all subsequent appeals in which the facts are substantially the  
28 same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) quoting, Walker v. State,

1 85 Nev. 337, 455 P.2d 34 (1969); See also Bejarno v. State, 106 Nev. 840, 801 P.2d 1388  
2 (1990); Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994).

3 When an appellate court states a principle or rule of law necessary to a decision, the  
4 principle or rule becomes the law of the case and must be followed throughout its subsequent  
5 progress, both in the lower court and upon subsequent appeal. LoBue v. State ex rel. Dep't  
6 Hwys., 92 Nev. 529, 532, 554 P.2d 258, 260 (1976). Upon remand, the lower court can take  
7 only such actions as conform to the judgment of the appellate tribunal. Id., 554 P.2d at 260.

8 The defendant has failed to overcome application of this doctrine because the  
9 underlying facts on which the Nevada Supreme Court determined that the Defendant's  
10 conviction was valid (in its decision on October 4, 1995) have not changed. In that opinion,  
11 the Nevada Supreme Court considered the Defendant's conviction and sentence on direct  
12 appeal. The Court concluded that "the State adequately proved the appellant received the  
13 three prior convictions." In addition, the Defendant raised the exact same challenge in his  
14 initial Petition for Writ of Habeas Corpus (Post-Conviction). The District Court specifically  
15 found that the Defendant's conviction was valid. Most recently, the Defendant once again  
16 raised the argument in his motion to correct an illegal sentence. The Defendant's claims  
17 were rejected for a third time, albeit now by Department VIII. Clearly, the Defendant's  
18 claims should be once again summarily dismissed. See, Hall v. State, 91 Nev. 314, 535 P.2d  
19 797 (1975)("The doctrine of law of the case cannot be avoided by a more detailed and  
20 precisely focused argument subsequently made after reflection upon the previous  
21 proceedings.").

22 The Defendant's motion should also be barred by the equitable doctrine of laches. In  
23 determining whether laches applies, this Court must look at several factors: "(1) whether  
24 there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen  
25 from the defendant's knowing acquiescence in existing conditions; and (3) whether  
26 circumstances exist that prejudice the State." Hart v. State, 116 Nev. Adv. Op. 66, pp. 4-5, 1  
27 P.3d 969, 972 (2000). The Defendant in the present case challenges an Amended Judgment  
28 of Conviction that was filed on September 29, 1993. The Defendant's delay in raising the

1 current issue over nine (9) years after the Judgment of Conviction was filed is inexcusable  
2 and constitutes an implied waiver of the claim.

3 Furthermore, the Defendant's claims are invalid on the merits. NRS 207.010 allows  
4 for the imposition of a sentence as a habitual offender based on a procedure whereby the  
5 district court finds that a defendant has previously been convicted of three felonies. See,  
6 NRS 207.010(1)(b). There is no limitation in the statute that the felony must be a violent  
7 offense. A review of the Defendant's record reveals the fact that he was previously  
8 convicted of at least three serious felonies. As such, the Defendant's motion should be  
9 summarily rejected.

10 DATED this 27 day of November, 2002.

11 Respectfully submitted,

12 STEWART L. BELL  
13 Clark County District Attorney  
14 Nevada Bar #000477

15 BY

16   
17 DOUGLAS HERNDON  
18 Chief Deputy District Attorney  
19 Nevada Bar #004286

20 CERTIFICATE OF MAILING

21 I hereby certify that service of the above and foregoing was made this 27 day of  
22 November, 2002, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

23 ROY DANIELS MORAGA #31584  
24 S.D.C.C.  
25 P.O. BOX 208  
26 INDIAN SPRINGS, NV 89070

27 BY: G. Reiger  
28 Secretary for the District Attorney's Office

MILLER/gmr

164

SAO  
CRISTINA HINDS, ESQ.  
Nevada Bar No. 7014  
525 S. 6<sup>th</sup> St.  
Las Vegas, Nevada 89101  
(702) 940-1234  
Attorney for Defendant

FILED

JUN 11 1 33 PM '03

IN THE EIGHTH DISTRICT COURT  
OF THE STATE OF NEVADA FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,

Plaintiff

vs.

ROY D. MORAGA

Defendant.

CASE NO.: C092174  
DEPT. NO.: VIII

STIPULATION AND ORDER

It is hereby stipulated and agreed to between Leon Simon, Esq. Deputy District Attorney and Cristina Hinds, Esq. that, Cristina Hinds, Esq. shall have up to and including the 4<sup>th</sup> day of August, 2003 in which to file the Petition for Writ of Habeas Corpus (Post-Conviction) in the above-entitled case. The State shall have until the 18<sup>th</sup> day of September, 2003 in which to file a response.

It is hereby requested that the oral argument currently on calendar for the 23<sup>rd</sup> of July, 2003 should be vacated and reset to a date and time convenient to the Court.

Dated this the 1<sup>st</sup> day of June, 2003.

*Cristina Hinds*

Cristina Hinds, Esq.  
Attorney for Defendant

*Leon Simon*

Leon Simon, Esq.  
Deputy District Attorney

///

///

RECEIVED  
JUN 11 2003  
COUNTY CLERK



1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Cristina Hinds, Esq. shall have  
2 up to and including the 4<sup>th</sup> day of August, 2003 in which to file the Petition for Writ of Habeas Corpus  
3 (Post-Conviction) in the above-entitled case. The State shall have until the 18<sup>th</sup> day of September, 2003  
4 in which to file a response.

5 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the oral argument currently  
6 calendared for July 23, 2003 shall be vacated and reset to a time and date convenient to the Court.

7 Dated this 10 day of June, 2003.

8  
9   
10 DISTRICT COURT JUDGE *gc*

11 **Judge A. Gattuso**

12  
13 **RECEIPT OF COPY**

14 RECEIPT OF COPY of the foregoing STIPULATION AND ORDER is hereby  
15 acknowledged this \_\_\_\_\_ day of June, 2003.

16  
17 \_\_\_\_\_  
18 Leon Simon, Esq.  
19 Deputy District Attorney

135  
**ORIGINAL**

14  
**FILED**

1 **MOT**

2 CRISTINA A. HINDS, ESQ.

3 Nevada Bar No. 7014

4 525 S. 6<sup>th</sup> St.

5 Las Vegas, NV 89101

6 (702) 940-1234

7 Attorney for Defendant

DEC 16 4 48 PM '03

*Shirley E. Ruggione*  
CLERK

**DISTRICT COURT  
CLARK COUNTY NEVADA**

8 THE STATE OF NEVADA,

9 Plaintiff,

10 v.

11 ROY DANIELS MORAGA

12 Defendant.

CASE NO: C92174  
Dept. 8

13 **MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT**

14 COMES NOW, Defendant, ROY DANIELS MORAGA, by and through his attorney of  
15 record, Cristina Hinds, Esq. and moves this Honorable Court to release all DNA evidence  
16 under the custody of the Las Vegas Metropolitan Police Department to an expert so that it can  
17 be tested. This Motion is based upon the pleadings, attached declaration, and oral argument  
18 at the time of hearing.

19 DATED this 15<sup>th</sup> day of December, 2003.

20 *Cristina Hinds*  
21 CRISTINA A. HINDS, ESQ.  
22 Nevada Bar No. 7014  
23 525 S. 6<sup>th</sup> St.  
24 Las Vegas, NV 89101  
25 (702) 940-1234  
26 Attorney for Defendant

27 **RECEIVED**  
28 DEC 16 2003  
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NOTICE OF MOTION

To: The State of Nevada, Plaintiff

You and each of you please take notice that the foregoing motion will take place on for  
hearing before this court on the 29<sup>th</sup> day of Dec, 2003 at the hour of  
9 a.m./p.m., or as soon thereafter as counsel may be heard.

Cristina Hinds  
CRISTINA A. HINDS, ESQ.  
Attorney for Defendant

## STATEMENT OF THE CASE

1 On or about the 9<sup>th</sup> day of January, 1990, Defendant Roy Daniels Moraga (Mr. Moraga)  
2 was charged two counts of burglary and two counts of sexual assault. On June 13, 1990, an  
3 amended information was filed charging Mr. Moraga as a habitual criminal.  
4

5 After entering a plea of not guilty, a jury trial was held from March 12, 1990 until March  
6 14, 1990. Mr. Moraga testified at the trial. He claimed that he had sex with the alleged victim  
7 but argued that it was consensual. The jury subsequently convicted him on all four (4) counts,  
8 and he was adjudged a habitual criminal.

9 Thereafter, the court sentenced Mr. Moraga to one term of life without the possibility  
10 of parole for the habitual criminal enhancement.

11 Mr. Moraga appealed the judgment of conviction to the Nevada Supreme Court. He  
12 alleged that there was insufficient evidence to convict him of the charges. The Court  
13 dismissed the appeal, but remanded the case for re-sentencing. The Court determined that  
14 Mr. Moraga was required to be sentenced on all counts.

15 On remand, he was sentenced by the District Court to two consecutive ten year  
16 sentences plus a consecutive life sentence with the possibility of parole, plus a life sentence  
17 without the possibility of parole.

18 Mr. Moraga appealed the new sentence, but said appeal was denied by the Nevada  
19 Supreme Court.

20 Mr. Moraga subsequently filed for relief seeking DNA testing of the evidence in this  
21 case. On June 13, 1996, through counsel, Mr. Moraga filed a Supplemental Points and  
22 Authorities in Support of Petition for Writ of Habeas Corpus. There, he argued that trial  
23 counsel was ineffective for failing to have DNA testing performed on the semen and blood  
24 samples to establish that he was not the source of the semen found in the "vaginal vault" of  
25 the alleged victim. He also argued that trial counsel was ineffective for failing to properly  
26 prepare him to testify, and that trial counsel was ineffective for failing to interview witnesses  
27 concerning his lack of sexual ability while intoxicated.  
28

1 The Court denied the Petition and found, in part, that because Mr. Moraga offered the  
2 defense of consent at trial, any identification issues which could be resolved through DNA  
3 testing were moot. Findings and Fact, Conclusions of Law and Order (9/6/96 FFCL). Further,  
4 the Court determined that trial counsel was not ineffective because a time limit existed for DNA  
5 testing, and waiting beyond that year compromised the integrity of the testing, citing People  
6 v. Karush, 802 P.2d 278, 298 (Cal. 1990). 9/6/96 FFCL, p. 4. The Court also explained that  
7 a defendant must show both a reasonable probability that the evidence was favorable, and  
8 that it could be produced. Id. Additionally, the Court found that Mr. Moraga waived the issue  
9 of DNA testing by not raising it in the District Court or on direct appeal. Id.

### 10 **STATEMENT OF THE FACTS**

11 At trial, Las Vegas Metropolitan Police Department Criminalist Linda Errichetto (Ms.  
12 Errichetto) testified that she examined articles of clothing believed to contain Mr. Moraga's  
13 blood, semen, and saliva. RTP, p. 71-76. She also examined the victim's sexual assault kit.  
14 Ms. Errichetto was looking for the presence of seminal material and spermatozoa in both the  
15 victim's vagina and mouth. Id. at 76-79. She also typed the victim's blood, and examined the  
16 victim's saliva to determine if the victim was a secreter. According to Ms. Errichetto, about  
17 80% of the population are secreters, meaning that they secrete their blood type in some of  
18 their peripheral body fluids. Id. at 80.

19 Ms. Errichetto determined that the victim had type O and that she was a secreter. Id.  
20 She also concluded that Mr. Moraga had type O blood and he was a secreter. Id. at 81.  
21 Ultimately, she stated she could not conclude that anything foreign in the victim's vagina was  
22 attributable to a semen donor; however, she could not exclude Mr. Moraga from being a  
23 source of the seminal material that was on the swabs. Id. at 82.

24 It is not known why Ms. Errichetto did not perform DNA testing on samples taken from  
25 either the victim or Mr. Moraga. Mr. Moraga desires to have DNA testing performed so that  
26 he can be excluded as a suspect. He is not asking to take any new samples from the victim.  
27  
28

1 Rather, he wants the samples tested that are still in the custody of the Las Vegas Metropolitan  
2 Police Department.

3 **ARGUMENT**

4 **POINTS AND AUTHORITIES**

5 **I.**

6 **THE DNA EVIDENCE IS A PUBLIC RECORD AND MUST BE RELEASED FOR**  
7 **INSPECTION BY MR. MORAGA**

8 Mr. Moraga desires to have DNA testing performed on the evidence that is currently  
9 in the possession of the Las Vegas Metropolitan Police Department. He will pay for the  
10 cost of testing himself. He desires this testing because he believes the results will show  
11 that he is excluded as a possible suspect in this matter.

12 Generally, all public records in the possession of the government which are not  
13 declared by law to be confidential must be open for inspection. NRS 239.010 provides:  
14

15 1. All public books and public records of a governmental entity, the contents  
16 of which are not otherwise declared by law to be confidential, must be open  
17 at all times during office hours to inspection by any person, and may be fully  
18 copied or an abstract or memorandum may be prepared from those public  
19 books and public records. Any such copies, abstracts or memoranda may be  
20 used to supply the general public with copies, abstracts or memoranda of the  
21 records or may be used in any other way to the advantage of the  
22 governmental entity or of the general public. This section does not supersede  
23 or in any manner affect the federal laws governing copyrights or enlarge,  
24 diminish or affect in any other manner the rights of a person in any written  
25 book or record which is copyrighted pursuant to federal law.

26 2. A governmental entity may not reject a book or record which is copyrighted  
27 solely because it is copyrighted.

28 3. A person may request a copy of a public record in any medium in which  
the public record is readily available. An officer, employee or agent of a  
governmental entity who has custody of a public record shall not refuse to  
provide a copy of that public record in a readily available medium because he  
has already prepared or would prefer to provide the copy in a different  
medium.

1 NRS 239.011 Application to court for order allowing inspection or copying of  
2 public book or record. If a request for inspection or copying of a public book or  
3 record open to inspection and copying is denied, the requester may apply to the  
4 district court in the county in which the book or record is located for an order  
5 permitting him to inspect or copy it. The court shall give this matter priority over other  
6 civil matters to which priority is not given by other statutes. If the requester prevails,  
7 he is entitled to recover his costs and reasonable attorney's fees in the proceeding  
8 from the governmental entity whose officer has custody of the book or record.

9 The aforementioned statutes related to all public records in general. The following  
10 statutes relate specifically to criminal records.

11 NRS 179A.100 entitled, "Records which may be disseminated without restriction;  
12 persons to whom records must be disseminated upon request; permission required  
13 for dissemination of information relating to sexual offenses" provides, in pertinent  
14 part:

15 1. The following records of criminal history may be disseminated by an  
16 agency of criminal justice without any restriction pursuant to this chapter:

17 (b) Any which pertain to an incident for which a person is currently within the  
18 system of criminal justice, including parole or probation.

19 5. Records of criminal history must be disseminated by an agency of criminal  
20 justice upon request, to the following persons or governmental entities:

21 (a) The person who is the subject of the record of criminal history for the  
22 purposes of NRS 179A.150.

23 (b) The person who is the subject of the record of criminal history or his  
24 attorney of record when the subject is a party in a judicial, administrative,  
25 licensing, disciplinary or other proceeding to which the information is relevant.

26 (j) Persons and agencies authorized by statute, ordinance, executive order,  
27 court rule, court decision or court order as construed by appropriate state or  
28 local officers or agencies.

NRS 179A.070 defines a "record of criminal history" as follows:

1. "Record of criminal history" means information contained in records  
collected and maintained by agencies of criminal justice, the subject of which  
is a natural person, consisting of descriptions which identify the subject and  
notations of arrests, detention, and indictments, informations or other formal  
criminal charges and dispositions of charges, including dismissals, acquittals,  
convictions, sentences, correctional supervision and release, occurring in  
Nevada. The term includes only information contained in memoranda of  
formal transactions between a person and an agency of criminal justice in this  
state. The term is intended to be equivalent to the phrase "criminal history  
record information" as used in federal regulations.

1 2. "Record of criminal history" does not include:

2 (a) Investigative or intelligence information, reports of crime or other  
3 information concerning specific persons collected in the course of the  
4 enforcement of criminal laws.

5 (b) Information concerning juveniles.

6 (c) Posters, announcements or lists intended to identify fugitives or wanted  
7 persons and aid in their apprehension.

8 (d) Original records of entry maintained by agencies of criminal justice if the  
9 records are chronological and not cross-indexed in any other way.

10 (e) Records of application for and issuance, suspension, revocation or  
11 renewal of occupational licenses, including permits to work in the gaming  
12 industry.

13 (f) Court indices and records of public judicial proceedings, court decisions  
14 and opinions, and information disclosed during public judicial proceedings.

15 (g) Records of traffic violations constituting misdemeanors.

16 (h) Records of traffic offenses maintained by the department to regulate the  
17 issuance, suspension, revocation or renewal of drivers' or other operators'  
18 licenses.

19 (i) Announcements of actions by the state board of pardons commissioners  
20 and the state board of parole commissioners.

21 (j) Records which originated in an agency other than an agency of criminal  
22 justice in this state.

23 NRS 179A.110 entitled, "Further dissemination of information or records" states:  
24 No person who receives information relating to sexual offenses or other  
25 records of criminal history pursuant to this chapter may disseminate it further  
26 without express authority of law or in accordance with a court order. This  
27 section does not prohibit the dissemination of material by an employee of the  
28 electronic or printed media in his professional capacity for communication to  
the public.

NRS Chapter 179A was enacted in 1979 in response to the federal government's  
requirement that states, "provide an acceptable plan concerning the dissemination of  
criminal history records, or be subject to certain budgetary sanctions." Donrey v.  
Bradshaw, 106 Nev. 630, 798 P.2d 144, 145 (1990). There, the Nevada Supreme Court  
reviewed the aforementioned criminal history statutes to determine the meaning of "public  
record" within NRS Chapter 179. Oddly, the term "public record" is not defined in this  
section of the NRS Chapter 179.



1 In Bradshaw, the appellant, a newspaper wanted to obtain a copy of a report  
2 prepared by the Reno City Attorney's Office in connection with an investigation of Joe  
3 Conforte. Appellants cited NRS 179A.070 and argued that the exclusion of the records  
4 listed in NRS 179A.070(2) from the definition of "record of criminal history" demonstrated  
5 that the legislature did not intend for those items to be confidential. Further, they argued  
6 that the Attorney General's opinion finding that investigative reports were confidential was  
7 inconsistent with the public status of the other records listed in NRS 179A.070(2). The  
8 Court agreed with this argument and noted that other excluded records were clearly not  
9 considered confidential, such as posters of wanted persons and court records of public  
10 judicial proceedings.  
11

12 Furthermore, appellants noted that although Chapter 179A was patterned after the  
13 federal regulations concerning criminal history records, the Nevada legislature specifically  
14 declined to follow the federal regulations by excluding investigative and intelligence  
15 information from the definition of "criminal history records." See NRS 179A.070(2). On the  
16 contrary, under federal regulations, while the definition of "criminal history record  
17 information" is qualified not to extend to investigative information, there is a separate  
18 subpart which specifically excludes various other records from the regulations governing  
19 disclosure of criminal history records. See 28 C.F.R. §§ 20.3(b), 20.20(b) and (c), and  
20 Appendix -- Commentary on § 20.3(b) (1989).  
21

22 Unlike the federal regulations, the Nevada statute lists investigative and intelligence  
23 information together with other excluded records in the same subsection, NRS  
24 179A.070(2), as not included in the definition of "record of criminal history" contained in  
25 NRS 179A.070(1). For this reason, the Court concluded that the Nevada legislature  
26  
27  
28

1 intended investigative reports to be subject to disclosure like other records if "policy  
2 considerations so warrant."

3       Next, the Court explained under what circumstances criminal investigative reports  
4 were disclosable under NRS 239.010. While NRS 239.010 mandates unlimited disclosure  
5 of all public records, the Court explained that a common law limitation on the disclosure of  
6 such records must exist. As such, the need for open government shall be balanced  
7 against the following factors propounded by the Attorney General: (1) the legitimate public  
8 policy interest in maintaining confidentiality of criminal investigation records and crime  
9 reports including the protection of the elements of an investigation of a crime from  
10 premature disclosures; (2) the avoidance of prejudice to the later trial of the defendant from  
11 harmful pretrial publicity; (3) the protection of the privacy of persons who are not arrested  
12 from the stigma of being singled out as a criminal suspect; (4) and the protection of the  
13 identity of informants. 83 Op. Att'y Gen. No. 3 (May 2, 1983).

16       Applying the balancing test applies to the instant case, none of the public  
17 policy considerations described by the Court justify the withholding of the blood and  
18 semen. Specifically, there is no pending or anticipated criminal proceeding; there are no  
19 confidential sources or investigative techniques to protect; there is no possibility  
20 of denying someone a fair trial, and there is absolutely no potential jeopardy to law  
21 enforcement personnel. If the DNA evidence demonstrates that Mr. Moraga is not a  
22 suspect, the appropriate avenue for obtaining relief will be dealt with at that time.

24       For these reasons, all DNA evidence in the possession of the is a public record and  
25 must be released to an expert for testing at no cost to the State.

26  
27 ///

28 ///

CONCLUSION

"Public record" is not defined in the relevant statutes. According to the Nevada Supreme Court's balancing test, Mr. Moraga is entitled to examine the DNA being held by the Las Vegas Metropolitan Police Department so that an expert can perform testing.

Respectfully submitted this 15 day of December, 2003.

Cristina Hinds

CRISTINA A. HINDS, ESQ.

Nevada Bar No. 7014

525 S. 6<sup>th</sup> St.

Las Vegas, NV 89101

(702) 940-1234

Attorney for Defendant

DECLARATION OF CRISTINA HINDS, ESQ.

1. That I was appointed to represent Mr. Moraga for post-conviction relief.
2. At this point, he wishes to have the DNA evidence examined to determine if he can be excluded as a possible suspect.
3. That phone calls have revealed that the evidence is still in the custody of the Las Vegas Metropolitan Police Department.
4. That payment has been promised for testing. Mr. Moraga is not seeking to have the testing paid for by the State. Regardless, the issue of payment is for Mr. Moraga to work out with the expert.

I swear under penalty of perjury that the foregoing is true and correct.

EXECUTED this 15 day of December, 2003.

Cristina Hinds  
CRISTINA HINDS

ORIGINAL

16

ROC  
CRISTINA A. HINDS, ESQ.  
Nevada Bar No. 7014  
525 S. 6<sup>th</sup> St.  
Las Vegas, NV 89101  
(702) 940-1234  
Attorney for Defendant

FILED

DEC 17 12 10 PM '03

*Shirley M. Longman*  
CLERK

DISTRICT COURT  
CLARK COUNTY NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,  
  
v.  
  
ROY DANIELS MORAGA  
  
Defendant.

CASE NO: C92174  
Dept. 8

RECEIPT OF COPY

I HEREBY CERTIFY that on the 17 day of December, 2003, a true and correct copy of the foregoing MOTION TO RELEASE DNA EVIDENCE UNDER THE NEVADA OPEN RECORDS ACT was received in the District Attorney's Office.

*Allen Davis*  
Employee for the District Attorney's Office

RECEIVED

DEC 17 2003

COUNTY CLERK

● ORIGINAL ●

98

1 OPPS,  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 ERIC G. JORGENSEN  
6 Chief Deputy District Attorney  
7 Nevada Bar #001802  
8 200 South Third Street  
9 Las Vegas, Nevada 89155-2211  
10 (702) 455-4711  
11 Attorney for Plaintiff

FILED

DEC 26 10 48 AM '03

*Eric G. Jorgensen*  
CLERK

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA, )  
15 )  
16 Plaintiff, )  
17 )  
18 -vs- )  
19 )  
20 ROY D. MORAGA, )  
21 #938554 )  
22 Defendant. )

CASE NO: C92174  
DEPT NO: 8

23 STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA  
24 EVIDENCE UNDER NEVADA OPEN RECORDS ACT

DATE OF HEARING: 12-29-03  
TIME OF HEARING: 9:00 A.M.

25 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
26 ERIC G. JORGENSEN, Chief Deputy District Attorney, and hereby submits the attached  
27 Points and Authorities in Opposition to Defendant's State's Opposition To Defendant's  
28 Motion For Release Of DNA Evidence Under Nevada Open Records Act.

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 PERTINENT TO THIS OPPOSITION

Roy Moraga, hereinafter Defendant, was convicted on March 15, 1990, after a jury trial, of two counts of burglary and two counts of sexual assault. On June 30, 1990, the District Court adjudicated the Defendant as a habitual offender and sentenced him to life in prison without the possibility of parole. After the Defendant appealed his conviction to the Nevada Supreme Court, that Court affirmed the Defendant's convictions. (See, Supreme Court Opinion 8/27/91). However, the Supreme Court reversed the District Court's sentence as erroneous and remanded the case back for re-sentencing.

On October 21, 1991, the Defendant was re-sentenced in Department X of the Eighth Judicial District to ten (10) years for each of the burglary counts, to run consecutive to each other and a consecutive sentence of life imprisonment with the possibility of parole for one of the sexual assault convictions. The District Court also adjudicated the Defendant as a habitual offender as to the second conviction for sexual assault and sentenced him to a consecutive term of life imprisonment without the possibility of parole under NRS 207.010(2). The Defendant then appealed the District Court's sentence to the Nevada Supreme Court. The Defendant challenged the District Court's adjudication of him as a habitual offender. The Defendant contended that the judgments of conviction used to adjudicate him as a habitual offender were invalid.

On October 4, 1995, the Nevada Supreme Court denied the Defendant's appeal. The Court found that the Defendant's status as a habitual offender was sufficiently proved through evidence that the Defendant had been convicted: 1) in 1977 for aggravated assault in Arizona; 2) in 1983 for attempted aggravated assault in Arizona; and 3) in 1988 for third degree burglary in Arizona. (See, Supreme Court Order 10/4/95).

The Defendant then filed a Petition for Writ of Habeas Corpus (Post-Conviction). As part of that petition, the Defendant argued, for the second time, that he was improperly adjudicated and sentenced as a habitual criminal. The District Court, Department X, denied the petition. Specifically, the Court ruled that the Defendant was properly adjudicated and

1 sentenced as a habitual offender and that his claim to the contrary was barred by the doctrine  
2 of law of the case. (See, District Court's Findings of Fact and Conclusions of Law 9/6/96).

3 On April 30, 1998, in Department VIII, the Defendant filed a motion to modify or in  
4 the alternative to correct an illegal sentence. For the third time, the Defendant included a  
5 challenge to his previous sentence of life in prison without the possibility of parole based on  
6 the District Court's prior adjudication of him as a habitual offender under NRS 207.010. On  
7 May 20, 1998, this Court denied the Defendant's motion.

8 On December 15, 2003, the Defendant filed a Motion for Release of DNA Evidence  
9 Under Nevada Open Records Act. The State's Opposition follows.

10 **STATEMENT OF FACTS PERTINENT TO THIS OPPOSITION**

11 On December 5, 1989, between the hours of 1:30 a.m. and 5:30 a.m., Defendant  
12 entered the residence of Pennie Hawk, located at 1000 Dumont, Apt. #227, Las Vegas,  
13 Nevada. As there were no signs of forced entry into the apartment, it is believed that Ms.  
14 Hawk's 22 year-old daughter left the front door closed but unlocked. Once inside the  
15 residence, the defendant took a woman's Seiko watch and approximately \$25.00 from a  
16 coffee table in the living room, an unknown amount of cash from Ms. Hawk's bedroom  
17 dresser, and a key to the apartment which was laying on a table near the front door.  
18 Defendant then left the apartment.

19 At approximately 7:30 a.m., Pennie Hawk returned to her apartment to find the  
20 aforementioned items missing. Ms. Hawk contacted the Las Vegas Metropolitan Police  
21 Department and a report submitted. Interestingly enough, Ms. Hawk's 22 year-old daughter  
22 was upstairs, inside the residence, when the burglary occurred.

23 At approximately noon that same day, Pennie Hawk, (a 46 year old female) was  
24 awakened by the Defendant knocking on her front door. After questioning the defendant on  
25 how he knew where she lived and informing the defendant that he had awakened her, before  
26 asking him to leave, Ms. Hawk bolted the door and went back to sleep in her bedroom.  
27 Awhile later, Ms. Hawk was awakened by a noise, only to find the defendant outside her  
28 bedroom on the stairs. Defendant grabbed Ms. Hawk and a brief struggle ensued. The



1 defendant put his hands over Ms. Hawk's mouth and forced her into the bedroom and onto  
2 her bed, where he sexually assaulted her by placing his penis into her vagina. After the  
3 defendant ejaculated into Ms. Hawk's vagina, he allowed her to get up and go downstairs.  
4 Once downstairs, the defendant pushed Ms. Hawk onto the couch and attempted to have  
5 sexual relations with her, again. Ms. Hawk was able to free herself and the defendant  
6 instructed her to go upstairs and shower, and she complied.

7       Upon Ms. Hawk exiting the shower, the defendant forced her back onto her bed and  
8 inserted his penis into her vagina a second time. After ejaculating, the defendant went into  
9 the bathroom and began washing himself and Ms. Hawk went downstairs and contacted her  
10 daughter. Ms. Hawk informed her daughter of the attack and asked for police assistance.  
11 The defendant then came downstairs and exited the apartment.

12       On his way out of the complex, the defendant bragged about what he had just done to  
13 Michael Harper, a worker at the apartment complex.

14       Additionally, William Gomez, another maintenance man working on the grounds of  
15 the apartment complex testified at trial that he heard calls for help but he wasn't sure where  
16 they were coming from.

17       The defendant was detained at approximately 2:14 p.m., that same day. After being  
18 positively identified by the victim, the defendant was arrested and transported to the Clark  
19 County Detention Center.

20       Ms. Hawk was transported to University Medical Center where a rape examination  
21 was completed. Medical evidence revealed the presence of semen in the victim's vagina.

22       A standard serology kit from the defendant was also booked into evidence on  
23 December 5, 1989. That kit contained blood, saliva, and hair samples.

24       Tests on the sexual assault kit showed the presence of semen which came from a type  
25 O secretor. Testing of the defendant's serology kit revealed that the defendant was a type O  
26 secretor and could not be excluded as a possible source of the semen on the victim's vaginal  
27 swab.

28       ///

1 In addition to the aforementioned physical evidence, the defendant's fingerprint was  
2 lifted from a hair spray canister in Ms. Hawk's apartment and the Seiko watch taken from  
3 Ms. Hawk's apartment was recovered from the defendant's ex-girlfriend, Jean Behl, who  
4 related to police that the defendant had given her the watch as a gift.

5 In a May 9, 1990 interview at the Clark County Detention Center the defendant stated  
6 that he had done nothing wrong and that the victim lied. The defendant further stated that he  
7 saw nothing wrong with forcing women to have sex with him and added, "I just roll over and  
8 do it."

9 At trial the defense offered a consensual sex defense. Defendant testified at trial the  
10 he agreed with the facts that had been presented to the jury and that the only issue as far as  
11 he was concerned, was whether or not the sex he had with the victim was consensual. The  
12 defendant was later convicted on all counts.

### 13 LEGAL ANALYSIS

#### 14 **I. The Motion For Release of DNA Evidence Under Nevada Open Records Act 15 Should be Dismissed On Its Merits, As the Weight of the Evidence Presented at 16 Trial Proved Roy Moraga's Guilt Beyond a Reasonable Doubt.**

17 The first issue to be determined is whether post-conviction DNA testing would likely  
18 affect the verdict in Mr. Moraga's criminal conviction.

19 A criminal defendant is not entitled to post-conviction DNA testing as a matter of  
20 right. As has been previously held, a blanket rule allowing any defendant to obtain post-  
21 conviction DNA testing at State expense would be overly broad. Mebane v. State, 902 P.2d  
22 494, 497 (Kan. Ct. App. 1995).

23 At the discretion of the court, post-conviction DNA testing is appropriate where the  
24 biological evidence is determined to actually exist in testable quantities, and where a judicial  
25 determination is made that the results of the testing could lead to a more favorable verdict for  
26 the defendant. Washpon v. New York State District Attorney, King's County, 625 N.Y.S.2d  
27 874, 876 (N.Y. Sup. Ct. 1995).

28 Nevada has not conclusively addressed the public policy questions relating to post-  
conviction DNA testing. The 2001 Nevada Legislature considered legislation to allow

1 "genetic marker" testing for defendants sentenced to death, but failed to adopt it, signaling  
2 the lack of consensus that exists about this issue in Nevada. AB354, 71st Session (Nev.,  
3 2001).

4 Cases from other jurisdictions where courts have addressed the issue of post-  
5 conviction DNA testing have at least two main similarities. First, each case involved a  
6 single perpetrator, which would tend to make DNA testing determinative of the guilt or  
7 innocence of the defendant. Second, the State's evidence in each case was weak or the  
8 defense was sufficient to support a reasonable doubt. Mebane, 902 P.2d at 497.

9 Post conviction DNA testing of biological evidence may be appropriate in criminal cases  
10 where the state's proof is weak, when the record supports at least a reasonable doubt of guilt  
11 and the interests of justice could be served by establishing guilt or innocence once and for  
12 all. Sewell v. State, 592 N.E.2d 705, 708 (Ind. Ct. App. 1992). New York courts, in  
13 interpreting the New York statute, held that in addition to determining that biological  
14 evidence exists, a judicial determination must be made as to whether a reasonable probability  
15 exists of a more favorable verdict. Washpon, 625 N.Y.S.2d at 878.

16 The Mebane Court denied the Defendant's request for post-conviction DNA testing.  
17 902 P.2d at 498. Tyrone Mebane was convicted of rape, burglary, sodomy, and kidnapping.  
18 Id. at 494. Several co-defendants pled guilty before trial. The court held that DNA testing  
19 should be allowed where "...the State's evidence is weak or the defense was sufficient to  
20 support a reasonable doubt." Id. at 496. In denying the request for testing, the Court noted  
21 that there were four perpetrators and the evidence against Mebane was "overwhelming" and  
22 that conflicts in the facts were resolved against Mebane at trial. Id. at 498.

23 Here, as in Mebane, *supra*, the evidence presented against Moraga at trial was  
24 overwhelming. The victim testified that on the day the crimes occurred Moraga had come to  
25 her door and woke her up. After inquiring as to how he knew where she lived, the victim  
26 refused to let the defendant into her apartment, telling him that had to get some sleep. The  
27 victim closed and locked the apartment door and went back to bed, only to wake up later to  
28 find the defendant inside her residence, on the stairs, in front of her bedroom door.

1 At trial, the maintenance worker at the complex, Michael Harper also testified that he  
2 encountered the defendant leaving Ms. Hawk's apartment complex after the attacks. At that  
3 time, the defendant was only half dressed and bragged about just having sex with a woman,  
4 twice.

5 Additionally, the key to Pennie Hawk's apartment, which had been stolen along with  
6 the Seiko watch, just hours prior to the sexual assaults when Ms. Hawk's daughter was home  
7 alone sleeping, was found in the defendant's possession upon his arrest. Likewise, the Seiko  
8 watch that was missing from Pennie Hawk's apartment had been given to Jean Behl, the  
9 defendant's ex-girlfriend, as a gift from the defendant, the same day that Pennie Hawk was  
10 raped and the watch went missing.

11 Defendant Moraga was not a stranger to Pennie Hawk. In fact, Ms. Hawk had first  
12 met the defendant just two or three weeks prior, at the Player's Lounge. Ms. Hawk socially  
13 had drinks and engaged in conversation, at the bar, with the defendant; however, no mention  
14 of a sexual relationship was ever suggested by the defendant.

15 In this case the defense offered a consent defense. Defendant testified at trial the he  
16 agreed with the facts that had been presented to the jury and that the only issue as far as he  
17 was concerned, was whether or not the sex he had with the victim was consensual. The  
18 defendant's admission to having sexual intercourse with the victim, along with the fact that  
19 he could not be excluded as a possible source of the semen on the victim's vaginal swab; and  
20 the fact that he had the victim's apartment key in his possession and had given his then  
21 girlfriend the Seiko watch taken from the victim's apartment, the evidence presented in this  
22 case overwhelmingly supports the conviction of the defendant.

23 In Sewell, the Defendant, Jeremy Sewell, was convicted of raping two teenaged girls,  
24 who identified him at trial. Scwell, 592 N.E.2d at 706-7. The Sewell court held that DNA  
25 testing is appropriate when the state's proofs are weak, when the record supports at least a  
26 reasonable doubt of guilt, and there exists a way to establish guilt..." Sewell, 592 N.E.2d at  
27 708.

28 ///

1 Unlike Sewell, in this case Roy Moraga was positively identified by the victim as the  
2 person who sexually assaulted her. Additionally, Michael Harper, a witness who was  
3 working at the apartment complex the day Ms. Hawk was attacked, saw the defendant after  
4 the attack occurred and noticed that the defendant was only half dressed. Moreover, the  
5 defendant bragged to Mr. Harper that he had just had sex with a woman, twice. Moreover,  
6 forensic lab testing of the semen taken for the victim's vaginal swab could not exclude the  
7 defendant as a source. Clearly, Moraga's own admissions to the police and to his friends  
8 and acquaintances; along with his admissions to the jury, clearly implicated his involvement  
9 as the attacker who raped Patti Hawk and stole from her apartment.

10 The State's proof in this case was not weak, nor does the record support any  
11 reasonable doubt of guilt. Quite simply, DNA testing will not change the outcome for Roy  
12 Moraga. He was convicted and sentenced to ten (10) years for each of the burglary counts,  
13 to run consecutive to each other and a consecutive sentence of life imprisonment with the  
14 possibility of parole for one of the sexual assault convictions. The District Court also  
15 adjudicated the Defendant as a habitual offender as to the second conviction for sexual  
16 assault and sentenced him to a consecutive term of life imprisonment without the possibility  
17 of parole under NRS 207.010(2). Furthermore, his conviction was upheld on appeal because  
18 of the overwhelming evidence presented at trial.

19 **II. Defendant's Motion to Withdraw Exhibits Should be Dismissed, Pursuant to**  
20 **Category 5 of the Department of Justice Recommendations for Classifying Post**  
21 **Conviction DNA Testing Requests.**

22 Although it is the State's position that this Defendant's request should be denied on  
23 its merits based upon the evidence of overwhelming guilt that was presented at trial of this  
24 matter, the State is also aware of the fact that guidelines have been put together by the  
25 National Institute of Justice which aids a prosecutor in establishing any initial relevancy  
26 determinations when considering whether a case is suited for post-conviction DNA testing.  
27 In sum, there are five separate categories illustrating circumstances in which conducting  
28 post-conviction DNA testing may or may not be favorable or helpful to a petitioner's claim of  
innocence as follows:

1 Category 1. These are cases in which biological evidence was collected and  
2 still exists. There is agreement on the need for DNA testing and that, if the  
3 results are exclusionary, the petitioner will be exonerated. These are cases in  
4 which the prosecution should be willing to stipulate to the testing and to agree  
5 that the testing will be paid for by the State if the inmate is exonerated.

6 Category 2. These are cases in which biological evidence was collected and  
7 still exists. If the evidence is subjected to DNA testing or retesting, favorable  
8 results would be helpful to the petitioner's claim of innocence, but reasonable  
9 people might disagree as whether the results would amount to a demonstration  
10 of innocence, would establish reasonable doubt of guilt, or would merely  
11 constitute helpful evidence to exonerate him. This category also includes cases  
12 where, for policy and/or economic reasons, there might be disagreement as to  
13 whether DNA testing should be permitted at all or, for indigent inmates, at  
14 State expense. The decision on whether testing or retesting should be done  
15 may have to be made by a judicial officer.

16 Category 3. These are cases in which biological evidence was collected and  
17 still exists. If the evidence is subjected to DNA testing, favorable results  
18 would not be meaningful.

19 Category 4. These are cases in which biological evidence was never collected  
20 or cannot be found despite all efforts. In such cases, post-conviction relief on  
21 the basis of DNA testing is not possible.

22 Category 5. These are cases in which a request for DNA is frivolous.  
23 Considerations include: 1) whether the petitioner confessed or pleaded guilty at  
24 trial; 2) whether the petitioner testified to performing the charged act, but  
25 raised a defense such as consent, self-defense, duress, or entrapment; 3)  
26 whether the petitioner was caught in the act or other strong evidence of  
27 identity or involvement exists such as unambiguous fingerprint evidence; and  
28 4) whether an earlier version of DNA testing had been performed but not  
introduced at trial.

Postconviction DNA Testing: Recommendations for Handling Requests, NCJ 177626  
(September 1999).

It is the State's position that under the Department of Justice's recommendations for  
handling DNA testing requests, this case is a Category 5 case.

In this case, the biological evidence was collected and still exists, but exclusionary  
results from DNA testing are not likely to be determinative of innocence. The defendant  
admitted to having sex with the victim but indicated that it was consensual. Furthermore, the  
defendant's fingerprints were found on a can of hairspray in the victim's house; and, the  
items taken from the victim's apartment were either found in the defendant's possession  
and/or had been given to the defendant's girlfriend at the time, as a gift.

1 According to the NCJ Recommendations, the request for DNA testing is frivolous in a  
2 Category 5 case. Id. at p. 6.

3 Obviously, in this case, not only was there a general serology testing of blood and/or  
4 semen from the victim and the defendant, of which Moraga could not be precluded; the  
5 defendant's finger print was discovered on a can of hairspray in Ms. Hawks residence.  
6 Additionally, there was a confession by the defendant, to not only another witness in the  
7 case; but, law enforcement as well. Likewise, the defendant testified at trial that he engaged  
8 in sexual intercourse with Pennie Hawk.

9 Evidence was also presented at trial indicating that the items taken from the burglary  
10 of Ms. Hawk's residence earlier in the day, prior to the sexual assault, was found either in  
11 the defendant's possession or linked back to him through his girlfriend at the time, Jean  
12 Behl.

13 Clearly, the State presented strong, competent and credible evidence in this case that  
14 established the defendant's guilt beyond a reasonable doubt. More importantly the  
15 defendant did not deny having sex with the victim, he simply denied forcing her to do so.

16 **III. The Motion for Release of DNA Evidence Under the Nevada Open Records Act**  
17 **Should be Dismissed On Its Merits, However, If DNA Testing is Ordered by the**  
18 **Court Under Applicable Legal Authority, All of the Biological Evidence**  
19 **Currently Available For Testing Should be Tested and the Testing Should Be**  
**Conducted Locally by the Las Vegas Metropolitan Police Department's Crime**  
**Lab.**

20 Should this Court determine that post-conviction testing of the evidence in this case  
21 should occur, it is the State's position that: (1) all the relevant items of evidence should be  
22 made available for examination and testing and (2) the testing should be accomplished  
23 through the use of the Las Vegas Metropolitan Police Department Forensic Laboratory.

24 This Court should note that the Las Vegas Metropolitan Police Department Forensic  
25 Laboratory is the one who conducted the original serology testing in this case. It is  
26 unquestionable that the most logical and prudent course of action would be to have them do  
27 any examinations and DNA testing. Moreover, the criminalist who did the initial serology  
28 testing and is most familiar with the case, Linda Errichetto, is still employed with the

1 LVMPD and is now the Director of the Las Vegas Metropolitan Forensic Laboratory. .

2 The LVMPD lab is a state of the art facility that is currently three fourths of the way  
3 through the process of being recognized as a ASCLAD/LAB, a process that takes two years  
4 to achieve. The criminalists who staff the LVMPD Forensic Laboratory are highly  
5 experienced, proficiency tested criminalists, experienced in the discipline of DNA analysis.

6 Moreover, the LVMPD Forensic Laboratory is a nationally recognized lab that is  
7 often utilized by the private sector to critique various areas of forensic technology. More  
8 importantly, the LVMPD Forensic Laboratory is equipped to conduct the requested Short  
9 Tandem Repeat (STR) testing of the biological evidence in this matter and it is prepared to  
10 give priority to the work in the instant case.

11 It would appear that a great number of pieces of evidence remain in the custody of the  
12 court clerk, excluding the Seiko watch which was released back to Pennie Hawk, though the  
13 defendant has not specified exactly what items he would like released for testing or the name  
14 of any expert the defense would employ for the testing. As such, the motion filed by the  
15 defendant is vague and irresponsible. Moreover, both the State, and this Court, would be  
16 derelict in their respective duties to simply agree to release evidence from a criminal case to  
17 any defense counsel under the "Nevada Open Records Act", as suggested by the defense in  
18 this case. Quite frankly, evidence in a criminal case is not categorized in such a manner, nor  
19 can this Court release such evidence for inspection and/or testing under any Nevada statutes  
20 governing the Open Records Act.

21 The State would submit that, in the interests of justice and fairness, if such DNA  
22 testing is going to be attempted, it would be more prudent and proper to have any and all  
23 relevant evidence released from the court clerk, said evidence all being turned over to the  
24 Las Vegas Metropolitan Police Department's forensic lab. At that point, all items of relevant  
25 evidence can be examined to see what, if any, evidence exists that might lend itself to  
26 possible DNA testing.

27 For all the reasons stated above, the State would propose that if the Court rules that  
28 DNA testing should occur in this case, the following should occur:



1. All of the available exhibits, as well as all evidence remaining in the custody of the North Las Vegas Police Department shall be released to Berch E. Henry, II, Ph.D., the laboratory manager at the Las Vegas Metropolitan Police Department Criminalistics/Forensic Laboratory, located at 6765 W. Charleston Blvd., Las Vegas, Nevada 89146. The evidence shall be obtained in a manner that maintains the integrity and chain of custody of the evidence.

2. That a criminalist specializing in the analysis of DNA, for the Las Vegas Metropolitan Police Department Forensic Laboratory, shall examine all relevant evidence to determine what items have evidentiary value for DNA testing and if it will be necessary to consume more than one half of each item of evidence in order to perform DNA testing. Should it be necessary to consume more than one half of any item of the evidence, the Court, defense counsel, and the Clark County District Attorney's Office will be notified by a representative of the LVMPD Forensic Laboratory.

3. Upon completion of the testing, remaining evidence will be returned, through the proper chain of custody utilized by the Las Vegas Metropolitan Police Department Forensic Laboratory, to the custodian of the Eighth Judicial District Court Evidence Vault.

4. If necessary, a saliva, and a blood sample shall be obtained from Roy Moraga by a qualified employee of the Las Vegas Metropolitan Police Department and taken to the LVMPD Criminalistics/Forensic Laboratory, at 6765 W. Charleston Blvd, Las Vegas, Nevada 89146. The State of Nevada will arrange when the sample(s) will be taken and will notify the Court and defense counsel when such arrangements have been made with Ely State Prison in Ely, Nevada, the facility where Defendant is currently incarcerated, and have been finalized so that the defense may have a representative present if they so chose.

5. The State of Nevada, by and through Chief Deputy District Attorney Eric G. Jorgenson, agrees to release the results of the DNA testing performed by the Las Vegas Metropolitan Police Department Criminalistics/Forensic Laboratory, regardless of the outcome, to Cristina Hinds, Esq., defense counsel in this case.

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However, should this Court find cause to order testing of DNA evidence, the State respectfully requests that all relevant evidence be turned over to the LVMPD for examination and potential testing as outlined above.

Respectfully submitted,

BY

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1                                    CERTIFICATE OF FACSIMILE TRANSMISSION

2            I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S  
3    MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS  
4    ACT, was made this 24th day of December, 2003, by facsimile transmission to:

5                                    CRISTINA A. HINDS, ESQ.  
6                                    FAX # 940-1235

7                                      
8    BY \_\_\_\_\_  
9                                    Employee of the District Attorney's Office

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\*\*\* TX REPORT \*\*\*  
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CONNECTION ID  
ST. TIME 12/24 14:52  
USAGE T 02'46  
PGS. SENT 14  
RESULT OK

1 **OPPS**

2 **DAVID ROGER**  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 **ERIC G. JORGENSEN**  
6 Chief Deputy District Attorney  
7 Nevada Bar #001802  
8 200 South Third Street  
9 Las Vegas, Nevada 89155-2211  
10 (702) 455-4711  
11 Attorney for Plaintiff

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**

10 Plaintiff,

11 -vs-

12 **ROY D. MORAGA,**  
13 #938554

14 Defendant.

CASE NO: C92174

DEPT NO: 8

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA**  
16 **EVIDENCE UNDER NEVADA OPEN RECORDS ACT**

17 **DATE OF HEARING: 12-29-03**

18 **TIME OF HEARING: 9:00 A.M.**

19 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
20 ERIC G. JORGENSEN, Chief Deputy District Attorney, and hereby submits the attached  
21 Points and Authorities in Opposition to Defendant's State's Opposition To Defendant's  
Motion For Release Of DNA Evidence Under Nevada Open Records Act.

ORIGINAL

1 RPLY  
2 CRISTINA A. HINDS, ESQ.  
3 Nevada Bar No. 7014  
4 525 S. 6<sup>th</sup> St.  
5 Las Vegas, NV 89101  
6 (702) 940-1234  
7 Attorney for Defendant

FILED IN OPEN COURT  
JAN 05 2004

SHARON COFFMAN, CLERK  
BY *Sharon Coffman*  
DEPUTY  
SHARON COFFMAN

DISTRICT COURT  
CLARK COUNTY NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 v.

11 ROY DANIELS MORAGA

12 Defendant.

CASE NO: C92174  
Dept. 8

13 REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF  
14 DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT

15 COMES NOW, Defendant, ROY DANIELS MORAGA, by and through his attorney of  
16 record, Cristina Hinds, Esq. and files this Reply to the State's Opposition to Defendant's  
17 Motion for Release of DNA Under the Nevada Open Records Act.

18 Dated this 4<sup>th</sup> day of January, 2004.

*Cristina Hinds*

20 CRISTINA A. HINDS, ESQ.  
21 Nevada Bar No. 7014  
22 525 S. 6<sup>th</sup> St.  
23 Las Vegas, NV 89101  
24 (702) 940-1234  
25 Attorney for Defendant

26  
27  
28 RECEIVED

JAN 05 2004

COUNTY CLERK

S8

**ARGUMENT**  
**POINTS AND AUTHORITIES**

**OTHER JURISDICTIONS HAVE NO BEARING ON THE QUESTION OF NEVADA**  
**STATUTORY INTERPRETATION**

The State argues that a "blanket rule" allowing a defendant to obtain post-conviction DNA testing at State expense would be overly broad, citing Mebane v. State, 902 P.2d 494, 497 (Kan. Ct. App. 1995). First, Mr. Moraga is not asking the State to pay for any testing. He has already stated that he will pay for the cost of testing himself. Second, a Kansas court of appeals ruling has absolutely no bearing on the interpretation of a Nevada statute.

The State also argues that there should be a judicial determination that, if testing is allowed, there will be a reasonable probability that a more favorable verdict exists. Washpon v. New York State District Attorney, King's County, 625 N.Y.S. 2d 874 (N.Y. Sup. Ct. 1995). It is Mr. Moraga's contention that a more favorable verdict would have existed had the DNA been tested. Mr. Moraga contends that if he had received effective assistance of trial counsel, trial counsel would have requested DNA testing prior to trial, and said testing would have exonerated him. Without the ability to conclusively show that he was not source of DNA, Mr. Moraga argues that he was left with no choice but to proceed to trial unprepared.

The State claims that there was overwhelming evidence that Mr. Moraga was guilty of sexual assault because Mr. Moraga was found in possession of the key to the victim's apartment, he had given his girlfriend a watch allegedly taken from the victim's apartment, and his fingerprints were found on a can of hair spray in the victim's apartment. State's Opposition, pp. 7,9. Assuming these facts are true, they show nothing more than that Mr. Moraga was in possession of these items. Even the State admits that Mr. Moraga and

1 and the victim knew each other prior to the incident. Perhaps the victim gave these items  
2 to Mr. Moraga. Whatever Mr. Moraga did or did not possess does not demonstrate that he  
3 raped the victim. Again, it is important to note that Mr. Moraga felt compelled to testify that  
4 he and the victim had consensual sex because, without the DNA evidence to exonerate  
5 him, he did not have any other defense to offer at trial.  
6

7 Attached hereto is a copy of the evidence that is in the possession of the Las Vegas  
8 Metropolitan Police Department. He is seeking to have the blood, semen, and saliva  
9 tested.

10 **CONCLUSION**

11 The State fails to respond to the merits of Mr. Moraga's argument. Specifically, that  
12 the evidence in the custody of the Las Vegas Metropolitan Police Department is a public  
13 record which must be made available for inspection to Mr. Moraga.  
14

15 Dated this 4<sup>th</sup> day of January, 2004.

16 

17 

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Cristina Hinds, Esq.  
18 Attorney for Defendant  
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# EXHIBIT 1



EXH. 5

LMPD LAB REPORT

PAGE

CRIMINALIST

Linda T. Errichetto  
Linda T. Errichetto #1471

DR. NO.

89-117709

## EVIDENCE ANALYZED

## SEROLOGICAL GROUPINGS

BOOKED BY:			EVIDENCE DESCRIPTION	ABO	SECRETOR ANTIGENS	SEMEN FACTORS	EsD	PGM	GLO	PGM st	
PACK	ITEM										
LTE1	SAK	1	blood/HAWK	O			1	2-1	Inc	2-1+	
	SAK	2	vaginal swabs		H						
	SAK	3	oral swabs			NR					
	SAK	4	vaginal smears			sperm present	NR	2-1	NR	2-1+	
	SAK	5	saliva sample		H/secretor						
	SAK	6	combed pubic hair								no hairs
LTE2	Novack		blood/MORAGA	O			1	1	2	1+	
	Novack		saliva		H/secretor						
	Novack		combed pubic hair								numerous hairs (see conclusion)
<u>CONCLUSION:</u> MORAGA cannot be excluded as a possible source of the semen on the swab. No apparent foreign hairs were noted upon macroscopic examination of the combed pubic sample from MORAGA.											

ORIGINAL

FILED

JAN 25 11:25 AM '04

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169  
1 **ORDR**

2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 ERIC JORGENSEN  
6 Chief Deputy District Attorney  
7 Nevada Bar #001802  
8 200 South Third Street  
9 Las Vegas, NV 89155-2211  
10 (702) 455-4711  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,  
11 Plaintiff,

12 -vs-

13 ROYD D. MARAGA,  
14 #938554

15 Defendant.

Case No. C92174  
Dept No. VIII

17 ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE  
18 UNDER NEVADA OPEN RECORDS ACT

19 DATE OF HEARING: 1/5/04  
20 TIME OF HEARING: 9:00 A.M.

21 THIS MATTER having come on for hearing before the above entitled Court on the  
22 5th day of January, 2004, the Defendant not being present, represented by CHRISTINA  
23 HINDS, Esq., the Plaintiff being represented by DAVID ROGER, District Attorney, through  
24 ERIC JORGENSEN, Chief Deputy District Attorney, and the Court having heard the  
25 arguments of counsel and good cause appearing therefor,

26 ///

27 ///

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JAN 07 2003

CLERK

1 IT IS HEREBY ORDERED that the Defendant's Motion for Release of DNA  
2 Evidence Under Nevada Open Records Act, shall be, and it is denied.

3 DATED this 7 day of January, 2004.

4  
5 *Lee A. Gates*  
6 DISTRICT JUDGE

7  
8 DAVID ROGER  
9 DISTRICT ATTORNEY  
Nevada Bar #002781

10  
11 *[Signature]*  
12 ERIC JORGENSEN  
13 Chief Deputy District Attorney  
14 Nevada Bar #001802  
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MOT  
CRISTINA HINDS, ESQ.  
Nevada Bar No. 7014  
525 S. 6<sup>th</sup> St.  
Las Vegas, Nevada 89101  
(702) 940-1234  
Attorney for Defendant

FILED

FEB 9 3 51 PM '04

*Cristina Hinds*

IN THE EIGHTH DISTRICT COURT  
OF THE STATE OF NEVADA FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,

Plaintiff

vs.

ROY D. MORAGA

Defendant.

CASE NO.: C092174  
DEPT. NO.: VIII

EX PARTE MOTION FOR EXCESS FEES

COMES NOW, Defendant, Roy Moraga, by and through his attorney, CRISTINA HINDS, ESQ., and hereby moves this Honorable Court, pursuant to NRS 7.125 (4), to allow extraordinary fees incurred in the preparation and argument of his post-conviction petition for writ of habeas corpus.

This motion is based upon the attached points and authorities, the Declaration of Cristina Hinds, Esq., the itemized bill, and the record in this action.

DATED this 4<sup>th</sup> of February, 2004.

*Cristina Hinds*  
CRISTINA HINDS, ESQ.  
Nevada Bar No. 7014  
525 S. Sixth St.  
Las Vegas, NV 89101  
(702) 940-1234

COUNTY CLERK  
RECEIVED  
FEB 09 2004

1 POINTS AND AUTHORITIES

2 Counsel for Mr. Moraga seeks to have this court grant extraordinary fees in this matter in the  
3 sum of \$2,088.68 arising out of representation of the Mr. Moraga from researching his post-conviction  
4 claims and drafting his motion. A copy of counsel's bill is attached hereto. Exhibit 1.

5 NRS 7.125 provides in relevant part:

6 3. An attorney appointed by a district court to represent an indigent petitioner for a writ  
7 of habeas corpus or other post-conviction relief, if the petitioner is imprisoned pursuant  
8 to a judgment of conviction of a gross misdemeanor or felony, is entitled to be paid a fee  
9 not to exceed \$750.

10 4. If the appointing court because of:

11 (a) The complexity of a case or the number of its factual or legal issues;

12 (b) The severity of the offense;

13 (c) The time necessary to provide an adequate defense; or

14 (d) Other special circumstances,

15 deems it appropriate to grant a fee in excess of the applicable maximum, the payment  
16 must be made, but only if the court in which the representation was rendered certifies that  
17 the amount of the excess payment is both reasonable and necessary and the payment is  
18 approved by the presiding judge of the Judicial district in which the attorney was  
19 appointed, or if there is no such presiding judge or if he presided over the court in which  
20 the representation was rendered, then by the district judge who holds seniority in years  
21 of service in office.

22 In addition to the statutory authority which allows for excess fees, the Nevada Supreme Court  
23 has held that it is proper to make payment for reasonable and necessary expenses in excess of  
24 statutory limits for court-appointed attorneys; in fact, the Nevada Supreme Court has viewed the  
25 approval of reasonable attorney's fees as a matter of abuse of discretion by District Court when  
26 explicit reasoning is not cited for the denial of reasonable attorneys fee by Court appointed counsel.  
27 Digesti v. Third Judicial Dist. Court, 109 Nev. 532, 853 P.2d 118 (1993).

28 In Digesti an attorney was hired to represent an indignant client. Id. The District Court  
arbitrarily awarded the counsel \$5,000 in fees without first making a determination whether his fees  
submitted to the Court in the amount of \$11,418 was unreasonable. As a result the District Court  
explicitly provided reasoning in their determination of the reasonableness of fees. Furthermore, the

1 Nevada Supreme Court rarely rules only in extraordinary circumstances regarding the District  
2 Court's certification of excess fees. Wood v. State, 113 Nev. 1455, 951 P. 2d. 601 (1997).

3 In this case, Mr. Moraga had an extensive filings which were necessary to review. Further,  
4 there was a good faith argument for raising the requested claims for relief. Given these  
5 circumstances, the total billing for this case of \$2,088.68 is accurate, fair, and reasonable. As such,  
6 there are no grounds to deny this ex parte order for reasonable excess fees.

7 **CONCLUSION**

8 It is hereby requested that this Honorable Court to allow and approve reasonable excess fees  
9 associated with the leading to and preparation of the post-conviction matter.

10 Respectfully submitted,

11  
12   
13 **CRISTINA HINDS, ESQ.**  
14 Nevada Bar No. 7014  
15 525 S. Sixth St.  
16 Las Vegas, NV 89101  
17 (702) 940-1234  
18  
19  
20  
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DECLARATION OF CRISTINA HINDS

1. That I was appointed to represent the Defendant in this case.
2. That I am requesting \$2,088.68 for fees and costs incurred in this matter.
3. That this truly and accurately reflects the fees and costs incurred in this matter.
4. That I swear under penalty of perjury that the foregoing is true.

Executed this 4<sup>th</sup> day of February, 2004.

Cristina Hinds

Cristina Hinds

**Cristina Hinds Esq.**

525 S. 6th Street  
Las Vegas, NV 89101

Ph:702-940-1234

Fax:702-940-1235

Roy Moraga  
200 S. Third Street  
Las Vegas, NV  
89101

February 4, 2004

**Attention:**

File #: 222-1

Inv #: 597

**RE:**

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Nov-18-02	Court appearance to confirm as counsel.	0.16	12.00	CH
Nov-20-02	Draft introductory letter to client.	0.25	18.75	CH
	Telephone call to David Schreck regarding file.	0.10	7.50	CH
	Draft Order of Appointment.	0.16	12.00	CH
	Telephone call.	0.08	6.00	CH
	Telephone call to Probation office regarding case file.	0.16	12.00	CH
Dec-19-02	Review client letter.	0.16	12.00	CH
	Draft Response.	0.25	18.75	CH
Feb-05-03	Attend hearing for status check on petition.	0.25	18.75	CH
Apr-23-03	Telephone call regarding transcript request.	0.08	6.00	CH
May-01-03	Review Blackstone to determine if transcripts have been filed.	0.32	24.00	CH
Jun-03-03	Draft Stipulation and Order: Make copies (No Charge).	0.16	12.00	CH



Jun-30-03	Telephone conference with client.	0.16	12.00	CH
Jul-07-03	Order file from court; Telephone call to prison to set up visit, will need to call back tomorrow.	0.25	18.75	CH
Jul-10-03	Draft letter to client; Make copies (No Charge).	0.16	12.00	CH
	Telephone conference with the prison to set appointment for visit 7/17/03.	0.16	12.00	CH
Jul-11-03	Proof read letters to client.	0.16	12.00	CH
Jul-16-03	Review all trial transcripts and begin drafting motion.	3.50	262.50	CH
Jul-17-03	Meeting with client at High Desert State Prison.	1.25	93.75	CH
Jul-29-03	Research DNA testing in post conviction relief.	0.32	24.00	CH
Jul-31-03	Telephone conference with client.	0.16	12.00	CH
	Telephone conference regarding DNA testing.	0.25	18.75	CH
	Review materials sent by client.	0.75	56.25	CH
	Research how to bring Request for DNA testing.	3.25	243.75	CH
	Begin drafting motion.	2.25	168.75	CH
Aug-01-03	Research.	0.32	24.00	CH
Oct-01-03	Telephone conference with client regarding motion.	0.16	16.00	CH
Oct-03-03	Meeting with client at High Desert State Prison.	0.75	75.00	CH
	Finish drafting motion.	2.50	250.00	CH
Oct-14-03	Review client letters and draft response.	0.40	40.00	CH
Oct-20-03	Review client letter.	0.25	25.00	CH

Invoice #: 597

Page 3

February 4, 2004

Nov-06-03	Review client letter and supporting documentation.	0.50	50.00	CH
Dec-01-03	Review client letter.	0.16	16.00	CH
Dec-15-03	Complete Motion.	0.58	58.00	CH
Dec-29-03	Review State's Opposition.	0.40	40.00	CH
	Review client letter.	0.32	32.00	CH
Jan-04-04	Research State's Opposition.	0.75	75.00	CH
	Prepare for hearing.	0.32	32.00	CH
Jan-05-04	Attend court hearing.	0.50	50.00	CH
	Draft Reply to State's Opposition.	1.00	100.00	CH
	Draft letter to client.	0.25	25.00	CH
Jan-12-04	Review Order denying motion.	0.25	25.00	CH
	Totals	24.16	\$2,039.25	

**DISBURSEMENTS**

	Postage	4.84
Jul-17-03	Mileage Expense - 51 miles @ .38	19.38
Oct-03-03	Mileage Expense - 51 miles @ .38	19.38
Dec-18-03	Postage Expense	0.83
Dec-19-03	Photocopies - 36 @ .10	3.60
Dec-31-03	Photocopies - 14 @ .10	1.40
	Totals	\$49.43

**Total Fee & Disbursements****\$2,088.68****Balance Now Due****\$2,088.68**

ORIGINAL

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*Shirley D. King*  
CLERK

ORD  
CRISTINA HINDS, ESQ.  
Nevada Bar No. 7014  
525 S. 6<sup>th</sup> St.  
Las Vegas, Nevada 89101  
(702) 940-1234  
Attorney for Defendant

IN THE EIGHTH DISTRICT COURT  
OF THE STATE OF NEVADA FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,

Plaintiff

vs.

ROY D. MORAGA

Defendant.

CASE NO.: C092174  
DEPT. NO.: VIII

ORDER FOR PAYMENT OF EXCESS FEES

Based upon the Ex Parte Motion for Excess Fees, attached declaration of counsel and itemized bill, it is hereby ordered that CRISTINA HINDS, ESQ. shall be paid the sum of \$2,088.68 for fees and costs arising out of her representation of Defendant Roy Moraga in post-conviction relief proceedings.

DATED this 10 of February, 2004.

*Shirley D. King*  
DISTRICT COURT JUDGE

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COURT OF CLARK

Defendant  
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ROY D. MORAGA  
NAME  
31584  
Prison Number  
Ely State Prison  
Place of Confinement

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2004 FEB 17 P 2:48

DISTRICT COURT  
CLARK COUNTY, NEVADA

*Shelly B. ...*  
CLERK

THE STATE OF NEVADA  
Plaintiff,  
  
vs.  
ROY D. MORAGA  
#938554  
Defendant.

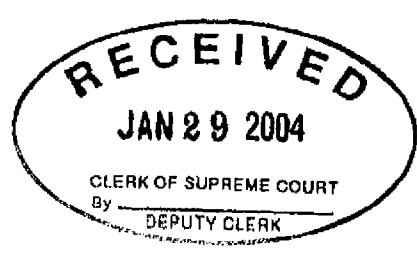
CASE NO. C92174  
Dept NO. VIII

NOTICE OF APPEAL

NOTICE is hereby given that Defendant, ROY D. MORAGA, hereby appeals from an Order denying his MOTION for release of DNA Evidence under Nevada Open Records Act relief dated JANUARY 7, 2004, to the Supreme Court of the State of Nevada. This appeal is to all issues of LAW AND FACT.

Dated this 26 day of JANUARY 2004.

By Roy D. Moraga  
Roy D. MORAGA \*31584  
E.S.P. P.O. Box 1989  
Ely, Nevada 89301



## CERTIFICATE OF SERVICE

I hereby Certify that I am the Defendant and ~~on~~ this 26 day of JANUARY 2004, I served a copy of the foregoing NOTICE OF APPEAL, by Mailing a Copy thereof to:

SUPREME COURT CLERK  
SUPREME COURT BUILDING  
CAPITOL COMPLEX  
CARSON CITY NV 89710

DAVID ROGER  
Clark County District Attorney  
Attention Appellate Division  
200 South Third Street  
LAS Vegas NV 89155-2211

FRANKIE SUE DEL PAPA  
NEVADA ATTORNEY GENERAL  
CRIMINAL DIVISION  
CAPITOL COMPLEX  
CARSON CITY NV 89710

District Court, Clerk - Dept VII I  
200 South Third Street  
LAS Vegas NV 89155

Cristina A. Hinds, ESQ  
525 S. 6<sup>th</sup> St.  
LAS Vegas NV 89101

173  
Roy D. MORAGA  
NAME  
31584  
PRISON NUMBER  
ELY STATE PRISON  
PLACE OF CONFINEMENT

CE 92174

DISTRICT COURT  
CLARK COUNTY NEVADA

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THE STATE OF NEVADA  
Plaintiff,

CASE NO. CE 92174  
CLERK  
Dept NO. 8

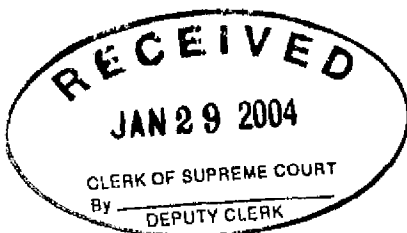
vs.  
ROY D. MORAGA  
Defendant.

SUPPLEMENTAL BRIEF TO STATES OPPOSITION  
TO DEFENDANT'S MOTION FOR RELEASE OF DNA  
EVIDENCE UNDER NEVADA OPEN RECORDS ACT

COMES NOW, Defendant, ROY DANIELS MORAGA, in  
~~pre se~~ and Files this reply to the STATE'S Opposition to  
Defendant's Motion For release of DNA under the Nevada  
Open Records Act.

DATED this 26 day of JANUARY 2004.

By Roy D. Moraga  
ROY D. MORAGA #31584  
E.S.P. P.O. BOX 1989  
ELY, NEVADA 89301



RECEIVED

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COUNTY CLERK

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## STATEMENT OF FACT PERTINENT TO THE STATES OPPOSITION

Defendant was represented by Roger Hillman, P.D.. At the trial on one of Mr. Hillman's visit Mr. MORAGA, told the Attorney that he Never had intercourse with Ms. HAWK. But did have Consensual Sex with her the Defendant told Mr. Hillman the only thing I did was ASK Ms. HAWK if he could Kiss her Nipples Ms. HAWK Said Yes this is why the defendant testified to Consensual Sex. The defendant did not want to testify in his behalf but Mr. Hillman told me if you don't tell the Court you had Sex with pennie then he would because he took an Oath to tell the truth, that he would tell the Judge. This is why the defendant offered a defense of Consensual Sex. The State Adds "the defendant ejaculated into Ms. HAWK's Vagina." But NO Place in the record will you find this Statement So where ever the State is getting its information its False. The defendant has been going over every transcript for over 13 years, to date I still CAN'T find this Statement. The State Also Adds there was a Seiko watch was taken from Ms. HAWK's Apartment. Maybe but I didn't take it, if you look at the Police report given to detective NOVACK by Jodie Howard Ms. HAWK's daughter she stated she was missing a Womens Seiko watch with 5 white stones, at trial when the watch was given to Jodie for identification she stated it was her watch. I then told Mr. Hillman that the watch only has 4 white stones so how can it be hers Mr. Hillman said it was OK. On page (6) ~~IS~~ Stating in Order to get DNA testing you have at least two main similarities. First, each case involved a single perpetrator, which would tend to make DNA testing determinative of the guilt or innocence of the defendant, well the State believes the Defendant ejaculated into Ms. HAWK so wouldn't this make the defendant a single perpetrator, and in the interest of justice the DNA test would establish defendant's guilt or innocence once and for all. Sewell v. State, 592 N.E.2d 705, 708 (Ind Ct App. 1992). Further, when Ms. HAWK took the stand she was asked "Do you swear to tell the

CONT.

Truth and Nothing but the truth so help you God. Ms. HAWK, I do. for the record Please State your NAME pennie HAWK would you Spell it P-e-n-n-i-e H-A-W-K. At this point I ASKED Mr. Hillman if he got Ms. HAWK's Criminal record he Stated NO because she WAS NOT ON Trial. I told Mr. Hillman it was only for Credibility he Said NO. IF Ms. HAWK's records where let into Court it would have Seen that Ms. HAWK's true NAME is Charlotte ANN DAVIS. So Ms. HAWK or DAVIS Committed Perjury but this is Alright because the State got their Conviction. Additionally, the Key to pennie HAWK's Apartment, which had been Stolen Along with the Seiko Watch, just hours prior to the Sexual ASSAULTS When Ms. HAWK's daughter was home alone sleeping, was Found in the defendant's possession upon his Arrest. First of All NO Key WAS Found in the defendant's possession. Detective NOVACK testified at trial "I took it upon myself to Check Mr. MORAGA'S property at Clark County Detention Center where I took his Keys. I took them to Ms. HAWK's daughter where she put the Key into the door AND opened it but when she gave me back the Key it WAS NOT the same Key we Switched the evidence. I told Mr. Hillman, he did Nothing but look at me. It's in the record. The State Adds. (FACT) The defendant's Admission to having Sexual intercourse with the victim, Along with the FACT that he Could Not be excluded AS a possible Source of the Semen on the Victim's VAGINAL Swab; (Page 8). Moreover, Forensic lab testing of the Semen taken For the Victim's VAGINAL Swab Could Not exclude the defendant AS a Source. Number (1) Linda Errichetto, is head of City of LAS VEGAS'S Forensic Laboratory, she testified she tested the blood NOT the Semen like the State would like this Court to believe. The test of the blood was done to See the type, it was of a O secretor AND the defendant Also is of a O Secretor this is the Only reason why the defendant Could Not be excluded AS a possible Source of the Semen on the Victim's VAGINAL Swab. The State Further Adds. Clearly, MORAGA'S OWN Admissions to the Police AND to his Friends AND Acquaintances; Along

CONT.



With his Admissions to the jury, Clearly implicated his involvement AS the ATTACKER Who raped PENNIE HAWK AND Stole From her Apartment. (Fact) the defendant NEVER Admitted Anything to the Police or ANYONE About rapping PENNIE HAWK. The defendant would like to Know Why the Police NEVER testified to this At trial. (Page 8, 10) Again Mr. Moraga HAS been reading his CASE AND I CAN'T Find ANY testimony Saying the defendant testified At trial that he engaged in Sexual intercourse With PENNIE HAWK. Please have the State Prove this Statement in record.

### CONCLUSION

The defendant's Motion to Release DNA Evidence under the Nevada Open Records Act Should be GRANTED because the State Made Numerous of Frivolous Violations Against the defendant. Furthermore the defendant Prays to this Court to Grant AN Evidentiary hearing before Granting the Motion for DNA testing under Nevada Open Records Act. In Order to call All the witnesses that are Stated in this Supplemental Brief, When the Court Finds All the Facts True then AND Only then will the test be Done. Also it should be Noted that the defendant has been trying to get these issue into Court but the Attorney's for the defendant denied his request. IF the defendant is Lying About these Statements in this brief the Court Shell Order defendant to pay All Court Fees, Attorney Fees, Filing Fees, Witnesses Fees, AND receive time required by LAW for Perjury. Furthermore if defendant Proves Actual innocence for the Charges he has been Wrongfully Convicted of the State Shell pay All expense for DNA testing. Further the evidence Shell be tested by the States Crime Lab, Linda Errichetto. Also defendant's Attorney Shell be Appointed: Ms. Cristina A. Hinds, ESQ.

Dated this 26 day of JANUARY 2004.

Submitted by,

Roy D. Moraga

ROY D. MORAGA # 31584  
E.P. P.O. Box 1989  
ELY, NEVADA 89301

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*Christina*  
CLERK

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ASTA

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

STATE OF NEVADA,

Plaintiff(s),

vs.

ROY D. MORAGA,

Defendant(s),

)  
) Case No: C92174  
) Dept No: VIII  
)  
)  
)  
)  
)  
)  
)

**CASE APPEAL STATEMENT**

1. Appellant(s): ROY D. MORAGA

2. Judge: LEE A. GATES

3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), ROY D. MORAGA

4. All Parties, Appeal:

Appellant(s), ROY D. MORAGA

Respondent, THE STATE OF NEVADA

5. Appellate Counsel:

*Appellant/Proper Person*  
ROY D. MORAGA #31584  
PO BOX 1989  
ELY NV 89301

*Respondent*  
David Roger, District Attorney  
200 S. 3<sup>rd</sup> St.  
Las Vegas NV 89101  
(702) 455-4711

1 6. District Court Attorney, Appointed

2 7. On Appeal, N/A

3 8. Forma Pauperis, Granted

4 9. Date Commenced in District Court: 12/28/1989

5 Dated This 18 day of February 2004.

6 Shirley B. Parraguirre, Clark County Clerk

7  
8 By:

9 MANUEL RIVAS, Deputy Clerk

10 200 South Third Street

11 PO Box 551601

12 Las Vegas, Nevada 89155-1601

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DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*  
May 4 3 51 PM '04  
*Sonia L. Riley*  
CLERK

THE STATE OF NEVADA, )  
PLAINTIFF, )  
VS. ) CASE NO.: C092174  
ROY DANIELS MORAGA, )  
DEFENDANT. )  
----- )

**ORIGINAL.**

REPORTER'S TRANSCRIPT  
OF  
DEFT'S MOTION FOR RELEASE OF DNA  
EVIDENCE UNDER NEVDA PEN RECORDS ACT  
BEFORE THE HONORABLE JUDGE LEE A. GATES  
DISTRICT COURT JUDGE  
DEPARTMENT VIII

DATED MONDAY, JANUARY 5, 2004

FOR THE PLAINTIFF: LYNN ROBINSON, ESQ.  
FOR THE DEFENDANT: CRISTINA HINDS, ESQ.  
REPORTED BY: SONIA L. RILEY, CCR NO. 727

SONIA L. RILEY, CCR NO. 727 (702) 455-3610

RECEIVED  
MAY - 4 2004  
COUNTY CLERK

S8

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 LYNN ROBINSON, ESQ.  
4 DISTRICT ATTORNEY'S OFFICE  
5 200 South Third Street  
6 Las Vegas, Nevada 89101  
7 (702) 455-4711

8 FOR THE DEFENDANT:

9 CRISTINA HINDS, ESQ.  
10 525 S. Sixth Street  
11 Las Vegas, Nevada 89101  
12 (702) 940-1234

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\* \* \* \* \*

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SONIA L. RILEY, CCR NO. 727 (702) 455-3610

1 LAS VEGAS, NEVADA; MONDAY, JANUARY 5, 2004

2 P R O C E E D I N G S

3 \* \* \* \* \*

4 **THE COURT:** State vs. Roy Moraga.

5 **MS. HINDS:** Cristina Hinds on behalf of  
6 Mr. Moraga.

7 I just did a reply this week. I don't  
8 know if the State would like to pass it for two days  
9 in order to read the reply.

10 **THE COURT:** Do we have to keep passing  
11 this thing here?

12 **MS. ROBINSON:** Your Honor, I'm ready to  
13 proceed.

14 **THE COURT:** Let's hear it.

15 **MS. HINDS:** My argument is simple. What  
16 we're asking for is a release of the DNA that's in  
17 the custody of Las Vegas Metropolitan Police  
18 Department.

19 May I approach, your Honor?

20 This is the DNA evidence in the State's  
21 possession. What I'm asking for under the Nevada  
22 Open Records Act is to allow Mr. Moraga to have the  
23 DNA to be released to an expert to test the DNA to  
24 see if it matches his DNA. What happened during the  
25 trial is for some reason they didn't test the DNA,

SONIA L. RILEY, CCR NO. 727 (702) 455-3610

1 they just tested the secretors, and of course it  
2 showed he could not be excluded as a possible source  
3 of the semen, the blood and saliva. So, what we  
4 would like is to have that tested under the Nevada  
5 Open Records Act to see if his DNA matches her DNA  
6 that's in the custody of the Las Vegas Metropolitan  
7 Police Department.

8 **THE COURT:** Counsel?

9 **MS. ROBINSON:** The main argument is it  
10 doesn't make sense to do it under this case. He  
11 admitted that he had consensual sex with her.

12 **THE COURT:** Identity isn't an issue, is  
13 it, Counsel?

14 **MS. HINDS:** That's correct. Of course  
15 it's my client's contention that had counsel not  
16 been ineffective and had counsel been prepared and  
17 requested the DNA at the earlier time, it would have  
18 exonerated him as a possible suspect, because he was  
19 unprepared for trial.

20 **THE COURT:** Wait a minute. He admits that  
21 he had sex with her and it was consensual and she  
22 agreed to have sex with him?

23 **MS. HINDS:** It's his contention.

24 **THE COURT:** That was the testimony at  
25 trial, right?

1           **MS. HINDS:** That was the testimony at  
2 trial.

3           **THE COURT:** He wants the DNA test to show  
4 that -- I don't know what he wants.

5           **MS. HINDS:** That's correct. It's his  
6 contention that had the DNA been tested originally,  
7 it would have excluded him as a suspect.

8           **THE COURT:** So, he would have been --

9           **MS. HINDS:** He would have been prepared  
10 for trial.

11           **THE COURT:** He would have been on the  
12 stand to lie about actually having sex?

13           **MS. HINDS:** That's correct. Under the  
14 Nevada Open Records Act, that doesn't appear to be  
15 relevant in any event. I hate to say that appears  
16 to be stupid, but I think it's frivolous. I don't  
17 think the Court is required to grant this motion.  
18 The guy already he admitted he had sex with her, the  
19 only issue is whether or not it was consensual. A  
20 DNA test is not going to prove or have any effect on  
21 the evidence in this case. It's a waste of time,  
22 and it's frivolous.

23           The Court denies the motion.

24           **MS. HINDS:** Thank you, your Honor.

25           **THE COURT:** Of course, I know it was your



1 client who came up with this.

2 **MS. HINDS:** Thank you, your Honor.

3 (WHEREUPON, THE PROCEEDINGS WERE  
4 CONCLUDED.)

5 \* \* \* \* \*

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SONIA L. RILEY, CCR NO. 727 (702) 455-3610

## REPORTER'S CERTIFICATE

STATE OF NEVADA)  
:SS  
COUNTY OF CLARK)

I, SONIA L. RILEY, CERTIFIED COURT  
REPORTER,  
DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL  
OF THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER  
AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER  
SAID STENOGRAPHY NOTES WERE TRANSCRIBED INTO  
TYPEWRITING AT AND UNDER MY DIRECTION AND  
SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES  
A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY  
ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO  
SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF  
CLARK, STATE OF NEVADA.

  
SONIA L. RILEY, CCR 727

SONIA L. RILEY, CCR NO. 727 (702) 455-3610

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DISTRICT COURT

CLARK COUNTY, NEVADA

*Shirley S. Rungtane*  
CLERK

\* \* \* \* \*

THE STATE OF NEVADA,  
PLAINTIFF,  
VS.  
ROY DANIELS MORAGA,  
DEFENDANT.

**ORIGINAL**

CASE NO.: C092174

REPORTER'S TRANSCRIPT

OF

DEFT'S PRO PER MOTION TO VACATE  
AND/OR AMEND JUDGMENT

BEFORE THE HONORABLE JUDGE LEE A. GATES  
DISTRICT COURT JUDGE  
DEPARTMENT VIII

DATED WEDNESDAY, NOVEMBER 13, 2002

FOR THE PLAINTIFF: DONNA ROSENBERG, ESQ.

FOR THE DEFENDANT: PRO PER

REPORTED BY: SONIA L. RILEY, CCR NO. 727

SONIA L. RILEY, CCR NO. 727 (702) 455-3610

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MAY - 4 2004

COUNTY CLERK

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APPEARANCES:

FOR THE PLAINTIFF:

DONNA ROSENBERG, ESQ.  
DISTRICT ATTORNEY'S OFFICE  
200 S. THIRD STREET  
LAS VEGAS, NEVADA 89101

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LAS VEGAS, NEVADA; WEDNESDAY, NOVEMBER 13, 2002

P R O C E E D I N G S

\* \* \* \* \*

THE COURT: State of Nevada vs. Roy  
Moraga. This is defendant's pro per motion to vacate  
and/or amend judgment.

The defendant is in Nevada Department of  
corrections. The defendant got life without parole.  
Defendant was sentenced to life without parole,  
habitual criminal. Defendant resentenced, pursuant to  
Supreme Court request to Count I, ten years; Count II,  
ten years; Count III, life without parole; Count IV,  
life without parole, all consecutive.

I'm going to appoint -- what's her name --  
on this case -- Cristina Hinds; so, let's continue it  
over until Monday and notify her to be here.

THE CLERK: November 18th at 9:00 o'clock,  
confirmation of counsel.

\* \* \* \* \*

(WHEREUPON, THE PROCEEDINGS WERE  
CONCLUDED)

\* \* \* \* \*

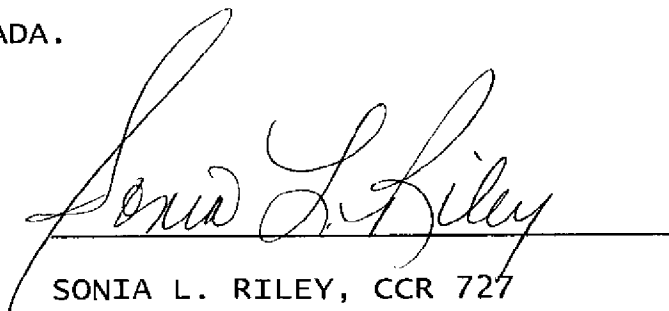
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REPORTER'S CERTIFICATE

STATE OF NEVADA)  
:SS  
COUNTY OF CLARK)

I, SONIA L. RILEY, CERTIFIED COURT  
REPORTER, DO HEREBY CERTIFY THAT I TOOK DOWN IN  
STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE  
BEFORE-ENTITLED MATTER AT THE TIME AND PLACE  
INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES  
WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY  
DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT  
CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE  
BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO  
SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF  
CLARK, STATE OF NEVADA.

  
SONIA L. RILEY, CCR 727



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Shelly B. Pangburn.

CLERK

CLARK COUNTY, NEVADA

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9:00 A.M.

ROBERT J. DASKAS, ESQ.  
Deputy District Attorney

Reported by: MARILYN WAGGONER, CCR No. 553

1 LAS VEGAS, CLARK COUNTY, NV., MONDAY, MAY 11, 1998

2 9:00 A.M.

3 -o0o-

4 P R O C E E D I N G S

5  
6 THE COURT: Page 3. Case No. C092174, State of  
7 Nevada versus Roy Moraga.

8 The record will show the absence of the  
9 defendant, the absence of his attorney, Mr. Michael  
10 Cherry, and the presence of Robert Daskas on behalf of  
11 the State of Nevada.

12 This is a pro per motion by the defendant to  
13 modify or correct an illegal sentence.

14 Has the State filed an opposition?

15 MR. DASKAS: We have, Judge. It was filed  
16 May 8th. I can provide the Court with a copy if it  
17 doesn't have one.

18 THE COURT: Let me see that, please.

19 All right. The motion to correct the illegal  
20 sentence will be denied. It lacks legal foundation. The  
21 examination of the record shows that he did have four  
22 prior felony convictions and was eligible for habitual  
23 criminal status pursuant to NRS 207.012. Therefore, the  
24 sentence that Judge Foley (phonetic) gave to the  
25 defendant was within the realm of the statute.



1           Previously, the defendant has exhausted this  
2 argument in the form of appeals and a petition for  
3 post-conviction relief, which were all denied. The  
4 defendant is just rehashing arguments that have already  
5 been made and decided.

6           So will the State prepare an order in accordance  
7 with that?

8           MR. DASKAS: Yes, we will.

9                               -o0o-

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REPORTER'S CERTIFICATE

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STATE OF NEVADA     )  
                              ) ss  
COUNTY OF CLARK    )

I, MARILYN WAGGONER, Certified Shorthand  
Reporter, do hereby certify that I took down in Stenotype  
all of the proceedings had in the before-entitled matter  
at the time and place indicated and that thereafter said  
shorthand notes were transcribed into typewriting at and  
under my direction and supervision and that the foregoing  
transcript constitutes a full, true and accurate record  
of the proceedings had.

IN WITNESS WHEREOF, I have hereunto set my hand  
and affixed my official seal in my office in the County  
of Clark, State of Nevada, this 9th day of May, 2004.

  
MARILYN WAGGONER  
NV CCR No. 553  
CA CSR No. 3586.

182  
ROY D. MORAGA 31584  
E.S.P. P.O. Box 1989  
ELY, NEVADA 89301

FILED

DISTRICT COURT SEP 27 8 13 AM '04  
CLARK COUNTY NEVADA

ROY D. MORAGA  
Plaintiff

vs.

JACKIE CRAWFORD,  
GINA MORRIS,  
V. HINE, 5/6 MOFFITT,  
LT. JOHNSON.

Defendant(s)

CASE NO. C92174  
Dept NO. VIII  
Docket NO. \_\_\_\_\_

CLERK

AFFIDAVIT OF ROY D. MORAGA

I, ROY D. MORAGA, Plaintiff, being First duly Sworn  
under Penalty of Perjury, deposes and Avers that;  
1.) That I am the Plaintiff in the Above-entitled  
Cause of Action and the Foregoing of this writ are  
true and Correct to the best of his Knowledge.

Roy D. Moraga\* 31584  
E.S.P. P.O. Box 1989  
ELY, NEVADA 89301

Executed, this 15th day of August, 2004 at Ely State Prison,  
ELY, NEVADA under Penalty of Perjury, Pursuant to NRS 208.165

Roy D. Moraga

//////  
//////  
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(8.)

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SEP 27 2004  
COUNTY CLERK

CERTIFICATE OF SERVICE

The undersigned Certifies that he Served A Copy of  
the Foregoing by Mailing SAid Copy to:

Brian Sandoval, Attorney General  
100 N. CARSON Street  
CARSON City, NEVADA 89701-4714

County Clerk  
P. O. Box 551601  
200 S. Third Street  
LAS VEGAS NEVADA 89155-1601

District Attorney's Office  
200 South Third Street  
LAS Vegas, Nevada 89155

Dated this 15th day of August, 2004

Roy D. Moraga #31584  
E. S. P. P. O. Box 1989  
Ely, Nevada 89301

Roy D. MORAGA

Inmate No. 31584  
 P.O. Box 1989  
 Elko, NEVADA 89301

FILED

DISTRICT COURT SEP 27 8 13 AM '04  
 CLARK COUNTY, NEVADA

ROY D. MORAGA  
 Plaintiff

vs.

JACKIE CRAWFORD,  
 LINA MORRIS,  
 V. HINE, % MOFFITT,  
 LT. JOHNSON.

Defendant(s)

CASE NO. C92174  
 Dept. NO. VIII

EXTRAORDINARY WRIT  
 OF MANDAMUS

Date of Hearing 10-13-04Time of Hearing 9 AM

COMES NOW, ROY D. MORAGA, Plaintiff, in the above  
 entitled CAUSE OF ACTION, AND hereby Submits his Points  
 AND Authorities Filed in Support of his Extraordinary  
 Writ of Mandamus For the Court's review AND Consideration,  
 AND respectfully Shows the Following:

Points AND Authorities

IN relationship to Ground 1 of Plaintiff's extraordinary writ  
 OF MANDAMUS, Violations of the Fifth AND Fourteenth Amendments  
 to the United States Constitution; Procedural Due Process  
 AND Violation of equal Protection OF the LAW.

1) That on the 17th day of October, 2003, Plaintiff, Roy D. Moraga  
 WAS Accused of Stalking % Gina Morris by % V. Hine.  
 But WAS never Charged.

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(1.)

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MCI

(2) The Plaintiff respectfully submits that the Department of Corrections, Jackie Crawford, Violated it's own Nevada Department of Prisons Code of Penal Discipline Section II; Procedures, and (2) Service of Notice, the discovery of the Violations by Failing to bring the Plaintiff before a hearings Officer Within 10 Calender days of the discovery of the Violations, 10 Calender days of Service of Notice of Charges; See; Violation of Nevada Department of Prisons Code of Penal Discipline, AND Administrative Rules and Regulations; Section 2; Procedures. (Emphasis Supplied).

3.) The Plaintiff Further Points out to the court that NRS 209.041 (Custody) means the level of Security restrictions imposed on an Offender by a Classification Committee. (Added to NRS by 1977, 845). Plaintiff WAS Never seen by the Classification Committee For a Transfer mandates a due Process hearing that was denied, the denial to call witnesses in his defiance. Plaintiff was put into Segregation, Loss of Statutory good time AND Prejudicial Statement by the hearing body.

4.) Plaintiff respectfully submits AND Argues that he WAS improperly, illegally detained For the maximum 10 Calender days From the discovery of the Violations AND the 10 Calender days of the Notice of Charges. McGinnes v. Stevens, 543 P.2d 1221. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287. Furthermore, Plaintiff States because of these FALSE Charges, the Failer of Jackie Crawford's Code of Penal Discipline Plaintiff has Loss his right to Program, Loss of 180 days of Statutory good time, 180 days  
(2.)

Administrative Segregation, and the Transfer to Maximum Custody by Lt. Johnson as Punishment without any evidence to support the finding of guilty as Lt. Johnson stated on Plaintiff's write-ups. Furthermore Plaintiff states that Lt. Johnson denied me the right to call witnesses (Staff) to rebutt these False Charges, and that Plaintiff's hearing was held about 6:45 pm in order so that Plaintiff could not have his witnesses, Lt. Johnson stated he was taking these charges personally this statement is prejudicial by the hearing body, for the reason he took his disciplinary action on Plaintiff. (Amendment XIV Section 1.) and equal protection of the law. Dorsey v. Solomon, 435 F. Supp. 725, 733. Boyer v. Dickerson, 80 Nev. 160, 390 P.2d 225, 227, Also because of Jackie Crawford and Lt. Johnson's Failure to follow their own Code of Penal Discipline rules and Regulations Plaintiff has lost his chance of employment at Southern Desert's Prison industry making minimum wage, the right to free access to the legal library. Further Plaintiff states that So Moffitt unlawfully and maliciously let an inmate take Plaintiff's personal property. That on December 29th 2003 he was rolled-up in order to be transferred to Ely State Prison. Plaintiff has completed his Administrative relief through the Grievance, Appeals Process only to be denied or never answered. On December 29, 2003 my T.V., radio were in good working order until So Moffitt rolled-up my property. Sometime between December 29, 2003 to January 12, 2004 when Plaintiff received his T.V., radio

(3.)

There has been no sound on his T.V. or radio, All of Plaintiff's grievances have been denied. % Moffitt has Violated Plaintiff's right under 5th Amendment, NRS 197.200. Oppression under color of Office. (1) AN OFFICER, or a person Pretending to be AN OFFICER, who unlawfully and Maliciously, under Pretense or color of Official Authority: (b) Seizes or levies upon Another's Property; 2 AN OFFICER or Person Committing Oppression Shall be Punished; (A) Where Physical Force or the immediate Threat of Physical Force is used, For a Category (D) Felony as Provided in NRS 193.130 (b) Where no Physical Force or immediate threat of Physical Force is used, For a gross Misdemeanor.

(1911 C & P § 541; RL § 6806; NCL § 10487-NRS A 1967, 462; 1995, 1172) NRS 209.243, NRS 208.085.

Plaintiff States that it has been over 7 months that he has been without sound Subjecting me to Cruel and unjust hardship by misuse and Abuses of Authority or Power.

Dunfee v. Baskin-Robbins, Inc., 221 Mont. 447, 720 P.2d 1148, 1155.

Further Plaintiff States that % V. Hine was Threatening me. When % Hines worked unit 4 at Southern Desert he came into my cell 4-B-34, Kicked my bed, told me I couldn't sleep, when he worked in the I.D. room he Threatened to put me into Admin. Segregation For Talking to % E. Morris when she worked unit 4.

% V. Hine stated he didn't care, no matter what it takes, then on October 17, 2003 % V. Hine came up to me at the infirmary, told me I was Stalking % Morris.

(4.)



AND WAS ORDERED TO GO TO THE YARD BY % V. HINE, SO I DID, ON THE SAME DAY OCT 17, 2003 CALLED SGT. FIGARO, TOLD HIM I WAS STALKING % E. MORRIS, I WAS CHARGED WITH STALKING AND PUT INTO ADMIN. SEGREGATION. ON OCT 22, 03 I RECEIVED MY NOTICE OF CHARGES, THEIR WAS NOTHING ABOUT STALKING. % V. HINE INFLUENCED % E. MORRIS TO FILE FALSE CHARGES BECAUSE THE PLAINTIFF REFUSED SEXUAL ADVANCES MADE BY % E. MORRIS IN VIOLATION OF FEDERAL LAW (TITLE VII OF 1964 CIVIL RIGHTS ACT) AND COMMONLY BY STATE STATUTES; E.G. MASS G.L. c. 151B, § 1(18)., 42 U.S.C.A. § 2000e et seq., E.G. TOMKINS V. PUBLIC SERVICE ELECTRIC & GAS CO., C.A.N.J., 568 F.2d 1044. FURTHERMORE PLAINTIFF STATES THAT % E. MORRIS WAS HAVING INTERCOURSE WITH INMATES, OFFICERS AT SOUTHERN DESERT FACT WHEN % MORRIS WORKED UNIT 4 SHE TOLD ME TO GET BEHIND HER BECAUSE SHE COULD SEE IF ANYONE WAS COMING INTO THE UNIT, SHE WOULD ALSO SAY SHE WAS HOT. FURTHER % MORRIS ASKED ME IF SHE HAD A P.H.A.T. PUSSY, SHE WOULD SHOW ME THE OUT-LINE OF HER VAGINA AS TO REQUESTING ME TO HAVE SEXUAL INTERCOURSE WITH HER, % V. HINE KNEW % E. MORRIS WAS HAVING INTERCOURSE AT THE PRISON, SINCE I REFUSED HER SEXUAL ADVANCES % V. HINE INFLUENCED HER TO FILE FALSE CHARGES ON PLAINTIFF. THEREFORE UNDER FEDERAL LAW, (TITLE VII OF 1964 CIVIL RIGHTS ACT) % E. MORRIS HAS VIOLATED PLAINTIFF'S RIGHTS AS TYPE OF EMPLOYMENT DISCRIMINATION, INCLUDES SEXUAL ADVANCES, REQUESTS FOR SEXUAL FAVORS, OTHER VERBAL OR PHYSICAL CONDUCT OF A SEXUAL NATURE PROHIBITED BY FEDERAL LAW, COMMONLY BY STATE STATUTES;

(5.)

e.g., MASS. G.L. c. 151 B, § 1 (18.) Furthermore PLAINTIFF States that because of 96 v. Hine illegal Act's Violated NRS 197.010; bribery of executive or Administrative Officer, A Person who gives, Offers or Promises, directive or indirectly, ANY Compensation, gratuity or reward to ANY executive or Administrative Officer of the State, with the intent to influence him with respect to ANY Act, decision, vote, opinion or other Proceeding, AS Such Officer, is guilty of a Category C Felony AND Shall be Punished AS Provided in NRS 193.130. U.S. v. Gordon, 641 F.2d 1289 (9th Cir 1981) AND NRS 197.020 Same AS NRS 197.010, 199.010, 218.590, with intent to influence him with respect to ANY Act, decision. NRS 197.130 False report by Public Officer. NRS 197.200 Oppression under color of Office. (d) does ANY Act whereby ANOTHER Person is injured in his Person, Property or rights. NRS 209.243(b).

### CONCLUSION

PLAINTIFF States under these Extraordinary Performances of ministerial Acts or MANDATORY duty where there is A Clear legal right in PLAINTIFF, A corresponding duty in defendant's AND a WANT OF ANY other Appropriate AND Adequate remedy. Cohen v. Ford, 19 Pa. Cmwlth. 417, 339 A.2d 175, 177.

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(6.)

The remedy of MANDAMUS is a drastic one, to be invoked only in extraordinary situations. BANKERS LIFE & CAS. CO. vs. HOLLAND, 346 U.S. 379, 382-385, 74 S. Ct. 145, 147-194, 98 L. Ed. 106; EX PARTE FAHEY, 332 U.S. 258, 259, 67 S. Ct. 1558, 1559, 91 L. Ed. 2041. The writ has Traditionally been used in Federal Courts only to confine an inferior court to a lawful exercise of its Prescribed jurisdiction or to compel it to exercise its Authority when it is its duty to do so. Will v. United States, 389 U.S. at 95, 88 S. Ct. 273, quoting Roche vs. Evaporated Milk Assn., 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185.

### Prayer For Relief

Accordingly, PLAINTIFF respectfully request that this Court Issue his extraordinary writ of MANDAMUS brought before the Court so that he may be discharged from his unconstitutional confinement and grant any and all relief the Court deems just and proper, to include the prosecution of all the Officer's named in this writ for the violations of Plaintiff Rights. Furthermore Plaintiff moves this Court for an Order to Transfer Plaintiff back to Southern Desert Correction Center where he shall receive all of his Property that has been damaged, or taken from him, all Charges be dismissed and taken off Plaintiff records.

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(7.)

183  
Roy D. MORAGA  
Inmate NO. 315  
P.O. Box 1989  
ELY NEVADA 89301

FILED

DISTRICT COURT SEP 27 8 13 AM '04  
CLARK COUNTY, NEVADA

ROY D. MORAGA  
Plaintiff

vs.

R. Irvin,  
J. Oxborrow,  
C.C.W. Chambliss  
Defendant(s)

CLERK  
CASE NO. 92174  
Dept NO. VIII

Supplemental Act

COMES NOW, ROY D. MORAGA, Plaintiff, in the  
Above entitled CAUSE OF ACTION, and hereby Submits  
his Points and Authorities Filed in Support of his Supple-  
mental Act for the Court's review and Consideration,  
and respectfully Shows the Following:

Points and Authorities

In relationship to Plaintiff's extraordinary writ of  
Mandamus, Supplemental Act and Violations of the Fifth and  
Fourteenth Amendments to the United States Constitution;  
Procedural Due Process and Violation of equal Protection  
of the Law.

1.) That on July 8, 2004 Caseworker Chambliss came to  
my cell door 6-B-29 at Ely State Prison, asked me if I  
wanted to move to 7-B a Single Cell, he said it was  
up to me and that I didn't have to move, I told him  
NO but that I would move to unit 7-A because it is  
not a lock-down unit he said OK, and on the same day  
I was told to move to unit 7-B. By J. Oxborrow and

(1)

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I told him I didn't want to move he said OK. Then on July 9, 2004 I received a Notice of Charges For refusing to bed move. On July 10, 2004 Plaintiff Filed his Informal Grievance Stating that my rights are being Violated because I was told by caseworker Chambliss that I didn't have to move, that is was up to me and Also there is AN Black, White inmate here in unit 6-B that refused to move and they Never got a write-up, me being a Mexican I get a write-up this is discrimination as I stated in my grievance AND Also a Violation of my right to equal Protection of the LAW. Furthermore Plaintiff States that on or About July 14, 2004 my grievance was denied AND casework R. Irvin came to my cell door, said that I was explained the Procedure AND I know that in fact that NO one explained anything to me. She got these Officers to say that they explained the Procedure to me, AND this is a Violation of NRS 197.130, NRS 197.140 False report by Public Officer. Every Public Officer who shall knowingly make any False or misleading Statement in any Official report or Statement, under circumstances not otherwise Prohibited by LAW, shall be guilty of a gross misdemeanor.

[§ 911 C & P § 84; RL § 6349; NCL § 10033]

NRS 197.140 Public Officer Making False Certificate. Every Public Officer who, being Authorized by LAW to make or give certificate or other writing, shall knowingly make and deliver as true such a Certificate or writing containing any Statement which he knows to be False, in a case where the Punishment thereof is not expressly Prescribed by LAW

(CONTINUATION) (2)

CONTINUATION PAGE 2.

Shall be guilty of a gross misdemeanor.

[1911 C & P § 110; RL § 6375; NCL § 10059]

Plaintiff Also States that C.C.W. R. Irvin influenced these Officer's in to stating that they explained the Procedures to me in Violation of NRS 197.010; bribery of executive or Administrative Officer, A Person who gives, Offers or Promises, directive or indirectly, any Compensation, gratuity or reward to any executive or Administrative Officer of the State, with the intent to influence him with respect to any Act, decision, vote, Opinion or other Proceeding, AS Such Officer, is guilty of a Category C Felony and Shall be Punished as Provided in NRS 193.130

U.S. v. Gordon, 641 F.2d 1289 (9th Cir. 1981) and NRS 197.020 NRS 197.010, 199.010, 218.590, with intent to influence him with respect to any Act, decision. NRS 197.130 False report by Public Officer. NRS 197.200 Oppression under color of Office. (d) does any Act whereby Another Person is injured in his Person, Property or rights. NRS 209.243(b).

CONCLUSION

Plaintiff respectfully request that this Court issue his Supplemental Act brough before the Court so that he may be discharged From his unconstitutional Confinement and Grant any, All relief the Court deems just and Proper, to include the Prosecution of the Officer's named in this Supplemental Act For the Violations of Plaintiff's Rights.

Furthermore Plaintiff moves this Court For an Order to Transfer Plaintiff to Southern Desert Correctional Center.

(3.)

ROY D. MORAGA  
Inmate NO. 315  
ELY, NEVADA 89301  
E.S.P. P.O. Box 1989

DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY D. MORAGA  
Plaintiff

vs.

R. Irvin,  
J. Oxborrow,  
C.C.W. Chambliss.

Defendant(s)

CASE NO. \_\_\_\_\_

Dept NO. \_\_\_\_\_

Docket \_\_\_\_\_

Affidavit of Roy D. MORAGA

I, ROY D. MORAGA, Plaintiff, being first duly sworn under Penalty of Perjury, deposes and Avers that;  
1.) That I am the Plaintiff in the Above-entitled Cause of Action and the Foregoing of this Supplemental Act are true and Correct to the best of his Knowledge.

Roy D. Moraga #31584  
E.S.P. P.O. Box 1989  
ELY, NEVADA 89301

Executed, this 15th day of August, 2004 at Ely State Prison,  
ELY, NEVADA Under Penalty of Perjury, Pursuant to NRS 208.165

Roy D. Moraga

/////  
/////  
/////  
/////  
/////

(4.)

CERTIFICATE OF SERVICE

The undersigned Certifies that he Served a copy of the Foregoing by MAILING SAID Copy to:

Brian SANDOVAL, Attorney General  
100 N. CARSON Street  
CARSON City, NEVADA 89701-4714

County Clerk  
P.O. Box 551601  
200 S. Third Street  
LAS Vegas, NEVADA 89155-1601

District Attorneys Office  
200 South Third Street  
LAS Vegas, NEVADA 89155

Dated this 15th day of August, 2004

Roy D. Moraga #31584  
E.S.P. P.O. Box 1989  
ELY, NEVADA 89301

(5.)



185  
ROY DANIELS MORAGA #31584  
E. S. P. P.O. Box 1989  
ELY, NEVADA 89301  
Defendant Pro Se

2  
FILED

DISTRICT COURT  
CLARK COUNTY, NEVADA  
OCT-18 6 47 AM '04  
Clerk

THE STATE OF NEVADA,  
Plaintiff,

vs.

ROY DANIELS MORAGA,  
Defendant.

CASE NO. C92174

Dept No. VIII

Docket M

Date of Hearing:

Time of Hearing:

MOTION AND ORDER FOR FAILURE TO PROSECUTE AND  
REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT

COMES NOW the Defendant, ROY DANIELS MORAGA, Pro Se,  
and hereby moves this Honorable Court for an Order for  
Failure to Prosecute and Reinstate his Motion to Vacate  
and/or Amend Judgment.

This Motion is made and based upon the papers and Pleadings  
on file in this case and the attached Points and Authorities.

Dated this 11th day of October, 2004.

Respectfully Submitted,

Roy D. Moraga

ROY D. MORAGA\* 31584

Defendant Pro Se

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COUNTY CLERK

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### POINTS AND AUTHORITIES

ON October 31, 2002, Defendant's Motion to Vacate and/or Amend Judgment was Filed.

At a status Check hearing on February 5, 2003, the Court set the following briefing Schedule:

4-9-03 opening brief due;

6-18-03 Answering brief due;

7-9-03 Reply brief due;

The Court set 7-23-03 For Argument: Post Conviction Relief. See Exhibit "A", the Criminal Court Minutes From the hearing. For the reasons set forth below, Defendant Asserts his right to have this Motion reinstated For Failure to Prosecute AND hereby Moves the Court For AN Order to reschedule All the briefings in this case, AND Further Defendant Moves this Court to reinstate All the Exhibit's set forth in his Motion AND Order For Failure to Prosecute AND Reinstate Motion to Vacate AND/or Amend Judgment.

Dated this 11<sup>th</sup> day of October, 2004.

Respectfully Submitted

Roy D. Moraga

ROY D. MORAGA # 31584

Defendant Pro se

Roy D. MORAGA #31584  
E.S.P. P.O. Box 1989  
Ely, Nevada 89301  
Defendant Pro se

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY DANIELS MORAGA

Defendant.

CASE NO. C92174

Dept No. VII I

Docket M

AFFIDAVIT OF DEFENDANT

I, ROY DANIELS MORAGA, being First duly Sworn under Penalty of Perjury, deposes and Avers that;

1. That I am the defendant in the Above-entitled case.
2. That I am incarcerated at Ely State Prison, Ely Nevada.
3. That I am a laymen of the Law, cannot Litigate this Action without Legal Counsel.
4. That I make this Affidavit in support of All the Pleadings, and Motions, and Order's in this case.

I understand that a False Statement in this Affidavit shall Subject me to Penalties For Perjury.

Further, Your Affiant Sayeth Naught.

Roy D. Moraga #31584  
E.S.P. P.O. Box 1989  
Ely, Nevada 89301

Executed this 11th day of October, 2004 at Ely State Prison under Penalty of Perjury Pursuant to the Provisions of NRS 208.165

Roy D. Moraga #31584  
E.S.P. P.O. Box 1989  
Ely Nevada 89301  
Defendant Pro se

IN CONCLUSION, defendant includes by reference thereto, All exhibits, Affidavit AND arguments heretofore Furnished this Honorable Court in these Proceedings, as Fully AND to the same extent that they would have were they set forth hereafter, in this Place.

CERTIFICATE OF MAILING

I, ROY DANIELS MORAGA, do hereby certify that I mailed a true AND Correct Copy of the Foregoing Motion AND Order For Failure to Prosecute AND Reinstate Motion to Vacate AND/or Amend Judgment to the Following:

District Attorney's Office  
200 South Third Street, Suite 701  
Post Office Box 552212  
LAS VEGAS, NEVADA 89155-2212

by: ROY D. MORAGA  
ROY D. MORAGA\* 31584  
Defendant Pro Se

POINTS AND AUTHORITIES

On October 31, 2002, Defendant's MOTION TO VACATE AND/OR AMEND JUDGMENT was filed.

At a status check hearing on February 5, 2003, the Court set the following briefing schedule:

- 4-9-03 Opening brief due;
- 6-18-03 Answering brief due;
- 7-9-03 Reply brief due.

The Court set 7-23-03 for ARGUMENT: POST-CONVICTION RELIEF. See EXHIBIT "A", the CRIMINAL COURT MINUTES from the 2-5-03 hearing.

For the reasons set forth below, Defendant asserts his right to be personally present at the July 23, 2003 hearing on his motion, and hereby moves the Court for an Order to transport and produce Defendant for the hearing.

ARGUMENT

I. THE ABSENCE OF DEFENDANT AT THE HEARING WOULD VIOLATE HIS RIGHTS UNDER THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE U.S. CONSTITUTION (5TH, 6TH & 14TH AMENDMENTS)

The Nevada Supreme Court has long recognized the right of an accused to be present during the presentation of evidence in his case, and that his absence violates his rights under the Confrontation and Due Process Clauses of the U.S. Constitution. In Kirksey v. State, 923 P.2d 1102 (Nev.1996), they wrote:

"The right to be present is rooted in the Confrontation Clause and the Due Process Clause of the Federal Constitution. The confrontation aspect arises when the proceeding involves the presentation of evidence. United States v. Gagnon, (citations omitted). The due process aspect has been recognized only to the extent that a fair and just hearing would be thwarted by the defendant's absence. *Id.*"

///  
Exhibit "A"

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*See Clerk*

MOTN  
ROY DANIELS MORAGA #31584  
Southern Desert Correctional Center  
Post Office Box 208  
Indian Springs, Nevada 89070

Defendant pro se

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \*

THE STATE OF NEVADA,	)	Case No. C92174
	)	
Plaintiff,	)	Dept. No. VIII
	)	
vs.	)	Docket M
	)	
ROY DANIELS MORAGA,	)	
	)	Date of Hearing:
Defendant.	)	Time of Hearing:

11-13-02

MOTION TO VACATE AND/OR AMEND JUDGMENT

COMES NOW the Defendant, ROY DANIELS MORAGA, pro se, and pursuant to Warden v. Peters, 429 P.2d 549 (Nev.1967); FRCP Rule 60(b)(4); NRCP 60(b)(3); and the Due Process and Double Jeopardy Clauses of the U.S. Constitution (5th and 14th Amendments), hereby moves this Honorable Court to vacate and/or amend the Amended Judgment of Conviction in the above-entitled case.

This motion is made and based upon the papers and pleadings on file in this case and the attached Points and Authorities.

DATED this 28th day of October, 2002.

Respectfully submitted,

*Roy Moraga*  
Roy D. Moraga #31584  
Defendant pro se

Exhibit "B"

1   ORDR  
2   ROY DANIELS MORAGA #31584  
3   Southern Desert Correctional Center  
4   Post Office Box 208  
5   Indian Springs, Nevada 89070

6   Defendant pro se

7                                   DISTRICT COURT  
8                                   CLARK COUNTY, NEVADA

9                                   \* \* \*

10   THE STATE OF NEVADA,	)	Case No. C92174
	)	
11                           Plaintiff,	)	Dept. No. VIII
	)	
12                           vs.	)	Docket M
	)	
13   ROY DANIELS MORAGA,	)	
	)	
14                           Defendant.	)	<u>ORDER TO TRANSPORT</u>
	)	

15   To: ROBERT HILDRETH, Warden  
16       Southern Desert Correctional Center  
17       U.S. Highway 95 & Cold Creek Road  
18       Post Office Box 208  
19       Indian Springs, Nevada 89070

20       IT APPEARING to the satisfaction of the Court that application  
21   has been duly made by the Defendant, ROY DANIELS MORAGA, NDOC No.  
22   31584, in proper person, showing the necessity that said Defendant,  
23   presently incarcerated at the Southern Desert Correctional Center,  
24   Indian Springs, Nevada, be brought before the Court for hearing on  
25   his MOTION TO VACATE AND/OR AMEND JUDGMENT in the above-entitled  
26   action. Now therefore;

27   ///

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Exhibit "C"

Plaintiff's  
Copy Stamp,  
File, send  
Back

ROY DANIELS MORAGA #31584  
E. S. P. P.O. Box 789  
ELY, NEVADA 89301  
Defendant Pro Se

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY DANIELS MORAGA,

Defendant.

CASE NO. C92174

Dept NO. VIII

Docket M

Date of Hearing:

Time of Hearing:

MOTION AND ORDER FOR FAILURE TO PROSECUTE AND  
REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT

COMES NOW the Defendant, ROY DANIELS MORAGA, Pro Se,  
and hereby moves this Honorable Court for an Order for  
Failure to Prosecute and Reinstate his Motion to Vacate  
and/or Amend Judgment.

This Motion is made and based upon the papers and Pleadings  
on file in this case and the attached Points and Authorities.

Dated this 11th day of October, 2004.

Respectfully Submitted,

Roy D. Moraga

ROY D. MORAGA #31584

Defendant Pro Se



183  
IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

2004 OCT 19 PM 3:13

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 42828

District Court Case No. C09231ZERK  
*Janette M. Bloom*  
C-92174

**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 the district court AFFIRMED."

Judgment, as quoted above, entered this 15th day of September, 2004.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 12th day of October, 2004.

Janette M. Bloom, Supreme Court Clerk

By: *J. Richards*

Chief Deputy Clerk

JUDGMENT ENTERED

OCT 21 2004

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S11

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42828

FILED

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ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Roy D. Moraga's motion for release of DNA evidence under the Nevada Open Records Act. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On July 7, 1990, the district court convicted Moraga, pursuant to a jury verdict, of two counts of burglary and two counts of sexual assault. The district court sentenced Moraga to serve a term of life without the possibility of parole in the Nevada State Prison. This court affirmed the conviction but issued an order of remand to resentence Moraga.<sup>1</sup> The remittitur issued on September 17, 1991. An amended judgment of conviction was entered on November 13, 1991, whereby Moraga was sentenced to two consecutive ten-year terms in the Nevada State Prison for the burglary offenses and a consecutive life term with the possibility of parole after five years for one of the sexual assault counts.

<sup>1</sup>Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991). We remanded Moraga's appeal because he was convicted of four separate offenses, yet received only one sentence.

The district court also adjudicated Moraga as a habitual criminal, sentencing him to a consecutive term of life without the possibility of parole for the second sexual assault count. This court dismissed Moraga's appeal from the amended judgment of conviction.<sup>2</sup> The remittitur issued on October 24, 1995.

On February 20, 1996, Moraga filed a post-conviction petition for a writ of habeas corpus. He asserted, among other claims, that his counsel was ineffective for failing to have the blood and semen samples tested to exclude him as a possible source of the semen collected from the victim. On September 6, 1996, the district court denied Moraga's petition. Moraga's subsequent appeal was docketed in this court in Docket No. 29321. On April 30, 1998, Moraga filed a motion to correct an illegal sentence. The district court denied the motion. Moraga's appeal was docketed in this court as Docket No. 32542. This court dismissed both appeals.<sup>3</sup>

On December 16, 2003, Moraga filed a motion for release of DNA evidence under the Nevada Open Records Act<sup>4</sup> in the district court.<sup>5</sup>

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<sup>2</sup>Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995).

<sup>3</sup>Moraga v. State, Docket Nos., 29321, 32542 (Order Dismissing Appeals, April 20, 1999).

<sup>4</sup>NRS 239.010.

<sup>5</sup>Moraga labeled his petition a motion for release of DNA evidence under the Nevada Open Records Act. However, because he challenged his conviction and sentence, we construe Moraga's motion as a post-conviction  
*continued on next page . . .*

The State opposed the motion. On January 5, 2004, the district court conducted a hearing to listen to arguments of counsel regarding Moraga's motion. During that hearing, the judge noted that Moraga's defense at trial was that the sexual contact between him and the victim was consensual, and thus identity was not at issue. On January 7, 2004, the district court denied Moraga's motion.<sup>6</sup> This appeal followed.

Moraga filed his motion more than eight years after this court issued the remittitur from his direct appeal of his amended judgment of conviction. Thus, Moraga's motion was untimely filed.<sup>7</sup> Moreover, Moraga's motion was successive because he had previously filed a habeas corpus petition.<sup>8</sup> Moraga's motion was procedurally barred absent a demonstration of good cause and prejudice.<sup>9</sup>

Moraga offers no explanation for the delay in filing his motion or why he did not assert his claim in his previous habeas corpus petition.

---

*... continued*

petition for a writ of habeas corpus. See NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them").

<sup>6</sup>We note that Moraga's motion falls outside the purview of NRS 239.010.

<sup>7</sup>See NRS 34.726(1).

<sup>8</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>9</sup>See NRS 34.726(1); NRS 34.810(3).

Based upon our review of the record on appeal, we conclude Moraga has not demonstrated good cause to excuse his procedural defaults.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Moraga is not entitled to relief and that briefing and oral argument are unwarranted.<sup>10</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

Becker J.  
Becker

Agosti J.  
Agosti

Gibbons J.  
Gibbons

cc: Hon. Lee A. Gates, District Judge  
Roy D. Moraga  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>10</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>11</sup>We have reviewed all documents that Moraga has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 42828

District Court Case No. C092174

**REMITTITUR**

TO: Shirley Parraguirre, Clark County Clerk

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

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

DATE: October 12, 2004

Janette M. Bloom, Clerk of Court

By: *J. Richards*  
Chief Deputy Clerk

cc: Hon. Lee A. Gates, District Judge  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Roy D. Moraga

**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 10-14-04  
JANETTE M. BLOOM

\_\_\_\_\_  
County Clerk

04-17159

1 RSPN  
2 BRIAN SANDOVAL  
3 Attorney General  
4 By: D. GREG WHICKER  
5 Deputy Attorney General  
6 Criminal Justice Division  
7 Nevada Bar Number 8307  
8 555 E Washington Avenue #3900  
9 Las Vegas, Nevada 89101  
10 (702) 486-3420  
11 Facsimile: (702) 486-3768  
12 Attorneys for Respondents

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*Linda M. [unclear]*  
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EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

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ROY DANIELS MORAGA,

Petitioner,

v.

STATE OF NEVADA, et al.

Respondents.

Case No. C92174  
Dept. No. VIII

**STATE'S RESPONSE TO  
EXTRAORDINARY WRIT OF MANDAMUS**

Respondents, through legal counsel, BRIAN SANDOVAL, Nevada Attorney General, by Deputy Attorney General D. Greg Whicker, hereby file their Response to Roy Daniel Moraga's (Moraga) Petition for an Extraordinary Writ of Mandamus. This Response is based upon the pleadings and papers on file herein and the following memorandum of points and authorities.

DATED this 15th day of December, 2004.

BRIAN SANDOVAL  
Attorney General

By: *[Signature]*

D. GREG WHICKER  
Deputy Attorney General

S15

**MEMORANDUM OF POINTS AND AUTHORITIES**

As a preliminary matter, Respondents expressly deny each and every factual allegation contained in Moraga's filings save and except those expressly found to exist by a Nevada court of competent jurisdiction.

**I.**

**PROCEDURAL HISTORY**

Based upon Moraga's request for Mandamus, it appears that Moraga was accused of stalking a corrections officer while he was incarcerated at the Southern Desert Correctional Center. Moraga claims that he was charged with stalking the officer and that as a result of the findings of the disciplinary panel, he was transferred to Ely State Prison. Moraga now challenges the prison disciplinary proceedings in the instant petition for Extraordinary Writ of Mandamus.

**II.**

**LEGAL ARGUMENT**

**A. THE INSTANT PETITION IS NOT PROPERLY BEFORE THE COURT**

Moraga has filed a petition for Extraordinary Writ of Mandamus. However, such extraordinary relief is not allowed in this instance. NRS 34.160 states that the writ of mandamus may be issued to "compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station. . ." With regards to this statute, the Nevada Supreme Court has held that mandamus will not issue unless a clear legal right to the relief sought is shown. State ex rel. Conklin v. Buckingham, 58 Nev. 450, 83 P.2d 462, 463 (1938). In Gill v. State ex rel. Booher, 75 Nev. 448, 451, 345 P.2d 421, 422 (1959), the Court held, "Mandamus is a remedy which may be invoked to cause an administrative officer to perform a ministerial act when the duty to perform such act is clear."



1 Moraga's petition does not identify what act the law specifically enjoins as a duty in this  
2 matter, nor has he shown that he has a clear legal right to the relief he seeks. Accordingly,  
3 the instant petition is not properly before this Court. Moraga's own arguments show that his  
4 petition is improper, as he argues that his confinement at Ely State Prison is illegal. To  
5 support his argument, Moraga alleges guards at SDCC were retaliating against him because  
6 he would not participate in sexual acts with a female guard. Moraga claims his transfer to Ely  
7 State Prison is a result of the retribution exhibited by the guards at SDCC. Clearly, Moraga's  
8 petition is not proper under NRS 34.160 and the Court should deny the instant petition.  
9

10 **B. HABEAS CORPUS IS THE ONLY REMEDY AVAILABLE TO CHALLENGE A**  
11 **CONVICTION OR SENTENCE.**

12 NRS 34.724(2)(b) provides that a petition for a writ of habeas corpus "comprehends  
13 and takes the place of all other common law, statutory or other remedies which have been  
14 available for challenging the validity of the conviction or sentence, and must be used  
15 exclusively in place of them." Additionally, NRS 34.735 sets out the specific form that is to be  
16 used by petitioners seeking habeas relief, directing that a petition substantially follow the form  
17 as specified by the legislature. Furthermore, NRS 34.370(4) requires the petitioner to attach  
18 ". . . affidavits, records, or other evidence supporting the allegations in the petition unless the  
19 petition cites the cause for failure to attach these materials. . ." Moraga has not attached any  
20 documentation to support his allegations, nor does he attempt to explain why the  
21 documentation is not attached.  
22

23 Just as Moraga's petition fails to meet the statutory requirements for mandamus, it also  
24 fails to meet the statutory requirements for a proper habeas petition. Accordingly, the instant  
25 petition should be denied.  
26

27 / / /

28 / / /

1 **Moraga's Claims Do Not Warrant Relief**

2 Even if Moraga had properly followed the statutory requirements in the instant matter,  
3 his claims would not entitle him to relief. Moraga contends that Fifth and Fourteenth  
4 Amendment rights were violated. Moraga bases his claim upon his unsupported allegation  
5 that he was accused of stalking a correctional officer at Southern Desert Correction Center  
6 (SDCC), but was never charged. He then claims that he was placed into disciplinary  
7 segregation and lost statutory good time credits. Moraga also claims that he was transferred  
8 into maximum custody at Ely State Prison. Moraga further contends that his TV and radio  
9 were damaged between the time he was transferred from SDCC and the time his belongings  
10 arrived in Ely. Not only are Moraga's claims bare, conclusory, and completely unsupported by  
11 the record, he cannot challenge his transfer from one prison to another through a writ of  
12 habeas corpus.  
13

14  
15 Post-conviction petitions for writs of habeas corpus are limited in scope and are only  
16 available to the petitioner who:

- 17 1. Requests relief from a judgment of conviction or sentence in a criminal case; or  
18 2. Challenges the computation of time that he has served pursuant to a judgment  
19 of conviction.

20 NRS 34.720. Such petitions may challenge the validity of current confinement, but not the  
21 conditions thereof. Bowen v. Warden, 100 Nev. 489, 490 (1984)(citing Director, Dep't Prisons  
22 v. Arndt, 98 Nev. 84 (1982); Rogers v. Warden, 84 Nev. 539 (1962); Rainsberger v. Leypoldt,  
23 77 Nev. 399 (1961)). Thus, the Nevada Supreme Court has held that a claim of brutal  
24 treatment at the hands of prison officials was not cognizable on a habeas petition, because  
25 the claim spoke to the conditions and not the validity of confinement. Rogers at 540. Specific  
26 to punitive disciplinary segregation, the imposition of a qualitatively more restrictive type of  
27 confinement within the prison only speaks to the conditions of confinement and likewise may  
28 not be raised by a habeas corpus petition. Bowen at 490.

1 Moraga's petition must be dismissed because he cannot challenge his placement in  
2 disciplinary segregation by a habeas corpus petition. Bowen is directly on point. There is no  
3 indication that Moraga has been sanctioned in any way, shape, or form. Moraga has made  
4 only bare and conclusory statements, yet has failed to file any documentation whatsoever to  
5 support his claims. The Nevada Supreme Court has held that such claims do not warrant  
6 relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Other than making the bare  
7 assertion that his computation of time has been effected, Moraga has failed to show how his  
8 any of his claims warrant relief or that any of his constitutional rights have actually been  
9 violated. As such, his allegations speak only to the conditions of his confinement and not the  
10 validity of his confinement; therefore, his petition exceeds the scope of the habeas statute  
11 and the petition must be dismissed.

12 **B. RESPONDENTS DID NOT VIOLATE THE CODE OF PENAL DISCIPLINE**

13 Moraga further argues that his Due Process rights have been violated due to various  
14 violations of the Code of Penal Discipline (hereinafter, the Code). Moraga lists the portions of  
15 the code which he feels were violated by prison officials. Moraga ignores the preliminary  
16 information provided in the Code dealing specifically with the rights associated thereto. On  
17 page 3 of the Code, Section D: Clarification of Procedures, specifically informs:  
18

19 It is not intended that the establishment of this Code create any  
20 right or interest in life, liberty, or property, or establish the basis for  
21 any cause of action against the State . . . officers or employees.  
22 The Code does not create any liberty interest on behalf of inmates  
nor is any liberty interest in favor of any inmate to be assumed from  
any part of the Code.

23 The Code specifically states that a liberty interest is not created by the creation of the  
24 Code. In the paragraph following the above, the drafters of the Code inform Nevada inmates:

25 Reliance on any published standard, the use of mandatory  
26 language, if such exists, or the creation of procedures related to the  
27 conduct of the disciplinary process, including but not limited to  
28 timeframes . . . is solely for the purpose of providing guidance for  
employees and should not be considered representative of the  
manner in which the NDOP has chose to exercise its discretion in  
such matters. The Failure of any employee of the NDOP to follow

any procedure should not result in any mandatory outcome, e.g., dismissal of charges, but should be one of many factors to be considered in exercising jurisdiction as to the outcome of any violation.

In situations similar to the instant case, the United States Supreme Court has held that Due Process is not implicated when a statute does not create a liberty interest in existing freedom or a presumption of release, or a presumption of continued enjoyment of a presently-existing right. In Meachum v. Fano, 427 U.S. 215 (1976) the Supreme Court, in rejecting the argument that Wolff v. McDonnell, supra, controlled, held that Due Process is *not* implicated when a prisoner is transferred from one prison facility to another which maintains conditions arguably substantially less favorable than the first. While the transfer represented a change in conditions having a substantial adverse impact on the prisoner, even a "substantial deprivation", Due Process was not implicated because the Massachusetts statute did not create any right or liberty interest, expectation of right or liberty interest, or any presumption of the continuation of existing conditions, or a presumption of future happenings. Creating no right or presumption, the statute did not implicate Due Process:

Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defensible only upon proof of specific acts of misconduct. Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon the occurrence of specified events. On the contrary, transfer in a wide variety of circumstances is vested in prison officials...

Meachum, 427 U.S. 226-27. Because the authority to transfer was discretionary, Due Process was not implicated. See, Board of Regents v. Roth, 408 U.S. 564 (1972).

In Sandin v. Connor, 515 U.S. 472 (1995) an inmate was sentenced pursuant to a disciplinary hearing to disciplinary segregation for misconduct while in prison. The Ninth Circuit reversed the district court's summary judgment for the prison officials, and found that an inmate has a liberty interest in remaining free from disciplinary segregation citing Wolff,

1 supra. The Supreme Court reversed and found that no such Due Process right existed either  
2 because of the change in conditions or because of the regulation permitting the discipline  
3 system. Apparently believing that the emphasis on finding liberty interests in mandatory  
4 statutory language had created unnecessary litigation, and believing that "liberty interest"  
5 litigation had gotten out of control, "the Court [having] encouraged prisoners to comb  
6 regulations in search of mandatory language on which to base entitlements to various state-  
7 conferred privileges," Sandin, 515 U.S. at 481, the Court reigned in the test for liberty interest  
8 litigation. The court rejected the assertion that any action taken for a punitive reason  
9 encroaches on a liberty interest. The Court found that disciplinary punishment in a prison  
10 setting effectuates prison management and prisoner rehabilitative goals, and that it falls within  
11 the expected perimeters of the sentence imposed by a court of law. The Court held that  
12 sentencing the Petitioner to disciplinary segregation did not present an atypical, significant  
13 deprivation in which a state might create a liberty interest. The segregation did not constitute  
14 a major change in conditions.  
15

16 Moraga makes a number of accusations, arguing that NDOC violated its own policies  
17 and Moraga's constitutional rights. However, he does not provide any supporting  
18 documentation whatsoever to bolster his claims. Accordingly, his claims are nothing more  
19 than bare and conclusory arguments that do not warrant relief. See Hargrove v. State, 100  
20 Nev. 498, 686 P.2d 222 (1984).  
21

### 22 **C. SUPPLEMENTAL ACT**

23 Moraga has also filed a "supplemental act." The State interprets this to be a  
24 supplement to Moraga's invalid petition for mandamus. In the supplement, Moraga contends  
25 that he was transferred to a cell at Ely State Prison that he did not want to be transferred to.  
26 As with the rest of Moraga's petition, the claim in the "supplemental act" is without merit and  
27 should be denied.  
28

Besides the fact that Moraga has not properly identified the Respondents in this matter (NRS 34.735 specifically states that the petitioner must name as Respondent the person by whom he is confined or restrained. If a petitioner is incarcerated at a particular institution, they are to name the warden of that institution. If he is not in a specific institution, he is to name the Director of the Department of Corrections), he has completely failed to provide any documentation to support his claims as required by NRS 34.370(4).

The very face of Moraga's claim shows that it is suspect. He asks this court to believe that he was allowed to choose the type of cell he wanted to be placed in (lockdown versus non-lockdown). It seems highly dubious that a maximum security prison facility would allow an inmate to choose whether he would be placed in a lockdown cell or in a cell with more freedom. Additionally, Moraga claims that he is being singled out because he is a Mexican and that inmates of other ethnicities are not being treated the same way he is. Moraga again fails to support his claims. Moraga's claims amount to nothing more than a fishing expedition and witch hunt at the expense of NDOC employees that he has had problems with. As Moraga has failed to meet his burdens under the controlling law, the instant petition should be denied.

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CONCLUSION

Not only is Moraga's petition improperly before the court, but as the foregoing arguments show, he was provided with the minimum procedural safeguards as required by the Constitution. Not only were Moraga's various constitutional rights not violated, they were not even implicated by the disciplinary process in the instant case. Moraga has failed to meet his burdens under the various statutes and case law, accordingly, the instant petition should be denied.

DATED this 15<sup>th</sup> day of December, 2004.

BRIAN SANDOVAL  
Attorney General

By:   
D. GREG WHICKER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I do hereby certify that I am an employee of the Office of the Attorney General and that on the 15<sup>th</sup> day of December, 2004, I served a true and accurate copy of the foregoing ***State's Response to Extraordinary Writ of Mandamus*** by mailing via United States mail, first class, postage prepaid, to:

Roy Daniels Moraga #31584  
Ely State Prison  
P. O. Box 1989  
Ely, Nevada 89301



An Employee of the  
Office of the Attorney General



Roy D. MORAGA #31584  
E.S.R. P.O. Box 1997  
ELY Nevada 89301

3

Plaintiff In Pro Per

FILED

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA JAN 5 2 07 PM '05

ROY DANIELS MORAGA

Plaintiff

*Shirley A. Hargrave*  
CLERK

CASE NO. C92174

Dept NO. VIII

VS.

JACKIE CRAWFORD, et al,

S.D.C. AND STAFF, NDOC

Defendants

Reply To State's Response To EXTRAORDINARY WRIT  
OF MANDAMUS AND MOTION TO DISMISS

Comes NOW the Plaintiff, Roy Daniels MORAGA, Pro Per,  
And hereby Moves this Honorable Court to Grant his  
Motion to dismiss AND Reply to State's Response to  
Extraordinary Writ of MANDAMUS.

THIS Motion is based upon the Points and Authorities  
Pleadings and Papers Filed in this CASE.

Dated this — day of December 2004.

Respectfully Submitted,

Roy D. Moraga

ROY D. MORAGA #31584

Plaintiff Pro Per

JAN 13 2005

COURT CLERK

## POINTS AND AUTHORITIES

ON or About August 26, 2004 Shirley B. Parraguirre, County Clerk Sent my Motion For ~~Extraordinary~~ writ OF MANDAMUS to Christina Hinds, ESQ Stating rule 3.70 MS. Parraguirre Also Filed my Motion under CASE NO. C92174. This CASE NO. Should have NEVER been Put on this Complaint AS you shall see From the Exhibit's Attached herein. Second this MANDAMUS is A Criminal Complaint Against Jackie Crawford, Staff At Southern Desert AND N. D. O. C. under NRS 197.130, NRS 197.200(D) AND NRS 197.140 AND the State, or it's Attorney(s) Should Know that A Criminal Complaint CAN NOT be Filed on a writ OF habeas Corpus Furthermore the Deputy Attorney General, D. Grey Whicker States MORAGA has not Properly identified the Respondents Fact: When MORAGA Filed his writ MORAGA Put Respondents NAMES, AND Not State of Nevada AND Fact MORAGA didn't ATTACH these materials or any documentation because MORAGA WAS going to use them on his Motion For discovery AS to MORAGA's Supplemental brief the Attorney States MORAGA did not want to be Transferred to a Cell At Ely State Prison AND that he did not want to be Transferred to. Fact: this Supplemental brief has to do with the CASE - Worker R. Irvin MAKING False reports under NRS 197.130 a Criminal Complaint AND MORAGA CAN Support these Claims. Futher MORAGA States he my NOT know how to Litigate this Complaint but No one is going to CALL me a Lier AS God is my Witness.

### CONCLUSION

Not only CAN MORAGA Prove that his Constitutional rights were violated, they did not meet the minimum Procedural Safeguards as required by the Constitution.

Furthermore if this Court Should deny this Criminal Complaint then it Should be dismissed because I Roy D. MORAGA Failed to Properly File it as one of a Criminal Complaint and not because of the Merits, or Failed to Attach materials and any documentation.

Dated this \_\_\_\_ day of December, 2004

Roy D. Moraga

### Certificate of Service

The undersigned Certifies that he Served a copy of the Foregoing by mailing said copy to:

D. Greg Whicker  
Deputy Attorney General  
Criminal Justice Division  
555 E. Washington Ave\* 3900  
Las Vegas, Nevada 89101

Submitted by:  
Roy D. Moraga  
Roy D. MORAGA\* 31584  
E.S.P. P.O. Box 1989  
Ely, Nevada 89301

# IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant(s),  
vs.

Case No: C092174  
SC No: 61734

STATE OF NEVADA,  
Respondent(s),

# RECORD ON APPEAL VOLUME 4

ATTORNEY FOR APPELLANT  
ROY D. MORAGA # 31584  
PROPER PERSON  
1200 PRISON RD.  
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT  
STEVEN B. WOLFSON, ESQ.  
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200 LEWIS AVE.  
LAS VEGAS, NEVADA 89101

I N D E X

<u>VOLUME:</u>	<u>PAGE NUMBER:</u>
1	1 - 220
2	221 - 441
3	442 - 662
4	663 - 882
5	883 - 1101
6	1102 - 1320

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	01/10/2006	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1117 - 1120
3	10/03/1991	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	442 - 442
4	03/05/1996	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	757 - 758
4	02/20/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	702 - 704
4	03/11/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	764 - 766
3	10/03/1991	AFFIDAVIT IN SUPPORT OF OF REQUEST TO PROCEED IN FORMA PAUPERIS	443 - 445
4	02/20/1996	AFFIDAVIT OF DEFENDANT	705 - 706
4	03/11/1996	AFFIDAVIT OF PETITIONER	767 - 768
6	01/10/2006	AFFIDAVIT OF PETITIONER	1121 - 1122
5	04/30/1998	AFFIDAVIT OF ROY D. MORAGA	887 - 888
5	09/27/2004	AFFIDAVIT OF ROY D. MORAGA	1061 - 1062
1	06/13/1990	AMENDED INFORMATION	118 - 121
3	11/13/1991	AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	461 - 463
4	07/31/1992	ANSWER IN OPPOSITION TO MOTION FOR RETURNING SEIZED PROPERTY	670 - 680
4	10/29/1996	CASE APPEAL STATEMENT	859 - 861
5	06/15/1998	CASE APPEAL STATEMENT	910 - 911
5	09/28/1998	CASE APPEAL STATEMENT	947 - 948
5	02/18/2004	CASE APPEAL STATEMENT	1044 - 1045
6	02/10/2005	CASE APPEAL STATEMENT	1102 - 1103
6	03/02/2007	CASE APPEAL STATEMENT	1214 - 1216
6	03/05/2007	CASE APPEAL STATEMENT	1219 - 1220
6	09/18/2012	CASE APPEAL STATEMENT	1317 - 1318

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
7	11/09/2012	CERTIFICATE OF COPY AND TRANSMITTAL OF RECORD	
5	02/25/2002	CERTIFICATE OF INMATE'S INSTITUTIONAL ACCOUNT	968 - 968
5	01/17/1997	CERTIFICATE OF MAILING	886 - 886
4	08/05/1996	CERTIFICATE OF MAILING OF MOTION TO WITHDRAW AS COUNSEL	830 - 830
1	12/28/1989	CRIMINAL BINDOVER	1 - 11
3	01/27/1992	CRIMINAL SETTING SLIP	469 - 469
1	06/27/1990	DESIGNATION OF RECORD ON APPEAL	140 - 141
3	11/13/1991	DESIGNATION OF RECORD ON APPEAL	464 - 465
3	02/13/1992	DESIGNATION OF RECORD ON APPEAL	471 - 471
4	10/07/1996	DESIGNATION OF RECORD ON APPEAL	849 - 850
5	06/13/1998	DESIGNATION OF RECORD ON APPEAL	907 - 908
5	09/22/1998	DESIGNATION OF RECORD ON APPEAL	944 - 945
6	02/10/2005	DESIGNATION OF RECORD ON APPEAL	1104 - 1105
7	11/09/2012	DISTRICT COURT MINUTES	
3	02/20/1992	EX PARTE APPLICATION FOR PREPARATION OF TRANSCRIPTS	472 - 472
5	02/09/2004	EX PARTE MOTION FOR EXCESS FEES	1030 - 1036
4	02/20/1996	EX PARTE MOTION FOR FEES FOR EXPERT SERVICES	707 - 711
5	09/27/2004	EXTRAORDINARY WRIT OF MANDAMUS	1063 - 1069
3	10/03/1991	FINANCIAL CERTIFICATE	446 - 447
6	01/10/2006	FINANCIAL CERTIFICATE	1123 - 1124
6	02/08/2007	FINDING OF FACT AND CONCLUSIONS OF LAW	1201 - 1206
4	09/06/1996	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	833 - 838
6	08/13/2012	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1275 - 1281
1	01/09/1990	INFORMATION	12 - 14
1	03/15/1990	INSTRUCTIONS TO THE JURY	42 - 66
1	07/07/1990	JUDGMENT OF CONVICTION (JURY TRIAL)	146 - 147
1	03/13/1990	JURY LIST	41 - 41

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	06/04/1990	MOTION AND NOTICE OF MOTION TO AMEND INFORMATION	85 - 117
4	02/20/1996	MOTION AND NOTICE OF MOTION TO COMPEL, PRODUCTION OF SEMAN AND BLOOD	712 - 726
1	02/05/1990	MOTION AND NOTICE OF MOTION TO ENDORSE NAMES ON INFORMATION	31 - 34
5	10/18/2004	MOTION AND ORDER FOR FAILURE TO PROSECUTE AND REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT	1075 - 1082
6	02/22/2006	MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING	1169 - 1173
6	03/05/2007	MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL	1221 - 1222
5	06/01/1998	MOTION FOR ENLARGEMENT OF TIME	905 - 906
4	04/11/1996	MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	791 - 794
3	10/03/1991	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	448 - 448
4	02/20/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	727 - 727
4	03/05/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	759 - 759
4	03/11/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	769 - 769
5	02/25/2002	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	969 - 971
6	01/10/2006	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1125 - 1126
4	08/26/1993	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS; MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE JAIL TIME CREDITS AND AFFIDAVIT OF PETITION	683 - 693
6	08/06/2012	MOTION FOR RECONSIDERATION	1257 - 1270
5	12/16/2003	MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	996 - 1006
4	07/21/1992	MOTION FOR RETURNING SEIZED PROPERTY	667 - 669
4	03/11/1996	MOTION FOR RETURNING SEIZED PROPERTY	770 - 773



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
3	01/02/1992	MOTION TO APPOINT COUNSEL FOR APPEAL	466 - 468
5	04/30/1998	MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	889 - 890
5	02/25/2002	MOTION TO PRESERVE EVIDENCE AND ORDER	972 - 980
5	08/06/1998	MOTION TO STRIKE	918 - 924
2	09/26/1991	MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VII	439 - 441
5	10/31/2002	MOTION TO VACATE AND/OR AMEND JUDGMENT	982 - 987
4	04/09/1996	MOTION TO WITHDRAW AS COUNSEL	785 - 788
4	08/02/1996	MOTION TO WITHDRAW AS COUNSEL	826 - 829
5	10/19/2004	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1083 - 1088
6	09/13/2007	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1241 - 1248
4	10/30/1995	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	698 - 701
5	04/30/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	949 - 951
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	952 - 959
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	960 - 967
6	05/02/2005	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	1113 - 1116
3	10/04/1991	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - REMAND	454 - 458
1	06/27/1990	NOTICE OF APPEAL	142 - 143
3	10/30/1991	NOTICE OF APPEAL	460 - 460
4	09/27/1996	NOTICE OF APPEAL	847 - 848
5	06/13/1998	NOTICE OF APPEAL	909 - 909
5	09/22/1998	NOTICE OF APPEAL	946 - 946

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	02/17/2004	NOTICE OF APPEAL	1038 - 1039
6	02/10/2005	NOTICE OF APPEAL	1106 - 1106
6	03/02/2007	NOTICE OF APPEAL	1217 - 1218
6	09/17/2012	NOTICE OF APPEAL	1312 - 1316
6	02/22/2006	NOTICE OF CHANGE OF ADDRESS	1174 - 1174
6	02/13/2007	NOTICE OF ENTRY OF DECISION AND ORDER	1207 - 1213
6	08/21/2012	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1282 - 1289
4	04/17/1996	NOTICE OF ENTRY OF ORDER	796 - 799
4	09/20/1996	NOTICE OF ENTRY OF ORDER	839 - 846
4	10/28/1996	NOTICE OF ENTRY OF ORDER	851 - 858
5	05/29/1998	NOTICE OF ENTRY OF ORDER	901 - 904
5	07/07/1998	NOTICE OF ENTRY OF ORDER	914 - 917
6	04/08/2005	NOTICE OF ENTRY OF ORDER	1109 - 1112
5	02/26/2002	NOTICE OF HEARING - CRIMINAL	981 - 981
3	10/03/1991	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	449 - 453
4	03/05/1996	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	760 - 763
1	06/29/1990	ORDER	144 - 145
1	08/02/1990	ORDER	148 - 149
4	08/17/1992	ORDER	681 - 682
6	03/30/2005	ORDER	1107 - 1108
3	02/10/1992	ORDER APPOINTING COUNSEL	470 - 470
6	03/23/2007	ORDER DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1239 - 1240
5	06/30/1998	ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME	912 - 913
5	01/07/2004	ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1028 - 1029

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	10/05/2012	ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER	1319 - 1320
5	05/28/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY OR IN ALTERNATIVE CORRECT ILLEGAL SENTENCE	899 - 900
5	08/27/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO STRIKE	942 - 943
3	10/23/1991	ORDER FOR APPOINTMENT OF COUNSEL	459 - 459
5	11/21/2002	ORDER FOR APPOINTMENT OF COUNSEL FOR POST- CONVICTION RELIEF	988 - 988
5	02/11/2004	ORDER FOR PAYMENT OF EXCESS FEES	1037 - 1037
6	01/12/2006	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	1162 - 1162
2	09/13/1991	ORDER FOR PRODUCTION OF INMATE	437 - 438
6	04/21/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1186 - 1187
6	05/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1188 - 1189
6	06/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1199 - 1200
4	08/27/1996	ORDER FOR TRANSCRIPTS	832 - 832
6	01/27/2006	ORDER GRANTING DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER DENYING DEFENDANT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL	1167 - 1168
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	473 - 474
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	475 - 476
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	477 - 478
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	479 - 480
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	481 - 482
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	483 - 484
2	01/09/1991	ORDER RELEASING EVIDENCE	435 - 435
1	06/13/1990	ORDER TO AMEND INFORMATION	122 - 122

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	02/15/1990	ORDER TO ENDORSE NAMES ON INFORMATION	39 - 40
4	04/17/1996	ORDER TO WITHDRAW AS ATTORNEY OF RECORD	800 - 801
2	01/09/1991	PETITION FOR RELEASE OF EVIDENCE	436 - 436
4	02/20/1996	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	728 - 748
6	01/10/2006	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1127 - 1161
1	05/16/1990	PRE-SENTENCE INVESTIGATION REPORT (UNFILED) CONFIDENTIAL	75 - 84
1	03/15/1990	PROPOSED VERDICT	71 - 74
3	02/26/1992	RECEIPT OF COPY	485 - 485
3	02/26/1992	RECEIPT OF COPY	486 - 486
3	02/28/1992	RECEIPT OF COPY	487 - 487
3	03/02/1992	RECEIPT OF COPY	488 - 488
3	03/02/1992	RECEIPT OF COPY	489 - 489
4	08/27/1993	RECEIPT OF COPY	694 - 694
5	12/17/2003	RECEIPT OF COPY	1007 - 1007
4	04/09/1996	RECEIPT OF COPY AND CERTIFICATE OF MAILING	789 - 790
4	04/15/1996	RECEIPT OF COPY OF MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	795 - 795
4	08/05/1996	RECEIPT OF COPY OF MOTION TO WITHDRAW AS COUNSEL	831 - 831
5	01/05/2004	REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1023 - 1027
6	08/28/2012	REPLY TO STATE'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION	1290 - 1297
6	05/24/2006	REPLY TO STATE'S RESPONSE AND OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1190 - 1198
5	01/05/2005	REPLY TO STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS AND MOTION TO DISMISS	1099 - 1101

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	01/13/1997	REPORTER'S TRANSCRIPT OF APRIL 17, 1996	862 - 866
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 12, 1996	867 - 871
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 21, 1996	872 - 875
1	01/24/1990	REPORTER'S TRANSCRIPT OF DECEMBER 26, 1989	15 - 30
3	03/04/1992	REPORTER'S TRANSCRIPT OF FEBRUARY 15, 1990	490 - 491
1	02/12/1990	REPORTER'S TRANSCRIPT OF JANUARY 11, 1990	35 - 38
6	03/12/2007	REPORTER'S TRANSCRIPT OF JANUARY 23, 2006	1223 - 1226
5	05/04/2004	REPORTER'S TRANSCRIPT OF JANUARY 5, 2004	1046 - 1052
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 15, 1996	876 - 877
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 19, 1996	878 - 882
1	06/13/1990	REPORTER'S TRANSCRIPT OF JUNE 13, 1990 (UNFILED)	123 - 139
6	03/12/2007	REPORTER'S TRANSCRIPT OF JUNE 26, 2006	1227 - 1233
1	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUED)	150 - 220
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUATION)	221 - 264
3	03/27/1992	REPORTER'S TRANSCRIPT OF MARCH 12, 1990	520 - 657
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 13, 1990	265 - 387
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 15, 1990	388 - 434
5	01/13/1997	REPORTER'S TRANSCRIPT OF MARCH 6, 1996	883 - 885
3	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 7, 1990	658 - 662
4	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 9, 1990	663 - 664
5	05/14/2004	REPORTER'S TRANSCRIPT OF MAY 11, 1998	1057 - 1060
5	05/04/2004	REPORTER'S TRANSCRIPT OF NOVEMBER 13, 2002	1053 - 1056
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 11, 1991	492 - 494
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 14, 1991	495 - 499
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 21, 1991	500 - 511
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 9, 1991	512 - 514
3	03/04/1992	REPORTER'S TRANSCRIPT OF SEPTEMBER 23, 1991	515 - 519

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	05/26/1992	REQUEST FOR RECORDS	665 - 666
6	08/28/2012	REQUEST TO FILE EXHIBIT 1	1298 - 1311
4	09/29/1993	SECOND AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	695 - 697
5	11/27/2002	STATE'S OPPOSITION TO DEFENDANT'S MOTIO TO VACATE AND/OR AMEND JUDGMENT	989 - 993
6	03/16/2007	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1234 - 1238
5	12/26/2003	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1008 - 1022
6	02/27/2006	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR TRANSPORT	1175 - 1178
4	04/01/1996	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SEMAN AND BLOOD, PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO PROCEED IN FORMA PAUPERIS	774 - 784
5	05/08/1998	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	891 - 898
6	08/09/2012	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER	1271 - 1274
6	01/19/2006	STATE'S OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL	1163 - 1166
6	05/16/2012	STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1249 - 1256
6	02/27/2006	STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1179 - 1185
5	08/17/1998	STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE	925 - 941
5	12/15/2004	STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS	1089 - 1098
4	06/27/1996	STATE'S SUPPLEMENTAL OPPOSITION TO PETITIONER'S FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	816 - 822

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	06/11/2003	STIPULATION AND ORDER	994 - 995
4	05/20/1996	SUBSTATION OF ATTORNEYS	802 - 803
4	07/16/1996	SUPPLEMENT REPLY AND OPPOSITION FOR WRIT OF HABEAS CORPUS	823 - 825
5	09/27/2004	SUPPLEMENTAL ACT	1070 - 1074
4	02/20/1996	SUPPLEMENTAL BRIEF AND POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	749 - 756
5	02/17/2004	SUPPLEMENTAL BRIEF TO STATES OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1040 - 1043
4	06/13/1996	SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	804 - 815
1	03/15/1990	VERDICT COUNT I	67 - 67
1	03/15/1990	VERDICT COUNT II	68 - 68
1	03/15/1990	VERDICT COUNT III	69 - 69
1	03/15/1990	VERDICT COUNT VI	70 - 70

1 CASE NO. C092174  
2 DEPARTMENT 8

FILED

3 APR 14 8 12 AM '92

4 *Loetta L...*  
5 CLERK

6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF  
7 NEVADA, IN AND FOR THE COUNTY OF CLARK

8  
9 THE STATE OF NEVADA, )  
10 Plaintiff, )  
11 versus )  
12 ROY D. MORAGA, )  
13 Defendant. )  
14

TRANSCRIPT OF  
REPORTER

15  
16 HELD BEFORE THE HONORABLE MICHAEL J. WENDELL,  
17 DISTRICT JUDGE  
Hearing held this 9th of March, 1990 at 9:00 a.m.

18  
19  
20 APPEARANCES:

21 Plaintiff: DEBORAH J. LIPPIS, ESQ.  
22 Defendant: ROGER R. HILLMAN, ESQ.  
23  
24

25 Reported by: Jennifer Marie Sperduti, CSR #293



\* \* \* \*

P R O C E E D I N G S

BY THE COURT: The State of Nevada  
against Roy Moraga.

He is present with counsel, Mr. Roger  
Hillman, and Miss Debbie Lippis representing the  
district attorney's office.

This matter is going to trial it  
looks like on Monday, Counsel.

BY MS. LIPPIS: Yes, your Honor.  
State's prepared.

BY MR. HILLMAN: Yes.

BY THE COURT: Monday at 10:00 in  
this department for trial.

BY MS. LIPPIS: Thank you, sir.

ATTEST: True and accurate transcript.

*Jennifer Maria Spadut*  
COURT REPORTER

39

FILED

May 26 11 11 AM '92

*Loretta J. ...*  
CLERK

DISTRICT COURT  
CLARK COUNTY NEVADA  
\*\*\*\*\*

ROY D. MORAGA )  
PETITIONER ) CASE No. C-92174  
V. ) DEPT No. VIII  
THE STATE OF NEVADA )  
RESPONDENTS )  
\_\_\_\_\_ )

REQUEST FOR RECORDS

PLEASE TAKE NOTICE, that, Now comes, ROY D. MORAGA, IN PRO PER, AND RESPECTFULLY REQUEST THIS HONORABLE COURT for an ORDER to get all records and transcripts, pleadings, papers and tangible personal property, including any and all discoveries of evidence, and copies of Exhibits in possession of respondent, THE STATE OF NEVADA AND RODGER HILLMAN, to be sent at State expense, to Petitioner at his place of confinement in Ely State Prison.

STATEMENT OF FACTS

1. PETITIONER, ROY D. MORAGA, has file stamped copies of notice of motion for withdrawal of attorney of record and transfer of records, Dated OCTOBER 3, 1991, at 9:57 am.
2. Motion for leave to proceed in forma paupers Dated OCT. 3, 1991, at 9:56 am.
3. The petitioner cannot proceed with appeals without said records, and the respondents should have records which petitioner seems unable to obtain.

CE03

(1)

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MAY 26 1992

CLERK

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CONCLUSION

PETITIONER, Prays this Honorable grant an order requiri  
ng the respondents to send the records requested as soon as  
possible.

CERTIFICATE OF SERVICE

I hereby certify that I, ROY D. MORAGA, am the Petition  
er in the above entitled action, and that on the 15th day of  
May. 1992, I served a true and correct copy of the foregoing  
Motion for records by mailing same to;

ROMGER R. HILLMAN  
Deputy Public Defender  
Public Defenders Office  
309 S. Third Str.  
Las Vegas, Nevada 89101

Respectfully Submitted

Roy D. Moraga  
Roy D. Moraga  
P.O.Box 1989  
Ely Nevada, 89301

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ROY D. MORAGA  
P.O. BOX 1989  
ELY, NEVADA 89301

FILED

JUL 21 9 42 AM '92

*Loetta Chapman*  
CLERK

IN THE EIGHTH JUDICIAL DISTRICT COURT OF NEVADA  
IN AND FOR CLARK COUNTY  
\*\*\*\*\*

ROY D. MORAGA )  
PETITIONER )  
Vs )  
THE STATE OF NEVADA )  
RESPONDANTS )

Motion for Returning  
Seized Property  
Case No C 92174  
Dept. VIII X  
8/3/92

Now Comes, Roy D. Moraga, Before this Honorable Court and hereby  
moves this Court to direct that certain property of which he is  
owner, a schedule of which is attached hereto, and which on Dec.  
5, 1989 at the Las Vegas, County Jail, in Clark County, was taken  
from him during booking, and unlawfully seized by Metro officers,  
whose true names are unknown to Petitioner, and that property be  
returned him.  
The Petitioner further states that the property was seized  
against his will.

Dated this 7th Day of December

*Roy D. Moraga*  
Roy D. Moraga  
P.O. Box 1989  
ELY, NEVADA 89301

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JUL 17 1992

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COUNTY CLERK

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The undersigned declares under the penalty of perjury that he is the Petitioner in the aboved named action, that he has read the above pleadings and that the information contained therein is true and correct.

Dated this 7th day of December 1992,

  
Roy D. Moraga  
P.O.Box 1989  
Ely, Nevada 89301

PROPERTY TAKEN

1. 1. Pair of Boots
2. 1. U.N.L.V. Sweatshirt
3. 1. T-shirt
4. 1. Levis Jacket
5. 1. Levis Pants
6. 1. Pair of socks
7. 1. Boxer shorts

FILED

JUL 31 3 48 PM '92

*[Handwritten signature]*  
CLERK

1 REX BELL  
2 DISTRICT ATTORNEY  
3 Nevada Bar #001799  
4 200 S. Third Street  
5 Las Vegas, Nevada 89155  
6 (702) 455-4711  
7 Attorney for Plaintiff  
8 THE STATE OF NEVADA

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,	)	CASE NO. C92174
	)	
11 Plaintiff,	)	DEPT. NO. X
	)	
12 -vs-	)	DOCKET NO. K
	)	
13 ROY D. MORAGA,	)	
	)	
14	)	
	)	
15 Defendant,	)	
	)	
16	)	

ANSWER IN OPPOSITION TO  
MOTION FOR RETURNING SEIZED PROPERTY

Hearing Date: 8-3-92  
Hearing Time: 9:00 A.M.

21 COMES NOW the State of Nevada through REX BELL, Clark County  
22 District Attorney, by and through Deputy District Attorney, VICKI  
23 J. MONROE, and opposes the defendant's motion for returning seized  
24 property.

25 / / /  
26 / / /  
27 / / /  
28 / / /

CE03

14

1 This answer is based upon the entire record of these  
2 proceedings, the points and authorities attached hereto, and  
3 argument of counsel.

4 DATED this 31 day of July, 1992.

5 REX BELL  
6 DISTRICT ATTORNEY  
7 Nevada Bar #001799

8 BY: Vicki J. Monroe  
9 VICKI J. MONROE  
10 Deputy District Attorney  
11 Nevada Bar #00003776

12 POINTS AND AUTHORITIES

13 STATEMENT OF FACTS

14 On December 5, 1989, between the hours of 1:30 a.m. and 5:30  
15 a.m., the defendant entered the victim's residence located at 1000  
16 Dumont, Apt. 227. As there were no signs of forced entry into the  
17 apartment, it is believed that the victim's 22 year old daughter  
18 left the front door closed but unlocked. Once inside, the  
19 defendant took a woman's Seiko watch and approximately \$25 from a  
20 coffee table in the living room, an unknown amount of cash from the  
21 victim's bedroom dresser, and a key to the apartment which was  
22 laying on a table by the front door. The defendant then left the  
23 apartment. At approximately 7:30 a.m., the victim returned home  
24 and discovered the items missing. Police were contacted and a  
25 crime report was submitted. Significantly, the victim's 22 year  
26 old daughter was upstairs asleep during the time of the incident.

27 On December 5, 1989, at approximately noon, the victim (a 46  
28 year old female) was awakened by the defendant knocking at her  
front door; after informing the defendant that he had awakened her



1 and to leave, the victim returned to her bed. Approximately 1 3/4  
2 hours later, the victim was awakened by a noise in her home; upon  
3 investigating, she discovered the defendant on the stairs outside  
4 of her bedroom. The defendant grabbed the victim, placing his hand  
5 over her mouth and forced her into her bedroom and onto her bed.  
6 A struggle ensued and the victim was able to free herself and  
7 attempted to flee; however, the defendant pushed her down on the  
8 stairs. The defendant grabbed the victim from behind, twisting her  
9 arm behind her back, forced her back into her bedroom, threw her  
10 onto the bed, and sexually assaulted her by inserting his penis  
11 into her vagina. After the defendant ejaculated into the victim's  
12 vagina, he allowed her to get up. The victim went downstairs to  
13 the kitchen, followed by the defendant; while downstairs, the  
14 defendant pushed the victim onto the couch and attempted to have  
15 sexual relations with her. The victim was able to free herself.  
16 The defendant then instructed the victim to shower and she  
17 complied. Upon the victim exiting the shower, the defendant forced  
18 her back onto the bed and inserted his penis into her vagina a  
19 second time. After ejaculating, the defendant allowed the victim  
20 to get up. When the defendant went into the bedroom and began  
21 "washing himself", the victim went downstairs and telephonically  
22 contacted her daughter, informing her of the attack and asking for  
23 police assistance. The defendant came downstairs and left the  
24 apartment.

25 At approximately 2:14 p.m., police detained the defendant in  
26 the 900 Block of Sierra Vista; after being positively identified by  
27 the victim, he was arrested and transported to the Clark County  
28 Detention Center. The victim was transported to the University

1 Medical Center and a rape examination completed.

2 Defendant plead not guilty and his case proceeded to trial on  
3 March 12, 1990, through March 15, 1990. The jury found Defendant  
4 guilty of two counts of Burglary and two counts of Sexual Assault.

5 On June 13, 1990, the Defendant was sentenced to life in the  
6 Nevada State Prison without the possibility of parole after being  
7 adjudicated a habitual criminal.

8 Defendant's appeal to the Nevada Supreme Court was denied on  
9 August 27, 1991; however, the court remanded the Defendant's case  
10 to District Court for resentencing. The Supreme Court found that  
11 the District Court had erroneously imposed one sentence for  
12 multiple offenses (Exhibit I - attached hereto and incorporated  
13 herein).

14 On October 21, 1991, this Court resentenced Defendant to ten  
15 (10) years Nevada State Prison for Count I - Burglary, to run  
16 consecutive to Count II - Burglary to run consecutive to life  
17 imprisonment without the possibility of parole to Count III -  
18 Sexual Assault to run consecutive to life imprisonment without  
19 possibility of parole for which Defendant was also adjudicated an  
20 habitual criminal.

21 On January 29, 1992, this Court appointed Mark Bailus to  
22 handle any further proceedings.

23 ARGUMENT

24 When Defendant was arrested shortly after he sexually  
25 assaulted the victim, the police impounded into evidence the  
26 clothes he was wearing at the time of the arrest. This property  
27 included one pair of cowboy boots, one pair of white socks, one  
28 pair blue levi jeans, one gray jacket, one pair white boxer shorts,

1 one white "UNLV Rebels" sweater, one white pullover shirt, and one  
2 brown elastic knee brace. (Exhibit II, attached hereto and  
3 incorporated herein). Several of these clothing items were  
4 examined by Linda Errichetto of the Las Vegas Metropolitan Police  
5 Department Crime Lab. The information recovered was used at trial.

6 The clothing that is the basis of Defendant's motion was and  
7 remains evidence in this case. The State anticipates that  
8 Defendant's attorney will file Petitions for Post-Conviction  
9 Relief. Due to the fact that the clothing is evidence and  
10 Defendant's case is still ongoing, the clothing must not be  
11 returned to the Defendant.

12 CONCLUSION

13 The State respectfully requests that Defendant's motion to  
14 return his property be denied.

15 DATED this 31 day of July, 1992.

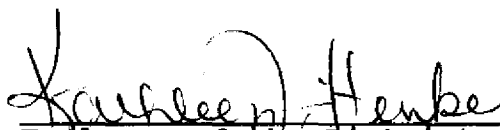
16 REX BELL  
17 DISTRICT ATTORNEY  
18 Nevada Bar #001799

19 BY: Vicki J. Monroe  
20 VICKI J. MONROE  
21 Deputy District Attorney  
22 Nevada Bar #00003776  
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1 CERTIFICATE OF MAILING

2 I hereby certify that on the 31<sup>st</sup> day of July, 1992, I  
3 deposited a copy of the above and foregoing in the United States  
4 Mail, Las Vegas, Clark County, Nevada, addressed as follows:

5 ROY D. MORAGA  
6 Ely State Prison  
7 P. O. Box 1989  
8 Ely, Nevada 89301

9   
Employee of the District  
Attorney's Office

10  
11  
12  
13  
14  
15 RECEIPT OF COPY

16 RECEIPT OF A COPY of the above and foregoing ANSWER IN  
17 OPPOSITION TO DEFENDANT'S MOTION FOR RETURNING SEIZED PROPERTY is  
18 hereby acknowledged this 31<sup>st</sup> day of July, 1992.

19 MARK B. BAILUS, ESQ.

20 **MARK B. BAILUS** 

21 By \_\_\_\_\_  
22 600 S. Eighth Street  
23 Las Vegas, Nevada 89101  
24  
25  
26  
27

28 kjh

BACK ON CALENDAR

FOR Resentencing OF APPELLANT

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 21488

FILED

AUG 27 1991

Chief of Supreme Court  
By [Signature]  
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a judgment of conviction pursuant to a jury verdict of two counts of burglary and two counts of sexual assault in violation of NRS 200.364, 200.366 and 205.060. The district court adjudicated appellant a habitual criminal and sentenced him to a single term of life imprisonment in the Nevada State Prison without the possibility of parole.

Appellant's sole contention on appeal is that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

In particular, we note that the victim's daughter testified that on December 5, 1989, she discovered that her watch, apartment key, and some other items were missing. She had heard a noise the night before. The same day, appellant gave the daughter's watch to his ex-girlfriend as a present. A key to the apartment was found among appellant's belongings. Although the victim had locked the door to the apartment, later that day the victim saw appellant standing in her bedroom hallway. He then raped her twice. Appellant's fingerprints were found on a can of hairspray in the bathroom. Neither the victim nor her daughter had given appellant permission to enter

"S.I.H + I"

the apartment. This evidence supports the conclusion that appellant twice entered the apartment, once with intent to commit larceny, once with intent to commit the felony of sexual assault.


In addition, we note that the victim testified that when she woke up and saw appellant in her bedroom hallway, she screamed out the bathroom window for help. Appellant grabbed her mouth and threw her on the bed. Following a struggle, appellant inserted his penis into her vagina against her will. After she showered, he again threw her on the bed and inserted his penis into her vagina against her will. Medical evidence revealed the presence of semen and sperm in her vagina. The victim immediately called for help. Appellant bragged about his deeds to a worker at the apartment complex as he left. This evidence supports the conclusion that appellant twice subjected the victim to sexual penetration against her will.

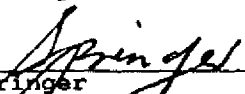
The jury could reasonably infer from the evidence presented that appellant committed two counts of burglary and two counts of sexual assault. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).


Finally, we note that appellant's sentence is erroneous. Appellant was convicted of four separate offenses (in addition to which he was adjudicated a habitual criminal), yet he received a single sentence. Although the district court has discretion to dismiss a count of habitual criminality, see NRS 207.010(4), the district court does not have discretion to impose but one sentence for multiple primary offenses. Cf. Barrett v. State, 105 Nev. 361, 775 P.2d 1276 (1989). Our criminal laws anticipate that, for each offense of which a

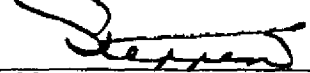
defendant is convicted, there should be a corresponding sentence. Accordingly, we remand this case to the district court for resentencing of appellant.


It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Mowbray

  
\_\_\_\_\_, J.  
Springer

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Steffen

  
\_\_\_\_\_, J.  
Young

cc: Hon. Michael J. Wendell, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Rex Bell, District Attorney  
Morgan D. Harris, Public Defender  
Loretta Bowman, Clerk

Date \_\_\_\_\_

Prisoner's Name \_\_\_\_\_

The following item(s) \_\_\_\_\_

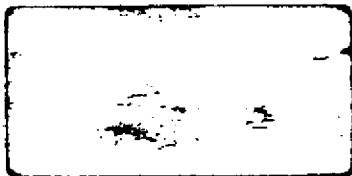
| PR. [illegible]

| PR. BLOC. [illegible]

| PR. [illegible]

| [illegible]

IMPD



"Exhibit II"



PAGE 1 OF 2

SECTOR/BEAT

M-4

INCIDENT

☒ FIELD  
☐ TELEPHONIC  
☐ STATION

EVENT NO.

0797

DR.

89-117709SEXUAL ASSAULT

VICTIM'S NAME (Last, First, Middle) FIRM NAME IF BUSINESS

PENNY HAWKPHONES RES UNK  
BUS

VICTIM'S ADDRESS (No. Street, City, State, Zip Code)

1000 DUMONT APT 227 LV NV

S. S. NO.

I.D. NO.	D.O.B	DESC	SEX	HT	WT	HAIR	EYES	PLACE OF BIRTH
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OCURRED ON OR BTWN.	MO	DAY	YR	DAY	TIME	REPORTED	MO	DAY	YR	TIME
	<u>12</u>	<u>5</u>	<u>89</u>	<u>TUE</u>	<u>1345</u>		<u>12</u>	<u>5</u>	<u>89</u>	<u>1415</u>
AND	<u>12</u>	<u>5</u>	<u>89</u>	<u>TUE</u>	<u>1400</u>					

LOCATION OF OCCURRENCE (No. Street, City, State, Zip Code)

1000 DUMONT APT 227 LV NV

PREMISES DESCRIPTION

APT

Suspect No. 1

MORAGA, ROY D

ARRESTED

☒ YES ☐ NOCharge SEX ASSULT (2-1)ID No. 938554

Suspect No. 2

N/A

ARRESTED

☐ YES ☐ NO

Charge

ID No.

Suspect No. 3

N/A

ARRESTED

☐ YES ☐ NO

Charge

ID No.

Recovered By

R. NOVACK 2103

Address

400 E STEWART

Phone

789-3111

Hold for Prosecution

☒ YES ☐ NO

Registration Check

☐ YES ☒ NO

Proof of Ownership

☒ YES ☐ NO

Safe Custody

☒ YES ☐ NO

Released to Owner?

☐ YES ☒ NO

(SIGNATURE)

Owner Notified

☒ YES ☐ NO

By

R. NOVACK 2103

Date

12-05-89

Via

IN-PERSON

## PROPERTY

PKQ. NO.	ITEM NO.	DESCRIPTION Including Serial No., Model No., and Value if Known
<u>1</u>	<u>1</u>	<u>1 PR BROWN COWBOY BOOTS</u>
<u>1</u>	<u>2</u>	<u>1 PR. WHT SOCKS</u>
<u>1</u>	<u>3</u>	<u>1 PR. BLUE LEVI JEANS</u>
<u>2</u>	<u>4</u>	<u>1 GRAY JACKET</u>
<u>2</u>	<u>5</u>	<u>1 PR WHITE BOXER SHORTS</u>
<u>2</u>	<u>6</u>	<u>1 WHITE UNLV REBELS SWEATER</u>
<u>2</u>	<u>7</u>	<u>1 WHITE PULL OVER SHIRT</u>
<u>2</u>	<u>8</u>	<u>1 BROWN ELASTIC KNEE BRACE</u>

WAS IDENTIFIABLE PROPERTY CHECKED THROUGH:

N/A PAWN SHOP SECTION☐ NCIC☐ SCOPE (CRIME VICTIM)

REPORTING OFFICER

R. NOVACK

UNIT

2L34

P. NO.

2103

CONNECTING REPORTS - TYPE &amp; DR NO.

QUARTER-CRIME

PROPERTY PHYSICALLY IMPOUNDED BY:

UNIT

2L34

P. NO.

2103

IMPOUNDMENT WITNESSED BY: (When Appropriate)

UNIT

P. NO.

SUPERVISOR APPROVING:

P. NO.

2103

PERSON REPORTING (SIGNATURE)

[Signature]

FOUND PROPERTY: Property that is not obviously identifiable, not connected with a previously reported incident and whose owner cannot be identified, may be released to the finder after 90 days, if written demand has been made not more than 90 days from the date of this receipt. If no claim is made within 90 days from receipt of the property, the property will be disposed of. All correspondence regarding found bicycles should be directed to Juvenile Section, Las Vegas Metropolitan Police Department, 400 E. Stewart Avenue, Las Vegas, NV 89101. All other correspondence should be addressed to: Evidence Custodian, Las Vegas Metropolitan Police Department, 2300 E. St. Louis, Las Vegas, NV 89104.

 LAS VEGAS METROPOLITAN POLICE DEPARTMENT  
 PROPERTY REPORT

42  
1 REX BELL  
DISTRICT ATTORNEY  
2 Nevada Bar #001799  
200 S. Third Street  
3 Las Vegas, Nevada 89155  
(702) 455-4711  
4 Attorney for Plaintiff  
THE STATE OF NEVADA

FILED  
AUG 17 10 16 AM '92

*For the Defendant*  
CLERK

5  
6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA  
8

9  
10 THE STATE OF NEVADA, )

11 Plaintiff, )

CASE NO. C92174X

12 vs. )

DEPT. NO. X

13 ROY D. MORAGA,  
ID#938554 )

DOCKET NO. K

14 )  
15 Defendant. )

ORDER

16 DATE OF HEARING: 8-3-92

17 TIME OF HEARING: 9:00 a.m.

18 THIS MATTER having come on for hearing before the above  
19 entitled Court on the 3rd day of August, 1992, the Defendant not  
20 being present, represented by MARK BAILUS, ESQ., the Plaintiff  
21 being represented by REX BELL, District Attorney, through VICKI J.  
22 MONROE, Deputy District Attorney, and the Court having heard the  
23 arguments of counsel and good cause appearing therefore,

24 / / / /

25 / / / /

26 / / / /

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CE03

AUG 6 1992

B1

1 IT IS HEREBY ORDERED that the Defendant's Motion for Return of  
2 Seized Property shall be, and it is, hereby denied without  
3 prejudice.

4 DATED this 18<sup>th</sup> day of August, 1992.

5  
6   
7 JACK LEHMAN  
DISTRICT JUDGE

8 REX BELL  
9 DISTRICT ATTORNEY  
Nevada Bar #001799  
10 Nevada Bar #003776

11   
12 VICKI J. MONROE  
13 Deputy District Attorney

14  
15  
16 / / / /  
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26  
27 gmr  
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FILED

24

MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
CHERRY, BAILUS & KELESIS  
600 South Eighth Street  
Las Vegas, NV 89101  
(702) 385-3788

AUG 26 3 48 PM '93

*[Signature]*

CLERK

Attorney for Defendant, ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

THE STATE OF NEVADA,  
  
Plaintiff,  
  
vs.  
  
ROY MORAGA,  
  
Defendant.

CASE NO. C 92174  
DEPARTMENT NO. X

DATE/HEARING: 9-8-93  
TIME/HEARING: \_\_\_\_\_

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS;  
AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN  
FORMA PAUPERIS; MOTION FOR AMENDED JUDGMENT OF  
CONVICTION TO INCLUDE JAIL TIME CREDITS AND  
AFFIDAVIT OF PETITION**

COMES NOW, Defendant, ROY MORAGA, through his attorney of record, MARK B. BAILUS, ESQ., of the law offices of CHERRY, BAILUS & KELESIS, and as a courtesy to Defendant and pursuant to E.D.C.R. 3.70, said counsel files the following documents for an on behalf of Defendant, ROY MORAGA:

1. Motion for Leave to Proceed in Forma Pauperis;
2. Affidavit in Support of Request to Proceed in Forma Pauperis;

...

*Law Office of  
Cherry, Bailus & Kelesis*  
600 S. EIGHTH STREET  
P.O. BOX 43087  
LAS VEGAS, NEVADA 89116  
(702) 385-3788  
FAX (702) 385-5125



- 1 3. Motion for Amended Judgment of Conviction to Include  
2 Jail Time Credit; and  
3 4. Affidavit of Petitioner

4 DATED this 26 day of August, 1993.

5 CHERRY, BAILUS & KELESIS

6 By Mark B. Bailus

7 MARK B. BAILUS, ESQ.  
8 State Bar No. 002284  
9 600 South Eighth Street  
10 Las Vegas, Nevada 89101

11 **NOTICE OF MOTION**

12 TO: STATE OF NEVADA, Plaintiff; and

13 TO: REX BELL, ESQ., its attorney of record:

14 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the  
15 undersigned will bring the MOTION FOR LEAVE TO PROCEED IN FORMA  
16 PAUPERIS and MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE  
17 JAIL TIME CREDITS on for hearing on the 8 day of Sept,  
18 1993, at the hour of 9 a.m., in Department No. X of the above-  
19 entitled Court, or as soon thereafter as counsel may be heard.

20 DATED this 26 day of August, 1993.

21 CHERRY, BAILUS & KELESIS

22 By Mark B. Bailus

23 MARK B. BAILUS, ESQ.  
24 State Bar No. 002284  
25 600 South Eighth Street  
26 Las Vegas, Nevada 89101

DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY MORAGA #31584, )

Petitioner )

vs. )

THE STATE OF NEVADA, )

Respondent. )

Case No. C 92174

Dept NO. X

**MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS**

Date of Hearing: \_\_\_\_\_

Time of Hearing: \_\_\_\_\_

COMES NOW the Petitioner, in propria persona, pursuant to NRS 12.015, and respectfully moves this Honorable Court for an Order granting Petitioner leave to proceed in the above-entitled action in forma pauperis, without requiring Petitioner to pay or provide security for the payment of costs of prosecuting this action.

This motion is made and based upon the attached affidavit and certificate.

DATED this 6 day of August, 1993.

Respectfully submitted,

Roy D. Moraga  
Petitioner-In Propria Persona

DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY MORAGA #31584 )  
 )  
 PETITIONER, )  
 )  
 vs. )  
 )  
 THE STATE OF NEVADA, )  
 )  
 RESPONDENT. )  
 )

Case No. C 92174

Dept No. X

**AFFIDAVIT IN SUPPORT OF**  
**REQUEST TO PROCEED IN FORMA PAUPERIS**

Date of Hearing: \_\_\_\_\_

Time of Hearing: \_\_\_\_\_

I, ROY MORAGA #31584, first being duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor; I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor that I am entitled to relief.

I do XXX do not \_\_\_\_\_ request an attorney to be appointed for me.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed: Yes \_\_\_\_\_ No XXX

a. If the answer is yes, state the amount of your salary of wages per month, and give the name and address of your employer: \_\_\_\_\_

1  
2 b. If the answer is no, state the date of last employment  
3 and the amount of salary and wages per month which you received.  
4

5  
6 2. Have you received within the past twelve months any  
7 money from any of the following sources?

8 a. Business, profession or form of self-employment?

9 Yes \_\_\_\_ No XXX

10 b. Rent payments, interest or dividends?

11 Yes \_\_\_\_ No XXX

12 c. Pensions, annuities or life insurance payments?

13 Yes \_\_\_\_ No XXX

14 d. Gifts or inheritances?

15 Yes \_\_\_\_ No XXX

16 e. Any other sources?

17 Yes \_\_\_\_ No XXX

18 If the answer to any of the above is "YES" describe each  
19 source of money and state the amount received from each during the  
20 past twelve months: \_\_\_\_\_  
21 \_\_\_\_\_  
22 \_\_\_\_\_

23 3. Do you own cash or equivalent prison currency, or do  
24 you have money in a checking or savings account?

25 Yes \_\_\_\_ No XXX

26 If the answer is "YES" state the total value of the items  
27 owned: \_\_\_\_\_  
28 \_\_\_\_\_



4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes \_\_\_\_\_ No XXX

If your answer is "YES" describe the property and state its approximate value: \_\_\_\_\_

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: \_\_\_\_\_

UNDER THE PENALTY OF PERJURY, pursuant to NRS 208.165, the above affidavit is true and correct to the best of affiant's personal knowledge and belief.

DATED this 16 day of August, 1993.

ELY STATE PRISON  
P.O. Box 1989  
Ely, Nevada 89301

/ / / / /

/ / / / /

/ / / / /

DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY MORAGA #31584, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. C 92174  
 )  
THE STATE OF NEVADA ) Dept No. X  
 )  
Respondent. )  
\_\_\_\_\_ )

**MOTION FOR AMENDED JUDGMENT OF  
CONVICTION TO INCLUDE JAIL TIME CREDITS**

Date of Hearing: \_\_\_\_\_

Time of Hearing: \_\_\_\_\_

COMES NOW the Petitioner, ROY MORAGA #31584, in propria persona, and respectfully moves this Honorable Court for an Order granting Petitioner credits for all time served in presentence custody (a combined total of roughly 193 days) in the above case, and for an Amended Judgment of Conviction reflecting said credits.

This motion is based on the accompanying Points and Authorities, attached Affidavit of Petitioner and all records and files of the above-entitled case on file with this Court.

DATED this 6 day of August 1993.

Roy D. Moraga  
Petitioner-In Propria Persona

1 POINTS AND AUTHORITIES

2 Traditionally, in this State, any defendant convicted of a  
3 crime and sentenced to a term of imprisonment is entitled credit  
4 against such term and sentencing. Slack vs. State, 90 Nev. 373,  
5 528 P.2d 703 (1974).

6 The common law rule, although discretionary in nature, has  
7 been held applicable regardless of the sentence imposed be it  
8 maximum, minimum, or whatever. Anglin vs, State, 90 Nev. 287, 525  
9 P.2d 34 (1979). And to all classes of defendants. Moreso, to the  
10 indigent defendant who is unable to post bail, in which case the  
11 awarding of presentence credits become mandatory. Id.

12 Along the same lines, the legislature has implemented  
13 credit to those convicted of crime. In this regard, NRS 176.055,  
14 sets forth the following:

15 (W)henever a sentence of imprisonment in the  
16 ...state prison is imposed, the court may order  
17 that credit be allowed against the duration of  
18 the sentence, including any minimum term thereof  
19 prescribed by law, for the amount of time which  
the defendant has actually spent in confinement  
before conviction, unless his confinement was  
pursuant to a judgment of conviction for another  
offense.

20 NEV. REV. STAT. 176.055 (1989).

21 Furthermore, NRS 176.105 commands that all credits awarded  
22 be reflected in the Judgment of Conviction:

23 (I)f a defendant is found guilty and is...(b)  
24 Sentenced as provided by law, the judgment of  
conviction must set forth ... the exact amount  
25 of credit granted for time spent in confinement  
before conviction, if any.

26 Here, the Petitioner spent 193 days in custody prior to  
27 sentencing, from 12/5/89 . 1989 , to 6/16/90 . 1990 .

28 / / / / /

1           However, neither the common law or statutory rule of award-  
2   ing presentence credits is being applied to the Petitioner's case.  
3   In essence, Petitioner, an indigent person, is being denied equal  
4   protection of law in violation of the Fourteenth Amendment to the  
5   United States Constitution ant Article 4, section 21 of the Nevada  
6   Constitution.

7           Furthermore, since the Nevada Department of Prisons uses a  
8   method of calculation whereby they back date the sentencing date  
9   by the total amount of jail time credit an inmate receives, deny-  
10   ing Petitioner credit directly affects the amount of time the Pet-  
11   itioner must remain in custody.

12           THEREFORE, for those reasons cited above, Petitioner  
13   respectfully requests this Court award him all jail time credit to  
14   which he may be entitled. Furthermore, Petitioner requests this  
15   Court issue an Amended Judgment of Conviction reflecting any  
16   credit awarded.

17           DATED this 6 day of August. 1993.

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Respectfully submitted

Roy D. Moraga  
Petitioner-In Propria Persona  
ELY STATE PRISON  
P.O.BOX 1989  
Ely, Nevada 89301

/ / / / /  
/ / / / /  
/ / / / /

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

ROY MORAGA #31584  
Petitioner,  
vs.  
THE STATE OF NEVADA  
Respondent.

# AFFIDAVIT OF PETITIONER

Date of Hearing: \_\_\_\_\_

Time of Hearing: \_\_\_\_\_

[illegible]

I, ROY MORAGA #31584, do hereby swear under penalty of perjury that the assertion of this affidavit are true, of my personal knowledge and belief.

1. I am the petitioner in the above-entitled action and I am a lay person untrained in law;

2. I make this affidavit in support of my Motion for Amended Judgment of Conviction to include Jail Time Credits.

3. I have not received any credit whatsoever for the time I spent in presentence custody in connection with the above-entitled action.

4. I was sentenced in the above-entitled action on or about 6/16/90, 1990, and prior to sentencing I served 193 days in custody, from 12/5/89, 1989, to 6/16/90, 1990.

1           5. That I believe I should be credited with a total of  
2 193 days pursuant to NRS 176.055 for the time spent in custody  
3 prior to sentencing.

4           6. If I am not given the credits sought, I will be incar-  
5 cerated and deprived of my freedom and liberty for a period longer  
6 than allowed by law, and the sentence imposed by this Court,  
7 unless this Court takes corrective action to provide full credit  
8 for all time spent in custody prior to the imposition of sentence  
9 in the above-entitled action.

10           Further your affiant sayeth nought.

11           EXECUTED this 6 day of August, 1993.

12  
13                                   Respectfully submitted

14                                   Roy D. Moraga 31584  
15                                   ROY MORAGA #31584

16           UNDER THE PENALTY OF PERJURY, pursuant to NRS 208.165, the  
17 above affidavit is true and correct to the best of affiant's  
18 personal knowledge and belief.

19           DATED this 6 day of August, 1993.

20  
21                                   Roy D. Moraga 31584  
22                                   Petitioner-In Propria Persona  
                                  ROY MORAGA # 31584

23   / / / / /

24   / / / / /

25   / / / / /

26

27

28

Law Office of  
Cherry, Bailus & Kelesis  
600 S. EIGHTH STREET  
P.O. BOX 4387  
LAS VEGAS, NEVADA 89116  
(702) 385-3788  
FAX (702) 385-5125

MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
CHERRY, BAILUS & KELESIS  
600 South Eighth Street  
Las Vegas, NV 89101  
(702) 385-3788

FILED

AUG 27 10 55 AM '93

*Lucita Luman*  
CLERK

Attorney for Defendant, ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

THE STATE OF NEVADA,  
  
Plaintiff,  
  
vs.  
  
ROY MORAGA,  
  
Defendant.

CASE NO. C 92174  
DEPARTMENT NO. X

DATE/HEARING: 9/8/93  
TIME/HEARING: 9:00 a.m.

RECEIPT OF COPY

RECEIPT OF COPY of the MOTION FOR LEAVE TO PROCEED IN FORMA  
PAUPERIS; AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA  
PAUPERIS; MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE JAIL  
TIME CREDITS AND AFFIDAVIT OF PETITIONER is hereby acknowledged  
this 27th day of August, 1993.

REX BELL, DISTRICT ATTORNEY

By *Sanster*  
Deputy District Attorney  
200 South Third Street  
Seventh Floor  
Las Vegas, Nevada 89155

49  
FILED

SEP 29 10 24 AM '93

*For the State of Nevada*  
FILED

1 REX BELL  
DISTRICT ATTORNEY  
2 Nevada Bar #001799  
200 S. Third Street  
3 Las Vegas, Nevada 89155  
(702) 455-4711  
4 Attorney for Plaintiff  
THE STATE OF NEVADA  
5  
6  
7

DISTRICT COURT

CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA, ) CASE NO. C92174  
10 )  
11 Plaintiff, ) DEPT. NO. X  
12 )  
13 -vs- ) DOCKET NO. K  
14 )  
15 ROY D. MORAGA, )  
16 #0938554 )  
17 )  
18 Defendant. )  
19 )  
20 )

21 SECOND AMENDED  
22 JUDGMENT OF CONVICTION (JURY TRIAL)

23 WHEREAS, on the 11th day of January, 1990, the defendant ROY  
24 D. MORAGA, entered a plea of not guilty to the crime of COUNTS I  
25 and II - BURGLARY, COUNTS III and IV - SEXUAL ASSAULT, committed  
26 between December 4, 1989, through December 5, 1989, in violation of  
27 NRS 205.060, 200.364, 200.366, and the matter having been tried  
28 before a jury, and the defendant being represented by counsel and  
having been found guilty of the crime of COUNTS I and II -  
BURGLARY, COUNTS III and IV - SEXUAL ASSAULT; and

WHEREAS, thereafter, on the 13th day of June, 1990, the  
defendant being present in Court with his counsel ROY GARCIA, ESQ.,  
and DEBORAH J. LIPPIS, Deputy District Attorney also being present;

CE06



1 the above entitled Court did adjudge defendant guilty thereof by  
2 reason of said trial and verdict and, in addition to the \$25.00  
3 administrative assessment fee, sentenced defendant to Life without  
4 the possibility of parole.

5       THEREAFTER on the 27th day of August, 1991, the Supreme Court  
6 ordered that the case be sent back to District Court for  
7 resentencing. That on October 21, 1991, the defendant was  
8 sentenced to a \$25.00 administrative assessment fee and Count I -  
9 ten (10) years in the Nevada Department of Prisons. Count II - ten  
10 (10) years in the Nevada Department of Prisons, sentence to run  
11 consecutive to Count I. Count III - Life in the Nevada Department  
12 of Prisons with the possibility of parole, defendant not being  
13 eligible for parole until he has actually served five (5) years,  
14 sentence to run consecutive to Count II. Count IV - That on June  
15 13, 1991, on a motion by the State, and granted by the Court to  
16 amend the Information to allege the defendant be treated as a  
17 Habitual Criminal, pursuant to NRS 207.010(2) and that he be  
18 sentenced to Life in the Nevada Department of Prisons without the  
19 possibility of parole, sentenced to run consecutive to Count III.  
20 Credit for time served to be determined by Department of Parole and  
21 Probation.

22       THEREAFTER on the 15th day of September, 1993, the defendant  
23 not being present in court, represented by his attorney, the Court  
24 ordered the defendant given 180 days credit for time served.

25 // //

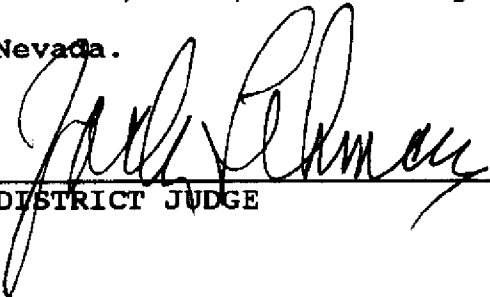
26 // //

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1        THEREFORE, the Clerk of the above entitled Court is hereby  
2 directed to enter this Judgment of Conviction as part of the record  
3 in the above entitled matter.

4        DATED this 28 day of September, 1993, in the City of Las  
5 Vegas, County of Clark, State of Nevada.

6  
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8 DISTRICT JUDGE *dw*  
9

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DA#89092174X/mmww/SAU  
LVMPD DR#89-117715  
BURG. & SA - F  
(TK2)

## CLERK'S CERTIFICATE

FILED

OCT 30 4 44 PM '95

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in the matter of ROY D. MORAGA vs. THE STATE OF NEVADA,  
Case No. 22901.

JUDGMENT

The Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: "ORDER this appeal dismissed."

Judgment, as quoted above, entered this 4th day of October, 19 95.

IN WITNESS WHEREOF, I have hereunto set my hand and  
affixed the Seal of said Supreme Court, at my office in  
Carson City, Nevada, this 24th day of  
October, 19 95.

JANETTE M. BLOOM  
Clerk of Supreme Court of the State of Nevada

By \_\_\_\_\_

*J. Richardson*  
Chief Deputy Clerk

sp

CE31

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 22901

**FILED**

OCT 04 1995

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL


This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts each of burglary and sexual assault. At appellant's sentencing hearing, the district court adjudicated him a habitual criminal and, as a result, sentenced him to a term of life in the Nevada State Prison without the possibility of parole. The habitual criminal adjudication was based on three prior felony convictions: (1) a 1977 conviction for aggravated assault in Arizona; (2) a 1983 conviction for attempted aggravated assault in Arizona; and (3) a 1988 conviction for third degree burglary in Arizona.

Appellant points out that two of the prior convictions list the name "Roy Daniels Moraga" and that the other lists the name "Roy Daniel Moraga" and asserts that the state presented convictions that may not apply to him. Appellant, however, failed to object to these prior convictions on the basis of identity. "[A]n unexcused failure to object in the trial court to the State's failure to make an affirmative showing of the validity of the prior convictions relied upon to enhance a penalty under NRS 207.010 preclude[s] the raising of this objection for the first time on appeal." *Baymon v. State*, 94 Nev. 370, 372, 580 P.2d 943, 944 (1978) (citing *Thomas v. State*, 93 Nev. 565, 571 P.2d 113 (1977)).

Moreover, we conclude that the state adequately proved that appellant received the three prior convictions. See NRS

207.010; Jackson v. State, 97 Nev. 179, 625 P.2d 1165 (1981). The prior convictions presented by the state do not, on their face, "raise a presumption of constitutional infirmity," and the district court was entitled to use these convictions for sentence enhancement purposes. McAnulty v. State, 108 Nev. 179, 181, 826 P.2d 567, 569 (1992). Accordingly, we

ORDER this appeal dismissed.

  
Steffen, C. J.

  
Young, J.

  
Springer, J.

  
Shearing, J.

  
Rose, J.

cc: Hon. Jack Lehman, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Stewart L. Bell, District Attorney  
Cherry, Bailus & Kelesis  
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

REMITTITUR

DATE: October 24, 1995  
TO: Honorable Loretta Bowman, Clerk  
RE: ROY D. MORAGA vs. THE STATE OF NEVADA

NO. 22901 DIST. CT. NO. C92174

Pursuant to NRAP Rule 41, enclosed is (are) the following:

- ☒ Certified copy of Judgment and copy of Order.  
☐ Certified copy of Judgment and copy of Opinion.  
☐ Certified copy of Judgment and Opinion.  
☒ Receipt for Remittitur. (County Clerk please sign below and return. Retain the attached copy for your records.)  
☐ Record on Appeal. Volumes  
☐ Exhibits  
☐ Deposition(s) of  
☐ Memorandum of Costs and Disbursements.  
☐ Other

cc: Hon. Jack Lehman, District Judge  
Cherry & Bailus  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Stewart Bell, District Attorney

Issued by: J. Richardson  
Chief Deputy Supreme Court Clerk  
sp

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 (date) OCT 30 1995

LORETTA BOWMAN  
County Clerk

57  
FILED

FEB 20 12 07 PM '96

*Loretta L. ...*  
CLERK

1 Case No. C92174

2 Dept. No. 10

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

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9

ROY DANIELS MORAGA,

10

Petitioner,

11

-vs-

12

THE STATE OF NEVADA,

13

14

Respondent.

15

16

I, ROY DANIELS MORAGA, hereby declare and state

17

that I am the Petitioner in the above entitled case; that in support

18

of my Motion to proceed without being required to prepay fees, costs

19

or give security therefor; I state that because of my poverty I am

20

unable to pay the costs of said proceeding or to give security

21

therefor; that I am entitled to relief.

22

I do xxx do not      request an attorney be appointed to

23

represent me.

24

I further swear that the responses which I have made to

25

questions and instructions below are true.

26

1. Are you presently employed: Yes      No xxx

27

a. If the answer is Yes, state the amount of your salary

28

or wages per month, and give the name and address of your employer:

3-6-96  
9:00 AM

NOT APPLICABLE

b. If the answer is No, state the date of last employment and the amount of salary and wages per month which you received:

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes \_\_\_\_\_ No XXX

b. Rent payments, interest or dividends?

Yes \_\_\_\_\_ No XXX

c. Pensions, annuities or life insurance payments?

Yes \_\_\_\_\_ No XXX

d. Gifts or inheritances?

Yes \_\_\_\_\_ No XXX

e. Any other sources?

Yes \_\_\_\_\_ No XXX

If the answer to any of the above is "Yes" describe each source of money and state the amount received from each during the past twelve months: NOT APPLICABLE

3. Do you own cash or equivalent prison currency, or do you have money in a checking or savings account?

Yes \_\_\_\_\_ No XXX

If the answer is "Yes", state the total value of the items owned: NOT APPLICABLE



1 4. Do you own any real estate, stocks, bonds, notes,  
2 automobiles, or other valuable property (excluding ordinary house-  
3 hold furnishings and clothing)? Yes \_\_\_\_\_ No XXX

4 If your answer is "Yes", describe the property and state  
5 its approximate value: NOT APPLICABLE

6  
7 5. List the persons who are dependent upon you for  
8 support, state your relationship to those persons, and indicate  
9 how much you contribute towards their support: \_\_\_\_\_

10 NONE

11  
12 UNDER THE PENALTY OF PERJURY, pursuant to N.R.S. §208.165,  
13 the above affidavit is true and correct to the best of affiants  
14 personal knowledge.

15 DATED this 12th day of February, 19 96.

16  
17 x Roy D. Moraga  
18 Sign your name

19  
20 ROY DANIELS MORAGA # 31584

21 Print your name DOP#

22

23

24

25

26

27

28

50

FILED

FEB 20 12 07 PM '96

1 Roy D. Moraga-31584  
2 P.O.Box 1989  
3 Ely, Nevada 89301  
4 Plaintiff, In Pro Se

*Loretta L. Luman*  
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

5  
6 The State of Nevada ) Case No. C92174  
7 Plaintiff ) Dept. No. X  
8 vs ) AFFIDAVIT OF DEFENDANT  
9 Roy D. Moraga )  
10 Defendant )

11  
12 I, ROY D. MORAGA, do hereby Swear and depose under penalty of  
13 Perjury that the assertions of this Affidavit are true and correct  
14 to the best of affiant's knowledge and belief.

15 1) That I am an inmate incarcerated within the Nevada Department  
16 of Prisons and have been housed at the Ely State Prison Since  
17 September 13th, 1990

18 2) That Affiant is over the age of (18) eighteen years of age  
19 and of sound mind competent to testify to the matters as stated  
20 herein.

21 3) That on or about December 5th, 1989 affiant is incarcerated  
22 for two counts of Sexual Assault and two counts of burglary, that I  
23 am innocent of, and can show this by way of D.N.A. testing. affiant  
24 to this Honorable Court to Grant Defendant this Motion and Notice  
25 of Motion to Compel Production of semen and blood of the Samples  
26 of Pennie Hawk, Plaintiff, and Roy D. Moraga, Defendant.

27 This affidavit is made, pursuant to N.R.S.208.165, without  
28 Notary Public.

Roy D. Moraga  
Roy D. Moraga-Defendant

FILED

COUNTY CLERK

FEB 2 1996

RECEIVED

1 Case No. C92174

2 Dept. No. 10

3

4

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6

IN THE JUSTICE COURT OF THE STATE OF NEVADA

7

IN AND FOR WHITE PINE COUNTY

8

9 IN THE MATTER OF

10 ROY DANIELS MORAGA . NDOP = 31584

FINANCIAL  
CERTIFICATE

11 NAME

12 ON MOTION FOR LEAVE TO PROCEED

13 IN FORMA PAUPERIS

14

15 I hereby certify that the Plaintiff herein has the sum  
of \$ 2.83 on account to his credit at the Institution

16 where he is confined. I further certify that Plaintiff likewise

17 has the following securities to his credit according to the

18 records of said Institution: \_\_\_\_\_

19

20

21

22

DATED: February 10th 1946

23

24

By: \_\_\_\_\_

Nevada Department of Prisons  
Inmate Services Accountant  
Authorized Officer of Institution

25

26

27

28

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FILED

FEB 20 12 07 PM '96

*Loretta L...*  
CLERK

1 Mark B. Bailus, Esq.  
2 600 S. 8th Street  
3 P.O.Box 43087  
4 Las Vegas, Nevada 89116  
5 Attorney for Petitioner  
6 Roy D. Moraga

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 Roy D. Moraga ) Case No. C-92174  
8 )  
9 Petitioner ) Dept.No.  
10 )  
11 vs )  
12 )  
13 State of Nevada )  
14 )  
15 Respondent )  
16 )

EX PARTE MOTION FOR FEES FOR EXPERT SERVICES

Date of Hearing \_\_\_\_\_

Time of Hearing \_\_\_\_\_

COMES NOW, Petitioner Roy D. Moraga, by and through his Court  
appointed counsel of record, Mark B. Bailus, Esq., and hereby  
moves this Honorable Court for an ORDER authorizing the expenditure  
of fees for the purposes of compensating an expert witness needed  
for Petitioner's defense, pursuant to N.R.S. 7.135. The purpose of  
compensating and subpoenaing said witness is to ascertain if  
petitioner voluntarily and knowingly entered a Plea of not Guilty.

This application for granting of fees in the amount of Five  
Hundred (\$500.00) dollars by the court which are proper and  
necessary for the preparation of an affirmative defense in the  
above entitled action.

It is further requested that all records of the subject matter  
of this Motion be Sealed by the Court in order to protect

COUNTY CLERK

FEB 20 1996

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1 Petitioner's rights to a Fair Trial, should a New Trial be Ordered.

2 This pleading is made and based upon N.R.S. 7,135, all the  
3 papers and pleadings on file, and the affidavit attached hereto,  
4 and is made in good faith and not to delay justice.

5 Dated this            day of            , 199 .

6 RESPECTFULLY SUBMITTED

7  
8 Mark B. Bailus, Esq.  
9 600 S. 8th Street  
10 P.O.Box 43087  
11 Las Vegas, Nevada 89116  
12 Attorney for Petitioner

11 NOTICE OF MOTION

12 TO: The Honorable Court in teh above entitled cause of  
13 Action. The State of Nevada, Respondent, and it attorney, you and  
14 each of you, will please take notice that the under-signed will  
15 bring the foregoing Ex Parte Motion for fees for Expert Services  
16 for hearing before the above entitled Court on the \_\_\_\_\_ day of  
17 \_\_\_\_\_, 199 , at the hour of \_\_\_\_\_ am/pm; Department \_\_\_\_\_ or  
18 as soon thereafter as counsel can be heard.

19  
20 RESPECTFULLY SUBMITTED

21 Mark B. Bailus, Esq.  
22

23

24

25

26

27

28

POINTS AND AUTHORITIES  
IN SUPPORT OF EX PARTE APPLICATION  
UNDER N.R.S. 7.135

I

FACTS

Defendant has applied for an appropriation of expense funds to employ, Dr. Thorn Jefferson Butler.

The state has a constitutional duty to provide indigent defendants with expert and other services reasonably necessary in presenting meaningful defense. AKE v. Oklahoma, 470 U.S. 68 (1985). Mason v. Arizona, 504 F.2d. 1245, 1351 (9th Cir. 1974). The Nevada Legislature has recognized its duty to provide such services by enacting N.R.S. 7.135 which provides in relevant part as follows... The attorney appointed to represent a defendant... may employ, subject to the prior approval of... the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. The defendant is unaware of any Nevada cases construing N.R.S. 7.135.

HOWEVER, N.R.S. 7.135 is similar to the criminal Justice Act provision authorizing appropriations for experts in Federal Cases, 18 U.S.C. § 300 A(e). Federal cases construing said statute have established the principles which govern indigent applications for expert and other services. A discussion of those principles follows.

The decision whether to appropriate funds to the defense for expert services is not an adversarial matter. Indeed, a defendant's application for funds to employ an expert is ex parte, SEE N.R.S. 7.135.

To qualify for funds, a defendant must make a showing that the employment of the expert is necessary for an adequate defense, N.R.

1 S. 7.135. This standard of "necessity" is not by any means, a  
2 strict one, the standard is one of "reasonable necessity". United  
3 States v. Durant, 545 F.2d. 823,827 (2nd Cir. 1971). Moreover, the  
4 goal is not Simply to provide an indigent defendant with a minimally  
5 adequate defense, rather, the gola is, insofar as possible, to  
6 overcome the defendant's indigency and provide him with the same  
7 quality of expert services that a financially Solvent defendant  
8 could afford, See, United States v. Theriault, 440 F.2d 713,716,  
9 (5th Cir. 1971), (Wisdom J. concurring), thus, it is reversable error  
10 to deny an indigent defendant's request for funds to retain an  
11 expert if a reasonable attorney representing a financially solvent  
12 defendant might hire the expert. Durant, supra, Commonsensically,  
13 the extent to which a reasonable attorney would involve experts in  
14 the defense of a case would depend upon the seriousness of the  
15 charge. Obviously, in a case such as the instant case, a reasonable  
16 attorney would seek experts to a greater degree then in a routine  
17 felony case.

18 An expert employed by the defense with court-appointed funds  
19 is not a neutral adviser to the court. Rather, he is a member of  
20 the defense team, and as such, his role is to assist the defense  
21 by being available to testify if called upon by the defense, by  
22 assisting counsel in cross-examining state witnesses, etc. United  
23 States v. Crews, 781 F.2d 826,834 (10th Cir. 1986), United States  
24 v. Bass, 477 F.2d 723,725, (9th Cir. 1973), United States v. Pat-  
25 terson, 724 F.2d 1128,1130, 1131, (5th Cir. 1984). Because the expert  
26 is a member of the defense team, the court should ordinarily defer  
27 to defense counsel's selection of experts. Bass, 477 F.2d at 726.

28 Defense counsel's shewing for wanting to retain the requested

1 expert's does reveal counsel's mental processes, areas of possible  
2 defense, and counsel's approach to the case, Thus, an attorney re-  
3 presenting a solvent client would nit, However, have to apply for  
4 funds pursuant to N.R.S. 7.135 and, therefore, would never be re-  
5 quired to reveal his mental processes. To prevent disclosure to  
6 the state of defense counsel's mental processes regarding a proper  
7 defense, the defendant is requesting that all pleadings relating  
8 to his requested appropriation,.. be sealed, Pursaunt to N.R.S.  
9 7.135.

10 The sealing of these pleadings becomes necessary to avoid  
11 constitutional deprivations, defendant submits that requiring his  
12 attorney to reveal information to the state prosecutor in a situa-  
13 tion where a financially solvent client's attorney would not have  
14 to do so intrudes upon the attorney-client relationship in violat-  
15 ion of the Sixth Amendment right to counsel and the Fifth Amendment  
16 due process clause. IT also constitutes invidious discrimination  
17 based upon lack of wealth in violation of the equal protection and  
18 due process clauses of the Fourteenth Amendment.

19 CONCLUSION

20 Based upon the legal argument herein, the defendant respect-  
21 fully request that this court authorize the necessary funds for a  
22 D.N.A. testing, for the purpose of Forensic Comparison and to  
23 issue a court order sealing all pleadings relating to these  
24 request.

25 Dated this 12th day of February 1996.

26  
27 RESPECTFULLY SUBMITTED

28 Roy D. Moraga  
Roy D. Moraga-31584



54

FILED  
FEB 20 12 04 PM '96  
*Laitha Shuman*  
CLERK

1 Roy D. Moraga  
2 Inmate No. 31584  
3 P.O.Box 1989  
4 Ely, Nevada 89301

5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7 oo0oo

8 The State of Nevada	)	Case No. C-92174
	)	Dept. No. _____
9 Plaintiff	)	
	)	
10 vs	)	MOTION AND NOTICE OF MOTION
	)	TO COMPEL, PRODUCTION OF
11 Roy D. Moraga	)	SEMAN AND BLOOD
	)	
12 Defendant	)	

13 Date of Hearing 3-6-96  
14 Time of Hearing 9:00 AM

15 TO; The State of Nevada, Plaintiff, and  
16 TO; Stewart Bell, Clark County District Attorney.

17 You and each of you, Please take notice that that the defense  
18 dent respectfully moves this Court to Order the state witness  
19 Linda T. Errichetto, to give to Dr Thorne Jefferson Butler, M.D.,  
20 A forensic Pathologist and Toxicologist for Associated Pathologist  
21 Laboratories, Located at 4230 Burnham Avenue, Las Vegas, Nevada, A  
22 sample of his blood and seman for D.N.A. Profiling Analysis.

23 This Motion is being made so that a D.N.A. Forensic compari-  
24 son can be made between Seman and Blood Samples obtained and the  
25 evidence recovered by the Metropolitan Police Department and is  
26 based upon the pleadings and records on file, the points and  
27 authorities attached hereto and any argument of defendant required  
28 by the Court.

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COUNTY CLERK  
FEB 20 1996

RECEIVED  
CMC

1 Said Motion will be heard in the above-entitled Court on the  
2 \_\_\_\_\_ day of \_\_\_\_\_, 1996, at \_\_\_\_\_ a.m. or as soon thereafter  
3 as defendant can be heard.

4 dated this \_\_\_\_\_ day of \_\_\_\_\_, 1996.

5  
6 BY Roy D. Morage  
7 Roy D. Morage--37584  
P.O.Box 1989  
Ely, Nevada 89301

8 POINTS AND AUTHORITIES

9 Forensic DNA Evidence; Analysis

10 When forensic DNA analysis appeared in 1987 the publicity  
11 made it sound like a dream come true for prosecutors and a night-  
12 mare for defense counsel. This new law technique could be used to  
13 identify the source of miniscule bits of blood, skin, semen and even  
14 hair roots or saliva. DNA typing was hailed as an infallible way  
15 to find the perpetrators of violent crimes, almost as if the  
16 criminal had left an address and social security number behind. In  
17 many early cases, defense lawyers could find no way to criticize the  
18 process, and it's air of scientific certainty gave it extra weight  
19 with juries.

20 However, petitioner submits that situation has now changed as  
21 another aspect of DNA evidence is it's ability to exclude suspects.  
22 This new wave of tests are being used to exclude rape suspects and  
23 murder suspects otherwise implicated by circumstantial or eye wit-  
24 nesses testimony. In fact, defense attorneys are using new DNA  
25 tests in order to successfully appeal old convictions. (see DNA  
26 Exclusions; new grounds for attacking old convictions, BNA crim. Prac.  
27 Manual, January 6, 1993, at 6). Molecules in tissue called DNA  
28 (Deoxyribonucleic Acid), which contains each individual's genetic

1 code), which contains each individual's genetic code and carry  
2 hereditary patterns, are being used to identify suspects in crimi-  
3 nal cases. Sometimes, years after a conviction, this new high-  
4 technology test proves a convicted person was innocent.

5 In Forensic DNA tests, genetic material from a suspect is  
6 compared to DNA from evidence which could be from the victim, the  
7 perpetrator or, of course, someone else\* four, six or eight highly  
8 variable (alleles) from each suspect's DNA are compared. If the  
9 (alleles) "do not match" the suspect could not be the Source of  
10 the evidence, if they do match, then he or she could. Roy D. Moraga  
11 was convicted of the alleged rape of Pennie Hawk (a white female)  
12 thus based upon forensic DNA test, Moraga would have a different  
13 (alleles) than Pennie Hawk in DNA analysis of blood semen.

14 The undisputed evidence in the instant case, reveals that Metro  
15 Crimalest Linda T. Errichetto examined the following samples from  
16 Pennie Hawk at Las Vegas, Metropolitan Police Department Forensic  
17 Laboratory. Blood, Vaginal Swabs, Oral swabs, Vaginal Smears, Saliva  
18 Pubic Hair combed, Pubic hair Standard and Head Hair. (D.C.# 7). and  
19 DR. No. 89-117709. Old Convictions. (SEE Dna Exclusions; New  
20 grounds for attacking Inforensic DNA tests, genetic material from  
21 a suspect is USEING, the use of forensic testimony and it's testing  
22 procedures are well documented in this State where prosecutors have  
23 obtained convictions based upon such inculpatory findings against  
24 Suspects and/or Defendants in criminal cases. These testing proce-  
25 dures have also exonerated defendant's convicted of a crime. See i,  
26 e. Crockett v. State, In each case the state went to great lengths  
27 and expense to introduce Scientific Evidence to connect the Suspect  
28 or Defendant to the physical evidence examined and tested by

1 Forensic Experts.

2 In Redman v. State, 828 P.2d. 395 (Nev, 1992) the state and  
3 its agents searched the defendants vehicle and obtained 2 pair of  
4 handcuffs, a stun gun with dried blood on it, survival knife and  
5 a .22caliber Ruger and Finger print evidence, was all found all  
6 over the victim's Van. This physical evidence was tested and used  
7 against the defendant at his trial and resulted in his conviction.

8 In Dawson v. State, 825 P.2d 593 (Nev. 1992) the state used  
9 forensic experts to connect teh defendant to the crime when they  
10 found 2 buttons, a small piece of belt and some hair samples, a  
11 witness idnetified one of the buttons as having characteristics  
12 identical to the remaining buttons on the victims blouse, the belt  
13 was idenfied as part of victims belt, and the hair samples found  
14 in Dawsons car had similar characteristics as hair samples taken  
15 from victims body. See also Michael Doyle v. State, 101 Nev. 360,  
16 705 P.2d 626 (1985).

17 HAIR ANALYSIS EVIDENCE

18 Radioimmunoassay hair Analysis, used to reveal drug use over  
19 a period of time (nomths) was sufficiently to be admissible in a  
20 probation hearing as some proof that the probationer violated the  
21 conditions of his probation. The court concluded that extensive  
22 Scientific Writings on RIA hair samples analysis established its  
23 reliability and acceptance in the field of forensic Tolicology  
24 when used to determine cocaine use, U.S. v. Media, \_\_\_ U.S. \_\_\_, 1990  
25 (E.D.N.Y.).

26 DISCOVERY-FAILURE TO MAKE REQUEST

27 Departing from the Federal Law, the Massachussets Supreme  
28 Judicial Court concluded that, when a defendant has not made a

1 Specific Request for the evidence in question, prosecution nondis-  
2 clousre of exculpatory evidence entitles the defendant to a new  
3 trial if absent the evidence would have played an important role  
4 in the jury's deliberations and conclusions, even though even  
5 it is not certain that the evidence would have produced a verdict  
6 of not guilty. (the prosecutions failure to disclose photographs  
7 taken of defendant after his arrest clearly showing that he had a  
8 mustache entitled defendant to a new trial, even though the defen-  
9 dant did not make a specific request for the photographs, where,as  
10 here,the alleged victim and another witness stated the attacker  
11 was clean shaven.

12 Adopting Dinoisio, supra, United States v. Mara, supra, held  
13 that a specific and narrowly drawn directive requireing a witness  
14 furnish a handwriting sample to a grand jury, to be used as a  
15 standard of comparison with certain writing, violated no Fourth  
16 Amendment interest.

17 The defendant delieves that the overriding function of the  
18 Fourth Amendment is to protect personal privacy and dignity again-  
19 st unwarranted intrusion by the state, The instant case does not  
20 reflect such inwarrented intrusion.

21 CONCLUSION

22 Based upon the above Points and Authorities, and any argument  
23 of defendant, the defendant respectfully requests an Order compel-  
24 ling the production of seman from the states witness, Linda T.  
25 Errichetto. The prior testing of Errichetto's Seman found inside of  
26 Pennie Hawks.

27

28 Dated this 12th day of February 1996.

1 Roy D. Moraga-31584  
2 P.O.box 1989  
3 Ely, Nevada 89301

Case No. \_\_\_\_\_

4 MOTION FOR RELEASE ON OWN RECOGNIZANCE

5 COMES NOW, the appellant Roy D. Moraga in proper person and  
6 in Forma Pauperis, and respectfully requests this court to grant  
7 the appellant an O.R. release.

8 This Motion is based upon the attached affidavit of appellant  
9 and Scientific Evidence previously submitted herein and all papers  
10 pleadings and documents on file herein.

11 Dated this 18<sup>th</sup> day of February 1996

12 Respectfully Submitted

13 Wherefore your affiant prays he be granted an O.R. and be  
14 released pending the court's ruling on the merits of appellant's  
15 Forensic Exculpatory Evidence establishing appellant's colorable  
16 claim of innocence.

17  
18 RESPECTFULLY SUBMITTED

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20 Roy D. Moraga  
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27  
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MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner's right to effective assistance of counsel includes the right to ancillary services necessary in the preparation of a defense. Such right is statutorily Authorized by Nevada Revised Statute Section 7.135 Providing compensation of appointed counsel and provides that counsel shall be reimbursed for "necessary expense".

Petitioner's Statutory right is based on the provisions of law which provide that the court shall allocate resources for the payment of experts as part of necessary expenses for defense; if petitioner cannot afford the cost. Corenevski v. Superior Court, 36 C.3d 307, 682 P.2d 360 (Cal.1984).

N.R.S. 7.135 States;

7.135 Reimbursement for expenses; employment of investigative expert or other services.

The attorney appointed by a Magistrate or District Court to represent a defendant is entitled in addition to the fee provided by N.R.S. 7.135 for his services, to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the approval of the Magistrate or the District Court in Ex Parte Application, such investigative, expert or other services, must not exceed \$300.00. exclusive of reimbursement for expenses reasonably incurred, UNless payment in excess of that limit IS;

1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before, as necessary to provide Fair compensation for character or duration; and

2. Approved by the presiding judge of the judicial district in

1 which the attorney was appointed, or if there is no presiding  
2 Judge, by the district Judge who holds Seniority in years of  
3 service in office. (1975, P.1155, 1981, P.875, 1983 P.110).

4 POINTS AND AUTHORITIES

5 The following Authorities stand for the proposition that all  
6 real or physical evidence is not prtected by the Fifth Amendment,  
7 Mc Cray v. State, 85 Nev. 597, 460 P.2d 160 (1969).

8 The Court, in Schmerber v. California, 384 U.S. 757, 86 S.Ct.  
9 1826, 16 L.Ed. 2d 908 (1966), was called to decide whether the  
10 withdrawal of blood and admission in evidence of the analysis  
11 violated a defendant's privilege under the Fifth Amendment.

12 "We hold that the privilege protects an accused only from  
13 being compelled to testify against himself, or otherwise  
14 provide the state with evidence of a testimonial or  
15 communications nature, and that the withdrawal of blood and  
16 use of the analysis in question in this case did not involve  
17 compulsion to these ends".  
18 IN United States v. Wade, 388 U.S. 218 (1967), the Court said;

19 "We held in Schmerber, supra, 384 U.S. at 761, 86 S.Ct. at 1830,  
20 that the distinction ot be drawn under the Fifth Amendment  
21 privilege against self-incrimination is one between an accused  
22 communications in whatever form, vocal or physical, and  
23 compulsion which makes physical evidence Schmerber, supra, at  
24 764, 86 S.Ct. at 1832, werecognized that both Federal and  
25 State Courts have usually held that...(the privilege) offers  
26 no protection against compulsion to submit to fingerprinting  
27 or photography, or measurements, to write or speak for  
28 identification, to appear in court, to stand, to assume a  
29 stance, to walk or to make a particular gesture". Id at 764,  
30 86 S.Ct. at 1832, 388U.S. 223.

31 The court held that the extraction and chemical analysis of a  
32 blood sample involved no shadow of testimonial compulsion upon or  
33 enforced communication by the accused". Id. at 765, 86 S.Ct. at  
34 1832.

35 These cases led the Supreme Court to conclude in Gilbert v.  
36 California, 388 U.S. 263, 87 S.Ct. 1951, (1967). that handwriting  
37 exemplars were not protected by the privilege against compulsory  
38



1 self-incrimination. While(o)ne's voice and hand writing are of  
2 course means of communications,"we held that a"mere handwriting  
3 exemplars in contrast to the content of what is written, like the  
4 voice or body itself, is an identifying physical characteristic  
5 outside it's protection," Id, at 266, 267, 87 S.Ct. at 1953, and  
6 similarly, in United States v. Wade,388 U.S. 218, 87 S.Ct.1926, 18  
7 L.ed. 2d 1149, We found no error in compelling a defendant accused  
8 of bank robbery to utter in a lineup words that had allegedly been  
9 spoken by the robber, The accused there was required to use his  
10 voice as an identifying physical characteristic, not to speak his  
11 guilt: Id.at 222, 223, 87 S.Ct. at 930.

12 Finally, United States v. Dionisio,410 U.S.1, 93 S.Ct. 764  
13 (1973) and United States v. Mara,410 U.S.19, 93 S.Ct. 774 (1973),  
14 further supports the defnedant's position, In Dionisio, supra,the  
15 court held that a subpoena to compel a person to appear before a  
16 grand Jury doe not constitute a "seizure" within the meaning of  
17 the Fourth Amendment, and the fact that many others besides respon-  
18 dent were ordered to give viece recordings did not render the sub-  
19 poena unconstitutional.

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1       When forensic DNA analysis first appeared in 1987, the publi-  
2 city made it sound like a dream come true for prosecutor and a  
3 nightmare for defense counsel.

4       This new law technique could be used to indenify the sousce of  
5 miniscule bit of blood, skin, seman, even hair roots or salvia. DNA  
6 typing was hailed as an infallible way to find the perpetrators of  
7 violent crimes, almost as if the criminal had left an address and  
8 Social Security Number behind. In many cases, defense lawyers could  
9 find no way to critize the process, and its air of scientific cer-  
10 tainty gave it extra weight with jurors. But that situation changed  
11 Sceintific debate over DNA analysis has become heated. As a result  
12 Eight Appellate Courts have excluded it or barred Statistics based  
13 explanations of what it means when a suspects DNA matches the DNA  
14 of evidence from a crime scene. Meanwhile another aspect of DNA  
15 evidence, it's ability to exclude suspects, is coming to fore. Tests  
16 are being used to exclude rape suspects otherwise implicated by  
17 circumstantial or eyewitness testimony, and defense counsel are  
18 useing new DNA test in order to appeal old convictions.

19       Weakland Part Indian would have a different alleles than  
20 Marvin Krouse in DNA analysis of blood, skin, hair-roots, the typing  
21 process often called DNA fingerprinting is based on an analysis of  
22 the genetic material found in all cell nuclei. The process takes  
23 about 6 weeks and uses about \$100.00 worth of materials. Three main  
24 commercial Lab. cellmark, lifecodes, and Cetus, do the test. So do  
25 the Federal Bureau of Investigations and about 40 states and local  
26 crime Lab.s. Protocols and materials at different Lab's may vary, if  
27 they do, the results are not comparable and cannot be used to link  
28 crimes. However, most states and local crime Lab's use the F.B.I.

1 techniques, so their experts centralized databanks to help connect  
2 serial rapes and murders. In forensicDNA test, genetic material  
3 from a suspect is compared to DNA from the evidence, whichcould be  
4 from the victim, the perpetrator or, of course, someone else. four  
5 six, or eight highly variable segments (alleles) from each suspects  
6 about a third of the time. This frees police to seek the real  
7 criminal and saves the tax payer dollars. A recent San Diego case  
8 shows how important DNA exclusions can be. A test of an overlooked  
9 semen stain on a rape child's nightgown freed her father Jim Wade,  
10 on the eve of trial. The authorities had not beleaved the girl  
11 when she said she had been abducted by a stranger. She was placed  
12 in a Foster Home and convinced to say her father had molested her,  
13 and Wade was jailed. A year later, Someone noticed the stain,DNA  
14 ruled out the father and pointed to a Known child molester who  
15 lived nearby. People v. Wade, No.CR-120451 (cal.San Diego Super.  
16 Ct.Nov. 1991).The whole family has filed suit against the private  
17 parties and government agencies involved in the prosecution. In a  
18 few cases, people convicted by circumstantial evidence or eyewit-  
19 ness testimony have used DNA analysis to win freedom, Ironically,  
20 district attorneys who enbrace DNA evidence for prosecution some-  
21 times argue that it is so new and expensive for use in appeals.

22 Thus far, the convict pays, In a widely reported New York case  
23 Kerry Koter was released after serving 11 years when DNA test he  
24 paid for showed he was no the Source of semen found on a Rape victim  
25 clothing. Peter Newfield and Law Professor Barry Scheck, who head  
26 the National association of Criminal Defense Lawyers task force on  
27 DNA evidence, represented Koter in his appeal. People v. Koter,No.  
28 2480-81 (New York Suffolk County Sup. Ct. Dec. 14,1992).

1 Koter was convicted when a woman identified him as the man  
2 who had raped her twice, her testimony apparently outweighed Koter  
3 's alibi and other evidence suggesting a misidentification. While  
4 in prison, Koter saw a T.V. show on DNA evidence and asked to have  
5 tests doen. Repeated DNA test show that neither he nor the victims  
6 husband was the source of the seman. Scheck says that both the  
7 Koter case and the FBI's rate of conclusions suggest that many  
8 innocent men are rotting in jail"(See DNA EXclusions; new grounds  
9 for attacking old convictions, DNA Crim.Prac. Manual, January 6,  
10 1993. at 6).

11 In a recent incident where a man charged with rape by a form-  
12 er girlfriend found himself in the same cell with a man who looked  
13 very much like himself, the cellmate said he, too, had once dated  
14 someone who lived in the raped woman's apartment complex. When the  
15 first man was later excluded by a DNA test, he told the authorities  
16 about the cellmate, whose DNA turned out to match the rape evidence  
17 Here the technology worked both ways; it ruled out one suspect and  
18 zeroed in on another.

19 Criminal Defense lawyers spend a great deal of time thinking  
20 about experts, these lawyers know that the testimony an expert gives  
21 in a trial often can make the difference in the defendant's case.

22 Making the best use of an experts of knowing when to challenge  
23 a government expert are critical skills that every defense lawyer  
24 needs to have, but developing those skills can be a constant chal-  
25 lenge. In recent decades, many new areas of expertise have developed  
26 and established areas are constantly evolving.

27 The most fundamental principle underlying a defendant's right  
28 to present evidence at a criminal trial is the public interest in

1 determining truth and reaching an accurate conclusion as the Supr.  
2 Court noted in AKE v. Oklahoma, The states interest in prevailing  
3 at criminal trials, unlike that of a private litigant, is necessarily  
4 tempered by its interest in the fair and accurate adjudication of  
5 criminal cases: expert testimony is frequently used to provide  
6 evidence in the form of opinions and hypotheticals that neither  
7 the defendant nor the government can otherwise introduce at trial.  
8 To be admissible, expert testimony must meet five criteria, (1) the  
9 witness giving the testimony must qualify as an expert under Fed.  
10 Rules of Evidence 702; (2), the testimony must be helpful to the  
11 jury and must focus on a subject the average juror knows A LITTLE  
12 ABOUT. (3) It must be relevant and material; (4) It must be reliable  
13 or conform with generally accepted explanatory theory and (5) its  
14 probative value must outweigh any potential prejudicial impact. If  
15 expert testimony is to be helpful to a jury in determining the  
16 truth, that the evidence also must be reliable and accurate. To  
17 insure this, many courts apply a test adopted in 1923 by the district  
18 of Columbia Circuit in Frye v. States, 293 F. 1013 (D.C. Cir. 1923),  
19 that a test requires that scientific expert testimony be based on  
20 a Scientific principle or discovery that has gained general accep-  
21 tance in the particular field in which it belongs; 10. U.S. v.  
22 Cooper, 983 F.2d 928 (9th Cir. 1993) defendants charged with offenses  
23 relating to manufacture of Methamphetamine moved to dismiss indict-  
24 ment on grounds of destruction of evidence.

25 The court of Appeals, Beezer, J. held that; (1) government  
26 bad faith failure to preserve laboratory equipment seized from  
27 defendants violated due process, and (2) appropriate remedy was  
28 dismissal of indictment, rather than suppression of evidence.

1        Because of the governments bad faith actions, the Laboratory  
2 equipment seized from Apotheosis Research Lies broken and buried  
3 in a toxic waste dump. This equipment cannot be introduced at trial  
4 It can neither Support nor undermine Wayne Cooper and Vincent  
5 Gammills repeated assertions that their Lab..lacked the Physical  
6 Capacity to manufacture methamphetamine. Id at 929, we review de  
7 novo districts court's determination the governemtns failure to  
8 preserve potentially exculpatory evidence violated Cooper and  
9 Gammill's due process rights. Paradis v. Arave, 954 F.2d 1483, 1488,  
10 (9th Cir. 1992).

11        Tow Supreme court cases set out the test we apply to determine  
12 when the government's failure to preserve evidence to the level of  
13 a due process violation. IN California v. Trombetta, 467 U.S.479,  
14 104 S.Ct. 2528, 2534, (1984), the court held that the government  
15 violates the defendant's right to due process if the unavaible  
16 evidence possesses "exculpatory value that was apparent before the  
17 evidence was destroyed, and (is) of such a nature that the defendant  
18 would be unable to obtain comparable evidence by other reasonably  
19 available means". In Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct.  
20 333 (1988), the court added the additional requirement that the  
21 defendant demonstrate that the police acted in bad faith in failing  
22 to preserve the potentially useful evidence. SEE also, Paradis 954  
23 at 1488 (explaining Trombetta and Youngblood test).

24        Youngblood's bad faith requirement dovetails with the first  
25 part of the Trombetta test; that the exculpatory value of the  
26 evidence be apparent before its destruction. Trumbetta, 467 U.S. at  
27 489, 104 S.Ct. at 2534. The presence or absence of bad faith turns  
28 on the government's knowledge (avants-Lee- Harmon) of the apparent

1 exculpatory value of the evidence at the time it was lost or des-  
2 troyed. Youngblood, 488 U.S. at 56-57w. , 109 S.Ct. at 336-337n, Id  
3 at 931.

4 General testimony about the possible nature of the destroyed  
5 equipment would be an inadequate Substitute for testimony informed  
6 by its examination, Id at 932.

7 CLERKS OF THE COURT

8 If the district clerk received petitioner's proper person  
9 Motions and Documents, clerk had absolute duty to file Motion for  
10 leave to proceed in Forma Pauperis and the clearly stamp the date  
11 of receipt of other documents on them. Donoho v. Eighth Judicial  
12 District Court, 842 P.2d 731 (1992)( had a duty to keep accurate  
13 record of case pending before the District Court).  
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FILED  
FEB 20 12 04 PM '96  
*Loretta L...*  
CLERK

1 Case No. C92174

2 Dept. No. 10

3  
4  
5

6 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 FOR THE COUNTY OF CLARK

8

9 ROY DANIELS MORAGA,

10 Petitioner,

11 -vs-

12 THE STATE OF NEVADA,

13 \_\_\_\_\_,

14 Respondent.

15

MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

36-96  
9:00AM

16 COMES NOW the Petitioner, in propria persona, pursuant  
17 to N.R.S. §12.015, and respectfully moves this Honorable Court for  
18 an Order granting Petitioner leave to proceed in the above-entitled  
19 action in forma pauperis, without requiring Petitioner to pay or  
20 provide security for the payment of costs of prosecuting this  
21 action.

22 This motion is made and based upon the attached affidavit  
23 and certificate.

24 DATED this 12th day of February, 19 96.

25 RECEIVED

Respectfully submitted,

FEB 20 1996

Roy D. Moraga

COUNTY CLERK

26  
27  
28

CE11



Case No. C92174  
Dept. No. 10

FILED  
FEB 20 12 04 PM '96  
*Ante L...*  
CLERK

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

ROY DANIELS MORAGA,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

PETITION FOR WRIT  
OF HABEAS CORPUS  
(POST-CONVICTION)

3-6-96  
9:00AM

INSTRUCTIONS:

(1) This petition must be legibly handwritten or type-written, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence.

1 Failure to raise all grounds in this petition may preclude you  
2 from filing future petitions challenging your conviction and  
sentence.

3 (6) You must allege specific facts supporting the claims  
4 in the petition you file seeking relief from any conviction or  
5 sentence. Failure to allege specific facts rather than just  
6 conclusions may cause your petition to be dismissed. If your  
petition contains a claim of ineffective assistance of counsel,  
that claim will operate to waive the attorney-client privilege  
for the proceeding in which you claim your counsel was  
ineffective.

7  
8 (7) If your petition challenges the validity of your  
9 conviction or sentence, the original and one copy must be filed  
10 with the clerk of the district court for the county in which  
the conviction occurred. Petitions raising any other claims  
must be filed with the clerk of the district court for the  
county in which you are incarcerated. One copy must be mailed  
to the respondent, one copy to the attorney general's office,  
and one copy to the district attorney of the county in which  
you were convicted or to the original prosecutor if you are  
challenging your original conviction or sentence. Copies must  
conform in all particulars to the original submitted for  
filing.

#### 14 PETITION

15 1. Name of institution and county in which you are  
16 presently imprisoned or where and how you are presently  
17 restrained of your liberty:

18 ELY STATE PRISON - ELY NEVADA

19 2. Name and location of court which entered the judgment  
20 of conviction under attack: District Court, CLARK  
21 County, Las Vegas, Nevada

22 3. Date of judgment of conviction: JUNE 13<sup>TH</sup> 1990

23 4. Case number: C92174

24 5. (a) Length of sentence: 10yrs, CS, 10yrs, CS, LWes, LWO.

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

27 6. Are you presently serving a sentence for a conviction  
28 other than the conviction under attack in this motion:

1 Yes \_\_\_\_\_ No X . If "yes," list crime, case number and  
2 sentence being served at this time: N/A

3 \_\_\_\_\_  
4 \_\_\_\_\_  
5 7. Nature of offense involved in conviction being  
6 challenged: Burglary, Two (2) counts, Sexual  
7 Assault, Two (2) counts

8 8. What was your plea? (check one)

9 (a) Not guilty X

10 (b) Guilty \_\_\_\_\_

11 (c) Nolo contendere \_\_\_\_\_

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

16 \_\_\_\_\_  
17 \_\_\_\_\_  
18 10. If you were found guilty after a plea of not guilty,  
19 was the finding made by: (check one)

20 (a) Jury X

21 (b) Judge without a jury: \_\_\_\_\_

22 11. Did you testify at the trial? Yes X No \_\_\_\_\_

23 12. Did you appeal from the judgment of conviction?

24 Yes X No \_\_\_\_\_

25 13. If you did appeal, answer the following:

26 (a) Name of court: Supreme Court, Nevada.

27 (b) Case number or citation: 21488

1 (c) Result: Remand back for resentencing  
2 (d) Date of Result: August 27, 1991 (See page 4 A.B.C)  
3 (Attach copy of order or decision, if available).  
4 14. If you did not appeal, explain briefly why you did  
5 not: N/A  
6  
7 15. Other than a direct appeal from the judgment of  
8 conviction and sentence, have you previously filed any  
9 petitions, applications or motions with respect to this  
10 judgment in any court, state or federal? Yes \_\_\_\_\_ No X \_\_\_\_\_.  
11 16. If your answer to No. 15 was "yes," give the  
12 following information:  
13 (a) (1) Name of Court: Supreme court of Nevada  
14 (2) Nature of proceeding: Petitioner has  
15 second appeal pending of district courts conviction  
16 of habitual Criminal statute, (Case no. 22901)  
17 (3) Grounds raised: State failed to produce  
18 Three (3) vailed prior felony convictions. /  
19 Denied some time in December 1995  
20 (4) Did you receive an evidentiary hearing on  
21 your petition, application or motion? Yes \_\_\_\_\_ No XX \_\_\_\_\_.  
22 (5) Result: N/A  
23 (6) Date of Result: N/A  
24 (7) If known, citations of any written opinion or  
25 date of orders entered pursuant to each result: N/A  
26  
27  
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

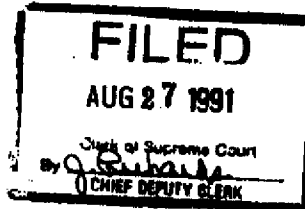
Appellant,

VS.

THE STATE OF NEVADA,

Respondent.

No. 21488



ORDER OF REMAND

This is an appeal from a judgment of conviction pursuant to a jury verdict of two counts of burglary and two counts of sexual assault in violation of NRS 200.364, 200.366 and 205.060. The district court adjudicated appellant a habitual criminal and sentenced him to a single term of life imprisonment in the Nevada State Prison without the possibility of parole.

Appellant's sole contention on appeal is that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

In particular, we note that the victim's daughter testified that on December 5, 1989, she discovered that her watch, apartment key, and some other items were missing. She had heard a noise the night before. The same day, appellant gave the daughter's watch to his ex-girlfriend as a present. A key to the apartment was found among appellant's belongings. Although the victim had locked the door to the apartment, later that day the victim saw appellant standing in her bedroom hallway. He then raped her twice. Appellant's fingerprints were found on a can of hairspray in the bathroom. Neither the victim nor her daughter had given appellant permission to enter

the apartment. This evidence supports the conclusion that appellant twice entered the apartment, once with intent to commit larceny, once with intent to commit the felony of sexual assault.


In addition, we note that the victim testified that when she woke up and saw appellant in her bedroom hallway, she screamed out the bathroom window for help. Appellant grabbed her mouth and threw her on the bed. Following a struggle, appellant inserted his penis into her vagina against her will. After she showered, he again threw her on the bed and inserted his penis into her vagina against her will. Medical evidence revealed the presence of semen and sperm in her vagina. The victim immediately called for help. Appellant bragged about his deeds to a worker at the apartment complex as he left. This evidence supports the conclusion that appellant twice subjected the victim to sexual penetration against her will.

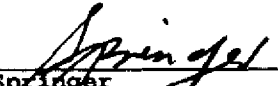
The jury could reasonably infer from the evidence presented that appellant committed two counts of burglary and two counts of sexual assault. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

Finally, we note that appellant's sentence is erroneous. Appellant was convicted of four separate offenses (in addition to which he was adjudicated a habitual criminal), yet he received a single sentence. Although the district court has discretion to dismiss a count of habitual criminality, see NRS 207.010(4), the district court does not have discretion to impose but one sentence for multiple primary offenses. Cf. Barrett v. State, 105 Nev. 361, 775 P.2d 1276 (1989). Our criminal laws anticipate that, for each offense of which a


defendant is convicted, there should be a corresponding sentence. Accordingly, we remand this case to the district court for resentencing of appellant.

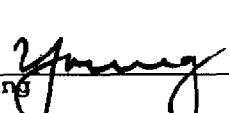
It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Mowbray

  
\_\_\_\_\_, J.  
Springer

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Steffen

  
\_\_\_\_\_, J.  
Young

cc: Hon. Michael J. Wendell, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Rex Bell, District Attorney  
Morgan D. Harris, Public Defender  
Loretta Bowman, Clerk

1 (b) As to any second petition, application or motion,  
2 give the same information:

3 (1) Name of Court: N/A

4 (2) Nature of proceeding: N/A

5 (3) Grounds raised: N/A

6 (4) Did you receive an evidentiary hearing on  
7 your petition, application or motion? Yes ~~YES~~ No N/A

8 (5) Result: N/A

9 (6) Date of Result: N/A

10 (7) If known, citations or any written opinion or  
11 date of orders entered pursuant to each result: N/A

12  
13 (c) As to any third or subsequent additional  
14 applications or motions, give the same information as above,  
15 list them on a separate sheet and attach.

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

19 (1) First petition, application or motion?

20 Yes N/A No N/A

21 Citation or date of decision: N/A

22 (2) Second petition, application or motion?

23 Yes \_\_\_\_\_ No N/A

24 Citation or date of decision: N/A

25 (3) Third or subsequent petitions, applications  
26 or motions? Yes \_\_\_\_\_ No N/A

27 Citation or date of decision: N/A



1 e. If you did not appeal from the adverse action on  
2 any petition, application or motion, explain briefly why you  
3 did not. (You must relate specific facts in response to this  
4 question. Your response may be included on paper which is  
5 8 1/2 x 11 inches attached to the petition. Your response may  
6 not exceed five handwritten or typewritten pages in length.)

7 N/A

8  
9 17. Has any ground being raised in this petition been  
10 previously presented to this or any other court by way of  
11 petition for habeas corpus, motion or application or any other  
12 post-conviction proceeding? If so, identify: identify:

13 a. Which of the grounds is the same: \_\_\_\_\_

14 N/A

15 b. The proceedings in which these grounds were raised:

16 N/A

17 c. Briefly explain why you are again raising these  
18 grounds. (You must relate specific facts in response to this  
19 question. Your response may be included on paper which is  
20 8 1/2 x 11 inches attached to the petition. Your response may  
21 not exceed five handwritten or typewritten pages in length.)

22 N/A

23 18. If any of the grounds listed in Nos. 23(a), (b), (c)  
24 and (d), or listed on any additional pages you have attached,  
25 were not previously presented in any other court, state or  
26 federal, list briefly what grounds were not so presented, and  
27 give your reasons for not presenting them. (You must relate

1 specific facts in response to this question. Your response may  
2 be included on paper which is 8 1/2 by 11 inches attached to  
3 the petition. Your response may not exceed five handwritten or  
4 typewritten pages in length.)

5 See page -(7A)

6 19. Are you filing this petition more than 1 year  
7 following the filing of the judgment of conviction or the  
8 filing of a decision on direct appeal? If so, state briefly  
9 the reasons for the delay. (You must relate specific facts in  
10 response to this question. Your response may be included on  
11 paper which is 8 1/2 x 11 inches attached to the petition.  
12 Your response may not exceed five handwritten or typewritten  
13 pages in length.)

14 At this time petitioner is waiting on direct appeal decision.

15 20. Do you have any petition or appeal now pending in any  
16 court, either state or federal, as to the judgment under  
17 attack? Yes ~~X~~ No ✓.

18 If yes, state what court and the case number: The  
19 Nevada Supreme Court; case no. 22901/decided Dec. 1995

20 21. Give the name of each attorney who represented you in  
21 the proceeding resulting in your conviction and on direct  
22 appeal: Roger Hillman, P.D., Mack B. Bailus

23  
24 22. Do you have any future sentences to serve after you  
25 complete the sentence imposed by the judgment under attack?

26 Yes \_\_\_\_\_ No X. If yes, specify where and  
27 when it is to be served, if you know: N/A

1           Question no. 18; (Questions in number  
2           23.) Grounds in number 23 page 8 were  
3           not previously presented to any court because  
4           petitioner relied on his public defender, Roger  
5           Hillman, to use his professional judgment, in  
6           that he would bring all potentially meritorious  
7           issues before the court. Petitioner at the  
8           time of arrest, trial and appeal had only an  
9           eighth grade education and with being a layman,  
10          petitioners ignorance of law, could not have  
11          challenged these issues at the time he was  
12          relying on Roger Hillman P.D. to be effective  
13          in his assistance to petitioner.

14          When petitioner became aware that his  
15          counsel had failed to bring these meritorious  
16          issues before the court, petitioner was advised  
17          that he had to wait until the filing of all  
18          decisions on direct appeal was complete.

(7A)

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

5           (a) Ground one: Violation of U.S. Const. Amend.,  
6 Illegal detainment and Violation of due Process.

7 Supporting FACTS (Tell your story briefly without citing cases  
8 or law): After arrest, petitioner was held (210) Two hundred  
9 and ten hours before being brought before a magistrate. cont-8A

10           (b) Ground two: Illegally adjudicated habitual  
11 criminal. (Cont. page(8D)).

12 Supporting FACTS (Tell your story briefly without citing cases  
13 or law): State failed to produce (3) Three unaided prior  
14 felony Convictions.

15           (c) Ground three: Ineffective assistance  
16 of counsel.

17 Supporting FACTS (Tell your story briefly without citing cases  
18 or law): Petitioner's counsel, Roger Hillman, P.D.  
19 failed to bring motion to suppress illegally obtained evidence.  
20 Cont-(8E)

21           (d) Ground four: \_\_\_\_\_

22 Supporting FACTS (Tell your story briefly without citing cases  
23 or law): \_\_\_\_\_

24  
25           WHEREFORE, Petitioner prays that the court grant  
26 petitioner relief to which he may be entitled in this  
27 proceeding.

## Supporting Facts

Supporting facts; Question 23(A). Ground One: Violation of the fourth and fourteenth Amendment of U.S. Constitution; Illegal detainment and Violation of Due Process.

Petitioner was arrested on December 5, 1989 and was unnecessarily and Illegally detained for two hundred and ten hours (210) without being brought personally before a magistrate or a Judge, or provided the use of closed circuit television to facilitate communication between the court and defendant. (see declaration of arrest, Exhibit 'A' page 8(B)).

Petitioner was illegally detained beyond any necessary delay for the purpose of investigating illegally obtained evidence taken from Petitioner's pockets prior to his arrest, and to accumulate more charges. This was prejudicial as petitioner could not challenge the probable cause arrest.

Not until December 14, 1989 was petitioner brought in person before a Judge at petitioners Initial Arraignment, without a probable cause hearing in my presence, without unnecessary delay as required by law. (see petitioners Justice Court minutes, Exhibit 'B' page 8(C)).

(8A)

DATE OF ARREST 12-05-89 TIME OF ARREST: 1445

I.D. ESTAB. BY:       

INMATE NAME (AKA ALIAS, ETC.) <u>MORAGA, ROY D</u>						ADDRESS: <u>1100 DUMONT # 212</u>					
TRUE NAME <u>MORAGA, ROY D</u>						CITY STATE ZIP <u>LV NV</u>					
DATE OF BIRTH <u>10-27-52</u>	RACE <u>CUB</u>	SEX <u>M</u>	HAIR <u>BLK</u>	EYES <u>BRN</u>	HEIGHT <u>511</u>	WEIGHT <u>147</u>	PLACE OF BIRTH <u>MESA AZ</u>	SOCIAL SECURITY NUMBER <u>52796-8289</u>			
LOCATION OF CRIME (No., Street, City, State, Zip) <u>1050 DUMONT #227 LV NV</u>						<input checked="" type="checkbox"/> OC <input type="checkbox"/> LV LOCATION OF ARREST <u>920 SERRA VISTA LV NV</u>					
CITIZENS ARREST YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>											
BKG. CODE	CHARGE ORD/NRS NO.					M GM F	ARR TYPE*	DR NUMBER	WARR/NCIC NUMBER	COURT LV JC DC	
5023	SEXUAL ASSAULT (2 CTS)					<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	PC	10,000 EACT		<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	
	NRS 200.386					<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>				<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
5628	HOME INVASION NRS 205.067					<input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	PC	3,000		<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/>	
						<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>				<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	
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						<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>				<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	

\*ARREST TYPE: PC - PROBABLE CAUSE BS - BONDSMAN SURRENDER BW - BENCH WARRANT WA - WARRANT RM - REMAND

<u>B. NAVACK</u> OFFICER'S NAME (ARRESTING) <u>U8SC</u> AGENCY: <u>LUMPD</u>	<u>2102</u> OFFICER'S NAME (TRANSPORTING) <u>B. NAVACK</u> AGENCY: <u>LUMPD</u>	<u>2103</u> OFFICER'S NAME (TRANSPORTING) <u>B. NAVACK</u> AGENCY: <u>LUMPD</u>
PROPERTY # <u>      </u> TANK # <u>      </u>		RELATIONSHIP: <u>      </u>

EXHIBIT 'A'

(86)

# Justice Court, Las Vegas Township

CASE NO. 7220X-89F

STATE VS. MORAGA, ROY D.

CHARGE BURGLARY & SEXUAL ASSAULT

BAIL IN CUSTODY

DATE, JUDGE  
OFFICERS OF  
COURT PRESENT

APPEARANCES — HEARING

CONTINUED TO

12-14-89 D. AHLSTROM V. MONROE, DA C. JORGENSEN, PD B. KULISH, CR M. MCCREARY, CLK	INITIAL ARRAIGNMENT Deft PRESENT in Court *IN CUSTODY* ADVISED/WAIVES PH set Court appoints PD to represent deft  DEFT REMANDED TO THE CUSTODY OF THE SHERIFF	12-26-89 9:00 #
12-26-89 M. ROBINSON FOR#3 D. LIPPIS, DA R. HILLMAN, PD T. FERRIOLA, CR M. SHANKLE, CLK	TIME SET FOR PRELIMINARY HEARING DEFT PRESENT In Court *IN CUSTODY* States witnesses : Penny Hawk John S. Fox  State rests Deft held to answer to said charge Bound over to District Court as charged. DEFT REMANDED TO THE CUSTODY OF THE SHERIFF	1-11-90 9:00 # District Court

2

## Supporting Facts

Supporting facts; Question 23(b) Ground Two: Illegally adjudicated habitual criminal.

Petitioner claims that the state failed to prove beyond a reasonable doubt that the petitioners sentence should be enhanced pursuant to state law. Petitioner states that not all of the certified copies of the convictions submitted to district court were those of petitioner. The certified copies of convictions submitted to the court, when compared, contain numerous inconsistencies and contradictions which makes it apparent that they do not pertain to the same individual.

Petitioner also states that it is clear that trial Judge who sentenced Petitioner, Judge Wendell, on 6-13-90 did not intend Petitioner's sentence's to run consecutive. When defendant was remanded from Supreme court for re-sentencing in Judge Lehman's court, and petitioner's motion to transfer back to dept. 8, and for withdrawal of Roger Hillman P.D., were denied that the court errored in re-sentencing petitioner to, Two consecutive (10) Ten year sentences and one consecutive, life with the possibility of parole to run consecutive with original sentence of Life without the possibility of parole.



## Supporting Facts

Supporting facts, Question 23(c); Ground Three;

Ineffective assistance of counsel

Petitioner now states, being his first opportunity to bring this ground before the court, as petitioners state appointed counsel for petitioners trial and his appeal were the same person. And acting on counsels advice, that being, not to worry about anything, that he would get me out and handle everything, did not bring these issues before the court. One being of his ineffectiveness by appealing only one issue, that there was not enough evidence to convict. But counsel did not provide petitioner with effective assistance from the time the court appointed Roger Hillman RD. to the petitioner, thru trial and on appeal. Petitioner states that evidence taken from his person was taken prior to his arrest and without his consent and used against him at trial, namely a key said to belong to victim. Counsel would not motion court to suppress evidence nor would counsel question petitioners warrantless arrest, time in custody prior to first arraignment at petitioners request. Counsel also failed to investigate petitioners case and to question witnesses and at petitioners request to call his witnesses to trial. Petitioner states that when he took stand at his trial his counsel let the court be misled by questions the petitioner did not understand, (cont. 8F)

(8F)

at no time did petitioner intend that he claimed to have had sexual intercourse with alledged victim, Penny Hawk by "inserting his penis in her Vagina." At time of trial this question was not defined to petitioner as it was to victim.

At time of trial petitioner had only an eighth grade education and sexual intercourse has a different meaning to many people. In fact when Penny Hawk was questioned as to the same question, the court made her meaning clear to Jury and court. Petitioner took the stand at Counsel's request and counsel should have made these Questions clear:

At FF 235-236 of trial transcripts when petitioner was ask "if he would have "sex" with a woman with out "her" consent" and he Answered "Sure I would", is further evidence that counsel had knowledge of Petitioners meaning of "sex". There is no doubt that these answers misled Jury to find Petitioner guilty.

Petitioner will further proceed to petition court to proceed with D.N.A. Testing to prove he never "inserted his penis in PENNY HAWK's Vagina" as court was made to believe.

Lastly, Petitioner adds Exhibit 'D' (page 86) as to the foundation of these charges, as dledged victim is a severe alcoholic and repeated child beater as this was with-held from jury, as Mr. Hillman seems to have assisted the State in getting a conviction, and this has been the case in his effectiveness to petitioner throughout these proceedings.

(8F)

1 the witnesses, so I don't think I need to go into  
2 that too much.

3 Ms. Lippis has stood up and talked about  
4 the victim and the affect this has had on her.  
5 There is some information about the victim that  
6 didn't come out in trial that is in the possession  
7 of both of us that would show that she is, and in  
8 saying this, I don't want to say that she deserves  
9 anything that ever happened to her, but it's  
10 interesting to note that since the trial, the victim  
11 and her daughter no longer live together. The  
12 victim has battered her daughter again. As a matter  
13 of fact, she was in justice court yesterday in front  
14 of Judge Ahlstrom.

15 Apparently, the victim has quite a severe  
16 alcohol problem and has had it for quite a period of  
17 time. The only reason I bring that up this time,  
18 the prosecution will try to portray a real rosie  
19 picture of the victim and their dilemma and that the  
20 dilemma may also result from other causes beside  
21 what the jury decided what the defendant is  
22 responsible for.

23 The Court heard the testimony of Mrs.  
24 Hawk. Court has heard many cases. It's my  
25 impression that although this is an act of violence,

EXHIBIT 'D'

14

(86)

1 EXECUTED at \_\_\_\_\_ on the \_\_\_\_\_ day  
2 of \_\_\_\_\_, 199\_\_.

3  
4 x Roy D. Moraga  
Signature of Petitioner

5 P.O. Box 1989  
6 Address

7 ELY, NEVADA 89301

8 N/A  
Signature of Attorney (if any)

9  
10 Attorney for Petitioner

11 Address

12  
13  
14 VERIFICATION

15 Under penalty of perjury, the undersigned declares that he  
16 is the petitioner named in the foregoing petition and knows the  
17 contents thereof; that the pleading is true of his own  
18 knowledge, except as to those matters stated on information and  
19 belief, and as to such matters he believes them to be true.

20 x Roy D. Moraga  
21 Signature of Petitioner

22 Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Roy Daniels Moraga, hereby certify pursuant  
to N.R.C.P. 5(b), that on the 12th day of February,  
1996, I mailed a true and correct copy of the foregoing  
PETITION FOR WRIT OF HABEAS CORPUS addressed to:

LORETTA BOWMAN, Court Clerk, CLARK Co.  
Respondent ~~XXXXX~~ ~~XXXX~~ official

P.O. Box 551601  
200 South Third Street  
Address

Las Vegas, Nevada 89155-1601

Attorney General  
Heroes Memorial Building  
Capitol Complex  
Carson City, Nevada 89710

CLARK County District Attorney  
District Attorney of County of Conviction  
P.O. Box 552212  
200 South Third Street, Suite # 201  
Address

X Roy D. Moraga  
Signature of Petitioner

51

FILED  
FEB 20 12 07 PM '96  
*Luella L.*  
CLERK

1 Roy Daniels Moraga, #  
2 Post Office Box 1989,  
3 Ely State Prison,  
4 Ely, Nevada, # 89301

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Petitioner, Pro Se,

IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR THE  
STATE OF NEVADA, COUNTY OF CLARK

\*\*\*\*\*

ROY DANIELS MORAGA,	)	CASE NUMBER: C92174
	)	
Petitioner,	)	DEPT. NUMBER: _____.
	)	
Vs,	)	DOCKET NUMBER: _____.
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	

3-6-96  
9:00 AM

SUPPLEMENTAL BRIEF AND POINTS AND AUTHORITIES IN  
SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Roy Daniels Moraga, Petitioner, Pro Se in the a-  
bove entitled cause of action, and hereby submits his Supplemental  
Brief And Points and Authorities filed in support of his previously  
filed Petition For Writ Of Habeas Corpus for the Court's review and  
consideration, and respectfully shows the following:

POINTS AND AUTHORITIES

I.

In relationship to item number 23, Ground A. of Petitioner's  
Original Petition For Writ Of Habeas Corpus, violation of the  
fourth and the Fourteenth Amendments to the united States Constit-  
ution; Illegal detainment and violation of Due Process.

1.) That on the 5th day of December, 1989, Petitioner, Roy

//////////

(1) 

RECEIVED  
FEB 20 1995  
COUNTY CLERK

1 Daniels Moraga was arrested by the Las Vegas Metrooolitan Police  
2 Department (LVMPD) at 14:45 hours. Petitioner was not brought be-  
3 fore a magistrate or a Judge empowered to commit persons charged  
4 with offenses against the laws of the State of Nevada until Dec-  
5 ember 14th, 1989, at 09:000 hours, 210 hours after his arrest.

6 2.) The Petitioner respectfully submits that the State Of  
7 Nevada violated it's own initial appearance Statute by failing to  
8 bring the Petitioner before a magistrate within 72 hours; See,  
9 NRS.171.178 (3), (EMPHASIS SUPPLIED).

10 3.) the Petitioner further points out to the court that  
11 NRS.178.388 (1) additionally mandates that a Defendant must be  
12 present except as provided in NRS.178.388 (4) wherein the Court  
13 has provided for use of a Closed Circuit Television to facilitate  
14 communication between the Court and the Defesdant during such pro-  
15 ceedings. (EMPHASIS SUPPLIED).

16 4.) The Petitioner points out however, that on May 13, 1991  
17 the United States Supreme Court tendered a ruling as to Pre-Trial  
18 Detainment, mandating that " persons arrested SHALL be brought be-  
19 fore a magistrate or a judge within 48 hours . Not excluding Non-  
20 Judicial hours, weekends, or holidays"; See RIVERSIDE COUNTY VS.  
21 McLAUGHLIN, 111 S.Ct. 1661, ( 1991), (EMPHASIS SUPPLIED).

22 5.) The Petitioner further submits that in September, 1992,  
23 the Nevada Supreme Court refused to impliment or adopt the rule  
24 of law cited in RIVERSIDE, supra, 111 S.Ct. 1661, as so stated in  
25 the case of POWELL VS, NEVADA, 838 P.2d 921, (1992);

26 6.) Petitioner respectfully points out however, that on the  
27 30th day of March, 1994, the United States Supreme Court made their

28 //////////////

1 ruling clear to the State Of Nevada in their Decision and Ruling in  
2 the case of POWELL VS NEVADA, 114 S.Ct. 1280, (1994), wherein the  
3 Court specifically made it clear that in the rule of conduct of  
4 criminal prosecutions is to be applied retroactively to ALL cases,  
5 State and Federal, not yet finally adjudicated when the rule is  
6 announced; See, GRIFFITH VS, KENTUCKY, 479 U.S. 314, 328.

7       7.) Petitioner respectfully submits and argues that he was  
8 improperly and illegally detained beyond the maximum 48 hours per-  
9 mitted for the purpose of investigation and to accumulate other  
10 charges, See, WILLIS VS, CITY OF CHICAGO, 999 F.2d 284, (1993),  
11 where the Court ruled that where detention of a suspect pursuant  
12 to police department policy for 45 hours without a judicial determ-  
13 ination of probable cause for the purpose of allowing the police  
14 additional time to investigate other crimes the suspect may have  
15 committed violated his rights under the Fourth Amendment even  
16 though the status of the investigation of other offenses was relev-  
17 ant to bail determination on offenses for which the suspect had  
18 been arrested; delay was not administrative or procedural in nature,  
19 and the suspect had in fact been processed in time for earlier  
20 probable cause determination. (U.S.C.A. Const. Amend. 4).

21       8.) Petitioner further submits that in HALLSTORM VS, GARDEN  
22 CITY, 991 F.2d 1473, (9th Cir. 1993) states that arresting officers  
23 determination of probable cause, justifies "only a brief period of  
24 detention to take the administrative steps incident to arrest".  
25 also, In GERSTEIN, 420 U.S. 114, the Court attached special sign-  
26 ificance to the shifting calculus of interests from the State to  
27 the individuals "in custody", especially one in custody for a pro-  
28 //////////////



1 longed period of time. furthermore, the Court emphasized the "high  
2 stakes" involved for individuals' liberty interests and undertook  
3 to ensure "meaningful" fourth amendment protection. Wherefore, it  
4 is the Petitioner's contention that the State Of Nevada failed to  
5 safeguard his constitutional right to due process.

6 II.

7 In relationship to item 23, Ground B. of the Original Pet-  
8 ition For Writ Of Habeas Corpus, Petitioner submits that he was  
9 illegally adjudicated a Habitual Criminal in that the State failed  
10 to produce proof that Petitioner had 3 valid prior felony convic-  
11 tions pursuant to NRS.207.010, and Petitioner was sentenced to Life  
12 Without The Possibility Of Parole.

13 9.) Petitioner subits and argues that the State Of Nevada  
14 failed to prove beyond a reasonable doubt that Petitioner's sent-  
15 ence should be enhanced pursuant to the Habitual Criminal Statute,  
16 NRS.207.010; Petitioner additionally submits that in prosecuting  
17 a Defendant as a Habitual Criminal under NRS.207.010, the State  
18 MUST prove prior convictions beyond a reasonable doubt, and the  
19 failure to rebutt the presumption created in NRS,207.010 (8) is  
20 not considered, See, HOLLANDER VS, STATE, 82 Nev. 345, 418 P.2d  
21 802, (1966), cited, HOWARD VS, STATE, 84 Nev. 53 at 56, 422 P.2d  
22 548, (1967), ATTEBERRY VS, STATE, 438 P.2d 789, (1968), and CARR  
23 VS, STATE, 96 Nev. 936 at 939, 620 P.2d 869, (1980).

24 10.) Petitioner submits that there was insufficient proof of  
25 Habitual Criminality as mandated under NRS.207.010, specifically,  
26 the State failed to prove "beyond a reasonable doubt" that the  
27 identity of the person named in the certified copies of the Judg-

28 //////////////

1 ments of Convictions presented to the Court was the same person as  
2 the Petitioner.

3 11.) Petitioner submits that close scrutiny of the certified  
4 copies of the Judgments Of Convictions reveal that they contain  
5 discrepancies and contradictions which indicate that they may or  
6 may not pertain to the Petitioner. In one instance the person is  
7 charged by the name of Roy D. Moraga, however, in the 1977 & 1988  
8 convictions the person named therein was charged Roy DanielsMoraga  
9 and, in the 1983 conviction, the person named was charged by the  
10 name of Roy Daniel Moraga; further, a reading of the documents per-  
11 taining to the 1983 conviction reveals that in the portion of the  
12 these documents addressing whether the Defendant had been previous-  
13 ly convicted of any felonies indicates "~~NONE~~", thus, the Defendant  
14 named in the 1983 conviction, Roy Daniel Moraga, had not been pre-  
15 viously convicted of a felony.

16 III.

17 In relationship to item 23, Ground C. of the Original Pet-  
18 ition For Writ Of Habeas Corpus, Ineffective Assistance Of Counsel.

19 12.) Petitioner respectfully submits that he was appointed  
20 counsel, such counsel being Mr. Roger Hillman of the Clark County  
21 Public Defender's Office; Petitioner and Mr. Hillman had many  
22 disagreements as to how Mr. hillman was handling Petitioners case.  
23 Petitioner submits and states that Counsels' representation did  
24 not effectively assist him in his defense, and denied him of his  
25 Sixth Amendment right to effective assistance of Counsel.

26 13.) Petitioner submits and argues that Counsel failed to  
27 raise any objection to the States' conduct when the State violated

28 //////////////

1 it's own initial appearance statute, NRS.171.178 when Petitioner  
2 was not brought before a magistrate within 72 hours. Counsel also  
3 would not investigate Petitioner's case and would not question  
4 witnesses on Petitioner's behalf.

5 14.) Petitioner filed a Motion To Dismiss Counsel on March  
6 12th, 1990, and this Motion was denied by the court. counsel did  
7 not adequately cross examine State witnesses and allowed Petitioner  
8 to be misled in essential questions which had substancial and in-  
9 jurous effect and influence in determining the jury's verdict,  
10 See, O'NEAL VS McANICH, 115 S.Ct. 992, (1995). Counsel's actions  
11 for the Petitioner in this case compared to those condemned in the  
12 case of FRAZER VS, UNITED STATES, 18 F.3d 778, (9th Cir. 1994).  
13 Petitioner's right to counsel guaranteed by the Sixth amendment to  
14 the U.S. Constitution means more than just the opportunity to be  
15 physically present and/or accompanied by a person privileged to  
16 practice law, but, rather, assistance to which Defendant is entit-  
17 led must be effective and unhindered by State or by counsel's con-  
18 stitutionally deficient performance. U.S.C.A. Const. Amend. 6.

19 15.) Petitioner further submits that Mr. Hillman told him  
20 that he was going to prison regardless if he was innocent or not;  
21 in FRAZER, the court stated that a Defense Attorney who abandons  
22 his duty of loyalty to his client and effectively joins the State  
23 in an effort to obtain a conviction suffers from an obvious con-  
24 flict of interest, in that the interests of the State and the De-  
25 endant are necessarily in opposition.

26 16.) Ppetitioner further submits as demonstration of Mr.  
27 Hillmans' ineffective representation Petitioner claimed that evid-

28 //////////////

1   ence taken from his person was taken prior to his arrest counsel  
2   still refused to file a Motion To Supress this evidence as request-  
3   ed by the Petitioner. Petitioner points out that in the case of  
4   PEOPLE VS, POPE, Cal. 3d 412, 425, (1979) the Court Stated that if  
5   counsel failed to perform in a manner to be expected of reasonably  
6   competent attorney acting as a diligent advocate, and if his fail-  
7   ure deprived Defendant of a potentially meritorious defense, rev-  
8   ersal is required, See Cal. 634 P.2d 534, Petitioner also directs  
9   the Courts attention to, EVITTS VS, LUCEY, 105 S.Ct. 830, (1985),  
10   wherein the United States Supreme Court held that a criminal De-  
11   fendant is entitled to effective assistance of counsel on first ap-  
12   peal as a matter of right.

13           17.) Petitioner submits that even after Petitioner had made  
14   it known to the lower Court ~~that~~ there was in fact a conflict of  
15   interest between himself and Mr. Hillman and had attempted to have  
16   him removed by Motion the court still appointed Mr. Hillman to  
17   represent Petitioner on appeal, which was grossly improper,


18           Furthermore, Mr. Hillman appealed ONLY that there was'nt en-  
19   ough evidence to convict, an issue he had never before expressed  
20   in his defense for Petitioner. The Supreme Court of Nevada remanded  
21   Petitioner's case for resentencing, and Petitioner again moved the  
22   court for dismissal of Roger Hillman as his attorney and his Motion  
23   was denied. Petitioner was sentenced to 30 more years than he was  
24   sentenced to originally. Counsel relied entirely upon the District  
25   Attorney's evidence and police reports, and, in fact, let the State  
26   try the Defendant, petitioner herein, and provided no defense for  
27   petitioner whatsoever.

28   ////////

1 In Conclusion, Petitioner respectfully submits that in the  
2 case, POWELL VS ALABAMA, 278 U.S. 45, 69, the U.S. Supreme Court  
3 stated that even the intelligent and educated layman has small and  
4 sometimes no skill in the science of law, if charged with a crime  
5 he is incapable, generally, of determining for himself whether the  
6 indictment is good or bad, he requires the guiding hand of Counsel  
7 at every step of the proceedings against him. Moreover, the court  
8 has assigned a special value to this right: "of all the rights that  
9 an accused person has, the right to be represented by counsel is by  
10 far the most pervasive for it affects his ability to assert any  
11 other rights he may have". In other words, the assistance to which  
12 a defendant is entitled must be effective.

13 Dated this 12th day of February, 1995.

14 Respectfully Submitted,

15   
16 Roy Daniels Moraga, #  
17 Post Office Box 1989,  
18 Ely State Prison,  
19 Ely, Nevada, # 89301  
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DISTRICT COURT

CLARK COUNTY. NEVADA

FILED

\* \* \* \* \*

Mar 5 11 39 AM '96

THE STATE OF NEVADA,

Plaintiff,

-v-

Roy D. ZERADA,

Defendant.

*Laette L. Luman*  
CLERK

CASE NO. C92124

DEPT. NO. X

AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL  
OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS

HEARING DATE: 3-18-96

HEARING TIME: 9:00AM

STATE OF NEVADA )

) ss.

COUNTY OF WHITE PINE )

I, Roy D. ZERADA being first duly sworn and under penalty of perjury, pursuant to NRS 208.165, do hereby depose and say that:

1) I am the Defendant in the above entitled action.

2) On the 19th day of February, 1996, I mailed a letter of "Termination of Counsel/Transfer of Records" to Mr. MARK B. BAILUS.

3) I received no response from Mr. MARK B. BAILUS.

4) On the 29th day of February, 1996, I petitioned this Court for it's order for production of all documents pursuant to NRS 7.055.

DATED this 29th day of February, 1996.

CEP

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

THE STATE OF NEVADA,

Plaintiff,

-v-

Roy D. Moraga,

Defendant.

CASE NO. C92174

DEPT. NO. X

O R D E R

DATE OF HEARING: \_\_\_\_\_

TIME OF HEARING: \_\_\_\_\_

THIS MATTER having come on hearing before the above entitled Court on the \_\_\_\_\_, the Defendant not being present, presently incarcerated in Ely State Prison and not being represented by counsel. The Plaintiff being represented by \_\_\_\_\_, Deputy District Attorney and the Court having heard the arguments of counsel and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendant's Motion for the Withdrawal of Counsel and the Transfer of all Documents and records of the Petitioner is hereby granted.

IT IS FURTHER ORDERED that said withdrawn attorney, \_\_\_\_\_, shall send, at state expense, to Petitioner, at his place of confinement in Ely State Prison, all Pleadings, Papers, Documents and other tangible personal property in his possession FORTHWITH.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

54  
orig

1 ROY D. MORAGA  
2 DOP No. 31584  
3 ELY STATE PRISON  
4 P. O. Box 1989  
5 Ely, Nevada 89301  
6  
7 Defendant in Proper Person

FILED

MAR 5 11 38 AM '96

*Latita L. Luman*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

9 THE STATE OF NEVADA, )  
10 ) CASE NO. C 92174  
11 Plaintiff, ) DEPARTMENT NO. X  
12 vs. )  
13 ROY MORAGA, )  
14 Defendant. )  
DATE/HEARING: 3 18.96  
TIME/HEARING: 9:00Am

MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

16 COMES NOW petitioner above-named, in his propria persona,  
17 pursuant to N.R.S. 12.015, and respectfully moves this Honorable  
18 Court for an Order granting Petitioner leave to proceed in the  
19 above-entitled action in forma pauperis, without requiring Petition  
20 to pay or provide security for the payment of costs of prosecuting  
21 this action.

22 This motion is made and based upon the attached affidavit and  
23 certificate.

24 DATED this 29th day of February, 1996.

Respectfully submitted,

*Roy D. Moraga* 31584  
ROY MORAGA, DOP #31584

FILED



DRIG

FILED

Mar 5 11 38 AM '96

*Janita L. Luman*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

THE STATE OF NEVADA,

Plaintiff,

-v-

Roy D. MORAGA,

Defendant.

CASE NO. C92174

DEPT. NO. X

NOTICE OF MOTION

MOTION FOR WITHDRAWAL OF ATTORNEY  
OF RECORD AND TRANSFER OF RECORDS

HEARING DATE: 3.18.96

HEARING TIME: 9:00AM

PLEASE TAKE NOTICE, that, COMES NOW, Petitioner,  
Roy D. MORAGA, in Propria Persona, and Respectfully  
requests this Honorable Court for an Order to withdraw

MARK B. BAILUS, of Cherry, Bailus and Kelesis

as the Attorney of Record in the above entitled action,  
and for the transfer of Petitioner's Documents, Pleadings, Papers  
and tangible personal property in possession of respondent,  
MARK B. BAILUS, to be sent, at State expense, to Petitioner  
at his place of confinement in Ely State Prison.

This Motion is made and based upon Eighth Judicial District  
Court Rules, Rule 7.40 (b)(2)(ii), Nevada Revised Statute 7.055,  
and supported by the following Points and Authorities, attached  
Letter of Termination and Petitioner's Affidavit.

POINTS AND AUTHORITIES

Petitioner Roy D. MORAGA in Propria Persona, in support

1 of his Motion for Withdrawal of Attorney of Record and Transfer  
2 of Records, offers the following:

3 The Judicial District Court Rules, Rule  
4 7.40 (b)(2)(ii), which deals with Withdrawal of Change of  
5 Attorney, states:

6 "(b) Counsel in any case may be changed only;

7 (2) When no attorney has been retained to  
8 replace the attorney withdrawing, by order  
9 of the court, granted upon written motion  
10 therefor, and;

11 (ii) If the application is made by the client,  
12 he must state in the application the address  
13 at which he may be served with notice of all  
14 further proceedings in the case in the event  
15 the application is granted, and must serve  
16 a copy of the application upon his attorney  
17 and all other parties to the action, and  
18 their attorneys."

19 Therefore, as clearly seen by the Fifth Judicial District  
20 Court Rules, the Defendant can file to have his attorney of  
21 record withdrawn and proceed in Propria Persona.

22 The Nevada Revised Statute (hereinafter NRS) 7.055(1), which  
23 deals with the duty of a discharged attorney, states:

24 "An attorney who has been discharged by his  
25 client shall, upon demand and payment of the  
26 fee due from the client, immediately deliver  
27 to the client all papers, documents,  
28 pleadings and items of tangible personal  
property which belong to or were prepared  
for that client."

29 As can be seen in this case, the Petitioner does not owe any  
30 fees to the Respondent, MARK B. BAILUS, in fact  
31 MARK B. BAILUS was appointed by the Court,  
32 to represent the Petitioner, who is indigent, in  
33 the case at bar, that being Case No. C92174, Dept. No. X.

34 NRS 7.055(2) gives the Court the power to Order the  
35 Respondent to produce and deliver to the Petitioner all the

1 documents and property belonging to the Petitioner in Respondents  
2 possession. It further states:

3 "A client who, after demand therefore and  
4 payment of the fee due from him, does not  
5 receive from his discharged attorney  
6 all papers, documents, pleadings and items  
7 of tangible personal property may, by a  
8 motion filed after at least 5 days' notice to  
9 the attorney, obtain an order for the produc-  
10 tion of his papers, documents, pleadings  
11 and other property."

12 In numerous cases, Courts have held attorneys to a high  
13 degree of professional responsibility and integrity. This is  
14 carried from the time of hiring to and through the attorney's  
15 termination of employment.

16 Supreme Court Rule 173 states clearly that a withdrawn  
17 attorney owes his former client a "- - - prompt accounting of all  
18 his client's - - - property in his possession."

19 This is echoed in Cannon 2 of the Code of Professional  
20 Responsibility of the American Bar Association which states in  
21 pertinent part (EC 2-32). "A lawyer should protect the welfare  
22 of his client by - - - delivering to his client all papers and  
23 property to which the client is entitled - - - " Again, in  
24 Disciplinary Rule 2-110(A)(2) of the ABA, it is brought out that  
25 a withdrawn attorney must deliver to the client all papers and  
26 comply with all applicable laws on the subject. The ABA Rules do  
27 apply by adoption under Supreme Court Rules, Rule 150.

28 In the cases of, In Re Yount, 93 Ariz. 322, 380 P.2d 780  
(1963), and State v. Alvey, 215 Kan. 460, 524 P.2d 747 (1974),  
both cases dealt with a factual situation involving a withdrawn  
attorney refusing to deliver to a former client his documents  
after being requested to do so by the client.

1 The Court in Yount supra, ordered the attorney disbarred,  
2 while in Alvev supra, the Court had the attorney censored.

3 While it is not the intention of the Petitioner to have the  
4 attorney sanctioned, these cases do show a pattern in the courts  
5 in considering the refusal to deliver to a former client all of  
6 his documents and property after being requested to do so, which  
7 amounts to a serious infraction of the law and of professional  
8 ethics. See: In Re Sullivan, 212 Kan. 233, 510 P.2d 1199 (1973).

9 In summary, this Court has the jurisdiction through NRS  
10 7.055 to ORDER the Respondent to produce and deliver unto the  
11 Petitioner all documents and personal property in his possession  
12 belonging to him or prepared for him. The Petitioner has  
13 fulfilled his obligations in trying to obtain the papers.

14 The Respondent is in disacord with Cannon 2 of the Code of  
15 Professional Responsibility and the Nevada Supreme Court Rule  
16 173, 176 and 203.

17 DATED this 29th day of February, 1996.

18  
19 Respectfully Submitted:

20 151 Roy D. Warraga

21 Derendant/Petitioner PRO Per  
22 Ely State Prison  
23 P.O. BOX 1989  
24 Ely, Nevada 89301  
25  
26  
27

FILED

Mar 11 9 09 AM '96

*Linda L. Simon*  
CLERK

1 Case No. C92174  
2 Dept. No. X

3  
4  
5

6 IN THE Eighth JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF CLARK

8

9 Roy D Moraga,  
10 Petitioner,

11

-vs-

12 The State of Nevada,

13

14 Respondent.

15

AFFIDAVIT IN SUPPORT  
OF MOTION TO PROCEED  
IN FORMA PAUPERIS

4-17-96  
9:00 a.m.

16 I, Roy D. Moraga, hereby declare and state  
17 that I am the Petitioner in the above entitled case; that in support  
18 of my Motion to proceed without being required to prepay fees, costs  
19 or give security therefor; I state that because of my poverty I am  
20 unable to pay the costs of said proceeding or to give security  
21 therefor; that I am entitled to relief.

22 I do \_\_\_ do not X request an attorney be appointed, to  
23 represent me.

24 I further swear that the responses which I have made to  
25 questions and instructions below are true.

26 1. Are you presently employed: Yes \_\_\_ No X

27 a. If the answer is Yes, state the amount of your salary  
28 or wages per month, and give the name and address of your employer:

REC-111  
COMM. CLERK

1 NOT APPLICABLE

2

3 b. If the answer is No, state the date of last employment  
4 and the amount of salary and wages per month which you received:

5 N/A

6 2. Have you received within the past twelve months any  
7 money from any of the following sources?

8 a. Business, profession or form of self-employment?

9 Yes      No X

10 b. Rent payments, interest or dividends?

11 Yes      No X

12 c. Pensions, annuities or life insurance payments?

13 Yes      No X

14 d. Gifts or inheritances?

15 Yes      No X

16 e. Any other sources?

17 Yes      No X

18 If the answer to any of the above is "Yes" describe each  
19 source of money and state the amount received from each during the  
20 past twelve months: NOT APPLICABLE

21

22

23 3. Do you own cash or equivalent prison currency, or do  
24 you have money in a checking or savings account?

25 Yes      No X

26 If the answer is "Yes", state the total value of the  
27 items owned: NOT APPLICABLE

28

1 4. Do you own any real estate, stocks, bonds, notes,  
2 automobiles, or other valuable property (excluding ordinary house-  
3 hold furnishings and clothing)? Yes \_\_\_\_\_ No X

4 If your answer is "Yes", describe the property and state  
5 its approximate value: NOT APPLICABLE

6  
7 5. List the persons who are dependent upon you for  
8 support, state your relationship to those persons, and indicate  
9 how much you contribute towards their support: \_\_\_\_\_

10 NONE

11  
12 UNDER THE PENALTY OF PERJURY, pursuant to N.R.S. §208.165,  
13 the above affidavit is true and correct to the best of affiants  
14 personal knowledge.

15 DATED this 3rd day of MARCH, 19 76.

16  
17 Roy D. Moraga  
18 Sign your name

19  
20 Roy D Moraga 31584  
21 Print your name DOP#

22

23

24

25

26

27

28

Roy D. Moraga  
P.O. Box 1989  
Ely, Nevada 89301

FILED

Mar 11 9 09 AM '96

*Shirley L. Luman*  
CLERK

District Court  
Clark County, Nevada

Roy D. Moraga  
Petitioner,  
vs  
The State of Nevada  
Respondant.

CASE NO: C92174  
Dept. NO: X  
Affidavit of Petitioner

4-17-96  
9:00 a.m.

I, Roy D. Moraga, do hereby Swear and depose under Penalty of Perjury that the Assertions of this Affidavit are true and correct to the best of my Knowledge and belief.

1) That I am an inmate incarcerated within the Nevada Department of Prisons and have been housed at the Ely State Prison since September 13th 1990.

2) That Affiant is over the age of (18) eighteen years of age and of sound mind competent to testify to the matters as stated herein.

3) Affiant moves this Honorable Court to Grant Petitioner this Motion For Returning Seized Property.

This Affidavit is made, Pursuant to N.R.S. 208.165 Without Notary Public.

RECEIVED

11

CC COUNTY CLERK

Roy D. Moraga  
Roy D. Moraga  
Petitioner

CE31



Certificate of Service By Mail

I, Roy Daniels Moraga, hereby certify pursuant to N.R.C.P. 5(b), that on the 3rd day of MARCH, 1996, I mailed a true and correct copy of the foregoing Motion For Returning Seized Property Addressed to:

Loretta Bowman, County Clerk  
P.O. Box 551601  
200 S. 3rd Street  
LAS Vegas NEVADA 89155-1601

Clark County District Attorney  
P.O. Box 552212  
200 S. 3rd Street, Suite #701  
LAS Vegas NEVADA

Roy D. Moraga  
Signature of Petitioner

1 Case No. C92174

2 Dept. No. X

FILED

MAR 11 9 09 AM '96

*State Clerk*

3  
4  
5  
6 IN THE Eighth JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 FOR THE COUNTY OF Clark

8  
9 Roy D. Moraga,

10 Petitioner,

11 -vs-

12 The State of Nevada,

13 \_\_\_\_\_,

14 Respondent.

MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

4-17-96  
9:00 a.m.

15  
16 COMES NOW the Petitioner, in propria persona, pursuant  
17 to N.R.S. §12.015, and respectfully moves this Honorable Court for  
18 an Order granting Petitioner leave to proceed in the above-entitled  
19 action in forma pauperis, without requiring Petitioner to pay or  
20 provide security for the payment of costs of prosecuting this  
21 action.

22 This motion is made and based upon the attached affidavit  
23 and certificate.

24 DATED this 3rd day of MARCH, 19 96.

25 RECEIVED

Respectfully submitted,

26 P. L. Long

Roy D. Moraga

27 COUNTY CLERK

28

CE11

65  
FILED

Roy D. Moraga  
P. O. Box 1989  
Ely, Nevada 89301

Mar 11 9 09 AM '96

*Just Luman*  
CLERK

In the Eighth Judicial District Court of Nevada  
In AND For Clark County

Roy D. Moraga  
Petitioner.  
vs  
State of Nevada  
Respondants.

Motion For Returning  
Seized Property  
CASE NO: C92174  
Dept. X

4-17-96

9:00 a.m.

Now Comes, Roy D. Moraga, Before this Honorable Court AND hereby moves this Court to direct that certain property of which he is owner, A schedule of which is Attached hereto, and which on Dec. 3, 1989 at the Las Vegas, County Jail, in Clark County, was taken from him during booking, AND unlawfully seized by Metro officers, whose true names are unknown to Petitioner, AND that Property be returned to him.

The Petitioner Further states that the property was seized against his will.

Dated this 3rd day of March  
1996

Roy D. Moraga  
Roy D. Moraga  
P.O. Box 1989  
Ely, Nevada  
89301

RECEIVED

11 11 96

COUNTY CLERK

CECL

The undersigned declares under the Penalty of Perjury that he is the Petitioner in the Aboved NAMED Action, that he has read the above Pleadings AND that the information Contained therein is true and Correct.

Dated this 3rd day of MARCH 1996.

Roy O. Moraga  
Roy O. MORAGA  
P.O. BOX 1989  
ELY, NEVADA 89301

## Property Taken

1. 1. Pair of Cowboy boots
2. 1. U.N.L.V. Sweatshirt
3. 1. T-Shirt
4. 1. Pair of Levis Pants
5. 1. Levis Jacket
6. 1. Pair of Socks
7. 1. Boxer Shorts

## Clerks of the Court

If the district clerk received Petitioner's Proper Person Motions AND Documents, Clerk has absolute duty to File Motion For leave to proceed in Forma Pauperis AND the clearly Stamp the date of receipt OF other documents ON them. Donoho vs Eighth - Judicial District Court, 842 P. 2d 731 (1992) (had a duty to Keep Accurate record OF Case pending before the District Court).

ORIGINAL

3

FILED

APR 1 1 22 PM '96

*Joetta Bowman*  
CLERK

OPPS  
STEWART L. BELL  
DISTRICT ATTORNEY  
Nevada Bar #000477  
200 S. Third Street  
Las Vegas, Nevada 89155  
(702) 455-4711  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

ROY MORAGA,  
#938554

Defendant.

Case No. C92174  
Dept. No. X  
Docket K

**STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL  
PRODUCTION OF SEMEN AND BLOOD, PETITION FOR WRIT  
OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO  
PROCEED IN FORMA PAUPERIS**

DATE OF HEARING: 4/17/96

TIME OF HEARING: 9:00 A. M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through VICKI J. MONROE, Deputy District Attorney, and files this Opposition to Defendant's Motion to Compel Production of Semen and Blood, Petition for Writ of Habeas Corpus (Post-Conviction) and Motion to Proceed in Forma Pauperis.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached

///

///

CE31

1 points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary  
2 by this Honorable Court.

3 DATED this 1st day of April, 1996.

4 Respectfully submitted,

5 STEWART L. BELL  
6 DISTRICT ATTORNEY  
7 Nevada Bar #000477

8 BY Vicki J. Monroe  
9 VICKI J. MONROE  
10 Deputy District Attorney  
11 Nevada Bar #00377

12 **POINTS AND AUTHORITIES**

13 **PROCEDURAL HISTORY**

14  
15  
16 Defendant was arrested for the December 5, 1989, sexual assault and rape of a woman in her  
17 home. Defendant plead not guilty and a jury trial was had wherein Defendant was found guilty of two  
18 (2) counts of Burglary and two (2) counts of Sexual Assault. Thereafter, on June 30, 1990, Defendant  
19 was sentenced to life in the Nevada State Prison without the possibility of parole after being adjudicated  
20 a habitual criminal. Defendant's direct appeal to the Nevada Supreme Court was denied on August 27,  
21 1991. However, the Court remanded Defendant's case to the District Court for resentencing. The  
22 Supreme Court concluded that the District Court had erroneously imposed one sentence for multiple  
23 offenses.

24 On October 21, 1991, Defendant was resentenced in Department X of the Eighth Judicial  
25 District, to ten (10) years for each of the Burglary counts, to run consecutive to each other and  
26 consecutive to a sentence of life imprisonment without the possibility of parole for Count III, Sexual  
27 Assault. Defendant was adjudicated a habitual criminal as to Count IV and sentenced to another  
28 consecutive term of life imprisonment without the possibility of parole. Defendant then appealed the



1 second sentencing, specifically contesting the validity of the judgments of conviction used to adjudicate  
2 him a habitual criminal. The Nevada Supreme Court denied the same on October 4, 1995. Defendant  
3 now files the instant Motion and Petition for Writ of Habeas Corpus (Post-Conviction).  
4

5  
6 **STATEMENT OF THE FACTS**  
7

8 On December 5, 1989, between the hours of 1:30 a.m. and 5:30 a.m., Defendant entered the  
9 victim's residence located at 1000 Dumont, Apartment 227, Las Vegas. As there were no signs of  
10 forced entry into the apartment, it is believed that the victim's 22 year-old daughter left the front door  
11 closed but unlocked. Once inside, Defendant took a woman's Seiko watch and approximately \$25 from  
12 a coffee table in the living room, an unknown amount of cash from the victim's bedroom dresser, and  
13 a key to the apartment which was laying on a table near the front door. Defendant then left the  
14 apartment. At approximately 7:30 a.m., the victim returned to find the items missing. Las Vegas  
15 Metropolitan Police were contacted and a report of the entry submitted. Significantly, the victim's 22  
16 year-old daughter was upstairs at the time of the incident.

17 At approximately noon of the same day, the victim (a 46 year-old female) was awakened by  
18 Defendant knocking at her front door. After informing Defendant that he had awakened her and asking  
19 him to leave, the victim returned to her room. Almost two hours later, the victim was awakened by a  
20 noise only to find Defendant outside her bedroom on the stairs. Defendant grabbed the victim and after  
21 a brief struggle, the victim was able to momentarily free herself. However, Defendant regained his  
22 hold and pushed the victim down the stairs. Thereafter Defendant raped the victim, instructed her to  
23 shower and raped her again. When Defendant exited the room, the victim contacted her daughter and  
24 requested her to contact the police.

25 At around 2:15 p.m., Las Vegas Metropolitan Police detained Defendant in the 900 block of  
26 Sierra Vista and after a positive identification by the victim, he was arrested and transported to the Clark  
27 County Detention Center.

28 ///

I

**THE TRIAL RECORD BELIES DEFENDANT'S  
NEED FOR POST-TRIAL FORENSIC TESTING**

Defendant requests this Court to compel DNA testing of semen and blood samples that were obtained from the victim some seven years ago. The impracticalities aside, Defendant took the stand at trial and offered a defense of "consent" to the charges of Sexual Assault. An excerpt from his offered testimony is as follows:

PROSECUTOR: Basically, Mr. Moraga, what you are saying to us is you are really confirming everything everybody already testified to. You are just saying that the sex that happened between you and Ms. Hawk was with her consent; is that right?

DEFENDANT: That's right. (3 ROA 550).

Apparent from Defendant's proffered defense is that any issue of identification that DNA testing might hope to resolve has been rendered moot by offering the defense of "consent" to the sexual assault. Moreover, Defendant has waived this issue by (1) not preserving it below, and (2) not raising the identification in his direct appeal. See Kimmel, *infra*. As such, this untimely request for unnecessary testing need only be denied by this Court.

II

**DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION PRESENTS ISSUES THAT SHOULD  
HAVE BEEN RAISED IN HIS DIRECT APPEAL AND AS SUCH,  
THEY ARE DEEMED WAIVED.**

Defendant, for the first time in his collateral attack, challenges the length of time he was incarcerated before he was brought before a magistrate. Specifically, after remaining silent on the issue in appealing from two judgments of conviction, Defendant now alleges that he was incarcerated some 210 hours before his initial arraignment and that no probable cause determination was made. Defendant's challenge is foreclosed for several reasons:

1. Defendant did not preserve this issue below or raise it in his direct appeal;

1           2. The Order Dismissing Appeal in Defendant's case concluded that there was sufficient  
2 evidence to uphold the conviction; and

3           3. Defendant only refers this Court to the time of his initial arraignment, but does not indicate  
4 when a probable cause determination was made.

5           First, the State submits that as Defendant has already had his appeal found meritless by the  
6 Supreme Court, any allegation herein that the a proper probable cause determination was not made, has  
7 been waived. NRS 34.810(1) provides in part:

8                     The court shall dismiss a petition if the court determines  
9 that:

10                    (b) The petitioner's conviction was the result of a trial  
and the grounds for the petition could have been:

11                         (1) Presented to the trial court;

12                         (2) Raised in a direct appeal or a prior  
13 petition for a writ of habeas corpus or  
post-conviction relief; or

14                         (3) Raised in any other proceeding that  
15 the petitioner has taken to secure relief  
16 from his conviction and sentence, unless  
the court finds both cause for the failure  
17 to present the grounds and actual  
prejudice to the petitioner.

18           NRS 34.810(3) imposes the burden upon the defendant of proving specific facts that  
19 demonstrate good cause for his failure to present such a claim in earlier proceedings and of showing  
20 actual prejudice to the defendant. Accordingly, the waiver of claims doctrine mandates the dismissal  
21 of Defendant's instant claim. Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State,  
22 99 Nev. 181, 659 P.2d 886 (1983). Defendant's Petition is barren as to why his allegations surrounding  
23 probable cause determination were not raised in either of his direct appeals.

24           The Nevada Supreme Court held in Phelps v. Director, 104 Nev. 565, 764 P.2d 1303 (1988), that  
25 the defendant has the burden of both pleading and proving his failure to present the claim and the State  
26 may then bring an affirmative defense of a waiver in its response to the Post-Conviction Relief. It is  
27 respectfully submitted that this Court can lawfully make a finding of waiver based upon the face of the  
28 petition alone. In Johnson v. Warden, 89 Nev. 476, 515 P.2d 63 (1973) the Nevada Supreme Court

1 stated:

2 . . . this court will consider as waived those issues raised  
3 in a post-conviction relief application which might  
4 properly have been raised on direct appeal, where no  
reasonable explanation is offered for petitioner's failure  
to present such issues.

5 In Scott v. Warden, 94 Nev. 726, 587 P.2d 36 (1978), the Supreme Court upheld a District  
6 Court's denial of Post-Conviction Relief on the grounds that the points raised in the petition, "were or  
7 could have been raised in the direct appeal and good cause has not been shown for the failure to do so".  
8 Id. at p. 727. Defendant's Petition is barren of legal authority or rationale as to good cause or prejudice.  
9 As such, the State submits that Defendant has waived his ability to raise any issue surrounding probable  
10 cause determination upon a warrantless arrest.

11 Next, as Defendant's conviction has been affirmed, any complaint about an illegal detention  
12 prior to a determination of probable cause, has been rendered moot. Gerstein v. Pugh, 420 U.S. 103,  
13 95 S.Ct. 854 (1975) (an illegal arrest or detention does not void a subsequent conviction)<sup>1</sup>. Once a  
14 criminal defendant has been convicted by a jury, his confinement is justified by the judgment of  
15 conviction and the Gerstein violation is moot. County of Riverside v. McLaughlin, 500 U.S. 44, 111  
16 S.Ct. 1661, 1667 (1991). Defendant bases his complaint partially on Powell v. Nevada, --- U.S. ---, 114  
17 S.Ct. 1280 (1994). Therein, the United States Supreme Court held that (1) when four days had elapsed  
18 between warrantless arrest and probable cause determination, that time lapse was presumptively  
19 unreasonable under County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661 (1991), as a  
20 violation of the Fourth Amendment prohibition against unreasonable seizures, and (2) while the remedy  
21 is not release, Powell v. Nevada, 114 S.Ct. at 1283, the proper remedy was to be decided on remand by  
22 the Nevada Supreme Court. Defendant however misconstrues Powell-Gerstein- McLaughlin, in that a  
23 challenge is only proper during the detention, and he is entitled to neither release nor his conviction  
24 vacated. As such, his collateral attack need only be denied on this issue.

25 Defendant was arrested on December 5, 1989, and his initial arraignment was on December 14,

26  
27 <sup>1</sup> In Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975), the United States Supreme Court held that the Fourth  
28 Amendment requires a prompt judicial determination of probable cause following an arrest made without a warrant and an  
ensuing detention. In County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661 (1991), the same Court determined  
that prompt generally means within 48 hours of the warrantless arrest.

1 1989. However, Powell v. Nevada, *supra*, discusses probable cause determination, not initial  
2 arraignment. Therefore, Defendant's allegation that he was incarcerated for some 210 hours before  
3 probable cause was determined to hold him, is belied by the record. Defendant can only direct this Court  
4 to his arraignment date and not the date of any probable cause determination. Bare allegations, without  
5 factual specificity, entitle Defendant to neither a post-conviction evidentiary hearing nor other post-  
6 conviction relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). The policy behind presenting  
7 claims for post-conviction relief to the District Court is that issues of fact can be determined. *See*  
8 Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214 (1981). Defendant has the burden of persuasion in  
9 a collateral attack and must raise and support these claims. Defendant's initial hurdle is to support his  
10 propositions: issues of fact must be created to warrant an evidentiary hearing. Drake v. State, 108 Nev.  
11 523, 836 P.2d 52 (1992). Moreover, Defendant does not complain that any statements made during this  
12 period of incarceration were impermissibly used against him and as such no prejudice can be inferred.

### 14 III

#### 15 THE DOCTRINE OF THE LAW OF THE CASE FORE- 16 CLOSSES DEFENDANT'S CHALLENGE TO HIS HABITUAL 17 CRIMINAL ADJUDICATION

18 Next, Defendant alleges that he was improperly adjudicated a habitual criminal pursuant to NRS  
19 207.010(2). In his last appeal from the judgment of conviction entered on remand, Defendant  
20 specifically challenged the validity of his habitual criminal status. The Nevada Supreme Court  
21 specifically denied his contentions and in a Order Dismissing Appeal, affirmed the District Court's  
22 conclusion that Defendant was a habitual criminal and the State had met its burden beyond a reasonable  
23 doubt. As such, that Order becomes the law of the case and forecloses Defendant's successive attempt  
24 at relief on this issue.

25 The Nevada Supreme Court applied the doctrine in Hall v. State, 91 Nev. 314, 535 P.2d 797  
26 (1975). In Hall, the defendant claimed, on appeal, that he entered into an involuntary guilty plea despite  
27 the fact that identical claim had been denied in a petition for post-conviction relief. The Court held that  
28 the first ruling became the law of that case and Defendant could not later revive that issue. The law of

1 a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the  
2 same. (Citations omitted). *Id.* at 315.

3 Most recently, in Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme  
4 Court, on direct appeal, affirmed the defendant's convictions. The Court expressed that there was  
5 sufficient evidence to convict the defendant of trafficking and manufacturing charges. Thereafter, the  
6 defendant petitioned the District Court for post-conviction relief. In an appeal from denial of his post-  
7 conviction petition, the defendant resubmitted the sufficiency claim. In dismissing that appeal, the  
8 Supreme Court opined that the Order Dismissing the Appeal became the law of the case and foreclosed  
9 the sufficiency of the evidence issues. *Id.* at 605. Likewise, Defendant's Petition should not be  
10 addressed on the merits because the Supreme Court has previously found his arguments undeserving.

11 On direct appeal, Defendant raised the identical issue that is in the Petition now before this  
12 Court. Defendant duplicates his complaints surrounding his adjudication as a habitual criminal. The  
13 Supreme Court confirmed that adjudication and, therefore, the Supreme Court's ruling, issued on  
14 Defendant's direct appeal, became the law of this case and forecloses Defendant's ability to revive this  
15 claim.

#### 16 17 IV

#### 18 DEFENDANT WAS AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL

19

20 The United States Supreme Court has clearly established the appropriate test for determining  
21 whether a defendant received constitutionally defective counsel. A defendant's burden is two-fold.  
22 First, a convicted defendant must show that his counsel's performance was objectively deficient such  
23 that counsel was not functioning as the 'counsel' envisioned by Sixth Amendment guarantees. Second,  
24 the defendant must show that the deficient performance prejudiced the defendant in a way that  
25 effectively deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052,  
26 2064 (1984). The United State's Supreme Court recently opined:

27 Thus, an analysis focusing solely on mere outcome  
28 determination, without attention to whether the result of the  
proceeding was fundamentally unfair or unreliable, is defective.

1 To set aside a conviction or sentence solely because the  
2 outcome would have been different but for counsel's error may  
3 grant the defendant a windfall to which the law does not entitle  
him. Lockhart v. Fretwell, --- U.S. ---, 113 S.Ct. 838, 842-843  
(1993).

4 Further, unreliability or unfairness does not result if the ineffectiveness of counsel claim does not  
5 deprive the defendant of any substantive or procedural right. Id. at 844.

6 To rise to the level of ineffective assistance, the representation must be outside the range of  
7 competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366  
8 (1985). Furthermore, "it is presumed that counsel fully discharged his duties, and that presumption can  
9 only be overcome by strong and convincing proof to the contrary." Davis v. State, 107 Nev. 600, 602,  
10 817 P.2d 1169, 1170 (1991), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981). On those  
11 premises, the State respectfully suggests that Defendant's counsel was effective. Defendant complains  
12 counsel was ineffective in that he did not challenge the length of incarceration without a probable cause  
13 determination, nor did he file suppression motions on Defendant's behalf. Defendant's contention that  
14 counsel failed to file a suppression motion is a bare allegation: Defendant neither reveals what the  
15 "evidence" is, nor does he suggest how it was necessary to an effective defense. Based on Hargrove,  
16 *supra*, Defendant is not entitled to relief on this claim as he cannot support a claim of ineffective  
17 assistance without the requisite specificity.

18 Moreover, counsel cannot be rendered ineffective for failing to challenge a Nevada practice  
19 before the issue has even been resolved. Defendant was arrested in 1989: McLaughlin, *supra*, and its  
20 bright line 48 hour rule were not announced until 1991 and the first Powell decision was not entered  
21 until 1992. As such, counsel's actions cannot be deemed unreasonable under Strickland, *supra*, nor  
22 representation ineffective, for not challenging the practices in Clark County before the United States  
23 Supreme Court decided what constituted a reasonable detention while awaiting a probable cause finding  
24 upon warrantless arrest. Moreover, even if counsel's actions in failing to challenge the detention were  
25 unreasonable, Defendant was not prejudiced in that once a jury convicted him, any detention violation  
26 was rendered moot. See McLaughlin, *supra*. Defendant's representation did not fall outside what is  
27 expected of professionally competent counsel.

28 ///

1 CONCLUSION

2  
3 Based on the forgoing, it is respectfully requested that Defendant's Motion to Compel Blood and  
4 Semen Samples, Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), and Defendant's  
5 Motion to Proceed in Forma Pauperis be denied.

6 DATED this 5<sup>th</sup> day of April, 1996.

7 Respectfully submitted,

8 STEWART L. BELL  
9 DISTRICT ATTORNEY  
Nevada Bar #000477

10  
11 BY Vicki J. Monroe  
12 VICKI J. MONROE  
13 Deputy District Attorney  
14 Nevada Bar #003776  
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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 1<sup>st</sup> day of April, 1996, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROY D MORAGA  
P. O. BOX 1989  
ELY, NEVADA 89301

BY Kathryn Lombard  
Secretary for the District Attorney's Office

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MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
CHERRY, BAILUS & KELESIS  
600 South Eighth Street  
Las Vegas, NV 89101  
(702) 385-3788

Attorney for Appellant  
ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*\*

STATE OF NEVADA,	)	CASE NO. C 92174
	)	DEPT. NO. X
Plaintiff,	)	DOCKET NO.
	)	
vs.	)	
	)	
ROY D. MORAGA,	)	
	)	
Respondent.	)	

MOTION TO WITHDRAW AS COUNSEL

Date of Hearing: 4-17-96  
Time of Hearing: 9A

COMES NOW, MARK B. BAILUS, ESQ., of the law offices of CHERRY, BAILUS & KELESIS, and moves this Honorable Court for its Order allowing the undersigned and the law offices of CHERRY, BAILUS & KELESIS to withdraw as Attorney of Record for Defendant, ROY D. MORAGA, in the above-captioned matter.

This Motion is made and based upon the papers, pleadings and documents on file herein, the Affidavit of MARK B. BAILUS, ESQ., filed herewith and upon such oral argument

CE11

*Law Office of*  
*Cherry, Bailus & Kelesis*  
600 SOUTH EIGHTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 385-3788  
FAX (702) 385-5125



*Law Office of  
Cherry, Bailus & Kelesis*  
600 SOUTH EIGHTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 385-4788  
FAX (702) 385-5125

1 as may be adduced at the time of the hearing hereon.

2 DATED this 9 day of April, 1996.

3 CHERRY, BAILUS & KELESIS

4  
5 By Mark B. Bailus  
6 MARK B. BAILUS, ESQ.  
7 Nevada State Bar No. 002284  
8 600 South Eighth Street  
9 Las Vegas, Nevada 89101

10  
11 **NOTICE OF MOTION**

12 TO: STATE OF NEVADA, Plaintiff; and

13 TO: STEWART BELL, ESQ., its attorney of record:

14 TO: ROY D. MORAGA, Defendant:

15 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned  
16 will bring on the above and foregoing MOTION TO WITHDRAW AS ATTORNEY OF  
17 RECORD on for hearing on the 17 day of April, 1996, at the hour of 9 a.m.,  
18 before the above-entitled Court in Department No. X, or as soon thereafter as counsel may be  
19 heard.  
20

21 DATED this 9 day of April, 1996.

22 CHERRY, BAILUS & KELESIS

23  
24 By Mark B. Bailus  
25 MARK B. BAILUS, ESQ.  
26 Nevada State Bar No. 002284  
27 600 South Eighth Street  
28 Las Vegas, Nevada 89101

*Law Office of*  
*Cherry, Bailus & Kelesis*  
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(702) 385-3786  
FAX (702) 385-5125

**AFFIDAVIT OF MARK B. BAILUS IN SUPPORT**  
**OF MOTION TO WITHDRAW AS ATTORNEY OF RECORD**

STATE OF NEVADA       )  
                                  ) ss:  
COUNTY OF CLARK     )

MARK B. BAILUS, ESQ., being first duly sworn according to law, deposes and says:

1. That Affiant is an attorney duly licensed to practice law in the State of Nevada and is a partner in the law offices of Cherry, Bailus & Kelesis.

2. That Affiant was appointed by the above-entitled Court to represent Defendant for appellate purposes only.

3. That on or about October 4, 1995, Affiant received an Order Dismissing Appeal from the Supreme Court of the State of Nevada and thereafter, on or about October 24, 1995, Affiant received the Remittitur, thus concluding Affiant's representation of Defendant.

4. That because of the foregoing reasons, Affiant requests that he be allowed to withdraw as counsel of record.

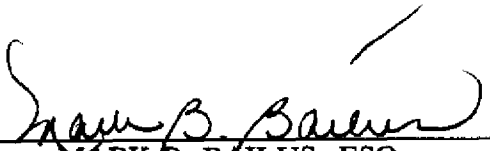
5. That the last known address known to Affiant for service of Defendant is:

Mr. Roy D. Moraga  
Inmate ID # 31584  
Ely State Prison  
Post Office Box 1989  
Ely, Nevada 89301

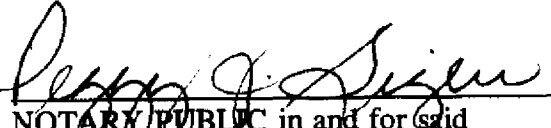
6. That this Motion is not made for the purposes of delay, but in the interest of justice.

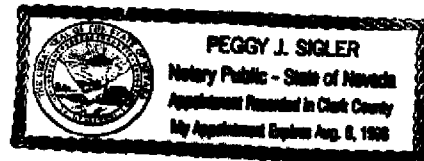
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7. Further your Affiant sayeth naught.

  
MARK B. BAILUS, ESQ.

SUBSCRIBED and SWORN to before me  
this 9<sup>th</sup> day of April, 1996.

  
NOTARY PUBLIC in and for said  
County and State



*Law Office of*  
*Cherry, Bailus & Malais*  
600 SOUTH EIGHTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 585-3788  
FAX (702) 385-5125

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*Loretta L. Thomas*  
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1 ROC  
2 MARK B. BAILUS, ESQ.  
3 Nevada Bar No. 002284  
4 CHERRY, BAILUS & KELESIS  
5 600 South Eighth Street  
6 Las Vegas, NV 89101  
7 (702) 385-3788

8 Attorney for Appellant  
9 ROY MORAGA

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \* \* \*

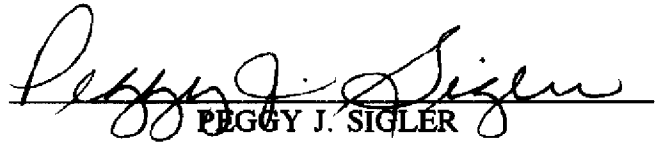
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Law Office of  
Cherry, Bailus & Kelesis  
600 SOUTH EIGHTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 385-3788  
FAX (702) 385-5125

**CERTIFICATE OF MAILING**

**I HEREBY CERTIFY** that I am an employee of the law offices of CHERRY, BAILUS & KELESIS, and that on the 9<sup>th</sup> day of April, 1996, I deposited for mailing in the United States Mail, at Las Vegas, Nevada, a true and correct copy of the MOTION TO WITHDRAW AS COUNSEL addressed as follows:

Mr. Roy D. Moraga  
Inmate ID # 31584  
Ely State Prison  
Post Office Box 1989  
Ely, Nevada 89301

  
PEGGY J. SIGLER

ORIGINAL

FILED

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APR 11 2 08 PM '96

*For the Clerk*

CLERK

0001  
DAVID M. SCHIECK, ESQ.  
NEVADA BAR NO. 0824  
302 E. CARSON, #600  
LAS VEGAS, NV 89101  
(702)382-1844  
ATTORNEY FOR DEFENDANT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

vs.

ROY D. MORAGA,  
Defendant.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO. K

MOTION FOR EXTENSION OF TIME  
TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES

DATE: 4-17-96  
TIME: 9:00 A.M.

COMES NOW, Defendant ROY D. MORAGA, by and through his attorney DAVID M. SCHIECK, ESQ., and moves this Court pursuant to N.R.S. 34.750(3) for an Order Extending the Time to File Supplemental Points and Authorities to MORAGA'S pro per Petition for Writ of Habeas Corpus (Post Conviction).

This Motion is based upon the Points and Authorities and Affidavit of counsel attached hereto, and all of the papers and pleadings heretofore filed in this matter.

David M. Schieck

302 E. Carson Ave., Ste. 918  
Las Vegas, NV 89101  
(702) 382-1844



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TO: THE STATE OF NEVADA, Plaintiff herein; and  
TO: THE DISTRICT ATTORNEYS OFFICE, its attorney:

### STATEMENT OF FACTS

Mr. Moraga does not have all of the paperwork necessary for counsel to review in order to supplement the Petition. Due to other priority cases of counsel, requests for the files of Mr. Moraga's previous counsel were delayed. (See Affidavit attached hereto)

**N.R.S. 34.750(3) states in pertinent part that:**

(a) The date the court orders the filing of an answer and a return; or

(b) The date of his appointment,  
whichever is later. If it has not previously been  
filed, the answer by the respondent must be filed  
within 15 days after receipt of the supplemental

1 pleadings and include any response to the  
2 supplemental pleadings."

3 In the instant case MORAGA is entitled to the effective  
4 assistance of counsel and the due process of law pursuant to  
5 the Sixth and Fourteenth Amendments to the United States  
6 Constitution and Article I, Section 8, of the Nevada  
7 Constitution. Counsel for MORAGA believes that relevant and  
8 justiciable issues should be reviewed by this Court and makes  
9 this Motion in good faith.

10 CONCLUSION

11 It is respectfully requested that this Court grant an  
12 extension of time of 30 days to file supplemental points and  
13 authorities to the pro per Petition for Writ of Habeas Corpus  
14 (Post Conviction) and reset the hearing for a time thereafter  
15 convenient to the Court and District Attorney.

16 DATED this 11 day of April, 1996.

17 SUBMITTED BY:

18   
19 By  
20 DAVID M. SCHIECK, ESQ.

21 AFFIDAVIT

22 STATE OF NEVADA)  
23 ) ss.  
24 COUNTY OF CLARK)

25 DAVID M. SCHIECK, being first duly sworn, deposes and  
26 says:

27 That Affiant is an attorney duly licensed to practice law  
28 in the State of Nevada, and retained counsel for MORAGA.

David M. Schieck  
302 E. Carson Ave., Ste. 918  
Las Vegas, NV 89101  
(702) 382-1844

1 That Affiant appeared and confirmed as counsel on March 6,  
2 1996 for MORAGA at which time the Court set a hearing date of  
3 April 17, 1996 and until April 3, 1996 to supplemental the  
4 Petition.

5 That since March 6, 1996 Affiant has had to file a capital  
6 Opening Brief in Greene v. State; file an emergency Writ of  
7 Mandamus in Leonard adv. State; and prepare for a capital trial  
8 Lopez adv. State.

9 That Affiant has had to request files, which as of this  
10 date have not been received by Affiant, from previous counsel  
11 as Mr. Moraga does not have the paperwork necessary for counsel  
12 to review and prepare supplemental points and authorities.

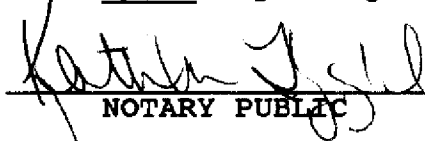
13 That this Motion is not made for the purpose of delay, but  
14 is made in the interest of justice.

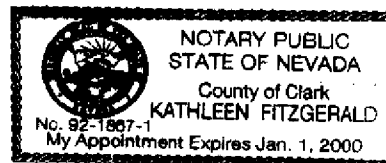
15 Further Affiant sayeth naught.

16 

17 DAVID M. SCHIECK

18  
19 SUBSCRIBED and SWORN to before me  
20 this 11 day of April, 1996.

21   
22 NOTARY PUBLIC



ORIGINAL

FILED

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*Jonathan Schmeck*  
CLERK

ROC  
DAVID M. SCHIECK, ESQ.  
NEVADA BAR NO. 0824  
302 E. CARSON, #600  
LAS VEGAS, NV 89101  
(702) 382-1844  
ATTORNEY FOR DEFENDANT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,  
  
vs.  
  
ROY D. MORAGA,  
  
Defendant.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO. K

RECEIPT OF COPY OF  
MOTION FOR EXTENSION OF TIME  
TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES

DATE: 4-17-96  
TIME: 9:00 A.M.

RECEIPT OF A COPY of the Motion for Extension of Time to  
File Supplemental Points and Authorities is hereby acknowledged  
this 12<sup>th</sup> day of April, 1996.

DISTRICT ATTORNEYS OFFICE

*James Schmeck*  
200 S. THIRD STREET  
LAS VEGAS, NV 89155

David M. Schieck  
302 E. Carson Ave., Ste. 918  
Las Vegas, NV 89101  
(702) 382-1844

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**FILED**

APR 17 3 38 PM '96

*Joetta Dorman*  
CLERK

1 NOEJ  
2 MARK B. BAILUS, ESQ.  
3 Nevada Bar No. 002284  
4 CHERRY, BAILUS & KELESIS  
5 600 South Eighth Street  
6 Las Vegas, NV 89101  
7 (702) 385-3788

8 Attorney for Appellant  
9 ROY MORAGA

10  
11 DISTRICT COURT  
12 CLARK COUNTY, NEVADA

13 \* \* \* \* \*

14 STATE OF NEVADA, )  
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*Law Office of  
Cherry, Bailus & Kelesis*  
600 SOUTH EIGHTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 385-3788  
FAX (702) 385-5125

17 **NOTICE OF ENTRY OF ORDER**

18 Date of Hearing: April 17, 1996  
19 Time of Hearing: 9:00 a.m.

20 TO: STATE OF NEVADA, Plaintiff; and  
21 TO: STEWART BELL, ESQ., its attorney of record:  
22 TO: ROY D. MORAGA, Defendant:

23  
24 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on the 17th day  
25 of April, 1996, an Order to Withdraw As Attorney of Record was entered in the above-  
26 captioned matter, a copy of said Order is attached hereto and by this reference incorporated  
27  
28 . . . . .

herein as though full set forth.

DATED this 17 day of April, 1996.

CHERRY, BAILUS & KELESIS

By Mark B. Bailus  
MARK B. BAILUS, ESQ.  
Nevada State Bar No. 002284  
600 South Eighth Street  
Las Vegas, Nevada 89101

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that I am an employee of the law offices of CHERRY, BAILUS & KELESIS, and that on the 17<sup>th</sup> day of April, 1996, I deposited for mailing in the United States Mail, at Las Vegas, Nevada, a true and correct copy of the MOTION TO WITHDRAW AS COUNSEL addressed as follows:

Mr. Roy D. Moraga  
Inmate ID # 31584  
Ely State Prison  
Post Office Box 1989  
Ely, Nevada 89301

Stewart L. Bell, Esq.  
District Attorney  
200 South Third Street  
Seventh Floor  
Las Vegas, NV 89155

Peggy J. Sigler  
PEGGY J. SIGLER

FILED

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*Janetta [Signature]*  
CLERK

OWAR  
MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
CHERRY, BAILUS & KELESIS  
600 South Eighth Street  
Las Vegas, NV 89101  
(702) 385-3788

Attorney for Appellant  
ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*\*\*

STATE OF NEVADA,	)	CASE NO. C 92174
	)	DEPT. NO. X
Plaintiff,	)	DOCKET NO.
	)	
vs.	)	
	)	
ROY D. MORAGA,	)	
	)	
Respondent.	)	

ORDER TO WITHDRAW AS ATTORNEY OF RECORD

Date of Hearing: April 17, 1996  
Time of Hearing: 9:00 a.m.

THIS MATTER having come on for hearing this 17th day of April, 1996, upon the Motion to Withdraw as Attorney of Record, filed by MARK B. BAILUS, ESQ., of the law offices of CHERRY, BAILUS & KELESIS, no opposition having been filed herein, the Court having before it all the papers, pleadings and documents on file herein, being fully advised in the premises and good cause appearing,

IT IS HEREBY ORDERED that the Motion to Withdraw as Attorney for Record filed by MARK B. BAILUS, ESQ., of the law offices of CHERRY, BAILUS & KELESIS be, and

*Law Office of*  
*Cherry, Bailus & Kelesis*  
600 SOUTH EIGHTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 385-3788  
FAX (702) 385-5125

1 it hereby is, granted.

2 IT IS FURTHER ORDERED that a copy of this Order shall be served upon Defendant  
3 ROY D. MORAGA, at his last known address of:


4 Mr. Roy D. Moraga  
5 Inmate ID # 31584  
6 Ely State Prison  
7 Post Office Box 1989  
8 Ely, Nevada 89301

9 DATED and DONE this 17<sup>th</sup> day of April, 1996.

10   
11 \_\_\_\_\_  
12 DISTRICT COURT JUDGE

13 Submitted by:

14 CHERRY, BAILUS & KELESIS

15  
16 By   
17 MARK B. BAILUS, ESQ.  
18 State Bar No. 002284  
19 600 South Eighth Street  
20 Las Vegas, Nevada 89101  
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*David H. ...*  
CLERK

1 OWAR  
2 MARK B. BAILUS, ESQ.  
3 Nevada Bar No. 002284  
4 CHERRY, BAILUS & KELESIS  
5 600 South Eighth Street  
6 Las Vegas, NV 89101  
7 (702) 385-3788

8 Attorney for Appellant  
9 ROY MORAGA

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \* \* \*

13 STATE OF NEVADA, )  
14 )  
15 Plaintiff, )  
16 )  
17 vs. )  
18 )  
19 ROY D. MORAGA, )  
20 )  
21 Respondent. )  
22 )  
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CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

**ORDER TO WITHDRAW AS ATTORNEY OF RECORD**

Date of Hearing: April 17, 1996  
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IT IS HEREBY ORDERED that the Motion to Withdraw as Attorney for Record filed by MARK B. BAILUS, ESQ., of the law offices of CHERRY, BAILUS & KELESIS be, and

1 it hereby is, granted.

2 IT IS FURTHER ORDERED that a copy of this Order shall be served upon Defendant  
3 ROY D. MORAGA, at his last known address of:

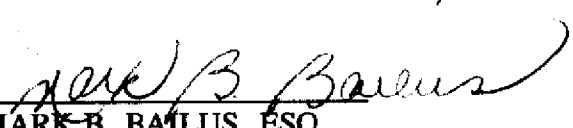
4 Mr. Roy D. Moraga  
5 Inmate ID # 31584  
6 Ely State Prison  
7 Post Office Box 1989  
8 Ely, Nevada 89301

9 DATED and DONE this <sup>26</sup>17 day of April, 1996.

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11   
12 DISTRICT COURT JUDGE

13 Submitted by:

14 CHERRY, BAILUS & KELESIS

15  
16 By   
17 MARK-B. BAILUS, ESQ.  
18 State Bar No. 002284  
19 600 South Eighth Street  
20 Las Vegas, Nevada 89101  
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SUBT  
DAVID M. SCHIECK, ESQ.  
NEVADA BAR NO. 0824  
302 E. CARSON, #600  
LAS VEGAS, NV 89101  
(702)382-1844

FILED

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DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,  
  
vs.  
  
ROY D. MORAGA,  
  
Defendant.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO. K

SUBSTITUTION OF ATTORNEYS

DATE: N/A  
TIME: N/A

Defendant ROY D. MORAGA, hereby substitutes David M. Schieck, Esq. in the above entitled cause in the place and instead of R. ROGER HILLMAN, Deputy Public Defender.

DATED: \_\_\_\_\_

Roy D. Moraga  
ROY D. MORAGA

I hereby agree to the above substitution.

DATED: 5/17/96

PUBLIC DEFENDER'S OFFICE

BY: R. Roger Hillman  
R. ROGER HILLMAN, ESQ.

David M. Schieck  
302 E. Carson Ave., Ste. 918  
Las Vegas, NV 89101  
(702) 382-1844

David M. Schieck  
302 E. Carson Ave., Ste. 918  
Las Vegas, NV 89101  
(702) 382-1844

1 I hereby accept the above substitution.

2 Dated: April 29, 1986

3  
4  
5 BY: 

6 DAVID M. SCHIECK, ESQ.

7 CERTIFICATE OF MAILING

8 The undersigned does hereby certify that on \_\_\_\_\_, a  
9 copy of the foregoing Substitution of Attorneys, was deposited  
10 in the United States Mail at Las Vegas, Nevada, postage  
11 prepaid, addressed to the following: District Attorneys Office,  
12 Attorney for Plaintiff, 200 S. Third Street, Las Vegas, NV  
13 89155.

14  
15 KATHLEEN FITZGERALD

16 An employee of David Schieck  
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PTAT  
DAVID M. SCHIECK, ESQ.  
Nevada Bar No. 0824  
302 E. Carson, #600  
Las Vegas, NV 89101  
702-382-1844  
Attorney for MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY C. MORAGA,  
  
Petitioner,  
  
vs.  
  
THE STATE OF NEVADA,  
  
Respondent.

CASE NO. C 92174  
DEPT NO. X  
DOCKET K

SUPPLEMENTAL POINTS AND AUTHORITIES  
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

DATE: JULY 15, 1996  
TIME: 9:00 A.M.

COMES NOW, Petitioner ROY D. MORAGA, by and through his  
attorney DAVID M. SCHIECK, ESQ., and for his Supplemental  
Points and Authorities in Support of Petition for Writ of  
Habeas Corpus and states as follows:

I.

PROCEDURAL HISTORY

On or about January 9, 1990 ROY D. MORAGA (hereinafter  
referred to as MORAGA) was charged with the crimes of Burglary  
(two counts) and Sexual Assault (two counts). An amended  
information charging MORAGA as a habitual criminal was filed on  
June 13, 1990. A jury trial was commenced on March 12, 1990  
and the trial was concluded on March 14, 1990 with a jury

David M. Schieck

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1 verdict of guilty to all four counts of the information.

2 MORAGA was sentenced by District Court Judge Michael Wendall to  
3 life in prison without the possibility of parole as a habitual  
4 criminal. MORAGA was represented at trial by Deputy Public  
5 Defender Roger Hillman.

6 MORAGA appealed from the judgement of conviction with only  
7 one issue being raised on the direct appeal, to wit: there was  
8 insufficient evidence adduced at trial to sustain the habitual  
9 criminal enhancement. The Nevada Supreme Court determined that  
10 the issue raised on the direct appeal was without merit,  
11 however the Court determined that the habitual sentence imposed  
12 by the trial court was erroneous and the matter was remanded  
13 for a new sentencing. MORAGA was represented on his direct  
14 appeal by Deputy Public Defender Roger Hillman.

15 On remand, MORAGA was sentenced to two consecutive ten  
16 year sentences plus a consecutive life with the possibility of  
17 parole, plus a life without the possibility of parole on the  
18 habitual criminal allegation. MORAGA was represented on remand  
19 by attorney Mark Bailus, who also appealed from the remanded  
20 sentence with said appeal being dismissed by the Nevada Supreme  
21 Court.

## 22 II.

### 23 STATEMENT OF FACTS

24 This statement of facts is summarized from the witnesses  
25 called at trial as contained in the Opening Brief filed on  
26 behalf of MORAGA.

27 Jodi Howard was the daughter of Penny Hawk, the alleged  
28

1 victim. On the day of the alleged sexual assault, Howard was  
2 given a ride to work by her mother. Howard, as was her usual  
3 practice, called her mother at 1:30 PM to wake her up for work,  
4 but received no answer to her call. About fifteen minutes  
5 later, Hawk called her and asked her to call the police because  
6 she had been attacked. Howard then called the police.

7 Penny Hawk first met MORAGA at the Player's Lounge when he  
8 asked her for the time. Later they sat in her pickup truck and  
9 talked for a while and then they went to another bar, Rascals.  
10 On the morning of December 5, 1989, Hawk took her daughter to  
11 work at about 7:30 AM and then returned home and went to bed.  
12 About 8:15 her doorbell rang and she went and answered the door  
13 and MORAGA was there. She did not let MORAGA into the  
14 apartment and closed and bolted the door and went back to bed.  
15 At about 1:45 she woke up and MORAGA was in her apartment.  
16 MORAGA sexually assaulted her and then followed her downstairs  
17 while she got a drink of water. They then talked for a while  
18 and Hawk went upstairs to take a shower and MORAGA followed  
19 behind her and again sexually assaulted her. MORAGA went into  
20 the bathroom to wash up and Hawk used the time to telephone her  
21 daughter.

22 On cross-examination Hawk admitted to spending  
23 approximately four hours in the truck with MORAGA when they  
24 first met, but denied having a sexual encounter with him or  
25 having any other social contact.

26 Maintenance man William Gomez was working on the grounds  
27 of the apartment complex where Hawk lived. On the day in  
28

1 question he heard calls for help but was not sure where they  
2 were coming from. Michael Harper was also employed by the  
3 Courtyard Gardens Apartments and saw MORAGA on the grounds of  
4 the apartment complex. MORAGA stated to him that he had just  
5 had sex with someone and that it wasn't that good.

6 Police officer Robert Novack interviewed a number of  
7 witnesses and obtained a description of the perpetrator from  
8 Hawk and arrested MORAGA. Novack also collected sexual assault  
9 kit from Hawk. Physician Donald Reisch assisted in the  
10 preparation of the sexual assault kit and also conducted an  
11 examination of Hawk. He did not note any contusions or bruises  
12 on Hawk.

13 A fingerprint found on a hair spray canister in Hawk's  
14 apartment was matched to MORAGA. Tests on the sexual assault  
15 kit showed the presence of semen which came from a type O  
16 secretor. Both Hawk and MORAGA were type O secretors. Nothing  
17 in the tests performed by Linda Erricheto could eliminate  
18 MORAGA as the donor of the semen, but likewise nothing that  
19 could be identified as being foreign to Hawk could be  
20 identified.

21 A watch belonging to Howard was recovered from the ex-  
22 girlfriend of MORAGA, Jean Behl. Behl related that she had  
23 been given the watch as a gift from MORAGA.

24 MORAGA testified on his own behalf that he had moved to  
25 Las Vegas in October, 1989 with Behl. He had first met Hawk at  
26 the Player's Lounge where she was sitting in the cab of her  
27 truck. He got into the truck and she bought some drinks for  
28



1 them. They talked for a while, lasting for a period of three  
2 or four hours. They moved to a new location and went into a  
3 bar where they started making out. A second social meeting  
4 occurred in late November, 1989.

5 On December 5, 1989 MORAGA had gone to Hawk's apartment  
6 complex looking to rent an apartment. He knocked on her door  
7 and they talked for a while and he told her that he would be  
8 back in a few hours. When he returned to her apartment he took  
9 off his coat, shirt and sweater and walked upstairs, whereupon  
10 Hawk started running around yelling. Hawk appeared to be in  
11 some physical distress as she was breathing real hard. She  
12 then laid down and MORAGA began kissing her. Hawks said she  
13 was thirsty so she walked downstairs and sat in a chair.  
14 MORAGA got her a wet towel and placed it around her neck. She  
15 told him that it was okay that they had sex. Hawk went  
16 upstairs and took a shower and when she got out he began to rub  
17 her back and then he began to kiss her and they had consensual  
18 sex. MORAGA testified that he had found a key on the floor of  
19 the apartment when he was putting on his knee brace and that he  
20 picked it up and put it on his key ring. The watch that Jean  
21 Behl turned over to the police had been purchased by MORAGA in  
22 a place known to him as crack alley from a tall skinny black  
23 guy.

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III.

POINTS AND AUTHORITIES

A.

MORAGA IS ENTITLED TO AN  
EVIDENTIARY HEARING ON HIS PETITION

It has long been the holding of the Nevada Supreme Court that if a petition for post conviction relief contains allegations, which, if true, would entitle the Petitioner to relief, an evidentiary hearing is required. Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983); Grandin v. State, 97 Nev. 454, 634 P.2d 456 (1981); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

In Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992) the Court remanded the case for an evidentiary hearing over the State's objection where trial counsel had not adequately opposed a Motion in Limine filed by the State. The purpose of the hearing was to determine whether counsel had sufficient cause for the noted failure. Drake, 108 Nev. at 527-528.

The Petition filed by MORAGA fits squarely within the parameters of the decision in Hargrove, supra. Contrary to the position of the State, Hargrove mandates that an evidentiary hearing occur. In Hargrove, the Nevada Supreme Court stated:

"Appellant's motion consisted primarily of 'bare' or 'naked' claims for relief, unsupported by any specific factual allegations that would, if true, have entitled him to withdrawal of his plea. Specifically, appellant's claim that certain witnesses could establish his innocence of the bomb threat charge was not accompanied by the witness' names or descriptions of their intended testimony. As such, to the extent that it advanced merely 'naked' allegations, the motion did not entitle appellant to an evidentiary hearing. See

1 Vaillancourt v. Warden, 90 Nev. 431, 529 P.2d 204  
2 (1974); Fine v. Warden, 90 Nev. 166, 521 P.2d 374  
3 (1974); see also Wright v. State, 619 P.2d 155, 158  
4 (Kan.Ct.App. 1980) (to entitle defendant to an  
5 evidentiary hearing, a post-conviction petition must  
6 set forth 'a factual background, names of witnesses  
7 or other sources of evidence demonstrating . . .  
8 entitlement to relief')."

9 The Petition of MORAGA contains the following claims for  
10 relief:

11 1. That MORAGA was held for two hundred and ten hours  
12 without being brought before a magistrate for a probable cause  
13 determination.

14 2. That he received ineffective assistance of counsel in  
15 the following respects;

16 a. Trial counsel failed to object to the certified  
17 copies of MORAGA'S other convictions that contained errors on  
18 the face of the documents;

19 b. Trial counsel failed to file a Motion to suppress  
20 the warrantless search that led to the discovery of the  
21 apartment key;

22 c. Trial counsel failed to interview witnesses that  
23 were listed by MORAGA and to call such witnesses to testify at  
24 trial concerning the lack of sexual ability of MORAGA while  
25 intoxicated, that he had been drinking heavily on the day in  
26 question. These witnesses could also have testified that they  
27 had seen MORAGA and Hawk engaged in "making out" when they first  
28 met. Witnesses could also testified to the nature and extent  
of MORAGA'S knee injury which required him to where a brace and  
that he could not have possibly performed the physical acts  
described by Hawk at the trial.

1 d. Trial counsel failed to prepare MORAGA to testify  
2 and discuss the types of questions that would be asked of him.  
3 MORAGA, a man of limited education did not understand sex to  
4 necessarily include penile penetration and therefore he  
5 answered questions put to him inappropriately. Additionally  
6 MORAGA did not understand when questioned whether he would have  
7 sex with a woman without her permission and therefore answered  
8 the question in such a fashion as to admit the commission of  
9 the crime charged.

10 e. Trial counsel failed to have DNA testing  
11 performed on the semen and blood samples to establish that  
12 MORAGA was not the source of the semen found in the vaginal  
13 vault of the alleged victim.

14 Based on the allegations contained in the pro per Petition  
15 for Writ of Habeas Corpus filed by MORAGA and the points raised  
16 herein it is respectfully urged that this Court grant an  
17 evidentiary hearing to Mr. MORAGA.

18 B.

19 MORAGA RECEIVED INEFFECTIVE  
20 ASSISTANCE OF COUNSEL

21 The State typically has taken the position that a Petition  
22 for Habeas Corpus should contain evidence to support every  
23 detail of the allegations. Such is not the purpose of the  
24 Petition but rather should be explored at an evidentiary  
25 hearing if sufficient allegations are raised to merit an  
26 evidentiary hearing. It is MORAGA'S position that sufficient  
27 allegations have been made to mandate an evidentiary hearing as  
28 to whether he received the effective assistance of counsel at

1 the trial and upon direct appeal.

2       The Sixth Amendment guarantees that a person accused of a  
3 crime receive effective assistance of counsel for his defense.  
4 The right extends from the time the accused is charged up to  
5 and through his direct appeal and includes effective assistance  
6 for any arguable legal points. Anders v. California, 386 U.S.  
7 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The United State  
8 Supreme Court has consistently recognized that the right to  
9 counsel is necessary to protect the fundamental right to a fair  
10 trial, guaranteed under the Fourteenth Amendment's Due Process  
11 Clause. Powell v. Alabama, 287 U.S. 45, 53 S.Ct.55, 77 L.Ed.  
12 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9  
13 L.Ed.2d 799 (1963). Mere presence of counsel does not fulfill  
14 the constitutional requirement: The right to counsel is the  
15 right to effective counsel, that is, "an attorney who plays the  
16 role necessary to ensure that the trial is fair." Strickland,  
17 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 657 (1984); McMann v.  
18 Richardson, 439 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d. 763  
19 (1970).

20       Pre-trial investigation is a critical area in any criminal  
21 case and failure to accomplish same has been held to constitute  
22 ineffective assistance of counsel. The Nevada Supreme Court in  
23 Jackson v. Warden, 91 Nev. 430, 537 P.2d 473 (1975) stated:

24       "It is still recognized that a primary requirement is  
25 that counsel . . . conduct careful factual and legal  
26 investigations and inquiries with a view toward  
27 developing matters of defense in order that he make  
28 informed decisions on his client's behalf both at the  
pleading stage . . . and at trial."

Jackson 91 Nev. at 433, 537 P.2d at 474. The Federal Courts

1 are in accord that pre-trial investigation and preparation for  
2 trial are a key to effective representation of counsel. U.S.  
3 v. Tucker, 716 F.2d 576 (1983).

4 In U.S. v. Baynes, 687 F.2d 659 (1982) the Court, in  
5 language applicable to this case, stated:

6 "Defense counsel, whether appointed or retained is  
7 obligated to inquire thoroughly into all potential  
8 exculpatory defenses and evidence, mere possibility  
9 that investigation might have produced nothing of  
10 consequences for the defense could not serve as  
11 justification for trial defense counsel's failure to  
12 perform such investigations in the first place. Fact  
13 that defense counsel may have performed impressively  
14 at trial would not have excused failure to  
15 investigate defense that might have led to complete  
16 exoneration of the Defendant."

17 In Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) the  
18 Nevada Supreme Court found that trial counsel was ineffective  
19 where counsel failed to conduct adequate pre-trial  
20 investigation, failed to properly utilize the Public Defender's  
21 full time investigator, neglected to consult with other  
22 attorneys although urged to do so, and failed to prepare for  
23 the testimony of defense witnesses. See also, Sanborn v.  
24 State, 107 Nev. 399, 812 P.2d 1279 (1991).

25 The United States Supreme Court in Strickland v.  
26 Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) set forth the  
27 standard for determining the merits of a claim of ineffective  
28 assistance of counsel. In Strickland, supra, the Court stated  
in relevant portion:

"A convicted defendant's claim that counsel's  
assistance was so defective as to require reversal of  
a conviction or death sentence, has two components.  
First, the defendant must show that counsel's  
performance was deficient. This requires showing  
that counsel made errors so serious that counsel was

1 not functioning as the counsel guaranteed the  
2 defendant by the Sixth Amendment. Second the  
3 defendant must show that the deficient performance  
4 prejudiced the defense. This requires showing that  
5 counsel's errors were so serious as to deprive the  
6 defendant of a fair trial, a trial whose result is  
7 reliable. Unless a defendant makes both showings, it  
8 cannot be said that the conviction or death sentence  
9 resulted from a breakdown in the adversary process  
10 that renders the result unreliable."

11 Id. 466 U.S. at 687, 194 S.Ct. at 2064. The question of  
12 whether a defendant has received ineffective assistance of  
13 counsel at trial in violation of the Sixth Amendment is a mixed  
14 question of law and fact and is thus subject to independent  
15 review. Strickland, 466 U.S. at 698, 104 S.Ct. 2070. State v.  
16 Love, 109 Nev. 1136, 865 P.2d 322 (1993).

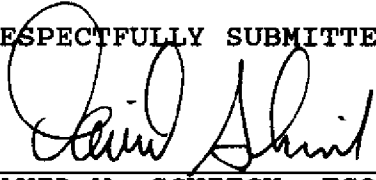
17 IV.

18 CONCLUSION

19 Based on the allegations of the Petition and the  
20 authorities and arguments contained herein it is respectfully  
21 requested that the Court grant an evidentiary hearing and that  
22 at the conclusion thereof the conviction of ROY MORAGA be  
23 reversed.

24 DATED this 11th day of June, 1996.

25 RESPECTFULLY SUBMITTED:

26   
27 DAVID M. SCHIECK, ESQ.

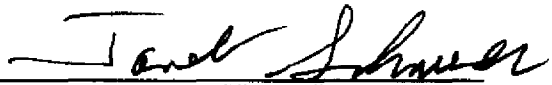
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RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing document is hereby  
acknowledged this 13 day of June, 1996.

DISTRICT ATTORNEYS OFFICE

  
200 S. THIRD STREET  
LAS VEGAS, NV 89155



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**ORIGINAL**

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1 **OPPS**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

FILED

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*Frederic D. ...*

CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 ROY MORAGA,  
12 #938554

13 Defendant(s).  
14

Case No. C92174  
Dept. No. X  
Docket K

15 **STATE'S SUPPLEMENTAL OPPOSITION TO PETITION FOR**  
16 **WRIT OF HABEAS CORPUS (POST-CONVICTION)**

17 DATE OF HEARING: 7/15/96  
18 TIME OF HEARING: 9:00A.M.

19 COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through VICKI  
20 J. MONROE, Deputy District Attorney, and files this Opposition to Defendant's Petition for Writ of  
21 Habeas Corpus (Post-Conviction).

22 This Opposition is made and based upon all the papers and pleadings on file herein, the attached

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1 points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary  
2 by this Honorable Court.

3 DATED this \_\_\_\_\_ day of June, 1996.

4 Respectfully submitted,

5 STEWART L. BELL  
6 DISTRICT ATTORNEY  
Nevada Bar #000477

7  
8 BY Vicki J. Monroe  
9 VICKI J. MONROE  
10 Deputy District Attorney  
Nevada Bar #003776

11 **POINTS AND AUTHORITIES**

12  
13 **PROCEDURAL HISTORY**

14  
15 The State hereby incorporates the statement of the procedural history as outlined in State's  
16 Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion to Compel  
17 Production of Blood and Semen Samples. After the State's Opposition was filed, David Schieck Esq.,  
18 was appointed to represent Defendant and permitted to file Supplemental Points and Authorities for  
19 Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). The State supplements its  
20 Opposition herein. A detailed version of the facts adduced at trial is set forth in the State's first  
21 response.

22  
23 I

24 **AN EVIDENTIARY HEARING IS NOT WARRANTED REGARDLESS OF A**  
25 **PETITION'S FACTUAL SPECIFICITY WHEN THE UNDERLYING CLAIMS ARE**  
26 **EITHER MERITLESS, PRESENTED UNTIMELY OR PRESENTED IN THE IMPROPER**  
**FORUM**

27 Defendant's Supplemental Points and Authorities offer nothing beyond Defendant's original  
28 *pro se* Petition such that an evidentiary hearing is warranted. The Supplemental Petition reiterates

1 Defendant's allegations and suggests that those allegations meet the requisite for an evidentiary  
2 hearing under *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). This position is misguided in  
3 that an evidentiary hearing cannot be warranted where there is no nexus between the underlying  
4 claims and any prejudice to Defendant. Phrased in a different manner, an evidentiary hearing cannot  
5 be warranted when the facts taken as true do not entitle a defendant to relief. Defendant's alleged  
6 errors do not impute prejudice because they have either been decided, rendered moot or are  
7 inappropriately presented in a collateral attack.

## 8 II

### 9 **DEFENDANT'S COLLATERAL ATTACK AS TO ANY ALLEGED GERSTEIN ERROR** 10 **HAS BEEN WAIVED BY NOT PRESENTING THAT ARGUMENT IN HIS DIRECT** 11 **APPEAL AND RENDERED MOOT BY DEFENDANT'S CONVICTION**

12 While the State responded to this argument in full in its previous response, it's position will  
13 be briefly reiterated herein. First Defendant argues, and the State agrees, that if a petition contains  
14 allegations which if true would entitle a defendant to relief, then an evidentiary hearing is proper.  
15 *Hargrove v. State*. Defendant misses the crux of the test, namely that a petitioner would have to  
16 have some relief forthcoming on the allegation. As Defendant's conviction has been affirmed, any  
17 complaint concerning an illegal detention prior to a determination of probable cause has been  
18 rendered moot. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975) (an illegal arrest or detention  
19 does not void a subsequent conviction). Once a criminal defendant has been convicted by a jury, his  
20 confinement is justified by his judgment of conviction and the *Gerstein* violation is moot. *County of*  
21 *Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1280 (1994). Thus, even if Defendant alleges in  
22 his Petition that he was held some 210 hours before a probable cause determination was had, the  
23 subsequent jury verdict and judgment of conviction rendered this issue moot. *Ergo*, Defendant is  
24 entitled to no relief and an evidentiary hearing is not warranted on this issue. Additionally, this issue  
25 was not raised on Defendant's direct appeal. As such, the waiver of claims doctrine forecloses this  
26 claim. NRS 34.810(1); *See also Kimmel v. Warden*, 101 Nev. 6, 692 P.2d 182 (1985). Similarly,  
27 by not presenting by way of direct appeal his claim that a warrantless search produced the key to the  
28 victim's apartment, Defendant has also waived that claim. Nothing presented in the instant Petition  
approaches good cause to find to the contrary.

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III

**DEFENDANT'S PROFFERED DEFENSE BELOW, NAMELY CONSENT,  
RENDERS ANY ISSUE OF IDENTIFICATION MOOT**

Defendant insists that DNA testing should have been performed or should presently be performed. Again, Defendant offered the defense of *consent* at trial, thus, there is no issue of identity and no prejudice can be imputed to Defendant as he took the stand and testified accordingly. Notwithstanding the internal inconsistency as between offering the defense of *consent* at trial and now claiming some seven years later to need require DNA testing, the State also insists that Defendant was not prejudiced by counsel's not obtaining such a test.

In *People v. Kaurish*, 802 P.2d 278, 298 (Cal. 1990),<sup>1</sup> a habeas petitioner claimed ineffective representation because his counsel failed to independently test dried stains on impounded clothing: the clothing, belonging to the murder victim, had been electrophoretically tested by the police. Analysis of the dried blood, semen and saliva were used to link that petitioner to a group of 5% of the population that could have committed the crime. Counsel therein did not know that a time limit existed for testing the material such that the test results would be reliable: counsel admitted that he did not learn of the time limit until one year after the clothing was impounded. As such, the integrity of any future testing was jeopardized. The California Supreme Court refused to find any prejudice inured to that defendant. The Court noted that more was required than speculation that timely testing would have shown a favorable result: there must have been a reasonable probability that such evidence would be produced. *Kaurish*, at 298. Therein, petitioner could not establish that the serological procedures employed by the police were suspect nor that independent testing would provide a different result. The Court said:

"To hold otherwise would be to establish a perverse system of incentives: defense counsel would have the choice of retesting physical evidence on some undetermined possibility that it might yield a favorable result to his client, or not retesting, with a high probability that any conviction of his client might be overturned." *Id.*

---

<sup>1</sup> *cert denied*, *Kaurish v. California*, 502 U.S. 837, 112 S.Ct. 121 (1990).

1 Nor can Defendant offer this Court anything beyond speculation of what additional testing  
2 would show. This issue does not necessitate any more of this Court's attention.

3 Similarly, Defendant suggests that counsel was remiss in failing to call several witnesses that  
4 could testify to Defendant's alcohol-induced impotency: again, this is inconsistent with the defense  
5 of *consent* and as such, warrants no relief from this Court.

#### 6 IV

#### 7 **THE DOCTRINE OF THE LAW OF THE CASE FORECLOSES THE NEED FOR AN** 8 **EVIDENTIARY HEARING ON THE ISSUE OF DEFENDANT'S HABITUAL CRIMINAL** 9 **STATUS**

10 Defendant complains that the judgments of conviction used to adjudicate him were erroneous  
11 and counsel failed to object to the errors therein. First, Defendant does not outline any of the errors  
12 or how they were determinative of his adjudication. Bare allegations, without the requisite factual  
13 specificity, do not warrant an evidentiary hearing. *Hargrove, supra*.

14 Moreover, the Nevada Supreme Court, on Defendant's direct appeal specifically approved of  
15 his habitual criminal adjudication. That ruling becomes the law of the case in Defendant's case and  
16 forecloses this issue herein. *See Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975); *Marshall v. State*,  
17 110 Nev. 1328, 885 P.2d 603 (1994). As Defendant attempts to have this Court revisit an issue, the  
18 propriety of which has been previously addressed by the Nevada Supreme Court, this claim need  
19 only be dismissed.

#### 20 V

#### 21 **DEFENDANT'S CANNOT MAKE A PRIMA FACIE SHOWING OF PREJUDICE PER** 22 **STRICKLAND SUCH THAT AN EVIDENTIARY HEARING NEED EVEN BE** 23 **CONTEMPLATED**

24 The State has dispelled all of Defendant's contentions such that no prejudice has been  
25 imputed to him and thus, he cannot meet the second prong in *Strickland*. The United States Supreme  
26 Court has clearly established the appropriate test for determining whether a defendant received  
27 constitutionally defective counsel. A defendant's burden is two-fold. First, a convicted defendant  
28 must show that his counsel's performance was objectively deficient such that counsel was not  
functioning as the 'counsel' envisioned by Sixth Amendment guarantees. Second, the defendant  
must show that the deficient performance prejudiced the defendant in a way that effectively deprived

1 him of a fair proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064  
2 (1984). The United State's Supreme Court recently opined:

3 Thus, an analysis focusing solely on mere outcome determination, without  
4 attention to whether the result of the proceeding was fundamentally unfair or  
5 unreliable, is defective. To set aside a conviction or sentence solely because  
6 the outcome would have been different but for counsel's error may grant the  
7 defendant a windfall to which the law does not entitle him. Lockhart v.  
8 Fretwell, --- U.S. ---, 113 S.Ct. 838, 842-843 (1993).

9 Further, unreliability or unfairness does not result if the ineffectiveness of counsel claim does  
10 not deprive the defendant of any substantive or procedural right. Id. at 844.

11 To rise to the level of ineffective assistance, the representation must be outside the range of  
12 competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366  
13 (1985). Furthermore, "it is presumed that counsel fully discharged his duties, and that presumption  
14 can only be overcome by strong and convincing proof to the contrary." Davis v. State, 107 Nev.  
15 600, 602, 817 P.2d 1169, 1170 (1991), *citing* Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981).  
16 To that end, Defendant has failed to make a showing of prejudice or show how prejudice inured  
17 because of counsel's conduct. Because the State has successfully dispelled Defendant's allegations,  
18 no prejudice can be imputed to Defendant and no evidentiary hearing warranted.


### 19 CONCLUSION

20 Based on the forgoing Supplemental Opposition, it is respectfully requested that Defendant's  
21 Petition be denied and no evidentiary hearing be ordered.

22 Dated this 27 day of June, 1996.

23 Respectfully submitted,  
24 STEWART L. BELL  
25 DISTRICT ATTORNEY  
26 Nevada Bar #000477

27 BY

28   
VICKI J. MONROE  
Deputy District Attorney  
Nevada Bar #003776

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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing Opposition was made this 27 day of  
June, 1996, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ROY D. MORAGA  
P. O. BOX 1989  
ELY, NEVADA 89301

BY Kathryn Lombard  
Secretary for the District Attorney's Office

kollins/kl/89092174X

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JUL 16 2 14 PM '96

*For the Court*

CLERK

NCA  
DAVID M. SCHIECK, ESQ.  
Nevada Bar No. 0824  
302 E. Carson, #600  
Las Vegas, NV 89101  
702-382-1844  
Attorney for MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

ROY C. MORAGA,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. C 92174  
DEPT NO. X  
DOCKET K

SUPPLEMENTAL REPLY AND OPPOSITION  
FOR WRIT OF HABEAS CORPUS

DATE: JULY 22, 1996  
TIME: 9:00 A.M.

COMES NOW, Petitioner ROY D. MORAGA, by and through his attorney DAVID M. SCHIECK, ESQ., and for his Supplemental Reply and Opposition for Writ of Habeas Corpus and states as follows:

I.

AN EVIDENTIARY HEARING IS WARRANTED

In the State's Opposition the position is taken that many of the claims made by MORAGA have been waived by failure to raise same on the direct appeal. MORAGA was represented by the same attorney on appeal as handled the trial. The claim of ineffective assistance of counsel includes the failure to raise these issues on appeal. Therefore if the Court determines that the issues have been waived, the Court must necessarily find



1 that appellate counsel was deficient and that MORAGA was  
2 prejudiced by the loss of viable claims.

3 Specifically on Page 8(e) of the Pro Per Petition for  
4 Relief, MORAGA stated:

5 "Petitioner now states, being his first opportunity  
6 to bring this ground before the Court, as  
7 petitioner's state appointed counsel for petitioner's  
8 trial and his appeal were same person. And acting on  
9 counsel's advice, that being not to worry about  
10 anything, that he could get me out and handle  
11 everything, did not bring these issues before the  
12 Court. One being his ineffectiveness by appealing  
13 only one issue, that there was not enough evidence to  
14 convict."

15 Additionally a substantial portion of the State's  
16 Opposition is based on the belief that MORAGA'S defense at  
17 trial was consent and that he is now urging inconsistent  
18 issues. In fact MORAGA claims that his defense was not  
19 consent, but rather that he did not engage in sexual  
20 intercourse by penetration with the alleged victim. The  
21 failure of communication with counsel and lack of preparation  
22 for his testimony resulted in the confusion. As stated in the  
23 Pro Per Petition:

24 "At no time did Petitioner intend that he claimed to  
25 have had sexual intercourse with alleged victim,  
26 Penny Hawk by 'inserting his penis in her  
27 vagina'...At the time of trial Petitioner had only on  
28 eighth grade education and sexual intercourse has a  
different meaning to many people. In fact when Penny  
Hawk was questioned as to the same question, the  
Court made her meaning clear to the jury and court.  
Petitioner took the stand at counsel's request and  
counsel should have made the question clear."

II.

#### CONCLUSION

Based on the failure of communication and failure to raise  
issues as detailed in the Supplemental Points and Authorities

David M. Schleck

302 E. Carson Ave., Ste. 918  
Las Vegas, NV 89101  
(702) 382-1844

1 it is respectfully requested that the Court grant an  
2 evidentiary hearing to MORAGA.

3 DATED:

July 16, 1996

4 RESPECTFULLY SUBMITTED:

5 

6 DAVID M. SCHIECK, ESQ.

7  
8 RECEIPT OF COPY

9 RECEIPT OF A COPY of the foregoing document is hereby  
10 acknowledged this 16<sup>th</sup> day of July, 1996.

11 DISTRICT ATTORNEYS OFFICE

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14 200 S. THIRD STREET  
15 LAS VEGAS, NV 89155  
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*Patricia J. ...*

CLERK

0042  
DAVID M. SCHIECK, ESQ.  
Nevada Bar No. 0824  
302 E. Carson, #600  
Las Vegas, NV 89101  
702-382-1844  
Attorney for Defendant

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO. K

MOTION TO WITHDRAW AS COUNSEL

DATE: 8-12-96

TIME: 9:47

COMES NOW, DAVID M. SCHIECK, ESQ. and moves this Honorable Court to allow him to withdraw as attorney of record for Defendant MORAGA. This motion is based on the fact that the Court has denied MORAGA'S Post Conviction Relief.

This motion is based on E.D.C.R. 7.40, the pleadings and papers on file herein, and the Points and Authorities and the Affidavit of David M. Schieck attached hereto.

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

TO: DISTRICT ATTORNEY'S OFFICE, Plaintiff's attorneys:

YOU WILL PLEASE TAKE NOTICE that the undersigned will

David M. Schieck

302 E. Carson Ave., Ste. 918  
Las Vegas, NV 89101  
(702) 382-1844



CE31

1 bring the foregoing Motion on for hearing before the above-  
2 entitled Court on the 12 day of Aug, 1996, at the  
3 hour of 9 a.m., or as soon thereafter as counsel can be  
4 heard, at the Clark County Courthouse, Las Vegas, Nevada.

5  
6 STATEMENT OF FACTS

7 David M. Schieck, Esq. was retained to file Supplemental  
8 Points and Authorities with respect to Roy Moraga's Petition  
9 for Post Conviction Relief.

10 On July 19, 1996 the Court denied Defendant's post  
11 conviction petition and as of this date the District Attorney's  
12 Office has not served the Findings on this office.

13 Mr. Moraga has been notified of the Court's decision and  
14 has stated that he will handle the appeal in proper person.

15 POINTS AND AUTHORITIES

16 EDCR 7.40 provides in relevant portion as follows:

17 "(b) Counsel in any case may be changed only:

18 (1) When a new attorney is to be substituted in  
19 place of the attorney withdrawing, by the written  
20 consent of both attorneys and the client, all of  
21 which must be filed with the court and served upon  
22 all parties or their attorneys who have appeared in  
23 the action, or

24 (2) When no attorney has been retained to replace  
25 the attorney withdrawing, by order of the court,  
26 granted upon written motion therefore, and

27 (i) If the application is made by the  
28 attorney, he must include in an affidavit  
the address, or last known address, at  
which the client may be served with notice  
of further proceedings taken in the case in  
even the application for withdrawal is  
granted, and he must serve a copy of the  
application upon the client and all other  
parties to the action or their attorneys,  
or...

1 No application for withdrawal or substitution may be  
2 granted if a delay of the trial or of the hearing of any  
3 other matter in the case would result."

4 In Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970) the  
5 Court stated:

6 "We think, however, that to compel one charged with  
7 grievous crime to undergo a trial with the assistance  
8 of an attorney with whom he has become embroiled in  
9 irreconcilable conflict is to deprive him of the  
10 effective assistance of any counsel whatsoever."

11 Brown, 424 F.2d at 1170.

12 Similarly in United States v. Williams, 594 F.2d 1258 (9th  
13 Cir. 1979) the Court found:

14 "Here, there was no finding, although a strong  
15 showing was made, on the issue of irreconcilable  
16 conflict, and the matter was called to the attention  
17 of the trial court well before the date of trial.  
18 Under the stated facts we find to exist here, the  
19 denial of appellant's motion for change of appointed  
20 counsel was error. As a result, appellant was  
21 deprived of his constitutionally guaranteed right to  
22 have the effective assistance of counsel at his  
23 trial."

24 Williams, 594 F.2d at 1261.

25 CONCLUSION

26 Based on the argument above and the Affidavit of Counsel  
27 attached it is respectfully requested that DAVID M. SCHIECK,  
28 ESQ. be allowed to withdraw as counsel for Defendant.

DATED this 1 day of August, 1996.

RESPECTFULLY SUBMITTED

  
DAVID M. SCHIECK, ESQ.

AFFIDAVIT OF COUNSEL

STATE OF NEVADA       )  
                              )       ss:  
COUNTY OF CLARK       )

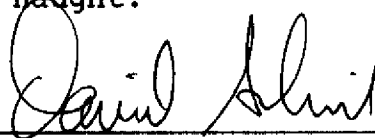
DAVID M. SCHIECK, being first duly sworn, deposes and says:

1. That Affiant is duly licensed to practice law in Nevada and attorney of record for MORAGA in the above matter.

2. That MORAGA has stated he will handle his appeal in proper person.

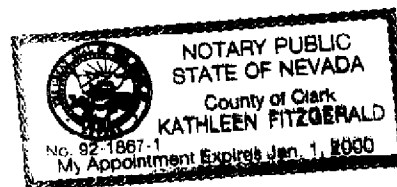
3. Affiant is informed and believes the last known address of MORAGA is Ely State Prison, P.O. Box 1989, Ely, NV 89301.

4. Further your Affiant sayeth naught.

  
\_\_\_\_\_  
DAVID M. SCHIECK

SUBSCRIBED AND SWORN to before me  
this 1 day of August, 1996.

  
\_\_\_\_\_  
NOTARY PUBLIC



CERT  
DAVID M. SCHIECK, ESQ.  
Nevada Bar No. 0824  
302 E. Carson, #600  
Las Vegas, NV 89101  
702-382-1844  
Attorney for Defendant

FILED

AUG 5 11 17 AM '96

*Loretta L. Luman*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,  
  
vs.  
  
ROY D. MORAGA,  
  
Defendant.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO. K

CERTIFICATE OF MAILING OF  
MOTION TO WITHDRAW AS COUNSEL

DATE: 8-12-96  
TIME: 9:00 A.M.

The undersigned does hereby certify that on August 5, 1996, I deposited in the United States Post Office at Las Vegas, Nevada, a copy of the Motion to Withdraw as Counsel, postage prepaid, addressed to the following: Roy Moraga, Ely State Prison, P.O. Box 1989, Ely, NV 89301.

*Kathleen J. Luman*  
An employee of D.M. Schieck, Esq.

CE31

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1 ROC  
2 DAVID M. SCHIECK, ESQ.  
3 Nevada Bar No. 0824  
4 302 E. Carson, #600  
5 Las Vegas, NV 89101  
6 702-382-1844  
7 Attorney for Defendant

FILED

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*Loretta L. Luman*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,  
11 vs.  
12 ROY D. MORAGA,  
13 Defendant.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO. K

RECEIPT OF COPY OF  
MOTION TO WITHDRAW AS COUNSEL

DATE: 8-12-96  
TIME: 9:00 A.M.

18 RECEIPT of a copy of the Motion to Withdraw as Counsel is  
19 hereby acknowledged this 5 day of August, 1996.

DISTRICT ATTORNEY'S OFFICE

*David M. Schieck*  
200 S. THIRD ST.  
LAS VEGAS, NV 89101

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**ORIGINAL**

1 **ORDR**

2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

**FILED**

AUG 27 8 17 AM '96

*Janet A. [unclear]*  
CLERK

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 ROY D. MORAGA,

12 Defendant.  
13  
14

Case No. C92174  
Dept. No. X  
Docket K

ORDER FOR TRANSCRIPT

15 Upon the ex-parte application of the State of Nevada, represented by STEWART L. BELL,  
16 District Attorney, by and through, VICKI J. MONROE, Deputy District Attorney, and good cause  
17 appearing therefor,

18 IT IS HEREBY ORDERED that a transcript of the Argument and Decision heard on the 19th  
19 day of July, 1996, be prepared by SHARLEEN NICHOLSON, Court Reporter for the above-entitled  
20 Court.

21 DATED this 23 day of August, 1996.

22 *Jack [unclear]*  
DISTRICT JUDGE

23 STEWART L. BELL  
24 District Attorney  
25 Nevada Bar #000477

26 BY *Vicki J. Monroe*  
VICKI J. MONROE  
27 Deputy District Attorney  
28 Nevada Bar #003776

/kl

**CEST**

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*James L. Bell*  
CLERK

1 **ORDR**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 ROY MORAGA,  
13 #938554

14 Defendant(s).

Case No.. C92174  
Dept. No. X  
Docket K

**FINDINGS OF FACT, CONCLUSIONS OF**

**LAW AND ORDER**

DATE OF HEARING: 7/19/96

TIME OF HEARING: 9:00 A.M.

18 THIS CAUSE having come on for hearing before the Honorable Jack Lehman, District Judge,  
19 on the 19th day of July, 1996, the Petitioner not being present, represented by DAVID SCHIECK, ESQ.,  
20 the Respondent being represented by STEWART L. BELL, District Attorney, by and through VICKI  
21 J. MONROE, Deputy District Attorney, and the Court having considered the matter, including briefs,  
22 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the  
23 following findings of fact and conclusions of law:

**FINDINGS OF FACT**

26 1. Defendant was arrested for the December 5, 1989, sexual assault and rape of a woman  
27 in her home. Defendant plead not guilty and a jury trial was had wherein Defendant was found guilty  
28

**CEST**

1 of two counts of Burglary and two counts of Sexual Assault. Thereafter on June 30, 1990, Defendant  
2 was sentenced to life in the Nevada State Prison without the possibility of parole after being  
3 adjudicated a habitual criminal. Defendant's direct appeal to the Nevada Supreme Court was denied  
4 on August 27, 1991. However, the Court remanded Defendant's case to the District Court for  
5 resentencing. The Supreme Court concluded that the District Court had erroneously imposed one  
6 sentence for multiple offenses.

7 2. On October 21, 1991, Defendant was resentenced in Department X of the Eighth  
8 Judicial District to ten years for each of the Burglary counts, to run consecutive to each other, and  
9 consecutive to a sentence of life imprisonment without the possibility of parole for Count III - Sexual  
10 Assault. Defendant was adjudicated a habitual criminal as to Count IV and sentenced to another  
11 consecutive term of life imprisonment without the possibility of parole. Defendant then appealed the  
12 second sentencing, specifically contesting the validity of the judgments of conviction used to  
13 adjudicate him a habitual criminal. The Nevada Supreme Court denied the same on October 4, 1995.

14 3. On December 5, 1989, between the hours of 1:30 a.m. and 5:30 a.m., Defendant  
15 entered the victim's residence located at 1000 Dumont, Apartment 227, Las Vegas. Once inside,  
16 Defendant took a woman's Seiko watch and approximately \$25 from a coffee table in the living room,  
17 an unknown amount of cash from the victim's bedroom dresser, and a key to the apartment which was  
18 laying on a table near the front door. Defendant then left the apartment. At approximately 7:30 a.m.,  
19 the victim returned to find the items missing. Las Vegas Metropolitan Police were contacted and a  
20 report of the entry submitted.

21 4. Approximately noon of the same day, the victim (a 46 year-old female) was awakened  
22 by Defendant knocking at her front door. After informing Defendant that he had awakened her and  
23 asking him to leave, the victim returned to her room. Almost two hours later, the victim was  
24 awakened by a noise, only to find Defendant outside her bedroom on the stairs. Defendant grabbed  
25 the victim and after a brief struggle, the victim was able to momentarily free herself. However,  
26 Defendant regained his hold and pushed the victim down the stairs. Thereafter Defendant raped the  
27 victim, instructed her to shower and raped her again. When Defendant exited the room, the victim  
28 contacted her daughter and requested her to contact the police.

5. Around 2:15 p.m., LVMPD detained Defendant at in the 900 block of Sierra Vista and after a positive identification by the victim, he was arrested and transported to the Clark County Detention Center.

## II

## CONCLUSIONS OF LAW

6. Defendant, for the first time in his collateral attack, challenges the length of time he was incarcerated before he was brought before a magistrate. Specifically, after remaining silent on the issue in appealing from two judgments of conviction, Defendant now alleges that he was incarcerated some 210 hours before his initial arraignment, and that no probable cause determination was made. Defendant did not preserve this issue below or raise it in his direct appeal and as such, it has been waived. NRS 34.810(1) provides in part:

The court shall dismiss a petition if the court determines that:

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

- (1) Presented to the trial court;
- (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or
- (3) 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.

NRS 34.810(3) imposes the burden upon the defendant of proving specific facts that demonstrate good cause for his failure to present such a claim in earlier proceedings and of showing actual prejudice to the defendant. Accordingly, the waiver of claims doctrine mandates the dismissal of Defendant's instant claim. Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). Defendant's Petition is barren as to why his allegations surrounding probable cause determination were not raised in either of his direct appeals.

7. Defendant took the stand at trial and offered a defense of "consent" to the charges of

1 Sexual Assault. An excerpt from his offered testimony is as follows:

2 PROSECUTOR: Basically, Mr. Moraga, what you are saying to  
3 us is you are really confirming everything  
4 everybody already testified to. You are just  
5 saying that the sex that happened between you  
6 and Ms. Hawk was with her consent; is that  
7 right?

8 DEFENDANT: That's right. (3 ROA 550).

9 8. Any issues of identification that DNA testing might hope to resolve has been rendered  
10 moot by offering the defense of "consent" to the sexual assault. Moreover, Defendant has waived  
11 this issue by (1) not preserving it below and (2) not raising the identification in his direct appeal  
12 pursuant to NRS 34.810.

13 9. Nor was Defendant's counsel ineffective for not testing DNA evidence at the time of  
14 trial. In People v. Kaurish, 802 P.2d 278, 298 (Cal. 1990),<sup>1</sup> a habeas petitioner claimed  
15 ineffective representation because his counsel failed to independently test dried stains on  
16 impounded clothing. Counsel therein did not know that a time limit existed for testing the  
17 material, such that the test results would be reliable: counsel admitted that he did not learn of the  
18 time limit until one year after the clothing was impounded. As such, the integrity of any future  
19 testing was jeopardized. The California Supreme Court refused to find any prejudice inured to  
20 that defendant. The Court noted that more was required than speculation that timely testing  
21 would have shown a favorable result: there must have been a *reasonable probability* that such  
22 evidence would be produced. Kaurish, at 298. No such reasonable probability can be gleaned  
23 from the record herein.

24 10. In his last appeal from the judgment of conviction entered on remand, Defendant  
25 specifically challenged the validity of his habitual criminal status. The Nevada Supreme Court  
26 specifically denied his contentions and in a Order Dismissing Appeal, affirmed the District Court's  
27 conclusion that Defendant was a habitual criminal and the State had met its burden beyond a  
28 reasonable doubt. As such, that Order becomes the law of the case and forecloses Defendant's  
successive attempt at relief on this issue. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

---

<sup>1</sup> cert denied, Kaurish v. California, 502 U.S. 837, 112 S.Ct. 121 (1990).

1 Defendant duplicates his complaints surrounding his adjudication as a habitual criminal. The Supreme  
2 Court confirmed that adjudication and, therefore, the Supreme Court's ruling, issued on Defendant's  
3 direct appeal, became the law of this case and forecloses Defendant's ability to revive this claim.

4 11. The United States Supreme Court has clearly established the appropriate test for  
5 determining whether a defendant received constitutionally defective counsel. A defendant's burden  
6 is two-fold. First, a convicted defendant must show that his counsel's performance was objectively  
7 deficient such that counsel was not functioning as the 'counsel' envisioned by Sixth Amendment  
8 guarantees. Second, the defendant must show that the deficient performance prejudiced the defendant  
9 in a way that effectively deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687,  
10 104 S.Ct. 2052, 2064 (1984). Defendant is unable to show any prejudice inured by his assertion that  
11 his trial counsel should have moved to suppress a key that was found as the result of a warrantless  
12 search. Defendant cannot show that the outcome of his trial would have been different with the  
13 suppression of the house key.

14 **CONCLUSION**

15 Based on the forgoing Findings of Fact and Conclusions of Law, Defendant's Petition for Writ  
16 of Habeas Corpus (Post-Conviction) is DENIED.


17 **ORDER**

18 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall  
19 be, and it is, hereby denied.

20 DATED this 28<sup>th</sup> day of August, 1996.

21  
22   
23 \_\_\_\_\_  
DISTRICT JUDGE 

24 STEWART L. BELL  
25 DISTRICT ATTORNEY  
Nevada Bar #000477

26 BY   
27 VICKI J. MONROE  
28 Deputy District Attorney  
Nevada Bar #003776

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RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Findings of Fact is hereby acknowledged this  
6 day of August, 1996.

David M. Schieck  
ATTORNEY FOR DEFENDANT

BY David M. Schieck / mt  
302 E. Carson #600 11:15 A  
Las Vegas, NV 89101, Nevada

kollins/kl

ORIGINAL

NEOJ  
STEWART L. BELL  
DISTRICT ATTORNEY  
Nevada Bar #000477  
200 S. Third Street  
Las Vegas, Nevada 89155  
(702) 455-4711  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

SEP 20 11 04 AM '96

CLERK

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROY MORAGA  
#938554

Defendant.

Case No. C92174  
Dept. No. X  
Docket K

NOTICE OF ENTRY OF ORDER

TO: STATE PUBLIC DEFENDER

YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled action,  
a copy of which is attached hereto.

DATED this 19 day of September, 1996.

STEWART L. BELL  
DISTRICT ATTORNEY  
Nevada Bar #000477

BY Vicki J. Monroe  
VICKI J. MONROE  
Deputy District Attorney  
Nevada Bar #003776

CE31



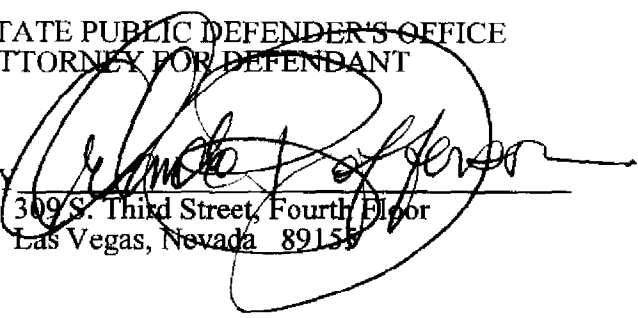
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RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Findings of Fact, Conclusions of Law and  
Order is hereby acknowledged this 19th day of September, 1996.

STATE PUBLIC DEFENDER'S OFFICE  
ATTORNEY FOR DEFENDANT

BY



309 S. Third Street, Fourth Floor  
Las Vegas, Nevada 89158

/kl

1 **ORDR**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

FILED

SEP 6 12 50 PM '96

*Jonathan Schieck*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,  
8  
9 Plaintiff,

-vs-

10 ROY MORAGA,  
11 #938554

12 Defendant(s).  
13

Case No.. C92174  
Dept. No. X  
Docket K

14 **FINDINGS OF FACT, CONCLUSIONS OF**  
15 **LAW AND ORDER**

16 DATE OF HEARING: 7/19/96

17 TIME OF HEARING: 9:00 A.M.

18 THIS CAUSE having come on for hearing before the Honorable Jack Lehman, District Judge,  
19 on the 19th day of July, 1996, the Petitioner not being present, represented by DAVID SCHIECK, ESQ.,  
20 the Respondent being represented by STEWART L. BELL, District Attorney, by and through VICKI  
21 J. MONROE, Deputy District Attorney, and the Court having considered the matter, including briefs,  
22 transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the  
23 following findings of fact and conclusions of law:

24  
25 **FINDINGS OF FACT**

26 1. Defendant was arrested for the December 5, 1989, sexual assault and rape of a woman  
27 in her home. Defendant plead not guilty and a jury trial was had wherein Defendant was found guilty  
28

1 of two counts of Burglary and two counts of Sexual Assault. Thereafter on June 30, 1990, Defendant  
2 was sentenced to life in the Nevada State Prison without the possibility of parole after being  
3 adjudicated a habitual criminal. Defendant's direct appeal to the Nevada Supreme Court was denied  
4 on August 27, 1991. However, the Court remanded Defendant's case to the District Court for  
5 resentencing. The Supreme Court concluded that the District Court had erroneously imposed one  
6 sentence for multiple offenses.

7 2. On October 21, 1991, Defendant was resentenced in Department X of the Eighth  
8 Judicial District to ten years for each of the Burglary counts, to run consecutive to each other, and  
9 consecutive to a sentence of life imprisonment without the possibility of parole for Count III - Sexual  
10 Assault. Defendant was adjudicated a habitual criminal as to Count IV and sentenced to another  
11 consecutive term of life imprisonment without the possibility of parole. Defendant then appealed the  
12 second sentencing, specifically contesting the validity of the judgments of conviction used to  
13 adjudicate him a habitual criminal. The Nevada Supreme Court denied the same on October 4, 1995.

14 3. On December 5, 1989, between the hours of 1:30 a.m. and 5:30 a.m., Defendant  
15 entered the victim's residence located at 1000 Dumont, Apartment 227, Las Vegas. Once inside,  
16 Defendant took a woman's Seiko watch and approximately \$25 from a coffee table in the living room,  
17 an unknown amount of cash from the victim's bedroom dresser, and a key to the apartment which was  
18 laying on a table near the front door. Defendant then left the apartment. At approximately 7:30 a.m.,  
19 the victim returned to find the items missing. Las Vegas Metropolitan Police were contacted and a  
20 report of the entry submitted.

21 4. Approximately noon of the same day, the victim (a 46 year-old female) was awakened  
22 by Defendant knocking at her front door. After informing Defendant that he had awakened her and  
23 asking him to leave, the victim returned to her room. Almost two hours later, the victim was  
24 awakened by a noise, only to find Defendant outside her bedroom on the stairs. Defendant grabbed  
25 the victim and after a brief struggle, the victim was able to momentarily free herself. However,  
26 Defendant regained his hold and pushed the victim down the stairs. Thereafter Defendant raped the  
27 victim, instructed her to shower and raped her again. When Defendant exited the room, the victim  
28 contacted her daughter and requested her to contact the police.

5. Around 2:15 p.m., LVMPD detained Defendant at in the 900 block of Sierra Vista and after a positive identification by the victim, he was arrested and transported to the Clark County Detention Center.

## II

## CONCLUSIONS OF LAW

6. Defendant, for the first time in his collateral attack, challenges the length of time he was incarcerated before he was brought before a magistrate. Specifically, after remaining silent on the issue in appealing from two judgments of conviction, Defendant now alleges that he was incarcerated some 210 hours before his initial arraignment, and that no probable cause determination was made. Defendant did not preserve this issue below or raise it in his direct appeal and as such, it has been waived. NRS 34.810(1) provides in part:

The court shall dismiss a petition if the court determines that:

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

(1) Presented to the trial court;

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or

(3) 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.

NRS 34.810(3) imposes the burden upon the defendant of proving specific facts that demonstrate good cause for his failure to present such a claim in earlier proceedings and of showing actual prejudice to the defendant. Accordingly, the waiver of claims doctrine mandates the dismissal of Defendant's instant claim. Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). Defendant's Petition is barren as to why his allegations surrounding probable cause determination were not raised in either of his direct appeals.

7. Defendant took the stand at trial and offered a defense of "consent" to the charges of

1 Sexual Assault. An excerpt from his offered testimony is as follows:

2 PROSECUTOR: Basically, Mr. Moraga, what you are saying to  
3 us is you are really confirming everything  
4 everybody already testified to. You are just  
5 saying that the sex that happened between you  
6 and Ms. Hawk was with her consent; is that  
7 right?

8 DEFENDANT: That's right. (3 ROA 550).

9 8. Any issues of identification that DNA testing might hope to resolve has been rendered  
10 moot by offering the defense of "consent" to the sexual assault. Moreover, Defendant has waived  
11 this issue by (1) not preserving it below and (2) not raising the identification in his direct appeal  
12 pursuant to NRS 34.810.

13 9. Nor was Defendant's counsel ineffective for not testing DNA evidence at the time of  
14 trial. In People v. Kaurish, 802 P.2d 278, 298 (Cal. 1990),<sup>1</sup> a habeas petitioner claimed  
15 ineffective representation because his counsel failed to independently test dried stains on  
16 impounded clothing. Counsel therein did not know that a time limit existed for testing the  
17 material, such that the test results would be reliable: counsel admitted that he did not learn of the  
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19 testing was jeopardized. The California Supreme Court refused to find any prejudice inured to  
20 that defendant. The Court noted that more was required than speculation that timely testing  
21 would have shown a favorable result: there must have been a *reasonable probability* that such  
22 evidence would be produced. Kaurish, at 298. No such reasonable probability can be gleaned  
23 from the record herein.

24 10. In his last appeal from the judgment of conviction entered on remand, Defendant  
25 specifically challenged the validity of his habitual criminal status. The Nevada Supreme Court  
26 specifically denied his contentions and in a Order Dismissing Appeal, affirmed the District Court's  
27 conclusion that Defendant was a habitual criminal and the State had met its burden beyond a  
28 reasonable doubt. As such, that Order becomes the law of the case and forecloses Defendant's  
successive attempt at relief on this issue. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

---

<sup>1</sup> cert denied, Kaurish v. California, 502 U.S. 837, 112 S.Ct. 121 (1990).

1 Defendant duplicates his complaints surrounding his adjudication as a habitual criminal. The Supreme  
2 Court confirmed that adjudication and, therefore, the Supreme Court's ruling, issued on Defendant's  
3 direct appeal, became the law of this case and forecloses Defendant's ability to revive this claim.

4 11. The United States Supreme Court has clearly established the appropriate test for  
5 determining whether a defendant received constitutionally defective counsel. A defendant's burden  
6 is two-fold. First, a convicted defendant must show that his counsel's performance was objectively  
7 deficient such that counsel was not functioning as the 'counsel' envisioned by Sixth Amendment  
8 guarantees. Second, the defendant must show that the deficient performance prejudiced the defendant  
9 in a way that effectively deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687,  
10 104 S.Ct. 2052, 2064 (1984). Defendant is unable to show any prejudice inured by his assertion that  
11 his trial counsel should have moved to suppress a key that was found as the result of a warrantless  
12 search. Defendant cannot show that the outcome of his trial would have been different with the  
13 suppression of the house key.

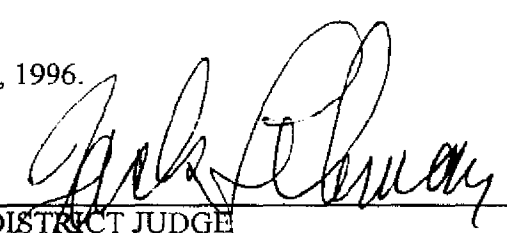
14 **CONCLUSION**

15 Based on the forgoing Findings of Fact and Conclusions of Law, Defendant's Petition for Writ  
16 of Habeas Corpus (Post-Conviction) is DENIED.

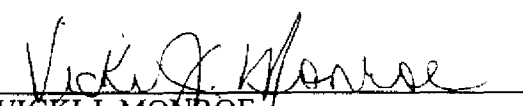
17 **ORDER**

18 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall  
19 be, and it is, hereby denied.

20 DATED this 28<sup>th</sup> day of August, 1996.

21  
22   
23 DISTRICT JUDGE 

24 STEWART L. BELL  
25 DISTRICT ATTORNEY  
26 Nevada Bar #000477

27 BY   
28 VICKI J. MONROE  
Deputy District Attorney  
Nevada Bar #003776

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RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Findings of Fact is hereby acknowledged this  
6 day of August, 1996.

David M. Schieck  
ATTORNEY FOR DEFENDANT

BY David M. Schieck /mt  
302 E. Carson #600  
Las Vegas, NV 89101, Nevada 11/5A

kollins/kl

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*Forrest L. ...*  
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1 NOAS  
2 STEVEN G. McGUIRE  
3 Nevada State Public Defender  
4 Nevada Bar No. 0335  
5 309 South Third Street, 4th Floor  
6 Las Vegas, Nevada 89155  
7 (702) 455-6265  
8 Attorneys for Defendant

DISTRICT COURT  
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA, )

9 Plaintiff, )

10 vs. )

11 ROY MORAGA, )

12 Defendant. )

Case No. : C92174  
Dept. No. : X  
Docket No. : K

14 NOTICE OF APPEAL

15 NOTICE is hereby given that the Defendant, ROY MORAGA, hereby appeals from an order  
16 denying his petition for post-conviction relief dated August 28, 1996, to the Supreme Court of the State  
17 of Nevada. This appeal is to all issues of law and fact.

18 DATED this 26th day of September, 1996.

19 STEVEN G. McGUIRE  
20 State Public Defender

21 By

*Richard Palma*  
22 RICHARD PALMA  
23 Deputy State Public Defender  
24 Nevada Bar No. 5733  
25 309 South Third Street, 4th Floor  
26 Las Vegas, Nevada 89155  
27 (702) 455-6265  
28

CE31



CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Nevada State Public Defender and on this 26th day of August, 1996, I served a copy of the foregoing NOTICE OF APPEAL, by mailing a copy thereof to:

SUPREME COURT CLERK  
SUPREME COURT BUILDING  
CAPITOL COMPLEX  
CARSON CITY NV 89710

STEWART L BELL  
CLARK COUNTY DISTRICT ATTORNEY  
ATTENTION APPELLATE DIVISION  
200 SOUTH THIRD STREET  
LAS VEGAS NV 89155

FRANKIE SUE DEL PAPA  
NEVADA ATTORNEY GENERAL  
ATTENTION CRIMINAL DIVISION  
CAPITOL COMPLEX  
CARSON CITY NV 89710

SHARLEEN NICHOLSON - DEPT. X  
DISTRICT COURT  
200 SOUTH THIRD STREET  
LAS VEGAS NV 89155

ROY MORAGA #31584  
ELY STATE PRISON  
POST OFFICE BOX 1989  
ELY NV 89301



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*Jonathan L. ...*  
CLERK

1 **DROA**  
2 STEVEN G. McGUIRE  
3 Nevada State Public Defender  
4 Nevada Bar No. 0335  
5 309 South Third Street, 4th Floor  
6 Las Vegas, Nevada 89155  
7 (702) 455-6265  
8 Attorneys for Defendant

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 ROY MORAGA,

13 Defendant.

Case No. : C92174  
Dept. No. : X  
Docket No. : K

14 DESIGNATION OF RECORD ON APPEAL

15 COMES NOW, STEVEN G. McGUIRE, Nevada State Public Defender, and RICHARD  
16 PALMA, Deputy State Public Defender, attorneys for the above-named Defendant, and designation of  
17 the following as the record on appeal:

18 Each and every document, pleading, transcript, trial transcript, and paper heretofore filed or  
19 lodged with the Clerk of the above-entitled court in Case Number C92174.

20 DATED this 3rd day of October, 1996.

21 STEVEN G. McGUIRE  
22 State Public Defender

23 By

*Richard Palma*  
24 RICHARD PALMA

25 Deputy State Public Defender  
26 Nevada Bar No. 5733  
27 309 South Third Street, 4th Floor  
28 Las Vegas, Nevada 89155  
(702) 455-6265

1001

1 CERTIFICATE OF SERVICE

2 I hereby certify that I am an employee of the Office of the Nevada State Public Defender and  
3 on this 4th day of October, 1996, I served a copy of the foregoing DESIGNATION OF RECORD ON  
4 APPEAL, by mailing a copy thereof to:

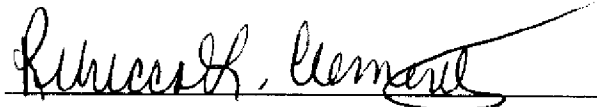
5 SUPREME COURT CLERK  
6 SUPREME COURT BUILDING  
7 CAPITOL COMPLEX  
8 CARSON CITY NV 89710

9 STEWART L BELL  
10 CLARK COUNTY DISTRICT ATTORNEY  
11 ATTENTION APPELLATE DIVISION  
12 200 SOUTH THIRD STREET  
13 LAS VEGAS NV 89155

14 FRANKIE SUE DEL PAPA  
15 NEVADA ATTORNEY GENERAL  
16 ATTENTION CRIMINAL DIVISION  
17 CAPITOL COMPLEX  
18 CARSON CITY NV 89710

19 PATSY SMITH - COURT REPORTER - DEPT VII  
20 200 SOUTH THIRD STREET  
21 LAS VEGAS NV 89155

22 ROY DANIELS MORAGA  
23 ELY STATE PRISON  
24 POST OFFICE BOX 1989  
25 ELY NV 89301

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1 NEOJ  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 ROY MORAGA  
12 #938554

13 Defendant.

Case No. C92174  
Dept. No. X  
Docket K

15 NOTICE OF ENTRY OF ORDER

16 TO: STATE PUBLIC DEFENDER

17 YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled action,  
18 a copy of which is attached hereto.

19 DATED this 28 day of <sup>Oct.</sup>~~September~~, 1996.

20 STEWART L. BELL  
21 DISTRICT ATTORNEY  
22 Nevada Bar #000477

23 BY Vicki J. Monroe  
24 VICKI J. MONROE  
25 Deputy District Attorney  
26 Nevada Bar #003776  
27  
28

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STATE PUBLIC DEFENDER  
ATTORNEY ~~FOR~~ DEFENDANT

309 S. Third St., Fourth Floor  
Las Vegas, Nevada 89155

1 **ORDR**  
2 STEWART L. BELL  
3 DISTRICT ATTORNEY  
4 Nevada Bar #000477  
5 200 S. Third Street  
6 Las Vegas, Nevada 89155  
7 (702) 455-4711  
8 Attorney for Plaintiff

**FILED**

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*Jonathan D. ...*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,  
8 Plaintiff,

9 -vs-

10 ROY MORAGA,  
11 #938554

12 Defendant(s).  
13

Case No.. C92174  
Dept. No. X  
Docket K

14 **FINDINGS OF FACT, CONCLUSIONS OF**

15 **LAW AND ORDER**

16 DATE OF HEARING: 7/19/96

17 TIME OF HEARING: 9:00 A.M.

18 THIS CAUSE having come on for hearing before the Honorable Jack Lehman, District Judge,  
19 on the 19th day of July, 1996, the Petitioner not being present, represented by DAVID SCHIECK, ESQ.,  
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21 J. MONROE, Deputy District Attorney, and the Court having considered the matter, including briefs,  
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23 following findings of fact and conclusions of law:  
24

25 **FINDINGS OF FACT**

26 1. Defendant was arrested for the December 5, 1989, sexual assault and rape of a woman  
27 in her home. Defendant plead not guilty and a jury trial was had wherein Defendant was found guilty  
28

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5. Around 2:15 p.m., LVMPD detained Defendant at in the 900 block of Sierra Vista and after a positive identification by the victim, he was arrested and transported to the Clark County Detention Center.

## II

## CONCLUSIONS OF LAW

6. Defendant, for the first time in his collateral attack, challenges the length of time he was incarcerated before he was brought before a magistrate. Specifically, after remaining silent on the issue in appealing from two judgments of conviction, Defendant now alleges that he was incarcerated some 210 hours before his initial arraignment, and that no probable cause determination was made. Defendant did not preserve this issue below or raise it in his direct appeal and as such, it has been waived. NRS 34.810(1) provides in part:

The court shall dismiss a petition if the court determines that:

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

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(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief; or

(3) 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.

NRS 34.810(3) imposes the burden upon the defendant of proving specific facts that demonstrate good cause for his failure to present such a claim in earlier proceedings and of showing actual prejudice to the defendant. Accordingly, the waiver of claims doctrine mandates the dismissal of Defendant's instant claim. Kimmel v. Warden, 101 Nev. 6, 692 P.2d 1282 (1985); Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). Defendant's Petition is barren as to why his allegations surrounding probable cause determination were not raised in either of his direct appeals.

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5 saying that the sex that happened between you  
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8 DEFENDANT: That's right. (3 ROA 550).

9 8. Any issues of identification that DNA testing might hope to resolve has been rendered  
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11 this issue by (1) not preserving it below and (2) not raising the identification in his direct appeal  
12 pursuant to NRS 34.810.

13 9. Nor was Defendant's counsel ineffective for not testing DNA evidence at the time of  
14 trial. In People v. Kaurish, 802 P.2d 278, 298 (Cal. 1990),<sup>1</sup> a habeas petitioner claimed  
15 ineffective representation because his counsel failed to independently test dried stains on  
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18 time limit until one year after the clothing was impounded. As such, the integrity of any future  
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22 evidence would be produced. Kaurish, at 298. No such reasonable probability can be gleaned  
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24 10. In his last appeal from the judgment of conviction entered on remand, Defendant  
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26 specifically denied his contentions and in a Order Dismissing Appeal, affirmed the District Court's  
27 conclusion that Defendant was a habitual criminal and the State had met its burden beyond a  
28 reasonable doubt. As such, that Order becomes the law of the case and forecloses Defendant's  
successive attempt at relief on this issue. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

---

<sup>1</sup> *cert denied*, Kaurish v. California, 502 U.S. 837, 112 S.Ct. 121 (1990).

1 Defendant duplicates his complaints surrounding his adjudication as a habitual criminal. The Supreme  
2 Court confirmed that adjudication and, therefore, the Supreme Court's ruling, issued on Defendant's  
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4 11. The United States Supreme Court has clearly established the appropriate test for  
5 determining whether a defendant received constitutionally defective counsel. A defendant's burden  
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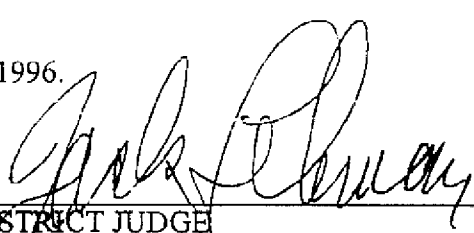
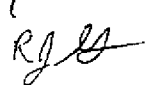
14 **CONCLUSION**

15 Based on the forgoing Findings of Fact and Conclusions of Law, Defendant's Petition for Writ  
16 of Habeas Corpus (Post-Conviction) is DENIED.

17 **ORDER**

18 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall  
19 be, and it is, hereby denied.

20 DATED this 25<sup>th</sup> day of August, 1996.

21  
22   
23 DISTRICT JUDGE 

24 STEWART L. BELL  
25 DISTRICT ATTORNEY  
26 Nevada Bar #000477

27 BY 

28 VICKI J. MONROE  
Deputy District Attorney  
Nevada Bar #003776

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RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Findings of Fact is hereby acknowledged this  
6 day of August, 1996.

David M. Schieck  
ATTORNEY FOR DEFENDANT

BY David M. Schieck / MT  
302 E. Carson #600 115A  
Las Vegas, NV 89101, Nevada

kollins/kl

ORIGINAL

FILED

OCT 29 1 15 PM '96

CASA  
STEVEN G. McGUIRE  
Nevada State Public Defender  
Nevada Bar No. 0335  
309 South Third Street, 4th Floor  
Las Vegas, Nevada 89155  
(702) 455-6265  
Attorneys for Defendant

*Jack Lehman*  
DISTRICT COURT CLERK

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY MORAGA,

Defendant.

Supreme Court No. : 29321

Case No. : C92174  
Dept. No. : X  
Docket No. : K

CASE APPEAL STATEMENT

1. Appellant : Roy Moraga
2. Judge : Jack Lehman
3. Parties in District Court : State of Nevada vs. Roy Moraga
4. Parties in Appeal : Roy Moraga vs. State of Nevada
5. Counsel on Appeal :

Richard Palma  
State Public Defender's Office  
309 South Third Street  
Las Vegas, Nevada 89155  
(702) 455-6265  
Appellant Roy Moraga

Clark County District Attorney's Office  
Attention: Appellate Division  
200 South Third Street  
Las Vegas, Nevada 89155  
(702) 455-4801

Frankie Sue Del Papa, Attorney General  
Attention: Criminal Division  
Capitol Complex  
Carson City, Nevada 89710  
(702) 687-4170

CEST

1           6.       Appellant was represented by appointed counsel in the district court.

2           7.       Appellant is represented by appointed counsel on appeal.

3           8.       Appellant was not granted leave to proceed in forma pauperis.

4           9.       January 9, 1990.

5       DATED this 28th day of October, 1996.

6                               STEVEN G. McGUIRE  
7                               State Public Defender

8  
9       By \_\_\_\_\_

10                              RICHARD PALMA  
11                              Deputy State Public Defender  
12                              Nevada Bar No. 5733  
13                              309 South Third Street, 4th Floor  
14                              Las Vegas, Nevada 89155  
15                              (702) 455-6265  
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Nevada State Public Defender and on this 29<sup>th</sup> day of October, 1996, I served a copy of the foregoing CASE APPEAL STATEMENT, by mailing a copy thereof to:

SUPREME COURT CLERK  
SUPREME COURT BUILDING  
CAPITOL COMPLEX  
CARSON CITY NV 89710

STEWART L BELL  
CLARK COUNTY DISTRICT ATTORNEY  
ATTENTION APPELLATE DIVISION  
200 SOUTH THIRD STREET  
LAS VEGAS NV 89155

FRANKIE SUE DEL PAPA  
NEVADA ATTORNEY GENERAL  
ATTENTION CRIMINAL DIVISION  
CAPITOL COMPLEX  
CARSON CITY NV 89710

ROY DANIELS MORAGA #31584  
ELY STATE PRISON  
PO BOX 1989  
ELY NV 89301

Rebecca Clement

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ORIGINAL

DISTRICT COURT  
CLARK COUNTY, NEVADA  
FILED IN OPEN COURT  
JAN 13 1997

LORETTA BOWMAN, CLERK  
BY [Signature] Deputy

THE STATE OF NEVADA,  
Plaintiff,

vs.

ROY D. MORAGA,  
Defendant.

CASE NO. C092174  
DEPT NO. X  
DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

WEDNESDAY, APRIL 17, 1996

RECORDER'S TRANSCRIPT RE:

DEFENDANT'S PRO PER MOTION FOR FEES FOR EXPERT SERVICE

DEFENDANT'S PRO PER PETITION FOR WRIT OF HABEAS CORPUS

DEFENDANT'S PRO PER MOTION TO COMPEL PRODUCTION OF  
SEMEN/BLOOD

DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS

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DEFENDANT'S PRO PER MOTION FOR RETURNING SEIZED PROPERTY

MARK BAILUS' MOTION TO WITHDRAW AS COUNSEL

HEARING: SUPPLEMENTAL PLEADINGS

APPEARANCES:

FOR THE STATE:

STEVEN HILL, DDA

FOR THE DEFENSE:

DAVID M. SCHIECK, ESQ.  
MARK B. BAILUS, ESQ.

RECORDER/TRANSCRIBER  
Sharleen Nicholson



1 LAS VEGAS, NEVADA: WEDNESDAY, APRIL 17, 1996 AT 9 A.M.

2 THE COURT: C92174. State of Nevada v. Roy D. Moraga.

3 Let the record reflect the presence -- the absence of Mr.  
4 Moraga, but he's in Nevada State Prison; the presence of Mr.  
5 Schieck and Mr. Bailus. Mr. Bailus, your motion is granted.

6 MR. BAILUS: Thank you, Your Honor. If I may approach?

7 THE COURT: Sure.

8 (Order signed in open court)

9 MR. HILL: Your Honor, could we pass this matter.  
10 Somebody from the Crimes Against Women and Children Sexual  
11 Assault Unit of our office will be handling this matter.

12 THE COURT: Well, actually we're going to do --

13 MR. SCHIECK: All we're going to do is appoint.

14 MR. HILL: Well, that's the problem.

15 THE COURT: Mr. Schieck has already been appointed.

16 MR. SCHIECK: I've been retained, Your Honor, but Mr.  
17 Moraga apparently, before he retained me or since he retained  
18 me, has filed a bunch of pro per motions of which I have no  
19 knowledge.

20 We knew that he had filed a pro per petition for  
21 writ of habeas corpus, and I confirmed on that and was here  
22 today to ask for another month to supplement his petition  
23 because I haven't been able to get a hold of all of his files  
24 because he's in Ely.

The calendar reflects he's filed a bunch of other motions that aren't in my file.

THE COURT: He's filed six motions all together. He filed a motion for extension of time to file supplemental points and authorities. I was going to grant that to you, whatever time you needed.

Then evidently you had knowledge of the habeas corpus.

MR. SCHIECK: Correct.

THE COURT: Defendant's pro per motion for fees for expert service, is it expert service?

MR. SCHIECK: Could we just take all those off calendar and the ones that are meritorious I'll refile if appropriate and if not I'll discuss them with Mr. Moraga and we'll come to a resolution of them that way.

THE COURT: That will be fine, so the rest of them will be taken off calendar. And how much time do you want for habeas?

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1 MR. SCHIECK: One more month to file the supplement, Your  
2 Honor.

3 THE COURT: That will be fine.

4 THE CLERK: May 24th, 9 a.m.

5 THE COURT: Okay.

6 MR. SCHIECK: Thank you, Judge.

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8 (Whereupon, the matter was continued to  
9 May 24, 1996 at 9 a.m.)

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ATTEST: Full, true and accurate transcript.

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SHARLEEN NICHOLSON  
Special Recorder

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ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED IN OPEN COURT  
JAN 13 1997 19

LORETTA BOWMAN, CLERK  
BY Henry Noble Deputy

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. C092174  
DEPT NO. X  
DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

MONDAY, AUGUST 12, 1996

RECORDER'S TRANSCRIPT RE:

DAVID SCHIECK'S MOTION TO WITHDRAW AS COUNSEL

APPEARANCES:

FOR THE STATE:

CRAIG HENDRICKS, DDA

FOR THE DEFENDANT:

DAVID M. SCHIECK, ESQ.

RECORDER/TRANSCRIBER  
Sharleen Nicholson

CE11

1 LAS VEGAS, NEVADA: MONDAY, AUGUST 12, 1996 AT 9 A.M.

2 THE COURT: C92174. State of Nevada v. Roy D. Moraga.  
3 Mr. Schieck, the Nevada Supreme Court in April came down with  
4 a thing called Kim Blandino v. State. Did you read that?

5 MR. SCHIECK: No, I did not, Your Honor.

6 THE COURT: It says that Mr. Blandino cannot represent  
7 himself on an appeal. They won't allow it. That puts me in  
8 a quandary with regard to your motion.

9 MR. SCHIECK: The problem is, Your Honor, I was retained  
10 to do the post conviction proceedings. He can't afford to  
11 retain me to go on any further. If the Court desires to  
12 appoint me that would be acceptable.

13 I know Mr. Moraga wants to appeal.

14 THE COURT: Is there a reason why the Public Defender's  
15 Office can't represent him?

16 MR. SCHIECK: I believe the Public Defender's Office  
17 represented him at trial, Your Honor.

18 THE COURT: Did they.

19 MR. SCHIECK: I don't have my file here to recall.

20 MR. HENDRICKS: I think they did, Judge.

21 THE COURT: If they did then -- do you want to represent  
22 him on the appeal?

23 MR. SCHIECK: That's fine, Your Honor.

24 THE COURT: Is he entitled to counsel on appeal of --

1 MR. SCHIECK: That's been a subject of some recent  
2 discussion between different District Court departments, Your  
3 Honor. Some departments take the position that on appeal from  
4 denial of post conviction you're not entitled to counsel.  
5 Some departments have still been appointing counsel to do it.

6 THE COURT: Has the Nevada Supreme Court said anything  
7 yet, that you know of?

8 MR. SCHIECK: Not that I was able to find, Your Honor.

9 THE COURT: Well, it would be interesting to see what  
10 happens if he files his own briefs. I'm going to kick this  
11 over a week to see whether we can find anything on the Nevada  
12 Supreme Court with regard to the right to an attorney to  
13 appeal a denial of post conviction relief and we'll have it  
14 back on calendar in a week.

15 THE CLERK: August 19th at 9 a.m.

16 MR. SCHIECK: Thank you.

17 THE COURT: I will grant your motion to withdraw then.

18 MR. SCHIECK: I'll come back on the 19th.

19 THE COURT: Yes. Just to see.

20 MR. SCHIECK: Your Honor, my file also indicates the  
21 State has not prepared the written findings on the case so  
22 that his 30 days to file his appeal is not run. I would just  
23 --

24 THE COURT: Okay. I'll ask that the State go ahead and

1 prepare that. Make sure you get that done. I've forgotten,  
2 who was the D.A. that --

3 MR. SCHIECK: I don't remember who was there.

4 THE COURT: You can check that out though, can't you?

5 MR. HENDRICKS: Sure, Judge.

6 MR. SCHIECK: Thank you.

7 THE COURT: Okay. Make sure. We'll -- I want to  
8 calendar that for 10 days to make sure that the findings of  
9 fact and conclusions of law have been filed. If they haven't  
10 I'll raise hell with whoever the deputy D.A. is.

11 THE CLERK: Do you want it back on calendar next week and  
12 then in 10 days?

13 THE COURT: Let's do it. Yes. Let's make it a week from  
14 Wednesday.

15 THE CLERK: Okay.

16 THE COURT: Yes.

17 THE CLERK: For everything?

18 THE COURT: For --

19 THE CLERK: Or just for the findings of fact?

20 THE COURT: Yes. No point having it Monday and  
21 Wednesday. A week from Wednesday we'll have it on calendar to  
22 determine whether I'll appoint you as counsel and also to  
23 determine whether the findings of fact and conclusions of law  
24 have been filed. If you can just tell whoever's job it is

1 that I expect it done by Wednesday of next week at the latest.  
2 Okay.

3 THE CLERK: August 21st at 9 a.m.

4 MR. SCHIECK: Thank you, Judge.

5  
6 (Whereupon, the Court heard unrelated matters and the  
7 instant matter was continued to  
8 August 21st at 9 a.m.)  
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12 ATTEST: Full, true and accurate transcript.

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15 SHARLEEN NICHOLSON  
16 Special Recorder  
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**ORIGINAL**

DISTRICT COURT

CLARK COUNTY, NEVADA **FILED IN OPEN COURT**

JAN 13 1997

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**LORETTA BOWMAN, CLERK**

BY

*Shana Hable*

**Deputy**

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. C092174

DEPT NO. X

DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

WEDNESDAY, AUGUST 21, 1996

RECORDER'S TRANSCRIPT RE:

APPOINTMENT OF COUNSEL

STATUS CHECK: FINDINGS OF FACT AND CONCLUSIONS

**APPEARANCES:**

FOR THE STATE:

VICKI J. MONROE, DDA

FOR THE DEFENSE:

DAVID SCHIECK, ESQ.

RECORDER/TRANSCRIBER  
Sharleen Nicholson

**CE11**

1 LAS VEGAS, NEVADA: WEDNESDAY, AUGUST 21, 1996 AT 9 A.M.

2 THE COURT: C092174. State of Nevada v. Roy D. Moraga.  
3 Okay. Have we determined, do you know Mr. Schieck, whether --  
4 I guess the Public Defender's office cannot do this case, is  
5 that correct?

6 MR. SCHIECK: That's correct, Your Honor.

7 THE COURT: So do you want to be appointed?

8 MR. SCHIECK: Your Honor, at this point my schedule is  
9 pretty well booked up. I am -- besides my trial calendar I  
10 have three murder appeals that I have to get done within the  
11 next about forty-five days. I really don't think I could do  
12 service to Mr. Moraga.

13 THE COURT: Okay. We'll have to -- let's see. The  
14 people -- I could appoint Mr. Gonzalez, who is the contract  
15 attorney, one of the contract attorneys assigned --

16 MR. SCHIECK: I think appeals are outside the contract,  
17 Your Honor.

18 THE COURT: Are they. Then --

19 MS. MONROE: Your Honor, is the State Public Defender's  
20 Office taking cases from the Public Defender's office?

21 THE COURT: Do you know? I don't know. That's a good  
22 question.

23 MS. MONROE: They have been.

24 THE COURT: It's probably a good idea.

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1 MR. SCHIECK: They have been assigned to some post-  
2 conviction matters in other departments. In fact I know of  
3 one appeal they are handling.

4 THE COURT: Would you do me a big favor, Mr. Schieck.  
5 Could you make contact with them and tell them I've  
6 tentatively appointed them.

7 MR. SCHIECK: Okay.

8 THE COURT: And we'll set this on calendar next Monday  
9 for confirmation of counsel.

10 MR. SCHIECK: Okay.

11 THE COURT: And if they can't take it then they need to  
12 have somebody here next week.

13 THE CLERK: Okay. Monday, August 26th at 9 o'clock.

14 MS. MONROE: Your Honor, in addition, for the record,  
15 I've asked the court recorder to get me a copy of the  
16 transcript so that we can do the findings of fact and  
17 conclusions of law.

18 THE COURT: Okay.

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1 MS. MONROE: As soon as I have that we'll work on that  
2 and hopefully by next week have that.

3 THE COURT: That will be fine. Okay, that's fine.

4 MS. MONROE: Thank you.

5 MR. SCHIECK: Thank you, Your Honor.

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8 \* \* \* \* \*

9 ATTEST: Full, true and accurate transcript.

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12 SHARLEEN NICHOLSON  
13 Special Recorder  
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**ORIGINAL**

DISTRICT COURT **FILED IN OPEN COURT**

CLARK COUNTY, NEVADA **JAN 13 1997 19**

**LORETTA BOWMAN, CLERK**

BY *Nancy Noble* **Deputy**

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. C092174

DEPT NO. X

DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

MONDAY, JULY 15, 1996

RECORDER'S TRANSCRIPT RE:

ARGUMENT AND DECISION

APPEARANCES:

FOR THE STATE:

FRANK COUMOU, DDA

FOR THE DEFENSE:

NO APPEARANCE

RECORDER/TRANSCRIBER  
Sharleen Nicholson

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LAS VEGAS, NEVADA: MONDAY, JULY 15, 1996 AT 9 A.M.

THE COURT: C092174. State of Nevada v. Roy D. Moraga.  
That argument and decision is being continued to July the  
19th.

MR. COUMOU: That's correct.

THE COURT: Okay.

(Whereupon, the Court heard unrelated cases  
and the instant matter was continued to  
July 19, 1996 at 9 a.m.)

\* \* \* \* \*

ATTEST: Full, true and accurate transcript.

  
SHARLEEN NICHOLSON  
Special Recorder

103 ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA  
FILED IN OPEN COURT  
JAN 13 1997 19

LORETTA BOWMAN, CLERK  
BY *Haug Noble* Deputy

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. C092174  
DEPT NO. X  
DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

FRIDAY, JULY 19, 1996

RECORDER'S TRANSCRIPT RE:

ARGUMENT AND DECISION

APPEARANCES:

FOR THE STATE: FRANK COUMOU, DDA

FOR THE DEFENSE: DAVID M. SCHIECK, ESQ.

RECORDER/TRANSCRIBER  
Sharleen Nicholson

CE11

1 LAS VEGAS, NEVADA: FRIDAY, JULY 19, 1996 AT 9 A.M.

2 THE COURT: C92174. State of Nevada v. Roy D. Moraga.  
3 Okay, let the record reflect the presence of Mr. Schieck  
4 representing Mr. Moraga, Mr. Coumou for the State.

5 In this matter -- this is also a petition for post-  
6 conviction writ of habeas corpus. Pursuant to NRS 34.810,  
7 which generally provides that a court shall dismiss a petition  
8 if the grounds for the petition could have been raised at an  
9 earlier proceeding unless the defendant can demonstrate good  
10 cause for the failure and actual prejudice.

11 In this case, Defendant failed to provide any  
12 reason, including ineffective assistance of counsel, for why  
13 his alleged two hundred and ten hour detention, prior to  
14 determination of probable cause, was not raised at trial or on  
15 direct appeal. Consequently, this claim is barred under the  
16 doctrine of waiver.

17 Defendant's remaining claims could have also been  
18 raised at an earlier proceeding, but the fact that they are  
19 based on ineffective assistance of counsel could demonstrate  
20 good cause for the failure to do so and actual prejudice,  
21 thereby avoiding waiver. However, some of these claims can be  
22 disposed of on grounds other than ineffective assistance of  
23 counsel.



1 First, the defendant's contention regarding  
2 counsel's failure to object to the certified copies of his  
3 prior convictions is procedurally barred by the doctrine of  
4 law of the case because the Nevada Supreme Court, in  
5 dismissing defendant's first appeal, concluded that the State  
6 adequately proved that he had received three prior  
7 convictions.

8 Secondly, defendant's claims regarding counsel's  
9 failure to interview and call certain witnesses to testify  
10 about his alcohol-induced impotence and have DNA tests  
11 performed are moot based on defendant's use of the defense of  
12 consent. When asked during cross examination if the sex  
13 between the victim and himself was consensual, the defendant  
14 responded, and I'm quoting, "That's right," unquote.

15 Now based on defendant's testimony there are no  
16 questions regarding identification of the assailant. Since he  
17 alleges that consent was there, DNA is simply not something  
18 that would be done under the circumstances. Even if consent  
19 was not used as a defense, counsel's failure to conduct DNA  
20 testing did not prejudice the outcome based on People v.  
21 Korish, a California case in 1998, 802 P.2d 278 at 298. In  
22 Korish defense counsel failed to independently test dried  
23 stains during the time limit that existed for testing  
24 materials so that the results would be reliable.

Now the California Supreme Court refused to find any prejudice to the defendant and noted that more was required than speculation that timely testing would have shown a favorable result. There must have been a reasonable probability that such evidence would be produced. Defendant sets forth no information that indicates another test would produce an outcome different from that obtained by the state.

In addition, of course, I think the key to this is the defense of consent. Now pursuant to Strickland v. Washington, defendant failed to show that counsel's performance was deficient and the deficient performance prejudiced the defense. Specifically, the defendant provides no evidence that an objection to the warrantless search and the possible exclusion of the apartment key from evidence as a result would have changed the outcome of this matter. As a result, the petition for post-conviction relief by way of habeas corpus is denied.

MR. SCHIECK: Can the state prepare the findings on that, Your Honor?

THE COURT: Yes. Mr. Coumou, you can check with my law clerk and she will show you what has been prepared on that.

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MR. COUMOU: Thank you, Judge.

THE COURT: Okay. Right.

MR. SCHIECK: Thank you, Your Honor.

THE COURT: Okay.

\* \* \* \* \*

ATTEST: Full, true and accurate transcript.

  
SHARLEEN NICHOLSON  
Special Recorder

# IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant(s),  
vs.

Case No: C092174  
SC No: 61734

STATE OF NEVADA,  
Respondent(s),

# RECORD ON APPEAL VOLUME 3

ATTORNEY FOR APPELLANT  
ROY D. MORAGA # 31584  
PROPER PERSON  
1200 PRISON RD.  
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT  
STEVEN B. WOLFSON, ESQ.  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NEVADA 89101

I N D E X

<u>VOLUME:</u>	<u>PAGE NUMBER:</u>
1	1 - 220
2	221 - 441
3	442 - 662
4	663 - 882
5	883 - 1101
6	1102 - 1320

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	01/10/2006	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1117 - 1120
3	10/03/1991	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	442 - 442
4	03/05/1996	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	757 - 758
4	02/20/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	702 - 704
4	03/11/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	764 - 766
3	10/03/1991	AFFIDAVIT IN SUPPORT OF OF REQUEST TO PROCEED IN FORMA PAUPERIS	443 - 445
4	02/20/1996	AFFIDAVIT OF DEFENDANT	705 - 706
4	03/11/1996	AFFIDAVIT OF PETITIONER	767 - 768
6	01/10/2006	AFFIDAVIT OF PETITIONER	1121 - 1122
5	04/30/1998	AFFIDAVIT OF ROY D. MORAGA	887 - 888
5	09/27/2004	AFFIDAVIT OF ROY D. MORAGA	1061 - 1062
1	06/13/1990	AMENDED INFORMATION	118 - 121
3	11/13/1991	AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	461 - 463
4	07/31/1992	ANSWER IN OPPOSITION TO MOTION FOR RETURNING SEIZED PROPERTY	670 - 680
4	10/29/1996	CASE APPEAL STATEMENT	859 - 861
5	06/15/1998	CASE APPEAL STATEMENT	910 - 911
5	09/28/1998	CASE APPEAL STATEMENT	947 - 948
5	02/18/2004	CASE APPEAL STATEMENT	1044 - 1045
6	02/10/2005	CASE APPEAL STATEMENT	1102 - 1103
6	03/02/2007	CASE APPEAL STATEMENT	1214 - 1216
6	03/05/2007	CASE APPEAL STATEMENT	1219 - 1220
6	09/18/2012	CASE APPEAL STATEMENT	1317 - 1318

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
7	11/09/2012	CERTIFICATE OF COPY AND TRANSMITTAL OF RECORD	
5	02/25/2002	CERTIFICATE OF INMATE'S INSTITUTIONAL ACCOUNT	968 - 968
5	01/17/1997	CERTIFICATE OF MAILING	886 - 886
4	08/05/1996	CERTIFICATE OF MAILING OF MOTION TO WITHDRAW AS COUNSEL	830 - 830
1	12/28/1989	CRIMINAL BINDOVER	1 - 11
3	01/27/1992	CRIMINAL SETTING SLIP	469 - 469
1	06/27/1990	DESIGNATION OF RECORD ON APPEAL	140 - 141
3	11/13/1991	DESIGNATION OF RECORD ON APPEAL	464 - 465
3	02/13/1992	DESIGNATION OF RECORD ON APPEAL	471 - 471
4	10/07/1996	DESIGNATION OF RECORD ON APPEAL	849 - 850
5	06/13/1998	DESIGNATION OF RECORD ON APPEAL	907 - 908
5	09/22/1998	DESIGNATION OF RECORD ON APPEAL	944 - 945
6	02/10/2005	DESIGNATION OF RECORD ON APPEAL	1104 - 1105
7	11/09/2012	DISTRICT COURT MINUTES	
3	02/20/1992	EX PARTE APPLICATION FOR PREPARATION OF TRANSCRIPTS	472 - 472
5	02/09/2004	EX PARTE MOTION FOR EXCESS FEES	1030 - 1036
4	02/20/1996	EX PARTE MOTION FOR FEES FOR EXPERT SERVICES	707 - 711
5	09/27/2004	EXTRAORDINARY WRIT OF MANDAMUS	1063 - 1069
3	10/03/1991	FINANCIAL CERTIFICATE	446 - 447
6	01/10/2006	FINANCIAL CERTIFICATE	1123 - 1124
6	02/08/2007	FINDING OF FACT AND CONCLUSIONS OF LAW	1201 - 1206
4	09/06/1996	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	833 - 838
6	08/13/2012	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1275 - 1281
1	01/09/1990	INFORMATION	12 - 14
1	03/15/1990	INSTRUCTIONS TO THE JURY	42 - 66
1	07/07/1990	JUDGMENT OF CONVICTION (JURY TRIAL)	146 - 147
1	03/13/1990	JURY LIST	41 - 41

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	06/04/1990	MOTION AND NOTICE OF MOTION TO AMEND INFORMATION	85 - 117
4	02/20/1996	MOTION AND NOTICE OF MOTION TO COMPEL, PRODUCTION OF SEMAN AND BLOOD	712 - 726
1	02/05/1990	MOTION AND NOTICE OF MOTION TO ENDORSE NAMES ON INFORMATION	31 - 34
5	10/18/2004	MOTION AND ORDER FOR FAILURE TO PROSECUTE AND REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT	1075 - 1082
6	02/22/2006	MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING	1169 - 1173
6	03/05/2007	MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL	1221 - 1222
5	06/01/1998	MOTION FOR ENLARGEMENT OF TIME	905 - 906
4	04/11/1996	MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	791 - 794
3	10/03/1991	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	448 - 448
4	02/20/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	727 - 727
4	03/05/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	759 - 759
4	03/11/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	769 - 769
5	02/25/2002	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	969 - 971
6	01/10/2006	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1125 - 1126
4	08/26/1993	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS; MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE JAIL TIME CREDITS AND AFFIDAVIT OF PETITION	683 - 693
6	08/06/2012	MOTION FOR RECONSIDERATION	1257 - 1270
5	12/16/2003	MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	996 - 1006
4	07/21/1992	MOTION FOR RETURNING SEIZED PROPERTY	667 - 669
4	03/11/1996	MOTION FOR RETURNING SEIZED PROPERTY	770 - 773



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
3	01/02/1992	MOTION TO APPOINT COUNSEL FOR APPEAL	466 - 468
5	04/30/1998	MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	889 - 890
5	02/25/2002	MOTION TO PRESERVE EVIDENCE AND ORDER	972 - 980
5	08/06/1998	MOTION TO STRIKE	918 - 924
2	09/26/1991	MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VII	439 - 441
5	10/31/2002	MOTION TO VACATE AND/OR AMEND JUDGMENT	982 - 987
4	04/09/1996	MOTION TO WITHDRAW AS COUNSEL	785 - 788
4	08/02/1996	MOTION TO WITHDRAW AS COUNSEL	826 - 829
5	10/19/2004	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1083 - 1088
6	09/13/2007	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1241 - 1248
4	10/30/1995	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	698 - 701
5	04/30/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	949 - 951
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	952 - 959
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	960 - 967
6	05/02/2005	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	1113 - 1116
3	10/04/1991	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - REMAND	454 - 458
1	06/27/1990	NOTICE OF APPEAL	142 - 143
3	10/30/1991	NOTICE OF APPEAL	460 - 460
4	09/27/1996	NOTICE OF APPEAL	847 - 848
5	06/13/1998	NOTICE OF APPEAL	909 - 909
5	09/22/1998	NOTICE OF APPEAL	946 - 946

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	02/17/2004	NOTICE OF APPEAL	1038 - 1039
6	02/10/2005	NOTICE OF APPEAL	1106 - 1106
6	03/02/2007	NOTICE OF APPEAL	1217 - 1218
6	09/17/2012	NOTICE OF APPEAL	1312 - 1316
6	02/22/2006	NOTICE OF CHANGE OF ADDRESS	1174 - 1174
6	02/13/2007	NOTICE OF ENTRY OF DECISION AND ORDER	1207 - 1213
6	08/21/2012	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1282 - 1289
4	04/17/1996	NOTICE OF ENTRY OF ORDER	796 - 799
4	09/20/1996	NOTICE OF ENTRY OF ORDER	839 - 846
4	10/28/1996	NOTICE OF ENTRY OF ORDER	851 - 858
5	05/29/1998	NOTICE OF ENTRY OF ORDER	901 - 904
5	07/07/1998	NOTICE OF ENTRY OF ORDER	914 - 917
6	04/08/2005	NOTICE OF ENTRY OF ORDER	1109 - 1112
5	02/26/2002	NOTICE OF HEARING - CRIMINAL	981 - 981
3	10/03/1991	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	449 - 453
4	03/05/1996	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	760 - 763
1	06/29/1990	ORDER	144 - 145
1	08/02/1990	ORDER	148 - 149
4	08/17/1992	ORDER	681 - 682
6	03/30/2005	ORDER	1107 - 1108
3	02/10/1992	ORDER APPOINTING COUNSEL	470 - 470
6	03/23/2007	ORDER DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1239 - 1240
5	06/30/1998	ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME	912 - 913
5	01/07/2004	ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1028 - 1029

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	10/05/2012	ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER	1319 - 1320
5	05/28/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY OR IN ALTERNATIVE CORRECT ILLEGAL SENTENCE	899 - 900
5	08/27/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO STRIKE	942 - 943
3	10/23/1991	ORDER FOR APPOINTMENT OF COUNSEL	459 - 459
5	11/21/2002	ORDER FOR APPOINTMENT OF COUNSEL FOR POST- CONVICTION RELIEF	988 - 988
5	02/11/2004	ORDER FOR PAYMENT OF EXCESS FEES	1037 - 1037
6	01/12/2006	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	1162 - 1162
2	09/13/1991	ORDER FOR PRODUCTION OF INMATE	437 - 438
6	04/21/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1186 - 1187
6	05/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1188 - 1189
6	06/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1199 - 1200
4	08/27/1996	ORDER FOR TRANSCRIPTS	832 - 832
6	01/27/2006	ORDER GRANTING DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER DENYING DEFENDANT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL	1167 - 1168
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	473 - 474
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	475 - 476
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	477 - 478
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	479 - 480
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	481 - 482
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	483 - 484
2	01/09/1991	ORDER RELEASING EVIDENCE	435 - 435
1	06/13/1990	ORDER TO AMEND INFORMATION	122 - 122

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	02/15/1990	ORDER TO ENDORSE NAMES ON INFORMATION	39 - 40
4	04/17/1996	ORDER TO WITHDRAW AS ATTORNEY OF RECORD	800 - 801
2	01/09/1991	PETITION FOR RELEASE OF EVIDENCE	436 - 436
4	02/20/1996	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	728 - 748
6	01/10/2006	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1127 - 1161
1	05/16/1990	PRE-SENTENCE INVESTIGATION REPORT (UNFILED) CONFIDENTIAL	75 - 84
1	03/15/1990	PROPOSED VERDICT	71 - 74
3	02/26/1992	RECEIPT OF COPY	485 - 485
3	02/26/1992	RECEIPT OF COPY	486 - 486
3	02/28/1992	RECEIPT OF COPY	487 - 487
3	03/02/1992	RECEIPT OF COPY	488 - 488
3	03/02/1992	RECEIPT OF COPY	489 - 489
4	08/27/1993	RECEIPT OF COPY	694 - 694
5	12/17/2003	RECEIPT OF COPY	1007 - 1007
4	04/09/1996	RECEIPT OF COPY AND CERTIFICATE OF MAILING	789 - 790
4	04/15/1996	RECEIPT OF COPY OF MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	795 - 795
4	08/05/1996	RECEIPT OF COPY OF MOTION TO WITHDRAW AS COUNSEL	831 - 831
5	01/05/2004	REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1023 - 1027
6	08/28/2012	REPLY TO STATE'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION	1290 - 1297
6	05/24/2006	REPLY TO STATE'S RESPONSE AND OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1190 - 1198
5	01/05/2005	REPLY TO STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS AND MOTION TO DISMISS	1099 - 1101

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	01/13/1997	REPORTER'S TRANSCRIPT OF APRIL 17, 1996	862 - 866
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 12, 1996	867 - 871
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 21, 1996	872 - 875
1	01/24/1990	REPORTER'S TRANSCRIPT OF DECEMBER 26, 1989	15 - 30
3	03/04/1992	REPORTER'S TRANSCRIPT OF FEBRUARY 15, 1990	490 - 491
1	02/12/1990	REPORTER'S TRANSCRIPT OF JANUARY 11, 1990	35 - 38
6	03/12/2007	REPORTER'S TRANSCRIPT OF JANUARY 23, 2006	1223 - 1226
5	05/04/2004	REPORTER'S TRANSCRIPT OF JANUARY 5, 2004	1046 - 1052
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 15, 1996	876 - 877
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 19, 1996	878 - 882
1	06/13/1990	REPORTER'S TRANSCRIPT OF JUNE 13, 1990 (UNFILED)	123 - 139
6	03/12/2007	REPORTER'S TRANSCRIPT OF JUNE 26, 2006	1227 - 1233
1	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUED)	150 - 220
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUATION)	221 - 264
3	03/27/1992	REPORTER'S TRANSCRIPT OF MARCH 12, 1990	520 - 657
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 13, 1990	265 - 387
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 15, 1990	388 - 434
5	01/13/1997	REPORTER'S TRANSCRIPT OF MARCH 6, 1996	883 - 885
3	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 7, 1990	658 - 662
4	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 9, 1990	663 - 664
5	05/14/2004	REPORTER'S TRANSCRIPT OF MAY 11, 1998	1057 - 1060
5	05/04/2004	REPORTER'S TRANSCRIPT OF NOVEMBER 13, 2002	1053 - 1056
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 11, 1991	492 - 494
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 14, 1991	495 - 499
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 21, 1991	500 - 511
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 9, 1991	512 - 514
3	03/04/1992	REPORTER'S TRANSCRIPT OF SEPTEMBER 23, 1991	515 - 519

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	05/26/1992	REQUEST FOR RECORDS	665 - 666
6	08/28/2012	REQUEST TO FILE EXHIBIT 1	1298 - 1311
4	09/29/1993	SECOND AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	695 - 697
5	11/27/2002	STATE'S OPPOSITION TO DEFENDANT'S MOTIO TO VACATE AND/OR AMEND JUDGMENT	989 - 993
6	03/16/2007	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1234 - 1238
5	12/26/2003	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1008 - 1022
6	02/27/2006	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR TRANSPORT	1175 - 1178
4	04/01/1996	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SEMAN AND BLOOD, PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO PROCEED IN FORMA PAUPERIS	774 - 784
5	05/08/1998	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	891 - 898
6	08/09/2012	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER	1271 - 1274
6	01/19/2006	STATE'S OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL	1163 - 1166
6	05/16/2012	STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1249 - 1256
6	02/27/2006	STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1179 - 1185
5	08/17/1998	STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE	925 - 941
5	12/15/2004	STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS	1089 - 1098
4	06/27/1996	STATE'S SUPPLEMENTAL OPPOSITION TO PETITIONER'S FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	816 - 822

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	06/11/2003	STIPULATION AND ORDER	994 - 995
4	05/20/1996	SUBSTATION OF ATTORNEYS	802 - 803
4	07/16/1996	SUPPLEMENT REPLY AND OPPOSITION FOR WRIT OF HABEAS CORPUS	823 - 825
5	09/27/2004	SUPPLEMENTAL ACT	1070 - 1074
4	02/20/1996	SUPPLEMENTAL BRIEF AND POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	749 - 756
5	02/17/2004	SUPPLEMENTAL BRIEF TO STATES OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1040 - 1043
4	06/13/1996	SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	804 - 815
1	03/15/1990	VERDICT COUNT I	67 - 67
1	03/15/1990	VERDICT COUNT II	68 - 68
1	03/15/1990	VERDICT COUNT III	69 - 69
1	03/15/1990	VERDICT COUNT VI	70 - 70

145

DISTRICT COURT  
CLARK COUNTY, NEVADA

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\* \* \* \* \*

THE STATE OF NEVADA, )  
 )  
Plaintiff, )  
 )  
-v- )  
Roy D. Moraga, )  
 )  
Defendant. )

*James Hillman*  
CLERK

CASE NO. C 92174  
VIII  
DEPT. NO. \_\_\_\_\_

**AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL  
OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS**

HEARING DATE: \_\_\_\_\_

HEARING TIME: \_\_\_\_\_

STATE OF NEVADA )  
 ) ss.  
COUNTY OF WHITE PINE )

I, Roy D. Moraga, being first duly sworn and under penalty of perjury, pursuant to NRS 208.165, do hereby depose and say that:

1) I am the Defendant in the above entitled action.

2) On the 30th day of July, 1991, I mailed a letter of "Termination of Counsel/Transfer of Records" to Mr. R. Roger Hillman, Deputy Public Defender.

3) I received no response from Mr. Hillman, or the Public Defenders Office.

4) On the 20th day of August, 1991, I petitioned this Court for it's order for production of all documents pursuant to NRS 7.055.

DATED this 20th day of August, 1991.

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/s/ Roy D. Moraga  
Roy D. Moraga

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1 CASE NO: C 92174  
2 DEPT NO: VIII

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*[Signature]*  
CLERK

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6 IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR Clark County

8  
9 Roy D. Moraga,  
10 Petitioner,

AFFIDAVIT IN SUPPORT OF  
OF REQUEST TO PROCEED IN  
FORMA PAUPERIS

11 vs.

12 State of Nevada,

13  
14 Respondent.

15 I, Roy D. Moraga, First being duly sworn, depose  
16 and say that I am the Petitioner in the above-entitled case; that  
17 in support of my Motion to proceed without being required to prepay  
18 fees, costs or give security therefor; I state that because of my  
19 poverty I am unable to pay the costs of said proceeding or to  
20 give security therefor; that I am entitled to relief.

21 I do    do not X request an attorney to be appointed for  
22 me.

23 I further swear that the responses which I have made to  
24 questions and instructions below are true.

25 1. Are you presently employed: Yes    No X

26 a. If the answer is yes, state the amount of your salary of  
27 wages per month, and give the name and address of your employer:  
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b. If the answer is no, state the date of last employment  
and the amount of salary and wayes per month which you received:

~~I was injured and unable to work prior to my arrest and~~  
have been unable to work the past year and a half since  
being incarcerated.

2. Have you received within the past twelve months any money  
from any of the following sources?

a. Business, profession or form of self-employment?

Yes \_\_\_\_\_ No X

b. Rent payments, interest or dividends?

Yes \_\_\_\_\_ No X

c. Pensions, annuities or life insurance payments?

Yes \_\_\_\_\_ No X

d. Gifts or inheritances?

Yes \_\_\_\_\_ No X

e. Any other sources?

Yes \_\_\_\_\_ No X

If the answer to any of the above is "YES" describe each  
source of money and state the amount received from each during the  
past twelve months: \_\_\_\_\_

3. Do you own cash or equivalent prison currency, or do you  
have money in a checking or savings account?

Yes \_\_\_\_\_ No X

If the answer is "YES" state the total value of the items  
owned: \_\_\_\_\_

1 4. Do you own any real estate, stocks, bonds, notes, automobiles, or  
2 other valuable property (excluding ordinary household furnishings and  
3 clothing)? Yes \_\_\_\_\_ No X

4 If your answer is "YES" describe the property and state its approximate  
5 value: \_\_\_\_\_  
6 \_\_\_\_\_

7 5. List the persons who are dependent upon you for support, state  
8 your relationship to those persons, and indicate how much you contribute  
9 toward their support: none  
10 \_\_\_\_\_  
11 \_\_\_\_\_

12 UNDER THE PENALTY OF PERJURY, Pursuant to N.R.S. 208.165 the above  
13 affidavit is true and correct to the best of affiants personal knowledge.

14 Dated this 20th day of August, 1991.  
15  
16

17 Roy D. Moraga  
18 Sign your name

19  
20 Roy D. Moraga 31584

21 Print your name DOP #  
22  
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147

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CASE NO: \_\_\_\_\_

DEPT NO: \_\_\_\_\_

IN THE 8<sup>th</sup> JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

IN THE MATTER OF

FINANCIAL  
CERTIFICATE

ROY D. MORAGA #31584  
NAME

ON MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

I hereby certify that the Petitioner herein has the sum  
of \$ 1.11 on account to his credit at the institution  
where he is confined. I further certify that Petitioner likewise  
has the following securities to his credit according to the records  
of said institution: \_\_\_\_\_

DATED this 16<sup>th</sup> day of September, 1991.

BY:

Shirley Winkelman  
Nevada Department of Prisons  
Inmate services Accountant  
Authorized Officer of Institution

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BOARD OF PRISON COMMISSIONERS  
 BOB MILLER  
 GOVERNOR  
 FRANKIE SUE DEL PAPA  
 ATTORNEY GENERAL  
 CHERYL LAU  
 SECRETARY OF STATE

STATE OF NEVADA  
 DEPARTMENT OF PRISONS  
 ADMINISTRATIVE OFFICES

RON ANGELONE  
 DIRECTOR  
 KAREL L. SANNICKS  
 ASSISTANT DIRECTOR, OPERATIONS  
 GEORGE M. WEEKS III  
 ASSISTANT DIRECTOR, SUPPORT SERVICES  
 HOWARD L. SKOLNIK  
 ASSISTANT DIRECTOR, PRISON INDUSTRIES

TO: Clerk of the Court

In the Matter of:

*Roy*  
*Moraga* 31584  
 (Ultimate Name & DOP No.)

Department of Prisons Administrative Regulations prohibit inmate access to \$200 of money in savings account. This Regulation is an offset for Release Money.

Trust Account	\$ 1.11
Savings Account	\$ 0
Charges owed to DOP Dept. Charges	\$ 0
Restitution	\$ 0
Net Total	\$ 1.11

I hereby certify that on September 16, 1991 the novant herein had cash and securities in the amount of 1.11 on account to his/her credit at the penal institution where he/she is confined.

September 16, 1991  
 Date

Shirley Winkelman  
 Authorized Officer of Penal  
 Institution  
Accountant  
 Title

CENTRAL OFFICE  
 P.O. BOX 7011  
 CARSON CITY, NEVADA 89702  
 PHONE (702) 487-3285

SOUTHERN OFFICE  
 2770 S. MARYLAND PARKWAY, NO. 312  
 LAS VEGAS, NEVADA 89169  
 PHONE (702) 486-6580

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1 Case No. C 92174

2 Dept. No. VIII

*[Signature]*  
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IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR Clark County

Roy D. Moraga

Petitioner,

vs.  
State of Nevada

MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

*for 10-9-91*

Respondent.

COMES NOW the Petitioner, in propria persona, pursuant to N.R.S. 12.015, and respectfully moves this Honorable Court for an Order granting Petitioner leave to proceed in the above-entitled action in forma pauperis, without requiring Petitioner to pay or provide security for the payment of costs of prosecuting this action.

This motion is made and based upon the attached affidavit and certificate.

DATED this 20th day of August, 19 91.

Respectfully submitted,

*Roy D. Moraga*

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OCT 2 - 1991

COUNTY CLERK

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LAW  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

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\* \* \* \* \*

CLERK

THE STATE OF NEVADA,

Plaintiff,

-v-

Roy D. Moraga

Defendant.

CASE NO. C 92174

DEPT. NO. VIII

NOTICE OF MOTION

MOTION FOR WITHDRAWAL OF ATTORNEY  
OF RECORD AND TRANSFER OF RECORDS

HEARING DATE: 10-9-91

HEARING TIME: 9 AM

PLEASE TAKE NOTICE, that, COMES NOW, Petitioner,  
Roy D. Moraga, in Propria Persona, and Respectfully  
requests this Honorable Court for an Order to withdraw  
R. Roger Hillman, of the Clark County Public Defenders  
office, as the Attorney of Record in the above entitled action,  
and for the transfer of Petitioner's Documents, Pleadings, Papers  
and tangible personal property in possession of respondent,  
R. Roger Hillman, to be sent, at State expense, to Petitioner  
at his place of confinement in Ely State Prison.

This Motion is made and based upon Eighth Judicial District  
Court Rules, Rule 7.40 (b)(2)(ii), Nevada Revised Statute 7.055,  
and supported by the following Points and Authorities, attached  
Letter of Termination and Petitioner's Affidavit.

POINTS AND AUTHORITIES

Petitioner, Roy D. Moraga, in Propria Persona, in support

1 of his Motion for Withdrawal of Attorney of Record and Transfer  
2 of Records, offers the following:

3 The Eighth Judicial District Court Rules, Rule  
4 7.40 (b)(2)(ii), which deals with Withdrawal of Change of  
5 Attorney, states:

6 "(b) Counsel in any case may be changed only;  
7 (2) When no attorney has been retained to  
8 replace the attorney withdrawing, by order  
9 of the court, granted upon written motion  
10 therefor, and;  
11 (ii) If the application is made by the client,  
12 he must state in the application the address  
at which he may be served with notice of all  
further proceedings in the case in the event  
the application is granted, and must serve  
a copy of the application upon his attorney  
and all other parties to the action, and  
their attorneys."

13 Therefore, as clearly seen by the Eighth Judicial District  
14 Court Rules, the Defendant can file to have his attorney of  
15 record withdrawn and proceed in Propria Persona.

16 The Nevada Revised Statute (hereinafter NRS) 7.055(1), which  
17 deals with the duty of a discharged attorney, states:

18 "An attorney who has been discharged by his  
19 client shall, upon demand and payment of the  
20 fee due from the client, immediately deliver  
21 to the client all papers, documents,  
22 pleadings and items of tangible personal  
23 property which belong to or were prepared  
24 for that client."

25 As can be seen in this case, the Petitioner does not owe any  
26 fees to the Respondent, R. Roger Hillman, in fact  
27 R. Roger Hillman was appointed by the Court from the Public  
28 Defenders Office to represent the Petitioner, who is indigent, in  
the case at bar, that being Case No. C 92174, Dept. No. VIII.

NRS 7.055(2) gives the Court the power to Order the  
Respondent to produce and deliver to the Petitioner all the



1 documents and property belonging to the Petitioner in Respondents  
2 possession. It further states:

3 "A client who, after demand therefore and  
4 payment of the fee due from him, does not  
5 receive from his discharged attorney  
6 all papers, documents, pleadings and items  
7 of tangible personal property may, by a  
8 motion filed after at least 5 days' notice to  
9 the attorney, obtain an order for the produc-  
10 tion of his papers, documents, pleadings  
11 and other property."

12 In numerous cases, Courts have held attorneys to a high  
13 degree of professional responsibility and integrity. This is  
14 carried from the time of hiring to and through the attorney's  
15 termination of employment.

16 Supreme Court Rule 173 states clearly that a withdrawn  
17 attorney owes his former client a " - - - prompt accounting of all  
18 his client's - - - property in his possession."

19 This is echoed in Cannon 2 of the Code of Professional  
20 Responsibility of the American Bar Association which states in  
21 pertinent part (EC 2-32). "A lawyer should protect the welfare  
22 of his client by - - - delivering to his client all papers and  
23 property to which the client is entitled - - - " Again, in  
24 Disciplinary Rule 2-110(A)(2) of the ABA, it is brought out that  
25 a withdrawn attorney must deliver to the client all papers and  
26 comply with all applicable laws on the subject. The ABA Rules do  
27 apply by adoption under Supreme Court Rules, Rule 150.

28 In the cases of, In Re Yount, 93 Ariz. 322, 380 P.2d 780  
(1963), and State v. Alvey, 215 Kan. 460, 524 P.2d 747 (1974),  
both cases dealt with a factual situation involving a withdrawn  
attorney refusing to deliver to a former client his documents  
after being requested to do so by the client.

1 The Court in Yount supra, ordered the attorney disbarred,  
2 while in Alvey supra, the Court had the attorney censored.

3 While it is not the intention of the Petitioner to have the  
4 attorney sanctioned, these cases do show a pattern in the courts  
5 in considering the refusal to deliver to a former client all of  
6 his documents and property after being requested to do so, which  
7 amounts to a serious infraction of the law and of professional  
8 ethics. See: In Re Sullivan, 212 Kan. 233, 510 P.2d 1199 (1973).

9 In summary, this Court has the jurisdiction through NRS  
10 7.055 to ORDER the Respondent to produce and deliver unto the  
11 Petitioner all documents and personal property in his possession  
12 belonging to him or prepared for him. The Petitioner has  
13 fulfilled his obligations in trying to obtain the papers.

14 The Respondent is in disacord with Cannon 2 of the Code of  
15 Professional Responsibility and the Nevada Supreme Court Rule  
16 173, 176 and 203.

17 DATED this 20th day of August, 1991.

18  
19 Respectfully Submitted:

20 /s/ Roy D. Moraga  
21 Roy D. Moraga 31584  
22 Defendant/Petitioner Pro Per  
23 Ely State Prison  
24 P.O. BOX 1989  
25 Ely, Nevada 89301  
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CERTIFICATE OF SERVICE

I hereby certify that I, Roy D. Moraga, am the  
Defendant/Petitioner in the above entitled action, and that on  
20th August 91  
the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, I served a true and correct  
copy of the foregoing MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD  
AND TRANSFER OF RECORDS, by mailing same to:

R. Roger Hillman  
Deputy Public Defender  
Public Defenders Office  
309 South 3rd Street  
Las Vegas NV 89101

Rex Bell  
District Attorney  
Clark County Courthouse  
200 South 3rd Street  
Las Vegas NV 89101

/s/ Roy D. Moraga

///  
///  
///

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLERK'S CERTIFICATE

C92174

Dept. VIII - M

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in the matter of Roy D. Moraga vs. The State of Nevada, No. 21488.

JUDGMENT

The Court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, to the effect: ". . . we remand this case to the district court for resentencing of appellant."

Judgment, as quoted above, entered this 27th day of August, 1991.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Supreme Court, at my office in Carson City, Nevada, this 17th day of September, 1991.

JANETTE M. BLOOM  
Clerk of Supreme Court of the State of Nevada

By Joanne C. Richard  
Chief Deputy Clerk

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FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

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## REMITTITUR

*Loretta Bowman*  
CLERK

DATE: September 17, 1991  
TO: Honorable Loretta Bowman, Clerk  
RE: Roy D. Moraga vs. The State of Nevada

NO. 21488 DIST. CT. NO. C92174

Pursuant to NRAP Rule 41, enclosed is (are) the following:

- ☒ Certified copy of Judgment and copy of Order.
- ☐ Certified copy of Judgment and copy of Opinion.
- ☐ Certified copy of Judgment and Opinion.
- ☒ Receipt for Remittitur. (County Clerk please sign below and return. Retain the attached copy for your records.)
- ☐ Record on Appeal. Volumes
- ☐ Exhibits
- ☐ Deposition(s) of
- ☐ Memorandum of Costs and Disbursements.
- ☐ Other

cc: Morgan D. Harris, Public Defender  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Rex Bell, District Attorney

sp

## 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, of date OCT 4 1991

LORETTA BOWMAN

MARY MOSLEY

County Clerk

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 21488

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Clerk of Supreme Court  
By *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a judgment of conviction pursuant to a jury verdict of two counts of burglary and two counts of sexual assault in violation of NRS 200.364, 200.366 and 205.060. The district court adjudicated appellant a habitual criminal and sentenced him to a single term of life imprisonment in the Nevada State Prison without the possibility of parole.

Appellant's sole contention on appeal is that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

In particular, we note that the victim's daughter testified that on December 5, 1989, she discovered that her watch, apartment key, and some other items were missing. She had heard a noise the night before. The same day, appellant gave the daughter's watch to his ex-girlfriend as a present. A key to the apartment was found among appellant's belongings. Although the victim had locked the door to the apartment, later that day the victim saw appellant standing in her bedroom hallway. He then raped her twice. Appellant's fingerprints were found on a can of hairspray in the bathroom. Neither the victim nor her daughter had given appellant permission to enter

the apartment. This evidence supports the conclusion that appellant twice entered the apartment, once with intent to commit larceny, once with intent to commit the felony of sexual assault.


In addition, we note that the victim testified that when she woke up and saw appellant in her bedroom hallway, she screamed out the bathroom window for help. Appellant grabbed her mouth and threw her on the bed. Following a struggle, appellant inserted his penis into her vagina against her will. After she showered, he again threw her on the bed and inserted his penis into her vagina against her will. Medical evidence revealed the presence of semen and sperm in her vagina. The victim immediately called for help. Appellant bragged about his deeds to a worker at the apartment complex as he left. This evidence supports the conclusion that appellant twice subjected the victim to sexual penetration against her will.

The jury could reasonably infer from the evidence presented that appellant committed two counts of burglary and two counts of sexual assault. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

Finally, we note that appellant's sentence is erroneous. Appellant was convicted of four separate offenses (in addition to which he was adjudicated a habitual criminal), yet he received a single sentence. Although the district court has discretion to dismiss a count of habitual criminality, see NRS 207.010(4), the district court does not have discretion to impose but one sentence for multiple primary offenses. Cf. Barrett v. State, 105 Nev. 361, 775 P.2d 1276 (1989). Our criminal laws anticipate that, for each offense of which a

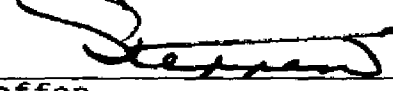
defendant is convicted, there should be a corresponding sentence. Accordingly, we remand this case to the district court for resentencing of appellant.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Mowbray

  
\_\_\_\_\_, J.  
Springer

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Steffen

  
\_\_\_\_\_, J.  
Young

cc: Hon. Michael J. Wendell, District Judge  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Rex Bell, District Attorney  
Morgan D. Harris, Public Defender  
Loretta Bowman, Clerk



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ROY GARCIA, ESQ.  
State Bar No. 2303  
2028 E. Charleston Blvd.  
Las Vegas, NV 89104  
(702) 387-8888  
Attorney for Defendant

*Donald L. Williams*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff.

vs.

ROY D. MORAGA,  
ID#938554

Defendant.

CASE NO. C 92174  
DEPT. NO. X

ORDER FOR APPOINTMENT OF  
COUNSEL

The Court having been apprised of the Order of remmand from the Nevada Supreme Court and further having noted that a conflict exists between the Defendant and his attorney, the Office of the Public Defender, it is hereby Ordered, Adjudged and Decreed that ROY GARCIA, ESQ. is hereby appointed as substitute counsel for Defendant, ROY D. MORAGA.

DATED this 21<sup>st</sup> day of October, 1991.

*Jack O'Quinn*  
DISTRICT COURT

Respectfully submitted,

By: *Roy Garcia*

ROY GARCIA, ESQ.  
State Bar No. 2303  
2028 E. Charleston Blvd.  
Las Vegas, NV 89104  
Attorney for Defendant

CE01



ROY GARCIA  
ATTORNEY AT LAW  
2028 E. CHARLESTON  
LAS VEGAS, NV 89104  
(702) 387-8888  
FAX: 387-1339

1 ROY GARCIA, ESQ.  
2 State Bar No. 2303  
3 2028 E. Charleston Blvd.  
4 Las Vegas, NV 89104  
5 (702) 387-8888  
6 Attorney for Defendant

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*Loretta D. ...*

CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

8 STATE OF NEVADA, )  
9 )  
10 Plaintiff, )  
11 vs. )  
12 ROY D. MORAGA, )  
13 ID# 938554 )  
14 Defendant. )

CASE NO. C92174  
DEPT. NO. VII

NOTICE OF APPEAL

13 NOTICE IS HEREBY GIVEN that Defendant, ROY D. MORAGA,  
14 hereby appeals to the Nevada Supreme Court from the sentence  
15 imposed on October 21, 1991.

16 DATED this 29th day of October, 1991.

17 Respectfully submitted,

18 By: *[Signature]*

19 ROY GARCIA, ESQ.  
20 State Bar No. 2303  
21 2028 E. Charleston Blvd.  
22 Las Vegas, NV 89104  
23 Attorney for Defendant  
24  
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CE03

ROY GARCIA  
ATTORNEY AT LAW  
2028 E. CHARLESTON  
LAS VEGAS, NV 89104  
(702) 387-8888  
FAX: 387-1339

19  
1 REX BELL  
2 DISTRICT ATTORNEY  
3 Nevada Bar#001799  
4 200 S. Third Street  
5 Las Vegas, NV 89155  
6 (702) 455-4861  
7 Attorney for Plaintiff  
8 THE STATE OF NEVADA

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CLERK

D I S T R I C T C O U R T  
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA, )

9 Plaintiff, )

10 vs )

11 ROY D. MORAGA, )  
12 938554 )

14 Defendant. )

CASE NO. C92174X

DEPT NO. X

DOCKET NO. K

15 AMENDED  
16 JUDGMENT OF CONVICTION (JURY TRIAL)

17 WHEREAS, on the 11th day of January,  
18 1990, the Defendant, ROY D. MORAGA,  
19 entered a plea of not guilty to the crimes of COUNT I and  
20 COUNT II - BURGLARY, COUNTS III and IV - SEXUAL ASSAULT  
21  
22 committed between December 4, 1989 through December 5, 1989,  
23 19, in violation of NRS 205.060, 200.364, 200.366;  
24 and

25 WHEREAS, thereafter, on the 13th day of June  
26 1990, the defendant being present in  
27 Court with his counsel ROY GARCIA, ESQ., and DEBORAH J.

28 ajcjtmor1, d6

CE03

1 LIPPIS, Deputy District Attorney, also being present, the  
2 above-entitled Court did adjudge defendant guilty thereof by  
3 reason of said trial and verdict and sentenced the defendant to  
4 a \$20.00 administrative assessment fee and Life without the  
5 possibility of parole.

6 THEREAFTER, on August 27, 1991, the Supreme Court ordered  
7 that the case be sent back to District Court for resentencing.  
8 That on October 21, 1991, the defendant was sentenced to a  
9 \$25.00 administrative assessment fee and COUNT I - Ten (10)  
10 years in the Nevada Department of Prisons. COUNT II - Ten (10)  
11 years in the Nevada Department of Prisons, sentence to run  
12 consecutive to Count I. COUNT III - Life in the Nevada  
13 Department of Prisons with the possibility of parole, defendant  
14 not being eligible for parole until he has actually served five  
15 (5) years, sentence to run consecutive to Count II. COUNT IV -  
16 That on June 13, 1991, on a motion by the State, and granted by  
17 the Court to amend the Information to allege the Defendant be  
18 treated as a Habitual Criminal, pursuant to NRS 207.010(2) and  
19 that he be sentenced to Life in the Nevada Department of Prisons  
20 without the possibility of parole, sentence to run consecutive  
21 to Count III. Credit for time served to be determined by  
22 Department of Parole and Probation.

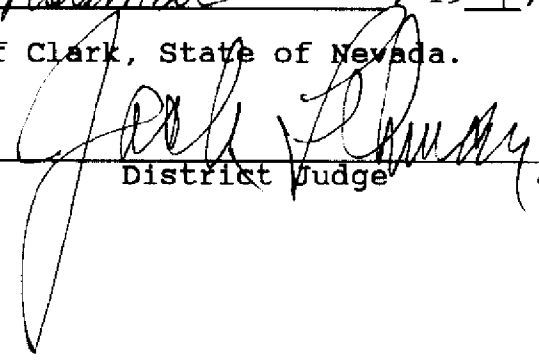
23 THEREFORE, the Clerk of the above-entitled Court is hereby  
24 directed to enter this Judgment of Conviction as part of the  
25 record in the above-entitled matter.

26 / / / /

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1 DATED this 12 day of November 1991, in  
2 the City of Las Vegas, County of Clark, State of Nevada.

3   
4 District Judge

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District Court  
Clark County, Nevada  
\* \* \* \* \*

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*[Signature]*  
CLERK

<u>Roy D. Moraga</u>	)	Case NO. C 92174
Defendant	)	Dept. No. VIII
V.S.	)	
<u>The State of Nevada</u>	)	
Plaintiff.	)	

DESIGNATION OF RECORD OF APPEAL,  
TO, The clerk of the court.

Please take notice that the following is the designation of record on appeal in the above-entitled action as follows.

1. Any and all records, files and documents file in the above entitled action.

2. Any and all transcripts and or recordings of any and all proceedings in the above entitled action.

3. Any and all minutes of the court in the above entitled action.

4. Requested appointment of appeals counsel, on the 20th day of August, 1991, and would like any and all information regarding appointment of appeals counsel.

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COUNTY CLERK

Respectfully Submitted

*[Signature]*  
Roy D. Moraga  
Ely State Prison  
P.O. Box 1989  
Ely Nevada, 89301

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CERTIFICATE OF SERVICE


I, The undersigned, do hereby certify that on the 7th day of November, 1991, that I placed a copy of the Designation of appeal in the United States Mail, addressed as follows.

Rex Bell  
District Attorney  
Clark County Courthouse  
200 So. Third Street.  
Las Vegas, Nevada 89155

and

Clerk of the court  
Eighth judicial District  
Clark County Courthouse  
200 So. Third Street.  
Las Vegas, Nevada 89155

Dated this 7th day of November 1991

  
Roy D. Moraga  
P.O.Box 1989  
Ely Nevada, 89301

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*Donita D. ...*  
CLERK

ROY GARCIA, ESQ.  
State Bar No. 2303  
2026 E. Charleston Blvd.  
Las Vegas, NV 89104  
Attorney for Defendant  
(702) 387-8888

DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA, )  
 )  
Plaintiff, )  
vs. )  
 )  
ROY D. MORAGA, )  
 )  
Defendant. )

CASE NO. C92174  
DEPT. NO. X

MOTION TO APPOINT COUNSEL  
FOR APPEAL

1-15-92

COMES NOW, Defendant ROY D. MORAGA by and through his attorney or record, ROY GARCIA, ESQ. and hereby moves this honorable court for an order to appoint Defendant counsel for his appeal. This motion is based upon all papers and pleadings on file herein and the attached affidavit of ROY GARCIA, ESQ. as well as any argument of counsel.

DATED this 31<sup>st</sup> day of December, 1991.

Respectfully submitted,

By: *[Signature]*  
ROY GARCIA, ESQ.  
State Bar No. 2303  
509 S. 7th Street  
Las Vegas, NV 89101  
Attorney for Defendant

5

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ROY GARCIA  
ATTORNEY AT LAW  
2026 E. CHARLESTON  
LAS VEGAS, NV 89104  
(702) 387-8888  
FAX: 387-1339




1 NOTICE OF MOTION

2 TO: DISTRICT ATTORNEY

3 YOU AND EACH OF YOU will please take notice that the  
4 undersigned will bring the foregoing MOTION TO APPOINT  
5 COUNSEL FOR APPEAL on for hearing before the above entitled  
6 court on the 15 day of JAN, 1992, at the hour of  
7 10:30 AM 9:00 a.m., or as soon thereafter as counsel can be heard.

8 DATED this 31 day of December, 1991.

9 Respectfully submitted,

10  
11 By:   
12 ROY GARCIA, ESQ.  
13 State Bar No. 2303  
14 509 S. 7th Street  
15 Las Vegas, NV 89101  
16 Attorney for Defendant

17 AFFIDAVIT

18 STATE OF NEVADA)  
19 ) ss:  
20 COUNTY OF CLARK)

21 ROY GARCIA, ESQ., being first duly sworn, deposes  
22 and says that:

23 1. I am the attorney of record for Defendant, ROY  
24 D. MORAGA.

25 2. I was appointed to handle his sentencing only.

26 3. An appeal notice to that sentence was filed on  
27 October 30, 1991.  
28 . . .  
. . .

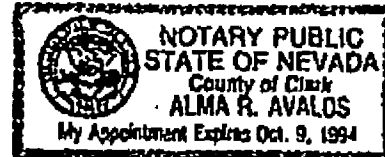
ROY GARCIA  
ATTORNEY AT LAW  
2028 E. CHARLESCH  
LAS VEGAS, NV 89101  
(702) 387-4888  
FAX: 387-1339

1 4. Defendant needs new counsel to handle his  
2 appeal because I am not an appellate attorney.

3  
4   
ROY GARCIA, ESQ.

5 SUBSCRIBED and SWORN to  
6 before me this 2 day  
7 of January 1992

8   
NOTARY PUBLIC



10  
11 RECEIPT OF COPY

12 RECEIPT OF COPY OF the above and foregoing MOTION TO  
13 APPOINT COUNSEL FOR APPEAL is hereby acknowledged this  
14 day of , 199 .

15  
16  
17 By:   
18 Deputy District Attorney

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*Jonathan S. ...*  
CLERK

MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
LAW OFFICES OF CHERRY & BAILUS  
600 South Eighth Street  
Post Office Box 43087  
Las Vegas, NV 89116  
(702) 385-3788

Attorney for Appellant, ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

ROY MORAGA, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
THE STATE OF NEVADA, )  
 )  
Respondent. )

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

CRIMINAL SETTING SLIP

Date/Hearing: 1/29/92  
Time/Hearing: 9:00 a.m.

The undersigned hereby requests this matter be placed on  
calendar in Department X of the above-entitled Court, on the 29th  
day of January, 1992, at the hour of 9:00 a.m., for the purposes of  
confirming the undersigned as counsel for the above-captioned  
Petitioner for the purpose of appeal.

DATED this 27<sup>th</sup> day of January, 1992.

LAW OFFICES OF CHERRY & BAILUS

By *Mark B. Bailus*  
MARK B. BAILUS, ESQ.  
600 South Eighth Street  
P. O. Box 43087  
Las Vegas, NV 89116

*Law Office of  
Cherry & Bailus*  
600 S. EIGHTH STREET  
P.O. BOX 43087  
LAS VEGAS, NEVADA 89116  
(702) 385-3788  
FAX (702) 385-5125

CMC

<sup>1</sup>  
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Law Offices of  
Cherry & Bailus  
600 S. EIGHTH STREET  
P.O. BOX 43087  
LAS VEGAS, NEVADA 89116  
(702) 385-3788  
FAX (702) 385-5125

1 MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
2 LAW OFFICES OF CHERRY & BAILUS  
600 South Eighth Street  
3 Post Office Box 43087  
Las Vegas, NV 89116  
4 (702) 385-3788  
5 Attorney for Appellant, ROY MORAGA

FILED

FEB 10 3 00 PM '92

*Loretta L. Loomis* 38

CLERK

6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA

8 \* \* \* \* \*

9 ROY D. MORAGA,	)	CASE NO. C92174
	)	DEPARTMENT NO. X
10 Appellant,	)	
	)	
11 vs.	)	<u>ORDER APPOINTING COUNSEL</u>
	)	
12 THE STATE OF NEVADA,	)	Date/Hearing: 1/29/92
	)	Time/Hearing: 9:00 a.m.
13 Respondent.	)	

14 THIS MATTER having come before the Court and the Court being  
15 fully advised in the premises, it is hereby

16 ORDERED that MARK B. BAILUS, ESQ., of the Law offices of  
17 CHERRY & BAILUS, be and he hereby is appointed as counsel of record  
18 to represent Appellant, ROY MORAGA, for the purpose of appeal.

19 DATED this 6 day of February, 1992.

*[Signature]*  
DISTRICT JUDGE *dw*

22 Submitted by:  
23 LAW OFFICES OF CHERRY & BAILUS

24  
25 BY *Mark B. Bailus*  
MARK B. BAILUS, ESQ.  
26 600 South Eighth Street  
Post Office Box 43087  
27 Las Vegas, Nevada 89116  
Attorneys for Appellant, MORAGA

CE03

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FILED

FEB 13 3 24 PM '92

Loretta Bowman  
CLERK

MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
LAW OFFICES OF CHERRY & BAILUS  
600 South Eighth Street  
Post Office Box 43087  
Las Vegas, NV 89116  
(702) 385-3788

Attorney for Appellant  
ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

ROY MORAGA,  
  
Petitioner,  
  
vs.  
  
THE STATE OF NEVADA,  
  
Respondent.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

DESIGNATION OF RECORD ON APPEAL

TO: LORETTA BOWMAN, CLERK, EIGHT JUDICIAL DISTRICT  
COURT, COUNTY OF CLARK, STATE OF NEVADA:

Please prepare an original and two (2) copies of all of the  
records, pleadings and/or documents in the above-entitled matter as  
the record on appeal herein, at the expense of the State of Nevada.

DATED this 12 day of February, 1992.

LAW OFFICES OF CHERRY & BAILUS

By Mark B. Bailus  
MARK B. BAILUS, ESQ.  
State Bar No. 002284  
600 South Eighth Street  
Post Office Box 43087  
Las Vegas, NV 89116  
Attorney for Appellant,  
ROY MORAGA

CE03

Law Office of  
Cherry & Bailus  
600 S. EIGHTH STREET  
P.O. BOX 43087  
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FAX (702) 385-5125

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65

1 MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
2 LAW OFFICES OF CHERRY & BAILUS  
600 South Eighth Street  
3 Post Office Box 43087  
Las Vegas, NV 89116  
4 (702) 385-3788

5 Attorney for Appellant  
ROY MORAGA

FILED

FEB 20 11 25 AM '92

DISTRICT COURT  
CLARK COUNTY, NEVADA

*Loretta L. Luman*  
CLERK

\* \* \* \* \*

9 ROY MORAGA, )

10 Petitioner, )

CASE NO. C 92174

DEPARTMENT NO. X

11 vs. )

12 THE STATE OF NEVADA, )

TIME/HEARING: N/A

13 Respondent. )

DATE/HEARING: N/A

14  
15 **EX PARTE APPLICATION FOR**  
**PREPARATION OF TRANSCRIPTS**

16 COMES NOW, Appellant, ROY MORAGA, by and through his attorney  
17 of record, MARK B. BAILUS, ESQ., and hereby makes an ex parte  
18 application that certain transcripts of the Court proceedings  
19 and/or hearings be prepared and/or transcribed, at the State's  
20 expense, for the purpose of Appellant's Appeal herein.

21 DATED this 12 day of February, 1992.

22 LAW OFFICES OF CHERRY & BAILUS

23  
24 By *Mark B. Bailus*

25 MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
501 South Sixth Street  
26 Las Vegas, NV 89101  
27 Attorney for Appellant  
28

CE03 h

2-6  
65  
1 MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
2 LAW OFFICES OF CHERRY & BAILUS  
600 South Eighth Street  
3 Post Office Box 43087  
Las Vegas, NV 89116  
4 (702) 385-3788

5 Attorney for Appellant  
ROY MORAGA

DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \* \* \*

9 ROY MORAGA,

10 Petitioner,

11 vs.

12 THE STATE OF NEVADA,

13 Respondent.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

15 **ORDER RE: PREPARATION OF TRANSCRIPTS**

16 **TO: R. SILVAGGIO, COURT REPORTER:**

17 Upon the Ex Parte Application of MARK B. BAILUS, ESQ.,  
18 attorney for the above-named Appellant in the above-entitled  
19 matter, and for good cause appearing therefor,

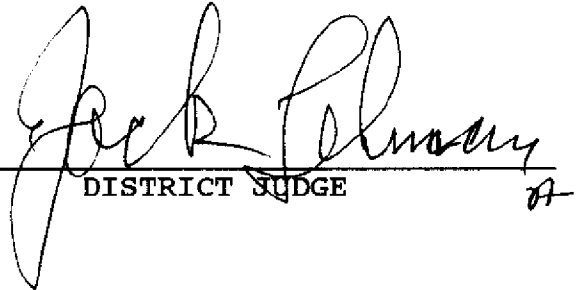
20 IT IS HEREBY ORDERED that the original and two (2) copies of  
21 the transcripts of the court proceedings and/or hearing listed  
22 below be prepared and/or transcribed, at the State's expense, for  
23 the purposes of Appeal:  
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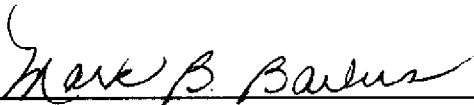
1 1. 3/5/90 - Jury Trial Overflow

2 DATED and DONE this 18 day of February, 1992.

3  
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6  
7  
8   
DISTRICT JUDGE *JP*

9 Submitted by:

10 LAW OFFICES OF CHERRY & BAILUS

11  
12 By 

13 MARK B. BAILUS, ESQ.  
14 Nevada Bar No. 001238  
15 501 South Sixth Street  
16 Las Vegas, NV 89101  
17 Attorney for Appellant  
18 ROY D. MORAGA  
19  
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28

65

1 MARK B. BAILUS, ESQ.  
 Nevada Bar No. 002284  
 2 LAW OFFICES OF CHERRY & BAILUS  
 600 South Eighth Street  
 3 Post Office Box 43087  
 Las Vegas, NV 89116  
 4 (702) 385-3788

FILED  
 Feb 20 11 25 AM '92  
*Latita L...*  
 CLERK

5 Attorney for Appellant  
 ROY MORAGA

DISTRICT COURT  
 CLARK COUNTY, NEVADA

\* \* \* \* \*

9 ROY MORAGA, )  
 10 )  
 11 Petitioner, )  
 12 )  
 13 vs. )  
 14 )  
 15 THE STATE OF NEVADA, )  
 16 )  
 17 Respondent. )  
 18 )  
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CASE NO. C 92174  
 DEPT. NO. X  
 DOCKET NO.

ORDER RE: PREPARATION OF TRANSCRIPTS

TO: PATSY SMITH, COURT REPORTER:

Upon the Ex Parte Application of MARK B. BAILUS, ESQ., attorney for the above-named Appellant in the above-entitled matter, and for good cause appearing therefor,

IT IS HEREBY ORDERED that the original and two (2) copies of the transcripts of the court proceedings and/or hearing listed below be prepared and/or transcribed, at the State's expense, for the purposes of Appeal:

1. 3/12/90 - Jury Trial;
2. 3/13/90 - Continued Jury Trial;
3. 3/15/90 - Continued Jury Trial;
4. 6/6/90 - Sentencing;

91

CE03

*Law Office of  
 Cherry & Bailus*  
 600 S. EIGHTH STREET  
 P.O. BOX 43087  
 LAS VEGAS, NEVADA 89116  
 (702) 385-3788  
 FAX (702) 385-5125

1 5. 6/13/90 - State's Motion to Amend Information  
2 and Sentencing

3 DATED and DONE this 18 day of February 1992.

4  
5   
6 DISTRICT JUDGE

7 Submitted by:

8 LAW OFFICES OF CHERRY & BAILUS

9  
10 By 

11 MARK B. BAILUS, ESQ.  
12 Nevada Bar No. 001238  
13 501 South Sixth Street  
14 Las Vegas, NV 89101  
15 Attorney for Appellant  
16 ROY D. MORAGA  
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(702) 385-3788  
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FILED

FEB 20 11 26 AM '92

*Loretta L. Luman*  
CLERK

1 MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
2 LAW OFFICES OF CHERRY & BAILUS  
600 South Eighth Street  
3 Post Office Box 43087  
Las Vegas, NV 89116  
4 (702) 385-3788

5 Attorney for Appellant  
ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

9 ROY MORAGA, )  
10 )  
11 Petitioner, )  
12 )  
13 vs. )  
14 )  
15 THE STATE OF NEVADA, )  
16 )  
17 Respondent. )  
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CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

ORDER RE: PREPARATION OF TRANSCRIPTS

TO: RUSSELL GARCIA, COURT REPORTER:

Upon the Ex Parte Application of MARK B. BAILUS, ESQ., attorney for the above-named Appellant in the above-entitled matter, and for good cause appearing therefor,

IT IS HEREBY ORDERED that the original and two (2) copies of the transcripts of the court proceedings and/or hearing listed below be prepared and/or transcribed, at the State's expense, for the purposes of Appeal:

. . .  
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CE03

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*Law Office of*  
*Cherry & Bailus*  
600 S. EIGHTH STREET  
P.O. BOX 43087  
LAS VEGAS, NEVADA 89116  
(702) 385-3788  
FAX (702) 385-5125

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1. 2/15/90 - State's Motion to Endorse Names

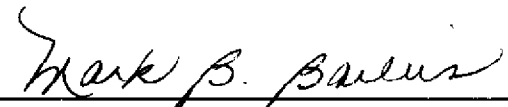
DATED and DONE this 18 day of February, 1992.

  
DISTRICT JUDGE

Submitted by:

LAW OFFICES OF CHERRY & BAILUS

By

  
MARK B. BAILUS, ESQ.  
Nevada Bar No. 001238  
501 South Sixth Street  
Las Vegas, NV 89101  
Attorney for Appellant  
ROY D. MORAGA

*Law Offices of  
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FAX (702) 385-5125

30

65

1 MARK B. BAILUS, ESQ.  
 Nevada Bar No. 002284  
 2 LAW OFFICES OF CHERRY & BAILUS  
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 3 Post Office Box 43087  
 Las Vegas, NV 89116  
 4 (702) 385-3788

FILED  
 Feb 20 11 26 AM '92  
*Latita L. Lerman*  
 CLERK

5 Attorney for Appellant  
 ROY MORAGA

DISTRICT COURT  
 CLARK COUNTY, NEVADA

\* \* \* \* \*

9 ROY MORAGA, )  
 10 )  
 11 Petitioner, )  
 12 )  
 13 vs. )  
 14 )  
 15 THE STATE OF NEVADA, )  
 16 )  
 17 Respondent. )  
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CASE NO. C 92174  
 DEPT. NO. X  
 DOCKET NO.

*Law Offices of  
 Cherry & Bailus*  
 600 S. EIGHTH STREET  
 P.O. BOX 43087  
 LAS VEGAS, NEVADA 89116  
 (702) 385-3788  
 FAX (702) 385-5125

ORDER RE: PREPARATION OF TRANSCRIPTS

TO: CONNIE SMITH, COURT REPORTER:

Upon the Ex Parte Application of MARK B. BAILUS, ESQ.,  
 attorney for the above-named Appellant in the above-entitled  
 matter, and for good cause appearing therefor,

IT IS HEREBY ORDERED that the original and two (2) copies of  
 the transcripts of the court proceedings and/or hearing listed  
 below be prepared and/or transcribed, at the State's expense, for  
 the purposes of Appeal:

1. 1/11/90 - Arraignment
2. 3/1/90 - Calendar Call

. . .  
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CE03

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1 3. 5/14/90 - State's Oral Motion to Continue  
2 Sentencing of 5/23/90

3 DATED and DONE this 18 day of February, 1992.

4  
5  
6   
DISTRICT JUDGE

7 Submitted by:

8 LAW OFFICES OF CHERRY & BAILUS

9  
10 By   
11

12 MARK B. BAIUS, ESQ.  
13 Nevada Bar No. 001238  
14 501 South Sixth Street  
15 Las Vegas, NV 89101  
16 Attorney for Appellant  
17 ROY D. MORAGA  
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*Law Office of*  
*Cherry & Bailus*  
600 S. EIGHTH STREET  
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LAS VEGAS, NEVADA 89116  
(702) 385-3788  
FAX (702) 385-5125

MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
LAW OFFICES OF CHERRY & BAILUS  
600 South Eighth Street  
Post Office Box 43087  
Las Vegas, NV 89116  
(702) 385-3788

FILED  
FEB 20 11 27 AM '92

*Loretta Luman*  
CLERK

Attorney for Appellant  
ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

ROY MORAGA,  
  
Petitioner,  
  
vs.  
  
THE STATE OF NEVADA,  
  
Respondent.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

ORDER RE: PREPARATION OF TRANSCRIPTS

TO: JENNIFER SPERDUTTI, COURT REPORTER:

Upon the Ex Parte Application of MARK B. BAILUS, ESQ.,  
attorney for the above-named Appellant in the above-entitled  
matter, and for good cause appearing therefor,

IT IS HEREBY ORDERED that the original and two (2) copies of  
the transcripts of the court proceedings and/or hearing listed  
below be prepared and/or transcribed, at the State's expense, for  
the purposes of Appeal:

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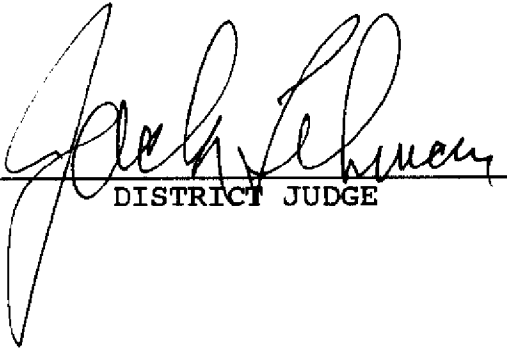
CE03

*Law Office of  
Cherry & Bailus*  
600 S. EIGHTH STREET  
P.O. BOX 43087  
LAS VEGAS, NEVADA 89116  
(702) 385-3784  
FAX (702) 385-5125

1 1. 3/7/90 - Jury Trial

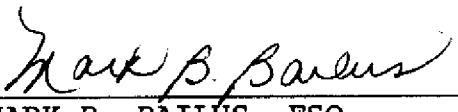
2 2. 3/9/90 - Status Check

3 DATED and DONE this 18 day of February, 1992.

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8   
9 DISTRICT JUDGE *JA*

10 Submitted by:

11 LAW OFFICES OF CHERRY & BAILUS

12  
13 By   
14 MARK B. BAILUS, ESQ.  
15 Nevada Bar No. 001238  
16 501 South Sixth Street  
17 Las Vegas, NV 89101  
18 Attorney for Appellant  
19 ROY D. MORAGA  
20  
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MARK B. BAILUS, ESQ.  
 Nevada Bar No. 002284  
 LAW OFFICES OF CHERRY & BAILUS  
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 (702) 385-3788

Attorney for Appellant  
 ROY MORAGA

FILED  
 Feb 20 11 27 AM '92  
*Laetta L. Luman*  
 CLERK

DISTRICT COURT  
 CLARK COUNTY, NEVADA

\* \* \* \* \*

ROY MORAGA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. C 92174
	)	DEPT. NO. X
THE STATE OF NEVADA,	)	DOCKET NO.
	)	
Respondent.	)	

ORDER RE: PREPARATION OF TRANSCRIPTS

TO: SHARLEEN NICHOLSON, COURT REPORTER:

Upon the Ex Parte Application of MARK B. BAILUS, ESQ., attorney for the above-named Appellant in the above-entitled matter, and for good cause appearing therefor,

IT IS HEREBY ORDERED that the original and two (2) copies of the transcripts of the court proceedings and/or hearing listed below be prepared and/or transcribed, at the State's expense, for the purposes of Appeal:

1. 9/23/91 - Remand from Supreme Court for Re-Sentencing;
2. 10/9/91 - All Pending Motions
3. 10/11/91 - Remand from Supreme Court for Re-Sentencing;
4. 10/14/91 - Remand from Supreme Court for Re-Sentencing;

CE03 1

*Law Office of  
 Cherry & Bailus*  
 600 S. EIGHTH STREET  
 P.O. BOX 43087  
 LAS VEGAS, NEVADA 89116  
 (702) 385-3788  
 FAX (702) 385-5123

1 5. 10/21/91 - Remand from Supreme Court for Re-Sentencing.

2 DATED and DONE this 18 day of February, 1992.

3  
4   
5 DISTRICT JUDGE

6 Submitted by:

7 LAW OFFICES OF CHERRY & BAILUS

8  
9 By Mark B. Bailus

MARK B. BAILUS, ESQ.

10 Nevada Bar No. 001238

501 South Sixth Street

11 Las Vegas, NV 89101

Attorney for Appellant

12 ROY D. MORAGA

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Law Offices of  
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LAS VEGAS, NEVADA 89116  
(702) 385-3786  
FAX (702) 385-5125

33

19

1 MARK B. BAILUS, ESQ.  
 Nevada Bar No. 002284  
 2 LAW OFFICES OF CHERRY & BAILUS  
 600 South Eighth Street  
 3 Post Office Box 43087  
 Las Vegas, NV 89116  
 4 (702) 385-3788

5 Attorney for Appellant  
 ROY MORAGA

FILED

FEB 26 10 56 AM '92

*Laetta Luman*  
 CLERK

DISTRICT COURT  
 CLARK COUNTY, NEVADA

\* \* \* \* \*

9 ROY MORAGA,	)	
	)	
10                      Petitioner,	)	
	)	
11                      vs.	)	CASE NO. C 92174
	)	DEPT. NO. X
12 THE STATE OF NEVADA,	)	DOCKET NO.
	)	
13                      Respondent.	)	
14 _____	)	

RECEIPT OF COPY

16 RECEIPT OF A COPY of the ORDER RE: PREPARATION OF TRANSCRIPTS  
 17 is hereby acknowledged this 25th day of February, 1992.

18 IT IS FURTHER ACKNOWLEDGED that I have been advised that the  
 19 supplemental record on appeal is presently scheduled for trans-  
 20 mittal on April 6, 1992.

21  
 22 BY: *Renee Silvaggio*  
 Renee SILVAGGIO, CSR  
 509 South Seventh Street  
 Las Vegas, Nevada 89101

CE03

18

*Law Office of  
 Cherry & Bailus*  
 600 S. EIGHTH STREET  
 P.O. BOX 43087  
 LAS VEGAS, NEVADA 89116  
 (702) 385-3788  
 FAX (702) 385-5125

34

2

MARK B. BAILUS, ESQ.  
 Nevada Bar No. 002284  
 LAW OFFICES OF CHERRY & BAILUS  
 600 South Eighth Street  
 Post Office Box 43087  
 Las Vegas, NV 89116  
 (702) 385-3788

Attorney for Appellant  
 ROY MORAGA

FILED

FEB 26 10 56 AM '92

*Latita L. Luman*  
 CLERK

DISTRICT COURT  
 CLARK COUNTY, NEVADA

\* \* \* \* \*

ROY MORAGA,  
  
 Petitioner,  
  
 vs.  
  
 THE STATE OF NEVADA,  
  
 Respondent.

CASE NO. C 92174  
 DEPT. NO. X  
 DOCKET NO.

RECEIPT OF COPY

RECEIPT OF A COPY of the ORDER RE: PREPARATION OF TRANSCRIPTS  
 is hereby acknowledged this 26 day of February, 1992.

IT IS FURTHER ACKNOWLEDGED that I have been advised that the  
 supplemental record on appeal is presently scheduled for trans-  
 mittal on April 6, 1992.

By: *Jennifer Sperduti*  
 JENNIFER SPERDUTTI, CSR  
 C/O Computran  
 1600 Lewis Street  
 Las Vegas, NV 89101

*Law Office of  
 Cherry & Bailus*  
 600 S. EIGHTH STREET  
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CE03

11

Law Office of  
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(702) 385-3788  
FAX (702) 385-5125

1 MARK B. BAILUS, ESQ.  
2 Nevada Bar No. 002284  
3 LAW OFFICES OF CHERRY & BAILUS  
4 600 South Eighth Street  
5 Post Office Box 43087  
6 Las Vegas, NV 89116  
7 (702) 385-3788

8 Attorney for Appellant  
9 ROY MORAGA

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

10 ROY MORAGA, )  
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ROY MORAGA,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

RECEIPT OF COPY

RECEIPT OF A COPY of the ORDER RE: PREPARATION OF TRANSCRIPTS  
is hereby acknowledged this 26<sup>th</sup> day of February, 1992.

IT IS FURTHER ACKNOWLEDGED that I have been advised that the  
supplemental record on appeal is presently scheduled for trans-  
mittal on April 6, 1992.

By Patsy K Smith  
PATSY SMITH, C.S.R.  
Department VIII - District Court  
Las Vegas, Nevada 89155

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Loretta Lowman  
CLERK

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1 MARK B. BAILUS, ESQ.  
2 Nevada Bar No. 002284  
3 LAW OFFICES OF CHERRY & BAILUS  
4 600 South Eighth Street  
5 Post Office Box 43087  
6 Las Vegas, NV 89116  
7 (702) 385-3788

8 Attorney for Appellant  
9 ROY MORAGA

10 DISTRICT COURT  
11 CLARK COUNTY, NEVADA

12 \* \* \* \* \*

13 ROY MORAGA, )  
14 )  
15 Petitioner, )  
16 )  
17 vs. )  
18 )  
19 THE STATE OF NEVADA, )  
20 )  
21 Respondent. )

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

22 RECEIPT OF COPY

23 RECEIPT OF A COPY of the ORDER RE: PREPARATION OF TRANSCRIPTS  
24 is hereby acknowledged this 28<sup>th</sup> day of February, 1992.

25 IT IS FURTHER ACKNOWLEDGED that I have been advised that the  
26 supplemental record on appeal is presently scheduled for trans-  
27 mittal on April 6, 1992.

28 By: Russell A. Garcia  
RUSSELL GARCIA, CSR  
Department V - Justice Court  
Justice Court - Las Vegas  
Las Vegas, Nevada 89101

CE03  
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P.O. BOX 43087  
LAS VEGAS, NEVADA 89116  
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Loretta Dorman  
CLERK

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MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
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600 South Eighth Street  
Post Office Box 43087  
Las Vegas, NV 89116  
(702) 385-3788

FILED

MAR 2 12 59 PM '92

Attorney for Appellant  
ROY MORAGA

*Laetta L. Luman*  
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \* \* \*

ROY MORAGA,  
  
Petitioner,  
  
vs.  
  
THE STATE OF NEVADA,  
  
Respondent.

CASE NO. C 92174  
DEPT. NO. X  
DOCKET NO.

RECEIPT OF COPY

RECEIPT OF A COPY of the ORDER RE: PREPARATION OF TRANSCRIPTS  
is hereby acknowledged this 27<sup>th</sup> day of February, 1992.

IT IS FURTHER ACKNOWLEDGED that I have been advised that the  
supplemental record on appeal is presently scheduled for trans-  
mittal on April 6, 1992.

By *Sharleen Nicholson*  
SHARLEEN NICHOLSON, C.S.R.  
Department X - District Court  
Las Vegas, Nevada 89155

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ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED

MAR 4 1992

LORETTA BOWMAN CLERK  
BY *Loretta Bowman*  
CLERK

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROY D. MORAGA,

Defendant.

Case No. C92174

Dept. No. VII

Docket: P

REPORTER'S TRANSCRIPT

DE

STATE'S MOTION TO ENDORSE NAMES ON INFORMATION

BEFORE THE HONORABLE CARL J. CHRISTENSEN, DISTRICT JUDGE

Thursday, February 15, 1990

9:00 o'clock calendar

APPEARANCES:

For the State:

ROBERT LUCHCERINI, ESQ.  
Deputy District Attorney

For the Defendant:

PETER J. CHRISTIANSEN, ESQ.  
Deputy Public Defender

Reported by: RUSSELL A. GARCIA, CSR No. 257, RPR

RUSSELL A. GARCIA, CSR NO. 257, RPR



1 LAS VEGAS, CLARK COUNTY, NEVADA; THURSDAY, FEBRUARY 15, 1990

2 P R O C E E D I N G S

3 THE COURT: State of Nevada versus Roy Dean Moraga.

4 Record will show the presence of the defendant in  
5 custody with counsel, Peter Christiansen, chief public  
6 defender; Robert Lucherini, deputy district attorney.

7 State's motion to endorse names is granted subject  
8 to usual discovery.

9 (Whereupon the proceedings in the foregoing  
10 matter were adjourned.)

11  
12 ATTEST: Full, true, and accurate transcript of proceedings.

13  
14   
15 RUSSELL A. GARCIA, CSR No. 257, RPR  
16  
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RUSSELL A. GARCIA, CSR NO. 257, RPR

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

MAR 4 1992

LOG [Signature] JURY [Signature]  
BY [Signature] CITY

THE STATE OF NEVADA,  
Plaintiff,

vs.

ROY D. MORAGA,  
Defendant.

CASE NO. C92174  
DEPT NO. X  
DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

FRIDAY, OCTOBER 11, 1991

RECORDER'S TRANSCRIPT RE:

REMAND FROM SUPREME COURT FOR RE-SENTENCING

APPEARANCES:

For the State: ERIC G. JORGENSEN, DDA

For the Defendant: REBECCA A. GEIB, DPD

RECORDER/TRANSCRIBER  
Sharleen Nicholson

1 LAS VEGAS, NEVADA: FRIDAY, OCTOBER 11, 1991; 9 A.M.

2 THE COURT: C92174. State of Nevada v. Roy D. Moraga.  
3 Let the record reflect the presence of the defendant, in  
4 custody. You can step down, Mr. Moraga.

5 THE BAILIFF: Down this way.

6 THE COURT: Ms.?

7 MS. GEIB: Geib, Your Honor.

8 THE COURT: Geib.

9 MS. GEIB: Your Honor, this is Mr. Hillman's case of our  
10 office. He's in preliminary hearings this morning. He was  
11 hoping to be back in time to handle this matter. Perhaps we  
12 could pass it for his presence.

13 THE COURT: It's going to have to be passed, then, until  
14 Monday because I have a jury waiting to come in that was told  
15 to be back at 9:30.

16 MS. GEIB: Very well, Your Honor.

17 THE COURT: So it will be continued until Monday if  
18 you'll tell him that.

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MS. GEIB: Yes, sir.

THE CLERK: October 14th at 9 o'clock.

\* \* \* \* \*

ATTEST: Full, true and accurate transcript.

  
SHARLEEN NICHOLSON  
Special Recorder

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

MAR 4 1991

CLERK  
BY *Valerie Riggs*  
CLERK

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. C92174  
DEPT NO. X  
DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE.

MONDAY, OCTOBER 14, 1991

RECORDER'S TRANSCRIPT RE:

REMAND FROM SUPREME COURT FOR RE-SENTENCING

APPEARANCES:

For the State: DEBORAH J. LIPPIS, DDA

For the Defendant: ROGER HILLMAN, DPD  
KEVIN V. WILLIAMS, DPD

RECORDER/TRANSCRIBER  
Sharleen Nicholson

1 LAS VEGAS, NEVADA: MONDAY, OCTOBER 14, 1991; 9:00 A.M.

2 THE COURT: C92174. State of Nevada v. Roy D. Moraga.  
3 Let the record reflect the presence of the defendant and his  
4 attorney, Mr. Williams, Ms. Lippis for the state.

5 This is a case that was remanded for sentencing.  
6 This is the time set for entry of judgment and imposition of  
7 sentencing.

8 MR. WILLIAMS: Your Honor, this is Mr. Hillman's case and  
9 I noticed a --

10 THE COURT: And he just walked in.

11 THE BAILIFF: He just walked in.

12 MR. WILLIAMS: Okay.

13 THE COURT: Are you ready?

14 MR. HILLMAN: I guess so. Mr. Moraga has informed me  
15 that he's suing me. I haven't received any notification  
16 regarding that. That kind of creates a conflict at this point  
17 in time.

18 MS. LIPPIS: Judge, I have --

19 DEFENDANT MORAGA: I filed that a month ago.

20 THE COURT: Just a minute.

21 MS. LIPPIS: I have a motion in our file for the  
22 withdrawal of attorney of record filed by the defendant in  
23 proper person on or about October 3, 1991. I don't know that  
24

1 it required a response from the state. We generally do not  
2 take a position with regard to who represents defendants, but  
3 it has been filed.

4 THE COURT: Is he suing you individually or the whole  
5 Public Defender's Office?

6 DEFENDANT MORAGA: The Public Defender's Office.

7 THE COURT: Well, I guess you know the system but I agree  
8 that you are to be represented by an attorney other than one  
9 that you're making allegations about at this point.

10 Mr. Hillman, do you want to make an oral motion?

11 MR. HILLMAN: Yes. I'd move to withdraw, Your Honor.

12 THE COURT: All right. That motion will be granted and  
13 give me that list again.

14 I will appoint Kathy Teague to represent him.

15 MR. HILLMAN: Your Honor?

16 THE COURT: No, let me see. Yes.

17 MR. HILLMAN: She works in our office now.

18 THE COURT: Oh, Kathy Teague does.

19 MR. HILLMAN: She's been hired by us. Yes.

20 THE COURT: I'll appoint Paul J. Fitzgerald to represent  
21 him. He should be kept in custody here in Clark County until  
22 after sentencing. He will have an opportunity to discuss this  
23 matter with Mr. Fitzgerald and then we'll set the matter for  
24 sentencing in one week. If Mr. Fitzgerald for some reason

1 needs more time, Mr. Hillman, would you see that Mr.  
2 Fitzgerald gets everything on this, including the PSI. Is  
3 there anything else he would need, Ms. -- well, he'll need --  
4 I'm sure your file contains the remand from the Supreme Court,  
5 does it not?

6 MR. HILLMAN: Yes, it does.

7 THE COURT: Okay. Then it will be set for sentencing one  
8 week from today.

9 THE CLERK: October 21st at 9 o'clock.

10 THE COURT: And Kurt, will you notify Mr. Fitzgerald?

11 THE BAILIFF: Yes, Your Honor.

12 THE COURT: Do you have his phone number?

13 THE BAILIFF: I'll find it.

14 THE COURT: It's 387-8888. He should contact Mr. Moraga  
15 as soon as possible.

16 DEFENDANT MORAGA: Your Honor, I'm a ward of the state.  
17 I'm in prison. How come I can't go back there. If I stay  
18 here I'll --

19 THE COURT: Well, because we're not going to keep running  
20 you back and forth, Mr. Moraga.

21 DEFENDANT MORAGA: Well, it's only twenty minutes away  
22 from where I'm at from Las Vegas.

23 THE COURT: What's the normal procedure, officer?

24 COURT SERVICES OFFICER: It's up to you, Your Honor. If



1 you want him here to talk to the attorney we'll --

2 THE COURT: I definitely want him here so he'll stay  
3 here. You'll just be here a week.

4 DEFENDANT MORAGA: Yeah, but I don't want to stay here a  
5 day.

6 THE COURT: You'll be here a week.

7 DEFENDANT MORAGA: Well.

8 THE COURT: Here's your list. (Speaking to the Clerk)

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12 \* \* \* \* \*

13 ATTEST: Full, true and accurate transcript.

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16 SHARLEEN NICHOLSON  
17 Special Recorder  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

MAR 4 1992

LONG & BOWMAN CLERK  
BY *Deborah J. Lippis*

THE STATE OF NEVADA,  
Plaintiff,  
vs.  
ROY D. MORAGA,  
Defendant.

CASE NO. C92174  
DEPT NO. X  
DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

MONDAY, OCTOBER 21, 1991

RECORDER'S TRANSCRIPT RE:

REMAND FROM SUPREME COURT FOR RE-SENTENCING

APPEARANCES:

For the State: DEBORAH J. LIPPIS, DDA

For the Defendant: ROY GARCIA, ESQ.

RECORDER/TRANSCRIBER  
Sharleen Nicholson

1 LAS VEGAS, NEVADA: MONDAY, OCTOBER 21, 1991; 9:00 A.M.

2 THE COURT: Ms. Lippis, which one are you here on?

3 MS. LIPPIS: Moraga, Your Honor.

4 THE COURT: Okay. Mr. Garcia was here but he's not here  
5 now. I'll have to wait.

6 MS. LIPPIS: Judge, I have about five other appearances  
7 to make. Should I wait for a few minutes before I head off,  
8 probably never to be seen again.

9 THE COURT: I don't understand where he went.

10 THE BAILIFF: Yes, I don't know where he went, Judge. I  
11 remember seeing him back there in your chambers.

12 THE COURT: Yes, he was here in my chambers.

13 (Whereupon the Bailiff left the courtroom)

14 THE COURT: No?

15 THE BAILIFF: I haven't seen him, Your Honor. I checked  
16 in XIV and XVI.

17 THE COURT: Well, I don't know what to say, Ms. Lippis.

18 MS. LIPPIS: The Court's pleasure, Your Honor. I'll do  
19 whatever you suggest. If you want to trail it I'll run down  
20 to Department IV and then come right back or --

21 THE COURT: Okay. That will be fine. As soon as we find  
22 Mr. Garcia he'll come down to Department IV and let you know.

23 MS. LIPPIS: I'll either be in IV or VII.  
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1 THE COURT: Okay. We're in recess.

2 THE BAILIFF: All rise.

3 (Whereupon the Court called a brief recess)

4 THE COURT: Let's see, were you not going to get Ms.  
5 Lippis.

6 THE BAILIFF: Aw, geez. She was just --

7 THE COURT: She's either in IV or VII I think.

8 THE BAILIFF: Let me go get her.

9 THE COURT: All right.

10 (Whereupon the Bailiff left the courtroom)

11 MR. GARCIA: Your Honor, while we're waiting for Ms.  
12 Lippis may I approach the bench?

13 THE COURT: Yes.

14 (Bench conference, not recorded)

15 THE COURT: Okay. C92174. State of Nevada v. Roy D.  
16 Moraga. Let the record reflect the presence of the Defendant  
17 in custody with his attorney, Mr. Garcia, Ms. Lippis for the  
18 State. This is the time set for the entry of judgment and the  
19 imposition of sentence.

20 On the 15th day of March 1990 Judge Mike Wendell --  
21 the jury returned a verdict of guilty to the offenses as  
22 follows: Count I and Count II-Burglary, Count III and Count  
23 IV-Sexual Assault, as charged in the Information.

24 Mr. Moraga, do you have any legal cause or reason

1 why judgment should not be pronounced against you at this  
2 time?

3 DEFENDANT MORAGA: No.

4 THE COURT: Okay. By virtue of the jury's verdict you  
5 are hereby adjudged guilty of Count I and II-Burglary and  
6 Count III and IV-Sexual Assault.

7 Does the Department of Parole and Probation have  
8 anything to add to this?

9 PAROLE & PROBATION: No.

10 THE COURT: All right. Ms. Lippis, would you like to  
11 make a statement?

12 MS. LIPPIS: Just briefly, Your Honor. It appears the  
13 Court is familiar with the record.

14 I tried Mr. Moraga in front of the trial court,  
15 Judge Wendell, and he was convicted of all counts that were  
16 charged, two counts of Burglary and two counts of Sexual  
17 Assault.

18 The jury found that the Defendant broke into the  
19 victim's apartment on two occasions. On one occasion he broke  
20 in and stole at least a key to the apartment and probably a  
21 watch. The next time he came in he committed two counts of  
22 sexual assault along with the burglary.

23 At the time of sentencing the State proved-up  
24 sufficiently evidence with which the trial court found that

1 Mr. Moraga should be treated as a habitual criminal. As the  
2 Court will note in the original Pre-Sentence Report, he has  
3 several prior felony convictions.

4 Certified copies of those convictions and proving  
5 identity and such were presented to the trial court. The  
6 Defendant has prior felony offenses for burglary in '73,  
7 assault, which was aggravated assault, in 1976, assault and  
8 sexual assault in Phoenix, Arizona. He was convicted of  
9 attempted aggravated assault. Another burglary in 1988. And  
10 then 1989 the offense that is currently before Your Honor.

11 He has either been incarcerated since approximately  
12 1977 or living in his mother's residence. He was on probation  
13 for aggravated assault at the time that he absconded from  
14 supervision in Arizona and came to the state of Nevada and  
15 committed these crimes.

16 The Defendant admitted, not only in the Pre-Sentence  
17 Report but at the trial as well, that he sees nothing wrong  
18 with having sex with a woman against her will. The Defendant  
19 testified to this because we had located another rape victim  
20 who was willing to testify and obviously his admission at  
21 trial precluded and actually we agreed not to call her based  
22 upon his admission of how he felt about sex in general.

23 In his interview with the Department of Probation he  
24 told them the same thing. The State considered him to be a

1 very dangerous member of our community and of our society. I  
2 argued before the trial court that he should be adjudicated a  
3 habitual criminal. I requested at that time and suggested  
4 that the evidence supported life without the possibility of  
5 parole. I also argued that on all four counts the defendant  
6 should be adjudicated a habitual and life without parole  
7 sentences on all four counts and that they be run consecutive.

8 The trial court agreed with the habitual criminal  
9 status. The trial court also agreed that he be sentenced to  
10 Nevada State Prison without the possibility of parole. The  
11 trial court, however, disagreed on the legality of  
12 adjudicating the defendant habitual as to all four counts.  
13 That's why we find ourselves back today, because the Nevada  
14 Supreme Court said that we have three other counts that we  
15 must deal with, the two burglaries and the other sexual  
16 assault.

17 Based upon the Defendant's actions, his total lack  
18 of remorse, his total lack of responsibility for what he's  
19 done in the past as well as the case that brought us here, I  
20 would suggest to this Court as well that the Defendant should  
21 be adjudicated a habitual criminal, as Judge Wendell found  
22 him, and that he be sentenced to life without the possibility  
23 on all the remaining three counts and that they be run  
24 consecutive.

1           This man should never walk the streets in a free  
2 society again.

3           THE COURT: Okay. Mr. Moraga, do you want to make a  
4 statement?

5           DEFENDANT MORAGA: No.

6           THE COURT: Mr. Garcia?

7           MR. GARCIA: Your Honor, there are just several points  
8 I'd like to raise in order to preserve the possibility that  
9 Mr. Moraga may be filing an appeal of your decision.

10          THE COURT: Sure.

11          MR. GARCIA: Your Honor, initially we disagree that this  
12 is the proper courtroom for Mr. Moraga to be adjudged. Mr.  
13 Moraga was originally sentenced by Judge Wendell. The case  
14 was remanded back down. Since that time Judge Wendell has  
15 retired and there is a new District Court Judge that's been  
16 appointed to fill his position. We believe that Judge Gates  
17 is the appropriate judge who should hear this case.

18          Secondly, Your Honor, because I was not the trial  
19 attorney I was not present during that proceeding and  
20 unfortunately I have not been provided with a transcript of  
21 what transpired during the sentencing.

22          Now I have read the Supreme Court's Decision, the  
23 Order of Remand, and as Your Honor well knows, this morning I  
24 spoke at the bench with you concerning an issue of which Mr.



1 Moraga has apprised me of and that is that he believes that  
2 Judge Wendell did in fact sentence him on each of the four  
3 separate counts at issue, but that his final decision was that  
4 they were to run consecutive -- or concurrent with each other.

5 THE COURT: Concurrent. I would just point out to you  
6 that that is not possible for the simple reason that we  
7 wouldn't be here had he done that, and the Supreme Court had  
8 the entire transcript of the proceedings before Judge Wendell  
9 before it when it made its determination. So there is no  
10 doubt that Mr. Moraga is wrong on that and Ms. Lippis, you  
11 were there and evidently Judge Wendell did not actually do  
12 that.

13 MR. LIPPIS: No, he did not, Your Honor.

14 THE COURT: So I don't have the transcript but I know the  
15 Supreme Court had it.

16 MR. GARCIA: Right.

17 THE COURT: And they would not have sent it back for  
18 remand, they would not have remanded it had he done that, but  
19 you may proceed. That's preserved.

20 MR. GARCIA: Your Honor, I'm simply doing that to  
21 preserve the record.

22 THE COURT: Yes.

23 MR. GARCIA: Your Honor, we've gone over the report. No  
24 doubt Mr. Moraga has had serious problems with law enforcement

1 in the past. Since my coming into this case we discussed the  
2 facts and circumstances of the case at issue here.

3 His position, as he informed me during the trial, is  
4 the same position that he maintains today, that he simply did  
5 not force or coerce this woman into having sexual relations.  
6 He informed me that this was a person who he had known and  
7 that in fact the sexual contact was consensual, that there was  
8 some disagreement with the lady in question afterwards, and  
9 that that resulted in his arrest and subsequent prosecution in  
10 this case.

11 In addition, Your Honor, the statement that appears  
12 in the report as attributed to him about his feelings about  
13 forcing women to have sex, Your Honor. That's on page six,  
14 the Defendant's statement. Also the comment that Ms. Lippis  
15 alluded to, Mr. Moraga has informed me that that is simply and  
16 absolutely untrue, that he never made that statement, that  
17 that's not the way he feels, that he would not force himself  
18 upon a woman who would not be consenting to his advances and  
19 that he just never made that statement.

20 Now, Your Honor, let me just suggest that what Ms.  
21 Lippis is arguing is proper according to statute, I believe,  
22 she has -- that Your Honor has the right to do that, but if  
23 Your Honor is to sentence Mr. Moraga on four life sentences to  
24 run consecutive without the possibility of parole, that Your

1 Honor's in effect going to be sending away this man to prison  
2 for a longer period of time than most murderers receive in the  
3 State of Nevada, and that the facts and circumstances simply  
4 do not warrant that.

5 I'd ask Your Honor to consider a period of  
6 incarceration on each of these, but that you run them  
7 consecutive -- or concurrent to each other.

8 THE COURT: At this time then, under the laws of the  
9 State of Nevada, this Court does now sentence you, Roy D.  
10 Moraga, in addition to the \$20.00 Administrative Assessment,  
11 as follows: On Count I-Burglary, to ten (10) years in the  
12 Nevada Department of Prisons. On Count II-Burglary, to ten  
13 (10) years in the Nevada Department of Prisons. That is to  
14 run consecutively to Count I. On Count III-Sexual Assault,  
15 life in the Nevada Department of Prisons and that will run  
16 consecutively to Count II. On Count IV-Sexual Assault, on  
17 this count I find that you're a habitual criminal pursuant to  
18 NRS 207.010(2), and having sustained three prior felony  
19 convictions in 1977, 1983 and 1988 and as a result of that I  
20 sentence you to life without possibility of parole, and that's  
21 to run consecutive to Count III.

22 Anything else. Let's see. Credit for time served  
23 in the amount of -- do you have that figure by any chance, Ms.  
24 Lippis?

1 MS. LIPPIS: No, Your Honor, I don't.

2 THE COURT: He'll be given credit for time served in  
3 whatever he has accrued. It was a hundred and sixty-nine days  
4 as of the time that he had been previously sentenced and we  
5 will make a determination on what additional time you're  
6 entitled to, Mr. Moraga.

7 THE CLERK: Your Honor, on Count III is that with  
8 possibility of --

9 THE COURT: That's without possibility of parole.

10 THE CLERK: Count III?

11 THE COURT: Yes.

12 THE CLERK: Thank you.

13 MS. LIPPIS: Judge, is the Defendant adjudicated a  
14 habitual on Count --

15 THE COURT: I did on Count IV.

16 MS. LIPPIS: Well, Count III will have to be with the  
17 possibility of parole, then, unless he is adjudicated a  
18 habitual on that one. Oh, no. It doesn't because the  
19 sentence is five to life on a sexual assault with the  
20 possibility of parole.

21 THE COURT: With the possibility of parole.

22 MS. LIPPIS: Yes.

23 THE COURT: I'll leave it with the possibility of parole  
24 on Count III. Sentence him to -- on Count IV I'm adjudicating

1 him a habitual criminal.

2 MS. LIPPIS: Thanks, Your Honor.

3 MR. GARCIA: Thank you.

4 Your Honor, there's one other issue that Mr. Moraga  
5 would like to raise and that is he's anxious to be returned  
6 back to prison. I've informed him that I don't believe the  
7 Court has the power to do it, that all you can do is work with  
8 the schedule of the Detention Center.

9 THE COURT: I'm sure that that will not take very long.  
10 Probably --

11 COURT SERVICES OFFICER: Tomorrow.

12 THE COURT: Tomorrow. So that's as quick as we can get  
13 you back.

14 MR. GARCIA: Thank you, Your Honor.

15 DEFENDANT MORAGA: All right. Thank you.

16 THE COURT: All right.

17 \* \* \* \* \*

18  
19 ATTEST: Full, true and accurate transcript.

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22 SHARLEEN NICHOLSON  
23 Special Recorder  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

MAR 4 1992

LORETTA MORAGA, CLERK  
BY Chloe Riga  
CLERK

THE STATE OF NEVADA,

Plaintiff,

vs.

RAY MORAGA,

Defendant.

CASE NO. C92174  
DEPT NO. X  
DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE

WEDNESDAY, OCTOBER 9, 1991

RECORDER'S TRANSCRIPT RE:

DEFENDANT'S MOTION TO TRANSFER SENTENCING BACK TO  
DEPARTMENT VIII.  
DEFENDANT'S PRO PER MOTION FOR WITHDRAWAL OF ATTORNEY  
OF RECORD AND TRANSFER OF RECORDS  
DEFENDANT'S PRO PER MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

## APPEARANCES:

For the State: VALERIE P. ADAIR, DDA  
For the Defendant: ROGER R. HILLMAN, DPD

RECORDER/TRANSCRIBER  
Sharleen Nicholson

1 LAS VEGAS, NEVADA: WEDNESDAY, OCTOBER 9, 1991; 9:00 A.M.

2  
3 THE COURT: C92174. State of Nevada v. Roy D. Moraga.

4 MR. HILLMAN: What was that date? December --

5 THE CLERK: December 10th.

6 MR. HILLMAN: Thank you.

7 I believe he's still in Nevada State Prison, Your  
8 Honor. We'd ask to waive his presence.

9 THE COURT: Okay. This is defendant's motion to transfer  
10 sentencing to --

11 MR. HILLMAN: I checked with --

12 THE COURT: -- Judge Wendell. Let me explain. Judge  
13 Wendell has indicated he'll be hearing nothing until after  
14 January 1. There's no money for him to sit as a visiting  
15 Judge until July 1; consequently, the motion to transfer  
16 sentencing to Department VIII will be denied.

17 MR. HILLMAN: Judge, may I interject something?

18 THE COURT: Sure.

19 MR. HILLMAN: I checked with Anna, or excuse, with the  
20 secretary who spoke with Anna in Court Administration, and  
21 Judge Wendell will be back next Tuesday.

22 THE COURT: No, he's back already. I talked to him  
23 yesterday.

24 MR. HILLMAN: Uh-huh.

1 THE COURT: And he advised me that he will not be sitting  
2 -- he will not even consider sitting until after January 1,  
3 but what I'm advising you that as a senior judge he will not  
4 be able to sit because of no funds until after July 1 of 1992,  
5 and for those reasons I'm denying the motion to transfer  
6 sentencing back to Department VIII.

7 Defendant's pro per motion for withdrawal of  
8 attorney of record and transfer of records, I guess he wishes  
9 to represent himself. He should probably be represented at  
10 the time of sentencing. I'm hesitant to grant that motion.  
11 At this point I will deny that.

12 Defendant's pro per motion for leave to proceed in  
13 forma pauperis, I'll grant that after the sentencing. So that  
14 will be held in abeyance until sentencing.

15 MR. HILLMAN: Thank you, Your Honor.

16 THE COURT: Okay.

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21 ATTEST: Full, true and accurate transcript.

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24 SHARLEEN NICHOLSON  
25 Special Recorder  
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FILED

DISTRICT COURT  
CLARK COUNTY, NEVADA

MAR 4 1992  
LORETTA BOWMAN CLERK  
BY W. H. R. G.  
DEPUTY

THE STATE OF NEVADA,  
Plaintiff,  
vs.  
ROY D. MORAGA,  
Defendant.

CASE NO. C92174  
DEPT NO. X  
DOCKET K

BEFORE THE HONORABLE JACK LEHMAN, DISTRICT JUDGE  
MONDAY, SEPTEMBER 23, 1991  
RECORDER'S TRANSCRIPT RE:  
REMAND FROM SUPREME COURT FOR RE-SENTENCING

APPEARANCES:

For the State: WILLIAM P. HENRY, DDA  
For the Defendant: ROGER R. HILLMAN, DPD

RECORDER/TRANSCRIBER  
Sharleen Nicholson

1 LAS VEGAS, NEVADA: MONDAY, SEPTEMBER 23, 1991; 9 A.M.

2 THE COURT: Okay. So let's go ahead with Department's  
3 VIII's remand from the Supreme Court. C92174. State of  
4 Nevada v. Roy D. Moraga. Let the record reflect the absence  
5 of the Defendant, who is in Nevada State Prison, and the  
6 presence of Mr. Hillman and Mr. Henry for the State.

7 This is the time set for imposition of sentence. On  
8 the 15th day of March 1990, in Department No. VIII of the  
9 Eighth Judicial District Court a jury returned a verdict of  
10 guilty of Counts I and II, Burglary, and Counts III and IV,  
11 Sexual Assault.

12 By virtue of the fact that the defendant, Roy D.  
13 Moraga, had three prior felony convictions, one for assault in  
14 1976, one for assault and sexual assault in 1983. On the 1976  
15 he was sentenced of aggravated assault and on the 1983 he was  
16 sentenced to attempted aggravated assault, and in 1988 he had  
17 a burglary. He was convicted of burglary third degree, which  
18 is also a felony. All of these prior to the instant offense.

19 I have reviewed the Pre-Sentence Investigation  
20 Report, and it was remanded to me on the basis that Judge  
21 Wendell erred by sentencing him only on one count and from the  
22 Supreme Court Remand Decision it's not clear which count he  
23 was sentenced on, but I think Judge Wendell felt that he would  
24

1 just sentence him to life without possibility of parole as a  
2 habitual criminal under the habitual criminal statute,  
3 207.010(2).

4 And do you want to say anything, Mr. Hillman?

5 MR. HILLMAN: Well, I think that this probably belongs in  
6 Department VIII. Secondly, I don't know that we can proceed  
7 without Mr. Moraga's presence.

8 It seems to me that the defendant has the right and  
9 is supposed to be present at all important parts of the  
10 proceedings, and I'd have to say this is probably a very  
11 important part. Other than that, I really don't have very  
12 much to say, Your Honor.

13 THE COURT: Mr. Henry?

14 MR. HENRY: Your Honor, it seems to me that -- I don't  
15 know if Judge Wendell retired or went senior, but in any event  
16 he's not regularly available. By sending it back to  
17 Department VIII we can't get it before Judge Wendell who heard  
18 the trial and did the sentencing.

19 THE COURT: That's correct and on that basis I'm going to  
20 deny that. I'm hearing Judge Gates' calendar. He's going to  
21 be gone for three more weeks. I plan to sentence this man  
22 since I'm hearing his calendar and since we don't have Judge  
23 Wendell available.

24 MR. HENRY: I think it would be safe to have him present

1 for sentencing, though, Your Honor.

2 THE COURT: I agree, so what I would like to do is set it  
3 for -- we can probably get him down here by Friday of this  
4 week, can't we?

5 MR. HENRY: If he's in a facility in Clark County we can,  
6 but if he's up North I don't know.

7 MR. HILLMAN: I suspect he's in Ely.

8 THE COURT: I would imagine.

9 MR. HILLMAN: I am going to be leaving on vacation,  
10 starting this Saturday, for ten days. I won't be back until  
11 after the 10th of October.

12 THE COURT: Well, we can surely get him down here after  
13 that so we'll sentence him on the 11th of -- let's see. Tenth  
14 of October. Do I have anything -- do you know if I have  
15 anything on the 11th?

16 THE CLERK: Only a revocation hearing.

17 THE COURT: Yes, well that's fine. We'll sentence him on  
18 the 11th. Mr. Henry, is that agreeable to you?

19 MR. HENRY: That's fine, Your Honor. We'll prepare an  
20 order to transport if Your Honor will sign it.

21 THE COURT: If you would do that. That should give him  
22 enough time, don't you think?

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MR. HENRY: Yes, it will.

THE COURT: Okay. That will be fine.

\* \* \* \* \*

ATTEST: Full, true and accurate transcript.

  
SHARLEEN NICHOLSON  
Special Recorder

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DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

MAR 27 1992

ORIGINAL  
DEPUTY

THE STATE OF NEVADA,  
Plaintiff,  
vs  
ROY D. MORAGA,  
Defendant.

CASE NO. C092174  
DEPT. NO. VIII  
DOCKET M

REPORTER'S TRANSCRIPT  
OF  
JURY SELECTION ONLY  
PARTIAL TRANSCRIPT

BEFORE THE HONORABLE:  
MICHAEL J. WENDELL DISTRICT JUDGE  
MONDAY, MARCH 12, 1990, 10:30 A.M.

APPEARANCES:

FOR THE STATE:           DEBORAH J. LIPPIS, ESQ.  
                                  Deputy District Attorney  
FOR THE DEFENDANT:       R. ROGER HILLMAN, ESQ.  
                                  Deputy Public Defender

REPORTED BY:       PATSY K. SMITH, C.S.R. #190

INDEX

1		
2		PAGE
3	<u>JURY SELECTION</u>	
4		
5	<u>DANIEL GODFREY COOPER</u>	
6	VOIR DIRE EXAMINATION BY THE COURT	38
7		
8	<u>MARIN VISCAINO HERNANDEZ</u>	
9	VOIR DIRE EXAMINATION BY THE COURT	39
10	<u>MYRAJANE PUGGI</u>	
11	VOIR DIRE EXAMINATION BY THE COURT	40
12		
13	<u>JOHN EDWARD KAUFMAN</u>	
14	VOIR DIRE EXAMINATION BY THE COURT	42
15	<u>SHARLINE C. ROELLER</u>	
16	VOIR DIRE EXAMINATION BY THE COURT	44
17		
18	<u>DENNIS WAYNE TIREY</u>	
19	VOIR DIRE EXAMINATION BY THE COURT	46
20	<u>HINTON DUANE ERNEST</u>	
21	VOIR DIRE EXAMINATION BY THE COURT	46
22		
23	<u>THOMAS E. DAVIS</u>	
24	VOIR DIRE EXAMINATION BY THE COURT	48
25	<u>MICHAEL PAUL REAGO</u>	
	VOIR DIRE EXAMINATION BY THE COURT	49

1	VERONICA ANNE PIKE	
2	VOIR DIRE EXAMINATION BY THE COURT	50
3		
4	DOUGLAS ARVIN CAUDELL	
5	VOIR DIRE EXAMINATION BY THE COURT	51
6	JOSE DE JESUS LEYA	
7	VOIR DIRE EXAMINATION BY THE COURT	52
8		
9	DAVID GARLAND BARNERBY	
10	VOIR DIRE EXAMINATION BY THE COURT	55
11	VOIR DIRE EXAMINATION BY MR. HILLMAN	60
12	JAYNE MARLENE HUGHES	
13	VOIR DIRE EXAMINATION BY THE COURT	61
14	CLARENCE DON MORGAN, JR.	
15	VOIR DIRE EXAMINATION BY THE COURT	61
16	VOIR DIRE EXAMINATION BY MR. HILLMAN	65
17	KENNETH A. NOVAK	
18	VOIR DIRE EXAMINATION BY THE COURT	66
19	VOIR DIRE EXAMINATION BY MR. HILLMAN	70
20	CLARE ARLAND KNAPP	
21	VOIR DIRE EXAMINATION BY THE COURT	71
22		
23	JAMES REIMER MARSH	
24	VOIR DIRE EXAMINATION BY THE COURT	72
25	VOIR DIRE EXAMINATION BY MR. HILLMAN	77
	VOIR DIRE EXAMINATION BY MS. LIPPIS	77



1	<u>GERRY LEE PITTINGER</u>	
2	VOIR DIRE EXAMINATION BY THE COURT	78
3	<u>ERIC SCOTT METZ</u>	
4	VOIR DIRE EXAMINATION BY THE COURT	84
5		
6	<u>JANET CAROL SEGUR</u>	
7	VOIR DIRE EXAMINATION BY THE COURT	92
8		
9	<u>COLLEEN MARIE MOONEY</u>	
10	VOIR DIRE EXAMINATION BY THE COURT	92
11	<u>HOWARD L. TOBLER</u>	
12	VOIR DIRE EXAMINATION BY THE COURT	96
13		
14	<u>DEBRA JUNE ROBINSON</u>	
15	VOIR DIRE EXAMINATION BY THE COURT	102
16	<u>MONIQUE L. COLE</u>	
17	VOIR DIRE EXAMINATION BY THE COURT	110
18		
19	<u>EVELYN RAUM BLOOMFIELD</u>	
20	VOIR DIRE EXAMINATION BY THE COURT	114
21	<u>PAUL DENNIS PETARDE</u>	
22	VOIR DIRE EXAMINATION BY THE COURT	115
23	VOIR DIRE EXAMINATION BY MS. LIPPIS	119
24	<u>DIANE SNELLING</u>	
25	VOIR DIRE EXAMINATION BY THE COURT	120

1     CHARLES WILFORD BEAN

2     VOIR DIRE EXAMINATION BY THE COURT             128  
3     VOIR DIRE EXAMINATION BY MR. HILLMAN           131

4     MICHAEL THOMAS BRIDENBURG

5     VOIR DIRE EXAMINATION BY THE COURT             132

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1 MONDAY, MARCH 12, 1990, 10:30 A.M.

2 THE COURT: This is the State of Nevada  
3 against Roy D. Moraga, who is present with his  
4 counsel, Mr. Hillman. Ms. Lippis is representing  
5 the State.

6 This is out of the presence of the jury.

7 Mr. Hillman.

8 MR. HILLMAN: Your Honor, briefly.

9 Mr. Moraga expressed some dissatisfaction  
10 with my representation of him. For the record, I  
11 went over to see him Thursday. He declined a  
12 visit. When I went on Friday, he declined a visit.  
13 When I went to see him Sunday, he declined a visit.  
14 He informed me about two weeks ago he was going to  
15 ask the Court to appoint a new attorney. He made  
16 that motion in front of Judge Christensen. Judge  
17 Christensen suggested he make a motion in front of  
18 the overflow judge. That motion was not made at  
19 that time. Mr. Moraga informs me he wants to make  
20 that motion at this point in time and I advised him  
21 if he wanted to put it on the record to reserve  
22 that.

23 THE COURT: Mr. Moraga, do you want to  
24 state on the record why you want another attorney?

25 THE DEFENDANT: He hasn't been doing

1 anything for me and he just keeps trying to get me a  
2 life sentence. I have got all the motions. I  
3 haven't seen him since March and I've been calling  
4 everyday from December all the way to March and I  
5 never seen him until March to ask him for things and  
6 he -- even when he was in his office, he wouldn't  
7 take my calls.

8               So that's not right and then that other  
9 lawyer because he was sick, that's why I didn't put  
10 any motions in and that other lawyer told me to shut  
11 up. So I don't want to deal with that. If I can't  
12 make it through a point to try to get me a lawyer  
13 that's going to defend me for these crimes that they  
14 say I have done and I know I can beat it, if I had a  
15 lawyer that would go out there and get my witnesses,  
16 but he don't want to do anything. So I just don't  
17 want him.

18               THE COURT: Motion is denied.

19               Get the jury. We will get underway.

20               (Off the record at 10:32 a.m. and

21               back on the record at 10:40 a.m.)

22               THE COURT: Good morning, ladies and  
23 gentlemen. This is the time fixed of the trial of  
24 State of Nevada, plaintiff, against Roy D. Moraga,  
25 defendant. Mr. Moraga is present in person and

1 represented by his attorney, Mr. Roger Hillman.  
2 Representing the State of Nevada is Mr. Debbie  
3 Hippiis of the District Attorney's office.

4 At this time, the clerk will take the  
5 roll of the prospective jurors. When your name is  
6 called, please answer present or here.

7 THE CLERK: Daniel Godfrey Cooper?

8 MR. COOPER: Here.

9 THE CLERK: Marin Viscaino Hernandez?

10 MR. HERNANDEZ: Present.

11 THE CLERK: Myra Jane Pucci?

12 MS. PUCCI: Here.

13 THE CLERK: John Edward Kaufman?

14 MR. KAUFMAN: Here.

15 THE CLERK: Sharline C. Roeller?

16 MS. ROELLER: Present.

17 THE CLERK: Keith Harmon Weeks?

18 MR. WEEKS: Here.

19 THE CLERK: Vinton Duane Ernest?

20 MR. ERNEST: Here.

21 THE CLERK: Thomas E. Davis?

22 MR. DAVIS: Here.

23 THE CLERK: Michael Paul Reago?

24 MR. REAGO: Here.

25 THE CLERK: Veronica Anne Pike?

1 MS. PIKE: Present.  
2 THE CLERK: Douglas Arvin Caudill?  
3 MR. CAUDILL: Here.  
4 THE CLERK: Jose de Jesus Leyva?  
5 MR. LEYVA: Present.  
6 THE CLERK: Dennis Wayne Tirey?  
7 MR. TIREY: Here.  
8 THE CLERK: David Garland Barneby?  
9 MR. BARNERY: Here.  
10 THE CLERK: Jayne Marlene Hughes?  
11 MS. HUGHES: Here.  
12 THE CLERK: Clarence Don Morgan, Jr.?  
13 MR. MORGAN: Here.  
14 THE CLERK: Kenneth A. Novak?  
15 MR. NOVAK: Here.  
16 THE CLERK: Clare Arland Knapp?  
17 MR. KNAPP: Here.  
18 THE CLERK: James Rejmers Marsh?  
19 MR. MARSH: Here.  
20 THE CLERK: Gerre Lee Pittenger?  
21 MR. PITTINGER: Here.  
22 THE CLERK: Eric Scott Metz?  
23 MR. METZ: Here.  
24 THE CLERK: Janet Carol Segur?  
25 MS. SEGUR: Here.

1 THE CLERK: Colleen Mooney?  
2 MS. MOONEY: Here.  
3 THE CLERK: Howard Tobler?  
4 MR. TOBLER: Here.  
5 THE CLERK: Debra June Robinson?  
6 MS. ROBINSON: Here.  
7 THE CLERK: Monique Cole?  
8 MS. COLE: Here.  
9 THE CLERK: Evelyn Bloomfield?  
10 MS. BLOOMFIELD: Here.  
11 THE CLERK: Paul Dennis Petarde?  
12 MR. PETARDE: Here.  
13 THE CLERK: Diane Marie Snelling?  
14 MS. SNELLING: Here.  
15 THE CLERK: Charles Wilford Bean?  
16 MR. BEAN: Here.  
17 THE CLERK: Michael Thomas Bridenberg?  
18 MR. BRIDENBERG: Here.  
19 THE CLERK: Linda Jean Ferron?  
20 MS. FERRON: Here.  
21 THE CLERK: Stanley Orlando Sharpe?  
22 MR. SHARPE: Here.  
23 THE CLERK: Anne DeVaney?  
24 MS. DEVANEY: Here.  
25 THE CLERK: James Edward Verden?

1 MR. VERDEN: Here.  
2 THE CLERK: William Edward Nelson?  
3 MR. NELSON: Here.  
4 THE CLERK: John Hofmann?  
5 MR. HOFMANN: Here.  
6 THE CLERK: Donald Leroy Wilson?  
7 MR. WILSON: Here.  
8 THE CLERK: Ralph Kenneth Hawley?  
9 MR. HAWLEY: Here.  
10 THE CLERK: Everlean Brown Terry?  
11 MS. TERRY: Here.  
12 THE CLERK: Barbara Dominicka Prandecka?  
13 MS. PRANDECKA: Present.  
14 THE CLERK: Kathleen Martinez McGee?  
15 MS. MCGEE: Here.  
16 THE CLERK: Julia E. Stromer?  
17 MS. STROMER: Here.  
18 THE CLERK: Margaret Bozarth?  
19 MS. BOZARTH: Here.  
20 THE CLERK: John Gilbert Keeley?  
21 MR. KEELEY: Here.  
22 THE CLERK: Elizabeth Mahle?  
23 MS. MAHLE: Present.  
24 THE CLERK: Candace Becker?  
25 MS. BECKER: Here.



1 THE CLERK: Kenneth James Kirkey, Jr.?

2 MR. KIRKEY: Here.

3 THE CLERK: Preston Van Cole?

4 MR. COLE: Here.

5 THE COURT: All present?

6 THE CLERK: Yes.

7 THE COURT: Is there anyone present whose  
8 name was not called?

9 The clerk will call the first 12 names on  
10 the list to fill the jury box. As your name is  
11 called, ladies and gentlemen, please come forward  
12 and take a seat in the jury box. We will start with  
13 the first row, first seat towards me and fill six  
14 seats, then we will go to the second row starting  
15 with the first seat towards me, fill the next six  
16 seats so we will have 12 persons in the jury box.

17 THE CLERK: Daniel Godfrey Cooper, Marin  
18 Viscaino Hernandez, Myra Jane Drewett Pucci, John  
19 Edward Kaufman, Sherline C. Roeller, Keith Harmon  
20 Weeks, Vinton Duane Ernest, Thomas E. Davis, Michael  
21 Paul Keago, Veronica Anne Pike, Douglas Arvin  
22 Candill, Jose De Jesus Leyva.

23 THE COURT: Ladies and gentlemen, those  
24 of you in the jury box, will you please stand to be  
25 placed under oath by my clerk.

1                   (At this time, the jury panel was duly  
2   sworn.)

3                   THE COURT: Ms. Lippis, will you state to  
4   the prospective jurors, both those in the jury box  
5   and those beyond the rail, the nature of this case  
6   and the names of the witnesses you intend to call?

7                   MS. LIPPIS: Yes, Sir.

8                   Good morning, ladies and gentlemen. As  
9   the Judge indicated to you, my name is Debbie  
10   Lippis. I'm with the District Attorney's office.  
11   You are here this morning to be called as potential  
12   jurors in the case involving the State of Nevada  
13   versus Roy D. Moraga.

14                  The Court will read to you and I will  
15   briefly just to tell you what the charges are  
16   about. The defendant, Mr. Moraga, is charged with  
17   two counts of burglary. That is, in Count I, that  
18   he entered a certain apartment with the intent to  
19   commit larceny. Count II is that he entered a  
20   certain apartment which is burglary, with the intent  
21   to commit sexual assault, Count III, and Count IV  
22   charges the defendant, Mr. Moraga, with two counts  
23   of sexual assault.

24                  We anticipate that there will be between  
25   17 and 20 witnesses to be called at this trial. We

1 are estimating approximately two and a half days for  
2 the length of the trial.

3 What I'd like to do is read to you some  
4 names. If you are familiar with any of these names  
5 or recognize them or think you may know these  
6 people, please remember the name because Judge  
7 Wendell will then ask you so we are assured that we  
8 have a fair trial for all purposes.

9 THE COURT: Pardon me, can everyone in  
10 the jury box hear all right?

11 A VOICE: No.

12 MS. LIPPIS: Perhaps if I come up here.

13 THE COURT: Yes, that would help.

14 MS. LIPPIS: Can everyone hear me now?

15 Dennis Devitte, who is a police officer  
16 with the Las Vegas Metropolitan Police, John Fox,  
17 also a police officer, William Gomez, a lay witness,  
18 Michael Harper is a lay witness, Penny Hawk, Jodi  
19 Howard, and Robert E. Novack, a police officer with  
20 the Las Vegas Metropolitan Police Department, Jean  
21 Real, a lay witness. We have endorsed, meaning we  
22 could have called the custodian of records for the  
23 University Medical Center. You will hear testimony,  
24 however, from the physician at that center as well  
25 as possibly the nurse. So there will not be a

1     custodian of records. Linda Errichetto, she is a  
2     forensic scientist with the Las Vegas Police  
3     Department, Mary Ruth Frink is actually in the  
4     fingerprint section of the Las Vegas Metropolitan  
5     Police Department. I don't believe we will have to  
6     call her, but I want to mention her name in the  
7     event that her testimony becomes necessary, Michael  
8     Gillins, who is -- that's a police officer with the  
9     Las Vegas Metropolitan Police Department, Richard  
10    Rague, also in the fingerprint identification  
11    section with Metro, Officer Luke, whose first name  
12    escapes me now. It's either Randall, I believe it's  
13    Randall, also an officer with Metro, Harrison Mayo,  
14    also an officer with Metro, Helen Prescott, she is a  
15    registered nurse at the Clark County Detention  
16    Center, Dawn Roche (phonetic), she is a physician  
17    at University Medical Center, Denise Rudolph, she is  
18    a corrections officer at the Clark County Detention  
19    Center, Ronald Swift with Metro, and Sabin or Sehina  
20    (phonetic). I'm not quite sure the pronunciation,  
21    her last name Young, she is a registered nurse with  
22    the University Medical Center.

23                   THE COURT: Thank you.

24                   MS. LIPPIS: Thank you.

25                   THE COURT: Ladies and gentlemen, those

1 of you in the jury box, I will be asking you some  
2 questions that will bear upon your qualifications to  
3 sit as jurors in the case and when I finish with my  
4 examination, the attorneys will have an opportunity  
5 to ask you questions. It's not our purpose to  
6 embarrass you. It's not our purpose to pry, but  
7 it's necessary that we ask these questions and that  
8 they be answered fully and correctly so we are  
9 assured of having 12 neutral jurors in the jury  
10 box.

11 Before I get underway, as Miss Dipple  
12 stated, the estimated time for this trial is  
13 something like two and a half or three days.  
14 However, because of prior commitments, this case  
15 will not be in session on Wednesday. So we would go  
16 from Monday and Tuesday and not Wednesday and return  
17 on Thursday. I will repeat that later on. But we  
18 do hope to conclude this trial this week, ladies and  
19 gentlemen.

20 Let me ask those of you in the jury box,  
21 first of all, do any of you know one another? If  
22 you do will you raise your hands?

23 MR. COOPER: Yes, casually.

24 THE COURT: Mr. Cooper, you know Mr.  
25 Davis?

1 MR. COOPER: Yes.

2 THE COURT: How do you know one another?

3 MR. COOPER: We are in a bowling  
4 tournament league.

5 MR. DAVIS: That's all.

6 THE COURT: I see. Mr. Cooper and Mr.  
7 Davis, if you two are ultimately seated on this  
8 jury, will each of you keep your own independent  
9 judgment and thinking in the case, Mr. Cooper?

10 MR. COOPER: Yes.

11 THE COURT: And Mr. Davis?

12 MR. DAVIS: Yes, sir.

13 THE COURT: Do any of you in the jury box  
14 know anything about this case other than what you  
15 heard so far in court this morning? By that, I mean  
16 have you read about it, heard it discussed by  
17 anyone, anything of that nature?

18 If your answer is yes to any of my  
19 questions, please raise your hand.

20 Are any of you acquainted with Mr.  
21 Moraga, who is the defendant in this case? He has  
22 the dark short-sleeved shirt, seated at the counsel  
23 table?

24 Do any of you know his attorney, Mr.  
25 Roger Hillman?

1           Are any of you acquainted with Ms. Debbie  
2       Lippis of the District Attorney's office?

3           Do any of you know Rex Bell, the District  
4       Attorney of Clark County, or anyone that works in  
5       that office?

6           It's a function of a jury in a jury  
7       trial, ladies and gentlemen, in both a civil and in  
8       a criminal case, to decide what the facts are after  
9       they have heard all the evidence in the case. After  
10      all the evidence has been presented, one of the  
11      functions of the Court is to instruct the jury on  
12      what the law is as it applies in this case. It is  
13      the duty of all the jurors to follow the Court's  
14      Instructions on the law. Is there anyone in the  
15      jury box that feels for any reason you could not  
16      follow the Court's Instructions on the law?

17          I see no hands, I therefore assume that  
18      each of you will follow the Court's Instructions on  
19      the law.

20          Let me take this one step further. In  
21      the event the Court's Instructions on the law are  
22      different than what you think the law is or ought to  
23      be, you would have to set aside your own personal  
24      beliefs and follow the Court's Instructions. Does  
25      that present a problem for any of you?

1           In there anything about the nature of  
2 this case that would make it difficult for you to be  
3 fair and impartial jurors? Ms. Lippis indicated  
4 what the charges are in this case. I believe two  
5 charges of burglary and two charges of sexual  
6 assault?

7           MS. LIPPIS: Yes, sir.

8           THE COURT: Is there anything by reason  
9 of the nature of the charges that would make it  
10 difficult for you to be fair and impartial?

11           Have any of you in the jury box, either  
12 you yourself or any friends or relative, ever been  
13 the victim of a crime? Let me take this a row at a  
14 time, in the first row? Let me give you some  
15 examples. When I say have you been the victim of a  
16 crime, if somebody broke into your home and stole  
17 something or robbed you at gunpoint, stole your lawn  
18 mower, broke into your truck and stole your tools,  
19 those are just examples where you were the victim of  
20 the crime.

21           Now, in the first row, have any of you or  
22 anyone close to you ever been the victim of any  
23 crime? Let me start with Mr. Hernandez, were you  
24 the victim, Mr. Hernandez?

25           MR. HERNANDEZ: Well, my house was broken



1 in twice.

2 THE COURT: In Clark County?

3 MR. HERNANDEZ: Yes.

4 THE COURT: Would that in any way

5 influence your verdict in this case for or against

6 either side?

7 MR. HERNANDEZ: Not really.

8 THE COURT: Did you report it to the

9 authorities, to the police?

10 MR. HERNANDEZ: Yes, we did.

11 THE COURT: Was anyone arrested?

12 MR. HERNANDEZ: No.

13 THE COURT: Were you satisfied with the

14 way the police handled your case?

15 MR. HERNANDEZ: Yes, I was.

16 THE COURT: Now, I believe somebody else

17 down there.

18 Mr. Weeks?

19 MR. WEEKS: Yes.

20 THE COURT: You were the victim, Mr.

21 Weeks?

22 MR. WEEKS: Of a robbery.

23 THE COURT: A robbery?

24 MR. WEEKS: Yes.

25 THE COURT: Now tell me what happened.

1 Mr. Weeks?

2 MR. WEEKS: Somebody broke into my garage  
3 and stole a couple motorcycles.

4 THE COURT: See, that would be burglary.  
5 A burglary is breaking in and stealing something. A  
6 robbery is taking something by force or violence.  
7 So that would have been a burglary. Was it in Clark  
8 County?

9 MR. WEEKS: No, it was in Phoenix.

10 THE COURT: Did you report it to the  
11 authorities there?

12 MR. WEEKS: Yes.

13 THE COURT: Was anyone arrested?

14 MR. WEEKS: No.

15 THE COURT: Would that experience in any  
16 way influence your verdict for or against either  
17 side in this case?

18 MR. WEEKS: I really don't know.

19 THE COURT: Do you think it might?

20 MR. WEEKS: It could.

21 THE COURT: I'm going to excuse you. Go  
22 back to the jury commissioner, Mr. Weeks. Report  
23 down there on the first floor.

24 Will you call another name, please?

25 THE CLERK: Dennis William Tiley.

1 DENNIS WILLIAM TIREY,  
2 having been first duly sworn to tell the truth, the  
3 whole truth and nothing but the truth, testified and  
4 said as follows:

5 THE COURT: Mr. Tirey or Tirey?

6 MR. TIREY: Tirey.

7 THE COURT: Mr. Tirey, you heard the  
8 questions I have asked so far. Do you know of any  
9 reason why you could not be a fair and impartial  
10 juror?

11 MR. TIREY: No.

12 THE COURT: Do you know anyone seated in  
13 the jury box?

14 MR. TIREY: No.

15 THE COURT: Do you know Mr. Moraga, the  
16 defendant?

17 MR. TIREY: No.

18 THE COURT: Do you know either of the  
19 attorneys involved in the trial?

20 MR. TIREY: No.

21 THE COURT: Do you know anyone that works  
22 for Rex Bell, the District Attorney of Clark  
23 County?

24 MR. TIREY: No.

25 THE COURT: Will you follow the Court's

1 Instructions on the law?  
2 MR. TIREY: Uh-huh.  
3 THE COURT: Is that yes?  
4 MR. TIREY: Yes.  
5 THE COURT: Have you ever been the victim  
6 of a crime?  
7 MR. TIREY: Yes.  
8 THE COURT: What was the crime?  
9 MR. TIREY: Burglary.  
10 THE COURT: In Clark County?  
11 MR. TIREY: Yes.  
12 THE COURT: How recently was it?  
13 MR. TIREY: Three years ago.  
14 THE COURT: Was anyone arrested?  
15 MR. TIREY: No.  
16 THE COURT: Was it to your home or?  
17 MR. TIREY: Yes.  
18 THE COURT: Would that experience  
19 influence your verdict in this case?  
20 MR. TIREY: No.  
21 THE COURT: Anyone else in the first row  
22 that has been the victim of a crime?  
23 In the second row, Mr. Davis?  
24 MR. DAVIS: Yes.  
25 THE COURT: Were you the victim?

1 MR. DAVIS: Yes.  
2 THE COURT: What was the crime?  
3 MR. DAVIS: One week, somebody broke in  
4 the window three times.  
5 THE COURT: Broke into what?  
6 MR. DAVIS: The window, broke in the  
7 window.  
8 THE COURT: Oh, I see to your home?  
9 MR. DAVIS: Yes, sir.  
10 THE COURT: Did they get in the home?  
11 MR. DAVIS: No.  
12 THE COURT: Inside?  
13 MR. DAVIS: No.  
14 THE COURT: How long ago did this  
15 happen?  
16 MR. DAVIS: Three years.  
17 THE COURT: Was it in Clark County?  
18 MR. DAVIS: Yes.  
19 THE COURT: Was anyone arrested?  
20 MR. DAVIS: Yes.  
21 THE COURT: Did that matter go to a  
22 trial, do you know?  
23 MR. DAVIS: No.  
24 THE COURT: Were you satisfied with the  
25 way the police handled your case?

1 MR. DAVIS: Yes.

2 THE COURT: Would that experience  
3 influence your verdict in this case for or against  
4 either side?

5 MR. DAVIS: Yes.

6 THE COURT: How would it influence you?  
7 Let me restate my question.

8 Would you be affected in this case by  
9 what happened to you, would that cause you to be  
10 influenced in how you would arrive at a verdict?

11 MR. DAVIS: Oh, no, no. It wouldn't  
12 affect me at all.

13 THE COURT: That would not influence your  
14 verdict?

15 MR. DAVIS: No.

16 THE COURT: Anyone else in the second  
17 row? Mr. Ernest, is it Erns or Ernest?

18 MR. ERNEST: Ernest. I had an attempted  
19 burglary about five years ago.

20 THE COURT: In Clark County?

21 MR. ERNEST: In Clark County. My dog  
22 chased a burglar away and he dropped his burglar  
23 tools so I didn't report it.

24 THE COURT: Would that influence you in  
25 this case?

1 MR. ERNEST: No.

2 THE COURT: And, Mr. Davis, you raised  
3 your hand?

4 MR. DAVIS: Yes, sir.

5 THE COURT: Were you the victim?

6 MR. DAVIS: I was.

7 THE COURT: What was the crime?

8 MR. DAVIS: Breaking in the automobile  
9 and theft of a radio from there.

10 THE COURT: Was that in Clark County?

11 MR. DAVIS: No, it was not.

12 THE COURT: How long ago was it?

13 MR. DAVIS: Oh, ten years ago.

14 THE COURT: Where was it?

15 MR. DAVIS: That was in New Jersey, sir.

16 THE COURT: Was anyone arrested?

17 MR. DAVIS: No, sir.

18 THE COURT: Would that in any way  
19 influence your verdict in this case?

20 MR. DAVIS: No.

21 THE COURT: Anyone else in the second  
22 row?

23 Have any of you ever been police officers  
24 or engaged in law enforcement related activity?

25 Mr. Davis, were you an officer?

1 MR. DAVIS: I was a military police  
2 officer for about ten years of a 40-year career.

3 THE COURT: Ten years of how long?

4 MR. DAVIS: Of about 40 military.

5 THE COURT: Police officers will be  
6 testifying in this case, Mr. Davis, and the jury  
7 will have to judge the credibility and the weight to  
8 be given to police officer's testimony, like you'll  
9 have to judge everyone who testifies as to their  
10 credibility and as to the weight to be given to  
11 their testimony.

12 Mr. Davis, do you think a police  
13 officer's testimony is more believable or less  
14 believable either way just because he's a police  
15 officer and for that reason alone?

16 MR. DAVIS: No, sir.

17 THE COURT: Anyone else that has ever  
18 been engaged in law enforcement related work?

19 Mr. Ernest?

20 MR. ERNEST: I was a security guard at  
21 the Circus Circus.

22 THE COURT: How long did you work there?

23 MR. ERNEST: About one year.

24 THE COURT: Let me ask you the same  
25 question. Do you think a police officer's testimony



1 is more believable than anyone else's because he's a  
2 police officer?

3 MR. ERNEST: I do, sir.

4 THE COURT: So if a police officer would  
5 testify from the stand and his testimony conflicted  
6 with all the other witnesses' testimony and all the  
7 other evidence, you would disregard all their  
8 testimony and believe him?

9 MR. ERNEST: Depends upon the situation,  
10 but I believe a police officer is trained in that  
11 and he would be more believable.

12 THE COURT: Well, perhaps the choice of  
13 words on my part you say more believable. Do you  
14 think he's more believable because he's been trained  
15 to be an observer?

16 MR. ERNEST: Right, yes, sir.

17 THE COURT: If his testimony conflicted  
18 with all the other testimony in the case, how would  
19 you judge his testimony then?

20 MR. ERNEST: I would have to go with the  
21 police officer's.

22 THE COURT: Even though a police officer  
23 said the color was black and 20 other people came in  
24 and maybe even some police officers themselves and  
25 said it was white, now how would you resolve that?

1           MR. ERNEST: Like I said, it depends on  
2     the situation.

3           THE COURT: Well, what we are trying to  
4     avoid is to have somebody in the jury box that says,  
5     well, he's a police officer and I'm going to believe  
6     everything he says and I don't care what the other  
7     evidence is. Is that the attitude you would have?

8           MR. ERNEST: No, sir.

9           THE COURT: Would your attitude be --  
10    well, strike that.

11          Would you judge a police officer's  
12    testimony the way you judge anybody else's testimony  
13    by observing how he says it, what he says?

14          MR. ERNEST: Yes, sir.

15          THE COURT: Comparing it with other  
16    evidence that you do believe?

17          MR. ERNEST: Yes, sir.

18          THE COURT: Would you reject a police  
19    officer's testimony if you said to yourself, well,  
20    this is contrary to all the other evidence that I  
21    believe?

22          MR. ERNEST: Yes, well, yes, sir.

23          THE COURT: See, what we're trying to  
24    avoid is to have people in the jury box that says,  
25    well, he's a police officer and I will automatically

1 accept his testimony no matter what it is or the  
2 other side of the coin, he's a police officer and  
3 I'm not going to believe anything that he says. Now  
4 we don't want people that way. We want people that  
5 would be able to judge the testimony of each  
6 witness, how they say it, their recollection of how  
7 the incident happened and then make a decision as to  
8 whether or not it's believable or not believable.  
9 Could you do that?

10 MR. DAVIS: Yes, sir.

11 THE COURT: Anyone else that's ever been  
12 engaged in law enforcement related work?

13 Do any of you know any of the witnesses  
14 whose names were read by Ms. Lippis? She read from  
15 a list of witnesses that she intends to call, do any  
16 of you know any of those persons?

17 Have any of you ever been jurors before?  
18 Let me take that a row at a time. In the first row,  
19 Mr. Cooper, you have been a juror before?

20 MR. COOPER: Yes, sir.

21 THE COURT: Was it a civil or criminal  
22 case, if you can remember?

23 MR. COOPER: A criminal case.

24 THE COURT: Was it in Clark County?

25 MR. COOPER: Yes, sir.

1 THE COURT: How long ago was it?  
2 MR. COOPER: Eight years.  
3 THE COURT: Do you remember what the  
4 charge was in that case?  
5 MR. COOPER: Breaking and entering.  
6 THE COURT: Without telling me what the  
7 verdict was, did that jury reach a verdict?  
8 MR. COOPER: Yes, sir.  
9 THE COURT: Did anything happen during  
10 that trial that might somehow influence your verdict  
11 in this trial for or against either side?  
12 MR. COOPER: No, sir.  
13 THE COURT: Mr. Hernandez, have you been  
14 a juror before?  
15 MR. HERNANDEZ: I was on a federal grand  
16 jury.  
17 THE COURT: Federal grand jury?  
18 MR. HERNANDEZ: Yes.  
19 THE COURT: Have you ever been a trial  
20 juror?  
21 MR. HERNANDEZ: No.  
22 THE COURT: Petit juror?  
23 MR. HERNANDEZ: No.  
24 THE COURT: Miss Pucci, did you raise  
25 your hand?

1 MS. PUGGET: Yes, I did.  
2 THE COURT: Have you been a juror  
3 before?  
4 MS. PUGGET: Yes, three years ago.  
5 THE COURT: In Clark County?  
6 MS. PUGGET: Yes.  
7 THE COURT: Was it a criminal case?  
8 MS. PUGGET: Yes, sir.  
9 THE COURT: What was the charge in that  
10 case?  
11 MS. PUGGET: Murder.  
12 THE COURT: Did that jury reach a  
13 verdict?  
14 MS. PUGGET: Yes.  
15 THE COURT: Did anything happen during  
16 the trial that would somehow influence your verdict  
17 in this trial?  
18 MS. PUGGET: Uh-uh.  
19 THE COURT: Anyone else in the first  
20 row? Yes. Mr. Kaufman, have you been a juror?  
21 MR. KAUFMAN: Yes.  
22 THE COURT: How many times?  
23 MR. KAUFMAN: One time.  
24 THE COURT: Was it in Clark County?  
25 MR. KAUFMAN: Yes, sir.

1 THE COURT: How long ago was it?  
2 MR. KAUFMAN: About six years ago.  
3 THE COURT: What was the charge in that  
4 case?  
5 MR. KAUFMAN: A rape.  
6 THE COURT: Without telling me what the  
7 verdict was, did that jury reach a verdict?  
8 MR. KAUFMAN: No, sir.  
9 THE COURT: Were they unable to agree  
10 upon a verdict in that case?  
11 MR. KAUFMAN: Not that time, no. Later  
12 they did.  
13 THE COURT: Tell me what happened, why  
14 you couldn't reach a verdict?  
15 MR. KAUFMAN: Well, everybody did not  
16 agree with the verdict.  
17 THE COURT: So it was what we call a hung  
18 jury?  
19 MR. KAUFMAN: Hung jury, yes.  
20 THE COURT: Anything by reason of that  
21 experience that might somehow influence your verdict  
22 in this case?  
23 MR. KAUFMAN: No, sir.  
24 THE COURT: Anyone else in the first row  
25 that has been a juror?

1 In the second row, have any of you been  
2 jurors before? Mr. Ernest, how recently was it?

3 MR. ERNEST: About three years ago, a  
4 child molestation case, but before the jury was  
5 seated, the defendant negotiated a plea bargain.

6 THE COURT: Anything by reason of the  
7 time that you were in court on that occasion that  
8 you would be influenced in this case?

9 MR. ERNEST: No.

10 THE COURT: Mr. Davis, have you been a  
11 juror?

12 MR. DAVIS: Not in the civilian  
13 community. I served on military courts both as  
14 trial counsel, defense counsel, and member of the  
15 court and a summary court officer.

16 THE COURT: Now, I'm sure you understand,  
17 Mr. Davis, that the law as it applied in this case  
18 might be different than the code of military  
19 justice?

20 MR. DAVIS: Yes, sir.

21 THE COURT: You understand that?

22 MR. DAVIS: Yes, sir.

23 THE COURT: Anything by reason of those  
24 various times that you did participate in court  
25 marials that you think you might be influenced in

1 this case?

2 MR. DAVIS: Not at all, sir.

3 THE COURT: Anyone else that has been a  
4 juror before? Yes?

5 Mr. Caudill?

6 MR. CAUDILL: Yes.

7 THE COURT: How many times have you been  
8 a juror?

9 MR. CAUDILL: Once.

10 THE COURT: How long ago was it?

11 MR. CAUDILL: Eight to ten years ago.

12 THE COURT: Was it in Clark County?

13 MR. CAUDILL: Yes.

14 THE COURT: Was it a criminal case?

15 MR. CAUDILL: Yes.

16 THE COURT: What was the charge in that  
17 case?

18 MR. CAUDILL: A man was accused of  
19 flashing some juveniles.

20 THE COURT: Of what?

21 MR. CAUDILL: Of flashing himself nude to  
22 juveniles.

23 THE COURT: Did that jury reach a  
24 verdict?

25 MR. CAUDILL: Yes.



1           THE COURT: Did anything happen during  
2   that trial that might influence you now in this  
3   trial?

4           MR. CAUNITZ: No.

5           THE COURT: Have I overlooked anyone?

6           Have any of you ever been a party to any  
7   civil or criminal litigation, you sued or were sued,  
8   plaintiff or defendant? In the first row?

9           In the second row, Mr. Davis?

10          MR. DAVIS: In Texas, I was a businessman  
11   and case of an individual returned to me some  
12   material which I had sold to him, he had broken part  
13   of it, I failed to check it under the law of caveat  
14   import, he sued me because I canceled the check,  
15   sent it back. We went to the court. I knew I was  
16   going to lose. We did lose and I had to give him  
17   back his money.

18          THE COURT: Would that experience in any  
19   way influence you here?

20          MR. DAVIS: No, sir.

21          THE COURT: Did it leave you with a bad  
22   feeling about the judicial system?

23          MR. DAVIS: No, sir; not at all.

24          THE COURT: Anybody else been a party  
25   plaintiff or defendant in any civil or criminal

1 proceeding?

2 Have any of you ever had a personal  
3 interest in the outcome of a criminal case? Now I  
4 emphasize personal interest to distinguish that from  
5 a case that you are interested in because it was  
6 newsworthy, a case that you might have been just  
7 following in the newspaper, but you didn't know  
8 anyone involved. Have any of you ever had a  
9 personal interest in the outcome of any criminal  
10 case? Maybe you knew the defendant, maybe you knew  
11 the attorneys involved, maybe you knew a witness,  
12 whatever you had a personal interest?

13 It's a principle of law in the United  
14 States, ladies and gentlemen, and it applies in  
15 every criminal case in every jurisdiction, a  
16 defendant in a criminal case is presumed to be  
17 innocent. Do any of you have any problem accepting  
18 the presumption of innocence principle that applies  
19 in criminal cases?

20 It's also a principle of law in every  
21 criminal case in the United States that the burden  
22 is upon the prosecution. In this case that would be  
23 the State of Nevada to prove the defendant guilty  
24 beyond a reasonable doubt. I will later tell you or  
25 instruct you as to what is meant by a reasonable

1     doubt.

2                     My question now is, do any of you have  
3     any problems accepting that principle, that the  
4     burden is upon the State to prove the defendant  
5     guilty beyond a reasonable doubt?

6                     Is there any reason that comes to your  
7     minds, ladies and gentlemen, as you sit here today  
8     and you feel that for some reason you could not be  
9     fair and impartial and do justice to both the  
10    defendant in this case and to the State of Nevada?

11                    Mr. Cooper, let me ask you some  
12    questions.   How long have you lived in Clark  
13    County?

14                    MR. COOPER:   Almost 18 years.

15                    THE COURT:   Are you employed?

16                    MR. COOPER:   Yes.

17                    THE COURT:   Where do you work?

18                    MR. COOPER:   At the Las Vegas Convention  
19    Center on 3150 Paradise Road.

20                    THE COURT:   What are your duties there?

21                    MR. COOPER:   I work in services.

22                    THE COURT:   Are you married?

23                    MR. COOPER:   No.

24                    THE COURT:   I'm sorry?

25                    MR. COOPER:   No.

1 THE COURT: Have you ever been married?  
2 MR. COOPER: No, sir.  
3 THE COURT: Did you serve in the armed  
4 forces?  
5 MR. COOPER: Yes, sir.  
6 THE COURT: What branch?  
7 MR. COOPER: Navy.  
8 THE COURT: How long did you serve?  
9 MR. COOPER: Four years.  
10 THE COURT: What were your duties in the  
11 navy?  
12 MR. COOPER: Aviation electrician.  
13 THE COURT: What is the extent of your  
14 education?  
15 MR. COOPER: Twelve years.  
16 THE COURT: Mr. Hernandez, how long have  
17 you lived in Clark County?  
18 MR. HERNANDEZ: Eighteen years.  
19 THE COURT: Where do you work?  
20 MR. HERNANDEZ: Bally Grand.  
21 THE COURT: Bally?  
22 MR. HERNANDEZ: Bally.  
23 THE COURT: What do you do there?  
24 MR. HERNANDEZ: Furniture upholster.  
25 THE COURT: What is your education?

1 MR. HERNANDEZ: Sixth grade.  
2 THE COURT: Are you married?  
3 MR. HERNANDEZ: Yes.  
4 THE COURT: Is your wife employed?  
5 MR. HERNANDEZ: Yes, she is.  
6 THE COURT: Where does she work?  
7 MR. HERNANDEZ: Las Vegas Club.  
8 THE COURT: Do you have children?  
9 MR. HERNANDEZ: Yes.  
10 THE COURT: How many?  
11 MR. HERNANDEZ: Five.  
12 THE COURT: How many of the five children  
13 live in Clark County?  
14 MR. HERNANDEZ: None.  
15 THE COURT: Where do the children live?  
16 MR. HERNANDEZ: Phoenix, Arizona,  
17 Indianapolis, Indiana.  
18 THE COURT: Did you serve in the armed  
19 forces?  
20 MR. HERNANDEZ: Yes, I did.  
21 THE COURT: What branch?  
22 MR. HERNANDEZ: Army Air Corps.  
23 THE COURT: How long did you serve?  
24 MR. HERNANDEZ: Fifteen months.  
25 THE COURT: Ms. Pucci, how long have you

1 lived in our community?

2 MS. PUGGET: Thirty-four years.

3 THE COURT: Are you employed outside the  
4 home?

5 MS. PUGGET: Well, just part-time.

6 THE COURT: What do you do part-time?

7 MS. PUGGET: I'm an aerobics instructor.

8 THE COURT: Are you married?

9 MS. PUGGET: Yes.

10 THE COURT: Where is your husband  
11 employed?

12 MS. PUGGET: He's a free lance musician.

13 That means when somebody calls him up and needs a  
14 musician for a certain thing, then he goes.

15 THE COURT: Do you have children?

16 MS. PUGGET: Three.

17 THE COURT: Do they live in Clark  
18 County?

19 MS. PUGGET: Yes.

20 THE COURT: Are they adults?

21 MS. PUGGET: Yes.

22 THE COURT: What type of employment do  
23 the children have?

24 MS. PUGGET: The youngest one is employed  
25 for Cosmo World. She's a secretary. The other two

1     are just married.

2                   THE COURT:   What is your education?

3                   MS. PUGET:   I had one year of college.

4                   THE COURT:   Did you serve in the armed

5     forces?

6                   MS. PUGET:   No, sir, I didn't.

7                   THE COURT:   Mr. Kaufman, how long have

8     you lived in Clark County?

9                   MR. KAUFMAN:   About 19 years.

10                  THE COURT:   Are you employed?

11                  MR. KAUFMAN:   Yes, sir.

12                  THE COURT:   Where do you work?

13                  MR. KAUFMAN:   Reynolds Electrical

14     Engineering Company.

15                  THE COURT:   What do you do there?

16                  MR. KAUFMAN:   I'm a senior benefit

17     specialist.

18                  THE COURT:   What is your education?

19                  MR. KAUFMAN:   Four years college.

20                  THE COURT:   Do you have a degree?

21                  MR. KAUFMAN:   Yes.

22                  THE COURT:   In what field?

23                  MR. KAUFMAN:   Business.

24                  THE COURT:   Are you married?

25                  MR. KAUFMAN:   Yes, sir.

1 THE COURT: Is your wife employed?  
2 MR. KAUFMAN: Yes.  
3 THE COURT: Where does she work?  
4 MR. KAUFMAN: She works at the welfare  
5 department.  
6 THE COURT: Do you have children?  
7 MR. KAUFMAN: Yes.  
8 THE COURT: Do they live in Clark  
9 County?  
10 MR. KAUFMAN: Yes.  
11 THE COURT: What type of employment do  
12 the children have?  
13 MR. KAUFMAN: She's not. She's only 13  
14 years old.  
15 THE COURT: I see. I don't know if I  
16 asked you this or not, did you serve in the armed  
17 forces?  
18 MR. KAUFMAN: Yes, sir.  
19 THE COURT: What branch?  
20 MR. KAUFMAN: Army.  
21 THE COURT: How long did you serve?  
22 MR. KAUFMAN: About three years.  
23 THE COURT: What were your duties in the  
24 service?  
25 MR. KAUFMAN: Personnel clerk.



1 THE COURT: Ms. Roeller, how long have  
2 you lived in Clark County?  
3 MS. ROELLER: Two years.  
4 THE COURT: Where did you live before  
5 that?  
6 MS. ROELLER: Casper, Wyoming.  
7 THE COURT: How long did you live there?  
8 MS. ROELLER: Thirty-one years.  
9 THE COURT: Were you employed in Casper?  
10 MS. ROELLER: Yes.  
11 THE COURT: What type of employment?  
12 MS. ROELLER: With banks.  
13 THE COURT: Where are you presently  
14 employed?  
15 MS. ROELLER: I'm just going to start a  
16 new job tomorrow at Weyerhaeuser Mortgage.  
17 THE COURT: Are you married?  
18 MS. ROELLER: Yes.  
19 THE COURT: Where is your husband  
20 employed?  
21 MS. ROELLER: Yes.  
22 THE COURT: Where is he employed?  
23 MS. ROELLER: Works for surveyors Inc.  
24 THE COURT: Do you have children?  
25 MS. ROELLER: Two.

1 THE COURT: How old are they?  
2 MS. ROELLER: Sixteen and twenty-one.  
3 THE COURT: Is the 21 year old living  
4 here in Clark County?  
5 MS. ROELLER: No.  
6 THE COURT: Where is that child?  
7 MS. ROELLER: Salt Lake.  
8 THE COURT: Is the child employed?  
9 MS. ROELLER: No, she is going to  
10 school.  
11 THE COURT: Does the 16 year old live  
12 with you and your husband?  
13 MS. ROELLER: Uh-huh.  
14 THE COURT: Is that yes?  
15 MS. ROELLER: Yes.  
16 THE COURT: I need an audible answer.  
17 MS. ROELLER: Okay..  
18 THE COURT: And I say it because it looks  
19 in the record, if it were transcribed, that I have  
20 asked the question, but it hasn't been answered even  
21 though I know by a nod of a head or shake of the  
22 head what the answer is, but, for the record, it  
23 looks like it's unanswered.  
24 Did you serve in the armed forces?  
25 MS. ROELLER: No, I did not.

1 THE COURT: Mr. Tirey, how long have you  
2 lived in Clark County?  
3 MR. TIREY: Twenty years.  
4 THE COURT: Are you employed?  
5 MR. TIREY: Yes.  
6 THE COURT: Where do you work?  
7 MR. TIREY: Las Vegas Transit System.  
8 THE COURT: What do you do there?  
9 MR. TIREY: Mechanic.  
10 THE COURT: What is your education?  
11 MR. TIREY: Twelfth grade.  
12 THE COURT: Did you serve in the armed  
13 forces?  
14 MR. TIREY: No.  
15 THE COURT: Are you married?  
16 MR. TIREY: No.  
17 THE COURT: Have you ever been married?  
18 MR. TIREY: No.  
19 THE COURT: Mr. Ernest, how long have you  
20 lived in Clark County?  
21 MR. ERNEST: Thirty-six years.  
22 THE COURT: Are you employed?  
23 MR. ERNEST: Yes, sir.  
24 THE COURT: Where do you work?  
25 MR. ERNEST: Costello Beverage.

1 THE COURT: What do you do there?  
2 MR. ERNEST: Driver.  
3 THE COURT: What is your education?  
4 MR. ERNEST: Twelve years.  
5 THE COURT: Are you married?  
6 MR. ERNEST: Yes.  
7 THE COURT: Is your wife employed?  
8 MR. ERNEST: No, sir.  
9 THE COURT: Do you have children?  
10 MR. ERNEST: Three.  
11 THE COURT: Do they live in Clark  
12 County?  
13 MR. ERNEST: Yes, sir.  
14 THE COURT: What type of employment do  
15 they have?  
16 MR. ERNEST: One is a craps dealer, one  
17 is an escrow officer, and one is housewife.  
18 THE COURT: Did you serve in the armed  
19 forces?  
20 MR. ERNEST: Yes, sir.  
21 THE COURT: What branch?  
22 MR. ERNEST: Air force.  
23 THE COURT: How long did you serve?  
24 MR. ERNEST: Six years.  
25 THE COURT: What were your duties in

1     general?

2                     MR. ERNEST: Intelligence technician.

3                     THE COURT: And, Mr. Davis, how long have  
4     you lived in Clark County?

5                     MR. DAVIS: It will be four years the  
6     27th this month, sir.

7                     THE COURT: Where did you live prior to  
8     that?

9                     MR. DAVIS: In New Jersey, sir.

10                    THE COURT: Were you employed in New  
11     Jersey?

12                    MR. DAVIS: Yes, sir, I was.

13                    THE COURT: What type of employment?

14                    MR. DAVIS: My last employment, I was an  
15     associate professor at the University for medical  
16     dentistry in New Jersey.

17                    THE COURT: Where are you presently  
18     employed?

19                    MR. DAVIS: I'm not employed. I gamble  
20     professionally. That's where I spend my time.

21                    THE COURT: What is your education?

22                    MR. DAVIS: Twenty years, sir.

23                    THE COURT: Do you hold degrees?

24                    MR. DAVIS: I hold a doctorate degree in  
25     dentistry D.M.D.

1 THE COURT: And you practiced in New  
2 Jersey?

3 MR. DAVIS: I practiced in New Jersey,  
4 yes, sir, and the military.

5 THE COURT: How long did you serve in the  
6 military?

7 MR. DAVIS: Thirty-three years for  
8 retirement; nearly forty-two years.

9 THE COURT: What is the highest rank or  
10 rating you achieved?

11 MR. DAVIS: Colonel, sir.

12 THE COURT: Are you married?

13 MR. DAVIS: I am, sir.

14 THE COURT: Is your wife employed?

15 MR. DAVIS: She does the same thing I  
16 do. She gambles.

17 THE COURT: Do you have children living  
18 in this community?

19 MR. DAVIS: No, sir.

20 THE COURT: Mr. Reago, how long have you  
21 lived in Clark County?

22 MR. REAGO: Twenty-four years.

23 THE COURT: Where are you employed?

24 MR. REAGO: With Las Vegas Valley Water  
25 District.

1 THE COURT: What do you do there?  
2 MR. REAGO: I'm a civil engineer.  
3 THE COURT: What is your education?  
4 MR. REAGO: I have a bachelor's degree in  
5 civil engineering.  
6 THE COURT: Where did you receive your  
7 degree?  
8 MR. REAGO: Penn State.  
9 THE COURT: Are you married?  
10 MR. REAGO: No.  
11 THE COURT: Have you ever been married?  
12 MR. REAGO: No.  
13 THE COURT: Did you serve in the armed  
14 forces?  
15 MR. REAGO: Yes.  
16 THE COURT: What branch?  
17 MR. REAGO: The air force.  
18 THE COURT: How long did you serve?  
19 MR. REAGO: About five years.  
20 THE COURT: And what were your duties?  
21 MR. REAGO: I was a civil engineer.  
22 THE COURT: Ms. Pike, how long have you  
23 lived in Clark County?  
24 MS. PIKE: Six and a half years.  
25 THE COURT: Where did you live prior to

1     that?

2                   MS. PIKE: Long Island, New York.

3                   THE COURT: Where?

4                   MS. PIKE: Long Island.

5                   THE COURT: Were you employed there?

6                   MS. PIKE: No.

7                   THE COURT: Are you presently employed?

8                   MS. PIKE: Yes, I am.

9                   THE COURT: Where do you work?

10                  MS. PIKE: Caesars Palace.

11                  THE COURT: What do you do there?

12                  MS. PIKE: I'm a payroll clerk.

13                  THE COURT: What is your formal

14     education?

15                  MS. PIKE: I have been to college for

16     five years but it's equivalent to two full years.

17                  THE COURT: What were you studying?

18                  MS. PIKE: Marketing.

19                  THE COURT: Are you married?

20                  MS. PIKE: No.

21                  THE COURT: Have you ever been married?

22                  MS. PIKE: No.

23                  THE COURT: Mr. Caudill, how long have

24     you lived in Clark County?

25                  MR. CAUDILL: Twenty-two years.



1 THE COURT: Where are you employed?  
2 MR. CAUDILL: Caesars Palace.  
3 THE COURT: What do you do?  
4 MR. CAUDILL: I work in the engineering  
5 department.  
6 THE COURT: What is your education?  
7 MR. CAUDILL: Twelve years.  
8 THE COURT: Did you serve in the armed  
9 forces?  
10 MR. CAUDILL: No.  
11 THE COURT: Are you married?  
12 MR. CAUDILL: Yes.  
13 THE COURT: Is your wife employed outside  
14 the home?  
15 MR. CAUDILL: No.  
16 THE COURT: Do you have children?  
17 MR. CAUDILL: Three boys.  
18 THE COURT: How old are they?  
19 MR. CAUDILL: Eight, five, and five  
20 months.  
21 THE COURT: Do they all live with you and  
22 your wife?  
23 MR. CAUDILL: Yes, sir.  
24 THE COURT: Mr. Layva, how long have you  
25 lived in Clark County?

PATSY K. SMITH, OFFICIAL COURT REPORTER

53

1 MR. LEVVA: Sixteen years.

2 THE COURT: Are you employed?

3 MR. LEVVA: Yes.

4 THE COURT: Where do you work?

5 MR. LEVVA: At the Dunes.

6 THE COURT: What do you do there?

7 MR. LEVVA: Snack bar attendant.

8 THE COURT: Are you married?

9 MR. LEVVA: Yes.

10 THE COURT: Is your wife employed?

11 MR. LEVVA: Yes.

12 THE COURT: Where does she work?

13 MR. LEVVA: At the Dunes.

14 THE COURT: What is your education?

15 MR. LEVVA: Five years.

16 THE COURT: Did you serve in the armed

17 forces?

18 MR. LEVVA: No.

19 THE COURT: Counsel, would you come up to

20 the bench, please?

21 (Off the record discussion not reported.)

22 THE COURT: Do either of you have any

23 questions?

24 Mr. Hillman, do you have any questions

25 you would like to ask of the prospective jurors?

1 MR. HILLMAN: I have one that I would  
2 like to ask.

3 THE COURT: Yes.

4 MR. HILLMAN: Of the entire panel, if I  
5 may, and that question is would the fact that Mr.  
6 Moraga is of a different nationality than any of you  
7 have any bearing upon any decision you might make in  
8 this case?

9 THE COURT: If it would, would you raise  
10 your hands.

11 MR. HILLMAN: Thank you. That's the only  
12 question I have.

13 THE COURT: Mr. Lippis, did you have any  
14 questions you wish to ask?

15 MS. LIPPIS: No, your Honor.

16 THE COURT: The State may exercise the  
17 first peremptory challenge.

18 MS. LIPPIS: Thank you.

19 Your Honor, the State would request the  
20 Court to thank and please excuse Mr. Kaufman.

21 THE COURT: Mr. Kaufman, we would thank  
22 you for your attendance.

23 MR. KAUFMAN: Thank you.

24 THE COURT: You are free to go home, Mr.  
25 Kaufman.

1 THE CLERK: Thank you.

2 THE COURT: Will you call another name,  
3 please?

4 THE CLERK: David Garland Barneby.

5 DAVID GARLAND BARNEBY,  
6 having been first duly sworn to tell the truth, the  
7 whole truth and nothing but the truth, testified and  
8 said as follows:

9 THE COURT: Mr. Barneby, do you know of  
10 any reason why you could not be a fair juror?

11 MR. BARNEBY: No.

12 THE COURT: Are you acquainted with  
13 anyone seated in the jury box?

14 MR. BARNEBY: No, I'm not.

15 THE COURT: Are you acquainted with Mr.  
16 Moraga, the defendant?

17 MR. BARNEBY: No, I'm not.

18 THE COURT: Are you acquainted with  
19 either of the attorneys involved in the trial?

20 MR. BARNEBY: No, I'm not.

21 THE COURT: Did you hear what I said  
22 about the function of the Court and the function of  
23 the jury and that the Court will be instructing the  
24 jury on the law?

25 MR. BARNEBY: Yes.

1 THE COURT: Will you follow the Court's  
2 Instructions on the law?  
3 MR. BARNEY: Yes, sir, I will.  
4 THE COURT: Even though it might be  
5 different than what you think the law is?  
6 MR. BARNEY: Yes.  
7 THE COURT: Have you ever been the victim  
8 of a crime?  
9 MR. BARNEY: Yes, I have.  
10 THE COURT: What was the crime?  
11 MR. BARNEY: It was a house prowling  
12 burglary in 1985.  
13 THE COURT: In Clark County?  
14 MR. BARNEY: Yes.  
15 THE COURT: Was anyone arrested?  
16 MR. BARNEY: No.  
17 THE COURT: Did you report it to the  
18 authorities?  
19 MR. BARNEY: Yes, I did.  
20 THE COURT: Were you satisfied with the  
21 way they investigated your case?  
22 MR. BARNEY: Yes.  
23 THE COURT: Would that experience  
24 influence your verdict in this case for or against  
25 either side?

1 MR. BARNERY: I don't think so.

2 THE COURT: Is there anything by reason  
3 of the nature of the charges in this case that would  
4 make it difficult for you to be fair and impartial?

5 MR. BARNERY: No.

6 THE COURT: Have you ever been engaged in  
7 law enforcement work?

8 MR. BARNERY: No, I haven't.

9 THE COURT: Do you have friends or  
10 relatives that are police officers?

11 MR. BARNERY: I have had neighbors who  
12 are court bailiffs and secret service agents.

13 THE COURT: Anything by reason of those  
14 acquaintanceships that might influence your verdict  
15 in this case?

16 MR. BARNERY: No.

17 THE COURT: Do you know any of the  
18 witnesses whose names were read by Mr. Lippis?

19 MR. BARNERY: No, I don't.

20 THE COURT: How long have you lived in  
21 Clark County?

22 MR. BARNERY: Forty-one years.

23 THE COURT: Where are you employed?

24 MR. BARNERY: Nevada Power.

25 THE COURT: What do you do there?

1 MR. BARNERY: I'm vice president of power  
2 supply for Nevada Power.

3 THE COURT: What is the extent of your  
4 formal education?

5 MR. BARNERY: I have a B.S. in mechanical  
6 engineering.

7 THE COURT: Are you married?

8 MR. BARNERY: Yes.

9 THE COURT: Is your wife employed outside  
10 the home?

11 MR. BARNERY: No.

12 THE COURT: Do you have children?

13 MR. BARNERY: Yes.

14 THE COURT: How many?

15 MR. BARNERY: I have two.

16 THE COURT: How old are they?

17 MR. BARNERY: Eleven and fourteen.

18 THE COURT: Do they live with you and  
19 your wife?

20 MR. BARNERY: Yes, they do.

21 THE COURT: Did you serve in the armed  
22 forces?

23 MR. BARNERY: Yes, I did.

24 THE COURT: What branch?

25 MR. BARNERY: Army.

1 THE COURT: How long did you serve?  
2 MR. BARNERY: Three years.  
3 THE COURT: What were your duties there?  
4 MR. BARNERY: I was an officer in the  
5 Corps of Engineers.  
6 THE COURT: Have you ever been a juror  
7 before?  
8 MR. BARNERY: No.  
9 THE COURT: Have you ever sued or been  
10 sued in any type of proceeding?  
11 MR. BARNERY: I have been involved in a  
12 number of civil cases with the power company, either  
13 as a witness or involved in starting suits.  
14 THE COURT: Anything by reason of that  
15 litigation that would in any way influence you in  
16 this case?  
17 MR. BARNERY: No.  
18 THE COURT: Have you ever had a personal  
19 interest in the outcome of any criminal case?  
20 MR. BARNERY: No.  
21 THE COURT: Did you hear what I said  
22 about the burden of proof and the presumption of  
23 innocence in a criminal case?  
24 MR. BARNERY: Yes.  
25 THE COURT: Do you accept those



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60

JAYNE MARLENE HUGHES,

THE CLERK: Jayne Marlene Hughes.

you will have more room to walk I think.

your attendance today. If you come down this way,

and you are free to go home. We do thank you for

THE COURT: Mr. Ernest, you are excused

would thank and excuse Juror Number 33, Mr. Ernest.

MR. HILLMAN: Your Honor, the defense

(off the record discussion not reported.)

first peremptory challenge.

THE COURT: The defense may exercise the

MS. LIPPIS: I have no questions.

THE COURT: Ms. Lippis.

MR. HILLMAN: Thank you, sir.

A. It makes no difference to me.

Q. Well, what would your answer be?

A. Yes, I did.

hear the question I asked?

Q. Just the question I asked before, did you

BY MR. HILLMAN:

YOUR DIRECT EXAMINATION

MR. HILLMAN:

THE COURT: Do you have any questions?

MR. BARNERY: Yes, I do.

proceed?

1 having been first duly sworn to tell the truth, the  
2 whole truth and nothing but the truth, testified and  
3 said as follows:

4 THE COURT: Ms. Hughes, do you know of  
5 any reason why you could not serve fairly and  
6 impartially?

7 MS. HUGHES: Yes.

8 THE COURT: You do?

9 MS. HUGHES: I'm six months pregnant. I  
10 would definitely. I have also been a victim of a  
11 sexual crime.

12 THE COURT: I'm going to excuse you.  
13 Thank you and you are free to go home.

14 MS. HUGHES: Thank you.

15 THE COURT: Will you call another name  
16 please.

17 THE CLERK: Clarence Don Morgan, Jr.

18 CLARENCE DON MORGAN, JR.,  
19 having been first duly sworn to tell the truth, the  
20 whole truth and nothing but the truth, testified and  
21 said as follows:

22 THE COURT: Mr. Morgan, do you know of  
23 any reason why you could not serve fairly and  
24 impartially?

25 MR. MORGAN: No, sir.

1 THE COURT: Do you know anyone seated in  
2 the jury box?

3 MR. MORGAN: No, I do not.

4 THE COURT: Do you know either of the  
5 attorneys involved?

6 MR. MORGAN: No.

7 THE COURT: Do you know Mr. Maraga, the  
8 defendant?

9 MR. MORGAN: No.

10 THE COURT: Other than what you heard in  
11 court, do you know anything about this case?

12 MR. MORGAN: No, sir.

13 THE COURT: Will you follow the Court's  
14 instructions on the law?

15 MR. MORGAN: Yes, sir.

16 THE COURT: Have you or anyone close to  
17 you ever been the victim of a crime?

18 MR. MORGAN: No, sir.

19 THE COURT: Have you ever engaged in law  
20 enforcement related work?

21 MR. MORGAN: No.

22 THE COURT: Do you have friends or  
23 relatives that are police officers?

24 MR. MORGAN: No.

25 THE COURT: Do you know any of the

1 witnesses whose names were read?  
2 MR. MORGAN: No, sir.  
3 THE COURT: How long have you lived in  
4 Clark County?  
5 MR. MORGAN: Three years.  
6 THE COURT: Prior to that where did you  
7 reside?  
8 MR. MORGAN: Colorado.  
9 THE COURT: Were you employed in  
10 Colorado?  
11 MR. MORGAN: Yes, sir.  
12 THE COURT: What type of employment?  
13 MR. MORGAN: I was installer for AT&T.  
14 THE COURT: Where?  
15 MR. MORGAN: Installer for AT&T.  
16 THE COURT: Where are you presently  
17 employed?  
18 MR. MORGAN: Target.  
19 THE COURT: What do you do there?  
20 MR. MORGAN: I'm receiving supervisor.  
21 THE COURT: Are you married?  
22 MR. MORGAN: Yes.  
23 THE COURT: Is your wife employed?  
24 MR. MORGAN: Yes, sir.  
25 THE COURT: Where does she work?

1 MR. MORGAN: Dillard's.  
2 THE COURT: Do you have children?  
3 MR. MORGAN: Yes, sir.  
4 THE COURT: Do any of them live in Clark  
5 County?  
6 MR. MORGAN: Yes, sir.  
7 THE COURT: What type of employment do  
8 the children have?  
9 MR. MORGAN: Daughter is a housewife and  
10 son is working for Desert Produce.  
11 THE COURT: What is your formal  
12 education?  
13 MR. MORGAN: Twelve years.  
14 THE COURT: Did you serve in the armed  
15 forces?  
16 MR. MORGAN: Yes, sir.  
17 THE COURT: What branch?  
18 MR. MORGAN: Coast guard.  
19 THE COURT: How long did you serve?  
20 MR. MORGAN: Three years.  
21 THE COURT: Have you ever served as a  
22 juror before?  
23 MR. MORGAN: No, sir.  
24 THE COURT: Have you ever sued or been  
25 sued?

1 MR. MORGAN: No, sir.

2 THE COURT: Have you ever had a personal  
3 interest in the outcome of any criminal case?

4 MR. MORGAN: No, sir.

5 THE COURT: Mr. Hillman, any questions?

6 VOIR DIRE EXAMINATION

7 BY MR. HILLMAN:

8 Q. Mr. Morgan, did you hear the question I  
9 asked previously?

10 A. Yes, sir.

11 Q. And what would your answer be to that?

12 A. No, sir.

13 MR. HILLMAN: Thank you.

14 THE COURT: Ms. Lippis.

15 MS. LIPPTIS: I have no questions, your  
16 Honor.

17 THE COURT: State may exercise the second  
18 peremptory challenge.

19 MS. LIPPTIS: Thank you, your Honor. The  
20 State would thank and ask to excuse Mr. Tirey.

21 THE COURT: Mr. Tirey, we do thank you  
22 for your attendance and you are free to go home, Mr.  
23 Tirey.

24 MR. TIREY: Thank you.

25 THE COURT: Will you call another name.

1 THE CLERK: Kenneth A. Novak.

2 KENNETH A. NOVAK,

3 having been first duly sworn to tell the truth, the  
4 whole truth and nothing but the truth, testified and  
5 said as follows:

6 THE COURT: Mr. Novak, do you know of any  
7 reason why you could not be a fair juror?

8 MR. NOVAK: No.

9 THE COURT: Are you acquainted with  
10 anyone seated with you in the jury box?

11 MR. NOVAK: No.

12 THE COURT: Do you know either of the  
13 attorneys involved?

14 MR. NOVAK: No.

15 THE COURT: Do you know the defendant,  
16 Mr. Moraga?

17 MR. NOVAK: No.

18 THE COURT: Will you follow the Court's  
19 instructions on the law?

20 MR. NOVAK: Yes, sir.

21 THE COURT: Even though it might be  
22 different than what you think the law is?

23 MR. NOVAK: Yes.

24 THE COURT: Have you ever been the victim  
25 of a crime?

1 MR. NOVAK: No.

2 THE COURT: Do you have any friends or  
3 relatives that are police officers?

4 MR. NOVAK: No.

5 THE COURT: Do you know any of the  
6 witnesses that may be called to testify by the  
7 State?

8 MR. NOVAK: No.

9 THE COURT: How long have you lived in  
10 our community?

11 MR. NOVAK: Approximately five years.

12 THE COURT: Prior to that where did you  
13 reside?

14 MR. NOVAK: Chicago, Illinois.

15 THE COURT: Were you employed back  
16 there?

17 MR. NOVAK: Yes.

18 THE COURT: What type of employment?

19 MR. NOVAK: I worked for United Parcel  
20 Service, UPS, as an unloader.

21 THE COURT: For UPS?

22 MR. NOVAK: Yes.

23 THE COURT: Where are you presently  
24 employed?

25 MR. NOVAK: J. C. Penneys.



1 THE COURT: What do you do there?  
2 MR. NOVAK: I'm a loss prevention  
3 manager.  
4 THE COURT: Are you married?  
5 MR. NOVAK: Yes.  
6 THE COURT: Is your wife employed?  
7 MR. NOVAK: Yes.  
8 THE COURT: Where does she work?  
9 MR. NOVAK: Barbary Coast Hotel.  
10 THE COURT: Do you have children?  
11 MR. NOVAK: Yes.  
12 THE COURT: How many?  
13 MR. NOVAK: One.  
14 THE COURT: How old is the child?  
15 MR. NOVAK: Two years old.  
16 THE COURT: Does the child live with you  
17 and your wife?  
18 MR. NOVAK: Yes, sir.  
19 THE COURT: What is your formal  
20 education?  
21 MR. NOVAK: Twelve years and about two  
22 years of college.  
23 THE COURT: Did you serve in the armed  
24 forces?  
25 MR. NOVAK: No.

1 THE COURT: Have you ever served as a  
2 juror before?

3 MR. NOVAK: No.

4 THE COURT: Have you ever sued or been  
5 sued?

6 MR. NOVAK: No.

7 THE COURT: Have you ever had a personal  
8 interest in any criminal case?

9 MR. NOVAK: A few; the ones that I dealt  
10 with with my company.

11 THE COURT: These were related to your  
12 employer?

13 MR. NOVAK: Yes.

14 THE COURT: Were you a witness in any of  
15 those cases?

16 MR. NOVAK: Yes.

17 THE COURT: Did they take place in this  
18 state or in Illinois?

19 MR. NOVAK: In this state, yes.

20 THE COURT: Anything by reason of those  
21 trials that might in any way influence you in this  
22 trial?

23 MR. NOVAK: No.

24 THE COURT: Were those criminal cases or  
25 civil cases?

1 MR. NOVAK: Criminal.

2 THE COURT: What were the charges in  
3 those cases?

4 MR. NOVAK: Grand larceny, petty larceny  
5 that's basically all.

6 THE COURT: You do not feel that those  
7 cases would in any way influence your verdict in  
8 this case?

9 MR. NOVAK: No.

10 THE COURT: Anything by reason of those  
11 cases that left you with a bad feeling in general  
12 about the criminal justice system?

13 MR. NOVAK: No.

14 THE COURT: Or about attorneys in  
15 general?

16 MR. NOVAK: No.

17 THE COURT: Mr. Hillman?

18 VOIR DIRE EXAMINATION

19 BY MR. HILLMAN:

20 Q. Mr. Novak, you heard the question I asked  
21 before; is that correct?

22 A. Yes.

23 Q. What would your answer be to that?

24 A. No.

25 MR. HILLMAN: Thank you. Nothing else.

1 THE COURT: Miss Lippis?

2 MS. LIPPTIS: I have no questions.

3 THE COURT: The defense may exercise the  
4 second peremptory challenge.

5 (Off the record discussion not reported.)

6 MR. HILLMAN: Now, your Honor, the  
7 defense would thank and excuse juror number 34, Mr.  
8 Davis.

9 THE COURT: Mr. Davis, we do thank you  
10 for your attendance today. You are free to go  
11 home.

12 MR. DAVIS: Thank you.

13 THE CLERK: Clare Arland Knapp.

14 CLARE ARLAND KNAPP,  
15 having been first duly sworn to tell the truth, the  
16 whole truth and nothing but the truth, testified and  
17 said as follows:

18 THE COURT: You have heard the questions,  
19 Mr. Knapp. Do you know any reason why you could not  
20 be a fair juror?

21 MR. KNAPP: Well, when my next to  
22 youngest daughter was living at home she was  
23 sexually assaulted.

24 THE COURT: Do you think that might  
25 influence your verdict in this case?

1 MR. KNAPP: I do, sir.

2 THE COURT: Then I'm going to excuse  
3 you. Thank you for your attendance today, Mr.  
4 Knapp. You are free to go home, Mr. Knapp.

5 MR. KNAPP: Thank you.

6 THE CLERK: James Reimers Marsh.

7 JAMES REIMERS MARSH,

8 having been first duly sworn to tell the truth, the  
9 whole truth and nothing but the truth, testified and  
10 said as follows:

11 THE COURT: Mr. Marsh, do you know anyone  
12 seated in the jury box with you?

13 MR. MARSH: No, sir.

14 THE COURT: Other than what you heard in  
15 court, do you know anything about the case?

16 MR. MARSH: No, sir.

17 THE COURT: Do you know either of the  
18 attorneys involved?

19 MR. MARSH: No, sir.

20 THE COURT: Do you know Mr. Moraga, the  
21 defendant?

22 MR. MARSH: No, sir.

23 THE COURT: Will you follow the Court's  
24 instructions on the law?

25 MR. MARSH: Yes, sir.

1 THE COURT: And if those instructions are  
2 different than what you think the law is, will you  
3 set aside your own personal beliefs and follow the  
4 Court's instructions?

5 MR. MARSH: Yes, sir.

6 THE COURT: Have you ever engaged in law  
7 enforcement related work?

8 MR. MARSH: No, sir.

9 THE COURT: Now, have you or any business  
10 that you might have been interested in ever involved  
11 as a victim in a crime?

12 MR. MARSH: Yes, sir.

13 THE COURT: Has it happened a number of  
14 times?

15 MR. MARSH: Yes, sir.

16 THE COURT: You have a car dealership,  
17 Mr. Marsh?

18 MR. MARSH: Yes, sir.

19 THE COURT: And have these crimes related  
20 to your business for the most part?

21 MR. MARSH: Minor vandalism primarily.

22 THE COURT: Have you reported these  
23 incidents to the police authorities?

24 MR. MARSH: Yes, sir.

25 THE COURT: Have you been satisfied in

1 general with the way the police have handled your  
2 complaints?

3 MR. MARSH: Yes, sir.

4 THE COURT: Has anyone ever been arrested  
5 on any of these occasions?

6 MR. MARSH: Yes, sir.

7 THE COURT: Did those matters go to trial  
8 if you know?

9 MR. MARSH: I don't believe so. I  
10 believe they were plea bargained.

11 THE COURT: Do you think those  
12 experiences might in any way influence your verdict  
13 in this case?

14 MR. MARSH: I wouldn't think so.

15 THE COURT: Are you acquainted with any  
16 law enforcement officers?

17 MR. MARSH: No, sir.

18 THE COURT: Do you know any of the  
19 witnesses whose names were read?

20 MR. MARSH: No, sir.

21 THE COURT: How long have you resided in  
22 Clark County?

23 MR. MARSH: Nineteen years.

24 THE COURT: And would you tell us the  
25 nature of your employment or business?

1           A.       I'm self-employed automotive.  
2           THE COURT:   How long have you engaged in  
3   that business?  
4           MR. MARSH:   Since I arrived here in '71.  
5           THE COURT:   Are you married?  
6           MR. MARSH:   No, sir.  
7           THE COURT:   Have you ever been married?  
8           MR. MARSH:   No, sir.  
9           THE COURT:   Did you serve in the armed  
10   forces?  
11          MR. MARSH:   Yes, sir.  
12          THE COURT:   What branch?  
13          MR. MARSH:   Army two years.  
14          THE COURT:   What is your formal  
15   education?  
16          MR. MARSH:   Well, I got thrown out of  
17   college my third year. So I guess that sums it up.  
18          THE COURT:   Have you ever been a juror  
19   before?  
20          MR. MARSH:   Yes, sir.  
21          THE COURT:   How many times?  
22          MR. MARSH:   Twice.  
23          THE COURT:   Were those criminal or civil  
24   cases?  
25          MR. MARSH:   One of each.



1 THE COURT: Did each of those juries  
2 reach a verdict?

3 MR. MARSH: Yes, sir, they did.

4 THE COURT: What was the charge in the  
5 criminal case?

6 MR. MARSH: Murder.

7 THE COURT: Did anything happen during  
8 either one of those trials that might in any way  
9 influence your thinking in this trial for or against  
10 either side?

11 MR. MARSH: No, sir.

12 THE COURT: Have you been a party to any  
13 litigation?

14 MR. MARSH: Yes, sir.

15 THE COURT: Anything by reason of those  
16 litigations that might in any way influence your  
17 verdict in this case?

18 MR. MARSH: No, sir.

19 THE COURT: Were those generally  
20 litigations based upon business dealings, things of  
21 that nature?

22 MR. MARSH: That's correct.

23 THE COURT: Do any of those or did any of  
24 those cases leave you with a bad feeling about the  
25 judicial system?

1 MR. MARSH: No, sir.

2 THE COURT: Have you ever had a personal  
3 interest in the outcome of any criminal case other  
4 than those vandalism cases you spoke of?

5 MR. MARSH: No, sir.

6 THE COURT: Do you accept those  
7 principles that I have mentioned regarding the  
8 burden of proof and the presumption of innocence?

9 MR. MARSH: Absolutely.

10 THE COURT: Mr. Hillman.

11 MR. HILLMAN: Thank you, Judge.

12 VOIR DIRE EXAMINATION

13 BY MR. HILLMAN:

14 Q. Mr. Marsh, would the fact that Mr. Moraga  
15 is of a different ethnic background when you effect  
16 your deliberations in any way?

17 A. No, sir.

18 MR. HILLMAN: Thank you. Nothing else.

19 THE COURT: Ms. Lippis?

20 MS. LIPPTS: Thank you, Judge.

21 VOIR DIRE EXAMINATION

22 BY MS. LIPPTS:

23 Q. Mr. Marsh, the two juries that you served  
24 on, without stating your verdicts, were the jurors  
25 able to agree on an opinion?

1           A.       Yes, they were.

2           MS. LIPPIS: Thank you, sir. Nothing  
3 further.

4           THE COURT: State may exercise the third  
5 peremptory challenge.

6           MS. LIPPIS: Your Honor, the State would  
7 thank and ask the Court to excuse Mrs. Pucci.

8           THE COURT: Mrs. Pucci, we would thank  
9 you for your attendance. You are free to go home.

10          THE CLERK: Gerry Lee Pittenger.

11                 GERRY LEE PITTENGER,  
12 having been first duly sworn to tell the truth, the  
13 whole truth and nothing but the truth, testified and  
14 said as follows:

15          THE COURT: Mr. Pittenger, having heard  
16 the questions we have been asking, do you know of  
17 any reason why you could not be a fair and impartial  
18 juror?

19          MR. PITTENGER: No.

20          THE COURT: Do you know anyone seated in  
21 the jury box?

22          MR. PITTENGER: No.

23          THE COURT: Other than what you heard in  
24 court this morning, do you know anything about this  
25 case?

1 MR. PITTENGER: No.

2 THE COURT: Are you acquainted with Mr.  
3 Lippin, who is the deputy district attorney?

4 MR. PITTENGER: No, sir.

5 THE COURT: Are you acquainted with Mr.  
6 Hillman, who is the defendant's attorney?

7 MR. PITTENGER: No, sir.

8 THE COURT: Do you know Mr. Moraga, the  
9 defendant?

10 MR. PITTENGER: No, sir.

11 THE COURT: Will you follow the Court's  
12 Instructions on the law?

13 MR. PITTENGER: I beg your pardon?

14 THE COURT: Will you follow the Court's  
15 Instructions on the law?

16 MR. PITTENGER: Yes.

17 THE COURT: If the Court's Instructions  
18 on the law are different than what you think the law  
19 is, will you have any problem setting aside your  
20 personal beliefs in following the Court's  
21 Instructions?

22 MR. PITTENGER: No, sir.

23 THE COURT: Do you have any hearing  
24 impairment? Do you have a problem hearing?

25 MR. PITTENGER: Yes, sir.

1 THE COURT: Do you wear a hearing aid?

2 MR. PITTENGER: Yes, sir.

3 THE COURT: Are you wearing it today?

4 MR. PITTENGER: No, I forgot them.

5 Sorry.

6 THE COURT: If you are selected, will you  
7 bring your hearing aid with you?

8 MR. PITTENGER: Yes, sir.

9 THE COURT: Are you having any problems  
10 understanding me now?

11 MR. PITTENGER: No.

12 THE COURT: We are in a room that is --  
13 it's -- the acoustics are just dreadful and we all  
14 recognize that and if any of you have any problem  
15 hearing me or the attorneys or witnesses, just raise  
16 your hand, if you would, as an indication so we can  
17 be assured that everyone hears what's going on.

18 Have you ever been the victim of a  
19 crime?

20 MR. PITTENGER: Our home was burglarized  
21 about four years ago.

22 THE COURT: Was that in Clark County?

23 MR. PITTENGER: Yes, sir.

24 THE COURT: Did you report it to the  
25 authorities?

80

PATSY K. SMITH, OFFICIAL COURT REPORTER

1 MR. PITTENGER: Yes, sir.  
2 THE COURT: Was anyone arrested?  
3 MR. PITTENGER: No.  
4 THE COURT: Were you satisfied with the  
5 way they handled your case?  
6 MR. PITTENGER: Yes, sir.  
7 THE COURT: Would that experience  
8 influence your verdict in this case?  
9 MR. PITTENGER: No.  
10 THE COURT: Are you acquainted with any  
11 police officers?  
12 MR. PITTENGER: No, sir.  
13 THE COURT: Do you know any of the  
14 witnesses whose names were read by the district  
15 attorney?  
16 MR. PITTENGER: No.  
17 THE COURT: How long have you lived in  
18 our community?  
19 MR. PITTENGER: Forty years.  
20 THE COURT: Are you employed?  
21 MR. PITTENGER: Yes, sir.  
22 THE COURT: Where do you work?  
23 MR. PITTENGER: I work for Reynolds  
24 Electric.  
25 THE COURT: What do you do there?

1 MR. PITTENGER: I'm an electrician.  
2 THE COURT: Are you married?  
3 MR. PITTENGER: Yes, sir.  
4 THE COURT: Is your wife employed?  
5 MR. PITTENGER: Yes, sir.  
6 THE COURT: Where does she work?  
7 MR. PITTENGER: She works for Whiting  
8 Brothers.  
9 THE COURT: Do you have children?  
10 MR. PITTENGER: Two.  
11 THE COURT: Do they live in Clark  
12 County?  
13 MR. PITTENGER: Yes, sir.  
14 THE COURT: What type of employment do  
15 the children have?  
16 MR. PITTENGER: I have one son that works  
17 for Whiting Brothers and one son that's in a  
18 painting business.  
19 THE COURT: What is your formal  
20 education?  
21 MR. PITTENGER: High school.  
22 THE COURT: Did you serve in the Armed  
23 Forces?  
24 MR. PITTENGER: No, sir.  
25 THE COURT: Have you ever served as a

1 Juror before?

2 MR. PITTENGER: Yes, sir.

3 THE COURT: How many times?

4 MR. PITTENGER: It was on a federal grand  
5 jury and I was on a federal court trial jury.

6 THE COURT: How long ago was the federal  
7 court trial?

8 MR. PITTENGER: About four years ago.

9 THE COURT: Do you remember if it was a  
10 criminal case or civil case?

11 MR. PITTENGER: It was a criminal case.

12 THE COURT: Did that jury reach a  
13 verdict?

14 MR. PITTENGER: Yes, sir.

15 THE COURT: Did anything happen during  
16 that trial that might somehow influence your  
17 thinking in this trial?

18 MR. PITTENGER: No, sir.

19 THE COURT: Have you ever sued or been  
20 sued in any type of proceeding?

21 MR. PITTENGER: No, sir.

22 THE COURT: Have you ever had a personal  
23 interest in the outcome of any criminal case?

24 MR. PITTENGER: No, sir.

25 THE COURT: Do you accept the principles



1     that I have alluded to previously regarding the  
2     burden of proof and the presumption of innocence?

3             MR. PITTENGER: Yes, sir.

4             THE COURT: Do you think you can be fair  
5     to both sides?

6             MR. PITTENGER: Yes, sir.

7             THE COURT: The defense may exercise the  
8     third peremptory challenge.

9             MR. HILLMAN: Thank you.

10            Your Honor, the defense would thank and  
11     excuse juror number 31, Ms. Roeller.

12            THE COURT: Ms. Roeller, we do thank you  
13     for your attendance and you are free to go home.

14            MS. ROELLER: Thank you.

15            THE COURT: Please call another name.

16            THE CLERK: Eric Scott Metz.

17            ERIC SCOTT METZ,  
18     having been first duly sworn to tell the truth, the  
19     whole truth and nothing but the truth, testified and  
20     said as follows:

21            THE COURT: Mr. Metz, do you know of any  
22     reason why you could not be a fair and impartial  
23     juror?

24            MR. METZ: No.

25            THE COURT: Do you know anyone seated

1 with you?

2 MR. METZ: No.

3 THE COURT: Do you know anything about  
4 this case other than what heard in court?

5 MR. METZ: No.

6 THE COURT: Are you acquainted with  
7 either of the attorneys involved?

8 MR. METZ: I have seen the defendant's  
9 attorney, but I don't know who he is.

10 THE COURT: Where do you think you saw  
11 him?

12 MR. METZ: In court, because I have been  
13 in here before.

14 THE COURT: Why have you been in court  
15 before?

16 MR. METZ: I had criminal cases a long  
17 time ago.

18 THE COURT: Were you a defendant in those  
19 cases?

20 MR. METZ: Yes.

21 THE COURT: What were the charges in  
22 those cases, Mr. Metz?

23 MR. METZ: Conspiracy to commit theft on  
24 a vending machine.

25 THE COURT: Did those matters go to a

1 trial?

2 MR. METZ: No, they didn't. It was a  
3 plea bargain.

4 THE COURT: How long ago was that?

5 MR. METZ: A couple years I think, about  
6 a year, a year or two.

7 THE COURT: Are you on probation?

8 MR. METZ: Yes.

9 THE COURT: Do you think it would be  
10 difficult for you to be a fair and impartial juror  
11 in this case and do justice to both sides?

12 MR. METZ: No.

13 THE COURT: Do you have any ill feelings  
14 about the criminal justice system?

15 MR. METZ: Not at all.

16 THE COURT: Do you have any ill feelings  
17 about the District Attorney's office?

18 MR. METZ: No.

19 THE COURT: Or about defense attorneys?

20 MR. METZ: No.

21 THE COURT: Will you follow the Court's  
22 instructions on the law?

23 MR. METZ: Yes.

24 THE COURT: Have you ever been the victim  
25 of a crime?

1 MR. METZ: No.

2 THE COURT: Has Mr. Hillman ever been  
3 your attorney?

4 MR. METZ: No.

5 THE COURT: Are you acquainted with any  
6 law enforcement officers?

7 MR. METZ: No.

8 THE COURT: Police officers will be  
9 testifying in this case, Mr. Metz. Do you think a  
10 police officer's testimony is more or less  
11 believable either way because he's a police  
12 officer?

13 MR. METZ: No.

14 THE COURT: Have you ever had any had  
15 experience with any law enforcement officer?

16 MR. METZ: No.

17 THE COURT: Do you know any of the  
18 witnesses whose names were read?

19 MR. METZ: No.

20 THE COURT: How long have you lived in  
21 Clark County?

22 MR. METZ: Twenty-two years.

23 THE COURT: How far have you gone in  
24 school?

25 MR. METZ: Graduated from high school.

PATSY K. SMITH, OFFICIAL COURT REPORTER

8a

1 THE COURT: What high school did you  
 2 graduate from?  
 3 MR. METZ: Chaperal.  
 4 THE COURT: What year did you graduate?  
 5 MR. METZ: '85.  
 6 THE COURT: '85?  
 7 MR. METZ: Yes, sir.  
 8 THE COURT: Where are you employed?  
 9 MR. METZ: I'm not employed.  
 10 THE COURT: Where is the last place of  
 11 employment?  
 12 MR. METZ: The City's.  
 13 THE COURT: What did you do there?  
 14 MR. METZ: I was a stock clerk.  
 15 THE COURT: How long have you been  
 16 unemployed?  
 17 MR. METZ: Oh, about two, three years.  
 18 THE COURT: What do you do to earn a  
 19 living?  
 20 MR. METZ: I'm independently -- I don't  
 21 have to work. I'm independently wealthy.  
 22 THE COURT: What is your source of your  
 23 wealth?  
 24 MR. METZ: I have a bunch of inheritance.  
 25 THE COURT: Do you have parents living

1 here in this community?

2 MR. METZ: Yes, I do.

3 THE COURT: What type of employment does  
4 your father have?

5 MR. METZ: He isn't. My mother works at  
6 Circus Circus. My father is deceased.

7 THE COURT: Did he die of natural  
8 causes?

9 MR. METZ: Heart attack.

10 THE COURT: Do you have brothers and  
11 sisters living here?

12 MR. METZ: Yes, I do.

13 THE COURT: How many?

14 MR. METZ: I have a brother. He's 25 and  
15 he works on Target Sports.

16 THE COURT: Do you have a sister also?

17 MR. METZ: No.

18 THE COURT: Have you ever been a juror  
19 before?

20 MR. METZ: Yes.

21 THE COURT: How long ago was it?

22 MR. METZ: About two or three years.

23 THE COURT: Two or three years ago? Was  
24 it in Clark County?

25 MR. METZ: Yes, sir.

1 THE COURT: Was it a civil or criminal  
2 case?

3 MR. METZ: It was a criminal case.

4 THE COURT: What was the charge in that  
5 case?

6 MR. METZ: It was an assault, security  
7 guard from a hotel supposedly assaulted a patron.

8 THE COURT: Was that a criminal case or  
9 civil case, were they seeking money damages in that  
10 case?

11 MR. METZ: Yeah.

12 THE COURT: That probably was a civil  
13 case, Mr. Metz. How many jurors were in the jury  
14 box with you, do you remember?

15 MR. METZ: There was 12 of us.

16 THE COURT: Without telling me what the  
17 verdict was, did that jury reach a verdict?

18 MR. METZ: Yes, they did.

19 THE COURT: Did anything happen during  
20 that trial that might in any way influence your  
21 thinking in this trial?

22 MR. METZ: No.

23 THE COURT: You had the one prior  
24 conspiracy charge, is that correct --

25 MR. METZ: Yes.

1 THE COURT: -- conviction?

2 Do you have any other convictions?

3 MR. METZ: Minor things like under the

4 influence of alcohol and things like that.

5 THE COURT: How recently were they?

6 MR. METZ: About when I was 18. So five

7 years I would say.

8 THE COURT: Do you have any problem

9 accepting those principles regarding the burden of

10 proof and the presumption of innocence?

11 MR. METZ: Not at all.

12 THE COURT: Do you think you can be fair

13 to both sides in this case?

14 MR. METZ: Yes.

15 THE COURT: Questions, Mr. Hillman.

16 MR. HILLMAN: May we approach the bench,

17 your Honor?

18 THE COURT: Yes.

19 (Off the record discussion not reported.)

20 THE COURT: Mr. Metz, in the case you

21 mentioned your personal case, did the public

22 defender represent you?

23 MR. METZ: Yes, they did. Kaven

24 Brauer.

25 THE COURT: There might be a conflict in



1 this case, so I'm going to excuse you, Mr. Metz. We  
2 do thank you for your attendance today and you are  
3 free to go home.

4 THE CLERK: Janet Carol Segur.

5 JANET CAROL SEGUR,  
6 having been first duly sworn to tell the truth, the  
7 whole truth and nothing but the truth, testified and  
8 said as follows:

9 THE COURT: Ms. Segur, do you know of any  
10 reason why you could not be a fair and impartial  
11 juror in this case?

12 MS. SEGUR: Yes. By looking at him, he  
13 reminds me of Charles Manson. I'm very serious.

14 THE COURT: I'm going to excuse you.

15 MS. SEGUR: Thank you.

16 THE COURT: You are free to go home.  
17 Thank you, Ms. Segur.

18 Will you call another name, please?

19 THE CLERK: Colleen Marie Mooney.

20 COLLEEN MARIE MOONEY,  
21 having been first duly sworn to tell the truth, the  
22 whole truth and nothing but the truth, testified and  
23 said as follows:

24 THE COURT: Ms. Mooney, do you know of  
25 any reason why you could not serve fairly and

1 impartially?

2 MS. MOONEY: No.

3 THE COURT: At this time, we are going to  
4 take our break for lunch. We will resume at 1:30,  
5 ladies and gentlemen.

6 Now, at each admonition or at each  
7 adjournment, it's my duty to admonish the jury that  
8 you must not discuss this case among yourselves or  
9 with anyone else. You must not read, watch, or  
10 listen to any news, should there be any news, at the  
11 trial and you must not form or express any opinions  
12 concerning any subject connected with the trial  
13 until the case is finally submitted to the jury.

14 Also, ladies and gentlemen, you will be  
15 seeing the attorneys out in the hallway perhaps.  
16 Ms. Lippis and Mr. Hillman will not be engaging  
17 members of the jury panel in conversations. The  
18 reason being that they, as attorneys, are governed  
19 by certain rules that apply to their profession and  
20 during the course of the trial, it just would not be  
21 proper for the attorneys to be engaging members of  
22 the jury in social conversations.

23 Now we will resume at 1:30, ladies and  
24 gentlemen, and gather downstairs in the jury room  
25 where you were earlier this morning and just wait

1 there for my bailiff to bring you up to court. We  
2 will resume at 1:30.

3 (Off the record at 11:55 a.m. and back on  
4 the record at 1:35 p.m.)

5 THE COURT: We will resume with the Court  
6 examining Ms. Mooney.

7 Ms. Mooney, you indicated you thought you  
8 could be a fair and impartial juror, I believe, is  
9 that correct?

10 MS. MOONEY: Yes.

11 THE COURT: Do you know anyone seated in  
12 the jury box?

13 MS. MOONEY: No, I do not.

14 THE COURT: Are you acquainted with any  
15 of the participants in the trial, the attorneys or  
16 the defendant Mr. Moraga?

17 MS. MOONEY: No, I'm not.

18 THE COURT: Will you follow the Court's  
19 instructions on the law?

20 MS. MOONEY: Yes, I will.

21 THE COURT: Have you ever been the victim  
22 of a crime?

23 MS. MOONEY: No, I have not.

24 THE COURT: Do you have friends or  
25 relatives, if you know, that have been victimized?

1 MS. MOONEY: Yes, I do.

2 THE COURT: Who would that be?

3 MS. MOONEY: My parents got their house  
4 broke into just a couple months ago.

5 THE COURT: Was anyone arrested?

6 MS. MOONEY: No.

7 THE COURT: Would that experience that  
8 they encountered in any way influence your verdict  
9 in this case?

10 MS. MOONEY: No, it would not.

11 THE COURT: Are you acquainted with any  
12 law enforcement officers?

13 MS. MOONEY: No, I'm not.

14 THE COURT: Is there anything by reason  
15 of the nature of the charges in this case that would  
16 make it difficult for you to be fair and impartial?

17 MS. MOONEY: No.

18 THE COURT: Do you know any of the  
19 witnesses the State intends to call?

20 MS. MOONEY: No, I do not.

21 THE COURT: How long have you resided in  
22 Clark County?

23 MS. MOONEY: For eight years.

24 THE COURT: Prior to that, where did you  
25 live?

1 MS. MOONEY: New Orleans, Louisiana.  
2 THE COURT: Were you employed there?  
3 MS. MOONEY: No, I was not.  
4 THE COURT: Are you presently employed?  
5 MS. MOONEY: No, I'm not.  
6 THE COURT: Are you married?  
7 MS. MOONEY: Yes, I am.  
8 THE COURT: Where is your husband  
9 employed?  
10 MS. MOONEY: He's employed at Sign System  
11 Incorporated. He is an electrician.  
12 THE COURT: Do you have children?  
13 MS. MOONEY: No, I don't.  
14 THE COURT: Did you serve in the armed  
15 forces?  
16 MS. MOONEY: No, I have not.  
17 THE COURT: What is the extent of your  
18 formal education?  
19 MS. MOONEY: Tenth grade.  
20 THE COURT: Have you ever served as a  
21 juror before?  
22 MS. MOONEY: No, I have not.  
23 THE COURT: Have you ever sued or been  
24 sued in any type of litigation?  
25 MS. MOONEY: No, I have not.

1 THE COURT: Have you ever had personal  
2 interest or private interest in any criminal case?

3 MS. MOONEY: No.

4 THE COURT: Questions, Mr. Hillman?

5 MR. HILLMAN: No questions, Judge.

6 THE COURT: Ms. Lippis.

7 MR. LIPPIS: No, your Honor.

8 THE COURT: The State may exercise the  
9 fourth peremptory challenge.

10 MS. LIPPIS: Your Honor, at this time,  
11 the State would waive its fourth peremptory  
12 challenge.

13 THE COURT: The defense may exercise the  
14 fourth peremptory challenge.

15 MR. HILLMAN: Could we approach the  
16 bench, your Honor?

17 THE COURT: Yes.

18 (Off the record discussion not reported.)

19 THE COURT: The defense may exercise the  
20 fourth peremptory challenge.

21 MR. HILLMAN: Your Honor, the defense  
22 would thank and excuse juror number 37, Mr.  
23 Gaudill.

24 THE COURT: Thank you, Mr. Gaudill, for  
25 your attendance today and you are free to go home.

1 THE CLERK: Howard L. Tobler.

2 HOWARD L. TOBLER,

3 having been first duly sworn to tell the truth, the  
4 whole truth and nothing but the truth, testified and  
5 said as follows:.

6 THE COURT: Mr. Tobler, it gets  
7 repetitive, but we have to ask these questions. Do  
8 you know anyone seated with you?

9 MR. TOBLER: No, I don't.

10 THE COURT: Do you know either of the  
11 attorneys involved?

12 MR. TOBLER: No.

13 THE COURT: Do you know Mr. Moraga, the  
14 defendant?

15 MR. TOBLER: No.

16 THE COURT: Do you know of any reason why  
17 you could not be fair and impartial?

18 MR. TOBLER: No.

19 THE COURT: Will you follow the Court's  
20 instructions on the law?

21 MR. TOBLER: Yes.

22 THE COURT: Even though it might be  
23 different than what you think the law is or should  
24 be?

25 MR. TOBLER: Yes, sir.

1 THE COURT: Have you ever been the victim  
2 of a crime?

3 MR. TOBLER: No.

4 THE COURT: Do you have anyone close to  
5 you that has been victimized?

6 MR. TOBLER: I have a niece that was a  
7 victim of a hit and run.

8 THE COURT: Would that in any way  
9 influence you in this case?

10 MR. TOBLER: No, the person came back a  
11 couple hours later.

12 THE COURT: Do you have friends or  
13 relatives that are police officers?

14 MR. TOBLER: I have some acquaintances,  
15 friends.

16 THE COURT: Are they with the  
17 Metropolitan Police Department?

18 MR. TOBLER: Yes.

19 THE COURT: Were any of those friends or  
20 acquaintances on the list of witnesses that Ms.  
21 Lippis read?

22 MR. TOBLER: No.

23 THE COURT: Anything by reason of your  
24 acquaintanceship with those officers that might be  
25 difficult for you to judge the credibility of



1 officers?  
2 MR. TOBLER: No.  
3 THE COURT: Do you know any of those  
4 witnesses whose names were read?  
5 MR. TOBLER: No.  
6 THE COURT: How long have you resided in  
7 Clark County?  
8 MR. TOBLER: Thirty-two years.  
9 THE COURT: Where are you employed?  
10 MR. TOBLER: Falcon Homes.  
11 THE COURT: What do you do there?  
12 MR. TOBLER: I'm vice president of  
13 finance.  
14 THE COURT: What is your education?  
15 MR. TOBLER: I have a B.S. in business  
16 administration.  
17 THE COURT: Are you married?  
18 MR. TOBLER: Yes.  
19 THE COURT: Is your wife employed?  
20 MR. TOBLER: No.  
21 THE COURT: Do you have children?  
22 MR. TOBLER: Yes.  
23 THE COURT: How many?  
24 MR. TOBLER: Four.  
25 THE COURT: How old is the oldest child?

1 MR. TOBLER: Nine.  
2 THE COURT: Do all the children live with  
3 you and your wife?  
4 MR. TOBLER: Yes.  
5 THE COURT: Did you serve in the armed  
6 forces?  
7 MR. TOBLER: No.  
8 THE COURT: Have you ever served as a  
9 juror before?  
10 MR. TOBLER: No.  
11 THE COURT: Have you ever been called to  
12 be a juror before and gotten as far as the jury box  
13 and then excused?  
14 MR. TOBLER: No.  
15 THE COURT: Have you ever sued or been  
16 sued?  
17 MR. TOBLER: No.  
18 THE COURT: Have you ever had any  
19 personal interest in the outcome of any criminal  
20 case?  
21 MR. TOBLER: No.  
22 THE COURT: Do you accept those  
23 principles that I mentioned earlier regarding the  
24 burden of proof and the presumption of innocence in  
25 a criminal case?

1 MR. TORLER: Yes.

2 THE COURT: Questions, Mr. Hillman?

3 MR. HILLMAN: No questions, your Honor.

4 THE COURT: Ms. Lippis?

5 MS. LIPPIS: No questions, your Honor.

6 THE COURT: State may exercise the fifth  
7 peremptory challenge.

8 MS. LIPPIS: The State would waive its  
9 fifth peremptory challenge.

10 THE COURT: The defense may exercise the  
11 fifth peremptory challenge.

12 MR. HILLMAN: Your Honor, the defense  
13 would thank and excuse juror number 45, Mr. Marsh.

14 THE COURT: Mr. Marsh, we thank you for  
15 your attendance today.

16 Call another name, please.

17 THE CLERK: Debra Robinson.

18 DEBRA JUNE ROBINSON,  
19 having been first duly sworn to tell the truth, the  
20 whole truth and nothing but the truth, testified and  
21 said as follows:

22 THE COURT: Ms. Robinson, do you know of  
23 any reason why you could not be a fair juror?

24 MS. ROBINSON: No, I don't.

25 THE COURT: Do you know anyone seated in

1 the jury box?

2 MS. ROBINSON: No.

3 THE COURT: Do you know Mr. Moraga, the  
4 defendant?

5 MS. ROBINSON: No, I do not.

6 THE COURT: Do you know Mr. Hillman, his  
7 attorney?

8 MS. ROBINSON: No.

9 THE COURT: Do you know Ms. Lippin?

10 MS. ROBINSON: No.

11 THE COURT: Of the District Attorney's  
12 office?

13 Will you follow the Court's Instructions  
14 on the law?

15 MS. ROBINSON: Yes, I will.

16 THE COURT: Do you have friends or  
17 relatives that are police officers?

18 MS. ROBINSON: No, I don't.

19 THE COURT: Have you or anyone close to  
20 you ever been the victim of a crime?

21 MS. ROBINSON: Yes. I have.

22 THE COURT: What was the crime?

23 MS. ROBINSON: Our son in an attempted  
24 murder.

25 THE COURT: Was it the same incident?

1 MS. ROBINSON: Yes.

2 THE COURT: Could you tell me a little  
3 bit more about the details?

4 MS. ROBINSON: My ex-husband shot me in  
5 the back of the head with a .22 rifle and then while  
6 I was at the hospital, he came back and set my  
7 mother's house on fire.

8 THE COURT: How long ago did this  
9 happen?

10 MS. ROBINSON: Almost five years ago.

11 THE COURT: Have you fully recovered?

12 MS. ROBINSON: Yes, I have.

13 THE COURT: Was there a trial, jury  
14 trial?

15 MS. ROBINSON: Not a jury trial, no.

16 THE COURT: Was he arrested?

17 MS. ROBINSON: He gave himself up.

18 THE COURT: Do you know what happened to  
19 the case?

20 MS. ROBINSON: He pleaded guilty and he  
21 was sent to prison for six years.

22 THE COURT: Did that case in any way  
23 leave a bad feeling with you about the criminal  
24 justice system?

25 MS. ROBINSON: With that particular case,

1     yes.

2                   THE COURT: Do you think that that might  
3     somehow carry over into this case and in some way be  
4     a problem for you in this case as and when I say  
5     problem --

6                   MS. ROBINSON: No.

7                   THE COURT: -- I mean with you being a  
8     fair and impartial juror?

9                   MS. ROBINSON: No, because this has  
10    nothing to do with my life.

11                  THE COURT: Would it have any impact on  
12    the way you would receive the Instructions on the  
13    law, for example, that the Court might give you?

14                  MS. ROBINSON: No.

15                  THE COURT: Did you have any feelings  
16    then about the District Attorney's office, adverse  
17    feelings about the District Attorney's office the  
18    way they handled the case?

19                  MS. ROBINSON: No, they did a real good  
20    job.

21                  THE COURT: What about the police  
22    department? Did you have any feelings about them at  
23    that time?

24                  MS. ROBINSON: No.

25                  THE COURT: What about -- strike that.

1                   Did your former husband have an attorney  
2 appointed for him, do you know?

3                   MS. ROBINSON: Yes.

4                   THE COURT: Was it the public defender's  
5 office --

6                   MS. ROBINSON: I --

7                   THE COURT: -- If you know.

8                   MS. ROBINSON: I assume. I don't know  
9 really.

10                  THE COURT: Do you have any feelings  
11 about defense attorneys in criminal cases?

12                  MS. ROBINSON: No.

13                  THE COURT: Adverse feelings?

14                  MS. ROBINSON: Huh-uh.

15                  THE COURT: Is your husband still in  
16 jail, in prison?

17                  MS. ROBINSON: Yes, he is.

18                  THE COURT: Have you received any  
19 correspondence from your husband since he has been  
20 in prison?

21                  MS. ROBINSON: All the time.

22                  THE COURT: Are they threatening?

23                  MS. ROBINSON: No.

24                  THE COURT: Has he said anything to you  
25 in this correspondence or has anything developed

1 since his imprisonment that might somehow have an  
2 impact on your thinking in this case?

3 MS. ROBINSON: No.

4 THE COURT: Anything by reason of the  
5 nature of the charges in this case that would make  
6 it difficult for you to be fair and impartial?

7 MS. ROBINSON: Not at all.

8 THE COURT: Do you know any of those  
9 persons whose names were read as witnesses?

10 MS. ROBINSON: No, I don't.

11 THE COURT: How long have you lived in  
12 Clark County?

13 MS. ROBINSON: A year and a half.

14 THE COURT: Prior to that, where did you  
15 live?

16 MS. ROBINSON: Michigan.

17 THE COURT: Did this incident that you  
18 related, did that take place in Michigan?

19 MS. ROBINSON: Yes, it did.

20 THE COURT: When you were living in  
21 Michigan, were you employed there?

22 MS. ROBINSON: No, I was not.

23 THE COURT: Are you presently employed?

24 MS. ROBINSON: No. I'm a homemaker.

25 THE COURT: What type of employment does



1 your husband have?

2 MS. ROBINSON: He works at Gold Bond Ice  
3 Cream Corporation. He is a parts purchaser there.

4 THE COURT: Do you have children?

5 MS. ROBINSON: Yes, I do, three.

6 THE COURT: Are they by this present  
7 marriage?

8 MS. ROBINSON: One is.

9 THE COURT: And two by the former  
10 marriage?

11 MS. ROBINSON: Right.

12 THE COURT: How old are the children?

13 MS. ROBINSON: Seven, four, and two and a  
14 half.

15 THE COURT: Do all three children live  
16 with you and your husband?

17 MS. ROBINSON: Yes, they do.

18 THE COURT: What is your education?

19 MS. ROBINSON: Tenth grade.

20 THE COURT: Did you serve in the armed  
21 forces?

22 MS. ROBINSON: No.

23 THE COURT: Have you ever been called for  
24 jury duty before?

25 MS. ROBINSON: No, I haven't.

1 THE COURT: Have you ever sued or been  
2 sued?

3 MS. ROBINSON: I have sued before.

4 THE COURT: Tell me something about that,  
5 what happened in that case?

6 MS. ROBINSON: My daughter who is seven  
7 now, when she was two, she fell in a place of  
8 business back in Michigan and severely cut her head  
9 and I sued for damages on that.

10 THE COURT: Did that go to a jury or was  
11 it settled?

12 MS. ROBINSON: It was settled out of  
13 court.

14 THE COURT: Would that experience in any  
15 way influence your verdict in this case?

16 MS. ROBINSON: No.

17 THE COURT: Have you ever had a personal  
18 interest in the outcome of any criminal case except  
19 the one case you related by your ex-husband?

20 MS. ROBINSON: No, I haven't.

21 THE COURT: Mr. Hillman?

22 MR. HILLMAN: No questions, your Honor.

23 THE COURT: Ms. Lippis?

24 MS. LIPPIS: No questions, your Honor.

25 THE COURT: The State may exercise the

1 sixth peremptory challenge.

2 MS. LIPPTIS: The State would waive its  
3 sixth peremptory challenge.

4 THE COURT: The defense may exercise its  
5 sixth challenge.

6 MR. HILLMAN: Your Honor, the defense  
7 would thank and excuse juror 52, Mrs. Robinson.

8 THE COURT: Mrs. Robinson, we thank you  
9 for your attendance today and you are free to go  
10 home.

11 MS. ROBINSON: Thank you.

12 THE CLERK: Monique Cole.

13 MONIQUE L. COLE,  
14 having been first duly sworn to tell the truth, the  
15 whole truth and nothing but the truth, testified and  
16 said as follows:

17 THE COURT: Mrs. Cole, you have heard all  
18 these questions we have been asking. Do you know of  
19 any reason why you could not serve fairly?

20 MS. COLE: No, sir.

21 THE COURT: Do you know either of the  
22 attorneys involved?

23 MS. COLE: No, I don't.

24 THE COURT: Do you know the defendant?

25 MS. COLE: No, I don't.

1 THE COURT: Do you know anyone that's  
2 seated with you in the jury box?  
3 MS. COLE: No, I don't.  
4 THE COURT: Do you know anything about  
5 this case other than what you heard in court today?  
6 MS. COLE: No, I don't.  
7 THE COURT: Did you hear what I said  
8 about the function of the jury and the function of  
9 the Court?  
10 MS. COLE: Yes, I did.  
11 THE COURT: Will you follow the Court's  
12 instructions on the law?  
13 MS. COLE: Yes.  
14 THE COURT: Have you or anyone close to  
15 you ever been the victim of a crime?  
16 MS. COLE: I have.  
17 THE COURT: What is the crime?  
18 MS. COLE: Attempted sexual assault.  
19 THE COURT: How long ago was this?  
20 MS. COLE: About 16 years ago.  
21 THE COURT: Was it in Clark County?  
22 MS. COLE: Yes, it was.  
23 THE COURT: Was anyone arrested?  
24 MS. COLE: No, they weren't.  
25 THE COURT: Did you know the person?

1 MS. COLE: No, I didn't.

2 THE COURT: Now, the defendant in this  
3 case has similar charges against him in this case.  
4 Do you think that would pose a problem for you?

5 MS. COLE: No, I don't.

6 THE COURT: Were you injured in that  
7 attempt?

8 MS. COLE: No, just very frightened.

9 THE COURT: How old were you at the  
10 time?

11 MS. COLE: Fourteen.

12 THE COURT: Where did it take place?

13 MS. COLE: In our home.

14 THE COURT: In Nevada?

15 MS. COLE: Yes, in Clark County.

16 THE COURT: Were you satisfied with the  
17 way the police handled your investigation?

18 MS. COLE: Yeah, they did the best they  
19 could.

20 THE COURT: Did you suffer any permanent  
21 injury or damage?

22 MS. COLE: No.

23 THE COURT: Psychological or physical?

24 MS. COLE: Just afraid for a long time,  
25 but that's all.

1 THE COURT: Are you employed outside the  
2 home?  
3 MS. COLE: No, sir.  
4 THE COURT: Where is your husband  
5 employed?  
6 MS. COLE: Nevada Prefab Engineers.  
7 THE COURT: Do you have children?  
8 MS. COLE: Yes, I do.  
9 THE COURT: How many?  
10 MS. COLE: Three.  
11 THE COURT: How old is the oldest?  
12 MS. COLE: Thirteen.  
13 THE COURT: Do all three children live  
14 with you and your husband?  
15 MS. COLE: Yes, they do.  
16 THE COURT: Did you serve in the armed  
17 forces?  
18 MS. COLE: No, I did not.  
19 THE COURT: What is your formal  
20 education?  
21 MS. COLE: High school and about six  
22 months college equivalency.  
23 THE COURT: Have you ever been a juror  
24 before?  
25 MS. COLE: No, I have not.

1 THE COURT: Have you ever been a party in  
2 any lawsuit?

3 MS. COLE: No, I haven't.

4 THE COURT: Have you ever had personal  
5 interest in the outcome of any criminal case?

6 MS. COLE: No.

7 THE COURT: Mr. Hillman?

8 MR. HILLMAN: No questions.

9 MS. LIPPIS: No, sir.

10 THE COURT: The State may exercise the  
11 seventh peremptory challenge.

12 MS. LIPPIS: State would waive its  
13 seventh challenge.

14 THE COURT: The defense may exercise.

15 MR. HILLMAN: Your Honor, the defense  
16 would thank and excuse Ms. Cole, juror number 53.

17 THE COURT: Thank you, Ms. Cole, for your  
18 attendance today.

19 MS. COLE: Thank you.

20 THE CLERK: Evelyn Bloomfield.

21 EVELYN BAUM BLOOMFIELD,  
22 having been first duly sworn to tell the truth, the  
23 whole truth and nothing but the truth, testified and  
24 said as follows:

25 THE COURT: Ms. Bloomfield, do you know

1 of any reason why you cannot be a fair and impartial  
2 juror?

3 MS. BLOOMFIELD: I have a daughter that  
4 was involved in a rape case.

5 THE COURT: I didn't get all that.

6 MS. BLOOMFIELD: I have a daughter that  
7 was involved in a rape case and it would.

8 THE COURT: Was that in Clark County?

9 MS. BLOOMFIELD: Yes.

10 THE COURT: Do you think that might have  
11 an impact on your thinking in this case?

12 MS. BLOOMFIELD: Yes, I do because it was  
13 devastating.

14 THE COURT: I'll excuse you, Ms.  
15 Bloomfield.

16 THE CLERK: Paul Petarde.

17 THE COURT: Thank you for your attendance  
18 today.

19 PAUL DENNIS PETARDE,  
20 having been first duly sworn to tell the truth, the  
21 whole truth and nothing but the truth, testified and  
22 said as follows:

23 THE COURT: Mr. Petarde, how long have --  
24 strike that.

25 Do you know anyone seated with you in the



1 jury box?

2 MR. PETARDE: No, sir, I don't.

3 THE COURT: Do you know of any reason why  
4 you could not be fair and impartial and do justice  
5 to both the State and the defendant?

6 MR. PETARDE: No, sir.

7 THE COURT: Do you know either of the  
8 attorneys involved in this trial?

9 MR. PETARDE: No, sir.

10 THE COURT: Do you know Mr. Moraga, the  
11 defendant?

12 MR. PETARDE: No, sir.

13 THE COURT: Will you follow the Court's  
14 instructions on the law?

15 MR. PETARDE: Yes, sir, I will.

16 THE COURT: Have you ever been the victim  
17 of a crime?

18 MR. PETARDE: No, sir, I haven't.

19 THE COURT: Do you have any friends that  
20 have been victimized?

21 MR. PETARDE: A friend of mine had his  
22 car broken into and a stereo stolen.

23 THE COURT: Would that in any way  
24 influence you in this case?

25 MR. PETARDE: No, sir, it wouldn't.

1 THE COURT: Are you acquainted with any  
2 police officers?

3 MR. PETARDE: One of our neighbors down  
4 the street is a police officer, but other than that,  
5 I don't know anybody.

6 THE COURT: Would that in any way have an  
7 impact on your thinking in this case?

8 MR. PETARDE: No, sir, not at all.

9 THE COURT: Or in judging the testimony  
10 of the police officers?

11 MR. PETARDE: No, sir.

12 THE COURT: Do you know any of the  
13 witnesses whose names were read?

14 MR. PETARDE: No, sir.

15 THE COURT: How long have you resided in  
16 Clark County?

17 MR. PETARDE: Twenty-one years.

18 THE COURT: Are you married?

19 MR. PETARDE: No, sir.

20 THE COURT: What is your education?

21 MR. PETARDE: I'm a junior at UNLV.

22 THE COURT: What are you studying?

23 MR. PETARDE: Pre-med.

24 THE COURT: Are you a graduate of one of  
25 the local schools?

1 MR. PETARDE: Yes, sir. I graduated in  
2 January '86 from Western High School.

3 THE COURT: Have you ever been called as  
4 a juror before?

5 MR. PETARDE: I was called when I was in  
6 high school, but I didn't go because of school.

7 THE COURT: Have you ever sued or been  
8 sued in any type of civil or criminal proceedings?

9 MR. PETARDE: No, sir.

10 THE COURT: Have you ever had a personal  
11 interest in the outcome of any criminal trial?

12 MR. PETARDE: No, sir, I don't.

13 THE COURT: Do you have any problems  
14 accepting those principles that I have mentioned  
15 earlier about the burden of proof and the  
16 presumption of innocence?

17 MR. PETARDE: No, sir.

18 THE COURT: Do you think you can be fair  
19 to both sides?

20 MR. PETARDE: Yes, sir, I think I can.

21 THE COURT: State may exercise its eighth  
22 peremptory challenge -- I'm sorry -- Mr. Hillman?

23 MR. HILLMAN: No questions.

24 THE COURT: Ms. Lippis.

25 MS. LIPPIS: I just have a few

1 questions.

2 VOIR DIRE EXAMINATION

3 BY MS. LIPPIS:

4 Q. Mr. Petarde, are you in school now,  
5 currently UNLV?

6 A. Yes, ma'am, I am.

7 Q. Do you have classes during the daytime?

8 A. No, at night.

9 Q. So sitting as a juror wouldn't cause you  
10 to miss any classes?

11 A. No.

12 MS. LIPPIS: Thank you, Judge.

13 THE COURT: State may exercise the eighth  
14 peremptory challenge.

15 MS. LIPPIS: State would waive its eighth  
16 challenge, your Honor.

17 THE COURT: The defense may exercise the  
18 eighth peremptory challenge.

19 MR. HILLMAN: Your Honor, the defense  
20 would waive its eighth peremptory challenge.

21 THE COURT: Ladies and gentlemen, will  
22 you stand please to be sworn as the jurors in this  
23 case.

24 (At this time the jury panel was duly  
25 sworn.)

1 THE COURT: Will you call two names as  
2 alternate jurors please.

3 THE CLERK: Diane Snelling.

4 THE COURT: Ms. Snelling, would you come  
5 forward please and take a seat in the jury box where  
6 the bailiff will indicate.

7 THE CLERK: Charles Bean.

8 DIANE SNELLING and CHARLES WILFORD BEAN,  
9 having been first duly sworn to tell the truth, the  
10 whole truth and nothing but the truth, testified and  
11 said as follows:

12 THE COURT: Please be seated.

13 Ms. Snelling and Mr. Bean, do either of  
14 you know of any reason why you could not be fair and  
15 impartial jurors, Ms. Snelling?

16 MS. SNELLING: No.

17 THE COURT: Mr. Bean?

18 MR. BEAN: No.

19 THE COURT: As alternate jurors, you  
20 would not go back with the other jurors to  
21 deliberate at the conclusion of all the evidence in  
22 the case unless for some reason the Court would have  
23 to excuse one of the regular jurors and, in that  
24 event, Ms. Snelling, you would be seated for that  
25 juror. If we had to excuse two jurors, then, Mr.

1     Beane, you would be seated for the second one.

2                 With that information, would that cause  
3     you to be less attentive as to what's going on  
4     during the trial, Ms. Snelling?

5                 MS. SNELLING:   No.

6                 MR. BEANE:    No.

7                 THE COURT:   Do either of you know either  
8     Mr. Hillman, attorney for the defendant, or Ms.  
9     Lippis, the attorney for the State, Ms. Snelling?

10                MS. SNELLING:  No.

11                MR. BEANE:   No.

12                THE COURT:   Do either of you know Mr.  
13     Moraga, who is the defendant?

14                MS. SNELLING:  No.

15                MR. BEANE:   No.

16                THE COURT:   Will each of you follow the  
17     Court's instructions on the law?

18                MS. SNELLING:  Yes.

19                MR. BEANE:   Yes.

20                THE COURT:   Ms. Snelling, have you ever  
21     been the victim of a crime?

22                MS. SNELLING:  No.

23                THE COURT:   Do you have any friends that  
24     have been, if you know?

25                MS. SNELLING:  My mother-in-law's home

1 was broken into.

2 THE COURT: In Clark County?

3 MS. SNELLING: Yes.

4 THE COURT: How recently?

5 MS. SNELLING: Within the year, last  
6 year.

7 THE COURT: Anyone arrested?

8 MS. SNELLING: No.

9 THE COURT: Would that experience in any  
10 way influence you in this case?

11 MS. SNELLING: No.

12 THE COURT: Mr. Bean, have you ever been  
13 the victim of a crime?

14 MR. BEAN: No.

15 THE COURT: Do you have any friends or  
16 relatives that have been, if you know?

17 MR. BEAN: No.

18 THE COURT: Do either of you know any  
19 police officers, Mr. Snelling?

20 MR. BEAN: No.

21 THE COURT: Mr. Bean?

22 MR. BEAN: No.

23 THE COURT: Anything by reason of the  
24 nature of the charges in this case that would make  
25 it difficult for you to be fair and impartial? Ms.

1 Snelling?  
2 MS. SNELLING: No.  
3 THE COURT: Mr. Bean?  
4 MR. BEAN: No.  
5 THE COURT: Do either of you know any of  
6 the witnesses whose names were read by Ms. Dippis?  
7 MS. SNELLING: No.  
8 MR. BEAN: No.  
9 THE COURT: Ms. Snelling, how long have  
10 you lived in Clark County?  
11 MS. SNELLING: Nine years.  
12 THE COURT: Prior to that, where did you  
13 reside?  
14 MS. SNELLING: North Hollywood,  
15 California.  
16 THE COURT: Were you employed there?  
17 MS. SNELLING: Yes.  
18 THE COURT: What type of employment?  
19 MS. SNELLING: I was a secretary.  
20 THE COURT: Were you ever a legal  
21 secretary?  
22 MS. SNELLING: Yes.  
23 THE COURT: Was it as a legal secretary  
24 there?  
25 MS. SNELLING: No. It was previous to



1     that.

2                   THE COURT: The attorney that you worked  
3     for, when you were a legal secretary, did he do  
4     criminal work?

5                   MS. SNELLING: No. Civil.

6                   THE COURT: Civil work. What is your  
7     education?

8                   MS. SNELLING: High school and little bit  
9     of college.

10                  THE COURT: Are you married?

11                  MS. SNELLING: Yes.

12                  THE COURT: Where is your husband  
13     employed?

14                  MS. SNELLING: He's -- right now he is  
15     unemployed.

16                  THE COURT: What type of work did he  
17     normally do?

18                  MS. SNELLING: Bricklayer.

19                  THE COURT: Do you have children?

20                  MS. SNELLING: Yes.

21                  THE COURT: How many?

22                  MS. SNELLING: Two.

23                  THE COURT: How old are they.

24                  MS. SNELLING: Seven and eight.

25                  THE COURT: Do they live with you?

1 MS. SNELLING: Yes.

2 THE COURT: Have you ever been a juror

3 before?

4 MS. SNELLING: No.

5 THE COURT: Have you ever sued or been

6 sued in any type of proceeding?

7 MS. SNELLING: Yes. I have sued.

8 THE COURT: What was the nature of that?

9 MS. SNELLING: It was a flooding suit.

10 THE COURT: Was that in California?

11 MS. SNELLING: No, it was here.

12 THE COURT: Did it go to a trial?

13 MS. SNELLING: Not our particular case.

14 It was like a whole lot of people that had sued.

15 THE COURT: Was this a mobile home park?

16 MS. SNELLING: Yes.

17 THE COURT: Did you ever go into the

18 court on that trial?

19 MS. SNELLING: No.

20 THE COURT: Were you told that it was

21 tried in this courtroom?

22 MS. SNELLING: No.

23 THE COURT: Anything by reason of that

24 experience that might have some impact on your

25 thinking in this case?

1 MS. SNELLING: No.

2 THE COURT: Anything by reason of that  
3 case that might leave you with a bad feeling about  
4 the judicial system?

5 MS. SNELLING: No.

6 THE COURT: Or about attorneys?

7 MS. SNELLING: No.

8 THE COURT: Have you ever had a personal  
9 interest in the outcome of any criminal case?

10 MS. SNELLING: Yes.

11 THE COURT: What was that, Ms. Snelling?

12 MS. SNELLING: My husband was in trouble  
13 once here.

14 THE COURT: What was the charge there?

15 MS. SNELLING: I'm not sure. I think it  
16 was assault.

17 THE COURT: Was this after you were  
18 married or before you were married?

19 MS. SNELLING: After.

20 THE COURT: Did it go to a trial?

21 MS. SNELLING: No.

22 THE COURT: Did he have an attorney in  
23 that case?

24 MS. SNELLING: Court appointed I think.

25 THE COURT: Was it a public defender, if

1 you know?

2 MS. SNELLING: Yes.

3 THE COURT: Counsel, would you come up  
4 here, please?

5 (Off the record discussion not reported.)

6 THE COURT: In that case, Ms. Snelling,  
7 were you pretty much satisfied your husband was  
8 treated justly?

9 MS. SNELLING: Yes.

10 THE COURT: Any bad feelings about the  
11 public defender's office?

12 MS. SNELLING: No.

13 THE COURT: About the District Attorney's  
14 office?

15 MS. SNELLING: No.

16 THE COURT: About the criminal justice  
17 system?

18 MS. SNELLING: No.

19 THE COURT: Was he placed on probation or  
20 do you know?

21 MS. SNELLING: Yes, he was.

22 THE COURT: Is he off probation now?

23 MS. SNELLING: Yes.

24 THE COURT: Did you hear what I said  
25 about the burden of proof and the presumption of

1 innocence as they apply in criminal cases?  
2 MS. SNELLING: Yes.  
3 THE COURT: Any problem with accepting  
4 those principles?  
5 MS. SNELLING: No.  
6 THE COURT: Do you think you can be fair  
7 to both the defendant and to the State of Nevada in  
8 this case?  
9 MS. SNELLING: Yes, I do.  
10 THE COURT: Mr. Bean, how long have you  
11 lived in Clark County?  
12 MR. BEAN: Twenty-three years.  
13 THE COURT: Are you employed?  
14 MR. BEAN: Yes.  
15 THE COURT: Where do you work?  
16 MR. BEAN: JJ Plumbing.  
17 THE COURT: Are you a plumber?  
18 MR. BEAN: Yes.  
19 THE COURT: Are you married?  
20 MR. BEAN: Yes.  
21 THE COURT: Is your wife employed?  
22 MR. BEAN: Yes.  
23 THE COURT: Where does she work?  
24 MR. BEAN: First Interstate Bank.  
25 THE COURT: Do you have children?

1 MR. BEAN: Yes.  
2 THE COURT: How many?  
3 MR. BEAN: Three.  
4 THE COURT: How old are they?  
5 MR. BEAN: Twenty-six, thirty,  
6 thirty-six.  
7 THE COURT: Do they live in Clark  
8 County?  
9 MR. BEAN: One.  
10 THE COURT: What type of employment does  
11 that child have?  
12 MR. BEAN: Carpenter.  
13 THE COURT: Where are the other two  
14 children?  
15 MR. BEAN: One in California and one in  
16 Detroit.  
17 THE COURT: What is your education?  
18 MR. BEAN: Tenth grade.  
19 THE COURT: Did you serve in the armed  
20 forces?  
21 MR. BEAN: Yes.  
22 THE COURT: What branch?  
23 MR. BEAN: Army.  
24 THE COURT: How long?  
25 MR. BEAN: Two years.

1 THE COURT: What were your duties  
2 generally?

3 MR. BEAN: Motor pool, acting motor pool  
4 sergeant.

5 THE COURT: Have you ever been a juror  
6 before?

7 MR. BEAN: No.

8 THE COURT: Have you ever sued or been  
9 sued?

10 MR. BEAN: No.

11 THE COURT: Have you ever had a personal  
12 interest in the outcome of any criminal case?

13 MR. BEAN: No.

14 THE COURT: Do you accept those  
15 principles that I mentioned regarding the burden of  
16 proof and presumption of innocence?

17 MR. BEAN: Yes.

18 THE COURT: Do you think you can be fair  
19 to both sides?

20 MR. BEAN: Oh, yes.

21 THE COURT: The State may exercise the  
22 one challenge to the alternate jurors. Before you  
23 do --

24 MR. HILLMAN: Can I ask Mr. Bean a few  
25 questions, your Honor?

1 THE COURT: Yes, I'm sorry, Mr. Hillman  
2 VOIR DIRE EXAMINATION.

3 BY MR. HILLMAN:

4 Q. Mr. Bean, you state your wife works at  
5 First Interstate Bank. Which branch does she work  
6 at?

7 A. She works for the computer center.

8 MR. HILLMAN: Okay. No further  
9 questions.

10 THE COURT: Any questions?

11 MS. LIPPIS: No questions, your Honor.

12 THE COURT: Before you exercise your  
13 challenge, if alternate number one, Ms. Snelling, is  
14 excused for any reason, number two does not move  
15 into number one's position. They maintain their  
16 same position one and two.

17 The State may exercise its peremptory  
18 challenge.

19 MS. LIPPIS: Your Honor, the State would  
20 thank but excuse Mrs. Snelling.

21 THE COURT: Ms. Snelling, we do thank you  
22 for your attendance and you are excused. You are  
23 free to go home.

24 MS. SNELLING: Thank you.

25 THE CLERK: Michael Reidenburg.



1                   MICHAEL THOMAS BRIDENBURG,  
2   having been first duly sworn to tell the truth, the  
3   whole truth and nothing but the truth, testified and  
4   said as follows:

5                   THE COURT: Mr. Bridenburg, do you know  
6   of any reason why you could not be fair and  
7   impartial?

8                   MR. BRIDENBURG: No, sir.

9                   THE COURT: Are you acquainted with  
10   anyone in the jury box?

11                  MR. BRIDENBURG: No, sir.

12                  THE COURT: Do you know the defendant,  
13   Mr. Moraga?

14                  MR. BRIDENBURG: No, sir.

15                  THE COURT: Do you know Mr. Hillman or  
16   Ms. Lippis? The attorneys?

17                  MR. BRIDENBURG: No, sir.

18                  THE COURT: Did you hear what I said  
19   about the Court instructing the jury on the law?

20                  MR. BRIDENBURG: Certainly.

21                  THE COURT: Will you follow the Court's  
22   instructions?

23                  MR. BRIDENBURG: Certainly.

24                  THE COURT: Have you ever been the victim  
25   of a crime?

1 MR. BRIDENBURG: Yes, sir.  
2 THE COURT: What was the crime?  
3 MR. BRIDENBURG: Burglary.  
4 THE COURT: To your home?  
5 MR. BRIDENBURG: Yes, sir.  
6 THE COURT: More than one time?  
7 MR. BRIDENBURG: No, sir, just once.  
8 THE COURT: Was it in Clark County?  
9 MR. BRIDENBURG: Yes, sir.  
10 THE COURT: How recently was it?  
11 MR. BRIDENBURG: Four years ago.  
12 THE COURT: Did you report it to the  
13 authorities?  
14 MR. BRIDENBURG: Yes, sir.  
15 THE COURT: Was anyone arrested?  
16 MR. BRIDENBURG: I think so, sir. They  
17 were minors.  
18 THE COURT: Were you satisfied with the  
19 way the police handled your matter?  
20 MR. BRIDENBURG: Yes, sir.  
21 THE COURT: Would that experience  
22 influence your verdict in this case?  
23 MR. BRIDENBURG: No.  
24 THE COURT: Do you know any police  
25 officers?

1 MR. BRIDENBURG: Yes, I do.

2 THE COURT: Are they with the  
3 Metropolitan Police Department?

4 MR. BRIDENBURG: Yes, sir.

5 THE COURT: Would you characterize them  
6 as friends or acquaintances?

7 MR. BRIDENBURG: I have some of both.

8 THE COURT: If a police officer  
9 testifies, Mr. Bridenburg, do you think his  
10 testimony is more believable and entitled to greater  
11 weight than anyone else's because he's a police  
12 officer?

13 MR. BRIDENBURG: No, sir.

14 THE COURT: Do you think he's entitled to  
15 any lesser weight or believability because he is a  
16 police officer?

17 MR. BRIDENBURG: No, sir.

18 THE COURT: Would you try to adjudge  
19 police officer's testimony the way you adjudge  
20 anyone else's testimony?

21 MR. BRIDENBURG: Certainly.

22 THE COURT: Do you know any of the  
23 witnesses whose names were read?

24 MR. BRIDENBURG: No, sir.

25 THE COURT: How long have you lived in

1     Clark County?

2                   MR. BRIDENBURG:   Forty-two years.

3                   THE COURT:   Are you employed?

4                   MR. BRIDENBURG:   I'm part-time and I'm a

5     student.

6                   THE COURT:   What are you studying?

7                   MR. BRIDENBURG:   Engineering.

8                   THE COURT:   Are you married?

9                   MR. BRIDENBURG:   Yes, sir.

10                  THE COURT:   Is your wife employed outside

11     the home?

12                  MR. BRIDENBURG:   Yes, sir.

13                  THE COURT:   In what capacity?

14                  MR. BRIDENBURG:   She is the cable T.V.

15     engineer for prime cable.

16                  THE COURT:   Do you have children?

17                  MR. BRIDENBURG:   One.

18                  THE COURT:   How old is the child?

19                  MR. BRIDENBURG:   Seven.

20                  THE COURT:   Is it boy or girl?

21                  MR. BRIDENBURG:   Boy.

22                  THE COURT:   Does he live with you and

23     your wife?

24                  MR. BRIDENBURG:   Yes, sir.

25                  THE COURT:   What is your education?

1 MR. BRIDENBURG: I have two years of  
2 college plus I'm currently enrolled.

3 THE COURT: Did you serve in the armed  
4 forces?

5 MR. BRIDENBURG: In the U.S. Navy.

6 THE COURT: How long did you serve?

7 MR. BRIDENBURG: Four years.

8 THE COURT: What were your duties in the  
9 navy?

10 MR. BRIDENBURG: I was a radio man.

11 THE COURT: Have you ever served as a  
12 juror before?

13 MR. BRIDENBURG: No, sir.

14 THE COURT: Have you ever sued or been  
15 sued in any proceeding?

16 MR. BRIDENBURG: At one time I was the  
17 supervisor in charge of litigation for the Bank of  
18 Nevada. All civil.

19 THE COURT: Any experience there that  
20 might somehow impact your thinking in this case?

21 MR. BRIDENBURG: No, sir.

22 THE COURT: Have you ever had a personal  
23 interest in any criminal case?

24 MR. BRIDENBURG: No, sir.

25 THE COURT: Do you accept the principles

1 I have mentioned regarding the burden of proof and  
2 presumption of innocence?

3 MR. BRIDENBURG: Certainly.

4 THE COURT: The defense may exercise the  
5 challenge to the alternate.

6 (Off the record discussion not reported.)

7 MR. HILLMAN: Your Honor, the defense  
8 would waive its preemptory challenge.

9 THE COURT: Mr. Bridenburg and Mr. Bean,  
10 will you stand please to be sworn as the alternate  
11 jurors.

12 (At this time, the jurors were duly  
13 sworn.)

14 THE COURT: To the other members of the  
15 jury panel, ladies and gentlemen, we have our jury  
16 now and two alternate jurors, your services will not  
17 be required in this case. However, they may be  
18 required in another case. So please report back to  
19 the jury commissioner on the first floor and we do  
20 thank you for your attendance today.

21

22 (At this time, the jury panel left the  
23 courtroom.)

24

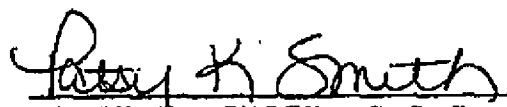
25 (At this time, proceedings were reported,

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but already transcribed.)

\* \* \* \* \*

ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF  
PROCEEDINGS.

  
PATSY K. SMITH, C.S.R. #190

242

FILED

1 CASE NO. C092174  
2 DEPARTMENT 8

APR 14 8 12 AM '92

3 *Loetta Linn*  
4 CLERK

5 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF  
6 NEVADA, IN AND FOR THE COUNTY OF CLARK  
7

8  
9 THE STATE OF NEVADA, )  
10 Plaintiff, )  
11 versus )  
12 ROY D. MORAGA, )  
13 Defendant. )  
14

TRANSCRIPT BY  
REPORTER

15  
16 HELD BEFORE THE HONORABLE MICHAEL J. WENDELL,  
17 DISTRICT JUDGE  
Hearing held this 7th of March, 1990 at 10:00 a.m.  
18

19  
20 APPEARANCES:

21 Plaintiff: DEBORAH J. LIPPIS, ESQ.

22 Defendant: PETER J. CHRISTIANSEN, ESQ.  
23

24  
25 Reported by: Jennifer Marie Sperduti, CSR #293



\* \* \* \*

P R O C E E D I N G S

BY THE COURT: This is the State of Nevada against Roy Moraga who's present with Mr. Christiansen of the defender's office and Miss Lippis representing the district attorney's office. Mr. Christiansen?

BY MR. CHRISTIANSEN: Your Honor, I had previously notified the court and counsel that Mr. Hillman came in this morning ready to proceed with trial and he was ill when he got here and became more ill as he stayed around and ended up going home. There's no way that I believe he will be here tomorrow, and I'm just hoping -- I understand from speaking to the prosecution and also the bailiff that the court's talking about passing this and beginning on Monday. That is fine with us with just a couple of caveats.

One is he has, Roger Hillman has, a supreme court argument next Wednesday the 14th. In fact, I've already had to reassign his justice court calendar that day due to that fact.

The other is I'm just hoping his health will be such he'll be able to try the case next

1 week. He has had some fairly serious problems with  
2 ulcers. Bleeding ulcers. In fact, we thought he had  
3 gotten it under control. He lost a good parcel of work.  
4 He was in the hospital and they ended up not having to  
5 operate on him. It all began the way this illness began  
6 this time, and I'm hoping what's wrong with him is just  
7 the flu and it's not back to the ulcer problem he had  
8 before.

9 I just want to put all this on the  
10 record and make the court a record of it because if  
11 Miss Lippis holds witnesses in town until Monday and  
12 he's not available there's nothing I can do about it.

13 I understand her problem. She says  
14 she's got 17 witnesses, some of which she's notified  
15 already that it's going to be continued over until  
16 Monday. I guess we can do that. It would make some  
17 sense to continue it beyond that time from our  
18 perspective, but I can see it from their perspective  
19 that they would like to hold it to a Monday trial.

20 BY THE COURT: I'm overflow next week  
21 and I could start the trial on Monday.

22 BY MS. LIPPIS: Judge, that would be  
23 preferable to the state. I know that Mr. Hillman has  
24 had these medical problems in the past and our concern  
25 for his health is certainly I think the same as

1 Mr. Christiansen's. What I suggest is, I have notified  
2 a majority of the witnesses we are going to start on  
3 Monday, perhaps if we could check with Mr. Hillman on  
4 Friday with a status check.

5 BY THE COURT: I think that's a good  
6 idea.

7 BY MS. LIPPIS: If he's not ready  
8 that would give me sufficient time to recall everybody.  
9 I have only one out-of-state witness and I'll send him  
10 back.

11 What I needed to do is confirm that  
12 everybody will be available next week and beyond that I  
13 think we would need subpoena.

14 BY THE COURT: I could put it back on  
15 status check for Friday morning.

16 BY MS. LIPPIS: Friday is fine.

17 BY MR. CHRISTIANSEN: I think we'll  
18 have a real good idea on his health by then.

19 BY THE COURT: Let's continue this  
20 until Friday at 9:00 in the morning. That's just for a  
21 status check.

22 BY MR. CHRISTIANSEN: We are also at  
23 this point, Judge, tentatively at least looking at this  
24 thing on March 12th as long as Roger's health is fine.  
25

1 BY THE COURT: Yes. Monday,  
2 March 12. And he has to be in Carson City on Wednesday?

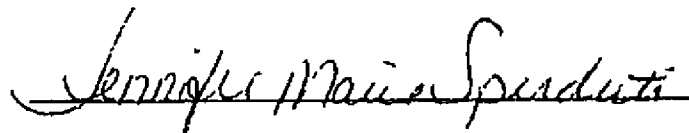
3 BY MR. CHRISTIANSEN: Yes. I think  
4 that's to fly up, do his argument and fly back.

5 BY THE COURT: We could recess for  
6 one day and resume back on Thursday.

7 BY MS. LIPPIS: That'll be fine.

8 BY THE COURT: All right.

9  
10 ATTEST: True and accurate transcript.  
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14 COURT REPORTER  
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# IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,  
Appellant(s),  
vs.

Case No: C092174  
SC No: 61734

STATE OF NEVADA,  
Respondent(s),

# RECORD ON APPEAL VOLUME 2

ATTORNEY FOR APPELLANT  
ROY D. MORAGA # 31584  
PROPER PERSON  
1200 PRISON RD.  
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT  
STEVEN B. WOLFSON, ESQ.  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NEVADA 89101

I N D E X

<u>VOLUME:</u>	<u>PAGE NUMBER:</u>
1	1 - 220
2	221 - 441
3	442 - 662
4	663 - 882
5	883 - 1101
6	1102 - 1320

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	01/10/2006	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1117 - 1120
3	10/03/1991	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	442 - 442
4	03/05/1996	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	757 - 758
4	02/20/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	702 - 704
4	03/11/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	764 - 766
3	10/03/1991	AFFIDAVIT IN SUPPORT OF OF REQUEST TO PROCEED IN FORMA PAUPERIS	443 - 445
4	02/20/1996	AFFIDAVIT OF DEFENDANT	705 - 706
4	03/11/1996	AFFIDAVIT OF PETITIONER	767 - 768
6	01/10/2006	AFFIDAVIT OF PETITIONER	1121 - 1122
5	04/30/1998	AFFIDAVIT OF ROY D. MORAGA	887 - 888
5	09/27/2004	AFFIDAVIT OF ROY D. MORAGA	1061 - 1062
1	06/13/1990	AMENDED INFORMATION	118 - 121
3	11/13/1991	AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	461 - 463
4	07/31/1992	ANSWER IN OPPOSITION TO MOTION FOR RETURNING SEIZED PROPERTY	670 - 680
4	10/29/1996	CASE APPEAL STATEMENT	859 - 861
5	06/15/1998	CASE APPEAL STATEMENT	910 - 911
5	09/28/1998	CASE APPEAL STATEMENT	947 - 948
5	02/18/2004	CASE APPEAL STATEMENT	1044 - 1045
6	02/10/2005	CASE APPEAL STATEMENT	1102 - 1103
6	03/02/2007	CASE APPEAL STATEMENT	1214 - 1216
6	03/05/2007	CASE APPEAL STATEMENT	1219 - 1220
6	09/18/2012	CASE APPEAL STATEMENT	1317 - 1318

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
7	11/09/2012	CERTIFICATE OF COPY AND TRANSMITTAL OF RECORD	
5	02/25/2002	CERTIFICATE OF INMATE'S INSTITUTIONAL ACCOUNT	968 - 968
5	01/17/1997	CERTIFICATE OF MAILING	886 - 886
4	08/05/1996	CERTIFICATE OF MAILING OF MOTION TO WITHDRAW AS COUNSEL	830 - 830
1	12/28/1989	CRIMINAL BINDOVER	1 - 11
3	01/27/1992	CRIMINAL SETTING SLIP	469 - 469
1	06/27/1990	DESIGNATION OF RECORD ON APPEAL	140 - 141
3	11/13/1991	DESIGNATION OF RECORD ON APPEAL	464 - 465
3	02/13/1992	DESIGNATION OF RECORD ON APPEAL	471 - 471
4	10/07/1996	DESIGNATION OF RECORD ON APPEAL	849 - 850
5	06/13/1998	DESIGNATION OF RECORD ON APPEAL	907 - 908
5	09/22/1998	DESIGNATION OF RECORD ON APPEAL	944 - 945
6	02/10/2005	DESIGNATION OF RECORD ON APPEAL	1104 - 1105
7	11/09/2012	DISTRICT COURT MINUTES	
3	02/20/1992	EX PARTE APPLICATION FOR PREPARATION OF TRANSCRIPTS	472 - 472
5	02/09/2004	EX PARTE MOTION FOR EXCESS FEES	1030 - 1036
4	02/20/1996	EX PARTE MOTION FOR FEES FOR EXPERT SERVICES	707 - 711
5	09/27/2004	EXTRAORDINARY WRIT OF MANDAMUS	1063 - 1069
3	10/03/1991	FINANCIAL CERTIFICATE	446 - 447
6	01/10/2006	FINANCIAL CERTIFICATE	1123 - 1124
6	02/08/2007	FINDING OF FACT AND CONCLUSIONS OF LAW	1201 - 1206
4	09/06/1996	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	833 - 838
6	08/13/2012	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1275 - 1281
1	01/09/1990	INFORMATION	12 - 14
1	03/15/1990	INSTRUCTIONS TO THE JURY	42 - 66
1	07/07/1990	JUDGMENT OF CONVICTION (JURY TRIAL)	146 - 147
1	03/13/1990	JURY LIST	41 - 41



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	06/04/1990	MOTION AND NOTICE OF MOTION TO AMEND INFORMATION	85 - 117
4	02/20/1996	MOTION AND NOTICE OF MOTION TO COMPEL, PRODUCTION OF SEMAN AND BLOOD	712 - 726
1	02/05/1990	MOTION AND NOTICE OF MOTION TO ENDORSE NAMES ON INFORMATION	31 - 34
5	10/18/2004	MOTION AND ORDER FOR FAILURE TO PROSECUTE AND REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT	1075 - 1082
6	02/22/2006	MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING	1169 - 1173
6	03/05/2007	MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL	1221 - 1222
5	06/01/1998	MOTION FOR ENLARGEMENT OF TIME	905 - 906
4	04/11/1996	MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	791 - 794
3	10/03/1991	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	448 - 448
4	02/20/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	727 - 727
4	03/05/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	759 - 759
4	03/11/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	769 - 769
5	02/25/2002	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	969 - 971
6	01/10/2006	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1125 - 1126
4	08/26/1993	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS; MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE JAIL TIME CREDITS AND AFFIDAVIT OF PETITION	683 - 693
6	08/06/2012	MOTION FOR RECONSIDERATION	1257 - 1270
5	12/16/2003	MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	996 - 1006
4	07/21/1992	MOTION FOR RETURNING SEIZED PROPERTY	667 - 669
4	03/11/1996	MOTION FOR RETURNING SEIZED PROPERTY	770 - 773

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
3	01/02/1992	MOTION TO APPOINT COUNSEL FOR APPEAL	466 - 468
5	04/30/1998	MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	889 - 890
5	02/25/2002	MOTION TO PRESERVE EVIDENCE AND ORDER	972 - 980
5	08/06/1998	MOTION TO STRIKE	918 - 924
2	09/26/1991	MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VII	439 - 441
5	10/31/2002	MOTION TO VACATE AND/OR AMEND JUDGMENT	982 - 987
4	04/09/1996	MOTION TO WITHDRAW AS COUNSEL	785 - 788
4	08/02/1996	MOTION TO WITHDRAW AS COUNSEL	826 - 829
5	10/19/2004	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1083 - 1088
6	09/13/2007	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1241 - 1248
4	10/30/1995	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	698 - 701
5	04/30/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	949 - 951
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	952 - 959
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	960 - 967
6	05/02/2005	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	1113 - 1116
3	10/04/1991	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - REMAND	454 - 458
1	06/27/1990	NOTICE OF APPEAL	142 - 143
3	10/30/1991	NOTICE OF APPEAL	460 - 460
4	09/27/1996	NOTICE OF APPEAL	847 - 848
5	06/13/1998	NOTICE OF APPEAL	909 - 909
5	09/22/1998	NOTICE OF APPEAL	946 - 946

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	02/17/2004	NOTICE OF APPEAL	1038 - 1039
6	02/10/2005	NOTICE OF APPEAL	1106 - 1106
6	03/02/2007	NOTICE OF APPEAL	1217 - 1218
6	09/17/2012	NOTICE OF APPEAL	1312 - 1316
6	02/22/2006	NOTICE OF CHANGE OF ADDRESS	1174 - 1174
6	02/13/2007	NOTICE OF ENTRY OF DECISION AND ORDER	1207 - 1213
6	08/21/2012	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1282 - 1289
4	04/17/1996	NOTICE OF ENTRY OF ORDER	796 - 799
4	09/20/1996	NOTICE OF ENTRY OF ORDER	839 - 846
4	10/28/1996	NOTICE OF ENTRY OF ORDER	851 - 858
5	05/29/1998	NOTICE OF ENTRY OF ORDER	901 - 904
5	07/07/1998	NOTICE OF ENTRY OF ORDER	914 - 917
6	04/08/2005	NOTICE OF ENTRY OF ORDER	1109 - 1112
5	02/26/2002	NOTICE OF HEARING - CRIMINAL	981 - 981
3	10/03/1991	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	449 - 453
4	03/05/1996	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	760 - 763
1	06/29/1990	ORDER	144 - 145
1	08/02/1990	ORDER	148 - 149
4	08/17/1992	ORDER	681 - 682
6	03/30/2005	ORDER	1107 - 1108
3	02/10/1992	ORDER APPOINTING COUNSEL	470 - 470
6	03/23/2007	ORDER DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1239 - 1240
5	06/30/1998	ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME	912 - 913
5	01/07/2004	ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1028 - 1029

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	10/05/2012	ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER	1319 - 1320
5	05/28/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY OR IN ALTERNATIVE CORRECT ILLEGAL SENTENCE	899 - 900
5	08/27/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO STRIKE	942 - 943
3	10/23/1991	ORDER FOR APPOINTMENT OF COUNSEL	459 - 459
5	11/21/2002	ORDER FOR APPOINTMENT OF COUNSEL FOR POST- CONVICTION RELIEF	988 - 988
5	02/11/2004	ORDER FOR PAYMENT OF EXCESS FEES	1037 - 1037
6	01/12/2006	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	1162 - 1162
2	09/13/1991	ORDER FOR PRODUCTION OF INMATE	437 - 438
6	04/21/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1186 - 1187
6	05/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1188 - 1189
6	06/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1199 - 1200
4	08/27/1996	ORDER FOR TRANSCRIPTS	832 - 832
6	01/27/2006	ORDER GRANTING DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER DENYING DEFENDANT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL	1167 - 1168
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	473 - 474
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	475 - 476
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	477 - 478
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	479 - 480
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	481 - 482
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	483 - 484
2	01/09/1991	ORDER RELEASING EVIDENCE	435 - 435
1	06/13/1990	ORDER TO AMEND INFORMATION	122 - 122

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	02/15/1990	ORDER TO ENDORSE NAMES ON INFORMATION	39 - 40
4	04/17/1996	ORDER TO WITHDRAW AS ATTORNEY OF RECORD	800 - 801
2	01/09/1991	PETITION FOR RELEASE OF EVIDENCE	436 - 436
4	02/20/1996	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	728 - 748
6	01/10/2006	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1127 - 1161
1	05/16/1990	PRE-SENTENCE INVESTIGATION REPORT (UNFILED) CONFIDENTIAL	75 - 84
1	03/15/1990	PROPOSED VERDICT	71 - 74
3	02/26/1992	RECEIPT OF COPY	485 - 485
3	02/26/1992	RECEIPT OF COPY	486 - 486
3	02/28/1992	RECEIPT OF COPY	487 - 487
3	03/02/1992	RECEIPT OF COPY	488 - 488
3	03/02/1992	RECEIPT OF COPY	489 - 489
4	08/27/1993	RECEIPT OF COPY	694 - 694
5	12/17/2003	RECEIPT OF COPY	1007 - 1007
4	04/09/1996	RECEIPT OF COPY AND CERTIFICATE OF MAILING	789 - 790
4	04/15/1996	RECEIPT OF COPY OF MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	795 - 795
4	08/05/1996	RECEIPT OF COPY OF MOTION TO WITHDRAW AS COUNSEL	831 - 831
5	01/05/2004	REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1023 - 1027
6	08/28/2012	REPLY TO STATE'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION	1290 - 1297
6	05/24/2006	REPLY TO STATE'S RESPONSE AND OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1190 - 1198
5	01/05/2005	REPLY TO STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS AND MOTION TO DISMISS	1099 - 1101

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	01/13/1997	REPORTER'S TRANSCRIPT OF APRIL 17, 1996	862 - 866
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 12, 1996	867 - 871
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 21, 1996	872 - 875
1	01/24/1990	REPORTER'S TRANSCRIPT OF DECEMBER 26, 1989	15 - 30
3	03/04/1992	REPORTER'S TRANSCRIPT OF FEBRUARY 15, 1990	490 - 491
1	02/12/1990	REPORTER'S TRANSCRIPT OF JANUARY 11, 1990	35 - 38
6	03/12/2007	REPORTER'S TRANSCRIPT OF JANUARY 23, 2006	1223 - 1226
5	05/04/2004	REPORTER'S TRANSCRIPT OF JANUARY 5, 2004	1046 - 1052
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 15, 1996	876 - 877
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 19, 1996	878 - 882
1	06/13/1990	REPORTER'S TRANSCRIPT OF JUNE 13, 1990 (UNFILED)	123 - 139
6	03/12/2007	REPORTER'S TRANSCRIPT OF JUNE 26, 2006	1227 - 1233
1	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUED)	150 - 220
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUATION)	221 - 264
3	03/27/1992	REPORTER'S TRANSCRIPT OF MARCH 12, 1990	520 - 657
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 13, 1990	265 - 387
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 15, 1990	388 - 434
5	01/13/1997	REPORTER'S TRANSCRIPT OF MARCH 6, 1996	883 - 885
3	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 7, 1990	658 - 662
4	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 9, 1990	663 - 664
5	05/14/2004	REPORTER'S TRANSCRIPT OF MAY 11, 1998	1057 - 1060
5	05/04/2004	REPORTER'S TRANSCRIPT OF NOVEMBER 13, 2002	1053 - 1056
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 11, 1991	492 - 494
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 14, 1991	495 - 499
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 21, 1991	500 - 511
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 9, 1991	512 - 514
3	03/04/1992	REPORTER'S TRANSCRIPT OF SEPTEMBER 23, 1991	515 - 519

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	05/26/1992	REQUEST FOR RECORDS	665 - 666
6	08/28/2012	REQUEST TO FILE EXHIBIT 1	1298 - 1311
4	09/29/1993	SECOND AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	695 - 697
5	11/27/2002	STATE'S OPPOSITION TO DEFENDANT'S MOTIO TO VACATE AND/OR AMEND JUDGMENT	989 - 993
6	03/16/2007	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1234 - 1238
5	12/26/2003	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1008 - 1022
6	02/27/2006	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR TRANSPORT	1175 - 1178
4	04/01/1996	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SEMAN AND BLOOD, PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO PROCEED IN FORMA PAUPERIS	774 - 784
5	05/08/1998	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	891 - 898
6	08/09/2012	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER	1271 - 1274
6	01/19/2006	STATE'S OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL	1163 - 1166
6	05/16/2012	STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1249 - 1256
6	02/27/2006	STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1179 - 1185
5	08/17/1998	STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE	925 - 941
5	12/15/2004	STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS	1089 - 1098
4	06/27/1996	STATE'S SUPPLEMENTAL OPPOSITION TO PETITIONER'S FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	816 - 822

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	06/11/2003	STIPULATION AND ORDER	994 - 995
4	05/20/1996	SUBSTATION OF ATTORNEYS	802 - 803
4	07/16/1996	SUPPLEMENT REPLY AND OPPOSITION FOR WRIT OF HABEAS CORPUS	823 - 825
5	09/27/2004	SUPPLEMENTAL ACT	1070 - 1074
4	02/20/1996	SUPPLEMENTAL BRIEF AND POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	749 - 756
5	02/17/2004	SUPPLEMENTAL BRIEF TO STATES OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1040 - 1043
4	06/13/1996	SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	804 - 815
1	03/15/1990	VERDICT COUNT I	67 - 67
1	03/15/1990	VERDICT COUNT II	68 - 68
1	03/15/1990	VERDICT COUNT III	69 - 69
1	03/15/1990	VERDICT COUNT VI	70 - 70



1           A.     Yes.

2           Q.     Are these yours as well?

3           A.     Yes.

4                   MS. LIPPIS: Court's indulgence one

5 moment. I'm going to get a pair of scissors.

6                   THE COURT: Best have them marked before

7 he opens them.

8                   MS. LIPPIS: I will.

9           Q.     Officer, while I'm having these marked,

10 would you -- may I have the Court's indulgence.

11                   Off the record discussion not reported.

12           Q.     (RY MS. LIPPIS) Officer, when you are

13 booking somebody in the Clark County Detention

14 Center for a crime such as sexual assault, is there

15 a certain protocol that you follow with in terms of

16 confiscating clothing, taking certain samples?

17           A.     Yes, there is.

18           Q.     Would you describe to the jury what that

19 is?

20           A.     On a sexual assault arrest, it's our

21 policy that a sexual assault kit is completed on the

22 subject who has been booked for sexual assault and

23 the items of clothing that the subject is wearing is

24 also booked in for evidence.

25           Q.     Did you in fact personally book the

1 defendant into jail?

2 A. Yes, I did.

3 Q. Did you confiscate his clothing?

4 A. Yes, I did.

5 Q. And book that into evidence?

6 A. Yes.

7 Q. Did you assist with the taking of a  
8 sexual assault kit on the subject?

9 A. Yes, I did.

10 Q. What is included in the sexual assault  
11 kit?

12 A. The first step is a package. The first  
13 step there is an envelope with a comb in it and the  
14 subject is instructed to comb the pubic area with  
15 the comb with the envelope underneath the pubic  
16 region and it's combed out and the comb is placed  
17 into the envelope and sealed up.

18 The next step is hair from the pubic area  
19 is pulled out and placed into another envelope and  
20 sealed up.

21 And then the next step is head hair is  
22 pulled from the suspect and placed in the envelope  
23 and sealed up.

24 Then there is a white disc that is folded  
25 over and the suspect places that in their mouth so

1 saliva is deposited on it and it's allowed to air  
2 dry and then placed in an envelope and sealed.

3 Q. And all of these things are for later  
4 forensic testing; is that correct?

5 A. Yes.

6 Q. At some point is blood drawn from the  
7 defendant?

8 A. Yes.

9 Q. Did Nurse Helen Prescott draw blood from  
10 this defendant to your recollection?

11 A. Yes, she did.

12 Q. And you were present when that blood was  
13 drawn?

14 A. Yes, I was.

15 Q. Has the blood been given to you to be  
16 booked?

17 A. Yes.

18 Q. Did you in fact book it?

19 A. Yes.

20 Q. Did bring the rape kit you just described  
21 with you today?

22 A. Yes, I did.

23 Q. And it will be in one of these packages  
24 that we are going to open?

25 A. Yes.

1 Q. So that we can stay in order, I'm showing  
2 you what's been marked for identification, State's  
3 proposed Exhibit No. 4, and I'll ask you, first of  
4 all, if you can identify this bag?

5 A. No, I can't.

6 Q. And why can you not identify the bag?

7 A. This isn't the bag that I put the items  
8 in.

9 Q. If we were to open up this bag, do you  
10 believe that we would find what you originally put  
11 in your own bag?

12 A. Yes, I do.

13 Q. There is some handwriting and some  
14 signature on here that you have seen before?

15 A. Yes.

16 Q. There is a name on there, Linda  
17 Errichetto, do you know who she is?

18 A. No, I don't.

19 Q. If would you please, without disturbing  
20 the seals that are in this bag -- let me ask you  
21 about the seals first.

22 Are your initials located on these seals  
23 in the initials right here?

24 A. No.

25 Q. And these are other seals?

1           A.       No.

2           Q.       Did the bag that you put the defendant's  
3 items in, did you initial the items and write on the  
4 bag and seal the bag up with seals?

5           A.       Yes, I did.

6           Q.       What I would like you to do, without  
7 disturbing these seals, is to open this bag on the  
8 side and let's remove the contents?

9           MR. HILLMAN: Before they do that, may I  
10 look at the contents?

11          THE COURT: Yes, please.

12          MS. LIPPIS: I'm sorry, Mr. Hillman.

13          (Off the record discussion not reported.)

14          Q.       (BY MS. LIPPIS) If you will remove the  
15 other items from inside the package.

16          (Off the record discussion not reported.)

17          Q.       (BY MS. LIPPIS) Officer, I'm going to  
18 stand over here. I'm going to show you what's been  
19 marked as State's Exhibit 4-A. It's the bag you  
20 took out of State's proposed Exhibit No. 4. Do you  
21 recognize this bag?

22          A.       Yes, I do.

23          Q.       And how is it that you recognize the bag  
24 that we removed from 4-A?

25          A.       I recognize my initials, and it has my

1 writing on it.

2 Q. All right. Is this the bag that you used  
3 to impound or to place some of the items of clothing  
4 that you took from the defendant during this booking  
5 process?

6 A. Yes.

7 Q. Did you list the items that you had  
8 originally placed in this bag?

9 A. Yes, I did.

10 Q. What did you list on your bag?

11 A. One one pair brown cowboy boots, one pair  
12 white socks, and one pair blue Levi jeans.

13 Q. Are these the boots you took from the  
14 defendant, which have been marked as State's  
15 proposed Exhibit 4-B?

16 A. Yes, they are.

17 Q. Are these the boots that you had  
18 originally put into your own packaging?

19 A. Yes.

20 Q. It appears that these items have been  
21 repackaged by someone; is that correct?

22 A. Yes.

23 Q. Are these the blue jeans that's marked as  
24 State's proposed Exhibit 4-C that you placed in your  
25 own evidence bag?

1           A.       Yes.

2           Q.       These are the blue jeans that you removed  
3       from the defendant at the Clark County Detention  
4       Center?

5           A.       Yes.

6           Q.       I'm handing you now what's been marked  
7       for identification State's proposed Exhibit No. 5  
8       and ask you to take a look at this.

9                   THE COURT: Do you want to see it,  
10       Mr. Hillman?

11          Q.       (BY MS. LIPPIS) I'd ask you to take a  
12       look at State's proposed Exhibit No. 5 and ask you  
13       if you can identify this bag?

14          A.       Yes, I will.

15          Q.       What is the nature of identification?

16          A.       My handwriting and my initials.

17          Q.       Where is your handwriting located on the  
18       bag?

19          A.       All along the front part of the bag and  
20       on the seals.

21          Q.       On the seals?

22          A.       Yes.

23          Q.       Do those seals appear to be in the same  
24       condition now as they were at the time you sealed  
25       the bag with the evidence in it?

1           A.     No.

2           Q.     They have been --

3           A.     They have been opened.

4           Q.     -- opened?

5           A.     Broken, yes.

6           Q.     There is another different colored seal

7 placed on the bag, a dark red one, did you place

8 that seal?

9           A.     No, I didn't.

10          Q.     Is it true that someone has been in the

11 bag; is that correct?

12          A.     Yes.

13          Q.     When you package evidence, are you

14 assigned a D.R. number?

15          A.     Yes, I am.

16          Q.     What is the D.R. number?

17          A.     89-11770099.

18          Q.     And that is the same D.R. number on the

19 other State's proposed Exhibit 4 and the letters

20 that went with it; is that correct?

21          A.     Yes.

22          Q.     Where did you get this D.R. number? Who

23 assigns it?

24          A.     The department of records.

25          Q.     Is it a daily report number?



1           A.       Yes.   It's the report number that's  
2 assigned to a case or a booking.

3           Q.       So each time another case comes through  
4 the system, another arrest, if there is evidence to  
5 be booked, it's given its own D.R. number?

6           A.       Yes.

7           Q.       So same D.R. 89-11770099 is the D.R.  
8 number assigned specifically to this case?

9           A.       That's correct.

10          Q.       I'm going to ask you is that all the  
11 evidence that you booked, to make the record clear  
12 with regard to State's proposed Exhibits 4-A, B, and  
13 C, and now we are into State's proposed Exhibit 5,  
14 that these all were in your sole care, custody, and  
15 control from the time you received them from the  
16 Defendant Moraga until you placed them in these  
17 bags?

18          A.       Yes.

19          Q.       Do they so far appear to be in  
20 substantially the same condition now as they were at  
21 the time you booked them?

22          A.       Except for the repackaging.

23          Q.       Repackaging and seal on State's proposed  
24 Exhibit 5; is that correct?

25          A.       Yes.

1 Q. Officer, would you please open State's  
2 proposed Exhibit No. 5 without touching the seals,  
3 if you can.

4 If you will remove the contents from that  
5 package I will have it marked before we discuss it.

6 Is that it?

7 A. Yes.

8 MS. LIPPIS: Mr. Hillman would you like  
9 to see these as they are being marked?

10 (Off the record discussion not reported.)

11 THE COURT: We will take a ten minute  
12 break, ladies and gentlemen. Don't discuss the case  
13 among yourself or with anyone else.

14 We will be in recess for ten minutes.

15 (Off the record at 4:07 p.m. and back on  
16 the record at 4:18 p.m.)

17 THE COURT: You may resume, Ms. Lippis.

18 MS. LIPPIS: Thank you, your Honor.

19 DIRECT EXAMINATION CONTINUED

20 BY MS. LIPPIS:

21 Q. Officer, we left off with State's  
22 proposed Exhibit No. 5, which was your evidence  
23 impound bag. I'm showing you what's been marked as  
24 part of the contents from that bag as State's  
25 proposed Exhibit 5-A, do you know what this is?

1           A.     No, I don't.

2           Q.     Do you recognize the initials on it?

3           A.     The same as it was on the outside of the

4     bag.

5           Q.     Okay, thank you.

6                 MR. HILLMAN: Your Honor, I'm having a

7     hard time hearing the witness.

8                 THE COURT: Would you speak up, please.

9           Q.     (BY MS. LIPPIS) You indicated they were

10    the same initials as on State's proposed Exhibit 4;

11    is that correct?

12          A.     Yes.

13          Q.     The initials of LTE?

14          A.     Yes.

15          Q.     Perhaps Linda Errichetto; is that

16    correct?

17          A.     Yes.

18          Q.     Showing you what's been marked for

19    identification as State's proposed Exhibit 5-E. DID

20    that come out of State's proposed Exhibit 5?

21          A.     Yes.

22          Q.     What is this?

23          A.     It's an elastic knee brace or elastic

24    brace.

25          Q.     An elastic band that stretches?

1           A.     Yes, sir.

2           Q.     Was the defendant wearing this when you

3           booked him or did he have it on his person or do you

4           recall?

5           A.     I believe he had it on his leg. Under

6           the clothing.

7           Q.     Under his clothing?

8           A.     I'm not sure.

9           Q.     That's fine.

10                 Showing you what has been marked for

11           identification as State's proposed Exhibit 5-E, do

12           you recognize this?

13           A.     Yes, I do.

14           Q.     This came out of State's 5; is that

15           correct?

16           A.     Yes.

17           Q.     Was the defendant wearing this or

18           carrying this when you transported him and booked

19           him at the Clark County Detention Center?

20           A.     I don't recall.

21           Q.     It was in his possession; is that

22           correct?

23           A.     Yes, it was.

24           Q.     Showing you what has been marked as

25           State's proposed Exhibit 5-D which appears to be a

1 T-shirt. Did this also come from the defendant?  
2 A. Yes.  
3 Q. And you booked this during the procedure;  
4 is that right?  
5 A. Yes, I did.  
6 Q. Do you recall whether or not he was  
7 wearing or carrying this?  
8 A. No, I don't. He had several items of  
9 clothing, and I don't recall if he was wearing some  
10 of it, or all of it, or he was carrying it.  
11 Q. Showing you what has been marked for  
12 identification as State's proposed Exhibit 5-C,  
13 which appears to be men's boxer shorts, were these  
14 also taken from the defendant?  
15 A. Yes, sir.  
16 Q. Do you recall whether he was wearing or  
17 carrying these?  
18 A. He was wearing them.  
19 Q. Was he wearing his blue jeans and boots?  
20 A. Yes, sir.  
21 Q. The ones we just described as State's  
22 proposed Exhibits 4-B and 4-C?  
23 A. Yes.  
24 MS. LIPPIS: For the record, your Honor,  
25 contained within State's proposed Exhibit B, which

1 are the boots, are a pair of socks.

2 THE COURT: Have they been marked?

3 MS. LIPPIS: No, they have not. I just  
4 found them in there when I was looking for it.

5 Q. Showing you what has been marked State's  
6 proposed Exhibit 5-B, which appears to be man's gray  
7 jacket, do you recognize this?

8 A. Yes, I do.

9 Q. Was this also taken from the defendant  
10 during his booking procedure?

11 A. Yes, it was.

12 Q. Do you recall when he was stopped in the  
13 area of the crime with other officers, whether he  
14 was wearing this jacket or carrying it?

15 A. I believe he was wearing it.

16 Q. Are you sure?

17 A. No.

18 Q. Or do you recall?

19 A. I don't recall.

20 Q. Finally, Officer, I'm showing you what's  
21 been marked for identification as State's proposed  
22 Exhibit 6 and ask you, first of all, do you  
23 recognize this smaller envelope?

24 A. Yes, I do.

25 Q. What is the basis of your recognition?

1           A.     My signature.  
2           Q.     Your P number?  
3           A.     P number, signature.  
4           Q.     Your handwriting?  
5           A.     My handwriting.  
6           Q.     What is the D.R. number on that envelope?  
7           A.     89-11770099.  
8           Q.     Being the same D.R. number that was  
9           assigned to Exhibit 4 and contents and 5 is the  
10          contents; is that correct?  
11          A.     Yes, it is.  
12          Q.     Officer, if we were to open up this  
13          package, what would we find?  
14          A.     Find the collection kit for the sexual  
15          assault and the blood sample.  
16          Q.     Does this envelope appear to be in the  
17          same condition now as it was at the time you sealed  
18          it with your initial on that blue seal?  
19          A.     Yes, on the top it's been resealed.  
20          Q.     So it appears not to be in the same  
21          condition; is that correct?  
22          A.     Correct.  
23          Q.     What is different about it?  
24          A.     It's been opened.  
25          Q.     And is there a new seal placed on it?

1           A.     Yes, there is.  
2           Q.     Is your seal the red seal?  
3           A.     My seal is the blue seal.  
4           Q.     I'm sorry, blue seal?  
5           A.     Yes.  
6           Q.     Do you recognize the initial on the red  
7     seal?  
8           A.     They are the same initials on all the  
9     other ones.  
10          Q.     L-E-T?  
11          A.     Yes.  
12          Q.     Would you please open this on the side  
13     without disturbing the seal, I don't mind this on  
14     the side. You can open it up through here, remove  
15     the contents so I can have them marked.  
16                 Have you got it open?  
17          A.     Yes.  
18          Q.     Would you remove the contents, please.  
19     Is there anything else inside there?  
20          A.     Yes.  
21          Q.     You can lay it out on the counter, Tom.  
22          Q.     Is it empty now?  
23          A.     Yes.  
24          Q.     It appears you have removed three vials,  
25     one burnt orange top, yellow top, purple top, and



1 four envelopes; is that correct?

2 A. Yes.

3 Q. First of all, with regard -- let me get  
4 these marked. Do you want to see these, Mr.  
5 Hillman?

6 MR. HILLMAN: Thanks.

7 Q. (BY MS. LIPPIS) Officer, I'm showing you  
8 now what has been marked for identification as  
9 State's proposed Exhibit 6-A, B, and C, which appear  
10 to be the three vials or tubes which were mentioned  
11 previously.

12 First of all, with regard to State's  
13 proposed Exhibit 6-A, do you recognize that?

14 A. Yes, I do.

15 Q. And what is the basis of your  
16 recognition?

17 A. My P number is written on them.

18 Q. On the tube itself?

19 A. On the tube, yes.

20 Q. Does that hold true for all three vials,  
21 A, B, and C?

22 A. Yes, it does.

23 Q. Were vials of blood taken by Helen  
24 Prescott in your presence from the defendant Roy  
25 Moraga?

1           A.     Yes, they were.

2           Q.     Once the blood was taken and sealed in  
3     the tube, Ms. Prescott give it to you to be placed  
4     in evidence?

5           A.     Yes.

6           Q.     Did you put the information on the  
7     tubes?

8           A.     Yes.

9           Q.     Is that correct?

10          A.     The information of my signature.

11                 THE COURT:   Keep your voice up, please.

12                 MS. LIPPIS:   Speak up, please.

13                 THE COURT:   The problem is when you get  
14     close together, you are conversing as if you are  
15     just talking to one another.

16          Q.     (BY MS. LIPPIS)   Your initials are on the  
17     tube; is that correct?

18          A.     Yes.

19          Q.     Is there other handwriting on the tube  
20     with the defendant's name and date and time,  
21     approximately 1605 hours, did you write that on  
22     there?

23          A.     No, I didn't.

24          Q.     So that would have been written by the  
25     nurse, Helen Prescott; is that correct?

1           A.     Yes, it is.

2           Q.     Thank you.

3                     Did you keep these tubes in your sole  
4     care, custody, and control from the time you  
5     received them from Nurse Prescott until the time  
6     they were placed in the evidence vault and when it  
7     was retrieved from the evidence vault; is that  
8     correct?

9           A.     Yes, sir.

10          Q.     You did keep them in your sole care and  
11     custody?

12          A.     Yes, I did.

13          Q.     Do they appear to be substantially in the  
14     condition now as they were at the time you booked  
15     them other than the seals from the chemist?

16          A.     Yes.

17          Q.     Showing you now what has been marked for  
18     identification as State's proposed Exhibit D, E, F,  
19     and G, which appear to be four envelopes and ask you  
20     if you can identify these?

21                     THE COURT:   That's D, E, F and G; is  
22     that correct?

23                     MS. LIPPIS:   Yes, your Honor.   That is  
24     correct.

25                     THE WITNESS:   Yes, I can.

1 Q. (BY MS. LIPPIS) You previously described  
2 to us the sexual protocol that's done at the Clark  
3 County Detention Center on a person who is arrested  
4 for sexual assault; is that correct?  
5 A. Yes.  
6 Q. And you have advised us on taking pubic  
7 strands, comb strands, and head hair, do you recall  
8 that --  
9 A. Yes.  
10 Q. -- and saliva samples.  
11 With regard to State's proposed Exhibit  
12 6-D, it indicates head hair on the envelope; is that  
13 correct?  
14 A. Yes, it is.  
15 Q. Do you recognize this envelope?  
16 A. Yes, I do.  
17 Q. What is the basis of your recognition?  
18 A. My initials and P number on them.  
19 Q. Did this head hair come from the  
20 defendant?  
21 A. Yes, it did.  
22 Q. Did he remove it or did you remove it?  
23 A. I had him remove it.  
24 Q. And did he place it in this envelope?  
25 A. Yes, he did.

1 Q. Did you seal the envelope and put your  
2 initials over it?  
3 A. Yes, I did.  
4 Q. Does the envelope appear to be in  
5 substantially the same condition now as it was at  
6 the time you sealed it with the defendant's head  
7 hair?  
8 A. Yes, sir.  
9 Q. Showing you what has been marked for  
10 identification as State's proposed Exhibit 6-E, do  
11 you recognize this envelope?  
12 A. Yes, I do.  
13 Q. What is the basis of your recognition?  
14 A. My initial and P number.  
15 Q. This envelope indicates pubic hair  
16 strands; is that correct?  
17 A. Yes.  
18 Q. Were these the pubic hair strands from  
19 the Defendant Moraga?  
20 A. Yes, they are.  
21 Q. Did he remove those strands himself?  
22 A. Yes, he did.  
23 Q. Are combed hairs or pulled hairs?  
24 A. These are pulled hairs.  
25 Q. The defendant pulled them himself?

1 A. Yes, he did.  
2 Q. Did he place them in the envelope?  
3 A. Yes, he did.  
4 Q. Once he did what, did you seal the  
5 envelope?  
6 A. Yes, I did.  
7 Q. Does the envelope appear now to be the  
8 same condition as it was at the time you sealed it?  
9 A. No.  
10 Q. What is different about it?  
11 A. It has been opened.  
12 Q. And there is scotch tape at the top with  
13 initials?  
14 A. Yes.  
15 Q. And they are initials foreign to you; is  
16 that correct?  
17 A. Yes.  
18 Q. Are these the same initials that appear  
19 throughout all the other evidence?  
20 A. Yes, it is.  
21 Q. Showing you what been marked as State's  
22 proposed Exhibit 6-F, do you recognize this  
23 envelope?  
24 A. Yes, I do.  
25 Q. What is the basis of your recognition?

1           A.     I have my initials and P number on them.  
2           Q.     Are these the combed pubic hairs of the  
3 defendant?  
4           A.     Yes, they are.  
5           Q.     Did he comb his own pubic hair area?  
6           A.     Yes, he did.  
7           Q.     If there was any hair, he placed the comb  
8 and hair into the envelope?  
9           A.     Yes, he did.  
10          Q.     Did you then seal it and place your  
11 initials and P number?  
12          A.     Yes, he did.  
13          Q.     Does this envelope appear to be in the  
14 same condition now as it was booked in evidence?  
15          A.     No, it doesn't.  
16          Q.     Has it been opened and rescotched with  
17 tape?  
18          A.     Yes.  
19          Q.     Do you see the same initials we have been  
20 talking on this envelope?  
21          A.     Yes, I do.  
22          Q.     Other than that, does it appear to be in  
23 the same condition as it was now at the time?  
24          A.     Yes.  
25          Q.     Finally showing you State's proposed

1 Exhibit 6-G, do you recognize this envelope?  
2 A. Yes, I do.  
3 Q. What is the basis of your recognition?  
4 A. My P number and initials.  
5 Q. This says saliva sample on the front of  
6 it. Is the saliva sample, you previously described  
7 for us and that which you took from the defendant?  
8 A. Yes, it is.  
9 Q. Once that saliva sample air dried, who  
10 placed it into the envelope?  
11 A. I placed it in the envelope.  
12 Q. Did you then seal the envelope and put  
13 your initials and P number?  
14 A. Yes, I did.  
15 Q. Does it appear -- this envelope appear to  
16 be in substantially the same condition now as it was  
17 at the time that you sealed the saliva sample?  
18 A. No.  
19 Q. The difference again is scotch tape  
20 resealing and initials foreign to you?  
21 A. That's correct.  
22 Q. Those initials look like LTE, is that  
23 correct?  
24 A. Yes.  
25 Q. Once you completed the rape kit and



1 packaged everything, did you place all of this into  
2 evidence for purposes of forensic testing later in  
3 the future?

4 A. Yes, I did.

5 Q. Now, you mentioned, in your direct  
6 testimony, you were talking about a leg brace, you  
7 had been given a description of a Hispanic male  
8 either carrying, or I forgot, wearing a leg brace.  
9 Did the defendant in fact have a brace?

10 A. Yes, he did.

11 Q. Now, all these packages that we have  
12 opened we found certainly the elastic brace, if you  
13 want to describe it as such. Was there a brace in  
14 addition to that?

15 A. Yes, there was.

16 Q. What did you do with that brace?

17 A. It was left at the jail.

18 Q. For what purpose?

19 A. For medical reasons.

20 Q. Are you saying to us then that when  
21 people have medical needs such as braces or, et  
22 cetera, they are not booked into evidence, but left  
23 for the prisoner to use?

24 A. In this case it was not known what the  
25 medical reason or the extent of the medical reason

1 why he had the leg brace, it was left there in case  
2 it was needed or an item that he had to have in the  
3 jail.

4 Q. He would be checked then by jail  
5 physicians or nurses; is that correct?

6 A. Yes.

7 Q. When you removed the rest of his personal  
8 property, did you fill out a form, prisoner evidence  
9 receipt?

10 A. Yes, I did.

11 MS. LIPPIS: May I approach the witness,  
12 your Honor?

13 THE COURT: Yes.

14 Q. (BY MS. LIPPIS) I haven't had this  
15 marked, I'm showing you what appears to be a  
16 photocopy, however, prisoner evidence receipt form.  
17 Does that have your name on it?

18 A. Yes, it does.

19 Q. Does it indicate that certain items of  
20 evidence were released to you?

21 A. Yes, it does.

22 Q. On 12-5-89; is that correct?

23 A. Yes.

24 Q. Regarding Defendant Roy Moraga?

25 A. That's correct.

1 Q. Would you review that and indicate to the  
2 jury what items of personal property of the  
3 defendant was in fact released to you?

4 A. One brown pair of cowboy boots, one pair  
5 of blue jeans, one pair of socks, one white UNLV  
6 Rebel sweater, one white pullover shirt, one gray  
7 jacket, and one pair of white striped shorts.

8 Q. Those shorts meaning men's underwear,  
9 boxer-type shorts?

10 A. Yes.

11 Q. That's all the evidence we have just gone  
12 through, is that correct?

13 A. Yes, sir.

14 Q. Thank you.

15 MS. LIPPIS: I have nothing further of  
16 this witness, your Honor.

17 THE COURT: Cross examination.

18 MR. HILLMAN: Just a few questions,  
19 Judge.

20 CROSS-EXAMINATION

21 BY MR. HILLMAN:

22 Q. Officer Novack, you testified that you  
23 arrived at the scene after two other officers had  
24 stopped Mr. Moraga; is that correct?

25 A. No. When I arrived in the area, I was

1     approached by the gardener who gave me information  
2     of --  
3             Q.     Let me restate my question.  
4             A.     Okay.  
5             Q.     This is after you arrived there. What  
6     I'm talking about was some point in time, Mr. Moraga  
7     had been stopped by two other officers and then you  
8     arrived at the scene where Mr. Moraga was at; is  
9     that correct?  
10            A.     Yes.  
11            Q.     To transport him?  
12            A.     Yes; yes.  
13            Q.     You don't remember if he was wearing his  
14     coat at that point in time?  
15            A.     I believe he was wearing his coat at that  
16     time.  
17            Q.     Was it a cold day that day, or warm day,  
18     or do you recall?  
19            A.     I don't recall.  
20            Q.     Now, you took the statements from Mr.  
21     Gomez and Mr. Harper; is that correct?  
22            A.     Yes.  
23            Q.     But it was not on December 5th, is that  
24     correct?  
25            A.     That's correct.

1 Q. Do you remember what day it was?  
2 A. I believe it was the next day. I went  
3 back for investigation follow-up.  
4 MR. HILLMAN: I have no further  
5 questions.  
6 MS. LIPPIS: Nothing further.  
7 THE COURT: You may step down, Officer  
8 Novack.  
9 MS. LIPPIS: Officer Swift.  
10 THE COURT: You can just leave those  
11 there. Oh, those are yours.  
12 MS. LIPPIS: May I have the Court's  
13 indulgence one moment.  
14 (Off the record discussion not reported.)  
15 OFFICER RONALD S. SWIFT,  
16 having been first duly sworn to tell the truth, the  
17 whole truth and nothing but the truth, testified and  
18 said as follows:  
19 DIRECT EXAMINATION  
20 BY MS. LIPPIS:  
21 Q. Would you state your full name for the  
22 record and spell your last name, please?  
23 A. Ronald S. Swift, S-W-I-F-T.  
24 Q. Sir, are you employed by the Las Vegas  
25 Metropolitan Police Department?

1           A.     Yes, I am.  
2           Q.     How long have you been so employed,  
3   Officer Swift?  
4           A.     Almost 16 years.  
5           Q.     Did you have an occasion to be dispatched  
6   to 1000 Dumont, Apartment 207, on December 5th,  
7   1989?  
8           A.     Yes, I was.  
9           Q.     Do you recall approximately what time you  
10   were dispatched to that area?  
11          A.     Right around 4:00. I believe.  
12          Q.     In the afternoon?  
13          A.     Yes.  
14          Q.     Were you the first officer on the scene  
15   or the second?  
16          A.     I was the second one.  
17          Q.     Who was there first?  
18          A.     An Officer Dennis Devitte.  
19          Q.     Did you go directly to Apartment 207?  
20          A.     Yes.  
21          Q.     And who was there when you arrived?  
22          A.     The Officer Dennis Devitte, and a lady  
23   who lives in the apartment.  
24          Q.     Do you recall the lady's name?  
25          A.     Not offhand at this time, no, I don't.

1 Q. Was it a young woman?  
2 A. No. It was 40, 50 year old woman.  
3 Q. Was her daughter there?  
4 A. No.  
5 Q. Officer, I'd like to show you an  
6 officer's report. It appears to be written by you.  
7 You can certainly let me know?  
8 A. It's a crime report.  
9 Q. Is that your signature?  
10 A. Yes.  
11 Q. Whose signature is this person reporting?  
12 A. Yes.  
13 Q. Whose signature is that?  
14 A. That's Jodi Howard.  
15 Q. Jodi Howard is a young woman?  
16 A. Yes.  
17 Q. So she had to have been present to sign  
18 that?  
19 A. She wasn't there when I got there. She  
20 came later.  
21 Q. Oh, I'm sorry, my mistake. Thank you.  
22 A. Okay.  
23 Q. Were you called to assist in the  
24 investigation of a sexual assault?  
25 A. That was the call originally, yes.

1 Q. That was the original call?  
2 A. Uh-huh.  
3 Q. When you arrived, some other information  
4 came to light regarding things missing; is that  
5 correct?  
6 A. After I was there awhile, yes. Jodi  
7 Howard called on the phone and talked to me, and  
8 said she would be over because she thinks she was  
9 broke into that morning.  
10 Q. But, evidently, they didn't know the  
11 nature of this stuff until the rape happened --  
12 A. Right.  
13 Q. -- is that correct?  
14 All right. In fact, did she come over  
15 then and tell you the things that were missing?  
16 A. Yes, she did.  
17 Q. One of these things on this report  
18 indicates a lady's Seiko watch. Did she indicate  
19 that that was missing?  
20 A. Yes.  
21 Q. And along with some currency?  
22 A. Yes, and silver dollars and a -- some  
23 necklace or something.  
24 Q. The necklace, so that you know, has been  
25 located.



1 Did you have an occasion to interview the  
2 victim of the sexual assault?

3 A. It was real brief. Dennis Devitte was  
4 talking to her. I just stood by there for a second,  
5 for a few minutes.

6 Q. Do you know whether or not Dennis was the  
7 one that transported her to the one-on-one  
8 identification with Novack and then to UMC?

9 A. No, I don't know that.

10 MS. LIPPIS: I have nothing further.

11 MR. HILLMAN: No questions, your Honor.

12 THE COURT: You may step down. You are  
13 excused.

14 THE WITNESS: Okay, thanks.

15 THE COURT: Your next witness.

16 MS. LIPPIS: Officer Gillins.

17 OFFICER MICHAEL LONG GILLINS,  
18 having been first duly sworn to tell the truth, the  
19 whole truth and nothing but the truth, testified and  
20 said as follows:

21 DIRECT EXAMINATION

22 BY MS. LIPPIS:

23 Q. Would you state your full name for the  
24 record, please, and spell your last name?

25 A. Michael Long Gillins, G-I-L-L-I-N-S.

1 Q. How are you employed sir?  
2 A. With the Las Vegas Metropolitan Police  
3 Department.  
4 Q. And how long have you been so employed?  
5 A. Approximately three years.  
6 Q. What division were you assigned to on  
7 December 6th, 1989?  
8 A. The selectment enforcement gang  
9 intelligence unit.  
10 Q. On that date, did you happen to be in the  
11 area of approximately 1000 Dumont?  
12 A. Yes, I was.  
13 Q. Were you with someone else or by  
14 yourself?  
15 A. I was with Officer Mayo.  
16 Q. Is he your partner?  
17 A. Yes.  
18 Q. And you were working plainclothes at that  
19 time?  
20 A. Yes, I was.  
21 Q. Did you have an occasion to either see a  
22 subject or hear a dispatch that kind of correlated  
23 with each other?  
24 A. Yes, I did.  
25 Q. Would you describe to the jury what took

1 place in the sequence of events?

2 A. We were headed southbound on Maryland  
3 Parkway and by Desert Inn and a call came over the  
4 radio, a 426 in progress, which is a sexual assault  
5 that was in progress, that a woman was on the phone  
6 claiming that she was being or talking to her  
7 relative -- I don't remember what -- that she was  
8 being raped, and the subject was in the apartment at  
9 that time and that the address was 1000, 1000 block  
10 of Dumont.

11 Q. And what did you do?

12 A. We decided, since we were already working  
13 undercover capacity, we would just drive by and see  
14 if we can lend any hand or watch to see if anything  
15 was going on.

16 Q. And did you in fact do that?

17 A. Yes. We went to the 1100 block, 1000  
18 block of Dumont.

19 Q. What, if anything, did you see as you  
20 were approaching the thousand hundred block of  
21 Dumont?

22 A. We came up the street and we saw some of  
23 the police cars that were arriving. We went to, I  
24 believe it was 1100 Dumont. We were passing by the  
25 west side parking lot at that area. While we were

1 passing by there, we saw a Latin male stepping into  
2 the parking lot area from the north end of the  
3 apartment complex, northwest end of the apartment  
4 complex.

5 Q. Do you see that Latin male here in court  
6 today?

7 A. Yes, I do.

8 Q. Would you please point to him and  
9 describe an article of clothing that he's wearing?

10 A. He is wearing a black button-up shirt.

11 MS. LIPPIS: May the record reflect  
12 identification of the defendant?

13 THE COURT: Yes.

14 Q. (BY MS. LIPPIS) Would you describe for  
15 the jury what he was wearing when you first saw  
16 him?

17 A. First time we saw him, he did not have a  
18 shirt on at the time. He was wearing pants. I  
19 don't remember what type of pants they were. They  
20 were light colored pants and boots and he was  
21 carrying what looked like a jacket, a knee brace,  
22 and a shirt.

23 Q. Could he have been wearing blue jeans?

24 A. Yes, very definitely.

25 Q. So you indicated he was carrying his

1 shirt?

2 A. Yes, his shirt, his jacket and a white  
3 knee brace.

4 Q. Did you stop him at that time?

5 A. No.

6 Q. Did there come a time later when you  
7 received a description of the possible rape suspect  
8 over dispatch?

9 A. Yes, we did.

10 Q. What description did you receive?

11 A. Latin male, medium length black hair,  
12 with numerous tatoos, wearing a white knee brace and  
13 a jacket; I believe it was a tan jacket. That was  
14 the call that we got the description that we had.

15 Q. Are you sure on the colors of these  
16 clothing?

17 A. No, I'm not.

18 Q. When you received that description, what,  
19 if anything, did that signal to you?

20 A. It immediately clicked the guy that we  
21 had been following, we followed him from that  
22 apartment complex because something clicked in our  
23 minds, when we saw him with the wet hair, combing  
24 his hair walking away from the exact apartment  
25 complex where the sexual assault had occurred, that

1 we just took it upon ourself to follow him and then  
2 when we got the description, it just, you know,  
3 immediately clicked that was in fact the guy.

4 Q. So what did you do?

5 A. We then stopped him in the 900 block of  
6 Sierra Vista.

7 Q. Did you detain him for the purposes of  
8 having Officer Devitte bring the victim for a  
9 one-on-one identification?

10 A. That is correct.

11 Q. Did Officer Novack also arrive on the  
12 scene shortly thereafter?

13 A. Yes, that's correct.

14 Q. Once the victim identified the subject,  
15 was he taken into custody by Officer Novack?

16 A. Yes.

17 MS. LIPPIS: I have nothing further.

18 THE COURT: Cross examination.

19 CROSS-EXAMINATION

20 BY MR. HILLMAN:

21 Q. Officer Gillins, you were in plainclothes  
22 that day; is that correct?

23 A. That's correct.

24 Q. And do you remember if it was cold out  
25 that day?

1           A.       It was cool. It wasn't really that  
2 cold.  
3           Q.       And you stated that you followed Mr.  
4 Moraga for a distance; is that correct?  
5           A.       That's true.  
6           Q.       Was he getting dressed at that time or  
7 just carrying his clothes?  
8           A.       Yes, slowly but surely he was getting  
9 dressed.  
10          Q.       Was he combing his hair too?  
11          A.       When we first witnessed him, he was  
12 combing his hair, yes, it was wet.  
13                 MR. HILLMAN: Thank you. I have no  
14 further questions.  
15                 THE COURT: Anything further?  
16                 MS. LIPPIS: Nothing.  
17                 THE COURT: You may step down, Officer  
18 Gillins. You are excused.  
19                 Your next witness.  
20                 MS. LIPPIS: Denise Rudolph.  
21                 DENISE RUDOLPH,  
22 having been first duly sworn to tell the truth, the  
23 whole truth and nothing but the truth, testified and  
24 said as follows:  
25 . . .

1 DIRECT EXAMINATION.

2 BY MS. LIPPIS:

3 Q. Would you state your name, please, for  
4 the record and spell your last name?

5 A. Denise Rudolph, R-U-D-O-L-P-H.

6 Q. Thank you, Ms. Rudolph.

7 How are you employed?

8 A. I work in the Clark County Detention  
9 Center. I take fingerprints.

10 Q. Were you so employed on December 28th,  
11 1989?

12 A. Yes, I was.

13 Q. Ms. Rudolph, I'm showing you what's been  
14 marked for identification as State's proposed  
15 Exhibit No. 7 and ask you if you can identify it?

16 A. It's a card of fingerprints that I took.  
17 It has my initials and my P number on it.

18 Q. When a person is arrested and brought to  
19 the Clark County Detention Center, during the normal  
20 booking process, are they booked right away or can  
21 some time elapse before the formal process is done?

22 A. The booking or fingerprinting?

23 Q. Fingerprinting.

24 A. Fingerprints, sometimes the time can  
25 elapse.



1 Q. What date did you take these?  
2 A. December 28th, 1989.  
3 Q. If I tell you this would have been after  
4 the date of his arrest, how would he have been  
5 identified to you?  
6 A. Through photograph. They have  
7 photographs on the booking sheets and also  
8 photographs on what we call locator card, which goes  
9 everywhere when anything is made.  
10 Q. And those were on December 28, '89?  
11 A. 28th 1989.  
12 Q. Ms. Rudolph, I'm showing you what has  
13 been marked for identification as State's proposed  
14 Exhibit 8 and 9, which appear to be certified  
15 copies, certified on the back of the booking photos,  
16 photo at least taken of inmates. This photo appears  
17 to have been taken, dated in the photograph,  
18 December 28th, 1989; is that correct?  
19 A. Yes, that's correct.  
20 Q. Would those photos evidently have been  
21 taken on the same day that you did these  
22 fingerprints?  
23 A. Yes.  
24 THE COURT: Could you step back a little  
25 bit I think some of the jurors are not able to see

1 the witness.

2 MS. LIPPIS: I'm sorry, your Honor.

3 Thank you.

4 THE COURT: Thank you.

5 Q. (BY MS. LIPPIS) Where did you receive  
6 your training in taking fingerprints?

7 A. Through Metro and we were trained over at  
8 the I.D. bureau over on Fremont Street.

9 Q. How long have you been doing this?

10 A. Almost seven months since August.

11 Q. Since August?

12 A. August 1989.

13 Q. Thank you.

14 These fingerprints that are done, they  
15 are called exemplars. Once they are taken, they are  
16 permanently retained in an inmate or defendant's  
17 file; is that correct?

18 A. As far as I know, yeah, we don't keep  
19 anything at the detention center. They are all  
20 turned in, someone picks them up on a daily basis.

21 Q. Is this your handwriting?

22 A. Yes, it is.

23 Q. There is an I.D. number that's been  
24 assigned to a defendant or the person who was  
25 fingerprinted, Roy D. Moraga, what is the I.D.

1 number?

2 A. Every person that's ever been in any kind  
3 of contact with Metro, whether it be traffic ticket  
4 or incarcerated or work card, is assigned a D.R.  
5 number and they always have the same I.D. number.

6 Q. What is the I.D. number for Mr. Moraga?

7 A. 099388554.

8 Q. And on State's proposed Exhibit 8 and 9,  
9 there also appears to be an I.D. number located  
10 within the bottom of the picture. What is one I.D.  
11 number?

12 A. 099388554.

13 Q. The same number recorded on the exemplar;  
14 is that correct?

15 A. That's correct.

16 MS. LIPPIS: Thank you. Nothing  
17 further.

18 MR. HILLMAN: No questions.

19 THE COURT: You may step down, Ms.  
20 Rudolph.

21 Will your next witness be more than five  
22 minutes?

23 MS. LIPPIS: He is a fingerprint expert,  
24 your Honor.

25 THE COURT: Well, I think it will take

1 more than five minutes. So we are going to take our  
2 recess at this time. We will resume at 10:00  
3 tomorrow morning, ladies and gentlemen.

4 Once more, please heed the admonition I  
5 have given you previously. Do not discuss the case  
6 among yourselves or with anyone else, don't form or  
7 express any opinions concerning the trial and don't  
8 read, watch, or listen to any news accounts should  
9 there be any.

10 (Off the record at 4:50 p.m.)

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FILED

DISTRICT COURT  
CLARK COUNTY, NEVADA

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ORIGINAL

THE STATE OF NEVADA,  
Plaintiff,  
vs  
ROY D. MORAGA,  
Defendant.

CASE NO. C092174  
DEPT. NO. VIII

BEFORE THE HONORABLE:

MICHAEL J. WENDELL, DISTRICT JUDGE

TUESDAY, MARCH 13 1990, 10:05 A.M.

VOLUME II

APPEARANCES:

FOR THE STATE: DEBORAH J. LIPPIS, ESQ.

FOR THE DEFENDANT: R. ROGER HILLMAN, ESQ.

REPORTED BY: PATSY K. SMITH, C.S.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER

1		
2	<u>INDEX</u>	
3		<u>PAGE</u>
4	<u>WITNESSES</u>	
5	<u>DR. REICH</u>	
6	Direct Examination by Ms. Lippis	4
7	Cross-Examination by Mr. Hillman	11
8	Redirect Examination by Ms. Lippis	12
9	<u>SABINA YOUNG</u>	
10	Direct Examination by Ms. Lippis	13
11	<u>RICHARD HAGUE</u>	
12	Direct Examination by Ms. Lippis	23
13	Cross-Examination by Mr. Hillman	51
14	Redirect Examination by Ms. Lippis	52
15	<u>DETECTIVE JOHN FOX</u>	
16	Direct Examination by Ms. Lippis	54
17	Cross-Examination by Mr. Hillman	65
18	<u>LINDA ERRICHETTO</u>	
19	Direct Examination by Ms. Lippis	66
20	Cross-Examination by Mr. Hillman	83
21	<u>DETECTIVE ROBERT D. LUKE</u>	
22	Direct Examination by Ms. Lippis	83
23	<u>JEAN R. BEHL</u>	
24	Direct Examination by Ms. Lippis	97
25	Cross-Examination by Mr. Hillman	103
	Direct Examination by Ms. Lippis	105
	<u>ROY D. MORAGA</u>	
	Direct Examination by Ms. Lippis	108
	Cross-Examination by Mr. Hillman	117

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

EXHIBITS

PAGE

State's Exhibit Nos. 1 through 3	29
State's Exhibit Nos. 4 through 13	107

1 TUESDAY, MARCH 13, 1990, 10:05 A.M.  
2 THE COURT: Good morning, Ladies and  
3 Gentlemen.

4 You may call your next witness,  
5 Ms. Lippis.

6 MS. LIPPIS: Thank you, your Honor.  
7 Doctor Reisch.

8 DR. DONALD HENRY REISCH,  
9 having been first duly sworn to tell the truth, the  
10 whole truth and nothing but the truth, testified and  
11 said as follows:

12 DIRECT EXAMINATION

13 BY MS. LIPPIS:

14 Q. Sir, would you state your full name for  
15 the record, please, and spell your last name?

16 A. Donald Henry Reisch, R-E-I-S-C-H.

17 Q. Could you tell us what your profession  
18 is?

19 A. I'm a physician.

20 Q. And a medical physician?

21 A. That's correct.

22 Q. Where are you employed, sir?

23 A. I'm currently working at University  
24 Medical Center.

25 Q. In what capacity?



1           A.     I'm an emergency room physician.  
2           Q.     How long have you been a physician?  
3           A.     I graduated from medical school in 1984.  
4           Q.     What medical school was that?  
5           A.     University of Arizona.  
6           Q.     And are you licensed to practice medicine  
7     in the State of Nevada?  
8           A.     Yes, I am.  
9           Q.     Is there any particular specialized  
10    license that goes with being an emergency room  
11    physician?  
12          A.     I'm also board certified through the  
13    American College of Physicians subject for emergency  
14    medication situations.  
15          Q.     For the edification of the jury, would  
16    you describe the education and degrees you hold with  
17    reference to your medical degree?  
18          A.     I went to four years of medical school at  
19    four years of Arizona. I did my internship in  
20    Fresno, California, rotating internship, and I did  
21    residency emergency medicine in Bakersfield,  
22    California, for two years.  
23                 I graduated in 1987 and since that time,  
24    I have been working full time as an emergency room  
25    physician and during that time period, I obtained my

1 board certification in emergency medicine. I have  
2 been board certified for the past year.

3 Q. In the course of your practice as an  
4 emergency room physician -- before I get to that,  
5 let me ask this first, have you ever testified in a  
6 court of law before?

7 A. Yes, I have.

8 Q. Have you ever been considered as an  
9 expert to so testify?

10 A. Yes, I have.

11 Q. Do you recall when and how many times you  
12 have testified and been qualified?

13 A. I have testified twice before in a court  
14 of law. First for a murder case in which I was the  
15 physician who took care of the patient, who  
16 subsequently died, secondary to her wounds and the  
17 other time, I was a toxicologist or a poison  
18 specialist in poisoning.

19 Q. Did you testify in the courts in the  
20 State of Nevada on those cases?

21 A. No, in California.

22 Q. And you were certified as an expert in  
23 those cases?

24 A. Yes, I was.

25 Q. I'd like to direct your attention, if I

1     night, to December 5th, 1989. Were you on duty on  
2     that date in the afternoon?

3             A.     Yes, I was.

4             Q.     Did you have an occasion to treat a woman  
5     identified as Penny Hawk?

6             A.     Yes, I did.

7             Q.     And did you bring with you today medical  
8     records for Ms. Hawk from the hospital?

9             A.     Yes, I did.

10            Q.     What was the nature of the treatment that  
11     you gave to Ms. Hawk?

12            A.     Well, she was brought in by the police  
13     for a possible sexual assault.

14            Q.     Is there a standardized protocol or  
15     method of examination that you utilize with regard  
16     to potential victims of sexual assaults?

17            A.     Yes, there is. There is a sexual assault  
18     sheet made up by someone, I presume, by the county  
19     or police or something like that which ask very  
20     specific questions and along with those ever  
21     specific questions have drawings and such where we  
22     are supposed to mark down what we find on a medical  
23     exam.

24            Q.     Did you follow any standardized protocol?

25            A.     Yes, I did.

1 Q. Were you assisted by anyone during the  
2 examination of Ms. Hawk?

3 A. Yes, the nurse at the time was Sabina  
4 Young.

5 Q. And she is out in the hallway ready to  
6 testify today; is that correct?

7 A. Yes.

8 Q. Would you describe for the jury what you  
9 did in terms of your examination of Ms. Hawk and  
10 what your findings were?

11 A. Basically, what I'm there for is to treat  
12 the patient for any physical injury that she might  
13 have received, as well as collect medical evidence  
14 for a possible rape.

15 When I examine the patient, we -- first  
16 thing we do is do an interview and ask exactly what  
17 happened by her report and then after that, we do a  
18 physical exam looking for injuries and then also  
19 doing a pelvic exam looking for injuries and  
20 possible other medical evidence like semen or sperm  
21 or something in the vagina or anywhere else.

22 Q. Did you in fact do a physical examination  
23 on Ms. Hawk?

24 A. Yes, I did.

25 Q. What were your findings with regard to

1 that examination?

2 A. The physical exam was essentially  
3 normal. There was no, at least for the outside part  
4 of the physical exam, there is no obvious bruises or  
5 contusions or anything like that.

6 On the pelvic exam, everything was normal  
7 also except there was a clear liquid at the bottom  
8 of the vagina and it was basically when you look  
9 down into the vagina, you could see a little puddle  
10 of clear liquid that is not normally found in the  
11 vagina.

12 Q. Did you administer or take vaginal  
13 swabs?

14 A. Yes, we did. Part of the exam includes  
15 taking vaginal swabs, as well as oral swabs and  
16 other things.

17 Q. Do you take the oral swabs and other  
18 evidence that's collected from the body or does the  
19 nurse do that?

20 A. The nurse usually does that.

21 Q. And you were the one however who  
22 collected the medical evidence from the vaginal  
23 cavity?

24 A. That is correct.

25 Q. And you indicated that you have a

1 questionnaire that you follow where you ask a victim  
2 what happened; is that correct?

3 A. Right.

4 Q. In fact, did you ask her those questions?

5 A. Yes, I did.

6 Q. With regard to what she told you finding  
7 this liquid pool in the cavity of her vagina, would  
8 that be consistent with her relation to you of the  
9 events that occurred?

10 A. Yes. She told me, going back over the  
11 chart here and it's just a little check-off box and  
12 stuff like that, when we were discussing before I  
13 examined her, she said that an ejaculation did occur  
14 inside of her vagina and then on exam that was about  
15 -- let's see, yeah, she said that and then on the  
16 physical exam, you know, I have a drawing here of  
17 the clear liquid and the little puddle down in the  
18 bottom of the vagina.

19 Q. When you collected the evidence within  
20 the vaginal cavity, what do you do with it?

21 A. Basically we take it and put it -- it's  
22 basically a long Q-tip. We place it in there, place  
23 the Q-tip in a box. The box is put in a special kit  
24 that is sealed and the sealed kit is -- I believe  
25 the police take it as part of their evidence.

1 Q. In addition to the vaginal exam that's  
2 done, do we also, in a sexual assault protocol, take  
3 hair samples and combings from the pubic area?  
4 A. That's correct.  
5 Q. And head samples. Did your nurse do  
6 that?  
7 A. Yes.  
8 Q. Is blood also drawn from a sexual assault  
9 victim?  
10 A. Yes, it is.  
11 Q. Does the nurse do that as well?  
12 A. Yes.  
13 Q. And all of that evidence then you believe  
14 is turned over to Metro?  
15 A. Right.  
16 Q. When you completed your vaginal  
17 examination and collect the evidence within that  
18 cavity, did you give that evidence to your nurse?  
19 A. Yes, I did.  
20 MS. LIPPIS: Thank you. I have nothing  
21 further.  
22 THE COURT: Cross examination.  
23 MR. HILLMAN: Thank you, your Honor.  
24 CROSS-EXAMINATION  
25 BY MR. HILLMAN:

1 Q. Doctor Reisch, I believe you asked the  
2 victim in this case if she bit Ortega?

3 A. Yeah, I'm going to have to look over the  
4 chart here, yeah, "Did you bite the suspect?"

5 Q. And she answered no; is that correct?

6 A. That's correct.

7 Q. She also said that she did not scratch  
8 the suspect; is that correct?

9 A. No -- yes, correct.

10 Q. And I believe she also told you that she  
11 had had consensual intercourse within the last 72  
12 hours; is that correct?

13 A. That's correct. She had had by her  
14 report sexual intercourse on 12-3-89 at 1:00 A.M.

15 MR. HILLMAN: I have no further  
16 questions.

17 MS. LIPPIS: Just a little redirect.

18 REDIRECT EXAMINATION

19 BY MS. LIPPIS:

20 Q. Doctor, are you aware of the purpose for  
21 asking whether or not a rape victim has had  
22 consensual intercourse with another person other  
23 than the perpetrator within the last 72 hours?

24 A. I believe what they are looking for, I  
25 mean, obviously if somebody had sex in a short



1 period of time before they had been assaulted and  
2 raped, then there could be ejaculate from the first  
3 sexual contact and it would be somewhat confusing  
4 for the case.

5 Q. However, the testimony, expert testimony  
6 would come from a forensic scientist with regard to  
7 whether or not we can determine whose ejaculate is  
8 present?

9 A. That's correct.

10 Q. In the system?

11 A. That's correct.

12 MS. LIPPIS: Thank you. Nothing further.

13 THE COURT: Anything further?

14 MR. HILLMAN: Nothing further.

15 THE COURT: Thank you, Doctor. You may  
16 step down.

17 Your next witness.

18 MS. LIPPIS: Thank you. Sabina Young.

19 SABINA YOUNG,

20 having been first duly sworn to tell the truth, the  
21 whole truth and nothing but the truth, testified and  
22 said as follows:

23 DIRECT EXAMINATION

24 BY MS. LIPPIS:

25 Q. Would you state your full name for the

1 record, please, and spell your last name?  
2 A. My name is Sabina Young, Y-O-U-N-G.  
3 Q. Are you employed, Ms. Young?  
4 A. Yes.  
5 Q. What is your profession?  
6 A. I'm an R.N. in UMC for 16 years.  
7 Q. For 16 years as an R.N., you mean a  
8 registered nurse?  
9 A. Yes.  
10 Q. Have you been employed with UMC for 16  
11 years?  
12 A. Sixteen years.  
13 Q. In what department of University Medical  
14 Center were you assigned on December 5th, 1989?  
15 A. Emergency room.  
16 Q. Did you have an occasion to work with  
17 Dr. Reisch that day?  
18 A. Yes.  
19 Q. And is he the physician who just left the  
20 courtroom?  
21 A. Yes.  
22 Q. Would you state for the jury the nature  
23 of your education that allows you to be licensed as  
24 a registered nurse? Where did you go to school?  
25 A. UNLV college.

1 Q. Does UNLV have a nursing school?  
2 A. Yes -- no, not nursing school. It's to  
3 get --  
4 Q. (Interrupting) I'm sorry?  
5 A. To get a nursing degree. I think the  
6 difference between a nursing school, a nursing  
7 school is a diploma school. They used to do that in  
8 the old time. They don't do it.  
9 Q. What type of degree do you hold?  
10 A. B.A.  
11 Q. In what area?  
12 A. Nursing.  
13 Q. In nursing?  
14 A. Yes, sir.  
15 Q. You received that degree from the  
16 University of Nevada?  
17 A. Yeah.  
18 Q. In what year?  
19 A. I forgot. I was an L.P.N. for 12 years,  
20 I think for 11 years maybe. I don't know.  
21 Q. And then you went back to school?  
22 A. Yes.  
23 Q. To obtain your degree?  
24 A. Uh-huh.  
25 Q. Are you licensed by the State Board of

1 Nursing?

2 A. Yes.

3 Q. Did you have to take an examination to  
4 qualify for that license?

5 A. Yes.

6 Q. Do you have to update that license  
7 periodically?

8 A. Yes.

9 Q. At what intervals do you update your  
10 license?

11 A. Every two years, we have to apply for a  
12 new license and we have to verify so many hours of  
13 schooling. And you can do it many sorts of ways.  
14 You can take classes, whatever you have feel you  
15 need, or I went to Mexico to help to do surgery and  
16 that takes care of my hours.

17 Q. In other words, you are required to take  
18 a certain number of hours of continuing --

19 A. Right.

20 Q. -- education?

21 A. Uh-huh.

22 Q. How many hours are you required to take  
23 in order to update your license?

24 A. I think you have to take 30.

25 Q. Thirty?

1           A.       Usually when you take an average class  
2 you usually wind up with 60 or something.

3           Q.       Is your license current at this time?

4           A.       Yes.

5           Q.       Are you certified or do you have to be  
6 certified to work in the emergency room or is that  
7 just part of your normal duties?

8           A.       No, you have to do different classes like  
9 ACLS, there is more to it. You can't just pull a  
10 nurse from the floor and expect her to work in the  
11 emergency room. You have to have I wouldn't call it  
12 a higher education, a different education.

13          Q.       And have you obtained that?

14          A.       Yes.

15          Q.       That other education?

16          A.       Yeah.

17          Q.       How did you obtain that, what classes did  
18 you have to take in order to obtain it?

19          A.       All sorts of classes. You have to take  
20 trauma classes, you have to take special pediatrics,  
21 life support classes, add advanced CPR classes.  
22 They are quite extensive.

23          Q.       Are you also certified to withdraw blood  
24 from human beings?

25          A.       That's part of our job. You are not

1 certified on paper. It's part of our job. I mean  
2 that's expected.

3 Q. You have had training?

4 A. It's expected to.

5 Q. You have had training in that area as  
6 well?

7 A. Yeah, everybody is.

8 Q. Have you ever testified in a court of law  
9 before?

10 A. Yes.

11 Q. Have you ever been qualified as an expert  
12 in your particular field? That you know of?

13 A. I wouldn't know what you call an expert.

14 Q. Have you ever testified in the courts of  
15 the State of Nevada, either justice court or  
16 district court?

17 A. No, just on cases like this before. This  
18 comes up very frequently.

19 Q. All right, maybe you didn't understand.  
20 Have you testified in courts in Las Vegas?

21 A. Yes.

22 Q. Do you know whether or not you testified  
23 in justice court or district court?

24 A. No. It was the same as what I'm doing.

25 Q. The same type of case we are here for

1 now?

2 A. Right.

3 Q. You just don't remember what courts they

4 were?

5 A. Right.

6 Q. Has a judge not ever allowed you to

7 testify?

8 A. No.

9 Q. Have you always been allowed to testify?

10 A. Yes.

11 Q. On December 5th, 1989, did you have an

12 occasion to assist Dr. Reisch?

13 A. Yeah.

14 Q. In the examination of a sexual assault

15 victim?

16 A. Yes.

17 Q. Was that victim Penny Hawk?

18 A. Yes.

19 Q. Would you describe for the jury what you

20 did, in terms of assisting Dr. Hawk -- or excuse me

21 -- Dr. Reisch with his examination?

22 A. Okay, my job entails to bring the patient

23 into the room. We usually have them by theirselves.

24 There are no other patients. I have them undress.

25 I give them moral support. Usually at this time,

1 the patient tells you about what happened to her.  
2 They usually cry or you give them moral support.  
3 You talk to the patient a lot, explain the  
4 procedures you have to do to the patient, which  
5 entails drawing blood, taking specimens like pulling  
6 hair out of her head, pulling out pubic hair,  
7 swabbing out her mouth, she has to spit on a little  
8 piece of paper for saliva, you explain all of this  
9 to the patient.

10 You fill part of the papers out, do vital  
11 signs, make her comfortable, explain to her what the  
12 doctor is going to do next to her and we explain to  
13 her what kind of medication we are going to give her  
14 and why and that's about my part.

15 Q. When Dr. Reisch then begins to do his  
16 part, does that entail a vaginal examination?

17 A. Yes.

18 Q. Did Dr. Reisch in fact conduct an  
19 examination of her vaginal area?

20 A. Yes.

21 Q. And evidence was collected; is that  
22 right?

23 A. Yes.

24 Q. Did he then give that evidence to you?

25 A. The evidence always stays with me.



1 Q. Okay.

2 A. The doctor comes in and out, but I keep  
3 the evidence all the time.

4 Q. Once the doctor had concluded his  
5 examination and you had collected your portion of  
6 the evidence including the hair samples and saliva,  
7 what did you then do with those portions of  
8 evidence?

9 A. I took all the evidence that goes in an  
10 envelope and then that envelope will not leave my  
11 hand not for one minute until I give it to the  
12 officer. Or we have an icebox that's locked, it's a  
13 special rigged up by the police. We put sometimes  
14 cases through the slot. You cannot get to it unless  
15 the police gets it. Those are two possibilities,  
16 but it never leaves your sight. If I have to go to  
17 the pharmacy, I carry my envelope. I will not lay  
18 it on the table.

19 Q. Additionally as part of your  
20 responsibilities, with regard to assisting in these  
21 sexual assault examinations, do you occasionally put  
22 notes on the patient's record regarding her  
23 emotional state, how she appears to be at the time?

24 A. Sometimes we do, sometimes we don't.

25 Q. Did you in this case?

1 A. Yes.

2 Q. Do you have any independent recollection  
3 of this person, could you recognize her?

4 A. No. Maybe if I see her, but I do see too  
5 many people.

6 Q. Would it assist you in referring to your  
7 medical records to determine what you know noted  
8 about her emotional state at that time?

9 A. I have read this outside. I noted that  
10 she was very depressed and she was alert, alert and  
11 depressed I believe I wrote down. Patient is alert,  
12 appears to be depressed.

13 MS. LIPPIS: Thank you very much. I have  
14 nothing further.

15 THE COURT: Cross examination.

16 MR. HILMAN: No questions.

17 THE COURT: You may step down.

18 Your next witness.

19 MS. LIPPIS: Thank you. Richard Hague.

20 RICHARD HAGUE,

21 having been first duly sworn to tell the truth, the  
22 whole truth and nothing but the truth, testified and  
23 said as follows:

24 DIRECT EXAMINATION

25 BY MS. LIPPIS:

1 Q. Would you state your name, please, for  
2 the record and spell your last name?  
3 A. Richard Hague, H-A-G-U-E.  
4 Q. Are you employed, sir?  
5 A. Yes, sir.  
6 Q. What is the nature of employment?  
7 A. I'm an identification specialist with the  
8 Las Vegas Metropolitan Police Department  
9 criminalistics bureau.  
10 Q. Mr. Hague, would you describe for the  
11 jury what an identification specialist is, what do  
12 you do?  
13 A. Basically we search for, gather, process,  
14 and impound physical evidence including fingerprints  
15 and provide photographic service.  
16 Q. In other words, if a crime scene were to  
17 be established, the police department would call you  
18 out to take photographs of the crime scene as well  
19 as see if other evidence can be collected?  
20 A. Yes, basically.  
21 Q. Were you so employed on December 27th,  
22 1989?  
23 A. Yes, I was.  
24 Q. We're going to be talking today about  
25 some fingerprints and some comparisons that you have

1 effected. What I'd like you to do, if you would  
2 please, describe to the jury the nature of the  
3 background of education that you have in terms of  
4 being able to find fingerprints, lift them, and  
5 compare them with exemplars.

6 A. Besides on the job training in the  
7 criminalistics bureau and working with fingerprints  
8 experts and discussing various aspects of  
9 fingerprint work and crime scene work, I have in  
10 1962 received my associate degree in police science  
11 and administration at Los Angeles Harbor College.

12 In 1964, I received my bachelor degree in  
13 police science and administration and it also  
14 included courses in fingerprinting, crime lab,  
15 photography, and such.

16 In 1981, I graduated from the American  
17 Institute of Applied Science, School of Scientific  
18 Crime Detection. It's nationally recognized for  
19 their fingerprint course.

20 In 1982, I completed the F.B.I. Advanced  
21 Latent Fingerprints School. I'm a member of the  
22 International Association for Identification in both  
23 the international and California chapters. I'm a  
24 fellow of the fingerprint society in England and I  
25 have done miscellaneous things like teach the

1 fingerprint merit badge for the boy scouts, reach a  
2 classified special fingerprint course to Red Flag at  
3 Nellis Air Force Base and some other small  
4 activities like that.

5 Q. Mr. Hague, how long have you been  
6 employed with Metro specifically in the area of  
7 doing fingerprint identification?

8 A. Eleven and a half years.

9 Q. Can you estimate for the jury  
10 approximately how many fingerprint comparisons you  
11 have compared?

12 A. In 11 and a half years?

13 Q. A lot?

14 A. It would have to be in the thousands. I  
15 couldn't begin to guess at how many thousands, tens  
16 of thousands.

17 Q. Have you ever testified in a court of law  
18 before regarding fingerprint identification?

19 A. Yes, I have.

20 Q. Have you ever been qualified as an expert  
21 in that area?

22 A. Yes.

23 Q. Can you estimate approximately how many  
24 times you have been qualified?

25 A. Oh, in the field of fingerprint

1 identification, 60, give or take ten, I suppose.

2 Q. And obviously you have testified in the  
3 courts of the State of Nevada; is that correct?

4 A. Yes, that's correct, in Clark County.

5 Q. Have you ever testified out of state as a  
6 qualified expert in fingerprinting?

7 A. Not out of state, no.

8 Q. What I would like to do is take you back  
9 to December 5th, 1989. Were you dispatched to an  
10 apartment 227 at 1000 Dumont in Las Vegas, Clark  
11 County, Nevada?

12 A. Yes, I was.

13 Q. For what purpose, sir?

14 A. I was advised of a sexual assault at that  
15 location and I was requested to go out there to aid  
16 in the investigation of that crime.

17 Q. Would you describe for the jury what you  
18 did upon your arrival?

19 A. As in most cases, I inquired of the  
20 persons that were at the scene as to what had  
21 happened, and what it was that they wanted me to do  
22 there, which was basically take photographs of  
23 certain areas that they showed me around the  
24 apartment and also to look for fingerprints, and  
25 they had some suggestions as to things that they

1 were pretty sure had been handled by the suspect and  
2 those would be the most likely places to search for  
3 suspect fingerprints.

4 So I, therefore, did some photography of  
5 the scene and in search for fingerprints basically  
6 on those items and any other items that I thought  
7 might be useful and I believe I also at the time  
8 recovered a top and bottom bed sheet and a towel at  
9 the scene and impounded that in evidence.

10 MS. LIPPIS: May I approach the witness,  
11 your Honor?

12 THE COURT: Yes.

13 Q. (BY MS. LIPPIS) With regard to  
14 photographs that were taken at the scene, they would  
15 have been photographs that you took; is that  
16 correct?

17 A. I did take photographs, yes.

18 Q. I'm showing you what's been marked for  
19 identification as State's proposed Exhibits 1, 2 and  
20 3, and ask you if you can take a look at those and  
21 see if you can identify those?

22 A. Yes, these appear to be three of the  
23 photographs. I took other photographs at the scene  
24 that day.

25 Q. All right. As far as State's proposed

1 Exhibit No. 1, which is, I believe the first  
2 photograph on top, would you describe for the jury  
3 what that photograph is, and what it attempted to  
4 depict?

5 A. This is a photograph of a bed. It was  
6 located on the second floor of the apartment, and  
7 this was the bed the sexual assault reportedly  
8 occurred in.

9 Q. All right.

10 A. It shows the top covers pulled down, it  
11 shows several pillows. There is some other object  
12 there. I can't tell whether it's clothing or a  
13 towel from that picture, and it shows a nightstand  
14 to the side of it.

15 Q. Fine. With regard to State's proposed  
16 Exhibit No. 2?

17 A. No. 2 shows the portion of the first  
18 floor bathroom is the sink and countertop area with  
19 various miscellaneous type items, cans, towels,  
20 soap, brush and things like that sitting on the  
21 counter. This was one of the photographs, as was  
22 Exhibit No. 1, prior to my processing or doing  
23 anything other than the photographs therefore  
24 depicting the scene as I saw it when I arrived.

25 Q. And that would hold true for State's



1 proposed Exhibit 1?

2 A. That's correct.

3 Q. With regard to State's proposed Exhibit  
4 No. 3?

5 A. No. 3 shows a hair spray can that also  
6 shows in Exhibit No. 2 before I did any processing.  
7 However, Exhibit No. 3 showed this same hair spray  
8 can at a closer detail, after I had processed with  
9 fingerprint powder and have some lifting tape on the  
10 can. In other words, this is after I have done my  
11 processing and I believe I found some identifiable  
12 fingerprints on this can. I then come back around  
13 with the camera. In this case, I photograph this  
14 particular can showing that I have lift tape on  
15 there. So that's where the can that the  
16 fingerprints were lifted from, at least these  
17 fingerprints.

18 Q. And those are the prints we are going to  
19 be discussing; is that correct?

20 A. That's correct.

21 MS. GIPPS: Your Honor, I would at this  
22 time move for the admission of State's Proposed 1, 2  
23 and 3.

24 THE COURT: Any objections?

25 MR. HILLMAN: No objection.

1 MS. LIPPIS: Your Honor, may I briefly  
2 show these to the jury so they will know what we are  
3 talking about.

4 THE COURT: Yes.

5 MS. LIPPIS: Just take them and pass them  
6 down.

7 May we rest at ease for just a moment?

8 THE COURT: Yes, we will be at ease until  
9 the jury examines the photographs. You will be able  
10 to take those photographs to the jury room when you  
11 deliberate.

12 MS. LIPPIS: May I proceed, your Honor?

13 THE COURT: Yes.

14 MS. LIPPIS: Thank you.

15 Q. Mr. Hague, we were just beginning to  
16 discuss some identifiable prints. What I'd like you  
17 to do, if you would, for the jury and for our  
18 edification as well, is describe what you mean by  
19 identifiable prints, latents, exemplars and the type  
20 of comparisons you effected?

21 A. An exemplar is nothing more than an ink  
22 fingerprint or fingerprint card. It's taken as a  
23 standard. It's taken of a known person. If we take  
24 your fingerprints and you come down to the police  
25 department for a work card, we know who you are,

1 when we take your fingerprints. Any other time in  
2 the future if we don't know who you are and we can  
3 match those unknown fingerprints to yours, then we  
4 know that you are the person that left those  
5 fingerprints. So an exemplar is ink fingerprint  
6 card from a known person.

7 A latent fingerprint, the word latent  
8 means hidden or not readily visible and a print is  
9 an impression left by the rings on the fingers,  
10 palms, soles or toes. In common usage, however, a  
11 latent fingerprint means any fingerprint, whether  
12 it's visible or invisible, found at a crime scene.  
13 What was the rest of the question?

14 Q. That's a good place to stop. I have  
15 something to show you, if I may. I'd like to show  
16 you what's been previously marked for identification  
17 as State's proposed Exhibit No. 7, which appears to  
18 be a certified photocopy of a fingerprint exemplar.  
19 Number one, do you recognize that?

20 A. Yes. This is the certified copy that I  
21 gave you outside of court yesterday.

22 Q. All right. Did you make use of the  
23 original exemplar card?

24 A. Yes. I used the original exemplar card,  
25 which this certified copy, was taken from to make

1 the identification and thereafter, I used the  
2 original card to compare with the certified copy  
3 just to be certain that they were -- that this was a  
4 copy of the original.

5 Q. What I'd like to do, I will leave these  
6 here for you to utilize if you need it. We were  
7 talking about the hair spray can that you  
8 photographed and located in a downstairs bathroom of  
9 the apartment that we're discussing. Were you able  
10 to lift any latent prints from the hair spray can?

11 A. Yes, I lifted several latent  
12 fingerprints, identifiable fingerprints from that  
13 can.

14 Q. What I would like you to do is describe  
15 for the jury the process you use the procedure in  
16 order to lift a print from a surface and how you  
17 save it, and what you do with it in order to utilize  
18 it for comparison later?

19 A. Briefly, we use a fingerprint powder  
20 that's made out of about 95 percent lampblack which  
21 is soot and it's refined by the maker of the product  
22 so that the particles are very tiny and that they  
23 will stick to the moisture left behind in the  
24 fingerprint. They also are kind of like some of the  
25 fast food restaurants with their secret sauces and

1 these companies put in their own various secret  
2 ingredients to do various things to keep the powder  
3 dry, to weight the powder down and so on.

4 We use this prepared powder and a  
5 fiberglass fingerprint brush which is very soft to  
6 process the surface of that we're looking for  
7 fingerprints on. We dip the brush in the powder,  
8 usually shake a little of the excess off and just  
9 simply begin to use paint like brush strokes in a  
10 soft manner in most cases and as we find  
11 fingerprints developing the little ridges, they go  
12 in different directions, and as we start to develop  
13 this, if we can see that it may be an identifiable  
14 fingerprint, we will try to follow the rings with  
15 our stroke so we don't damage the print with the  
16 fibers from the brush.

17 As we clean up the print and develop it  
18 more, we take some lift tape, which is essentially  
19 like the common scotch tape except that it's been  
20 manufactured a little bit thicker for strength, a  
21 little bit wider, well, I'd say greatly wider so it  
22 will cover a print, and it bonds under a greater  
23 degree of tension to help keep some bubbles out, but  
24 it's basically the same sort of thing as scotch  
25 tape. We put that on top of the impression that we

1 have developed and my particular method is to do all  
2 of that, and when I have finished that, I go back  
3 and get my camera for the second time and go around  
4 and photograph where these pieces of paper are on  
5 prints that I'm going to lift.

6 Now, sometimes, when I lift these and get  
7 them back to the lab and look at them, I find that  
8 they are not sufficient for identification and those  
9 we just throw away.

10 The ones that we find are useful for  
11 identification that have been removed, we simply  
12 just pull the tape back off the item, and put it on  
13 a white transfer card, and we fill out the  
14 information that's provided on the card or the  
15 blank, we fill in and it includes the date, the  
16 location, the police D.R. number, and my name and  
17 the name of the victim and the address. We take  
18 these cards now that I have collected, put them in  
19 an envelope, fill out the information on that  
20 information similar to what's on the card and when  
21 we return back to the lab, we review that.

22 If we've taken the victim fingerprints  
23 for comparison, the first chance we get we will  
24 compare their exemplars, their fingerprints that we  
25 received at the scene and compare those to what we

1 recovered and brought back, because it could very  
2 well and, in many cases, is the victim's  
3 fingerprints.

4           If they do not appear to be any of those  
5 person's fingerprints, the victim, other family  
6 members, or whatever, then we save those and put  
7 them back in the envelope and put them in a basket  
8 in the crime lab in the field section. Each workday  
9 morning, one of the latent print examiners, who  
10 works day shift, comes into the office and empties  
11 that basket and they take it back into their office  
12 and do a review. They take the items out of there  
13 and review what's on the cards and at some time  
14 shortly thereafter, if the quality is good enough,  
15 they will put it into the fingerprint computer.  
16 Now, that's if it's a fingerprint from the first  
17 digit of a finger and it's clear enough and there is  
18 a sufficient amount of it. Many times that isn't  
19 the case. It might be from a different part of the  
20 finger, it might not be clear enough for the  
21 computer to read, or it might be from the palms,  
22 toes, or feet, in which case they almost have to  
23 have a name given to them from the detectives to  
24 check and see if we have their prints in the file,  
25 go to the file, bring them out and compare them, and

1 either they can find a match or they can't.

2           If it goes into the computer, the  
3 computer gives a readout of say the first 25,  
4 whatever the computer is told to do and it's usually  
5 something like the top 20 or so most likely. Now  
6 the computer cannot make a fingerprint  
7 identification, but it picks out those that are the  
8 most similar. Then somebody takes that list and  
9 starts with number one because that's the most  
10 likely fingerprint identification and they will go  
11 to the files and pull those cards out and sit down  
12 and make a comparison.

13           If it's not the one, then they have to go  
14 down the list. If it doesn't show up on that list,  
15 then that will be the end of it unless we get some  
16 suspect names from either officers or detectives  
17 requesting so-and-so be checked. If it is an  
18 identification, then they will write up the form  
19 saying it's an identification.

20           In the case of one that is searched  
21 manually not through the computer, the same thing  
22 happens; they make an identification and they type  
23 up some paperwork.

24           Now, if I'm the one who lifted those  
25 fingerprints and I have qualified as a fingerprint



1 expert in court before or I am preparing to qualify  
2 for my first time, then those fingerprints are sent  
3 to me for a second opinion and I will sit there and  
4 compare them and decide whether there is sufficient  
5 points of identification and clarity and so on to  
6 make an identification with. If there is, then at  
7 that time, I am the second person to make an  
8 identification. If I were just in training, there  
9 would be a third person who would already be  
10 qualified in court also to make a comparison. This  
11 we do in criminal matters where someone's liberty  
12 may be at stake to make sure there hasn't been any  
13 mistakes or problems with it.

14 Q. You were describing at one point the  
15 little white cards that you use that you transfer  
16 the latents to the card.

17 A. That's the latent print transfer card.

18 Q. Did you bring that with you today?

19 A. Yes, I did.

20 Q. May I see it, please?

21 Mr. Hague, I'm now showing you, returning  
22 to you, what you handed to me to be marked, which  
23 appears to be a manila envelope now marked as  
24 State's proposed Exhibit No. 10. Can you take a  
25 look at that and for purposes of our record describe

1 what that is?

2 A. This is the envelope that we use to place  
3 latent evidence and to contain it in one or more  
4 envelopes and then it's filed away in our files  
5 within the criminalistics bureau. It's also used to  
6 file negatives from photographs. In this case, it's  
7 for fingerprints.

8 Q. All right. There is some other  
9 information on there as well. I see the victim's  
10 name, P. Hawk; is that correct?

11 A. Yes.

12 Q. And the location at 1000 Dumont  
13 Boulevard, apartment 2277?

14 A. That's correct.

15 Q. Also, I see requested by, who was the  
16 officer that requested you respond?

17 A. The name that I used there were several  
18 officers out there. I used R. Swift, Personnel No.  
19 10488.

20 Q. And then of course your name is at the  
21 bottom; is that correct?

22 A. That's correct.

23 Q. Would you remove the contents of the  
24 envelope, please?

25 Those have now been marked in order as

1 10-A, B, C, D, E and F, I believe there are six  
2 transfer cards; is that correct?

3 A. That's correct.

4 Q. Referring, first of all, to State's  
5 proposed Exhibit 1-A and going through to, excuse me  
6 10-A through 10-F, would you describe what those are  
7 and where you recovered them from?

8 A. Beginning with Exhibit 10-A, I have  
9 impression from a drinking glass on the living room  
10 coffee table. That has not been identified to  
11 anyone.

12 Q. Now, by that, you mean the suspect Mr.  
13 Moraga or the victim; is that correct?

14 A. Or a friend, a neighbor, a police  
15 officer, it has not been identified to anyone.

16 Q. Okay.

17 A. Exhibit 10-B is a drinking glass on the  
18 living room coffee table. Again that has not been  
19 identified to anyone.

20 10-C, is from a Faberge hair spray  
21 16-ounce can on the first floor bathroom  
22 countertop. That fingerprint has not been  
23 identified to anyone.

24 10-D, is from a Faberge hair spray  
25 16-ounce can, first floor bathroom countertop. This

1 one has been identified as the left middle finger of  
2 Ray Moraga.

3 Q. Could that be right?

4 A. Yes. Police identification number  
5 938544.

6 Q. All right.

7 A. And this is one that I have identified.

8 Q. Set this one aside.

9 A. 10-E is again the same hair spray can  
10 from the same location of course. This is  
11 identified as the right ring finger and the right  
12 little finger of Roy Moraga, identification number  
13 938554. Those were both from the same can.

14 Q. Okay.

15 A. The last one, 10-F, is from a drinking  
16 glass on the living room coffee table and the  
17 impressions on this lift tape have not been  
18 identified to anyone.

19 Q. All right. First of all, with regard to  
20 State's proposed Exhibits A, B, C and F, where we  
21 have not identified to whom these prints belong, are  
22 they in fact identifiable prints?

23 A. Yes, they are.

24 Q. In this case, we had a known suspect; is  
25 that correct?

1           A.     Well, I wasn't involved in all the  
2 process that followed or I wasn't necessarily aware  
3 of all the information that was known at the time.  
4 Now, I had some information that they had a suspect  
5 and someone had seen the suspect. I don't remember  
6 how much information I had at the time as to who it  
7 was.

8           Q.     All right. With regard to the  
9 explanation you were giving to the jury regarding  
10 putting unknown prints into the computer, in this  
11 case, we had an exemplar that we returned through  
12 the Clark County Detention Services. Is that in  
13 fact what you used to make your comparison?

14          A.     That's what I used to make my comparison,  
15 yes, and these particular impressions were on what  
16 we refer to as SPC cards, and those are cards where  
17 the prints are just from one hand instead of both  
18 hands on the card, therefore requiring two separate  
19 cards, and the reason is on the back of these cards,  
20 we also have the palm prints as well as the  
21 fingerprints and the SPC files or fingerprint cards  
22 are kept in the files right there in the same  
23 building I'm at in the criminalistics bureau. The  
24 ten fingerprint cards are kept at a different  
25 location at Sixth and Fremont.

1 Q. The exemplar that you have used has the  
2 name Roy Moraga on it; is that correct?

3 A. Yes. Roy D., as in David, Moraga.

4 Q. How would that exemplar come to your  
5 attention in order for you to be able to effectuate  
6 your comparison with the latents that were  
7 returned? If you recall, how did it?

8 A. Yes, one of the latent print examiners  
9 had found that these impressions that I recovered  
10 from the scene that are on Exhibits 10-D and 10-E  
11 compared with those on the SPC cards in our files  
12 with the identification number 938554, bearing the  
13 name and signature of a person identified as Roy,  
14 D., as in David, Moraga. Those prints were taken on  
15 December 28th, 1989.

16 Q. And that's by Denise Rudolph, is that  
17 correct? Is it Randolph or Rudolph, now I forgot?

18 A. All I have on here is a number D.R. and  
19 that would stand for the first and last initials of  
20 the person taking the fingerprints and their  
21 personnel No. 3779. I don't believe I know that  
22 person.

23 Q. Okay, that's fine.

24 Would you describe for the jury, I  
25 suppose what we're looking for now once we have an

1 identifiable latent and we have something with this  
2 to compare it, we're looking for points of  
3 comparison separate from the print itself?

4 A. That's the major thing that we are  
5 looking for. It's not the only thing. The first  
6 thing that we would look for is the pattern type, if  
7 it's available.

8 Now, if you look at your fingers, the  
9 last digit on each finger in almost every single  
10 case has some sort of a pattern. It might be arch  
11 pattern where the ridges enter from one side of the  
12 finger rise up slightly in the middle and continue  
13 to flow out to the other side of the finger.

14 There is a second pattern called a loop  
15 where the ridges enter the fingerprint from one  
16 side, turn and return back out the same side of the  
17 finger and the third general type or pattern of  
18 fingerprints is a whirl and that generally is where  
19 the ridges toward the center make a generally  
20 circular movement. Now, there are four different  
21 subclassifications and that may not always be the  
22 case, but those are your three general  
23 classifications.

24 Now, if that appears on the latent  
25 impression that I recovered from the crime scene, I

1 will look for it on the exemplar. That will make my  
2 search a lot easier because if this should have an  
3 arch, for example, and I look through here and I  
4 don't find any arches, I don't need to spend any  
5 more time on that search. If I find ten arches,  
6 then I have ten fingers I'm going to have to look at  
7 more closely at the point of identification to see  
8 if possibly that is the same one.

9           So now if the latent does have a pattern  
10 type, I will check that first. If not, I will look  
11 for something to identify on an unusual pattern  
12 where maybe the ridges on the fingers make an X  
13 shape, that's fairly rare, or a dot that's just a  
14 single little dot ridge it doesn't connect to  
15 anything else. Those are less common than the other  
16 types of formation and I will look to see if I can  
17 find that or a scar or anything else that will help  
18 me on this and then look for that same thing on the  
19 exemplar.

20           If I can find something there, then  
21 that's my starting point and I will look for points  
22 of identification originally referred to as my  
23 newsha (phonetic), but they are points of  
24 identification. There are four basic points of  
25 identification that all their types are made out of



1 that we're aware of. Some day somebody may find  
2 something in the future, but so far there is a ridge  
3 ending and that's one of little raised strips of  
4 skin is ridged and where it comes to a sudden  
5 ending, it doesn't kinds taper off and eventually  
6 disappear, but one comes to a sudden stop, that's a  
7 ridge ending and we count that as one point or one  
8 point of identification.

9 Another type, as I mentioned, is a dot,  
10 just a single dot. It's not connected to anything  
11 else.

12 And a third type is a bifurcation, and  
13 that's where one ridge runs along and then separates  
14 into two, it bifurcates, it forks.

15 And the fourth type would be where two  
16 ridges come together at an angle and therefore that  
17 would be an angle. Those are the four basic types  
18 and there are things called enclosures and spurs and  
19 so on, but they are actually deviations of these  
20 four.

21 So now I look and I find I have one point  
22 of identification. I look and I'm looking under a  
23 magnifying glass for this purpose of somewhere  
24 between four and six power. It's usually around  
25 four power. That's four magnifications and I'll

1 have two ridge counters and those are nothing you  
2 can sharpen up and they'll be good points, knitting  
3 edges, a metal scriber for etching, anything with a  
4 sharp point that's handy and working with so that we  
5 can look at both fingers that we are comparing and  
6 put a ridge counter on the latent and a ridge  
7 counter on the exemplar. And as we do that, we find  
8 what we're looking for on the latent and I have a  
9 bifurcation we might say, and I'll put a ridge  
10 counter on that bifurcation. I will look on the  
11 other, find a bifurcation that I think is probably  
12 the same one and put a ridge counter on the point of  
13 it there.

14 Now, from there, I will look to see if  
15 there's anything else nearby. Maybe I find a second  
16 bifurcation with two intervening ridges that just  
17 flow through and don't do anything, find another  
18 bifurcation over here. So I will count with my  
19 ridge counter one, two intervening ridges and then  
20 place my counter on that bifurcation.

21 Likewise, I go over here with this ridge  
22 counter and now I count out here one, two and onto  
23 that bifurcation. I'm also looking to see do both  
24 bifurcations point basically in the same direction.

25 Now, our skin is elastic. When you are

1 pushing, pulling, or doing something our skin can  
2 turn. So one might show a bifurcation a little to  
3 one side and the other might show a little to the  
4 other. That's okay. That explains many  
5 differences, we can explain what happened to the  
6 elasticity of our skin. If we've got one  
7 bifurcation going this way and the other this way,  
8 that's not explainable, and we're in the wrong place  
9 or it's not that person's finger, and so on, and we  
10 go until we feel that we have enough to make an  
11 identification. We're also looking at the clarity,  
12 how clear is it, the prints that we're looking at,  
13 there's a number of things like this. Are there any  
14 unexplainable differences. If there's a difference  
15 on a clear impression, clear and distinct impression  
16 and we can explain why something is there or not,  
17 then we cannot make an identification.

18 Q. Were there any other unexplainable  
19 differences between Mr. Moraga's exemplar and the  
20 latents that you recovered?

21 A. No, I looked and did not find it.

22 Q. Are there a certain number of points of  
23 identification that you have to establish before you  
24 can positively confirm an identification? Is there  
25 a stopping point?

1           A.       In some countries there is. In this  
2 country there isn't. There was at one time a  
3 requirement for, I believe it was 12 points of  
4 identification to make an identification. In some  
5 countries it is currently more, some countries it's  
6 currently less. Some countries it's the same.

7           In our country, however, the F.B.I. felt  
8 after awhile that it was possible to make  
9 identifications -- positive identifications with no  
10 relevance of error with somewhat less number of  
11 points. So in this country, as in some other  
12 countries, no given number is required. It's up to  
13 the individual examiner's experience and judgment,  
14 his opinion as to whether he's made an  
15 identification, whether he has sufficient number of  
16 points and when I don't feel I have a sufficient  
17 number of points, I won't make an identification.  
18 If I feel that I have enough there, I will make an  
19 identification, again, considering the points of  
20 identification in the correct direction, are they in  
21 the correct location. If I have a bifurcation here  
22 and here, and I count over two ridges and have  
23 another one, that's fine, and I get over here and  
24 look at this bifurcation, count over to three, four,  
25 five ridges until I get to that bifurcation, there's

1 no explainable way why this finger wound up with  
2 three more intervening ridges. It may be the same  
3 finger. I may be looking in the wrong place, but  
4 that is not the place and I can't make an  
5 identification from there on those particular  
6 points.

7 Q. Having examined then State's proposed  
8 Exhibits D and E, which is the latent transfer card  
9 and the exemplar that you have utilized in that  
10 comparison, are you able to positively identify  
11 whose fingerprints are on that hair spray can?

12 A. Yes, I can. It's my opinion that the  
13 latents that I processed, photographed, and  
14 recovered at that crime scene on Dumont that was  
15 mentioned earlier in Exhibits 10-D and 10-E are the  
16 same as the left middle finger of the person named  
17 and the signature of Roy D. Moraga on that left SPC  
18 card that's on Exhibit 10-D and on 10-E, it's my  
19 opinion that two fingers on that recovered tape are  
20 the right ring and right little finger of the person  
21 who who made these exemplar prints on the right-hand  
22 SPC card again with the signature and name Roy D.  
23 Moraga, I.D. No. 938554.

24 Q. I only have one further question,  
25 Mr. Hague. When we were talking about those others,

1 obviously would it be fair to assume that a house is  
2 full of fingerprints whether identifiable or not  
3 from the people who live there?

4 A. Yes. Fingerprints, let me state first  
5 that fingerprints are not -- identifiable  
6 fingerprints are not left as easily as most people  
7 seem to think because I have been to something like  
8 eight to 10,000 burglaries alone and I find that  
9 many people tell me that they found fingerprints  
10 here and they found fingerprints here. What they  
11 are referring to some kind of a mark probably left  
12 by a finger.

13 However, when I put it up or even examine  
14 it, I find that the rings and the points necessary  
15 to make an identification are not there. For one  
16 thing, these are all what we call accidental  
17 prints. Nobody is going around the house trying to  
18 leave fingerprints and neither is a suspect. So  
19 most of the things that are touched do not contain  
20 identifiable fingerprints for many reasons. There  
21 are many reasons that they don't have identifiable  
22 fingerprints.

23 Sometimes we will come up with just the  
24 victim's prints, sometimes we will come up with  
25 identifiable prints we never identify to anybody.

1 Well, certainly they have visitors, they have  
2 relatives, there are other family members that  
3 weren't there when we were and so on. So there are  
4 a lot of fingerprints all throughout the house.

5 Now, of course, that also depends on how  
6 well the house has been cleaned and wiped down and  
7 how recent it's been. Normally we don't go around  
8 and wipe down a lot of things such as cans and  
9 packages and things like that, credit cards we just  
10 don't go around wiping those down. So a lot of time  
11 we have a better chance of finding an identifiable  
12 fingerprint there. So, yes, there can be many  
13 fingerprints in the house. There are a number of  
14 times we find nothing.

15 MS. GIPPIS: Thank you. I have nothing  
16 further.

17 THE COURT: Cross examination.

18 CROSS-EXAMINATION

19 BY MR. HILLMAN:

20 Q. Mr. Hague, then in effect what you are  
21 saying is that from the apartment that day, you only  
22 found six fingerprints that you felt were worth  
23 comparing?

24 A. I would say that there were six lifts.  
25 Now by that, I mean there may be, when I put the

1 tape down, there may be more than one print that  
2 that tape picks up and I think when these prints are  
3 looked at, we will see that they are not set down in  
4 a nice even order. Sometimes they overlap,  
5 sometimes part of them are smudged, but there are  
6 clear and distinct areas where certain fingerprints  
7 have been found. I don't recall, but I think there  
8 may be pieces of palm prints in there. So I did  
9 recover six lift tapes that contained six  
10 identifiable prints at least, yes.

11 Q. And those were from a drinking glass and  
12 from a hair spray can; is that correct?

13 A. Yes, that's correct.

14 MR. HILLMAN: I have no further  
15 questions.

16 THE COURT: Anything further?

17 MS. LIPPIS: Thank you, Judge.

18 REDIRECT EXAMINATION

19 BY MS. LIPPIS:

20 Q. Was the drinking glass that we talked  
21 about the same glass or was it other glasses, was it  
22 just one glass or more?

23 A. I would have to look at the photographs  
24 to know. There wasn't more than two. I think it  
25 was just one. But there may have been two.



1 MS. LIPPIS: Fine, thank you. I have  
2 nothing further.

3 THE COURT: Anything further?

4 MR. HILLMAN: Nothing else.

5 THE COURT: Thank you, Mr. Hague.

6 We will take a ten minute break, ladies  
7 and gentlemen. Once more, do not discuss the case  
8 among yourselves or with anyone else.

9 (Off the record at 11:13 A.M. and back on  
10 the record at 11:25 A.M.)

11 THE COURT: Ladies and gentlemen, we have  
12 run into a snag and we're going to have to take a  
13 break early. We are going to break at this time and  
14 resume at 1:00, not 1:30. We will resume at 1:00  
15 this afternoon.

16 So at 1:00, we will resume and, once  
17 more, do not discuss the case among yourself or with  
18 anyone else. We will be in recess until 1:00.

19 (Off the record at 11:25 A.M. and back  
20 on the record at 1:00 p.m.)

21 THE COURT: You may call your next  
22 witness.

23 MS. LIPPIS: John Fox.

24 DETECTIVE JOHN S. FOX,  
25 having been first duly sworn to tell the truth, the

1 whole truth and nothing but the truth, testified and  
2 said as follows:

3 DIRECT EXAMINATION

4 BY MS. LIPPIS:

5 Q. Would you state your full name for the  
6 record, please, and spell your last name?

7 A. John S. Fox, F-O-X.

8 Q. How are you employed, sir?

9 A. I'm a police detective for the  
10 Metropolitan Police Department.

11 Q. And how long have you been employed with  
12 Las Vegas Metropolitan Police Department?

13 A. Slightly in excess of 21 years.

14 Q. Are you currently assigned to the sexual  
15 assault division of the police department?

16 A. Yes, ma'am.

17 Q. And how long have you been with that  
18 unit?

19 A. Two years.

20 Q. I'd like to direct your attention to  
21 approximately December 4th and 5th and several days  
22 beyond of 1989, were you assigned to the  
23 investigation of a sexual assault case regarding a  
24 suspect identified as Roy Moraga?

25 A. Yes, ma'am.

1 Q. Did you have occasion to respond on  
2 December 5th to University Medical Center to  
3 interview or meet with the victim in that case?

4 A. Yes, I did.

5 Q. Do you recall her name?

6 A. Penny Hawk.

7 Q. Did you in fact respond to University  
8 Medical Center?

9 A. Yes, sir.

10 Q. Would you describe what you did once you  
11 got there?

12 A. I interviewed Mrs. Hawk, completed a  
13 crime report and with the nursing staff at the  
14 hospital, completed a serial kit concerning that  
15 alleged sexual assault.

16 Q. When you talk about serial kit, does that  
17 also include things other than serology, such as  
18 hair, vaginal swabs, et cetera?

19 A. Yes, ma'am.

20 Q. You were not present when the physical  
21 exam was done and that evidence was collected, were  
22 you?

23 A. No, I was not.

24 Q. Did you somehow come into possession of  
25 what we now know to call the rape kit?

1 A. Yes.

2 Q. And how did you come in possession of  
3 it?

4 A. That was presented to me by the staff  
5 nurse and I in turn placed it in a locked  
6 container.

7 Q. At what container and where was it  
8 located?

9 A. It's a refrigerator located on the  
10 premises at UMC.

11 Q. That would be in the emergency room  
12 area?

13 A. In that area, yes.

14 Q. In the triage?

15 A. Yes.

16 Q. Did you bring some evidence with you  
17 today, specifically, first of all that evidence kit,  
18 the rape kit?

19 A. Yes, I did.

20 Q. Detective Fox, I'm showing you what's  
21 been marked for identification purposes as State's  
22 proposed Exhibit No. 11. I ask you, sir, if you can  
23 identify that envelope?

24 A. Yes. That is the serology kit.

25 Q. And is that the evidence you obtained at

1 University Medical Center regarding Penny Hawk?

2 A. Yes, ma'am.

3 Q. What is the basis of your recognition?

4 What on that envelope causes you to recognize it  
5 after this period of time?

6 A. I recognize my name and a portion of it,  
7 the information on it was filled out by myself and I  
8 recognize that handwriting.

9 Q. There is a D.R. number assigned to that  
10 envelope?

11 A. Yes, ma'am.

12 Q. What is that D.R. number?

13 A. It is 89-117709.

14 Q. May I see the envelope for just a minute,  
15 please?

16 Does this envelope appear to be in  
17 substantially the same condition now as it was at  
18 the time that you sealed it and placed it in the  
19 refrigerated evidence unit at the hospital?

20 A. Yes, ma'am, with the exception that it  
21 has been opened for further review.

22 Q. There is a seal tape on the back of the  
23 envelope, a blue tape; who placed that there?

24 A. That was placed by the nurse.

25 Q. So you are referring to the red tape that

1 you did not place there, is that correct?

2 A. Yes, ma'am.

3 Q. Are there other initials on the red  
4 tape?

5 A. Yes, there are. There is the initial G  
6 followed by the digit 1471 and then the initial E.

7 Q. Thank you. What I'd like you to do, if  
8 you would please, is open up this envelope and  
9 remove the contents so we can --

10 THE COURT: Do you want to see it first?

11 MR. HILLMAN: I have seen it, thank you,  
12 your Honor.

13 Q. (BY MS. LIPPIS) Without disturbing the  
14 seals, if you can open it, please.

15 A. I'm going to have to cut through at least  
16 one of them unless I do it on the side.

17 Q. Can you cut it on the side?

18 A. Sure.

19 Q. If I could assist you.

20 A. Sure.

21 Q. Does the envelope appear to be empty at  
22 this point?

23 A. Yes, it does.

24 Q. Would you hand me the contents, please,  
25 and I will have them marked before we discuss what

1 they are. This envelope was given to you in a  
2 sealed condition; is that correct?

3 A. Yes, ma'am.

4 Q. Detective Fox, inasmuch as the envelope  
5 was given to you in a sealed condition and you then  
6 thereafter impound it, what I would like to do is go  
7 on further with the rest of the investigation you  
8 conducted.

9 Once you ended or terminated your  
10 interview with Mrs. Hawk at the hospital, did you  
11 then do any further investigation regarding this  
12 case?

13 A. Yes, I did.

14 Q. Would you describe for the jury what you  
15 did?

16 A. Yes, ma'am. While at the hospital with  
17 Mrs. Hawk, her daughter, Jodi Howard, arrived and  
18 indicated that she believed that their apartment had  
19 been burglarized and possibly by the suspect in the  
20 sexual assault. At that time, Ms. Howard told me  
21 that she felt that a key had been taken. When I saw  
22 a key, a front door key.

23 Q. It's true, is it not, that Ms. Howard had  
24 indicated to you that she hadn't seen the suspect,  
25 is that correct?

1 A. That's correct.

2 Q. So her indication of the suspect may have  
3 taken a key was certainly speculation at that point  
4 on your part?

5 A. That is correct.

6 Q. However, in light of the fact that she  
7 was missing the key to her apartment, her apartment  
8 key, what did you do?

9 A. At that time, she showed me another key  
10 to the apartment. I made an outline of that key.  
11 The following day, which would have been December  
12 6th, I went to the Clark County Detention Center and  
13 went through the property of the arrestee, that  
14 being Mr. Moraga.

15 Q. That would have been the remainder of his  
16 personal property that was left upon his person?

17 A. That's correct.

18 As I say, she had supplied me with a key  
19 which she described as being silver in color with no  
20 markings or stampings that she could recall. When I  
21 looked through the property of Mr. Moraga, I found  
22 such a key. I seized that key, took it up to Mrs.  
23 Howard's place of employment, had her look at it,  
24 she seemed that she was quite sure it was one in the  
25 same key.



1 Q. Did you compare the key that you  
2 retrieved from the defendant's personal property at  
3 the jail with the diagram that you had drawn?  
4 A. Yes, ma'am.  
5 Q. Did it appear to be the same?  
6 A. Yes, it matched.  
7 Q. And based on that, you went to see Ms.  
8 Howard at her place of employment?  
9 A. That's correct.  
10 Q. Once she tentatively identified that key  
11 as possibly belonging to her, what did you then do?  
12 A. I went from there to the residence on  
13 Dumont and tried the key in the front door of the  
14 apartment and it did operate the lock mechanism.  
15 Q. It did operate?  
16 A. Yes, ma'am.  
17 Q. Once you determined that Mr. Moraga was  
18 in possession of the apartment key, what did you do  
19 then with the key?  
20 A. I impounded it as evidence.  
21 Q. Did you bring that with you today, sir?  
22 A. Yes, ma'am.  
23 (Off the record discussion not reported.)  
24 Q. (BY MS. LIPPIS) I'm showing you what's  
25 been marked for identification as State's proposed

1 Exhibit No. 12 and ask you, sir, if you can identify  
2 that envelope?

3 A. Yes, ma'am. That is the envelope  
4 containing the key in question.

5 Q. What is the basis of your identification  
6 of that particular envelope?

7 A. Recognition of my printing, as well as my  
8 initials, personnel number which appear on the face  
9 of the envelope and the seal that I placed on the  
10 back side of the envelope also containing my  
11 initials and personnel number.

12 Q. Does that envelope have a D.R. number  
13 assigned to it?

14 A. Yes, ma'am.

15 Q. What is the D.R. number?

16 A. 89-117709.

17 Q. Does it also have the defendant's name  
18 and the case number assigned to it on that envelope,  
19 which would be the D.R. number?

20 A. Yes, it does.

21 Q. Is that Roy D. Moraga?

22 A. I have it as Roy Moraga.

23 Q. Does that envelope appear to be in  
24 substantially the same condition now as it was at  
25 the time that you put the key inside of it and

1 evidently sealed it and initialed and sealed it?

2 A. Yes.

3 Q. So this envelope has not been opened?

4 A. That's correct.

5 Q. Would you please open the envelope  
6 without disturbing the seal and remove the  
7 contents?

8 (Off the record discussion not reported.)

9 Q. (BY MS. LIPPIS) Detective Fox, I'm  
10 showing you now what has been marked for  
11 identification as State's proposed Exhibit 12-A and  
12 ask you if you can identify that document?

13 A. That is a receipt supplied by the  
14 detention center indicating that I have removed  
15 property from Mr. Moraga's property.

16 Q. So you obtained a copy of the receipt  
17 with the keys and you leave a copy in his personal  
18 effects, is that correct?

19 A. I believe a copy goes to his personal  
20 effects. I know that the jail retains the  
21 original.

22 Q. All right, fine. Thank you, sir.

23 I'm now showing you what's been marked  
24 for identification as State's proposed Exhibit 12 B  
25 and ask you if you can identify that?

1           A.     This is the key ring and the two keys  
2 seized and the silver key is the one that fits the  
3 lock mechanism to the Hawk residence.  
4           Q.     And that residence was located at 1000  
5 Dumont?  
6           A.     Apartment 272 or 227, I have to look.  
7           Q.     227.  
8                   There are also some writing on the silver  
9 key. Do you know what this writing is?  
10          A.     Yes, ma'am, again that's my initials and  
11 my personnel number.  
12          Q.     The second key, for the record, I suppose  
13 is sort of gold in color. These two keys were  
14 together on this key ring in the defendant's  
15 properties?  
16          A.     Yes.  
17          Q.     Did you ever try this key in Mrs.  
18 Howard's --  
19          A.     I did not. I questioned Ms. Howard about  
20 both the ring and the ring holder, as well as the  
21 second key and she had no knowledge of them nor did  
22 she recognize them.  
23          Q.     And obviously by comparison these two  
24 keys are not the same?  
25          A.     No.

1 Q. Thank you.

2 MS. LIPPIS: I have nothing further of  
3 this witness.

4 THE COURT: Cross examination.

5 MR. HILLMAN: Just a few questions, your  
6 Honor.

7 CROSS-EXAMINATION

8 BY MR. HILLMAN:

9 Q. Officer Fox, you stated that you placed  
10 the serology kit in a locked refrigerator; is that  
11 correct?

12 A. That's correct.

13 Q. And that's at the University Medical  
14 Center?

15 A. Yes, sir.

16 Q. Do you know who has access to that locked  
17 container?

18 A. So far as I know, only staff members from  
19 our criminalistics bureau.

20 Q. In other words, only the people working  
21 in the criminalistics department?

22 A. As far as I know.

23 MR. HILLMAN: I have no further  
24 questions.

25 MS. LIPPIS: Nothing further.

1 THE COURT: You may step down, Detective  
2 Fox.

3 Your next witness.

4 MS. LIPPIS: Linda Errichetto.

5 LINDA ERRICHETTO,

6 having been first duly sworn to tell the truth, the  
7 whole truth and nothing but the truth, testified and  
8 said as follows:

9 DIRECT EXAMINATION

10 BY MS. LIPPIS:

11 Q. Would you state your full name for the  
12 record, please, and spell your last name?

13 A. My name is Linda Errichetto,  
14 E-R-R-I-C-H-E-T-T-O.

15 Q. How are you employed, Ms. Errichetto?

16 A. I'm a criminalist for the Las Vegas  
17 Metropolitan Police Department.

18 Q. And how long have you been so employed  
19 there?

20 A. About 12 and a half years now.

21 Q. Would you describe for the jury what a  
22 criminalist and the nature of your responsibilities  
23 as a criminalist?

24 A. A criminal is someone who is responsible  
25 for analyzing a variety of evidence and this can

1 include powders and leafy substances for the  
2 presence of controlled substances. It can include  
3 biological fluids like blood, urine, saliva, semen,  
4 and those types of things, and those are the two  
5 areas that I'm responsible for analyzing drug  
6 substances and also for sexual assault cases,  
7 homicides, and things like that.

8 Q. Is there a special type of education that  
9 is required for you to be able to perform these  
10 types of duties?

11 A. Yes, there is.

12 Q. Would you tell the jury your educational  
13 background?

14 A. I have a bachelor of arts degree in  
15 chemistry from Thiel College in Greenville,  
16 Pennsylvania, and I have a master of science degree  
17 in forensic chemistry from the University of  
18 Pittsburgh in Pittsburgh, Pennsylvania, and after  
19 becoming employed with the police department, I  
20 received about 320 hours of vocational training in  
21 the analysis and identification of biological fluids  
22 and those, once again, can include things like  
23 blood, saliva, semen and so forth.

24 After I became employed, I began  
25 testifying in court as an expert and I have

1 qualified in the district courts of Clark County and  
2 Nye County, in the municipal courts of Henderson,  
3 Boulder City, and Las Vegas, and the justice courts  
4 of Las Vegas township and Reatty and Henderson.

5 Q. Thank you.

6 A. I'm sorry, probably about 200 times.

7 Q. That's all right.

8 Did you have an occasion to do some  
9 testing with regard to a case entitled State of  
10 Nevada versus Roy Moraga?

11 A. Yes, I did.

12 Q. I'd like to show you what's been marked  
13 for identification, first of all, as State's  
14 proposed Exhibit No. 4, which appears to be a large  
15 evidence envelope and ask you if you can identify  
16 that bag?

17 A. Yes, I can.

18 Q. Can you tell me the nature of your  
19 identification?

20 A. There's a large white sticker on the  
21 front of this envelope that has a variety of  
22 information on it that was written in my  
23 handwriting. In addition to that, you can see these  
24 red seals on the back of the envelope and they have  
25 my initials and a date in my handwriting also on the



1 back.

2 Q. Showing now what's been marked for  
3 identification as State's proposed Exhibit 4-A, can  
4 you identify that bag? First, let me ask you this,  
5 when you received the evidence bag which is entitled  
6 4-A, did you have to repackage it?

7 A. Yes, I did.

8 Q. Can you tell us why?

9 A. I went to get ahold of the bag and lifted  
10 it up and I ripped the whole top of it. So I had  
11 to, when I was finished with my analysis after I  
12 opened the bag and took the contents out, I thought  
13 I would be unable to properly return the evidence  
14 that was contained in this bag. So I had to  
15 repackage everything in a larger bag. However, I  
16 did keep this bag because this was the officer's  
17 original bag that I ripped.

18 Q. So when the officer came in and didn't  
19 recognize this, it was because his bag was placed in  
20 the inside?

21 A. Right.

22 Q. From your paperwork that's noted on  
23 State's proposed Exhibit No. 4, what should this  
24 evidence bag have contained?

25 A. This was the rebooking of the original

1 package 4-A and that had some cowboy boots in it and  
2 some socks and pair of blue jeans, and, once again,  
3 like I said, I kept the original bag so the officer  
4 would be able to identify his original bag.

5 Q. Thank you.

6 Did you do any forensic testing on the  
7 boots, socks, or blue jeans?

8 A. I did some examination on the blue  
9 jeans. And I examined them and I identified some  
10 stains on the front of the blue jeans.

11 Q. I'm showing you what has been marked for  
12 identification as State's proposed Exhibit 4-C and  
13 ask you if those are in fact the jeans that you  
14 tested?

15 A. Yes, they are.

16 Q. Would you describe what you did in terms  
17 of testing and the results?

18 A. Sure. You can see that there's a little  
19 hole cut out from these blue jeans right here and  
20 has a little mark on it, and that's a mark that I  
21 use to show that I put this hole there and I removed  
22 some of the fabric so I can test it. In addition to  
23 that, I also put my initials on the inside of the  
24 pants so I can identify that these are the jeans I  
25 examined.

1                   What I did was I noticed some -- it's  
2   probably difficult for you to see, but there is some  
3   discoloration in the jeans in this area, kind of a  
4   reddish stain, and I cut out an area because it  
5   looks like blood to me and I examined that area and  
6   identified it was in fact human blood that was  
7   present in these reddish brown stains that I cut  
8   out.

9           Q.     Were you able to type the blood?

10          A.     No, ma'am, I was not. I felt there was  
11   not a sufficient amount there.

12          Q.     Thank you.

13                   I'm showing you now what's been marked  
14   for identification as State's proposed Exhibit No. 5  
15   and ask you if you can identify this bag?

16          A.     Yes, I can. There is an area on it that  
17   says "chain of custody" and my first two initials  
18   and my last name, a number called the P number which  
19   is my identification number in the police  
20   department, and a date and a time are in my  
21   handwriting on the front of the bag.

22                   In addition to that, you can see a red  
23   seal here. That seal is intact and that has my  
24   initials on it and a date and, once again, that's in  
25   my handwriting.

1 Q. Thank you.

2 Did you remove the contents from this bag  
3 for the purpose of taking a look at the contents and  
4 seeing whether or not analysis should be conducted  
5 on some of the contents?

6 A. Yes, I did.

7 Q. What in fact did you analyze that came  
8 out of State's proposed Exhibit 5-A?

9 A. There were a variety of clothing items in  
10 that bag and I examined a pair of boxer shorts. I  
11 also examined a light gray polo-type shirt, and I  
12 believe I looked at a dark gray jacket that was in  
13 there. However, I didn't do a full analysis on it.

14 Q. Well, did you find anything on the dark  
15 gray jacket at all?

16 A. No; no, I didn't.

17 Q. I'm showing you, first of all, that's  
18 been marked as State's proposed Exhibit 5-A, which  
19 also came out of that bag. Can you also identify  
20 that item?

21 A. This is called a slide holder and in  
22 there is a microscope slide that I made.

23 Q. Is there any evidence or testimony with  
24 regard to this microscopic slide that's in there?  
25 We couldn't tell what it was.

1           A.     Oh, I'm sorry, there is a D.R. and  
2 information on the slide itself. However, the slide  
3 is contained in this so it doesn't break and I made  
4 a stain extract of the boxer shorts to look at it  
5 under the microscope.

6           Q.     Then I will hand you for identification  
7 as State's proposed Exhibit 5-C, which appear to be  
8 men's boxer shorts?

9           A.     Yes.

10          Q.     Are those the shorts which you tested?

11          A.     Yes, ma'am, they are.

12          Q.     Would you describe the testing conducted  
13 and your results?

14          A.     Once again, I cut out a little section of  
15 the stained area that initially when I do an  
16 examination, I look at an item of clothing and I see  
17 if there are any stains that might be blood or semen  
18 like stains.

19                 In this case, the boxer shorts have a  
20 small area of sustaining near the fly area that I  
21 thought could possibly be semen. So I cut out that  
22 area and then I tested the area that I cut out and I  
23 found that they did in fact have semen on them. On  
24 the shorts.

25          Q.     And those are the slides that are

1 contained in State's proposed exhibit --

2 A. It's one slide.

3 Q. In State's proposed 5-A?

4 A. Right.

5 Q. Showing you what has been marked as  
6 State's proposed 5-D, which appears to be the light  
7 gray shirt, what tests, if any, and what results  
8 from the tests that you made?

9 A. On this shirt, I noticed once again a  
10 reddish, light reddish brown stained area on the  
11 front of the shirt and I cut out the area once again  
12 and tested it, and I believe that I identified human  
13 blood on this. However, I was not able to blood  
14 type the stain or get a type from it because there  
15 wasn't a sufficient amount of the stain there.

16 Q. With regard to the blood that you found  
17 on the blue jeans and this light gray shirt, are you  
18 able to tell, through testing, the age of the blood  
19 stains?

20 A. No, ma'am, I'm not.

21 MS. LIPPIS: May I have the Court's  
22 indulgence for one moment, your Honor.

23 Q. I'm showing now what has been marked for  
24 identification as State's proposed Exhibit No. 11  
25 and ask you if you can identify that?

1           A.     Yes, I can.

2           Q.     And what is the basis of your  
3     identification?

4           A.     Once again, there is an area on the front  
5     of this envelope that says chain of custody and that  
6     has my first two initials and last name, a P number  
7     and a date on it, and then a variety of red stains  
8     on the back and the side have my initials and P  
9     number on them also.

10          Q.     Does this envelope, as well as the other  
11     envelope you testified to, appear to be in  
12     substantially the same condition as it was at the  
13     time you opened it, removed it, opened the contents,  
14     and resealed it?

15          A.     When I resealed it, I would have resealed  
16     the areas I opened, and, of course, it's been opened  
17     and all contents removed.

18          Q.     Other than that, it's in the same  
19     condition?

20          A.     Yes.

21          Q.     I'm handing you now what has been marked  
22     for identification as State's proposed Exhibits A,  
23     B, C and D, and ask you if you had an opportunity to  
24     see those during your examination?

25          A.     Yes, I looked at some of these samples.

1 I looked at some of the envelopes that were  
2 contained in this. The most notably, the combed  
3 pubic hair, the pubic hair standards, and saliva  
4 sample.

5 Q. Were you able to do any testing with  
6 regard to these samples?

7 A. Well, the combed pubic hair sample, there  
8 were no hairs contained in it. So I would have  
9 opened it and looked to see if there were any hairs  
10 in it, and there weren't, so I just put that on the  
11 side.

12 The pubic hair standard contains strands  
13 from the victim's pubic region and I believe I did  
14 microscopic examination. In other words, I just  
15 looked at it not under a microscope, but on a piece  
16 of white paper to note what type of hairs the victim  
17 had.

18 The saliva sample I cut out an area of  
19 the saliva sample for testing, and I did not look at  
20 the head hairs standard.

21 Q. I'm showing now what's been marked for  
22 identification as State's proposed Exhibit E, F, G,  
23 H, I and J, all being removed from the rape kit  
24 sexual assault.

25 A. These are a variety of items that are



1 contained in the kit that I examined. The vaginal  
2 smears are slides that contains smears from the  
3 vaginal area, then there is swabs from the vaginal  
4 area. There is swabs from the mouth or oral area,  
5 there is also several blood samples that I examined  
6 and made stains from. I think the yellow and the  
7 purple were the two that I examined and made stains  
8 from and I typed that blood to determine what blood  
9 types the victim was.

10 Q. Having done your analysis with this, did  
11 you then do some analysis with regard to the  
12 subject's or suspect's rape kit?

13 A. Yes, it's a serology standard kit.

14 Q. I'm showing you what has been marked for  
15 identification as State's proposed Exhibit No. 6,  
16 contents are in it, and ask if you can identify that  
17 envelope?

18 A. Yes, I can. Once again, there is an area  
19 that says "chain of custody" and my initials and  
20 name appears there. Once again you can see a red  
21 police seal at one end of the manila envelope and  
22 that also contains my identifying marks, my initials  
23 and a date. There's a variety of things inside this  
24 envelope. We have blood samples that were purported  
25 to be from Roy Moraga, is that correct, how I'm

1 saying that?

2 Q. Yes.

3 A. There is also some standards, pubic hair  
4 standards, and a combed pubic hair sample, and a  
5 saliva sample also from Roy Moraga that I examined.

6 Q. Having then had an opportunity, for the  
7 purposes of the jury, to go through the things that  
8 you had an opportunity to examine, would you advise  
9 the jury what tests you conducted and the results of  
10 those tests?

11 A. On both the kits?

12 Q. On both kits.

13 A. The serology standards and the sexual  
14 assault kit.

15 The examination of the sexual assault kit  
16 consist basically of looking for constituents of the  
17 sexual assault. In this case, I was looking for the  
18 presence of seminal material on the vaginal swab and  
19 that's on the vaginal smear. I did that first, and  
20 I examined the slides; one of the slides that was  
21 contained in the vaginal in this little cardboard  
22 container, and I also looked at the swab that was  
23 contained in this white box and I found that there  
24 was. In fact, we initially started our examination  
25 by looking for something called acid phosphatase,

1     which is an enzyme that's found in high  
2     concentration in semen. It's not proof that semen  
3     is there, but it's a good indicator that semen could  
4     be there if this test is positive and the test for  
5     acid phosphatase on the vaginal swab was in fact  
6     positive.

7                 I then proceeded to the vaginal smear,  
8     and I have stained the material that was on the  
9     slide and I looked under a microscope for spermatozoa  
10    and I found that there were apparent spermatozoa  
11    heads on the slide.

12                I then looked at the oral or mouth swab,  
13    and once again I looked at it for the presence of  
14    semen. However, that swab was negative for the  
15    presence of semen.

16                I took the blood samples from the victim  
17    and I typed her blood. Most of us are familiar with  
18    the A, B, O blood group. That's because we have  
19    donated blood or been to a doctor's office or had  
20    surgery of some type, and there are four different  
21    blood groups in that system. There is blood type A,  
22    blood type B, blood type AB and blood type O, and I  
23    typed the victim's blood samples and I also typed  
24    the suspect's blood samples and identified their  
25    blood type in this A, B, O system.

1 But our blood also contains other  
2 systems. So I did additional tests to identify  
3 other blood groups and these blood groups help us to  
4 put people in different subgroups thereby  
5 differentiating between people by their blood  
6 types.

7 I also examined the saliva samples from  
8 both the suspect and the victim and this is because  
9 about 80 percent of the population are what's called  
10 secreters, and by that we mean that people secrete  
11 their A, B, O blood group substance or type that  
12 they are in some of their peripheral body fluids,  
13 like semen, like perspiration, and like saliva.

14 If you are blood type A and secrete, you  
15 would secrete that A in your saliva. So we use the  
16 saliva standard to determine who is a secretee and  
17 who is not. I did that both on the suspect and the  
18 victim.

19 I identified semen, as I stated, on the  
20 vaginal swabs, the vaginal smears were positive for  
21 the presence of spermatozoa and I also determined  
22 that the victim was an O secretee. So she did  
23 secrete her type in her saliva. I determined that  
24 she was an O blood group, O blood type in the A, B,  
25 O blood group system.

1 I also checked the suspect, Mr. Moraga,  
2 was a blood group O also, and he also was a  
3 secreter. He also would secrete his blood type in  
4 her peripheral body fluids. So that means we can't  
5 separate their bloods because they are both the same  
6 blood type.

7 So I went to additional blood group  
8 systems and I did several other systems and one that  
9 is important to us, it's called the PGM subtype and  
10 that allows us to put people in about ten different  
11 groups instead of four. So it's a good different  
12 secreter and I determined that they were different  
13 blood groups in that system.

14 Ms. Hawk was a PGM subgroup two minus one  
15 plus. Instead of using letters, we use numbers in  
16 these systems, and Mr. Moraga was just a one plus  
17 and so that blood group allows me to differentiate  
18 between these two individuals.

19 However, when I tested the vaginal slides  
20 -- we test the vaginal swabs, I'm sorry, to see if  
21 we can determine the presence of blood group  
22 substances on the swab and this is important because  
23 sometimes if the blood groups are different than the  
24 victim, we know the victim can't possibly have put  
25 them on the swabs that are taken from the vagina

1 area. So sometimes that allows us to make a type of  
2 blood profile of the semen donor.

3           However, in this case, I found that what  
4 I found on the vaginal swab was consistent with an O  
5 secreter and, also, I found the PGM subtype two  
6 minus one plus which is the same as the victim's.

7           Q.     Based upon all the analysis that you did,  
8 were you able to draw any scientific conclusion with  
9 regard to the results of your testing?

10           A.     We make a conclusion based on the types  
11 that the victim is, the types that our suspect are  
12 and the type that we find on the various evidence  
13 that's submitted to us. In this case, I didn't find  
14 anything foreign to the victim that was present.  
15 Nothing that I can attribute to a semen donor.

16           However, because Mr. Moraga fell in two  
17 groups that were consistent with what I found. In  
18 other words, the blood groups could be masked by the  
19 presence, I could not exclude him. In other words,  
20 I didn't find anything that was different than what  
21 he had so that I could exclude him from being a  
22 possible source of the seminal material that was on  
23 the swabs.

24           MS. LIPPIS: Thank you. I have nothing  
25 further.

1 THE COURT: Cross examination.

2 CROSS-EXAMINATION

3 BY MR. HILLMAN:

4 Q. So, briefly, when a person is a secreter,  
5 then their blood type comes through other bodily  
6 fluids; is that correct?

7 A. That's correct.

8 MR. HILLMAN: I have no further  
9 questions.

10 THE COURT: Anything further?

11 MS. LIPPIS: Nothing.

12 THE COURT: You may step down, Ms.  
13 Errichetto.

14 THE WITNESS: Thank you, Judge.

15 THE COURT: Your next witness.

16 MS. LIPPIS: Thank you, Judge. Detective  
17 Luke.

18 DETECTIVE ROBERT DOUGLAS LUKE,

19 having been first duly sworn to tell the truth, the  
20 whole truth and nothing but the truth, testified and  
21 said as follows:

22 DIRECT EXAMINATION

23 BY MS. LIPPIS:

24 Q. Would you state your full name for the  
25 record, please, sir, and spell your last name?

1 A. Robert Douglas Luke, L-U-K-E.  
2 Q. Are you employed, sir?  
3 A. Yes.  
4 Q. And how are you employed?  
5 A. Pardon me?  
6 Q. How are you employed, sir, where?  
7 A. I'm a policeman with the Las Vegas  
8 Metropolitan Police Department.  
9 Q. And are you assigned to any specific  
10 detail?  
11 A. Burglary detail.  
12 Q. Were you so assigned in December of 1989?  
13 A. Yes, ma'am.  
14 Q. And how long have you been with the  
15 Metropolitan Police Department?  
16 A. Twenty one years.  
17 Q. I'd like to direct your attention to  
18 December of 1989 and the months following. Did you  
19 have occasion to come in contact with a woman  
20 identified as Jean Behl?  
21 A. Yes, I did.  
22 Q. Do you remember the first time you had  
23 contact with her?  
24 A. First time I had contact was by phone.  
25 She had called and I was out. I returned her call



1 when I got back.

2 Q. Do you remember approximately when that  
3 was, sir?

4 A. I'm not sure of the exact date. It was  
5 the first part of January.

6 Q. First part of January, that would have  
7 been 1990?

8 A. Yes, uh-huh.

9 Q. Would you describe for the jury -- well,  
10 let me clear this one point up.

11 Did you have an occasion to call her back  
12 and speak with her on the phone?

13 A. Yes, I did.

14 Q. Did you have a conversation regarding  
15 some jewelry?

16 A. Yes.

17 Q. Would you describe to the jury the  
18 essence of that conversation?

19 A. Well, Jean told me that --

20 MR. HILLMAN: I'd object as to hearsay.

21 THE COURT: Sustained.

22 MS. LIPPIS: Judge, may I respond?

23 THE COURT: Yes.

24 MS. LIPPIS: I'm not offering it for the  
25 truth of the matter. Ms. Behl is in the hall here

1 to testify, merely to show what the result of the --  
2 what the officer did.

3 THE COURT: I will let it in for that  
4 limited purpose. This is not being offered to prove  
5 the truth of the matter stated, but just to  
6 establish what Detective Luke did based upon the  
7 information that was given to him.

8 MS. HIPPIS: Thank you, Judge.

9 Q. Would you describe for the jury the  
10 conversation that you had with  
11 Ms. Behl?

12 A. Okay, Ms. Behl told me that she had a  
13 watch that she believed was stolen and so I asked,  
14 you know, how she thought that and she said that she  
15 had been given a watch and that she was talking to a  
16 friend of hers and this woman had a friend --  
17 another friend that had her place burglarized and  
18 this lady was describing her friend's watch and Jean  
19 said it was really kind of odd because she felt that  
20 was the same watch that was sitting in her purse at  
21 that time.

22 Q. Having received this information from Ms.  
23 Behl, did you then meet with her to obtain the  
24 watch?

25 A. Yes, I did.

1 Q. And did you also take a formal statement  
2 from her as to how she obtained the watch?  
3 A. Yes, I did.  
4 Q. Did you take the watch into your  
5 possession?  
6 A. Yes.  
7 Q. Once you did that, what did you do with  
8 it?  
9 A. I contacted the person that was a victim.  
10 Q. Would that have been Jodi Howard?  
11 A. Yes, ma'am.  
12 Q. Did you have the watch with you when you  
13 contacted Jodi Howard?  
14 A. Can I check my notes?  
15 Q. Of course. Do you have your report with  
16 you?  
17 A. The name is throwing me.  
18 Q. That's fine:  
19 MR. HILLMAN: May I approach the witness  
20 to see what he is looking at?  
21 THE COURT: Yes. Do you want to see the  
22 report?  
23 THE WITNESS: Okay. Yeah, it was.  
24 Q. (BY MS. LIPPIS) Was it Jodi Howard?  
25 A. Jodi Howard, yeah.

1 Q. Having refreshed your recollection by  
2 referring to your report, did your report indicate  
3 on what date you saw Jodi Howard?  
4 A. It was on February the 1st.  
5 Q. Of 1990?  
6 A. Right.  
7 Q. And you showed Jodi the watch?  
8 A. Yes, I did.  
9 Q. And she has testified previously that  
10 that was her watch, is that correct?  
11 A. Yes.  
12 Q. Did you then impound the watch --  
13 A. Yes, I did.  
14 Q. -- as in evidence?  
15 Did you bring it with you today, sir?  
16 A. Yes.  
17 Q. Detective Luke, I'm now showing what's  
18 been marked for identification as State's proposed  
19 Exhibit No. 13 and ask you if you can identify this  
20 evidence envelope?  
21 A. Yes, I can.  
22 Q. And what is the basis of your  
23 identification?  
24 A. Well, everything that I put into  
25 evidence, I use my initials and my personnel number,

1       which is R488L.

2               Q.       Do you recognize the handwriting on the

3       envelope?

4               A.       Yes.

5               Q.       Is that your handwriting?

6               A.       Yes, ma'am.

7               Q.       Is there a D.R. number assigned to that

8       evidence envelope?

9               A.       Yes, ma'am.

10              Q.       What is the D.R. number?

11              A.       That's 89-11715.

12              Q.       Does this envelope appear to be in

13       substantially the same condition now as it was at

14       the time that you placed the watch inside the

15       envelope?

16              A.       Yes, ma'am.

17              Q.       There's a seal on the back of the

18       envelope and kind of a bright orange seal. Do you

19       recognize that seal?

20              A.       Yeah.

21              Q.       Did you place it there?

22              A.       Yes, I did.

23              Q.       Are your initials and P number contained

24       on that seal?

25              A.       Yes, it is.

1 Q. Does the seal appear to have been  
2 disturbed?

3 A. No, it doesn't.

4 Q. All right. Sir, would you open the  
5 envelope without disturbing the seals and remove the  
6 contents.

7 Detective Luke, I'm now showing you  
8 what's been removed from State's proposed Exhibit 13  
9 and having it marked as State's proposed Exhibit  
10 13-A and ask if you can identify that?

11 A. Yes, I can.

12 Q. And what is the basis of your  
13 identification? How do you know where this watch  
14 came from? You have to tell me.

15 A. I have my initials and my P number on the  
16 bottom.

17 Q. Is this the watch that you were given by  
18 Jean Behl?

19 A. Yes, it is.

20 Q. Thank you, sir. I have nothing further,  
21 your Honor.

22 THE COURT: Cross examination.

23 MR. HILLMAN: No questions, your Honor.

24 THE COURT: You may step down, Detective  
25 Luke.

1 THE WITNESS: Thank you.

2 THE COURT: Your next witness.

3 MS. LIPPIS: Jean Behl.

4 THE BAILIFF: No one responds, your  
5 Honor.

6 THE COURT: What time was she supposed to  
7 be here?

8 MS. LIPPIS: At a quarter to 2:00.

9 THE COURT: Well, we will take ten  
10 minutes, ladies and gentlemen. Please heed the  
11 court's admonition I have given you previously.

12 (Off the record at 1:47 p.m. and back on  
13 the record at 1:58 p.m.)

14 THE COURT: This is out of the presence  
15 of the jury. How many more witnesses do you have,  
16 Ms. Lippis?

17 MS. LIPPIS: One, sir.

18 THE COURT: Mr. Moraga, I don't know if  
19 you've made the decision to testify or not, but let  
20 me tell you what your rights are.

21 Under the Constitution of the United  
22 States and the Constitution of this state, you  
23 cannot be required to testify in a case. Do you  
24 understand that?

25 THE DEFENDANT: Yes.

1 THE COURT: If you do not testify, the  
2 Court would not permit the district attorney to make  
3 any comments to the jury because you did not  
4 testify. Do you understand that?

5 THE DEFENDANT: Yes.

6 THE COURT: If you do not testify and if  
7 your attorney would request it, I would instruct the  
8 jury essentially as follows, the law does not compel  
9 a defendant in a criminal case to take the stand and  
10 testify and no presumption may be raised and no  
11 inference of any kind may be drawn from a failure of  
12 a defendant to testify period.

13 So if you do not testify and if your  
14 attorney requests it, I would give that  
15 instruction. Do you understand?

16 THE DEFENDANT: Yes.

17 THE COURT: If you do testify, of course  
18 you will be subject to cross examination by the  
19 district attorney. Then anything that you may say  
20 from the witness stand would be the subject of  
21 comment by the district attorney when she addresses  
22 the jury in her final summation.

23 Do you understand that? In other words,  
24 whatever you say from the witness stand, she can  
25 comment on when she addresses the jury whatever your



1     answers are.

2             THE DEFENDANT:  So she can change it.

3             THE COURT:  No, she can just comment he  
4     said such and such, whatever it was and then she can  
5     compare whatever you answered from the witness stand  
6     with other evidence.  And so it would be the subject  
7     matter of comment when she speaks to the jury  
8     whatever you say.

9             THE DEFENDANT:  Oh, okay.

10            THE COURT:  Do you understand that?

11            THE DEFENDANT:  Yes.

12            MS. LIPPIS:  Your Honor, may I advise the  
13     Court that should the defendant testify, he has a  
14     prior felony conviction.

15            THE COURT:  How long ago was it?

16            MS. LIPPIS:  1983.  He was sentenced to  
17     four years in the Arizona Department of Corrections  
18     prison facility.  The crime was attempt aggravated  
19     assault.  I have a certified copy of judgment of  
20     conviction.  I have shown it to Mr. Hillman.  We  
21     obviously recently found out about it because it  
22     didn't show up on the N.C.I. National Registers that  
23     we checked.  Because of the shortness of time, we  
24     contacted the Department of Corrections and they  
25     have facsimilled or faxed that conviction

1 correspondence to us, and I have that correspondence  
2 as well as judgment of conviction and I have that  
3 available for Mr. Hillman. So if the defendant does  
4 testify, I will be cross examining him on the facts  
5 of his prior felony.

6 THE COURT: Did you hear what she said?

7 THE DEFENDANT: That she is going to use  
8 my prior conviction.

9 THE COURT: If you testify.

10 THE DEFENDANT: Well --

11 THE COURT: If you testify, she will be  
12 able to ask you have you ever been convicted of a  
13 felony.

14 THE DEFENDANT: Yeah.

15 THE COURT: What the felony was and when  
16 it happened. Neither side would be permitted to go  
17 into any details of that felony. Only the fact that  
18 there was a felony conviction, what that felony was,  
19 and when it happened.

20 THE DEFENDANT: Okay.

21 THE COURT: That's all.

22 THE DEFENDANT: Okay.

23 THE COURT: Has the decision been made,  
24 will you be testifying?

25 THE DEFENDANT: Yes.

1 MS. LIPPIS: May I advise one more thing,  
2 Judge. If the defendant testifies, it's quite  
3 possible that I would be putting together a rebuttal  
4 case which will entail probably two, maybe three  
5 witnesses. I believe the Court may want to discuss  
6 with Mr. Hillman, and I don't know if I will be  
7 ready to do it this afternoon, we might have to wait  
8 until Thursday morning. It's a possibility I will  
9 be bringing in an out-of-state witness for that  
10 rebuttal and I will make that name available to Mr.  
11 Hillman.

12 THE COURT: Well, you would not know if  
13 you will have rebuttal until after the defense case  
14 is presented?

15 MS. LIPPIS: That's correct.

16 THE COURT: We will take that up after  
17 Mr. Moraga testifies.

18 THE DEFENDANT: What does that mean?

19 THE COURT: That means if you testify,  
20 she indicates she has some witnesses that she is  
21 going to bring in to testify concerning what you  
22 testify to.

23 THE DEFENDANT: Okay, but it's not  
24 related to another case. It's this case? I mean,  
25 she can't tell me, well, I did such-and-such to this

1 person when it has nothing to do with that person.  
2 It has to do with this case.

3 THE COURT: Well, that is not completely  
4 true, Mr. Moraga. For example, evidence of other  
5 offenses or bad conduct or wrongdoing may be  
6 admissible in a case, even though it seems like it's  
7 unrelated because they were different parties.

8 THE DEFENDANT: Uh-huh.

9 THE COURT: But it may be admissible to  
10 prove certain things like knowledge, identity,  
11 intent, lack of consent, various things like that  
12 can be proved by other witnesses who are not in any  
13 way connected with this particular case.

14 THE DEFENDANT: Sure. I will do it  
15 anyway.

16 THE COURT: I didn't hear you.

17 THE DEFENDANT: Sure, I will go ahead.

18 THE COURT: All right. Let's get the  
19 jury back then and we will finish the testimony of  
20 at least the State's case and the defense case will  
21 be this afternoon it looks like.

22 MS. LIPPTS: Yes.

23 THE COURT: We might not be arguing until  
24 Thursday. Let's get the jury back, please.

25 THE BAILIFF: Are you going to remain on

1 the bench?

2 THE COURT: Yes.

3 (At this time, the jury entered the  
4 courtroom.)

5 THE COURT: The record will show the jury  
6 is present.

7 You may call your next witness, Ms.  
8 Lippis.

9 MS. LIPPIS: Thank you, your Honor. Jean  
10 Behl.

11 JEAN RUTH BEHL,  
12 having been first duly sworn to tell the truth, the  
13 whole truth and nothing but the truth, testified and  
14 said as follows:

15 DIRECT EXAMINATION

16 BY MS. LIPPIS:

17 Q. Would you state your full name for the  
18 record, please, and spell your last name?

19 A. Jean Ruth Behl, B-E-H-L.

20 Q. Ms. Behl, do you know a man by the name  
21 of Roy Moraga?

22 A. Yes, I do.

23 Q. Do you see him present in court today?

24 A. Yes, I do.

25 Q. Would you point to him please and

1 describe an article of clothing that he wearing?

2 A. Okay. He is wearing dark sunglasses as  
3 usual.

4 THE COURT: Would you speak up, please.

5 THE WITNESS: He is wearing dark  
6 sunglasses as usual.

7 MS. LIPPIS: May the record reflect the  
8 identification of the defendant?

9 THE COURT: Yes, sir.

10 Q. (BY MS. LIPPIS) Ma. Behl, would you  
11 describe for the jury how it is you know Mr. Moraga?

12 A. He and I lived together for several  
13 months.

14 Q. Where did you first meet Mr. Moraga?

15 A. In Arizona.

16 Q. Would it have been in the last year  
17 1989?

18 A. Yes, sir.

19 Q. About what month, if you recall?

20 A. Probably August.

21 Q. Did you then have occasion to move to Las  
22 Vegas, Nevada?

23 A. Yes, we did.

24 Q. Did you take up residence here in town?

25 A. Yes, we did.

1 Q. And you indicated you began living  
2 together?  
3 A. Yes, sir.  
4 Q. Is that correct?  
5 A. Yes.  
6 Q. In a romantic-type relationship?  
7 A. Yes, sir.  
8 Q. Where were you living?  
9 A. Glendale, Arizona, which is a suburb of  
10 Phoenix.  
11 Q. Okay, Glendale.  
12 When you moved to Las Vegas, where did  
13 you live?  
14 A. Lived at Newport Gardens, 1100 Dumont.  
15 Q. What was the apartment number?  
16 A. 212.  
17 Q. Did there come a time when you and Mr.  
18 Moraga separated?  
19 A. Yes.  
20 Q. Do you recall when that was?  
21 A. 15th of November.  
22 Q. Did you cease living together?  
23 A. Yes.  
24 Q. Did you do anything to ensure that he did  
25 not return or have access to your apartment?

1           A.     Had the locks changed on the apartment.  
2           Q.     Did you have an occasion to see Mr.  
3 Moraga some time in the morning hours of December  
4 5th, 1989?  
5           A.     Yes, I did.  
6           Q.     Would you describe for the ladies and  
7 gentlemen of the jury, under what circumstances you  
8 saw him?  
9           A.     He phoned me and said he had something  
10 for me, a gift that he had purchased for me, and he  
11 would like to give it to me and --  
12          Q.     What time did he call you?  
13          A.     Prior to 5:30 a.m. because I start work  
14 at 5:30 in the morning.  
15          Q.     Where did you work at that time?  
16          A.     At Burger King on Maryland Parkway.  
17          Q.     What time did you have to be to work?  
18          A.     5:30.  
19          Q.     So he had to have called you obviously  
20 before 5:30 a.m.?  
21          A.     Correct.  
22          Q.     Did you indicate that he could come over  
23 or that you would meet him somewhere?  
24          A.     No. We set up a meeting point.  
25          Q.     Where was that?



1           A.     Which was to be in front of Players  
2 Lounge, but he met me at the corner of Cambridge and  
3 Dumont.  
4           Q.     And obviously this was also prior to  
5 5:30?  
6           A.     Correct. I had to be at work by 5:30.  
7           Q.     When you met Mr. Moraga on the corner of  
8 Cambridge and Maryland Parkway did you say?  
9           A.     And Dumont.  
10          Q.     Did he give you a present?  
11          A.     Yes, he did.  
12          Q.     What did he give you?  
13          A.     He gave me a gold watch.  
14          Q.     Did he say where he got it?  
15          A.     He said he had bought it. He had seen it  
16 and he bought it for me.  
17          Q.     As a gift for you?  
18          A.     Yes.  
19          Q.     Later on that day, did you learn that he  
20 had been arrested?  
21          A.     Yes, I did.  
22          Q.     Did there come a time when you had some  
23 concern over the ownership of the watch?  
24          A.     Yes.  
25          Q.     How did that concern come about?

1           A.       Friends of mine knew the girl that  
2       supposedly had the watch stolen and she remarked  
3       about it that she knew I had gotten a watch and it  
4       sounded like the same thing and I said if you get a  
5       description of it and I feel that that might be the  
6       watch, then I will turn it in, but I needed to know  
7       that it might have been that watch, so.

8           Q.       Did she provide a description for you?

9           A.       Yes, she did.

10          Q.       Based upon the description that you  
11       received, what did you do?

12          A.       I called the police that night, Metro,  
13       and they told me to call back in the morning talk to  
14       a detective, and the detective that was working with  
15       the case was not there. He got back in contact with  
16       me later.

17          Q.       When he got back in contact with you, did  
18       he in fact show you a watch or did you in fact show  
19       him a watch?

20          A.       Yes, I did.

21          Q.       I'm showing you what's been marked for  
22       identification as State's proposed Exhibit 13-A and  
23       ask you if you can identify that watch?

24          A.       Yes, that's the watch.

25          Q.       Is that the watch that Roy Moraga gave to

1     you?

2             A.     Yes, it is.

3             Q.     Early in the morning on December 5th,  
4     1989?

5             A.     Yes, it is.

6             MS. LIPPIS: I have nothing further.

7             THE COURT: Cross examination.

8                     CROSS-EXAMINATION

9     BY MR. HILLMAN:

10            Q.     Ms. Behl, do you know Mike Harper? Do  
11     you know a man named Mike Harper?

12            A.     By name. I just heard his last name  
13     today, as far as the gardener landscaper at our  
14     complex.

15            Q.     So you do know him?

16            A.     Yes, I do.

17            Q.     Is this the person you had the  
18     conversation with regarding the watch?

19            A.     No, it is not.

20            Q.     Who is that person?

21            A.     Debbie Marcoty (phonetic).

22            Q.     And was this the first you heard about  
23     the watch possibly being stolen?

24            A.     When Debbie mentioned what we had  
25     discussed that I had gotten a watch and she said

1 there was a watch stolen at that time and she would  
2 check into it. She thought it might be and that's  
3 when I first knew about it.

4 Q. Did you ever have any discussions with  
5 Mike Harper about the subject?

6 A. We might have sat and talked about it,  
7 that that was something I had gotten when he was at  
8 the house and we talked about then when I knew he  
9 was involved in it or had known knowledge of what  
10 had happened.

11 Q. Do you remember when these conversations  
12 took place either with Debbie or with Mike?

13 A. Well, Debbie, it was as far as the  
14 identification was some time the beginning of --  
15 well, I have it written down in my purse somewhere  
16 as to the dates when I called the Metro and turned  
17 it in, but I'm not good with dates.

18 Q. Would it have been in December or  
19 January?

20 A. It was probably January.

21 Q. And you called the police immediately  
22 following that?

23 A. Correct. The same evening that she told  
24 me and described the watch to me.

25 MR. HILLMAN: Court's indulgence.

1 No further questions, your Honor.

2 THE COURT: Anything on redirect?

3 MS. LIPPIS: Only one question.

4 REDIRECT EXAMINATION

5 BY MS. LIPPIS:

6 Q. Is Debbie Marcoty employed at the Court  
7 Yard Gardens?

8 A. She was when we rented our apartment.

9 Q. What was her capacity there?

10 A. She was the leasing agent.

11 MS. LIPPIS: Thank you.

12 THE COURT: Anything further?

13 MR. HILLMAN: Nothing else.

14 THE COURT: You may step down, Ms. Bahl.  
15 Your next witness?

16 MS. LIPPIS: May I have the Court's  
17 indulgence one minute, please.

18 (Off the record discussion not reported.)

19 MS. LIPPIS: Judge, the State rests at  
20 this time.

21 THE COURT: Have you checked if all --  
22 let's see if the evidence has all been offered and  
23 received.

24 MS. LIPPIS: Thank you, Judge. Judge, I  
25 have offered and have been admitted State's Proposed

1 Exhibits 1, 2 and 3, which are photographs.

2 At this time, at the conclusion of our  
3 case, I would offer Exhibits 4 through 13, which  
4 would include all the contents of those envelopes.

5 THE COURT: Any objections?

6 MR. HILLMAN: The only objection I have  
7 would be with what purpose 13 would be admitted?

8 THE COURT: What is 13?

9 THE CLERK: Evidence envelope and 13-A  
10 was the watch that came out of it.

11 MR. HILLMAN: My objection to 13-A is  
12 that simply Ms. Behl has come forward with the watch  
13 stating that she received it from Mr. Moraga, but we  
14 don't know whose watch that is other than through  
15 hearsay evidence. And, for that reason, I would ask  
16 that it not be admitted.

17 MS. LIPPIS: Your Honor, I believe we  
18 received testimony from Detective Luke, as well as  
19 Jodi Howard that her watch was missing that  
20 morning. Officer Swift described it as well, and  
21 Detective Luke as well as Ms. Howard, indicated that  
22 she was shown the watch, Detective Luke impounded  
23 it. Obviously the time frame is what the State was  
24 essentially concerned with that she was missing her  
25 watch.

1 THE COURT: I think it's a matter of  
2 identification also and I think it is admissible.  
3 It will be received over objections.

4 Anything further, Ms. Lippis?

5 MS. LIPPIS: Nothing by the State, your  
6 Honor.

7 THE COURT: Do you wish to make an  
8 opening statement, Mr. Hillman?

9 MR. HILLMAN: Your Honor, we will waive  
10 our opening statement and just call Mr. Moraga to  
11 take the stand.

12 ROY D. MORAGA,  
13 having been first duly sworn to tell the truth, the  
14 whole truth and nothing but the truth, testified and  
15 said as follows:

16 THE COURT: Mr. Moraga, would you remove  
17 your sunglasses while you are testifying, please.

18 THE WITNESS: They are prescription.  
19 They are not sunglasses.

20 THE COURT: They are prescription?

21 THE WITNESS: I'm sensitive to the  
22 light.

23 THE COURT: You may wear them.

24 DIRECT EXAMINATION

25 BY MR. HILLMAN:

1 Q. Would you state your name and spell your  
2 last name for the court reporter?  
3 A. Roy D. Moraga, M-O-R-A-G-A.  
4 Q. Mr. Moraga, how long have you lived in  
5 Las Vegas?  
6 A. Since I think it was October.  
7 Q. And what brought you to Las Vegas?  
8 A. Work and Jean.  
9 Q. That's Ms. Behl?  
10 A. Behl, yes.  
11 Q. Mr. Moraga, have you ever been convicted  
12 of a felony?  
13 A. Yes, I have.  
14 Q. And what was that for?  
15 A. Aggravated assault.  
16 Q. When was that?  
17 A. 1982.  
18 Q. Do you know Penny Hawk?  
19 A. Yes, I do.  
20 Q. When did you first meet her?  
21 A. In November, last part of November.  
22 Q. Of what year?  
23 A. Of 1989.  
24 Q. Where did you meet her at?  
25 A. I was sitting in front of the Players



1 Lounge.

2 Q. And what happened then?

3 A. Well, she was drinking in her truck and  
4 she yelled out --

5 Q. Excuse me, when you say she, please use  
6 the people's name.

7 A. Penny. Okay, sorry.

8 Penny was drinking in her truck and she  
9 just yelled out that she couldn't sleep and I walked  
10 to her truck and started talking to her and she says  
11 that those people over there, the cable people, were  
12 putting in cables in there for -- I don't know, I  
13 guess HBO or something, and she just told me she  
14 couldn't sleep and she had a drink, and she got in  
15 the fight with the manager. So she was in the  
16 parking lot drinking and so we just kept on talking  
17 and she asked me to sit down in her truck. So I sat  
18 in her truck and she asked me if I drank, and I told  
19 her yes. She bought all the drinks. That was it.

20 Q. How long were you with her?

21 A. It was still daylight. So it must have  
22 been at the Players for about three, four hours,  
23 something like that.

24 Q. Do you remember what you talked about?

25 A. She was telling me about the time she was

1 arrested and how Metro beat her up and stuff and she  
2 showed me marks on her hands where they put the  
3 cuffs on, she had marks all over her wrist, and that  
4 she didn't get along with them, that her and her  
5 daughter always fight.

6 Q. Did you -- did anything out of the  
7 ordinary happen that night?

8 A. She got drunk and started crying, telling  
9 me about that nobody loves her and stuff like this  
10 and I told her I did, I believed in her and stuff  
11 like that and we just, just start kissing outside in  
12 the parking lot of Players Lounge and after that, we  
13 just went someplace -- to the one on Cambridge and  
14 Twain around the corner. I don't know the name of  
15 the bar because I had never been there before and we  
16 went inside there and drank more and she started  
17 making out with me inside the bar. The bartender  
18 told us to go out and get a cheap motel. And that  
19 was it.

20 Q. When was the next time you saw Ms. Hawk?

21 A. I seen her when I was inside the Players  
22 Lounge, she ran in there looking for her daughter.

23 Q. Do you remember when it was?

24 MS. LIPPIS: Objection --

25 Q. (BY MR. HILLMAN) Do you remember when it

1 was?

2 A. It was still in November of '89. She was  
3 kind of tipsy. You can -- you could see it. She is  
4 hyperactive when she drinks.

5 Q. Do you remember what happened on December  
6 5th of 1989?

7 A. Yes. Let's see, I went to her apartment.

8 Q. And that's Penny Hawk?

9 A. Penny Hawk's, excuse me. I went to Penny  
10 Hawk's apartment and rang the doorbell and she  
11 answered the door.

12 Q. Do you remember what time that was?

13 A. It had to be in the morning. I don't  
14 know. I was waiting for the manager to get home so  
15 I can go over there and rent me an apartment because  
16 I just got paid and we talked and I told her I would  
17 be back later and she said okay. So I left.

18 Q. How long were you gone?

19 A. Oh, about two hours.

20 Q. And did you then go back?

21 A. Yes, I did.

22 Q. What happened when you arrived there?

23 A. The door was open, so I walked in and I  
24 took off my coat and my shirt and my sweater and  
25 laid it down on the chair and walked upstairs and I

1 just walked in and she was yelling and I told her  
2 that it was all right that it was me and she ran to  
3 the window to the bathroom and started yelling out  
4 the window and I thought it was kind of funny. So I  
5 ran -- well, I didn't run out, I walked over to the  
6 bathroom and I started yelling out the window and  
7 that was it.

8 Q. What happened?

9 A. Oh, well, she walked over there to the  
10 side of the door and I told her it was still all  
11 right that nothing is going to happen and she said,  
12 "Okay," and she was like passing out or something,  
13 you know, like breathing real hard and stuff like  
14 this. So I told her just to lay down and be cool  
15 and everything is all right. And she said okay. So  
16 she just laid down and I just began to kiss her.  
17 That was it and I didn't, you know, didn't do  
18 anything else, just kiss her.

19 Q. What happened after that?

20 A. Well, she said she was thirsty because  
21 her mouth was all dry and stuff and I said okay and  
22 I got up and went downstairs to get her a glass of  
23 water and I gave her a glass of water. She came  
24 downstairs too and sat on the rocking chair and I  
25 gave her a glass of water and she says she was still

1 hot and she was dizzy. So I went in the bathroom  
2 downstairs and I got a towel and wet it and wrang it  
3 out and put it around her neck and she just sat  
4 there and we kept on talking and she wanted to know  
5 what happened when we went out. I told her  
6 everything that happened when we went out, that I  
7 had sex with her and she says okay. And she went  
8 upstairs and I was downstairs getting some water, I  
9 drank the water and I put the glass down and walked  
10 back up stairs and she was getting into the shower  
11 and I told her I wanted to take a shower with her,  
12 but I couldn't get my boot off because my leg was  
13 swollen and she said okay.

14 So she got in the shower, took a shower  
15 and came out and I started drying her back and she  
16 says that -- well, I kissed her and she said, "We  
17 don't have enough time because I have to go to work  
18 in an hour," and I said, "Don't worry, I won't take  
19 an hour," and she laid on the bed and I still had my  
20 clothes on other than -- well, I had my clothes on  
21 from my waist down. Everything up on top of me I  
22 didn't have on and I laid down next to her and I  
23 kept on kissing her and she says, "You can't do it  
24 with your pants on." So I took my pants off and  
25 then she says, "You can't do it because your dick's

1 not hard," and I said, "Okay," -- no, I didn't say  
2 okay. I told her that once I was inside of her, it  
3 would work, it's way up and I kept on kissing her  
4 and we had sex, and I couldn't get off. So I got  
5 off of her and I went in the bathroom and washed my  
6 face and wet my hair and she was already downstairs  
7 and when I went down there, she was on the phone and  
8 I told her that I was going to go and I would be  
9 back later and she said okay. She kissed me goodbye  
10 and I walked out the door and I remembered I left my  
11 brace in there. So I walked back inside and grabbed  
12 my brace and I waved to her and she waved back and I  
13 left and she was still on the phone.

14 Q. Now, you have heard testimony that a key  
15 was found?

16 A. Yes.

17 Q. In your possession?

18 A. Yes.

19 Q. Do you know which key that is?

20 A. Yes. It was a silver key that I found on  
21 the floor and it had one hole in it.

22 Q. Which floor did you find that?

23 A. On the bottom floor next to the couch.

24 Q. And you picked that up?

25 A. Yes, I picked it up and put it in my

1 pocket and when I left, after I grabbed my brace,  
2 after I left, then I got it and put it on my key  
3 chain. I didn't know where it belonged to. So I  
4 just put it on the key chain and left.

5 Q. But that was at about what time?

6 A. I don't remember the time, but I'm pretty  
7 sure it had to be close to lunchtime because when I  
8 was walking out, I met Mike downstairs and me and  
9 him walked across the parking lot where they park  
10 their cars. We walked and I went to my ride and he  
11 went straight and I figured he was going to lunch.  
12 So I figured it had to be lunchtime.

13 Q. Now, you heard Jena Behl testify about a  
14 watch you gave her. Did you give her that watch?

15 A. Yes, I did.

16 Q. How did you come in contact with that  
17 watch?

18 A. I bought it over there at -- they call it  
19 Crack Alley; this guy I bought it off of over  
20 there.

21 Q. Do you know who you bought it from?

22 A. No, I don't.

23 Q. Can you describe him?

24 A. Tall, black, skinny and wired. That's  
25 really all. He always goes into the Players Lounge

1 and sells stuff all the time. He's always in there  
2 selling stuff. He tried to sell me a sidalane  
3 (phonetic) torch, but I didn't have enough money for  
4 that.

5 Q. Do you remember talking with Jean Rehl  
6 about the watch?

7 A. Yes, I did.

8 Q. Do you recall her telling you that she  
9 thought it had been stolen?

10 A. Yes, she did.

11 Q. When did these conversations take place?

12 A. She told me that in December. I called  
13 her up to wish her a Merry Christmas and she told me  
14 that Mike came down and told her that the watch was  
15 stolen, and I says, "Well, I didn't steal it, I  
16 bought it," and she said, "Okay," and then we  
17 started talking about other things.

18 Q. Did at any time you were in the apartment  
19 with Ms. Hawk, did she ever tell you that she did  
20 not want to have sex with you?

21 A. No, she didn't.

22 Q. So as far as you knew, everything was  
23 okay?

24 A. Yes.

25 Q. As far as you knew, she was agreeing to



1 it?

2 A. Yes.

3 MR. HILLMAN: I have no further  
4 questions.

5 THE COURT: Cross examination.

6 MS. LIPPIS: Thank you, Judge.

7 CROSS-EXAMINATION

8 BY MS. LIPPIS:

9 Q. Basically, Mr. Moraga, what you are  
10 saying to us is you are really confirming everything  
11 that everybody already testified to. You are just  
12 saying that the sex that happened between you and  
13 Mrs. Hawk was with her consent; is that right?

14 A. That's right.

15 Q. You wouldn't take sex without consent,  
16 would you?

17 A. It --

18 MR. HILLMAN: Objection. This goes  
19 beyond the scope of direct.

20 THE COURT: Overruled.

21 You may answer.

22 THE WITNESS: I don't understand. What  
23 do you mean by take it?

24 Q. (BY MS. LIPPIS) Well, I think you know  
25 what I mean, sir.

1 A. No.

2 Q. You wouldn't have sex with a woman  
3 without her consent, would you?

4 A. Sure, I would.

5 Q. You say you were in Penny Hawk's  
6 apartment and you found a key on the floor; is that  
7 correct?

8 A. That's correct.

9 Q. And you put the key in your pocket, is  
10 that correct?

11 A. In my pocket.

12 Q. And you left with a key that didn't even  
13 belong to you; is that correct?

14 A. That's correct.

15 Q. I'm sure you have a good explanation for  
16 that. Why don't you tell us what it is?

17 A. I just picked up a key. I picked up the  
18 other key, too. The other key, the gold one, I  
19 picked that one up. I found that too, and I put it  
20 in my pocket.

21 Q. All right. Let's assume you found the  
22 gold one, sir, you found the silver one in,  
23 evidently, a willing sexual partner's apartment?

24 A. Uh-huh.

25 Q. So if she was on such good terms with

1 you, why didn't you give her key back? You found it  
2 in her apartment?

3 A. I wasn't thinking about it. I just  
4 grabbed it and put it in my pocket and left.

5 Q. You say that you couldn't get off. That  
6 means you couldn't ejaculate, right?

7 A. That's right.

8 Q. So the semen that was found on your  
9 shorts and the semen that was found in Penny  
10 Moraga's vagina -- or Penny Hawk's vagina obviously  
11 didn't come from you; is that correct?

12 A. No, it didn't.

13 Q. When you met Mike outside, as you were  
14 leaving, you told him you just had great sex with a  
15 woman, you got off twice, your dick's still hard;  
16 you were rubbing your thigh on the inside of your  
17 leg. Do you remember that?

18 A. No.

19 Q. So Mike Harper lied?

20 A. That's right.

21 Q. So when I asked you, just a few moments  
22 ago, when you stated that everybody told the truth  
23 except for the fact that the sex with Penny was  
24 consensual, you were mistaken?

25 A. No.

1 Q. Mike Harper didn't tell the truth?  
2 A. No.  
3 Q. Mike Harper lied?  
4 A. All of them lied.  
5 Q. Oh, all of them lied?  
6 A. Yeah.  
7 Q. All right.  
8 A. See, you said something about the watch.  
9 Q. I haven't gotten to the watch yet?  
10 A. Yes, you did.  
11 THE COURT: This is getting  
12 argumentative. State the next question.  
13 MS. LIPPIS: Thank you, Judge.  
14 Q. So sex with Penny Moraga was consensual,  
15 am I correct?  
16 A. That's Hawk.  
17 Q. Excuse me. Sex with Penny Hawk was  
18 consensual, is that correct?  
19 A. She told me to take my pants off, that's  
20 correct.  
21 Q. Sex was consensual in your opinion?  
22 A. Well, if you tell me to take my clothes  
23 off.  
24 Q. Yes or no?  
25 A. I'm sure sex is.

1 Q. Is that a yes?  
2 A. That's a yes.  
3 Q. Could you explain to the jury how it is,  
4 if you are having consensual sex with somebody, that  
5 you leave their apartment half dressed?  
6 A. I have done it a lot of times. I have  
7 left my own house half dressed after having sex with  
8 Jean Behl.  
9 Q. Let's talk about the conversation you  
10 just related to us with Jean Behl. Isn't it true  
11 that you called Jean Behl on March 3rd, 1989 or  
12 March 3rd, 1990?  
13 A. March 3rd?  
14 Q. Uh-huh, just a couple weeks ago prior to  
15 the time that the trial was supposed to start?  
16 A. I don't think so.  
17 Q. Called her at a her apartment?  
18 A. I don't think so.  
19 Q. You could have called her, but you don't  
20 remember?  
21 A. I don't remember.  
22 Q. Isn't it true that you called her, isn't  
23 that true?  
24 A. Oh, I call her all the time.  
25 Q. In a conversation you had with Jean Behl

1 rather recently, you told her, did you not, that you  
2 had this case beat until she turned the watch in?

3 A. Did I say that?

4 Q. Do you remember telling her that? You  
5 told her that, didn't you?

6 A. Oh, I don't know.

7 Q. You could have told her that?

8 A. I could have, but I don't remember. I  
9 got a lot of things on my mind.

10 MS. LIPPIS: I have nothing further,  
11 Judge.

12 THE COURT: Anything further?

13 MR. HILLMAN: Nothing else, your Honor.

14 THE COURT: You may step down.

15 Your next witness.

16 MR. HILLMAN: Your Honor, the defense  
17 rests.

18 THE COURT: Will you have witnesses in  
19 rebuttal?

20 MS. LIPPIS: Yes, your Honor, I will have  
21 witnesses in rebuttal. However, we won't be  
22 prepared this afternoon inasmuch as we went a little  
23 quicker than anticipated.

24 THE COURT: We will be in recess until  
25 Thursday at 10:00. As I indicated when we picked

1 the jury on Monday, we will not be in session on  
2 Wednesday. We will resume Thursday at 10:00, ladies  
3 and gentlemen.

4 Once more, do not discuss the case among  
5 yourselves or with anyone else. Do not read watch,  
6 or listen to any news account should there be any  
7 and don't form or express any opinions concerning  
8 the trial.

9 10:00 on Thursday.

10 (Off the record at 2:33 p.m.)

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DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

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*Lois L. Lippis*  
CLERK

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5 THE STATE OF NEVADA,  
6 Plaintiff,  
7 vs  
8 ROY D. MORAGA,  
9 Defendant.

ORIGINAL

CASE NO. CD92174

DEPT. NO. VIII

10  
11 BEFORE THE HONORABLE:

12 MICHAEL J. WENDELL, DISTRICT JUDGE

13 THURSDAY, MARCH 15, 1990, 10:25 A.M.

14 VOLUME III

15  
16 APPEARANCES:

17  
18 FOR THE STATE: DEBORAH J. LIPPIS, ESQ.

19  
20 FOR THE DEFENDANT: R. ROGER HILLMAN, ESQ.

21  
22  
23  
24  
25 REPORTED BY: PATSY K. SMITH, C.S.R. #190



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INDEX

PAGE

WITNESSES

JEAN R. BEHI. (Rebuttal)

Direct Examination by Ms. Gippis  
Cross-Examination by Mr. Hillman

5  
7

1 THURSDAY, MARCH 15, 1990, 10:25 A.M.

2 THE COURT: This is the time fixed for  
3 the settling of instructions, which will be given  
4 prior to argument.

5 Does the State object to any of the  
6 instructions I indicated I will give?

7 MS. LIPPIS: No, your Honor.

8 THE COURT: Do you request the giving of  
9 any additional instructions?

10 MS. LIPPIS: No, your Honor.

11 THE COURT: Does the defense object to  
12 any of the instructions?

13 MR. HILLMAN: Not having seen 19, no.

14 THE COURT: Do you request the giving of  
15 any additional instructions?

16 MR. HILLMAN: No, sir.

17 THE COURT: Now, No. 19 -- I'm sorry,  
18 it's No. 18.

19 MR. HILLMAN: 18, yes, I'm sorry.

20 THE COURT: No. 18, while we do not have  
21 it yet, is being brought down by a representative of  
22 the District Attorney's office and it will be to the  
23 effect the fact that the defendant has been  
24 convicted of a felony is not evidence of his bad  
25 character and I forgot just how it does read, but

1 It's just one of the circumstances you may consider,  
2 I believe.

3 MS. LIPPIS: Yes, sir.

4 THE COURT: In any event, we will insert  
5 that as Instruction 18.

6 MR. HILLMAN: That will be fine.

7 THE COURT: Do you request the giving of  
8 any additional Instructions?

9 MR. HILLMAN: No, sir.

10 THE COURT: With respect to the alternate  
11 jurors, will you stipulate that at the conclusion of  
12 arguments and with the usual admonition, the Court  
13 may excuse those alternates, send them home after  
14 obtaining their telephone numbers.

15 If, during their deliberations, one of  
16 the jurors has to be excused for some reason, that  
17 we may call back the alternates in the order in  
18 which they were seated and seat that alternate juror  
19 for the juror that has to be excused and the jury  
20 then told to start anew in their deliberation  
21 without reswearing the jury?

22 MS. LIPPIS: Yes, sir.

23 MR. HILLMAN: Yes.

24 (Off the record at 10:27 A.M. and back on  
25 the record at 10:30 A.M.)

1 THE COURT: Good morning, ladies and  
2 gentlemen.

3 MS. LIPPIS, you may call your first  
4 witness in rebuttal.

5 MS. LIPPIS: Thank you, your Honor. Jean  
6 Behl.

7 May I approach the bench, your Honor?

8 THE COURT: Yes.

9 You may be seated. You are still under  
10 oath.

11 THE WITNESS: Thank you.

12 JEAN RUTH BEHL,

13 having been previously duly sworn to tell the truth,  
14 the whole truth and nothing but the truth, testified  
15 and said as follows:

16 DIRECT EXAMINATION

17 BY MS. LIPPIS:

18 Q. Mrs. Behl, in the recent past and if you  
19 recall the date, did you have an occasion to speak  
20 telephonically with the defendant, Roy Moraga?

21 A. Yes, I did.

22 Q. Do you recall the last time you spoke  
23 with him, the date?

24 A. Saturday March 3rd.

25 Q. March 3rd, would that have been 1990; is

1 that correct?

2 A. Yes.

3 Q. Did you and Mr. Moraga discuss some of  
4 the evidence in this case?

5 A. He did.

6 Q. Would you tell the ladies and gentlemen  
7 of the jury and the Court what he said?

8 A. Okay. The whole conversation? Do you  
9 want the whole conversation?

10 Q. Regarding specifically with regard to the  
11 evidence.

12 A. Okay. He said that he got, has some  
13 papers with my name on it saying I was going to be  
14 in court or something to that effect.

15 Q. Now, when you say in court, do you mean  
16 with regards --

17 A. Regards to this.

18 Q. Regards to this case?

19 A. Yes. That he had the case beat, if I  
20 wouldn't have turned in the merchandise, that I'm  
21 the one that is condemning him.

22 MS. LIPPIS: Thank you. I have nothing  
23 further.

24 THE COURT: Cross examination.

25 CROSS-EXAMINATION

1 BY MR. HILLMAN:

2 Q. Were those his exact words?

3 A. As close as I can recall, yes, sir.

4 Q. But you don't remember word for word what  
5 he said?

6 A. I don't have a photostatic mind, no,  
7 sir.

8 MR. HILLMAN: No questions.

9 THE COURT: Anything further?

10 MS. LIPPIS: Nothing.

11 THE COURT: You may step down.

12 Your next witness.

13 MS. LIPPIS: State rests, your Honor.

14 THE COURT: Ladies and gentlemen, both  
15 sides have rested their case in this trial. At this  
16 time, the Court is going to instruct you on the law  
17 as it applies in this case. I will be reading these  
18 instructions to you. Keep in mind, as I read the  
19 instructions, you will be able to take the written  
20 instructions to the jury room where you can read and  
21 consider them yourselves.

22 Each of the instructions is numbered. I  
23 don't read the number when I read the instruction.  
24 I say this because sometimes the attorneys will  
25 refer to the instructions by number when they make

7

PATSY K. SMITH, OFFICIAL COURT REPORTER

1 their final arguments.

2 (At this time, the Court read the  
3 Instructions to the jury.)

4 THE COURT: Ms. Lippis, you may make the  
5 opening argument.

6 MS. LIPPIS: Thank you, your Honor.

7 Your Honor, if it please the Court, Mr.  
8 Hillman, Mr. Moraga, ladies and gentlemen of the  
9 jury, the cold is still hanging on and getting  
10 worse. So you will feel a little treat, I'm going  
11 to try and make this as quickly as possible so you  
12 can begin your deliberations.

13 I'd first like to thank you. We have  
14 taken four days out of your life now, but I know  
15 that probably each of you belong to other civic  
16 functions that you do for churches, PTA and other  
17 community service work. The job which you are about  
18 to undertake I think now is probably the most  
19 important civic duty you will ever perform. You are  
20 going to be sitting in judgment of a fellow human  
21 being and that's a very difficult thing to do. Once  
22 we have reviewed the evidence, the State will be in  
23 the position to ask you to return verdicts of guilty  
24 on all counts.

25 In our experience and as the Judge will

1 tell you, when we are all finished, you can speak to  
2 Mr. Hillman and myself if you wish to. The number  
3 of jury trials we have had has lent some experience  
4 to us. We know jurors have questions, could you  
5 have called another witness, why didn't you ask this  
6 question. Generally, we try to give you everything  
7 we have. Sometimes we just plain forget to ask the  
8 question. It's hard to coordinate 18 to 20  
9 witnesses and make sure that everybody is here and  
10 available and we have doctors and nurses and other  
11 professionals. What I ask you to do is consider  
12 what the State did present. There was certainly an  
13 abundance of evidence with which you can consider.  
14 When we were selecting the jury, both Mr.  
15 Hillman and I exercised peremptory challenges. That  
16 means people were excused without giving a reason.  
17 We think we sometimes have some insight into  
18 people's personalities. I'm not sure that's even  
19 true at all, but we try. The essence of that we all  
20 want a fair trial. We want impartial people who can  
21 sit and listen to the evidence and make a  
22 determination. Some witnesses are excused because  
23 they had what we believed to be a personal prejudice  
24 and they wouldn't be able to hear the evidence  
25 fairly.



1                   What I'd like to do now that we have this  
2 fair and impartial jury, is let you know when the  
3 witnesses were testifying, I'm sure that we all  
4 watched looking for some reactions, seeing how you  
5 were receiving some of this, there were only two  
6 women on the panel, one female lawyer and we have  
7 some support staff. I had to use some language that  
8 may have been offensive. I noticed that when Linda  
9 Errichetto testified and she had to use words such  
10 as spermatazoa and the doctors with the words  
11 ejaculate and vagina, those are just embarrassing  
12 tough subjects to talk about in front of people, but  
13 we're all adults and the things we have to talk  
14 about because that's what the evidence is all about  
15 and when I use words that are probably slang, it may  
16 be a little offensive to describe certain parts of  
17 the anatomy of a man, I do not mean to intend to  
18 offend anyone. It's just that's the evidence I have  
19 to work with and those are the words we have to  
20 use. So with that and an apology in mind, I would  
21 like to get on with the facts as quickly as  
22 possible.

23                   First of all, the Judge read to you some  
24 Instructions. If you will remember, when the Judge  
25 was asking you questions, some people said they were

1 former victims. One said, "My house was burglarized  
2 or my car." Another person said, "I was robbed,"  
3 and then we got into a little bit, oh, it wasn't  
4 really a robbery, it was a burglary. That's what  
5 the Instruction on elements have to do with.  
6 Whenever a crime is charged, we have murder, sexual  
7 assault or whatever, there are certain elements and  
8 the State has to give you proof beyond a reasonable  
9 doubt for all the elements for each crime charged.

10 Burglary has essentially two elements.  
11 The Judge gave that to you, well, whatever  
12 Instruction it was. One, that there was an entry,  
13 an unlawful entry and, two, that at the time of the  
14 entry itself, the time you walk through the door,  
15 you have a specific intent either to commit larceny  
16 which is stealing, or to commit some other felony.  
17 The evidence in the case we will certainly go  
18 through, you have heard a lot of it already, but you  
19 must consider each crime separately. There are two  
20 counts of burglary, one with the intent to commit  
21 larceny, one with the intent to commit sexual  
22 assault, and then two counts of sexual assault. We  
23 will talk about each of those individually.

24 Another Instruction I want to refer you  
25 to is the Instruction that defines intent and

1 motive. It's Instruction No. 4. They mean two  
2 different things. It says, "Do not confuse intent  
3 with motive. Motive is what prompts a person to  
4 act. Intent refers to the state of mind with which  
5 an act is done," and we're talking about specific  
6 intent in relation to the burglary counts.

7 For instance, if a person, any person,  
8 say a homeless person, went into somebody's house  
9 because it was cold and they needed a place to  
10 sleep, well, we certainly have unlawful entry and it  
11 doesn't matter whether it's day or night, but if  
12 they didn't have the intent to steal when they  
13 entered, but with the intent to try to keep warm,  
14 that's not burglary. You have to have the specific  
15 intent upon entry.

16 Now, once inside there, they see  
17 something they like and they take it, then we have a  
18 theft. Does it make burglary now because there's a  
19 theft? No. The minute the entry was made, what was  
20 the intent? Now, obviously we can't take a person's  
21 mind out of their head and let you dissect it to  
22 find out what the intent was when the person  
23 entered. You have to decide what the intent was  
24 from the circumstances, from the facts, from the  
25 evidence, and what was done once the entry was

1 made. The law tells you that a breaking or forced  
2 entry is not an element of the crime of burglary and  
3 we don't have forced entry. That is not an  
4 element. Sometimes you will find burglaries where  
5 doors are pried or windows broken, those kinds of  
6 things that will still make it a burglary and you  
7 can prove the intent they had in their minds once  
8 they entered, but it is not necessary to prove that  
9 the entry was forced.

10 If a person commits a burglary by  
11 entering with the intent to commit a crime when they  
12 are in either stealing or another felony and they  
13 don't steal or they don't commit another felony, do  
14 we still have a burglary? The answer is yes because  
15 it's the intent not what follows or what they do,  
16 but what they intended to do when they got in, but  
17 what happens if upon entry they either steal or they  
18 commit a felony, they can be prosecuted for those  
19 crimes as well. That's why the defendant is charged  
20 with burglary with intent to commit sexual assault  
21 because upon the entry, we believe the State has  
22 evidence and has shown that he intended to commit  
23 sexual assault and then he is then charged with the  
24 crime he committed therein.

25 The Instructions on sexual assault are

1 very straightforward. They tell you that any person  
2 who subjects another person to sexual penetration  
3 against the victim's will is guilty of sexual  
4 assault. Sexual penetration means any intrusion  
5 however slight of any part of a person's body or any  
6 object manipulated or inserted by a person into the  
7 genital openings of the body of another.

8         The reason why we talk about any objects  
9 because there are different ways that sexual assault  
10 can be committed. We're all adults and I don't have  
11 to go into those kinds of examples. We have, if you  
12 want to call rape basic, we have penal penetration  
13 into the vaginal cavity of a woman in this case  
14 against her will.

15         Instruction No. 12 tells you physical  
16 force is not a necessary ingredient in the  
17 commission of a crime of sexual assault. The  
18 crucial question is not whether the victim was  
19 penetrated by physical force, but whether the act of  
20 that penetration was committed without her consent.  
21 Those -- that should be read in conjunction with  
22 Instruction No. 13, the victim of a sexual assault  
23 is not required to do more than her age, strength  
24 surrounding facts and intending circumstances make  
25 it reasonable for her to do to manifest her

1 opposition.

2 And, finally, Instruction No. 14, there  
3 is no requirement that the testimony of a victim of  
4 sexual assault be corroborated and her testimony  
5 standing alone, if believed beyond a reasonable  
6 doubt, is sufficient to sustain a verdict of  
7 guilty.

8 Now, those three Instructions I think we  
9 ought to talk about a little bit, physical force is  
10 not a necessary ingredient, you have to take into  
11 consideration the age, strength, the circumstances  
12 surrounding the facts, and the fact that no  
13 corroboration is necessary, why do you think all of  
14 that is? Well, perhaps you would agree with me that  
15 when a rape is committed, there are generally no  
16 witnesses. Generally it's two people, the victim  
17 and the person who is the perpetrator, the  
18 offender. Occasionally, you will have cases  
19 involving gang rapes in an area that may be open  
20 where other witnesses may see something and be able  
21 to shed some light on it, but generally you are  
22 going to have two people, the victim who is  
23 testifying, saying this person raped me, and a  
24 defendant, like Mr. Moraga, saying it was consensual  
25 and from those two people, you need to make a

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PATSY K. SMITH, OFFICIAL COURT REPORTER

1 determination on who is telling the truth.

2 In this case, we didn't bring to you a  
3 victim who was beaten, who had obvious physical  
4 bruises on her body. If you had seen photographs of  
5 a person who was brutally beaten and raped, perhaps  
6 you would say to yourself, "Oh, my goodness this has  
7 to be true," but what about if you have a woman like  
8 Penny Hawk, Ms. Hawk, who is, I believe she said 46  
9 years old, frightened, pushed down the stairs, he  
10 had his hands around her arm, he wouldn't leave her  
11 alone, followed her everywhere and she was raped.

12 Women, and ladies I ask you to share your  
13 common experiences with the gentlemen on the panel,  
14 I would submit to you will react differently in  
15 different circumstances. Some women will fight to  
16 the death, claw, beat me, I'll take any pain you  
17 want to inflict, but don't rape me. Other women  
18 will fight to the extent they can run and scream for  
19 help, hope to God that somebody will hear, and when  
20 they don't, they will try to resist to the extent  
21 they can, but don't hurt me.

22 Perhaps, that was what went through Penny  
23 Hawk's mind. She tried to run and scream for help.  
24 Obviously someone heard her, but couldn't determine  
25 where it was coming from. Then she tried to get

1 down the stairs. She was pushed down the stairs and  
2 then brought back up, and that's where it all  
3 began.

4           Some women, when they were able to get to  
5 the phone would have dialed 911, please send the  
6 police. The first thing that went through Penny's  
7 mind was probably the first number that popped in  
8 her head was my daughter and she didn't have to  
9 explain anything. This is where I am at. This is  
10 my name. This is what happened. "Jodi, I'm being  
11 raped. Call the police." Boom, and Jodi called the  
12 police. This is certainly not a case where we can  
13 say where is a cop when you need one. I think it's  
14 apparent from the evidence that the police were in  
15 that area and converged almost immediately and we  
16 probably had so many that even at this point, we  
17 don't know exactly who did what at every minute of  
18 the time. That's a little bit unusual.

19           Generally what you will have is a sexual  
20 assault unit, the one John Fox assigned to  
21 responding immediately. The police did a good job.  
22 They did some investigation right away, and as it  
23 turns out and we'll talk about this, you don't have  
24 a case where you have to rely solely on the  
25 testimony of the victim. This case has an abundance



1 of corroborating evidence and we'll talk about all  
2 of it, we will make a chart of it and you can take a  
3 look at it.

4 When the defendant walked in this  
5 courtroom to stand trial for this charges, he had a  
6 cloak, I call it a cloak of innocence. He was  
7 innocent until you determine that he's guilty. I  
8 submit to you that that cloak of innocence is now  
9 gone. The State has proven beyond a reasonable  
10 doubt that he acted viciously, that in his arrogance  
11 he raped a woman, and that that is against the law,  
12 and by your verdict, you will let him know that that  
13 is unacceptable, unacceptable behavior.

14 You also have some circumstantial  
15 evidence to deal with in this case and when we watch  
16 T.V. and we see courtrooms, we hear people say but  
17 it's circumstantial evidence, and how can you prove  
18 a case on circumstantial evidence? Well, absent  
19 eyewitness testimony that I saw this person rob the  
20 bank, absent that kind of testimony, basically a lot  
21 of the testimony you will ever hear from a case is  
22 always circumstantial. You have a chain of facts  
23 and you have to follow them and following that  
24 change of facts will lead you somewhere and lead you  
25 to a conclusion.

1           What circumstantial evidence do you have  
2   in this case? First, you have got the direct  
3   evidence. Penny telling you there he is in my  
4   apartment. The door was locked; I didn't give him  
5   permission to come in and she certainly didn't give  
6   him permission to have sex with her. The  
7   circumstantial evidence is the watch, the house key,  
8   the scientific evidence, her scream is  
9   circumstantial evidence and if you follow all of  
10   those . . . in of events, they are going to lead you to  
11   one conclusion and that is the defendant is guilty.

12           All the witnesses who testified, and I  
13   think that there were 17 of them by the time that we  
14   were through, have to be judged by you in terms of  
15   their credibility. You look at their manner upon  
16   the stand, their relationship to any of the parties,  
17   if any, fears, motives, interests, feelings,  
18   opportunity to observe the matter to which they  
19   testify, the reasonableness of their statements, and  
20   the strength or weaknesses of their recollections.  
21   I keyed in, just as I was reading this, the  
22   reasonableness of his statements. We're going to  
23   talk about Mr. Moraga's testimony and I ask you to  
24   judge the reasonableness of his statements, how he  
25   got the key, how he got the watch, what happened

1     when he was in the apartment, what happened as he  
2     was leaving. Instruction No. 19, or excuse me, 18  
3     advise you that the defendant has a prior felony  
4     conviction --

5                 THE COURT: That's the fire alarm, ladies  
6     and gentlemen. It's usually a false alarm, but I  
7     think it's best to play it safe and to leave the  
8     courtroom, ladies and gentlemen. Don't discuss the  
9     case among yourselves, don't form or express any  
10    opinions.

11                We will leave the courtroom until they  
12    announce it is a false alarm.

13                (Off the record at 11:05 A.M. and back on  
14    the record at 11:13 A.M.)

15                THE COURT: It was a false alarm  
16    obviously.

17                You may resume, Ms. Lippis.

18                MS. LIPPIS: Thank you, Judge.

19                Where did we leave off? We were talking  
20    about the prior felony conviction of the defendant.  
21    Instruction No. 18 tells you that you have heard  
22    that he has a prior felony conviction. The  
23    Instruction also tells you that the fact that this  
24    crime or the fact of the crime being admissible is  
25    not for the purpose of proving the character of the

1 defendant or that he acted in conformity therewith  
2 on that occasion. However, it is admissible and may  
3 be considered for purposes of determining the  
4 credibility of the defendant as a witness.

5 So take that into consideration along  
6 with his statement that, yes, he would have sex with  
7 a woman against her will. Evidently not Penny Hawk,  
8 but somebody else.

9 The expert witnesses who have testified,  
10 Dr. Reisch, Nurse Young, Nurse Prescott, Linda  
11 Errichetto and Richard Hague, their testimony was  
12 really rather straightforward. We'll talk just  
13 minimally about some of it because it really  
14 contradicts much of what the defendant told you and  
15 I think we will get it mostly listed right here on  
16 the chart.

17 Finally, and I save this one always for  
18 last, No. 19, you came in here and we pried somewhat  
19 into your personal lives certainly not  
20 intentionally. For that purpose, we asked you about  
21 biases and prejudices, we asked you to please leave  
22 those out in the courtroom, but what we didn't ask  
23 you to leave out there your common sense.  
24 Collectively you bring together into this jury panel  
25 a wealth of living years of life experiences, bring

1 with you your good common sense and judgment bring  
2 with you; we don't want that left out of the  
3 courtroom.

4 All right. My topic here says  
5 defendant's story just doesn't make sense. Number  
6 one, credibility. We talked about the credibility  
7 instruction, we talked about the reasonableness of  
8 the defendant's statements. He seemed to hint if he  
9 almost didn't say that when they met that first  
10 night, approximately two, three weeks before the  
11 rape, they had sex. The victim denies that. If it  
12 were true and she had admitted it, it wouldn't have  
13 mattered. You don't break into somebody's house and  
14 rape them whether you had sex or not. She didn't  
15 have any motive to lie in either event. What the  
16 defendant says makes no sense.

17 He says he was at the apartment complex  
18 on December 5th to rent an apartment. Well, Michael  
19 Harper testified that he had been 86'd from the  
20 apartment complex and that's what caught his  
21 attention the fact that he was on the premises.  
22 Mike Harper didn't know anything about a rape, he  
23 didn't hear a woman scream. He went to the  
24 apartment manager or wherever you go to report  
25 somebody being on the premises.

1                   Later, when the defendant was leaving,  
2   partially unclothed and here are those words again,  
3   I will write them on the chart. The defendant says  
4   he walks into the victim's apartment with the door  
5   unlocked and he immediately goes upstairs. Well,  
6   how did he know she was upstairs? He never said he  
7   had been in the apartment before. Certainly Ms.  
8   Hawk said he had never been, but up he goes and she  
9   is screaming and he thinks that's funny. So he  
10   starts screaming too. Does that make any sense? It  
11   does not make sense. If he was there for a romantic  
12   liaison with a woman, why would she scream for  
13   help? Why would Michael Gomez say he heard screams  
14   for help, somebody please help me?

15                   He says they attempted consensual sex and  
16   these words aren't so bad, but he couldn't get off.  
17   He says the victim says, "Your dick's not hard, you  
18   can't do it. Your dick's not hard." What is  
19   interesting about that is that word because that's  
20   not Penny Hawk's word. That's the defendant's word  
21   because when he walked out of the apartment complex,  
22   what did he say to Michael Harper? "I came twice,"  
23   and I'm going to use the word penis. "My penis was  
24   too hard," that's not Penny's word, that's his.

25                   He left the apartment not dressed,

1     combing his hair, shirt off, whatever he was  
2     wearing, confirmed by Michael Harper and the police  
3     who saw him and followed him because he looked  
4     suspicious. The defendant says he does it all the  
5     time. My question is if you are there for a  
6     romantic liaison with a woman, why is he leaving in  
7     such a hurry, why is she on the phone according to  
8     him and he's just left? No, ladies and gentlemen,  
9     nothing he says has made any sense at all and the  
10    jury instruction on credibility tells you that if a  
11    witness has lied about any material fact, you may  
12    disregard their entire testimony. The evidence is  
13    certainly clear that the defendant has lied.

14               Remember I told you about corroborating  
15    evidence, we are going to do it right here. The  
16    State need not corroborate Penny Hawk's testimony in  
17    any respect. It just so happens that even without  
18    her assistance, the corroborating evidence is  
19    there. First one the watch. Jodi is home late in  
20    the evening on the 4th, mom graveyard worker, her  
21    days and nights are the opposite. She goes out for  
22    awhile. Jodi expects her back, doesn't lock the  
23    door. Mom gets home in time to give Jodi a ride to  
24    work and Jodi can't find her watch and also some  
25    money is missing. They are late. She gets her to

1 work.

2 5:30 in the morning or before 5:30, when  
3 Jean Behl has to be at work, that watch that was  
4 there when Jodi went to bed is gone in the  
5 defendant's possession and he's giving it to Jean  
6 Behl. The defendant's story is he bought it in a  
7 crack alley. I don't think we have to ask the  
8 defendant what crack means. We're all adults. It  
9 hits the newspaper every single day. Crack is  
10 cocaine. It's where he said he bought it in a crack  
11 alley.

12 Corroboration number two, the key to the  
13 apartment. Jodi didn't know her key was missing  
14 until mom was in the hospital, she's trying to lock  
15 up to get out and she has no key. The defendant is  
16 in custody. She tells John Fox, "My key is now gone  
17 too." Detective Fox responds back to the jail. Now  
18 not only the defendant has the watch, of course, we  
19 don't know that he has the watch at this point, but  
20 for purposes of trial, you can see every time, it  
21 points directly to Defendant Moraga. John Fox  
22 checks, he has an outline of the key, key matches;  
23 he signed out for the key, takes it to Jodi. They  
24 try it to the door, he tries it in the door, it  
25 fits.



1           Defendant's explanation. I want you to  
2   consider the reasonableness of this explanation,  
3   found on floor. Well, I suppose a reasonable  
4   question would be if you are involved romantically  
5   with a woman either for just a short encounter,  
6   obviously you are getting along, obviously you want  
7   this sexual thing to happen. You find a key on her  
8   floor and you pick it up and put it in your pocket  
9   and out the door you go. Is that reasonable? No.  
10           Corroborating evidence number three,  
11   scream for help. Certainly no reason to scream for  
12   help out the bathroom window of the upstairs floor  
13   unless you need some help. I suppose romantic  
14   partners can be playful in their sex and joke  
15   around, "If you don't leave me alone, I'm going to  
16   scream," but that's not what this was. This was  
17   him, he said on his way upstairs, and she is  
18   screaming. That's not the way it happened. She saw  
19   him in her bedroom doorway and she tried to get to  
20   the window to scream for help and that's what Mr.  
21   Gomez heard. Mr. Gomez didn't hear a male voice.  
22   He said he heard a female voice screaming for help,  
23   "Help, somebody help me," and he tried to find out  
24   where it was, the direction it was coming from. He  
25   couldn't.

1           The defendant's explanation, he thought  
2    It was funny.

3           There is some more corroborating evidence  
4    and it actually came from the defendant himself.  
5    That little triangle means defendant, defendant's  
6    statements. Coming out of Penny Hawk's apartment,  
7    he runs into Michael Harper. Now, judge Michael  
8    Harper like would you anybody else who if a  
9    defendant had been 86'd and knew him as Sonny,  
10   didn't know him beyond that, they weren't friends,  
11   Michael worked there. He had no motive to make it  
12   up or lied. It's just what he heard. He didn't  
13   know a rape occurred and the defendant asked him  
14   and, yeah, what did the defendant say? "Sex from a  
15   woman, it wasn't the best piece, but my dick is  
16   still hard, and I came twice." That's important.  
17   That's a quote of -- I'm not going to write all  
18   that, but I'm going to use the word twice and you  
19   will know what I'm referring to. Michael Harper  
20   didn't know a rape occurred. Penny Hawk hadn't  
21   talked to Michael. Penny is at the hospital.  
22   Police are getting all this information. Penny  
23   tells the police he did it to her twice, twice. The  
24   defendant admitted twice to Michael Harper as he's  
25   leaving. On the stand, the defendant says I didn't

1 get off. I don't know how to write that, get off.  
2 Talks to Jean Behl, former girlfriend,  
3 couple weeks ago. "I had this case beat until you  
4 turned in the merchandise." She didn't remember his  
5 exact words. That shows this defendant's  
6 arrogance. Yes, he will have sex with a woman  
7 without her consent. Evidently not Penny Hawk and  
8 he believes he had this case beat until she turned  
9 in the watch. Well, that's certainly something that  
10 you as jurors could discuss.

11 Take the watch off, the key, the scream  
12 for help, his statements, his testimony, did he have  
13 this case beat without the watch? It's not  
14 important because we have the watch, but that shows  
15 his arrogance. Case beat. Would you have sex with  
16 a woman against her will, without her consent?  
17 Yes.

18 Leaving the defendant's statement for a  
19 moment, we have some scientific evidence. The  
20 defendant certainly put himself in the apartment by  
21 his own testimony, but before he testified, we had  
22 him placed there. Michael Harper placed him there,  
23 but the fingerprints confirmed that, but he  
24 confirmed all that.

25 So we know our evidence is correct, but

1 we have some scientific evidence. We have vaginal  
2 pooling of a clear or white clear liquid inside the  
3 vaginal cavity. We have sperm slides, the vaginal  
4 slides, we have sperm on defendant's -- I don't have  
5 a word for underwear, so I'm going to put shorts --  
6 on the defendant's shorts. His explanation, he  
7 didn't get off. Again, didn't get off.

8 Sixth and last, motive and motive. You  
9 saw what it's like for the victim of a rape to get  
10 up on the stand and testify to the most intimate  
11 things that can happen between consenting adults.  
12 Sex is legal. Sex can be fun. It can be  
13 compassionate. It can be all the things that you  
14 have experienced in life. You can make babies with  
15 sex. Sex that way is not violent. It has often  
16 been said that rape is a crime of violence. It is  
17 definitely not a crime of passion.

18 What motive does this woman have to come  
19 in and lie? You probably read in the paper a lot, a  
20 lot of women don't even report being raped, but she  
21 did. Why would she lie? What's her motive? She  
22 met the man once. You certainly can question her  
23 judgment, although she went to a neighborhood bar  
24 where she goes; she met the defendant in the parking  
25 lot. Yeah, they talked and had some drinks. They

1 went to Rascals and that's where he said to her, "I  
2 want you to be my mama," and that's when she decided  
3 this probably isn't the best decision I made in my  
4 life and that was the end of that. There was no sex  
5 between these two and even if there were, it doesn't  
6 matter when somebody breaks into your house and  
7 rapes you. She has no reason to lie.

8           The trauma associated with getting up on  
9 that stand and trying to say words to you that come  
10 easy for me since these are the cases that I do, but  
11 for her in front of all these men and only two  
12 ladies, "He raped me." She danced all around putting  
13 his penis into her vagina against her will. Those  
14 words are hard to say.

15           And then I said to her what happened to  
16 you at the hospital when you went? It's totally one  
17 thing to be raped, but now we go to the hospital and  
18 here comes another intrusion against your will  
19 maybe, but not in a legal sense, but you have to go  
20 through it again. And the whole wheels of the  
21 judicial system, what motive? She didn't know him,  
22 she had nothing to gain, we're not talking about  
23 laughs here or married or divorced people fighting  
24 over children, one yells rape or you did this to the  
25 kids, or whatever, we are not talking about that.

1                   We are talking about a man who is  
2   incredible, incredible arrogance taking what should  
3   be and what is a legal act and turning it into a  
4   crime of violence. Not only did he rape her once,  
5   he raped her twice. Sometimes you can argue and  
6   maybe even rightfully so that if a woman is raped  
7   twice, maybe it's just one act, but what if there is  
8   sufficient time intervening for a person of normal  
9   senses to pause and reflect upon their actions,  
10   whoa, whoa, I better not. He had time, he was in  
11   control, he didn't let her go, he bragged to the  
12   gardner what he had just done. He's guilty of two.

13                  After the evidence came in and you know  
14   what your case is about and you put it together and  
15   you hear it, I started looking at the burglary  
16   charges specifically Count I. Burglary with intent  
17   to commit larceny. Well, we know he took the watch  
18   and we know he probably took some money  
19   circumstantially, but was that his intent at the  
20   time he entered? I don't know that the evidence  
21   shows that and that's being quite candid with you.  
22   Our whole theory has been that he probably was  
23   looking for Penny when he entered and, in all  
24   likelihood, he got the house key at the same time  
25   and then he came back several hours later. Unless

1 you, in your own mind, determine that he's guilty  
2 beyond a reasonable doubt with that element entry  
3 with the intent to commit larceny, then acquit him  
4 on Count I. I'm going to leave it up to you whether  
5 the evidence is there.

6 We know what he did when we went in. He  
7 certainly stole the watch. Was that his intent of  
8 when he entered in light of what he did  
9 subsequently? I don't know. That one is left up to  
10 you, but ladies and gentlemen, beyond a doubt, he's  
11 the only one in this trial who had any motive  
12 whatsoever to lie. He's on trial for some very  
13 serious charges. He violated the dignity of a woman  
14 and it can happen the other way, the dignity of a  
15 man can also be violated. He lied to you from the  
16 stand. The evidence does not support one word that  
17 he said and the State asks you, at a minimum, to  
18 convict him of the second count of burglary and two  
19 counts of sexual assault. I will leave to your  
20 determination and your good judgment that element of  
21 specific intent as regarding Count II.

22 Thank you.

23 THE COURT: Mr. Hillman, do you want the  
24 bailiff to remove that?

25 MR. HILLMAN: I will just turn it. Ms.

1 Lippis may use it again.

2 May it please the Court.

3 THE COURT: Mr. Hillman.

4 MR. HILLMAN: Ms. Lippis, ladies and  
5 gentlemen of the jury, now Mr. Moraga is lucky that  
6 he lives in the United States of America where he  
7 has 12 open minded people to determine his fate.  
8 There are many countries in the world where a man or  
9 a woman is guilty until they can prove themselves  
10 innocent and I think all of us are lucky that we  
11 don't live in a country of that type.

12 As a matter of fact, Mr. Moraga didn't  
13 need to testify, we didn't need to do anything in  
14 this case because it's upon the State to prove their  
15 case and they have to prove it not beyond a shadow  
16 of doubt, but as the instruction says, beyond a  
17 reasonable doubt and we will talk a little bit more  
18 about that, but like Ms. Lippis, I thank you too for  
19 your time and your attention. Your job isn't an  
20 easy one. It's not always an interesting one, but  
21 it is an essential one because without you, the  
22 system just would not work, it wouldn't work.

23 Something else I would like to talk about  
24 is also that Ms. Lippis and I would have made  
25 statements about and will make statements about the



1 evidence, about what we heard and if anything we say  
2 doesn't jive with your recollection, it's not  
3 because either one of us are trying to misrepresent  
4 anything. It's simply because we hear things in one  
5 way, perhaps you heard it in a different way, but  
6 neither one of us, I have known Ms. Lippis for a  
7 long time, would intentionally try to mislead you  
8 about anything.

9           These are very serious charges. They are  
10 charges that are sensitive to people, sensitive to  
11 you, sensitive to the people that are involved.  
12 These just have a way of reaching into your gut and  
13 just grabbing you. It's something that cannot be  
14 taken lightly by either side.

15           These charges are here for you to decide  
16 what actually happened. We have two different  
17 stories and basically the real issue here is  
18 consent, did consent occur or didn't it, and that's  
19 going to be your decision to decide. The State  
20 called a great number of witnesses in this case and  
21 there is quite a bit of testimony regarding  
22 different things.

23           First, I'd like to respond a little bit  
24 to some of the things that Ms. Lippis brought up,  
25 some of the questions that she brought up. First of

1 all, she stated that Mr. Moraga left in a hurry and  
2 she asked why would he leave in such a hurry if this  
3 was a romantically liaison, as Mr. Moraga stated.  
4 Well, he left in a hurry because Penny told him that  
5 she had to go to work, that there wasn't much time.

6 She asked about the key, he picked the  
7 key up off the floor. Why would he pick the key  
8 up? My response to that is if he's lying, why  
9 didn't he make up a better story? It would have  
10 been very easy for him to say, well, the guy that  
11 bought the watch, the guy gave me the key or some  
12 other ridiculous thing, but he didn't do that. If  
13 he is lying, why wouldn't he make up a better story  
14 than I saw it on the ground and picked it up. It's  
15 not a benefit of the defendant to say I was in a  
16 woman's house, I saw the key on the floor and I  
17 picked it up.

18 Finally, no matter what you think of Mr.  
19 Moraga, no matter what he looks like or what you  
20 think about him, he's not on trial for his looks and  
21 he's not on trial for his arrogance either. He's on  
22 trial for what he's been charged with.

23 Now, the State's burden is to show beyond  
24 a reasonable doubt that what happened is indeed what  
25 he's been charged with. There is an instruction

1 that explains what reasonable doubt is and I'd like  
2 to tell you a story I have heard that better  
3 illustrates reasonable doubt.

4 Let's suppose that we had a cardboard box  
5 that's about the size of this desk right here and we  
6 open up the top of the box, into the box we put a  
7 cat, into the box we put a mouse. Close the box,  
8 come back in two hours, open it back up. There's  
9 the cat, but the mouse is gone. What happens to the  
10 mouse? That's reasonable to decide that the cat ate  
11 the mouse. It's just gone.

12 Okay same scenario, open up the top of  
13 the box, put a cat in it, put a mouse in it, close  
14 it up, come back in two hours and, again, there's  
15 the cat, but the mouse is gone, but this time you  
16 look down in the corner of the box and there's a  
17 hole about two inches across. Did the cat eat the  
18 mouse or did the mouse escape through the hole? We  
19 don't know. There's a reasonable doubt as to  
20 whether or not the cat ate the mouse.

21 Now, Penny Hawk came in here and  
22 testified and told you her version of what had  
23 happened. She stated that, number one, Mr. Moraga  
24 threw her around, threw her into the wall, that he  
25 pushed her down the stairs. People die from being

1 pushed down the stairs, people get broken bones from  
2 being pushed down the stairs and, yet, when Mr.  
3 Reisch came in and testified, Dr. Reisch stated that  
4 there was no obvious trauma. In other words, there  
5 weren't any injuries he could see, no bruises, no  
6 cuts, no scrapes, no carpet burns, none of that  
7 existed.

8 If you looked at Mr. Moraga, when he took  
9 the stand, he had a hard time walking up the steps.  
10 There's been testimony that at the time he was  
11 wearing a knee brace and you can see physically he's  
12 not a very strong person. Now anybody that ever  
13 tried to pick anybody else up knows that when you  
14 lift somebody, you don't lift with your arms, you  
15 lift with your legs. Mr. Moraga was physically  
16 incapable of doing that.

17 Now, there were fingerprints found in the  
18 house. There were only three useable ones and they  
19 are two different hands, not in such a manner that  
20 you would expect someone to pick up the can of hair  
21 spray or the drinking glass. Perhaps that has been  
22 explained, but what has not been explained is why  
23 weren't there more fingerprints? For example, no  
24 fingerprints off any door knobs anywhere, a surface  
25 which is very adept to picking up fingerprints,

1 something smooth and hard like that. No  
2 fingerprints off Jodi Howard's wallet either which  
3 is where the money was taken from.

4 Linda Errichetto came in and testified  
5 about the results of her scientific investigations.  
6 She stated that there was indeed a pool found in the  
7 vagina of Penny Hawk -- excuse me -- of clear  
8 liquid. She attempted to type the blood type of Mr.  
9 Moraga, the blood type of Ms. Hawk and found them to  
10 both be O. She then went into a sub-type  
11 examination, was unable to identify any sub-typings  
12 that would definitely or that would separate the two  
13 of them, put them in two different categories and,  
14 yet, this pool, clear pool of liquid came back as  
15 being the type that was consistent with Penny Hawk  
16 and not with Mr. Moraga. Nor did Ms. Errichetto  
17 state that this pool of liquid could not have come  
18 from a previous sexual encounter that occurred a  
19 couple of days before, according to Dr. Reisch's  
20 testimony.

21 Ms. Errichetto also testified that both  
22 Penny Hawk and Roy Moraga are secreters and that 80  
23 percent of the population are secreters. What does  
24 that mean? Well, it means that your blood type  
25 comes through your bodily liquids. It also means

1 that -- well, it also means that you should be able  
2 to identify someone in their blood type through  
3 those secretions.

4 Now, again, the pool that was found in  
5 the vagina was of an O type, the type of Ms. Hawk  
6 also of Mr. Moraga. Where it came from, the State  
7 has been unable to specifically say and that's the  
8 whole point of that discussion.

9 Now, Mr. Moraga stated that he bought the  
10 watch. Jodi Howard stated that the door was left  
11 open that night in the middle of the night. We  
12 don't know who went in that house. In this day and  
13 age and especially of the neighborhood where these  
14 incidents took place, it's not uncommon for home  
15 burglaries to occur. It's not uncommon that the  
16 perpetrators of those burglaries are people who are  
17 looking for money and for things to buy drugs with  
18 and where else would you find someone like that but  
19 in a crack alley a few hours later. It's entirely  
20 possible. It's not nearly as outlandish as the  
21 State would ask you to believe.

22 Finally, with regard to what Ms. Dippis  
23 talked about intent on Count No. 1 of the burglary,  
24 there has been no evidence of intents, none  
25 whatsoever. If you decide it was Mr. Moraga who

1     went in that first time, there is no evidence of  
2     intent. We don't know why he went there, if indeed  
3     he was there. Mr. Moraga denies being there.

4             Now, ladies and gentlemen, this is an  
5     important case to both sides. It's a serious case  
6     to both sides and I would ask that you don't let  
7     your emotions get involved here, but you sit down,  
8     use your reason, listen to what's said and decide as  
9     objectively as you can what your decision is going  
10    to be and at the end of your deliberations, I feel  
11    confident that you will come back with verdicts of  
12    not guilty for Mr. Moraga.

13            THE COURT: Ms. Lippis.

14            MS. LIPPIS: Thank you, sir.

15            You will be out in time for lunch. I  
16    have a couple of questions here.

17            Mr. Hillman used the word absolutely no  
18    intent of Count 1 or any evidence to support it.  
19    There is evidence. Your decision is whether there's  
20    enough and I bring it up to you only out of  
21    fairness, because considering the theory of the  
22    case, the State wasn't even sure if there was  
23    sufficient evidence, and if there is not, you should  
24    acquit him as to Count 1, but that's all.

25            Mr. Hillman brings up fingerprints and

1 wants to know why weren't there anywhere else. I  
2 hope you listened to Richard Hague's testimony. He  
3 addressed that issue we don't go around touching  
4 things like this intentionally trying to leave  
5 prints. As a matter of routine living, we move  
6 quickly prints smudged and you cannot always find  
7 identifiable prints. He defined them, however,  
8 where he was directed and when the police do an  
9 investigation, they ask where a victim was and even  
10 the last place he happened to be was in spraying his  
11 hair and getting ready to go out and that's where  
12 the fingerprints -- identifiable ones were found.

13 Of course, it's not really important at  
14 this point because we have developed that evidence  
15 to put a person there to show this is where he was.  
16 He has already admitted to being there. So don't be  
17 sidetracked by it. We're not dealing now with an  
18 issue of identity. We know who it is. The only  
19 issue, all be it weak that it is, is the issue of  
20 consent.

21 Mr. Hillman says that couldn't the  
22 defendant have made up a better story? Well,  
23 defendants aren't, by nature, very brilliant and  
24 it's very difficult to explain a way how you get  
25 somebody's house key. I can offer to you a better



1 story. We were having consensual sex, getting along  
2 really great and she gave me a house key so I could  
3 come and go. That's not too hard to think up, but  
4 you know that it's not what happened because it was  
5 Jodi's house key.

6 Mr. Hillman, I heard him once before in a  
7 pretty sterling argument talking about the box with  
8 the cat and mouse and then I thought it was adorable  
9 and I still do. It explains quite nicely reasonable  
10 doubt.

11 In this case, however, the only person  
12 who's playing cat and mouse with victims, with the  
13 judicial system, and in this courtroom is the  
14 defendant Roy Moraga.

15 Thank you.

16 THE COURT: Mr. Bridenburg and Mr. Bean,  
17 we are going to temporarily excuse you and you are  
18 free to go home, but please leave your telephone  
19 number with my clerk and then if we need you, we  
20 will telephone you to come back.

21 Thank you.

22 Thank you, Mr. Bridenburg.

23 MR. BRIDENBURG: Thank you.

24 THE COURT: Thank you, Mr. Bean.

25 MR. BEAN: Thank you.

1 THE COURT: The clerk will swear the  
2 officer to take charge of the jury.  
3 (At this time, the officer was duly  
4 sworn.)  
5 THE COURT: Ladies and gentlemen, the  
6 case is submitted to you for your deliberation. If  
7 you will just follow the bailiff, he will take you  
8 to the jury deliberation room.  
9 (Off the record at 11:49 a.m. and back on  
10 the record at 3:03 p.m.)  
11 THE COURT: Ladies and gentlemen, have  
12 you reached a verdict?  
13 Let me inquire, who is the foreman? Yes,  
14 Mr. Tobler?  
15 MR. TOBLER: Yes.  
16 THE COURT: Have you reached a verdict?  
17 MR. TOBLER: Yes, we have.  
18 THE COURT: Would you hand the forms of  
19 verdict to the bailiff, please.  
20 Do you have the other forms of verdict  
21 that were not used?  
22 MR. TOBLER: They are right here.  
23 THE COURT: Okay, may I see those,  
24 please?  
25 Thanks.

1           The clerk will read allowed the verdicts  
2   and inquire of the jury if those are their  
3   verdicts.

4           THE CLERK: "Verdict: We the jury in the  
5   above entitled case find the defendant guilty of  
6   Count I, burglary, dated this 15th day of March,  
7   1990, Howard L. Tobler, foreperson.

8           Verdict: We the jury in the above  
9   entitled case find the defendant guilty of Count II,  
10   burglary, dated this 15th day of March, 1990, Howard  
11   L. Tobler, foreperson.

12          Verdict: We the jury in the above  
13   entitled case find the defendant guilty of Count  
14   III, sexual assault, dated this 15th day of March,  
15   1990, Howard L. Tobler, foreperson.

16          Verdict: We the jury in the above  
17   entitled case find the defendant guilty of Count IV,  
18   sexual assault, dated this 15th day of March, 1990,  
19   Howard L. Tobler, foreperson."

20          Ladies and gentlemen of the jury, are  
21   those your verdicts as read so say you one, so say  
22   you all?

23          THE JURY: (In Unison) Yes.

24          THE COURT: Poll the jury.

25          THE CLERK: Yes, sir.

1 Daniel Cooper, are are those your  
2 verdicts as read?

3 MR. COOPER: Yes, ma'am.

4 THE CLERK: Marin Hernandez, are those  
5 your verdicts as read?

6 MS. HERNANDEZ: Yes, ma'am.

7 THE CLERK: Gerre Pittenger, are those  
8 your verdicts as read?

9 MS. PITTENGER: Yes, ma'am.

10 THE CLERK: David Barneby, are those your  
11 verdicts as read?

12 MR. BARNERY: Yes, sir.

13 THE CLERK: Colleen Monney, are those  
14 your verdicts as read?

15 MS. MOONEY: Yes, ma'am.

16 THE CLERK: Kenneth Novak, are those your  
17 verdicts as read?

18 MR. NOVAK: Yes, ma'am.

19 THE CLERK: Clarence Morgan, are those  
20 your verdicts as read?

21 MR. MORGAN: Yes, sir.

22 THE CLERK: Paul Petarde, are those your  
23 verdicts as read?

24 MR. PETARDE: Yes, ma'am.

25 THE CLERK: Michael Reago, are those your

1 verdicts as read?

2 MR. REAGO: Yes, ma'am.

3 THE CLERK: Veronica Pike, are those your  
4 verdicts as read?

5 MS. PIKE: Yes, ma'am.

6 THE CLERK: Howard Tobler, are those your  
7 verdicts as read?

8 MR. TOBLER: Yes, ma'am.

9 THE CLERK: And Jose Leyva, are those  
10 your verdicts as read?

11 MR. LEYVA: Yes.

12 THE COURT: The clerk will record the  
13 verdicts as read.

14 With the recording of the verdicts,  
15 ladies and gentlemen, this concludes your services  
16 as jurors in this case.

17 Before we discharge you and send you on  
18 your way home, we do want to express the Court's  
19 thanks for the attention that you have given the  
20 case. We all recognize it's not an easy job, but  
21 the system works, and it's a good and fair system,  
22 ladies and gentlemen, because people like yourself  
23 devote your time, your attention, your energy, to  
24 making the system work and we appreciate it. I  
25 think you'll look back on this as a valuable

1 experience being able to be a part of the system,  
2 just seeing how it does work.

3 We do thank you and you are excused. You  
4 are free to discuss the case with anyone you want  
5 to, if you want to, and if you go down to the jury  
6 administrator's room on the first floor, she will  
7 have vouchers cut for you so you can be paid before  
8 you go home.

9 Thank you, ladies and gentlemen.

10 (At this time, the jury left the  
11 courtroom.)

12 THE COURT: At this time, the Court is  
13 revoking bail. Defendant will be held without  
14 bail.

15 We will continue the matter until the  
16 18th of April at 9:00 a.m. for sentencing.

17 MR. HILLMAN: Your Honor, Mr. Moraga does  
18 have a knee problem suffered while he was working.  
19 He's informed me that he'd like to have about a  
20 month after that, see if he can't get this medical  
21 problem taken care of before he's transported to the  
22 prison. Seems to me it would be taken care of here  
23 than once he gets to prison.

24 THE COURT: Are you seeing a doctor now?

25 THE DEFENDANT: Yes, I am.

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

JAN 9 9 33 AM '91

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY MORAGA

Defendant.

*L. A. ...*  
CLERK

CASE NO. C92174  
DEPT NO. VII

ORDER RELEASING EVIDENCE

Upon the ex parte application and representation of REX BELL, District Attorney, by and through Assistant District Attorney, DONALD K. WADSWORTH, that evidence in the above entitled matter, held in the custody of the Clark County Clerk, is no longer required to be retained in evidence for further prosecution of this matter, and that its release to the apparent rightful owner is in the best interest of Justice, authorizing ALDINA MANG and/or NORRETA CALDWELL, Custodians of the Evidence Vault, to break Justice Court seal for the purpose of returning said property to the rightful owner PENNY HAWKS, and good cause appearing therefore,

IT IS HEREBY ORDERED that the evidence held in the custody of the County Clerk, being State Exhibit 13A, one Sieko watch, be and hereby are released to PENNY HAWKS.

Dated this 7th day of January, 1991.

*Paul ...*  
DISTRICT JUDGE

*Donald K. Wadsworth*  
DONALD K. WADSWORTH  
Assistant District Attorney

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1 DISTRICT COURT  
2 CLARK COUNTY, NEVADA

3 FILED

4 THE STATE OF NEVADA, )

5 Plaintiff, )

6 vs. )

7 ROY MORAGA )

8 Defendant. )

JAN 9 9 32 AM '91

*Loetta Simon*  
CLERK

CASE NO. C92174  
DEPT NO. VII  
PETITION FOR RELEASE  
OF EVIDENCE

9  
10 COMES NOW, The State of Nevada, through REX BELL, District  
11 Attorney, by and through his Assistant District Attorney,  
12 DONALD K. WADSWORTH, and moves this Honorable Court, ex parte  
13 to release the following evidence in the above entitled matter,  
14 to-wit: States Exhibit 13A, one Sieko watch, authorizing ALDINA  
15 MANG and/or NORRETA CALDWELL, Custodians of the Evidence Vault  
16 to break Justice Court seal for the purpose of returning said  
17 property to the apparent rightful owner, PENNY HAWKS, on the  
18 grounds that said property is no longer required to be retained  
19 in evidence for further prosecution of this matter and that its  
20 release to PENNY HAWKS, is in the best interest of Justice.

21 DATED this 28<sup>th</sup> day of December, 1990.

22 REX BELL  
23 District Attorney

24  
25 BY: *Donald K. Wadsworth*  
26 DONALD K. WADSWORTH  
Assistant District Attorney

27 x





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Las Vegas, NV 89155  
(702) 455-4861  
Attorney for the Plaintiff  
THE STATE OF NEVADA

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SEP 13 12 56 PM '91

DISTRICT COURT

Clark County, Nevada

THE STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. C92174X

DEPT. NO. VIII

DOCKET NO. M

ORDER FOR PRODUCTION

OF INMATE

TO: ROBIN BATES, Chief of Classifications;

TO: JOHN MORAN, Sheriff of Clark County, Nevada:

Upon the ex parte motion of THE STATE OF NEVADA, Plaintiff, by  
REX BELL, District Attorney, through DEBORAH J. LIPPIS, Deputy  
District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that ROBIN BATES, Chief of  
Classifications, shall be, and he is hereby directed to produce  
ROY D. MORAGA #31584, defendant in Case No. C92174X, on a  
charges of Burglary and Sexual Assault wherein THE STATE OF  
NEVADA is the Plaintiff, inasmuch as the said defendant is  
currently incarcerated in the Ely State Prison located at

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opimor1, d3

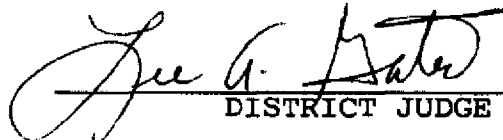
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1 Carson City, Nevada and his presence will be required in Las  
2 Vegas, Nevada commencing on September 23, 1991 at the hour of  
3 9:00 o'clock a.m., and continuing until the completion of the  
4 prosecution's case against the said defendant.

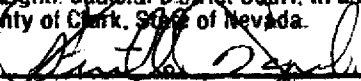
5 IT IS FURTHER ORDERED that JOHN MORAN, Sheriff of Clark  
6 County, Nevada, shall accept and retain custody of the said  
7 defendant in the Clark County Jail, Las Vegas, Nevada, pending  
8 completion of said matter in Clark County, or until the further  
9 Order of this Court; or in the alternative shall make all  
10 arrangements for the transportation of the said defendant to  
11 and from the Nevada State Prison facility which are necessary  
12 to insure the defendant's appearance in Clark County pending  
13 completion of said matter, or until further Order of this  
14 Court.

15 DATED this 12 day of September, 1991.

16  
17   
DISTRICT JUDGE

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19   
20 DEBORAH J. LIPPIS  
Deputy District Attorney

21  
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28

CERTIFIED COPY  
The document to which this certificate is attached  
is a full, true and correct copy of the original on  
file and of record in my office.  
DATE: 9/13/91  
LORETTA DOWNING, County Clerk and Clerk of  
the Eighth Judicial District Court, in and for the  
County of Clark, State of Nevada.  
By  Deputy

gmr

1 MORGAN D. HARRIS  
2 PUBLIC DEFENDER  
3 Nevada Bar #1879  
4 309 S. Third Street  
5 Las Vegas, NV 89155  
6 (702) 455-4685  
7 Attorney for Defendant

FILED

SEP 26 3 50 PM '91

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA  
10

11 THE STATE OF NEVADA, ) CASE NO. C92174  
12 )  
13 Plaintiff, ) DEPT. NO. X  
14 vs. ) DATE OF HEARING: 10/9/91  
15 ROY D. MORAGA, ) TIME OF HEARING: 9:00 AM  
16 Defendant. )  
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29 MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VIII

30 COMES NOW the defendant, ROY D. MORAGA, by and  
31 through his attorney, R. ROGER HILLMAN, Deputy Public  
32 Defender, and moves this Honorable Court for an order  
33 transferring this case back to District Court VIII, pursuant  
34 to the Order of Remand from the Supreme Court of Nevada.

35 This Motion is based on Affidavit of counsel.

36 DATED this 26th day of September, 1991.

37 MORGAN D. HARRIS  
38 Nevada Bar #1879  
39 PUBLIC DEFENDER

40 By R. Roger Hillman  
41 R. ROGER HILLMAN, #3076  
42 Deputy Public Defender  
43  
44  
45  
46  
47  
48

CE

A F F I D A V I T

STATE OF NEVADA)

ss:

COUNTY OF CLARK)

R. ROBER HILLMAN, having been first duly sworn, deposes  
and says

1. That he is an attorney duly licensed to practice  
law in the State of Nevada, is the Deputy Public Defender  
assigned to represent the defendant and is familiar with the  
case.

2. That this case was tried in front of the Honorable  
Michael J. Wendell.

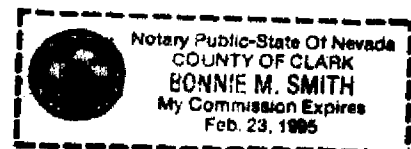
3. That the Honorable Michael J. Wendell is familiar  
with all the facts of the case, as well as the thought processes  
involved in reaching the sentence given the defendant.

4. That your affiant has been informed by the  
secretary in District Court VIII that Judge Wendell is due to  
return in mid-October to render decisions in several civil  
matters. Therefore, this case could properly be heard by Judge  
Wendell at that time.

*R. Roger Hillman*  
R. ROGER HILLMAN

Subscribed and Sworn to before me  
this 26th day of September, 1991.

*Bonnie M. Smith*  
Notary Public in and for said  
County and State



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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office has set the foregoing MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VIII for hearing on Wednesday, the 9th day of October, 1991, at 9:00 am. in Department X of District Court.

DATED this 26th day of October, 1991.

MORGAN D. HARRIS  
Nevada Bar #1879  
PUBLIC DEFENDER

By R. Roger Hillman  
R. ROGER HILLMAN, #3076  
Deputy Public Defender

RECEIPT OF COPY of the foregoing MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VIII is hereby acknowledged this 26<sup>th</sup> day of September, 1991.

CLARK COUNTY DISTRICT ATTORNEY

By Carol Hessel

# IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed  
Nov 13, 2012 09:19 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

ROY D. MORAGA,  
Appellant(s),  
vs.

Case No: C092174  
SC No: 61734

STATE OF NEVADA,  
Respondent(s),

# RECORD ON APPEAL VOLUME 1

ATTORNEY FOR APPELLANT  
ROY D. MORAGA # 31584  
PROPER PERSON  
1200 PRISON RD.  
LOVELOCK, NV 89419

ATTORNEY FOR RESPONDENT  
STEVEN B. WOLFSON, ESQ.  
DISTRICT ATTORNEY  
200 LEWIS AVE.  
LAS VEGAS, NEVADA 89101

I N D E X

<u>VOLUME:</u>	<u>PAGE NUMBER:</u>
1	1 - 220
2	221 - 441
3	442 - 662
4	663 - 882
5	883 - 1101
6	1102 - 1320

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	01/10/2006	AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1117 - 1120
3	10/03/1991	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	442 - 442
4	03/05/1996	AFFIDAVIT IN SUPPORT OF MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	757 - 758
4	02/20/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	702 - 704
4	03/11/1996	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	764 - 766
3	10/03/1991	AFFIDAVIT IN SUPPORT OF OF REQUEST TO PROCEED IN FORMA PAUPERIS	443 - 445
4	02/20/1996	AFFIDAVIT OF DEFENDANT	705 - 706
4	03/11/1996	AFFIDAVIT OF PETITIONER	767 - 768
6	01/10/2006	AFFIDAVIT OF PETITIONER	1121 - 1122
5	04/30/1998	AFFIDAVIT OF ROY D. MORAGA	887 - 888
5	09/27/2004	AFFIDAVIT OF ROY D. MORAGA	1061 - 1062
1	06/13/1990	AMENDED INFORMATION	118 - 121
3	11/13/1991	AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	461 - 463
4	07/31/1992	ANSWER IN OPPOSITION TO MOTION FOR RETURNING SEIZED PROPERTY	670 - 680
4	10/29/1996	CASE APPEAL STATEMENT	859 - 861
5	06/15/1998	CASE APPEAL STATEMENT	910 - 911
5	09/28/1998	CASE APPEAL STATEMENT	947 - 948
5	02/18/2004	CASE APPEAL STATEMENT	1044 - 1045
6	02/10/2005	CASE APPEAL STATEMENT	1102 - 1103
6	03/02/2007	CASE APPEAL STATEMENT	1214 - 1216
6	03/05/2007	CASE APPEAL STATEMENT	1219 - 1220
6	09/18/2012	CASE APPEAL STATEMENT	1317 - 1318



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
7	11/09/2012	CERTIFICATE OF COPY AND TRANSMITTAL OF RECORD	
5	02/25/2002	CERTIFICATE OF INMATE'S INSTITUTIONAL ACCOUNT	968 - 968
5	01/17/1997	CERTIFICATE OF MAILING	886 - 886
4	08/05/1996	CERTIFICATE OF MAILING OF MOTION TO WITHDRAW AS COUNSEL	830 - 830
1	12/28/1989	CRIMINAL BINDOVER	1 - 11
3	01/27/1992	CRIMINAL SETTING SLIP	469 - 469
1	06/27/1990	DESIGNATION OF RECORD ON APPEAL	140 - 141
3	11/13/1991	DESIGNATION OF RECORD ON APPEAL	464 - 465
3	02/13/1992	DESIGNATION OF RECORD ON APPEAL	471 - 471
4	10/07/1996	DESIGNATION OF RECORD ON APPEAL	849 - 850
5	06/13/1998	DESIGNATION OF RECORD ON APPEAL	907 - 908
5	09/22/1998	DESIGNATION OF RECORD ON APPEAL	944 - 945
6	02/10/2005	DESIGNATION OF RECORD ON APPEAL	1104 - 1105
7	11/09/2012	DISTRICT COURT MINUTES	
3	02/20/1992	EX PARTE APPLICATION FOR PREPARATION OF TRANSCRIPTS	472 - 472
5	02/09/2004	EX PARTE MOTION FOR EXCESS FEES	1030 - 1036
4	02/20/1996	EX PARTE MOTION FOR FEES FOR EXPERT SERVICES	707 - 711
5	09/27/2004	EXTRAORDINARY WRIT OF MANDAMUS	1063 - 1069
3	10/03/1991	FINANCIAL CERTIFICATE	446 - 447
6	01/10/2006	FINANCIAL CERTIFICATE	1123 - 1124
6	02/08/2007	FINDING OF FACT AND CONCLUSIONS OF LAW	1201 - 1206
4	09/06/1996	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	833 - 838
6	08/13/2012	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1275 - 1281
1	01/09/1990	INFORMATION	12 - 14
1	03/15/1990	INSTRUCTIONS TO THE JURY	42 - 66
1	07/07/1990	JUDGMENT OF CONVICTION (JURY TRIAL)	146 - 147
1	03/13/1990	JURY LIST	41 - 41

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	06/04/1990	MOTION AND NOTICE OF MOTION TO AMEND INFORMATION	85 - 117
4	02/20/1996	MOTION AND NOTICE OF MOTION TO COMPEL, PRODUCTION OF SEMAN AND BLOOD	712 - 726
1	02/05/1990	MOTION AND NOTICE OF MOTION TO ENDORSE NAMES ON INFORMATION	31 - 34
5	10/18/2004	MOTION AND ORDER FOR FAILURE TO PROSECUTE AND REINSTATE MOTION TO VACATE AND/OR AMEND JUDGMENT	1075 - 1082
6	02/22/2006	MOTION AND ORDER TO TRANSPORT AND PRODUCE INMATE FOR HEARING	1169 - 1173
6	03/05/2007	MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL	1221 - 1222
5	06/01/1998	MOTION FOR ENLARGEMENT OF TIME	905 - 906
4	04/11/1996	MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	791 - 794
3	10/03/1991	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	448 - 448
4	02/20/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	727 - 727
4	03/05/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	759 - 759
4	03/11/1996	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	769 - 769
5	02/25/2002	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	969 - 971
6	01/10/2006	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL	1125 - 1126
4	08/26/1993	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS; MOTION FOR AMENDED JUDGMENT OF CONVICTION TO INCLUDE JAIL TIME CREDITS AND AFFIDAVIT OF PETITION	683 - 693
6	08/06/2012	MOTION FOR RECONSIDERATION	1257 - 1270
5	12/16/2003	MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	996 - 1006
4	07/21/1992	MOTION FOR RETURNING SEIZED PROPERTY	667 - 669
4	03/11/1996	MOTION FOR RETURNING SEIZED PROPERTY	770 - 773

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
3	01/02/1992	MOTION TO APPOINT COUNSEL FOR APPEAL	466 - 468
5	04/30/1998	MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	889 - 890
5	02/25/2002	MOTION TO PRESERVE EVIDENCE AND ORDER	972 - 980
5	08/06/1998	MOTION TO STRIKE	918 - 924
2	09/26/1991	MOTION TO TRANSFER SENTENCING BACK TO DEPARTMENT VII	439 - 441
5	10/31/2002	MOTION TO VACATE AND/OR AMEND JUDGMENT	982 - 987
4	04/09/1996	MOTION TO WITHDRAW AS COUNSEL	785 - 788
4	08/02/1996	MOTION TO WITHDRAW AS COUNSEL	826 - 829
5	10/19/2004	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1083 - 1088
6	09/13/2007	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - AFFIRMED	1241 - 1248
4	10/30/1995	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	698 - 701
5	04/30/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	949 - 951
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	952 - 959
5	06/01/1999	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	960 - 967
6	05/02/2005	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - DISMISSED	1113 - 1116
3	10/04/1991	NEVADA SUPREME COURT CLERK'S CERTIFICATE JUDGMENT - REMAND	454 - 458
1	06/27/1990	NOTICE OF APPEAL	142 - 143
3	10/30/1991	NOTICE OF APPEAL	460 - 460
4	09/27/1996	NOTICE OF APPEAL	847 - 848
5	06/13/1998	NOTICE OF APPEAL	909 - 909
5	09/22/1998	NOTICE OF APPEAL	946 - 946

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	02/17/2004	NOTICE OF APPEAL	1038 - 1039
6	02/10/2005	NOTICE OF APPEAL	1106 - 1106
6	03/02/2007	NOTICE OF APPEAL	1217 - 1218
6	09/17/2012	NOTICE OF APPEAL	1312 - 1316
6	02/22/2006	NOTICE OF CHANGE OF ADDRESS	1174 - 1174
6	02/13/2007	NOTICE OF ENTRY OF DECISION AND ORDER	1207 - 1213
6	08/21/2012	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	1282 - 1289
4	04/17/1996	NOTICE OF ENTRY OF ORDER	796 - 799
4	09/20/1996	NOTICE OF ENTRY OF ORDER	839 - 846
4	10/28/1996	NOTICE OF ENTRY OF ORDER	851 - 858
5	05/29/1998	NOTICE OF ENTRY OF ORDER	901 - 904
5	07/07/1998	NOTICE OF ENTRY OF ORDER	914 - 917
6	04/08/2005	NOTICE OF ENTRY OF ORDER	1109 - 1112
5	02/26/2002	NOTICE OF HEARING - CRIMINAL	981 - 981
3	10/03/1991	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	449 - 453
4	03/05/1996	NOTICE OF MOTION MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD AND TRANSFER OF RECORDS	760 - 763
1	06/29/1990	ORDER	144 - 145
1	08/02/1990	ORDER	148 - 149
4	08/17/1992	ORDER	681 - 682
6	03/30/2005	ORDER	1107 - 1108
3	02/10/1992	ORDER APPOINTING COUNSEL	470 - 470
6	03/23/2007	ORDER DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1239 - 1240
5	06/30/1998	ORDER DENYING DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME	912 - 913
5	01/07/2004	ORDER DENYING DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1028 - 1029

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
6	10/05/2012	ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER	1319 - 1320
5	05/28/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO MODIFY OR IN ALTERNATIVE CORRECT ILLEGAL SENTENCE	899 - 900
5	08/27/1998	ORDER DENYING DEFENDANT'S PRO PER MOTION TO STRIKE	942 - 943
3	10/23/1991	ORDER FOR APPOINTMENT OF COUNSEL	459 - 459
5	11/21/2002	ORDER FOR APPOINTMENT OF COUNSEL FOR POST- CONVICTION RELIEF	988 - 988
5	02/11/2004	ORDER FOR PAYMENT OF EXCESS FEES	1037 - 1037
6	01/12/2006	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	1162 - 1162
2	09/13/1991	ORDER FOR PRODUCTION OF INMATE	437 - 438
6	04/21/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1186 - 1187
6	05/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1188 - 1189
6	06/05/2006	ORDER FOR PRODUCTION OF INMATE ROY D. MORAGA, BAC # 31584	1199 - 1200
4	08/27/1996	ORDER FOR TRANSCRIPTS	832 - 832
6	01/27/2006	ORDER GRANTING DEFENDANT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER DENYING DEFENDANT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL	1167 - 1168
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	473 - 474
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	475 - 476
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	477 - 478
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	479 - 480
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	481 - 482
3	02/20/1992	ORDER RE: PREPARATION OF TRANSCRIPTS	483 - 484
2	01/09/1991	ORDER RELEASING EVIDENCE	435 - 435
1	06/13/1990	ORDER TO AMEND INFORMATION	122 - 122

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
1	02/15/1990	ORDER TO ENDORSE NAMES ON INFORMATION	39 - 40
4	04/17/1996	ORDER TO WITHDRAW AS ATTORNEY OF RECORD	800 - 801
2	01/09/1991	PETITION FOR RELEASE OF EVIDENCE	436 - 436
4	02/20/1996	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	728 - 748
6	01/10/2006	PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1127 - 1161
1	05/16/1990	PRE-SENTENCE INVESTIGATION REPORT (UNFILED) CONFIDENTIAL	75 - 84
1	03/15/1990	PROPOSED VERDICT	71 - 74
3	02/26/1992	RECEIPT OF COPY	485 - 485
3	02/26/1992	RECEIPT OF COPY	486 - 486
3	02/28/1992	RECEIPT OF COPY	487 - 487
3	03/02/1992	RECEIPT OF COPY	488 - 488
3	03/02/1992	RECEIPT OF COPY	489 - 489
4	08/27/1993	RECEIPT OF COPY	694 - 694
5	12/17/2003	RECEIPT OF COPY	1007 - 1007
4	04/09/1996	RECEIPT OF COPY AND CERTIFICATE OF MAILING	789 - 790
4	04/15/1996	RECEIPT OF COPY OF MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL POINTS AND AUTHORITIES	795 - 795
4	08/05/1996	RECEIPT OF COPY OF MOTION TO WITHDRAW AS COUNSEL	831 - 831
5	01/05/2004	REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1023 - 1027
6	08/28/2012	REPLY TO STATE'S OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION	1290 - 1297
6	05/24/2006	REPLY TO STATE'S RESPONSE AND OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1190 - 1198
5	01/05/2005	REPLY TO STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS AND MOTION TO DISMISS	1099 - 1101

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	01/13/1997	REPORTER'S TRANSCRIPT OF APRIL 17, 1996	862 - 866
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 12, 1996	867 - 871
4	01/13/1997	REPORTER'S TRANSCRIPT OF AUGUST 21, 1996	872 - 875
1	01/24/1990	REPORTER'S TRANSCRIPT OF DECEMBER 26, 1989	15 - 30
3	03/04/1992	REPORTER'S TRANSCRIPT OF FEBRUARY 15, 1990	490 - 491
1	02/12/1990	REPORTER'S TRANSCRIPT OF JANUARY 11, 1990	35 - 38
6	03/12/2007	REPORTER'S TRANSCRIPT OF JANUARY 23, 2006	1223 - 1226
5	05/04/2004	REPORTER'S TRANSCRIPT OF JANUARY 5, 2004	1046 - 1052
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 15, 1996	876 - 877
4	01/13/1997	REPORTER'S TRANSCRIPT OF JULY 19, 1996	878 - 882
1	06/13/1990	REPORTER'S TRANSCRIPT OF JUNE 13, 1990 (UNFILED)	123 - 139
6	03/12/2007	REPORTER'S TRANSCRIPT OF JUNE 26, 2006	1227 - 1233
1	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUED)	150 - 220
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 12, 1990 (CONTINUATION)	221 - 264
3	03/27/1992	REPORTER'S TRANSCRIPT OF MARCH 12, 1990	520 - 657
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 13, 1990	265 - 387
2	10/11/1990	REPORTER'S TRANSCRIPT OF MARCH 15, 1990	388 - 434
5	01/13/1997	REPORTER'S TRANSCRIPT OF MARCH 6, 1996	883 - 885
3	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 7, 1990	658 - 662
4	04/14/1992	REPORTER'S TRANSCRIPT OF MARCH 9, 1990	663 - 664
5	05/14/2004	REPORTER'S TRANSCRIPT OF MAY 11, 1998	1057 - 1060
5	05/04/2004	REPORTER'S TRANSCRIPT OF NOVEMBER 13, 2002	1053 - 1056
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 11, 1991	492 - 494
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 14, 1991	495 - 499
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 21, 1991	500 - 511
3	03/04/1992	REPORTER'S TRANSCRIPT OF OCTOBER 9, 1991	512 - 514
3	03/04/1992	REPORTER'S TRANSCRIPT OF SEPTEMBER 23, 1991	515 - 519

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
4	05/26/1992	REQUEST FOR RECORDS	665 - 666
6	08/28/2012	REQUEST TO FILE EXHIBIT 1	1298 - 1311
4	09/29/1993	SECOND AMENDED JUDGMENT OF CONVICTION (JURY TRIAL)	695 - 697
5	11/27/2002	STATE'S OPPOSITION TO DEFENDANT'S MOTIO TO VACATE AND/OR AMEND JUDGMENT	989 - 993
6	03/16/2007	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR APPOINTMENT OF COUNSEL	1234 - 1238
5	12/26/2003	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1008 - 1022
6	02/27/2006	STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR TRANSPORT	1175 - 1178
4	04/01/1996	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SEMAN AND BLOOD, PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO PROCEED IN FORMA PAUPERIS	774 - 784
5	05/08/1998	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO MODIFY OR IN THE ALTERNATIVE CORRECT ILLEGAL SENTENCE	891 - 898
6	08/09/2012	STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER	1271 - 1274
6	01/19/2006	STATE'S OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL	1163 - 1166
6	05/16/2012	STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1249 - 1256
6	02/27/2006	STATE'S RESPONSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	1179 - 1185
5	08/17/1998	STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE	925 - 941
5	12/15/2004	STATE'S RESPONSE TO EXTRAORDINARY WRIT OF MANDAMUS	1089 - 1098
4	06/27/1996	STATE'S SUPPLEMENTAL OPPOSITION TO PETITIONER'S FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)	816 - 822



I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER :</u>
5	06/11/2003	STIPULATION AND ORDER	994 - 995
4	05/20/1996	SUBSTATION OF ATTORNEYS	802 - 803
4	07/16/1996	SUPPLEMENT REPLY AND OPPOSITION FOR WRIT OF HABEAS CORPUS	823 - 825
5	09/27/2004	SUPPLEMENTAL ACT	1070 - 1074
4	02/20/1996	SUPPLEMENTAL BRIEF AND POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	749 - 756
5	02/17/2004	SUPPLEMENTAL BRIEF TO STATES OPPOSITION TO DEFENDANT'S MOTION FOR RELEASE OF DNA EVIDENCE UNDER NEVADA OPEN RECORDS ACT	1040 - 1043
4	06/13/1996	SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS	804 - 815
1	03/15/1990	VERDICT COUNT I	67 - 67
1	03/15/1990	VERDICT COUNT II	68 - 68
1	03/15/1990	VERDICT COUNT III	69 - 69
1	03/15/1990	VERDICT COUNT VI	70 - 70

Justice Court, Las Vegas Township

CLARK COUNTY, NEVADA

DEC 78 11 11 AM '89

*[Handwritten signature]*  
CLERK

THE STATE OF NEVADA,

Plaintiff,

—vs—

ROY D. MORAGA

Defendant.

District Court Case No.

C92174

Justice Court Case No.

7220X-89F

VII  
P

I, hereby certify the foregoing to be a full, true and correct copy of the proceedings at the same appear in the above case.

WITNESS my hand this 26th day of December, 19 89.

*[Handwritten signature]*  
Justice of the Peace of Las Vegas Township



## Justice Court, Las Vegas Township

CASE NO. 7220X-89F

STATE VS. MORAGA, ROY D.

CHARGE BURGLARY & SEXUAL ASSAULT

BAIL IN CUSTODY

DATE, JUDGE  
OFFICERS OF  
COURT PRESENT

**APPEARANCES — HEARING**

CONTINUED TO:

12-14-89  
D. AHLSTROM  
V. MONROE, DA  
C. JORGENSEN, PD  
B. KULISH, CR  
M. MCCREARY, CLK

INITIAL ARRAIGNMENT  
Deft PRESENT in Court \*IN CUSTODY\*  
ADVISED/WAIVES  
PH set  
Court appoints PD to represent deft  
  
DEFT REMANDED TO THE CUSTODY OF THE SHERIFF

12-26-89 9:00 #3

ms

12-26-89  
M. ROBINSON FOR#3  
D. LIPPIS, DA  
R. HILLMAN, PD  
T. FERRIOLA, CR  
M. SHANKLE, CLK

TIME SET FOR PRELIMINARY HEARING  
DEFT PRESENT In Court \*IN CUSTODY\*  
States witnesses : Penny Hawk  
John S. Fox  
State rests  
Deft held to answer to said charge  
Bound over to District Court as charged.  
DEFT REMANDED TO THE CUSTODY OF THE SHERIFF

1-11-90 9:00 #7  
District Court

MS

JUSTICE COURT, LAS VEGAS TOWNSHIP  
CLARK COUNTY, NEVADA

District Court A

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	CASE NO. 7220 X
	)	
vs	)	DOCKET NO. 89F
	)	
ROY D. MORAGA,	)	<u>C R I M I N A L</u>
ID#938554	)	<u>C O M P L A I N T</u>
	)	
Defendant.	)	

The Defendant above named has committed the crimes of BURGLARY (Felony - NRS 205.060) and SEXUAL ASSAULT (Felony - NRS 200.364, 300.366) in the manner following, to-wit: That the said Defendant, on or between December 4, 1989 and December 5, 1989, at and within the County of Clark, State of Nevada,

COUNT I - BURGLARY

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit larceny, that certain building occupied by PENNIE HAWK, located at 1000 Dumont, #227, Las Vegas, Clark County, Nevada.

COUNT II - BURGLARY

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit sexual assault, that certain building occupied by PENNIE HAWK, located at 1000 Dumont, #227, Las Vegas, Clark County, Nevada.

COUNT III - SEXUAL ASSAULT


did then and there wilfully, unlawfully and feloniously sexually assault and subject PENNIE HAWK, a female person, to

1 sexual penetration, to-wit: Sexual Intercourse, by inserting  
2 his penis in the vagina of the said PENNIE HAWK, against her  
3 will.

4 COUNT IV - SEXUAL ASSAULT

5 did then and there wilfully, unlawfully and feloniously  
6 sexually assault and subject PENNIE HAWK, a female person, to  
7 sexual penetration, to-wit: Sexual Intercourse, by inserting  
8 his penis in the vagina of the said PENNIE HAWK, against her  
9 will.

10 All of which is contrary to the form, force and effect of  
11 statutes in such cases made and provided and against the peace  
12 and dignity of the State of Nevada. Said Complainant makes  
13 this declaration subject to the penalty of perjury.

14   
15 12-12-89  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

26 89F07220X/gmr  
27 LVMPD DR#89-117715, 117709  
28 Burg, Sex Asslt - F  
Tk2

2\*

7220-89F

## LAS VEGAS METROPOLITAN POLICE DEPARTMENT

PAGE 1 OF 2

## TEMPORARY CUSTODY RECORD/DECLARATION OF ARREST

I.D. NO: 938554DATE OF ARREST 12-05-89 TIME OF ARREST: 1445

I.D. ESTAB. BY: \_\_\_\_\_

INTAKE NAME (AKA ALIAS, ETC.) <u>MORAGA, ROY D</u>					ADDRESS: <u>1100 DUMONT #212</u>				
TRUE NAME <u>MORAGA, ROY D</u>					CITY STATE ZIP <u>LV NV</u>				
DATE OF BIRTH <u>10-27-52</u>	RACE <u>CUB</u>	SEX <u>M</u>	HAIR <u>BLK</u>	EYES <u>BRN</u>	HEIGHT <u>511</u>	WEIGHT <u>147</u>	PLACE OF BIRTH <u>MESA AZ</u>	SOCIAL SECURITY NUMBER <u>527-96-8289</u>	
LOCATION OF CRIME (No., Street, City, State, Zip) <u>1000 DUMONT #227 LV NV</u>					<input checked="" type="checkbox"/> CC <input type="checkbox"/> LV		LOCATION OF ARREST <u>920 SIERRA VISTA LV NV</u>		
BKG. CODE <u>5023</u>		CHARGE ORD/NRS NO. <u>SEXUAL ASSAULT (2 CTS)</u>			M	GM	F	ARR TYPE <u>PC</u>	
		<u>NRS 200.386</u>			<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	DR NUMBER <u>85-117709</u>	
<u>5628</u>		<u>HOME INVASION NRS 205.067</u>			<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	WARR/CIC NUMBER	
					<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	COURT LV JC DC	
					<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
					<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
					<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

ARREST TYPE: PC - PROBABLE CAUSE BS - BONDSMAN SURRENDER BW - BENCH WARRANT WA - WARRANT RM - REMAND

R. NOVACK  
OFFICER'S NAME (ARRESTING)  
AGENCY: LUMPD

R. NOVACK  
OFFICER'S NAME (TRANSPORTING)  
AGENCY: LUMPD

2103  
Pg:

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with LUMPD (Department), Clark County, Nevada, being so employed for a period of 10 years (months). That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense of SEXUAL ASSAULT (2 CTS) / HOME INVASION at the location of 1000 DUMONT #227 LV NV and that the offense occurred at approximately 1400 hours on the 5TH day of DEC, 19 89.

THAT ON 12-05-89 AT APPROXIMATELY 1414 HRS. I OFFICER R. NOVACK PNO#2103 WHILE WORKING AS UNIT 2634 WAS DISPATCHED TO 1000 DUMONT APT 227 IN REFERENCE TO A SEXUAL ASSAULT CALL. UPON ARRIVAL I LEARNED FROM THE GARDNER IN THE AREA A MIKE HARPER, THAT A HISPANIC LOOKING MALE WITH A WHITE LEG BRACE, GRAY JACKET AND BLUE LEVIS HAD JUST LEFT THE AREA AND WAS BRASSING ABOUT JUST GETTING SEX. METRO OFFICERS GILLINS

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

First Appearance: Date DEC 07 1989 Time \_\_\_\_\_Court: Justice ☐ Municipal ☐ Juvenile ☐Standard Bail ☒ "OR" Release ☐ Probable Cause: ☐ Yes ☒ No ☐Judge \_\_\_\_\_  
LVMPD 22 (REV. 3-89)

RECORDS COPY

Page 2

PNO# 3292 AND MAYO PNO# 2860 WHILE WORKING AS UNIT 4E21 THEN MADE A STOP ON SUBJECT ROY D. MORAGA WHO WAS LATER IDENTIFIED BY SOCIAL CARD AND RICHARD ID. OFFICER GILLINS SAID HE OBSERVED SUBJECT MORAGA AT THE LOCATION OF 1000 DUMONT BUT DID NOT HAVE A DESCRIPTION OF THE SUSPECT AT THAT TIME. WHEN LEARNING OF SUSPECT'S DESCRIPTION MAYO AND GILLINS THEN STOPPED SUSPECT MORAGA AT 920 SIERRA VISTA. A ONE ON ONE IDENTIFICATION OF THE SUSPECT WAS MADE BY THE VICTIM PENNY HAWK AT 920 SIERRA VISTA. SUBJECT MORAGA WAS READ HIS RIGHTS PER MIRANDA BY OFFICER GILLINS PNO# 3292. THE VICTIM PENNY HAWK OF 1000 DUMONT APT. 227 TOLD DETECTIVE JOHN FOX PNO# 469 THAT SHE WAS ASLEEP IN HER BEDROOM WHEN SHE WAKE UP AND SUBJECT MORAGA WAS IN HER ROOM. SHE SAID SUBJECT FORCED HER TO HAVE SEXUAL INTERCOURSE WITH HIM AND THEN A LITTLE LATER FORCED HER TO HAVE SEXUAL INTERCOURSE WITH HIM AGAIN. SUBJECT ROY MORAGA WAS PLACED UNDER ARREST FOR 2 CTS OF SEXUAL ASSAULT AND HOME INVASION AND TRANSPORTED TO THE CLARK COUNTY DETENTION CENTER. A RAPE KIT WAS COMPLETED ON SUBJECT MORAGA BY MYSELF AND HIS CLOTHING IMPOUNDED AS EVIDENCE, AND UNDER DA 89-117709 SUBJECT ROY MORAGA WAS THEN BOOKED ALLEGARINELY.

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

Declarant



# Justice Court, Las Vegas Township

## INTAKE SERVICES FINANCIAL INFORMATION SHEET

Case No. 89F07220X

NAME: MORAGA, Roy D. I.D. #: 938554

CHARGE(S): SEX Assault (2 counts) Home Inv

BAIL(S): 20,000 3,000

MARRIED ☒ UNMARRIED ☒ Divor

Children Supported By Defendant: 0

Spouse Employed: ☐ Yes ☐ No

Where? \_\_\_\_\_

Defendant Employed: ☐ Yes ☒ No 1 mo

Where? SESUS

Salary: Hourly \_\_\_\_\_ Shift \_\_\_\_\_ Bi-Monthly \_\_\_\_\_

Other Income: 500 280.00 Bi-wkly

Cash On Hand: 516.15 In Bank/Trust: 0

Does Defendant Have Any Property? Real Or Other: ☐ Yes ☒ No

Approximate Value: \_\_\_\_\_

### DEBTS:

Rent: 0 Mortgage: \_\_\_\_\_

Lives at Salvation Army  
Other Monthly Payments: (Utilities, Child Support, Etc.) 0

Will The Defendant Retain His Job If He Is Held In Custody: ☐ Yes ☐ No

PD recommended

JP

INTAKE SERVICES

12-14-89

DATE

Rebooking 12-13-89



# Justice Court, Las Vegas Township

## INTAKE SERVICES INFORMATION SHEET

Case No. 7220-89F

NAME: Moraga, Roy I.D. #: 938554

CHARGE(S): Sexual Assault (2ct) / Home Inv / Burglary

CURRENT BAIL: 20,000 (10,000 each) / 5,000 / 5,000

VERIFIED Salvation Army  
Local Address 1 Year Or More Less Than 1 Year 3 days

VERIFIED Out Of State Address:  
State Of Residency: Arizona 2 yrs

VERIFIED Employment 1 Year Or More Less Than 1 Year 1 mo

Unemployed 1 Year Or More Less Than 1 Year

VERIFIED Relatives: unk Local Not Local

Felony Convictions More Than 1

Misdemeanor Convictions More Than 1

Failures To Appear 0

Traffic

Misdemeanor

Felony

Pending Charges / Holds: \_\_\_\_\_

RECOMMENDATION: Release On Recognizance \_\_\_\_\_

Intensive Supervision \_\_\_\_\_

Bail Reduction \_\_\_\_\_

VERIFIED Indigent Non-Indigent

PD Recommended

Naw Noce

INTAKE SERVICES

12-21-89

DATE

Defendant: <u>Moraga, Roy</u>	
Arrest Date: <u>12-5-89</u>	Arraign. Date: <u>12-13-89</u>
S.S.N.: <u>527-96-8289</u>	I.D.: <u>93 8554</u>
D.R. #:	D.O.B. <u>10-27-52</u>
M J Charge: <u>Sexual Assault (2CTS)</u>	Bail: <u>20,000</u>
M J Charge: <u>Home Inv.</u>	Bail: <u>3,000</u>
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:
M J Charge:	Bail:

BASED ON \_\_\_\_\_ VERIFIED POINTS THIS DEFENDANT HAS RECEIVED, AND THE INFORMATION GATHERED BY INTAKE SERVICES, THE FOLLOWING RECOMMENDATION IS MADE:

Supervised Release with Conditions as Directed by Intake Services:

Bail Reduction To:

Not Recommended for an O/R Release or Bail Reduction Because:

Release Granted:

Date:

Bail Reduction To:

Release Denied:

Date:

7220-84F

RESIDENCY

Defendant: Ray Moraga

Present Address: <u>Salvation Army</u>	Apt. #:	Phone #:
How Long: <u>3 Day</u>	Living With:	Relationship:
Prior Address: <u>1100umont</u>	Apt. #: <u>12</u>	Phone #:
How Long: <u>2 mos</u>	Living With: <u>Jean Behl</u>	Relationship: <u>girlfriend</u>
Clark County Resident: <u>2 1/2</u> Months	Years. Visiting: <input type="checkbox"/> Yes <input type="checkbox"/> No	How Long:
State of Residency (address) if Less Than 5 Years: <u>Mesa AZ - 2 yrs</u>		
Marital Status: <u>Single</u> Married Divorced Separated	# of Children: <u>0</u>	Education: <u>8 yrs</u>

EMPLOYMENT

Are You Employed? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No. If no, means of support: <u>SSIS</u>	How Much: <u>280 30 weekly</u>
Cash on hand or in bank (including spouse): <u>210</u>	Spouse's Income:
Property (including spouse): <u>0</u>	
Rent: <u>0</u>	Mortgage: Other Debts:
Total Monthly Payments: <u>0</u>	

Present Employer: <u>SSIS</u>	Address:
How Long: <u>1 mo</u>	Occupation: Phone:
Supervisor:	Net Income: \$ <input type="checkbox"/> Shift <input type="checkbox"/> Weekly <input type="checkbox"/> Monthly
Prior Employer: <u>Western States</u>	Address:
How Long: <u>1 1/2 mos</u>	Occupation: <u>pipe layer / equipment operator</u> Phone:
Supervisor:	Reason for Leaving: <u>injury</u>

BACKGROUND

Family Not Living With Defendant:

Name/Relationship:	Address:	Phone:	Work: Res:
Name/Relationship:	Address:	Phone:	Work: Res:

Character References:

Name: <u>Jean Behl</u>	Address:	Phone:	Work: Res: <u>792-9615</u>
Name: <u>Bill</u>	Address: <u>CO worker</u>	Phone:	Work: Res: <u>386-8095</u>

List all prior convictions/pending charges other than in Clark County:

Charge	Conviction Date	Where	Disposition
<u>Assault</u>	<u>1976</u>	<u>Arizona</u>	<u>5 yrs</u>
2.			

I the undersigned defendant, under penalty of perjury, declare that the above facts are true and correct.

Subscribed and sworn to before me this 5 day of Dec 19 89

Phone interview

Defendant: [Signature]

Notary Public: [Signature]

Circle One: P.D. N.A. P.A. Name: Interview Date: 12/6 Time:

**CLARK COUNTY, NEVADA**

11

13  
1-11-9

FILED

*James L. ...*  
CLERK

CASE NO. C92174

INFORMATION

Defendant.

/ / / /

1 occupied by PENNIE HAWK, located at 1000 Dumont, #227, Las  
2 Vegas, Clark County, Nevada.

3 COUNT II - BURGLARY

4 did then and there wilfully, unlawfully, and feloniously  
5 enter, with intent to commit sexual assault, that certain  
6 building occupied by PENNIE HAWK, located at 1000 Dumont, #227,  
7 Las Vegas, Clark County, Nevada.

8 COUNT III - SEXUAL ASSAULT

9 did then and there wilfully, unlawfully and feloniously  
10 sexually assault and subject PENNIE HAWK, a female person, to  
11 sexual penetration, to-wit: Sexual Intercourse, by inserting  
12 his penis in the vagina of the said PENNIE HAWK, against her  
13 will.

14 COUNT IV - SEXUAL ASSAULT

15 did then and there wilfully, unlawfully and feloniously  
16 sexually assault and subject PENNIE HAWK, a female person, to  
17 sexual penetration, to-wit: Sexual Intercourse, by inserting  
18 his penis in the vagina of the said PENNIE HAWK, against her  
19 will.

20 DATED this 2nd day of January, 1990.

21  
22 REX BELL  
DISTRICT ATTORNEY  
23 NEVADA BAR#1799

24 By Deborah J. Phipps  
25 DEBORAH J. PHIPPS  
Deputy District Attorney

26  
27 The names of witnesses known to the District Attorney's  
28 Office at the time of filing this Information, are as follows:

/ / / /

1 DEVITTE, Dennis W.  
LVMPD  
2 Badge# 2256

3 FOX, J.  
LVMPD  
4 Badge# 469

5 GOMEZ, William  
3955 Swenson #116  
6 Las Vegas, NV 89121

7 HARPER, Michael  
1000 Dumond #227  
8 Las Vegas, NV 89109

9 HAWK, Pennie  
1000 Dumond #227  
10 Las Vegas, NV 89109

11 HOWARD, Jodi  
1000 Dumont  
12 Las Vegas, NV 89109

13 NOVACK, Robert E.  
LVMPD  
14 Badge# 2103

15 BEHL, Jean R.  
1100 Dumont #212  
16 Las Vegas, NV

17 CUSTODIAN OF RECORDS  
University Medical Center  
18 1800 W. Charleston Blvd.  
Las Vegas, NV 89102

19

20 ERRICHETTO, L.  
LVMPD  
21 BADGE #1471

22 FRINK, Mary  
LVMPD  
23 Badge #175

24 GILLINS, M.  
LVMPD  
25 Badge #3297

26

27 89F07220X/gmr  
Burg, Sex Asslt - F  
LVMPD DR# 89-117709  
28 Tk2

HAGUE, R.  
LVMPD  
Badge # 1662

LUKE, R.  
LVMPD  
Badge #488

MAYO, Harrison Jr.  
LMVPD  
Badge #2860

PRESCOTT, H. R.N.  
Clark County Detention Center  
330 S. Casino Center Blvd.  
Las Vegas, NV 89101

REISH, Don M.D.  
University Medical Center  
1800 W. Charleston Blvd.  
Las Vegas, NV 89102

RUDOLPH, D.  
LVMPD  
Badge #3779

SWIFT, R.  
LVMPD  
Badge #1048

YOUNG, Sabine R.N.  
University Medical Center  
1800 W. Charleston Blvd.  
Las Vegas, NV 89102



ORIGINAL

FILED<sup>1</sup>

JAN 24 3 47 PM '90

*Loretta Robinson*  
CLERK

CASE NO. 092174

IN THE JUSTICE'S COURT OF LAS VEGAS TOWNSHIP  
COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

ROY D. MORAGA,

Defendant.

CASE NO. 7220-89F

DOCKET NO. 89-F

D.A. NO. 89-F-7220

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

BEFORE THE HONORABLE MARLEY ROBINSON  
JUSTICE OF THE PEACE

TUESDAY, DECEMBER 26, 1989

APPEARANCES:

For the State:

DEBORAH J. LIPPIS, ESQ.  
Deputy District Attorney

For the Defendant:

ROGER R. HILLMAN, ESQ.  
Deputy Public Defender

Reported by: Therese Ferriola, CSR #314

CE44

CSR Associates of Nevada



W I T N E S S E SSTATE'SDr.Cr.Redr.

PENNY HAWK

By Ms. Lippis  
By Mr. Hillman

3

11

JOHN S. FOX

By Ms. Lippis  
By Mr. Hillman

13

16

*CSR Associates of Nevada*

1 LAS VEGAS, NEVADA, DECEMBER 26, 1989, 9:00 A.M.

2 \* \* \* \* \*

3 THE COURT: Roy Moraga, 89F-7220X.

4 MS. LIPPIS: State is ready to proceed, your  
5 Honor.

6 THE COURT: Is the defense ready?

7 MR. HILLMAN: I'm sorry. Yes.

8 MS. LIPPIS: State would call Penny Hawk.

9  
10 PENNY HAWK,

11 Having been first duly sworn, was  
12 examined and testified as follows:

13 THE CLERK: Please be seated.

14  
15 DIRECT EXAMINATION

16 BY MS. LIPPIS:

17 Q. Would you state your full name for the record,  
18 and spell your last name, please.

19 A. Penny Hawk, H-a-w-k.

20 Q. Ms. Hawk, on December 4th and 5th, 1989, of this  
21 year, where were you living?

22 A. 1000 Dumont, Apartment 227.

23 Q. And that's located in Las Vegas, Clark County,  
24 Nevada?

25 A. Yes.

*CSR Associates of Nevada*

1 Q. With whom were you living at that time?  
2 A. My daughter.  
3 Q. And what's your daughter's name?  
4 A. Jody Howard.  
5 Q. And that's spelled H-o-w-a-r-d?  
6 A. Yes.  
7 Q. And how old is Jody?  
8 A. Twenty-two.  
9 Q. On that date and time, were you employed?  
10 A. Yes.  
11 Q. Do you know a man by the name of Roy D. Moraga?  
12 A. Yes.  
13 Q. Is he present in court today?  
14 A. Yes, he is.  
15 Q. Would you point to him, please, and tell me the  
16 color of shirt that he is wearing.  
17 A. Sitting right there. Brown shirt.  
18 MS. LIPPIS: May the record reflect the  
19 identification of the defendant.  
20 THE COURT: Yes.  
21 BY MS. LIPPIS:  
22 Q. I'd like to direct your attention to the morning  
23 of December 5th, 1989. Did you have an occasion to go home  
24 for the purpose of taking your daughter to work?  
25 A. Yes, I did.

- 1 Q. About what time did you arrive home?
- 2 A. 7:30 in the morning.
- 3 Q. When you got home, was your daughter there?
- 4 A. Yes.
- 5 Q. Upon your arrival home at the Dumont address, did
- 6 you notice anything unusual had happened within the inside of
- 7 the apartment?
- 8 A. Yes. We noticed that we had been burglarized.
- 9 Q. By burglarized, do you mean that someone unknown
- 10 to you had entered the apartment and taken something?
- 11 A. Yes.
- 12 Q. Do you recall what, if anything, was missing?
- 13 A. Yes, several items and some cash.
- 14 Q. Do you recall the nature of those items that were
- 15 missing?
- 16 A. A watch, money out of my daughter's wallet, money
- 17 out of my dresser.
- 18 Q. And all of those were located within your
- 19 apartment; is that correct?
- 20 A. Yes.
- 21 Q. What if anything else did you determine either
- 22 then or at some point later was missing?
- 23 A. We'd determined that our house key was missing
- 24 later.
- 25 Q. Did you give anyone permission to enter your

1 apartment on that date and take anything?

2 A. No.

3 Q. To your knowledge, had your daughter given anyone  
4 permission to enter and remove items?

5 A. No, ma'am.

6 Q. The house key that you mentioned that was missing,  
7 where was that normally kept within the inside of the  
8 apartment?

9 A. It was kept on a table near the front door.

10 Q. Did you, in fact, take your daughter to work?

11 A. Yes.

12 Q. Later on that day did you have an occasion to see  
13 the defendant, Roy Moraga?

14 A. Yes.

15 Q. Do you remember approximately what time you saw  
16 him on that date?

17 A. At approximately 12:30 he knocked on my door.

18 Q. The door to your apartment?

19 A. Yes.

20 Q. Had Mr. Moraga ever been to your apartment before?

21 A. Absolutely not.

22 Q. When he knocked on the door, did you answer the  
23 door?

24 A. Yes.

25 Q. And you observed him standing outside your

1 apartment?

2 A. Yes.

3 Q. What, if anything, did you say or did he say?

4 A. I asked him how he knew where I lived, and he said  
5 he had always known where I lived.

6 Q. Had you met Mr. Moraga on a previous occasion?  
7 Did you know him from before?

8 A. Yes.

9 Q. How long ago had you met him prior to the 5th?

10 A. Two or three weeks before.

11 Q. Had you ever done anything social with him after  
12 that first meeting two or three weeks before the fifth of  
13 December?

14 A. Yes. We had some drinks together.

15 Q. But never in your apartment; is that correct?

16 A. Never.

17 Q. After you and Mr. Moraga had this conversation at  
18 your front door, did he stay or did he leave?

19 A. No, he left. I shut the door. I was asleep; he  
20 woke me up.

21 Q. On December 5th, 1989, did you see Mr. Moraga  
22 again after you had told him to leave the area of your  
23 apartment?

24 A. Yes.

25 Q. Would you describe to the Court the circumstances

1 under which you met Mr. Moraga this last time?

2 A. I was sleeping in my bed. It was almost time for  
3 me to get up to go to work, and I heard noises like my stairs  
4 creaking. I screamed out who's there.

5 I thought it might be my daughter. I got  
6 out of bed at that time. I was standing in my doorway in my  
7 bedroom when he appeared.

8 Q. Now when you say he appeared, to whom are you  
9 referring?

10 A. Roy.

11 Q. The defendant?

12 A. Yes.

13 Q. Did he have permission to be in your home?

14 A. No.

15 Q. At that time, did you know how he gained entrance  
16 to your home?

17 A. No.

18 Q. Would you tell the judge what happened after you  
19 saw him standing there at the entrance to your bedroom?

20 A. I started screaming at him. I told him to get out  
21 of my apartment. I had kept asking him how did he get into my  
22 apartment.

23 I ran to the bathroom window and screamed  
24 out of the bathroom window for someone to call the police. He  
25 grabbed me from behind and put his hand over my mouth and drug

1 me to the bed.

2 Q. What were you wearing?

3 A. I was wearing my -- I was still wearing my  
4 housecoat but nothing underneath.

5 Q. So you had slept in your housecoat?

6 A. Only because I had been woken up before.

7 Q. All right. When he threw you on the bed, what did  
8 he do?

9 A. He raped me.

10 Q. Now when you say he raped you, I need you to tell  
11 the judge what you mean.

12 A. He put his penis in my vagina.

13 Q. Did you give him permission to do that?

14 A. Absolutely not.

15 Q. While you were on the bed and you indicated that  
16 he raped you, did it happen on more than one occasion, or just  
17 that one occasion?

18 A. It happened about 15 minutes later again.

19 Q. I need you to describe to the Court, once he  
20 finished on the first incidence with what you described as a  
21 rape, what did he then do in order to accomplish the second  
22 rape?

23 A. I went upstairs, and he kept asking me to take a  
24 shower. I took a shower, and he followed me up the stairs  
25 again. Then he threw me down on the bed again and raped me a



1 second time.

2 Q. I know these words are difficult. When you say he  
3 raped you a second time, I need you to tell me what he did.

4 A. Took his penis and entered my vagina.

5 Q. Was that with or without your permission?

6 A. Without my permission.

7 Q. I'd like to clear up one area. You indicated that  
8 he wanted you to take a shower and sent you back upstairs; is  
9 that correct?

10 A. Yes.

11 Q. And the first rape occurred upstairs in the  
12 bedroom. Is that also correct?

13 A. Yes.

14 Q. How did you get from the bedroom upstairs,  
15 downstairs? What point in this action?

16 A. I went downstairs. I told him I needed a drink.  
17 He followed me downstairs to get a drink of water. I got a  
18 drink of water.

19 He tried to rape me downstairs on the  
20 couch. I got away from him again, and I went back upstairs.  
21 I thought maybe if I took a shower he'd leave, but he didn't.

22 Q. All right. So the second rape then occurred after  
23 the shower; is that correct?

24 A. Yes.

25 Q. I have nothing further.

1 MR. HILLMAN: Just a few questions.

2 CROSS EXAMINATION

3  
4 BY MR. HILLMAN:

5 Q. Is it Ms. or Mrs. Hawk?

6 A. Ms.

7 Q. Ms. Hawk, where did you meet Mr. Moraga?

8 A. At Players Lounge. In front of Players Lounge.

9 Q. And you said you had seen him socially a couple of  
10 times -- went out for drinks; is that correct?

11 A. No, only once.

12 Q. Only once?

13 A. Only once.

14 Q. Do you remember where that was?

15 A. It was in front of Players Lounge.

16 Q. That's the time when you went for drinks?

17 A. And then we also went to another bar around the  
18 corner. I can't remember the name of it right now.

19 Q. Okay. Do you know what street Players Lounge is  
20 on?

21 A. Cambridge.

22 Q. Okay. Where were you working at that time?

23 MS. LIPPIS: Objection, your Honor. Relevance.

24 MR. HILLMAN: Well, she was asked if she was  
25 working, your Honor, number one. Number two, we have the -- I

1 think we have the right to ask the question to find out about  
2 her background a little bit.

3 MS. LIPPIS: I asked her were you working at  
4 that time, and I let it go at that not to give the defendant  
5 knowledge of where she may be working at this time.

6 I'll be happy to provide that information  
7 to Mr. Hillman.

8 THE COURT: I'm going to sustain the objection.

9 MR. HILLMAN: I'll withdraw the question.

10 BY MR. HILLMAN:

11 Q. You testified that you were sexually assaulted two  
12 times; is that correct?

13 A. Yes.

14 Q. And there were approximatley 15 minutes between  
15 the two attacks; is that correct?

16 A. Yes.

17 Q. Were you in Mr. Moraga's presence the entire time?

18 A. Yes.

19 MR. HILLMAN: I have no further questions, your  
20 Honor.

21 MS. LIPPIS: I have no redirect.

22 THE COURT: You may be excused, Ms. Hawk.

23 MS. LIPPIS: Your Honor, may I go get my next  
24 witness?

25 THE COURT: Certainly.

1 JOHN S. FOX,  
2 having been first duly sworn, was  
3 examined and testified as follows:  
4 THE CLERK: Please be seated.

5  
6 DIRECT EXAMINATION

7 BY MS. LIPPIS:

8 Q. Would you state your full name for the record,  
9 please, and spell your last name.

10 A. John S. Fox. F-o-x.

11 Q. How are you employed, sir?

12 A. Police officer, Las Vegas Metropolitan Police  
13 Department.

14 Q. And how long have you been with the Las Vegas  
15 Metropolitan Police Department?

16 A. Twenty-one years.

17 Q. And where are you currently assigned?

18 A. Sexual assault division.

19 Q. Were you so assigned to that division on or about  
20 December 5th and 6th, 1989.

21 A. Yes, I was.

22 Q. Did you have an occasion to be assigned to the  
23 investigation of an alleged rape, victim being Penny Hawk, the  
24 defendant being Roy Moraga?

25 A. I did.

1 Q. Did you come in contact with Mr. Moraga at all  
2 during this investigation?

3 A. Yes, I did.

4 Q. Do you see Mr. Moraga present in court today?

5 A. Yes. He's seated at the defense table wearing a  
6 brown and beige stripe shirt and glasses.

7 MS. LIPPIS: May the record reflect the  
8 identification of the defendant.

9 THE COURT: Yes.

10 BY MS. LIPPIS:

11 Q. During the course of your investigation, did you  
12 interview Penny Hawk?

13 A. Yes.

14 Q. During that investigation, did you learn from her  
15 that certain items had been taken from the inside of the  
16 residence she shared with her daughter?

17 A. Yes, I did.

18 Q. Was one of the items taken a key to their  
19 apartment?

20 A. Yes.

21 Q. Regarding the information that you discovered  
22 during that investigation, did you respond to the jail to  
23 check the defendant's property?

24 A. Yes, I did.

25 Q. Would you describe for the Court what transpired

1 with regard to the apartment key?

2 A. I went to the detention center at about 10:00  
3 on the 6th.

4 I had previously drawn an outline of an  
5 existing key belonging to Ms. Hawk. I compared that outline  
6 with a key found in Mr. Moraga's property.

7 I seized that key and took it initially to  
8 Mrs. Hawk's daughter for tentative identification, which she  
9 did.

10 Then I proceeded to Ms. Hawk's residence  
11 where I tried it in the keyway in the front door, and it did  
12 operate that lock mechanism.

13 Q. Was this just a lone key that the defendant had in  
14 his possession? Were there other keys with it?

15 A. There was a second key on the ring. I don't know  
16 what it was for.

17 Q. Did Ms. Hawk or her daughter identify the key ring  
18 or the other key that was with their apartment key?

19 A. Her daughter identified the key alone. She did  
20 not recognize the key ring or the second key.

21 Q. Was that evidence then subsequently impounded for  
22 purposes of use in prosecution?

23 A. Yes, it was.

24 MS. LIPPIS: Pass the witness.

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CROSS EXAMINATION

BY MR. HILLMAN:

Q. Officer Fox, did you find anything else in Mr. Moraga's property that was related to the theft that was reported by Ms. Hawk?

A. No, I did not.

MR. HILLMAN: No further questions.

MS. LIPPIS: I have nothing further.

THE COURT: You may be excused, Officer Fox.

MS. LIPPIS: State rests, your Honor.

MR. HILLMAN: Your Honor, I have explained to Mr. Moraga his right to take the stand today, and upon my advice, he'll decline to do so. We'll call no witnesses.

THE COURT: It appears to me from the complaint on file during preliminary hearing the crimes committed, to wit: Two counts of burglary and two counts of sexual assault.

And there is sufficient evidence to believe the defendant Roy D. Moraga committed said crimes is ordered to be bound over to district court to answer to this crime.

THE CLERK: January 11th, 9:00 a.m.,  
Department VII.

(Whereupon, the proceedings were concluded.)

Attest: Full, true, accurate transcript of proceedings.

  
Therese Ferriola, CSR #314

FILED

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DISTRICT COURT  
CLARK COUNTY, NEVADA

FEB 5 2 05 PM '90

THE STATE OF NEVADA, )  
 )  
Plaintiff, ) CASE NO. C92174  
 )  
vs ) DEPT. NO. VII  
 )  
ROY D. MORAGA, )  
 )  
Defendant. )

MOTION AND NOTICE OF MOTION TO ENDORSE NAMES ON INFORMATION

DATE OF HEARING: 2-15-90

TIME OF HEARING: 9:00 a.m.

TO: Defendant above named, and

TO: Your Counsel of Record: PUBLIC DEFENDER

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that, on  
Thursday, the 15th day of February, 1990, at the hour of 9:00  
o'clock a.m, or as soon thereafter as Counsel can be heard, in  
the Courthouse, Las Vegas, Clark County, Nevada, the STATE OF  
NEVADA will move the Court for leave to endorse upon  
Information heretofore filed herein the names of the following  
witnesses:

NAME	ADDRESS
BEHL, Jean R.	1100 Dumont #212 Las Vegas, NV
CUSTODIAN OF RECORDS	University Medical Center 1800 W. Charleston Blvd. Las Vegas, NV 89102
ERRICHETTO, L.	LVMPD Badge# 1471

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1	FRINK, Mary Ruth	LVMPD Badge# 175
2		
3	GILLINS, M.	LVMPD Badge# 3297
4	HAGUE, R.	LVMPD Badge# 1662
5		
6	LUKE, R.	LVMPD Badge# 488
7	MAYO, Harrison Jr.	LVMPD Badge# 2860
8		
9	PRESCOTT, H. R.N.	Clark County Detention Center 330 S. Casino Center Blvd. Las Vegas, NV 89101
10		
11	REISH, Don M.D.	University Medical Center 1800 W. Charleston Blvd. Las Vegas, NV 89102
12		
13	RUDOLPH, D.	LVMPD Badge# 3779
14	SWIFT, R.	LVMPD Badge# 1048
15		
16	YOUNG, Sabine R.N.	University Medical Center 1800 W. Charleston Blvd. Las Vegas, NV 89102
17		

DATED this 2nd day of February, 1990.

REX BELL  
DISTRICT ATTORNEY  
NEVADA BAR#001799

By   
DEBORAH J. LIPPIS  
Deputy District Attorney

/ / / /

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**STATE OF NEVADA           )**  
                                       **) ss:**  
**COUNTY OF CLARK          )**

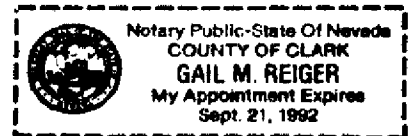
\_, being first duly sworn, deposes and says:

**WHEREFORE**, Affiant prays that the Court enter an Order for endorsement of names on Information, in accordance with NRS 173.045.

*D. Hippie*  
Deputy  
DEC

**Deputy District Attorney**  
**DEBORAH J. LIPPIS**

this 2<sup>nd</sup> day of February, 1990  
Gail M. Preyer



1. After filing the Information the District Attorney shall endorse thereon the names of such other witnesses which shall become known to him before the trial as the Court prescribes. Such amendment may be made at any time after defendant pleads when it can be done without prejudice to the substantial rights of the defendant.

NRS 173.045.

REX BELL  
DISTRICT ATTORNEY  
CLARK COUNTY COURTHOUSE  
300 SO. THIRD STREET  
LAS VEGAS, NEVADA 89101

DA-50a

1 3. Any prejudice resulting to defendant because the District Attorney was permitted to add names on the  
2 Information after the jury had been sworn, he having known these names before trial, was cured by the court's  
3 granting defendant a continuance (three days) to prepare to meet the testimony of these witnesses. State v. Monahan,  
4 50 Nev. 27, 35 (1926); Gallegos v. State, 84 Nev. 608 (1968).

5 4. Failure to endorse a name does not preclude calling any witness whose name or materiality of testimony  
6 is first learned at the time of trial NRS 173.045.

7 5. Defects or imperfections of form are immaterial. NRS 173.100. Minor defects in an Information, in-  
8 cluding typographical errors, may be disregarded where the intent is clear and the rights of the defendant are not  
9 prejudiced. 22 CJS 955, Sec. 377.



DEPUTY DISTRICT ATTORNEY  
DEBORAH J. LIPPIS

10  
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14  
15 RECEIPT of a copy of the above and foregoing Motion, Notice  
16 of Motion, Affidavit and Points and Authorities is hereby  
17 acknowledged this 4 day of Febr,  
18 19 90.

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\_\_\_\_\_  
Attorney for Defendant

OFFICE OF THE PUBLIC DEFENDER

By:   
Attorney for Defendant

FILED

DISTRICT COURT  
CLARK COUNTY, NEVADA

FEB 12 11 44 AM '90

*For the Plaintiff*  
CLERK

THE STATE OF NEVADA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ROY D. MORAGA, )  
 )  
Defendant. )  
 )

CASE NO. C92174  
DEPARTMENT VII  
DOCKET "P"

REPORTER'S TRANSCRIPT OF HEARING IN RE: ARRAIGNMENT

BEFORE THE HONORABLE CARL J. CHRISTENSEN, DISTRICT JUDGE

THURSDAY, JANUARY 11, 1990

9:00 A.M.

APPEARANCES:

For the Plaintiff: ROBERT LUCHERINI, Esq.  
Deputy District Attorney

For the Defendant: KAREN E. BRASIER, Esq.  
Deputy Public Defender

Reported by: Constance Miller, CSR No. 270  
Official Court Reporter

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1 LAS VEGAS, NEVADA; THURSDAY, JANUARY 11, 1990; 9:00 A.M.

2 ---o0o---

3

4 THE COURT: State of Nevada versus Roy D.  
5 Moraga. The record will show the presence of the defendant  
6 in custody and the presence of counsel Karen Brasier,  
7 Deputy Public Defender; Robert Lucherini, Deputy District  
8 Attorney, representing the State of Nevada.

9 At this time, Ms. Brasier, would you  
10 hand the defendant a conformed true copy of the Information  
11 that was filed in this case January 9, 1990.

12 Does the defendant waive the reading  
13 of the Information out loud in open court?

14 MS. BRASIER: Yes, Your Honor.

15 THE COURT: Does he waive the reading of the  
16 witnesses' names attached out loud?

17 MS. BRASIER: Yes, Your Honor.

18 THE COURT: Mr. Moraga, do you understand  
19 these waivers and join with Ms. Brasier in making them?

20 THE DEFENDANT: Yeah.

21 THE COURT: So do you waive me having them  
22 read to you out loud as well as the names?

23 THE DEFENDANT: Yeah.

24 THE COURT: Do you need those glasses for  
25 a prescription or something?

-2-

1 THE DEFENDANT: Yes.

2 THE COURT: Is your true name Mr. Roy D.

3 Moraga?

4 THE DEFENDANT: Yes.

5 THE COURT: What is your age, sir?

6 THE DEFENDANT: 37.

7 THE COURT: What is the extent of your

8 formal education?

9 THE DEFENDANT: Ninth.

10 THE COURT: Ninth grade?

11 THE DEFENDANT: Yes.

12 THE COURT: Do you know how to read and write

13 in the English language?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you understand the nature of

16 the charges contained in the Information in this case

17 against you?

18 THE DEFENDANT: Yes.

19 THE COURT: Mr. Roy D. Moraga, what is your

20 plea to Count I of the Information in this case wherein you

21 are charged with the crime of burglary, a felony, guilty

22 or not guilty?

23 THE DEFENDANT: Not guilty.

24 THE COURT: Mr. Roy D. Moraga, what is your

25 plea to Count II of the Information in this case wherein

1 you are charged with the crime of burglary, a felony,  
2 guilty or not guilty?

3 THE DEFENDANT: Not guilty.

4 THE COURT: Mr. Roy D. Moraga, what is your  
5 plea to Count III of the Information in this case wherein  
6 you are charged with the crime of sexual assault, a felony,  
7 guilty or not guilty?

8 THE DEFENDANT: Not guilty.

9 THE COURT: Mr. Roy D. Moraga, what is your  
10 plea to Count IV of the Information in this case wherein  
11 you are charged with the crime of sexual assault, a felony,  
12 guilty or not guilty?

13 THE DEFENDANT: Not guilty.

14 THE COURT: This case is set down for trial  
15 before a jury at 10:00 a.m. on Monday, March 5, 1990. The  
16 defendant and counsel are directed to appear in court on  
17 Thursday, March 1, 1990, at 9:00 a.m. for the calendar call.

18 ---o0o---

19 ATTEST: Full, true and accurate transcript of proceedings.

20

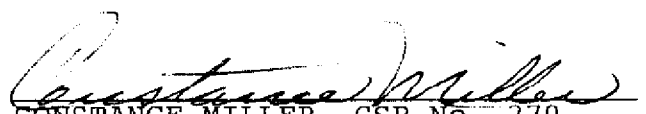
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CONSTANCE MILLER, CSR No. 270  
Official Court Reporter

1 DISTRICT COURT

- FILED IN OPEN COURT -

2 CLARK COUNTY, NEVADA

FEB 15 1990

LORETTA BOWMAN, CLERK

By *Elizabeth C. Amabile* Deputy

3 THE STATE OF NEVADA, )

4 Plaintiff, )

5 vs )

6 ROY D. MORAGA, )

7 Defendant. )

CASE NO. C92174

DEPT. NO. VII

8 ORDER TO ENDORSE NAMES ON INFORMATION

9  
10 Upon Motion of the STATE OF NEVADA, Plaintiff, by and  
11 through the Clark County District Attorney, and Notice to  
12 Defendant above named by and through Defendant's Counsel,  
13 PUBLIC DEFENDER, and good cause appearing therefore,

14 IT IS HEREBY ORDERED that the Motion is granted and the  
15 Clerk of the above-entitled Court is hereby directed to endorse  
16 upon the Information on file herein the following names:

17 NAME	ADDRESS
18 BEHL, Jean R.	1100 Dumont #212 Las Vegas, NV
19 CUSTODIAN OF RECORDS	University Medical Center 1800 W. Charleston Blvd. Las Vegas, NV 89102
20 ERRICHETTO, L.	LVMPD Badge# 1471
21 FRINK, Mary Ruth	LVMPD Badge# 175
22 GILLINS, M.	LVMPD Badge# 3297

23 / / / /







1 HAGUE, R. LVMPD  
2 Badge# 1662  
3  
4 LUKE, R. LVMPD  
5 Badge# 488  
6  
7 MAYO, Harrison Jr. LVMPD  
8 Badge# 2860  
9  
10 PRESCOTT, H. R.N. Clark County Detention Center  
11 330 S. Casino Center Blvd.  
12 Las Vegas, NV 89101  
13  
14 REISH, Don M.D. University Medical Center  
15 1800 W. Charleston Blvd.  
16 Las Vegas, NV 89102  
17  
18 RUDOLPH, D. LVMPD  
19 Badge# 3779  
20  
21 SWIFT, R. LVMPD  
22 Badge# 1048  
23  
24 YOUNG, Sabine R.N. University Medical Center  
25 1800 W. Charleston Blvd.  
26 Las Vegas, NV 89102  
27  
28

15 as prospective witnesses in the prosecution of the within  
16 matter.

17 DATED this 15 day of February, 1990.

18  
19   
20 DISTRICT JUDGE

21   
22 Deputy District Attorney  
23  
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FILE  
DISTRICT COURT  
CLARK COUNTY NEVADA  
Mar 13 8 43 AM '93

*[Signature]*  
CLERK

STATE OF NEVADA, )  
 )  
 PLAINTIFF, )  
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 VS )  
 )  
 ROY D. MORAGA, )  
 )  
 DEFENDANT. )  
 \_\_\_\_\_ )

CASE NO. C92174  
DEPARTMENT VIII  
DOCKET "M"

J U R Y

- |                             |                             |
|-----------------------------|-----------------------------|
| 1. DANIEL GODFREY COOPER    | 7. CLARENCE DON MORGAN, JR. |
| 2. MARIN VISCAINO HERNANDEZ | 8. PAUL DENNIS PETARDE      |
| 3. GERRE LEE PITTENGER      | 9. MICHAEL PAUL REAGO       |
| 4. DAVID GARLAND BARNEBY    | 10. VERONICA ANNE PIKE      |
| 5. COLLEEN MARIE MOONEY     | 11. HOWARD L. TOBLER        |
| 6. KENNETH A. NOVAK         | 12. JOSE DeJESUS LEYVA      |

ALTERNATES: 1. MICHAEL THOMAS BRIDENBURG  
2. CHARLES WILFORD BEAN



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DISTRICT COURT  
CLARK COUNTY, NEVADA

—FILED IN CLERK'S OFFICE—  
MAR 15 1990 10  
CLERK  
By *W. Keith Reese* Deputy  
CASE NO. C92174  
DEPT. NO. VII

THE STATE OF NEVADA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ROY D. MORAGA, )  
 )  
 )  
 )  
Defendant. )  
\_\_\_\_\_ )

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

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1  
2 If, in these instructions, any rule, direction or idea is  
3 repeated or stated in different ways, no emphasis thereon is  
4 intended by me and none may be inferred by you. For that  
5 reason, you are not to single out any certain sentence or any  
6 individual point or instruction and ignore the others, but you  
7 are to consider all the instructions as a whole and regard each  
8 in the light of all the others.  
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10 The order in which the instructions are given has no signi-  
11 ficance as to their relative importance.  
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An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Information that on or between December 4, 1989, and December 5, 1989, the defendant committed the following offenses:

COUNT I - Burglary

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit larceny, that certain building occupied by PENNIE HAWK, located at 1000 Dumont #227, Las Vegas, Clark County, Nevada.

COUNT II - Burglary

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit sexual assault, that certain building occupied by PENNIE HAWK, located at 1000 Dumont #227, Las Vegas, Clark County, Nevada.

COUNT III - Sexual Assault

did then and there wilfully, unlawfully, and feloniously sexually assault and subject PENNIE HAWK, a female person, to sexual penetration, to-wit: Sexual Intercourse, by inserting his penis in the vagina of the said PENNIE HAWK, against her will.

COUNT IV - Sexual Assault

did then and there wilfully, unlawfully, and feloniously sexually assault and subject PENNIE HAWK, a female person, to sexual penetration, to-wit: Sexual Intercourse, by inserting his penis in the vagina of the said PENNIE HAWK, against her will.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and

1 determine whether or not the defendant is guilty of one or more  
2 of the offenses charged.

3 Each charge and the evidence pertaining to it should be con-  
4 sidered separately. The fact that you may find a defendant  
5 guilty or not guilty as to one of the offenses should not con-  
6 trol your verdict as to any other offense charged.

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3 To constitute the crime charged, there must exist a union  
4 or joint operation of an act forbidden by law and an intent to  
5 do the act.

6 The intent with which an act is done is shown by the facts  
7 and circumstances surrounding the case.

8 Do not confuse intent with motive. Motive is what prompts  
9 a person to act. Intent refers only to the state of mind with  
10 which the act is done.

11 Motive is not an element of the crime charged and the State  
12 is not required to prove a motive on the part of the defendant  
13 in order to convict. However, you may consider evidence of  
14 motive or lack of motive as a circumstance in the case.  
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The defendant is charged with two counts of burglary.

In order to convict the defendant of these offenses, the elements of the crime of burglary must be proved beyond a reasonable doubt.

The elements of the crime of burglary are as follows:

(1) an unlawful entry into any apartment, home, or building, either by day or night;

(2) with the specific intent to commit a larceny or a felony therein.



Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the State must prove that the defendant knowingly did the act which the law forbids, purposely intending to violate that law.

An act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The intention with which entry was made is a question of fact to be determined by your consideration of the evidence. The intention may be inferred from the defendant's conduct and all other circumstances.

INSTRUCTION NO. 7

You are advised that Sexual Assault is a felony.

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A breaking into or a forced entry into the apartment is not an element of the crime of burglary. The law requires only an entry with the specific intent to commit a larceny or felony therein.

INSTRUCTION NO. 9

Every person, who in the commission of a burglary shall commit any other crime, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

INSTRUCTION NO. 10

Any person who subjects another person to sexual penetration,  
against the victim's will, is guilty of sexual assault.

INSTRUCTION NO. 11

Sexual penetration means any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital openings of the body of another.

INSTRUCTION NO. 12

Physical force is not a necessary ingredient in the commission of the crime of sexual assault. The crucial question is not whether the victim was penetrated by physical force, but whether the act was committed without her consent.

INSTRUCTION NO. 13

The victim of a sexual assault is not required to do more than her age, strength, surrounding facts and attending circumstances make it reasonable for her to do to manifest her opposition.



INSTRUCTION NO. 17

There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

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2 The defendant is presumed innocent until the contrary is  
3 proved. This presumption places upon the State the burden of  
4 proving beyond a reasonable doubt every material element of the  
5 crime charged and that the defendant is the person who com-  
6 mitted the offense.

7  
8 A reasonable doubt is one based on reason. It is not mere  
9 possible doubt but is such a doubt as would govern or control a  
10 person in the more weighty affairs of life. If the minds of  
11 the jurors, after the entire comparison and consideration of  
12 all the evidence, are in such a condition that they can say  
13 they feel an abiding conviction of the truth of the charge,  
14 there is not a reasonable doubt. Doubt to be reasonable must  
15 be actual and substantial, not merely possibility or  
16 speculation.

17 If you have a reasonable doubt as to the guilt of the  
18 defendant, he is entitled to a verdict of not guilty.  
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The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the Court and any evidence ordered stricken by the Court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

The credibility or "believability" of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

During the trial, you have heard evidence concerning a prior felony conviction of the defedant. Evidence of another crime is not admissable to prove the character of the defendant in order to show that he acted in conformity therewith on a particular occassion. However, it is admissiable and may be considered for the purpose of determining the credibilty of the defendant as a witness.

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3 A witness who has special knowledge, skill, experience,  
4 training or education in a particular science, profession or  
5 occupation is an expert witness. An expert witness may give  
6 his opinion as to any matter in which he is skilled.

7 You should consider such expert opinion and weigh the  
8 reasons, if any, given for it. You are not bound, however, by  
9 such an opinion. Give it the weight to which you deem it  
10 entitled, whether that be great or slight, and you may reject  
11 it, if, in your judgment, the reasons given for it are unsound.  
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3 Although you are to consider only the evidence in the case  
4 in reaching a verdict, you must bring to the consideration of  
5 the evidence your everyday common sense and judgment as reason-  
6 able men and women. Thus, you are not limited solely to what  
7 you see and hear as the witnesses testify. You may draw reason-  
8 able inferences from the evidence which you feel are justified  
9 in the light of common experience, keeping in mind that such  
10 inferences should not be based on speculation or guess.

11 A verdict may never be influenced by sympathy, prejudice or  
12 public opinion. Your decision should be the product of sincere  
13 judgment and sound discretion in accordance with these rules of  
14 law.  
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In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the Court. Your duty is confined to the determination of the guilt or innocence of the defendant.



When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, those written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and the defendant and his counsel.

Readbacks of testimony are time consuming and are not encouraged unless you deem it a necessity. Should you require a readback, you must carefully describe the testimony to be read back so that the court reporter can arrange his notes. Remember, the court is not at liberty to supplement the evidence.

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada.

GIVEN:

  
DISTRICT JUDGE

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,  
vs.  
ROY D. MORAGA,  
Defendant.

FILED IN CASE NO. 19  
MAR 15 1990  
By *W. H. Rose* Deputy  
CASE NO. C92174  
DEPT. NO. VII

V E R D I C T

We, the Jury in the above entitled case, find the defendant  
guilty of Count I, Burglary.

DATED this 15 day of March, 1990.

*Edward J. Lohr*  
FOREPERSON



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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, )  
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Plaintiff, )  
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vs. )  
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ROY D. MORAGA, )  
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Defendant. )  
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—FILED IN \_\_\_\_\_  
MAR 15 1990 19\_\_\_\_  
CLERK  
By *Keith Reese* Deputy  
CASE NO. C92174  
DEPT. NO. VII

V E R D I C T

We, the Jury in the above entitled case, find the defendant  
guilty of Count II, Burglary.

DATED this 15 day of March, 1990.

*Steward I. Zoller*  
FOREPERSON

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DISTRICT COURT

CLARK COUNTY, NEVADA

FILED IN OPEN COURT

THE STATE OF NEVADA, )  
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Plaintiff, )  
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vs. )  
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ROY D. MORAGA, )  
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Defendant. )  
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MAR 15 1990 19

CLERK  
By *Ruth Rose* Deputy

CASE NO. C92174  
DEPT. NO. VII

V E R D I C T

We, the Jury in the above entitled case, find the defendant  
guilty of Count III, Sexual Assault.

DATED this 15 day of March, 19 90.

*Howard L. Zolner*  
FOREPERSON

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, )  
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Plaintiff, )  
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vs. )  
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ROY D. MORAGA, )  
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Defendant. )  
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FILED IN COURT  
MAR 15 1990 19  
CLERK  
By *Paula Rene* Deputy

CASE NO. C92174  
DEPT. NO. VII

V E R D I C T

We, the Jury in the above entitled case, find the defendant  
guilty of Count IV, Sexual Assault.

DATED this 15 day of March, 19 90.

*Howard L Lober*  
FOREPERSON

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, )  
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Plaintiff, )  
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vs. )  
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ROY D. MORAGA, )  
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Defendant. )  
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CASE NO. C92174  
DEPT. NO. VII

V E R D I C T

We, the Jury in the above entitled case, find the defendant  
not guilty of Count I, Burglary.

DATED this \_\_\_\_\_ day of March, 1990.

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DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	
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Plaintiff,	)	
	)	
vs.	)	
	)	
ROY D. MORAGA,	)	CASE NO. <u>C92174</u>
	)	
Defendant.	)	DEPT. NO. <u>VII</u>
	)	
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V E R D I C T

We, the Jury in the above entitled case, find the defendant  
not guilty of Count III, Sexual Assault.

DATED this \_\_\_\_\_ day of March, 19 90.

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, )  
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Plaintiff, )  
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vs. )  
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ROY D. MORAGA, )  
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Defendant. )  
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CASE NO. C92174

DEPT. NO. VII

V E R D I C T

We, the Jury in the above entitled case, find the defendant  
not guilty of Count IV, Sexual Assault.

DATED this \_\_\_\_\_ day of March, 1990.

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, )  
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Plaintiff, )  
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vs. )  
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ROY D. MORAGA, )  
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Defendant. )  
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CASE NO. C92174  
DEPT. NO. VII

V E R D I C T

We, the Jury in the above entitled case, find the defendant  
not guilty of Count II, Burglary.

DATED this \_\_\_\_\_ day of March, 1990.

FOREPERSON

THIS SEALED  
DOCUMENT,  
NUMBERED PAGE(S)  
75 - 84  
WILL FOLLOW VIA  
U.S. MAIL

JUN 4 3 59 PM '90

**District Court**  
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

—vs—

ROY D. MORAGA,  
ID# 938554

Defendant.

CASE NO. C92174

DEPT. NO. VIII

**MOTION AND NOTICE OF MOTION TO AMEND INFORMATION**

DATE OF HEARING: 6-6-90

TIME OF HEARING: 9:00 a.m.

TO: Defendant above named, and

TO: Your Counsel of Record: Roger Hillman, Deputy Public Defender

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that, on Wednesday,  
the 6th day of June, 19 90, at the hour of 9:00 o'clock, A.M., or as  
soon thereafter as Counsel can be heard, in the Courthouse, Las Vegas, Clark County, Nevada, the STATE OF  
NEVADA will move the Court for an Order permitting the Information heretofore filed in the above entitled action  
to be amended to include an additional count charging Defendant above named as an habitual criminal, pursuant  
to, and in accordance with NRS 207.010.

DATED this 4th day of June, 19 90.

REX BELL, District Attorney  
NEVADA BAR#001799  
000301

By: [Signature]  
Deputy District Attorney  
Deborah J. Lippis

REX BELL  
DISTRICT ATTORNEY  
CLARK COUNTY COURTHOUSE  
200 SO. THIRD STREET  
LAS VEGAS, NEVADA 89155

DA-51

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**AFFIDAVIT IN SUPPORT OF MOTION**

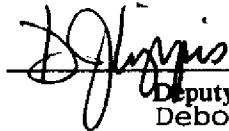
STATE OF NEVADA     )  
                              ) ss:  
COUNTY OF CLARK    )

DEBORAH J. LIPPIS

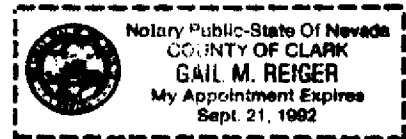
, being first duly sworn, deposes and says:

That Affiant is a Deputy District Attorney of Clark County, Nevada; that Information has heretofore been filed in the within action; that since the filing of said Information Affiant has learned that Defendant has been previously convicted of offenses which are felonies under the laws of the State of Nevada and Defendant should be charged accordingly as an habitual criminal.

WHEREFORE, Affiant prays that the Court enter an Order permitting the Clark County District Attorney to file an Amended Information herein, pursuant to NRS 207.010.

  
Deputy District Attorney  
Deborah J. Lippis

SUBSCRIBED AND SWORN to before me  
this 1<sup>st</sup> day of June, 1990  
Gail M. Reiger



**POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND INFORMATION**

1. An amendment may be made at any time after Defendant pleads when it can be done without prejudice to the substantial rights of the Defendant. NRS 173.095.

2. "Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously been twice convicted, whether in this state or elsewhere, of any crime which, under the laws of this state would amount to a felony, or who shall previously have been three times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state prison for not less than 10 years nor more than 20 years."

"Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been three times convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been five times convicted, whether in this state or elsewhere, of petit larceny, or any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served."

1 "In proceedings under this section, each previous conviction must be alleged in the accusatory pleading  
2 charging the primary offense, but no such conviction may be alluded to on trial of the primary offense, nor may  
3 any allegation of such conviction be read in the presence of a jury trying the offense or a grand jury considering  
4 an indictment for the offense." NRS 207.010.

5 3. A state of a previous conviction under habitual criminal act does not charge an offense. It is only the  
6 averment of a fact which may affect the punishment.

7 State v. Bardmess, 54 Nev. 84;

8 Hollander v. State, 82 Nev. 345, 418 P.2d 802.

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15 RECEIPT of a copy of the above and foregoing Motion, Notice  
16 of Motion, Affidavit and Points and Authorities is hereby  
17 acknowledged this 6/7 day of June,  
18 19      .

19 \_\_\_\_\_  
20 Attorney for Defendant

21  
22 OFFICE OF THE PUBLIC DEFENDER

23  
24 By [Signature]  
25 Attorney for Defendant  
26 Roger Hillman, DPD  
27  
28

# IN THE SUPERIOR COURT

OF  
MARICOPA COUNTY, STATE OF ARIZONA

12-N Feb. 7, 1977

JUDGE RAPP, PRESIDING

OFFICE INSTRUCTIONS	
APPEALS	
CRIMINAL	
PROPERTY	
CRIMINAL	
PROPERTY	
CRIMINAL	
PROPERTY	
CRIMINAL	
PROPERTY	

WILSON D. PALMER, Clerk  
Carol B. Nevalle, Deputy

CR 95949

STATE OF ARIZONA

County Attorney

by: Kim M. Stuart

vs.

Adult Probation Department

Related  
Cases:

ROY DANIELS MORAGA

Maricopa County Sheriff's Office

P.D.-Robert A. Hertzberg  
Defense Counsel

95949

## SENTENCE - PROBATION - NO JAIL

The State is represented by the above-named deputy; the defendant is present with counsel above named. Court Reporter: Marilyn Sanchez

The defendant is advised of the charge, the determination of guilt and is given an opportunity to speak. The Court has reviewed the Pre-Sentence Report. Having found no legal cause to delay, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the defendant is guilty of the crime of Aggravated Assault, Open-End

committed on: December 21, 1976

in violation of ARS 13-241, 13-245 (A)

As punishment for this crime,

ORDERED suspending imposition of sentence and placing the defendant on probation for a period of FIVE (5) YEARS commencing February 7, 1977, under the supervision of the Probation Department of this Court, in accordance with the formal Judgment and Order suspending sentence and imposing terms of probation signed by the Court.

FORM 99-17

51-SENTENCE - PROBATION - NO JAIL  
(Continued on next page)

Page 22



**IN THE SUPERIOR COURT**  
OF  
MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION	
APPEALS	
CRIMINAL	
CIVIL	
CLERK OF COURT	
CLERK OF VICE	
DEPUTY CLERK	
RECORDS	
RECEPTION	

12-H Feb. 7, 1977 HON. EDWARD C. BATT, PRESIDING WILSON D. PALMER, CLK  
CLK CLK CLK CLK  
Carol M. Novella CLK

**CR 95940**

STATE OF ARIZONA vs. MORAGA (continued)

Related  
Cases:

ORDERED defendant shall make and pay restitution through the Clerk of the Superior Court of Maricopa County in the total amount of \$ N/A in regular monthly payments of \$        each month beginning on        and on the        day of each month thereafter until paid in full.

ORDERED defendant shall pay a fine to the Clerk of the Superior Court of Maricopa County in the amount of \$ N/A on or before       .

The written terms and conditions of probation are handed to the defendant for explanation and signature.

ORDERED releasing defendant, exonerating any bond ~~and expending any money on the defendant's behalf.~~

The defendant is advised concerning the consequences of failure to abide the conditions of probation.

The defendant is advised concerning rights of appeal and written notice of those rights is provided.

FILED: Conditions of Probation, signed by defendant. (Copy provided defendant.); Notice of Appeal Rights, signed by defendant. (Copy provided defendant.)

ISSUED: ORDER OF RELEASE.

FORM 40-17

**51-SENTENCE - PROBATION - NO JAIL**

Page 54

**ALLIED BUSINESS  
PROPERTY OF UNITED STATES GOVT**

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~~DOZ 8849~~

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ROSE MOFFORD  
GOVERNOR

# Arizona Department of Corrections

1801 WEST JEFFERSON  
PHOENIX, ARIZONA 85007  
(602) 542-5538

OFFENDER SERVICES  
FACSIMILE TRANSMISSION COVER SHEET



SAMUEL A. LEWIS  
DIRECTOR

Date: *MARCH 8, 1990*

To: *CLARK County District Attorney*

Attn: *LT. GLADE LAMOREAUX*

No. of pages (Excluding Cover Sheet) *4*

Should any pages need to be re-transmitted.  
please call us ASAP at (602) 542-5586

Contact Person

*BOB MARTZ*  
*Administrative Assistant II*

Extension

*602-542-5586 EX. 69*

Our Fax Number

*602-542-1638*

**IN THE SUPERIOR COURT**  
OF

MARICOPA COUNTY, STATE OF ARIZONA

## OFFICE DISTRIBUTION

APPEALS	
BONDS REFUND	
FORFEITURE	
CHANGE OF VENUE	
JURY FEES	
DEMANDS	
SENTENCING	

32-L

May 23, 1983

Hon. Cecil B. Patterson, Jr.

131275

STATE OF ARIZONA,

vs.

ROY DANIEL MORAGA

County Attorney

By: Fred Newton for  
Herb Williams

RECEIVED

MAY 31 1983

ARIZONA STATE  
DEPT. OF CORRECTIONS  
RECORD SECTION

Mary Wisdom for M. Terribile,

Criminal Judgments-Clerk's O.

Dept. of Corrections

MCSO

APO

SENTENCE-IMPRISONMENT-DEPARTMENT OF CORRECTIONS

9:35 a.m.

The State is represented by the above-named counsel; the defendant is present with above-named counsel.

Court Reporter Frances Turman, is present.

The defendant is advised of the charge, the determination of guilt and is given an opportunity to speak.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the defendant is guilty of the crime of Count I: Attempted Aggravated Assault

a Class 4 felony, ~~nondangerous~~/nondangerous, ~~nonrepetitive~~/nonrepetitive offense, in violation of A.R.S. 13-1001, 1204(A)(2), & (B), 1203, 701, 702 and 801 committed on Jan 1, 1983 and \_\_\_\_\_

a Class \_\_\_\_\_ felony, dangerous/nondangerous, repetitive/nonrepetitive offense, in violation of A.R.S. \_\_\_\_\_ committed on \_\_\_\_\_

FORM 1.1.17

SENTENCE-IMPRISONMENT-DOC

(CONTINUED).....

MAY 24 1983

MAY 25 1983

Page

13

## OFFICE DISTRIBUTION

APPEALS
BONDS REFUND
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

## IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

32-L

May 23, 1983

Hon. Cecil B. Patterson, Jr.

VIVIAN KRINGLE, Clerk

Deputy

DIV

DATE

JUDGE OF COMMISSIONER

m. d. Vada

R 131275

STATE vs. Moraga

(CONTINUED).....

The defendant was also found to have been previously convicted of the following felonies:

1. none

a Class \_\_\_\_\_ felony, nondangerous/dangerous convicted on \_\_\_\_\_ in \_\_\_\_\_

2.

a Class \_\_\_\_\_ felony, nondangerous/dangerous convicted on \_\_\_\_\_ in \_\_\_\_\_

Upon consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of incarceration with the Arizona Department of Corrections is appropriate. The Court further finds that there are circumstances sufficiently substantial to call for a ~~(M) Presumptive/Aggravated/Mitigated~~ term. These circumstances are as stated by the Court on the record

As punishment for this/~~XXXX~~ crime(M)

As to Count I:

IT IS ORDERED that the defendant is committed to the Arizona Department of Corrections for a term of imprisonment for FOUR (4) years; which is the Presumptive/~~Aggravated/Mitigated~~ term to date from May 23, 1983 and defendant is to be given credit for 56 days served prior to sentencing.

As to

IT IS ORDERED that the defendant is committed to the Arizona Department of Corrections for a term of imprisonment for \_\_\_\_\_ years; which is the Presumptive/Aggravated/Mitigated term to date from \_\_\_\_\_ and defendant is to be given credit for \_\_\_\_\_ days served prior to sentencing.

MAY 24 1983 (CONTINUED).....

Page

MAY 25 1983

OFFICE DISTRIBUTION

## IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

APPEALS
BONDS REFUND
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

32-L

May 23, 1983

Hon. Cecil B. Patterson, Jr.

BY

DATE

JUDGE OF COMMISSIONER

VIVIAN KRINGLE,  
M. D. VegaClerk  
Deputy

CR 131275

STATE vs. Moraga

(CONTINUED).....

The defendant is advised concerning rights of appeal and written notice of those rights is provided.

ORDERED exonerating any bond.

ORDERED granting motion to dismiss Count II

ORDERED authorizing the Sheriff of Maricopa County to deliver defendant to the custody of the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the terms of imprisonment set forth herein.

ORDERED that the Clerk shall remit to the Department of Corrections a copy of this order, plus all pre-sentence reports, probation violation reports, medical and psychological reports relating to the defendant and involving this cause.

FILED: Notice of Rights of Appeal, signed by the defendant.

ISSUED: Order of Confinement.

9:39 a.m. Hearing concludes.

*Cecil B. Patterson, Jr.*  
JUDGE OF SUPERIOR COURT

FORM 43 17

SENTENCE-IMPRISONMENT-DOC

MAY 24 1983

Received

MAY 25 1983

Page

15

The foregoing Minute Entry is a full, true and correct copy of the original Order on file in this office.

Attest MAY 26 1983 19\_\_\_\_  
VIVIAN KRINGLE, Clerk of the Superior Court of the State  
of Arizona, in and for the County of Maricopa.

By  Deputy

MAR 08 '98 13:34 DOC OFFENDER SERVICE

# In the Superior Court of Yavapai County

STATE OF ARIZONA

STATE OF ARIZONA, }  
County of Yavapai } ss:

I, ETHEL BOUTON, Clerk of the Superior Court of Yavapai County, State of Arizona, do hereby certify  
and attest the foregoing to be a full, true and correct copy of the Indictment; Plea Agreement; and  
Sentence of Probation, State of Arizona vs. Roy Daniels Moraga, Case No. 12891

as the same appear \_\_\_\_\_ of record in my office.

IN WITNESS WHEREOF, I have hereunto  
set my hand and affixed the Seal of said Superior  
Court at Prescott, this 10th day of  
May, A. D., 1990

ETHEL BOUTON

Clerk, Superior Court

*Amos H. Chave*  
by Deputy



APD  
**FILED**

12<sup>00</sup> O'Clock, A M

JUN 6 1988

**SUPERIOR COURT OF ARIZONA  
YAVAPAI COUNTY  
PRESCOTT, AZ**

**ETHEL BOUTON, Clerk**  
*[Signature]*  
Deputy

3                      June 6, 1988                      JAMES B. SULT                      Mary Slaughter  
Div                      Date                      Judge or Commissioner                      Deputy

NO. 12891

STATE OF ARIZONA  
VS

ROY DANIELS MORAGA

County Attorney  
By: Julia Stoner  
William T. Kiger  
Defense Counsel

DATE OF BIRTH: 1/27/52

**SENTENCE OF PROBATION**

10:30 a.m./p.m. The State is represented by the above named Deputy County Attorney; the Defendant is present with counsel named above.

Court Reporter Sandra K Markham is present.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

- ☐ **WAIVER OF COUNSEL** The Defendant knowingly, intelligently, and voluntarily waived his right to be represented by counsel after being advised of the right to be represented by counsel including the right to have counsel appointed free of charge if the Defendant is indigent.
- ☐ **WAIVER OF JURY TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial by jury after having been advised of his right to same. The determination of guilt was based upon a trial to the Court.
- ☒ **WAIVER OF TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial with or without a jury, his right to confront and cross examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty/no contest.
- ☐ **JURY VERDICT** The determination of guilt was based upon a verdict of guilty after a jury trial.

(Continued)

Page 1

3                      June 6, 1988                      JAMES B. SULT                      Mary Slaughter  
Div                      Date                      Judge or Commissioner                      Deputy

No. 12891

STATE VS. ROY DANIELS MORAGA

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence.

IT IS THE JUDGMENT OF THE COURT that the Defendant is guilty of the crime of \_\_\_\_\_

Third Degree Burglary

a Class 4 felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. 13-1506, 13-1501, 13-701, 13-702, 13-801, committed on January 10, 1988  
and \_\_\_\_\_

a Class \_\_\_\_\_ felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. \_\_\_\_\_

committed on \_\_\_\_\_  
and \_\_\_\_\_

a Class \_\_\_\_\_ felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. \_\_\_\_\_

committed on \_\_\_\_\_  
and \_\_\_\_\_

a Class \_\_\_\_\_ felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. \_\_\_\_\_

committed on \_\_\_\_\_  
and \_\_\_\_\_

a Class \_\_\_\_\_ felony/misdemeanor/undesignated, nondangerous and nonrepetitive offense, in violation of A.R.S. \_\_\_\_\_

committed on \_\_\_\_\_

(Continued)

Page 2

3  
Div

June 6, 1988  
Date

JAMES B. SULT  
Judge or Commissioner

Mary Slaughter  
Deputy

No. 12891

STATE VS. ROY DANIELS MORAGA

Upon consideration of the offense, and the facts, law and circumstances involved in this case, the Court finds that the Defendant is eligible for probation. The specific reasons for the granting of probation are stated by the Court on the record.

☐ The Court further finds that the term of probation should include incarceration in the County Jail as a term and condition of probation.

☐ The Court further finds that the term of probation should include imprisonment in the custody of the Arizona Department of Corrections as a term of probation.

As punishment for this/these crime(s),

☒ IT IS ORDERED suspending imposition of sentence and placing the Defendant on probation for a period of 4 years commencing June 6, 1988 under the supervision of the Adult Probation Department of this Court, in accordance with the formal Judgment and Order suspending sentence and imposing terms of probation signed by the Court.

As a condition of probation,

☐ IT IS ORDERED that the Defendant be incarcerated in the Yavapai County Jail for a period of \_\_\_\_\_ commencing \_\_\_\_\_ with credit for \_\_\_\_\_ days served.

☐ IT IS ORDERED that the Defendant be committed to the Arizona Department of Corrections for a term of imprisonment for a period of \_\_\_\_\_ commencing \_\_\_\_\_

☒ IT IS ORDERED that the Defendant pay a monthly probation services fee to the Clerk of the Superior Court of Yavapai County at a rate of \$ 30.00 commencing on July 1, 1988 and due on the 1st day of each month thereafter during the term of probation.

(Continued)

Page 3

3                      June 6, 1988                      JAMES B. SULT                      Mary Slaughter  
Div                      Date                      Judge or Commissioner                      Deputy  
No. 12891  
STATE VS. ROY DANIELS MORAGA

## RESTITUTION

☒ ORDERED that the defendant shall make and pay restitution to the victim of this crime, for the victim's economic loss, through the Clerk of the Superior Court of Yavapai County in the total amount of \$ 647.40 to James Strauss, Jerome, Arizona 86331

☒ ~~XXXXX~~ in regular monthly payments of \$ 53.95 commencing August 1, 1988 and on the 1st day of each month thereafter until paid in full.

\_\_\_\_\_ six months following release from custody or in regular monthly payments of \$\_\_\_\_\_ commencing \_\_\_\_\_ and on the \_\_\_\_\_ day of each month thereafter until paid in full or as ordered by the Board of Pardons and Paroles pursuant to A.R.S. Section 31-412, whichever date first occurs. Any order entered by the Board pursuant to A.R.S. Section 31-412 shall be transmitted to the Clerk of the Superior Court of Yavapai County.

## REIMBURSEMENT

☐ ORDERED that the defendant shall make and pay reimbursement through the Clerk of the Superior Court of Yavapai County for the reasons stated on the record and in the terms and conditions of probation, in the total amount of \$ \_\_\_\_\_ on or before \_\_\_\_\_ or in regular monthly payments of \$ \_\_\_\_\_ each month beginning on \_\_\_\_\_ and on the \_\_\_\_\_ day of each month thereafter until paid in full.

**FINE**

☒ ORDERED that the defendant shall pay a fine to the Clerk of the Superior Court of Yavapai County in the amount of \$ -0- which equals \$ -0- plus a surcharge of \$ -0- and \$ 100.00 is designated as restitution to be paid to Victim Compensation said fine and surcharge to be paid

Fund  
X on or before September 1, 1988

\$XXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX

(Name of tax payer) (Address)

\_\_\_\_\_ six months following release from custody or in regular monthly payments of \$\_\_\_\_\_ commencing \_\_\_\_\_ and on the \_\_\_\_\_ day of each month thereafter until paid in full or as ordered by the Board of Pardons and Paroles pursuant to A.R.S. Section 31-412, whichever date first occurs. Any order entered by the Board pursuant to A.R.S. Section 31-412 shall be transmitted to the Clerk of the Superior Court of Yavapai County.

(Continued)

Page 4

3  
Div

June 6, 1988  
Date

JAMES B. SULT  
~~Judge or Commissioner~~

Mary Slaughter  
Deputy

No. 12891

STATE VS. ROY DANIELS MORAGA

The written terms and conditions of probation are handed to the Defendant for explanation, acceptance, and signature. Defendant agrees to the stated waiver of right of extradition. The Defendant is advised concerning the consequences of failure to abide by the conditions of probation.

The Defendant is advised concerning rights of appeal and written notice of those rights is provided.

☒ ORDER granting the State's Motion to Dismiss Counts II and III of the  
Indictment herein.

☐ ORDERED remanding Defendant to the custody of the Sheriff of Yavapai County and authorizing the Sheriff to carry out the condition of incarceration and probation.

☐ ORDERED authorizing the Sheriff of Yavapai County to transport the Defendant to the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the condition of imprisonment on probation.

☐ ISSUED: Order of Confinement

☐ ORDERED that the Defendant be released from custody as to this cause only.

☐ ISSUED: Order of Release

☐ ORDERED that the Clerk of the Superior Court remit to the Department of Corrections a copy of this Order, plus all pre-sentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

☒ ORDERED exonerating any bond.  
FILED: Conditions of Probation and Notice of Right to Appeal, both signed by the Defendant and copies provided to the Defendant.  
Let the record reflect that the Defendant's fingerprint is permanently affixed to this sentencing order in open Court.

12:00 a.m./p.m. Hearing Concludes

Right Index Finger



James B. Sult  
JUDGE OF THE SUPERIOR COURT

Page 5

*Lonny*

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

State of Arizona  
vs.

No. 12891

Division 3

Defendant

PLEA AGREEMENT

ROY DANIELS MORAGA

The State of Arizona and the defendant hereby agree to the following disposition of this case:  
Plea: The defendant agrees to plead guilty ~~and waive~~ to:

Count I, as alleged in the Indictment.

This is a non dangerous offense under the criminal code.

Terms: On the following understandings, terms and conditions:

- ☐ 1. The crime carries a presumptive sentence of four (4) years; a minimum sentence of two (2) years and a maximum sentence of five (5) years.

Probation is ~~is not~~ available. Restitution of economic loss to the victim will be required.

The maximum fine that can be imposed is \$150,000.00 plus 37% percent surcharge. Special conditions regarding sentence, parole or commutation imposed by statute (if any) are none.

- ☐ 2. The parties stipulate to the following additional terms: (These stipulations are subject to court approval at the time of sentencing as set forth in paragraph 8). Defendant will pay a \$100 assessment to the Victim's Compensation Fund. Restitution will be paid in the amount of \$647.40 to Betty's Ore House.

- ☐ 3. The following charges are dismissed, or if not yet filed, shall not be brought against the defendant Counts II and III of the Indictment. State will not allege any prior convictions.

- ☐ 4. This agreement, unless rejected or withdrawn, or reversed upon appeal by defendant, serves to amend the complaint, indictment, or information, to charge the offense to which the defendant pleads, without the filing of any additional pleading. If the plea is rejected or withdrawn, or if the conviction is reversed upon an appeal by the defendant, the original charges and any charges that are dismissed by reason of this plea agreement are automatically reinstated.

- ☐ 5. If the defendant is charged with a felony, he hereby waives and gives up his rights to a preliminary hearing or other probable cause determination on the charges to which he pleads. The defendant agrees that this agreement shall not be binding on the State should the defendant be charged with or commit a crime between the time of this agreement and the time for sentencing in this cause; nor shall this agreement be binding on the State until the State

Superior Court of Arizona  
Yavapai County

COP RW III  
3/15/88 9:15  
N.S.

State of Arizona,

Plaintiff,

vs.

ROY DANIELS MORAGA

Defendant(s).

Superior Court No. \_\_\_\_\_

Grand Jury No. 40 -GJ- 4064

Division \_\_\_\_\_

INDICTMENT

(FELONY) (~~MISDEMEANOR~~)

The grand jurors of Yavapai County, Arizona, accuse Roy Daniels Moraga

charging that in Upper Verde  
Precinct, Yavapai County, State of Arizona:

COUNT I

On or about January 10, 1988, ROY DANIELS MORAGA, with intent to commit a theft or a felony therein, entered or remained unlawfully in or on the non-residential structure of James Straus doing business as Betty's Ore House, located at 309 Main St., Jerome, Az, in violation of A.R.S. §§ 13-1506, 13-1501, 13-701, 13-702 and 13-801.

COUNT II

On or about January 10, 1988, ROY DANIELS MORAGA, knowingly controlled property of James Straus, to-wit: cigarettes and currency, of a value of \$100.00 or more but less than \$250.00, with the intent to deprive James Straus of such property in violation of A.R.S. §§ 13-1802, 13-1801, 13-701, 13-702 and 13-801.

**\*\*SEE ADDITIONAL CHARGE ON NEXT PAGE\*\***

COUNT III

On or about January 10, 1988, ROY DANIELS MORAGA, recklessly defaced or damaged property, to-wit: ventilation fan, door, window, and cash register, of James Straus, causing damage in an amount of more than \$100.00 but less than \$1500.00 in violation of A.R.S. §§ 13-1602, 13-1601, 13-701, 13-702 and 13-801.

CHARLES R. HASTINGS  
Yavapai County Attorney

By THOMAS B. LINDBERG  
Deputy County Attorney

January 21, 1988  
Dated

(Foreman writes "A True Bill")

Foreman of the Grand Jury



STATE OF ARIZONA  
COUNTY OF YAVAPAI ADULT PROBATION DEPARTMENT  
PROBATION OFFICER NANCY L. SPRIGGS PROBATION NO. 12891  
INTERVIEW DATE: MARCH 22, 1988

NAME ROY DANIELS MORAGA, JR. RACE SP/AM SEX M HT. 5'11"  
RESIDENCE P.O. BOX 1075 CLARKDALE, AZ EYES BR HAIR BR WT. 180  
2591 MOUNTAIN VIEW DR. DOB 10/27/52 AGE 35  
PHONE 634-3889 MESS. PHONE \_\_\_\_\_ CITIZEN OF USA  
AKA/MAIDEN "SONNY" BIRTHPLACE MESA, AZ  
I.D. MARKS SCAR - 10" R. WRIST \*\*MULTIPLE DRIVER'S LIC. NO. AZ  
EMPLOYER/ADDRESS/PHONE UNEMPLOYED TATTOOS ES. NO. 527-96-8289  
FBI NO. 759894H  
OCCUPATION GROUND MAINT. EDUCATION \_\_\_\_\_ BOOKING NO. \_\_\_\_\_  
MARITAL STATUS D RELIGION CATH CHILDREN 0 D.O.C. 037089

**\*\*TATTOOS SEE ATTACHED SHEET** AZ SID 03005925

CAUSE NO.	DATE	OFFENSE/A.R.S. NO.	CLASS	NCIC
<u>12891</u>	<u>1/10/88</u>	<u>NON-RESIDENTIAL BURGLARY</u>	<u>4F</u>	
		<u>13-1506, 13-1501, 13-701,</u>		
		<u>13-702, 13-801</u>		

ARREST DATE/AGENCY 1/16/88 JEROME P.D. DATE/INDICTMENT FILED 1-21-88  
DATE INCAR. 1/16/88 RELEASE DATE/STATUS 3/15/88 BOND-ROR  
DAYS IN JAIL THIS ARREST 86 REMAND JUVENILE COURT/DATE \_\_\_\_\_

DEFENSE COUNSEL WILLIAM KIGER (APT) PROSECUTOR MARC HAMMOND  
GUILT BY/DATE COP 3/15/88 SENTENCING JUDGE JAMES SULT  
DATE OF SENTENCING/SENTENCE APRIL 11, 1988 DIV III

CODEFENDANT DISPOSITION

NO. CONVICTIONS:	FEL. <u>2</u>	MISD. <u>X</u>	JUV. <u>4</u>	CASE NO.	CHARGE	STATE
NO. INCARCERATIONS:	PRISON <u>6</u>	JAIL <u>X</u>	OTHER <u>0</u>			
	ESCAPES <u>0</u>					
NO. SUPERVISIONS:	PROB. <u>0</u>	PAROLE <u>2</u>	OTHER <u>0</u>			

NARCOTICS/ALCOHOL HISTORY PAST POLY DRUG/ALCOHOL ABUSE  
TREATMENT/PROGRAMS A.A.

MILITARY HISTORY: NONE PROBATION: \_\_\_\_\_  
BRANCH \_\_\_\_\_ TYPE DISCH. \_\_\_\_\_ PROB. TERM. DATE \_\_\_\_\_  
ENTRY DATE \_\_\_\_\_ DISCHARGE DATE \_\_\_\_\_ TYPE TERM. \_\_\_\_\_  
CLASS. \_\_\_\_\_ FIRST FEL. \_\_\_\_\_

NAME	RELATION	AGE	ADDRESS	PHONE NO.
<u>ROY MORAGA</u>	<u>FATH</u>	<u>62</u>	<u>P.O. BOX 1075 CLARKDALE, AZ</u>	<u>634-3889</u>
<u>SUSIE MORAGA</u>	<u>MOTH</u>	<u>61</u>	<u>SAME</u>	

**\*\*TATTOOS**

**R.U. ARM**

WOMAN WITH WIZARD  
CHRIST  
MEXICAN FLAG  
GAVEYARD  
PEACOCK  
POPPIES

**L. ARM**

3 WOMEN  
1 WOMAN  
VIRGIN MARY  
AXTEC WARRIOR

MAGORA ON STOMACH  
2 WOMEN AND 2 PEACOCKS ON BACK  
ROSE ON L. CHEST

**ALL RPISON TATTOOS**

**R. FOOT**

SPIDERWEB  
LADY L. THIGH

YAVAPAI COUNTY

ADULT PROBATION DEPARTMENT

Superior Court, Prescott, Arizona

Case 12891

Division 3

Prosecutor: Marc Hammond

Judge James Sult

Defense: William T. Kiger

Sentencing: April 11, 1988

DEFENDANT'S NAME: ROY DANIELS MORAGA

OFFENSE:

Original:

COUNT I

On or about January 10, 1988, ROY DANIELS MORAGA, with intent to commit a theft or felony therein, entered or remained unlawfully in or on the non-residential structure of James Straus doing business as Betty's Ore House, located at 309 Main St., Jerome, Az., in violation of A.R.S. 13-1506, 13-1501, 13-701, 13-702 and 13-801.

COUNT II

On or about January 10, 1988, ROY DANIELS MORAGA, knowingly controlled property of James Straus, to-wit: cigarettes and currency, of a value of \$100.00 or more but less than \$250.00, with the intent to deprive James Straus of such property in violation of A.R.S. 13-1802, 13-1801, 13-701, 13-702 and 13-801.

COUNT III

On or about January 10, 1988, ROY DANIELS MORAGA, recklessly defaced or damaged property, to-wit: ventilation fan, door, window, and cash register, of James Straus, causing damage in an amount of more than \$100.00 but less than \$1,500.00 in violation of A.R.S. 13-1602, 13-1601, 13-701, 13-702 and 13-801.

Amended Court Action:

COUNT I

On or about January 10, 1988, ROY DANIELS MORAGA, with intent to commit a theft or felony therein, entered or remained unlawfully in or on the non-residential structure of James Straus doing business as Betty's Ore House, located at 309 Main St., Jerome, Az., in violation of A.R.S. 13-1506, 13-1501, 13-701, 13-702 and 13-801.

The defendant's plea was accepted and sentencing was set for April 11, 1988. A Presentence Report was ordered and the defendant was released on his own recognizance, at the stipulation of both parties.

PENALTIES:

The class 4 felony of this instant offense is designated as non-dangerous and non-repetitive. It carries a presumptive sentence of 4 years; a minimum sentence of 2 years and a maximum sentence of 5 years. Probation is available and restitution will be required.

The maximum fine that can be imposed is \$150,000.00 plus a 37% surcharge. A \$100.00 assessment payable to the Victim's Compensation Fund will be levied.

Both parties stipulate the defendant will pay a \$100.00 assessment to the Victim's Compensation Fund and restitution in the amount of \$647.40 will be paid to Betty's Ore House.

Counts II and III of the Indictment will be dismissed or not charged and the State agrees not to allege any prior convictions of the defendant.

OFFICER'S VERSION:

Officers of the Jerome Police Department filed information regarding this report under DR 88-012. In the original report, Patrolman David Canfield, states that on January 10, 1988 at approximately 3:48 in the morning he received a report of a burglary in progress at Betty's Ore House on Main Street in Jerome, Arizona. The person reporting was Bill Lytle. He stated that someone had broken into the bar and fled North bound on 89A in light colored, full size, 1974 or 1975 pickup.

Clarkdale Police Department responded and watched the road for the described vehicle without any results. The Jerome officer contacted Mr. Lytle, who stated he had been sleeping in the hotel upstairs when he was awakened by a bell on the bar-room door. He looked out the front window of the hotel to see a vehicle leaving the scene. He then went down stairs and discovered the entry, immediately prior to phoning police.

The officer observed that suspects had apparently gained entry by breaking the glass on the bar door, then reaching through to open the dead-bolt lock on the inside. The cash drawer had been pried open and the money tray was lying on the floor in pieces. The officer also observed the liquor closet in the hall where the cash box is kept to be partially opened, and that several blades on the exhaust fan, in the rear of the kitchen, were bent inwards from the outside.

Officers came into contact with a subject, who identified himself as Roy Danielson at the #1 Food Store in Clarkdale. He stated he had been in Jerome just previously, drinking and playing pool. He had walked down to the store. Officers searched him and observed he had \$7.00 in quarters, a ten dollar bill and three packages of Camel filter cigarettes, two of which were unopened. Officers checked his description and found he was an employee of the Ore House, whose correct name was Roy A. Moraga, Jr..

Officers in Clarkdale were advised that Moraga had given them a false name, the Spirit Room had a dance that night and the pool table was closed and officers who had been patrolling the road did not see Moraga walking down to the #1 Food Store during the time stated. He asked that he be held but he had already left the area.

At the burglary scene officers found numerous fresh footprints in the grease residue on the sewer line that runs along the rear of the building by the exhaust fan. Additionally, finger print impressions were lifted and it was learned this was Mr. Moraga's last day of employment at the Ore House. On January 29, 1988, the owner of the Ore House called officers to report he had found a screw-driver behind some boxes, which was bent and indicated it was probably used as the pry tool which opened his cash register.

Mr. Lytle told officers he and Moraga had gone to the Spirit Room and drank there until closing time. Then they went to Mr. Lytle's room in Miner's Roost and drank a six-pack of beer. Mr. Moraga left his room at about 2:00 a.m. and Mr. Lytle went to bed.

Officers interviewed the bartender from the Spirit Room and he told them that on the night of this offense he had seen the person described to him as Mr. Moraga in the bar. After the bar closed, Mr. Moraga had asked for a beer to go and the bartender refused him. When the bartender locked up, at about 2:15 a.m. on January 10, 1988, he noticed Moraga leaning against a vehicle in front of the door-way to the Connor Hotel. There is an entry-way between the hotel and the bar and the doors automatically lock. Mr. Turner felt suspicious about the individual being there and he checked the locks. He found the front door to the Connor Hotel blocked open and removed the blocks, locking the door.

Officers arrested Mr. Moraga at his home on January 10, 1988. At the time of his arrest he pulled away from one officer and attempted to flee the apartment. He was subdued and handcuffed after a brief struggle. During the struggle, Mr. Moraga is reported as stating to the officers "Fuck you, you ass hole! I didn't do no burglary!" and "If you don't get out of

my face, I am going to get out of these things (handcuffs) and kick your fucking ass!" Both his parents were present at the time of his arrest and tried to calm him down, to no avail.

Officers confiscated Mr. Moraga's shoes and they matched the impressions found at the scene of the burglary. Mr. Moraga was held in the Yavapai County Jail and a bond of \$10,275.00 was set.

Officers had enough information to search Lytle's room and did so on January 15, 1988. They recovered the following:

1. 1 small orange and black phillips screwdriver, on table
2. 3 open carton of Marlboro Lights, containing 4 packs; one pack of Marlboro 100's; one pack Camel Filters; all from the table.
3. 1 tan flop-bill hat belonging to (S) Moraga, greasy, from on top of the clothes cabinet
4. 1 opened paper quarter roll, from the trash can
5. 1 plastic Safeway cup containing \$19.00 in quarters (86)
6. Empty Marlboro Lights packs, from the trash can
7. 10 small seeds on table
8. 1 bottle with small seeds in shoebox
9. 2 roach clips, hanging on wall
10. 9 bong, head hitter, sifter, pipe, small bowls.

Following the search, Lytle was arrested for Possession of Paraphernalia. When officers were questioning him, he again reviewed the events of the night he reported the burglary at the Ore House. He told officers a number of contradictory statements. Officers felt both Moraga and Lytle were involved in the burglary.

Mr. Lytle eventually told officers that he had been at his home and heard the buzzer to the door ringing. When he opened it Mr. Moraga rushed past him and had several cartons of cigarettes in his arms. Mr. Lytle saw the door to the bar was open and when he went up stairs Mr. Moraga said, "I scored some smokes and some cash." Mr. Moraga reportedly stayed in Lytle's room for several minutes and then left taking everything he had stolen, with him. Mr. Lytle said he neither wanted nor accepted any of the stolen property. He told Mr. Moraga he would not call anybody about the burglary and he was more frightened of Mr. Moraga than the police and that, is why he didn't tell about this incident earlier.

Officers found so many discrepancies in Mr. Lytle's statements, he was subsequently arrested as a co-defendant in this burglary. He entered a plea of guilty to charges on April 4, 1988 and is pending a disposition for a burglary of the Ore House which occurred in August.

DEFENDANT'S VERSION:

Mr. Moraga gave the following statement on March 22, 1988.

Mr. Moraga states, "I entered into the Plea Bargain in order to get my R.O.R.. On the night this offense occurred, I had been drinking and started up to Lytle's and he didn't have anything to eat. He said, "Lets go down and so we went and he showed me how to stop the fan to get in to the restaurant. He stated he had gone in this way before. I smelled smoke and I could see smoke through the windows and I thought the fan was on fire and I broke the window and went in. I didn't intend to steal anything, I just wanted something to eat. He opened the door and he got the money and the cigarettes and everything. I only stopped the fan. We went up stairs and then he divided up the money and I left. All there was that I got, was two cartons of cigarettes, one bottle of whiskey, it was about a gallon, and a little money. I let him do it and we were dividing the money. I walked down the mountain and called my folks. I did it and it's done. I am not drinking now. Maybe next week. I can't say.

I am trying to make my life better and everybody is dropping dimes on me and I don't know who to trust. I want out of jail. I'll do what ever you want. I would do my five years day for day but do time and then pay restitution too. On the streets it is different, that goes with my freedom. To go to prison and to pay, no that's not right. I am not afraid to go to prison, I can go and do my time if that is what the judge wants. I'd much rather have probation, then I can go to prison if that's what he wants. I don't like the idea of Intensive Probation, that's worse than prison. I would rather do my time in prison than have to answer to that Intensive Program."

On April 5, 1987, the defendant came to the probation office and stated he had changed his mind. He would accept Intensive Probation in preference to prison.

VICTIM'S COMMENTS/RESTITUTION:

The police report lists the following items as a part of theft and criminal damage in this instant offense.

1.) Cash from the register:	
quarters	\$21.50
nickels	2.30
dimes	3.70
8 five dollar bills	40.00
27 one dollar bills	27.00
Sub total	<u>\$94.50</u>
2.) Cash closet:	
quarters	\$ 7.25

nickels	.35
dimes	3.30
2 ten dollar bills	20.00
7 five dollar bills	35.00
29 one dollar bills	29.00
Sub total	\$189.40
3.) 1 carton Marlboro	
red pack cigarettes	\$9.00
1 carton Camel Filter	9.00
Sub total	\$18.00
TOTAL THEFT	\$207.40
4.) Property Damage	
1 kitchen exhaust fan	\$540.00
1 front door 1/4 glass	400.00
1 cash box	20.00
1 cash register	1,000.00
TOTAL DAMAGE	\$1,960.00

COMPLETE TOTAL LOSS

\$2,167.40

Mr. Strauss, the victim, states figures in the police report are essentially correct. He would feel satisfied with \$800.00 restitution. He did not collect any insurance. At this time he has a pay check for the defendant in the amount of \$68.44. He gave the defendant \$20.00 while in custody so he could purchase cigarettes. He feels the defendant should receive the maximum prison sentence.

The defendant's restitution in the offense has been stipulated in the Plea Agreement as \$647.40.

STATEMENT OF INTERESTED PARTIES:Defense Attorney:

Mr. William Kiger, attorney for the defense, will submit a presentence memorandum to the court.

Prosecuting Attorney:

Mr. Marc Hammond, prosecutor for the State of Arizona, will submit his remarks directly to the court.

PRIOR RECORD:Juvenile:

This officer could not locate any formal juvenile record for

*Who's  
Total \$852.40  
Total Restitution 1265.40*



this individual. However, he told the officer that they could not always catch him because he was always on the run. He did time in Fort Grant for stealing cars and joy riding, at the Youth Center in Tucson for stealing cars and in Durango for stealing cars. Additionally, he was arrested in Placerville, California for theft and assault.

Adult:

<u>Date</u>	<u>Location/Offense</u>	<u>Disposition</u>
1976	Maricopa County Agg. Assault-Felony	2-5 years Az. Dept. of Corrections 1/23/77 served max time
1982	Maricopa County Agg. Assault	Az. Dept. of Corrections 6/20/83 Max. release left prison 1/22/86 on original sent. 2 years-5 months & 29 days

The defendant states he was also arrested for Sexual Assault as he refused to pay a prostitute but that case was dismissed.

SOCIAL HISTORY:

The defendant was born in the Mesa/Tempe area of Arizona in 1952 and is fourth from the oldest of nine children. The defendant has five brothers and three sisters. The defendant's brothers, Armondo, Pete and Rick, live in Phoenix, Arizona. His brother, Bob, lives in Mexico and his brother, David, lives in Cottonwood, Arizona. The defendant does not know the whereabouts of his sister, Lucy, but states his sister, Nelly Hernandez, lives in Phoenix, Arizona and his sister, Terry Cheveria, lives in Mesa, Arizona. Roy states he gets along well with all of his family with the exception of one brother.

When the defendant was growing up, his father was employed by the City of Tempe. The defendant stated his father was not a drinker but he did things that were wrong and that at that time his folks "beat the hell out of him". He adds that he did not stay around long enough to change his ways but ran with the street gangs. He was a "toughy" but always ended up going back home. At one time the defendant was ordered to leave the State of Arizona by the Court and then went to Tijuana for two years.

Roy adds that he dynamited "cop" cars and things like that so he did not have a very good reputation. He likes his tattoos, as he feels they are art, but people make him out to be a gangster because of them. Roy adds that he can get along well in the world if he knows what the rules are and people do not

make a game out of the situation. If he knows the rules ahead of time and no one is pushing him to upset him he can get along very well. He states, "I am honest with people unless they are playing a game with me."

The defendant attended grade school at Our Lady of Mount Carmel in Tempe, and at two public grade schools in Tempe, Arizona. He adds that "Those nuns beat me up all the time, but then I was a nasty little kid." He did not go to school while he was living in Mexico. The defendant completed the eighth grade while in Fort Grant.

The defendant graduated from mechanics training through the Phoenix Skill Center after he was in prison and also attended Mechanics Training through the O.J.T. Program while in prison. There he learned auto and diesel mechanics.

The defendant's first wife was Cindy Davis. They were married in Buckeye, Arizona in 1979 and divorced one year later. He states that he married for security and someone to go to, but it just didn't work. She had too many rules and she was accustomed to always having money and he was not. He states, "I had to work for it or steal it or whatever and it just didn't work." There were no children born to the union. The defendant states he still thinks about his first wife as she was a good person.

The defendant adds that he has had numerous girl friends with which he has lived with but had not established any permanent female relationships.

In his spare time the defendant loves to cook, likes to spend time with women, work on cars, do physical work-outs, run power equipment, play pool, swim, and be out of doors. He adds that when he is in prison he makes the most of his time and tries to get something out of it for himself. He adds that he does hate County Jail as there is nothing there for him to do.

When the defendant was employed he was a hard worker and even tried detailing cars on his own. He bought buffers and he walked the street and went from house to house. He generally earned from fifty to seventy dollars a car and was able to find work all the time. He adds he can build houses out of rock and do a lot of different kinds of things. When he is in prison he always does his own time, not someone else's and is a quick learner. He can do anything if someone will just take the time to show him.

#### MEDICAL HISTORY:

##### Physical:

The defendant has a work-out routine he keeps up with to

keep himself in good physical condition. At this time he does not have the proper teeth, as they were pulled in prison and they did not replace them. He also suffers from ulcers.

Mental:

The defendant states he went to counseling once but he doesn't think he needs any counseling at this time. We discussed his situation with continual involvement with the law and his mental status. The defendant stated he goes out by himself once in a while and tries to think. He adds, "I hope I can stay out but if worse comes to worse, I will go back. It matters, but then it doesn't. I want something I can't have yet. I want a job and freedom. It's hard to accept freedom when you have been locked up so long. Sometimes I look at birds and I wish I was a bird, they are really free."

SUBSTANCE ABUSE:

Alcohol:

When the defendant was a small child he stole his dad's liquor and drank occasionally but didn't like it. He has not drank since his release from jail. He would like to at times but figures that if he can stay off of the alcohol then he can go straight. He realizes that he only gets in trouble when he drinks.

Substances:

The defendant states he has done every kind of drug there is to do but has not done any drugs since his last release from prison. He adds he does not like drugs.

EMPLOYMENT:

From 1986 to 1988 the defendant was employed at the Arizona State University in Tempe. He began working in the Research Park at A.S.U. as a laborer, worked up through four different job descriptions and was an equipment operator when he was laid off. The defendant adds that he did a good job for A.S.U., that he was eligible for rehire there and that his job at A.S.U. meant a great deal to him. After he was laid off at A.S.U. he came to Jerome and obtained employment at Betty's Ore House as a dish washer and prep cook. He states he was laid off at Betty's Ore House, but the owners at Betty's Ore House state that he resigned from his job. The defendant had been working for Gene Groves as a mechanic at a Texaco station in Cottonwood at the time that he was arrested. Mr. Moraga states that Mr. Groves did not pay him as much as they had agreed upon and he did not go back to his employment there.

ASSETS/LIABILITIES:

Mr. Moraga states he has no assets and no liabilities.

PROBATION:

If this defendant is placed on probation, he has the earning capacity to pay a \$30.00 per month cost of supervision fee.

IMPRESSIONS/RECOMMENDATION:

Mr. Moraga is no stranger to the criminal justice system. He was prompt for his interview and prepared to give all the information necessary. He stated it was a new process for him as he had never gone through a Presentence Process that he was aware of. Mr. Moraga also states he has never been placed on probation as the community felt he was too dangerous with acts committed as a kid and he was always sent directly to State institutions. His priors were difficult to track as many of his records have been lost. The majority of his priors were those which were submitted by Mr. Moraga. If this officer is able to find additional information a supplement to this report will be filed.

During his interview, Mr. Moraga expressed a desire to try completing probation and paying his restitution. He felt he could stay sober, obey the rules, pay off his restitution and try to prove one time, that he could live by the rules. He states definitively that he is adverse to County Jail and feels he might try to complete the Intensive Probation Program.

The defendant is making a concerted effort to obtain a job and establish his ability to follow court directions.

He added that he had advised his attorney and the court that he was going to Phoenix to take care of personal business. He had done everything that he was ordered to do in an appropriate manner necessary for him to leave the area. Mr. Moraga has been in prison a great deal of his life and realizes that it is very difficult to have freedom. He states that in prison, you try to forget everything about your past and just do your time, one day at a time and follow the rules.

Mr. Moraga was defensive with officers and denied any complicity in the offense until after he entered his plea. During his Presentence Interview he admitted what he had done as a part of the burglary but couched it in terms that were cloaked in denial. At the time of this offense, Mr. Moraga was not on parole with the State Department of corrections.


The defendant seems determined to give probation a try. He needs explicit rules and instructions and by all his remarks he is highly socialized into prison society. He hasn't but the faintest hint of life - coping skills. As much as this officer would like to recommend probation, the protection of society must be the primary consideration.

Mr. Moraga is an extremely high risk for recidivism and violence. Therefore, it is respectfully recommended that the court impose the presumptive term of four (4) years in the Arizona Department of Corrections.

This defendant is not a candidate for the Intensive Probation Program.

Respectfully submitted to  
Judge James Sult  
this 6<sup>th</sup> day of April, 1988.

Chuck Sizemore  
Chief Adult Probation Officer

  
Nancy L. Spriggs  
Adult Probation Officer

/jpd

14  
REX BELL  
DISTRICT ATTORNEY  
Clark County, Courthouse  
Las Vegas, Nevada 89155

DISTRICT COURT  
CLARK COUNTY, NEVADA

—FILED IN OPEN COURT—

JUN 13 1990 19

LORETTA BOWMAN, CLERK

By *Auth Reese* Deputy

CASE NO. C92174

DEPT. NO. VII

AMENDED  
INFORMATION

THE STATE OF NEVADA,  
Plaintiff,

vs

ROY D. MORAGA,  
ID# 938554

Defendant.

BURGLARY (Felony - NRS  
205.060); SEXUAL ASSAULT  
(Felony - NRS 200.364,  
200.366)

STATE OF NEVADA )  
COUNTY OF CLARK ) ss

REX BELL, District Attorney within and for the County  
of Clark, State of Nevada, in the name and by the authority of  
the State of Nevada, informs the Court:

That ROY D. MORAGA the Defendant above named, on or  
between December 4, 1989 and December 5, 1989, at and within  
the County of Clark, State of Nevada, contrary to the form,  
force and effect of statutes in such cases made and provided,  
and against the peace and dignity of the State of Nevada,

COUNT I - BURGLARY

did then and there wilfully, unlawfully, and feloniously  
enter, with intent to commit larceny, that certain building

/ / / /



1 occupied by PENNIE HAWK, located at 1000 Dumont, #227, Las  
2 Vegas, Clark County, Nevada.

3 COUNT II - BURGLARY

4 did then and there wilfully, unlawfully, and feloniously  
5 enter, with intent to commit sexual assault, that certain  
6 building occupied by PENNIE HAWK, located at 1000 Dumont, #227,  
7 Las Vegas, Clark County, Nevada.

8 COUNT III - SEXUAL ASSAULT

9 did then and there wilfully, unlawfully and feloniously  
10 sexually assault and subject PENNIE HAWK, a female person, to  
11 sexual penetration, to-wit: Sexual Intercourse, by inserting  
12 his penis in the vagina of the said PENNIE HAWK, against her  
13 will.

14 COUNT IV - SEXUAL ASSAULT

15 did then and there wilfully, unlawfully and feloniously  
16 sexually assault and subject PENNIE HAWK, a female person, to  
17 sexual penetration, to-wit: Sexual Intercourse, by inserting  
18 his penis in the vagina of the said PENNIE HAWK, against her  
19 will.

20 DATED this 4th day of June, 1990.

21 REX BELL  
22 DISTRICT ATTORNEY  
23 NEVADA BAR#1799

24 By DEBORAH J. LIPPIS  
25 Deputy District Attorney

26 The names of witnesses known to the District Attorney's  
27 Office at the time of filing this Information, are as follows:

28 / / / /

1 DEVITTE, Dennis W.  
LVMPD  
2 Badge# 2256  
3 FOX, J.  
LVMPD  
4 Badge# 469  
5 GOMEZ, William  
3955 Swenson #116  
6 Las Vegas, NV 89121  
7 HARPER, Michael  
1000 Dumond #227  
8 Las Vegas, NV 89109  
9 HAWK, Pennie  
1000 Dumond #227  
10 Las Vegas, NV 89109  
11 HOWARD, Jodi  
1000 Dumont  
12 Las Vegas, NV 89109  
13 NOVACK, Robert E.  
LVMPD  
14 Badge# 2103  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26 89F07220X/gmr  
27 Burg, Sex Asslt - F  
LVMPD DR# 89-117709  
28 Tk2

3\*



1 UNDER NO CIRCUMSTANCES IS THE LANGUAGE CONTAINED  
2 HEREINAFTER TO BE READ TO A JURY HEARING THE PRIMARY OFFENSE  
3 FOR WHICH THE DEFENDANT IS PRESENTLY CHARGED.

4 Defendant ROY D. MORAGA, hereinbefore named, is placed on  
5 notice that, in accordance with the authorization of NRS  
6 207.010, punishment imposed pursuant to the above-stated  
7 habitual criminal statute will be urged upon the Court if said  
8 defendant is found guilty on the primary offense of Burglary  
9 and Sexual Assault, for which defendant is presently charged.

10 This page concerning the prior convictions hereinbelow  
11 set forth is to be considered by the Court in its discretion  
12 ONLY after the finding of guilt of defendant on the primary  
13 charge herein.


14 That said Defendant ROY D. MORAGA has been (3) times con-  
15 victed of crimes which, under the laws of the situs of the  
16 crime and/or the State of Nevada, amount to felonies, to-wit:

17 1. That on or about April 19, 1977, the defendant ROY D.  
18 MORAGA, was convicted of Aggravated Assault, Case No. 95949,  
19 Scottsdale, County of Maricopa, Arizona.

20 2. That on or about May 23, 1983, the defendant ROY D.  
21 MORAGA, was convicted of Attempt Aggravated Assault, Case No.  
22 131275 in Phoenix, Arizona.

23 3. That on or about June 6, 1988, the defendant ROY D.  
24 MORAGA, was convicted of Burglary, Case No. 12891 in Jerome,  
25 Arizona.

26 REX BELL  
27 DISTRICT ATTORNEY  
28 NEVADA BAR#001799  
000301

By   
DEBORAH J. LIPPIS  
Deputy District Attorney

DO NOT READ TO JURY

139

# District Court

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

—vs—

ROY D. MORAGA,  
ID# 938554

Defendant.

—FILED IN OPEN COURT—

JUN 13 1990

19

LORETTA BOYMAN, CLERK

By *Keith Reese* Deputy

CASE NO. C92174

DEPT. NO. VIII

## ORDER TO AMEND INFORMATION

Upon Motion of the STATE OF NEVADA, Plaintiff, by and through the Clark County District Attorney,  
and Notice to Defendant above named by and through Defendant's Counsel, Public Defender

and good cause appearing therefor,

IT IS HEREBY ORDERED that the Information heretofore filed in the within action be, and the same  
is hereby amended to include an additional count charging Defendant above named as an habitual criminal.

DATED this 13 day of June, 1990.

*Michael J. Wendell*  
DISTRICT JUDGE  
Michael J. Wendell

*Deborah J. Lippis*  
Deputy District Attorney  
Deborah J. Lippis

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs

ROY D. MORAGA,

Defendant.

ORIGINAL

CASE NO. C92174

DEPT. NO. VIII

DOCKET #

REPORTER'S TRANSCRIPT

OF

SENTENCING

BEFORE THE HONORABLE:

MICHAEL J. WENDELL DISTRICT JUDGE

WEDNESDAY, JUNE 13, 1990, 9:00 A.M.

APPEARANCES:

FOR THE STATE:

DEBORAH J. LIPPEIS, ESQ.  
Deputy District Attorney

FOR THE DEFENDANT:

R. ROGER HILLMAN, ESQ.  
Deputy Public Defender

FOR THE DEPT. OF

PAROLE & PROBATION: JOY L. MUNDY-NEAL

REPORTED BY:

PATSY K. SMITH, C.S.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER

1 WEDNESDAY, JUNE 13, 1990, 9:00 A.M.

2 THE COURT: State of Nevada against Roy  
3 Moraga.

4 The defendant is present with counsel,  
5 Mr. Hillman. Representing the Department of Parole  
6 & Probation?

7 MS. NEAL: Officer Joy Mundy-Neal.

8 THE COURT: And Ms. Lippis representing  
9 the District Attorney's office.

10 Are you prepared to go forward with  
11 sentencing this morning?

12 MR. HILLMAN: Yes, sir.

13 MS. LIPPIS: Your Honor, the State has  
14 previously filed a notice of motion and motion to  
15 amend the Information to allege a habitual criminal.

16 THE COURT: Let's hear that. Any  
17 objections to that motion, Mr. Hillman?

18 MR. HILLMAN: I know that I have it. I  
19 don't seem to have it with me. Do you have an extra  
20 copy?

21 MS. LIPPIS: Yes.

22 MR. HILLMAN: No, I have seen this  
23 before, Judge.

24 THE COURT: At this time, then the Court  
25 is granting the State's motion to amend the

1 Information.

2 MS. LIPPIS: May I file the Information,  
3 your Honor?

4 THE COURT: You may and serve counsel.

5 MS. LIPPIS: I have one more set of  
6 papers to be filed in support of the motion.

7 THE COURT: It's what?

8 MS. LIPPIS: Prior felony convictions of  
9 the defendant.

10 THE COURT: Have you seen those, Mr.  
11 Hillman?

12 MR. HILLMAN: I have seen them, yes, your  
13 Honor.

14 THE COURT: Are they authenticated?

15 MS. LIPPIS: Yes, sir, they are.

16 THE COURT: They will be filed at this  
17 time and made a part of the record.

18 THE COURT: The authenticated copies of  
19 the prior felony convictions will be Exhibits 1, 2,  
20 and 3.

21 MS. LIPPIS: Your Honor, for the record,  
22 I should advise the Court one of the exhibits, while  
23 it is certified as being true and correct, was faxed  
24 to us from the Arizona Department of Corrections. I  
25 have their letter to us attached to all the exhibits.

1 as well for authenticity.

2 THE COURT: Any objections to that?

3 MR. HILLMAN: No.

4 MS. LIPPIS: For the record, your Honor,  
5 that faxed copy is State's Exhibit No. 2.

6 The State is ready to proceed, your  
7 Honor.

8 THE COURT: Does the Department of Parole  
9 & Probation have any additions, deletions, or  
10 corrections to the presentence report?

11 MS. NEAL: No, your Honor, we do not.

12 THE COURT: You may be seated, Mr. Moraga  
13 and Mr. Hillman.

14 Do you wish to be heard, Ms. Lippis?

15 MS. LIPPIS: Thank you, your Honor.

16 Judge, as the Court is now aware, the  
17 State is seeking that this defendant be sentenced as  
18 a habitual criminal under N.R.S. 207.010, Subsection  
19 2. Subsection 2 indicates that, "If any person  
20 convicted in this state of any crime of which fraud  
21 or intent to defraud is an element, or petit  
22 larceny, or of any felony, who has previously been  
23 three times convicted, whether in this state or  
24 elsewhere, of any crime which under the laws of this  
25 state of the crime or of this state would amount to,

PATSY K. SMITH, OFFICIAL COURT REPORTER

1 a felony, or who has previously been five times  
2 convicted, whether in this state or elsewhere, of  
3 petit larceny, of any misdemeanor or gross  
4 misdemeanor of which fraud or intent to defraud is  
5 an element, should be punished by imprisonment in  
6 the state prison for life with or without  
7 possibility of parole. If the penalty fixed by the  
8 court is life imprisonment with the possibility of  
9 parole, eligibility for parole begins when a minimum  
10 of ten years has been served."

11 It is the State's position that this  
12 defendant should be sentenced on all counts for  
13 which he was convicted at jury trial as a habitual  
14 criminal. As to Count I, he was convicted of  
15 burglary, Count II of burglary, Count III and IV of  
16 sexual assault.

17 The Department of Parole & Probation in  
18 its report, if the Court were not to sentence him as  
19 a habitual criminal, have recommended that all of  
20 those counts that the defendant is to be sentenced  
21 to run consecutive.

22 If the Court is not inclined to sentence  
23 this defendant as a habitual defendant, certainly we  
24 would agree with that.

25 However, this defendant's record

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1 indicates that he should be and must be incarcerated  
2 for the longest period of time to protect the  
3 citizens of our community and the citizens of other  
4 communities.

5 In support of that, the State has filed  
6 Exhibit 1, 2, and 3. Exhibit 1 is several documents  
7 supporting that the defendant has been previously  
8 convicted in the Superior Court of Maricopa County,  
9 State of Arizona, 95949 for aggravated assault.

10 That aggravated assault was committed against Carol  
11 J. Binsler (phonetic), a woman. As the Court is  
12 well aware, the defendant not only testified at  
13 trial, but told the probation officer who authored  
14 the report that he sees nothing wrong with having  
15 sex with a woman against their will. He has done it  
16 and he will continue to do it.

17 THE DEFENDANT: Liar.

18 MS. LIPPIS: State's Exhibit No. 2 is  
19 also a certified copy of several documents informing  
20 the Court that the defendant is convicted in the  
21 Superior Court in and for the County of Maricopa,  
22 C.R. 131275. The defendant was originally charged  
23 with aggravated assault, class three felony, and  
24 sexual abuse, a class five felony. The victim in  
25 that case was Pamela K. Morrison (phonetic),

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1 another woman. The defendant pled guilty with his  
2 attorney present to attempted aggravated assault.  
3 That offense occurred in January 1963. The document  
4 indicates to the Court the date upon which judgment  
5 was entered.

6 State's Exhibit No. 3 is also from the  
7 Superior Court of Arizona -- the Superior Court of  
8 Yapi (phonetic) County. The defendant was convicted  
9 in case number 12691 of burglary in the third  
10 degree. That offense occurred in January of 1968.

11 The defendant's name on all of the  
12 judgments of conviction and supporting documents  
13 read Roy Daniels Moraga in State's Exhibit 1, Roy  
14 Moraga in State's Exhibit 2, Roy Daniels Moraga in  
15 State's Exhibit 3.

16 Also within those exhibits, you will find  
17 verification of the numerous tattoos on the  
18 defendant's body of women and other things which  
19 have been verified by our own Department.  
20 Identification of this defendant is not at issue at  
21 this point.

22 I would refer the Court to the  
23 presentence report prepared by our own Department of  
24 Parole & Probation. The defendant has 23 prior  
25 adult arrests, three prior felony convictions, two

1 of which involve violence and three misdemeanor  
2 convictions. The defendant entered the criminal  
3 justice system in 1968. It is now 1990 and he is  
4 still in the criminal justice system.

5 His offenses are escalating in the  
6 severity of their violence. We had a woman testify  
7 as to the nature of the acts that he committed upon  
8 her and according to our Department and the Arizona  
9 Department of Parole & Probation revealed the  
10 defendant was granted a four year period of  
11 community supervision on April 11th, 1988. That  
12 would have been before his last burglary  
13 conviction.

14 During that period of time, the defendant  
15 failed to comply with all of the rules governing his  
16 supervision, failed to seek employment, failed to  
17 attend substance counseling, abuse counseling and  
18 absconded from supervision. While he had absconded  
19 from supervision, he rapes a woman in our  
20 community. It is due to the defendant's refusal to  
21 cooperate with further grounds of probation and  
22 community supervision are not warranted.

23 The defendant, your Honor, is 37 years  
24 old. The presentence report indicates that in 1989,  
25 he had received disability benefits. October '89 to

1 11/69, it appeared he worked as a laborer. What's  
2 interesting to know is that when he was not  
3 incarcerated, which was apparently quite a bit of  
4 the time, he lived with his parents. He is still  
5 not emancipated from his parents at this age and he  
6 advised us that he needs to get back to his mother.  
7 In fact, the mother wrote a very heart-rending  
8 letter. She has several children incarcerated in  
9 penal institutions and this defendant is certainly  
10 one of them.

11 Victim information that's supplied, as  
12 could even be seen from the stand when she  
13 testified, that as a result of this man's actions,  
14 the victim is afraid to be alone, is fearful of all  
15 men, has lost ability to trust those that she does  
16 not know. She has suffered an excessive number of  
17 sleeplessness nights which resulted in substantial  
18 number of lost working days.

19 Significantly, however, this woman is now  
20 contemplating on buying a gun to attempt to protect  
21 herself. That is something she shouldn't have to do  
22 as a result of this man's action. Heaven only knows  
23 what could happen if someone approached her even  
24 innocently and she's afraid because of the fear he  
25 has instilled in her.

1           The defendant told this probation officer  
2   during her interview that he denies all culpability  
3   in the instant offense and stated, "I didn't do  
4   anything. They lied."

5           Additionally, the defendant acknowledged  
6   that he sees nothing wrong with forcing women to  
7   have sexual relations with him.

8           Finally, the Department of Parole &  
9   Probation in our jurisdiction states the  
10   circumstance of the instant offense and defendant's  
11   own acknowledgment that he does not believe forcing  
12   women to have sex with him characterizes the  
13   defendant as a direct threat to society.

14           That is a statement within which the  
15   State of Nevada wholeheartedly agrees and based upon  
16   the defendant's three prior felony convictions, his  
17   continuous contact with law enforcement, his  
18   absconding from a privilege of a probationary grant  
19   where he comes to this jurisdiction and brutalizes  
20   our citizens, the State felt compelled and asks the  
21   Court to sentence this defendant as a habitual  
22   criminal.

23           Additionally, we would ask the Court to  
24   sentence him as a habitual criminal to life without  
25   the possibility of parole. We believe that is

1 warranted. The defendant has accepted no  
2 responsibility for his actions. He continues to  
3 accept no responsibility. In fact, he blatantly  
4 tells the Court and other officers of the Court that  
5 there is nothing wrong with raping women.

6 Based upon that, your Honor, we would  
7 hope the Court would have no other alternative than  
8 to do that.

9 As an aside, however, as an alternative,  
10 if the Court is concerned with life without the  
11 possibility of parole, we still request he be  
12 sentenced, as a habitual criminal as on all four  
13 counts. The alternative life with the possibility  
14 of parole, as to Counts I and II burglary,  
15 increasing those two life sentences and also for the  
16 sexual assaults because even while sexual assault  
17 carries and can carry a life sentence, eligibility  
18 for parole doesn't begin until five years has been  
19 served under the habitual enhancement. At least it  
20 will be increased to ten before he is eligible for  
21 parole.

22 In conclusion, we ask he be sentenced to  
23 life in prison on all counts without the possibility  
24 of parole. Alternatively, he be sentenced as a  
25 habitual criminal to life with the possibility of

1 parole consecutive on all counts so at least the  
2 minimum time he has to spend in prison mandatorily  
3 will be increased.

4 Thank you.

5 THE COURT: Mr. Lippie, you take the  
6 provision under Chapter 207 of the Nevada Revised  
7 Statutes that the Court has jurisdiction to sentence  
8 the defendant as a habitual on each of those four  
9 counts that he has been found guilty by a jury and I  
10 don't think that that's the law of the State of  
11 Nevada. I think if the Court sentences a person  
12 under the habitual criminal statute, the Court is  
13 limited to one sentence as an enhanced penalty.

14 MS. LIPPIS: That was not my  
15 understanding. If that's the Court's understanding  
16 that we only have one sentence, then I have no  
17 objection if that's what the Court feels.

18 I would request, however, under those  
19 conditions, that the defendant be sentenced to life  
20 without the possibility of parole.

21 THE COURT: The defendant will stand.

22 Mr. Moraga, have you read the presentence  
23 investigation report?

24 THE DEFENDANT: Which one is that?

25 MR. HILMAN: That's the one from the

1 Department --

2 THE DEFENDANT: Oh, yeah.

3 THE COURT: Is there anything you would  
4 like to say about that report or anything you would  
5 like to say in your own behalf?

6 THE DEFENDANT: Well, those years there  
7 are wrong. I was in prison in '76, not '77. I was  
8 in prison in '82, not '83. So they are all wrong.

9 THE COURT: Was that in Arizona?

10 THE DEFENDANT: Yeah, but they told me  
11 that they couldn't find the records under the '76  
12 one and said there was no records of it. So how can  
13 you sentence me on something that they say they  
14 can't find?

15 THE COURT: Is there anything else you  
16 would like to say, Mr. Moraga?

17 THE DEFENDANT: No.

18 Well, it doesn't matter. You can give me  
19 the death penalty. I don't care. I don't care  
20 about nothing because I know I didn't do it. I will  
21 bear it.

22 THE COURT: Mr. Hillman, is there  
23 anything you would like to say?

24 MR. HILLMAN: Your Honor, you heard all  
25 the facts contained in this case, the testimony of

1 the witnesses, so I don't think I need to go into  
2 that too much.

3           Ms. Dippin has stood up and talked about  
4 the victim and the affect this has had on her.  
5 There is some information about the victim that  
6 didn't come out in trial that is in the possession  
7 of both of us that would show that she is, and in  
8 saying this, I don't want to say that she deserves  
9 anything that ever happened to her, but it's  
10 interesting to note that since the trial, the victim  
11 and her daughter no longer live together. The  
12 victim has battered her daughter again. As a matter  
13 of fact, she was in justice court yesterday in front  
14 of Judge Ahlstrom.

15           Apparently, the victim has quite a severe  
16 alcohol problem and has had it for quite a period of  
17 time. The only reason I bring that up this time,  
18 the prosecution will try to portray a real, real  
19 picture of the victim and their dilemma and that the  
20 dilemma may also result from other causes beside  
21 what the jury decided what the defendant is  
22 responsible for.

23           The Court heard the testimony of Mrs.  
24 Hawk. Court has heard many cases. It's my  
25 impression that although this is an act of violence,



1 it was very mild compared to many that I have seen  
2 and I'm sure that it's very mild that the Court has  
3 seen. Mr. Hawk did testify that there was some  
4 physical action by Mr. Moraga upon her with respect  
5 to pushing her down the stairs and throwing her  
6 around. She never really got specific as to what  
7 throwing her around meant. The medical reports show  
8 that there were really no injuries to her and I  
9 bring this up simply to say that there are many  
10 cases that are much worse than the one that the  
11 Court heard.

12 It is also my reading of the habitual  
13 criminal allegations that if that is in fact the  
14 judgment the Court makes, then that is the Court is  
15 free to substitute that penalty for any other  
16 penalties that the defendant might receive and I  
17 don't believe that the Court could sentence him and  
18 give him a separate sentence on each count under the  
19 habitual criminal allegation.

20 Finally, I would state that Mr. Moraga  
21 was willing to negotiate this case at the beginning  
22 of the trial. Of course, under the circumstances,  
23 and I don't fault the State for this, it's certainly  
24 their case and they are free to do what they want,  
25 the State was not willing to meet those negotiations

1 where Mr. Moraga wanted to plead guilty to all  
2 counts if the State would agree to recommend  
3 concurrent time on them.

4 I think that's the appropriate sentence  
5 here. Whatever the Court decides to do, number one,  
6 if you decide to sentence him on each of the counts  
7 and deny the habitual criminal allegation, that  
8 those counts should run concurrent.

9 Secondly, if you decide to adjudge him  
10 under the habitual criminal allegation, I would urge  
11 the Court to give Mr. Moraga life with the  
12 possibility of parole. Although this crime is  
13 irreprehensible and there is no excuse for it, I  
14 don't think it arises to the severity of those  
15 people who have been adjudged guilty under the  
16 habitual criminal allegation that received life  
17 without the possibility parole.

18 Those would be my recommendations, your  
19 Honor.

20 THE COURT: Mr. Moraga, remain standing.

21 A jury having found the defendant guilty  
22 of Count I burglary, Count II burglary, Count III  
23 sexual assault, and Count IV sexual assault, the  
24 Court at this time adjudges the defendant guilty of  
25 each of those offenses.

1                   Mr. Moraga, I think it's an  
2 understatement to say that any man who takes a  
3 position that having sex with a woman against her  
4 will that there is nothing wrong with that, you  
5 indicated that a number of times I believe. Even  
6 from the stand under oath you indicated that. No  
7 question you are a threat to every woman in the  
8 community.

9                   The Court having adjudged the defendant  
10 guilty of Count I, Count II, Count III, and Count  
11 IV, it's the judgment of the Court that the  
12 defendant be sentenced by imprisonment in the Nevada  
13 State Prison for a term of life without the  
14 possibility of parole as provided in N.R.S. 207.101,  
15 Subparagraph 2, based upon a felony conviction  
16 followed by proof beyond a reasonable doubt of three  
17 prior felony convictions.

18                   The defendant is remanded to the custody  
19 of the sheriff.

20                   \* \* \* \* \*  
21                   ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF  
22                   PROCEEDINGS.

23                   *Patsy K. Smith*

24                   PATSY K. SMITH, C.S.R. #100  
25

140  
DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED

JUN 21 1 52 PM '90

*Theresa Bowman*  
CLERK

THE STATE OF NEVADA,  
Plaintiff,  
-vs-  
ROY D. MORAGA,  
Defendant.

Case No. C92174

Dept. No. VIII

**DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL**

TO: LORETTA BOWMAN, Clerk, Eighth Judicial District Court  
of the State of Nevada, in and for the County of Clark.

Please prepare three certified copies of the original  
record in the above entitled matter to include the following:

1. The Information.
2. Amended Information.
3. Transcript of trial commencing March 12, 1990.
4. Judgment of Conviction.
5. Notice of Appeal.
6. Designation of Contents of Record on Appeal.
7. Court Minutes.

DATED this 27th day of June, 1990.

MORGAN D. HARRIS  
CLARK COUNTY PUBLIC DEFENDER

By *R. Roger Hillman*  
R. ROGER HILLMAN  
NEVADA BAR #3076  
DEPUTY PUBLIC DEFENDER

CE44



1                    RECEIPT OF A COPY of the foregoing Designation of  
2 Contents of Record on Appeal is hereby acknowledged this 27<sup>TH</sup> day  
3 of June, 1990.

4                    REX A. BELL  
5                    CLARK COUNTY DISTRICT ATTORNEY

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7 By  \_\_\_\_\_  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

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*Paula L. Freeman*  
CLERK

THE STATE OF NEVADA,  
Plaintiff,  
-vs-  
ROY D. MORAGA,  
Defendant.

Case No. C92174

Dept. No. VIII

**NOTICE OF APPEAL**

TO: THE STATE OF NEVADA

REX BELL, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and  
DEPARTMENT VIII OF THE EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that ROY D. MORAGA, presently  
incarcerated in the Nevada State Prison, appeals to the Supreme  
Court of the State of Nevada from the judgment entered against  
said defendant on the 13th day of June, 1990, whereby he was  
convicted of Counts I and II, Burglary; Counts III and IV, Sexual  
Assault; found to be an habitual criminal; and sentenced to serve  
a term of life imprisonment without the possibility of parole.

DATED this 27th day of June, 1990.

MORGAN D. HARRIS  
CLARK COUNTY PUBLIC DEFENDER

By *R. Roger Hillman*  
R. ROGER HILLMAN  
NEVADA BAR #3076  
DEPUTY PUBLIC DEFENDER

CE44

7

1 RECEIPT OF A COPY of the foregoing Notice of Appeal is  
2 hereby acknowledged this 22<sup>nd</sup> day of June, 1990.

3 REX A. BELL  
4 CLARK COUNTY DISTRICT ATTORNEY

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DISTRICT COURT **FILED**  
CLARK COUNTY, NEVADA  
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*Loretta E. Roman*  
CLERK

THE STATE OF NEVADA,	)	Case No. C92174
	)	
Plaintiff,	)	Dept. No. VIII
	)	
-vs-	)	<u><b>O R D E R</b></u>
	)	
ROY D. MORAGA,	)	
	)	
Defendant.	)	

TO: COURT REPORTER - DEPARTMENT NO. VIII

Upon the ex parte application of R. ROGER HILLMAN, Deputy Public Defender, attorney for defendant in the above entitled matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that an original and two (2) copies of the transcript of the trial heard in Department VIII, commencing March 12, 1990, EXCLUDING voir dire examination and reading of instructions, but INCLUDING opening statements and closing arguments, be prepared at State expense in order that an appeal may be effected.

DATED this 28 day of June, 1990.

*[Signature]*  
DISTRICT JUDGE

MORGAN D. HARRIS  
CLARK COUNTY PUBLIC DEFENDER

By *R. Roger Hillman*  
R. ROGER HILLMAN  
NEVADA BAR #3076  
DEPUTY PUBLIC DEFENDER

**CE44**





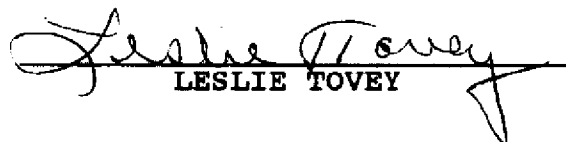
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**AFFIDAVIT OF MAILING**

STATE OF NEVADA    )  
                          )    ss:  
COUNTY OF CLARK    )

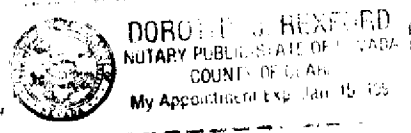
LESLIE TOVEY, being first duly sworn, deposes and says:

That affiant is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 29th day of June, 1990, affiant deposited in the United States mail at Las Vegas, Nevada, a copy of the Order for transcripts in the case of State of Nevada vs. Roy D. Moraga, Case No. C92174, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to Patsy Smith, Court Reporter, Department VIII, Clark County Courthouse, 200 South Third Street, Las Vegas, Nevada 89155; that there is a regular communication by mail between the place of mailing and the place so addressed.

  
LESLIE TOVEY

Subscribed and sworn to before me  
this 29th day of June, 1990.

  
Notary Public



FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

JUL 7 3 23 PM '90

*Loretta L. Loomis*  
CLERK

THE STATE OF NEVADA,

Plaintiff,

vs

ROY D. MORAGA,  
ID# 938554

Defendant.

CASE NO. C92174

DEPT NO. VIII

JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 11th day of January,  
1990, the Defendant, ROY D. MORAGA,  
entered a plea of not guilty to the crimes of COUNT I and II -  
BURGLARY, COUNTS III and IV - SEXUAL ASSAULT

committed between December 4, 1989 and December 5, 1989,  
19, in violation of NRS 205.060, 200.364, 200.366;  
and

WHEREAS, thereafter, on the 13th day of June,  
1990, the defendant being present in  
Court with his counsel ROGER HILLMAN, Deputy Public Defender,  
and DEBORAH J. LIPPIS, Deputy District Attorney, also being  
present, the above-entitled Court did adjudge defendant guilty  
thereof by reason of said trial and verdict and sentenced

///

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1 the defendant to a \$20.00 administrative assessment fee and  
2 Life without the possibility of parole.

3 THEREFORE, the Clerk of the above-entitled Court is  
4 hereby directed to enter this Judgment of Conviction as part of  
5 the record in the above-entitled matter.

6 DATED this 26 day of June,  
7 1990, in the City of Las Vegas, County of Clark, State of  
8 Nevada.

9   
10 District Judge

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Burg, Sex Asslt - F  
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FILED

DISTRICT COURT  
CLARK COUNTY, NEVADA

*Pat L...*  
CLERK

THE STATE OF NEVADA,  
  
Plaintiff,  
  
-vs-  
  
ROY D. MORAGA,  
  
Defendant.

Case No. C92174  
Dept. No. VIII  
O R D E R

Upon the ex parte application of the Clark County Public Defender, by and through R. ROGER HILLMAN, Deputy Public Defender, attorney for the defendant, ROY D. MORAGA, it appearing that the Court Reporter has not yet finished the trial transcript, and good cause appearing therefor,

IT IS HEREBY ORDERED BY THE COURT that defendant may have to and including September 25, 1990, within which to file the Record on Appeal in said cause.

DATED this 31 day of July, 1990.

*[Signature]*  
DISTRICT JUDGE

CLARK COUNTY PUBLIC DEFENDER

By *R. Roger Hillman*  
R. ROGER HILLMAN  
NEVADA BAR #3076  
DEPUTY PUBLIC DEFENDER

CE44



1                    RECEIPT OF A COPY of the foregoing Order is hereby  
2 acknowledged this 2nd day of August, 1990.

3                    REX A. BELL  
4                    CLARK COUNTY DISTRICT ATTORNEY

5                    By James T. Telford  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

FILED  
Oct 11 12 33 PM '90  
*Loretta Johnson*  
CLERK

THE STATE OF NEVADA,

Plaintiff,

vs

ROY D. MORAGA,

Defendant.

ORIGINAL

CASE NO. C092174

DEPT. NO. VIII

BEFORE THE HONORABLE:

MICHAEL J. WENDELL, DISTRICT JUDGE

MONDAY, MARCH 12, 1990, 1:30 P.M.

VOLUME I

APPEARANCES:

FOR THE STATE: DEBORAH J. LIPPIS, ESQ.

FOR THE DEFENDANT: R. ROGER HILLMAN, ESQ.

REPORTED BY: PATSY K. SMITH, C.S.R. #190

1	<u>INDEX</u>	
2		<u>PAGE</u>
3		
4	<u>WITNESSES</u>	
5	<u>JODI HOWARD</u>	
6	Direct Examination by Ms. Lippis	18
6	Cross-Examination by Mr. Hillman	28
7	<u>PENNY HAWK</u>	
8	Direct Examination by Ms. Lippis	29
8	Cross-Examination by Mr. Hillman	48
9	<u>WILLIAM GOMEZ</u>	
10	Direct Examination by Mr. Lippis	51
10	Cross-Examination by Mr. Hillman	53
11	<u>HELEN V. PRESCOTT</u>	
12	Direct Examination by Ms. Lippis	54
13	<u>MICHAEL HARPER</u>	
13	Direct Examination by Ms. Lippis	58
14	Cross-Examination by Mr. Harper	63
15	<u>ROBERT NOVACK</u>	
15	Direct Examination by Ms. Lippis	65
16	Direct Examination Cont'd by Mr. Lippis	81
16	Cross-Examination by Mr. Hillman	98
17	<u>OFFICER RONALD SWIFT</u>	
18	Direct Examination by Ms. Lippis	100
19	<u>OFFICER MICHAEL GILLINS</u>	
19	Direct Examination by Ms. Lippis	104
20	Cross-Examination by Mr. Hillman	109
21	<u>DENISE RUDOLPH</u>	
21	Direct Examination by Ms. Lippis	111
22		
23		
24		
25		

1 MONDAY, MARCH 12, 1990, 1:30 P.M.

2 (At this time, a jury was duly  
3 empaneled.)

4 THE COURT: Ladies and gentlemen, this  
5 case will proceed in the following order, first the  
6 State, through Ms. Lippis, may make an opening  
7 statement outlining its case, then the defense may  
8 make an opening statement outlining their case  
9 unless the defense reserve an opening statement  
10 until the conclusion of the State's case. Neither  
11 side is required to make an opening statement.

12 The State will first introduce evidence.  
13 At the conclusion of the State's evidence, the  
14 defense will have an opportunity to introduce  
15 evidence. Rebuttal evidence may be introduced by  
16 the State. At the conclusion of all the evidence,  
17 further instructions will be given you after which  
18 the attorneys may make their closing arguments, then  
19 you will select a foreman, deliberate, and arrive at  
20 your verdict.

21 Faithful performance by you of your  
22 duties is vital to the administration of justice.  
23 The law applicable to this action is given to you in  
24 these Instructions and in other Instructions you  
25 receive at the close of all the evidence in the case



1 and it is your duty to follow all such  
2 Instructions.

3 It is your duty to determine the facts  
4 and to determine them from the evidence and the  
5 reasonable inferences arising from such evidence.  
6 In so doing, you must not indulge in guesswork or  
7 speculation.

8 The evidence which you are to consider,  
9 consist of the testimony of witnesses and exhibits  
10 admitted into evidence. The term witness means  
11 anyone who testifies in person or by deposition.  
12 The admission of evidence in court is governed by  
13 certain rules.

14 From time to time, it may be the duty of  
15 the attorneys to make objections and my duty, as  
16 Judge, to rule on those objections and whether you  
17 can consider certain evidence. You must not concern  
18 yourself with the objections or the Court's reasons  
19 for its rulings. You must not consider testimony or  
20 exhibits to which an objection was sustained or  
21 which has been ordered stricken by the Court.

22 Opening statements and closing arguments  
23 of the attorneys are intended to help you in  
24 understanding the evidence and applying the law, but  
25 they are not evidence. You must not be influenced

1 in any degree by any personal feelings or sympathy  
2 for or prejudice against either side. Each side is  
3 entitled to the same fair and impartial  
4 consideration.

5 No statement or ruling or remark which I  
6 make make during the course of the trial is intended  
7 to indicate my opinion as to what the facts are.  
8 You are to determine the facts. In that  
9 determination, you alone must decide upon the  
10 believability of the evidence and its weight in  
11 value.

12 In considering the weight and the value  
13 of the testimony of any witness, you may take into  
14 consideration the appearance, attitude and behavior  
15 of the witness, the interest of the witness in the  
16 outcome of the action, the inclination of the  
17 witness to speak truthfully or not, the probability  
18 or improbability of a witness's statements and all  
19 other facts and circumstances in evidence. Thus you  
20 may give the testimony of any witness just such  
21 weight in value as you may believe the testimony of  
22 that witness is entitled to receive.

23 Until this case is submitted to you for  
24 your deliberation, you must not discuss the case  
25 with anyone or remain within hearing of anyone

1 discussing it. After the case has been submitted to  
2 you for your deliberation, you may discuss the case  
3 only in the jury room when all the members of the  
4 jury are present. You are to keep an open mind and  
5 shall not decide any issue in the case until the  
6 case is submitted to you for your deliberation under  
7 the Instructions of the Court.

8 If you cannot hear a witness, please  
9 raise your hand as an indication.

10 The Court may, during the trial, take  
11 notes. You are not to draw any inference from  
12 that. The Court is required to prepare for  
13 arguments of counsel and the Court may take  
14 extensive notes.

15 Now, ladies and gentlemen, my bailiff is  
16 going to distribute pads and pencils and during the  
17 course of the trial, you may take notes and when you  
18 go out to the jury room, you may take your own notes  
19 with you, but if you have got any conflict among  
20 your notes, the only official record is the record  
21 that is being kept by my court reporter.

22 It is now my duty also to admonish the  
23 jury that no juror may declare to his fellow jurors  
24 any fact relating to the case as of his own  
25 knowledge. If any juror discovers during the trial

1 or after the jury has retired that he or she or any  
2 other juror has personal knowledge of any fact in  
3 controversy, the juror will report that to the Judge  
4 out of the presence of the other jurors.

5 At this time, the clerk will read aloud  
6 the Information and state the plea entered by the  
7 defendant.

8 At this time, the Information was read to  
9 the jury.

10 THE COURT: Counsel, will you waive the  
11 reading of the names of the witnesses on the  
12 Information? I think they have already been stated,  
13 haven't they, by counsel?

14 MS. LIPPIS: Yes, sir.

15 MR. HILLMAN: Yes, sir.

16 THE COURT: At this time, Ms. Lippis, you  
17 may make an opening statement.

18 MS. LIPPIS: Thank you. Your Honor, may  
19 we stand at ease for just a moment while I check to  
20 see who is available outside.

21 THE COURT: Well, let's take ten  
22 minutes. We will take a ten minute break and then  
23 we will get underway.

24 Once more, please heed my admonition. Do  
25 not discuss the case with anyone else or

1 yourselves.

2 (Off the record at 2:26 p.m. and back on  
3 the record at 2:37 p.m.)

4 THE COURT: With the jury present, you  
5 may make an opening statement at this time,  
6 Ms. Lippis.

7 MS. LIPPIS: Thank you, your Honor.

8 Good afternoon, ladies and gentlemen.

9 As the Judge indicated to you, the  
10 purpose of an opening statement and before I even  
11 start, it appears I'm starting to get a cold. I'm  
12 going to stay back away from you a little bit. If I  
13 cough, excuse me, and if I don't talk loud enough,  
14 please let me know.

15 As the Court indicated to you, the  
16 purpose of an opening statement is kind of to give  
17 you a road map of what to expect what the case is  
18 all about, why we are here, and what kind of factual  
19 determinations you need to make in order to return a  
20 verdict of guilty on all counts, which the State  
21 will be asking for at the conclusion of the case.

22 When the clerk read the information to  
23 you, I will first of all advise you that it's a  
24 piece of paper. It's a charging document to let you  
25 know what charges the State will be seeking to

1 convict the defendant of, it is not evidence of  
2 guilt. The defendant is convicted of two counts of  
3 burglary and two counts of sexual assault.

4 MR. HILLMAN: Excuse me, charge.

5 MS. LIPPIS: Thank you. Judge, I'm sorry  
6 it's the cold.

7 The defendant is charged with two counts  
8 of burglary, two counts of sexual assault. When the  
9 information was read to you, it indicated to you  
10 between on or about December 4, 1989, and December  
11 5, 1989. They are all at the same occurrence and we  
12 will explain to you why we have two counts of each.  
13 The evidence and the facts of the case start out  
14 this way.

15 Penny Hawk and Jodi Howard, mother and  
16 daughter. Penny Hawk, mother, and Jodi, daughter.  
17 Penny, I believe, is in here mid to late 40s, she  
18 will let you know her exact age when she testifies.  
19 Jodi is in her 20s. They share the same apartment.

20 Penny Hawk was by profession, at the time  
21 of this incident a cab driver. I believe that she  
22 worked the graveyard shift. In the area where they  
23 lived was a local bar called Players Bar, and that's  
24 where Penny Hawk first met the defendant Roy  
25 Moraga. It was approximately two weeks before this

1 incident. They had, I believe, a couple drinks  
2 together in that area of the Players Bar. They even  
3 went to another bar called Rascals and had a few  
4 more drinks. That was the last time as Penny Hawk  
5 will testify that she cared to see Roy Moraga.  
6 However, she did see him in the area where she  
7 lived. He was never invited to her house. I  
8 believe she'll testify that she had no indication  
9 that he even knew where she lived.

10 In the late hours of December 4th, 1989  
11 or the early morning hours of December 5th, Jodi was  
12 alone in the apartment. She indicated at one point  
13 she believed she thought her mother may be home. As  
14 it turned out, I think the evidence will show her  
15 mother was not at home. Jodi will testify that she  
16 heard something in the apartment. She didn't get up  
17 to check; she didn't really think it was anything  
18 real important.

19 Her mother arrived at home at about 7:30  
20 in the morning on the morning of December 5th to  
21 give Jodi a ride to work. There is some confusion  
22 when the two left to take Jodi to work because there  
23 were some item Jodi couldn't find. In any event,  
24 mom takes daughter to work, comes home, goes to bed,  
25 because she's got to go to work the next day when

1 she is working graveyard.

2 At approximately noon on the 5th, mom,  
3 Penny, hears a knock at the door. She has on her  
4 bath robe. She goes downstairs to see who it is and  
5 it's the defendant. She has a brief conversation  
6 with the defendant and you'll hear from her mouth  
7 what she says to him and what he says to her. She  
8 then closes the door and she'll testify that she  
9 locked the door. A little while afterwards, maybe a  
10 couple of hours, the defendant is in her bedroom and  
11 he rapes her. She didn't leave the apartment,  
12 she'll explain to you why.

13 At some point, she is able to call her  
14 daughter at work to say, "Please call the police I  
15 have just been raped." The defendant raped her  
16 twice.

17 After having had an opportunity to  
18 reflect on his actions and what I mean by that is  
19 the evidence will show between the first rape and  
20 second rape some time had passed. But we have two  
21 counts of burglary. The defendant is arrested in  
22 the area you will hear from some other witnesses who  
23 saw him coming from that area of the apartment  
24 complex where they lived, what the defendant said,  
25 and then you will hear from Detective Luke and a



1 witness by the name of Jean Behl.

2           Some time after the rape, a few weeks had  
3 passed. Detective Luke will testify that he  
4 received a telephone call from the a woman  
5 identified as Jean Behl. Jean Behl will testify  
6 that the defendant gave her a watch at approximately  
7 5:30 in the morning on December 5th. She was on her  
8 way to work. He called and said, "I want to talk to  
9 you. I have a present for you." They met.

10           That watch was reported stolen during the  
11 investigation of the rape. It was one of the items  
12 that was found missing. Jodi's watch, a house key  
13 to the apartment. When the defendant was arrested,  
14 he had keys on his person, no jewelry and there were  
15 a couple of items taken, the watch being one of  
16 them. As the time passed between the time of  
17 defendant's rape and the time that Detective Luke  
18 spoke to Jean Behl, conversation went on at the  
19 apartment complex as to the rape and he expressed  
20 what had taken place and the subject of this watch  
21 came up. Jean Behl called Detective Rike and she'll  
22 testify that Roy Moraga gave her the watch on the  
23 date we just talked about, December 5th.

24           After someone first entered the  
25 apartment, the rape and the rape, he has possession

1 of this watch. That's the first burglary count.  
2 The State intends to prove that it was Roy Moraga  
3 that went into the house or the apartment in the  
4 early morning hours or very late evening hours of  
5 December 4th or 5th, kind of took a look around.  
6 Jodi wasn't who he wanted, it was Penny.

7 At that point, the State will prove that  
8 he took the house keys, that he took the watch, that  
9 about 5:30 in the morning, he gives the watch to  
10 Jean Bohl. At about noon, he knocks on the door,  
11 comes back a couple hours later, the door is locked,  
12 and let's himself in.

13 Detective Fox will testify that once the  
14 victim and her daughter realized the key was taken  
15 because they couldn't figure out how this person got  
16 in the apartment, they went and checked the  
17 defendant's property because they had been booked in  
18 the Clark County Detention Center. Detective Fox, I  
19 believe, will testify that he took a diagram of the  
20 house key with him to the Clark County Detention  
21 Center. There were keys found in the defendant's  
22 possession and one of them matched. Detective Fox  
23 then took that key back to the apartment to try to  
24 unlock it and it worked. That key has been  
25 impounded. You will take a look at that.

1 Penny Hawk was transported to University  
2 Medical Center by officers of the Las Vegas  
3 Metropolitan Police Department. There she underwent  
4 a rape examination by Dr. Reisch assisted by a Nurse  
5 Young. Dr. Reisch will testify, as well as Sabina,  
6 their testimony is certainly reflected in the  
7 medical records that they will use to refresh their  
8 memory should they need it.

9 Basically, Dr. Reisch will testify that  
10 he found a white pooling in the vaginal cavity when  
11 he did a vaginal exam. He will indicate that that's  
12 consistent with an ejaculation or semen.

13 Nurse Young will indicate the mental or  
14 emotional condition that Penny was in at the time  
15 she was examined.

16 You will also hear from certainly other  
17 witnesses. I'm not going to go into detail with all  
18 of them. You heard their names before. Linda  
19 Errichetto will testify from the crime lab. She  
20 tested some of the defendant's clothing. She also  
21 compared blood samples from the victim, as well as  
22 the defendant and you will hear her conclusions and  
23 her explanation for them regarding the semen that  
24 she tested, among other things in this case.

25 It is the State's position that once all

1 the testimony has been given to you, that you will  
2 return a verdict of guilty on both counts of  
3 burglary and both counts of sexual assault.

4 THE COURT: Mr. Hillman, did you wish to  
5 make or reserve your opening statement?

6 MR. HILLMAN: Your Honor, we will reserve  
7 our opening statement.

8 THE COURT: We will exclude witnesses.  
9 There are none in the courtroom, but if anyone comes  
10 in Mr. Baldonado will inquire if they are witnesses,  
11 I will exclude them and give them the usual  
12 admonition.

13 THE BAILIFF: Very good, your Honor.

14 THE COURT: State may call their first  
15 witness.

16 MS. LIPPIS: Jodi Howard.

17 JODY LEE HOWARD,  
18 having been first duly sworn to tell the truth, the  
19 whole truth and nothing but the truth, testified and  
20 said as follows:

21 DIRECT EXAMINATION

22 BY MS. LIPPIS:

23 Q. Would you state your full name for the  
24 record, please, and spell your last name?

25 A. Jodi Lee Howard, H-O-W-A-R-D.

1 Q. Jodi, do you know Penny Hawk?  
2 A. Yes, I do.  
3 Q. How do you know her?  
4 A. She's my mother.  
5 Q. And she is outside waiting to testify; is  
6 that correct?  
7 A. Yes, she is.  
8 Q. I'd like to direct examination your  
9 attention to December 4th, 1989. Were you and your  
10 mother sharing the same apartment living together?  
11 A. Yes, we were.  
12 Q. What was the address of that apartment?  
13 A. 1000 Dumont, No. 207.  
14 Q. Is that located in Las Vegas, Clark  
15 County, Nevada?  
16 A. Yes, it is.  
17 Q. On December 5th, 1989 were you -- was  
18 your mother to take you to work on that date?  
19 A. December 5th?  
20 Q. Yes.  
21 A. Yeah, that morning she usually takes me  
22 to work. I went to work every morning about 7:30.  
23 Q. Did she in fact take you to work on that  
24 day?  
25 A. Yes, she did.

1 Q. Was she home prior to that time or did  
2 she come home to take you to work?

3 A. She came home to take me to work.

4 Q. Did anything unusual happen about the  
5 time that you were ready to leave for work with your  
6 mother there to take you?

7 A. Uh-huh, yes.

8 Q. Would you describe for the ladies and  
9 gentlemen of the jury what took place?

10 A. I woke up that morning and as usual, I go  
11 to get my panty hose or get ready for work. I'm  
12 always running late. So I notice I couldn't find my  
13 watch, and I knew I had left my watch downstairs  
14 that morning because -- so I wouldn't have to walk  
15 clear upstairs to get it that particular morning,  
16 and I couldn't find it, and she is telling me, "Oh,  
17 come on you just misplaced the watch," and I went to  
18 my wallet and I knew I had a lot of quarters and  
19 stuff in my wallet and my wallet was very heavy and  
20 all the money was missing out of the wallet. So I  
21 knew I was robbed at this time, but I was in such a  
22 hurry to get to work, she just went ahead took me to  
23 work and I left for work.

24 Q. When you say work, where do you work?

25 A. I worked at Dealers Choice at the time.

1 Q. As a?

2 A. Bartender.

3 Q. So you make tips?

4 A. Yes, I do.

5 Q. Is that the coins you were referring to?

6 A. Coins and \$1 bills and such, yes.

7 Q. Did you and your mother both have house

8 keys to this apartment?

9 A. Yes, we did.

10 Q. Did you notice at that time, as you were

11 leaving for work looking for your watch and noticing

12 other things missing, did you notice anything about

13 your house keys?

14 A. No, I didn't because she locks the door.

15 We have to lock the door from the outside and she's

16 the one that locked the door when she took me to

17 work because I just left, grabbed my keys. I have a

18 key chain with a lot of key chains and stuff. So I

19 wouldn't have noticed just my key, no.

20 Q. Later, did you ever notice something

21 about your keys?

22 A. I never noticed until after the police

23 officers left the house, when I went to go pick up

24 mother from the house, and I went to go lock the

25 door, and my key was not on the key ring, and then

1     that's how I realized he got in the house.

2           Q.     On the evening, very late evening of  
3     November 4th, or early morning hours of December  
4     5th, 1989, you indicated you were alone in your  
5     apartment; is that correct? You have indicated you  
6     were alone alone?

7           A.     You mean the night of December 4th?

8           Q.     Yes.

9           A.     Yes.

10          Q.     Were you alone?

11          A.     Yes, sir.

12          Q.     Were you keeping late evening hours?

13          A.     Yes, I fell asleep on the couch, went  
14     upstairs, turned off the lights off, then I kind of  
15     heard something, but I thought it was the heater  
16     kicking in.

17          Q.     Before we get to that point, from the  
18     time you woke up downstairs and went upstairs to go  
19     to bed, did you lock the doors to the apartment, do  
20     you recall whether you did or not?

21          A.     I really don't believe I did because, and  
22     I have to say that it was because my mother was  
23     supposed to be right back and so I was sleeping on  
24     the couch and, no, I don't believe I locked the door  
25     when I went upstairs.



1 Q. Now, you indicated that something woke  
2 you up or you thought?

3 A. Something did yeah, yeah. I heard  
4 something I got up and normally I go straight  
5 downstairs and check and kept going, "Mom, are you  
6 there? Mom, are you there," and it got real quiet,  
7 sat up for awhile, and just went back to bed.

8 Q. So you don't know at this point whether  
9 anyone was in your house at that point; is that  
10 correct?

11 A. I don't know for sure, no, but I do now.

12 Q. Okay, we will talk about that later.

13 You indicated then when you did get ready  
14 for work the following morning, that at least your  
15 watch and money were missing; is that correct?

16 A. Uh-huh, and my panty hose.

17 Q. What time did your mom drop you off at  
18 work?

19 A. That morning I was running a little  
20 late. It must have been a quarter to eight when I  
21 finally got to work and arrived at work.

22 Q. Did you and your mother have some type of  
23 deal set up where you would call and help wake her  
24 up since she worked a graveyard?

25 A. Yes, we did.

1 Q. Describe what that was?

2 A. About everyday about 1:30, 2:00, I would  
3 call her from work and say, "Mom, it's time to get  
4 up."

5 Q. On December 5th, did you do that?

6 A. Yes, I did.

7 Q. Would you describe what happened when you  
8 called home?

9 A. It rang about 40 times and it just kept  
10 ringing and ringing and I just figured, well, maybe  
11 she is just sleeping and she can't hear the phone  
12 ring, but I knew she had enough sleep, so I called  
13 back again and then she did answer the telephone.

14 Q. How much later between the time when the  
15 phone rang all those times you described to the time  
16 you called again?

17 A. I would say I took care of a couple  
18 customers; I would say within ten minutes, 15  
19 minutes prior to that.

20 Q. The second time that you called, did she  
21 answer the phone?

22 A. She did, yes, she did.

23 Q. What, if anything, unusual happened  
24 during that conversation?

25 A. I kept on saying, "Are you up," and she

1 said, "Yes," and she was acting very strangely, but  
2 I thought maybe she was just dazed from sleeping,  
3 but I kept on saying, "What's wrong? Are you up,"  
4 and I kept on asking her, and she kept on saying --  
5 she was trying to give me hints that somebody was in  
6 the house.

7 Q. Let's not speculate what she was trying  
8 to do.

9 A. Okay.

10 Q. Did you notice something unusual from the  
11 other phone calls?

12 A. Yes. Yes, I thought that was strange,  
13 yes.

14 Q. Did the phone call end, did you say  
15 "Goodbye, get up mom"?

16 A. Yeah, and then she called me back prior  
17 to that about --

18 MR. HILLMAN: Your Honor, at this point,  
19 I would like to object as to the characterization of  
20 the strange phone call. Those are conclusions and  
21 we don't really know what was strange about it.

22 THE COURT: I will sustain them.

23 MS. LIPPIS: I will rephrase the  
24 question.

25 Q. What, if anything, was different about

1 this phone call, when you finally got ahold of your  
2 mom to wake her up, and other phone calls where you  
3 would call her around 1:30 to wake her up?

4 A. The difference was that normally when I  
5 call her, it's time to get up and she would go,  
6 "Okay, thanks for calling, waking me up, I'm on the  
7 way to the shower." That morning she did not do  
8 that. She just kept on --

9 Q. What, if anything, did you notice about  
10 the tone of her voice?

11 A. It was -- she just was acting strange.  
12 There was a difference in her voice, a difference in  
13 her attitude, the way she was acting, like I kept on  
14 asking her over and over again, "What is wrong? Are  
15 you up? Are you up," and she just kept on not  
16 answering me. And I just wanted her to answer me.

17 Q. After this phone call was over, did you  
18 ever talk to your mom again that day on the 5th?

19 A. Yes, I did.

20 Q. When was that?

21 A. About five or ten minutes later, I was  
22 taking care of, you know, my bar and I got a phone  
23 call, and she said, "Jodi, I'm being raped. Call  
24 the police."

25 Q. Would you describe what the tone of her

1 voice was at that time?

2 A. The tone of her voice was I took it very  
3 seriously. The first thing I did was she was  
4 whispering to try to get somebody not to hear her.

5 MR. HILLMAN: Objection.

6 Q. (BY MS. LIPPIS) Just tell me what she  
7 was doing?

8 THE COURT: Sustained.

9 Q. (BY MS. LIPPIS) And what you did as a  
10 result?

11 A. She was whispering, "Jodi, call the  
12 police. I'm being raped," and she hung up the  
13 telephone. First thing I did was call 911.

14 Q. And did you get ahold of the police?

15 A. Yes, I did.

16 Q. What did you do after that?

17 A. I paced the floor, and I cried, and I  
18 called my boss and said, "Let me off work early."

19 Q. And did you go home?

20 A. I went home.

21 Q. When you got home, was your mom there?

22 A. No.

23 Q. Where was she?

24 A. At the hospital.

25 Q. During the course of the investigation at

1 the house while you were there, were police officers  
2 there?

3 A. Yes.

4 Q. Did you fill out a police report listing  
5 the things that had been taken?

6 A. Yes, I did.

7 Q. And at this time you still don't know  
8 about the key; is that right?

9 A. No.

10 Q. The key to your house?

11 A. No, I do know about it. John Fox had  
12 found it on --

13 MR. HILLMAN: Objection, hearsay.

14 THE COURT: Sustained.

15 Q. (BY MS. LIPPIS) Let me see if I can  
16 clarify my question a little bit.

17 At what point did you realize that your  
18 house key was missing from the key ring?

19 A. That was after the fingerprint guy had  
20 come in to take fingerprints, then I was around  
21 there for maybe an hour, and they had left, and they  
22 kept on asking me how he got in the house or  
23 whatever, and then I went to lock the door, to go to  
24 the hospital to pick my mother up, and that's when I  
25 noticed my key was not on my ring.

1 MS. LIPPIS: May I approach my the  
2 witness, your Honor?

3 THE COURT: Yes.

4 Q. (BY MS. LIPPIS) Jodi, I'm going to show  
5 you what happens to be a two page police report.  
6 First showing you what appears to be the first page,  
7 is that your signature down at the bottom?

8 A. Yes, it is.

9 Q. Did you review this report prior to  
10 signing it?

11 A. Yes, I did.

12 Q. Does it accurately reflect the items that  
13 you noticed, other than the key obviously, at this  
14 point that were taken from your home?

15 A. The only thing that was not taken is the  
16 diamond necklace and such. I thought it was  
17 missing, but it was not.

18 Q. You did find that?

19 A. Yes, I did.

20 Q. So what we have missing is your money?

21 A. And the U.S. currency, what's that? The  
22 miscellaneous coins, yes, and dollars.

23 Q. And the lady's watch?

24 A. Yes.

25 Q. Did you ever see your watch again?

1           A.     I saw my watch a couple weeks ago when a  
2     detective came by for identification.  
3           Q.     So a detective had your watch?  
4           A.     A detective has it. I don't know who has  
5     it right now, but.  
6           Q.     You don't have it?  
7           A.     I do not have my watch, no.  
8           Q.     A detective however did come and show you  
9     a watch?  
10          A.     Yes, sir.  
11          Q.     Was that your watch?  
12          A.     That was my watch.  
13          Q.     Did you give permission for anyone to  
14     take -- enter your home and take your watch?  
15          A.     No.  
16          Q.     Do you know a gentleman by the name of  
17     Roy Moraga?  
18          A.     No, I have never met Roy Moraga. I have  
19     seen him one time.  
20          Q.     Where did you see him?  
21          A.     I barely remember this incident, but it  
22     was -- he was trying to come up to my mother's truck  
23     and I said, "Get away from my mother," and this was  
24     one time when I was outside the truck trying to talk  
25     to my mother. That's the only time I ever seen



1 him. I don't remember him by looking at him.

2 MS. LIPPIS: Thank you. Nothing further.

3 THE COURT: Cross examination.

4 MR. HILLMAN: Thank you, your Honor.

5 CROSS-EXAMINATION

6 BY MR. HILLMAN:

7 Q. Ms. Howard, do you recall the last time  
8 that you saw your watch?

9 A. That night right before I went to bed.

10 Q. And you remember specifically leaving it  
11 down there?

12 A. I remember exactly where I put it and the  
13 position on the end table or coffee table.

14 Q. How long have you been living with your  
15 mother?

16 A. Since October of 1989.

17 Q. Do you still live with her?

18 A. She moved out yesterday.

19 Q. You stated also that you used to call and  
20 wake her up; is that correct?

21 A. Yes. Every day.

22 Q. That's so she could get ready for work?

23 A. Uh-huh.

24 Q. Did you ever have a hard time waking her  
25 up?

1           A.     No, she was real good about answering the  
2     phone on the first or second ring.

3           Q.     And you state that you did not lock the  
4     door on the night of December 4th; is that correct?

5           A.     I don't believe I did, no.

6           MR. HILLMAN: I have no further  
7     questions.

8           THE COURT: Redirect?

9           MS. LIPPIS: No redirect.

10          THE COURT: You may step down,  
11     Ms. Howard.

12          Ms. Howard, do not discuss your testimony  
13     with any other witnesses.

14          MS. HOWARD: Okay.

15          THE COURT: Your next witness.

16          MS. LIPPIS: Penny Hawk.

17          PENNY HAWK,  
18     having been first duly sworn to tell the truth, the  
19     whole truth and nothing but the truth, testified and  
20     said as follows:

21                   DIRECT EXAMINATION

22     BY MS. LIPPIS:

23           Q.     Would you state your full name for the  
24     record, please, and spell your last name?

25           A.     Penny Hawk, H-A-W-K.

1 Q. Penny, do you have a daughter named Jodi  
2 Howard?  
3 A. Yes, I do.  
4 Q. Is she the young woman that just left the  
5 courtroom?  
6 A. Yes, she is.  
7 Q. Penny, I would like to direct your  
8 attention to December 4th and December 5th, 1989.  
9 Were you and Jodi living together?  
10 A. Yes.  
11 Q. At the apartment at 1000 Dumont,  
12 Las Vegas, Clark County, Nevada?  
13 A. Yes.  
14 Q. And what was your apartment number?  
15 A. 227.  
16 Q. Penny, do you mind if I ask how old you  
17 are?  
18 A. Forty-six.  
19 Q. Do you know a man by the name of Roy  
20 Moraga?  
21 A. Yes.  
22 Q. Do you see Mr. Moraga present in court  
23 today?  
24 A. Yes, sir.  
25 Q. Would you please point to him and

1 describes an article of clothing that he is currently  
2 wearing?

3 A. Sitting over there, black shirt,  
4 sunglasses.

5 MS. LIPPIS: Thank you. May the record  
6 reflect the identification of the defendant?

7 THE COURT: Yes.

8 MS. LIPPIS: Thank you, your Honor.

9 Q. Penny, would you describe for the ladies  
10 and gentlemen of the jury how you first became  
11 acquainted with Roy Moraga?

12 A. I was sitting at Players Lounge in my  
13 pickup and he walked over and asked me the time and  
14 that's how we first met.

15 Q. Is Players Lounge close to your  
16 apartment?

17 A. Yes, right next door.

18 Q. And were you employed on December -- on  
19 or about December 4th and 5th, 1989?

20 A. Yes.

21 Q. How were you employed, what did you do?

22 A. I drive for Yellow Cab.

23 Q. What shift did you work? At that time?

24 A. 4:00 to 4:00.

25 Q. 4:00 in the afternoon until 4:00 in the

1 morning?

2 A. Yes.

3 Q. Did you have to go to work on December  
4 5th at 4:00 in the afternoon?

5 A. No, I couldn't get any sleep that day.  
6 We had jackhammers putting in our prime cable T.V.  
7 and I couldn't sleep that day so I called in off  
8 work.

9 Q. Before we get to that, I want to go back  
10 to the first time when you first met Mr. Moraga,  
11 okay.

12 You indicated that you were in your truck  
13 at the Players Lounge; is that correct?

14 A. Yes.

15 Q. Prior to the incident that we're going to  
16 talk about that happened on December 5th, from  
17 December 5th back, how much time passed?

18 A. Approximately three weeks.

19 Q. Would you describe for the jury what, if  
20 anything, you and Mr. Moraga did that first night  
21 that you met?

22 A. We were sitting in my pickup and talking  
23 and I had a couple drinks and basically we were just  
24 talking.

25 Q. Did you stay at the Players Lounge or did

1     you go anywhere?

2             A.     Later, we went to another bar called

3     Rascals around the corner.

4             Q.     So you are staying all in the same area;

5     is that correct?

6             A.     Yes.

7             Q.     Did you drive to Rascals with Mr. Moraga

8     or how?

9             A.     Yes.

10            Q.     How did you get there?

11            A.     Yes. I drove.

12            Q.     When you left Rascals, was it alone or

13     with Mr. Moraga?

14            A.     With him.

15            Q.     And where did you go from Rascals?

16            A.     I went back home.

17            Q.     Where did Mr. Moraga go?

18            A.     I don't know.

19            Q.     You said you left with him, though?

20            A.     No, I didn't leave with him from

21     Rascals.

22            Q.     I'm sorry, I misunderstood.

23                    Did you leave Rascals alone?

24            A.     Yes.

25            Q.     Do you recall about how many hours

1     totally you spent from the first time you met Mr.  
2     Moraga until the time you left Rascals?

3             A.     Five hours maybe.

4             Q.     After you left Mr. Moraga at Rascals and  
5     went home, did you have any intention of seeing him  
6     socially again?

7             A.     No.

8             Q.     Can you explain to the jury how you came  
9     to make that decision?

10            A.     He said some things to me that I didn't  
11    appreciate him saying and making movements on me  
12    that I didn't like.

13            Q.     Can you tell the jury what he said to  
14    you?

15            A.     He said he wanted me to be his mama.

16            Q.     From that last time that you left  
17    Mr. Moraga at Rascals until the date we are going to  
18    talk about December 5th, did you ever see him  
19    again?

20            A.     Yes.

21            Q.     At your request?

22            A.     No.

23            Q.     Would you describe to the jury how it  
24    came about that you saw him?

25            A.     I have seen him on the street by my

1 apartment when I was coming home at night. I have  
2 seen him when I went into Players to see if my  
3 daughter was there. Each time he approached me  
4 wanting to talk to me and I told him to get away  
5 from me.

6 Q. Did you ever invite Mr. Moraga to your  
7 apartment?

8 A. No.

9 Q. To your knowledge, did he know where you  
10 lived?

11 A. No.

12 Q. Did you ever tell him where you lived?

13 A. No.

14 Q. On December 5th, 1989, did you come home  
15 to take your daughter Jodi to work?

16 A. Yes.

17 Q. Do you know about what time you got  
18 home?

19 A. Approximately 7:30.

20 Q. Would that be in the morning?

21 A. Yes, a.m.

22 Q. Was Jodi up?

23 A. Yes.

24 Q. Would you describe for the ladies and  
25 gentlemen of the jury what took place as you were



1 getting ready to take Jodi to work?

2 A. Well, she was trying to find her watch  
3 and she knew she had left it on the table downstairs  
4 and we were in a hurry and she started missing other  
5 things like money out of her wallet, and I told  
6 her -- I said, well, you know, I'll search for these  
7 things, but we have got to take you to work, you  
8 know. So we were in kind of a rush to get her to  
9 work.

10 Q. Did you take her to work?

11 A. Yes.

12 Q. When you left your apartment to take her  
13 to work, did you lock the door?

14 A. Yes.

15 Q. Did you use your keys?

16 A. Yes.

17 Q. What time did you get back to your  
18 apartment after you took Jodi to work?

19 A. Approximately 8:00, 8:15.

20 Q. And that would be in the morning as  
21 well?

22 A. Yes.

23 Q. What did you do once you got back to your  
24 apartment?

25 A. I went straight to bed because I had to

1 get up and go to work at 2:00.

2 Q. Is your apartment a one bedroom or two  
3 bedroom?

4 A. It's two bedroom.

5 Q. Is it double level?

6 A. Yes.

7 Q. Are both of the bedrooms located  
8 upstairs?

9 A. Yes.

10 Q. What else is upstairs?

11 A. Two restrooms, just two bedrooms, and two  
12 restrooms.

13 Q. After you went to sleep, did something  
14 awaken you?

15 A. Yes.

16 Q. What was that?

17 A. Approximately about 12:30, there was a  
18 knock on the door or maybe even the doorbell rang.  
19 I think the doorbell rang, and I went downstairs and  
20 I opened the door a little bit, and he was standing  
21 there.

22 Q. Who was standing there?

23 A. Roy Moraga.

24 Q. And that's the gentleman you just  
25 identified in court?

1           A.     Yes.

2           Q.     And had he ever been over to your house  
3 or apartment before?

4           A.     No.

5           Q.     What did you say to him and what did he  
6 say to you?

7           A.     I asked him -- I asked how did you find  
8 out where I lived and I told him that he had woke me  
9 up, to leave me alone. When I asked him how he knew  
10 where I lived, he said, "I've always known where you  
11 lived."

12          Q.     What did you do once this conversation  
13 ended?

14          A.     I shut the door and bolted it and went  
15 back to bed.

16          Q.     And that was about noon?

17          A.     Approximately 12:30.

18          Q.     When you sleep, do you sleep in pajamas  
19 or in the nude or how do you sleep?

20          A.     I sleep in the nude. But I had my  
21 housecoat on.

22          Q.     So when you answered the door, you had a  
23 housecoat on?

24          A.     Yes.

25          Q.     Did you ever see Mr. Moraga again that

1 day?

2 A. Yes.

3 Q. When is the next time you saw Mr.

4 Moraga?

5 A. A quarter til 2:00.

6 Q. And where was that?

7 A. He -- in my bedroom.

8 Q. Did you invite him in there?

9 A. No.

10 Q. At that time, did you know how he got

11 in?

12 A. No.

13 Q. Would you describe for the ladies and

14 gentlemen of the jury what happened?

15 A. I woke up because my -- the stairs were

16 creaking and I thought it might be my daughter, but

17 I woke up and I saw a person's arm slip in like to

18 my daughter's bedroom and so I sat up in bed and I

19 hollered, "Who is it," and no one answered and I

20 said, "Jodi," and no one answered. Then I got out

21 of bed and I went to the door, my bedroom door and

22 he just appeared there, just suddenly.

23 Q. When you say he, who do you mean?

24 A. Roy Moraga. He just appeared suddenly in

25 my bedroom hallway or -- and I started screaming.

1 "How did you get into my apartment," and I ran to  
2 the bathroom window I had left open that night and I  
3 screamed, "Someone call the police."

4 Q. What happened after that?

5 A. He grabbed me, he grabbed my mouth. He  
6 was behind me and he grabbed my mouth and drug me  
7 over to the bed and threw me on the bed.

8 Q. What did he do once you were on the bed?

9 A. I started kicking him and I was fighting  
10 him and he said, he said, "Please don't do that,"  
11 and I thought, you know, I thought for a split  
12 second he wasn't going to hurt me. So I got up off  
13 the bed and I ran to the doorway and he pushed me  
14 down the stairs and we have a brick wall at the end  
15 of about five or six stairs and I fell into the  
16 brick wall. He came down, he grabbed me again.  
17 This time he had his arm around my neck. He twisted  
18 my other arm and he drug me back up the stairs and  
19 then he threw me down on the bed and I was like  
20 hyperventilating. I couldn't breathe and --

21 Q. What did he do, if anything, once he had  
22 you on the bed?

23 A. He unzipped his pants and started raping  
24 me.

25 Q. I know that this is difficult, but I need

1 you to let the ladies and gentlemen of the jury  
2 understand what you mean by rape, what did he do to  
3 you?

4 A. He inserted his penis into my vagina.

5 Q. Did you want him to do this to you?

6 A. No.

7 Q. Do you remember, if you can, what he was  
8 wearing that day?

9 A. Blue jeans and a white shirt.

10 Q. Did he ever take all of his clothes off,  
11 if you remember?

12 A. At one time, he did take his shirt off.  
13 I think it was a sweat shirt of some sort. He did  
14 take that off, but he never took his jeans off.

15 Q. Do you remember anything at all about any  
16 other clothing he may have had on?

17 A. A leg brace, that's all I can remember --  
18 well, he didn't have the leg brace on then, no.

19 Q. Had he taken it off?

20 A. Yes.

21 Q. At some point?

22 A. I think he left it downstairs.

23 Q. Do you know whether or not he  
24 ejaculated?

25 A. Yes.

1 Q. He did?

2 A. Yes.

3 Q. Did there come a point when he ceased  
4 having sex with you and removed his body from your  
5 body?

6 A. Yes.

7 Q. What happened after that?

8 A. I started telling him I needed a drink of  
9 water. I wanted to get away from him, I just wanted  
10 to get away from him. I went downstairs to get a  
11 drink of water. I was just -- I didn't know what to  
12 do at that point. He could have killed me, I didn't  
13 know.

14 Q. Were you alone?

15 A. He followed me downstairs. He was there  
16 the whole time. I got a drink of water. I sat in  
17 the living room for awhile. He sat there talking to  
18 me.

19 Q. Do you recall what he said to you?

20 A. No.

21 Q. What he was talking about?

22 A. I didn't care. I don't remember.

23 Q. That's all right.

24 A. He kept telling me he wanted me to take a  
25 shower. So finally I went back up stairs. I

1 thought maybe if I took a shower, he would leave and  
2 so I jumped in the shower, I got back out and then I  
3 like had a towel around me at the time. He was  
4 standing in my bedroom and then he threw me down on  
5 the bed again and raped me again.

6 Q. Now, when you say that he raped you  
7 again, are we talking about the same type of --

8 A. Yes. He inserted his penis into my  
9 vagina.

10 Q. Thank you.

11 Did you want him to do it this time?

12 A. No.

13 Q. Did you tell him that?

14 A. Yes. I kept saying don't do this.

15 Q. And what was his response?

16 A. I don't know.

17 Q. Do you know whether or not he ejaculated  
18 this time?

19 A. I think he did, but I don't know.

20 Q. Once this sexual act was completed, what  
21 did he do?

22 A. He went into the restroom and started  
23 washing himself off with a towel in there. That's  
24 when I went back downstairs and I grabbed the phone  
25 and I called my daughter and I told her, I said,



1 "Call the police. I have just been raped," and I  
2 hung up because I knew I only had a short period of  
3 time to talk to her because I knew where he was and  
4 I knew that he would be coming back down those  
5 stairs any minute.

6 Q. Did he in fact come back down those  
7 stairs?

8 A. Yes.

9 Q. At what point from the time that you were  
10 talking to your daughter, what point did he come  
11 back downstairs?

12 A. I heard him coming down. He was about  
13 halfway down the stairs when I hung up the phone.

14 Q. Did he ask you any questions regarding  
15 you being on the phone?

16 A. Yes. He said, "I hope you didn't call  
17 the narcs, or the police," or something.

18 Q. Did he stay around your apartment for any  
19 length of time after this or did he leave right  
20 away?

21 A. He left right away, approximately three  
22 or four minutes later.

23 Q. Did he have an occasion you indicated  
24 that he was upstairs. Do you know whether or not he  
25 showered?

1           A.     No, I think he was just washing himself  
2 off.

3                   MS. LIPPIS: May I approach the witness,  
4 your Honor?

5                   THE COURT: Yes.

6           Q.     (BY MS. LIPPIS) Ms. Hawk, I'm going to  
7 show you what's been marked for identification as  
8 State's proposed Exhibit 1, 2 and 3, which are all  
9 photographs. As to State's proposed Exhibit 1,  
10 could you tell the jury what that is?

11          A.     That's my bed.

12          Q.     Is that where the sexual acts took place  
13 that you just described?

14          A.     Yes.

15          Q.     As to State's proposed Exhibit No. 2, can  
16 you tell me what this is?

17          A.     That's our restroom.

18          Q.     Is it the restroom upstairs?

19          A.     Downstairs.

20          Q.     Did the defendant have an occasion to go  
21 into this restroom downstairs?

22          A.     Yes.

23          Q.     At what point?

24          A.     When he came down, after I got off the  
25 phone, I went in to the kitchen to get another glass

1 of water and he went in there and I heard him  
2 spraying his hair. He was combing his hair and  
3 spraying it. I heard him doing that.

4 Q. You didn't see it, but you heard?

5 A. I heard him spraying his hair.

6 Q. State's proposed Exhibit No. 3, is this  
7 once again a close-up of some items in your  
8 downstairs bathroom?

9 A. Yes.

10 Q. Thank you.

11 After the defendant finished whatever he  
12 was doing in the bathroom, did he stick around very  
13 long or did he leave?

14 A. No, he left almost immediately after  
15 that.

16 Q. Once he left, what did you do?

17 A. My girlfriend called while he was there  
18 and I answered the phone and she was asking me  
19 questions because my daughter called her. I think I  
20 was talking to my girlfriend.

21 Q. Did the police eventually arrive?

22 A. Yes. She stayed on the phone with me  
23 because she was asking me questions and I was  
24 talking to her and she stayed there until the police  
25 got there. She stayed on the phone.

1 Q. Did several police officers respond?  
2 A. Yes.  
3 Q. Did one of those police officers take you  
4 to an area where Mr. Moraga was?  
5 A. Yes.  
6 Q. With some other police officers?  
7 A. Yes.  
8 Q. And did you identify him as having done  
9 this to you for those officers?  
10 A. Yes, I did.  
11 Q. Were you then transported to the  
12 hospital?  
13 A. Yes.  
14 Q. Once at the hospital, would you describe  
15 for the ladies and gentlemen what took place at the  
16 hospital?  
17 A. What took place at the hospital?  
18 Q. Yes.  
19 A. Really?  
20 Q. Please.  
21 A. I was taken into an examining room. They  
22 examined every part of my body. They gave me a  
23 pelvic examination.  
24 Q. Did your daughter eventually meet you at  
25 the hospital?

1           A.     Yes.

2           Q.     To take you home?

3           A.     Yes.

4                   MS. LIPPIS: I have nothing further.

5                   THE COURT: Cross examination.

6                   MR. HILLMAN: Thank you.

7                           CROSS-EXAMINATION

8   BY MR. HILLMAN.

9           Q.     Ms. Hawk, you stated the first time you

10   met Mr. Moraga was at Players; is that correct?

11           A.     Yes.

12           Q.     And he introduced himself as being Roy

13   Moraga at that time?

14           A.     No.

15           Q.     You stated that he walked up to and he

16   asked you what time it was; is that correct?

17           A.     Yes, sir.

18           Q.     And you were sitting in the pickup truck

19   at that time?

20           A.     Yes, I was.

21           Q.     And then you invited him to sit in your

22   truck with you?

23           A.     Yes. He complained his leg was hurting

24   and he --

25           Q.     Okay. And you said you had a few

1 drinks. Did you have a few drinks inside the  
2 truck?  
3 A. Yes.  
4 Q. Did you have drinks with you or did he  
5 bring drinks in with him?  
6 A. He had a couple drinks.  
7 Q. Do you remember what they were?  
8 A. No. Do I remember what he drank or what  
9 I drank?  
10 Q. Do you remember either of those, do you  
11 remember what you drank?  
12 A. I remember I drank rum and Coke. I don't  
13 know what he drank.  
14 Q. Where did those drinks come from?  
15 A. He went in and got them inside Players.  
16 Q. How long were you in the parking lot  
17 there at Players?  
18 A. Approximately four hours.  
19 Q. Do you remember what you were talking  
20 about?  
21 A. Not really.  
22 Q. Just general talk back and forth?  
23 A. Right, just general talk.  
24 Q. Did you -- what made you decide to go  
25 over to Rascals?

1           A.     It was getting cold out.  
2           Q.     So then you went to Rascals so you could  
3 go inside the establishment?  
4           A.     Yes.  
5           Q.     Did you and Mr. Moraga have a sexual  
6 encounter inside the pickup truck that evening?  
7           A.     No.  
8           Q.     And this was approximately three weeks  
9 before December 5th?  
10          A.     Yes.  
11          Q.     Did you see Mr. Moraga between -- strike  
12 that, please.  
13          A.     Could I bring up something?  
14                 MS. LIPPIS: Penny, you just have to  
15 respond to the questions.  
16          Q.     (BY MR. HILLMAN) You stated that on  
17 December 5th, when Mr. Moraga left, that you were on  
18 the phone, is that correct, to the best of your  
19 recollection?  
20          A.     Yes, I was on the phone with my  
21 girlfriend.  
22          Q.     Do you remember which girlfriend it was?  
23          A.     Yes. Her name is Loretta Fowler.  
24          Q.     Did you ever see Mr. Moraga socially  
25 again between the incident at Players and December

1 5th?

2 A. No.

3 Q. Did you ever speak to him?

4 A. Just to tell him to leave me alone.

5 MR. HILLMAN: I have no further

6 questions, your Honor.

7 THE COURT: Redirect?

8 MS. LIPPIS: No.

9 THE COURT: You may step down, Ms. Hawk.

10 Do not discuss your testimony with any other

11 witnesses, Ms. Hawk.

12 THE WITNESS: Okay.

13 THE COURT: Your next witness.

14 MS. LIPPIS: William Gomez.

15 WILLIAM GOMEZ,

16 having been first duly sworn to tell the truth, the

17 whole truth and nothing but the truth, testified and

18 said as follows:

19 DIRECT EXAMINATION

20 BY MS. LIPPIS:

21 Q. Would you state your name, please, for

22 the record and spell your last name?

23 A. William Gomez, G-O-M-E-Z.

24 Q. Mr. Gomez, I'd like to direct your

25 attention to December 5th, 1989. Do you recall



1 where you were working at that time?

2 A. It was picking up the grounds because I'm  
3 a grounds keeper for the complex there.

4 Q. Would that be the complex located at 1000  
5 Dumont?

6 A. Yes.

7 Q. On that date and time, did you have an  
8 occasion late in the afternoon or later in the  
9 afternoon to be interviewed by police officers?

10 A. Yes, I did.

11 Q. And what was that regarding? Why were  
12 you interviewed?

13 A. Because there was an incident, a woman  
14 had been raped in one of the apartments there.

15 Q. And did you in fact give a handwritten  
16 statement to the police officers?

17 A. Yes, I did.

18 Q. Would you tell the jury why you gave a  
19 statement to the police officers?

20 A. Well, I was going about my own business  
21 picking up the grounds and I happen to hear somebody  
22 yell out, "Help, please somebody help," and I tried  
23 to pinpoint from what direction it was coming from,  
24 but it was so short and quick, I never really got a  
25 chance to figure out where it was coming from.

1 Q. All right. These few words that you did  
2 hear, however, did they come from a man or a woman?

3 A. It was a woman's voice.

4 MS. LIPPIS: Thank you. I have nothing  
5 further.

6 THE COURT: Cross examination.

7 MS. LIPPIS: Excuse me, Judge, I do have  
8 one more.

9 Q. (BY MS. LIPPIS) Do you recall  
10 approximately what time you heard these screams?

11 A. 2:00, some time after 2:00.

12 Q. That would be two in the afternoon?

13 A. Yeah.

14 MS. LIPPIS: Thank you. Nothing  
15 further.

16 THE COURT: Cross examination.

17 CROSS-EXAMINATION

18 BY MR. HILLMAN:

19 Q. Mr. Gomez, how do you know what time it  
20 was?

21 A. I wear a watch all the time and I  
22 constantly look at my watch.

23 Q. And you were working, I'm sorry, you were  
24 working at the apartment complex that day?

25 A. Yeah.

1 Q. And doing what?

2 A. Picking up the grounds.

3 MR. HILLMAN: I have no further

4 questions, your Honor.

5 THE COURT: Anything further?

6 MS. LIPPIS: Not by the State.

7 THE COURT: You may step down,

8 Mr. Gomez.

9 Your next witnesses.

10 MS. LIPPIS: Your Honor, with the Court's

11 permission, I have a nurse from the detention

12 center, may I call her out of order?

13 THE COURT: Yes. Is that any problem,

14 Mr. Hillman?

15 MR. HILLMAN: That's fine.

16 HELEN V. PRESCOTT,

17 having been first duly sworn to tell the truth, the

18 whole truth and nothing but the truth, testified and

19 said as follows:

20 DIRECT EXAMINATION

21 BY MS. LIPPIS:

22 Q. Would you state your full name for the

23 record, please, and spell your last name?

24 A. Helen V. Prescott, P-R-E-S-C-O-T-T.

25 Q. Ms. Prescott, how are you employed?

1           A.     I'm a registered nurse at the Clark  
2 County Detention Center.

3           Q.     Are you licensed by the State of Nevada,  
4 State Board of Nursing as a registered nurse?

5           A.     Yes, I am.

6           Q.     Are parts of your responsibilities the  
7 withdrawal of whole blood from human beings?

8           A.     Yes.

9           Q.     When a person is booked on a charge of  
10 rape, is it standard procedure to withdraw blood  
11 from that arrestee?

12          A.     If the officer requests, yes.

13          Q.     Do you have any independent recollection  
14 of withdrawing blood from a person identified to you  
15 as Roy Moraga?

16          A.     I do.

17          Q.     Do you recall what Mr. Moraga looks  
18 like?

19          A.     I do.

20          Q.     Do you see him present in court today?

21          A.     Yes.

22          Q.     Would you point to him, please, and  
23 describe an article of clothing that he is wearing?

24          A.     Sitting over there and he has a black  
25 shirt on.

1 MS. LIPPIS: Thank you.

2 May the record reflect identification of

3 the defendant?

4 THE COURT: Yes.

5 Q. (BY MS. LIPPIS) Did an officer of the

6 Las Vegas Metropolitan Police Department request

7 that you draw blood from Mr. Moraga?

8 A. Yes, he did.

9 Q. Was that Officer Novack?

10 A. Yes, it was.

11 Q. Did you in fact draw blood then from

12 Mr. Moraga?

13 A. Yes, I did.

14 Q. Is that a regular part of your duties and

15 are you licensed to do so?

16 A. Yes, I am I.V. certified in the State of

17 Nevada.

18 Q. Thank you.

19 Once the blood was withdrawn from Mr.

20 Moraga, what did you do with it?

21 A. I gave it to the officer.

22 Q. That would be Officer Novack?

23 A. Officer Novack.

24 Q. Was Officer Novack present when you

25 withdrew the blood?

1           A.       Yes, he was.

2           Q.       From the time you withdrew the blood or  
3 at the time, did you keep it in your sole care,  
4 custody, and control until you personally delivered  
5 it to Officer Novack?

6           A.       Yes, I did.

7           Q.       Was it delivered to Officer Novack  
8 directly upon you have withdrawing it and dating it  
9 and sealing it?

10          A.       Yes.

11                MS. LIPPIS: Thank you.

12                Nothing further.

13                THE COURT: Cross examination.

14                MR. HILLMAN: No questions.

15                THE COURT: You may step down,  
16 Ms. Prescott.

17                THE WITNESS: Thank you, sir.

18                THE COURT: Your next witness.

19                MS. LIPPIS: Thank you, your Honor.  
20 Michael Harper.

21                MICHAEL CHARLES HARPER,  
22 having been first duly sworn to tell the truth, the  
23 whole truth and nothing but the truth, testified and  
24 said as follows:  
25 . . .

DIRECT EXAMINATION

BY MS. LIPPIS:

Q. Would you state your full name, please, for the record and spell your last name?

A. My name is Michael Charles Harper, H-A-R-P-E-R.

Q. Thank you, Mr. Harper.

Mr. Harper, I'd like to direct your attention to December 5th, 1989. Could you tell the jury where you were employed, sir?

A. I was employed at Court Yard Gardens at 1000 Dumont Boulevard, Las Vegas.

Q. On that date and time, did you have an occasion to give a handwritten statement to a representative of the Las Vegas Metropolitan Police Department?

A. Yes, ma'am, I did.

Q. Would you tell the jury the reason why you were asked to give that statement?

A. I witnessed an individual who was removed from the property a few days before, who I thought was incarcerated, come onto the property fully dressed.

Subsequently, I was working with somebody from the cable T.V. company repairing broken water

1 pipes that they had broke while working.

2 Q. Can I slow you down for a minute?

3 A. Yes.

4 Q. I just want to see if we can direct this

5 a little bit, you witnessed a person come on the

6 property; is that correct?

7 A. That I knew he was removed because he

8 was.

9 Q. Well, he was removed from the property?

10 A. Yes.

11 Q. All right. Is the person present in

12 court today?

13 A. Yes, ma'am, he is.

14 Q. Would you please point to him and

15 describe an article of clothing that he is wearing?

16 A. Black shirt. Dark glasses.

17 MS. LIPPIS: May the record reflect

18 identification of the defendant?

19 THE COURT: Yes.

20 Q. (BY MS. LIPPIS) Do you recall

21 approximately what time you saw this person you just

22 identified come onto the property on Dumont?

23 A. I believe it was some time after

24 lunchtime. I cannot be precise. So much time has

25 gone by.



1 Q. Once he came onto the property, did you  
2 have an occasion to see him again later on?

3 A. Yes, ma'am, I did.

4 Q. You can sit up, that's okay. The mike  
5 will pick up your voice you are going to break your  
6 back.

7 A. Okay.

8 Q. Would you describe for the jury what  
9 condition the defendant was in the next time you saw  
10 him? Was he dressed, undressed?

11 A. He was partially undressed with a white  
12 leg brace in his arm, no shirt on, I could see  
13 tattoos on his stomach and on his arms and he  
14 described to me, in so many words, a sexual contact  
15 with somebody. I thought it was just -- I didn't  
16 know what he said had really happened.

17 Q. In your written statement for the police  
18 officers, did you indicate what you recalled him  
19 saying?

20 A. Yes, ma'am.

21 Q. Would you tell the jury what he said?

22 A. I was walking past the staircase and this  
23 individual was coming down from the second floor and  
24 as I went past, he was pretty much behind me on the  
25 ground level and he made the comment that he had

1 just had sex with a woman and that it wasn't the  
2 best piece of ass that he ever had, but he had  
3 knocked her around a little bit to get it, and he  
4 came twice and his dick was still hard and he was  
5 rubbing his crotch area.

6 Q. Those were his words?

7 A. Those were his words. Like I say, a lot  
8 of time transpired, but in context and what was  
9 said, I have no doubt to my testimony.

10 Q. Were those words, "not the best piece of  
11 ass I ever had"?

12 A. Yes.

13 Q. And, "his dick was still hard"?

14 A. Yes.

15 Q. Those were his words?

16 What did he do after he said these things  
17 to you?

18 A. He went his way and I went my way. There  
19 was no other comments. I rushed forward quicker and  
20 went into the direction of the office to tell the  
21 personnel there that this individual was on the  
22 property and that he had made some gross sexual  
23 comments about a sexual contact with a woman.

24 Q. And, evidently, the defendant went  
25 another way; is that correct?

1           A.     Pardon.

2           Q.     The defendant left the area to your  
3 knowledge?

4           A.     Yes. He went to the right and I went to  
5 the left.

6           Q.     Do you recall about approximately how  
7 much longer it was until you were contacted by the  
8 police or you saw the police in the area on the  
9 property?

10          A.     It was probably within minutes because I  
11 went up to the office and told the office personnel  
12 and next thing I knew, why the police are here and I  
13 don't know and I went right out to the street and  
14 talked to a policeman in the car, "Hey, this  
15 individual you removed him a few days before. He is  
16 back on the property. I don't think he belongs here  
17 and he came downstairs undressed and was talking  
18 about gross sexual activity with a woman."

19          Q.     Had the police indicated to you that they  
20 had arrived on the property to investigate?

21          A.     No; no. If I can jump and tell you  
22 exactly what was said by the police officer.

23          Q.     Well, the police officers will be here to  
24 testify. So we will get that from him.

25          A.     Okay.

1 Q. Did you give the police officer a  
2 description of the man who was on the property?

3 A. Yes, I did.

4 MS. LIPPIS: Thank you. I have nothing  
5 further.

6 THE COURT: Cross examination.

7 CROSS-EXAMINATION

8 BY MR. HILLMAN:

9 Q. Mr. Harper, this was December the 8th; is  
10 that correct?

11 A. Yes, sir.

12 Q. Do you remember if it was warm out or  
13 cold out that day?

14 A. It was warm.

15 Q. Were you wearing a jacket?

16 A. I can't remember that. I probably  
17 wasn't. I was working, I did hard physical labor.  
18 So even if it was cool weather to some people, it  
19 wasn't to me.

20 Q. Was Mr. Moraga wearing a jacket?

21 A. I believe he had one. I can't remember  
22 exact pieces of clothing that people wore.

23 Q. Have you talked to other people, people  
24 in the apartment complex about this case at all?

25 A. I don't think so because shortly

1 afterwards, I had left.

2 Q. No you remember talking to Jean Behl  
3 about this case?

4 A. I did have a conversation with her but it  
5 wasn't in detail. I don't know her personally.

6 Q. Do you remember about when that was in  
7 relationship to this incident?

8 A. No, I don't. I had problems at work with  
9 my employers at the time and I was in preparation to  
10 leave.

11 Q. Did you talk to Jean Behl before or after  
12 you left in your employment?

13 A. Just before. I had already terminated  
14 employment, and I was concerned, and I didn't know  
15 where I was going to be going or what I was going to  
16 do because I was wrongfully treated on my employment  
17 and I terminated my employment there.

18 Q. And you talked to Jean Behl about this  
19 incident and missing watch; is that correct?

20 A. No; no, because I don't know anything  
21 about anything except for my contact with the person  
22 I know of as Sonny.

23 Q. When did you leave your work, what date,  
24 do you recall?

25 A. I can't give you an exact date.

1 Q. Was it in December or in January?  
2 A. It was in January.  
3 MR. HILLMAN: Thank you. I have no  
4 further questions.  
5 MS. LIPPIS: I have nothing further.  
6 THE COURT: You may step down, Mr.  
7 Harper.  
8 THE WITNESS: Thank you.  
9 THE COURT: Your next witness.  
10 MS. LIPPIS: Robert Novack.  
11 ROBERT EARL NOVACK,  
12 having been first duly sworn to tell the truth, the  
13 whole truth and nothing but the truth, testified and  
14 said as follows:  
15 DIRECT EXAMINATION  
16 BY MR. MS. LIPPIS:  
17 Q. Officer, would you state your full name  
18 and spell your last name for the record, please?  
19 A. My name is Robert Earl Novack, last name  
20 N-O-V-A-C-K.  
21 Q. Are you employed with the Las Vegas  
22 Metropolitan Police Department?  
23 A. Yes, I am.  
24 Q. How long have you been so employed?  
25 A. For ten years.

1           Q.     Officer, I would like to direct your  
2     attention to December 5th, 1989. Did you have an  
3     occasion to be dispatched to the area of 1000  
4     Dumont, specifically apartment 2077

5           A.     Yes, I did.

6           Q.     And what was the purpose of you being  
7     dispatched there?

8           A.     It was in reference to a sexual assault  
9     call.

10          Q.     Would you describe for the jury what your  
11     role was? We understand that there were several  
12     officers in fact on the scene already, but what your  
13     role was in this investigation?

14          A.     I was dispatched to that area 1000 Dumont  
15     in reference to the sexual assault call. My job at  
16     that time was to make contact with the people in the  
17     area and find out exactly what was going on.

18                 I was, when I pulled up in front of the  
19     apartment complex, I was approached by a subject  
20     there who told me he was the gardner for the grounds  
21     at the Dumont complex there. He stated that he had  
22     heard some screaming and that a subject had walked  
23     out and gave me the subject's description.

24          Q.     Did you take statements from more than  
25     one person with regard to things that they may have

1     seen or heard just prior to the dispatch?

2             A.     I took a statement from the -- would you  
3     repeat the question, please?

4             Q.     Sure. Did you ever take more than one  
5     statement from witnesses in the area?

6             A.     At that time I didn't take any  
7     statements.

8             Q.     At some point did you in fact take  
9     statements?

10            A.     Yes I did.

11            Q.     From more than one person?

12            A.     I believe it was from the gardener from  
13     who I got the statement from.

14            Q.     Did you take statements from Mr. Gomez  
15     and Mr. Harper, both employees of the apartment  
16     complex? Do you recall? Do you have any  
17     independent recollection?

18            A.     No, I don't. I believe it was the next  
19     day that the statement was obtained from the  
20     gardener.

21                   MS. LIPPIS: May I approach the witness?

22                   THE COURT: Yes.

23            Q.     {BY MS. LIPPIS} Officer, I'm showing you  
24     what appears to be handwritten statements from  
25     Michael Harper and William Gomez. Is that your



1 signature at the bottom?

2 A. Yes it is.

3 Q. And you are correct, the statements were  
4 taken the following day on the 6th; is that correct?

5 A. Yes.

6 Q. Was that due to the follow-up  
7 investigation that you were doing?

8 A. Yes.

9 Q. With regard to the investigation of a  
10 sexual assault; is that correct?

11 A. Yes.

12 Q. Did you have any communication or did you  
13 interview the victim at all, Penny Hawk?

14 A. No, I didn't.

15 Q. Did you have -- I understand that  
16 Officers Mayo and Gillins got on the scene at some  
17 points or at least close by in the area did you meet  
18 with those two officers involved?

19 A. Yes, I did.

20 Q. For what purpose?

21 A. After I had, after I was approached by  
22 the gardener and given the description of the  
23 suspect who was in the area, I was then dispatched  
24 to the Players Lounge which was right around the  
25 corner from that address and the information that

1 the subject might be in that area. I went over to  
2 the Players Lounge and went inside and looked around  
3 and as I was looking for a subject fitting the  
4 description I had, I then heard that there was a  
5 suspect in custody; not in custody, but a suspect  
6 stopped at 920 -- I think it was 920 Sierra Vista by  
7 a plainclothes unit.

8 Q. Would that have been Mayo and Gillins?

9 A. Yes, it was.

10 Q. Is 920 Sierra Vista relatively close to  
11 the Dumont address?

12 A. Yes, it is.

13 Q. What type of distance are you talking  
14 about?

15 A. Half mile.

16 Q. Within a half mile?

17 A. Within a half mile.

18 Q. The gardener who gave you the  
19 description, do you recall what description you were  
20 given?

21 A. I believe it was a description of a  
22 Hispanic looking male, one of the things that I  
23 keyed on, because not too many people are out  
24 running around that the subject had a leg brace and  
25 I believe it was a gray jacket and blue jeans.

1 Q. That description that you were given, did  
2 you in turn call that into dispatch?  
3 A. That description was not given by me to  
4 dispatch that I recall.  
5 Q. Another officer?  
6 A. There was several units in the area on  
7 the same call.  
8 Q. Once you received that information, now  
9 we are at the Players Lounge again, what did you  
10 do?  
11 A. I then got in my vehicle and went over to  
12 the 920 Sierra Vista address.  
13 Q. Where Officers Mayo and Gillina had a  
14 subject stopped; is that correct?  
15 A. Yes.  
16 Q. Do you see that subject present in court  
17 today?  
18 A. Yes I do.  
19 Q. Would you point to him and describe an  
20 article of clothing that he is wearing?  
21 A. He is wearing a black shirt and dark  
22 sunglasses.  
23 MS. LIPPIS: May the record reflect  
24 identification of the defendant, your Honor?  
25 THE COURT: Yes.

1 Q. (BY MS. LIPPIS) The description that you  
2 had received from the gardener, did that match the  
3 defendant's description the one who was stopped at  
4 the area with Officers Mayo and Gillins?  
5 A. Yes, it did.  
6 Q. Did he have the leg brace with him?  
7 A. Yes, he did.  
8 Q. Was the victim brought to the scene to  
9 make an on scene identification with another  
10 officer, I believe Officer Devitte?  
11 A. Yes.  
12 Q. And to your recollection, was she able to  
13 identify this person?  
14 A. I had gotten the confirmation that she  
15 positively identified the suspect.  
16 Q. Once that identification was made, what  
17 did you do?  
18 A. I then placed him under arrest for sexual  
19 assault.  
20 Q. Did you then take him to the Clark County  
21 Detention Center where he was booked?  
22 A. Yes, I did.  
23 Q. Did you bring certain items with you  
24 today as a result of the subpoena that I had issued  
25 to you?

**PLEADING  
CONTINUES  
IN NEXT  
VOLUME**