IN THE SUPREME COURT OF THE STATE OF NEVADA

JEMAR MATTHEWS, Appellant, vs. THE STATE OF NEVADA, Respondent,	Supreme Court No. 62241 **OPENING BRIEF**

OPENING BRIEF

WILLIAM H. GAMAGE, ESQ.
Nevada Bar No. 9024
GAMAGE & GAMAGE
5580 South FT. Apache, Ste 110
Las Vegas, Nevada 89148
(702) 386-9529
(702) 382-9529 (Facsimile)
Counsel for Appellant MATTHEWS

STEVEN WOLFSON
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2750
(702) 477-2957 (Facsimile)

Counsel for Respondent

CATHERINE CORTEZ MASTO, ESQ.
ATTORNEY GENERAL
100 N. Carson Street
Carson City, Nevada 89701-4717
(775) 684-1100
Counsel for State of Nevada

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STATEMENT OF ISSUES

I. **APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SEVER HIS CLIENT FROM A JOINT TRIAL OF ALL DEFENDANTS.**

II. **SUBSTANTIAL DANGER EXISTS THAT AN INNOCENT MAN WAS CONVICTED AS THE EVIDENCE AGAINST HIM SOLELY RESTS UPON THE FLIMSY IDENTIFICATION BY TWO OFFICERS.**

STATEMENT OF THE CASE

This is an appeal, pursuant to NRS 34.575, NRAP 4(b), and NRAP 22 regarding the denial by the trial court of Appellant's post conviction writ of habeas corpus after completion of an evidentiary hearing.

On or about December 7, 2006, an Information was electronically filed in Department XVIII of the Eighth Judicial District Court charging Appellant Jemar Matthews and co-defendant Pierre Joshlin, with Conspiracy to Commit Murder (NRS 199.480, NRS 200.010, NRS 200.030); Murder with Use of a Deadly Weapon (NRS 200.010, NRS 200.030, NRS 193.165); Attempt Murder with Use of a Deadly Weapon (NRS 100.010, 200.030, 193.300, 193.165); Discharging a Firearm at or into a Structure (NRS 202.285); Possession of a Short Barreled Rifle (NRS 202.275); Conspiracy to Commit Robbery Possession of a Short Barreled Rifle (NRS 202.275); Conspiracy to Commit Robbery (NRS 199.480, 200.380); two counts of Robbery with Use of a Deadly Weapon (NRS 200.380, NRS 193.165) and two counts of Assault with a Deadly Weapon (NRS 200.471). Matthews was then arraigned on December 11, 2006, before the Arraignment Court Judge at which time Matthews pled "not guilty," and invoked his right to trial within 60 days.

A trial by jury commenced on May 7, 2007, and concluded on May 11, 2007. The jury returned a verdict of guilty on all counts on May 11, 2007. Matthews filed a timely Motion for New Trial on or about May 21, 2007, which was primarily premised on alleged prosecutorial misconduct that occurred during closing arguments. The Court heard the matter on July 9, 2007. That motion was denied. Matthews was then sentenced

to life with the possibility of parole on the murder charge with an equal and consecutive sentence for the weapon enhancement.

With regard to the other charges, Matthews was essentially sentenced to concurrent time with the exception of mandatory enhancements which ran consecutive within the counts but concurrent to the life sentence on the murder count. The Judgment of Conviction was filed on July 17, 2007. The Order denying the Motion for a New Trial was filed on September 17, 2007. A Notice of Appeal was filed on August 17, 2007. Petitioner's conviction on all counts was affirmed. The Order of Affirmance was filed on June 30, 2009

On December 14, 2010, Matthews filed his original Petition for Writ of Habeas Corpus. AA0001420. On or about July 9, 2012, Matthews filed his Supplemental Points and Authorities in Support Of Petition For Writ Of Habeas Corpus (Post-Conviction). AA1433 and AA1446 (Amended Supplement). The State opposed the writ and supplemental points and authorities on or about September 10, 2012. AA0001512. Finally, Matthews filed a Reply on or about September 24, 2012. AA1518.

An evidentiary hearing was held on or about October 12, 2012 wherein testimony was heard from trial counsel. AA1503.

Based upon the briefing of the issues and testimony taken from trial counsel, the trial court denied Matthews' writ. On or about December 4, 2012, the Findings of Fact and Conclusions of Law were filed to reflect the ruling of the Court. AA1572.

MATTHEWS, through this appeal of his trial court denial of his post conviction writ of habeas corpus now asks the Nevada Supreme Court to overturn the trial courts denial of his writ.

STATEMENT OF FACTS

Mercy Williams (hereinafter "Mercy") was killed by a single .22 caliber bullet in the evening hours of September 30, 2006, while standing with others in front of a friend's house on Balzar Street in North Las Vegas. AA420 and AA1224. Two Las Vegas police officers, Cupp and Walter, assigned to the "Problem Solving Unit" were in the vicinity and proceeded to the location where they believed the gunshots had come from. AA586 to AA591.

A short time after the shooting, a car theft took place approximately one block away. Officers Cupp and Walter located and pursued the stolen vehicle which was a silver, Lincoln Towncar with tinted windows. AA598. The victims related that this vehicle had been taken by three or more young African-American men. AA597 to AA602.

Officers Cupp and Walters engaged in a short car chase that proceeded down Martin Luther King Boulevard to Jimmy Street and concluded very suddenly on Lexington. AA599 to AA600. The officers testified that just prior to the stolen vehicle crashing into a fire hydrant, the driver of the vehicle very briefly leaned out of the door of the car while holding a rifle or shotgun. AA602-AA603. The police saw the driver exit the vehicle (or fall from the vehicle) and they ran into him with their patrol car. AA604. He then got up quickly and ran away. AA605. Two others exited the vehicle but the

officers could not see what they looked like due to the dark tint on the vehicle windows. *Id.* A chase of the fleeing individuals ensued. AA600 to AA605 and AA758 to AA760. It was late at night and very dark where this car crash had occurred. AA668 and AA760.

During the incident, Officer Cupp fired shots at one of the fleeing suspects. AA760. Not long after that, Pierre Joshlin was found in a nearby dumpster and within that same dumpster were black gloves and a .45 caliber handgun. AA764 to AA765. Officer Walter responded to the sound of Office Cupp's gunshots and abandoned his pursuit of the alleged driver consequently losing sight of that person. AA611.

Approximately one hour after the crash, Matthews, was located by a K-9 dog in some bushes in a backyard near Jimmy Street. AA698. The dog bit Matthews on the shoulder and the hand. AA712.

During the trial, the State produced no lay witnesses from either the shooting or the car robbery capable of identifying Matthews as being present at or involved in either crime. However, the identification and other evidence presented against the co-defendant, Pierre Joshlin, was substantial .AA532. Officers Walter and Cupp both admitted to only catching a "fleeting glimpse" of the fleeing driver from the stolen vehicle. AA596 to AA606 and AA809 to AA810.

Cupp only identified Matthews at in-court proceedings. AA781. Officer Walter identified Matthews as the fleeing driver after a one-on-one line-up while Matthews was in custody. AA650 to AA655. Officer Walter was allowed over objection to testify during the trial that he was "100 per cent" certain of his identification and that they had "the right guy". AA681 to AA684. Officer Walters didn't dispute, however, that

Matthews is 511" (AA655 to AA656) which conflicted with the testimony of the car theft victims who felt the driver was substantially shorter. *Id*.

No physical evidence was admitted at trial linking Matthews to the Lincoln Towncar or the weapons booked as evidence. No evidence was produced by the State linking Matthews to co-defendant, Pierre Joshlin. Indeed, Joshlin was found at a different location from Matthews an hour or so earlier that evening. AA764 to AA765 and AA698.

The State offered no evidence of motive or any connection between the defendants or the alleged "intended" victims of the shooting. Also, both Officers Walter and Cupp agreed that Matthews was hit in the legs by the police vehicle which was traveling approximately 10-15 miles an hour, yet he exhibited no discernable injuries other than dog bites after being examined once taken into custody. AA600 to AA605; AA708; and AA758 to AA760. Further, a number of inconsistent descriptions were given regarding the shooter as well as the ultimate driver of the stolen vehicle, all of which had that person at 5'7" or shorter and in long pants. AA490 to AA579. During the trial, Matthews was identified from his Nevada ID as being 5ft 11" tall. AA1248. Matthews was wearing jean shorts at the time of his arrest (AA340-AA341) and Joslin was wearing dark pants at the time of his apprehension. AA760 and AA764 to AA765.

Lastly, Matthews produced a witness to establish that he was hiding in the bushes when apprehended because he saw the police and didn't want to be arrested for violating an active restraining order which was in effect during this time period. AA1243 to AA1248. Matthews was apprehended in the bushes approximately 5 houses away from the house that the woman who procured the restraining order lived in. *Id*. The restraining

order required him to stay out of that area or face arrest. Evidence of that restraining order was presented to the jury *Id*.

ARGUMENT

This Court reviews a trial court's denial of a post conviction writ of habeas corpus (involving a claim of ineffective assistance of counsel) along with Constitutional and statutory issues at law de novo. *Evans v. State*, 117 Nev. 609, 622 (2001); *Kirksey v. State*, 112 Nev. 980, 987 (1996); and, *In re Halverson*, 169 P.3d 1161, 1172 (2007).

A clear danger exists that an innocent man was wrongfully convicted in this case due to the failure of trial counsel to move to sever Appellant Matthews from his co-defendants trial. The evidence of guilt against Mr. Matthews hinged upon the weak, unreliable identifications by two police officers who responded to a dark, nighttime shooting scene under dangerous and uncertain circumstances. Appellant Matthew was merely present in the vicinity of the shooting and attendant chase. As this Court is aware, "mere presence" at a crime scene is not enough to sustain a conviction. *Brooks v. State*, 103 Nev. 611, 747 P.2d 893 (1987).

No physical evidence was offered by the State linking Matthews to the crimes Officers Cupp and Walter were investigating. The State's case rested upon the testimony of Officers Walter and Cupp in identifying Matthews even though they had only a "fleeting glimpse" of the driver of the stolen vehicle. Officer Walter never saw the driver's face after this mere "glimpse." Further, while the driver of the stolen vehicle was struck by Officer Walter's patrol car prior to fleeing the scene, Matthews was found to have no injury upon his person other than dog bit wounds.

Likewise, police could not testify that the driver of the stolen vehicle was involved in the earlier shooting or homicide since they did not witness the shooting and the stolen car was not the car driven by the shooters. Moreover, no corroborating forensic evidence linked the bullet that caused Mercy Williams' death with the rifle police found in the grass near the suspect vehicle. It was merely the same caliber.

Aside from the "fleeting glimpse" of Officer Walter, no evidence existed to put the rifle recovered near the stolen vehicle in Matthew's possession. Quite the contrary. There was evidence introduced during the trial which tended to place this rifle in the possession of a passenger in the backseat of the suspect vehicle. The police testified that based upon their fleeting glimpses that Matthews was the driver of the stolen car. There was never any testimony that Matthews was a passenger in that car. Based upon this thin veil of evidence, No rational jury would have convicted Matthews had he been tried separately.

/ / /

I. MATTHEW' TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SEVER HIS CLIENT FROM A JOINT TRIAL OF ALL DEFENDANTS

Appellant was denied his right to due process of law and his Sixth Amendment Constitutional right to the effective assistance of counsel triggering his Constitutional rights to due process and a fair trial as guaranteed under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. Matthews' attorney was ineffective in violation of his Sixth Amendment right because he failed to attempt to sever his trial from that of Joshlin at any time prior to or during his trial.

A claim that counsel provided constitutionally inadequate representation is subject to the two-part test established by the United States Supreme Court. *Nika v. State*, 198 P.3d 839, 844 (Nev. 2008) citing to *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of trial counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88; *Kirksey v. State*, 112 Nev. 980, 987 (1996).

A defendant must demonstrate prejudice by showing a reasonable probability that but for counsel's error, the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *Thomas v. State*, 120 Nev. 37, 43-44 (2004). "The defendant carries the affirmative burden of establishing prejudice." *Riley v. State*, 110 Nev. 638, 646 (1994). A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 687-689, 694; and *see Dawson v. State*, 108 Nev. 112, 115 (1992). A court need not consider both prongs of the *Strickland* test if a defendant makes an insufficient showing on either prong. *Strickland*, 466 U.S. at 697.

FAILURE TO INVESTIGATE

In *U.S. v. Cronic*, 466 U.S. 648 (1984), the United States Supreme Court ruled that a defendant is denied effective assistance of counsel in violation of his due process rights if the attorney fails to subject the prosecution's case to meaningful adversarial testing. *Cronic*, 466 U.S. at 658. The Court reasoned that the Sixth Amendment envisions that the accused is entitled to a reasonably competent attorney whose advice is one within the range of competence required of attorneys in criminal cases. *Id*. at 657. The Constitution

guarantees an accused adequate legal assistance. *Id*. and U.S. Const. amend. VI. A criminal defendant has a constitutional guarantee of a fair trial and a competent attorney. U.S. Const. Amend V, VI, and XIV. Demonstrable errors on the part of defense counsel are not enough to trigger a constitutional violation. *Cronic*, 466 U.S. at 657. It is only when the trial process begins to lose its character as a confrontation between adversaries that the constitutional guarantee is violated. *Id*. Accordingly, the focus of the inquiry is on the adversarial process and whether the accused received a fair trial. *Id.* at 657-58.

The United States Supreme Court has clearly established that counsel has an "obligation to conduct a thorough investigation." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). In *Wiggins*, the Court also held that this duty to investigate is not a "new" rule for *Teague* purposes and should be applied retroactively. *Wiggins*, 539 U.S. at 520, *see* also *Teague v. Lane*, 489 U.S. 288, 301 (1989). *Strickland* itself clearly established that, in evaluating counsel's investigation, federal courts must objectively assess the reasonableness of counsel's performance against "prevailing professional norms." *Wiggins*, 539 U.S. at 522. This assessment "includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time" and "every effort must be made to eliminate the distorting effects of hindsight." *Id.* (internal quotations and citations omitted). Strategic choices made after less than a complete investigation are reasonable only to the extent that reasonable professional judgment supports the weakness of little or no investigation. *Strickland*, 466 U.S. at 674 and *Wiggins*, 539 U.S. at 521-22. Trial counsel's failure to investigate is only entitled deference if it was a strategic judgment based on a reasonable decision that made the

investigation unnecessary. *Strickland,* 466 U.S. at 690-691. Again, *Strickland* only requires a "reasonable probability."

The Ninth Circuit Court of Appeals has ruled on several occasions that counsel must, at a minimum, conduct a reasonable investigation so as to be able to make an informed decision regarding representation of a client. *See Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("The failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence"); *Avila v. Galaza*, 297 F.3d 911, 920 (9th Cir. 2002) (holding that defense counsel's failure to interview potential eyewitnesses to a shooting where his client was accused of being the shooter constituted deficient performance: "[C]ounsel can hardly be said to have made a strategic choice when she has not yet obtained the facts on which a decision could be made"); and, *Harris v. Wood,* 64 F.3d 1432, 1435-36 (9th Cir. 1995) (defense counsel rendered deficient performance by failing to interview witnesses identified in police reports).

The American Bar Association's Standard for Criminal Justice (ABA SCJ) § 4-4.1 has been repeatedly cited by the United States Supreme Court as a guideline for counsel's duty to investigate. *See Williams (Terry) v. Taylor*, 529 U.S. 362, 396 (2000) and *Wiggins*, 539 U.S. at 522. ABA SCJ § 4-4.1(a) opines that "[d]efense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." The investigation should also "include efforts to secure information in the possession of the prosecution and law enforcement authorities." Moreover, "[t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel

of facts constituting guilt…" ABA SCJ § 4-4.1(a). The comments to § 4-4.1 state, "[e]ffective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial . . . the lawyer needs to know as much as possible about the character and background of witnesses to take advantage of impeachment."

Here, between the time that trial counsel were appointed to represent Matthews and the filing of the Bench Brief on May 8, 2007 (AA1531), which mentions possible severance, they had more than adequate time to carefully review the discovery, to conduct their own investigation, to interview the defendant and the witnesses and to prepare for trial.

In reviewing this Bench Brief, it is apparent that prior to trial, defense counsel was well aware that the State intended to try Joshlin and Matthews together. Various evidentiary issues were brought to the court's attention in this brief including potential statements by co-defendant Joshlin which could be admissible against him but which would be inadmissible and highly prejudicial against Matthews under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) and *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968).

In realizing the harsh realities of trying co-defendants together and the danger of each violating the due process rights of the other, Matthews' defense counsel noted in the Bench Brief as follows:

> In the event, the Defense feels Mr. Matthews is being prejudiced by joinder of the parties, it is anticipated that a Motion to Sever may be made.

AA1531. While this statement was made in the context of the possibility of inadmissible statements being allowed into evidence which would negatively impact Matthews, the obvious analogy can be made to other evidence coming in against Joshlin during the joint trial which the jury could not help but consider against Matthews.

Once Matthews was linked to Joslin by the State's Opening Statement and Closing Arguments; in the minds of the jurors, Matthews was doomed. The case against Joshlin was much stronger than the case against Matthews. Joshlin was chased and tracked from the stolen vehicle to the dumpster where he was ultimately caught and arrested. A handgun and glove were also found in the dumpster where Joshlin had been hiding. The bullets found at the first crime scene were forensically linked to that handgun. The identification of Joshlin and the circumstantial evidence against him was much stronger than that against Matthews.

FAILURE TO MOVE TO SEVER

A trial judge may sever a joint trial if it appears that a defendant...is prejudiced by a joinder of ...defendants...for trial together,". NRS 174.165(1); *Chartier v. State*, 124 Nev. 760, 191 P.3d 1182 (2008). Moreover, a district court should grant a severance where there exists a serious risk that "a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.*, citing *Zafiro v. U.S.*, 506 U.S. 534, 539, 113 S.Ct. 933 (1993). A decision to grant a severance rests within the discretion of the trial court. *Buff v. State*,

114 Nev. 1237,1245; 970 P.2d 564, 569 (1998), citing *Amen v. State*, 106 Nev. 749, 755-756, 801 P.2d 1354, 1359 (1990).

In determining issues regarding severance pursuant to NRS 174.165(1), a district court looks at the facts of each case individually. *Chartier*, 124 Nev. at 765, 191 P.3d at 1185. Spill-over prejudice alone is generally not sufficient to demonstrate substantial prejudice. *See Lisle v. State*, 113 Nev. 679, 689-90, 941 P.2d 459, 466 (1997), overruled on other grounds by *Middleton v. State*, 114 Nev. 1089, 1117 (n. 9), 968 P.2d 296, 315 (n. 9)(1998).

The danger to be guarded against is that the jury may not separate the offenders and the offenses, and may not separately assess each defendant's culpability. *See U.S. v. Saleh*, 875 F.2d 535, 538 (6th Cir. 1989). "In assessing prejudice, the ultimate issue is whether the jury can reasonably be expected to compartmentalize the evidence." *Lisle v. State*, 113 Nev. 679, 689; 941 P.2d 459 (1997), *cert. denied*, 525 U.S. 830 (1998); *Jones v. State*, 111 Nev. 848, 854, 899 P.2d 544 (1995). Given the nature of the crimes charged, the utter lack of any reliable evidence against Matthews and the inherent unreliablity of eye witness testimony, joining Joshlin for trial purposes destroyed Matthews' chances to have his finding of innocence or guilt considered solely upon the evidence presented against him.

Here, it is readily apparent that if trial counsel had moved to sever the trials, only good things could have happened. First, the issue would have been preserved for appeal or post-conviction proceedings. Second, the motion could have been granted and the

danger of undue prejudice to Matthews based upon joinder with Joshlin would have been avoided.

The undue prejudice to Matthews is expressly manifested in the prosecutors repeated linking of Matthews and Joshlin time after time in closing argument. The defendants are constantly referred to as "they" and the evidence that brings "them" here. Both are lumped together almost on all discussion of evidence with this joint characterization repeated again and again to the jury. *See* AA1344 to AA1377. Trial Counsel saw this link coming yet failed to do anything about it even though this linking made a Motion to Sever imperative. Unfortunately, the motion was never made.

While strategic decisions are seldom questioned, given the strength of the case against Joshlin and the relatively weak case against Matthews, trial counsel should have moved to sever the cases in order to protect Matthews' rights. The failure to file and to pursue a motion to sever the cases constituted ineffective assistance of counsel as that failure fell below the standard set in *Strickland*. The prejudice to Matthews was obvious from the nature of the foreseeable argument which the State made as they tried to link the evidence against Joshlin to both defendants. Not linking the two defendants would have enhanced Matthews chances to mount a successful defense and enhanced the probability of a different result at trial.

Matthews joinder of the defendant for trial was obviously prejudicial and resulted in a substantial injurious effect on the verdict. The jury heard evidence that Joshlin, was found in a dumpster almost immediately after the shooting and that a gun used in the shooting was found underneath him when he was extracted from it. That evidence alone

is much stronger than the evidence that was presented against Matthews by the State yet when considered together by the same jury, its effect was to deny Matthews a fair trial and due process because he was painted by the prosecutor's broad brush-strokes. *See Chartier v. State*, 124 Nev. 760 (2012). In the *Chartier*, the Nevada Supreme Court reversed the conviction of a defendant holding that joinder of the parties violated the defendant's right to a fair trial by preventing the jury from making a reliable judgment as to his guilt or innocence. This was exactly the same prejudice in Matthews' trial.

II. SUBSTANTIAL DANGER EXISTS THAT AN INNOCENT MAN WAS CONVICTED AS THE EVIDENCE AGAINST HIM SOLELY RESTS UPON THE FLIMSY IDENTIFICATION BY THE TWO OFFICERS

It is important for this Court to note that the record amply supports the premise that Matthews was convicted almost solely by the eyewitness identification of the two responding police officers. Counsel respectfully submits that criminal trial law has long recognized the risk of inaccurate eyewitness identification testimony.

> A great upsurge in eyewitness memory research began in the early 1970's, and much of this research has revealed a disturbingly high error rate and ever more ways in which eyewitness identifications and recollections are susceptible to error.

Michael R. Leipe, The Case for Expert Testimony About Eyewitness Memory. 1 Psychol. Pub. Pol'y & L. 909 (1995). The Utah Supreme Court in *State v. Long*, 721 P.2d 483, 488-490 (Utah 1986) has summarized the research in this area in the following:

> The literature [referred to *supra* See F. Woocher, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977); J. Bibicoff, Seeing is Believing? The Need for Cautionary Jury Instructions on the Unreliability of Eyewitness Identification Testimony, 11 San Fernando Valley L. Rev. 95 (1983); R. Sanders, Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards, 12

Am. J. Crim. Law 189 (1984).] is replete with empirical studies documenting the unreliability of eyewitness identification. See generally P. Wall, Eyewitness Identification in Criminal Cases (1965); E. Loftus, Eyewitness Testimony (1979). There is no significant division of opinion on the issue. The studies all lead inexorably to the conclusion that human perception is inexact and that human memory is both limited and fallible. We therefore have concluded that a more rigorous approach to cautionary instructions than this court has heretofore followed is appropriate. *See State v. Malmrose,* 649 P.2d at 62-66 (Stewart, J., dissenting)...

Some background is necessary. Anyone who stops to consider the matter will recognize that the process of perceiving events and remembering them is not as simple or as certain as turning on a camera and recording everything the camera sees on tape or film for later replay. What we perceive and remember is the result of a much more complex process, one that does not occur without involving the whole person, and one that is profoundly affected by who we are and what we bring to the event of perception. *See* R. Buckhout, Eyewitness Testimony, 15 Jurimetrics J. 171, 179 (1975) (reprinted from 231 Scientific American 23 (Dec. 1974)).

Research on human memory has consistently shown that failures may occur and inaccuracies creep in at any stage of what is broadly referred to as the "memory process." This process includes the acquisition of information, its storage, and its retrieval and communication to others. These stages have all been extensively studied in recent years, and a wide variety of factors influencing each stage have been identified. *See* Loftus, *supra*, at chs. 3-5; Buckhout, *supra*, at 172-81.

During the first or acquisition stage, a wide array of factors have been found to affect the accuracy of an individual's perception. Some of these are rather obvious. For example, the circumstances of the observation are critical: the distance of the observer from the event, the length of time available to perceive the event, the amount of light available, and the amount of movement involved. Buckhout, *supra*, at 173. However, perhaps the more important factors affecting the accuracy of one's perception are those factors originating within the observer. One such limitation is the individual's physical condition, including both obvious infirmities as well as such factors as fatigue and drug or alcohol use. Another limitation which can affect perception is the emotional state of the observer. Contrary to much accepted lore, when an observer is experiencing a marked degree of stress, perceptual abilities are known to decrease significantly. *See, e.g., Woocher, supra*, at 979 n.29.

A far less obvious limitation of great importance arises from the fact that the human brain cannot receive and store all the stimuli simultaneously presented to it.

This forces people to be selective in what they perceive of any given event. *See* Woocher, *supra*, at 976-77. To accomplish this selective perception successfully, over time each person develops unconscious strategies for determining what elements of an event are important enough to be selected out for perception. The rest of the stimuli created by the event are ignored by the brain. These unconscious strategies of selective perception work quite well in our day-to-day lives to provide us with only the most commonly useful information, but the strategies may result in the exclusion of information that will later prove important in a court proceeding. For example, the significance of the event to the witness at the time of perception is very important. Buckhout, *supra*, at 172-73. Thus, people usually remember with some detail and clarity their whereabouts at the time they learned of John F. Kennedy's assassination. Those same people, however, are generally less accurate in their descriptions of people, places, and events encountered only recently in the course of their daily routines. For instance, few of us can remember the color or make of the car that was in front of us at the last traffic signal where we waited for the light to turn green. An everyday situation such as this presents an excellent opportunity to observe, and yet, while such information may be a critical element in a criminal trial, our process of selective perception usually screens out such data completely. To the extent that court proceedings may focus on events that were not of particular importance to the observer at the time they occurred, then, the observer may have absolutely no memory of the facts simply because he or she failed to select the critical information for perception.

Another mechanism we all develop to compensate for our inability to perceive all aspects of an event at once is a series of logical inferences: if we see one thing, we assume, based on our past experience, that we also saw another that ordinarily follows. This way we can "perceive" a whole event in our mind's eye when we have actually seen or heard only portions of it. *Id*. at 980. The implications of this memory strategy for court proceedings are similar to those of selective perception.

Other important factors that affect the accuracy of a viewer's perception, and which are unique to each observer, include the expectations, personal experience, biases, and prejudices brought by any individual to a given situation. Buckhout, *supra*, at 175-76. A good example of the effect of preconceptions on the accuracy of perception is the well-documented fact that identifications tend to be more accurate where the person observing and the one being observed are of the same race. Wells, Applied Eyewitness-Testimony Research: System Variables and Estimator Variables, 36 J. Personality & Social Psych. 1546, 1550 (1978); Note, Cross Racial Identification Errors in Criminal Cases, 69 Cornell L. Rev. 934 (1984); Bibicoff, *supra*, at 101.

The memory process is also subject to distortion in the second or retention stage, when information that may or may not have been accurately perceived is stored in

the memory. Research demonstrates that both the length of time between the witness's experience and the recollection of that experience, and the occurrence of other events in the intervening time period, affect the accuracy and completeness of recall. Just as in the perception stage, where the mind infers what occurred from what was selected for perception, in the retention stage people tend to add extraneous details and to fill in memory gaps over time, thereby unconsciously constructing more detailed, logical, and coherent recollections of their actual experiences. Thus, as eyewitnesses wend their way through the criminal justice process, their reports of what was seen and heard tend to become "more accurate, more complete and less ambiguous" in appearance. Buckhout, supra, at 179. The implications of this mental strategy for any criminal defendant whose conviction hinges on an eyewitness identification are obvious. *See* Woocher, *supra*, at 983 n.53.

Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection. K. Deffenbacher, Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?, 4 Law and Human Behavior 243 (1980); Lindsay, Wells, Rumpel, Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?, 66 J. Applied Psych. 79, 80-82 (1981); Bibicoff, *supra*, at 104 n.35. In fact, the accuracy of an identification is, at times, inversely related to the confidence with which it is made. Buckhout, *supra*, at 184.

Finally, the retrieval stage of the memory process--when the observer recalls the event and communicates that recollection to others--is also fraught with potential for distortion. For example, language imposes limits on the observer. Experience suggests that few individuals have such a mastery of language that they will not have some difficulty in communicating the details and nuances of the original event, and the greater the inadequacy, the greater the likelihood of miscommunication. An entirely independent problem arises when one who has accurately communicated his recollection in a narrative form is then asked questions in an attempt to elicit a more complete picture of the event described. Those asking such questions, by using a variety of subtle and perhaps unconscious questioning techniques, can significantly influence what a witness "remembers" in response to questioning. And as the witness is pressed for more details, his responses become increasingly inaccurate. *See* Loftus, Reconstructing Memory: The Incredible Eyewitness, 15 Jurimetrics J. 188 (1975). In addition, research has documented an entirely different set of no less significant problems that relate to the suggestiveness of police lineups, showups, and photo array. *See, e.g.*, Buckhout, *supra*, at 179-87.

Long, 721 P.2d at 488-490 (emphasis added).

Here, the danger that Matthews may have been wrongly convicted is at its peak in a case almost solely premised upon his eyewitness identification in the courtroom by the arresting officers; especially when studies may suggest that the veracity of an identification may be inversely proportionate to the "confidence in which it is made". *Long*, 721 P.2d at 489. Certainly, without joinder of the direct and damning evidence in Joshlin's possession, Matthews would never have been convicted of these crimes. Therefore, counsel respectfully submits that the Court should consider these factors in weighing Appellants claims of ineffective assistance of counsel and in weighing the foreseeable and necessary step of severing Matthews' trial from Joshlins.

CONCLUSION

Based upon the above and foregoing, Appellant Matthews respectfully requests that this Court vacate the Findings of Facts and Conclusions of Law of the trial court in denying Appellants writ of habeas corpus.

Dated this 15th day of July, 2013.

Respectfully Submitted,

/s/ William H. Gamage, Esq.

William H. Gamage, Esq.
Nevada Bar No. 9024
5580 S. Ft. Apache, Ste 110
Las Vegas, Nevada 89148
(702) 386-9529
(702) 382-9529 (facsimile)
Appointed Counsel to Defendant

CERTIFICATE OF COMPLIANCE (NRAP 28.2 AND 32(a)(8))

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

I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman, 14 point type.

I further certify that this brief complies with the page or type limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

Dated this 9th day of August, 2013.

GAMAGE & GAMAGE

/s/ William H. Gamage, Esq.

_____

William H. Gamage, Esq.
Nevada Bar No. 9024
5580 S. Ft. Apache, Ste 110
Las Vegas, Nevada 89148
(702) 386-9529
(702) 382-9529 (facsimile)
Appointed Counsel to Defendant

CERTIFICATE OF SERVICE

I hereby certify and affirm that I am an employee of GAMAGE & GAMAGE, and that I served a copy of the foregoing **Appellant's Opening Brief** to the parties identified below:

XX	Through the Courts electronic filing system,
	by placing the same in the United States Mail via Certified Mail, Return Receipt Requested, with postage prepaid attached thereto,
	via telephonic facsimile transmission
	Federal Express/Express Mail, or other overnight delivery,
	via hand-delivery

and addressed for delivery to:

STEVEN WOLFSON
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671- 2501
(702) 455-2294 (Facsimile)
Respondent

CATHERINE CORTEZ MASTO, ESQ.
ATTORNEY GENERAL
100 N. Carson Street
Carson City, Nevada 89701-4717
(775) 684-1100

DATED: This 9th day of August, 2013.

/s/ William H. Gamage, Esq.
_____
Employee