

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEMAR MATTHEWS, vs. THE STATE OF NEVADA, 	Appellant, Respondent,	Supreme Court No. 62241 APPELLANT'S APPENDIX VOLUME VII	Electronically Filed Aug 14 2013 01:53 p.m. Tracie K. Lindeman Clerk of Supreme Court
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APPELLANT'S INDEX VOLUME VII

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2013, a true and copy of above and foregoing APPELANTS APPENDIX VOL. VII was served on all counsel via the Court's electronic filing system to all counsel of record listed below:

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INDEX OF APPELLANT'S APPENDIX

A. Transcript of Jury Trial, Day 1	Vol. 1 AA001-Vol. 2 AA0360
B. Transcript of Jury Trial, Day 2	Vol. 2 AA0361- Vol. 4 AA0725
C. Transcript of Jury Trial, Day 3	Vol. 4 AA0726- Vol. 5 AA1097
D. Transcript of Jury Trial, Day 4	Vol. 5 AA1097- Vol. 6 AA1419
E. Petition For Writ of Habeas Corpus	Vol. 6 AA1420- AA1430
F. Order for Petition of Writ of Habeas Corpus	Vol. 6 AA1431- AA1432
G. Supplemental Points And Authorities in Support of Petition for Writ of Habeas Corpus	Vol. 6 AA1433-Vol. 7 AA1445
H. Amended Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus	Vol. 7 AA1446- AA1511
I. State's Response to Defendant's Supplemental Points and Authorities in Support of Petition for Habeas Corpus	Vol. 7 AA1512- AA1517
J. Reply to State's Response to Defendant's Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus	Vol. 7 AA1518-AA1532
K. Recorder's Transcript of Proceedings: Hearing on Writ of Habeas Corpus	Vol. 7 AA1533- AA1571
L. Findings of Fact, Conclusions of Law and Order on Writ of Habeas Corpus	Vol. 7 AA1571- AA1578

1 challenged conduct on the facts of the particular case, viewed as if at the time of
2 counsel's conduct." Strickland at 690.

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4 must prove the disputed factual allegations underlying his effective-assistance claim
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13 States Supreme Court in Strickland and Nevada Supreme Court in Love and the
14 rights guaranteed to Matthews under the Fifth, Sixth and Fourteenth Amendments of
15 the Constitution of the United States.

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

20 In reviewing this Bench Brief, it is apparent that prior to trial, defense counsel
21 were well aware that the State intended to try Pierre Joshlin and Jamar Matthews
22 together. Various evidentiary issues were brought to the court's attention in this
23 brief including potential statements by co-defendant Joshlin which could be
24 admissible against him but which would be inadmissible and highly prejudicial
25 against Matthews under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354
26 (2004) and Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968).

27 In realizing the harsh realities of trying co-defendants together and the danger
28 of each violating the due process rights of the other, Matthews' defense counsel noted

1 in the Bench Brief as follows:

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

5 (See Exhibit 4 attached hereto at page 8)

6 While this statement was made in the context of the possibility of inadmissible
7 statements being allowed into evidence which would negatively impact Mr. Matthews,
8 the obvious analogy can be made to other evidence coming in against Joshlin during
9 the joint trial which the jury could not help but consider against Mr. Matthews.
10 Realistically, you cannot unring the bell once it has been rung even with a cautionary
11 jury instruction and once Matthews was linked to Joslin, not by the evidence but
12 only by the State's Opening Statement and Closing Arguments, in the minds of the
13 jurors, Matthews was doomed.

14 The case against Joshlin was much stronger than the case against Matthews.
15 Joshlin was chased and tracked from the stolen vehicle to the dumpster where he
16 was ultimately caught and arrested. A handgun and glove were also found in the
17 dumpster where Joshlin had been hiding. The bullets found at the first crime scene
18 were forensically linked to that handgun. The identification of Joshlin and the
19 circumstantial evidence against him was much stronger than that against Matthews.
20 Given the nature of the crimes charged, associating Matthews with Joshlin really
21 hurt Matthews' chances to have his innocence or guilt considered solely upon the
22 evidence presented against him.

23 The problem with misjoinder of defendants is that the jury may not separate
24 the offenders and the offenses, and may not separately assess each defendant's
25 culpability. See United States v. Saleh, 875 F.2d 535, 538 (6th Cir. 1989). "In
26 assessing prejudice, the ultimate issue is whether the jury can reasonably be
27 expected to compartmentalize the evidence." Lisle v. State, 113 Nev. 679, 689, 941
28 P.2d 459 (1997), cert. Denied, 525 U.S. 830 (1998); Jones v. State, 111 Nev. 848,
854, 899 P.2d 544 (1995).

1 The analysis should begin with the question of whether there was prejudice to
2 Matthews by not having his trial severed from that of Joshlin? What benefit was
3 there for Matthews not to file a motion to sever and to have a joint trial? Petitioner
4 asserts that there was no benefit to Matthews and that there was a great likelihood of
5 undue prejudice and deprivation of his statutory rights and his state and federal due
6 process rights to a fair trial by not addressing this prejudicial joinder.

7 While hindsight is nearly always perfect, it is obvious that if trial counsel had
8 moved to sever the trials, only good things could have happened. First, the issue
9 would have been preserved for appeal or post-conviction proceedings. Second, the
10 motion could have been granted and the danger of undue prejudice would have been
11 avoided.

12 The foreseeable undue prejudice manifested itself when the prosecutor, in her
13 zealously, joined Matthews and Joshlin time after time in her rebuttal argument.
14 She referred constantly to "they" and the evidence that brings "them" here. She
15 lumped **them** together and hammered that characterization to the jury. Here is an
16 example of a portion of her rebuttal argument which illustrates this point:

17 Now it's the end of the trial. At the beginning of trial all you hear about
18 is how **they're** presumed innocent, believe **they're** innocent, innocent,
19 innocent, innocent, you haven't heard anything, you don't know
20 anything, they're innocent. No you know everything.

21 How innocent do **they** look to you? Take a look over there. How
22 innocent do **they** look? You heard all the evidence.

23 Take a look at **them**. Stare at **them**. They're on trial here. And
24 you heard all of the evidence that brings **them** here.

25 (TT, 5/11/07, Portion of Jury Trial - Day 5, p. 66)

26 The prosecutor continues in her rebuttal argument to link the two defendants
27 together but by doing so again illustrates petitioner's point that due process required
28 him to be tried separately and his attorney's failure to do so caused him prejudice.

They put **themselves** there that night, one (Joshlin) hiding in a
dumpster shamelessly, with no excuse for why he (Joshlin) happens to
be on top of the murder weapon. . . ."

1 (TT, 5/11/07, Portion of Jury Trial - Day 5, p. 67)

2 The foreseeability of this argument linking these two defendants together
3 should have been and was obvious to defense trial counsel before and during the trial
4 and should have made the need for motion to sever the trials imperative.
5 Nevertheless, the motion was never made.

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

15 **CONCLUSION**

16 For the reasons set forth in the original points and authorities and in this
17 supplement thereto, Petitioner asserts that this petition should be granted or in the
18 alternative that this Court should grant Petitioner an evidentiary hearing so that
19 facts can be elicited on his allegation that the failure to file and pursue a motion to
20 sever denied him due process and a fair trial in violation of his rights as guaranteed
21 under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United
22 States.

23 DATED this 9th day of July, 2012.

24 CARMINE J. COLUCCI, CHTD.

25 
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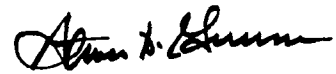
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DISTRICT COURT
CLARK COUNTY, NEVADA

11 JEMAR MATTHEWS,

12 Petitioner,

13 vs.

14 RENEE BAKER, WARDEN, ELY STATE
15 PRISON,

16 Respondent.

CASE NO. C228460
DEPT NO. XVIII

**AMENDED SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT
OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

AMENDED ONLY TO REPAGINATE AND ADD MISSING TEXT TO PAGE 5

Petitioner, JEMAR MATTHEWS (hereinafter Matthews), hereby files these supplemental points and authorities in support of his Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner requests that these be considered in addition to the original points and authorities filed with the original Petition for Writ of Habeas Corpus (Post-Conviction).

I.

STATEMENT OF THE CASE

An Amended Criminal Complaint was filed in open court on October 17, 2006, charging petitioner, Matthews, along with 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); Two counts of Attempt Murder with Use of a Deadly Weapon (NRS 100.010, 200.030,

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1 193.300, 193.165); Discharging a Firearm at or into a Structure (NRS 202.285);
2 Possession of a Short Barreled Rifle (NRS 202.275); Conspiracy to Commit Robbery
3 (NRS 199.480, 200.380); two counts of Robbery with Use of a Deadly Weapon (NRS
4 200.380, NRS 193.165) and two counts of Assault with a Deadly Weapon (NRS
5 200.471).

6 On November 30, 2006, a preliminary hearing was held. At the end of the
7 hearing, the State moved to amend the Amended Criminal Complaint to reflect one
8 additional count of Attempt Murder (Maurice Hickman) and drop the Discharge of a
9 Firearm charge. Following the preliminary hearing, Matthews was held to answer of
10 all counts in the Amended Criminal Complaint.

11 On or about December 7, 2006, an Information was electronically filed in
12 Department XVIII of the Eighth Judicial District Court with the same charges bound
13 over in the Justice Court.¹ Matthews was then arraigned on December 11, 2006,
14 before the Arraignment Court Judge at which time Matthews pled "not guilty," and
15 invoked his right to trial within 60 days. The trial date was set for February 12,
16 2007, in front of Judge Elizabeth Halverson.

17 A calendar call was held on February 7, 2007, and during that proceeding, the
18 trial date was reset to May 7, 2007. In the interim, the State filed a Motion for
19 Buccal Swabs which was heard and granted on April 20, 2007. A trial by jury
20 commenced on May 7, 2007, and concluded on May 11, 2007. The jury returned a
21 verdict of guilty on all counts on May 11, 2007.

22 Matthews filed a timely Motion to New Trial on or about May 21, 2007, which
23 was mostly premised on alleged prosecutorial misconduct which occurred during
24 closing arguments. The Court heard that matter on July 9, 2007. That motion was
25 denied. Matthews was then sentenced to life with the possibility of parole on the
26

27 ¹See court minutes attached hereto as Exhibit 1 for the chronology of the
28 district court proceedings.

1 murder charge with an equal and consecutive sentence for the weapon enhancement.
2 With regard to the other charges, Matthews was essentially sentenced to concurrent
3 time with the exception of mandatory enhancements which ran consecutive within
4 the counts but concurrent to the life sentence on the murder count.²

5 The Judgment of Conviction was filed on July 17, 2007. The Order denying the
6 Motion for a New Trial was filed on September 17, 2007. A Notice of Appeal was filed
7 on August 17, 2007. Petitioner's conviction on all counts was affirmed. The Order of
8 Affirmance was filed on June 30, 2009.³

9 **II.**

10 **FACTS OF THE CASE**

11 Mercy Williams (hereinafter "Mercy") was killed by a single .22 caliber bullet in
12 the evening hours of September 30, 2006, while standing with others in front of a
13 friend's house on Balzar Street in North Las Vegas (Trial Transcript, hereinafter
14 referred to as TT 5/8/07, p. 9; TT, 5/10/07, p. 126). Two Las Vegas police officers,
15 Cupp and Walter, assigned to the "Problem Solving Unit" were in the vicinity and
16 proceeded to the location where they believed the gunshots had come from (TT,
17 5/8/07, pp. 226-231).

18 A short time after the shooting, a car theft took place approximately one block
19 away. The victims, Geishe Orduno was the passenger and her friend, Melvin Bolden
20 was the driver (TT, 5/8/07, pp. 178-182). Officers Cupp and Walter located and
21 pursued the stolen vehicle which was a silver, Lincoln Towncar with tinted windows.
22 The victims related that this vehicle had been taken by three or more young African-
23 American men (TT, 5/8/07, pp. 237-242).

24 Officers Cupp and Walters engaged in a short car chase that proceeded down
25

26 ²See Judgment of Conviction attached hereto as Exhibit 2.

27 ³The issues considered on appeal are set forth in Section III herein. The Order
28 of Affirmance is attached hereto as Exhibit 3.

1 Martin Luther King Boulevard to Jimmy Street and concluded very suddenly on
2 Lexington. The officers testified that just prior to the stolen vehicle crashing into a
3 fire hydrant, the driver of the vehicle very briefly leaned out of the door of the car
4 while holding a rifle or shotgun. The police saw the driver exit the stolen vehicle and
5 they directed their car towards the driver, striking him and causing him to fall to the
6 ground. He then got up quickly and ran away. Two other individuals also exited the
7 stolen vehicle and fled on foot. A chase of the fleeing individuals ensued (TT, 5/8/07,
8 pp. 239-245, TT 5/9/07, pp. 33-35). It was late at night and very dark where this
9 car crash had occurred.

10 During the incident, Officer Cupp fired shots at one of the fleeing suspects.
11 Not long after that, Pierre Joshlin was found in a nearby dumpster and within that
12 same dumpster were black gloves and a .45 caliber handgun (TT, 5/9/07, pp. 39-41).
13 Officer Walter responded to the sound of Office Cupp's gunshots and abandoned his
14 pursuit of the alleged driver consequently losing sight of that person (TT, 5/8/07, p.
15 251).

16 Approximately an hour later, Jamar Matthews, petitioner herein, was located
17 by a K-9 dog in some bushes in a backyard on Jimmy Street (TT, 5/8/07, pp. 330-
18 353). Matthews had been bitten on the shoulder and the hand by the police dog (TT,
19 5/8/07, p. 352). A single red glove was recovered from Eleanor Street (TT, 5/9/07,
20 p. 236). A rifle was located near the original location of the stolen vehicle's crash into
21 the fire hydrant (TT, 5/9/07, p. 247).

22 During the trial, the State did not produce any lay witnesses from either the
23 shooting, or the car robbery, and who were able to identify Matthews as being present
24 at or involved in either crime. However, the identification and other evidence
25 presented against the co-defendant, Pierre Joshlin, was much stronger (TT, 5/8/07,
26 P. 172).

27 Officers Walter and Cupp both admitted to only catching a "fleeting glimpse" of
28 the fleeing driver from the stolen vehicle (TT, 5/8/07, p. 259, TT 5/9/07, p. 85).

1 Officer Cupp only identified Matthews at in-court proceedings (TT, 5/9/07, p. 56).
2 Officer Walter identified Matthews as the fleeing driver after a one-on-one line-up
3 while Matthews was in custody (TT, 5/8/07, p. 290-295). Officer Walter was allowed
4 over objection to testify during the trial that he was "100 per cent" certain of his
5 identification and that they had "the right guy" (TT, 5/8/07, p. 324). Officer Walters
6 didn't dispute, however, that Matthews is 5'11" (TT, 5/8/07, p. 296) which conflicted
7 with the testimony of the car theft victims who felt the driver was substantially
8 shorter. Additionally, during the trial, the State elicited that Officer Cupp had
9 identified Matthews in a prior proceeding. An objection was made, and it was
10 sustained (TT, 5/9/07, pp. 56-57). Nevertheless, the State brought it up again in its
11 closing argument (TT, 5/11/07, p. 80).

12 There wasn't any physical evidence admitted at trial that linked Matthews to
13 any of the weapons that were retrieved. There wasn't any evidence produced by the
14 State that linked Matthews to co-defendant, Pierre Joshlin. Indeed, Joshlin was
15 found at a different location from Matthews an hour or more earlier that evening.
16 The State did not offer any evidence of motive or any connection between the
17 defendants and the allegedly "intended" victims of the shooting.

18 Also, both Officers Walter and Cupp agreed that Matthews was hit in the legs
19 by the police vehicle which was traveling approximately 10-15 miles an hour, Yet
20 there weren't any injuries to Matthews' legs or body, except for the dog bites, when he
21 was taken into custody (TT, 5/8/07, pp. 273, 374); TT 5/9/07, p. 84). A number of
22 inconsistent descriptions were given regarding the shooter as well as the ultimate
23 driver of the stolen vehicle, all of which had that person at 5'7" or shorter and in long
24 pants (TT, 5/8/07, pp. 130-219). During the trial, Matthews was identified from his
25 Nevada ID as being 5'11" tall (TT, 5/10/07, p. 150). Matthews was wearing jean
26 shorts at the time of his arrest (TT, 5/8/07, pp. 340-341). Joslin was wearing dark
27 pants at the time of his apprehension (TT, 5/7/07, p. 307).

28 Additionally, the defense called a witness who testified at trial, in order to

1 establish that the reason that Matthews was hiding in the bushes when he was
2 apprehended, was because he saw the police and didn't want to be arrested for
3 violating an active restraining order which was in effect during this time period. The
4 restraining order required him to stay out of that area or face arrest. Evidence of
5 that restraining order was presented to the jury (TT, 5/10/07, pp. 142-170).

6 III.

7 **ISSUES RAISED ON DIRECT APPEAL**

8 Matthews previously appealed his conviction to the Nevada Supreme Court.
9 The Case Appeal Statement was filed on August 17, 2007. The following issues were
10 raised and decided on appeal.

11 1. Whether there sufficient evidence to convict the defendant on any of the
12 offenses?

13 2. Whether the State committed prosecutorial misconduct by holding up and
14 referring to the defendant's criminal "SCOPE" history and suggesting to the jury that
15 he doesn't look like an innocent person, that he doesn't dress nice, etc?

16 3. Whether it was error to allow the so-called "expert" in gun residue to testify
17 regarding a glove unconnected to any crime?

18 4. Whether the trial court erred in allowing the key witness for the State
19 (Officer Cupp) to offer his opinion that they "had the right guy?"

20 5. Whether the court erred by claiming it had no discretion to order additional
21 peremptory challenges?

22 IV.

23 **ARGUMENT**

24 The evidence of guilt against Mr. Matthews in this case was not overwhelming.
25 His conviction was based upon the weak, unreliable identifications of two police
26 officers who responded to a dark, night shooting in the neighborhood that they were
27 patrolling and Mr. Matthew's mere presence in the vicinity of said shooting. "Mere
28 presence" at a crime scene is not enough to sustain a conviction. Brooks v. State,

1 103 Nev. 611, 747 P.2d 893 (1987).

2 The State's case rested upon the testimony of Officers Walter and Cupp. Both
3 officers only got a "fleeting glimpse" of the driver of the stolen vehicle who they
4 identified as Matthews . Walter never saw the driver's face after this mere "glimpse."

5 It is important to note also that there was a collision between the police car
6 driven by Officer Crupp and the driver of the stolen vehicle which resulted in the
7 driver being forcefully knocked down by the police car. At the time of his arrest, Mr.
8 Matthews did not have any injuries consistent with being hit by a car. His only
9 injuries worth noting were from the police dog bites.

10 Further, the police officers could not testify that the driver of the stolen vehicle
11 was involved in the earlier shooting and resulting homicide since they did not witness
12 the shooting and the stolen car was not the car driven by the shooters. Nor was
13 there any corroborating forensic evidence linking the bullet that caused Mercy
14 Williams' death with the rifle found by the police in the grass near the suspect
15 vehicle. It was merely the same caliber.

16 Aside from the "fleeting glimpse" of Officer Walter, there wasn't any evidence to
17 ever put the rifle recovered near the stolen vehicle in Matthew's possession. Quite
18 the contrary. There was evidence introduced during the trial which tended to place
19 this rifle in the possession of a passenger in the backseat of the suspect vehicle. The
20 police testified that based upon their fleeting glimpses that Matthews was the driver
21 of the stolen car. There was never any testimony that Matthews was a passenger in
22 that car.

23 **INEFFECTIVE ASSISTANCE OF COUNSEL**

24 Petitioner has raised, in his original Petition for Writ of Habeas Corpus (Post-
25 Conviction), the issue of whether he was denied his right to due process of law and
26 his Sixth Amendment Constitutional rights to the effective assistance of counsel
27 which would have triggered his constitutional rights to due process and a fair trial as
28 guaranteed under the Fifth, Sixth and Fourteenth Amendments of the Constitution of

1 the United States. Petitioner has asserted that his trial counsel was ineffective in
2 violation of his Sixth Amendment right because his trial counsel failed to attempt to
3 sever his trial from that of Joshlin at any time prior to or during his trial.

4 Petitioner has asserted that being forced to go to trial with this co-defendant
5 denied him a fair trial and due process. Petitioner's attorney did not even request to
6 sever the trials, despite the fact that he acknowledged that the need might arise and
7 if so that he would file for it.⁴

8 Ineffective assistance of counsel claims are properly raised for the first time in
9 a timely first post-conviction petition. This petition has been timely filed. The
10 standard for review has been set forth in Strickland v. Washington, 466 U.S. 668,
11 104 S.Ct. 2052 (1984). That case states the two-prong test that must be satisfied
12 before a court can rule that counsel has been constitutionally ineffective.

13 In State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993), the Nevada
14 Supreme Court adopted the standard announced in Strickland. Under this test, in
15 order to successfully prove a claim of ineffective assistance of counsel, the defendant
16 must show first that, his counsel's representation fell below the objective standard of
17 reasonableness and second, that but for counsel's errors, there is a reasonable
18 probability that the result of the proceedings would have been different. See
19 Strickland, 466 U.S. at 687-688 and 684, 104 S.Ct. At 2065 and 2068. See also
20 Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004)

21 In considering whether trial counsel was effective, the court must determine
22 whether counsel made "sufficient inquiry into the information which is pertinent to
23 his client's case." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996)
24 citing Strickland. The court will then make an inquiry into whether counsel made a
25 reasonable strategy decision on how to proceed. See Doleman at 846. The judge
26 considering a petitioner's claim must "... judge the reasonableness of counsel's
27

28 ⁴See Bench Brief filed on May 8, 2007, attached hereto as Exhibit 4.

1 challenged conduct on the facts of the particular case, viewed as if at the time of
2 counsel's conduct." Strickland at 690.

3 In Means, *supra*, the court went on to hold that a habeas corpus petitioner
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16 was ultimately caught and arrested. A handgun and glove were also found in the
17 dumpster where Joshlin had been hiding. The bullets found at the first crime scene
18 were forensically linked to that handgun. The identification of Joshlin and the
19 circumstantial evidence against him was much stronger than that against Matthews.
20 Given the nature of the crimes charged, associating Matthews with Joshlin really
21 hurt Matthews' chances to have his innocence or guilt considered solely upon the
22 evidence presented against him.

23 The problem with misjoinder of defendants is that the jury may not separate
24 the offenders and the offenses, and may not separately assess each defendant's
25 culpability. See United States v. Saleh, 875 F.2d 535, 538 (6th Cir. 1989). "In
26 assessing prejudice, the ultimate issue is whether the jury can reasonably be
27 expected to compartmentalize the evidence." Lisle v. State, 113 Nev. 679, 689, 941
28 P.2d 459 (1997), cert. Denied, 525 U.S. 830 (1998); Jones v. State, 111 Nev. 848,
854, 899 P.2d 544 (1995).

1 The analysis should begin with the question of whether there was prejudice to
2 Matthews by not having his trial severed from that of Joshlin? What benefit was
3 there for Matthews not to file a motion to sever and to have a joint trial? Petitioner
4 asserts that there was no benefit to Matthews and that there was a great likelihood of
5 undue prejudice and deprivation of his statutory rights and his state and federal due
6 process rights to a fair trial by not addressing this prejudicial joinder.

7 While hindsight is nearly always perfect, it is obvious that if trial counsel had
8 moved to sever the trials, only good things could have happened. First, the issue
9 would have been preserved for appeal or post-conviction proceedings. Second, the
10 motion could have been granted and the danger of undue prejudice would have been
11 avoided.

12 The foreseeable undue prejudice manifested itself when the prosecutor, in her
13 zealousness, joined Matthews and Joshlin time after time in her rebuttal argument.
14 She referred constantly to "they" and the evidence that brings "them" here. She
15 lumped **them** together and hammered that characterization to the jury. Here is an
16 example of a portion of her rebuttal argument which illustrates this point:

17 Now it's the end of the trial. At the beginning of trial all you hear about
18 is how **they're** presumed innocent, believe **they're** innocent, innocent,
19 innocent, innocent, you haven't heard anything, you don't know
20 anything, they're innocent. No you know everything.

21 How innocent do **they** look to you? Take a look over there. How
22 innocent do **they** look? You heard all the evidence.

23 Take a look at **them**. Stare at **them**. They're on trial here. And
24 you heard all of the evidence that brings **them** here.
25 (TT, 5/11/07, Portion of Jury Trial - Day 5, p. 66)

26 The prosecutor continues in her rebuttal argument to link the two defendants
27 together but by doing so again illustrates petitioner's point that due process required
28 him to be tried separately and his attorney's failure to do so caused him prejudice.

29 **They** put **themselves** there that night, one (Joshlin) hiding in a
30 dumpster shamelessly, with no excuse for why he (Joshlin) happens to
31 be on top of the murder weapon. . . ."
32 (TT, 5/11/07, Portion of Jury Trial - Day 5, p. 67)

1 The foreseeability of this argument linking these two defendants together
2 should have been and was obvious to defense trial counsel before and during the trial
3 and should have made the need for motion to sever the trials imperative.
4 Nevertheless, the motion was never made.

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

14 **CONCLUSION**

15 For the reasons set forth in the original points and authorities and in this
16 supplement thereto, Petitioner asserts that this petition should be granted or in the
17 alternative that this Court should grant Petitioner an evidentiary hearing so that
18 facts can be elicited on his allegation that the failure to file and pursue a motion to
19 sever denied him due process and a fair trial in violation of his rights as guaranteed
20 under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United
21 States.

22 DATED this 10th day of July, 2012.

23 CARMINE J. COLUCCI, CHTD.

24 
25 CARMINE J. COLUCCI, ESQ.

26 Nevada Bar No. 000881
27 629 South Sixth Street
28 Las Vegas, Nevada 89101
Attorney for Petitioner

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Steven B. Wolfson
Clark County District Attorney
H. Leon Simon
Chief Deputy District Attorney
200 E. Lewis Avenue
Las Vegas, NV 89101

Zoe McCough
An employee of
CARMINE J. COLUCCI, CHTD.

EXHIBIT 1

AA0001459

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Matthews, Jemar D

12/11/06 10:30 AM 00 INITIAL ARRAIGNMENT

HEARD BY: Kevin V Williams, Hearing Master; Dept. AA

OFFICERS: Sandra Anderson, Court Clerk
Phyllis Irby/pi, Relief Clerk
Kiara Schmidt, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
007595	Bawa, Ravindar N.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
005239	Bunin, Daniel M.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

02/07/07 09:00 AM 00 CALENDAR CALL

HEARD BY: Elizabeth Halverson, Judge; Dept. 23

OFFICERS: Katherine Streuber, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Matthews, Jemar D
CONTINUED FROM PAGE: 001

04/16/07 08:30 AM 01 STATE'S MTN TO COMPEL BUCCAL SWABS /6

HEARD BY: Elizabeth Halverson, Judge; Dept. 23

OFFICERS: Pamela Humphrey, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

CONTINUED TO: 04/18/07 08:30 AM 02

04/18/07 08:30 AM 02 STATE'S MTN TO COMPEL BUCCAL SWABS /6

HEARD BY: Elizabeth Halverson, Judge; Dept. 23

OFFICERS: Pamela Humphrey, Court Clerk
Denice Lopez, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

CONTINUED TO: 04/20/07 08:30 AM 03

AA0001461

PAGE: 003

MINUTES DATE: 04/20/07

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Matthews, Jemar D
CONTINUED FROM PAGE: 002

04/20/07 08:30 AM 03 STATE'S MTN TO COMPEL BUCCAL SWABS /6

HEARD BY: Elizabeth Halverson, Judge; Dept. 23

OFFICERS: Pamela Humphrey, Court Clerk
Pamela Humphrey, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

05/02/07 08:30 AM 00 CALENDAR CALL CONTINUED

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES: NO PARTIES PRESENT

See MINUTES for Defendant 0001: Joshlin, Pierre

CONTINUED TO: 05/04/07 08:30 AM 01

PRINT DATE: 04/25/08

PAGE: 003

CONTINUED ON PAGE: 004
MINUTES DATE: 05/02/07

AA0001462

PAGE: 004

MINUTES DATE: 05/04/07

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Matthews, Jemar D

CONTINUED FROM PAGE: 003

05/04/07 08:30 AM 01 CALENDAR CALL CONTINUED

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y
005239	Bunin, Daniel M.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

05/07/07 01:00 PM 00 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

CONTINUED TO: 05/08/07 10:00 AM 01

PRINT DATE: 04/25/08

PAGE: 004

CONTINUED ON PAGE: 005
MINUTES DATE: 05/07/07

AA0001463

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Matthews, Jemar D
CONTINUED FROM PAGE: 004

05/08/07 10:00 AM 01 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

CONTINUED TO: 05/09/07 10:00 AM 02

05/09/07 10:00 AM 02 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Chanel West (1:05PM -2:05PM), Relief Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

CONTINUED TO: 05/10/07 09:30 AM 03

AA0001464

PAGE: 006

MINUTES DATE: 05/10/07

CRIMINAL COURT MINUTES

06-C-22B460-C STATE OF NEVADA

vs Matthews, Jemar D

CONTINUED FROM PAGE: 005

05/10/07 09:30 AM 03 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y
005239	Bunin, Daniel M.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

CONTINUED TO: 05/11/07 09:30 AM 04

05/11/07 09:30 AM 04 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y
005239	Bunin, Daniel M.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

PRINT DATE: 04/25/08

PAGE: 006

CONTINUED ON PAGE: 007

MINUTES DATE: 05/11/07

AA0001465

PAGE: 007

MINUTES DATE: 06/04/07

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Matthews, Jemar D
CONTINUED FROM PAGE: 006

06/04/07 08:30 AM 00 DEFT'S MTN FOR NEW TRIAL /9

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
007595	Bawa, Ravindar N.	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

Upon stipulation of both counsel, COURT ORDERED, Motion CONTINUED.

CUSTODY

CONTINUED TO: 06/08/07 08:15 AM 01

06/08/07 08:15 AM 01 DEFT'S MTN FOR NEW TRIAL /9

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

COURT STATED it read the Motion and reviewed the video-tape, but, requires more time to review in detail. COURT ORDERED, MOTION CONTINUED TO 7/2/07.

Mr. Figler requested additional transcripts prepared, including Bunin's closing and the rebuttal. Mr. Kangas advised they may possibly be back in a week, once ordered. COURT ORDERED, TRANSCRIPT TO BE PREPARED ON EXPEDITED BASIS.

COURT FURTHER ORDERED, the 6/18/07 Sentencing of both Joshlin & Matthews, CONTINUED to 7/2/07 as well.

CUSTODY

7/2/07 8:15 AM SENTENCING (JOSHLIN & MATTHEWS)

CONTINUED TO: 07/02/07 08:15 AM 02

PRINT DATE: 04/25/08

PAGE: 007

CONTINUED ON PAGE: 008
MINUTES DATE: 06/08/07

AA0001466

PAGE: 008

MINUTES DATE: 07/09/07

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Matthews, Jemar D

CONTINUED FROM PAGE: 007

07/09/07 08:15 AM 00 ALL PENDING MOTIONS (07-09-07)

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Carol Donahoo, Relief Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

See MINUTES for Defendant 0001: Joshlin, Pierre

01/28/08 08:15 AM 00 DEFT'S REQUEST STATUS CHECK: CUSTODY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Tia Everett/te, Relief Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
010008	Clowers, Shanon	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

Mr. Figler advised the Defendant has been sentenced in this case and a Judgment of Conviction has been signed by the Court; however, he has yet to be transported to the Nevada Department of Corrections. Court Directed State to look into this matter and COURT ORDERED, matter CONTINUED.

CUSTODY

CONTINUED TO: 02/01/08 08:15 AM 01

PRINT DATE: 04/25/08

PAGE: 008

CONTINUED ON PAGE: 009

MINUTES DATE: 01/28/08

AA0001467

PAGE: 009

MINUTES DATE: 02/01/08

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Matthews, Jemar D

CONTINUED FROM PAGE: 008

02/01/08 08:15 AM 01 DEFT'S REQUEST STATUS CHECK: CUSTODY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Tia Everett/te, Relief Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
	008764 Bateman, Samuel G.	Y
	0002 D Matthews, Jemar D	Y

Court noted, he has spoken with the Clark County Detention Center (CCDC) who has advised the Defendant has been placed on the correct list in order for him to be transported to Nevada Department of Corrections. COURT ORDERED, MATTER OFF CALENDAR.

NDC

PRINT DATE: 04/25/08

PAGE: 009

MINUTES DATE: 02/01/08

AA0001468

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Joshlin, Pierre

12/11/06 10:30 AM 00 INITIAL ARRAIGNMENT

HEARD BY: Kevin V Williams, Hearing Master; Dept. AA

OFFICERS: Sandra Anderson, Court Clerk
Phyllis Irby/pi, Relief Clerk
Kiara Schmidt, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
007595	Bawa, Ravindar N.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
005239	Bunin, Daniel M.	Y

AS TO DEFT. JOSHLYN: DEFT. JOSHLYN ARRAIGNED, PLED NOT GUILTY and INVOKED THE 60-DAY RULE. COURT ORDERED, matter set for trial.

AS TO DEFT. MATTHEWS: DEFT. MATTHEWS ARRAIGNED, PLED NOT GUILTY and INVOKED THE 60-DAY RULE. COURT ORDERED, matter set for trial.

CUSTODY (BOTH)

2-07-07 9:00 AM CALENDAR CALL (DEPT. XVIII)(BOTH)

2-12-07 1:30 PM JURY TRIAL (DEPT. XVIII) (BOTH)

02/07/07 09:00 AM 00 CALENDAR CALL

HEARD BY: Elizabeth Halverson, Judge; Dept. 23

OFFICERS: Katherine Streuber, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

Ms. Lewis advised they had not received Preliminary Hearing transcript and requested a continuance of trial. COURT ORDERED, trial date VACATED and RESET.

CUSTODY (BDTH)

PAGE: 002

MINUTES DATE: 02/07/07

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 001

05-02-07 8:30 AM CALENDAR CALL (BOTH)

05-07-07 10:30 AM TRIAL BY JURY (BOTH)

04/16/07 08:30 AM 01 STATE'S MTN TO COMPEL BUCCAL SWABS /6

HEARD BY: Elizabeth Halverson, Judge; Dept. 23

OFFICERS: Pamela Humphrey, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

Mr. Figler advised Mr. Singer is supposed to be Mr. Joshlin's counsel of record, however, counsel advised Mr. Singer informed him he withdrew from this matter. Court noted and stated no order has been submitted. Mr. Figler further made representation as to there being a PD conflict if appointed. Deft. Matthews made representation and Mr. Figler stated he still needs a copy of the preliminary transcript. There being no appearance by Mr. Singer, COURT ORDERED, matter CONTINUED for Mr. Singer to appear; Motion and Trial STAND.

CUSTODY (BOTH)

CONTINUED TO: 04/18/07 08:30 AM 02

PRINT DATE: 04/25/08

PAGE: 002

CONTINUED ON PAGE: 003

MINUTES DATE: 04/16/07

AA0001470

PAGE: 003

MINUTES DATE: 04/18/07

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 002

04/18/07 08:30 AM 02 STATE'S MTN TO COMPEL BUCCAL SWABS /6

HEARD BY: Elizabeth Halverson, Judge; Dept. 23

OFFICERS: Pamela Humphrey, Court Clerk
Denice Lopez, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

Mr. Singer advised he has been in contact with the Public Defender's office and the deft's family and was advised deft. and his family want the matter to be reassigned to PD's office as there is no conflict. Further, counsel stated Mr. Reed was on the matter and have discovery. Mr. Inlay stated he was advised there was a conflict with the PD's office because of a witness and stated he will request Mr. Reed appear next date to advise Court of conflict.

Mr. Figler stated there are some genetic materials recovered that can be connected to Mr. Joshlin and there is a red knit glove found in the pathway of the person who fled. There was no genetic material found on this glove. State opposed and stated the glove has been tested and DNA was found. State lodged with Court a report as to the DNA genetic material found on the glove. Following arguments, COURT ORDERED, matter CONTINUED and Mr. Reed to APPEAR next date. COURT FURTHER ORDERED, Motion STAYED and Trial STANDS. FURTHER, COURT ADMONISHED, Mr. Figler to get expedited transcript as to preliminary hearing to Court IMMEDIATELY.

CUSTODY (BOTH)

CONTINUED TO: 04/20/07 08:30 AM 03

PRINT DATE: 04/25/08

PAGE: 003

CONTINUED ON PAGE: 004

MINUTES DATE: 04/18/07

AA0001471

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 003

04/20/07 08:30 AM 03 STATE'S MTN TO COMPEL BUCCAL SWABS /6

HEARD BY: Elizabeth Halverson, Judge; Dept. 23

OFFICERS: Pamela Humphrey, Court Clerk
Pamela Humphrey, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

APPEARANCES CONTINUED: Norman Reed, Clark County Homicide Team, also present.

Mr. Reed advised the Court his office checked and learned there is a conflict and, therefore, can't take this case. COURT SO NOTED, and ORDERED, Mr. Singer APPOINTED. Mr. Figler argued as to the buccal swabs stating any testing done on the red glove should be limited. Mr. Figler further stated the results of the testing will be entered into a data base which will be used to search for other crime matches. Mr. Figler stated if State finds other crimes, counsel doesn't want other crimes brought into this case and that the search should be limited to determining the DNA profile as to the red glove. Ms. Lewis argued the type of testing that will be done is standard and the results of the testing has to be entered into the database accordingly. Further, Ms. Lewis noted the red glove have DNA profile and State is trying to see if it matches the deft. Mr. Figler stated deft. wants the transcripts and want 21 days to file writ and to invoke speedy trial. Following arguments, COURT ORDERED, Motion GRANTED and if results are entered into database, NO EVIDENCE from other crimes can be brought into this case, and TRIAL STANDS.

AA0001472

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Joshlin, Pierre
CONTINUED FROM PAGE: 004

05/02/07 08:30 AM 00 CALENDAR CALL CONTINUED

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

CALENDAR CALL: JOSLIN & MATTHEWS

Both Mr. Singer and Mr. Figler stated they were prepared to start trial on 5/7/07 and want to go forward.

Ms. Lewis stated that on 4/20/07 Judge Halverson Granted the State's Motion To Compel Buccal Swabs. She had submitted the Order to Judge Halverson, but, has not yet received the signed Order. She inquired if this Court will sign a new Order for preparation of the buccal swab, because this evidence is of an urgent matter and the results could take up to a couple of weeks. COURT SIGNED the State's Order, it was conformed and FILED IN OPEN COURT.

COURT NOTED this case is eighteen months old, both Defts are in custody, and both have Invoked, so this case has a priority trial status. Mr. Figler stated he thinks that both defense counsel may be able to "work out some type of stipulation" with Ms. Lewis.

COURT ORDERED, CALENDAR CALL CONTINUED to Friday. All counsel acknowledged they will be present at that time.

CUSTODY (BOTH)

CONTINUED TO 5/4/07 8:30 A.M.

CONTINUED TO: 05/04/07 08:30 AM 01

AA0001473

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 005

05/04/07 08:30 AM 01 CALENDAR CALL CONTINUED

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y
005239	Bunin, Daniel M.	Y

COURT ADVISED that jury selection will begin at 1:00 PM on Monday, May 7, 2007. Both parties confirmed they expected the trial to complete in five days, and, there may not be a penalty phase, that is still being discussed. Ms. Lewis noted the State has twenty witnesses with one from Texas.

Mr. Figler moved to strike any expert witnesses disclosed within twenty-one days of this trial. Arguments ensued by Ms. Lewis and Mr. Figler; Ms. Lewis reiterated that she could not disclose the experts until she did because of continuances delays by Defense for the buccal swabs. She also noted she had filed the State's Notice of Witnesses on 4/25/07 and the Supplemental Notice of Witnesses filed on 5/2/07. Ms. Lewis reiterated that she needed the buccal swabs before the DNA testing could be performed and the DNA expert is coming in on Saturday to share the results. COURT STATED that issue of late disclosure of witnesses will be determined on a case-by-case basis at trial.

Mr. Figler renewed his argument that the DNA evidence is too late. COURT STATED it agrees with the State that the evidence can come in, but, ORDERED, it may not come in during the State's Case-In-Chief, it was not properly noticed.

Ms. Lewis stated she may need a couple of extra days before trial start so the Report can be prepared. She also requested any Motions in Limine to be submitted in writing, so as not to discuss the issues during trial. COURT STATED it will not limit Defendants. COURT ORDERED, trial to go forward as scheduled on Monday with a 1:00 P.M. start.

Mr. Figler noted that this case was transferred from Dept XXIII to this Department, but, Defense never received a formal findings or reasons why the case was transferred from one to the other. He also noted that this Judge was employed by the District Attorney's Office and he respectfully requests this Judge if he knows of any conflicts to disclose. COURT ADVISED that it reviewed every criminal file and has been recusing if there is a possible

CONTINUED ON PAGE: 007

PRINT DATE: 04/25/08

PAGE: 006

MINUTES DATE: 05/04/07

AA0001474

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 006

conflict. COURT STATED there is no potential conflict and this Court has no memory of this case, it was never on his "track". COURT ADVISED that Judge Bell is willing to try this case if counsel have any doubt as to potential conflicts. Mr. Figler stated he just wanted to make a record. COURT INQUIRED if either counsel had any information that this Judge was conferenced in this case.

Ms. Lewis interjected that she has been directly assigned this case and that the only one to help her was Mr. Bateman, and when this case was reassigned, and this Judge was never involved in this case. COURT DIRECTED counsel to advise the Court if they wanted to send this trial to Overflow, Judge Bell. Mr. Figler stated he will do so.

COURT REITERATED, TRIAL BEGINS Monday, 5/7/07 at 1:00 P.M.

CUSTODY (BOTH)

05/07/07 01:00 PM 00 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

TRIAL CONVENED before Jury Panel was seated.

Ms. Lewis stated that the Information should include Deft Jemar Matthews' name on page 1, Line 21, but, due to a clerical error it was not included. COURT ORDERED the INFORMATION INTERLINEATED to insert Jemar Matthews and the AMENDED INFORMATION was FILED IN OPEN COURT.

COURT NOTED there appeared to be issues re witnesses. Ms. Lewis explained that three or four names have been added to the State's Witnesses and Mr. Figler was given the names. Mr. Figler objected to any DNA evidence based on Notice requirements; no reports were submitted to Defense. Mr. Bateman noted the buccal swabs were tested and the State wants to include that information. COURT EXPRESSED concern re the Brady issue. Mr. Figler argued that any exculpatory evidence must be turned over by the State and inquired if there was a formalized document regarding the Offer of Proof if it were

AA0001475

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 007

to be admissible. No ruling yet made by the Court.

COURT INQUIRED of Mr. Figler about his concern that this Judge was with the District Attorney's Office prior to being appointed to the Bench and any possibility of conflict. Mr. Figler noted that Defense only received notice of the case transfer from Dept XXIII to this Department on the Friday prior to Calendar Call, and, there was no explanation given as to why Judge Halverson was not still on this case. He also stated that since he had an initial concern that this Judge was with the District Attorney's he made an Oral Motion for this Court to reveal any conflicts and a record made that this Court was not involved with this case. Mr. Figler stated that this Court has satisfied the requirements by Defense and there is no conflict; Defense is ready to proceed to trial. COURT REITERATED that it has no memory or knowledge of this case. Mr. Bateman interjected that all of Judge Halverson's criminal cases were transferred to this Court, not just this case.

COURT STATED that neither the location for the trial, nor the schedule is yet firm, but, counsel will be apprised on a day-to-day basis.

Discussion held regarding jury selection and alternates. COURT ADVISED that the SECRET ALTERNATES will be seated in Seat 13 & 14. COURT ALSO ORDERED, re the Peremptory Challenges for Alternates, the State will be allowed one challenge and the Defense will be allowed two between them.

Discussion held regarding potential penalty phase. Ms. Lewis stated that the State will waive the penalty phase and the Court may sentence Deft. Mr. Figler and Mr. Singer both stated they will also waive the penalty phase of the trial.

Mr. Figler requested that the State does not disclose statements as to gunshot discharging too soon. COURT ORDERED, that issue must wait for proper foundation.

JURY PANEL SEATED AT 2:00 P.M., the first fourteen members being seated in the jury box. COURT PRESENTED opening remarks and made introductions of the court staff and all counsel. Introductions made by Mr. Bateman, Mr. Figler, and Mr. Singer. ROLL CALL conducted by the Clerk. Following additional remarks by the Court, Jury Panel was administered the voir dire oath. General voir dire conducted by the Court with the COURT THANKING and EXCUSING Jury Panel members for cause. Individual panel members were further voir dired by counsel. Peremptory Challenges were conducted. COURT THANKED and EXCUSED additional Panel members for cause during the Challenges.

OUTSIDE PRESENCE OF JURORS: Stipulation and Order regarding the Penalty Hearing, FILED IN OPEN COURT. PANEL SEATED, all present per stipulation of counsel. Peremptory challenges concluded. COURT THANKED and EXCUSED those Panel Members not selected as final Jurors. FOURTEEN JURORS WERE PLACED UNDER OATH and SEATED.

AA0001476

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 008

COURT ADMONISHED JURORS and ORDERED them RECESSED until 10:00 A.M. tomorrow.

There being nothing to come before the Court at this time, COURT ORDERED, EVENING RECESS; TRIAL CONTINUED TO 10:00 A.M. on 5/8/07.

CUSTODY

CONTINUED TO: 05/08/07 10:00 AM 01

05/08/07 10:00 AM 01 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y

JURY TRIAL - DAY 2

OUTSIDE PRESENCE OF JURY: Both Mr. Singer and Mr. Figler mentioned that members of the jury had spoken to them outside the courtroom, and, although counsel told them they weren't allowed to speak to them, they suggested the Court give jurors the admonishment re conversations with officers of the Court. COURT STATED it will do so again this morning. All parties agreed that there was no other resolutions needed.

FILED IN OPEN COURT: Deft Jamar Matthews, BENCH BRIEF. Court REVIEWED and inquired if Mr. Figler were raising Motions in Limine at this late time? He responded that he is reiterating past issues of concern. Mr. Bateman confirmed the State will "do our best to avoid any references to gangs."

Mr. Figler again raised the question of foundation for the gunshot residue test and argued that no discovery has been presented by the State per date and cited "notice violation." Ms. Lewis argued that the State is not required to provide discovery re an impound report and noted she had given Defense the names of every single person who will testify. However, when questioned who will testify as to the gunshot residue, she stated she was not sure, but, thought his name was Mr. McPhail. COURT DIRECTED Ms. Lewis to give a copy of any reports to Defense and ORDERED that Mr. McPhail is to be made available to Defense before he takes the stand to testify. Mr.

AA0001477

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 009

Figler reiterated that he evidence was tested without a report and without impounding it, and, Mr. McPhail does not show up on the Pltf's Witness List. He also reiterated that the Notice was faxed to his office yesterday at 11:24 A.M. COURT STATED IT WILL RESERVE RULING on foundation, it goes to weight of admissibility and is okay for Pltf to use in their Opening. Ms. Lewis confirmed that Mr. McPhail was not referred to in other reports. Mr. Figler renewed his objection, citing a Discovery Rule Violation, further testing needs to be done before admission, there is no time frame, there is a transference issue re the gunshot residue, there is an absence of reports, and it is prejudicial to Defense. Plaintiff should not be allowed to reference the gunshot residue test in their opening. Ms. Lewis argued that the Pltf is now required to provide a report. COURT ORDERED, Plaintiff allowed to proceed with foundation, and is to provide to Deft any exhibits for examination. Mr. Figler cited "notice violation". COURT STATED there is sufficient information and notice for Deft to proceed. Mr. Singer stated he joins in Mr. Figler's objection. Mr. Figler inquired of Ms. Lewis if that was all the added witnesses; Ms. Lewis responded, yes.

JURORS SEATED AT 10:27 A.M. and all counsel stipulated to presence of all. COURT PRESENTED comments and admonishment to Jurors and the Information was read by the Clerk. COURT ADVISED JURORS re evidence and directed them as to any Juror questions.

During the Opening Statements made by Ms. Lewis, objections were raised by either Mr. Figler or Mr. Singer. COURT ORDERED, OBJECTIONS OVER-RULED. Mr. Figler presented his opening statement, followed by Mr. Singer.

State's first witness called forth, was sworn, and testified; exhibits presented. (Please see Witness List and Exhibit Lists.)

OUTSIDE PRESENCE OF JURORS a record was made of Defense's objections to photo(s) shown during the State's opening remarks. Mr. Figler stated the photos were prejudicial; Mr. Singer noted his client was shown in "shackles" and that Ms. Lewis misrepresented the charges. COURT STATED that Defense can raise those questions during closing arguments. Ms. Lewis stated there was no purposeful design, she only showed the photo because that's the only one available. Following a brief recess, Mr. Figler noted that he has the Report and Declaration now. COURT SO NOTED.

JURORS SEATED, all present per stipulation of all counsel. Bench Conference held, wherein the Bailiff advised the Court that Juror #13's Juror Notebook could not be found after lunch. Another was provided temporarily. Later it was returned to Juror, the COURT EXPLAINED that during the lunch recess there was a meeting in the courtroom and one of the attendees had inadvertently picked it up and carried it off with him/her. Jurors confirmed everything in the notebook was as it was before.

State continued with additional witnesses and exhibits. Witnesses identified Deft(s) at various times during testimonies. Mr. Figler and Mr. Singer noted for the record that the witnesses identified the Defendants who

AA0001478

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 010

were sitting next to their counsel during the trial.

COURT ORDERED, JURORS RECESSED at 5:14 P.M. and TRIAL NOTED TO CONTINUE TOMORROW at 10:30 A.M. in Courtroom 15-B.

OUTSIDE JURORS: COURT DIRECTED counsel to confer about Jury Instructions so they can be addressed. Counsel so confirmed. Mr. Figler noted that one of the jurors, #2, was nodding off during trial.

Mr. Figler made an Oral Motion for Mistrial because Mr. Bateman's reference to Deft's "SCOPE" and that it was waived before the face of a witness as though an official document, and a witness could have seen it. He also stated that no cautionary instruction can remedy that. Mr. Bateman argued that "we can all have a SCOPE" and that it was not prejudicial. COURT ORDERED, UNDER ADVISEMENT, a ruling will be made tomorrow on this issue.

COURT ORDERED, EVENING RECESS.

CONTINUED TO: 05/09/07 10:00 AM 02

05/09/07 10:00 AM 02 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Chanel West (1:05PM -2:05PM), Relief Clerk
Richard Kangas/Francesca Haak, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y
005239	Bunin, Daniel M.	Y

DAY 3 OF TRIAL

TRIAL RECONVENED, OUTSIDE PRESENCE OF JURORS. COURT ADDRESSED the Defts' Motions for Mistrial. COURT STATED it had researched the matter and DETERMINES that "SCOPE" is a neutral term and that it had minimum impact to jurors. COURT NOTED that the Deft does not want to have a curative instruction presented to jurors. COURT ORDERED, Motion For Mistrial, DENIED.

Mr. Figler renewed his argument that Defense had not received notice that a gunshot residue test had been performed until the day of trial and had not

CONTINUED ON PAGE: 012

PRINT DATE: 04/25/08

PAGE: 011

MINUTES DATE: 05/09/07

AA0001479

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 011

received the Evidence Impound Report until last night. He argued that the results of the gunshot residue test failed to reveal the mix of three elements, and because only two were found and that admissibility is disallowed across the country. He requested he be allowed to voir dire Mr. McPhail and that the State is penalized by not allowing testing notice, "the Defense was sandbagged". Ms. Lewis argued that they noticed witnesses. COURT INQUIRED if the third person is an exculpatory witness? Ms. Lewis responded, no. COURT STATED IT DOES NOT FIND A BRADY VIOLATION. COURT FURTHER noted that this can be taken up further outside the jury during examination of Mr. McPhail.

JURORS SEATED, all present per stipulation of all counsel. Plaintiff called forth additional witnesses with testimonies under oath; exhibit presented. (Please see Witness and Exhibit Lists.) During identification of Deft by witness, Mr. Figler noted that both Defts are seated by their respective counsel.

JURY PRESENT: (CHANEL WEST-RELIEF CLERK at 1:05 P.M.) Testimony and exhibits presented (See worksheet.) Court excused the Jury for an afternoon recess.

OUTSIDE THE PRESENCE: Upon Court's inquiry, State advised the Court of the number of remaining witnesses and indicated they intend to rest tomorrow. Court requested Jury Instructions from counsel and Mr. Figler advised counsel is currently working on them. Court made reference to evidence previously not admitted in front of the Jury and STATED FINDINGS pursuant to statute that could possibly allow it's admission. Mr. Figler submitted objection. Ms. Lewis made request to re-move for it's submission in front of the Jury and COURT SO ORDERED. Further, COURT ADVISED, it is limiting this ruling. Colloquy regarding evidence. COURT STATED FURTHER FINDINGS and ADVISED it would reserve the ruling as to this evidence. Court noted the issue of the gun-shot residue and noted it's receipt of Points and Authorities and the State's opposition as to Motions in Limine. Mr. Phillips moved for Joinder to Motions in Limine. Testimony and exhibits continued (See worksheet.) Mr. Figler, Mr. Bunin, and Mr. Singer submitted an objection that they have never received a curriculum vitae and Mr. Figler requested the State provide a copy. Argument submitted by Mr. Bateman. Mr. Figler agreed to proceed with the trial and advised he would follow-up to ensure he receives the copies. Mr. Figler and Mr. Bunin submitted further objections that they have not received a full copy of the reports. Upon Court's inquiry, State advised they didn't have that information today. Court advised testimony would continue. During testimony, Mr. Figler submitted an objection as to the testimony and record referenced to by the witness.

(CLERK PRESENT at 2:25 P.M.) STILL OUTSIDE PRESENCE OF JURORS, voir dire of Crystina Vachon continued. When she was excused from the witness stand, Mr. Figler argued that Ms. Vachon is not an authority, has no scholarly works, and he could have brought in Ph.D. experts and scholars to testify had he known about this test. He reiterated that the documents were not provided to Defense before yesterday. And, he argued Mr. McPhail can provide no

CONTINUED ON PAGE: 013

PRINT DATE: 04/25/08

PAGE: 012

MINUTES DATE: 05/09/07

AA0001480

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 012

guarantees on non-contamination. Mr. Figler again requested a dismissal of the case because the evidence has major prejudicial impact. Or, in the alternative, Mr. Figler requested a trial continuance to "get our experts for the gunshot residue "experts".

COURT ORDERED, Mr. Figler's Motion for Dismissal of Trial With Prejudice, DENIED. COURT INQUIRED if Deft now wants to continue the trial two weeks? Mr. Figler stated he needs a continuance or he'll be ineffective because he didn't know that the gunshot residue test was done. Mr. Bateman argued that Defense is not prejudiced because "they didn't do their work, as of May 3 they had the results." He noted he has proof of the transmittal. Mr. Singer argued that a fax was sent yesterday to their office, but, of course was not received because he was here in court yesterday. Mr. Singer also argued that he could have scheduled experts, had he known and argued that even Mr. McPhail stated that the original report was not found and the print-out was only received yesterday.

Following additional arguments and colloquy, Mr. Figler referred the Court to the Plaintiff's reference to "firearms analysis", there was no mention of gunshot residue tests. All counsel noted a two week continuance would be possible. COURT STATED that a two-week continuance is appropriate. Mr. Figler stated that neither Deft has waived his right to a speedy trial.

Following a brief recess. Ms. Lewis stated there is a stipulation that the State can proceed with mention of a residue examination of the black and red gloves, but, will make no mention of the hands being examined for residue. Mr. Figler confirmed there is to be no evidence re gunshot residue, only testimony about the gloves, and with that stipulation he withdraws his motion for continuance of the trial. Ms. Lewis stated she wants Mr. Figler to state that he is ready to cross-examine this witness based upon the agreement of gloves, and she reiterated that the State never saw the 180 page report until Ms. Vachon noted it. COURT ORDERED RECESS.

TRIAL RECONVENED, STILL OUTSIDE PRESENCE OF JURORS. Mr. Bateman stated that the State will not introduce the gunshot residue test on the hands of co-defendants, but, only will bring in the red and two black gloves, so Mr. McPhail will not need to testify. Mr. Figler confirmed he withdraws his motion to continue trial. Mr. Singer inquired if Defense can argue about the gloves. COURT RESPONDED, "yes."

JURORS SEATED, all present per stipulation of all counsel. State's next witnesses were placed under oath and testified; exhibits presented.

COURT ORDERED, EVENING RECESS; TRIAL CONTINUED tomorrow at 9:30 A.M.

CONTINUED TO: 05/10/07 09:30 AM 03

AA0001481

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 013

05/10/07 09:30 AM 03 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y
005239	Bunin, Daniel M.	Y

DAY 4 OF TRIAL

COURT RECONVENED OUTSIDE PRESENCE OF JURORS. COURT NOTED there is a stipulation regarding the evidence chain-of-custody from the victim to Det. Krylo, Exhibit #165. Also, State's Consolidated Opposition to Defendant's Motions In Limine, FILED IN OPEN COURT.

JURORS SEATED at 10:03 A.M., all present per stipulation of all counsel. The State called forth its next witness, designated as an expert. Mr. Singer objected to testimony regarding microscopic analysis; COURT NOTED he can cross-examine regarding that issue. The Questions from Jurors were brought to the attention of the Bench, counsel approached to discuss, and the Juror Questions were marked as Court's Exhibits. (Please see Court's Exhibit List.) Fred Boyd designated as expert witness and testified as to microscopic examination of the bullets.

OUTSIDE PRESENCE OF JURORS: Regarding Juror Question, marked as Court's Exhibit #2, Mr. Singer requested the Court to ask the Juror Question in a different manner than it was written. The Court presented the alternative which was approved by Mr. Singer before being asked of the witness.

COURT CANVASSED DEFT MATTHEWS re his Fifth Amendment Rights. Deft Matthews stated he will not take the stand to testify. Mr. Figler requested a Jury Instruction given regarding fact that the Deft is not compelled to testify.

COURT ALSO CANVASSED DEFT JOSH LIN as to his Fifth Amendment Rights. Deft Joshlin stated he will not take the stand to testify. Mr. Singer also requested a Jury Instruction regarding the fact that the Deft is not compelled to testify.

Following a full recess, OUTSIDE PRESENCE OF JURY, Mr. Figler stated that several parties were present in the courtroom during the trial, and as they

CONTINUED ON PAGE: 015

PRINT DATE: 04/25/08

PAGE: 014

MINUTES DATE: 05/10/07

AA0001482

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 014

were leaving the court room they said, "they killed my baby." He requested the Court to admonish all present about comments made. COURT STATED it didn't hear the comments. At request of Plaintiff, Court's Exhibit #3 was marked.

JURORS SEATED, all present as before per stipulation of all counsel. THE STATE ANNOUNCED IT RESTED ITS CASE at 12:31 P.M. COURT ORDERED, Jurors recessed for lunch.

OUTSIDE PRESENCE OF JURORS, Mr. Singer made an Oral Motion to Dismiss Count 5 against Deft Joshlin, stating his argument on the record. The State argued in opposition. COURT ORDERED, DEFT JOSH LIN'S MOTION TO DISMISS COUNT 5, DENIED. Arguments re final Jury Instructions continued. Deft's Proposed Jury Instructions Not Used At Trial, FILED IN OPEN COURT.

JURORS SEATED at 1:24 P.M., all present per stipulation of all counsel. Mr. Figler presented the first Defense witness, who was sworn and testified; exhibits presented. (Please see Witness and Exhibit Lists.) COURT ORDERED, JURORS RECESSED at 6:00 P.M. and ORDERED to return tomorrow at 9:30 A.M.

OUTSIDE PRESENCE OF JURORS, discussion held regarding tomorrow's schedule.

COURT ORDERED, EVENING RECESS

CONTINUED TO: 05/11/07 09:30 AM 04

05/11/07 09:30 AM 04 TRIAL BY JURY

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
008764	Bateman, Samuel G.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y
005239	Bunin, Daniel M.	Y

DAY 5 OF TRIAL

TRIAL RECONVENED OUTSIDE PRESENCE OF JURORS. Arguments re Jury Instructions continued on the record. Final Jury Instructions accepted and numbered by the Court. Deft's Jury Instructions Offered But Not Used, FILED IN OPEN

AA0001483

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 015

COURT. All counsel stipulated to the reading of the Jury Instructions prior to closing arguments. The State confirmed it will call no rebuttal witnesses; Defense stated no sur-rebuttal witnesses will be called.

JURORS SEATED, all present per stipulation of all counsel. COURT READ Jury Instructions and Verdict forms to the Jurors, each provided their own copy.

Closing arguments made by all counsel. COURT ANNOUNCED the Alternate Jurors to be Jurors #13 and #14. The Bailiff and Judicial Executive Assistant were sworn to take charge of the Jurors and Alternates. COURT ORDERED JURORS TO DELIBERATION AT 2:24 p.m.

VERDICT REACHED AT APPROXIMATELY 6:10 P.M.

TRIAL RECONVENED at 6:35 P.M. with all twelve jurors present per stipulation of all counsel. FOREPERSON was announced to be Juror #8. At direction of the Court the Clerk announced the Verdicts, as follows:

VERDICT FOR DEFT PIERRE JOSH LIN:

GUILTY OF

- COUNT 1 - CONSPIRACY TO COMMIT MURDER;
- COUNT 2 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON;
- COUNT 3 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (MYNIECE COOK);
- COUNT 4 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (MICHEL-LE

TOLEFREE);

- COUNT 5 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (MAURICE HICKMAN);
- COUNT 7 - CONSPIRACY TO COMMIT ROBBERY;
- COUNT 8 - ROBBERY WITH USE OF A DEADLY WEAPON (GEISHE M. ORDUNO); and
- COUNT 9 - ROBBERY WITH USE OF A DEADLY WEAPON (MELVIN BOLDEN).

VERDICT RE DEFT JEMAR MATTHEWS

GUILTY OF:

- COUNT 1 - CONSPIRACY TO COMMIT MURDER;
- COUNT 2 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON;
- COUNT 3 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (MYNIECE COOK);
- COUNT 4 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (MICHEL-LE

TOLEFREE);

- COUNT 5 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (MAURICE HICKMAN);
- COUNT 6 - POSSESSION OF SHORT BARRELED RIFLE;
- COUNT 7 - CONSPIRACY TO COMMIT ROBBERY;
- COUNT 8 - ROBBERY WITH USE OF A DEADLY WEAPON (GEISHE M. ORDUNO);
- COUNT 9 - ROBBERY WITH USE OF A DEADLY WEAPON (MELVIN BOLDEN);
- COUNT 10- ASSAULT WITH USE OF A DEADLY WEAPON (BRADLEY CUPP); and
- COUNT 11- ASSAULT WITH USE OF A DEADLY WEAPON (BRIAN WALTERS)

At request of Defense counsel, COURT ORDERED, JURORS POLLED as to if those were their verdicts as read. All twelve Jurors answer in the affirmative.

COURT THANKED AND EXCUSED JURORS.

AA0001484

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 016

OUTSIDE PRESENCE OF JURORS, COURT ORDERED, matter referred to the Division of Parole and Probation (P & P) for both defendants, and set for sentencing.

Mr. Figler made an Oral Motion for A New Trial Based On Cumulative Prosecutorial Misconduct. COURT ORDERED, DENIED.

FILED IN OPEN COURT: Verdicts and Jury Instructions.

COURT ORDERED, JURY TRIAL ADJOURNED.

CUSTODY (BOTH)

6/18/07 8:30 AM SENTENCING (BOTH)

07/09/07 08:15 AM 00 ALL PENDING MOTIONS (07-09-07)

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Carol Donahoo, Relief Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Joshlin, Pierre	Y
007914	Singer, Phillip	Y
0002 D	Matthews, Jemar D	Y
004264	Figler, Dayvid J.	Y
005239	Bunin, Daniel M.	Y

DEFT.'S MOTION FOR NEW TRIAL (MATTHEWS)...SENTENCING (JOSHLIN)...SENTENCING (MATTHEWS)

Deft.'s Reply to State's Opposition to Motion for New Trial FILED IN OPEN COURT. Court noted it reviewed the video tape of the trial. Arguments by counsel. Court stated its findings and ORDERED, Motion DENIED.

PIERRE JOSHLIN: Pursuant to the Jury's verdict, DEFT. JOSHLIN ADJUDGED GUILTY of COUNT 1 - CONSPIRACY TO COMMIT MURDER (F), COUNT 2 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (F), COUNTS 3, 4, 5 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (F), COUNT 7 - CONSPIRACY TO COMMIT ROBBERY (F), and COUNTS 8, 9 - ROBBERY WITH USE OF A DEADLY WEAPON (F). Sworn statement by victim's mother, Cora Williams, and victim's sister, Danielle Matison. COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee and the \$150.00 DNA Analysis fee including testing to determine genetic markers and \$418.85 Restitution, as to COUNT 1, Deft. SENTENCED to a MINIMUM of TWENTY-SIX (26) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS in

CONTINUED ON PAGE: 018

PRINT DATE: 04/25/08

PAGE: 017

MINUTES DATE: 07/09/07

AA0001485

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 017

the Nevada Department of Corrections (NDC); as to COUNT 2, Deft. SENTENCED to LIFE WITH the possibility of parole after TWENTY (20) YEARS, plus an equal and CONSECUTIVE term for use of a deadly weapon; as to COUNT 3, Deft. SENTENCED to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM OF FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon; as to COUNT 4, Deft. SENTENCED to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM OF FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon; as to COUNT 5, Deft. SENTENCED to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM OF FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon; as to COUNT 7, Deft. SENTENCED to a MINIMUM of TWELVE (12) MONTHS and a MAXIMUM of SEVENTY-TWO (72) MONTHS in the Nevada Department of Corrections (NDC); as to COUNT 8, Deft. SENTENCED to a MINIMUM of FORTY (40) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM of FORTY (40) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS for use of a deadly weapon; as to COUNT 9, Deft. SENTENCED to a MINIMUM of FORTY (40) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM of FORTY (40) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS for use of a deadly weapon; all COUNTS to run CONCURRENT with each other, with THREE HUNDRED (300) DAYS credit for time served; BOND, if any, EXONERATED.

JEMAR D. MATTHEWS: Pursuant to the Jury's verdict, DEFT. MATTHEWS ADJUDGED GUILTY of COUNT 1 - CONSPIRACY TO COMMIT MURDER (F), COUNT 2 - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (F), COUNTS 3, 4, 5 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (F), COUNT 6 - POSSESSION OF SHORT BARRELED RIFLE (F), COUNT 7 - CONSPIRACY TO COMMIT ROBBERY (F), COUNTS 8, 9 - ROBBERY WITH USE OF A DEADLY WEAPON (F), COUNTS 10, 11 - ASSAULT WITH USE OF A DEADLY WEAPON (F). Sworn statement by victim's mother, Cora Williams, and victim's sister, Danielle Matison. COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee and the \$150.00 DNA Analysis fee including testing to determine genetic markers, as to COUNT 1, Deft. SENTENCED to a MINIMUM of TWENTY-SIX (26) MONTHS and a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC); as to COUNT 2, Deft. SENTENCED to LIFE WITH the possibility of parole after TWENTY (20) YEARS, plus an equal and CONSECUTIVE term for use of a deadly weapon; as to COUNT 3, Deft. SENTENCED to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM OF FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon; as to COUNT 4, Deft. SENTENCED to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM OF FORTY-EIGHT (48)

CONTINUED ON PAGE: 019

PRINT DATE: 04/25/08

PAGE: 018

MINUTES DATE: 07/09/07

AA0001486

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA

vs Joshlin, Pierre

CONTINUED FROM PAGE: 018

MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon; as to COUNT 5, Deft. SENTENCED to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM OF FORTY-EIGHT (48) MONTHS and a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon; as to COUNT 6, Deft. SENTENCED to a MINIMUM of TWELVE (12) MONTHS and a MAXIMUM of FORTY-EIGHT (48) MONTHS in the Nevada Department of Corrections (NDC); as to COUNT 7, Deft. SENTENCED to a MINIMUM of TWELVE (12) MONTHS and a MAXIMUM of SEVENTY-TWO (72) MONTHS in the Nevada Department of Corrections (NDC); as to COUNT 8, Deft. SENTENCED to a MINIMUM of FORTY (40) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM of FORTY (40) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS for use of a deadly weapon; as to COUNT 9, Deft. SENTENCED to a MINIMUM of FORTY (40) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS in the Nevada Department of Corrections (NDC), plus an equal and CONSECUTIVE MINIMUM of FORTY (40) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS for use of a deadly weapon; as to COUNT 10, Deft. SENTENCED to a MINIMUM of SIXTEEN (16) MONTHS and a MAXIMUM of SEVENTY-TWO (72) MONTHS in the Nevada Department of Corrections (NDC); as to COUNT 11, Deft. SENTENCED to a MINIMUM of SIXTEEN (16) MONTHS and a MAXIMUM of SEVENTY-TWO (72) MONTHS in the Nevada Department of Corrections (NDC); all COUNTS to run CONCURRENT with each other, with THREE HUNDRED (300) DAYS credit for time served; BOND, if any, EXONERATED.

03/26/08 08:15 AM 00 AT REQ OF SUPREME COURT: APPOINTMENT OF
COUNSEL/14

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
010008	Clowers, Shanon	Y
0001 D1	Joshlin, Pierre	N
007914	Singer, Phillip	Y

Deft incarcerated in NDC and not present. Mr. Singer appeared and stated he has not been appointed as counsel in this matter. COURT ORDERED, JOHN PARRIS APPOINTED as counsel and matter SET for status check on Friday. Deft so agreed.

NDC

3/28/08 8:15 AM STATUS CHECK: FURTHER PROCEEDINGS...STATUS CHECK:
CONFIRMATION OF COUNSEL (JOHN PARRIS)

AA0001487

5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
6. UNLAWFUL POSSESSION, MANUFACTURE OR DISPOSITION OF SHORT-BARRELED RIFLE	202.275	Felony	01/01/1900
7. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
7. ROBBERY	200.380	Felony	01/01/1900
8. ROBBERY	200.380	Felony	01/01/1900
8. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
9. ROBBERY	200.380	Felony	01/01/1900
9. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
10. ASSAULT WITH A DEADLY WEAPON (5024)	200.471-2B	Felony	01/01/1900
11. ASSAULT WITH A DEADLY WEAPON (5024)	200.471-2B	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

01/28/2008 Request (8:15 AM) ()

DEFT'S REQUEST STATUS CHECK: CUSTODY Relief Clerk: Tia Everett/te Reporter/Recorder: Richard Kangas Heard By: Barker, David

Minutes

01/28/2008 8:15 AM

- Mr. Figler advised the Defendant has been sentenced in this case and a Judgment of Conviction has been signed by the Court; however, he has yet to be transported to the Nevada Department of Corrections. Court Directed State to look into this matter and COURT ORDERED, matter CONTINUED. CUSTODY

Parties Present

Return to Register of Actions

AA0001488

7/9/2012 3:39 PM

5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
6. UNLAWFUL POSSESSION, MANUFACTURE OR DISPOSITION OF SHORT-BARRELED RIFLE	202.275	Felony	01/01/1900
7. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
7. ROBBERY	200.380	Felony	01/01/1900
8. ROBBERY	200.380	Felony	01/01/1900
8. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
9. ROBBERY	200.380	Felony	01/01/1900
9. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
10. ASSAULT WITH A DEADLY WEAPON (5024)	200.471-2B	Felony	01/01/1900
11. ASSAULT WITH A DEADLY WEAPON (5024)	200.471-2B	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

02/01/2008 **Request** (8:15 AM) ()

DEFT'S REQUEST STATUS CHECK: CUSTODY Relief Clerk: Tia Everett/te Reporter/Recorder: Richard Kangas Heard By: David Barker

Minutes

02/01/2008 8:15 AM

- Court noted, he has spoken with the Clark County Detention Center (CCDC) who has advised the Defendant has been placed on the correct list in order for him to be transported to Nevada Department of Corrections. COURT ORDERED, MATTER OFF CALENDAR. NDC

Parties Present

Return to Register of Actions

PAGE: 020

MINUTES DATE: 03/26/08

CRIMINAL COURT MINUTES

06-C-228460-C STATE OF NEVADA vs Joshlin, Pierre

CONTINUED FROM PAGE: 019

CLERK'S NOTE: Mr. Parris has been notified of the appointment via email this date.

03/28/08 08:00 AM 00 ALL PENDING MOTIONS 03-28-08

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sandra Anderson, Court Clerk
Richard Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
	009089 Krusey, Amanda K.	Y
	0001 D1 Joshlin, Pierre	Y
	007479 Parris, John P.	Y

STATUS CHECK: FURTHER PROCEEDINGS...STATUS CHECK: CONFIRMATION OF COUNSEL

COURT ORDERED, Mr. Parris confirmed as attorney of record. Mr. Parris advised the Court he would contact Mr. Singer for Discovery.

PRINT DATE: 04/25/08

PAGE: 020

MINUTES DATE: 03/28/08

AA0001490

EXHIBIT 2

AA0001491

13

JOC

FILED

JUL 17 11 28 AM '07

ORIGINAL

Chaf
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

CASE NO. C228460

-vs-

DEPT. NO. XVIII

JEMAR D. MATTHEWS
aka Jemar Demon Matthews
#1956579

Defendant.

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of
COUNT 1 - CONSPIRACY TO COMMIT MURDER (Category B Felony), in violation of
NRS 199.480, 200.010, 200.030; COUNT 2 - MURDER WITH USE OF A DEADLY
WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165;
COUNTS 3, 4, 5, - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON
(Category B Felony), in violation of NRS 193.330, 200.020, 200.030, 193.165; COUNT
6 - POSSESSION OF SHORT BARRELED RIFLE (Category D Felony), in violation of
NRS 202.275; COUNT 7 - CONSPIRACY TO COMMIT ROBBERY
(Category B Felony), in violation of NRS 199.480, 200.380; COUNTS 8 & 9 -

CLERK OF THE COURT

RECEIVED
JUL 17 2007

AA0001492

1 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of
2 NRS 200.380, 193.165; COUNTS 10 & 11 – ASSAULT WITH A DEADLY WEAPON
3 (Category B Felony), in violation of NRS 200.471; and the matter having been tried
4 before a jury and the Defendant having been found guilty of the crimes of COUNT 1 –
5 CONSPIRACY TO COMMIT MURDER (Category B Felony), in violation of NRS
6 199.480, 200.010, 200.030; COUNT 2 – FIRST DEGREE MURDER WITH USE OF A
7 DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030,
8 193.165; COUNT 3 – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON
9 (Category B Felony), in violation of NRS 193.330, 200.020, 200.030, 193.165; COUNT
10 4 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony), in
11 violation of NRS 193.330, 200.020, 200.030, 193.165; COUNT 5 - ATTEMPT MURDER
12 WITH USE OF A DEADLY WEAPON (Category B Felony), in violation of NRS 193.330,
13 200.020, 200.030, 193.165; COUNT 6 – POSSESSION OF SHORT BARELLED RIFLE
14 (Category D Felony), in violation of NRS 202.275; COUNT 7 – CONSPIRACY TO
15 COMMIT ROBBERY (Category B Felony), in violation of NRS 199.480, 200.380;
16 COUNTS 8 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony), in
17 violation of NRS 200.380, 193.165, COUNTS 9 – ROBBERY WITH USE OF A
18 DEADLY WEAPON (Category B Felony), in violation of NRS 200.380, 193.165; COUNT
19 10 – ASSAULT WITH A DEADLY WEAPON (Category B Felony), in violation of NRS
20 200.471; COUNT 11 – ASSAULT WITH A DEADLY WEAPON (Category B Felony), in
21 violation of NRS 200.471, thereafter, on the 9TH day of July, 2007, the Defendant was
22 present in court for sentencing with his counsel, DAYVID J. FIGLER, ESQ. and DANIEL
23 BUNIN, ESQ., and good cause appearing.

1 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in
2 addition to the \$25.00 Administrative Assessment Fee and \$150.00 DNA Analysis Fee
3 including testing to determine genetic markers, the Defendant is SENTENCED to the
4 Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO A
5 MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM Parole
6 Eligibility of TWENTY-SIX (26) MONTHS; AS TO COUNT 2 - TO LIFE with a MINIMUM
7 Parole Eligibility of TWENTY (20) YEARS, plus an EQUAL and CONSECUTIVE term of
8 LIFE with a MINIMUM Parole Eligibility of TWENTY (20) YEARS for the Use of a Deadly
9 Weapon; AS TO COUNT 3 - TO A MAXIMUM of TWO HUNDRED FORTY (240)
10 MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, plus an
11 EQUAL and CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS
12 MAXIMUM and FORTY-EIGHT (48) MONTHS MINIMUM for the Use of a Deadly
13 Weapon; AS TO COUNT 4 - TO A MAXIMUM of TWO HUNDRED FORTY (240)
14 MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, plus an
15 EQUAL and CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS
16 MAXIMUM and FORTY-EIGHT (48) MONTHS MINIMUM for the Use of a Deadly
17 Weapon; AS TO COUNT 5 - TO A MAXIMUM of TWO HUNDRED FORTY (240)
18 MONTHS with a MINIMUM Parole Eligibility of FORTY-EIGHT (48) MONTHS, plus an
19 EQUAL and CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS
20 MAXIMUM and FORTY-EIGHT (48) MONTHS MINIMUM for the Use of a Deadly
21 Weapon; AS TO COUNT 6 - TO A MAXIMUM of FORTY-EIGHT (48) MONTHS with a
22 MINIMUM Parole Eligibility of TWELVE (12) MONTHS; AS TO COUNT 7 - TO A
23 MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of
24 TWELVE (12) MONTHS; AS TO COUNT 8 - TO A MAXIMUM of ONE HUNDRED

1 EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of FORTY (40) MONTHS,
2 plus an EQUAL and CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MONTHS
3 MAXIMUM and FORTY (40) MONTHS MINIMUM for the Use of a Deadly Weapon; AS
4 TO COUNT 9 - TO A MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a
5 MINIMUM Parole Eligibility of FORTY (40) MONTHS, plus an EQUAL and
6 CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MONTHS MAXIMUM and
7 FORTY (40) MONTHS MINIMUM for the Use of a Deadly Weapon; AS TO COUNT 10 -
8 TO A MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM Parole Eligibility of
9 SIXTEEN (16) MONTHS; AS TO COUNT 11 - TO A MAXIMUM of SEVENTY-TWO
10 (72) MONTHS with a MINIMUM Parole Eligibility of SIXTEEN (16) MONTHS; ALL
11 COUNTS TO RUN CONCURRENT; with THREE HUNDRED (300) DAYS credit for time
12 served.
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15

16 DATED this 13th day of July, 2007

17
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20 DAVID BARKER
21 DISTRICT JUDGE

22 CC

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28 2007 SEP -5 P 4: 08

CLERK OF COURT

EXHIBIT 3

AA0001496

IN THE SUPREME COURT OF THE STATE OF NEVADA

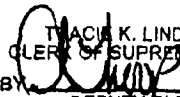
JEMAR D. MATTHEWS A/K/A JEMAR
DEMON MATTHEWS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50052

FILED

JUN 30 2009

ORDER OF AFFIRMANCE

THACIA K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, first-degree murder with the use of a deadly weapon, three counts of attempted murder with the use of a deadly weapon, possession of a short-barreled rifle, conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, and two counts of assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In this case, appellant Jemar Matthews and three other young men walked up to a group of people standing outside a friend's house and opened fire, killing one victim with a shot to the head and injuring another. In attempting to flee the area, the shooters robbed a vehicle at gunpoint and a police chase ensued, resulting in Matthews' capture.

On appeal, Matthews raises multiple challenges to his conviction. For the following reasons, we conclude that Matthews' arguments fail, and therefore, affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Prosecutorial misconduct

Matthews contends that the prosecutor committed misconduct by directing the jury to infer his guilt in two respects: (1) by urging the jurors to stare and scrutinize his attire, and (2) by questioning his strenuous opposition to a key piece of evidence.¹

Comment directing the jurors to scrutinize Matthews' attire

At trial, a group of youths dressed in oversized white T-shirts and baggy shorts attended the proceedings and were involved in a disturbance in the halls outside the courtroom. Then, during closing argument, in an attempt to associate Matthews with the troublemaking youths, the prosecutor directed the jurors to stare at Matthews and his co-defendants, and take note of their attire.²

¹Matthews also contends that the prosecutor improperly referred to his prior criminal history by using his SCOPE report (a document compiled when individuals obtain sheriff cards, work cards, or are arrested, for instance) to prove his height. However, after reviewing this argument, we conclude it is without merit.

²While Matthews did not provide a transcript of the objectionable statements, the State conceded that the prosecutor stated the following:

At the beginning of trial all you hear about is how they're presumed innocent, believe they're innocent—innocent, innocent, innocent—you have (sic) haven't heard anything, you don't know anything, they're innocent. Now you know everything. How innocent do they look to you? Take a look over there. How innocent do they look? There's nothing improper about it. Take a look at them. Stare at them.

continued on next page . . .

Asking the jury to infer a defendant's guilt based solely on his or her appearance and demeanor at trial is improper. Cf. Nau v. Sellman, 104 Nev. 248, 251, 757 P.2d 358, 360 (1988) (stating that an expert witness' comment that the defendant "acted like a guilty guy" during the preliminary hearing was improper); see, e.g., United States v. Schuler, 813 F.2d 978, 981-82 (9th Cir. 1987) (concluding that a prosecutorial comment on a defendant's nontestifying behavior impinges on his constitutional right to a fair trial and his right not to testify); United States v. Wright, 489 F.2d 1181, 1185-86 (D.C. Cir. 1973) (stating that the prosecutor improperly directed the jury, in its deliberations, to consider the defendant's demeanor during trial). Here, since the prosecutor clearly urged the jury to take note of Matthews' attire and thus infer his guilt by equating him with the troublemaking youths, we conclude that the comment was improper.

Comment regarding Matthews' strenuous opposition to a key piece of evidence

Throughout trial, Matthews strenuously opposed evidence of gunshot residue that was found on a red glove that was linked to him and the commission of the crimes. Focusing on Matthews' opposition to that evidence during its closing argument, the prosecutor commented to the

... continued

Look at these two defendants. What, you think they walk around the street wearing those white shirts and ties? Come on.

jurors that, "[i]f we have the wrong guys and it's not them, why do they care so much about gunshot residue being found on the gloves?"

A defendant has the right to challenge the evidence against him, see Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1243 (2008), and this court has repeatedly stated that it is improper for a prosecutor to disparage legitimate defense tactics. See, e.g., Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004).

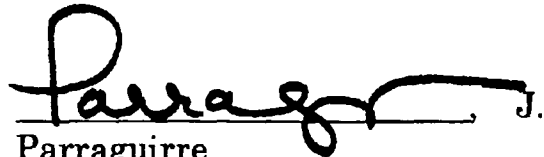
Here, the prosecutor's statement directed the jury to infer Matthews' guilt as a result of his strenuous opposition to the red glove and the gunshot residue discovered thereon. Since the prosecutor's statement disparaged Matthews' defense and denigrated his right to challenge a key piece of evidence against him, we conclude that the comment was improper.

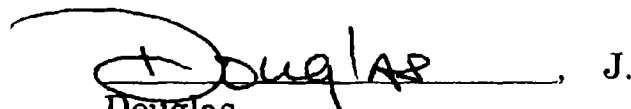
The misconduct was harmless

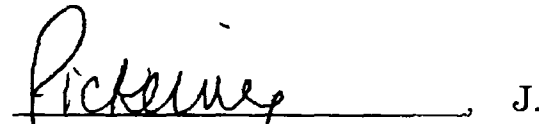
Although the two comments mentioned above were improper, since there was significant evidence indicating that Matthews participated in the shooting, robbery, and police chase (a pursuing officer identified Matthews as the driver in possession of the rifle, the bullet that killed the victim came from the same type of rifle in Matthews' possession, the red glove found near where the police apprehended Matthews tested positive for gunshot residue, and Matthews closely matched the description of the shooting and robbery suspects), we conclude that the prosecutor's misconduct was harmless. See Smith v. State, 120 Nev. 944, 947-48, 102 P.3d 569, 572 (2004). Therefore, reversal on these grounds is unwarranted.

For the reasons set forth above, we conclude that Matthews' arguments on appeal do not warrant reversing his convictions.³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre


Douglas


Pickering

cc: Hon. David B. Barker, District Judge
Bailus Cook & Kelesis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

³Matthews also argues that (1) there was insufficient evidence to sustain any of his seven convictions; (2) since there was no evidence of premeditation and deliberation, his first degree conviction cannot stand; (3) his robbery convictions are redundant; (4) the district court erred by permitting expert testimony regarding gunshot residue; (5) a State's witness offered impermissible opinion testimony; and (6) the district court's refusal to grant him a peremptory challenge warrants reversal. However, after reviewing the record, we conclude that these arguments are without merit.

EXHIBIT 4

AA0001502

ORIGINAL

FILED IN OPEN COURT

MAY - 8 2007

20

CHARLES J. SHORT
CLERK OF THE COURT

BY

Sharon Chen
DEPUTY

1 DAYVID J. FIGLER
Nevada Bar #04264
2 BUNIN & BUNIN, LTD.
626 South Third Street
3 Las Vegas, Nevada 89101
(702) 386-0333

4 Attorneys for the Defendant

5
6 DISTRICT COURT
CLARK COUNTY, NEVADA
7

8 THE STATE OF NEVADA)

Case No. C228460

9 Plaintiff,)

Dept. No. 18

10 vs.)

11 JAMAR MATTHEWS)

12 Defendant.)
13

14 **BENCH BRIEF**

15 TO: The Honorable DAVID BARKER, Judge of the Eighth Judicial
16 District Court of the State of Nevada, in and for the County of
Clark:

17 COMES NOW, DAYVID J. FIGLER, attorney for the above-captioned
18 person, and respectfully submits the following facts and issues for
19 consideration by the District Court in light of the impending trial
20 in the above-captioned matter.

21 **BRIEF OVERVIEW OF FACTS OF THE CASE**

22 Mercy Williams was shot by a .22 caliber bullet while standing
23 in front of a friends house on Balzar in North Las Vegas in the
24 evening hours of September 30, 2006. Witnesses place between three
25 and five individuals within the group from where the bullets
26 originated. Two Las Vegas Metropolitan Police Officers assigned to
27 the "Problem Solving Unit" were in the vicinity to what they testified
28 to as "preventing retaliation" for a gang murder that occurred the
prior evening. When these officers, Cupp and Walter, heard the gun

AA0001503

1 fire, they proceeded to the area. Shortly after the shooting of Mercy
2 Williams, a car theft took place approximately one block away. The
3 owner of this vehicle is Geishe Orduno who was in possession of the
4 vehicle along with her friend, Melvin Bolden. Police pursued this
5 vehicle, a silver, Lincoln towncar with tinted windows, after it was
6 observed that it was taken by three-four African-American juveniles.

7 That short chase proceeded down Martin Luther King Boulevard to
8 a street called Jimmy and ended shortly thereafter on a street called
9 Lexington. Police report that just prior to the suspect car crashing
10 into a fire hydrant, the driver of the vehicle leaned out the door of
11 the car and pointed what appeared to be a sawed-off shotgun at police.
12 Police upon seeing the alleged driver exit the vehicle swerved towards
13 the individual alleged to be the driver and struck him with their
14 police vehicle causing the individual to fall to the ground. Two
15 other individuals in the suspect car also exited and fled on foot.
16 There was a chase of the fleeing individuals. Shortly thereafter, gun
17 shots were fired by Officer Cupp at one of the fleeing suspects.
18 Shortly thereafter, Piere Joshlin was found in a nearby dumpster and
19 within that dumpster were black gloves and a .45 caliber weapon.
20 Officer Walter responding to the gunshots, abandoned his pursuit of
21 the alleged driver.

22 Approximately an hour later, Defendant, Jamar Matthews was seized
23 by K-9 dogs from an area in the backyard on Jimmy Street. Officer
24 Walter identified Matthews as the fleeing driver after a one-on-one
25 line-up while Matthews was alone in custody. A single red glove
26 appeared on a street named Eleanor which is also in the vicinity. The
27 sawed-off shotgun was located in the grass area in a church near the
28 situs of the suspect vehicle crash.

1 Both during the police investigation and at the preliminary
2 hearing, no lay witness present at the scenes of the various crimes
3 identified Jamar Matthews as being present.

4 ISSUES OF CONCERN FOR TRIAL

5 A. MOTIONS IN LIMINE

- 6 1. References to the specific reasons why the Metro officers
7 were in the area
- 8 2. References to gang affiliation
- 9 3. Reference to prior offenses of the Defendant
- 10 4. References to DNA evidence
- 11 5. References to Gun Residue evidence
- 12 6. Testimony of any parties without personal knowledge of the
13 events.
- 14 7. Use of irrelevant autopsy photos.
- 15 8. Mug shots of the Defendant.

16 B. STATEMENTS OF THE CO-DEFENDANT PIERRE JOSHEIN

17 C. EVIDENCE ONLY ATTRIBUTABLE TO CO-DEFENDANT PIERRE JOSHEIN

18 D. ADMISSIBILITY OF THE DEFENDANT'S STATEMENT

19 A. MOTIONS IN LIMINE

20 Presenting motions in limine, essentially allowing the trial
21 court an opportunity to appraise evidence which may be offered in
22 contravention of the law, is a favored tool to the administration of
23 justice and keeping trials free from error. See Richmond v. State,
24 118 Nev. 924 (2002). Simply stated, there are a number of areas of
25 potential evidence that the State cannot meet the burden to introduce
26 because of (1) relevancy (2) the failure to specifically move for
27 admission and/or (3) the prejudicial impact outweighs any probative
28 value. See NRS 48.015, NRS 48.035.

1 1. References to the specific reasons why the "Problem Solving
2 Unit" was in the area.

3 The discovery provided by the State and some of the testimony
4 elicited at the preliminary hearing indicates that the reason that
5 Metro was nearby was to "prevent retaliation for a gang murder the
6 night before." The State has provided no discovery that the instant
7 event was connected to a gang murder from the previous night, nor is
8 there any relevance as to why these officers were in the neighborhood.
9 The Defense suggests that it would be highly prejudicial to suggest
10 to the jury through this testimony that this was a gang or retaliation
11 murder as it has no bearing on the ultimate disposition, nor any
12 elements of the offense. As such, the Defense would suggest that the
13 police officers do not indicate the specific unit they were involved
14 with (i.e. "Problem Solving Unit") and that they be instructed to
15 indicate that they were on patrol of the area. This is a truthful
16 statement of their purpose and allows the State to then proceed to the
17 relevant events of that evening.

18 2. Reference to gang affiliation

19 Pre-trial discussions with the State have indicated that the
20 State does not intend on offering any gang evidence and that the
21 witnesses have been instructed not to make reference as a gang. As
22 such, specifically excluding such references would be appropriate.
23 See Dawson v. Delaware, 503 US 159, 112 S.Ct. 1093, 117 L.Ed.2d 309
24 (1992).

25 3. References to prior offenses of the Defendant

26 The SCOPE of Defendant Jamar Matthews indicates a number of drug
27 offenses and gun charges. The Defense noted on the State's Notice(s)
28 of witnesses, some officers involved with those prior arrests are

1 listed. However, the State has not specifically moved for the entry
2 of those prior crimes into the current offense. If at some time these
3 prior events become relevant, it is requested that the State make an
4 offer of proof outside the presence of the jury before the witness
5 testifies so that the Defense could be heard regarding any potential
6 objections.

7 **4. References to DNA evidence**

8 Outside the 21 day time-frame for noticing witnesses, the State
9 indicated that there was a DNA expert (and one unnamed to come)
10 involving DNA testing on a red glove found in the neighborhood where
11 the police gave chase to fleeing suspects. Preliminary tests provided
12 to the Defense indicate that one of four contributing sources of the
13 DNA source found in the glove was that of a male. The Defense will
14 be objecting to the admissibility of any of that evidence.

15 **5. References to Gun Residue**

16 On May 3, 2007, the State provided by fax transmission, a "trace
17 evidence report" that three microscopic particles of different
18 composition were found on each hand of the Defendant Jamar Matthews.
19 No prior discovery was provided indicating a gun residue collection
20 kit was conducted on Jamar Matthews, who did it, under what conditions
21 it was conducted, or the chain of custody for the test. No evidence
22 was provided as to the accreditation or lab conditions of the Bexar
23 County Criminal Investigation Laboratory out of San Antonio, Texas.
24 As such, the Defense intends on making a foundational and/or Brady
25 violation challenge to the introduction of this evidence.

26 Secondly, the report indicates a third individual named Trevin
27 Jones was tested and the Defense has no discovery on that person.

28 Finally, the results of the test indicate that "based on the

1 morphology and elemental composition of these particles, Jamar Demone
2 Matthews may have discharged a firearm, handled a discharged firearm
3 or was in close proximity to a discharged firearm." Ultimately, the
4 Defense will be challenging the admissibility of this evidence based
5 on failure to meet the standards of relevant, scientific evidence.

6 However, in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509
7 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d (BNA)
8 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23
9 Env'tl. L. Rep. 20979 (1993), the United States Supreme Court
10 determined that Federal Rule of Evidence 702 had superseded the prior
11 Frye test (corresponding Nevada Revised Statute is NRS 50.275, et.
12 al), and enunciated a new standard for determining the admissibility
13 of novel scientific evidence, establishing a "gatekeeping" role for
14 federal district courts and enunciating several factors to be
15 considered in determining the admissibility of new scientific
16 evidence. The Nevada Supreme Court has used the *Frye*, *Daubert*, and
17 other tests in determining the admissibility of expert testimony
18 regarding scientific, technical, or other specialized knowledge. As
19 such, the evidence rule applicable to expert testimony, and while the
20 Nevada Supreme Court has not specifically overruled the *Frye* test,
21 this Court has appropriate standard for determining the admissibility
22 of scientific evidence. A brief overview of those traditional
23 factors includes: (1) general acceptance of the theory and technique
24 by the relevant scientific community; (2) the expert's qualifications;
25 (3) the existence of literature supporting or rejecting the theory;
26 (4) the technique's potential rate of error; (5) the availability of
27 other experts to test and evaluate the technique; (6) the clarity with
28 which the theory or technique can be explained to the trial court; and

1 (7) the experience and skill of the person who applied the technique
2 on the occasion in question. See generally, Yamaha Motor Co., U.S.A.
3 v. Arnoult, 114 Nev. 233, 955 P.2d 661 (1998).

4 6. The use of any evidence where the witness lacks personal
5 knowledge.

6 NRS 50.025 provides that a witness may NOT testify unless
7 sufficient evidence exists to support that he or she has personal
8 knowledge of matter to which they are testifying. Speculative
9 testimony about how another might have acted without personal
10 knowledge is not admissible. Nevada Power Co. v. Monsanto Co. 891
11 F.Supp. 1406 (D. Nev. 1995).

12 NRS 47.080 provides, in relevant part, that "in jury cases,
13 hearings on preliminary questions of admissibility, offers of proof
14 in narrative or question and answer ^W form shall to extent practicable
15 be conducted out of the hearing of the jury to prevent the suggestion
16 of inadmissible evidence."

17 7. Autopsy Photos

18 8. "Mug" shots

19 Whereas cause of death is contested, it is understandable that
20 some autopsy photos may assist the State's witnesses. However, the
21 Defense objects to the use of any gratuitous or unnecessary autopsy
22 photos and will be asking the Court to review said photos prior to
23 their admissibility to meet these parameters. Further, there is no
24 reason for Jamar's booking photo or for that matter any "unflattering"
25 photos of Jamar to be introduced under any circumstances by the State
26 unless a specific offer of proof be made and the Defense would object
27 to these photos as irrelevant and prejudicial under NRS 48.035.

28 B. STATEMENTS OF THE CO-DEFENDANT

1 C. EVIDENCE ATTRIBUTABLE ONLY TO THE CO-DEFENDANT

2 Crawford v. Washington holds that "the Confrontation Clause bars
3 the use of a testimonial statement made by a witness who does not
4 appear at trial, unless the witness is unavailable to testify at
5 trial, and the defendant had a prior opportunity to cross-examine the
6 witness regarding the statement." 541 U.S. ____, 124 S. Ct. 1354
7 (2004). It is axiomatic that since the Statements of Pierre Joshlin
8 are not subject to cross-examination that there are inadmissible. The
9 Defendant intends on challenging the admissibility of the evidence so
10 offered based on all available grounds.

11 More importantly, It is presumed that the State will not attempt
12 to offer this improper evidence into the trial. To do so would be a
13 clear violation of Bruton v. United States, 391 US 123, 88 S.Ct.
14 1620, 20 L.Ed. 476 (1968). In Bruton, the United States Supreme Court
15 stated that a defendant was prejudiced by the admissions in evidence
16 against a co-defendant of a statement or confession made by that co-
17 defendant. Id. The Defense only raises this issue in an abundance
18 of caution, for certainly the State cannot avoid the realities of this
19 black letter rule. Any admission against the co-defendant should be
20 accompanied by an admonishment not to consider the evidence against
21 the Mr. Matthews. Presumably, this can be done orderly and without
22 prejudicing Mr. Matthews. In the event, the Defense feels Mr.
23 Matthews is being prejudiced by joinder of the parties, it anticipated
24 that a Motion to Sever may be made.

25 D. The admissibility of the Defendant's "statement."

26 It is the belief of the Defense that the "Statement" given
27 by the Defendant whereupon he requests an attorney is not admissible
28 for any reason, and to refer to it would be a violation of the

1 Defendant's Fifth Amendment rights.

2 CONCLUSION

3 The Defendant and hopefully, the State as well, should be
4 directed to do everything within their power to keep this record clean
5 and free from any error or misconduct. As such, the Defendant files
6 this Bench Brief both to preserve his rights as well as alert the
7 Court of potential areas of concern given that the State is ostensibly
8 seeking a conviction for first-degree murder in this case.

9 DATED this 7th day of May, 2007.

10 BUNIN & BUNIN, LTD.

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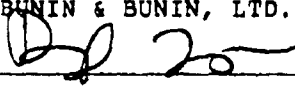
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1 **OPPS**

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3 Clark County District Attorney
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5 NELL CHRISTENSEN
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10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 -vs-)

12 JEMAR MATTHEWS, aka,)
13 Jemar Demon Matthews, #1014654)

14 Defendant.)

CASE NO: C228460-2

DEPT NO: XVIII

15 **STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL POINTS AND**
16 **AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

17 DATE OF HEARING: OCTOBER 12, 2012

18 TIME OF HEARING: 9:00 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney,
20 through NELL CHRISTENSEN, Chief Deputy District Attorney, and hereby submits the
21 attached Points and Authorities in Response to Defendant's Supplemental Points and
22 Authorities in Support of his Petition for Writ of Habeas Corpus.

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

26 //

27 //

28 //

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 An Information was filed on December 7, 2006 charging Jemar Matthews (hereinafter
4 "Defendant") as follows: COUNT 1 - CONSPIRACY TO COMMIT MURDER (Felony -
5 NRS 199.480, 200.010, 200.030); COUNT 2 - MURDER WITH USE OF A DEADLY
6 WEAPON (Felony - NRS 200.010, 200.030, 193.165); COUNTS 3-5 - ATTEMPT
7 MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030,
8 193.165); COUNT 6 - POSSESSION OF SHORT BARRELED RIFLE (Felony - NRS
9 202.275); COUNT 7 - CONSPIRACY TO COMMIT ROBBERY (Felony - NRS 199.480,
10 200.380); COUNTS 8-9 - ROBBERY WITH USE OF A DEADLY WEAPON (Felony -
11 NRS 200.380, 193.165) and COUNTS 10-11 - ASSAULT WITH A DEADLY WEAPON
12 (Felony - NRS 200.471). Following a jury trial, Defendant was convicted on all counts on
13 May 11, 2007.

14 On May 21, 2007, Defendant filed a Motion for New Trial. The State filed its
15 Opposition on June 1, 2007. Defendant filed a Reply on July 9, 2007. The District Court
16 denied the Motion on July 9, 2007 and filed its Order September 17, 2007.

17 In addition to a \$25.00 Administrative Assessment Fee and a \$150.00 DNA Analysis
18 Fee, Defendant was sentenced on July 9, 2007 to the Nevada Department of Corrections as
19 follows: COUNT 1 - to a maximum of one hundred and twenty (120) months with a
20 minimum parole eligibility of twenty-six (26) months; COUNT 2 - LIFE with a minimum
21 parole eligibility of twenty (20) years plus an equal and consecutive term of LIFE with a
22 minimum parole eligibility of twenty (20) years for use of the deadly weapon; COUNTS 3-5
23 - to a maximum of two hundred forty (240) months with a minimum parole eligibility of
24 forty-eight (48) months plus an equal and consecutive term of a maximum of two hundred
25 forty (240) months with a minimum parole eligibility of forty-eight (48) months for use of
26 the deadly weapon; COUNT 6 - to a maximum of forty-eight (48) months with a minimum
27 parole eligibility of twelve (12) months; COUNT 7 - to a maximum of seventy-two (72)
28 months with a minimum parole eligibility of twelve (12) months; COUNTS 8-9 - to a

1 maximum of one hundred eighty (180) months with a minimum parole eligibility of forty
2 (40) months plus an equal and consecutive term of a maximum of one hundred eighty (180)
3 months with a minimum parole eligibility of forty (40) months for use of the deadly weapon;
4 and COUNTS 10-11 - to a maximum of seventy-two (72) months with a minimum parole
5 eligibility of sixteen (16) months; all counts to run concurrent with three hundred (300) days
6 credit for time served. The Judgment of Conviction was filed on July 17, 2007.

7 Defendant filed a Notice of Appeal on August 17, 2007. The Nevada Supreme Court
8 filed its Order of Affirmance on June 30, 2009. Remittitur issued on December 15, 2009.

9 Defendant filed a Petition for Writ of Habeas Corpus on December 14, 2010. The
10 evidentiary hearing for the Petition scheduled on March 23, 2011 was vacated. On February
11 6, 2012, Carmine Collucic, Esq., accepted the Court's appointment as Defendant's counsel.
12 Thereafter, on July 9, 2012, Defendant filed the instant Supplemental Points and Authorities
13 in Support of Petition for Writ of Habeas Corpus.¹ The State responds as follows.

14 ARGUMENT

15 **I. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL**

16 The only issue raise in Defendant's initial Petition filed December 14, 2010 and the
17 Supplement filed on July 9, 2012 is that trial counsel was ineffective for failing to file a
18 motion to sever Defendant's trial from that of his co-defendant.

19 **A. Legal Standard**

20 In order to assert a claim for ineffective assistance of counsel, a defendant must prove
21 that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong
22 test set forth in Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64
23 (1984). Under this test, the defendant must show: first, that his counsel's representation fell
24 below an objective standard of reasonableness, and second, that but for counsel's errors,
25 there is a reasonable probability that the result of the proceedings would have been different.

26
27
28 ¹ On September 10, 2012, Defendant filed an "Amended Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus which only repaginated the original Supplement and added the phrase "Additionally, the defense called a witness who testified at trial, in order to." Those adjustments make no material alterations to Defendant's argument or the State's Response.

1 See Strickland, 466 U.S. at 687–688, 694, 104 S.Ct. at 2065, 2068. “Effective counsel does
2 not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
3 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, Nevada State
4 Prison, 91 Nev. 430, 432, 537 p.2d 473, 474 (1975), quoting Mcman v. Richardson, 397
5 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

6 The court begins with the presumption of effectiveness and then must determine
7 whether the defendant has demonstrated by a preponderance of the evidence that counsel
8 was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). This analysis does not
9 indicate that the court should “second guess reasoned choices between trial tactics, nor does
10 it mean that defense counsel, to protect himself against allegations of inadequacy, must make
11 every conceivable motion no matter how remote the possibilities are of success.” Donovan
12 v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing Cooper v. Fitzharris, 551 f.2d
13 1162, 1166 (9th Cir. 1977). In essence, the court must “judge the reasonableness of
14 counsel’s challenged conduct on the facts of the particular case, viewed as of the time of
15 counsel’s conduct.” Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

16 Even if a defendant can demonstrate that his counsel’s representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel’s errors, the result of the trial would have been
19 different. McNelson v. State, 115 Nev. 396, 403, 990 p.2d 1263, 1268 (1999), citing
20 Strickland, 466 U.S. at 687. “A reasonable probability is a probability sufficient to
21 undermine confidence in the outcome.” Id., citing Strickland, 466 U.S. at 687-89, 694.
22 Defendant makes several allegations of ineffective assistance of counsel.

23 **B. Counsel Cannot be Deemed Ineffective for Failing to Move to Sever**
24 **Defendant’s Case from Co-Defendant’s Case.**

25 Defendant claims that his trial counsel was ineffective for failing to sever his case
26 from that of his co-defendant. However, Defendant has failed to demonstrate that there
27 indeed was a legal basis upon which severance would have been granted.

28 //

1 A trial judge may sever a joint trial if "it appears that a defendant ... is prejudiced by a
2 joinder of ... defendants ... for trial together." NRS 174.165(1); Chartier v. State, 124 Nev.
3 760, 191 P.3d 1182 (2008). Moreover, a district court should grant a severance only where
4 there exists a serious risk that "a joint trial would compromise a specific trial right of one of
5 the defendants, or prevent the jury from making a reliable judgment about guilt or
6 innocence." Id., citing Zafiro v. United States, 506 U.S. 534, 539, 113 S.Ct. 933 (1993).
7 The decision to grant a severance rests solely within the discretion of the trial court. Buff v.
8 State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998), citing Amen v. State, 106 Nev. 749,
9 755-56, 801 P.2d 1354, 1359 (1990).

10 Although Defendant now claims that the evidence was slight against him as compared
11 to the co-defendant, the Supreme Court of Nevada in its Order of Affirmance stated at page
12 four:

13 "There was significant evidence indicating that [Defendant]
14 participated in the shooting, robbery and police chase (a pursuing
15 officer identified [Defendant] as the driver in possession of the
16 rifle, the bullet that killed the victim came from the same type of
17 rifle in [Defendant's] possession, the red glove found near where
the police apprehended [Defendant] tested positive for gunshot
residue, and [Defendant] closely matched the description of the
shooting and robbery suspects)."

18 Order of Affirmance, Case No. 50052, 12/21/2009, p. 4.

19 Defendant merely provides this court with bare assertions that the evidence against
20 him was weak and a comparison that the case against the co-defendant was stronger.
21 However, these allegations do not sufficiently explain to this Court why severance was
22 required given the finding of the Nevada Supreme Court and evidence presented against
23 Defendant during trial. Since Defendant has failed to make an adequate showing of
24 antagonistic defenses between himself and his co-defendant, a motion to sever would have
25 been futile. Since trial counsel cannot be deemed ineffective for failing to file futile
26 motions, Defendant's Petition should be denied. See Ennis v. State, 122 Nev. 694, 137 P.3d
27 1095.

28 //

CONCLUSION

Based on the foregoing arguments, Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) should be DENIED.

DATED this 10th day of September, 2012.

Respectfully submitted,

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

BY /s/ Christopher Pandelis for
NELLY CHRISTENSEN
Chief Deputy District Attorney
Nevada Bar #008822

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response To Defendant's Supplemental Points And Authorities In Support Of Petition For Writ Of Habeas Corpus, was made this 10th day of September, 2012, by facsimile transmission to:

CARMINE J. COLUCCI, Esq.
384-4453

BY: /s/ R. Johnson
R. JOHNSON
Secretary for the District Attorney's Office

RS/ NC/rj


CLERK OF THE COURT

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10 Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

JEMAR MATTHEWS,)	CASE NO. C228460
)	DEPT NO. XVIII
Petitioner,)	
)	
vs.)	
)	
RENEE BAKER, WARDEN, ELY STATE)	
PRISON,)	
)	
Respondent.)	

REPLY TO STATE'S RESPONSE TO DEFENDANT'S
SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Petitioner, JEMAR MATTHEWS, by and through his attorney,
CARMINE J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI, CHTD., and
hereby submits his reply points and authorities to the State's Response to
Defendant's Supplemental Points and Authorities in Support of Petition for Writ of
Habeas Corpus (Post-Conviction).

This reply is made and based upon all pleadings and papers on file herein
together with the points and authorities submitted herewith and the oral arguments

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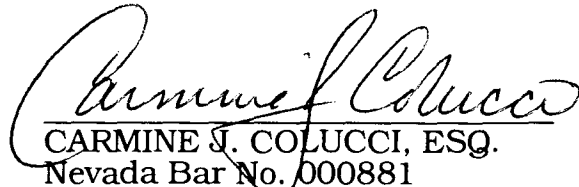
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AA0001518

1 of the parties, if any, as deemed necessary by this Court.

2 DATED this 24th day of September, 2012.

3 CARMINE J. COLUCCI, CHTD.

4 
5 CARMINE J. COLUCCI, ESQ.

6 Nevada Bar No. 000881
7 629 South Sixth Street
8 Las Vegas, Nevada 89101
9 Attorney for Petitioner

10 **POINTS AND AUTHORITIES**

11 The issue being addressed in the original petition and supplements thereto is
12 whether petitioner's trial counsel was constitutionally ineffective for failing to file a
13 motion to sever especially after recognizing that there might be a need to do so.¹

14 The legal basis upon which the severance could have been granted was that
15 Matthews would suffer unfair prejudice because the evidence against his co-
16 defendant, Pierre Joshlin, was much stronger and the State, by linking the argument
17 of their guilt together, violated Petitioner's constitutional right to a fair trial. By being
18 exposed to the evidence against both defendants "collectively" and then having the
19 prosecutor argue over and over that "they" did this or that, the jury was realistically
20 precluded from considering only the evidence which was relevant solely against
21 Matthews as they were weighing the evidence against each defendant separately.

22 While it has been asserted that the red glove was found near where the
23 Petitioner was apprehended, it was found on another street some distance away. Any
24 connection between the red glove and the Petitioner is tenuous at best. Aside from
25 the possible location in the same neighborhood, there was nothing else to connect
26 this particular glove to the Petitioner. Aside from a "fleeting" view during a quick
27 glance by police, the evidence against Petitioner was circumstantial at best.

28 ¹Bench Brief attached hereto as Exhibit 1.

1 To establish that joinder of the parties was prejudicial, Petitioner must show
2 that the joinder had a substantial injurious effect on the verdict. The jury heard
3 evidence that Petitioner's co-defendant, Pierre Joshlin, was found in a dumpster
4 almost immediately after the shooting and that a gun used in the shooting was found
5 underneath him when he was extracted from it. That evidence alone is much
6 stronger than the evidence that was presented against Petitioner by the State yet
7 when considered together by the same jury, its effect was to deny Petitioner a fair
8 trial and due process. See Chartier v. State, 124 Nev. 760 (2012).

9 In the Chartier case, the Nevada Supreme Court reversed the conviction of the
10 defendant holding that the joinder of the parties violated the defendant's right to a
11 fair trial by preventing the jury from making a reliable judgment as to his guilt or
12 innocence. Petitioner now asserts that since allegations of ineffective assistance of
13 counsel present mixed questions of law and fact, Petitioner's trial counsel should be
14 required to explain the basis for his decision not to file a motion for severance and
15 further to explain the projected benefit that he expected to inure to Petitioner's
16 benefit from this decision.

17 The undue prejudice and denial of a fair trial by being joined at trial with his
18 co-defendant is clearly illustrated by the continuous references to "them" in the
19 State's rebuttal argument. This satisfies the second requirement needed to establish
20 that severance of the parties was necessary and the failure to request a severance
21 caused defense counsel to be ineffective.

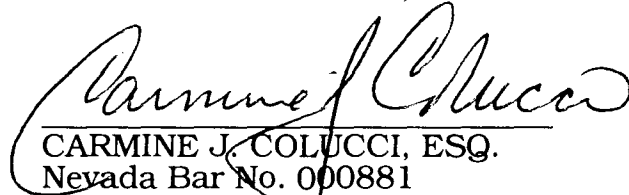
22 CONCLUSION

23 For the reasons set forth in the original points and authorities, the supplement
24 thereto and this reply, Petitioner asserts that this petition should be granted or in the
25 alternative that this Court should grant Petitioner an evidentiary hearing so that
26 facts can be elicited on his allegation that the failure to file and pursue a motion to
27 sever denied him due process and a fair trial in violation of his rights as guaranteed
28 under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United

1 States.

2 DATED this 24th day of September, 2012.

3 CARMINE J. COLUCCI, CHTD.

4 

5 CARMINE J. COLUCCI, ESQ.
6 Nevada Bar No. 000881
7 629 South Sixth Street
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9 Attorney for Petitioner

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Catherine Cortez Masto
Nevada Attorney General
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EXHIBIT 1

AA0001523

ORIGINAL

FILED IN OPEN COURT

MAY - 8 2007 20

CHARLES J. SHORT
CLERK OF THE COURT

BY Sharon Chum
DEPUTY

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4 Attorneys for the Defendant

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CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA

9 Plaintiff,

10 vs.

11 JAMAR MATTHEWS

12 Defendant.

Case No. C228460

Dept. No. 18

14 BENCH BRIEF

15 TO: The Honorable DAVID BARKER, Judge of the Eighth Judicial
16 District Court of the State of Nevada, in and for the County of
Clark:

17 COMES NOW, DAYVID J. FIGLER, attorney for the above-captioned
18 person, and respectfully submits the following facts and issues for
19 consideration by the District Court in light of the impending trial
20 in the above-captioned matter.

21 BRIEF OVERVIEW OF FACTS OF THE CASE

22 Mercy Williams was shot by a .22 caliber bullet while standing
23 in front of a friends house on Balzar in North Las Vegas in the
24 evening hours of September 30, 2006. Witnesses place between three
25 and five individuals within the group from where the bullets
26 originated. Two Las Vegas Metropolitan Police Officers assigned to
27 the "Problem Solving Unit" were in the vicinity to what they testified
28 to as "preventing retaliation" for a gang murder that occurred the
prior evening. When these officers, Cupp and Walter, heard the gun

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1 fire, they proceeded to the area. Shortly after the shooting of Mercy
2 Williams, a car theft took place approximately one block away. The
3 owner of this vehicle is Geishe Orduno who was in possession of the
4 vehicle along with her friend, Melvin Bolden. Police pursued this
5 vehicle, a silver, Lincoln towncar with tinted windows, after it was
6 observed that it was taken by three-four African-American juveniles.

7 That short chase proceeded down Martin Luther King Boulevard to
8 a street called Jimmy and ended shortly thereafter on a street called
9 Lexington. Police report that just prior to the suspect car crashing
10 into a fire hydrant, the driver of the vehicle leaned out the door of
11 the car and pointed what appeared to be a sawed-off shotgun at police.
12 Police upon seeing the alleged driver exit the vehicle swerved towards
13 the individual alleged to be the driver and struck him with their
14 police vehicle causing the individual to fall to the ground. Two
15 other individuals in the suspect car also exited and fled on foot.
16 There was a chase of the fleeing individuals. Shortly thereafter, gun
17 shots were fired by Officer Cupp at one of the fleeing suspects.
18 Shortly thereafter, Piere Joshlin was found in a nearby dumpster and
19 within that dumpster were black gloves and a .45 caliber weapon.
20 Officer Walter responding to the gunshots, abandoned his pursuit of
21 the alleged driver.

22 Approximately an hour later, Defendant, Jamar Matthews was seized
23 by K-9 dogs from an area in the backyard on Jimmy Street. Officer
24 Walter identified Matthews as the fleeing driver after a one-on-one
25 line-up while Matthews was alone in custody. A single red glove
26 appeared on a street named Eleanor which is also in the vicinity. The
27 sawed-off shotgun was located in the grass area in a church near the
28 situs of the suspect vehicle crash.

1 Both during the police investigation and at the preliminary
2 hearing, no lay witness present at the scenes of the various crimes
3 identified Jamar Matthews as being present.

4 ISSUES OF CONCERN FOR TRIAL

5 A. MOTIONS IN LIMINE

- 6 1. References to the specific reasons why the Metro officers
7 were in the area
- 8 2. References to gang affiliation
- 9 3. Reference to prior offenses of the Defendant
- 10 4. References to DNA evidence
- 11 5. References to Gun Residue evidence
- 12 6. Testimony of any parties without personal knowledge of the
13 events.
- 14 7. Use of irrelevant autopsy photos.
- 15 8. Mug shots of the Defendant.

16 B. STATEMENTS OF THE CO-DEFENDANT PIERRE JOSEPH

17 C. EVIDENCE ONLY ATTRIBUTABLE TO CO-DEFENDANT PIERRE JOSEPH

18 D. ADMISSIBILITY OF THE DEFENDANT'S STATEMENT

19 A. MOTIONS IN LIMINE

20 Presenting motions in limine, essentially allowing the trial
21 court an opportunity to appraise evidence which may be offered in
22 contravention of the law, is a favored tool to the administration of
23 justice and keeping trials free from error. See Richmond v. State,
24 118 Nev. 924 (2002). Simply stated, there are a number of areas of
25 potential evidence that the State cannot meet the burden to introduce
26 because of (1) relevancy (2) the failure to specifically move for
27 admission and/or (3) the prejudicial impact outweighs any probative
28 value. See NRS 48.015, NRS 48.035.

1 1. References to the specific reasons why the "Problem Solving
2 Unit" was in the area.

3 The discovery provided by the State and some of the testimony
4 elicited at the preliminary hearing indicates that the reason that
5 Metro was nearby was to "prevent retaliation for a gang murder the
6 night before." The State has provided no discovery that the instant
7 event was connected to a gang murder from the previous night, nor is
8 there any relevance as to why these officers were in the neighborhood.
9 The Defense suggests that it would be highly prejudicial to suggest
10 to the jury through this testimony that this was a gang or retaliation
11 murder as it has no bearing on the ultimate disposition, nor any
12 elements of the offense. As such, the Defense would suggest that the
13 police officers do not indicate the specific unit they were involved
14 with (i.e. "Problem Solving Unit") and that they be instructed to
15 indicate that they were on patrol of the area. This is a truthful
16 statement of their purpose and allows the State to then proceed to the
17 relevant events of that evening.

18 2. Reference to gang affiliation

19 Pre-trial discussions with the State have indicated that the
20 State does not intend on offering any gang evidence and that the
21 witnesses have been instructed not to make reference as a gang. As
22 such, specifically excluding such references would be appropriate.
23 See Dawson v. Delaware, 503 US 159, 112 S.Ct. 1093, 117 L.Ed.2d 309
24 (1992).

25 3. References to prior offenses of the Defendant

26 The SCOPE of Defendant Jamar Matthews indicates a number of drug
27 offenses and gun charges. The Defense noted on the State's Notice(s)
28 of witnesses, some officers involved with those prior arrests are

1 listed. However, the State has not specifically moved for the entry
2 of those prior crimes into the current offense. If at some time these
3 prior events become relevant, it is requested that the State make an
4 offer of proof outside the presence of the jury before the witness
5 testifies so that the Defense could be heard regarding any potential
6 objections.

7 **4. References to DNA evidence**

8 Outside the 21 day time-frame for noticing witnesses, the State
9 indicated that there was a DNA expert (and one unnamed to come)
10 involving DNA testing on a red glove found in the neighborhood where
11 the police gave chase to fleeing suspects. Preliminary tests provided
12 to the Defense indicate that one of four contributing sources of the
13 DNA source found in the glove was that of a male. The Defense will
14 be objecting to the admissibility of any of that evidence.

15 **5. References to Gun Residue**

16 On May 3, 2007, the State provided by fax transmission, a "trace
17 evidence report" that three microscopic particles of different
18 composition were found on each hand of the Defendant Jamar Matthews.
19 No prior discovery was provided indicating a gun residue collection
20 kit was conducted on Jamar Matthews, who did it, under what conditions
21 it was conducted, or the chain of custody for the test. No evidence
22 was provided as to the accreditation or lab conditions of the Bexar
23 County Criminal Investigation Laboratory out of San Antonio, Texas.
24 As such, the Defense intends on making a foundational and/or Brady
25 violation challenge to the introduction of this evidence.

26 Secondly, the report indicates a third individual named Trevin
27 Jones was tested and the Defense has no discovery on that person.

28 Finally, the results of the test indicate that "based on the

1 morphology and elemental composition of these particles, Jamar Demone
2 Matthews may have discharged a firearm, handled a discharged firearm
3 or was in close proximity to a discharged firearm." Ultimately, the
4 Defense will be challenging the admissibility of this evidence based
5 on failure to meet the standards of relevant, scientific evidence.
6 However, in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509
7 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d (BNA)
8 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23
9 Env'tl. L. Rep. 20979 (1993), the United States Supreme Court
10 determined that Federal Rule of Evidence 702 had superseded the prior
11 Frye test (corresponding Nevada Revised Statute is NRS 50.275, et.
12 al), and enunciated a new standard for determining the admissibility
13 of novel scientific evidence, establishing a "gatekeeping" role for
14 federal district courts and enunciating several factors to be
15 considered in determining the admissibility of new scientific
16 evidence. The Nevada Supreme Court has used the Frye, Daubert, and
17 other tests in determining the admissibility of expert testimony
18 regarding scientific, technical, or other specialized knowledge. As
19 such, the evidence rule applicable to expert testimony, and while the
20 Nevada Supreme Court has not specifically overruled the Frye test,
21 this Court has appropriate standard for determining the admissibility
22 of scientific evidence. A brief overview of those traditional
23 factors includes: (1) general acceptance of the theory and technique
24 by the relevant scientific community; (2) the expert's qualifications;
25 (3) the existence of literature supporting or rejecting the theory;
26 (4) the technique's potential rate of error; (5) the availability of
27 other experts to test and evaluate the technique; (6) the clarity with
28 which the theory or technique can be explained to the trial court; and

1 (7) the experience and skill of the person who applied the technique
2 on the occasion in question. See generally, Yamaha Motor Co., U.S.A.
3 v. Arnoult, 114 Nev. 233, 955 P.2d 661 (1998).

4 6. The use of any evidence where the witness lacks personal
5 knowledge.

6 NRS 50.025 provides that a witness may NOT testify unless
7 sufficient evidence exists to support that he or she has personal
8 knowledge of matter to which they are testifying. Speculative
9 testimony about how another might have acted without personal
10 knowledge is not admissible. Nevada Power Co. v. Monsanto Co. 891
11 F.Supp. 1406 (D. Nev. 1995).

12 NRS 47.080 provides, in relevant part, that "in jury cases,
13 hearings on preliminary questions of admissibility, offers of proof
14 in narrative or question and answer ^W form shall to extent practicable
15 be conducted out of the hearing of the jury to prevent the suggestion
16 of inadmissible evidence."

17 7. Autopsy Photos

18 8. "Mug" shots

19 Whereas cause of death is contested, it is understandable that
20 some autopsy photos may assist the State's witnesses. However, the
21 Defense objects to the use of any gratuitous or unnecessary autopsy
22 photos and will be asking the Court to review said photos prior to
23 their admissibility to meet these parameters. Further, there is no
24 reason for Jamar's booking photo or for that matter any "unflattering"
25 photos of Jamar to be introduced under any circumstances by the State
26 unless a specific offer of proof be made and the Defense would object
27 to these photos as irrelevant and prejudicial under NRS 48.035.

28 B. STATEMENTS OF THE CO-DEFENDANT

1 C. EVIDENCE ATTRIBUTABLE ONLY TO THE CO-DEFENDANT

2 Crawford v. Washington holds that "the Confrontation Clause bars
3 the use of a testimonial statement made by a witness who does not
4 appear at trial, unless the witness is unavailable to testify at
5 trial, and the defendant had a prior opportunity to cross-examine the
6 witness regarding the statement." 541 U.S. ____, 124 S. Ct. 1354
7 (2004). It is axiomatic that since the Statements of Pierre Joshlin
8 are not subject to cross-examination that there are inadmissible. The
9 Defendant intends on challenging the admissibility of the evidence so
10 offered based on all available grounds.

11 More importantly, It is presumed that the State will not attempt
12 to offer this improper evidence into the trial. To do so would be a
13 clear violation of Bruton v. United States, 391 US 123, 88 S.Ct.
14 1620, 20 L.Ed. 476 (1968). In Bruton, the United States Supreme Court
15 stated that a defendant was prejudiced by the admissions in evidence
16 against a co-defendant of a statement or confession made by that co-
17 defendant. Id. The Defense only raises this issue in an abundance
18 of caution, for certainly the State cannot avoid the realities of this
19 black letter rule. Any admission against the co-defendant should be
20 accompanied by an admonishment not to consider the evidence against
21 the Mr. Matthews. Presumably, this can be done orderly and without
22 prejudicing Mr. Matthews. In the event, the Defense feels Mr.
23 Matthews is being prejudiced by joinder of the parties, it anticipated
24 that a Motion to Sever may be made.

25 D. The admissibility of the Defendant's "statement."

26 It is the belief of the Defense that the "Statement" given
27 by the Defendant whereupon he requests an attorney is not admissible
28 for any reason, and to refer to it would be a violation of the

1 Defendant's Fifth Amendment rights.

2 CONCLUSION

3 The Defendant and hopefully, the State as well, should be
4 directed to do everything within their power to keep this record clean
5 and free from any error or misconduct. As such, the Defendant files
6 this Bench Brief both to preserve his rights as well as alert the
7 Court of potential areas of concern given that the State is ostensibly
8 seeking a conviction for first-degree murder in this case.

9 DATED this 7th day of May, 2007.

10 BUNIN & BUNIN, LTD.

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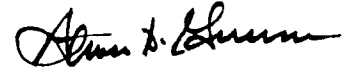
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DAYVID J. FIGLER
Nevada Bar #04264
626 South Third Street
Las Vegas, Nevada 89101



CLERK OF THE COURT

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3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 THE STATE OF NEVADA,

7 Plaintiff,

8 vs.

9 JEMAR MATTHEWS, aka
10 JEMAR DEMON MATTHEWS,

11 Defendant.

CASE NO. C228460-2

DEPT. XVIII

12
13 BEFORE THE HONORABLE DAVID BARKER, DISTRICT COURT JUDGE

14 FRIDAY, OCTOBER 12, 2012

15 **RECORDER'S TRANSCRIPT OF PROCEEDINGS:**
16 **HEARING**

17
18
19 **APPEARANCES:**

20 For the State:

SAMUEL G. BATEMAN, ESQ.
Chief Deputy District Attorney

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22 For the Defendant:

CARMINE J. COLUCCI, ESQ.

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25 RECORDED BY: CHERYL CARPENTER, COURT RECORDER

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WITNESS LIST

Defense Witness:

Page

DAYVID FIGLER

Direct Examination by Mr. Colucci	6
Cross-Examination by Mr. Bateman	19
Redirect Examination by Mr. Colucci	28
Recross Examination by Mr. Bateman	29

1 FRIDAY, OCTOBER 12, 2012 AT 9:04 A.M.

2 THE COURT: This is C228460, State of Nevada versus Jemar Matthews.
3 Record should reflect the presence of representative of Mr. Matthews, Mr. Colucci;
4 representative of the State, Mr. Bateman. This is time set for hearing on petition for
5 writ of habeas corpus post conviction. Mr. Colluci?
6

7 MR. COLUCCI: We're ready to go, Your Honor. We'd call Dayvid Figler as
8 our first witness.

9 THE COURT: Yes.

10 MR. BATEMAN: Can I just -- can I just maybe interject real quick?

11 THE COURT: Okay.

12 MR. BATEMAN: Just so I know kind of where we're going 'cause I just got
13 this last night. It appears, and just for clarification before we put the witness up
14 there, that the Defense is arguing, petitioner is arguing that a motion to sever should
15 have been filed and then included in the petition, and I think it started out with Mr.
16 Ciciliano; is that correct? And then Mr. Colucci followed it up. They included the
17 legal reasons that you would normally put in a severance motion.

18 It strikes me that this might be something that is purely a legal matter
19 for the Court. Because if the Court looks at the reasoning of what should have gone
20 into a severance motion and determines that those aren't sufficient legal reasons to
21 base a severance on, then I don't know what Mr. Figler's going to add to -- I guess
22 unless he got up there and disagreed. But it strikes me that it potentially is a matter
23 purely of law and that there isn't really a reason for an evidentiary hearing. I mean
24 what seems to be in here is that the argument is a spillover effect. That's the only
25 thing I've been able to really glean from here is that the argument is that -- you'll

1 remember that the co-defendant was found in a dumpster close by after the chase
2 with the firearm. And I think the argument is that the evidence was so overwhelming
3 as to this individual that somehow there was a spillover effect onto Mr. Matthews.

4 And so I mean I'm prepared certainly to argue the law in that regard and
5 if the Court were to determine that that was legitimate, then I could see how they
6 may have made a mistake in not filing it. I guess we could decide at that point
7 whether it was a strategic decision but if the Court's belief legally is that wouldn't
8 have been a basis for severance in this case, then I don't know what Mr. Figler's
9 going to add to the issue.

10 THE COURT: Interesting argument.

11 Mr. Colucci?

12 MR. BATEMAN: Because it'd be a prejudice issue.

13 THE COURT: Right. Mr. Colucci, how do you respond to that?

14 MR. COLUCCI: Your Honor, at first blush that appears to be the status of the
15 law in this case; however, there are a lot of other factors that are involved. One,
16 early in the case before the trial, Mr. Figler filed a bench brief indicating that there
17 could be some *Bruton* issues in this case. He also knew the strength of the co-
18 defendant's case -- against the co-defendant versus the strength of the evidence
19 against my client.

20 And while we're talking about a spillover effect, all you have to do is
21 look at the rebuttal argument by the State, which to me was so -- in 35 years it's one
22 of the most egregious closing arguments I've seen, but what the purpose of all --

23 MR. BATEMAN: It wasn't mine.

24 MR. COLUCCI: But the purpose of all of that was to tie this gentleman
25 together with the other gentleman who had a -- who they had a pretty airtight case

1 on. And so normally is a spillover enough for a severance? Maybe not. But in this
2 case given all of the circumstances, they had a strong case against one guy; they
3 had a weak case against the other guy and the State pounded the they and them
4 and together arguing that both of these gentlemen acted in concert. They weren't
5 charged with conspiracy so that argument was probably something that should have
6 been considered and anticipated by Defense counsel.

7 And generally, you know -- and I'm just going to put this on the record
8 because I truly believe this. I think Mr. Figler and Mr. Bunin did a good job in
9 virtually every other aspect of the case and that's why I didn't raise any additional
10 issues. But with respect to this case, I would like to know was this a strategic
11 decision. Not going to take that much time to glean that evidence.

12 THE COURT: That's fine. I'm going to let you build your record. I do note on
13 the Order of Affirmance there was a count of conspiracy. Per the Order of
14 Affirmance: Judgment of Conviction pursuant to jury verdict, conspiracy to commit
15 murder, first degree murder with use, three counts of attempted murder with use,
16 possession of short barreled rifle, conspiracy to commit robbery, two counts of
17 robbery with use, two counts of assault with.

18 MR. COLUCCI: Well, then I stand corrected --

19 THE COURT: Yeah.

20 MR. COLUCCI: -- on that issue.

21 THE COURT: And I thought there was a conspiracy aspect there too.

22 MR. COLUCCI: But even with the -- even with the conspiracy issue, there
23 was no evidence I think at the trial that there was any conspiracy to commit the
24 murder and that's the primary charge that we're concerned with today, so.

25 THE COURT: All right. I'll let you build your record.

1 Mr. Bateman, your arguments are noted.

2 Let's call your first witness, Mr. Colucci.

3 MR. COLUCCI: Thank you.

4 Mr. Figler.

5 May I move the podium?

6 THE COURT: Whatever -- however you need to work.

7 MR. COLUCCI: Just so I can see him.

8 THE COURT: Absolutely.

9 **DAYVID FIGLER**

10 [Having been called as a witness and being first duly sworn, testified as follows:]

11 THE COURT CLERK: Thank you. Please be seated. Will you please state
12 your full name, spelling your first and last name for the record?

13 THE WITNESS: Thank you. My name is Dayvid Figler. First name is spelled
14 D-A-Y-V-I-D, last name F- like in Frank, I-G-L-E-R.

15 THE COURT CLERK: Thank you.

16 THE COURT: Your witness, Mr. Colucci.

17 MR. COLUCCI: Thank you, Your Honor.

18 **DIRECT EXAMINATION**

19 **BY MR. COLUCCI:**

20 Q Mr. Figler, what's your occupation?

21 A I'm an attorney.

22 Q How long have you been an attorney?

23 A I was barred in Nevada in 1991.

24 Q And have you practiced primarily in the area of criminal law?

25 A Since 1995.

1 Q Are you acquainted with Jemar Matthews?

2 A I am.

3 Q And how do you know Mr. Matthews?

4 A Mr. Matthews was an appointed client of mine when I had a contract
5 with the Office of Appointed Counsel, or whatever it was called at the time, and I
6 was appointed to represent Mr. Matthews in a murder charge along with Daniel
7 Bunin.

8 Q Okay. Do you recall at what stage of the proceedings you were
9 appointed to represent Mr. Matthews?

10 A I think we were there at the onset as I recall and then Mr. Matthews
11 invoked his right to a speedy trial so our representation was for an expedited
12 amount of time. But I believe we started in the fall of one year and then we resolved
13 the murder case in the spring of the following year.

14 Q And your co-counsel was Daniel Bunin?

15 A That's correct.

16 Q Okay. And did you guys just divide up your responsibilities with respect
17 to representing Mr. Matthews?

18 A We pretty much had a system in place where we would go over all the
19 materials together, decide which witnesses would be better suited to our various
20 styles, decide who's going to do the opening, who's going to do the closing. I had
21 the primary responsibility for legal objections and arguments and Mr. Bunin went
22 through the evidence to make sure that we had everything. So it was a pretty much
23 a 50/50 split but I had more of the legal issue in Mr. Matthews' case.

24 Q Okay. After your appointment, were you at some point given
25 discovery?

1 A Yes.

2 Q And was it pretty voluminous?

3 A It was a good deal of discovery. I mean no more so than any other
4 murder case. In fact, there was a lot that was still in the process of being developed
5 by the State and so that was I think one of the reasons why we did a invocation of
6 speedy trial right to sort of get through the case before some additional discovery
7 came which may not have been favorable to Mr. Matthews. But voluminous? I
8 would say it was an average case.

9 Q Okay. Over the course of your representation, do you believe you got
10 all of the discovery?

11 A Yes, I believe that we did receive all the pertinent information. There
12 was indeed discovery coming in at the very end. We moved successfully, either
13 through stipulation or through argument to exclude some additional evidence but I
14 think we had all the evidence that was pertinent to the case at the end of the -- when
15 the trial had begun.

16 Q Did you also review the homicide file?

17 A I believe we did have a meeting with the open file and that the homicide
18 file was present at that time.

19 Q Do you feel you had adequate time to prepare for the trial?

20 A Well, that was interesting. It was a little bit of a chaotic case when it
21 came down to the trial time primarily because of the interactions of the -- both the
22 original trial judge and the co-counsel -- or co-defendant's counsel. There were a lot
23 of problems with that, with both of those parties. It was originally Judge Halverson.
24 Judge Halverson was going through a lot of extraneous issues at the time and
25 ultimately was removed from our case. Mr. Singer also was not showing up to court

1 appearances for Mr. Joshlin who was the co-defendant. He was making
2 representations to Mr. Bunin and myself about the status of the case, about his
3 status, the Public Defender came in. So there was a little bit of a sideshow. We
4 were doing our best to prepare 'cause we wanted to maintain the invocation
5 especially in light of there being additional testing out there so we made a concerted
6 effort to be as prepared as we could for the trial.

7 Q Did Mr. Singer make any representations as to the status of a possible
8 plea bargain?

9 A I'll say Mr. Singer made lots of representations to us; that he was fired
10 from the case, that he was back on the case, that he wasn't going to do the case,
11 that he had a deal in the case. It was really not until the very last minute because
12 there was at one point the Public Defender was showing up for Mr. Joshlin and then
13 they had some sort of conflict. I think -- golly, I think Norm Reed showed up on one
14 of the -- near the calendar call, and this was all in the month of April when all this
15 was happening. So Mr. Singer did not be -- did not appear to us to be fully prepared
16 to go forward and we thought that he wasn't going to go forward and then at one
17 point he said that he had a deal. So yeah, he made a lot of representations to us
18 but it was all sort of scattered and we were never really sure that Mr. Singer was
19 even going to show up at the time when the trial was set. Eventually, he was -- he
20 was appointed. I think it was either the very last action of Judge Halverson or
21 maybe the very first action of Judge Barker but Mr. Singer was eventually appointed
22 to the case.

23 Q Did these problems with Mr. Singer serve to give you any kind of a
24 warning that he would not be able to really participate in the trial effectively?

25 A It was a distraction; I'll say that for certain. But we had to focus on Mr.

1 Matthews. It was really sort of an X-factor, if you will; an uncertainty that Mr. Bunin
2 and I were concerned about but that we were trying very hard not to be as distracted
3 as it was presenting.

4 Q Did you consider filing a motion to sever based on Mr. Singer's
5 performance up to the time you were getting ready for trial?

6 A No and what Mr. Bunin and I had done, we had discussed the various
7 merits of doing that. We didn't feel that there was a legal grounds at the time to
8 sever but we were concerned about Mr. Singer. So we decided that we would do
9 this bench brief to put all the parties on notice that if anyone tethered too close to
10 the line or if something happened, that we would be -- that we were contemplating a
11 motion to sever. But, no, I don't think that Mr. Bunin and I thought specifically, boy,
12 we need to sever this because of the misconduct. I'm not going to call it
13 misconduct, but because of the interesting and unusual process that was going on
14 with regard to both the judge and Mr. Singer. We didn't contemplate that that would
15 be the -- a grounds for a sever, that we should move for a severance at that time.
16 We didn't think of that.

17 Q Do you recall filing the bench brief on May 8th of 2007?

18 A Absolutely, yes.

19 MR. COLUCCI: Your Honor, I take -- just ask the Court to take judicial notice
20 of it. It's in your file.

21 THE COURT: I will.

22 MR. COLUCCI: And I know the State should have a copy. It was also part of
23 our filing.

24 BY MR. COLUCCI:

25 Q In your bench brief you mention possible -- a possible motion to keep

1 out the statements of the co-defendant.

2 A Correct.

3 Q And did you recognize that that might be an issue that would require a
4 severance in this case?

5 A Yes and I think we pointed that out in the bench brief that if any of the
6 statements violated *Bruton* or in any way implicated our client, either by name or by
7 an omission that could be filled in by the jury thinking that it was Mr. Matthews, that
8 we would be forced into a severance situation.

9 Q And of course you can file a severance virtually at any point before the
10 jury verdict comes in.

11 A Indeed, the case law supports that severance can happen at any time.

12 Q And you were aware of that at the time?

13 A Yes.

14 Q Okay. You filed some other pretrial motions as well; correct?

15 A We were fighting over evidentiary stuff. I don't recall if it was done
16 orally or if it was done by motion but we were certainly fighting testing, admission of
17 experts done late. We also put the Court on notice for certain motions in limine
18 which were discussed orally. We -- in writing we put the motions in limine down but
19 I think we discussed them orally and then there was also a degree of stipulation that
20 was occurring between the parties so that the case could go forward in a way that
21 was fair to the State and Mr. Matthews.

22 Q Did you discuss with Mr. Bunin the possibility of filing a motion to sever
23 pretrial?

24 A If we did have a discussion, it would have been ultimately my decision.
25 I think we did talk about -- again, it was heavy on our minds what was going on with

1 Mr. Singer and his client but I think ultimately we felt that the legal grounds would be
2 light and that there -- frankly, there might even be some manner of benefit to having
3 a comparison between Mr. Joshlin and Mr. Matthews because we felt Mr. Matthews'
4 case was much weaker than Mr. Joshlin's case. So ultimately the decision came to
5 me and the decision was made to simply put the Court on notice and put the State
6 on notice that if they did cross the line that we would do that; but as far as the rest of
7 your question, no. No motion to sever was decided to be filed.

8 Q Okay. But you did discuss it?

9 A It was briefly discussed with Mr. Bunin and myself, yes.

10 Q Okay. You had an adequate opportunity do you feel to evaluate the
11 strengths of your case and the strengths and weaknesses of Mr. Joshlin's case?

12 A Yes.

13 Q And after reviewing the discovery relevant to each of the defendants, is
14 it fair to say that you decided that because the evidence was so much stronger
15 against Mr. Joshlin that you thought the jury would say: Okay, he's got strong
16 evidence against him and that's going to highlight the weaker evidence against Mr.
17 Matthews. Would that be fair to say?

18 A That was the thought process, yes.

19 Q Okay. And you were aware at the time or at least you anticipated that
20 the State would try -- would attempt basically to put these two defendants in the
21 same pot so to speak as far as having the jury consider their activities during the
22 time that they allegedly committed these crimes.

23 A I don't know that they had an evidentiary basis for that but, yeah. I
24 mean that was always a risk that the prosecution was going to try to link these two
25 as together even though they were found separately and under much different

1 circumstances.

2 Q And knowing that the evidence against Mr. Matthews was weaker than
3 the evidence against Mr. Joshlin, wouldn't that have been a foreseeable strategy on
4 the part of the State?

5 A That would have been -- yeah, that would have been something that the
6 State probably would have done and something we would have tried to do our best
7 to stop.

8 Q In fact, that is the strategy that they used throughout the trial.

9 A Even more so than we anticipated but, yes.

10 Q And clearly they used that strategy in rebuttal argument.

11 A Yes, they did over strenuous objection.

12 Q During the course of your preparation did you not have a fear to some
13 degree that the evidence against Mr. Joshlin would be used in effect to help convict
14 Mr. Matthews?

15 A That's a really hard --

16 MR. BATEMAN: Judge, can I just object as to what specific evidence? I
17 mean we're kind of talking about evidence in general and if the Court remembers,
18 this is kind of a long -- a number of incidents with different evidence in different
19 places.

20 THE COURT: I remember the case.

21 MR. COLUCCI: Yeah, I mean I could go through the, you know --

22 THE COURT: Let's stay broad strokes right now.

23 MR. BATEMAN: Okay.

24 THE COURT: We'll tighten it up if we --

25 MR. COLUCCI: Okay. Thank you.

1 THE WITNESS: Sure. Generally speaking, you know, there was definitely a
2 distinction in evidence between the two co-defendants. I don't think that we
3 adequately, frankly, anticipated that none of the evidence against Mr. Joshlin would
4 effectively have been challenged on any level nor would Mr. Joshlin's counsel really
5 fail to be making any kind of objections or anything other than sort of joining in to Mr.
6 Bunin and myself with our objections. So whatever Mr. Bunin and I -- and I can only
7 really speak for myself -- may have anticipated with regard to the strong evidence of
8 Mr. Joshlin start spilling over, we weren't prepared for the degree of no resistance by
9 Mr. Joshlin with regard to the evidence that was coming in against him in our opinion
10 and that became somewhat frustrating for us but, you know, that's kind of where it
11 ended.

12 BY MR. COLUCCI:

13 Q Well, just to highlight one small piece of evidence there was testimony
14 by the police officers about the various participants wearing gloves and Mr. Joshlin
15 was found in a trash bin basically on top of the gun -- one of the guns used in the
16 crime and also on top of one of the gloves; correct?

17 A Yes.

18 Q And the other glove which was a different color was found in a location
19 about a block away from where Mr. Matthews was arrested. Is that right?

20 A That sounds familiar, yes.

21 Q And wouldn't the two gloves, wouldn't that be -- at least raise an
22 inference that the two parties may have acted in concert because they were kind of
23 equipped the same way?

24 A That's possible.

25 Q And is that not one of the ideas that the State conveyed to the jury?

1 A I think on some extent -- to some extent they did, yes.

2 Q Okay. Now, there were other people supposedly in the vehicle that was
3 stopped by the police officers initially. Is that right?

4 A Correct.

5 Q So there were three -- at least three and possibly four total suspects
6 that were being looked at by the police for the commission of the crimes.

7 A Yeah; I mean there was a little bit of a trickiness there because there
8 were actually three flash points. There was the group of people who were
9 responsible for the shooting that resulted in the young woman's death, then there
10 was an implication that that was the same group who were involved in the carjacking
11 though there was a time span between that, and then there was an implication that
12 the people who were being chased by the police were the same ones who were the
13 ones who did the carjacking who theoretically then were the same ones who were
14 involved in the shooting.

15 So in answer to your question, it was never contested that there were
16 more than two people in the vehicle that was being chased by the police. That was
17 admitted by all parties.

18 Q And in this case, as far as you know, no one else was caught or
19 charged with respect to the murder or the carjacking.

20 A That's my understanding.

21 Q Outside of the two defendants.

22 A That's my understanding.

23 Q Okay. Now, despite Mr. Singer's, we'll just say poor performance
24 during trial, at that point during the course of the trial did you consider again filing a
25 motion or requesting a motion to sever the trials?

1 A At the time, no. At the time we were being vigilant for any sort of *Bruton*
2 type of issue or if it became a mutually antagonistic defense per se. So we were
3 waiting for that as a trigger and that didn't occur so we didn't move to sever. So at
4 the time severance was not heavy on our mind with regard to what was happening.

5 Q And essentially because of the evidence and the lack of Mr. Singer's
6 performance, Mr. Joshlin essentially was being steamrolled towards conviction I
7 would say.

8 A I --

9 MR. BATEMAN: I'm gong to object to the characterization.

10 THE COURT: Sustained.

11 BY MR. COLUCCI:

12 Q Okay. Well, let's just say that Mr. Singer wasn't strongly objecting to
13 any of the evidence that was coming in against Mr. Joshlin.

14 A To be honest, I can't recall an objection that he made that wasn't a
15 coattail on Mr. Bunin or myself.

16 Q Okay. Looking back on it do you feel that Mr. Singer's performance had
17 an adverse effect on your case?

18 A In hindsight, I'll be honest; I do. I think Mr. Bunin and I discussed it
19 afterwards that it would have been better to have tried that case without Mr. Singer
20 being present in there. I -- to this day I don't know the legal grounds, but I do know
21 that just from a practice perspective, and Mr. Bunin and I practiced quite a few years
22 at that point and done a number of murder cases together, that when we looked
23 back at it we felt that that was a factor in the jury deliberation ultimately.

24 Q Do you believe that Mr. -- and this is kind of an odd situation, but do you
25 believe Mr. Singer's performance caused Mr. Matthews not to get a fair trial?

1 A I think Mr. Singer's performance was extraordinarily problematic and
2 that it had an impact on the jury deliberations for certain. And I think that if we're
3 looking for Mr. Matthews to have a pure trial -- I mean there were a lot of issues
4 there. I think that Ms. Lewis' rebuttal argument had a far more negative impact but
5 taken in conjunction with Mr. Singer's performance, Mr. Bunin and I had some
6 consternation that that went forward and we did feel that it impacted Mr. Matthews in
7 a negative way all things considered, absolutely.

8 Q Did you discuss with Mr. Bunin not to file a motion to sever during the
9 course of the trial?

10 A No. Again, the -- ultimately the responsibility would have been mine.
11 Mr. Bunin, I always value his input, etcetera, with regard to where things are going
12 and, again, if there was a traditional grounds for the severance pre or during the
13 trial, I think we would have pulled that trigger very quickly. In retrospect looking
14 back at it, this would have been a very nontraditional way to do it and obviously the
15 benefit -- well, obvious to us, the benefit if the Court would have granted it would
16 have inured to Mr. Matthews' benefit.

17 Q If you had the opportunity to move to sever the trials at this point in time
18 would you have done so?

19 A I'll say this, that once we were well into the trial and seeing what was
20 going on with Mr. Singer, I might have asked the Court if it would consider stopping
21 it for us and just letting Mr. Joshlin's go forward and for whatever reason and that we
22 could just do a reset of some sort. I don't know how that would have been received
23 by the Court but in retrospect it would have been -- I could just say this very straight,
24 it would have been better for Mr. Matthews to not have had Mr. Joshlin in his trial
25 then having Mr. Joshlin with Mr. Singer in his trial. I can say that without any

1 qualification.

2 Q Well, do you agree that there's a problem with misjoinder of the
3 defendants in a case that the jury may not separate, you know, the evidence against
4 each of the defendants?

5 A I guess that's always an issue in any co-defendant case; yeah.

6 Q Would you also agree that once Mr. Matthews was linked to Mr. Joshlin,
7 that Joshlin -- that Mr. Matthews' fate was pretty much sealed as far as a guilty
8 verdict?

9 A We don't give up. You know, we fight hard and Mr. Bunin fought hard in
10 the closing arguments, but I don't know that I could go as far as saying sealed. I will
11 say he was definitely negatively impacted by what was happening with his co-
12 defendant and co-defendant's counsel.

13 Q And would you say he's negatively impacted because Mr. Singer's
14 performance failed to keep out certain evidence that was possibly inadmissible and
15 then, therefore, used against Mr. Matthews?

16 A I would be hard-pressed to come up with specifics but I do remember
17 that Mr. Bunin and I had that kind of conversation like, you know, an eye rolling, a
18 head shaking. I mean, look, we all know that it's a hard job what we do and having
19 facts like Mr. Joshlin's were certainly hard, but there is a certain standard of
20 performance that we expect in our colleagues at least at a minimum and Mr. Bunin
21 and I felt that Mr. Singer was not performing at those standards. There was a lot of
22 eye rolling and I can't believe that and, you know, there were some things that
23 happened during the trial with Mr. Singer that were very curious to the Defense on
24 our side.

25 Q Do you think that Mr. Matthews was denied a fair trial because a motion

1 to sever wasn't filed or granted in his case?

2 A He certainly would have had a much more fair trial had a motion to
3 sever been filed and granted. I mean I can say that.

4 MR. COLUCCI: Judge, I don't have any additional questions.

5 THE COURT: Cross.

6 MR. BATEMAN: Thank you.

7 CROSS-EXAMINATION

8 BY MR. BATEMAN:

9 Q I guess let's start with the last question. You asked if it had been filed
10 and granted. As you sit here today, do you know of any law that would have
11 supported -- excuse me, Judge, at any time the granting of the severance?

12 A It would have been a novel argument to make that Mr. Matthews'
13 constitutional rights were being impacted because of the negative performance of
14 his counsel and what we're all calling spillover.

15 Q Well, let me see if I --

16 A We would have had to create something novel.

17 Q As you sit here today, I mean you've been practicing since 1991, are
18 you aware of any law that would have existed at the time to grant a severance
19 based solely on co-counsel's performance?

20 A No.

21 Q Okay. So obviously the spillover effect you were talking about would
22 relate to the evidence in the case.

23 A It was -- I would say yes, just only at that there was this other kind of
24 factor that was out there for Mr. Bunin and I.

25 Q Okay. If I could follow -- jump back a little bit. You initially talked about

1 the fact that the defendants had invoked their right to a speedy trial. Is that correct?

2 A Correct.

3 Q Are you suggesting that that was a recommendation, a strategic
4 recommendation by you and Mr. Bunin to your defendant to invoke or was it the
5 preference of your defendant to invoke and you would have suggested an alter --
6 that he waive to give you more time to look at the evidence?

7 A Yeah; I specifically -- and I have to -- 'cause this is post-conviction I still
8 have an attorney/client privilege for Mr. Matthews and I'm now being asked about a
9 discussion that I had with Mr. Matthews. So that specifically needs to be
10 established as being waived.

11 THE COURT: Mr. Colucci, as a function of Chapter 34 analysis, you
12 understand that there's a waiver.

13 MR. COLUCCI: Absolutely.

14 THE COURT: Have you had that --

15 MR. COLUCCI: Absolutely.

16 THE COURT: -- conversation with Mr. Matthews?

17 MR. COLUCCI: Yes. And I don't think there's any problem with Mr. Figler
18 testifying and answering the questions based on that.

19 THE COURT: Are you satisfied with that, Mr. Figler?

20 THE WITNESS: Yes, Your Honor. Thank you.

21 THE COURT: All right. Very good.

22 THE WITNESS: With regard to my discussions with Mr. Matthews, he was
23 very eager to have the case go forward as quickly as possible. Mr. Bunin and I did
24 not dissuade him because of the status of the evidence that was going on. We
25 could have gone either way on that but there did seem to be a benefit to the

1 Defense in addition to Mr. Matthews' strong desire to have the case go forward as
2 quickly as possible.

3 BY MR. BATEMAN:

4 Q Now you've done, obviously, a lot of trials including complicated trials,
5 trials with a lot of discovery and murder trials. Is that fair to say?

6 A Yes.

7 Q And specific to murder trials, is it usually in your experience the case
8 that they go forward on a first setting based upon an invocation or is it usually the
9 case that if the speedy trial rights are waived and it takes some time to get to trial?

10 A This was the fastest trial that we had ever done in a murder setting, with
11 an invocation or without an invocation. Most cases do tend to go on for various
12 reasons for more time.

13 Q So would you agree with me that given the short amount of time, you
14 were in a different position with evaluating the evidence and making strategic
15 decisions as you would be potentially in a case where you had six months, a year,
16 eighteen months in a murder case?

17 A Yes.

18 Q Would you agree with me that that invocation, that short period of time
19 would affect some of the decisions that you would be forced to make in the case?

20 A Yes.

21 Q And is it the case that that short period of time was one of the reasons
22 that -- you might have already testified to this -- that the bench brief was filed in
23 order to just alert everyone because the trial was coming so quickly.

24 A Yes.

25 Q Okay. And just -- and I'm not sure how much -- well, you also, just to

1 make clear, were advising that invocation, despite these issues with making it more
2 difficult for you to make strategic decisions on such a thing as a motion to sever,
3 was offset by the potential for avoiding evidence that might come in through, for
4 instance, forensic testing that might implicate your client?

5 A That was a concern, yes.

6 Q Okay. So I -- would you -- would it fair to say that all of those decisions
7 would be fairly characterized as strategic decisions?

8 A Yes.

9 Q Can you -- and I'm not putting -- giving you a pop quiz, but I just want to
10 clarify some of the legal grounds that you considered at the time that might be
11 potential grounds for severance. One of them I think you said was *Bruton*.

12 A Correct.

13 Q And that would be if the State was attempting to introduce statements
14 by the co-defendant, Mr. Joshlin, that would unfairly implicate your client.

15 A By directly or indirectly, yes.

16 Q Right. And is it fair to say that none of those statements -- or that did
17 not at any time during the trial become an issue.

18 A I don't recall that. I would like to think that Mr. Bunin and I would have
19 objected had that occurred.

20 Q You don't remember the State introducing any of those statements.

21 A No.

22 Q Okay. Is another basis for severance the potential for antagonistic
23 defenses between the co-defendants that amount to mutual exclusivity?

24 A Yes.

25 Q Okay.

1 A To a degree.

2 Q Right.

3 A But the courts have played with that one but, yeah, we always feel that
4 that is a basis

5 Q Okay. So you were aware going into the trial that that was -- there may
6 be that potential or that was a basis for severance.

7 A Yes.

8 Q In law.

9 A Yes.

10 Q And to date, do you see any basis even looking back at the trial where
11 that standard would have been met in this case?

12 A To my recollection, Mr. Joshlin nor Mr. -- neither -- Mr. Singer on Mr.
13 Joshlin's behalf never pointed the finger or accused Mr. Matthews of this offense in
14 any way nor did they say it couldn't have been us and it had to be them or any of the
15 other variations on that particular part of the theme. So I don't recall that being in
16 this case.

17 Q So fair to say that the defenses were both simply the one of
18 identification?

19 A Yes, to our chagrin where I felt ours was kind of legitimate that that was
20 one that was a little rough for Mr. Joshlin to take on as well. But, yes, that was how
21 it came down.

22 Q Okay. Were you to date aware of any specific trial rights, for instance,
23 the introduction -- the ability to introduce evidence that Mr. Matthews was precluded
24 from exercising because he was sitting next to Mr. Joshlin?

25 A No, that's another grounds that Mr. Singer did not object to any of the

1 defense tactics or introduction of evidence by the Defense or really any of the
2 questions that the Defense asked, that he was not a hindrance to us with putting our
3 case on. That's true.

4 Q Okay. But you can't think of the fact that you were unable to introduce
5 something because it was -- would have been precluded as against Mr. Joshlin as
6 you sit here today.

7 A No.

8 Q Okay. And to your knowledge Mr. Singer and Mr. Joshlin did not
9 present any evidence that should not have come in or specifically tried to, should not
10 come in because they were sitting next to your client.

11 A No.

12 Q Okay. Now, we talked a little bit about Mr. Singer's performance. Are
13 you aware as you sit here today of any evidence that came in that Mr. Singer should
14 have objected to that would have negatively effected your client?

15 A Well, I mean that's a tricky question without going through the
16 transcript. There were statements, there were -- there was examination, etcetera,
17 that the Defense for Mr. Matthews did not have the grounds to object to but Mr.
18 Joshlin did and Mr. Singer was not making those objections. I recall that happening
19 numerous times through the trial and that was one of the consternations of Mr.
20 Bunin and myself were, you know, at some point you don't want to nudge your co-
21 defendant's counsel and say: Dude, you need to object. That would have been bad
22 form in front of the jury and I think that would have been viewed very negatively by
23 everyone. But I do recall that happening a number of times. If you ask me for
24 specifics, I can't give you the specifics 'cause it's been so many years but I do
25 remember that these discussions were happening on a fairly regular basis once we

1 got into the meat of the trial with regard to that performance.

2 Q And I understand it was back in 2007 so you -- but you don't have any
3 specific evidence that came in that you believe -- that you can remember and
4 articulate today that Mr. Singer should have objected to.

5 A And, again, I have strong recollection of his failure to object at times
6 when we knew that he needed to object for his client. I cannot give you a specific
7 without going through the transcript. I just -- it's so unusual for that to happen in
8 such a way that it is indelible in my mind and of that I'm very certain. But with regard
9 to the very specifics of what those type of objections were of the evidence, I can't
10 recall them but I can say very strongly that I know they exist.

11 Q Okay. Now, I want to talk specifically about the concept in law for
12 severance of spillover. Are you generally familiar with that concept or is that a
13 grounds that isn't usually brought up or you're not aware of as being as common in
14 motions for severance?

15 A It comes up now and again. Really, it talks more about a specific type
16 of evidence or piece of evidence as opposed to a general spillover effect. That's
17 where that word gets used more, but I'm familiar with the broader concept as well.
18 So I think you and I had a little discussion about that briefly yesterday.

19 Q Okay. Now in this particular case, there's some discussion from your
20 testimony by implication in the questions from counsel that there was a vast
21 disparity of evidence in this particular case. How would you characterize it?

22 A I'd say the character of the evidence was very different between Mr.
23 Joshlin and Mr. Matthews to the extent that if you look at the three different areas so
24 you had different sets of witnesses; you have witnesses who were being shot at, you
25 had witnesses who were being carjacked, and then you had the police officer

1 witnesses. Mr. Matthews doesn't show up with the first two sets and Mr. Joshlin did.
2 In other words, Mr. Matthews was not identified by description or specifically by any
3 of the first two groups of people.

4 With regard to the police chase, etcetera, the police testified in a way
5 that we felt was not necessarily believable and we went after them very strong
6 because we felt they didn't have the proper opportunity to make the representations
7 on personal knowledge that they had but that their depictions of who Mr. Matthews
8 had to be in the car certainly didn't match up with the other evidence as well,
9 whereas as with Mr. Joshlin, it did.

10 And then finally with regard to Mr. Joshlin, there was always a direct
11 line of chase of Mr. Joshlin from the car to the dumpster where he was found with
12 the weapon that was linked to the murder case. With regard to Mr. Matthews, or the
13 person who they decided was Mr. Matthews, there was a break. There wasn't a
14 complete follow to that area. He was not found with a weapon. A weapon that was
15 used in the homicide was found near the vehicle; the difference between the glove
16 etcetera. So we felt that there was a significant difference in character of evidence
17 between the two parties for sure.

18 Q You would agree obviously, and my recollection might be slightly
19 different, that the record itself would speak for itself in this particular case as to the --

20 A The entirety of the case --

21 Q Yeah.

22 A -- really did come down to the police officer testimony and that was
23 obviously believed by the jury despite Mr. Bunin and I's efforts to impeach it. But
24 other than that, those were the distinctions between the case. If you believe the
25 police officer that he -- that it was Mr. Matthews who he was chasing, then that was

1 the same person he caught up later then -- you know, then it is a different -- you
2 would say that the character evidence is the same. But if you follow where we were
3 going with what we were challenging in that particular evidence, then it's definitely a
4 vastly different case against Mr. Joshlin who never loses sight of contact and is
5 found with the murder weapon in a dumpster versus Mr. Matthews.

6 And then additionally Mr. Matthews presented evidence of why he was
7 in that area and why he would be hiding from the police and Mr. Joshlin didn't have
8 any such evidence as well. If you recall, there was a temporary restraining order,
9 etcetera.

10 Q And just to be specific, Mr. Matthews was found in the vicinity in a
11 backyard hiding under -- I don't remember whether it was leaves or grass or
12 something.

13 A Yeah; it was in cartilage and he was found by a police dog who
14 attacked him about an hour after the police chase incident.

15 Q And there was some testimony, correct me if I'm wrong, about the --
16 from the canine detective about certain secretions or pheromones that someone
17 puts out if they've been in a chase or something like that, whether you believe it or
18 not, that came in.

19 A Yeah; there was some evidence to that extent, absolutely.

20 Q Okay. Well, we talked a little bit about strategy to link the two together.
21 It's fair to say in this case that they were indicted together or they were -- I don't
22 remember whether it was an indictment or if it was through a preliminary hearing but
23 there was a conspiracy charge and that was always the theory that these two
24 individuals were together. Is that fair to say?

25 A It was a little loose how the conspiracy was pled. I think the idea was

1 that all of the original kids were together and had -- were acting in concert and that
2 conspiracy liability was an alternate theory that would track any potential liability for
3 any of the people charged. And so Mr. Joshlin and Mr. Matthews were both caught
4 up in that theory of liability.

5 Q Okay. But just -- I guess to recap at the end of the day, your concern
6 as you sit here today was more with -- well, in making the decision about severance,
7 is it fair to say that you didn't see at the time or throughout the trial in terms of the
8 evidence itself as being a basis under a spillover theory to file a severance motion
9 and instead your concern throughout the trial was more counsel for the co-
10 defendant than the actual evidence against the co-defendant? Setting aside
11 whatever arguments you have with regard to my co-counsel's arguments at the end
12 of the trial.

13 A Well, and that's the thing. It's a complicated calculus but in general, I
14 would agree with your principle, yes.

15 MR. BATEMAN: I have nothing further, Your Honor.

16 THE COURT: Redirect.

17 REDIRECT EXAMINATION

18 BY MR. COLUCCI:

19 Q Mr. Figler, would you say that if the evidence against Mr. Joshlin was
20 precluded from coming in that Mr. Matthews would have had a better chance with
21 the evidence that was solely against him?

22 A Yes.

23 Q And when we're talking about just the performance of counsel, it's not
24 just the performance of counsel that we should be concerned about but also as we
25 have discussed the spillover effect of the evidence against Mr. Joshlin that

1 contributed to Mr. Matthews conviction.

2 A As I stated, yeah; I think that was a factor for sure.

3 Q I mean Mr. Joshlin's found with the gun and the glove. That's pretty
4 strong evidence. That evidence, had that been precluded from coming in against
5 Mr. Matthews, would have enabled Mr. Matthews to present a stronger defense to
6 the jury.

7 A Yes.

8 MR. COLUCCI: I don't have any other questions, Your Honor.

9 THE COURT: Recross.

10 MR. BATEMAN: Can I just do one follow-up on that?

11 RECROSS EXAMINATION

12 BY MR. BATEMAN:

13 Q Are you aware of any legal basis why evidence of the gun and the glove
14 that Mr. Joshlin was sitting on in the dumpster would be excluded from trial?

15 A Since they were joined together in the same pleading? No. I mean
16 they were there together so, no. There would be no legal --

17 Q Even in a severed trial --

18 A Oh, in a severed trial there might be some aspect of it that wouldn't
19 necessarily have come in. Just depends on the investigation whether it'd be
20 relevant to Mr. -- I mean we would have a stronger basis of -- it's a fine line. I think
21 that while it wasn't so prejudicial to our client to come in specifically that we would
22 need a curative instruction, etcetera, we did get one that you're only supposed to
23 consider the evidence against one versus the other.

24 But I would say that Mr. Bunin and I would be better poised as skilled
25 counsel to keep out aspects of the Joshlin case, if you will, out of the case all

1 together based on relevance and grounds, based on prejudice grounds, etcetera,
2 that didn't exist because Mr. Joshlin was sitting there. I mean that's just a -- you
3 know, you could do these trials a lot of times. There's always going to be more
4 evidence that comes in because you have co-defendants than if they're not there.

5 Q In the instance of the case that we have at hand do you know of any
6 basis for Mr. Singer to have objected to the evidence coming in to trial of Mr. Joshlin
7 sitting on the gun and the glove in the dumpster?

8 A With regard to that evidence? No.

9 Q And I appreciate you bringing up; I probably should have. There was a
10 jury instruction, was there not in this case, I'm sure you would have asked for it, that
11 the jury needed to consider the evidence relating to each co-defendant as it related
12 to that co-defendant.

13 A If we didn't ask for that, we would have made a mistake.

14 Q Yeah.

15 A But I don't recall. I really don't. That should be definitely in there when
16 there's co-defendants.

17 MR. BATEMAN: Nothing else, Your Honor.

18 THE COURT: Anything else for this witness?

19 MR. COLUCCI: No, we have nothing further.

20 THE COURT: Thank you for your testimony.

21 THE WITNESS: Thank you, Your Honor.

22 THE COURT: Please step down.

23 MR. COLUCCI: Your Honor, at this point we don't have any further
24 witnesses.

25 THE COURT: All right. Argument, Mr. Colucci. This is your petition.

1 MR. COLUCCI: Well, you know, usually it's the ineffective assistance of the
2 attorney that handled the trial; that's usually the basis for a petition for post-
3 conviction relief, petition for writ of habeas corpus post-conviction. In this case
4 because there wasn't a severance, Mr. Matthews' case was subjected to the lesser
5 than stellar performance of Mr. Singer, and I'm being a little facetious on that -- on
6 that point.

7 The evidence against my client wasn't as strong, nearly as strong as
8 the evidence against Mr. Joshlin and that wouldn't be so important except if you look
9 at that rebuttal argument, which I know we've been beaten the drum on, that rebuttal
10 argument ties these two guys together not even by joining them by discussion of the
11 evidence but by repeating over and over and over: They did this, it was them, look
12 at them, they themselves. So the State has just -- had lumped these two together
13 without any differentiation as to degree of guilt or separation of the charges or
14 anything like that.

15 So I think because there was no severance that the spillover effect, you
16 know, that's our -- maybe that's just our generic term for it but the reality of it is that
17 when you have one guy that is strongly guilty and you have another guy that's not
18 linked to the crimes but linked to this guy, being in the same place -- or being in the
19 same area, the spillover effect has a much greater impact than if it's just, you know,
20 two guys doing this and doing that and there's a statement relating to this guy and it
21 also implicates this guy. In this case the spillover effect was huge. Defense counsel
22 was aware that was going to happen. Defense counsel was aware that they were
23 going to link these two people. Defense counsel was aware pretrial that there were
24 possible *Bruton* issues. The fact that there weren't *Bruton* issues, I guess that's
25 something we can look back with on hindsight. But pretrial, if there are possible

1 *Bruton* issues, you got to file a motion for severance. And I didn't hear anything to
2 say that Mr. Figler -- and maybe I should have asked the question -- Mr. Figler knew
3 that Mr. Joshlin wasn't going to testify. But neither of us asked that question so we
4 don't know the answer to that.

5 Nevertheless, I think the spillover effect was huge. I think taking that
6 into consideration along with the rebuttal argument, the Supreme Court
7 characterized as misconduct, although they didn't think it was harmless -- they
8 thought it was harmless. Nevertheless, that taken with the spillover effect I believe
9 denied my client a fair trial. That's why we filed the petition. We'd ask the Court to
10 vacate the convictions and give him a new trial.

11 THE COURT: Reply.

12 MR. BATEMAN: Thanks.

13 I don't want to get too far -- I don't want this to turn into kind of a kitchen
14 sink type argument but, you know, I guess my -- Judge, I tried the case too and I
15 have a different recollection of Mr. Singer's performance. And, you know, I wasn't
16 particularly -- you know, we as prosecutor obviously have an obligation to make sure
17 that the record is clean and that the defendants are getting a fair trial so that we
18 don't end up in this particular position.

19 I can tell you that neither myself nor Ms. Lewis even talked or discussed
20 throughout the entire trial about Mr. Singer's performance. I did talk to Mr. Figler
21 about this case and I just -- I guess I just have a disagreement with him about the
22 level of Mr. Singer's performance. I don't believe the Court ever made mention of --
23 during the trial that, hey --you know, you have an obligation as well, Your Honor, to
24 kind of protect the record and the defendant's rights and I just don't remember
25 anybody ever bringing up even an inkling that there was a problem with Mr. Singer's

1 performance in this particular case. Is there a scale of performance where someone
2 can fall within the ballpark, and can we argue about where he was in the ballpark?
3 But there was just no red flags at any time during this trial from the Court. In my
4 mind nothing was brought up by Defense counsel and I just think at the end of the
5 day we know Mr. Singer's issues that he's had subsequent to this trial and I worry
6 that maybe some of these arguments don't have something to do with what's
7 happened since.

8 So setting that aside -- well, let's address that specifically. I know of no
9 law as I sit here that's been presented that deficient performance by a counsel in a
10 co-defendant case would necessarily be a basis for a severance. I haven't seen -- I
11 don't know that it isn't possible but I don't know of any and I don't know that any has
12 been cited.

13 So I think we need to probably talk specifically about the evidence in
14 this particular case. It's my understanding, and I'll be corrected if I'm wrong, that
15 there was a sufficiency of the evidence argument made before the Supreme Court
16 with regard to Mr. Matthews. And if I'm wrong, I'm wrong but at no time do I believe
17 that it's been brought up that there was insufficient evidence against Mr. Matthews,
18 which I guess at this point when we're talking about spillover, we're talking about,
19 you know, my understanding is kind of the concept of differing levels of evidence in
20 this particular case. And I think that it's been a little bit mischaracterized. I'll let the
21 transcript stand for what -- you know, says what it says.

22 My recollection is that not that nobody could identify Mr. Matthews or
23 that Mr. Matthews didn't fit the description of the folks either at the initial shooting --
24 and the Court will remember the shooting took place on basically like the north end
25 of a block and then the subsequent carjacking to get away was literally on the south

1 end of that block. And you'll remember at the time police were on alert in this
2 particular area because of previous gang shootings. I don't know that it came out
3 that it was gang shootings, but it was -- it came out that they were on alert in this
4 area. So there were a lot of patrol cars. And so you remember the timing of this is
5 the shooting takes place, obviously the patrol cars can hear the shooting and they're
6 on top of these guys when they're doing the carjacking which is literally a block
7 south of where the shooting took place. And then obviously they chased the car
8 through -- I think it was onto Lake Mead and then back into a neighborhood area.
9 So this wasn't like there was these huge breaks in time. I think that was a major
10 influence on the jury. This all happened very quickly, these events.

11 And then obviously the police officer saw the individuals bail. They
12 made the identifications that they did. Counsel properly cross-examined them. Let's
13 not forget Mr. Matthews was chased as well. He was seen jumping over a fence.
14 There was issues about red gloves. There was a red glove found on the fence. And
15 then about -- it wasn't a block away, it was essentially a street away Mr. Matthews
16 was found subsequently hiding in someone's backyard.

17 So, you know, I think we need to not get into -- not unfairly judge the
18 evidence in this case that there was some extreme difference in the level of the
19 evidence in this case. And I think the Supreme Court's affirmance of the appeal
20 would probably suggest that as well.

21 So just finally, Judge, I pulled one of the only spillover prejudice cases
22 that I could find in Nevada and unfortunately it's an unpublished opinion. So I'm only
23 going to cite it for the fact that it cites other cases that are published. It is the *O.J.*
24 *Simpson* case where, you know, the -- that was one in which they kind of talked
25 about spillover generally. And I think, you know, we can all understand an O.J.

1 versus his buddy Stewart and all the issues that were going in that particular case.

2 But it said in determining whether --

3 THE COURT: You're not going to cite to it under --

4 MR. BATEMAN: No, under the rule --

5 THE COURT: -- SCR 123 but you're going to read from it.

6 MR. BATEMAN: I'm going to read from it because it --

7 THE COURT: Okay.

8 MR. BATEMAN: -- cites the case -- previous Nevada Supreme Court case
9 law.

10 In determining whether any action is warranted pursuant to NRS
11 174.165, that's joinder, a district court must look at the facts of each case. It cites
12 *Chartier*, which is kind of the most recent otherwise a severance case.
13 Demonstrating spillover, prejudice alone is not sufficient to demonstrate substantial
14 prejudice. Then they cite *Lisle v. State*, which is -- I don't know if you prefer the
15 Nevada or the Pacific Reporter, Judge, but the Pacific Reporter is 941 P.2d 459 pin
16 cite 466, 1997. In looking at the facts, the district court should grant a severance
17 only if there is a serious risk that a joint trial would compromise a specific trial right
18 of one of the defendants or prevent the jury from making a reliable judgment about
19 guilt or innocence. Again, it cites the *Chartier* case and that, again, was -- I think
20 *Chartier* is 191 P.3d 1182.

21 When you look at the severance cases in Nevada, it's generally a two-
22 step process which is they identify something like antagonistic defenses that are
23 mutually exclusive, *Bruton*, and perhaps in this case you could even talk about
24 spillover to the extent that it's defined, which I think it is a little unclear.

25 But then it has a second step which is kind of almost a prejudice prong.

1 It's the did it prevent you from exercising a specific trial right in a sense that you
2 become prejudiced and the jury can't make a reliable judgment. I think the spillover
3 effect in this case from the disparity of evidence is not that disparate and, that you
4 know, I just haven't heard anything that suggests that it is and I'll let the record in
5 this case stand on what it is.

6 But the second concept of a specific trial right that's being precluded,
7 you'll remember in the *Chartier* case, they were not allowed to -- one defendant
8 wanted to introduce evidence that was precluded because they were sitting together
9 that would have been able to come in in a severed case. There's been no showing
10 that that's the case here, and I think that was the testimony from Mr. Figler, so.

11 You know, there's a lot of talk about this being -- that these two were
12 being conflated together. Well, that's the State's theory is that they were together
13 and that there was this concert of act from start to finish until they were found. I
14 think we have a right to make that argument. I think you if look at my closing, at a
15 minimum, I think that we did discuss the issue of identification and talked about what
16 the evidence showed, both in terms of the description of the defendants and the
17 identification by the police officers of the defendants. We -- individually, we would
18 have had to do that.

19 So, you know, on a *Strickland* basis I don't think that Mr. Figler's and
20 Mr. Bunin's performance in not filing a severance motion based on either, one, law
21 that doesn't exist as to co-counsel or two, what has been argued as disparate
22 evidence in this case fell to such a level as to be, you know, deficient. And then
23 number two, I don't know that the prejudice prong has been met in this particular
24 case.

25 So I think we probably ought to focus specifically on what's in the briefs.

1 Those seem to be really geared toward the spillover concept. There isn't a lot of
2 discussion in there about Mr. Singer. This has kind of come up subsequently. And,
3 you know, I just don't think we've gotten to that level where ineffective assistance
4 has been shown so I would ask the Court to deny and dismiss the petition.

5 THE COURT: All right. Anything else?

6 MR. COLUCCI: Just one thing. When he talked about the violation of a
7 substantial trial right, the right to a fair trial is a substantial trial right.

8 THE COURT: Okay.

9 Mr. Colucci, I don't know but there's a gentleman in the back that's got
10 his hand up.

11 UNIDENTIFIED SPEAKER: I've got a hand up. I want to ask the Court a
12 question.

13 MR. COLUCCI: Sh, sh.

14 UNIDENTIFIED SPEAKER: I'm confused on a lot of things. You know, not
15 about --

16 THE COURT: Sir, you're not called as a witness.

17 UNIDENTIFIED SPEAKER: It's not about the case. It's just about the law in
18 general.

19 THE COURT: You're out.

20 THE MARSHAL: You're done.

21 [Gentleman is removed from the courtroom]

22 THE COURT: Gentlemen, the issue as addressed in this petition for writ of
23 habeas corpus is whether or not the conduct and trial efforts of Mr. Figler and Mr.
24 Bunin were deficient under a *Strickland* analysis.

25 Frankly, as a matter of law had the issue of severance been brought to

1 the Court pretrial, based upon the facts as presented in the theories identified, I
2 would have denied a motion for severance under 174.165. Based -- again, based
3 upon the theories as presented. Under *Chartier* the analysis is whether exists a
4 serious risk that a joint trial would compromise a specific trial right of one of the
5 defendants or prevent the jury from making a reliable judgment about the guilt or
6 innocence of either man.

7 Mr. Figler testifies that it was part of his trial strategy to focus the
8 substantial evidence against the co-defendant of Mr. Matthews, Mr. Joshlin, in an
9 effort to convince the jury that the burden that the State carries solely was not
10 reached. He uses words like novel, fine line but they don't create in my mind even a
11 question that Mr. Figler's efforts, even with this spillover argument, were met. I don't
12 think that based upon that fact that anything I've seen, heard or been briefed on
13 would indicate his efforts were either factually or legally deficient and so I'm doing to
14 deny the petition for writ of habeas corpus at this time; direct the State prepare
15 findings of facts and conclusions of law consistent with that decision.

16 Gentlemen, anything else?

17 MR. BATEMAN: No, Your Honor.

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MR. COLUCCI: No, Your Honor. Thank you.

THE COURT: Thank you very much.

[Proceedings concluded at 10:06 a.m.]

* * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.



Cheryl Carpenter,
Court Recorder

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CLERK OF THE COURT

ORDER

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

SAMUEL BATEMAN
Chief Deputy District Attorney
Nevada Bar #008764
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-

CASE NO: 06C228460-2

JEMAR MATTHEWS,
#1975205

DEPT NO: XVIII

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: OCTOBER 12, 2012

TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable JUDGE DAVID BARKER, District Judge, on the 12th day of October, 2012, the Petitioner being present and represented by his attorney, CARMINE COLUCCI, Esq., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SAMUEL BATEMAN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, the testimony of Defendant's former attorney DAYVID FIGLER, documents on file herein, and arguments of counsel, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. An Information was filed on December 7, 2006 charging Defendant as follows:
COUNT 1 – Conspiracy to Commit Murder (Felony – NRS 199.480, 200.010, 200.030);

1 COUNT 2 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030,
2 193.165); COUNTS 3-5 – Attempt Murder with use of a Deadly Weapon (Felony – NRS
3 200.010, 200.030, 193.330, 193.165); COUNT 6 – Possession of Short Barreled Rifle
4 (Felony – NRS 202.275); COUNT 7 – Conspiracy to Commit Robbery (Felony – NRS
5 199.480, 200.380); COUNTS 8-9 – Robbery With Use of a Deadly Weapon (Felony – NRS
6 200.380, 193.165) and COUNTS 10-11 – Assault with a Deadly Weapon (Felony – NRS
7 200.471).

8 2. Following a jury trial, Defendant was convicted on all counts on May 11,
9 2007.

10 3. On May 21, 2007, Defendant filed a Motion for New Trial. The State filed its
11 Opposition on June 1, 2007. Defendant filed a Reply on July 9, 2007. The District Court
12 denied the Motions on July 9, 2007 and filed its Order September 17, 2007.

13 4. In addition to a \$25.00 Administrative Assessment Fee and a \$150.00 DNA
14 Analysis Fee, Defendant was sentenced on July 9, 2007, to the Nevada Department of
15 Corrections as follows: as to COUNT 1, to a minimum of TWENTY-SIX (26) MONTHS
16 and a maximum of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department
17 of Corrections (NDC); as to COUNT 2 to Life With The Possibility Of Parole after
18 TWENTY (20) YEARS, plus an equal and consecutive term for use of a deadly weapon; as
19 to COUNT 3, to a minimum of FORTY-EIGHT (48) MONTHS and a maximum of TWO
20 HUNDRED FORTY (240) MONTHS in the NDC, plus an equal and consecutive minimum
21 of FORTY-EIGHT (48) MONTHS and a maximum of TWO HUNDRED FORTY (240)
22 MONTHS for use of a deadly weapon; as to COUNT 4 to a minimum of FORTY-EIGHT
23 (48) MONTHS and a maximum of TWO HUNDRED FORTY (240) MONTHS in the NDC,
24 plus an equal and consecutive minimum of FORTY-EIGHT (48) MONTHS and a maximum
25 of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon; as to COUNT 5,
26 to a minimum of FORTY-EIGHT (48) MONTHS and a maximum of TWO HUNDRED
27 FORTY (240) MONTHS in the NDC, plus an equal and consecutive minimum of FORTY-
28 EIGHT (48) MONTHS and a maximum of TWO HUNDRED FORTY (240) MONTHS for

1 use of a deadly weapon; as to COUNT 6, to a minimum of FORTY-EIGHT (48) MONTHS
2 with a minimum parole eligibility of TWELVE (12) MONTHS; as to COUNT 7, to a
3 minimum of TWELVE (12) MONTHS and a maximum of SEVENTY-TWO (72) MONTHS
4 in the NDC; as to COUNT 8, to a minimum of FORTY (40) MONTHS and a maximum of
5 ONE HUNDRED EIGHTY (180) MONTHS in the NDC, plus an equal and consecutive
6 minimum of FORTY (40) MONTHS and a maximum of ONE HUNDRED EIGHTY (180)
7 MONTHS for use of a deadly weapon; as to COUNT 9, to a minimum of FORTY (40)
8 MONTHS and a maximum of ONE HUNDRED EIGHTY (180) MONTHS in the NDC, plus
9 an equal and consecutive minimum of FORTY (40) MONTHS and a maximum of ONE
10 HUNDRED EIGHTY (180) MONTHS for use of a deadly weapon; all counts to run
11 CONCURRENT with each other. Defendant was granted THREE HUNDRED (300) DAYS
12 credit for time served.

13 5. Judgment of Conviction was filed July 17, 2007.

14 6. Defendant filed a Notice of Appeal on August 17, 2007. The Nevada Supreme
15 Court filed its Order of Affirmance on June 30, 2009. Matthews v. State of Nevada, Case
16 Number 50052, 6/30/2009. Remittitur issued December 15, 2009.

17 7. Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction) on
18 December 14, 2010. The Court appointed Carmine Colucci, Esq., as post-conviction counsel
19 for Defendant on February 6, 2012. On July 9, 2012 Defendant filed a Supplemental
20 Petition for Writ of Habeas Corpus (Post-Conviction). The State filed a Response on
21 September 10, 2012 and the matter was addressed by the District Court on October 12, 2012.

22 8. Defendant did not establish that severance of his trial from his co-defendant
23 was warranted.

24 9. Defendant failed to establish that the evidence at trial was significantly greater
25 against one defendant than another.

26 10. Even to the extent evidence of guilt was greater against one defendant than
27 another, Defendant's trial counsel, Dayvid Figler, Esq., testified that there existed no legal
28 basis for severance of Defendant's trial.

11. Any motion for severance would have been futile.

12. Defendant received effective assistance of trial counsel.

CONCLUSIONS OF LAW

1. In order to assert a claim for ineffective assistance of counsel, a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). Under this test, the defendant must show: first, that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

2. The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

3. Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing

1 Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. "A reasonable probability is a probability
2 sufficient to undermine confidence in the outcome." Id.

3 4. Counsel cannot be deemed ineffective for failing to make a futile motion.
4 Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

5 5. A trial judge may sever a joint trial if "it appears that a defendant...is
6 prejudiced by a joinder of ...defendants...for trial together." NRS 174.165(1); Chartier v.
7 State, 124 Nev. 760, 191 P.3d 1182 (2008). Moreover, a district court should grant a
8 severance only where there exists a serious risk that "a joint trial would compromise a
9 specific trial right of one of the defendants, or prevent the jury from making a reliable
10 judgment about guilt or innocence." Id., citing Zafiro v. United States, 506 U.S. 534, 539,
11 113 S.Ct. 933 (1993). The decision to grant a severance rests solely within the discretion of
12 the trial court. Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998), citing Amen v.
13 State, 106 Nev. 749, 755-756, 801 P.2d 1354, 1359 (1990).

14 6. In determining whether any action is warranted pursuant to NRS 174 .165(1), a
15 district court must look at the facts of each case. Chartier, 124 Nev. at 765, 191 P.3d at 1185.
16 Demonstrating spill-over prejudice alone is not sufficient to demonstrate substantial
17 prejudice. See Lisle v. State, 113 Nev. 679, 689-90, 941 P.2d 459, 466 (1997), *overruled on*
18 *other grounds by* Middleton v. State, 114 Nev. 1089, 1117 n. 9, 968 P.2d 296, 315 n. 9
19 (1998). In looking at the facts, the district court should grant a severance " 'only if there is a
20 serious risk that a joint trial would compromise a specific trial right of one of the defendants,
21 or prevent the jury from making a reliable judgment about guilt or innocence.' " Chartier,
22 124 Nev. at 765, 191 P.3d at 1185 (quoting Marshall v. State, 118 Nev. 642, 647, 56 P.3d
23 376, 379 (2002)).

24 7. Since Defendant failed to illustrate any specific right that a joint trial would
25 have compromised or any circumstances that would have prevented the jury from making a
26 reliable judgment about guilt or innocence, there was no ground upon which a severance
27 could have been granted. Moreover, since the post-conviction writ was the basis for
28 severance, and this Court found that it would not have granted a motion for severance had it

1 been brought before trial, any motion seeking severance would have been futile and cannot
2 provide Defendant relief.

3 **ORDER**

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

6 DATED this 7th day of November, 2012.

7
8 
DISTRICT JUDGE 23

9
10 STEVEN B. WOLFSON
11 Clark County District Attorney
Nevada Bar #001565

12
13 BY 

SAMUEL BATEMAN
Deputy District Attorney
Nevada Bar #008764

14
15
16 **CERTIFICATE OF SERVICE**

17 I certify that on the 6th day of November, 2012, I mailed a copy of the foregoing
18 proposed Findings of Fact, Conclusions of Law, and Order to: Carmine J. Colucci, Esq., 629
19 South Sixth Street, Las Vegas, Nevada 89101, for his review.

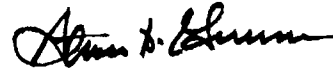
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21 BY: 

22 R. JOHNSON
23 Secretary for the District Attorney's Office
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28 RS/SB/rj/M-1

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11/20/2012 08:22:00 AM



CLERK OF THE COURT

NEO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JEMAR D. MATTHEWS,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 06C228460-2

Dept No: XVIII

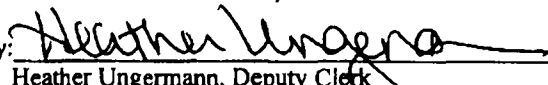
**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

PLEASE TAKE NOTICE that on November 13, 2012, the court entered a decision or order in this matter,
a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
mailed to you. This notice was mailed on November 20, 2012.

STEVEN D. GRIERSON, CLERK OF THE COURT

By:


Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 20 day of November 2012, I placed a copy of this Notice of Entry of Decision
and Order in:

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

☒ The United States mail addressed as follows:

Jemar Matthews # 1014654

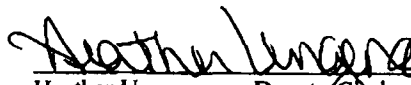
P.O. Box 650

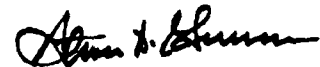
Indian Springs, NV 89070

Carmine J. Colucci, Esq.

629 S. Sixth St.

Las Vegas, NV 89101


Heather Ungermann, Deputy Clerk



CLERK OF THE COURT

ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
SAMUEL BATEMAN
Chief Deputy District Attorney
Nevada Bar #008764
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-

JEMAR MATTHEWS,
#1975205

Defendant.

CASE NO: 06C228460-2

DEPT NO: XVIII

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: OCTOBER 12, 2012
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the Honorable JUDGE DAVID BARKER, District Judge, on the 12th day of October, 2012, the Petitioner being present and represented by his attorney, CARMINE COLUCCI, Esq., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SAMUEL BATEMAN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, the testimony of Defendant's former attorney DAYVID FIGLER, documents on file herein, and arguments of counsel, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. An Information was filed on December 7, 2006 charging Defendant as follows:
COUNT 1 – Conspiracy to Commit Murder (Felony – NRS 199.480, 200.010, 200.030);

1 COUNT 2 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030,
2 193.165); COUNTS 3-5 – Attempt Murder with use of a Deadly Weapon (Felony – NRS
3 200.010, 200.030, 193.330, 193.165); COUNT 6 – Possession of Short Barreled Rifle
4 (Felony – NRS 202.275); COUNT 7 – Conspiracy to Commit Robbery (Felony – NRS
5 199.480, 200.380); COUNTS 8-9 – Robbery With Use of a Deadly Weapon (Felony – NRS
6 200.380, 193.165) and COUNTS 10-11 – Assault with a Deadly Weapon (Felony – NRS
7 200.471).

8 2. Following a jury trial, Defendant was convicted on all counts on May 11,
9 2007.

10 3. On May 21, 2007, Defendant filed a Motion for New Trial. The State filed its
11 Opposition on June 1, 2007. Defendant filed a Reply on July 9, 2007. The District Court
12 denied the Motions on July 9, 2007 and filed its Order September 17, 2007.

13 4. In addition to a \$25.00 Administrative Assessment Fee and a \$150.00 DNA
14 Analysis Fee, Defendant was sentenced on July 9, 2007, to the Nevada Department of
15 Corrections as follows: as to COUNT 1, to a minimum of TWENTY-SIX (26) MONTHS
16 and a maximum of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department
17 of Corrections (NDC); as to COUNT 2 to Life With The Possibility Of Parole after
18 TWENTY (20) YEARS, plus an equal and consecutive term for use of a deadly weapon; as
19 to COUNT 3, to a minimum of FORTY-EIGHT (48) MONTHS and a maximum of TWO
20 HUNDRED FORTY (240) MONTHS in the NDC, plus an equal and consecutive minimum
21 of FORTY-EIGHT (48) MONTHS and a maximum of TWO HUNDRED FORTY (240)
22 MONTHS for use of a deadly weapon; as to COUNT 4 to a minimum of FORTY-EIGHT
23 (48) MONTHS and a maximum of TWO HUNDRED FORTY (240) MONTHS in the NDC,
24 plus an equal and consecutive minimum of FORTY-EIGHT (48) MONTHS and a maximum
25 of TWO HUNDRED FORTY (240) MONTHS for use of a deadly weapon; as to COUNT 5,
26 to a minimum of FORTY-EIGHT (48) MONTHS and a maximum of TWO HUNDRED
27 FORTY (240) MONTHS in the NDC, plus an equal and consecutive minimum of FORTY-
28 EIGHT (48) MONTHS and a maximum of TWO HUNDRED FORTY (240) MONTHS for

1 use of a deadly weapon; as to COUNT 6, to a minimum of FORTY-EIGHT (48) MONTHS
2 with a minimum parole eligibility of TWELVE (12) MONTHS; as to COUNT 7, to a
3 minimum of TWELVE (12) MONTHS and a maximum of SEVENTY-TWO (72) MONTHS
4 in the NDC; as to COUNT 8, to a minimum of FORTY (40) MONTHS and a maximum of
5 ONE HUNDRED EIGHTY (180) MONTHS in the NDC, plus an equal and consecutive
6 minimum of FORTY (40) MONTHS and a maximum of ONE HUNDRED EIGHTY (180)
7 MONTHS for use of a deadly weapon; as to COUNT 9, to a minimum of FORTY (40)
8 MONTHS and a maximum of ONE HUNDRED EIGHTY (180) MONTHS in the NDC, plus
9 an equal and consecutive minimum of FORTY (40) MONTHS and a maximum of ONE
10 HUNDRED EIGHTY (180) MONTHS for use of a deadly weapon; all counts to run
11 CONCURRENT with each other. Defendant was granted THREE HUNDRED (300) DAYS
12 credit for time served.

13 5. Judgment of Conviction was filed July 17, 2007.

14 6. Defendant filed a Notice of Appeal on August 17, 2007. The Nevada Supreme
15 Court filed its Order of Affirmance on June 30, 2009. Matthews v. State of Nevada, Case
16 Number 50052, 6/30/2009. Remittitur issued December 15, 2009.

17 7. Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction) on
18 December 14, 2010. The Court appointed Carmine Colucci, Esq., as post-conviction counsel
19 for Defendant on February 6, 2012. On July 9, 2012 Defendant filed a Supplemental
20 Petition for Writ of Habeas Corpus (Post-Conviction). The State filed a Response on
21 September 10, 2012 and the matter was addressed by the District Court on October 12, 2012.

22 8. Defendant did not establish that severance of his trial from his co-defendant
23 was warranted.

24 9. Defendant failed to establish that the evidence at trial was significantly greater
25 against one defendant than another.

26 10. Even to the extent evidence of guilt was greater against one defendant than
27 another, Defendant's trial counsel, Dayvid Figler, Esq., testified that there existed no legal
28 basis for severance of Defendant's trial.

1 11. Any motion for severance would have been futile.

2 12. Defendant received effective assistance of trial counsel.

3 **CONCLUSIONS OF LAW**

4 1. In order to assert a claim for ineffective assistance of counsel, a defendant
5 must prove that he was denied "reasonably effective assistance" of counsel by satisfying the
6 two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052,
7 2063-64 (1984). Under this test, the defendant must show: first, that his counsel's
8 representation fell below an objective standard of reasonableness, and second, that but for
9 counsel's errors, there is a reasonable probability that the result of the proceedings would
10 have been different. See Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068.
11 "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is
12 '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v.
13 Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), *quoting*
14 McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

15 2. The court begins with the presumption of effectiveness and then must
16 determine whether the defendant has demonstrated by a preponderance of the evidence that
17 counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). This analysis
18 does not indicate that the court should "second guess reasoned choices between trial tactics,
19 nor does it mean that defense counsel, to protect himself against allegations of inadequacy,
20 must make every conceivable motion no matter how remote the possibilities are of success."
21 Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). In essence, the court must
22 "judge the reasonableness of counsel's challenged conduct on the facts of the particular case,
23 viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

24 3. Even if a defendant can demonstrate that his counsel's representation fell
25 below an objective standard of reasonableness, he must still demonstrate prejudice and show
26 a reasonable probability that, but for counsel's errors, the result of the trial would have been
27 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), *citing*
28

1 Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. "A reasonable probability is a probability
2 sufficient to undermine confidence in the outcome." Id.

3 4. Counsel cannot be deemed ineffective for failing to make a futile motion.
4 Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

5 5. A trial judge may sever a joint trial if "it appears that a defendant...is
6 prejudiced by a joinder of ...defendants...for trial together." NRS 174.165(1); Chartier v.
7 State, 124 Nev. 760, 191 P.3d 1182 (2008). Moreover, a district court should grant a
8 severance only where there exists a serious risk that "a joint trial would compromise a
9 specific trial right of one of the defendants, or prevent the jury from making a reliable
10 judgment about guilt or innocence." Id., citing Zafiro v. United States, 506 U.S. 534, 539,
11 113 S.Ct. 933 (1993). The decision to grant a severance rests solely within the discretion of
12 the trial court. Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998), citing Amen v.
13 State, 106 Nev. 749, 755-756, 801 P.2d 1354, 1359 (1990).

14 6. In determining whether any action is warranted pursuant to NRS 174 .165(1), a
15 district court must look at the facts of each case. Chartier, 124 Nev. at 765, 191 P.3d at 1185.
16 Demonstrating spill-over prejudice alone is not sufficient to demonstrate substantial
17 prejudice. See Lisle v. State, 113 Nev. 679, 689-90, 941 P.2d 459, 466 (1997), *overruled on*
18 *other grounds by* Middleton v. State, 114 Nev. 1089, 1117 n. 9, 968 P.2d 296, 315 n. 9
19 (1998). In looking at the facts, the district court should grant a severance " 'only if there is a
20 serious risk that a joint trial would compromise a specific trial right of one of the defendants,
21 or prevent the jury from making a reliable judgment about guilt or innocence.' " Chartier,
22 124 Nev. at 765, 191 P.3d at 1185 (quoting Marshall v. State, 118 Nev. 642, 647, 56 P.3d
23 376, 379 (2002)).

24 7. Since Defendant failed to illustrate any specific right that a joint trial would
25 have compromised or any circumstances that would have prevented the jury from making a
26 reliable judgment about guilt or innocence, there was no ground upon which a severance
27 could have been granted. Moreover, since the post-conviction writ was the basis for
28 severance, and this Court found that it would not have granted a motion for severance had it

1 been brought before trial, any motion seeking severance would have been futile and cannot
2 provide Defendant relief.

3 ORDER

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

6 DATED this 15 day of November, 2012.

7
8 
DISTRICT JUDGE 23

9
10 STEVEN B. WOLFSON
11 Clark County District Attorney
Nevada Bar #001565

12
13 BY 
14 SAMUEL BATEMAN
Deputy District Attorney
Nevada Bar #008764

15
16 CERTIFICATE OF SERVICE

17 I certify that on the 6th day of November, 2012, I mailed a copy of the foregoing
18 proposed Findings of Fact, Conclusions of Law, and Order to: Carmine J. Colucci, Esq., 629
19 South Sixth Street, Las Vegas, Nevada 89101, for his review.

20
21 BY: 
22 R. JOHNSON
23 Secretary for the District Attorney's Office

24
25
26
27
28 RS/SB/rj/M-1