

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| JEMAR MATTHEWS,<br><br>Appellant,<br><br>vs.<br><br>THE STATE OF NEVADA,<br><br>Respondent, | Supreme Court No. 62241<br>Electronically Filed<br>Dec 06 2013 10:52 a.m.<br>Tracie K. Lindeman<br>Clerk of Supreme Court<br><b>APPELLANT'S REPLY BRIEF</b> |
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**APPELLANT'S REPLY BRIEF**

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## **ARGUMENT**

### **I. MATTHEWS' CLAIM REGARDING TRIAL COUNSEL'S FAILURE TO INVESTIGATE HIS CASE PRIOR TO TRIAL WAS MADE IN THE PETITION BELOW**

Matthews makes no improper argument here regarding trial counsel's failure below to properly investigate his case. We bring no stand alone claim for ineffective assistance of counsel for 'failure to investigate'. Appellant merely argues that had trial counsel properly investigated the case below prior to trial, the need to sever the case would have been obvious to counsel acting effectively. This same argument was submitted directly and by implication in MATTHEWS' initial Petition, his Supplemental Petition, and his Amended Supplemental Petition. AA1427, AA1441, and AA1453.

As the Court is aware, effective counsel is granted some leeway in the decision-making process regarding the tactical significance of filing pretrial motions and the creation of trial strategy. *See Strickland v. Washington*, 466 U.S. 668, 674 and 690-691 (1984), *Wiggins v. Smith*, 539 U.S. 510, 521-522 (2003). Counsel however, is only given this leeway when it is based upon sound preparation and proper investigation in support of putting on a constitutionally adequate defense at trial. *Id.* Counsel below could not have properly prepared for trial, without concluding that a motion to sever was essential. Consequently, this Court should consider this lack of preparation in assessing the reasonableness and

effectiveness of trial counsel below. Appellant urges this Court to see that trial counsel's decision to not file a motion to sever was unreasonable, prejudicial, and amounts to ineffective assistance of counsel in violation of the U.S. Const. U.S. Const. amend. V, VI, and XIV.

**II. MATTHEWS MAKES NO 'INSUFFICIENT EVIDENCE' CLAIM BUT RATHER HIGHLIGHTS FOR THE COURT THE SCANT EVIDENCE THAT EXISTS WHICH SUBSTANTIALLY INCREASES THE LIKLEIHOOD THAT AN INNOCENT MAN WAS CONVICTED**

Appellant's second prong of our argument is not brought as a standalone claim but rather a cautionary admonishment to the Court that we may very well be faced with a case involving the conviction of an innocent man. *See* Appellant's Opening Brief, Page 15. The record below and Appellant's claim is substantially based upon the utter lack of credible evidence in the trial court below. This averment was brought in MATTHEWS' initial Petition, his Supplemental Petition, and his Amended Supplemental Petition in the District Court below. Aa1427-AA1428, AA1438-AA1439, and AA1450-1451.

Here, Appellant makes no new surprise claim to this Court. Legal precedent bolstered by substantive scientific evidence support MATTHEWS' contention in his briefs before the District Court below that substantial danger exists that an innocent man was convicted here largely based upon fleeting eye-witness identification. Michael R. Liepe, *The Case for Expert Testimony About*

Eyewitness Memory, 1 Psychol. Pub. Pol'y & L. 909 (1995) and *State v. Long*, 721 P.2d 483, 488-490 (Utah 1986). As the legal precedent and scientific studies cited in Appellant's Opening Brief show, eye-witness identification is a precarious and inherently unreliable form of evidence. *Id.* Appellant's Opening Brief, Page 13-16. Counsel would be doing no justice to his oath as an attorney if he did not bring this matter to the Court's attention. The lack of any objectively reliable evidence in this case should militate towards this Court's proper determination that an effective attorney would have moved to sever MATTHEWS for purposes of his trial.

### **CONCLUSION**

Based upon the above and foregoing, Appellant Matthews respectfully requests that this Court find that trial counsel was constitutionally ineffective as MATTHEWS' attorney and vacate the Findings of Facts and Conclusions of Law of the trial court in denying Appellants petition for writ of habeas corpus. Further, we ask that the Court direct the District Court to vacate MATTHEWS' conviction as it is constitutionally infirm.

Dated this 31st day of October, 2013.

Respectfully Submitted,

**/s/ William H. Gamage, Esq.**

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William H. Gamage, Esq.

Nevada Bar No. 9024

*Appointed Counsel to Appellant*

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

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

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

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

Dated this 31st day of October, 2013.

GAMAGE & GAMAGE

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### **CERTIFICATE OF SERVICE**

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

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|----|--|
| XX | Through the Courts electronic filing system,   |
|    | by placing the same in the United States Mail via Certified Mail, Return Receipt Requested, with postage prepaid attached thereto, |
|    | via telephonic facsimile transmission  |
|    | Federal Express/Express Mail, or other overnight delivery,   |
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DATED: This 31st day of October, 2013.

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