

1           **b. Failure to object to eyewitness identification**

2           In so much as the defendant argues that his trial counsel should have objected to an  
3           eyewitness's testimony, deciding when to object is also a strategic function within the  
4           attorney's discretion. Id. Especially since defendant's complaints about the witness's  
5           testimony go to the weight and not the admissibility of her testimony, the trial counsel was  
6           not required to make a futile objection. Furthermore, since the testimony was admissible per  
7           NRS 48.025, there was no legal basis for such an objection.

8           **c. Failure to call witnesses to show actual innocence**

9           While clients may make decisions regarding their representation by counsel, the "trial  
10          lawyer alone is entrusted with decisions regarding legal tactics such as deciding which  
11          witnesses to call." Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002). Similarly, how to cross  
12          examine the state's witnesses, is a decision within the discretion of the individual attorney.  
13          Id. These decisions must be reviewed in accordance with the standard set forth in  
14          Strickland. Nothing in the facts indicates that Defendant's attorney's actions were not  
15          objectively reasonable and that a different result would have been reasonably probable if he  
16          had proceeded differently.

17          Here, Defendant makes a bare self-serving allegation that his attorney did not call  
18          witnesses to prove his actual innocence of the crimes charged. His attorney was not required  
19          to call witnesses to support his meritless allegation. "If there is no bona fide defense to the  
20          charge, counsel cannot create one and may disserve the interests of his client by attempting a  
21          useless charade." U.S. v. Cronin, 466 U.S. 648, 657 (1984) fn. 19.

22          **GROUND 2: THE TRIAL COURT PROPERLY RULED ON THE DEFENDANT'S**  
23          **ALLEGATION OF A CONFLICT WITH HIS TRIAL COUNSEL**

24          Defendant's claim that his counsel failed to inform the trial judge of a conflict of  
25          interest is entirely contradictory to the record. An actual conflict of interest between an  
26          attorney and a client which adversely affects the attorney's performance will result in a  
27          presumption of prejudice to the defendant. Clark v. State, 108 Nev. 324, 326, 831 P.2d  
28          1374, 1376 (1992) (citing Mannon v. State, 98 Nev. 224, 226, 645 P.2d 433, 434 (1982)).  
"Conflict of interest and divided loyalty situations can take many forms, and whether an  
actual conflict exists must be evaluated on the specific facts of each case. In general, a

1 conflict exists when an attorney is placed in a situation conducive to divided loyalties." Id.  
2 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)).

3 In this particular case, one of the defendant's attorney, Howard Brooks, was  
4 concerned that he might get better representation if different counsel were appointed. Mr.  
5 Brooks informed the trial court that it was defendant's desire to replace his current attorneys  
6 with a different one. Mr. Brooks further explained to the judge that he was concerned that  
7 the defendant was not happy with the representation he had received and that it may work to  
8 his own detriment.

9 A defendant is not entitled to reject his court-appointed counsel and request  
10 substitution of other counsel without a showing of adequate cause for the change. Junior v.  
11 State, 91 Nev. 439, 441, 537 P.2d 1204, 1206 (1975). The decision whether an actual  
12 conflict exists between the attorney and the client is within the sound discretion of the trial  
13 court, and should not be disturbed on appeal absent a clear showing of abuse. Thomas v.  
14 State, 94 Nev. 605, 584 P.2d 674 (1978).

15 Upon inquiry, the trial court determined that a continuance for the substitution of  
16 counsel was not warranted. The trial court noted that the defendant's attorneys were  
17 providing adequate representation. Such was the sound judgment of the trial court, and  
18 absent any clear showing of abuse by the defendant, the trial court's decision should not be  
19 disturbed.

### 20 **GROUND 3: THE TRIAL COURT PROPERLY ADMITTED THE TRANSCRIBED** 21 **TESTIMONY OF WINSTON BUDD**

22 Defendant's attorney objected to the admission of the transcribed testimony of  
23 Winston Budd. While the attorney acknowledged that Mr. Budd was living in Belize, he  
24 explained to the court that Mr. Budd was willing to come and testify and that the State could  
25 have obtained his attendance through the help of the Belize consulate. However upon  
26 hearing from the State on the matter, the trial court decided to allow for the testimony  
27 because the witness was determined to be unavailable under NRS 51.055.

28 In this situation, all defendant's attorney could have done to be effective was to  
object. Once he made his argument to the court, he satisfied the requirement to provide  
effective legal assistance.

1 **GROUND 4: TRIAL COUNSEL WAS NOT INEFFECTIVE FOR CONCEDED**  
2 **SOME POSSIBLE GUILT**

3 First, defendant's attorney did not make any concessions regarding his guilt in this  
4 case. Rather, he explained that the defendant was presumed innocent but that the State still  
5 had only managed to prove second-degree murder. This was a hypothetical argument made  
6 in the alternative and was not a concession of guilt.

7 However, even if one construes the attorney's statement as a concession of guilt, such  
8 concessions may sometimes be a valuable strategic tool used by attorneys. Not only can a  
9 concession be a reasonable trial tactic where there is overwhelming evidence of guilt, but it  
10 may also help to make concessions in preparation of arguing mitigation in preparation of the  
11 penalty phase. See People v. Bolin, 18 Cal.4<sup>th</sup> 297, 75 Cal.Rptr.2d 412 (1998).

12 Given that this was a strategic decision, it is not reviewable per the guidelines set  
13 forth in Strickland. It was reasonable for the attorney to make the argument the way he did,  
14 and he was not ineffective for making a hypothetical concession.

15 **GROUND 5: THE STATE OPENLY INFORMED THE COURT OF THE**  
16 **AGREEMENT IT HAD WITH A WITNESS**

17 Defendant incorrectly asserts that the State did not disclose an agreement it had with  
18 one of its witnesses. Greg Lewis, who was in the same jail housing unit as the defendant,  
19 testified that the defendant told him he shot three people but a fourth person had gotten  
20 away. Although Lewis and a detective both testified that no promises were made to Lewis in  
21 exchange for his testimony, the jury was informed that an assistant district attorney wrote a  
22 letter to the parole board noting Lewis's cooperation in the investigation. (Order of  
23 Affirmance, 4-5).

24 In so much as the defendant argues that his trial counsel was ineffective for not  
25 calling a handwriting expert to examine a letter that was alleged to have been written by the  
26 victim, this was a strategic decision that is unchallengeable. As mentioned above, the  
27 attorney has the responsibility of deciding which witnesses to call. Rhyne v. State, 118 Nev.  
28 1, 38 P.3d 163 (2002). Here, the attorney decided not to call an expert handwriting or  
fingerprint expert in favor of cross examining on the letter instead. Such a decision was part  
of the attorney's strategy and does not amount to ineffective assistance of counsel.

1 **GROUND 6: THE PROSECUTOR'S OPENING STATEMENT WAS PROPER AND**  
2 **DID NOT AMOUNT TO PROSECUTORIAL MISCONDUCT**

3 A prosecutor has "a duty to refrain from making statements in opening arguments  
4 that cannot be proved at trial." Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270  
5 (1997). Furthermore, "[e]ven if the prosecutor overstates in his opening statement what he is  
6 later able to prove at trial, misconduct does not lie unless the prosecutor makes these  
7 statements in bad faith." Id. at 1312-1313, 949 P.2d at 270.

8 Under the standard above, the prosecutor did not commit prosecutorial misconduct.  
9 First, the prosecutor made statements that could be proved at trial. The witness to which he  
10 referenced in his opening argument failed to come to trial after informing the prosecutor that  
11 she would be there. Even though she never testified, the prosecutor had a preliminary  
12 hearing transcript and could have introduced her testimony under the hearsay exception for  
13 an unavailable witness. Therefore, his statements about her testimony could be produced at  
14 trial.

15 Moreover, the prosecutor here did not make the statements in bad faith. As he  
16 explained to the trial court, his investigator had been in contact with the witness and she had  
17 assured him that she would show up to court. When she did not appear, the prosecutor could  
18 have secured her presence by having a warrant issued, but instead, he chose to prove the  
19 facts desired through other witnesses. Therefore, there was no bad faith that would  
20 constitute prosecutorial misconduct.

21 In so much as the defendant also argues that it was improper for the prosecutor to  
22 reference the testimony of Winston Budd, again the prosecutor was not referring to anything  
23 that could not be produced in evidence at trial and was not acting in bad faith. As mentioned  
24 earlier, the prosecutor explained to the judge that this particular witness was living in Belize,  
25 was not coming back to testify, and that the State would be introducing his testimony from  
26 the preliminary hearing. In his opening statement, the prosecutor did not refer to any  
27 information that would not be proven through the preliminary hearing. Therefore, he did not  
28 commit prosecutorial conduct in referring to this testimony in his opening argument.



1 **GROUND 7: THE TRIAL COURT WAS NOT REQUIRED TO *SUA SPONTE***  
2 **ORDER A MISTRIAL**

3 There was no reason for the trial court to *sua sponte* order a mistrial. A trial court  
4 will only grant a mistrial on its own motion when there is presentation of evidence so  
5 inherently prejudicial that the declaration of a mistrial is necessary. Baker v. State, 89 Nev.  
6 87, 88, 506 P.2d 1261 (1973).

7 Here there was absolutely no cause for declaring a mistrial. First, the State did not  
8 say anything that was inherently prejudicial. The prosecutor simply informed the jurors of  
9 the information that would be presented at trial. In referring to the testimony of unavailable  
10 witnesses, the prosecutor fully expected the previous testimony to be entered into evidence  
11 as the court had already ruled on the matter in favor of the State. Given that there was no  
12 error, the trial court should not have declared a mistrial *sua sponte*.

13 **GROUND 8: THE JURY INSTRUCTIONS WERE PROPER**

14 District courts have broad discretion in settling jury instructions and may only be  
15 reviewed where there is a clear showing of an abuse of discretion or judicial error. Jackson v.  
16 State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An abuse of discretion only occurs if  
17 the district court's decision is "arbitrary or capricious or if it exceeds the bounds of law or  
18 reason." Id. Claims concerning errant jury instructions are subject to a harmless error  
19 standard of review. Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003).

20 In this case, the defendant argues that his trial counsel was ineffective for failing to  
21 object to the wording of Jury Instructions Seven (7) and Nineteen (19). However, a "trial  
22 counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."  
23 Ennis v. State, -- Nev. --, 137 P.3d 1095, 1103 (2006). Here, defense counsel was not  
24 required to object to the proposed jury instructions because they would have been futile  
25 objections.

26 Jury Instruction Seven (7) simply lays out the elements of first-degree murder as set  
27 forth by NRS 200.030(1)(a). In fact, the language which the defendant complains about  
28 actually aids the defense because it explains how a deliberate killing must not be formed in  
passion. In ensuring that the jury was aware of the distinction, the trial counsel was not  
ineffective for refusing to object as such an objection would have been strategically dubious

1 as it would have hurt the defendant.

2 The defendant also argues that his attorney should have objected to Instruction  
3 Number Nineteen (19) (erroneously cited as Instruction Number 17 in his Petition).  
4 Instruction 19 deals with the credibility of the witnesses. Defendant alleges that he was  
5 entitled to an instruction that a biased or interested witness had a motive to testify falsely,  
6 but in addition to the district court's broad discretion to settle jury instructions, the trial court  
7 need not use a defendant's proposed jury instructions where "a defendant's proposed jury  
8 instructions on the theory of his case if his theory is substantially covered by other  
9 instructions. Crawford v. State, 121 Nev. 744, 121 P.3d 582, 589 (2004)."

10 In its entirety, Jury Instruction 19 reads:

11 The credibility or believability of a witness should be determined by his manner  
12 upon the stand, his or her relationship to the parties, his or her fears, motives  
13 interests or feelings, his or her opportunity to have observed the matter to which he  
14 testified, the reasonableness of his statements and the strength or weakness of his  
15 recollections.

16 If you believe that a witness has lied about any material fact in the case, you may  
17 disregard the entire testimony of that witness or any portion of his or her testimony  
18 which is not proved by other evidence.

19 Jury Instruction 19 essentially covers the same information that the defendant argues  
20 wanted. Due to the fact that the district court is not obligated to use a defendant's exact  
21 wording, the defendant was not entitled to his exact jury instruction. Therefore, the trial  
22 court did not err in using Instruction 19.

#### 23 **GROUND 9 AND 10: DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF** 24 **APPELLATE COUNSEL**

25 Similar to the standard used to show an ineffective assistance of trial counsel, the  
26 Strickland test is also used for claims of ineffective assistance of appellate counsel. First, the  
27 defendant must show a severe deficiency in representation. Then, the defendant must show  
28 that the omitted issue would have a reasonable probability of success on appeal. Rippo v.  
State, -- Nev. --, 146 P.3d 279, 285 (2006). Likewise, appellate counsel has no constitutional  
duty to raise every non-frivolous issue requested by a defendant on appeal. Jones v. Barnes,  
463 U.S. 745, 751 (1983). There is a strong presumption that appellate counsel's

1 performance was reasonable and fell within "the wide range of reasonable professional  
2 assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing  
3 Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

4 This Court has held that all appeals must be "pursued in a manner meeting high  
5 standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366,  
6 1368, 887 P.2d 267, 268 (1994). In Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308,  
7 3312 (1983), the Supreme Court recognized that part of professional diligence and  
8 competence involves "winnowing out weaker arguments on appeal and focusing on one  
9 central issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313.  
10 In particular, a "brief that raises every colorable issue runs the risk of burying good  
11 arguments . . . in a verbal mound made up of strong and weak contentions." Id. 753, 103  
12 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional  
13 judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested  
14 by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103  
15 S.Ct. at 3314.

16 Here, in addition to a broad statement that his appellate counsel was ineffective, the  
17 defendant argues that his appellate counsel was ineffective for not having federalized the  
18 issues in his case. However, appellate counsel will not be deemed ineffective for not  
19 "federalizing" an issue. See Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004).  
20 Furthermore, as stated earlier, appellate counsel is also not required to make futile objections  
21 or file frivolous motions where there is not a legal basis to do so per Ennis. Therefore, the  
22 defendant received effective appellate counsel.

## 23 **GROUND ELEVEN: THERE WAS NO CUMULATIVE ERROR**

24 Defendant argues that the series of alleged errors amounts to reversible error.  
25 However, Defendant has failed to make out a valid claim for any of the issues he has raised.  
26 Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the  
27 issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the  
28 crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854 - 855 (2000); see also  
Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

1 Although this case satisfies the third prong of the Mulder test—both the crime and the  
2 punishment are extremely grave—his claim fails the first two prongs. The Defendant has  
3 not shown that any errors whatsoever occurred throughout the adjudication of this case and  
4 there is no reasonable question of Defendant's guilt. Therefore, his claim of cumulative  
5 error must fail under Mulder.

6 **CONCLUSION**

7 Based on the arguments set forth above, the State respectfully requests that this Court  
8 DENY Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

9 DATED this 27th day of November, 2007.

10 Respectfully submitted,

11 DAVID ROGER  
12 Clark County District Attorney  
Nevada Bar #002781

13  
14 BY /s/WILLIAM D. KEPHART for

15 H. LEON SIMON  
16 Deputy District Attorney  
Nevada Bar #000411

17  
18 **CERTIFICATE OF MAILING**

19 I hereby certify that service of the above and foregoing was made this 27th day of  
20 November, 2007, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

21 GLENFORD BUDD #90043  
22 ELY STATE PRISON  
23 P.O. Box 1989  
24 4569 North State Rt. 490  
Ely, Nevada 89301

25  
26 BY /s/D.Daniels  
Secretary for the District Attorney's Office

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FILED

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CLERK OF THE COURT

1 **ORDER**  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 H. LEON SIMON  
6 Deputy District Attorney  
7 Nevada Bar #000411  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 GLENFORD BUDD,  
16 #1900089

17 Defendant.

CASE NO: C193182

DEPT NO: XVIII

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER

DATE OF HEARING: November 28, 2007  
TIME OF HEARING: 8:15 A.M.

18 THIS CAUSE having come on for hearing before the Honorable DAVID BARKER,  
19 District Judge, on the <sup>30<sup>th</sup></sup> 28<sup>th</sup> day of November, 2007, the Petitioner not being present,  
20 Proceeding in Forma Pauperis, the Respondent being represented by DAVID ROGER,  
21 District Attorney, by and through DAVID STANTON, Deputy District Attorney, and the  
22 Court having considered the matter, including briefs, transcripts, ~~arguments of counsel~~, and  
23 documents on file herein, now therefore, the Court makes the following findings of fact and  
24 conclusions of law:

FINDINGS OF FACT

25  
26 1. On May 29, 2003, Glenford Budd (hereinafter "Defendant") was charged with three  
27 (3) counts of Murder with Use of a Deadly Weapon. After a preliminary hearing, a  
28 magistrate ordered Defendant to answer the charges in District Court.

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1       2. The State filed an Information on June 26, 2003. At the initial arraignment on July 2,  
2 2003, Defendant pled not guilty to the charges.

3       3. The matter was set for trial which commenced on December 5, 2005. After the trial,  
4 the jury returned three (3) guilty verdicts of First Degree Murder with Use of a Deadly  
5 Weapon on December 13, 2005.

6       4. On December 16, 2005, Defendant was sentenced to three life sentences without  
7 possibility of parole, each with an equal and consecutive sentence for use of a deadly  
8 weapon. Judgment of Conviction was filed on March 1, 2006.

9       5. On March 23, 2006, Defendant filed a Notice of Appeal. On January 9, 2007, the  
10 Nevada Supreme Court filed an Order of Affirmance thereby affirming Defendant's  
11 conviction.

12       6. On July 5, 2007, Defendant filed a pro per motion to have his trial attorney held in  
13 contempt. On July 23, 2007, Defendant's motion was denied. On August 10, 2007,  
14 Defendant filed another Notice of Appeal regarding the denial to hold his attorney in  
15 contempt. On September 11, 2007, the matter was closed by the Supreme Court.

16       7. On September 21, 2007, Defendant filed a petition for writ of habeas corpus (post-  
17 conviction). The State responded on November 27, 2007.

18       8. Defendant received effective assistance of counsel.

19           a. Counsel was not ineffective for failing to object to a witness's testimony  
20           regarding the fact that Defendant was angry about losing some marijuana  
21           because such an objection would have been futile.

22           b. Counsel was not ineffective for failing to object to an eyewitness's testimony  
23           because this was a strategic decision.

24           c. Counsel was not ineffective for failing to call certain witness because counsel  
25           alone is entrusted with decisions regarding legal tactics.

26           d. Counsel was effective when he raised an objection to the admission of the  
27           transcribed testimony of Winston Budd.

28           e. Counsel was not ineffective for posing a hypothetical stating that the State has

1           only managed to prove second-degree murder. Regardless of whether or not  
2           this is considered an admission of guilt, such a concession may be a reasonable  
3           trial tactic.

4           f. Counsel was not ineffective for not calling a handwriting expert to examine a  
5           letter that was alleged to have been written by the victim because this was a  
6           strategic decision.

7           g. Counsel was not ineffective for not objecting to jury instructions seven (7) and  
8           nineteen (19) because such objections would be futile.

9           9. The District Court properly ruled on Defendant's allegation of a conflict with his  
10          counsel because Defendant's claim that his counsel failed to inform the District Court of a  
11          conflict of interest is entirely contradictory to the record.

12          10. This Court properly admitted the transcribed testimony of Winston Budd because the  
13          witness was determined to be unavailable per NRS 51.055.

14          11. Defendant incorrectly asserts that the State did not disclose an agreement it had with  
15          one of its witnesses.

16          12. There was no prosecutorial misconduct.

17          13. This Court was not required *sua sponte* to order a mistrial because there was no cause  
18          in this case to do so. The State did not say anything that was inherently prejudicial. The  
19          prosecutor simply informed the jurors of the information that would be presented at trial. In  
20          referring to the testimony of unavailable witnesses, the prosecutor fully expected the  
21          previous testimony to be entered into evidence as this Court had already ruled on the matter  
22          in favor of the State.

23          14. The jury instructions in this case were proper.

24          15. Defendant received effective assistance of appellate counsel.

25           a. Defendant's appellate counsel was not ineffective for failing to federalize  
26           issues in Defendant's case.

27           b. Defendant's appellate counsel need not raise futile objections or file frivolous  
28           motions where there is not a legal basis to do so.

1 16. There was no cumulative error in this case.

2  
3 CONCLUSIONS OF LAW

4 1. In order to assert a claim for ineffective assistance of counsel a defendant must prove  
5 that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong  
6 test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See  
7 also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the  
8 defendant must show (1) that his counsel's representation fell below an objective standard of  
9 reasonableness, and (2) that but for counsel's errors, there is a reasonable probability that the  
10 result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104  
11 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d  
12 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not  
13 mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of  
14 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State  
15 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397  
16 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

17 2. A defendant who contends that his attorney was ineffective because he did not  
18 conduct an adequate investigation must show how a better investigation would have made a  
19 more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

20 3. Claims asserted in a petition for post-conviction relief must be supported with specific  
21 factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100  
22 Nev. 498, 502, 686 P.2d 222, 225 (1984).

23 4. "Trial counsel need not lodge futile objections to avoid ineffective assistance of  
24 counsel claims." Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1103 (2006).

25 5. According to NRS 48.025, all relevant evidence is admissible, and all irrelevant  
26 evidence is inadmissible.

27 6. The "trial lawyer alone is entrusted with decisions regarding legal tactics such as  
28 deciding which witnesses to call." Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).



1 Similarly, how to cross examine the state's witnesses is a decision within the discretion of  
2 the individual attorney. Id.

3 7. "If there is no bona fide defense to the charge, counsel cannot create one and may  
4 disserve the interests of his client by attempting a useless charade." U.S. v. Cronin, 466 U.S.  
5 648, 657 (1984) fn. 19.

6 8. An actual conflict of interest between an attorney and a client which adversely affects  
7 the attorney's performance will result in a presumption of prejudice to the defendant. Clark  
8 v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (citing Mannon v. State, 98 Nev.  
9 224, 226, 645 P.2d 433, 434 (1982)).

10 9. "Conflict of interest and divided loyalty situations can take many forms, and whether  
11 an actual conflict exists must be evaluated on the specific facts of each case. In general, a  
12 conflict exists when an attorney is placed in a situation conducive to divided loyalties." Id.  
13 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)).

14 10. A defendant is not entitled to reject his court-appointed counsel and request  
15 substitution of other counsel without a showing of adequate cause for the change. Junior v.  
16 State, 91 Nev. 439, 441, 537 P.2d 1204, 1206 (1975). The decision whether an actual  
17 conflict exists between the attorney and the client is within the sound discretion of the trial  
18 court, and should not be disturbed on appeal absent a clear showing of abuse. Thomas v.  
19 State, 94 Nev. 605, 584 P.2d 674 (1978).

20 11. NRS 51.055 reads:

21 1. A declarant is "unavailable as a witness" if he is:

- 22 (a) Exempted by ruling of the judge on the ground of privilege from testifying  
23 concerning the subject matter of his statement;  
24 (b) Persistent in refusing to testify despite an order of the judge to do so;  
25 (c) Unable to be present or to testify at the hearing because of death or then  
26 existing physical or mental illness or infirmity; or  
27 (d) Absent from the hearing and beyond the jurisdiction of the court to compel  
28 appearance and the proponent of his statement has exercised reasonable  
diligence but has been unable to procure his attendance or to take his  
deposition.

1 2. A declarant is not "unavailable as a witness" if his exemption, refusal,  
2 inability or absence is due to the procurement or wrongdoing of the proponent  
3 of his statement for the purpose of preventing the witness from attending or  
4 testifying.

5 12. Even if one construes an attorney's statement as a concession of guilt, such  
6 concessions may sometimes be a valuable strategic tool. Not only can a concession be a  
7 reasonable trial tactic where there is overwhelming evidence of guilt, but it may also help to  
8 make concessions in preparation of arguing mitigation in preparation of the penalty phase.  
9 See People v. Bolin, 18 Cal.4<sup>th</sup> 297, 75 Cal.Rptr.2d 412 (1998).

10 13. A prosecutor has "a duty to refrain from making statements in opening arguments  
11 that cannot be proved at trial." Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270  
12 (1997). Furthermore, "[e]ven if the prosecutor overstates in his opening statement what he is  
13 later able to prove at trial, misconduct does not lie unless the prosecutor makes these  
14 statements in bad faith." Id. at 1312-1313, 949 P.2d at 270.

15 14. A trial court will only grant a mistrial on its own motion when there is presentation  
16 of evidence so inherently prejudicial that the declaration of a mistrial is necessary. Baker v.  
17 State, 89 Nev. 87, 88, 506 P.2d 1261 (1973).

18 15. District courts have broad discretion in settling jury instructions and may only be  
19 reviewed where there is a clear showing of an abuse of discretion or judicial error. Jackson v.  
20 State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An abuse of discretion only occurs if  
21 the district court's decision is "arbitrary or capricious or if it exceeds the bounds of law or  
22 reason." Id. Claims concerning errant jury instructions are subject to a harmless error  
23 standard of review. Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003).

24 16. The trial court need not use a defendant's proposed jury instructions where "a  
25 defendant's proposed jury instructions on the theory of his case if his theory is substantially  
26 covered by other instructions. Crawford v. State, 121 Nev. 744, 121 P.3d 582, 589 (2004)."

27 17. Similar to the standard used to show an ineffective assistance of trial counsel, the  
28 Strickland test is also used for claims of ineffective assistance of appellate counsel. First, the  
defendant must show a severe deficiency in representation. Then, the defendant must show  
that the omitted issue would have a reasonable probability of success on appeal. Rippo v.

1 State, -- Nev. --, 146 P.3d 279, 285 (2006). Likewise, appellate counsel has no constitutional  
2 duty to raise every non-frivolous issue requested by a defendant on appeal. Jones v. Barnes,  
3 463 U.S. 745, 751 (1983). There is a strong presumption that appellate counsel's  
4 performance was reasonable and fell within "the wide range of reasonable professional  
5 assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing  
6 Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

7 18. This Court has held that all appeals must be "pursued in a manner meeting high  
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9 1368, 887 P.2d 267, 268 (1994). In Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308,  
10 3312 (1983), the Supreme Court recognized that part of professional diligence and  
11 competence involves "winnowing out weaker arguments on appeal and focusing on one  
12 central issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313.  
13 In particular, a "brief that raises every colorable issue runs the risk of burying good  
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15 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional  
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17 by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103  
18 S.Ct. at 3314.

19 19. Appellate counsel will not be deemed ineffective for not "federalizing" an issue. See  
20 Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004).

21 20. Appellate counsel is not required to make futile objections or file frivolous motions  
22 where there is not a legal basis to do so. Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1103  
23 (2006).


24 21. Relevant factors to consider in evaluating a claim of cumulative error are (1) whether  
25 the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of  
26 the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854 - 855 (2000); see also  
27 Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

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ORDER

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

DATED this 27 day of December, 2007.



DISTRICT JUDGE



DAVID BARKER

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

BY



H. LEON SIMON  
Deputy District Attorney  
Nevada Bar #000411

ORIGINAL

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1 NOED

2 DISTRICT COURT

JAN 8 12 35 PM '08

3 CLARK COUNTY, NEVADA

4 *Charles J. Short*  
CLERK OF THE COURT

5 GLENFORD BUDD,

6 Petitioner,

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

Case No: C193182

Dept No: XVIII

10 NOTICE OF ENTRY OF  
DECISION AND ORDER

11 PLEASE TAKE NOTICE that on January 7, 2008, the court entered a decision or order in this matter, a  
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you  
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is  
15 mailed to you. This notice was mailed on January 8, 2008.

16 CHARLES J. SHORT, CLERK OF THE COURT

17 By: *Brandi J. Wendel*

18 Brandi J. Wendel, Deputy Clerk

19 CERTIFICATE OF MAILING

20 I hereby certify that on this 8 day of January 2008, I placed a copy of this Notice of Entry of Decision and  
21 Order in:

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

- 24 ☒ The United States mail addressed as follows:  
25 Glenford Budd # 90043  
26 P.O. Box 1989  
Ely, NV 89301

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

002816

ORIGINAL

FILED

JUN 7 1 21 PM '03

CLERK OF THE COURT

1 **ORDR**  
2 **DAVID ROGER**  
3 **Clark County District Attorney**  
4 **Nevada Bar #002781**  
5 **H. LEON SIMON**  
6 **Deputy District Attorney**  
7 **Nevada Bar #000411**  
8 **200 Lewis Avenue**  
9 **Las Vegas, Nevada 89155-2212**  
10 **(702) 671-2500**  
11 **Attorney for Plaintiff**

DISTRICT COURT  
CLARK COUNTY, NEVADA

8 **THE STATE OF NEVADA,**  
9 **Plaintiff,**

10 **-vs-**

11 **GLENFORD BUDD,**  
12 **#1900089**

13 **Defendant.**

CASE NO: C193182

DEPT NO: XVIII

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

16 **DATE OF HEARING: November 28, 2007**  
17 **TIME OF HEARING: 8:15 A.M.**

18 **THIS CAUSE** having come on for hearing before the Honorable DAVID BARKER,  
19 District Judge, on the <sup>30<sup>th</sup></sup> 28<sup>th</sup> day of November, 2007, the Petitioner not being present,  
20 Proceeding in Forma Pauperis, the Respondent being represented by DAVID ROGER,  
21 District Attorney, by and through DAVID STANTON, Deputy District Attorney, and the  
22 Court having considered the matter, including briefs, transcripts, ~~arguments of counsel~~, and  
23 documents on file herein, now therefore, the Court makes the following findings of fact and  
24 conclusions of law:

25 **FINDINGS OF FACT**

26 1. On May 29, 2003, Glenford Budd (hereinafter "Defendant") was charged with three  
27 (3) counts of Murder with Use of a Deadly Weapon. After a preliminary hearing, a  
28 magistrate ordered Defendant to answer the charges in District Court.

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CLERK OF THE COURT

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1       2. The State filed an Information on June 26, 2003. At the initial arraignment on July 2,  
2 2003, Defendant pled not guilty to the charges.

3       3. The matter was set for trial which commenced on December 5, 2005. After the trial,  
4 the jury returned three (3) guilty verdicts of First Degree Murder with Use of a Deadly  
5 Weapon on December 13, 2005.

6       4. On December 16, 2005, Defendant was sentenced to three life sentences without  
7 possibility of parole, each with an equal and consecutive sentence for use of a deadly  
8 weapon. Judgment of Conviction was filed on March 1, 2006.

9       5. On March 23, 2006, Defendant filed a Notice of Appeal. On January 9, 2007, the  
10 Nevada Supreme Court filed an Order of Affirmance thereby affirming Defendant's  
11 conviction.

12       6. On July 5, 2007, Defendant filed a pro per motion to have his trial attorney held in  
13 contempt. On July 23, 2007, Defendant's motion was denied. On August 10, 2007,  
14 Defendant filed another Notice of Appeal regarding the denial to hold his attorney in  
15 contempt. On September 11, 2007, the matter was closed by the Supreme Court.

16       7. On September 21, 2007, Defendant filed a petition for writ of habeas corpus (post-  
17 conviction). The State responded on November 27, 2007.

18       8. Defendant received effective assistance of counsel.

19           a. Counsel was not ineffective for failing to object to a witness's testimony  
20           regarding the fact that Defendant was angry about losing some marijuana  
21           because such an objection would have been futile.

22           b. Counsel was not ineffective for failing to object to an eyewitness's testimony  
23           because this was a strategic decision.

24           c. Counsel was not ineffective for failing to call certain witness because counsel  
25           alone is entrusted with decisions regarding legal tactics.

26           d. Counsel was effective when he raised an objection to the admission of the  
27           transcribed testimony of Winston Budd.

28           e. Counsel was not ineffective for posing a hypothetical stating that the State has

1           only managed to prove second-degree murder. Regardless of whether or not  
2           this is considered an admission of guilt, such a concession may be a reasonable  
3           trial tactic.

4           f. Counsel was not ineffective for not calling a handwriting expert to examine a  
5           letter that was alleged to have been written by the victim because this was a  
6           strategic decision.

7           g. Counsel was not ineffective for not objecting to jury instructions seven (7) and  
8           nineteen (19) because such objections would be futile.

9           9. The District Court properly ruled on Defendant's allegation of a conflict with his  
10          counsel because Defendant's claim that his counsel failed to inform the District Court of a  
11          conflict of interest is entirely contradictory to the record.

12          10. This Court properly admitted the transcribed testimony of Winston Budd because the  
13          witness was determined to be unavailable per NRS 51.055.

14          11. Defendant incorrectly asserts that the State did not disclose an agreement it had with  
15          one of its witnesses.

16          12. There was no prosecutorial misconduct.

17          13. This Court was not required *sua sponte* to order a mistrial because there was no cause  
18          in this case to do so. The State did not say anything that was inherently prejudicial. The  
19          prosecutor simply informed the jurors of the information that would be presented at trial. In  
20          referring to the testimony of unavailable witnesses, the prosecutor fully expected the  
21          previous testimony to be entered into evidence as this Court had already ruled on the matter  
22          in favor of the State.

23          14. The jury instructions in this case were proper.

24          15. Defendant received effective assistance of appellate counsel.

25               a. Defendant's appellate counsel was not ineffective for failing to federalize  
26               issues in Defendant's case.

27               b. Defendant's appellate counsel need not raise futile objections or file frivolous  
28               motions where there is not a legal basis to do so.



1 16. There was no cumulative error in this case.

2  
3 CONCLUSIONS OF LAW

4 1. In order to assert a claim for ineffective assistance of counsel a defendant must prove  
5 that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong  
6 test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See  
7 also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the  
8 defendant must show (1) that his counsel's representation fell below an objective standard of  
9 reasonableness, and (2) that but for counsel's errors, there is a reasonable probability that the  
10 result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104  
11 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d  
12 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not  
13 mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of  
14 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State  
15 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397  
16 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

17 2. A defendant who contends that his attorney was ineffective because he did not  
18 conduct an adequate investigation must show how a better investigation would have made a  
19 more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

20 3. Claims asserted in a petition for post-conviction relief must be supported with specific  
21 factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100  
22 Nev. 498, 502, 686 P.2d 222, 225 (1984).

23 4. "Trial counsel need not lodge futile objections to avoid ineffective assistance of  
24 counsel claims." Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1103 (2006).

25 5. According to NRS 48.025, all relevant evidence is admissible, and all irrelevant  
26 evidence is inadmissible.

27 6. The "trial lawyer alone is entrusted with decisions regarding legal tactics such as  
28 deciding which witnesses to call." Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

1 Similarly, how to cross examine the state's witnesses is a decision within the discretion of  
2 the individual attorney. Id.

3 7. "If there is no bona fide defense to the charge, counsel cannot create one and may  
4 disserve the interests of his client by attempting a useless charade." U.S. v. Cronie, 466 U.S.  
5 648, 657 (1984) fn. 19.

6 8. An actual conflict of interest between an attorney and a client which adversely affects  
7 the attorney's performance will result in a presumption of prejudice to the defendant. Clark  
8 v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (citing Mannon v. State, 98 Nev.  
9 224, 226, 645 P.2d 433, 434 (1982)).

10 9. "Conflict of interest and divided loyalty situations can take many forms, and whether  
11 an actual conflict exists must be evaluated on the specific facts of each case. In general, a  
12 conflict exists when an attorney is placed in a situation conducive to divided loyalties." Id.  
13 (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)).

14 10. A defendant is not entitled to reject his court-appointed counsel and request  
15 substitution of other counsel without a showing of adequate cause for the change. Junior v.  
16 State, 91 Nev. 439, 441, 537 P.2d 1204, 1206 (1975). The decision whether an actual  
17 conflict exists between the attorney and the client is within the sound discretion of the trial  
18 court, and should not be disturbed on appeal absent a clear showing of abuse. Thomas v.  
19 State, 94 Nev. 605, 584 P.2d 674 (1978).

20 11. NRS 51.055 reads:

21 1. A declarant is "unavailable as a witness" if he is:

- 22 (a) Exempted by ruling of the judge on the ground of privilege from testifying  
23 concerning the subject matter of his statement;  
24 (b) Persistent in refusing to testify despite an order of the judge to do so;  
25 (c) Unable to be present or to testify at the hearing because of death or then  
26 existing physical or mental illness or infirmity; or  
27 (d) Absent from the hearing and beyond the jurisdiction of the court to compel  
28 appearance and the proponent of his statement has exercised reasonable  
diligence but has been unable to procure his attendance or to take his  
deposition.

1 2. A declarant is not "unavailable as a witness" if his exemption, refusal,  
2 inability or absence is due to the procurement or wrongdoing of the proponent  
3 of his statement for the purpose of preventing the witness from attending or  
4 testifying.

5 12. Even if one construes an attorney's statement as a concession of guilt, such  
6 concessions may sometimes be a valuable strategic tool. Not only can a concession be a  
7 reasonable trial tactic where there is overwhelming evidence of guilt, but it may also help to  
8 make concessions in preparation of arguing mitigation in preparation of the penalty phase.  
9 See People v. Bolin, 18 Cal.4<sup>th</sup> 297, 75 Cal.Rptr.2d 412 (1998).

10 13. A prosecutor has "a duty to refrain from making statements in opening arguments  
11 that cannot be proved at trial." Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270  
12 (1997). Furthermore, "[e]ven if the prosecutor overstates in his opening statement what he is  
13 later able to prove at trial, misconduct does not lie unless the prosecutor makes these  
14 statements in bad faith." Id. at 1312-1313, 949 P.2d at 270.

15 14. A trial court will only grant a mistrial on its own motion when there is presentation  
16 of evidence so inherently prejudicial that the declaration of a mistrial is necessary. Baker v.  
17 State, 89 Nev. 87, 88, 506 P.2d 1261 (1973).

18 15. District courts have broad discretion in settling jury instructions and may only be  
19 reviewed where there is a clear showing of an abuse of discretion or judicial error. Jackson v.  
20 State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An abuse of discretion only occurs if  
21 the district court's decision is "arbitrary or capricious or if it exceeds the bounds of law or  
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1 State, -- Nev. --, 146 P.3d 279, 285 (2006). Likewise, appellate counsel has no constitutional  
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3 463 U.S. 745, 751 (1983). There is a strong presumption that appellate counsel's  
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13 In particular, a "brief that raises every colorable issue runs the risk of burying good  
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17 by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103  
18 S.Ct. at 3314.

19 19. Appellate counsel will not be deemed ineffective for not "federalizing" an issue. See  
20 Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004).

21 20. Appellate counsel is not required to make futile objections or file frivolous motions  
22 where there is not a legal basis to do so. Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1103  
23 (2006).

24 21. Relevant factors to consider in evaluating a claim of cumulative error are (1) whether  
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26 the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854 - 855 (2000); see also  
27 Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

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ORDER



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

DATED this 27 day of December, 2007.

  
DISTRICT JUDGE

 DAVID BARKER

DAVID ROGER  
DISTRICT ATTORNEY  
Nevada Bar #002781

BY   
 H. LEON SIMON  
Deputy District Attorney  
Nevada Bar #000411

No. C193182

Dept. No. 18

16  
**FILED**

JAN 23 2 57 PM '08

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

*Cheryl S. [Signature]*  
CLERK OF THE COURT

GLENFORD BUDD

Petitioner/Plaintiff,

v.

THE STATE OF NEVADA

Respondent/Defendant.

**NOTICE OF APPEAL**

Notice is hereby given that GLENFORD BUDD, Petitioner/Defendant above named,  
hereby appeals to the Supreme Court of Nevada from the final judgment/order  
( FINDINGS OF FACT; CONCLUSIONS OF LAW AND ORDER )  
entered in this action on the 8th day of January, 2008.

Dated this 21 day of January, 2008.

*Glenford A. Budd*  
Appellant

Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301-1989

CERTIFICATE OF SERVICE BY MAIL

I, GLENFORD BUDD, hereby certify pursuant to N.R.C.P. 5(b), that on  
this \_\_\_\_\_ day of the month of January, of the year 2008, I mailed a true and  
correct copy of the foregoing NOTICE OF APPEAL

\_\_\_\_\_ addressed to:

CLERK OF THE COURT

Name

200 Lewis Ave., 3rd Fl.  
Las Vegas, NV 89155-1160

Address

DAVID ROGER

Name

District Attorney  
200 Lewis Ave.  
Las Vegas, NV 89155-2212

Address

Name

Address

  
Signature

GLENFORD BUDD #90043  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

**AFFIRMATION**  
**Pursuant to NRS 239B.030**

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL

\_\_\_\_\_  
(Title of Document)

filed in District Court Case No. C193182

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

*Stanford R. Budd*  
(Signature)

*X 11/21/08*  
(Date)

002827



ORIGINAL

FILED

2008 JAN 25 A 9 13

DISTRICT COURT  
CLARK COUNTY, NEVADA

*Carol Ann*  
CLERK OF THE COURT

STATE OF NEVADA,

Plaintiff(s),

vs.

GLENFORD BUDD,

Defendant(s),

) Case No: C193182  
) Dept No: XVIII  
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)

CASE APPEAL STATEMENT

1. Appellant(s): GLENFORD BUDD

2. Judge: DAVID BARKER

3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), GLENFORD BUDD

4. All Parties, Appeal:

Appellant(s), GLENFORD BUDD

Respondent, THE STATE OF NEVADA

5. Appellate Counsel:

*Appellant/Proper Person*  
Glenford Budd # 90043  
P.O. Box 1989  
Ely, NV 89301

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

1 6. District Court Attorney, Appointed

2 7. On Appeal, N/A

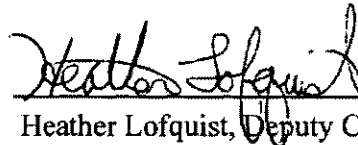
3 8. Forma Pauperis, Granted

4 9. Date Commenced in District Court: June 26, 2003

5 Dated This 25 day of January 2008.

6 Charles J. Short, Clerk of the Court

7  
8 By:



9 Heather Lofquist, Deputy Clerk

10 200 Lewis Ave

11 PO Box 551601

12 Las Vegas, Nevada 89155-1601

13 (702) 671-0512

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

OCT 23 2009

GLENFORD ANTHONY BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 50972

*Tracie Lindeman*  
CLERK OF COURT

District Court Case No. C193182

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 25th day of September, 2009.

IN WITNESS WHEREOF, I have subscribed my name and affixed  
the seal of the Supreme Court at my Office in Carson City,  
Nevada, this 20th day of October, 2009.

Tracie Lindeman, Supreme Court Clerk

By: Deputy Clerk

*A. Ingerman*



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OCT 22 2009

CLERK OF THE COURT

002830

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD ANTHONY BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50972

**FILED**

SEP 25 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Vanner  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

On March 1, 2006, the district court convicted appellant, pursuant to a jury verdict, of three counts of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve six consecutive terms of life in the Nevada State Prison without the possibility of parole. Appellant's judgment of conviction and sentence were affirmed on appeal. Budd v. State, Docket No. 46977 (Order of Affirmance, January 9, 2007). The remittitur issued on February 6, 2007.

On September 21, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

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OCT 22 2009

CLERK OF THE COURT

SUPREME COURT  
OF  
NEVADA

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09-23466

conduct an evidentiary hearing. On January 7, 2008, the district court denied appellant's petition. This appeal followed.

Appellant raised numerous claims in his petition including twelve claims of ineffective assistance of counsel: (1) failing to investigate appellant's innocence; (2) failing to investigate the identification by Celeste Palau; (3) failing to object to bad act evidence; (4) failing to conduct scientific testing on blood stains; (5) failing to disclose a conflict of interest between counsel and appellant prior to the first day of trial; (6) failing to keep an unavailable witness's testimony from the preliminary hearing from being read to the jury; (7) conceding appellant's guilt in closing arguments; (8) failing to secure a handwriting expert; (9) failing to object to judicial misconduct; (10) failing to object to the instruction on first-degree murder; (11) failing to object to the instruction on credibility; and (12) failing to object to the reasonable doubt instruction. Appellant further claimed that he received ineffective assistance of appellate counsel because appellate counsel failed to raise the above underlying claims on direct appeal and failed to "federalize" his claims. Appellant also claimed that the State committed prosecutorial misconduct because the State failed to disclose a deal between the State and a key witness and because the State failed to call a witness referenced in opening statements. Finally, appellant claimed that the cumulative errors committed entitled him to relief.

Our review of the record on appeal reveals post-conviction counsel should have been appointed in the instant case. NRS 34.750

provides for the discretionary appointment of post-conviction counsel and sets forth the following factors which the court may consider in making its determination to appoint counsel: the petitioner's indigency, the severity of the consequences to the petitioner, the difficulty of those issues presented, whether the petitioner is unable to comprehend the proceedings, and whether counsel is necessary to proceed with discovery. The determination of whether counsel should be appointed is not necessarily dependent upon whether a petitioner raises issues in a petition which, if true, would entitle the petitioner to relief.

Appellant's petition arose out of a lengthy trial with potentially complex issues and several of appellant's claims may require the development of facts outside the record. Appellant was represented by appointed counsel at trial. Appellant is serving six consecutive terms of life in prison without the possibility of parole and was facing the death penalty. In addition, appellant moved for the appointment of counsel and claimed that he was indigent. Appellant had been granted permission to proceed *in forma pauperis*. The district court's failure to appoint post-conviction counsel deprived appellant of a meaningful opportunity to litigate his claims in the instant case. As appellant is serving a significant sentence, is indigent, and there are potentially complex issues, we reverse the district court's denial of appellant's petition and remand this matter for the appointment of counsel to assist appellant in the post-conviction proceedings.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

1. Hardesty C.J.  
Hardesty

Cherry J.  
Cherry

Gibbons J.  
Gibbons

cc: Hon. David B. Barker, District Judge  
Glenford Anthony Budd  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk



Enclosed is a full and complete copy  
of original on file and on record in my office

DATE October 20, 2009  
Supreme Court Clerk, State of Nevada

By A. Magallon Deputy

002835



IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD ANTHONY BUDD,  
Appellant,

Supreme Court No. 50972

vs.  
THE STATE OF NEVADA,  
Respondent.

District Court Case No. C193182

**REMITTITUR**

TO: Steven D. Grierson, Clark District Court Clerk

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

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

DATE: October 20, 2009

Tracie Lindeman, Clerk of Court

By: \_\_\_\_\_  
Deputy Clerk

*A. Ingersoll*

cc (without enclosures):

Hon. David B. Barker, District Judge  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Glenford Anthony Budd

**RECEIPT FOR REMITTITUR**

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on OCT 23 2009.

**HEATHER LOFQUIST**  
Deputy \_\_\_\_\_  
District Court Clerk

RECEIVED

OCT 22 2009

CLERK OF THE COURT

042826  
09-24080

ORIGINAL

FILED

OCT 29 2009

*John L. Barker*  
CLERK OF COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

GLENFORD ANTHONY BUDD,

Defendant.

CASE NO. C193182  
DEPT NO. XVIII

**ORDER SETTING HEARING**  
**APPOINTMENT OF COUNSEL RE: SUPREME COURT REMAND**

An Order of Reversal and Remand having been filed by the Nevada Supreme Court on September 25, 2009, and the Court having received the Remittitur, it is

ORDERED that this matter is set for hearing on Monday, November 16, 2009 at the hour of 8:15 a.m. in Department 18 for further proceedings in accordance with said Order.

DATED: October 27, 2009

*[Signature]*  
DISTRICT JUDGE

I hereby certify that on the date filed,  
I placed a copy of the foregoing Order in the  
folder(s) in the Clerk's Office of the following:

Frank Ponticello, Esq. (DA Criminal)  
Darin Imlay, Esq. (Public Defender's Office)

*[Signature]*  
DIANE SANZO, Judicial Assistant

CLERK OF THE COURT

OCT 29 2009

DAVID B. BARKER  
DISTRICT JUDGE

DEPARTMENT EIGHTEEN  
LAS VEGAS, NV 89155

002837

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FILED

NOV 25 2009

*John J. Blum*  
CLERK OF COURT

OPI  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
PAMELA WECKERLY  
Chief Deputy District Attorney  
Nevada Bar #006163  
200 Lewis Avenue  
Las Vegas, Nevada, 89155-2211  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GLENFORD ANTHONY BUDD,  
#01900089

Defendant.

Case No. C193182

Dept No. XVIII

ORDER FOR PRODUCTION OF INMATE  
GLENFORD ANTHONY BUDD, BAC # 90043

DATE OF HEARING: 12/2/09

TIME OF HEARING: 8:15 AM

TO: E.K. MCDANIEL, Warden, Ely State Prison

TO: DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID ROGER, District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that E.K. MCDANIEL, Warden of Ely State Prison shall be, and is, hereby directed to produce GLENFORD ANTHONY BUDD, Defendant in Case No. C193182, on a charge of MURDER WITH USE OF A DEADLY WEAPON (3

RECEIVED

NOV 25 2009

CLERK OF THE COURT

Document39

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1 COUNTS); wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said  
2 Defendant is currently incarcerated in the Ely State Prison located in Ely, Nevada, and his  
3 presence will be required in Las Vegas, Nevada, commencing on 12/2/09, at the hour of 8:15  
4 o'clock AM and continuing until completion of the prosecution's case against the said  
5 Defendant.


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

13 DATED this 20 day of November, 2009.

14   
15 \_\_\_\_\_  
16 DISTRICT JUDGE

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

20 BY

  
21 PAMELA WECKERLY  
22 Chief Deputy District Attorney  
23 Nevada Bar #006163  
24  
25  
26  
27  
28

  
CLERK OF THE COURT

0042  
ROBERT E. GLENNEN III, ESQ.  
Nevada State Bar No. 2143  
ROBERT E. GLENNEN III, P.C.  
601 S. Tenth St., #100  
Las Vegas, NV 89101  
Office: 702-384-8981  
Fax: 702-489-6619  
robert.glennen@yahoo.com  
Attorney for Defendant


DISTRICT COURT  
CLARK COUNTY, NEVADA

GLENFORD BUDD,	)	
	)	Case No. C193182
Petitioner,	)	Dept. No. 18
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondant.	)	

MOTION TO WITHDRAW AS PETITIONER'S ATTORNEY

ROBERT E. GLENNEN III, ESQ., Petitioner's appointed attorney, hereby moves this Court for an Order allowing said attorney to withdraw as Attorney of Record for the Petitioner in the above-captioned matter. This Motion is based upon NRS 252.120, SCR 48, SCR 166, and the attached Points and Authorities.

SUBMITTED this 13 day of September, 2012.

 #11545  
ROBERT E. GLENNEN III  
Nev. Bar No. 002143  
601 S. Tenth St.  
Las Vegas, NV 89101  
Attorney for Petitioner

ROBERT E. GLENNEN III P.C.  
601 S. TENTH ST., #100  
LAS VEGAS, NEVADA 89101  
(702) 384-8981; FAX: (702) 489-6619

002840

ROBERT E. GLENNEN III P.C.  
601 S. TENTH ST., #100  
LAS VEGAS, NEVADA 89101  
(702) 384-8981; FAX: (702) 489-6619

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Respondent herein;  
AND TO: STEVEN WOLFSON, ESQ.  
Its attorney of record

NOTICE IS HEREBY GIVEN that the undersigned will bring on the above motion for hearing before the above entitled Court in Department 18 of the Eighth Judicial District Courthouse, 200 Lewis Ave., Las Vegas, Nevada, on the 24 day of Sept, 2012, at the hour of 8:15 o'clock a.m., or as soon thereafter as counsel may be heard.

SUBMITTED this 13 day of September, 2012.

*Robert E. Glennen III* #11545  
for  
ROBERT E. GLENNEN III  
Nev. Bar No. 002143  
601 S. Tenth St.  
Las Vegas, NV 89101  
Attorney for Petitioner

POINTS AND AUTHORITIES

Undersigned has been representing Mr. Budd as his defense counsel, after having been appointed conflict counsel.  
Undersigned has been appointed Esmeralda District Attorney as of July 1, 2012. NRS 252.120 prevents his future representation of Mr. Budd. It states:

1. No district attorney or partner thereof shall appear within his or her county as attorney in any criminal action, or directly or indirectly aid, counsel or assist in the defense in any criminal action, begun or prosecuted during his or her term; nor in any civil action begun or prosecuted during his or her term, in behalf of any person suing or sued by the State or any county thereof.

This statute prevents this attorney from any longer helping with defense of Glenford Budd.

Supreme Court Rule 166, in combination with SCR 48, govern the standard for withdrawals of attorneys from representation of a client in a legal matter.

It states, in pertinent part:

2. Except as stated in subsection 3, a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(a) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(b) The client has used the lawyer's services to perpetrate a crime or fraud;

(c) A client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(d) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(e) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(f) Other good cause for withdrawal exists.

3. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

4. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

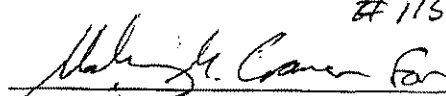
Here, the attorney must withdraw or commit a crime. Thus, this court should grant undersigned's Motion to Withdraw. There are pending motions or hearings within the next month pending

ROBERT E. GLENNEN III P.C.  
601 S. TENTH ST., #100  
LAS VEGAS, NEVADA 89101  
(702) 384-8981; FAX: (702) 489-6619

1 before this court.

2 SUBMITTED this 13 day of September, 2012.

#11545

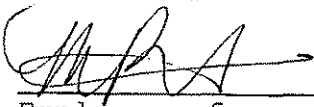
3   
4 ROBERT E. GLENNEN III  
5 Nev. Bar No. 002143  
6 601 S. Tenth St.  
7 Las Vegas, NV 89101  
8 Attorney for Petitioner

9 **CERTIFICATE OF SERVICE**

10 I HEREBY CERTIFY that I am an agent or employee of the above  
11 attorney, and that on the 13 day of September, 2012, I served  
12 the above and foregoing MOTION TO WITHDRAW AS PETITIONER'S  
13 ATTORNEY by depositing a copy in the U.S. mail, postage prepaid,  
14 addressed to the following:

15 CLARK COUNTY DISTRICT ATTORNEY  
16 200 S. Lewis St  
17 Las Vegas, NV 89155  
18 Attorney for Respondent

19 The undersigned does hereby affirm that the preceding  
20 document does not contain the social security number of any  
21 person.

22   
23 Employee of  
24 ROBERT E. GLENNEN III, P.C.  
25 Attorney for Petitioner  
26  
27  
28



  
CLERK OF THE COURT

1 **ORDR**  
2 MATTHEW D. CARLING, ESQ.  
3 Nevada Bar No.: 007302  
4 1100 S. Tenth Street  
5 Las Vegas, NV 89101  
6 (702) 419-7330 (Office)  
7 (702) 446-8065 (Fax)  
8 CedarLegal@gmail.com  
9 Court-Appointed Attorney for Petitioner,  
10 GLENFORD BUDD

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

9 GLENFORD BUDD,  
10 Petitioner,  
11 vs.  
12 RENEE BAKER, WARDEN, ELY STATE  
13 PRISON,  
14 Respondent.

Case No.: 03C193182  
Dept. No.: XVIII


14 **ORDER OF APPOINTMENT**

15 IT IS HEREBY ORDERED that MATTHEW D. CARLING, ESQ., be appointed as  
16 counsel to represent Petitioner, Glenford Budd, in the post-conviction proceedings, effective  
17 October 8, 2012, and that counsel be paid by the Nevada State Public Defender's Office as set  
18 forth in NRS 7.155.

20 DATED and DONE this 10<sup>th</sup> day of October, 2012.

23   
24 DISTRICT COURT JUDGE 

24 Respectfully Submitted:

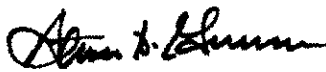
25   
26 MATTHEW D. CARLING, ESQ.  
27 Court-Appointed Attorney for Petitioner,  
28 GLENFORD BUDD

002844

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1 SAO  
2 MATTHEW D. CARLING, ESQ.  
3 Nevada Bar No.: 007302  
4 1100 S. Tenth Street  
5 Las Vegas, NV 89101  
6 (702) 419-7330 (Office)  
7 (702) 446-8065 (Fax)  
8 CedarLegal@gmail.com  
9 Attorneys for Defendant,  
10 PHILIP HENDERSON

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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 GLENFORD BUDD,  
11 Petitioner,  
12 vs.  
13 RENEE BAKER, WARDEN, ELY STATE  
14 PRISON,  
15 Respondent.

Case No.: 03C193182  
Dept. No.: XVIII

HEARING DATE  
ALREADY ENTERED  
IN ODYSSEY

**STIPULATION TO ENLARGE BRIEFING SCHEDULE AND ORDER**

16 The Petitioner, Glenford Budd, by and through his attorney, MATTHEW D.  
17 CARLING, ESQ., and the Plaintiff, the State of Nevada, by and through its attorney, LEON  
18 SIMON, ESQ., Deputy District Attorney, hereby stipulate to continue the briefing schedule in  
19 the above-captioned matter as follows:


- 21 1. That the Defendant will file his Supplement to his Petition for Writ of Habeas  
22 Corpus (Post-Conviction) on or before May 22, 2013;
- 23 2. That the State will file its Response 60 days thereafter on or before July 22,  
24 2013;
- 25 3. That the Defendant will file his Reply 30 days thereafter on or before August  
26 22, 2013; and
- 27 4. That with this Court's permission, the Hearing for argument currently scheduled  
28 for July 24, 2013, in this matter be vacated and rescheduled for a date  
convenient for this Court after August 22, 2013.

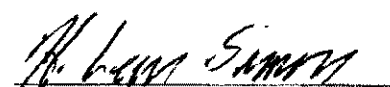
1 Grounds for this Stipulation are that counsel for the Defendant requires additional time  
2 to review the case and obtain evidence that may be attached to the Supplement. This  
3 Stipulation is entered in good faith by both parties and is not for the purpose of undue delay.  
4

5 DATED this 21<sup>st</sup> day of March, 2013.

6 CARLING LAW OFFICES, PC

STEVEN WOLFSON, ESQ.  
DISTRICT ATTORNEY

7  
8   
9 MATTHEW D. CARLING, ESQ.  
Nevada Bar No.: 007302

  
H. LEON SIMON, ESQ.  
Deputy District Attorney  
Nevada Bar No.: 000411  
200 S. Third Street  
P.O. Box 552212  
Las Vegas, Nevada 89155-2212  
Attorneys for Plaintiff

10 1100 S. Tenth Street  
11 Las Vegas, NV 89101  
12 (702) 419-7330 (Office)  
13 (702) 446-8065 (Fax)  
14 [Cedarl.egal@gmail.com](mailto:Cedarl.egal@gmail.com)  
Attorneys for Petitioner,  
Glenford Budd

15 **ORDER**

16 **IT IS HEREBY ORDERED** that the above Stipulation be entered and the same is  
17 hereby approved by the Court.

18 **IT IS FURTHER ORDERED** that the Hearing set in this matter be vacated and  
19 rescheduled for the 9<sup>th</sup> day of September, 2013, at 8:15 A.M.  
20

21 DATED this \_\_\_\_\_ day of MAR 28 2013, 2013.

22  
23   
24 DISTRICT COURT JUDGE   
25  
26  
27  
28

Glenford A. Budd, # 90043  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301-1989

Petitioner in Pro Per

FILED  
SEP 21 9 43 AM '07  
CLERK OF THE COURT

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

ORIGINAL Court Copy

\*\*\*\*

Glenford A. Budd,  
Petitioner,

CASE NO. 03-c-193 182-c  
DEPT NO. 18

vs.

E.K. McDANIEL, WARDEN  
ELY STATE PRISON

Respondent

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

Petitioner, Glenford A. Budd (hereinafter Petitioner) proceeding in pro se, hereby submits his Memorandum of Points and Authorities in Support of his Petition for Writ of Habeas Corpus (Post Conviction).

**ISSUES PRESENTED**

1. DUE TO DEFENSE COUNSEL'S FAILURE TO INVESTIGATE, FAILURE TO OBJECT TO THE ALLEGED EYE WITNESS IDENTIFICATION, FAILURE TO PERFORM SCIENTIFIC TESTS, AND FAILURE TO CALL WITNESSES FOR THE DEFENSE TO PROVE THAT PETITIONER WAS ACTUALLY INNOCENT OF THE CRIMES CHARGED, RESULTED IN COUNSEL PROVIDING INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF PETITIONERS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

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**II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION, WHEN TRIAL COUNSEL HOWARD BROOKS FAILED TO DISCLOSE TO THE TRIAL JUDGE THAT A CONFLICT OF INTEREST EXISTED BETWEEN HIMSELF AND PETITIONER.**

**III. THE ADMISSION OF TRANSCRIBED TESTIMONY OF WINSTON BUDD CONSTITUTED ERROR IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, ARTICLE 1 SECTIONS 1 AND 5 OF THE NEVADA CONSTITUTION, THE EFFECTIVE ASSISTANCE OF COUNSEL; THE CONFRONTATION CLAUSE BY THE STATE'S FAILURE TO SECURE THE WITNESS' PRESENCE AT TRIAL; AND THE COURTS ERROR BY ALLOWING FUNDAMENTAL UNFAIRNESS TO A FAIR AND IMPARTIAL OUTCOME TO THE PROCEEDINGS.**

**IV. TRIAL COUNSEL WAS INEFFECTIVE VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION WHEN COUNSEL BROOKS CONCEDED BUDD'S GUILT DURING CLOSING ARGUMENTS.**

**V. THE PROSECUTORS FAILURE TO DISCLOSE AN AGREEMENT BETWEEN THE STATE AND A KEY WITNESS IN EXCHANGE FOR HIS INFORMATION AND TESTIMONY, THUS, TRIAL COUNSEL'S FAILURE TO COLLECT POTENTIALLY EXCULPATORY EVIDENCE ON THE PETITIONER'S BEHALF LEADING TO THE MISREPRESENTATION OF EVIDENCE VIOLATING PETITIONER'S FUNDAMENTAL FAIRNESS AS PROVIDED IN THE FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.**

**VI. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTORIAL MISCONDUCT DURING OPENING STATEMENTS OF A HIGHLY INCULPATORY AND PREJUDICIAL NATURE VIOLATING PETITIONER'S DUE PROCESS RIGHTS TO THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.**

**VII. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE JUDICIAL MISCONDUCT THAT WAS COMMITTED VIOLATING BUDD'S DUE PROCESS RIGHTS TO THE SIXTH AND FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, WHEN THE TRIAL JUDGE FAILED TO SUA SPONTE A MISTRIAL BASED UPON PROSECUTORIAL MISCONDUCT COMMITTED BY THE PROSECUTOR.**

**VIII. TRIAL COUNSEL'S FAILURE TO OBJECT TO ERRONEOUS JURY INSTRUCTIONS WHICH EXPANDED THE ELEMENTS OF FIRST- DEGREE MURDER OR WITNESS CREDIBILITY INSTRUCTIONS 7 AND 19, DID NOT ADEQUATELY AND OR ACCURATELY COVER THE ISSUE TO BE DETERMINED BY THE JURY, VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.**

**IX. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON DIRECT APPEAL THE STATUTORY REASONABLE DOUBT INSTRUCTION, WHICH WAS UNCONSTITUTIONAL AND IN DIRECT VIOLATION OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.**

**X. APPELLATE COUNSEL WAS INEFFECTIVE VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.**

**XI. DUE TO THE ACCUMULATION OF ERRORS BY TRIAL COUNSEL AND APPELLATE COUNSEL'S INEFFECTIVENESS, PETITIONER HAS BEEN DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.**

On January 9, 2007, the Supreme Court of Nevada issued its "Order of Affirmance" in Supreme Court Case number 46977.

In February of 2007, Budd, through the assistance of an imate was able to obtain a copy of "Appellant's Appendix," Volume One through Seven, via Mr. Brooks, but, When the volumes were checked out to determine if all corresponding documents werhein place; it was discovered that the following documents pertaining to the matter at hand were missing:

- a) All Pretrial Discovery;
- b) Appellant's Appendix, pages 1398 to 1463;
- c) The State and Defense Opening Statements;
- d) The State's and Defense proposed jury instruction to the jury in the trial phase;
- e) Affidavit of the Prosecutor's Investigator's disposition of Key State Witness, Winston Budd, pertaining to the State's Motion pursuant to NRS 51.055 (1)(d), "unavailability as a Witness," and NRS 51.325 (1), Former Testimony; and,
- f) A copy of the Supreme Court of Nevada Remittitur, in Supreme Court Case Number 46977.

Appellate counsel for Petitioner was the same lead counsel for Petitioner's trial phase and penalty phase, Mr. Howard S. Brooks, Deputy Public Defender.

Appellate counsel failed to argue any issues, except for the one issue on Budd's

behalf.

On April 24, 2007, Petitioner Budd mailed a legal correspondence to counsel Brooks, requesting all above-cited missing documents to be sent to him as ESP, and that counsel file a Motion to Withdraw as the Attorney of Record in the above entitled case. See, Exhibit No. 7.

On May 1, 2007, Petitioner filed a pro-per Motion for Withdrawal of Attorney of Record, or in the alternative, Request for Records/Court Case Documents/Motion for Leave to Proceed In Forma Pauperis, Requesting all the above-cited missing documents, and, any and all other missing documents pertaining to this matter.

On May 21, 2007, the District Court heard the above Motions, and granted both of them. On June 14, 2007, Petitioner sent counsel Brooks another legal correspondence via the U.S. Postal Service, requesting the same above-cited documents and a copy of the Court's Criminal Minutes granting the two-above Motions. Mr. Brooks has never responded from the 4/21/07 letter to date. See, Exhibit No. 8.

On July 1, 2007, Petitioner mailed the following: Notice of Motion and Motion to Hold Howard S. Brooks, attorney of record, in contempt for failing to forward a copy of the case file. A hearing was conducted on this matter on 7-31-07. the motion was denied. See, Criminal Court Minutes, 7-23-07.

On 8-10-07, Petitioner filed a pro-per Motion for Rehearing, and on 8-27-07, the Rehearing Motion was never heard. On August 15, 2007, the Honorable Nancy M. Saitta recused herself from this matter. See, Exhibit 8, page 3. Documents still missing. p.4.

The Petition for Writ of Habeas Corpus (Post Conviction) follows; and Petitioner is requesting that this Court grant him permission to file a Supplemental Petition to this one, once he can obtain the missing documents.

## **ARGUMENT IN SUPPORT OF ISSUES PRESENTED.**

### **INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD OF REVIEW..**

The United State Supreme Court has held that there is two prong test that must be met for a criminal defendant who wishes to present issues by way of a post conviction. That being cause for the failure to present the issues at a prior time and to show prejudice there from. See, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

The burden is on the criminal defendant who claims he received ineffective assistnace to identify the acts and or omissions that he claims were the result of that incompetent representation. *Id.* at 104 S.Ct., at 2066, n.12.

To show prejudice, the defendant bears the burden of persuading the court that the result of the proceeding would have been difference abscent counsel's errors. *Id.* at 104 S.Ct., at 2068, n.19.

Petitioner herein identifies the following errors of trial and Appellant counsel he alleges are ineffective assistance of counsel.

### **GROUND ONE**

Petitioner hereby incorporates as if fully stated herein all of the supporting facts of Ground One in support hereof:

#### **I. a) Misidentification of Celeste Palau:**

In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Court noted that "[I]t is he liklihood of misidentification which violates a defendant's right to due process." Palau testified that she saw the Petitioner clearly shooting someone on the patio. App. Vol 4, pp. 000192-93; lines 25; 1. She also testified that looking from one building diagonally across to the other, she didn't have a clear view. 001214, lines 17-23. She was 218 feet away and only observed an outline of a person, and the structure of his body.

Testimony will be disregarded as incredible if it gives facts that witness physcially could not have possibly occurred under the laws of nature, as Palau original description of the



shooting. See, *Tapia v. Tansy*, 926 F.2d 1554 (10th Cir.); *United States v. Garner*, 581 F.2d 481, 485 (5th Cir. 1978).

Palau was 218 feet away and it was midnight and the light over the patio was busted. Based upon her eyewitness testimony, and her inconsistencies, she could not have possibly observed the events she testified to. As even in daylight it would be difficult to see what took place. Therefore, the identification is unreliable, See, *Kyles*, 514 U.S. at 454 (verdict not worthy of confidence, because undisclosed evidence "would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer.")

II. b) Failure to object to uncharged acts.

During opening statements to the jury, prosecutory Edward Kane (Kane) made the following statements implicating uncharged bad acts and threats made by the Petitioner to two of the victims, Derrick Jones (Derrick) and Jason Moore (Jason) during a basketball game: Note the Petitioner is referred to as A.I..

Mr. Kane:

So, everyone lived in the same area and they were all playing basketball in the afternoon, and Lazon was down watching the basketball game, and the basketball game was basically between A.I. and the two 19 year olds, Derrick Jones and Jason Moore. And while Lazon was watching the basketball game he noticed that there seemed to be some friction between them. At one point Lazon will testified that he heard the defendant ask Derrick Jones, "Where's my weed? Where's my stuff?" And at another point there was a fight or something that looked like a start to a fight, a foul in the basketball game between Jason Moore and A.I., and A.I. said, "There ain't going to be any fight." Which Lazon means that there was going to be violence. So what the boys understood at that point was that A.I. thought somebody had taken some weed, some marijuana that was his property, and he wanted it back or wanted to know who was responsible.

Id. App. Vol.3B, p. 00818, lines 5-22.

Ms. Pandukht:

Q. Okay, and then did anything unusual happen while you were playing basketball?

A. Before, they had got into a confrontation, an argument.

Q. Who's "they"?

A. A.I. and Derrick.

Q. What was that about?

A. Offer some weed. He said someone told him that - -

THE COURT: Who is "he"?

THE WITNESS: A.I. said someone told him that Derrick had stole his weed.

Id. App. Vol.3B, p. 000849, lines 10-21.

As set forth more fully herebelow, the State was allowed to present evidence against the Petitioner, that he was involved in illegal drugs, marijuana, with the victims, and that he had a confrontation with them, when it was not proven by clear and convincing evidence that Petitioner ever posses said drugs.

Nevada Revised Statute sets forth the statutory requirements for the admission of evidence which may result in prejudice. NRS 48.035(1) states:

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

NRS 48.045 provides, in pertinent part as follows:

1. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(a) Evidence of his character or a trait of his character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence;

(b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of > NRS 48.069 where applicable, and

similar evidence offered by the prosecution to rebut such evidence; and

(c) Unless excluded by > NRS 50.090, evidence of the character of a witness, offered to attack or support his credibility, within the limits provided by > NRS 50.085.

2. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As set forth above, evidence of uncharged bad acts is heavily disfavored. *Berner v. State*, 765 P.2d 1144, 1145-46 (1988). However, evidence of a prior bad act may be admissible if the following conditions are met: (1) the prior bad act is relevant to the crime charged; (2) the prior bad act is proven by clear and convincing evidence; (3) and the evidence is more probative than prejudicial. *Felder v. State*, 107 Nev. 237, 810 P.2d 755 (1991). *United States v. Brenna*, 798 F.2d 581 (2nd Cir. 1988); *United States v. Harris*, 733 F.2d 994, 1006 (2nd Cir. 1984); *Cohn v. Papke*, 655 F.2d 191 (9th Cir. 1981); *U.S. v. Miles*, 207 F.3d 988 (7th Cir. 2000).

The trial court erred in admitting evidence of Petitioner's threats.

The prerequisites enumerated above were a threshold requirement which was not met by the State in this case. There should be no quarrel that one of the prerequisites is that the Petitioner's commission of the other crime, wrong or act must be proven by "clear and convincing" evidence. See, *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

a) The police never charged Petitioner with possession of marijuana; nor did Petitioner ever test positive for any controlled substance.

b) The Court never conducted an evidentiary hearing to admit the uncharged bad act.

Absent on evidentiary hearing, it is Petitioner's position that the state failed to meet its burden by "clear and convincing" evidence that the Petitioner committed the other bad act.

Because of this procedural deficiency, the State failed to satisfy one of the threshold requirements for the admission of prior bad acts.

The trial court erred in admitting evidence of Petitioner's alleged threats to Derrick or Jason.

The following alleged threat was allowed to be presented to the jury:

A. We were just playing, and him and Jason, they had fouled each other -- however it happened -- but they got into a confrontation over a foul.

Q. Okay. And what did he -- what did the defendant say anything?

A. The defendant told him that he wasn't going to fight him, he was going to put some slugs in him..

App.Vol.3B, p. 000850, lines 14-16, and 19-22.

Evidence of the Petitioner's alleged threats to Derrick or Jason should not have been admitted under NRS 48.045.

The State's theory was that one of the homicide victims had stolen Petitioner's marijuana. The State contended that Petitioner killed the victims in retaliation for the theft, and the other victims were killed to eliminate eyewitnesses. The proffered evidence was not necessary to show "identity" of the perpetrator. The State argued that the alleged threat demonstrated the intent necessary for a first degree murder conviction. The "threat" evidence only prejudiced Petition and confused the jury.

Therefore, allowing into evidence that Petitioner threatened the victims over stolen drugs to demonstrate bad character, was an abuse of discretion that misled the jury. See, United States v. Hitt, 981 F.2d 422 (9th Cir. 1992); and Walker v. State, 997 P.2d 803 (Nev. 2000).

Based on the above, the admitted evidence certainly did not comport with the elements of first-degree murder, as the State's case is anything-but circumstantial, which is exactly what NRS 48.045 was designated to prohibit. Trial counsel's failure to object to the

introduction of uncharged bad acts and alleged threats, amounted to ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984) standard, and the conviction must be reversed.

III. C) Failure to Perform Scientific Tests.

The LVMPD, CSA, team collected a "blood sample" at the bottom of the stairs of apartment 2068. Numerous people were in and out of that apartment, as the place held illegal drugs, which were confirmed to be in the victims bodies by the coroner's office. Trial counsel's failure to have a serology test conducted on the blood sample found at the bottom of the stairs.

In Toney v. Gammon, 79 F.3d 693, 700 (8th Cir. 1996), the Eighth Circuit reversed a District Court's refusal to permit a habeas petitioner alleging ineffective assistance of counsel to conduct DNA and other tests on physical evidence collected by law enforcement officials where the petitioner has consistently maintained his innocence and claimed the test results could exonerate him. Petitioner has always maintained his innocence and claims and believes the test results could show that it was not him who committed these crimes. Therefore, defense counsel's failure to conduct DNA and physical evidence tested independently, resulted in ineffective assistance of counsel and the outcome of the proceedings are unfair and remand is warranted for a new trial.

IV. D) Failure to call witnesses for the defense or to prove Petitioner was actually innocent of the crimes charged.

During the conduct of the criminal case against Petitioner, defense counsel had knowledge as to why Petitioner left, fearing for his life, and an alibi defense, that could have established, actual innocence, and most importantly would have acquitted his client of the charges in which he had falsely been imprisoned for.

Trial counsel was ineffective for failing to perform investigation as to Petitioner's life fearing experiencing and alibi defense.

See, *Brown v. Meyers*, 137 F.3d 1154 (9th Cir. 1998)(trial counsel's failure to investigate alibi defense or to present any alibi witnesses to corroborate Petitioner's testimony undermined the confidence of the outcome of trial and constituted ineffective assistance of counsel. Trial counsel failed to perform adequate investigation so as to determine Petitioner's possible defenses. A defendant's right to assistance of counsel is only satisfied only when such counsel is effective.

*Powell v. Alabama*, 287 U.S. 45 at 71, 53 S.Ct. 55 (1935). Effective counsel does not mean errorless counsel, but rather counsel whose assistance is "[w]ithin the range of competence demanded of attorney's in criminal cases." *McMann v. Ricardson*, 397 U.S. 759, at 771, 90 S.Ct. 1441 at 1449 (1970).

While Nevada law presumes that counsel has fully discharged his duties, and will recognize the ineffectiveness of counsel only when the proceedings have been reduced to a farce or pretense, *Warden v. Lischko*, 523 P.2d 6, 7 (1974); *Berryman v. Morton*, 100 F.3d 1089 at 1096 (3rd Cir. 1996) (the question of whether counsel's strategy was reasonable goes directly to the performance prong of Strickland test, thus requiring the application of legal principals, and de novo review). But it is still recognized that a primary requirement is that counsel "... Conduct careful, factual and legal investigations and inquires with a view to developing matters of defense in order that he may make informed decisions on his client's behalf both at the pleading stage . . . and at trial . . . " *In re Sanders*, 472 P.2d 921, 926 (1970).

In the case at bar, Palau claimed to indentify the Petitioner shooting someone in the dard from "77" yards away, and did not see a flash from the weapon at midnight. Her story was riddled with inconsistencies.

Lazon's story was also riddled with inconsistencies, as he himself did not see the actual shooter. Krissy Smith, herself could not identify the shooter. And, Greg Lewis's story of the rap-song (as no actual proof) of who wrote it, his sotry also was riddled with

inconsistencies. See, *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981)(trial counsel's failure to pursue misidentification defense constituted ineffective assistance of counsel).

The Supreme Court has observed that the trial process generally does not function properly "unless defense counsel has done some investigation into the prosecution's case and into various strategies." *Kimmelman v. Morrisson*, 477 U.S. 365, 384, 106 S.Ct. 2574, 2587 (1986), trial counsel's actions cannot be justified as a "tactical" decision. The record herein does not contain any evidence from which it can be inferred that counsel made an informed tactical decision as to the defense theory or the failure to investigate. If counsel would have performed his function he could have presented a substantial defense to the State's case by showing through, the alibi witnesses, "freeman", the misidentification of Petitioner, and the inconsistencies of the State's "key" witnesses, that someone other than Petitioner committed the crime. See, *U.S. v. Gray*, 878 F.2d 702 (3rd Cir. 1989).

In *Schlep v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) the court held that: For a claim of actual innocence to be credible, claim requires habeas petitioner asserting actual innocence in successive or abusive petition to support his allegations of constitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented at trial. *Id.* The gang wars at the Saratoga Palms threatening Peitioner, the victims, and his brother Lazon, and also Freeman over territorial rights to sell illegal drugs as them being Hoover Crips from Los Angeles, Petitioner from Rollin 20's, L.A. were invading another gang's territory as the above-cited gangs did to the "28th St. gang and 8-Side," the probative force of relevant evidence that was either excluded or unavailable at trial would have established a reasonable doubt, and actual innocence of Petitioner's cause, as in light of this new evidence, no juror, acting reasonable, would have voted to find Petitioner guilty beyond a reasonable doubt. See, *McCoy v. Norris*, 958 F.Supp. 420 (E.D. Ark. 1996).

## GROUND TWO

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One, in support herein.

On December 5, 2005, the date set for Petitioner's trial to start, lead counsel, Howard Brooks, informed the trial judge that himself and second chair defense counsel, both had a conflict of interest with the Petitioner were their attorney-client relationship was virtually non-existence, and that they wre requesting an oral continuance. App., Vol. 2, pp 000393-94.

Counsel informed the trial judge that Petitioner's family was ready to discharge them and retain John Momot as defense counsel and that Mr. Momet was ready to come on the case, if both attorneys were withdrawn. App. Vol. 2, pp 000393-94.

Further, second chair defense counsel. Timothy O'Brien informed the judge that Petitioner and his family were not fully cooperative, and that could lessen the impact of the mitigation case, as the conflict of non-existent relationship had been going on for over a year and a half, and he consider that to be an impediment to trying the guilt phase of the case. App. Vol. 2, p. 000397, lines 5-11.

Although counsel Brooks further stated to the judge that it would be better if Petitioner had an attorney who he whole heartedly wanted to work with. App. Vol. 2, p. 000397, lines 16-22;

The trial judge denied the oral request for a continuance. App. Vol. 2, p. 000402, lines 24-25.

In *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980) it was held that in order to find a Sixth Amendment violation based upon conflict of interest the reviewing court must find: (1) that counsel actively represented conflicting interests; adn (2) that an actual conflict of interest adversely affected the attorney's performance. *Id.* at 348, 100 S.Ct. at 1778.

As stated above, counsel Brooks himself stated to the trial judge "that it would be



better if Petitioner had an attorney who he whole heartedly wanted to work with." Id. App. Vol. 2, p. 000397, lines 16-22. Under Cuyler, the Court must presume prejudice if the conflict of interest adversely affected the attorney's performance.

In this case, both of defendant's counsel, Brooks and O'Brien, could not have been so openly with the trial judge, even though they waited over 18 months to inform the judge. They both stated opinions as if defending the Petitioner it would hurt their case. Brooks had a non-existent relationship with the Petitioner. O'Brien stated that Petitioner's family was not cooperating with him to assist in the mitigation part of the defense. Therefore, both counsel's performances were effected because it prevented them from raising reasonable defenses. See, *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir.) cert. denied, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 249 (1989)(the presumption of prejudice extends to a "conflict between a client and his lawyer's personal interest." And, also see, *Renalds v. Chapman*, 253 F.3d 1337, 1347 (11th Cir. 2001)(counsel's conflict of interest had adverse affect because prevented counsel from raising reasonable defenses in defendant's favor).

If this conflict didn't exist, Mr. Brooks could have learned that not only as both LVMPD detectives, Patricia Spencer (Spenser) Michael Wallace (Wallace), testimonies that they were patrolling that particular apartment complex, due to their prior experiences of high level of narotic and gang activities in that area; See, App. Vol. 4, p. 0001073-174, lines 21-25; 1-2; 9-20; And they would catch people selling drugs; App. Vol. 4, p. 001077, lines 11-25; that after Spencer heard the gun shots; App. Vol. 4, p. 001079, lines 5-19; they saw a kid jogging West to East wearing shorts, socks, no shoes, heading in the direction of 7-11; App. Vol. 4, p. 001081-82, lines 8-25; 1-25; and 1-2; and 001094-001096; Thus they saw kid's frantically running around pointing to apartment 2068; and one run up and down the stairs. App. Vol. 4, p. 001082-83, lines 15-25; 1-3; and they failed to learn the identity of any of the people outside that apartment.

In fact that kid stated to Spencer and Wallace, "They're hurt," App. Vol. 4, p.

001083-85, lines 4-10; 24-25. How could that kid know that? Two of the victims were completely out of view, "one in the hallway," one behind the door of the master bedroom. App. Vol. 4, p. 001086-89, 001104-05; lines 21-25; 1-7.

If no conflict would have existed (because of defense counsel Brooks negligence of telling Petitioner, "it's not use", he would have learned that the people of Saratoga Palms apartments complex consisted of kids from Los Angeles California (Hoover Crips, 5-Duces, 52nd St, 111st and 112st) an from Las Vegas 28th St. Gangsters and 8-Side, which were having a territorial war over illegal drug sales out of apartment 2068. Yes, the above information could have assisted defense counsel in their defense. Therefore, Petitioner has met the two prong test of Cuyler, supra, as the conflict of interest affected the attorney's performance and prevented him from raising a reasonable defenses in defendant's favor.

### **GROUND THREE**

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One and Two in support hereof.

Three days after the start of Petitioner's trial, defense counsel, Howard S. Brooks, informed the trial court that the prosecutor, Edward Kane, intended to move the court, pursuant to NRS 51.055 1.(d), "Unavailable as a witness," and NRS 51.325, "Former Testimony," to admit the "Preliminary Hearing Transcripts," of state witness, Winston Budd, see, App. Vol. 3a, p. 000932, lines 5-20; Exhibit No. 2.

Over the objection of defense counsel, the former testimony of Winston Budd was read into the record, although that it was learned through the defense counsel that Winston was available and willing to come back to the United States from Belize and testify at trial.

Let it be known and placed in the record that during the Preliminary Hearing stages of these proceedings, Winston, was facing deportation from the U.S. to his native country of Belize for unrelated criminal conduct and was willing to lie for the state in order to secure residency in this country. Furthermore, the country of Belize has a Consulate in Los Angeles,

California, who was available to assist the State in procuring witnesses in Belize, as there is a procedure by which the State could obtain a subpoena to procure Winston's attendance.

Defense counsel did so to obtain the attendance of two witnesses, Petitioner's grandmother, Kathiline Glenn, App. Vol. 7, p. 001755 through 00766; and his sister Shermaine Budd, App. Vol. 7, 001810 through 001815, from Belize, for mitigating purposes during the penalty phase of the trial, so the prosecutor's excuse of unavailability and former testimony had no merit.

In Motes v. United States, 178 U.S. 468, 470-472 (1900), the U.S. Supreme Court stated that the rights of the accused under the Sixth Amendment to the United States Constitution to confront witnesses against him is violated by admitting the deposition or statement of an absent witness taken at an examine trial, to be read at the final trial when it does not appear that the witness was absent by the suggestions, connivance, or procurement of the accused but it does appear that her absence was due to the actions of the District Attorney. See also Crawford v. Washington, 124 S.Ct. 1354 (2004).

No mention is made of the District attorney's office ever contacting the Consulate in Los Angeles, or of a subpoena being mailed to Winston, or being returned, as there was no assertion that a check was made with the Consulate, or U.S. Postal authorities to determine where Winston's mail was going. What is mentioned is that the D.A.'s office simply called Belize to speak with Winston, and he wasn't available at those hours because he was working, but Winston did leave a number where he could be contacted. The results of the reading of Winston's former testimony at Petitioner's trial do not comport with the Statutes set forth in NRS 51.055(1)(d), as Winston was willing to testify and his absence was the result of prosecutorial negligence. Id., Crawford at 1374, Crawford applies when the out-of-court statements are testimonial, which refers to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

Here, Winston Budd's testimony from his preliminary hearing was admitted into

evidence as an offer of proof of the matter asserted; It was prejudicial and violated the Petitioner's due process rights to confront the witness against him. Therefore, the conviction must be reversed.

#### GROUND FOUR

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One, Two, and Three in support hereof.

Trial counsel was ineffective violating Petitioner's Sixth and Fourteenth Amendment rights to the U.S. Constitution when he conceded as to what degree of murder the State had proven Petitioner's guilty of.

During closing arguments Brooks stated the following to the jury:

15. Lets talk about the facts. I would be insane
  16. if I didn't stand before you and say that some people may
  17. believe, right now, the State's proven Gleford killed
  18. these kids. And I have to deal with that reality. So
  19. I'm going to talk about, first, what the evidence means,
  20. if you believe the State has shown that Glenford did, in
  21. fact, killed those three boys. But please understand I am
  22. not conceding this in any way, shape, or form; and we'll
  23. talk about that later.
  24. With the evidence, and considering the
  25. presumption of innocence and the burden of proof, I submit
- 
1. to you the State has only proven, theoretical,
  2. second-degree murder; three counts of second-degree
  3. murder.

App. Vol. 6, pp. 1510-11; lines 15-25; 1-3.

Petitioner in this Petition in support of ground four alleges:

A. That counsel conceded his guilt as to what degree of murder the juror's should find him guilty of;

B. In actuality, this would be as to Three Counts of Second-Degree Murder with the Use of a deadly weapon. Which means that Petitioner, if found guilty of second degree murder, he would be eligible for parole when he turns One Hundred and Forty (140) years

old. In short, the rest of his life in prison.

The bench mark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 n.3. (1984).

From counsel's function as assistant to defendant derive the overarching duty to advocate defendant on important decisions and to keep him informed of important developments in the course of prosecution. Id. 104 S.Ct. at 2066, n.12.

Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. Id. 104 S.Ct. 2067 n. 16. However, to succeed on a Sixth Amendment claim of ineffective assistance of counsel, the defendant must show that there is a reasonable probability, which is a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Id. 104 S.Ct. at 2068, n.19.

Petitioner has pointed to the errors of counsel which he claims were the result of unprofessional errors. As in the foregoing: closing statements to the jury. Id., at pp. 1510-11. Although counsel tried to explain that Petitioner was not guilty of First-Degree Murder Quote: "I submit to you the State has only proven, theoretically, second-degree murder; three counts of second-degree murder." Unquote:

Here, the damage to his client's case, was irreparable. The District Court ignored the fact that by admitting as to what degree of murder counsel Brooks conceded to the jury that they should find his client guilty of. As a result, he received three counts of first degree, with the use of a deadly weapon and sentenced to Six Life's without the possibility of parole, running consecutive.

In United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991)(Prejudice per se when trial counsel concedes that there is no reasonable doubt concerning the only factual issue in

dispute during closing arguments).

Petitioner claims and maintains that he never waived his right to have counsel concede his guilt, thus the Court must indulge every reasonable presumption against waiver of fundamental constitutional rights. Johnson v. Zerbst, 58 S.Ct. 1019, 1023, n.2. 304 U.S. 458 (1938).

Petitioner never consented nor discussed with Brooks the above stated concession, nor has he ever taken responsibility to what occurred on the day in question.

#### GROUND FIVE

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One, Two, Three and Four in support hereof.

The government's obligation to disclose favorable evidence under Brady covers not only such exculpatory evidence, but also was expanded in Giglio v. United States, 405 U.S. 150 (1972), to include information that could be used to impeach government witnesses. In particular, the due process clause requires that an agreement made with a government witness for testimony in exchange for monetary compensation or favorable treatment in the criminal justice system should be disclosed as impeachment evidence, especially where the witness's testimony is an important part of the government's case. Id. , 405 U.S. at 154-55. Monroe v. Angelone, 323 F.3d 286, 314 (4th Cir. 2003)(due process violated by government's failure to reveal government favor to witness because prosecution's case depended on credibility of this key witness).

In the case at hand, the prosecution relied and depended upon the testimony and the rap-song-letter, provided to them by Greg Lewis. See, Exhibit No. 4.

At trial, Greg Lewis testified under oath that he had received no assistance, promises or deals from the state. Further, detective Vaccaro stated under oath that he made no deals with Mr. Lewis in exchange for his testimony and evidence. See, App. Vol. 5, p. 001346, lines 6-20.

Yet, it was learned that Clark County Deputy District Attorney, David P. Schwartz, who was previously handling the case, had written a letter of recommendation to the Nevada Parole Board on Lewis' behalf. See, App. Vol. 5, pp. 001272 through 001276. Lewis stated the letter did him no good as the Parole Board denied his parole.

On the other hand, Vaccaro stated, that he did not remember by whose design it was that the letter was written, but that it certainly wasn't him, nor was he the author of said letter. App. Vol. 5, pp. 001349-50, lines 19-25; 1-3.

In United States v. Shaffer, 789 F. 2d 682, 688 (9th Cir. 1986) quoting Jimenez v. State, 112 Nev. 610, 918 P.2d 687, 690 (1996), the government contended that "because there was no explicit agreement on this matter, it had nothing to disclose." *Id.* at 690. Same as our case. In Schaffer, the Court held: "While it is clear that an explicit agreement would have to be disclosed because of its effect on [the informant's] credibility, it is equally clear that facts which imply an agreement would also bear on [his] credibility and would have to be disclosed." *Id.* The Supreme Court held that where the credibility of a witness is an important issue in the case, "evidence of an understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." Giglio v. United States, 405 U.S. 150, 155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972)(emphasis added); See also Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir. 1985).

Here Lewis' evidence provided damaging evidence against the Petitioner, as otherwise the case was circumstantial. Lewis testified and provided explicitly incriminating evidence (the letter rap-song), therefore. Lewis's testimony was central to the State's case, as the jury's assessment of his credibility was important to the outcome of the trial, the failure to disclose such an agreement denied the Petitioner of his fundamental rights under the due process clause and a fair trial. See, Bell v. Bell, 460 F.3d 739 at 754 (C.A. 6 (Tenn.) 2006).

Lastly, handwriting analysis should have been conducted of the letter presented as evidence to determine the actual author responsible for the incriminating Lyrics. This failure

also denied due process and the conviction must be reversed.

### GROUND SIX

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One through Five in support hereof.

Given the unique role prosecutor's play in the criminal justice system, State and Federal law, as well as professional ethical standards, not only prohibit prosecutors from committing the type of misconduct described below, but also, obligate them to assist in protecting the constitutional rights of people facing trial.

The United States Supreme Court has held that the prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. 78, 88 (1935), overruled on other grounds by Stirone v. United States, 361 U.S. 212 (1960). The Ninth Circuit explained in Commonwealth of the Northern Mariana Islands v. Mediala, 976 F.2d 475, 486 (9th Cir. 1997), overruled on other grounds by George v. Camache, 119 F.3d 1393 99th Cir. 1997), that "[I]t is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial." See, also, Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) ("the proper role of the criminal prosecutor is not simply to obtain a conviction, but to obtain a fair conviction.") National District Attorneys Association, National Prosecution Standards, Rule 1.1 (2nd ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished.") In the case at hand, Clark County Deputy District Attorney, Edward Kane (Kane), committed prosecutorial misconduct during opening statements to the jury, of a highly inculpatory and prejudicial nature, when he made improper arguments and statements to the jury as to what Tracey Richards would testify to at trial, as the factual statements were not supported by the record. Id, at App. Vol., 3B, pp. 000824-25, lines 8-25; 1-4. See also, Exhibit No. 5.



The State of Nevada failed to call Tracey Richards to the stand to support the prosecutor's statements to the jury.

They also committed further misconduct by alleging as to what Petitioner's Uncle, Winston Budd would testify to, as the State knew that Winston Budd was in another Country (Belize), see, ground three of this petition, and the State only produced his former testimony of the preliminary hearing, denying the defense an opportunity to cross-examine the witness. Through said former testimony alleged confessions to the crime were disclosed to the jury. See, App. Vol., 3B, 000825, lines 5-11; Exhibit N. 5. These alleged confessions were not subject to cross-examination, not supported by the record.

In light of the historical practices of the Clark County District Attorney, as to exposing the jury to factual statements not supported by the record, whether the misconduct was non-prejudicial on the ground that it was unintentional or inadvertent, see, e.g., Turner v. Johnson, 106 F.3d 1178, 1188 (5th Cir. 1997); United States v. Manning 56 F.3d 1188, 1199 (9th Cir. 1995). That is not the case here. Mr. Kane knew where Tracey Richards resided. The State Investigator was in contact with her. Yet, he failed to secure her presence at Petitioner's trial. He had the power to bring her into the Courtroom and elected not to do so. See, App. Vol. 6, at 001467, lines 7-22. Exhibit No. 6.

The Clark County District Attorney has a history and practice of violating the Constitutional rights of defendants through the commission of prosecutorial misconduct. The most experienced members of that office (who are now retired) were consistent and habitual perpetrators of misconduct. See, e.g., McKenna v. State, 114 Nev. 1044, 468 P.2d 739 (19 \_\_\_)(Mr. Seaton); Howard v. State, 106 Nev. 713, 722-23., n.1. 800 P.2d 175 (1991)(Mr. Seaton); Dawson v. State, 103 Nev. 76, 80, 734 P.2d 221 (1987)(Mr. Harmon). Unfortunately, Mr. Kane, and the new generation of prosecutors in the Clark County District Attorney's Office has learned from it's seniors to commit the same type of pernicious misconduct. See, e.g., Greene v. State, 113 Nev. 157, 170, 931 P.2d 54 (1997)(Mr.

Schwartz), and Murray v. State, 113 Nev. 11, 17-18, 930 P.2d 121 (1997)(reversing three Clark County cases for prosecutorial misconduct).

Petitioner Budd claims that the misconduct committed by the prosecutor, could never be undone, thus was prejudicial and in direct violation of his due process rights to the Fourteenth Amendment, and a new trial must be granted.

#### **GROUND SEVEN**

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One through Six in support hereof.

Although defense counsel Howard Brooks made a timely objection to Mr. Kane's exposing the jury during opening statements to making factual statements not in evidence or supported by the record as to what Tracey Richards would testify to at trial concerning his character and alleged confession as to the murders; See App. Vol., 3B pp. 000824-25; lines 8-25; 1-4. And, later requested a mistrial, App. Vol., 6 at 0001466-0001469, the trial Judge denied the motion from mistrial. Id. 0001469, line 2.

Further, the trial judge failed to sua sponte order a mistrial, as the jurors had been infected with the alleged confessions by the Petitioner, made through the prosecutor's statements not supported by the record. No curative instruction was given to the jurors. The court just simply left it up to defense counsel to comment during closing statements as to the prosecutorial misconduct.

In habeas corpus context, the United States Supreme Court recognized in Brecht v. Abrahamson, 507 U.S. 619, 638 n. 9 (1993):

[T]he possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. The court of appeals for the Ninth Circuit has characterized this type of error as a "hybrid" which is "declared to be incapable of redemption

by actual prejudice analysis. The integrity of the trial, having been destroyed, cannot be reconstituted by an appellate court." Hardnett v. Marshall, 25 F.3d 875, 879 (9th Cir. 1994), cert. denied, 513 U.S. 1130 (1995). The defendant provided the State and the Court with case law establishing what the prosecutor could not do, thus, the defendant did all he could to prevent misconduct from occurring. But, the prosecutor committed the misconduct anyway, and he should not have been heard to argue that any response less than an immediate mistrial by the trial judge, would have been adequate remedy for the intentional and deliberate deprivation of the defendant's constitutional due process rights to a fair trial.

Therefore, the trial judge's failure to sua sponte, call for a mistrial due to the prosecutor's factual statements not supported by the record, rendered the proceedings unfair and this court should grant habeas relief.

#### **GROUND EIGHT**

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One through Seven in support hereof.

Trial counsel's failure to object to the erroneous jury instructions which expanded the elements of first degree murder or witness credibility, Instructions Seven (7) and Nineteen (19), did not adequately and or accurately cover the issues to be determined by the jury, violating Petitioner's Sixth and Fourteenth Amendment rights to the U.S. Constitution.

Jury Instruction number Seven (7), derived from NRS 200.030(1)(a), as to describe the three essential elements of first-degree murder; as "willful, deliberate and premeditated." See, App. Vol., 6, pp. 001476-77, lines 5-25; 1-9.

In the above quoted instruction, paragraphs 1,2,3,5, and 6, were derived from NRS 200.030(1)(a), and correctly informed the jurors, that there are three (3) necessary and distinct elements to the crime of first-degree murder.

Paragraph number four described an essential element not set forth by the legislature when it carved out NRS 200.030(1)(a). There was no crime of "Passion" within this crime.

To describe such only expanded the essential elements of first-degree murder, and trial counsel's failure to object to such an erroneous instruction constituted ineffective assistance of counsel on his part. See, Gray v. Lynn, 6 F.3d 265 (5th Cir. 1993)(Trial counsel's failure to object to erroneous jury instruction which expanded the elements of attempted first-degree murder charge, constitutes ineffective assistance of counsel). Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989)(defense counsel's failure to object to erroneous instruction during death penalty phase of case, constituted ineffective assistance of counsel). And, Wayne v. Morris, 469 U.S. 908, 83 L.Ed.2d 218, 105 S.Ct. 282 (1984)(trial counsel's failure to object constitutes ineffective assistance of counsel).

Trial counsel should have objected to instruction number Seven (7), as the instruction was expanded to describe more than the three essential elements of first-degree murder as derived in the Nevada Revised Statutes. Said failure of trial counsel amounted ineffective assistance of counsel.

Jury Instruction Number 17:

This instruction addressed witness credibility. Petitioner was entitled to an instruction that a biased or interested witness had a motive to testify falsely. See, United States v. Iacvetti, 466 F. 2d 1147 (5th Cir.) cert. denied, 410 U.S. 908 (1973). Such is true, in light of the fact that drugs were being sold from the victims apartment. Lazon Jones was never charged and or investigated to determine if drugs were being sold out of Apt. 2068. And, the same is true as to Greg Lewis, who was attempting to gain parole for his cooperation with the state. No jailhouse snitch, will snitch on someone just for spite. He always wants something in return.

Accordingly, Petitioner was entitled to a jury instruction where trial counsel did not have to explain away the witness credibility, or as to how the jury could determine whether to believe or not to believe a particular witness and the weight to give said testimony. Thus, the district court judge erred in not making a modification to the above-mentioned jury

instructions regarding credibility offered by the state.

#### **GROUND NINE**

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One through Eight in support hereof.

A criminal defendant has the constitutional right to receive the effective assistance of counsel on his direct appeal as a matter of right, just as he has the right to effective assistance of counsel at trial and at all pre-trial proceedings. See, Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985).

Appellate counsel failed to challenge, or point out what in the reasonable doubt instruction was unconstitutional language. Petitioner here did.

The third sentence of the second paragraph states: "If in the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt."

By using the term, 'after the entire comparison and consideration of all the evidence', burden shifts to the criminal defendant to place before the jury some evidence to rebut the state's evidence accusing them of the charges, otherwise, why would the jury need to make a comparison of evidence. It does not tell them what it is to be compared, or how to go about it.

The next part of the sentence lowers the state's burden of proof and also burden shifts to the defendant to prove his innocence of the charges, 'are in such a condition that they can say they feel an abiding conviction of the truth of the charge,' there is not a reasonable doubt.

This sentence tells the jury they need to believe that the state is telling the truth, and if they do, then there is no reasonable doubt as to the guilt of the defendant. rather than describe what a reasonable doubt is; it describes by lessening the State's burden by requiring the defendant to prove that there is no "truth" to the State's charges and that he is entitled to a verdict of not guilty. If the defendant does not do that, then a jury has no choice but to return

a verdict of guilty, as the State claims the defendant is.

Petitioner was prejudiced by Appellate counsel's failure to identify the unconstitutional language contained in the Nevada's Reasonable Doubt instruction. See, Brown v. U.S., 167 F.3d 109 (2nd Cir. 1999)(Appellate counsel's failure to raise on direct appeal an obviously deficient jury instruction on reasonable doubt constitutes ineffective assistance of counsel).

Further, Appellate counsel was defense counsel; and in Bloomer v. U.S., 162 F.3d 187 (2nd Cir. 1998), the Court held that: "Defense counsel's failure to object to and raise issue that the jury instruction on reasonable doubt is constitutionally deficient constituted ineffective assistance of counsel.

It is well settled law that a reasonable doubt instruction that is unconstitutional in violation of the Fourteenth Amendment to the U.S. Constitution is per se reversible error. See, Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993).

It is also well settled law that any jury instruction which shifts the burden to a criminal defendant is unconstitutional and requires reversal of the conviction. See, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). Trial counsel's failure to object to this unconstitutional language in the reasonable doubt instruction, and or raise it on the direct appeal constitutes ineffective assistance of counsel.

#### **GROUND TEN**

#### **APPELLATE COUNSEL WAS INEFFECTIVE VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION**

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One through Nine in support hereof.

BUDD has the right to the effective assistance of counsel on his direct appeal. Evitts v. Lucey, *supra*. And, when counsel presents issues on direct appeal that are weaker than the

issues that could have been presented, there is ineffective assistance of counsel. Smith v. Robbins, supra. This nation's highest court has held that a criminal defendant is 'entitled' to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. See, Mattews v. U.S., 485 U.S. 58, 108 S.Ct. 883, 887-888, n. 4, (1988).

Petitioner was prejudiced in that all of the issues that could have been presented on direct appeal were not presented and only argued one issue and failed to present it as having been constitutional violations, but were argued as state law claims which has waived petitioner's right to have his constitutional violations adjudicated on direct appeal with the assistance of counsel. Further, grounds one through nine of this petition could have been presented on direct appeal as being in violation of petitioner's fifth, sixth and fourteenth amendment rights to the U.S. constitution. Petitioner Budd has the right to the effective assistance of counsel on direct appeal as a matter of right, just as he has the right to the effective assistance of counsel at trial and at pretrial proceedings, See Evitts v. Lucy, 469 U.S. 387, 105 S. Ct. 830 (1985).

As pointed out, Appellate counsel failed to present the issue as being of a constitutional magnitude. He failed to challenge and point out grounds One through Eight, and to point out the reasonable doubt instruction was unconstitutional language. All of which has prevented petitioner from presenting his issues to the federal Court by way of filing a Writ of Habeas Corpus pursuant to 28 U.S.C 2254, or to seek review by writ of Certiorar with the U.S. Supreme Court.

When an issue is not presented to a states high court as having been a violation of an appellants constitutional rights to the U.S. Constitution, then that issue is to be deemed as having been waived see, Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2554 (1991). See also, Crotts v. Smith, 73 F.3d 861 ( 9th cir. 1996).

The supreme court "has long held that a states prisoner's Federal Habeas Petition

should be dismissed if the prisoner has not exhausted available state remedies as to any of his Federal claims." (cites omitted). The exhaustion- of state-remedies doctrine, now codified at 28 U.S.C. 2254 (b) and (c), reflects a policy of federal state comity to give the state " the initial " opportunity to pass upon and correct alleged violations of it's prisoner's federal rights. (cites omitted). Once the federal claim has been "Fairly presented" to the states courts, the exhaustion requirement is satisfied. (emphasis in Original) (cites omitted). Id 73 F.3d at 865, n.3.

In *Duncan v. Henry*, 513 U.S. 365, 115 S.Ct. 887 (1995) The Supreme Court held that a Habeas petitioner failed to exhaust his claim that state trial courts evidentiary ruling denied him due process of law guaranteed by the fourteenth amendment, " he must say so " Id. 115 S.Ct. 888. Not only in federal court, but also in state court. Id. By failing to present Budds issues as being constitutional violations, Budd is now required to show cause and prejudice for failure to exhaust in state court, his federal claims. See, *Colman*, supra, 111 S.Ct., at 2564-2565, n. 20. Constitutional rights are not only created by the constitution itself, but are also created by statute. See, *Carlo v. City of Chino*, 105 F3d 493, 496, n.6 (1997).

By Appellate counsel failing to present the issues as constitutional violations, counsel has then waived petitioner's Fundamental rights to seek redress in federal court for violation of his constitutional rights at trial. Counsel can not be allowed to waive petitioner Budds constitutionally protected fundamental rights. Without the implicit agreement of Budd on the record. See, *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 664, n.5 (2000). The failure of appellate counsel to preserve that issue on the record.

An issue that prevented the defendant from presenting that issue on discretionary review to the United States Supreme Court was ineffective assistance of counsel. See, *Freeman v. Lane*, 962 F.2d 1252, 1258. n.7 (7th.cir.1992).

How much so here, where petitioner was also denied his fundamental right to seek federal review by way of Habeas corpus, as well as certiorari to the U.S. Supreme Court



See, Smith v. Robbins, 528 U.S. 259 120 S.Ct. 746, 765, n.2 (2000). The failure of appellate counsel to present a meritorious issue on direct appeal which could have been raised, is ineffective assistance of counsel. Here counsel could have presented the issue as a constitutional issue, he failed to do so. As stated, appellate counsel never identified the language contained in the reasonable doubt instructions that was alleged to be "un-constitutional". It has been held that the failure to challenge a reasonable doubt instruction on direct appeal does constitute ineffective assistance of counsel. See, McKee v. U.S., 167 F.3d 103 (2nd cir. 1999), and Brown v. U.S., 167 F.3d 109 (2nd cir. 1999). Further, appellate counsel failed to cite the states use of inconsistent prosecutorial theories that precluded by the doctrine of judicial estoppel. New Hampshire v. Maine, 530 U.S. 742, 121 S.Ct. 1808 (2001), which violated petitioners right to a fair trial and due process of law protected by the fourteenth amendment to the U.S. Constitution.

Appellate counsel failed to identify what amendment of the constitution was being violated, thus leaving the courts with no measuring stick by which to gauge the violation.

It is well settled law that a reasonable doubt instruction that is un-constitutional in violation of the fourteenth amendment to the constitution is per se reversible error.

See, Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993).

It is well settled law that any jury instruction which shifts the burden of proof to a criminal defendant is un-constitutional and requires reversal of the conviction. See, Sandstrom v. Montana, 442 U.S. 511, 99 S.Ct. 2450 (1999).

Clearly, counsel should have been more lucid as to instructions, 7, 17, and reasonable doubt was un-constitutional.

## **GROUND ELEVEN**

### **DUE TO ACCUMULATION OF ERRORS BY TRIAL COUNSEL AND APPELLATE COUNSEL'S INEFFECTIVENESS, PETITIONER HAS BEEN DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION**

Petitioner hereby incorporates as if fully stated herein the supporting facts of Ground One through Ten in support hereof.

Further, Petitioner Budd would incorporate herein as if fully stated herein the foregoing legal arguments contained in grounds 1-10 of these points and authorities in support hereof. It has been stated that the totality of counsel's error's is what constitutes ineffective assistance of counsel. See, Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982).

Here the evidence against Budd is not strong. However, the errors are numerous.

(a). Ground one: Trial counsel was ineffective violating petitioner's Fifth, Sixth, and fourteenth Amendment Rights to the U.S. Constitution when counsel failed to conduct meaningful investigation into the facts of the case; Failed to object to alleged eye witness identification; Failed to object to uncharged bad acts; Failed to have scientific testing done.

And; Failed to call witnesses for the defence which would have shown petitioner was actually innocent of the crimes for which he was charged. See, Ground One of this petition.

(b) Ground Two: Trial counsel was ineffective violating petitioner's sixth and fourteenth Amendment rights to the U.S. Constitution when he failed to disclose to the trial judge that a Conflict of interest existed between himself and petitioner. See, Ground Two of this petition.

(c) The admission of the Transcribed Testimony of Winston Budd constituted error in violation of petitioner's Fifth, Sixth and fourteenth Amendment rights to the constitution, Article 1 section 1 and 5 of the Nevada Constitution, due to: the ineffective assistance of counsel; The confrontation clause by the states failure to secure the witness's presence at trial;

And, The courts error by allowing fundamental unfairness to a fair and impartial trial.  
See, Ground Three of this Petition,

(d) Ground four: Trial counsel was in-effective violating Petitioner's Sixth and fourteenth Amendment rights to the U.S. Constitution when Brooks conceded his guilt during closing arguments at the guilt phase of the trial. See, Ground Four of this petition,

(e) Ground four: The prosecutions failure to disclose an agreement between the state and a key witness in exchange for his information and testimony, thus, Trial counsel's failure to collect potentially exculpatory evidence on petitioners behalf, led to the misrepresentation of evidence, violating petitioner's right to effective assistance of counsel and fundamental fairness under the sixth and fourteenth amendments to the U.S. Constitution. See, Ground Five of this petition.

(f) Ground Six: Trial counsel 's failure to object to the prosecutorial misconduct during opening statement of a highly inculpatory and prejudicial nature was in-effective assistance that violated petitioner's sixth and fourteenth amendment rights to the U.S. Constitution. See, Ground Six of this petition.

(g) Ground Seven; Trial counsel was in-effective when he failed to object to Judicial Misconduct that was committed, Thus, violating petitioner's sixth and fourteenth amendment rights to the U.S. Constitution, when the trial judge failed to Sua-Sponte order a mistrial based upon the prosecutorial misconduct. See, Ground Seven of this petition.

(h) Ground Eight: Trial counsel was ineffective for failing to object to the erroneous Jury Instructions which expanded the elements of first degree murder and witness credibility, Instructions 7 and 17 respectively, did not adequately and or accurately cover the issues to be determined by the jury, Thus, violating petitioner's sixth and fourteenth amendment rights to the U.S. Constitution. See, Ground Eight of this petition.

(i) Ground Nine: Appellate counsel was ineffective for failing to challenge on direct appeal the statutory defined reasonable doubt instructions as being un-constitutional,

violating petitioner's sixth and fourteenth amendment rights to the U.S. Constitution. See, Ground Nine of this petition. (j) Ground Ten: Appellate counsel was ineffective for failing to present meritorious issues on direct appeal, violating petitioner's sixth and fourteenth amendment rights to the U.S. Constitution. See, Ground Ten of this petition.

Trial counsel also represented petitioner on his direct appeal. He knew this case first hand, yet he only presented one issue for direct appeal and failed to identify the federal amendment that was violated. Thus, He effectively insured that the issue could not or would not be addressed by the federal court if the Nevada Supreme Court failed to address the issue by applying the correct federal laws to the issue.

Appellate counsel also completely failed to present any of the ineffective assistance of counsel claims as presented in grounds 1-8 of this petition, or to present grounds 9-10 of this petition.

In sum, The state had a weak circumstantial case against the petitioner. This was a case where a misidentification of a person "77" yards away: uncharged bad acts, Alleged threats, thus failed to perform scientific tests, and call witnesses on petitioner's behalf to bring forth that at the Saratoga Palms apartments gang wars between Hoover Crips, Rollin 20's, LA, were invading other gang territory and selling illegal drugs prompted the Las Vegas 28th.St. gang a 8-side to promote violence and kill these victims, and counsel's failure to perform reasonable investigations denied this petitioner due process of law to a fair trial.

Finally, Appellate counsel's representation fell below an objective standard of reasonableness measured under prevailing professional norms, See, United States v. Vaccaro, 816 F.2d 443,455 ( 9th Cir.), Thus , petitioner was prejudiced as there is a reasonable probability that absent appellate counsel errors, Taken either singularly or cumulatively, Petitioner would have recieved the relief he sought in his direct appeal.

Petitioner cannot fully show his claim without an evidentiary hearing, but has fully set forth his argument on this petition under grounds 1-11 and corresponding grounds in the

points and authorities and hereby incorporates them here by reference.


**PRAYER FOR RELIEF**

Accordingly, Petitioner respectfully requests that this Court:

1. Issue a Writ of Habeas Corpus to have Petitioner brought before this Court so that he might be discharged from his unconstitutional confinement;
2. Conduct a hearing at which proof may be offered concerning the allegations in this Petition and any affirmative defenses raised by Respondents; and
3. Grant leave to perform additional necessary and reasonable discovery to substantiate the claims for relief addressed in this petition; and
4. Grant any other relief that may be appropriate in the interests of justice.

Dated this 18 day of September 2007.

Respectfully submitted,

  
Glenford A. Budd # 90043  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301-1989

Prepared by: Inmate Fernando Rodriguez # 51052

  
\_\_\_\_\_

CERTIFICATE OF SERVICE BY MAIL

I, Glenford A. Budd, hereby certify pursuant to N.R.C.P. 5(b), that on this 18 day of the month of September, of the year 2007, I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS MEMORANDUM** of **POINTS AND AUTHORITIES** addressed to;

Charles J. Short, Clerk of the Court

200 LEWIS AVE, 3<sup>rd</sup> Floor  
Las Vegas, NV 89155-1160  
Address

Attorney General  
Heroes' Memorial Building  
100 North Carson Street  
Carson City, Nevada 89710-4717

DAVID ROGER, ESQ.  
District Attorney of County of Conviction  
200 LEWIS AVE  
Las Vegas, NV 89155-2212  
Address

Glenford A. Budd  
Signature of Petitioner

**AFFIRMATION**  
**Pursuant to NRS 239B.030**

, The undersigned does hereby affirm that the preceding Memorandum  
of Points And Authorities, to Petition For Writ of Habeas  
Corpus (Post-Conviction)

\_\_\_\_\_  
(Title of Document)

filed in District Court Case No. 03-C-193182-C

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

\_\_\_\_\_

*Samuel A. Budd*  
(Signature)

September 18 2007  
(Date)

Case No. 03-C-193182-C

Dept. No. 18

FILED

SEP 21 9 42 AM '07

CLERK OF THE COURT

Original Court Copy

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

Glenford A. Budd

Petitioner,

v.

E.K. McDaniel, Warden ESP et al.,  
Respondent.

**MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS**

COMES NOW, the Petitioner,, in propria persona, pursuant to N.R.S. 12.015, and respectfully moves this Honorable Court for an Order granting Petitioner leave to proceed in the above-entitled action in forma pauperis, without requiring Petitioner to pay or provide security for the payment of costs of prosecuting this action.

This motion is made and based upon the attached affidavit and certificate.

Dated this 18 day of September, 2007.

Respectfully submitted,

Glenford A. Budd  
Petitioner

RECEIVED

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CLERK OF THE COURT

RECEIVED

SEP 21 2007

CLERK OF THE COURT



Case No. 03-C-193182-C

Dept. No. 18

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

GLENFORD A. BUDD  
Petitioner,

v.

E. K. McDANIEL, Warden, ESP, et al  
Respondent.

AFFIDAVIT IN SUPPORT OF  
MOTION TO PROCEED  
IN FORMA PAUPERIS

I, Glenford A. Budd being first duly sworn, depose and say that I am the  
Petitioner in the above-entitled case; that in support of my motion to proceed without being required to  
prepay fees, cost or give security therefor, I state that because of my poverty I am unable to pay the costs of  
said proceeding or to give security therefor, that I believe I am entitled to relief.

I do X do not \_\_\_\_\_ request an attorney be appointed to represent me.

I further swear that the responses which I have made to the questions and instructions below  
relating to my ability to pay the cost of prosecuting the proceeding are true.

1. Are you presently employed? Yes ✓ No \_\_\_\_\_

a. If the answer is yes, state the amount of your salary or wages per month and give the  
name and address of your employer.

ESP, Culinary  
EMPLOYER

\_\_\_\_\_  
EMPLOYER

N/A  
Salary or Wage per month

\_\_\_\_\_  
Salary or Wage per month

b. If the answer is no, state the date of your last employment and the amount of the  
salary or wages per month which you received.

\_\_\_\_\_  
Date of last Employment

\_\_\_\_\_  
Date of last Employment

\_\_\_\_\_  
Salary or Wage per month

\_\_\_\_\_  
Salary or Wage per month

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes \_\_\_\_\_ No X

b. Rent payments, interest or dividends?

Yes \_\_\_\_\_ No X

c. Pensions, annuities or life insurance payments?

Yes \_\_\_\_\_ No X

d. Gifts or inheritances?

Yes \_\_\_\_\_ No X

e. Any other sources?

Yes \_\_\_\_\_ No X

If the answer to any of the above is "Yes" describe each source of money and state the amount received from each during the past twelve months:

NONE  
Source of Income

\_\_\_\_\_  
Source of Income

\_\_\_\_\_  
Amount Received (in the past year)

\_\_\_\_\_  
Amount Received (in the past year)

3. Do you own any cash or checking or savings account? Yes \_\_\_\_\_ No X

a. If the answer is yes, state the total value of the items owned.

\_\_\_\_\_  
Item

\_\_\_\_\_  
Item

\_\_\_\_\_  
Item

\_\_\_\_\_  
Total Value

\_\_\_\_\_  
Total Value

\_\_\_\_\_  
Total Value

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

\_\_\_\_\_  
Property

\_\_\_\_\_  
Property

\_\_\_\_\_  
Property

\_\_\_\_\_  
Approximate value

\_\_\_\_\_  
Approximate value

\_\_\_\_\_  
Approximate value

5. List the persons who are dependent upon you for support and state your relationship to those Persons, and indicate how much you contribute towards their support.

<u>N/A</u>	_____	_____
Person	Person	Person
_____	_____	_____
Relationship	Relationship	Relationship
_____	_____	_____
Contribution	Contribution	Contribution

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

*Memphard A. Sudd*  
Petitioner

**EXECUTION OF INSTRUMENT BY PRISONER**

Pursuant to N.R.S. 208.165, I hereby declare under the penalty of perjury that the contents of the above documents are true and correct to the best of my knowledge.

*Memphard A. Sudd*  
Petitioner/Declarant

**ORDER**

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 200 7.

\_\_\_\_\_  
District Judge

**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion for  
Leave to Proceed In forma Pauperis, Affidavit In Support of  
Motion To Proceed IN forma Pauperis

\_\_\_\_\_  
(Title of Document)

filed in District Court Case No. 03-C-193182-C

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

  
(Signature)

September 18 2007  
(Date)

002790

FILED

SEP 27 10 02 AM '07

*Chaf*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

GLENFORD A. BUDD,  
Petitioner,

vs.

E.K. MCDANIEL, WARDEN, ESP,  
Respondent,

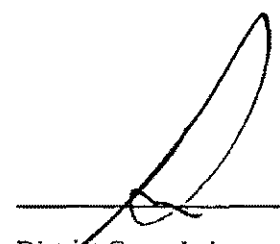
Case No: C193182  
Dept No: 18

ORDER FOR PETITION FOR  
WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on September 21, 2007. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

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

**IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's Calendar on the 28<sup>th</sup> day of November, 200 7, at the hour of 8:15 <sup>AM</sup> o'clock for further proceedings.

  
\_\_\_\_\_  
District Court Judge

RECEIVED  
SEP 27 2007  
CLERK OF THE COURT

46

CMC

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

GLENFORD ANTHONY BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 50008

2007 OCT -5 P 2:24

District Court Case No. C193182

*[Signature]*  
CLERK OF THE COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER this appeal DISMISSED."

Judgment, as quoted above, entered this 7th day of September, 2007.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 2nd day of October, 2007.

Janette M. Bloom, Supreme Court Clerk

By:

*[Signature]*  
Chief Deputy Clerk

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OCT 04 2007

CLERK OF THE COURT

002792

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD ANTHONY BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50008

**FILED**

SEP 07 2007

ORDER DISMISSING APPEAL

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY Alvarado  
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's motion to hold attorney of record in contempt. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Our review of this appeal reveals a jurisdictional defect. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists.<sup>1</sup> No statute or court rule provides for an appeal from an order denying a motion to hold attorney of record in contempt. Accordingly, we

ORDER this appeal DISMISSED.

Maupin, C.J.

Maupin

Gibbons J.

Gibbons

Cherry J.

Cherry

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

RECEIVED

OCT 04 2007

CLERK OF THE COURT

cc: Hon. David B. Barker, District Judge  
Glenford Anthony Budd  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk



CERTIFIED COPY

This document is a full, true and correct copy of  
the original on file and of record in my office.

DATE: October 2, 2007

Supreme Court Clerk, State of Nevada

By *J. Caotilla* Chief Deputy

002795

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD ANTHONY BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 50008

District Court Case No. C193182

**REMITTITUR**

TO: Charles J. Short, Clark District Court Clerk

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

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

DATE: October 2, 2007

Janette M. Bloom, Clerk of Court

By: *H. Castells*

Chief Deputy Clerk

cc: Hon. David B. Barker, District Judge  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Glenford Anthony Budd

**RECEIPT FOR REMITTITUR**

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

REMITTITUR issued in the above-entitled cause, on \_\_\_\_\_

BRANDI J. WENDEL

District Court Clerk

*Deputy*

002796  
07-19825

  
CLERK OF THE COURT

**OPPS**  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
H. LEON SIMON  
Deputy District Attorney  
Nevada Bar #000411  
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-  
  
GLENFORD BUDD,  
#1900089  
  
Defendant.

CASE NO: C193182  
DEPT NO: XVIII

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

DATE OF HEARING: November 28, 2007  
TIME OF HEARING: 8:15 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
H. LEON SIMON, Deputy District Attorney, and hereby submits the attached Points and  
Authorities in Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-  
Conviction).

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

///

///

///

1  
2 **POINTS AND AUTHORITIES**

3  
4 **STATEMENT OF THE CASE**

5 On May 29, 2003, Glenford Budd (hereinafter "the defendant") was charged with  
6 three (3) counts of Murder with Use of a Deadly Weapon. After a preliminary hearing, a  
7 magistrate ordered the defendant to answer the charges in District Court.

8 The State filed an Information on June 26, 2003. At the initial arraignment on July 2,  
9 2003, the defendant pleaded not guilty to the charges. The matter was set for trial which  
10 commenced on December 5, 2005. After the trial, the jury returned three (3) guilty verdicts  
11 of First Degree Murder with Use of a Deadly Weapon on December 13, 2005.

12 On December 16, 2005, the defendant was sentenced as a result of the jury trial to  
13 three life sentences without possibility of parole, each with an equal and consecutive  
14 sentence for use of a deadly weapon, to be served consecutively. A Judgment of Conviction  
15 was filed on March 1, 2006. Then on March 23, 2006, the defendant filed a Notice of  
16 Appeal. On January 9, 2007, the Nevada Supreme Court filed an Order of Affirmance  
17 thereby affirming the defendant's conviction.

18 On July 5, 2007, the defendant filed a pro per motion to have his trial attorney held in  
19 contempt. On July 23, 2007, the defendant's motion was denied. On August 10, 2007, the  
20 defendant filed another Notice of Appeal regarding the denial to hold his attorney in  
21 contempt. On September 11, 2007, the matter was closed by the Supreme Court.

22 On September 21, 2007, defendant filed a petition for writ of habeas corpus (post-  
23 conviction). The State responds as follows.

24 **ARGUMENT**

25 **I. DEFENDANT DOES NOT MAKE A VALID CLAIM THAT HIS COUNSEL WAS  
26 INEFFECTIVE**

27 In order to assert a claim for ineffective assistance of counsel a defendant must prove  
28 that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong

1 test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See  
2 also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the  
3 defendant must show (1) that his counsel's representation fell below an objective standard of  
4 reasonableness, and (2) that but for counsel's errors, there is a reasonable probability that the  
5 result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104  
6 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d  
7 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not  
8 mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of  
9 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State  
10 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397  
11 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

12 A defendant who contends that his attorney was ineffective because he did not conduct an  
13 adequate investigation must show how a better investigation would have made a more  
14 favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). Claims  
15 asserted in a petition for post-conviction relief must be supported with specific factual  
16 allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev.  
17 498, 502, 686 P.2d 222, 225 (1984).

18 **a. Failure to object to uncharged bad acts**

19 The defendant argues that his trial counsel was ineffective for not objecting to a  
20 witness's testimony regarding the fact that the defendant was angry about having lost some  
21 marijuana. While the defendant is correct that evidence of person's character is not  
22 admissible to show conformity therewith on a particular occasion, the introduction of the  
23 comment about the marijuana here was not to show conformity of the defendant's behavior.  
24 The statement was introduced to show why the defendant was angry. A "trial counsel need  
25 not lodge futile objections to avoid ineffective assistance of counsel claims." Ennis v. State,  
26 122 Nev. 694, 137 P.3d 1095, 1103 (2006). Given that objecting would have been futile,  
27 trial counsel was not obligated to lodge a meritless objection. Here, the testimony was  
28 properly admitted, therefore trial counsel was not ineffective for not making the desired  
objection.

## CRIMINAL COURT MINUTES

03-C-193182-C STATE OF NEVADA vs Budd, Glenford A  
CONTINUED FROM PAGE: 017

05/21/07 08:30 AM 00 ALL PENDING MOTIONS (5/21/07)

HEARD BY: David Barker, Judge; Dept. 18

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

PARTIES: STATE OF NEVADA  
007521 Smith, Sarah A.  
0001 D1 Budd, Glenford A  
PUBDEF Public Defender  
006208 Avants, Lynn

Y  
Y  
N  
Y  
Y

DEFT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS...DEFT'S PRO  
PER MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD OR REQUEST FOR COURT  
RECORDS/COURT CASE DOCUMENTS

COURT NOTED that Deft is incarcerated in the NV Dept of Corrections and not  
present today.

COURT ORDERED, Deft's Pro Per Motion to Proceed Forma Pauperis, GRANTED.

COURT FURTHER ORDERED, Deft's Pro Per Motion for Withdrawal of Public  
Defender as counsel and for Request for Court Records/Court Case Documents,  
GRANTED. Mr. Avants stated he will contact prior counsel, Howard S. Brooks,  
and will see that the records are forwarded to Deft Budd. COURT SO NOTED.

NDC

07/23/07 08:15 AM 00 DEFT'S PRO PER MTN TO HOLD HOWARD S  
BROOKS ATTORNEY OF RECORD IN CONTEMPT/44

HEARD BY: David Barker, Judge; Dept. 18

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

PARTIES: STATE OF NEVADA  
007521 Smith, Sarah A.  
0001 D1 Budd, Glenford A  
PRO SE Pro Se

Y  
Y  
Y  
Y

Deft was not transported for this matter. COURT STATED that Deft's Motion  
did not state what transcript date he was requesting, and the motion was not  
cognizable. COURT ORDERED, MOTION DENIED.

CLERK'S NOTE: The above minute order has been Distributed to:

## CRIMINAL COURT MINUTES

03-C-193182-C STATE OF NEVADA

vs. Budd, Glenford A

CONTINUED FROM PAGE: 018

Glenford Budd, NDOC #90043, Ely State Prison, P.O. Box 1989, Ely, NV

89301

# **EXHIBIT**

## **# 2**



*Shirley Blanton*  
CLERK

1 NOTC  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 DAVID P. SCHWARTZ  
6 Chief Deputy District Attorney  
7 Nevada Bar #000398  
8 200 South Third Street  
9 Las Vegas, Nevada 89155-2212  
10 (702) 455-4711  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA, )

10 Plaintiff, )

11 -vs- )

12 GLENFORD ANTHONY BUDD, )  
13 #1900089 )

14 Defendant. )

CASE NO: C193182

DEPT NO: XVIII

NOTICE OF WITNESSES  
[NRS 174.234(1)(a)]

17 TO: GLENFORD ANTHONY BUDD, Defendant; and

18 TO: PUBLIC DEFENDER, Counsel of Record:

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF  
20 NEVADA intends to call the following witnesses in its case in chief:

NAME

ADDRESS

22 BUDD, WINSTON

UNKNOWN ADDRESS

23 COR

LVMPD - DISPATCH

24 JONES, LAZON

C/O REG WEAVER, D.A.'S OFFICE

25 JONES, SHERYL

UNKNOWN ADDRESS

26 KEY, TERRY

UNKNOWN ADDRESS

27 LEWIS, GREG

NDOC

28 PALAU, CELESTE

C/O REG WEAVER, D.A.'S OFFICE

1 RICHARD, TRACEY 1100 CENTER ST., HEND., NV  
2 SMITH, KRISSY UNKNOWN ADDRESS  
3 SPENCER, P. LVMD #4852  
4 VACARRO, J. LVMPD #1480  
5 WALLACE, M. LVMPD #4761  
6 WASHINGTON, NAKIA UNKNOWN ADDRESS  
7 WILDEMAN, M. LVMPD #3516

8 These witnesses are in addition to those witnesses endorsed on the Information and  
9 any other witness for which a separate Notice has been filed.

10  
11 DAVID ROGER  
12 DISTRICT ATTORNEY  
Nevada Bar #002781

13 BY /s/ DAVID P. SCHWARTZ  
14 DAVID P. SCHWARTZ  
15 Chief Deputy District Attorney  
16 Nevada Bar #000398

17 CERTIFICATE OF FACSIMILE TRANSMISSION

18 I hereby certify that service of NOTICE OF WITNESS, was made this 28th day of  
19 September, 2004, by facsimile transmission to:

20  
21 PUBLIC DEFENDER  
FAX#455-5112

22  
23  
24 BY /s/ M. Beaird  
Employee of the District Attorney's Office

25  
26  
27 mb  
28

# **EXHIBIT**

## **# 3**

**ORIGINAL**

DISTRICT COURT  
CLARK COUNTY, NEVADA

DEC 09 2005 20

SHIRLEY B. PARRAGUIRRE, CLERK

BY Jennifer Kimmel

JENNIFER KIMMEL DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

GLENFORD ANTHONY BUDD,

Defendant.

Case No. C193182

Dept. No. XVIII

VOLUME 3-A  
(A.M. SESSION)**REPORTER'S TRANSCRIPT OF JURY TRIAL****Before the Honorable Justice Nancy M. Saitta**Thursday, December 8, 2005  
10:00 a.m.-12:30 p.m.**APPEARANCES:**For the State: EDWARD KANE, ESQUIRE  
Deputy District AttorneyTALEEN PANDUKHT, ESQUIRE  
Deputy District AttorneyFor the Defendant: HOWARD BROOKS, ESQUIRE  
Deputy Public DefenderTIMOTHY O'BRIEN, ESQUIRE  
Deputy Public DefenderReported by: Gayle G. Pichierri, RPR, CRR  
NV CCR No. 595, CA CSR No. 11406PRESTIGE COURT REPORTING  
(702) 898-7676

COUNTY CLERK

DEC 09 2005

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1 was subject to cross-examination, it was in  
2 the same case, and we asked that it be  
3 admitted.

4 THE COURT: Anything further,  
5 Mr. Brooks?

6 MR. BROOKS: Submit it, Your Honor.

7 THE COURT: I'm going to allow -- I  
8 presume there will be a formal request to use,  
9 unless you want to have this substitute as,  
10 the formal request for use of that transcript,  
11 but I presume you could provide by  
12 affidavit -- can I presume that you could  
13 provide by affidavit the representations that  
14 you made here that you attribute to your  
15 investigator?

16 MR. KANE: Absolutely, Judge. I'll  
17 make sure that that's on file.

18 THE COURT: For the time being, any  
19 concern about the use of that is, as far as  
20 I'm concerned, yet to be determined. We'll  
21 deal with it when you bring that motion. I  
22 presume you'll bring a formal motion.

23 MR. KANE: Yes, I will, Judge. What  
24 I would like to do, though, now is offer as an  
25 offer of proof the statements that I have made

1 so we can get a ruling because we are going to  
2 want to reference briefly, not in any great  
3 detail, what Winston Budd will be saying, in  
4 our opening statement.

5 THE COURT: So long as you have the  
6 proof to support the representations that you  
7 have made regarding the efforts of your  
8 investigator.

9 MR. KANE: And I am aware of the risk  
10 there and I'll assume it, Judge.

11 THE COURT: My ruling would be that  
12 an informal finding of unavailability and/or  
13 an effort to avoid contact with the state is  
14 sufficiently made and you can use the  
15 preliminary hearing transcript.

16 MR. KANE: Let me just make one final  
17 offer, Judge, since Mr. Brooks and his  
18 cocounsel are apparently in touch with the  
19 family, if Mr. Budd is flying up with these  
20 other people and he is going to be here  
21 tomorrow, I would be more than happy to put  
22 him on as a live witness rather than use his  
23 testimony, and I make that offer in open  
24 court.

25 THE COURT: Very well. Anything else

Case No. 03-C-193182-C

Dept. No. 18

FILED

SEP 21 9 42 AM '07

CLERK OF THE COURT

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

*Original Court Copy*

GLENFORD A. BUDD  
Petitioner,

v.

E.K. McDANIEL, Warden, ESP  
Respondent.

**PETITION FOR WRIT  
OF HABEAS CORPUS  
(POSTCONVICTION)**

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

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SEP 20 2007

CLERK OF THE COURT

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

### PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison, White Pine County, Nevada

2. Name and location of court which entered the judgment of conviction under attack: Eight Jud. Dist. Court, Las Vegas, Nevada

3. Date of judgment of conviction: February 22, 2006

4. Case number: 03-C-193182-C

5. (a) Length of sentence: Six Consecutive - Life Without Possibility of Parole

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes \_\_\_\_\_ No XX  
If "yes", list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: Three (3) Counts First Degree Murder w/use of a Deadly Weapon

8. What was your plea? (check one):

(a) Not guilty XX (b) Guilty \_\_\_\_\_ (c) Nolo contendere \_\_\_\_\_

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)  
(a) Jury XX (b) Judge without a jury \_\_\_\_\_

11. Did you testify at the trial? Yes \_\_\_\_\_ No XX

12. Did you appeal from the judgment of conviction? Yes XX No \_\_\_\_\_

13. If you did appeal, answer the following:

(a) Name of Court: Supreme Court of Nevada

(b) Case number or citation: 46977

(c) Result: Affirmed



(d) Date of result: January 9, 2007

(Attach copy of order or decision, if available.)

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

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes \_\_\_\_\_ No XX

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

(a)(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes \_\_\_\_\_ No \_\_\_\_\_

(5) **Result:**

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

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

(1) Name of court:

(2) Nature of proceeding:

(3) **Grounds raised:**

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes \_\_\_\_\_ No \_\_\_\_\_

**(5) Result:**

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: \_\_\_\_\_

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes \_\_\_\_\_ No \_\_\_\_\_

**Citation or date of decision:**

(2) Second petition, application or motion? Yes \_\_\_\_\_ No \_\_\_\_\_

**Citation or date of decision:**

(3) Third or subsequent petitions, applications or motions? Yes \_\_\_\_\_ No \_\_\_\_\_

**Citation or date of decision:**

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: \_\_\_\_\_

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) \_\_\_\_\_

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) SEE PETITION.

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NO

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes \_\_\_\_\_ No XX  
If yes, state what court and case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Deputy Public Defender Timothy O'Brien and Howard S. Brooks, Clark County Public Defenders Office, Las Vegas, Nevada

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes \_\_\_\_\_ No XX  
If yes, specify where and when it is to be served, if you know: N/A

23. State concisely every ground on which you claim that you are being held unlawfully, summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) **Ground One:** TRIAL COUNSEL WAS INEFFECTIVE VIOLATING PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION WHEN COUNSEL FAILED TO CONDUCT MEANINGFUL INVESTIGATION INTO THE FACTS OF THE CASE, FAILED TO OBJECT TO ALLEGED EYE-WITNESS IDENTIFICATION, FAILED TO OBJECT TO UNCHARGED BAD ACTS, FAILED TO HAVE SCIENTIFIC TESTING CONDUCTED AND, FAILED TO CALL WITNESSES FOR THE DEFENSE WHICH WOULD HAVE SHOWN PETITIONER WAS ACTUALLY INNOCENT OF THE CRIMES FOR WHICH HE WAS CHARGED.

**Supporting FACTS:** Petitioner hereby incorporates as if fully stated herein all other grounds of this petition in support hereof.

1. Defense Counsel Howard S. Brooks, failed to conduct meaningful pre-trial investigation into the facts of the case, since the police decided to limit their investigation to one (1) suspect, "Petitioner." The duty fell to defense counsel to show that Petitioner was actually innocent based upon Petitioner having informed Counsel he did not commit the crimes for which he was charged.

I. a) MISIDENTIFICATION BY CELESTE PALAU

On direct examination, CELESTE PALAU (Palau) claimed that she saw AI "Petitioner," come out of the house and, that he was shooting somebody at the patio. App. Vol. 4, pp. 001192-001193, lns.25-1.

Palau claimed that where she was sitting on her second floor patio, 218 feet away, she could see Petitioner on the patio in the dark and, although the patio light at Apartment 2068 was not on. Id. p. 001198, lns. 11-13.

On cross-examination when asked by counsel, Palau made the following admission:

- 17. BY MR. BROOKS:
  - 18. Q. So, you're looking from one building
  - 19. Diagonally accross to the other, correct?
  - 20. A. Yes.
  - 21. Q You do not have a clear view directly
  - 22. accross into the apartment at 2068?
  - 23. A. No.
- Id. App. Vol. 4, p. 001213, lns. 17-23.

Palau further claimed that she saw Petitioner leave apartment 2068 after Lazon James and Krissy. That she could only see Petitioner's outline and, the

structure of his body and everything else but, he was not close. App. Vol. 4, p. 001214, lns. 17-23. The lights over the apartment's patio was not working;

In fact, right afterwards, she testified that although the police had arrived in numbers within a few minutes, she never approached the police to provide them with any information; even though she had gone downstairs and she was talking amongst other neighbors about what had taken place in 2068. App. Vol. 4, p. 001215-001218.

Palau only provided information to Law Enforcement Officials two (2) weeks after the incident when they came to her apartment while knocking at doors. She also testified that she provided other persons names to the police of people outside of 2068 that night. See, App. Vol. 4, pp.001218-001219.

Counsel failed to investigate Palau and the other peoples names she provided to the police to check out her theory of events and corroborate her version of the events. She was a key witness for the State and gave other witnesses names. The failure of counsel to persue these witnesses and establish a possible defense on Petitioner's behalf, fell below the Strickland standard of reasonableness, as Palau's vision in poorly lighted areas seemed to be phenomenal, especially at Seventy-Five (75) yards distance, three quarters of a football field away, with obstacles in the way. Counsel had over thirty (30) months to investigate and interview Palau and failed to do so. Based on the alleged eyewitness testimony, her inconsistencies leave a reasonable doubt as to what she actually observed. Even in daylight conditions it is hard to distinguish a person from that distance.

II.b) FAILURE TO OBJECT TO UNCHARGED BAD ACTS

During opening statements to the jury Deputy District Attorney Edward Kane (Kane) made the following statements to the jury implying uncharged bad acts and threats that were made by Petitioner to two (2) of the victims, Derrick Jones

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(Derrick) and, Jason Moore (Jason), during a basketball game inside of the Saratoga Palms Apartments Basketball Court. NOTE: A.I. is Petitioner's nickname.

Kane made the following statements to the jury:

5. So, everybody lived in the same area, and they
  6. were all playing basketball in the afternoon. And Lazon
  7. was down watching the basketball game, and the basketball
  8. game was basically between A.I. and the two 19-year-olds,
  9. Derrick Jones and Jason Moore.
  10. And while Lazon was watching the basketball game
  11. he noticed that there seemed to be some friction between
  12. them. At one point Lazon will testified that he heard the
  13. defedant ask Derrick Jones, "Where's my weed? Where's my
  14. stuff?" And at another point there was a fight or
  15. something that looked like the start of a fight, a foul in
  16. the basketball game between Jason Moore and A.I., and A.I.
  17. said, "There ain't going to be any fight," which Lazon
  18. means that there was going to be violence.
  19. So what the boys understand at that point was
  20. that A.I. thought somebody had taken some weed, some
  21. marijuana that was his property, and he wanted it back or
  22. wanted to know who was responsible.
- Id. App. Vol. 3B, p. 000818, lns. 5-22.

Now, during the direct examination of State's witness Lazon Jones (Lazon), the following testimony took place with Deputy D.A. Pandukht:

10. Q. Okay. And then did anything unusual happen
  11. while you were playing basketball?
  12. A. Before, they had got into a confrontation, a
  13. argument.
  14. Q. Who's "they"?
  15. A. A.I. and Derrick.
  16. Q. What was that about?
  17. A. Over some weed. He said someone told him
  18. that—
  19. THE COURT: Who is "he"?
  20. THE WITNESS: A.I. said someone told him that
  21. Derrick had stole his weed.
- Id. App. Vol. 3B, p. 000849, lns. 10-21.

As set more fully herein below, the State was allowed to present evidence against Petitioner, that he was involved with illegal drugs, marijuana with the victims and, that he had a confrontation with them, when it was not proven by clear and convincing evidence that Petitioner ever possessed said drugs.

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Nevada Revised Statutes set forth the statutory requirements for the admission of evidence which might result in prejudice. NRS 48.035(1) states:

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or is misleading the jury...

NRS 48.045 provides in part:

1. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion...

2. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

As set forth above, evidence of uncharged bad acts is heavily disfavored. However, evidence of a prior bad act may be admissible if the following conditions are met: (1) the prior bad act is relevant to the crime charged; (2) the prior bad act is proven by clear and convincing evidence; (3) and the evidence is more probative than prejudicial.

The prerequisites enumerated above are a threshold requirement which were not met by the State in this case, as no Petrocelli Hearing was ever conducted, nor was any evidence pertaining to the Petitioner's involvement in illegal drugs ever proven by clear and convincing evidence.

Further, the following alleged threats were allowed to be presented to the jury, without proof that was clear and convincing:

14. A. We were just playing, and him and Jason, they
  15. had fouled each other -- however it happened -- but they
  16. got into a confrontation over a foul.
  19. Q. Okay. And what did he -- what did the defendant
  20. say, if anything?
  21. A. The defendant told him that he wasn't going to
  22. fight him, he was going to put some slugs in him.
- Id. App. Vol. 3B, p. 000850, lns. 14-16 & 19-22.

Evidence of the Petitioner's alleged threats to Jason should not have been admitted under NRS 48.045. Said evidence did little other than suggest to the jury that Petitioner acted in 'conformity therewith' on the day of the murders.

Such is precisely what NRS 48.045 was designed to prohibit. Evidence of alleged threats would be nothing more than cumulative and unduly prejudicial to show that Petitioner was a "bad man," who dealt in drugs.

III. c) FAILURE TO CONDUCT SCIENTIFIC TESTING

The LVMPD Crime Scene Analyst (CSA) were able to collect a blood sample at the bottom of the stairs to apartment 2068. Numerous persons were said to have gone upstairs and down from 2068, thus, other possible suspects could have been inside the dwelling, as the place held illegal drugs; which was confirmed to be in the victims bodies. Trial counsel failed to have scientific tests performed for comparisons of the blood sample found downstairs with Petitioner to eliminate the Petitioner as a suspect amounted to ineffective assistance of counsel.

IV. d) FAILURE TO CALL WITNESSES FOR THE DEFENSE OR TO PROVE PETITIONER WAS ACTUALLY INNOCENT OF THE CRIMES CHARGED

On the night of the murders, Petitioner as he has always admitted to Counsel's Brooks and O'Brien, was inside of apartment 2068. He had just returned and was inside the living room when the shooting started. He also ran away right behind Lazon Jones and Krissy Smith. Lazon headed towards the east; Krissy headed downstairs to the apartment below; and he, Petitioner headed to his ex-girlfriend's house, Erica Murdock, who wasn't home; then he went to the 7-11 on Charleston Blvd. and Atlantic where he called his friend Freeman (first name unknown), A.K.A. Young. Young was not home; so he ran to the 7-11 store on Eastern and Sahara (Video Tape of him inside the Store). He then contacted Young, who arrived a short time later with Tracey Richards and picked Petitioner up. They then proceeded to the home of a friend of Young's, who were arguing when they arrived, so they left and went to Tracey's home in Henderson, Nevada. Tracey was Young's friend, not Petitioner's and they had just met that night.

Now the reason that Petitioner fled for his life was because him being a member of the Rolling 20 Bloods from Los Angeles, and Lazon; Derrick and Jason being members of the Hoover Crips, 5-Duece, 52 St., of Los Angeles, and also the 111th St. and 112th St. Hoover Crips, who sold illegal drugs at the Saratoga Palms Apartment Complex; who were at war over territorial rights with the 28th St. Gangsters and 8-Side, he figured that the perpetrator was from one of the rival gangs, as Lazon, Derrick and Jason had all been warned to leave or suffer the consequences.

Petitioner told this to his attorneys and their investigators, yet, they failed to investigate any of the above. He provided addresses and telephone numbers on how to contact "Freeman" to corroborate his story, as Freeman also sold illegal drugs at the Saratoga Palms and had been warned by the rival Vegas gangs also, but Counsel failed to follow up on those leads. As time went by Petitioner learned that Freeman was killed in an apartment complex parking lot on Paradise and Twain in Las Vegas on December 22, 2004; (It was called a Carjacking gone bad, but he was killed 'execution style.') To date this crime is unsolved. What Petitioner did discover was that one week prior to Freeman's death, someone at the Saratoga Palms attempted to shoot Freeman and a Police Report was made to verify that. Counsel's failure to object to the uncharged bad acts admitted into evidence without conducting a Petrocelli Hearing prejudiced Petitioner due to the evidence be unreliable and not proven by clear and convincing evidence.



(b) **Ground Two:** TRIAL COUNSEL WAS INEFFECTIVE VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION WHEN HE FAILED TO DISCLOSE TO THE TRIAL JUDGE THAT A CONFLICT OF INTEREST EXISTED BETWEEN HIMSELF AND PETITIONER.

**Supporting FACTS:** Petitioner would incorporate herein as if fully stated herein all other grounds of this petition in support hereof.

1. On December 5, 2005, the date set for trial of Petitioner, lead counsel Howard S. Brooks and Timothy O'Brien informed trial Judge Nancy M. Saitta, that a conflict of interest existed between themselves and the Petitioner and, that they were requesting an oral continuance. See, App. Vol. 2, p. 000393-000394.

2. That Petitioner would like to discharge them and that his family was ready to retain Mr. John Momot; thus, Mr. Momot had told the family that he would be ready to come on the case if, in fact both attorneys were withdrawn. Id.

3. Defense counsel O'Brien then informed the Judge that Petitioner and his family were not cooperative with them and, that he thought it could lessen the impact of our mitigation case.

4. In fact, Mr. O'Brien further conceded that the relationship between Brooks, himself and petitioner had been non-existent for over a year-and-a-half and that he considered that to be an impediment to trying the guilt phase of the trial. See, App. Vol. 2, p. 000397, lns. 5-11.

5. Brooks even stated to the Judge, "that it would be better if Petitioner had an attorney who he whole heartedly wanted to work with." App. Vol. 2, p. 00397, lns. 16-22. In fact, the Judge stated that the request for continuance was extraordinary and unusual. App. Vol. 2, p. 00394, lns. 22-24.

6. Brooks failed to inform the Judge of the conflict and, had been before her eight (8) previous times in this case. See, Criminal Court Minutes, pp. 001-006; App. Vol. 7, pp. 001973-001978. No conflict of interest was ever mentioned. See, Exhibit #1. The Judge denied the motion. App. Vol. 2, p.000402,

lns. 24-25.

7. This conflict of interest began when Brooks visited Petitioner in CCDC and informed him, "It's no use." Thereafter Brooks only performed the minimal to prepare a defense for trial.

8. If Brooks would have investigated and performed his ethical duties as counsel, he would have learned that LVMPD Detectives Spencer and Wallace patrolled the Saratoga Palms Apartments due to sales of illegal drugs and gang activity. He would have learned of the L.A. Hoover Crips and 28th St. Gangsters and 8 Side territorial drug wars. And, how people enter and exit the complex; the people there the night of the crime. And that for sure at least one had gone upstairs into the apartment. He would have learned of the other possible suspects. And the conflict of interest would not have affected the attorneys performance and prevented him from raising a reasonable doubt defense in Petitioner's favor. Therefore, Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel free of a conflict of interest and, a fair trial, have been violated and the conviction should be reversed.

(c) **Ground Three; THE ADMISSION OF THE TRANSCRIBED TESTIMONY OF WINSTON BUDD CONSTITUTED ERROR IN VIOLATION OF PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION, ARTICLE 1 SECTION 1 and 5 OF THE NEVADA CONSTITUTION, DUE TO: THE INEFFECTIVE ASSISTANCE OF COUNSEL; THE CONFRONTATION CLAUSE BY THE STATE'S FAILURE TO SECURE THE WITNESS' PRESENCE AT TRIAL; AND, THE COURT'S ERROR BY ALLOWING FUNDAMENTAL UNFAIRNESS TO A FAIR AND IMPARTIAL TRIAL.**

**Supporting FACTS:** Petitioner would incorporate herein as if fully stated herein the supporting facts of all other grounds in support hereof.

1. On December 8, 2005, three (3) days after the start of Petitioner's trial, Brooks informed the trial Court that two (2) days prior, after an out of court discussion with the lead prosecutor, Kane, that Kane intended to move the trial court to admit the former testimony of Winston Budd's Preliminary Hearing Transcript pursuant to NRS 51.055 and NRS 51.325. See, App. Vol. 3A, p. 00932, lns. 5-20. As the Declarant was unavailable as a witness. See, Exhibit #2.

2. NRS 51.055 "Unavailable as a witness" defined:

1. A declarant is "unavailable as a witness" if he is:

(d) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance or to take his deposition.  
Id. See, Exhibit #2.

3. NRS 51.325 defines former testimony as:

Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, is not inadmissible under the hearsay rule if:

The declarant is unavailable as a witness...  
Id. See, Exhibit #2.

4. Over the objection of the defense, Brooks had claimed that Winston Budd was in Belize. That Kane told him that he had called his phone number and had spoken with people at his residence who confirmed that Winston was living there; and that Kane left a message asking Winston to call him back, but that Winston had not done so. See, App. Vol. 3, p.00933, lns. 4-10.

5. Brooks then informed the Court that he was not aware that anything else had been done beyond that, by the State and, that he had personally spoken

to Winston on the phone, at the same address and Winston confirmed that he lived there but that he worked and could only be reached at certain hours, usually night time. See, App. Vol. 3, p. 000933, lns. 11-20; and, Exhibit #2.

6. Brooks further informed the Court that when he talked to Winston that Winston was willing to come back to Las Vegas to testify, but the defense decided not to bring him in and, that the Country of Belize has a consulate in Los Angeles who was available to assist the State in procuring witnesses living in Belize, as he believed that there is a procedure by which the State could obtain a subpoena to procure Winston Budd's attendance. Thus, had the State actually contacted Winston, Winston would have been cooperative with the State. And, under those circumstances the defense disputed the contention that by simply calling and not receiving a returned phone call, that the State had failed to exercise reasonable diligence and had not satisfied the unavailability requirement of NRS 51.055, which therefore does not satisfy the requirement of NRS 51.325 for the former testimony to be admitted. See, App. Vol. 3 3A, p.000934, lns. 3-25.

7. Further, Brooks was able to secure the attendance of two (2) family members from the same household Winston was currently residing at in Belize, to come to Vegas and testify during the penalty phase of the trial for mitigation purposes. Kathleen Glenn, Budd's Grandmother, see App. Vol. 7, p. 001755-001766; and, Shermaine Budd, see App. Vol. 7, pp. 001810-001815.

8. The State on the other hand claimed to the Court that they attempted to contact Winston by telephone in Belize, left messages from Kane and, Winston never called back. That they would have preferred live testimony from Winston Budd and that they would have made the necessary arrangements if Winston was willing to travel to Las Vegas to testify, rather than using his Preliminary Hearing transcript, because the State of Nevada's subpoena on its face had no extra-territorial application to drag a witness back from Belize. See, App. Vol.

3A, pp. 000935-000938; and, Exhibit #2.

9. The Court's ruling was to allow the Preliminary Hearing transcript testimony of Winston Budd and, presumed there would be a formal request to use as long as the State provided by affidavit the representations that were made in open court to attribute to the investigator, for the time being and, would determine and deal with it when the prosecution brought in the motion. See, App. Vol. 3A, pp. 000938-000939.

SPECIAL NOTICE: To date, the Appellant's Appendix does not show such a motion as having been submitted by the prosecution.

10. The Court's actually ruling was as follows:

11. THE COURT: My ruling would be that
  12. an informal finding of unavailability and/or
  13. an effort to avoid contact with the state is
  14. sufficiently made and you can use the
  15. preliminary hearing transcript.
- Id. App. Vol. 3A, p. 00939, lns. 11-15. See also, Exhibit #2.

11. The admission of Winston Budd's Preliminary Hearing testimony effectively violated Petitioner's Fifth, Sixth and Fourteenth Amendment rights to confront the witnesses against him and, the only way to refute such statements would have been for Petitioner to cross-examine Winston to show the jury his demeanor while testifying to judge the truthfulness of Winston's testimony and, for Petitioner to take the stand and deny the allegations made against him by Winston, which he was unable to do because Winston was never called to the witness stand by the State.

12. Petitioner contends that the Court committed reversible error in allowing the Preliminary Hearing transcript testimony of Winston Budd to be read to the jury, based upon permitting the State's unfounded claim of "unavailability of a witness" to circumvent producing the witness, as the former testimony violated Petitioner's rights to confront the witnesses against him as well as the fundamental fairness inherent in the due process clause to a fair trial.

(d) **Ground Four:** TRIAL COUNSEL WAS INEFFECTIVE VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION WHEN BROOKS CONCEDED HIS GUILT DURING CLOSING ARGUMENTS AT THE GUILT PHASE OF THE TRIAL.

**Supporting FACTS:** Petitioner would incorporate herein as if fully stated herein all other grounds of this petition in support hereof.

1. During closing argument Brooks stated the following conceding Petitioner's guilt:

15. Let's talk about the facts. I would be insane  
16. if I didn't stand before you and say that some people may  
17. believe, right now, the State's proven Glenford killed  
18. these kids. And I have to deal with that reality. So,  
19. I'm going to talk about, first, what the evidence means,  
20. if you believe the State has shown that Glenford did, in  
21. fact, kill those three boys. But please understand I am  
22. not conceding this in any way, shape, or form; and we'll  
23. talk about that later.  
Id. App. Vol. 6, p.001510, lns. 15-22.

2. Although Brooks claim to not be conceding Petitioner's guilt in lines 21-23, he did in fact do that in lines 15-18. He then argues the degree of guilt that the jury should be found guilty of:

24. With this evidence, and considering the  
25. presumption of innocence and the burden of proof, I submit  
1. to you the State has only proven, theoretically,  
2. second-degree murder; three counts of second-degree  
3. murder.  
Id. App. Vol. 6, pp.001510-001511, lns. 24-3.

3. Brooks further concedes Petitioner's guilt as to what degree of murder he should be convicted of by attempting to quote the prosecutor's opening statement mistakenly misleading the jury on what the word 'snap' means:

25. Mr. Kane, in his opening, said that one of the  
1. witnesses would testify that Glenford said he snapped.  
2. What does that mean? The dictionary says snap is,  
3. "done, made, or carried through suddenly or without  
4. deliberation." No real thinking process. No plan. No  
5. considered judgment about what was happening. A person  
6. snapping and doing something that in this case was  
7. obviously horrible, obviously criminal and wrong, but  
8. certainly not premeditated and deliberate.  
9. Under our law, a snap decision is not

10. first degree murder. There might be an intent to kill,
  11. evidence by the use of a gun, evidence by the repeated
  12. shots. And that would be murder. But it's not
  13. first-degree murder.
- Id. App. Vol. 6, pp.001511-001512, lns. 25-13; see also, Exhibit #3.

4. The condescension as to what degree of murder Petitioner was responsible for contaminated the jury's decision making process and prejudiced Petitioner in that he could not overcome counsel's concession of guilt thereafter, no matter what defense counsel said next.

5. Therefore, Petitioner was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel, due process of law and his right to a fair trial and the conviction should be reversed.

(e) Ground Five: THE PROSECUTION'S FAILURE TO DISCLOSE AN AGREEMENT BETWEEN THE STATE AND A KEY STATE WITNESS IN EXCHANGE FOR HIS INFORMATION AND TESTIMONY, THUS, TRIAL COUNSEL'S FAILURE TO COLLECT POTENTIALLY EXCULPATORY EVIDENCE ON PETITIONER'S BEHALF, LEAD TO THE MISREPRESENTATION OF EVIDENCE, VIOLATING PETITIONER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND FUNDAMENTAL FAIRNESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Supporting FACTS: Petitioner hereby incorporates herein as if fully stated herein all other grounds of this petition in support hereof.

a. THE STATE'S FAILURE TO DISCLOSE AN AGREEMENT

1. The State's introduction of the written rap song that became a bias incriminating confession allegedly written by Petitioner violated his fundamental rights to a fair and impartial trial; as this evidence was not proven by clear and convincing evidence that it was written by Petitioner. See, Exhibit #4.

2. Greg Lewis (Lewis), a jailhouse informant who was awaiting to serve a 28 to 72 month prison term in the Nevada Department of Corrections (NDOC), contacted LVMPD Homicide Detective James Vaccaro (Vaccaro), on August 13, 2003, from the CCDC so that he could present incriminating evidence against Petitioner. Lewis gave Vaccaro the letter/rap song supposedly written by Petitioner. See, Exhibit #4: see also, App. Vol. 5, p. 001271, lns. 19-20.

3. At trial when Lewis was asked by defense counsel as to what promises the State had made to him in exchange for the evidence and his testimony he was presenting on behalf of the State for assisting to help convict Petitioner, Lewis stated under oath that he had received no assistance or promises from the State. Further, Detective Vaccaro stated under oath that he made no deals with Lewis in exchange for his testimony and information. See, App. Vol. 5, p. 001346, lns. 6-20.

4. Yet, it was later learned that Deputy District Attorney David Schwartz who was previously assigned to Petitioner's case, had written a letter of recommendation to the Nevada Parole Board on Lewis's behalf. See, App. Vol. 5,



pp. 001272-001276.

5. Even further, Detective Vaccaro stated under oath that he did not remember by whose design it was that the letter was written, but that it certainly wasn't him, nor was he the author of said letter to the Parole Board on Mr. Lewis's behalf. See, App. Vol. 5, pp. 001349-001350, lns. 19-3.

6. The failure on the State's part to disclose as to whether or not they had an agreement with Lewis in exchange for his help in the prosecution deprived Petitioner of a fair and impartial trial which prejudiced him when he was unable to explore on cross-examination the deal in exchange for Lewis's help.

B. TRIAL COUNSEL'S FAILURE TO COLLECT POTENTIALLY EXCULPATORY EVIDENCE

7. The prosecution used Lewis's testimony, a letter written in cursive, allegedly written by Lewis, one stamped envelope and a letter/rap song allegedly written by Petitioner, in an effort to obtain a confession against Petitioner, without ever actually investigating the actual evidence by having a handwriting analysis done. Defense counsel failure to have an expert in handwriting analysis examine Lewis's and Petitioner's handwriting and compare that to the purported letters written by each of them and/or taken fingerprints from the paper of each letter to determine if it had been handled by each as claimed by Lewis to prove by clear and convincing evidence who the actual persons were who wrote the letters, denied Petitioner from showing that the incriminating letter was not written by him. See, App. Vol. 5, pp. 001298-001299, lns. 19-1.

8. Any person, including Lewis, could have written this letter, especially Lewis who was benefiting by providing the State with incriminating evidence and statements against Petitioner. Although it was established that the stationary used as evidence was provided to all inmates at CCDC by way of the commissary, as it being the only type of stationary, envelopes, pens and pencils sold at the facility for correspondence purposes. See, App. Vol. 5, p. 001296, lns. 6-9,

9. When defense counsel cross-examined Detective Vaccaro and asked him as to why he never had an expert conduct handwriting analysis or fingerprint comparisons of the letters, and/or conduct a cell search of Lewis and Petitioner's cell to see if they could find similar rap songs and/or handwritten documents to provide positive proof as to who actually was responsible for the evidence presented against the Petitioner, Vaccaro stated numerous unprofessional excuses as follows:

20. THE WITNESS: Yeah, I'm sorry. I had  
21. what I, appeared to be two different styles of  
22. handwriting. We had a, sort of a nice pleasant  
23. cursive in the letter, and then we had this  
24. strange looking, I don't know even know how to refer to  
25. what those letters were in the song.  
Id. App. Vol. 5, p. 001356, lns. 20-25; see also, Exhibit #4.

11. All right. So you're saying it would  
12. not be helpful to you to have in your possession a  
13. handwriting in that style which you know is  
14. Glenford Budd's? It would not be helpful to you?  
15. No. I'm not saying it would not be  
16. helpful. It didn't occur to me further that,  
17. to try to find more of that.  
Id. App. Vol. 5, p. 001357, lns. 11-17.

12. Did you initiate any effort to have the  
13. contents of his jail cell searched to see if you  
14. could find one piece of rap music in that  
15. handwriting?  
16. No, I didn't.  
Id. App. Vol. 5, p. 001358, lns. 12-16.

10. Detective Vaccaro further gives more unprofessional excuses as to why he failed to have Lewis's or Petitioner's cell searched. See, App. Vol. 5, p. 001360, lns. 5-17; p. 001361-001365, as to why he must protect his informants.

11. The record as it stands establishes bad faith with regards to this issue on the part of the prosecution prior to and during trial, ie., a knowing violation of their ethical obligations. The evidence should have been examined by defense counsel even though it was not by the prosecution.

12. Petitioner's trial was the direct result of the prosecutor's pretrial constitutional failure to guard against improprieties in the trial process. A failure which rendered the trial itself patently unfair in due process terms, as it was never established as to who the person was that wrote the letter. Trial counsel's failure to investigate was also ineffective on his part.

13. The prosecutor's bad faith failure to collect potentially exculpatory evidence violated the due process clause as it has been made mandatory that law enforcement officials duty is not just to preserve evidence already in hand, but to also gather evidence in which the police themselves by their conduct indicate that the evidence 'could' form a basis for exonerating the defendant. Further, trial counsel's failure to have the above evidence independently tested resulted in ineffective assistance of counsel and the conviction is unreliable due to the prejudice this evidence caused Petitioner by misleading the jury into believing that Petitioner had written this letter/rap song admitting guilt of the crimes.

(f) **Ground Six:** TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTORIAL MISCONDUCT DURING OPENING STATEMENT OF A HIGHLY INCUPLYATORY AND PREJUDICIAL NATURE WAS INEFFECTIVE ASSISTANCE THAT VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.

**Supporting FACTS:** Petitioner would incorporate herein as if fully stated herein all other grounds of this petition in support hereof.

1. On September 14, 2004, Brooks filed: DEFENDANT BUDD'S MOTION IN LIMINE FOR ORDER PROHIBITING PROSECUTORIAL MISCONDUCT IN ARGUMENT: AND FOR ORDER THAT COURT TAKES JUDICIAL NOTICE OF AUTHORITY CITED IN THIS MOTION IF DEFENSE OBJECTS AT TRIAL TO IMPROPER ARGUMENT. See, App. Vol. 1, p. 000089, id. at 000093-000107.

2. During Opening Argument to the jury, Kane made the following statements:

Now, aside from the evidence of the witnesses to the crime and the evidence that the police gathered at the crime scene, you will also receive evidence -- as I told you -- of what the defendant did after the crime. And you'll hear from Tracy Richards, and Tracy Richards was an acquaintance of the defendant's, she saw him on the morning after the killings, and was sitting on a bench at a fast-food joint and just seemed to be at loose ends. She asked him what he was doing and, he told her he had a fight with his girlfriend and really didn't have any place to stay. And she said, "Well, why don't you come over to my house?"

And, so, he went over to her house, where he spent the day after the murder and that night. She said he seemed extremely nervous and he was chain smoking. And so, when she woke up on the next morning, she said, "Well, I'll go down to the store and get some more cigarettes." And as she was getting ready to leave, the defendant said to her, "I had the weirdest dream. I dreamed that three guys stole my weed and I had to kill them all." And she just sort of laughed it off, went out to the store, and by the time she got back, he was gone. Id. App. Vol. 3B, p. 000824-000825, lns. 8-4; see also Exhibit #5.

3. The prosecution 'never called Tracy Richards' as a witness; which is the exact reason why defense counsel filed the above named motion, to place the District Attorney's Office on notice not to knowingly commit misconduct, who has a history and practice of violating the constitutional rights of criminal defendants their Office has charged with committing crimes through the use of knowing and deliberate acts of misconduct.

4. The prosecutor, Kane, further committed prosecutorial misconduct when he stated: the jurors would hear from the defendant's uncle Winston Budd, who saw him later that day; and when he saw him, the first thing he noticed was that all of his Allen Iverson hair was bald. It was gone. He looked like Michael Jordan, maybe; but not like Allen Iverson.

5. The prosecutor even went further, so as to allege that Petitioner confessed to his uncle Winston to killing them. Winston also never testified at Petitioner's trial, although his Preliminary Hearing Transcript was allowed to be read to the jury by the Court pursuant to NRS 51.055(1)(d) and NRS 51.325(1). Id. Vol. 3B, p. 000825, lns. 16-18; see also Exhibit #5.

6. On December 13, 2005, Defense Counsel, outside the presence of the jury requested a mistrial based upon the prosecutor's comments to the jury of what Tracy Richards would testify to and not being called to testify as claimed by the prosecution.

7. The Court denied the motion for a mistrial. Id. App. Vol. 6, pp. 001466-001469, see also Exhibit #6.

8. Based upon the foregoing facts stated above, Petitioner claims the prosecutions statements during opening statements to the jury were highly prejudicial in nature which violated his right to due process under the Fourteenth Amendment to the U.S. Constitution, and therefore his conviction should be reversed.

(g) **Ground Seven:** TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO JUDICIAL MISCONDUCT THAT WAS COMMITTED VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION, WHEN THE TRIAL JUDGE FAILED TO SUA SPONTE ORDER A MISTRIAL BASED UPON THE PROSECUTORIAL MISCONDUCT.

**Supporting FACTS:** Petitioner hereby incorporates herein as if fully stated herein all other grounds of this petition in support hereof.

1. On September 14, 2004, defense counsel filed a Motion In Limine For Order Prohibiting Prosecution Misconduct In Argument; And For Order That The Court Take Judicial Notice Of Authority Cited In This Motion If Defense Objects At Trial To Improper Argument. See, App. Vol. 1, pp. 000089-000107.

2. During opening argument Kane made improper arguments and statements to the jury that Tracy Richards would testify to certain facts. See, Ground Six of this petition.

3. The State never called Tracy Richards as a witness and the evidence to support Kane's representation as to what Richards would testify to, was never presented to the jury.

4. As the result to the above, defense counsel requested a mistrial. The State argued making bare naked allegations as to why they failed to present Tracy Richards as a witness. See, App. Vol. 6, p. 001467, lns. 1-22. And, as a result, the trial Judge denied the motion for a mistrial. See, App. Vol. 6, p. 001469, ln. 2.

5. The State knowingly and deliberately bolstered their case by exposing the jury to factual statements the prosecutor knew would not be supported by evidence. This deprived the Petitioner of a fair trial and due process of law and required that a mistrial be declared sua sponte.

6. Furthermore, the possibility that a deliberate and especially egregious error as made in the opening statement by the prosecutor, combined with a pattern of prosecutorial misconduct, "such as in this case," so infected the integrity of the trial process that the conviction should be reversed.

(h) **Ground Eight:** TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ERRONEOUS JURY INSTRUCTION WHICH EXPANDED THE ELEMENTS OF FIRST DEGREE MURDER AND WITNESS CREDIBILITY, INSTRUCTIONS 7 AND 17 RESPECTIVELY, DID NOT ADEQUATELY AND/OR ACCURATELY COVER THE ISSUES TO BE DETERMINED BY THE JURY, THUS VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.

**Supporting FACTS;** Petitioner would incorporate herein as if fully stated herein all other grounds of this petition in support hereof.

1. Trial counsel should have objected to jury instruction #7, which stated:

Murder of the first degree is murder which is perpetrated by means of any kind of willfull, deliberate, and premeditated killing. All three elements -- willfullness, deliberation, and premeditation -- must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder.

Willfullness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.

Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the actions.

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate even though it includes the intent to kill.

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been the result of premeditation, no matter how rapidly the acts follows the premeditation, it is premeditated. Id. App. Vol. 6, pp. 001476-001477, lns. 25-25.

2. In the above quoted instruction, paragraphs 1, 2, 3, 5 & 6, are derived from NRS 200.030(1)(a) and correctly informs the jury that there are three (3) necessary elements to the crime of first degree murder.

3. Paragraph four (4) describes passion, which is not one of the three (3) essential elements, "WILLFULL," "DELIBERATE," and "PREMEDITATED," as derived from NRS 200.030 are. The "PASSION" part of the instruction expanded the elements of first degree murder in violation of the due process clause to the Fourteenth Amendment and should have been objected to as such by trial counsel.

4. Jury Instruction 17 stated:

The credibility of a witness should be determined by his manner upon the stand, his or her relationship to the parties, his or her fears, motives interests or feelings, his or her opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his or her testimony which is not proved by other evidence. Id. App. Vol. 6, p. 001485, lns. 2-12.

5. This Instruction addressed the credibility of a witness. Petitioner was entitled to an instruction that a biased or interested witness, such as Winston Budd or Greg Lewis, who had motives to testify falsely could be discredited. The Court instruction as to how the jury could determine whether to believe or, not believe, a particular witness and the weight to give said testimony, could not be clearly established by the jurors, because:

(a) The State's prime witness Celeste Palau did not clearly identify Petitioner due to her being 218 feet from the person she observed and it being dark outside without any lighting, and that she only saw an outline of the structure of the person's body. See, App. Vol. 4, p. 001213, lns. 17-23; see also Ground One of this Petition.

(b) The State failed to give the defense an opportunity to cross-examine Winston Budd. See, Ground Three of this Petition.

(c) Krissy Smith's testimony lacked credibility as she herself stated under oath that she did not know exactly how many people were inside of apartment 2068 and, after running downstairs immediately went inside a downstairs apartment.

6. The Court should have given or made a modification to the instruction regarding witness credibility offered by the state. Defense Counsel failure to object and offer a constitutional definition of how to determine a witness's credibility fell below an objective standard of reasonableness and was ineffective assistance of counsel.



(i) **Ground Nine:** APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ON DIRECT APPEAL THE STATUTORY DEFINED REASONABLE DOUBT INSTRUCTION AS BEING UNCONSTITUTIONAL, VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.

**Supporting FACTS:** Petitioner would incorporate herein as if fully stated herein all other grounds of this petition in support hereof.

1. The reasonable doubt instruction is burden shifting and lowers the State's burden of proof, as well as defining when there is not a reasonable doubt:

The defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a verdict of not guilty.  
Id. App. Vol. 6, p. 001483, lns. 5-21.

2. Petitioner concedes that the first paragraph of the instruction is an acceptable definition of reasonable doubt, the offensive language is contained within the following second and third paragraphs.

3. The third sentence of the second paragraphs states, "if in the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt."

4. By using the term, "after the entire comparison and consideration of all the evidence," the State has shifted the burden to the defendant to place before the jury "evidence" in order for the jury to make a comparison too, to rebut the State's charge[s]. Otherwise, why would the jury need to make a comparison of evidence? Further, it does not tell them what it is to be compared to, or how to go about it.

002735

5. The next part of the sentence lowers the State's burden of proof and also shifts the burden to a defendant to prove he is innocent of the charge[s] when it states, "are in such a condition that they can say they feel an abiding conviction of the truth of the charge."

6. Many people have 'abiding convictions' that require no evidentiary proof. This sentence tells the jury that if they believe the State, then there is no reasonable doubt as to the guilt of the defendant. This belief that the State is telling the truth when it charged the defendant lowers the State's burden of proof, since it is not based upon evidence, also, it shifts the burden to the defendant to prove that there is no truth to the State's charge, thus he must put on evidence to rebut the State's charge. The last sentence of that paragraph, "Doubt to be reasonable must be actual, not mere possibility or speculation," highlights that if the jury believes the State, then it must find the defendant guilty because to have a reasonable doubt that the defendant is not guilty to the State's charge[s] it must be an actual, not mere possibility or speculation, because we all know that the State would never wrongly accuse a person, which again shifts the burden to the defendant to prove that there is no truth to the State's charge because he did not commit the crime.

7. The third paragraph is a red herring to mislead the jury and throw a bone to the defendant, "If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a verdict of not guilty." As the preceding paragraph indicates, to have a 'reasonable doubt' it must be an actual doubt as to the guilt of the accused, it cannot be mere possibility or speculation that he is innocent, but an 'actual doubt.' Again this paragraph when taken in context with the preceding paragraph that tells a jury when there is "not a reasonable doubt" shifts the burden to the defendant to prove he is not guilty. It also negates the entire first paragraph when read in context with the second.

8. Appellate counsel was ineffective for failing to present this issue on direct appeal as denying Petitioner a Fair Trial and Due Process of Law as guaranteed under the Fifth and Fourteenth Amendments to the U.S. Constitution, which prejudiced Petitioner because it was a structural error that undermined the entire trial process, violating Petitioner's Sixth and Fourteenth Amendment rights to the U.S. Constitution.

(j) **Ground Ten:** APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT MERITORIOUS ISSUES ON DIRECT APPEAL, VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.

**Supporting FACTS:** Petitioner would incorporate herein as if fully stated herein grounds one through nine of this petition in support hereof.

1. Petitioner was prejudiced in that the all of the issues presented on direct appeal were not presented as having been constitutional violations, but were argued as State Law claims which has waived Petitioner's right to have his constitutional violations adjudicated on Direct Appeal with the assistance of counsel.

2. Further, grounds one through nine of this petition could have been presented on direct appeal as being in violation of Petitioner's Fifth, Sixth and Fourteenth Amendment Constitutional rights to the U.S. Constitution. Counsel failed to provide reasonably effective assistance of counsel when he failed to recognize this issues and present them as constitutional violations, again waiving Petitioner's right to have the issues heard on their merits as constitutional violations and thereby waiving his right to seek review by Writ of Certioarai with the U.S. Supreme Court, or by was of 28 U.S.C. subsection 2254, which has prejudiced Petitioner by violating his First and Fourteenth Amendment rights of access to the courts.

002728

(k) Ground Eleven: THE ACCUMULATION OF ERRORS BY TRIAL COUNSEL AND APPELLATE COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL VIOLATING PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION.

**Supporting FACTS:** Petitioner would incorporate herein as if fully stated herein grounds one through ten of this petition in support hereof.

1. Trial counsel was ineffective for failing to perform reasonable meaningful investigations of the facts of the case. See, Ground One.

2. Trial counsel was ineffective for failing to disclose that a conflict of interest existed between the Petitioner and counsel. See, Ground Two.

3. Trial counsel was ineffective for failing to require the prosecution to produce Winston Budd to testify rather than the Court allowing his Preliminary Hearing testimony to be read to the jury. See, Ground Three.

4. Trial counsel was ineffective when he conceded Petitioner's guilt during closing arguments at the guilt phase of the trial. See, Ground Four.

5. Trial counsel was ineffective when he failed to require the State to disclose an agreement between the State and a key witness. See, Ground Five.

6. Trial counsel was ineffective when he failed to object to prosecutorial misconduct. See, Ground Six.

7. Trial counsel was ineffective when he failed to object to judicial misconduct. See, Ground Seven.

8. Trial counsel was ineffective when he failed to object to erroneous Jury Instructions Nos. 7 and 17. See, Ground Eight.

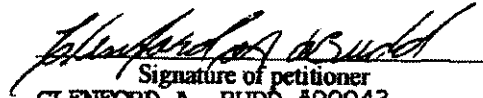
9. Appellate counsel was ineffective when he failed to present the reasonable doubt instruction as being unconstitutional on direct appeal. See, ground Nine.

10. Appellate counsel was ineffective for failing to present grounds one through nine of the petition as constitutional violations on direct appeal. See, ground Ten.

11. All of the above errors have accumulated to the point as to deny Petitioner his right to due process of law and the right to a fair trial, to such an extent that the trial can not be relied upon to have been a fair adjudication on the merits of the case.

**WHEREFORE**, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

**EXECUTED** at Ely State Prison, on the 18 day of the month of September of the year 2007

  
Signature of petitioner  
GLENFORD A. BUDD #90043  
Ely State Prison  
Post Office Box 1989  
Ely, Nevada 89301-1989

Prepared By Inmate:

  
FERNANDO RODRIGUEZ #51052

\_\_\_\_\_  
Signature of Attorney (if any)  
  
\_\_\_\_\_  
Attorney for petitioner  
  
\_\_\_\_\_  
Address

**VERIFICATION**

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

  
Petitioner

\_\_\_\_\_  
Attorney for petitioner

**CERTIFICATE OF SERVICE BY MAIL**

I, GLENFORD A. BUDD, hereby certify pursuant to N.R.C.P. 5(b), that on this 18 day of the month of September, of the year 2007, I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

~~E. K. McDANIEL, Warden, ESP~~  
Respondent prison or jail official

P.O. Box 1989  
Ely, Nevada 89301  
Address

Catherine Cortez Masto  
Attorney General  
Heroes' Memorial Building  
100 North Carson Street  
Carson City, Nevada 89710-4717

DAVID ROGER  
District Attorney of County of Conviction  
200 Lewis St.  
P.O. Box 552212  
Las Vegas, Nevada 89155-2212  
Address

  
Signature of Petitioner  
GLENFOD A. BUDD



**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding PETITION

EPR WRIT OF HABEAS CORPUS (POST-CONVICTION)  
(Title of Document)

filed in District Court Case No. 03-C-193182-C

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

Erinford A Budd  
(Signature)

September 18 2007  
(Date)

002743

ASB

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD ANTHONY BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46977

**FILED**

JAN 09 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction and sentence. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On March 1, 2006, the district court convicted appellant Glenford Anthony Budd, pursuant to a jury verdict, of three counts of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve three consecutive terms of life in prison without the possibility of parole for the murders and three consecutive equal terms for the deadly weapon enhancements.

Budd's sole claim on appeal is that there was insufficient evidence to support his convictions. "In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence."<sup>1</sup> Evidence is sufficient to

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<sup>1</sup>Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002) (citing Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980)).

sustain a conviction if, viewed in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>2</sup>

At trial, Lazon Jones testified that in the hours before midnight on May 26, 2002, he was present in his apartment with his brother Dajon Jones, Derrick Jones (no relation), Jason Moore, and Budd. Budd left for about 15 minutes to buy a drink, then returned to the apartment, said he needed to use the bathroom, and went into the master bedroom where Dajon Jones was, closing the door behind him. Lazon Jones then heard two gunshots and Budd saying, "Where's my stuff at?" He then heard a third gunshot, at which point he fled the apartment and called 911 from a nearby pay telephone. While waiting for police to respond to his location, he saw Budd run across the street with a gun in his hand. He also testified that only himself, Dajon Jones, Derrick Jones, Jason Moore, and Budd were present when the shots were fired, and that he had seen Budd and Derrick Jones argue about Budd's missing marijuana earlier that day.

Las Vegas Metropolitan Police detectives Patricia Spencer and Michael Wallace were patrolling the apartment complex in a vehicle at the time of the incident. Detective Spencer testified that she heard gunshots, drove toward them, and observed an agitated group of people in front of a

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<sup>2</sup>Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (emphasis in original) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

staircase leading up to some apartments. They also saw a young man run past their vehicle in his socks. She and Detective Wallace proceeded up the staircase and found Jason Moore, apparently dead from gunshot wounds, on the landing in front of Lazon Jones's apartment. They found Dajon Jones, also dead from gunshot wounds, in one of the bedrooms. Derrick Jones was lying in the hallway, wounded but alive. He was transported for medical treatment but died later from his wounds.

Celeste Palau testified that she was on her balcony when she heard the sound of what she thought were firecrackers coming from Lazon Jones's apartment. She looked in that direction and saw Lazon and a young woman she knew as Chrissy run down the staircase from the apartment. She then saw Budd exit the front door, linger on the landing while firing a weapon three times, then walk down the staircase and away from the area. She did not see anyone else leave the apartment.

Chrissy Smith testified that she was standing on Lazon Jones's apartment landing talking to Jason Moore when she heard shots. Derrick Jones and Lazon Jones then ran from the apartment. She and Lazon Jones ran down the stairs, but Derrick Jones went back inside the apartment.

Crime scene analysts recovered 11 expended cartridges from a 9-millimeter handgun at the scene as well as bullets and bullet fragments. All the cartridges were determined to have been fired by the same weapon. The bullets were also for a 9-millimeter, but analysts could not determine whether they were fired by the same weapon. The murder weapon was never recovered.

The medical examiner testified that Jason Moore sustained three gunshot wounds, one to the back of the head, one to the right neck, and one to the back of the right shoulder. Dajon Jones had two gunshot wounds to the left neck, one fired from about 24 inches away. Derrick Jones had seven gunshot wounds, including wounds to the forehead, ear, back of the left shoulder, right upper back, right hand, and back of the left arm. Four of the shots were fired from behind the victim. All of the victims' blood contained traces of marijuana and no trace of alcohol.

The preliminary hearing testimony of Budd's uncle, Winston Budd, was read into the record. Winston Budd testified that during the two days after the killings, before Budd was arrested, Budd called him and asked him to pick him up from a friend's house and to get some money for him so he could "get out of here." When Winston Budd picked Budd up, he noticed that Budd had cut his hair. Budd also told him that he suspected the victims had robbed him of some marijuana and he had shot them. Winston Budd testified that Budd said he had given the gun back to a friend, but did not name the friend. He advised Budd to turn himself in, but Budd said he "preferred to run."

Greg Lewis, who knew Budd before the killings, was in the same jail housing unit as Budd after Budd's arrest. Lewis testified that Budd told him he shot three people but a fourth had gotten away. Lewis notified homicide detectives of this information. Several days later, he also gave detectives a letter he had received from Budd in which Budd implicated himself in the killings. Lewis and a detective testified that no promises were made to Lewis to obtain his information or testimony, but

the jury was informed that an assistant district attorney wrote a letter to the parole board noting Lewis's cooperation in the investigation.

The detective who questioned Budd after his arrest testified that Budd said he had been in the apartment but fled with Lazon Jones after he heard shots.

Budd argues the evidence supporting his convictions was insufficient because Lazon Jones did not actually see him shoot anyone and because the witnesses were not credible. He claims that Lazon Jones, Celeste Palau, and Chrissy Smith gave differing testimony about the facts. In particular, he notes that Lazon Jones never mentioned Chrissy Smith and claimed the men were drinking alcohol but not smoking marijuana before the killings, whereas the victims' blood revealed traces of marijuana but not alcohol. Budd also notes that Celeste Palau's balcony was more than 200 feet from the scene of the crime, that Greg Lewis wanted help in obtaining parole, and that Winston Budd was not present in court.<sup>3</sup>

"[C]ircumstantial evidence alone may support a conviction."<sup>4</sup> In this case, from the direct and circumstantial evidence presented, the jury could reasonably have inferred from the testimony presented that Budd was guilty of three first-degree murders with the use of a deadly

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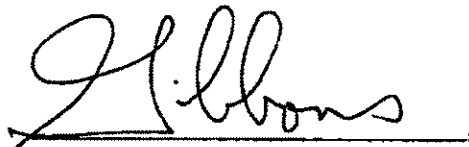
<sup>3</sup>At the time of trial, Winston Budd resided outside the country. The district court allowed his preliminary hearing testimony to be read into the record over a defense objection after the State detailed its fruitless efforts to secure his presence at trial.


<sup>4</sup>Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

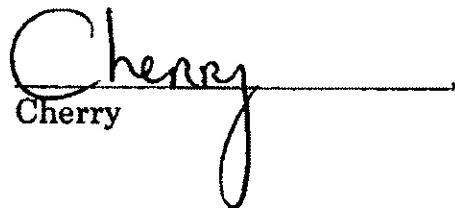
weapon. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.<sup>5</sup>

Having reviewed Budd's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Gibbons

 J.  
Douglas

 J.  
Cherry

cc: Eighth Judicial District Court, Department Eighteen  
Clark County Public Defender Philip J. Kohn  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>5</sup>See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

1 so we can get a ruling because we are going to  
2 want to reference briefly, not in any great  
3 detail, what Winston Budd will be saying, in  
4 our opening statement.

5 THE COURT: So long as you have the  
6 proof to support the representations that you  
7 have made regarding the efforts of your  
8 investigator.

9 MR. KANE: And I am aware of the risk  
10 there and I'll assume it, Judge.

11 THE COURT: My ruling would be that  
12 an informal finding of unavailability and/or  
13 an effort to avoid contact with the state is  
14 sufficiently made and you can use the  
15 preliminary hearing transcript.

16 MR. KANE: Let me just make one final  
17 offer, Judge, since Mr. Brooks and his  
18 cocounsel are apparently in touch with the  
19 family, if Mr. Budd is flying up with these  
20 other people and he is going to be here  
21 tomorrow, I would be more than happy to put  
22 him on as a live witness rather than use his  
23 testimony, and I make that offer in open  
24 court.

25 THE COURT: Very well. Anything else



# **EXHIBIT**

## **# 3**

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED IN OPEN COURT

DEC 15 2005 20

SHIRLEY J. PARRAGUIRRE, CLERK

BY Kristen M. Brown

KRISTEN M. BROWN DEPUTY

THE STATE OF NEVADA,  
Plaintiff,

vs.

GLENFORD ANTHONY BUDD,  
Defendant.

Case No.: C193182

Dept. No.: XVIII

VOLUME 6

ORIGINAL

REPORTER'S TRANSCRIPT OF JURY TRIAL

Before the Honorable Nancy M. Saitta, District Court Judge

Tuesday, December 13, 2005

1:35 p.m.

APPEARANCES:

For the State: EDWARD KANE, ESQUIRE  
Deputy District Attorney

TALEEN PANDUKHT, ESQUIRE  
Deputy District Attorney

For the Defendant: HOWARD BROOKS, ESQUIRE  
Deputy Public Defender

TIMOTHY O'BRIEN, ESQUIRE  
Deputy Public Defender

Reported by: Jean M. Dahlberg, RPR, CCR 759, CSR 11715

PRESTIGE COURT REPORTING  
State of Nevada v. Budd

001463

002652

COUNTY CLERK

DEC 15 2005

PRESTIGE COURT REPORTING

1 proving this case is the government's. They must prove  
2 their case beyond a reasonable doubt.

3 People often say there really isn't a  
4 presumption of innocence in these kind of cases. Some  
5 people say, "Well, if the State has brought the case to  
6 trial, surely there must be something there." In fact,  
7 you may have heard other jurors say this during the course  
8 of jury selection. Well, the fact is, the presumption of  
9 innocence and the burden of proof are only as real as you  
10 make them real. It's your job in this case to look at  
11 their evidence and test it, question it, doubt it, and see  
12 what the truth really is. Apply the burden of proof to  
13 every fact, every bit of testimony, every inference, and  
14 that's how we get a fair verdict.

15 Let's talk about the facts. I would be insane  
16 if I didn't stand before you and say that some people may  
17 believe, right now, the State's proven Glenford killed  
18 these kids. And I have to deal with that reality. So,  
19 I'm going to talk about, first, what the evidence means,  
20 if you believe the State has shown that Glenford did, in  
21 fact, kill those three boys. But please understand I am  
22 not conceding this in any way, shape, or form; and we'll  
23 talk about that later.

24 With this evidence, and considering the  
25 presumption of innocence and the burden of proof, I submit

1 to you the State has only proven, theoretically,  
2 second-degree murder; three counts of second-degree  
3 murder.

4 Now, why do I say that? The difference between  
5 first- and second-degree murder is about what is happening  
6 in Glenford's head. It's about the person's intent. It's  
7 about whether he is thinking about what he is doing.

8 The law in Instructions 7 and 8 tell you that a  
9 killing is a deliberate killing if the defendant uses his  
10 mind to determine upon a course of action, and he weighed  
11 the reasons for it and against it.

12 The State has shown absolutely not one shred of  
13 evidence in this case that Glenford committed a  
14 premeditated and deliberate killing. These people were  
15 his friends. He hung out with these people. These are  
16 kids. They played basketball together. They smoked  
17 marijuana together. These were not enemies. This is not  
18 someone where he would stand back and say, "I've got to  
19 kill these people." This is in the realm, ladies and  
20 gentlemen, of classic unpremeditated murder, if it is  
21 murder at all. This is a case where not only was there no  
22 weighing the benefits and the bad points of killing these  
23 people, I'm not sure there was any thinking going on at  
24 all.

25 Mr. Kane, in his opening, said that one of the

1 witnesses would testify that Glenford said he snapped.  
2 What does that mean? The dictionary says to snap is,  
3 "done, made, or carried through suddenly or without  
4 deliberation." No real thinking process. No plan. No  
5 considered judgment about what was happening. A person  
6 snapping and doing something that in this case was  
7 obviously horrible, obviously criminal and wrong, but  
8 certainly not premeditated and deliberate.

9 Under our law, a snap decision is not  
10 first-degree murder. There might be an intent to kill,  
11 evidenced by the use of a gun, evidenced by the repeated  
12 shots. And that would be murder. But it's not  
13 first-degree murder.

14 I want to emphasize that the language in the  
15 instructions is confusing. You're going to read the  
16 Instructions -- there's an Instruction, and Ms. Pandukht  
17 referred to it -- that premeditation and deliberation can  
18 occur in as little as successive thoughts of the mind;  
19 whatever that means. Has there been evidence in this case  
20 about which thought was in his mind here and which thought  
21 was in his mind there? I submit to you there's been no  
22 evidence by any thinking going on in this young man's mind  
23 at all. And I estimate to you that the idea that we're  
24 glowing to talk about, how successive thoughts of the mind  
25 occur is theoretical nonsense. In this case, ladies and

# **EXHIBIT**

## **# 4**

002656

#32

330 S. Casino Center Blvd  
Las Vegas, NV 89101

IN house  
mail

T480  
8-10-04

85101/2102

Postage and Fees

330 S. Casino Center Blvd  
Las Vegas, NV 89101



002657

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The United States  
Post Office  
Washington, D.C.

Mr. B.  
1800  
330  
18

 THIS ENVELOPE IS RECYCLABLE AND MADE  
WITH 30% POST CONSUMER CONTENT.

002658



Mum,

Whats going on or whats the word?  
al just got through reading your letter,  
its good to hear from you havin a usual  
N-l-ways al did get that money and  
al did write to thank you al sent it  
to your moms house al didn't think it  
got to you cause al didn't hear from  
you. Well, as far as im still here on  
the 9<sup>th</sup> floor I side but al moved to room  
18 a single room after what I sent  
home, al aint heard from me in a while  
he did see a nigger come flirts al called  
his house but the number off visits for  
me is the same like when you was up  
here Sunday's, Monday's, Wednesday's, and Friday's  
feel me, if old girl come up here that  
ill be back, the bitch that was coming  
up here was off on go day but one  
of my old female's stop right in your  
room, how it goes the only thing about  
her is she don't come up here she don't  
wanna see a nigger like this after that  
old girl pulled al sick al would take  
these female's serious, ill hit the out-  
side again the bitch just gonna take  
time that's all don't trip al aint gone in.

3rd P.S. we got killed in a/c  
Still. right

2nd P.S. We feel as if we've been  
back to the movement since this  
weekend. We've been in here 14 months now. I still  
that we're fighting. But it'll be home. Believe that.  
We left. Congratulations on your shooting. Being  
most of these it's a good thing. It's as if the  
we get some missions. Some more. Some more. Ride  
sent up as soon as we get back. I'll be  
in note. I've asked if we still growing. May  
back out. Right now. I got it. Twisted  
up going down. I'm in. I wanted to  
try for a while. But never did. Because  
of the long process. I said what  
(702) better time than now? A nigger. It is  
266- long. Then with twists. It's almost to  
4567 the upper middle of my thigh. With it  
Cell # twisted. It looks like a shot. I got my nig  
(702) this time. When you return. Have it. It's  
649- you last. You have ride. It's this time  
7551 when it's at. I'll get out and wait  
house # for my return. I'll stay in contact  
get at it. Always good to have a real nigger  
him till on the ground. You know? I'll be  
on a. get back at me as soon as you get  
said to this, one. I'll be. P.S.  
get at We got. Tell the girl to  
me. I'll be. get at me. I'll be. 000000

CHUCK #3 THIS IS THE I GOT MY HAND SOLD IN 90V  
RELEASED WHEN THEY RELEASE THE

P.S. ZORUM "KILLER IN THE" OF THE CO "MAMAMUSI"  
SO SHIPPY THEY CALLED THE SHIP, AKA A.F.  
THIS HON EVERYDAY ON THE STREET I USED TO  
LIVE THERE THEY KILL, THERE'S MILES FAR A KILL  
SO PEOPLE DON'T GET IT CONFUSED, I'M WEARIN' COUNTRY  
CLOTHES BUT MY TALK ON THE NAVY, BLEW  
MY WAY THERE, NINE OF THE EARLY, THAT'S THE  
WAY IT WAS 90, I ONLY KILLED 3  
BUT I SHOULD KILLED 4, I LEFT  
ON THE ROAD ON THE ROAD, BUT JUST  
RIGHT BEFORE THEY WAS CERTAIN N  
PLEASANT, SOME AMIN FOR JESUS,  
IS ANCHOR, YOU CAN KEEP THE ROAD AND YE  
CAN'T SPEAK E NOW, AND YE ARE IS  
HONORABLE, CROSS ME I KNOW THE  
A BOMB, TAKE A MURDER FROM THE  
MURDER, I'M A SHIPPER KILLER ASK  
GALAXY A PART. -  
LULLMA - MURDERER/AN-

How do I know "my" name  
is correct. Will it  
be all -

1 Q. It would be very, very helpful to you if  
2 you had in your possession other rap songs in that  
3 handwriting that you knew belonged to Glenford  
4 Budd; isn't that right?

5 A. For like a comparison for handwriting?

6 Q. Absolutely.

7 A. I suppose.

8 Q. Don't you think it would be incredibly  
9 helpful to have a document that you knew was  
10 Glenford Budd's in that precise handwriting?

11 A. Well, I don't think it would be  
12 incredibly helpful.

13 Q. Of course, it would be.

14 A. But I have --

15 MS. PANDUKHT: Objection, argumentative.

16 MR. BROOKS: Okay. Let the man answer.

17 THE COURT: Sustained.

18 THE WITNESS: Well, I had --

19 THE COURT: Or to explain his answer.

20 THE WITNESS: Yeah. I'm sorry. I had  
21 what I, appeared to be two different styles of  
22 handwriting. We had a, sort of a nice pleasant  
23 cursive in the letter, and then we had this  
24 strange-looking, I don't even know how to refer to  
25 what those letters were in the song.

1 BY MR. BROOKS:

2 Q. Okay. I don't care about the whole issue  
3 of his nice handwriting.

4 A. Right.

5 Q. Wouldn't it be helpful to you to have  
6 handwriting from Glenford Budd in that rap style  
7 that you know is Glenford Budd's?

8 A. I, it didn't, it didn't pose itself to  
9 me. I didn't think that that would be helpful to  
10 me.

11 Q. All right. So, you're saying it would  
12 not be helpful to you to have in your possession a  
13 handwriting in that style which you know is  
14 Glenford Budd's? It would not be helpful to you?

15 A. No. I'm not saying it would not be  
16 helpful. It didn't occur to me to further that,  
17 to try to find more of that.

18 Q. Wouldn't it be helpful to you?

19 A. I don't know whether it would be  
20 comparable or not because, as I said, I knew what  
21 his handwriting was. I don't know what that was.  
22 And I guess we could beat that up all afternoon  
23 about whether --

24 Q. Mr. Vaccaro, wait a second. You know  
25 what I'm getting at. Let's assume that you could

1 have a document in the same handwriting --

2 A. Uh-huh.

3 Q. -- as 49C --

4 A. Okay.

5 Q. -- that you know comes from Glenford  
6 Budd. That would certainly be helpful to you,  
7 wouldn't it?

8 A. If I had him write that, sure.

9 Q. Absolutely. And the jail is cooperative  
10 with you; isn't that right?

11 A. Yes. They did, I would say they are.

12 Q. Did you initiate any effort to have the  
13 contents of his jail cell searched to see if you  
14 could find one piece of rap music in that  
15 handwriting?

16 A. No, I didn't.

17 Q. Okay. But that would be helpful to you  
18 if you did?

19 A. It didn't occur to me at the time, no.

20 Q. But it would certainly be helpful to you?  
21 It would be helpful to you if the State's Exhibit  
22 49C had Glenford Budd's fingerprints on it,  
23 wouldn't it?

24 A. Yes.

25 Q. Was there ever a request made to do a

1 fingerprint analysis of that document?

2 A. No.

3 Q. It would be very helpful to you if you  
4 found out that, that 49C that, that gang script --

5 MS. PANDUKHT: Objection.

6 MR. BROOKS: What?

7 THE COURT: It's not been characterized  
8 in that manner.

9 BY MR. BROOKS:

10 Q. Okay. I'll take away gang script.

11 Excuse me.

12 The rap, the rap script, it would be  
13 helpful to you if you found a document with that  
14 script in the cell occupied by Greg Lewis in the  
15 prison?

16 A. I disagree.

17 Q. Why?

18 A. I thought that that, when I read it, was  
19 personalized enough that it was the product of  
20 Glenn Budd. So, it has enough things in it that  
21 personalized it to me that it's his product, and  
22 so I took no further steps.

23 Q. So, you don't care about the possibility  
24 that Greg Lewis wrote that in his cell at prison?  
25 Is that what you're saying?



1 A. No. I'm not saying I don't care about  
2 that. Certainly I would be interested in knowing  
3 if that was the case, but I have no way of knowing  
4 that.

5 Q. And wouldn't it have been helpful just to  
6 go through Greg Lewis's cell at prison and see if  
7 you might find that exact handwriting there in his  
8 prison cell?

9 MS. PANDUKHT: Objection, asked and  
10 answered.

11 MR. BROOKS: No. I don't think it has  
12 been answered.

13 THE COURT: I would agree with it, but  
14 I'll give you one more shot.

15 THE WITNESS: I didn't examine  
16 Mr. Lewis's cell or Mr. Budd's cell. I didn't  
17 cause that to happen.

18 BY MR. BROOKS:

19 Q. Okay. Ms. Pandukht has asked you about  
20 the whole procedure that happened when  
21 Mr. Schwartz sent the letter to the parole board.

22 Did you have conversations with David  
23 Schwartz about his sending that letter to the  
24 parole board?

25 A. No. I said, David, don't forget

1 Mr. Lewis. And I don't know what his process was.  
2 It's not my arena for me to address the parole  
3 board on behalf of an inmate. And so I knew  
4 something had taken place with Mr. Schwartz, but I  
5 did not know nor have I been copied with that.  
6 So, I don't know. I've never seen the product.

7 Q. But you had a conversation with him on  
8 the telephone, which you said, don't forget  
9 Mr. Lewis?

10 A. Actually I think he was in the office,  
11 and it was a face-to-face thing.

12 Q. Okay. You yourself, you never sent any  
13 information to the parole board on behalf of  
14 Mr. Lewis?

15 A. No. No.

16 Q. Did your, your partner, Mr. Wildemann?

17 A. No.

18 Q. Do you know of anyone else who sent  
19 information to the parole board on behalf of  
20 Mr. Lewis?

21 A. I don't, no. I have, you know, I know  
22 that Mr. Schwartz sent a letter. That's the  
23 extent of it. I don't know of anybody else that  
24 wrote the board.

25 Q. And that's the only letter that you're

1 aware of?

2 A. That I am aware of, yes.

3 MR. BROOKS: Thank you very much. I'll  
4 pass the witness.

5 THE COURT: Redirect?  
6

7 REDIRECT EXAMINATION

8 BY MS. PANDUKHT:

9 Q. Just a couple of questions. Mr. Brooks  
10 asked you if you got handwriting samples, other  
11 samples from the defendant.

12 Did you have any information that other  
13 handwriting samples existed or were found --

14 A. No.

15 Q. -- of the defendant's?

16 A. No. I didn't know of any others.

17 Q. I mean, if other handwriting samples came  
18 into your possession or you were made aware of --

19 A. I had nothing but what we have here today  
20 in those exhibits.

21 Q. And generally how do you obtain  
22 handwriting samples of an individual?

23 A. There is a process where I would cause a,  
24 the jail, they have a sheet. They can provide the  
25 inmate with that sheet, and then he's to copy down

1 certain phrases, certain letters in cursive, block  
2 letter, upper case, lower case, so on and so  
3 forth. Whether that was done or not, I don't  
4 know.

5 Q. And, and why did you not have the jail  
6 cell searched for the defendant?

7 A. I, I don't know. I, to be honest with  
8 you, I would just simply say that I accepted the  
9 letter and let it stand for what it said there in  
10 the letter. I didn't cause the search to happen  
11 and probably more importantly, I know from my  
12 experience as a narc, working with informants,  
13 that going there to the pod and shaking his cell  
14 out could cause some scrutiny. And I have an  
15 individual who's provided me with some  
16 information, and I didn't want to do that at that  
17 point. So, that was probably more of the reason  
18 than anything else.

19 THE COURT: I'm going to just interrupt  
20 for a moment and ask the detective, please, to  
21 define what he means by his experience being a  
22 narc.

23 THE WITNESS: Okay. I'm sorry. As a  
24 narcotics detective for 10 years, you work with  
25 people that provide us with information all the

1 time. And these people are referred to by lots of  
2 names, informants, cooperating individual, niche,  
3 and so. When we receive information, we handle it  
4 delicately, as you might imagine that we're in  
5 positions where someone's providing us with  
6 information, and we have an obligation to filter  
7 or use the information. And in my experience, I  
8 handled it the right way with regard to the letter  
9 from Mr. Budd to Mr. Lewis.

10 MS. PANDUKHT: Thank you. I have nothing  
11 further.

12  
13 RE CROSS-EXAMINATION

14 BY MR. BROOKS:

15 Q. Would it surprise you to know that I've  
16 had lots of cases where they go and into the jail  
17 cell and seize documents?

18 MS. PANDUKHT: I would object to defense  
19 counsel acting as a witness.

20 MR. BROOKS: Mr. Vaccaro just did the  
21 same thing.

22 THE COURT: I'm going to give him a  
23 little leeway.

24 BY MR. BROOKS:

25 Q. Would that surprise you?

1 A. No, sure doesn't surprise me.

2 Q. Okay. Your testimony here today is that  
3 you are trying to protect Greg Lewis, and you  
4 thought that if Greg Lewis's sell at prison was  
5 shaken down, it would cause Greg Lewis problems,  
6 right?

7 A. No, not Greg's so much as I was Mr. Budd.

8 Q. So, you're trying to protect Mr. Budd?

9 A. No. No. That's not what I'm saying at  
10 all here. What I'm saying is if he has a  
11 conversation with an individual and he has maybe  
12 told no one else that information and then he gets  
13 his room torn down, he may very well make a  
14 conclusion about who he had that conversation  
15 with. So, I left the matter alone. And I take  
16 the responsibility. I didn't cause his cell to  
17 get tossed, nor did I to have Greg Lewis's get  
18 tossed.

19 MR. BROOKS: Okay. Thank you.

20 THE WITNESS: Okay.

21 MS. PANDUKHT: No re-redirect.

22 THE COURT: No re-re? You may step down,  
23 detective. Thank you so much.

24 Who's next?

25 MR. KANE: Krissy Smith, your Honor.

# **EXHIBIT**

## **# 5**

FILED IN OPEN COURT

DISTRICT COURT

DEC 09 2005 20

CLARK COUNTY, NEVADA

SHIRLEY J. PARRAGUIRRE, CLERK

BY *Jennifer L. Marshall*  
JENNIFER L. MARSHALL DEPUTY

ORIGINAL

THE STATE OF NEVADA,

Plaintiff,

vs.

GLENFORD ANTHONY BUDD,

Defendant.

Case No.: C193182

Dept. No.: XVIII

VOLUME 3B

(P.M. Session)

## REPORTER'S TRANSCRIPT OF JURY TRIAL

Before the Honorable Nancy M. Saitta, District Court Judge

Thursday, December 8, 2005

1:40 p.m.

## APPEARANCES:

For the State:

EDWARD KANE, ESQUIRE  
Deputy District AttorneyTALEEN PANDUKHT, ESQUIRE  
Deputy District Attorney

For the Defendant:

HOWARD BROOKS, ESQUIRE  
Deputy Public DefenderTIMOTHY O'BRIEN, ESQUIRE  
Deputy Public Defender

Reported by: Jean M. Dahlberg, RPR, CCR 759, CSR 11715

PRESTIGE COURT REPORTING  
(702) 898-7676

000772

002674

COUNTY CLERK

DEC 09 2005

RECEIVED



1 things -- bodies or furniture or parts of the apartment --  
2 and were not able to be compared, except to say that they  
3 were fired from the same type of firearm that the  
4 cartridge cases were fired from.

5 So, you will receive positive identification of  
6 the defendant as the person in the apartment firing the  
7 fatal shots from both Lazon Jones and from Celeste Palau.

8 Now, aside from the evidence of the witnesses to  
9 the crime and the evidence that the police gathered at the  
10 crime scene, you will also receive evidence -- as I told  
11 you -- of what the defendant did after the crime. And  
12 you'll hear from Tracey Richards, and Tracy Richards was  
13 an acquaintance of the defendant's. She saw him on the  
14 morning after the killings, and was sitting on a bench at  
15 a fast-food joint and just seemed to be at loose ends.  
16 She asked him what he was doing, and he told her he had a  
17 fight with his girlfriend and really didn't have any place  
18 to stay. And she said, "Well, why don't you come over to  
19 my house?"

20 And, so, he went over to her house, where he  
21 spent the day after the murder and that night. She said  
22 he seemed extremely nervous and he was chain-smoking.  
23 And, so, when she woke up on the next morning, she said,  
24 "Well, I'll go down to the store and get some more  
25 cigarettes." And as she was getting ready to leave, the

1 defendant said to her, "I had the weirdest dream. I  
2 dreamed that three guys stole my weed and I had to kill  
3 them all." And she just sort of laughed it off, went out  
4 to the store, and by the time she got back, he was gone.

5           You'll hear from the defendant's uncle, Winston  
6 Budd, who saw him later that day. So, we're now two days  
7 out from the murder. And when he saw him, the first thing  
8 he noticed about him is -- about the defendant -- was that  
9 all of his Allen Iverson hair was bald. It was gone. He  
10 looked like Michael Jordan, maybe; but not like Allen  
11 Iverson anymore. And you'll see photographs that the  
12 police took when they arrested him later that same day,  
13 that will show you that he basically shaved his head in  
14 the day or two between the murder and the time that he was  
15 arrested two days later.

16           The defendant discussed what happened with his  
17 Uncle Winston. He told him that three guys had tried to  
18 rob him and that he had to kill them. His Uncle Winston  
19 had already heard that the police were looking for  
20 Mr. Budd and wanted to talk to him, and he said to him,  
21 "Glenford, you could get life in prison or even the  
22 death penalty for this. You've got to turn yourself in."  
23 And the defendant told him, "I'd rather run." And before  
24 he would run, he was arrested by members of the Las Vegas  
25 Metropolitan Police Department.

# **EXHIBIT**

## **# 6**

002677

DISTRICT COURT  
CLARK COUNTY, NEVADA

FILED IN OPEN COURT

DEC 15 2005 20

SHIRLEY S. PARRAGUIRRE, CLERK

BY Kristen M. Brown  
KRISTEN M. BROWN DEPUTY

THE STATE OF NEVADA,  
  
Plaintiff,  
  
vs.  
  
GLENFORD ANTHONY BUDD,  
  
Defendant.

Case No.: C193182  
Dept. No.: XVIII

VOLUME 6

ORIGINAL

REPORTER'S TRANSCRIPT OF JURY TRIAL

Before the Honorable Nancy M. Saitta, District Court Judge

Tuesday, December 13, 2005

1:35 p.m.

APPEARANCES:

For the State: EDWARD KANE, ESQUIRE  
Deputy District Attorney

TALEEN PANDUKHT, ESQUIRE  
Deputy District Attorney

For the Defendant: HOWARD BROOKS, ESQUIRE  
Deputy Public Defender

TIMOTHY O'BRIEN, ESQUIRE  
Deputy Public Defender

Reported by: Jean M. Dahlberg, RPR, OCR 759, CSR 11715

PRESTIGE COURT REPORTING  
State of Nevada v. Budd

001463

002678

DEC 15 2005  
COUNTY CLERK  
PRESTIGE

1 December 9th transcript. It was labeled as Friday,  
2 December 8th, and I want to make certain that it is clear  
3 on the record that there was a transcript filed on Friday,  
4 December 9th, which was labeled Friday, December 8th.

5 THE COURT: And that correction will be noted  
6 for the record.

7 MR. BROOKS: And I'm not sure, but I think that  
8 we may have made a record -- may have made a lineation on  
9 the actual document with the court.

10 THE COURT: If there is, I'm sure that my clerk  
11 did. I'm glad that you did.

12 MR. BROOKS: Second issue, Judge, is during  
13 opening statements, Mr. Kane -- at page 53 and 54 of the  
14 transcript on Friday, December -- I'm sorry, Thursday,  
15 December 8th -- said that, "say we presume testimony of  
16 Tracey Richards," and Mr. Kane explained what she would  
17 say if she testified.

18 And he said that she would testify that she  
19 picked Glenford up, took him to her home in Henderson, Mr.  
20 Glenford Budd spent the night there. In the morning, they  
21 got up and Glenford told Tracey that he had had a dream,  
22 and in this dream he dreamed that he killed three killed  
23 people offer some marijuana. No such evidence was  
24 actually presented by the State during trial. Tracey  
25 Richards did not testify.

1 Under these circumstances, Judge, the jury has  
2 been exposed to the State making factual statements not  
3 supported by the record, statements of a highly  
4 inculpatory and prejudicial nature. Therefore, because  
5 this caused us due process, we ask for a mistrial.

6 THE COURT: Mr. Kane, do you wish to be heard?

7 MR. KANE: Judge, we had contacted and served  
8 Tracey prior to trial. Throughout the trial she was in  
9 phone contact with my investigator, and on several  
10 occasions promised to come to court, and never did.

11 As the trial approached its close, I was faced  
12 with a couple of choices: One was, of course, to get an  
13 arrest warrant and go out and pick her up; one was to lay  
14 a foundation for her unavailability and read her testimony  
15 into the record -- as we already did that with Mr. Budd  
16 and as he testified both as to admissions by the  
17 defendant, the defendant's changed appearance and his  
18 preparations for flight -- I deemed it not necessary to go  
19 to those lengths to get her testimony into the record.  
20 So, I made a choice not to call her and not to have a  
21 warrant issued and go out and have her picked up or read  
22 her testimony into the record.

23 If the Court feels that any curative action is  
24 necessary, I suggest one of two on alternatives. We can  
25 either into a stipulation on the record that Tracey

1 Richards was unavailable as a witness, or I can move to  
2 reopen the case; if Mr. Brooks is so concerned about it,  
3 I'll laid a foundation for her unavailability and we will  
4 read her preliminary hearing testimony into the record.  
5 Whichever make the defendant happy.

6 THE COURT: Did the preliminary injunction  
7 hearing contain, in fact, the information -- the testimony  
8 from the preliminary hearing -- contain the information  
9 that you advised the jury that her testimony would elicit?

10 MR. KANE: It did, Your Honor, and I confirmed  
11 that both by reading it and consultation with  
12 Ms. Pandukht, who was present at the preliminary hearing.

13 THE COURT: Mr. Brooks.

14 MR. BROOKS: Judge, I will simply say that what  
15 I desire, as far as a remedy, is that the defense -- well,  
16 I've asked for a mistrial. If the Court is not inclined  
17 to grant a mistrial, then I would ask that the defense be  
18 allowed to comment in the closing argument that the State  
19 mentioned this evidence and the State did not present the  
20 evidence.

21 THE COURT: Mr. Kane, do you many wish to be  
22 heard on that request?

23 MR. KANE: As long as I can comment the response  
24 that the witness was unavailable.

25 THE COURT: It is what it is. I think you both

1 can make those comments within the law motion.

2 The mistrial -- motion for mistrial is denied.

3 You certainly may both make those comments.

4 And let me clear up the record, in saying that  
5 although we began these outside the presence --  
6 proceedings -- as the defendant was just coming in from  
7 the lockup area, he was present during all of these  
8 opening arguments, as were all counsel.

9 And we'll get a check whether or not we have a  
10 full jury, and then I'll and back.

11 Mr. O'Brien?

12 MR. O'BRIEN: May we discuss something off the  
13 record? It doesn't need to be on the record.

14 THE COURT: Certainly.

15 (Brief discussion held off the record.)

16 MR. KANE: I just have two quick things that I'd  
17 like to put on the record, as long as they're not here.

18 THE COURT: Certainly.

19 MR. KANE: One, has to do with Celeste Palau,  
20 testified at trial. I discussed this matter with  
21 Mr. Brooks, and here's the situation: At the time that  
22 Celeste Palau first came forward, she asked us for some  
23 help in relocating her. She didn't necessarily want to  
24 still be at the Saratoga Palms. We said we'd help her.  
25 It turned out that the same landlord had an available



# **EXHIBIT**

## **# 7**

002683

Glenford Budd, NDOC #90043

Ely State Prison

P.O. Box 1989

Ely, Nevada 89301

Howard S. Brooks,

Nev. S. Ct. Case No. 46977

Deputy Public Defender.

District Court Case No. 03-C-193182-C

309 South Third Street

Dept. No. 18

Las Vegas, Nevada 89155-2610

RE: Missing Documents; Withdrawal as Attorney of Record.

April 29, 2007

Counsel Brooks,

In February of this year when you sent to me Volumes 1 through 7 of Appellant's Appendix, the following documents were missing.

1. Pages 00.1378 to 00.1464, of Appellant's Appendix are missing
2. All Discovery,
3. The investigator's affidavit of Prosecutor Edward Keme, as to the attempted deposition and to bring Winston Budd from Belize to Las Vegas to testify and the Prosecutor's motion pursuant to NRS 51.055(1) and NRS 51.325 1. "unavailability as a witness" and "former testimony," which was to be submitted by the District Attorney's office during the course of my trial, to show reasonable diligence on the part of the State in presenting Winston Budd's Preliminary Hearing Testimony at my trial.
4. For you and the Public Defenders office, to withdraw as attorney of record.
5. The Nev. Sup. Ct. Remittitur.

Lastly, Mr. Brooks please be so kind and forward the above documents to me so that I may complete and submit my State Post-Conviction in a timely manner. And, if you have any questions, do not hesitate to ask.

Sincerely,

cc:

Glenford A Budd.

PU2681

# **EXHIBIT**

## **# 8**

## CRIMINAL COURT MINUTES

03-C-193182-C STATE OF NEVADA

vs Budd, Glenford A

CONTINUED FROM PAGE: 017

05/21/07 08:30 AM 00 ALL PENDING MOTIONS (5/21/07)

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk  
Richard Kangas, Reporter/RecorderPARTIES: STATE OF NEVADA  
007521 Smith, Sarah A.  
0001 D1 Budd, Glenford A  
PUBDEF Public Defender  
006208 Avants, LynnY  
Y  
N  
Y  
YDEFT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS...DEFT'S PRO  
PER MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD OR REQUEST FOR COURT  
RECORDS/COURT CASE DOCUMENTSCOURT NOTED that Deft is incarcerated in the NV Dept of Corrections and not  
present today.

COURT ORDERED, Deft's Pro Per Motion to Proceed Forma Pauperis, GRANTED.

COURT FURTHER ORDERED, Deft's Pro Per Motion for Withdrawal of Public  
Defender as counsel and for Request for Court Records/Court Case Documents,  
GRANTED. Mr. Avants stated he will contact prior counsel, Howard S. Brooks,  
and will see that the records are forwarded to Deft Budd. COURT SO NOTED.

NDC

**SUPREME COURT OF THE STATE OF NEVADA  
OFFICE OF THE CLERK**

GLENFORD ANTHONY BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

**Supreme Court No. 50008**

District Court Case No. C193182

**RECEIPT FOR DOCUMENTS**

TO: Glenford Anthony Budd #90043  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Charles J. Short, District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

08/15/07 Filing Fee Waived: Criminal.  
  
08/15/07 Filed Certified Copy of proper person Notice of Appeal.  
Appeal docketed in the Supreme Court this day.  
  
08/15/07 Issued Notice re: Justice Disqualification.  
Justice Nancy M. Saitta sat in district court proceedings.

DATE: August 15, 2007

Janette M. Bloom, Clerk of Court

By: \_\_\_\_\_

NH  
Deputy Clerk

002687

**SUPREME COURT OF THE STATE OF NEVADA  
OFFICE OF THE CLERK**

GLENFORD ANTHONY BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

**Supreme Court No. 50008**

District Court Case No. C193182

**NOTICE OF JUSTICE DISQUALIFICATION**

TO: Glenford Anthony Budd #90043

You are hereby notified that The Honorable Nancy M. Saitta, Justice, has voluntarily recused herself from participation in this matter. (Sat in district court proceedings.)

DATE: August 15, 2007

Janette M. Bloom, Clerk of Court

By:  \_\_\_\_\_

Deputy Clerk

cc: Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Charles J. Short, District Court Clerk

002688

Petitioner's  
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*CRIF*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

GLENFORD A. BUDD,  
Petitioner,

VS.

THE STATE OF NEVADA,  
et al.,

Respondents

Case No. 03-C-193182-C

Dept. No. 18

NOTICE OF APPEAL

NOTICE OF APPEAL is hereby given by the Petitioner, Glenford A. Budd, acting in propria persona, to the Supreme Court of the State of Nevada from the Order Denying Defendant's Pro Per Motion to Hold Howard S. Brooks Attorney of Record in Contempt for failing to forward a copy of the case file, filed July 23, 2007.

DATED: this 6 day of August, 2007

Respectfully submitted,

*Glenford A. Budd*

Glenford A. Budd #90043

Ely, State Prison

PO Box 1989

Ely, Nevada 89301

Petitioner, Pro Per

## CERTIFICATE OF SERVICE

I, Glenford A. Budd, petitioner, hereby Certify pursuant to  
NRCP 5(b), that on this 6 day of August, 2007,  
I mailed a true and correct copy of Notice of Appeal, via  
First Class, postage pre-paid, to:

Charles J. Short,  
Clerk of the Court  
200 Lewis Avenue, 3rd floor  
Las Vegas, Nevada 89155-1160

David Roger, Esq  
Clark County District Attorney  
200 Lewis Ave.  
Las Vegas, Nevada 89155

DATED this 6 day of August 2007.

Glenford A. Budd  
Glenford A. Budd # 90043  
Ely State Prison  
PO Box 1989  
Ely, Nevada 89301

Petitioner, Pro Per

///

///

///



**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice of Appeal for Defendant's Pro Per Motion to Hold Howard S. Brooks, Attorney of Record in Contempt for failing to forward a copy of the Case File

\_\_\_\_\_  
(Title of Document)

Filed in District Court Case No. 03-C-193182-C

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

N.R.C.P. 5(b)  
(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

[Signature]  
(Signature)

August 6, 2007  
(Date)

002691

**PROPER PERSON SETTINGS**

**CASE #C193182**

**DEPARTMENT:18**

**DEFENDANT:GLENFORD A. BUDD**

**DATE FILED:August 10, 2007**

**MATTERS TO BE HEARD:MOTION FOR REHEARING**

**HEARING DATE: 08/27/07**

**COPIES GIVEN TO:**

- ☒ **DISTRICT ATTORNEY**
- ☐ **PUBLIC DEFENDER**
- ☒ **PROPER PERSON**
- ☐ **ATTORNEY GENERAL**
- ☐ **ATTORNEY OF RECORD**

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002692

Petitioner's  
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CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

GLENFORD A. BUDD,  
Petitioner,

Case No. 03-C-193182-C

Rept. No. 18

vs.  
THE STATE OF NEVADA,  
et al.,

MOTION FOR REHEARING

Respondents.

COMES NOW, Glenford A. Budd, Petitioner, acting in Pro-  
Per, and respectfully moves this Honorable Court to rehear his  
July 23, 2007, Motion for Ordering Holding Howard S. Brooks, Deputy  
Public Defender, as the Attorney of Record in Contempt of the  
Court's Order of May 21, 2007, for failing to forward a copy of the case  
files to Petitioner

This Motion is made and based pursuant to NRS 8,  
and Local District Court Rule 2.24, Thus, all papers and  
Pleadings on file in this matter.

POINTS AND AUTHORITIES

On May 21, 2007, this Honorable Court "Granted" Petitioner's  
Pro Per Motion for Leave To Proceed IN forma Pauperis... Defendant's  
Pro Per Motion For Withdrawal of Attorney of Record or Request  
for Court Records/Court Case Documents. See, page 18, Criminal

Court Minutes, attached hereto as Exhibit No. 1.

On July 5, 2007, Petitioner filed with this Honorable Court, Defendant's Pro Per Motion To Hold Howard S. Brooks Attorney of Record In Contempt.

On July 23, 2007 the above Motion was heard in Dept. 18, where upon the Court stated that Defendant's Motion did not state what transcript date he was requesting, and the motion was not cognizable. Court Ordered Motion Denied. Petitioner received Court Minutes: 07/31/07. See, Exhibit No. 1

On its July 5, 2007 Motion this Petitioner specifically requested "ALL Pretrial Discovery;" Petitioner does not have the above dates for ALL Pretrial Discovery. But, he will attempt to clarify this portion of his request for the Court to reconsider rehearing this matter.

Petitioner request the following Pretrial Discovery and interviews conducted of the following State Witnesses, and detectives Notes.

1. Winston Budd; 2. COR, LVMPD - Dispatch; 3. Lazon Jones, C/O Reg Weaver, D.A.'s Office; 4. Sheryl Jones; 5. Terry Key; 6. Greg Lewis; 7. Celeste Palau, C/O Reg Weaver, D.A.'s Office; 8. Tracey Richard; 9. Krissy Smith; 10. P. Sparker, LVMPD # 4852; 11. J. Vaccaro, LVMPD # 1480; 12. M. Wallace, LVMPD # 4761; 13. Nakia Washington; 14. M. Wildermann, LVMPD # 3316. See, Exhibit. No. 2, attached hereto.

On December 8, 2005, the State's prosecutor, Edward Kane made an offer of proof pursuant to NRS 51.055 1 (d) "Unavailability as a Witness" and pursuant to NRS 51.325 "former Testimony" of Witness Winston Budd to be admitted over defense counsel objection. The trial Judge allowed the above request presuming

Mr. Kane could provide the Court by affidavit the representations made by him to attribute to his investigator being unable to secure State's Key Witness, "Winston Budd," as a witness. See, Transcripts of Jury Trial, December 8, 2005, Volume 3 A, pages 000-931; 000938-39, Attached hereto as Exhibit No. 3.

Furthermore, Petitioner requests from the December 12, 2005, Trial Transcripts, Volume 4, pages 001398 through 001464, which are missing. And,


Finally, Petitioner Budd request that counsel send him a copy of the Nevada Supreme Court "Remittitur," issued after the Order of Affirmance of Petitioner's Direct Appeal. Approximate date is after January 7, 2007.

### CONCLUSION

Petitioner Budd hereby prays that this Court grants this Motion for Rehearing, of the July 23, 2007 hearing denied by this Court, as he has made a good faith attempt to provide this honorable court with a cognizable request.

Dated this 6 day of August, 2007.

Respectfully submitted,

  
Glenford A. Budd #90043  
Ely State Prison  
PO. Box 1989  
Ely, Nevada 89301

Petitioner, Pro Per

///

## CERTIFICATE OF SERVICE

I, Glenford A. Budd, petitioner, hereby certify pursuant to NRCF 5(h), that on this 6 day of August, 2007, I mailed a true and correct copy of Motion for Rehearing and Exhibits attached, via first-class, U.S. Postal Service  
To:

Charles J. Short, Clerk of the Court  
200 Lewis Avenue, 3rd floor  
Las Vegas, Nevada 89155-1160  
DAVID ROGER, Esq.  
Clark County, District Attorney's Office  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Howard S. Brooks, Deputy  
Public Defender  
309 South 3rd Street  
Las Vegas, Nevada 89155-2610

DATED this 6 day of August, 2007.

Glenford A. Budd  
Glenford A. Budd #90043  
Ely State Prison  
PO Box 1989  
Ely, Nevada 89301

Petitioner, Pro Per

///

///

///

**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding \_\_\_\_\_

Motion for Rehearing

(Title of Document)

filed in District Court Case No. 03-C-193182-C

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

NRS 8, DCJR 2, 24; [REDACTED]

NRS 8 (b) [REDACTED]

(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

[Signature]  
(Signature)

August 6, 2007  
(Date)

602697

# **EXHIBIT**

## **# 1**

002698



NEVADA DEPARTMENT OF CORRECTIONS  
ELY STATE PRISON  
LEGAL MAIL

NAME: GLENFORD BUDD DOC#: 90043 UNIT: 8B/34

REPORT TO CONTROL AT ADMIN FOR THE FOLLOWING:

LEGAL MAIL: \_\_\_\_\_

CERTIFIED MAIL: \_\_\_\_\_

REGISTERED MAIL: \_\_\_\_\_

DATE: \_\_\_\_\_

INMATE SIGNATURE: [Signature]

DOC#: 90043

DATE: 7/31/07

DOC - 3020A (REV. 7/01)

CHARLES J. SHORT, Clerk of the Court  
200 LEWIS AVENUE, 3<sup>RD</sup> FLOOR  
LAS VEGAS NV 89155-1180

RETURN SERVICE REQUESTED

PRESORTED  
FIRST CLASS



UNITED STATES POSTAGE  
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GLENFORD BUDD  
NDOC #90043  
ELY STATE PRISON  
P.O. BOX 1989  
ELY, NV 89301

BAVDS11 89301



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IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD A BUDD,  
Appellant,  
vs.  
THE STATE OF NEVADA  
Respondent.

Supreme Court No.:  
District Court Case No.: 03C193182  
Electronically Filed  
Nov 10 2014 09:44 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

APPELLANT'S APPENDIX – VOLUME XII – PAGES 2598-2846

MATTHEW D. CARLING  
51 East 400 North, Bldg. #1  
Cedar City, Utah 84720  
(702) 419-7330 (Office)  
*Attorney for Appellant*

STEVEN B. WOLFSON  
Clark County District Attorney  
200 Lewis Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89155  
*Counsel for Respondent*

CATHERINE CORTEZ MASTO  
Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
*Counsel for Respondent*

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FILED

AUG 10 11:14 AM '07

*[Signature]*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

GLENFORD A. BUDD,  
Petitioner,

Case No. D3-C-193182-C

Rept. No. 18

vs.  
THE STATE OF NEVADA,  
et al.,

MOTION FOR REHEARING

Respondents.

COMES NOW, Glenford A. Budd, Petitioner, acting in Pro-  
Per, and respectfully moves this Honorable Court to rehear his  
July 23, 2007, Motion for Ordering Holding Howard S. Brooks, Deputy  
Public Defender, as the Attorney of Record in Contempt of the  
Court's Order of May 21, 2007, for failing to forward a copy of the case  
files to Petitioner.

This Motion is made and based pursuant to NRS 8,  
and Local District Court Rule 2.24, Thus, all papers and  
Pleadings on file in this matter.

POINTS AND AUTHORITIES

On May 21, 2007, this Honorable Court "Granted" Petitioner's  
Pro Per Motion for Leave To Proceed IN forma Pauperis... Defendant's  
Pro Per Motion For Withdrawal of Attorney of Record or Request  
for Court Records/Court Case Documents. See, page 18, Criminal

45

CNC

Court Minutes, attached hereto as Exhibit No. 1.

On July 5, 2007, Petitioner filed with this Honorable Court, Defendant's Pro Per Motion To Hold Howard S. Brooks Attorney of Record In Contempt.

On July 23, 2007 the above Motion was heard in Dept. 18, where upon the Court stated that Defendant's Motion did not state what transcript date he was requesting, and the motion was not cognizable. Court Ordered Motion Denied, Petitioner received Court Minutes 07/31/07. See Exhibit No. 1.

On it's July 5, 2007 Motion this Petitioner specifically requested "ALL Pretrial Discovery;" Petitioner does not have the above dates for ALL Pretrial Discovery. But, he will attempt to clarify this portion of his request for the Court to reconsider rehearing this matter.

Petitioner request the following Pretrial Discovery of interviews conducted of the following State Witnesses, and detectives Notes.

1. Winston Budd; 2. COR, LVMPD-Dispatch; 3. Lazon Jones; 4. O Reg Weaver, D.A.'s Office; 5. Sheryl Jones; 6. Terry Key; 7. Greg Lewis; 8. Celeste Palau, O Reg Weaver, D.A.'s Office; 9. Tracey Richard; 10. Krissy Smith; 11. P. Spencer, LVMPD # 4852; 12. J. Vacarro, LVMPD # 1480; 13. M. Wallace, LVMPD # 4761; 14. Nakice Washington; 15. M. Wildermann, LVMPD # 3316. See Exhibit No. 2, attached hereto.

On December 8, 2005, the State's prosecutor, Edmund Kane made an offer of proof pursuant to NRS 51.055 1(d) "Unavailability as a Witness" and pursuant to NRS 51.325 "former Testimony" of Witness Winston Budd to be admitted over defense counsel objection. The trial Judge allowed the above request presuming

Mr. Kane could provide the Court by affidavit the representations made by him to attribute to his investigator being unable to secure State's Key Witness, "Winston Budd," as a witness. See, Transcripts of Jury Trial, December 8, 2005, Volume 3 A, pages 000-931; 000938-39, Attached hereto as Exhibit No. 3.

Furthermore, Petitioner requests from the December 12, 2005, Trial Transcripts, Volume 4, pages 001398 through 001464, which are missing. And,

Finally, Petitioner Budd request that counsel send him a copy of the Nevada Supreme Court "Remittitur," issued after the Order of Affirmance of Petitioner's Direct Appeal. Approximate date is after January 7, 2007.

### CONCLUSION

Petitioner Budd hereby prays that this Court grants this Motion for Rehearing, of the July 23, 2007 hearing denied by this Court, as he has made a good faith attempt to provide this honorable court with a cognizable request.

Dated this 6 day of August, 2007.

Respectfully submitted,

Glendon A. Budd  
Glendon A. Budd #90043  
Ely State Prison  
PO. Box 1989  
Ely, Nevada 89301

Petitioner, Pro Per

///

## CERTIFICATE OF SERVICE

I, Glenford A. Budd, petitioner, hereby certify pursuant to NRCF 5(b), that on this 6 day of August, 2007, I mailed a true and correct copy of Motion for Rehearing and Exhibits attached, via first-class, U.S. Postal Service To:

Charles J. Short, Clerk of the Court  
200 Lewis Avenue, 3rd floor  
Las Vegas, Nevada 89155-1160  
DAVID ROGER, Esq.,  
Clark County, District Attorney's Office  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Howard S. Brooks, Deputy  
Public Defender  
309 South 3rd Street  
Las Vegas, Nevada 89155-2610

DATED this 6 day of August, 2007.

Glenford A. Budd  
Glenford A. Budd #90043  
Ely State Prison  
PO Box 1989  
Ely, Nevada 89301

Petitioner, Pro Per

///

///

///

**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding \_\_\_\_\_

Motion For Rehearing

(Title of Document)

filed in District Court Case No. 03-C-193182-C

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

NRS 8, DCJR 2.24, [REDACTED]

NRSP §(b), [REDACTED]

(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

[Signature]  
(Signature)

August 6, 2007  
(Date)

002602

# **EXHIBIT**

## **# 1**

002603

NEVADA DEPARTMENT OF CORRECTIONS  
ELY STATE PRISON  
LEGAL MAIL

NAME: GLENFORD BUDD DOC#: 90043 UNIT: 8B/34

REPORT TO CONTROL AT ADMIN FOR THE FOLLOWING:

LEGAL MAIL: \_\_\_\_\_

CERTIFIED MAIL: \_\_\_\_\_

REGISTERED MAIL: \_\_\_\_\_

DATE: \_\_\_\_\_

INMATE SIGNATURE: Glenford Budd

DOC#: 90043

DATE: 7/21/07

DOC - 3020A (REV. 7/01)

CHARLES J. SHORT, Clerk of the Court  
200 LEWIS AVENUE, 3RD FLOOR  
LAS VEGAS NV 89155-1160

RETURN SERVICE REQUESTED

PRESORTED  
FIRST CLASS



UNITED STATES POSTAGE  
FIRST CLASS  
\$ 00.37<sup>3</sup>  
0004325779 JUL 27 2007  
MAILED FROM ZIP CODE 89101

GLENFORD BUDD  
NDOC #90043  
ELY STATE PRISON  
P.O. BOX 1989  
ELY, NV 89301

EAUDES11 89301



002604

## CRIMINAL COURT MINUTES

03-C-193182-C STATE OF NEVADA

vs Budd, Glenford A

CONTINUED FROM PAGE: 017

05/21/07 08:30 AM 00 ALL PENDING MOTIONS (5/21/07)

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk  
Richard Kangas, Reporter/RecorderPARTIES: STATE OF NEVADA  
007521 Smith, Sarah A.  
0001 D1 Budd, Glenford A  
PUBDEF Public Defender  
006208 Avants, LynnY  
Y  
N  
Y  
YDEFT'S PRO PER MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS...DEFT'S PRO  
PER MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD OR REQUEST FOR COURT  
RECORDS/COURT CASE DOCUMENTSCOURT NOTED that Deft is incarcerated in the NV Dept of Corrections and not  
present today.

COURT ORDERED, Deft's Pro Per Motion to Proceed Forma Pauperis, GRANTED.

COURT FURTHER ORDERED, Deft's Pro Per Motion for Withdrawal of Public  
Defender as counsel and for Request for Court Records/Court Case Documents,  
GRANTED. Mr. Avants stated he will contact prior counsel, Howard S. Brooks,  
and will see that the records are forwarded to Deft Budd. COURT SO NOTED.

NDC

07/23/07 08:15 AM 00 DEFT'S PRO PER MTN TO HOLD HOWARD S  
BROOKS ATTORNEY OF RECORD IN CONTEMPT/44

HEARD BY: David Barker, Judge; Dept. 18

OFFICERS: Sharon Chun, Court Clerk  
Richard Kangas, Reporter/RecorderPARTIES: STATE OF NEVADA  
007521 Smith, Sarah A.  
0001 D1 Budd, Glenford A  
PRO SE Pro SeY  
Y  
Y  
YDeft was not transported for this matter. COURT STATED that Deft's Motion  
did not state what transcript date he was requesting, and the motion was not  
cognizable. COURT ORDERED, MOTION DENIED.

CLERK'S NOTE: The above minute order has been Distributed to:

CONTINUED ON PAGE: 019



CRIMINAL COURT MINUTES

03-C-193182-C STATE OF NEVADA

vs Budd, Glenford A

CONTINUED FROM PAGE: 018

Glenford Budd, NDOC #90043, Ely State Prison, P.O. Box 1989, Ely, NV  
89301

# **EXHIBIT**

## **# 2**

002607

*Spurlock*  
CLERK

NOTC  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
DAVID P. SCHWARTZ  
Chief Deputy District Attorney  
Nevada Bar #000398  
200 South Third Street  
Las Vegas, Nevada 89155-2212  
(702) 455-4711  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

-vs-

GLENFORD ANTHONY BUDD,  
#1900089  
Defendant.

CASE NO: C193182

DEPT NO: XVIII

NOTICE OF WITNESSES  
[NRS 174.234(1)(a)]

TO: GLENFORD ANTHONY BUDD, Defendant; and

TO: PUBLIC DEFENDER, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF  
NEVADA intends to call the following witnesses in its case in chief:

<u>NAME</u>	<u>ADDRESS</u>
BUDD, WINSTON	UNKNOWN ADDRESS
COR	LVMPD - DISPATCH
JONES, LAZON	C/O REG WEAVER, D.A.'S OFFICE
JONES, SHERYL	UNKNOWN ADDRESS
KEY, TERRY	UNKNOWN ADDRESS
LEWIS, GREG	NDOC
PALAU, CELESTE	C/O REG WEAVER, D.A.'S OFFICE

1 RICHARD, TRACEY 1100 CENTER ST., HEND., NV  
2 SMITH, KRISSY UNKNOWN ADDRESS  
3 SPENCER, P. LVMD #4852  
4 VACARRO, J. LVMPD #1480  
5 WALLACE, M. LVMPD #4761  
6 WASHINGTON, NAKIA UNKNOWN ADDRESS  
7 WILDEMANN, M. LVMPD #3516

8 These witnesses are in addition to those witnesses endorsed on the Information and  
9 any other witness for which a separate Notice has been filed.

10  
11 DAVID ROGER  
12 DISTRICT ATTORNEY  
Nevada Bar #002781

13 BY /s/ DAVID P. SCHWARTZ  
14 DAVID P. SCHWARTZ  
15 Chief Deputy District Attorney  
16 Nevada Bar #000398

17 CERTIFICATE OF FACSIMILE TRANSMISSION

18 I hereby certify that service of NOTICE OF WITNESS, was made this 28th day of  
19 September, 2004, by facsimile transmission to:

20  
21 PUBLIC DEFENDER  
22 FAX#455-5112

23  
24 BY /s/ M. Beaird  
25 Employee of the District Attorney's Office  
26

27 mb  
28

# **EXHIBIT**

## **# 3**

002610

**ORIGINAL**DISTRICT COURT  
CLARK COUNTY, NEVADA

DEC 09 2005 20

THE STATE OF NEVADA,

Plaintiff,

vs.

GLENFORD ANTHONY BUDD,

Defendant.

SHIRLEY D. PARRAGUIRRE, CLERK

BY Jennifer Kimmel

JENNIFER KIMMEL

DEPUTY

Case No. C193182

Dept. No. XVIII

VOLUME 3-A  
(A.M. SESSION)

## REPORTER'S TRANSCRIPT OF JURY TRIAL

Before the Honorable Justice Nancy M. SaittaThursday, December 8, 2005  
10:00 a.m.-12:30 p.m.

## APPEARANCES:

For the State: EDWARD KANE, ESQUIRE  
Deputy District AttorneyTALEEN PANDUKHT, ESQUIRE  
Deputy District AttorneyFor the Defendant: HOWARD BROOKS, ESQUIRE  
Deputy Public DefenderTIMOTHY O'BRIEN, ESQUIRE  
Deputy Public DefenderReported by: Gayle G. Pichierri, RPR, CRR  
NV CCR No. 595, CA CSR No. 11406PRESTIGE COURT REPORTING  
(702) 898-7676

COUNTY CLERK

DEC 09 2005

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1 was subject to cross-examination, it was in  
2 the same case, and we asked that it be  
3 admitted.

4 THE COURT: Anything further,  
5 Mr. Brooks?

6 MR. BROOKS: Submit it, Your Honor.

7 THE COURT: I'm going to allow -- I  
8 presume there will be a formal request to use,  
9 unless you want to have this substitute as,  
10 the formal request for use of that transcript,  
11 but I presume you could provide by  
12 affidavit -- can I presume that you could  
13 provide by affidavit the representations that  
14 you made here that you attribute to your  
15 investigator?

16 MR. KANE: Absolutely, Judge. I'll  
17 make sure that that's on file.

18 THE COURT: For the time being, any  
19 concern about the use of that is, as far as  
20 I'm concerned, yet to be determined. We'll  
21 deal with it when you bring that motion. I  
22 presume you'll bring a formal motion.

23 MR. KANE: Yes, I will, Judge. What  
24 I would like to do, though, now is offer as an  
25 offer of proof the statements that I have made

1 so we can get a ruling because we are going to  
2 want to reference briefly, not in any great  
3 detail, what Winston Budd will be saying, in  
4 our opening statement.

5 THE COURT: So long as you have the  
6 proof to support the representations that you  
7 have made regarding the efforts of your  
8 investigator.

9 MR. KANE: And I am aware of the risk  
10 there and I'll assume it, Judge.

11 THE COURT: My ruling would be that  
12 an informal finding of unavailability and/or  
13 an effort to avoid contact with the state is  
14 sufficiently made and you can use the  
15 preliminary hearing transcript.

16 MR. KANE: Let me just make one final  
17 offer, Judge, since Mr. Brooks and his  
18 cocounsel are apparently in touch with the  
19 family, if Mr. Budd is flying up with these  
20 other people and he is going to be here  
21 tomorrow, I would be more than happy to put  
22 him on as a live witness rather than use his  
23 testimony, and I make that offer in open  
24 court.

25 THE COURT: Very well. Anything else



ORIGINAL

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2007 AUG 13 1 A 10: 23

DISTRICT COURT  
CLARK COUNTY, NEVADA

*Chaf*  
CLERK OF THE COURT

STATE OF NEVADA,

Plaintiff(s),

vs.

GLENFORD A. BUDD,

Defendant(s),

) Case No: C193182

) Dept No: XVIII

CASE APPEAL STATEMENT

1. Appellant(s): GLENFORD A. BUDD

2. Judge: DAVID BARKER

3. All Parties, District Court:

Plaintiff, THE STATE OF NEVADA

Defendant(s), GLENFORD A. BUDD

4. All Parties, Appeal:

Appellant(s), GLENFORD A. BUDD

Respondent, THE STATE OF NEVADA

5. Appellate Counsel:

*Appellant/Proper Person*  
Glenford A. Budd #90043  
P.O. Box 1989  
Ely, NV 89301

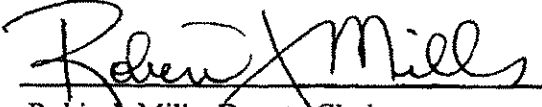
*Respondent*  
David Roger, District Attorney  
200 Lewis Ave.  
Las Vegas, NV 89101  
(702) 671-2700

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- 6. District Court Attorney, Appointed
- 7. On Appeal, N/A
- 8. Forma Pauperis, Granted
- 9. Date Commenced in District Court: June 26, 2003

Dated This 13 day of August 2007.

Charles J. Short, Clerk of the Court

By:   
Robin J. Mills, Deputy Clerk  
200 Lewis Ave  
PO Box 551601  
Las Vegas, Nevada 89155-1601  
(702) 671-0512

15 EXP

FILED

Case No. C-193182

Dept. No. 18

SEP 21 9 42 AM '07

*[Signature]*  
CLERK OF THE COURT

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

IN THE MATTER OF,

FINANCIAL CERTIFICATE

Name Glenford A. Budd # 90043  
Prison Number

On a Motion to Proceed  
In Forma Pauperis

Glenford A. Budd # 90043  
Signature Prison Number

I hereby certify that the Petitioner/Applicant herein has the sum of  
\$ 8.60 on account to his credit at the institution (Ely State  
Prison) where he is confined. I further certify that the Petitioner/Applicant likewise has the following  
securities to his credit according to the records of said institution (Ely State Prison):

\$44.64 in savings

Dated this 8th day of August, 2007.

By *[Signature]*  
Nevada Department of Corrections  
Inmate Services Accountant  
Authorized Officer of Institution

RCUD IN SER'37603 8

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SEP 20 2007

CLERK OF THE COURT

002616

ORIGINAL COURT COPY

Case No. 03-C-193182-C

Dept. No. 18

FILED  
SEP 21 9 44 AM '07  
CLERK OF THE COURT

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

GLENFORD A. BUDD  
Petitioner,

MOTION FOR THE APPOINTMENT  
OF COUNSEL

-VS-

E.K. McDANIEL, Warden, et al.  
Respondents.

REQUEST FOR EVIDENTIARY HEARING

COMES NOW, the Petitioner, Glenford A. Budd, proceeding pro se, within the above entitled cause of action and respectfully requests this Court to consider the appointment of counsel for Petitioner for the prosecution of this action.

This motion is made and based upon the matters set forth here, N.R.S. 34.750(1)(2), affidavit of Petitioner, the attached Memorandum of Points and Authorities, as well as all other pleadings and documents on file within this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

This action commenced by Petitioner Glenford A. Budd, in state custody, pursuant to Chapter 34, et seq., petition for Writ of Habeas Corpus (Post-Conviction).

II. STATEMENT OF THE FACTS

To support the Petitioner's need for the appointment of counsel in this action, he states the following:

1. The merits of claims for relief in this action are of Constitutional dimension, and Petitioner is likely to succeed in this case.

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SEP 21 2007  
CLERK OF THE COURT

2. Petitioner is incarcerated at the Ely State Prison in Ely, Nevada. Petitioner is unable to undertake the ability, as an attorney would or could, to investigate crucial facts involved within the Petition for Writ of Habeas Corpus.
3. The issues presented in the Petition involves a complexity that Petitioner is unable to argue effectively.
4. Petitioner does not have the current legal knowledge and abilities, as an attorney would have, to properly present the case to this Court coupled with the fact that appointed counsel would be of service to the Court, Petitioner, and the Respondents as well, by sharpening the issues in this case, shaping the examination of potential witnesses and ultimately shortening the time of the prosecution of this case.
5. Petitioner has made an effort to obtain counsel, but does not have the funds necessary or available to pay for the costs of counsel, see Declaration of Petitioner.
6. Petitioner would need to have an attorney appointed to assist in the determination of whether he should agree to sign consent for a psychological examination.
7. The prison severely limits the hours that Petitioner may have access to the Law Library, and as well, the facility has very limited legal research materials and sources.
8. While the Petitioner does have the assistance of a prison law clerk, he is not an attorney and not allowed to plead before the Courts and like Petitioner, the legal assistants have limited knowledge and expertise.
9. The Petitioner and his assisting law clerks, by reason of their imprisonment, have a severely limited ability to investigate, or take depositions, expand the record or otherwise litigate this action.
10. The ends of justice will be served in this case by the appointment of professional and competent counsel to represent Petitioner.

## II. ARGUMENT

Motions for the appointment of counsel are made pursuant to N.R.S. 34.750, and are addressed to the sound discretion of the Court. Under Chapter 34.750 the Court may request an attorney to represent any

such person unable to employ counsel. On a Motion for Appointment of Counsel pursuant to N.R.S. 34.750, the District Court should consider whether appointment of counsel would be of service to the indigent petitioner, the Court, and respondents as well, by sharpening the issues in the case, shaping examination of witnesses, and ultimately shortening trial and assisting in the just determination.

In order for the appointment of counsel to be granted, the Court must consider several factors to be met in order for the appointment of counsel to be granted; (1) The merits of the claim for relief; (2) The ability to investigate crucial factors; (3) whether evidence consists of conflicting testimony effectively treated only by counsel; (4) The ability to present the case; and (5) The complexity of the legal issues raised in the petition.

### III. CONCLUSION

Based upon the facts and law presented herein, Petitioner would respectfully request this Court to weigh the factors involved within this case, and appoint counsel for Petitioner to assist this Court in the just determination of this action

Dated this 18 day of September, 2007.


Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

  
Petitioner.

### VERIFICATION

I declare, affirm and swear under the penalty of perjury that all of the above facts, statements and assertions are true and correct of my own knowledge. As to any such matters stated upon information or belief, I swear that I believe them all to be true and correct.

Dated this 18 day of September, 2007.

  
Petitioner, pro per.

CERTIFICATE OF SERVICE BY MAIL

I, Glenford A. Budd, hereby certify pursuant to N.R.C.P.

5(b), that on this 18 day of September, of the year 2007, I mailed a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis; Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis; Motion fore the Appointment of Counsel; and Request for Evidentiary Hearing, addressed to:

Charles J. Short,  
Name  
Clerk of the Court

Name

David Roger, Esq  
Name  
Clark County D.A.

200 Lewis Ave, 3rd floor  
Las Vegas, NV 89155-1160

Address

200 Lewis Ave  
Las Vegas, NV 89155-2212

Address

Glenford A. Budd  
Petitioner

**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion FOR  
THE APPOINTMENT OF COUNSEL; Request for Evidentiary  
Hearings

\_\_\_\_\_  
(Title of Document)

filed in District Court Case No. 03-C-193182-C

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

*Elmer David A. Sudd*  
(Signature)

September 18 2007  
(Date)

002621



GLENFORD A. BUDD #90043  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

Petitioner, Pro-Per.

3  
FILED  
SEP 21 9 44 AM '07  
CLERK OF THE COURT

*Original Court Copy*

DISTRICT COURT  
CLARK COUNTY, NEVADA

GLENFORD A. BUDD, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
E.K. McDANIEL, )  
Warden, E.S.P., )  
 )  
Respondents. )

Case No. 03-C-193182-C

Dept. No. 18

PETITIONER'S EXHIBITS IN SUPPORT OF  
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

RECEIVED

SEP 21 2007

CLERK OF THE COURT

# TABLE OF CONTENTS

<u>Exhibit #</u>	<u>Description</u>
#1	CRIMINAL COURT MINUTES, pp. 001-006
#2	NRS 51.055 & NRS 51.325, and TRIAL TRANSCRIPT, dated December 8, 2005, pp. 000931-000939.
#3	TRIAL TRNASCRIPT, dated December 13, 2005, pp. 001463, 001510-001512
#4	ENVELOPE AND LETTER, pp.1-6, and TRIAL TRNSCRIPT, pp. 001356-001365
#5	TRIAL TRANSCRIPT, dated December 8, 2005, pp. 000772, 000824-000825
#6	TRIAL TRANSCRIPT, dated December 13, 2005, pp. 001463, 001466-001469
#7	<i>April 24, 2007, Letter to Defense Counsel, Howard S. Brooks, requesting missing documents.</i>
#8	<i>Criminal Court Minutes, p. 18 p Supreme Court of Nevada, Office of the Clerks, Receipt of Documents, Notice of Justice Disqualification</i>

002623

CERTIFICATE OF SERVICE

I hereby declare and state pursuant to NRCP 5(b) that I am the Petitioner in the foregoing, PETITIONER'S EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), and that on this 18 day of September, 2007, I did mail a true and correct copy of same by giving it to a prison guard at the Ely State Prison to deposit in the U.S. Mail, sealed in an envelope, postage pre-paid, addressed to the following:

CLERK, 8th JUDICIAL DISTRICT  
200 LEWIS STREET  
P.O. Box 551601  
Las Vegas, Nevada 89155-1601

CATHERINE CORTEZ MASTO  
ATTORNEY GENERAL  
100 NORTH CARSON STREET  
Carson City, Nevada 89701-4717

DAVID ROGER  
200 LEWIS STREET  
P.O. Box 552212  
Las Vegas, Nevada 89155-2212

E.K. McDANIEL  
WARDEN, E.S.P.  
P.O. Box 1989  
Ely, Nevada 89301

By: *Glenford Budd*  
GLENFORD BUDD ##90043  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

Prepared by: Inmate Fernando Rodriguez #51052

*Fernando Rodriguez*

**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding PETITIONER'S

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)  
(Title of Document)

filed in District Court Case No. 03-C-193182 C

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific law)

-OR-

B. For the administration of a public program or  
for an application for a federal or state grant.

\_\_\_\_\_

*Stanford A. Smith*  
(Signature)

September 18 2007  
(Date)

002625

# **EXHIBIT**

## **# 1**

## CRIMINAL COURT MINUTES

03-C-193182-C      STATE OF NEVADA      vs Budd, Glenford A

07/02/03 09:00 AM 00 INITIAL ARRAIGNMENT

HEARD BY: Nancy M Saitta, Judge; Dept. 18

OFFICERS: Amber Farley, Court Clerk  
Kristine Cornelius, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
005734	Pandukht, Taleen R.	Y
0001 D1	Budd, Glenford A	Y
PUBDEF	Public Defender	Y
003374	Brooks, Howard S.	Y

DEFENDANT ARRAIGNED, PLED NOT GUILTY and WAIVED the sixty-day rule. COURT ORDERED, matter set for trial. Mr. Brooks inquired of the State if this will be a death penalty case. Ms. Pandukht stated that determination hasn't been made yet.

**CUSTODY**

2/18/04 9:00 AM CALENDAR CALL

2/23/04 1:30 PM JURY TRIAL

02/11/04 09:00 AM 00 DEPT'S MTN TO VACATE /CONTINUE TRIAL  
DATE/4

HEARD BY: Nancy M Saitta, Judge; Dept. 18

OFFICERS: Amber Farley, Court Clerk  
Dick Kangas, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
006541	Lewis, Linda Y.	Y
0001 D1	Budd, Glenford A	Y
PUBDEF	Public Defender	Y
003374	Brooks, Howard S.	Y

The Court noted that Mr. Brooks is presently involved in a capital murder case in this department, and there's been no opposition by the State. COURT ORDERED, motion GRANTED; trial date vacated and re-set.

**CUSTODY**

7/14/04 9:00 AM CALENDAR CALL

7/19/04 1:30 PM JURY TRIAL

## CRIMINAL COURT MINUTES

B-C-193182-C STATE OF NEVADA

vs Budd, Glenford A

CONTINUED FROM PAGE: 001

05/24/04 09:00 AM 00 STATE'S REQUEST RESET TRIAL DATE

HEARD BY: Joseph S. Pavlikowski, Senior Judge; Dept. VJ30

OFFICERS: Amber Farley, Court Clerk  
Liz Garcia, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
005734	Pandukht, Taleen R.	Y
000398	Schwartz, David P.	Y
0001 D1	Budd, Glenford A	Y
PUBDEF	Public Defender	Y
003374	Brooks, Howard S.	Y

Mr. Brooks stated the Defendant has waived his speedy trial rights, and counsel have agreed on a November date. COURT ORDERED, request GRANTED; trial date vacated and re-set.

## CUSTODY

11/10/04 9:00 AM CALENDAR CALL

11/15/04 1:30 PM JURY TRIAL

10/27/04 09:00 AM 00 ALL PENDING MOTIONS 10-27-04

HEARD BY: Nancy M Saitta, Judge; Dept. 18

OFFICERS: Kristen Brown, Court Clerk  
Jo Anne Pierpont, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
000398	Schwartz, David P.	Y
005734	Pandukht, Taleen R.	Y
0001 D1	Budd, Glenford A	Y
PUBDEF	Public Defender	Y
003374	Brooks, Howard S.	Y
006762	O'Brien, Timothy P.	Y

## DEFT'S MOTION IN LIMINE #1-14

Court stated parties met in chambers and determined that it would be appropriate to take all the motions off calendar and to be reset at the calendar call as there are issues regarding aggravators's in front of the Supreme Court. COURT ORDERED, Motions OFF CALENDAR and matter set for status check to reset to motions.

CONTINUED ON PAGE: 003

## CRIMINAL COURT MINUTES

13-C-193182-C STATE OF NEVADA

vs Budd, Glenford A

CONTINUED FROM PAGE: 002

## CUSTODY

11/10/04 9:00 AM STATUS CHECK: RESET MOTIONS

11/10/04 09:00 AM 00 ALL PENDING MOTIONS 11-10-04

HEARD BY: Michael A Cherry, Judge; Dept. 17

OFFICERS: Kristen Brown, Court Clerk  
Jo Anne Pierpont, Reporter/Recorder

PARTIES:	STATE OF NEVADA	Y
	005734 Pandukht, Taleen R.	Y
	0001 D1 Budd, Glenford A	Y
	PUBDEF Public Defender	Y
	003374 Brooks, Howard S.	Y

CALENDAR CALL...STATUS CHECK: RESET DEFT'S MOTIONS IN LIMINE 1-14

Mr. Brooks stated the trial is being continued and Deft's motions will need to be reset. COURT ORDERED, Trial VACATED and RESET along with Deft's Motions in Limine 1-14.

## CUSTODY

1/12/05 10:30 AM DEFT'S MOTIONS IN LIMINE 1-14

4/27/05 9:00 AM CALENDAR CALL

5/02/05 1:30 PM JURY TRIAL



## CRIMINAL COURT MINUTES

13-C-193182-C STATE OF NEVADA

vs Budd, Glenford A

CONTINUED FROM PAGE: 003

01/12/05 10:30 AM 00 ALL PENDING MOTIONS 1-12-05

HEARD BY: Nancy M Saitta, Judge; Dept. 18

OFFICERS: Kristen Brown, Court Clerk  
Jo Anne Pierpont, Reporter/RecorderPARTIES: STATE OF NEVADA  
000398 Schwartz, David P.  
0001 D1 Budd, Glenford A  
PUBDEF Public Defender  
003374 Brooks, Howard S.Y  
Y  
Y  
Y  
Y

DEFT'S MOTION IN LIMINE 1-14

Mr. Brooks request a continuance as there are issues that still need to be investigated. COURT ORDERED, matter CONTINUED.

CUSTODY

CONTINUED TO: 4/04/05 10:30 AM

04/20/05 09:00 AM 00 ALL PENDING MOTIONS 4-20-05

HEARD BY: Kathy Hardcastle, Chief Judge; Dept. 4

OFFICERS: Kristen Brown, Court Clerk  
Jo Anne Pierpont, Reporter/RecorderPARTIES: STATE OF NEVADA  
000398 Schwartz, David P.  
005734 Pandukht, Taleen R.  
0001 D1 Budd, Glenford A  
PUBDEF Public Defender  
003374 Brooks, Howard S.Y  
Y  
Y  
Y  
Y  
Y

DEFT'S MOTION IN LIMINE #1 FOR ORDER PROHIBITING PROSECUTION MISCONDUCT IN ARGUMENT; AND FOR ORDER THAT COURT TAKES JUDICIAL NOTICE OF AUTHORITY CITED IN THIS MOTION IF DEFENSE OBJECTS AT TRIAL TO IMPROPER ARGUMENT...DEFT'S MOTION #2 FOR EXCHANGE OF JURY INSTRUCTIONS ON THE FIRST DAY OF TRIAL... DEFT'S MOTION #3 FOR RECORDING OF ALL PROCEEDINGS PURSUANT TO SUPREME COURT RULE 250...DEFT'S MOTION #4 TO DISQUALIFY ALL POTENTIAL JURORS WHO KNEW OR WERE ACQUAINTED WITH THE VICTIMS OR THEIR FAMILIES...DEFT'S MOTION #5 TO DISQUALIFY ALL POTENTIAL JURORS WHO WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY IN THE EVENT OF A FIRST DEGREE MURDER CONVICTION...DEFT'S MOTION IN LIMINE #6 TO PROHIBIT THE STATE FROM USING PREEMPTORY CHALLENGES TO REMOVE MINORITIES FROM JURY...DEFT'S MOTION #7 TO BIFURCATE PENALTY PHASE

CONTINUED ON PAGE: 005

PRINT DATE: 03/07/06

PAGE: 004

MINUTES DATE: 04/20/05

001976

002630

## CRIMINAL COURT MINUTES

13-C-193182-C STATE OF NEVADA

vs Budd, Glenford A

CONTINUED FROM PAGE: 004

PROCEEDINGS...DEFT'S MOTION #8 TO ALLOW THE DEFENSE TO ARGUE LAST IN A POTENTIAL PENALTY PHASE PROCEEDINGS...DEFT'S MOTION #9 FOR JURY QUESTIONNAIRE TO BE COMPLETED BY JURY VENIRE ONE WEEK PRIOR TO TRIAL... DEFT'S MOTION IN LIMINE #10 TO PROHIBIT ANY REFERENCE IN FRONT OF THE JURY TO THE TRIAL PHASE OF THE PROCEEDINGS AS THE "GUILT PHASE"...DEFT'S MOTION #11 TO STRIKE ALLEGATIONS OF CERTAIN AGGRAVATING CIRCUMSTANCES ALLEGED IN STATE'S NOTICE OF INTENT TO SEEK DEATH PENALTY...DEFT'S MOTION #12 TO PRECLUDE THE ADMISSION, DURING A POSSIBLE PENALTY PROCEEDING OF EVIDENCE ABOUT THE PERSONAL CHARACTER OF THE VICTIMS AND THE IMPACT OF THE VICTIM'S DEATHS ON THE FAMILY...DEFT'S MOTION #13 TO BAR THE ADMISSION OF CUMULATIVE VICTIM IMPACT EVIDENCE IN VIOLATION OF THE DUE PROCESS LAW...DEFT'S MOTION #14 TO DISMISS THE STATE'S NOTICE OF INTENT BECAUSE NEVADA'S DEATH PENALTY SCHEME VIOLATES DUE PROCESS GUARANTEES BY FAILING TO REQUIRE A PRE-TRIAL FINDING OF PROBABLE CAUSE FOR ALLEGED AGGRAVATORS

COURT ORDERED, Trial dates VACATED and RESET and all motions CONTINUED.

CUSTODY

CONTINUED TO: 8/01/05 9:00 AM

11/23/05 9:00 AM CALENDAR CALL

11/28/05 1:30 PM JURY TRIAL (FIRM)

11/02/05 09:00 AM 00 ALL PENDING MOTIONS 11-02-05

HEARD BY: David Wall, Judge; Dept. 20

OFFICERS: Kristen Brown, Court Clerk  
Angela Lee, Reporter/Recorder

PARTIES: STATE OF NEVADA  
009210 Tomsheck, Joshua L.

Y  
Y

0001 D1 Budd, Glenford A

Y

DEFT'S MOTION IN LIMINE #1 FOR ORDER PROHIBITING PROSECUTION MISCONDUCT IN ARGUMENT; AND FOR ORDER THAT COURT TAKES JUDICIAL NOTICE OF AUTHORITY CITED IN THIS MOTION IF DEFENSE OBJECTS AT TRIAL TO IMPROPER ARGUMENT...DEFT'S MOTION #2 FOR EXCHANGE OF JURY INSTRUCTIONS ON THE FIRST DAY OF TRIAL... DEFT'S MOTION #3 FOR RECORDING OF ALL PROCEEDINGS PURSUANT TO SUPREME COURT RULE 250...DEFT'S MOTION #4 TO DISQUALIFY ALL POTENTIAL JURORS WHO KNEW OR WERE ACQUAINTED WITH THE VICTIMS OR THEIR FAMILIES...DEFT'S MOTION #5 TO DISQUALIFY ALL POTENTIAL JURORS WHO WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY IN THE EVENT OF A FIRST DEGREE MURDER CONVICTION...DEFT'S MOTION IN LIMINE #6 TO PROHIBIT THE STATE FROM USING PREEMPTORY CHALLENGES TO REMOVE MINORITIES FROM JURY...DEFT'S MOTION #7 TO BIFURCATE PENALTY PHASE PROCEEDINGS...DEFT'S MOTION #8 TO ALLOW THE DEFENSE TO ARGUE LAST IN A

CONTINUED ON PAGE: 006

PRINT DATE: 03/07/06

PAGE: 005

MINUTES DATE: 11/02/05

001977

002631

## CRIMINAL COURT MINUTES

13-C-193182-C STATE OF NEVADA

vs Budd, Glenford A

CONTINUED FROM PAGE: 005

POTENTIAL PENALTY PHASE PROCEEDINGS...DEFT'S MOTION #9 FOR JURY QUESTIONNAIRE TO BE COMPLETED BY JURY VENIRE ONE WEEK PRIOR TO TRIAL... DEFT'S MOTION IN LIMINE #10 TO PROHIBIT ANY REFERENCE IN FRONT OF THE JURY TO THE TRIAL PHASE OF THE PROCEEDINGS AS THE "GUILT PHASE"...DEFT'S MOTION #11 TO STRIKE ALLEGATIONS OF CERTAIN AGGRAVATING CIRCUMSTANCES ALLEGED IN STATE'S NOTICE OF INTENT TO SEEK DEATH PENALTY...DEFT'S MOTION #12 TO PRECLUDE THE ADMISSION, DURING A POSSIBLE PENALTY PROCEEDING OF EVIDENCE ABOUT THE PERSONAL CHARACTER OF THE VICTIMS AND THE IMPACT OF THE VICTIMS' DEATHS ON THE FAMILY...DEFT'S MOTION #13 TO BAR THE ADMISSION OF CUMULATIVE VICTIM IMPACT EVIDENCE IN VIOLATION OF THE DUE PROCESS LAW...DEFT'S MOTION #14 TO DISMISS THE STATE'S NOTICE OF INTENT BECAUSE NEVADA'S DEATH PENALTY SCHEME VIOLATES DUE PROCESS GUARANTEES BY FAILING TO REQUIRE A PRE-TRIAL FINDING OF PROBABLE CAUSE FOR ALLEGED AGGRAVATORS

COURT ORDERED, Motions CONTINUED to the Calendar Call date.

CUSTODY

CONTINUED TO: 11/23/05 9:00 AM

11/14/05 09:00 AM 00 STATUS CHECK

HEARD BY: J. CHARLES THOMPSON, Senior Judge; Dept. VJ42

OFFICERS: Kristen Brown, Court Clerk  
Jo Anne Pierpont, Reporter/Recorder

PARTIES: STATE OF NEVADA  
001438 Kane, Edward R.  
005734 Pandukht, Taleen R.  
  
0001 D1 Budd, Glenford A  
PUBDEF Public Defender  
003374 Brooks, Howard S.

Y  
Y  
Y  
  
Y  
Y  
Y

Mr. Kane stated Mr. Brooks would like to start the trial on the following week. Following a conference at the Bench, COURT ORDERED, Trial date STANDS.

CUSTODY

# **EXHIBIT**

## **# 2**

887 N.R.S. 51.055

**WEST'S NEVADA REVISED  
STATUTES ANNOTATED  
TITLE 4. WITNESSES AND  
EVIDENCE  
CHAPTER 51. HEARSAY  
GENERAL PROVISIONS**

*Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature, statutory and constitutional provisions effective as a result of approval and ratification by the voters at the November 2006 General Election, and technical corrections received from the Legislative Counsel Bureau (2006).*

**51.055. "Unavailable as a witness" defined**

1. A declarant is "unavailable as a witness" if he is:

(a) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement;

(b) Persistent in refusing to testify despite an order of the judge to do so;

(c) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(d) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance or to take his deposition.

2. A declarant is not "unavailable as a witness" if his exemption, refusal, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

*Added by Laws 1971, p. 794.*

<General Materials (GM) - References, Annotations, or Tables>

**HISTORICAL NOTES**

**SUBCOMMITTEE'S COMMENT**

Taken from subdivision (d) of Draft Federal Rule 8-01, with the addition of the reference to depositions at paragraph (d) of subsection 1.

**HISTORICAL AND STATUTORY  
NOTES**

**Uniform Law**

This section is based upon Rule 804 of the Uniform Rules of Evidence (1974). See 13B Uniform Laws Annotated, Master Edition.

**REFERENCES**

**LAW REVIEW COMMENTARIES**

Crawford v. Washington: The Confrontation Clause Gets Teeth. Rene L. Valladares and Franny A. Forsman. 12 Nev. Law. 12 (Sep. 2004).

**LIBRARY REFERENCES**

Criminal Law 419(5).  
\*4388 Evidence 317(17).  
Westlaw Topic Nos. 110, 157.  
C.J.S. Criminal Law § 860.  
C.J.S. Evidence §§ 259 to 260.

**RESEARCH REFERENCES**

**ALR Library**

92 ALR 3rd 1138, Admissibility of Former Testimony of Nonparty Witness, Present in Jurisdiction, Who Refuses to Testify at Subsequent Trial Without Making Claim of Privilege.

92 ALR 3rd 1164, Admissibility, as Against Interest, in Criminal Case of Declaration of Commission of Criminal Act.

159 ALR 201, Comment Note.--Cross-Examination to Dispel Favorable Inference Which Jury Might Draw from Appearance of Witness on Witness-Stand.

87 ALR 891, When One Deemed to be Beyond Jurisdiction of Court Within Meaning of Statute Relating to Admissibility of Testimony Given on Former Trial.

**Treatises and Practice Aids**

Wharton's Criminal Evidence § 92:30, Nevada.

## ANNOTATIONS

### NOTES OF DECISIONS

Confrontation rights 2  
 Construction and application 1  
 Death 6  
 Foundation for admission of evidence 8  
 Inability to locate or summon 7  
 Privilege from testifying 3  
 Refusal to testify 4  
 Statement against interest 5

#### 1. Construction and application

Trial court deciding admissibility of testimony from preliminary hearing may consider general provisions of evidence code when determining unavailability of witness; thus, court is not limited to grounds of unavailability stated in statute permitting admission of preliminary hearing testimony when witness is sick, out of state, dead, or persistent in refusing to testify despite judicial order or when personal attendants cannot be had in court. N.R.S. 51.055, 171.198, subd. 6(b). *Funches v. State*, 1997, 944 P.2d 775, 113 Nev. 916. Criminal Law Ⓒ543(1)

\*4389 Admissibility of preliminary hearing testimony in later proceedings is governed by statute providing that such testimony may be used as substantive evidence in criminal trial only when witness is sick, out of the state, dead, or when his personal attendance cannot be had in court; such statute, which deals specifically with issue of admissibility of preliminary hearing testimony of witness who persistently refuses to testify, prevailed over general evidence code provision governing admissibility of former testimony of unavailable witness. N.R.S. 51.055, subd. 1(b), 51.325, 171.198, subd. 7. *LaPena v. State*, 1980, 604 P.2d 811, 96 Nev. 43. Criminal Law Ⓒ543(1)

#### 2. Confrontation rights

Defendant's rights under confrontation clause were not violated where witness claimed not to remember out-of-court statements which were admitted, but witness was nevertheless present at trial, under oath, and subject to full and effective cross-examination by defense. U.S.C.A. Const.Amend. 6. *Cheatham v. State*, 1988, 761 P.2d 419, 104 Nev. 500. Criminal Law Ⓒ662.9

Witness was not "unavailable" for cross-examination, thus violating defendant's constitutional right to confront witnesses against him, where witness refused to testify about certain prior inconsistent out-of-court statements, and refused to acknowledge that he remembered giving the statements, but where witness testified to underlying facts of prosecution and was not ordered by court to testify about prior inconsistent statements. N.R.S. 51.035, subd. 2(a, b); U.S.C.A. Const.Amend. 6. *Cheatham v. State*, 1988, 761 P.2d 419, 104 Nev. 500. Criminal Law Ⓒ662.9

In proceeding in which defendant was convicted of possession of heroin, use of heroin and two counts of sale of heroin, admission of preliminary hearing testimony given by two informant buyers, who were shown to be unavailable to testify at trial and who were material to prosecution's case, did not violate defendant's right of confrontation, in light of fact that defendant was represented by counsel at preliminary hearing at which such witnesses were subjected to plenary cross-examination. N.R.S. 51.055, 453.321, 453.336, 453.411; U.S.C.A. Const. Amend. 6. *Sparkman v. State*, 1979, 590 P.2d 151, 95 Nev. 76. Criminal Law Ⓒ662.60

#### 3. Privilege from testifying

Witness was "unavailable" due to invocation of his Fifth Amendment right not to testify, even though district court did not order witness to testify before he invoked his Fifth Amendment privilege, and so court did not err by admitting witness's preliminary hearing testimony in defendant's murder trial. U.S.C.A. Const.Amend. 5; N.R.S. 171.198, subd. 6(b). *Thomas v. State*, 1998, 967 P.2d 1111, 114 Nev. 1127, rehearing denied, certiorari denied 120 S.Ct. 85, 528 U.S. 830, 145 L.Ed.2d 72, denial of habeas corpus affirmed in part, reversed in part 83 P.3d 818, 120 Nev. 37. Criminal Law Ⓒ543(1)

\*4390 District court's admission of witness' preliminary hearing testimony in defendant's murder trial was not basis for reversal of convictions where prosecutor informed court that it would have to order witness to testify in order to satisfy statutory requirements for use of preliminary hearing testimony, defendant argued that court could not order witness to testify if witness invoked his Fifth Amendment right on the stand, and defendant specifically explained that if that happened, he would move for mistrial, so that any error was requested by defendant. U.S.C.A. Const.Amend. 5; N.R.S. 171.198, subd. 6(b). *Thomas v. State*, 1998, 967 P.2d 1111, 114 Nev. 1127, rehearing denied, certiorari denied 120 S.Ct. 85, 528 U.S. 830, 145 L.Ed.2d 72, denial of habeas corpus affirmed in part, reversed in part 83 P.3d 818, 120 Nev. 37. Criminal Law Ⓒ1137(5)

Witness was "unavailable" due to invocation of his Fifth Amendment right not to testify, even though district court did not order witness to testify before he invoked his Fifth Amendment privilege, and so court did not err by admitting witness's preliminary hearing testimony in defendant's murder trial. U.S.C.A. Const.Amend. 5; N.R.S. 171.198, subd. 6(b). *Thomas v. State*, 1998, 967 P.2d 1111, 114 Nev. 1127, rehearing denied, certiorari denied 120 S.Ct. 85, 528 U.S. 830, 145 L.Ed.2d 72, denial of habeas corpus affirmed in part, reversed in part 83 P.3d 818, 120 Nev. 37. Criminal Law Ⓒ543(1)

Prosecution was not required to ask for immunity for witness and did not commit misconduct by failing to do so, even though witness invoked his Fifth Amendment right against self-incrimination and refused to testify at defendant's murder trial, thus requiring use of witness's preliminary hearing testimony. U.S.C.A. Const.Amend. 5; N.R.S.

171.198, subd. 6(b), 178.572. *Thomas v. State*, 1998, 967 P.2d 1111, 114 Nev. 1127, rehearing denied, certiorari denied 120 S.Ct. 85, 528 U.S. 830, 145 L.Ed.2d 72, denial of habeas corpus affirmed in part, reversed in part 83 P.3d 818, 120 Nev. 37. Criminal Law ⚡706(1)

#### 4. Refusal to testify

Hearsay declarant is unavailable as witness if he is persistent in refusing to testify despite order of judge to do so. N.R.S. 51.055, subd. 1(b). *Kaplan v. State*, 1983, 663 P.2d 1190, 99 Nev. 449. Criminal Law ⚡543(1)

Testimony given in defendant's first trial, in which issues were substantially the same as those in second trial, by witness who was, through refusal to testify, "unavailable" at second trial, was not subject to exclusion on hearsay grounds. N.R.S. 51.055, subd. 1(b), 51.325. *Kaplan v. State*, 1983, 663 P.2d 1190, 99 Nev. 449. Criminal Law ⚡543(1)

\*4391 In prosecution for bribery of a public official and perjury, trial court committed reversible error in admitting preliminary hearing testimony by one defendant's superior after declarant stated his intention to claim privilege against self-incrimination with regard to all matters upon which he had testified upon preliminary examination and then refused to answer specific questions from preliminary examination as proposed to him by counsel. U.S.C.A. Const. Amend. 5; N.R.S. 51.055, subd. 1(b), 51.325, 171.198, subd. 7. *Lemberes v. State*, 1981, 634 P.2d 1219, 97 Nev. 492. Criminal Law ⚡539(1); Criminal Law ⚡1169.1(2.1)

#### 5. Statement against interest

Murder co-defendant's initial statement to police exonerating murder defendant was admissible at joint trial, under hearsay exception for statement against interest, and failure to admit the statement denied defendant's right to fair trial; co-defendant's statement was contrary to penal interest, co-defendant was unavailable because he invoked Fifth Amendment right not to testify, and co-defendant's statement was corroborated by other witnesses' initial statements to police, which also exonerated defendant. U.S.C.A. Const. Amends. 5, 6; N.R.S. 51.055, subd. 1(a), 51.345, subd. 1(b, d). *Buff v. State*, 1998, 970 P.2d 564, 114 Nev. 1237, denial of habeas corpus affirmed 174 Fed.Appx. 411, 2006 WL 1050124, certiorari denied 127 S.Ct. 243. Criminal Law ⚡422(5); Criminal Law ⚡1170(1)

#### 6. Death

Death of witness prior to trial was no basis for excluding her testimony given at preliminary hearing. N.R.S. 51.055, subd. 1(c), 51.325, subd. 1. *Passarelli v. State*, 1977, 564 P.2d 608, 93 Nev. 292. Criminal Law ⚡542

Alleged unreliability of witness who testified at preliminary hearing but died prior to trial was not ground for excluding her preliminary hearing testimony, but merely went to her credibility and the weight to be given her

testimony, which were determinations for the trier of fact. *Passarelli v. State*, 1977, 564 P.2d 608, 93 Nev. 292. Criminal Law ⚡542

Decision to admit testimony of deceased witness given at preliminary hearing, after balancing its prejudicial effect against its probative value, was addressed to the sound discretion of the trial court. *Passarelli v. State*, 1977, 564 P.2d 608, 93 Nev. 292. Criminal Law ⚡542

As a general and well-settled rule the testimony of a deceased witness, given under oath, in a proceeding authorized by law, where the opposing party had the opportunity of a cross-examination, is admissible as evidence against such party in any subsequent trial of the case; and the fact that, in the trial, when the deceased witness testified, the court erred in impaneling the jury under an unconstitutional statute, does not warrant excluding the testimony of the witness. *State v. Johnson*, 1877, 12 Nev. 121. Criminal Law ⚡542

\*4392 The testimony of a witness, since deceased, in a former suit, is admissible in a subsequent suit between the same parties or their privies in reference to the same subject-matter. *Gerhauser v. North British & Mercantile Ins. Co.*, 1871, 7 Nev. 174. Evidence ⚡576

#### 7. Inability to locate or summon

Efforts undertaken by state to locate and serve two witnesses were reasonable, even though state did not make every possible effort to locate witnesses, and thus their prior trial testimony was admissible; investigator for district attorney's office went to witness' prior place of employment, investigator visited other possible places of employment, investigator went to witness' last known address, investigator ran computer check, and investigator contacted Department of Motor Vehicles. U.S.C.A. Const. Amend. 6. *Quillen v. State*, 1996, 929 P.2d 893, 112 Nev. 1369, rehearing denied. Criminal Law ⚡543(2)

Where state investigator had been in contact with robbery victim prior to trial, knew of his out-of-state residence and his presence there but made no effort to compel victim's attendance at trial, victim was not "unavailable" at commencement of trial and allowing use at trial, of transcript of his testimony given at preliminary hearing was error even though during continuance prosecutor unsuccessfully utilized Uniform Act to secure the attendance of out-of-state witnesses. N.R.S. 171.198, subd. 7, 174.395 et seq. *Drummond v. State*, 1970, 462 P.2d 1012, 86 Nev. 4. Criminal Law ⚡543(1)

Reasonable diligence must be exercised to locate witness for use of his reported testimony in subsequent trial of same cause. N.R.S. 178.230. *Eisentrager v. State*, 1963, 378 P.2d 526, 79 Nev. 38. Criminal Law ⚡543(2)

Where police officers spent 16 to 24 man-hours attempting to locate witness, who had testified during first trial of defendant, letter addressed to supposed permanent address of

witness in Mexico was returned and investigator from district attorney's office spent four days attempting to locate witness, reasonable diligence was exercised to locate witness and it was not error to permit reading of absent witness' reported testimony in second trial. N.R.S. 178.230. Eisentrager v. State, 1963, 378 P.2d 526, 79 Nev. 38. Criminal Law Ⓒ 543(2)

\*4393 Evidence that deputy sheriff attempted to locate state witness named in subpoena every day for some seventeen days preceding trial by visiting probable places of witness' employment, communicating with secretary of labor union in city without state where witness had gone, and by otherwise searching and inquiring, showed witness' unavailability sufficiently to authorize admission of witness' deposition taken at preliminary examination, under statute. Comp.Laws, § 10775, as amended by St.1933, c. 101. Hill v. State, 1937, 68 P.2d 569, 58 Nev. 28. Criminal Law Ⓒ 543(2)

Evidence of what an absent witness testified to on a former

trial is inadmissible when the whereabouts of the absent witness is known and his deposition can be taken. Gerhauser v. North British & Mercantile Ins. Co., 1871, 7 Nev. 174. Evidence Ⓒ 577

#### 8. Foundation for admission of evidence

No error was shown in excluding hearsay declaration against penal interest in absence of showing that purported declarant was unavailable as a witness. N.R.S. 51.055, 51.345(1)(b). Goff v. State, 1972, 496 P.2d 160, 88 Nev. 264. Criminal Law Ⓒ 419(4)

Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature, statutory and constitutional provisions effective as a result of approval and ratification by the voters at the November 2006 General Election, and technical corrections received from the Legislative Counsel Bureau (2006).



**\*4467 N.R.S. 51.325**

**WEST'S NEVADA REVISED  
STATUTES ANNOTATED  
TITLE 4. WITNESSES AND  
EVIDENCE  
CHAPTER 51. HEARSAY  
EXCEPTIONS  
DECLARANT UNAVAILABLE**

*Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature, statutory and constitutional provisions effective as a result of approval and ratification by the voters at the November 2006 General Election, and technical corrections received from the Legislative Counsel Bureau (2006).*

**51.325. Former testimony**

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, is not inadmissible under the hearsay rule if:

1. The declarant is unavailable as a witness; and

2. If the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same.

*Added by Laws 1971, p. 797.*

<General Materials (GM) - References, Annotations, or Tables>

**HISTORICAL NOTES****SUBCOMMITTEE'S COMMENT**

Altered from Illustration (1) of Draft Federal Rule 8-04 to preclude, for example, use against a second victim of a multiple accident of testimony elicited in a trial involving the first victim.

**HISTORICAL AND STATUTORY****NOTES****Uniform Law**

This section is based upon Rule 804 of the Uniform Rules of Evidence (1974). See 13B Uniform Laws Annotated, Master Edition.

**REFERENCES****CROSS REFERENCES**

Depositions, use in court proceedings, see NRCP 32.

**LIBRARY REFERENCES**

Criminal Law  $\S$  539 to 548.  
Evidence  $\S$  575 to 583.  
Westlaw Topic Nos. 110, 157.  
C.J.S. Criminal Law  $\S$  858, 1089 to 1093.  
C.J.S. Evidence  $\S$  478 to 494.

**\*4468 RESEARCH REFERENCES****Treatises and Practice Aids**

Wharton's Criminal Evidence  $\S$  93:30, Nevada.

Wharton's Criminal Evidence  $\S$  100:30, Nevada.

**UNITED STATES SUPREME COURT****Former testimony,**

Former testimony of unavailable declarant, similar motive requirement, waiver, see U.S. v. Salerno, U.S.N.Y. 1992, 112 S.Ct. 2503, 505 U.S. 317, 120 L.Ed.2d 255, on remand 974 F.2d 231.

**ANNOTATIONS****NOTES OF DECISIONS****In general 1****Availability of witness 3****Construction and application 2****Death or disability of witness 7****Grand jury testimony 4****Preliminary hearing testimony 5****Presumptions and burden of proof 6****1. In general**

Unavailable witness' prior sworn testimony concerning his drug transaction with murder defendant, which testimony witness had given at penalty hearing during trial of defendant for another murder, was admissible in present murder prosecution, where defendant's motive to cross-examine was in both instances to avoid death penalty, and where defense

counsel had had full, complete, and unrestricted opportunity to cross-examine witness and did not show how he would have further impeached witness. N.R.S. 51.325. *Lisle v. State*, 1997, 941 P.2d 459, 113 Nev. 679, rehearing denied, certiorari denied 119 S.Ct. 81, 525 U.S. 830, 142 L.Ed.2d 63. Criminal Law Ⓒ544

## 2. Construction and application

Prior testimony is not inadmissible under hearsay rule if hearsay declarant is unavailable as witness and party against whom former testimony is offered was party or is in privity with one of former parties and issues are substantially the same. N.R.S. 51.325. *Kaplan v. State*, 1983, 663 P.2d 1190, 99 Nev. 449. Criminal Law Ⓒ543(1)

\*4469 Word "proceeding," following "trial" in statute relating to reading of reported testimony of deceased witness, was intended to include practically every inquiry which might invoke attention of court (Comp. Laws 1929, § 9019). *Martin v. Duncan Automobile Co.*, 1931, 296 P. 24, 53 Nev. 212. Evidence Ⓒ576

## 3. Availability of witness

Witness was "unavailable" due to invocation of his Fifth Amendment right not to testify, even though district court did not order witness to testify before he invoked his Fifth Amendment privilege, and so court did not err by admitting witness's preliminary hearing testimony in defendant's murder trial. U.S.C.A. Const.Amend. 5; N.R.S. 171.198, subd. 6(b). *Thomas v. State*, 1998, 967 P.2d 1111, 114 Nev. 1127, rehearing denied, certiorari denied 120 S.Ct. 85, 528 U.S. 830, 145 L.Ed.2d 72, denial of habeas corpus affirmed in part, reversed in part 83 P.3d 818, 120 Nev. 37. Criminal Law Ⓒ543(1)

Efforts undertaken by state to locate and serve two witnesses were reasonable, even though state did not make every possible effort to locate witnesses, and thus their prior trial testimony was admissible; investigator for district attorney's office went to witness' prior place of employment, investigator visited other possible places of employment, investigator went to witness' last known address, investigator ran computer check, and investigator contacted Department of Motor Vehicles. U.S.C.A. Const.Amend. 6. *Quillen v. State*, 1996, 929 P.2d 893, 112 Nev. 1369, rehearing denied. Criminal Law Ⓒ543(2)

Hearsay declarant is unavailable as witness if he is persistent in refusing to testify despite order of judge to do so. N.R.S. 51.055, subd. 1(b). *Kaplan v. State*, 1983, 663 P.2d 1190, 99 Nev. 449. Criminal Law Ⓒ543(1)

Testimony given in defendant's first trial, in which issues were substantially the same as those in second trial, by witness who was, through refusal to testify, "unavailable" at second trial, was not subject to exclusion on hearsay grounds. N.R.S. 51.055, subd. 1(b), 51.325. *Kaplan v. State*, 1983, 663 P.2d 1190, 99 Nev. 449. Criminal Law Ⓒ543(1)

Where state investigator had been in contact with robbery victim prior to trial, knew of his out-of-state residence and his presence there but made no effort to compel victim's attendance at trial, victim was not "unavailable" at commencement of trial and allowing use at trial, of transcript of his testimony given at preliminary hearing was error even though during continuance prosecutor unsuccessfully utilized Uniform Act to secure the attendance of out-of-state witnesses. N.R.S. 171.198, subd. 7, 174.395 et seq. *Drummond v. State*, 1970, 462 P.2d 1012, 86 Nev. 4. Criminal Law Ⓒ543(1)

\*4470 Reasonable diligence must be exercised to locate witness for use of his reported testimony in subsequent trial of same cause. N.R.S. 178.230. *Eisentrager v. State*, 1963, 378 P.2d 526, 79 Nev. 38. Criminal Law Ⓒ543(2)

Where police officers spent 16 to 24 man-hours attempting to locate witness, who had testified during first trial of defendant, letter addressed to supposed permanent address of witness in Mexico was returned and investigator from district attorney's office spent four days attempting to locate witness, reasonable diligence was exercised to locate witness and it was not error to permit reading of absent witness' reported testimony in second trial. N.R.S. 178.230. *Eisentrager v. State*, 1963, 378 P.2d 526, 79 Nev. 38. Criminal Law Ⓒ543(2)

Evidence that deputy sheriff attempted to locate state witness named in subpoena every day for some seventeen days preceding trial by visiting probable places of witness' employment, communicating with secretary of labor union in city without state where witness had gone, and by otherwise searching and inquiring, showed witness' unavailability sufficiently to authorize admission of witness' deposition taken at preliminary examination, under statute. Comp.Laws, § 10775, as amended by St.1933, c. 101. *Hill v. State*, 1937, 68 P.2d 569, 58 Nev. 28. Criminal Law Ⓒ543(2)

Evidence of what an absent witness testified to on a former trial is inadmissible when the whereabouts of the absent witness is known and his deposition can be taken. *Gerhauser v. North British & Mercantile Ins. Co.*, 1871, 7 Nev. 174. Evidence Ⓒ577

## 4. Grand jury testimony

Admission of grand jury testimony of defendant's wife, who was not married to defendant when she gave grand jury testimony, was not abuse of trial court's discretion under hearsay exception for statement offered as evidence of material fact which is more probative than any other evidence proponent can procure through reasonable efforts, where wife was unavailable as witness due to her assertion of marital privilege, testimony contained substantial guarantees of trustworthiness, and wife was only person who could establish link between drafting of supplier checks and their conversion to cash, which demonstrated defendant's guilt. Fed.Rules Evid.Rule 804(b)(5), 28 U.S.C.A. U.S. v. Marchini, 1986, 797 F.2d 759, certiorari denied 107 S.Ct.

1288, 479 U.S. 1085, 94 L.Ed.2d 145. Criminal Law ⚡ 543(1)

**\*4471 5. Preliminary hearing testimony**

Codefendant who invoked Fifth Amendment privilege against self-incrimination was unavailable, and, thus, his testimony at preliminary hearing during which he was represented by counsel and cross-examined was admissible hearsay, even though codefendant remained available under statute permitting admission of preliminary hearing testimony when witness is sick, out of state, dead, or persistent in refusing to testify despite judicial order; overruling *LaPena v. State*, 96 Nev. 43, 604 P.2d 811 (1980); *Lemberes v. State*, 97 Nev. 492, 634 P.2d 1219 (1981). U.S.C.A. Const.Amend. 5; N.R.S. 50.115, subd. 4, 51.055, 171.198, subd. 6(b). *Funches v. State*, 1997, 944 P.2d 775, 113 Nev. 916. Criminal Law ⚡ 543(1)

Trial court deciding admissibility of testimony from preliminary hearing may consider general provisions of evidence code when determining unavailability of witness; thus, court is not limited to grounds of unavailability stated in statute permitting admission of preliminary hearing testimony when witness is sick, out of state, dead, or persistent in refusing to testify despite judicial order or when personal attendants cannot be had in court. N.R.S. 51.055, 171.198, subd. 6(b). *Funches v. State*, 1997, 944 P.2d 775, 113 Nev. 916. Criminal Law ⚡ 543(1)

Trial court's admission of preliminary hearing testimony by prostitute that defendant had followed her to her apartment on day of charged capital murder and stated that "he was going to do the same thing to me he did with a girl at Caesar's Palace with a Coke can," excising prostitute's reference to defendant's alleged rape of her, was not abuse of discretion; prostitute was subpoenaed to appear at trial but nonetheless skipped town and was unavailable. *Dawson v. State*, 1992, 825 P.2d 593, 108 Nev. 112, rehearing denied, certiorari denied 113 S.Ct. 1286, 507 U.S. 921, 122 L.Ed.2d 678, rehearing denied 113 S.Ct. 1884, 507 U.S. 1046, 123 L.Ed.2d 502. Criminal Law ⚡ 543(1)

**\*4472** Any deficiency in State's formal showing of county pathologist's unavailability to testify at time of trial was inconsequential in determining admissibility of pathologist's preliminary hearing testimony where court was independently aware that coronary bypass surgery rendered pathologist unavailable to testify at trial. N.R.S. 171.198, subd. 7. *Hogan v. State*, 1987, 732 P.2d 422, 103 Nev. 21, certiorari denied 108 S.Ct. 201, 484 U.S. 872, 98 L.Ed.2d 153, dismissal of habeas corpus affirmed 952 F.2d 224, dismissal of post-conviction relief affirmed 860 P.2d 710, 109 Nev. 952, rehearing denied 916 P.2d 805, 112 Nev. 553, certiorari denied 117 S.Ct. 334, 519 U.S. 944, 136 L.Ed.2d 245. Criminal Law ⚡ 543(2)

Admission into evidence of transcript of preliminary hearing testimony of complaining witness, who was essential witness to State's case, whose testimony was not cumulative, and whose testimony was only evidence which contradicted

defendants' version of events in question, was reversible error, where State made absolutely no effort to contact witness' relatives, neighbors, or coemployees and made only nominal efforts to contact witness' friends and employers. U.S.C.A. Const.Amend. 6. *Power v. State*, 1986, 724 P.2d 211, 102 Nev. 381. Criminal Law ⚡ 543(2); Criminal Law ⚡ 1169.1(1)

Physician's preliminary hearing testimony, concerning autopsy of victim, was admissible at trial where murder defendant was represented by counsel at preliminary hearing, counsel cross-examined physician and physician was unavailable at time of trial. N.R.S. 171.198, subd. 7. *Aesoph v. State*, 1986, 721 P.2d 379, 102 Nev. 316. Criminal Law ⚡ 543(1); Criminal Law ⚡ 544

In prosecution for bribery of a public official and perjury, trial court committed reversible error in admitting preliminary hearing testimony by one defendant's superior after declarant stated his intention to claim privilege against self-incrimination with regard to all matters upon which he had testified upon preliminary examination and then refused to answer specific questions from preliminary examination as propounded to him by counsel. U.S.C.A. Const. Amend. 5; N.R.S. 51.055, subd. 1(b), 51.325, 171.198, subd. 7. *Lemberes v. State*, 1981, 634 P.2d 1219, 97 Nev. 492. Criminal Law ⚡ 539(1); Criminal Law ⚡ 1169.1(2.1)

Admissibility of preliminary hearing testimony in later proceedings is governed by statute providing that such testimony may be used as substantive evidence in criminal trial only when witness is sick, out of the state, dead, or when his personal attendance cannot be had in court; such statute, which deals specifically with issue of admissibility of preliminary hearing testimony of witness who persistently refuses to testify, prevailed over general evidence code provision governing admissibility of former testimony of unavailable witness. N.R.S. 51.055, subd. 1(b), 51.325, 171.198, subd. 7. *LaPena v. State*, 1980, 604 P.2d 811, 96 Nev. 43. Criminal Law ⚡ 543(1)

**\*4473** Even if the district court, after the defendant at trial introduced preliminary hearing testimony of an unavailable witness to the effect that defendant had never told her he was going to "dust" the murder victim, erred in allowing the State to call a detective who testified that the witness had given a contrary statement to him, the jury's verdict finding defendant guilty of second-degree murder was supported by other overwhelming evidence of guilt and thus would not be disturbed on appeal. N.R.S. 51.325, subd. 1. *Passarelli v. State*, 1977, 564 P.2d 608, 93 Nev. 292. Criminal Law ⚡ 1170.5(1)

Transcript of testimony of a material witness given at preliminary examination may be received in evidence at trial if (1) defendant was represented by counsel at preliminary hearing; (2) counsel cross-examined witness; and (3) witness is shown to be actually unavailable at time of trial. *Drummond v. State*, 1970, 462 P.2d 1012, 86 Nev. 4. Criminal Law ⚡ 543(2)

### 6. Presumptions and burden of proof

Where it was shown that witness who had testified at defendant's first trial on same charge was beyond jurisdiction of the court, trial court did not err in permitting state to read in evidence testimony of such witness, stenographically reported by official reporter at first trial, upon a proper foundation being laid by showing witness to be at the time in an institution in Colorado and by proving testimony to be correct in accordance with terms of statute. Comp.Laws. § 11252. *State v. Loveless*, 1944, 150 P.2d 1015, 62 Nev. 312. Criminal Law ⚡543(2)

To introduce testimony of witness given on previous proceeding in same cause, it was not necessary to prove witness was permanently outside jurisdiction (Comp. Laws 1929, § 9019). *Martin v. Duncan Automobile Co.*, 1931, 296 P. 24, 53 Nev. 212. Evidence ⚡577

### 7. Death or disability of witness

Death of witness prior to trial was no basis for excluding her testimony given at preliminary hearing. N.R.S. 51.055, subd. 1(c), 51.325, subd. 1. *Passarelli v. State*, 1977, 564 P.2d 608, 93 Nev. 292. Criminal Law ⚡542

Alleged unreliability of witness who testified at preliminary hearing but died prior to trial was not ground for excluding her preliminary hearing testimony, but merely went to her credibility and the weight to be given her testimony, which were determinations for the trier of fact. *Passarelli v. State*, 1977, 564 P.2d 608, 93 Nev. 292.

### Criminal Law ⚡542

Decision to admit testimony of deceased witness given at preliminary hearing, after balancing its prejudicial effect against its probative value, was addressed to the sound discretion of the trial court. *Passarelli v. State*, 1977, 564 P.2d 608, 93 Nev. 292. Criminal Law ⚡542

\*4474 As a general and well-settled rule the testimony of a deceased witness, given under oath, in a proceeding authorized by law, where the opposing party had the opportunity of a cross-examination, is admissible as evidence against such party in any subsequent trial of the case; and the fact that, in the trial, when the deceased witness testified, the court erred in impaneling the jury under an unconstitutional statute, does not warrant excluding the testimony of the witness. *State v. Johnson*, 1877, 12 Nev. 121. Criminal Law ⚡542

The testimony of a witness, since deceased, in a former suit, is admissible in a subsequent suit between the same parties or their privies in reference to the same subject-matter. *Gerhauser v. North British & Mercantile Ins. Co.*, 1871, 7 Nev. 174. Evidence ⚡576

Current through the 2005 73rd Regular Session and the 22nd Special Session of the Nevada Legislature, statutory and constitutional provisions effective as a result of approval and ratification by the voters at the November 2006 General Election, and technical corrections received from the Legislative Counsel Bureau (2006).

**ORIGINAL**

DISTRICT COURT  
CLARK COUNTY, NEVADA FILED IN OPEN COURT

DEC 09 2005 20

SHIRLEY N. PARRAGUIRRE, CLERK

BY Jennifer Kimmel

JENNIFER KIMMEL DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

GLENFORD ANTHONY BUDD,

Defendant.

Case No. C193182

Dept. No. XVIII

VOLUME 3-A  
(A.M. SESSION)

REPORTER'S TRANSCRIPT OF JURY TRIAL

Before the Honorable Justice Nancy M. Saitta

Thursday, December 8, 2005  
10:00 a.m.-12:30 p.m.

APPEARANCES:

For the State: EDWARD KANE, ESQUIRE  
Deputy District Attorney

TALEEN PANDUKHT, ESQUIRE  
Deputy District Attorney

For the Defendant: HOWARD BROOKS, ESQUIRE  
Deputy Public Defender

TIMOTHY O'BRIEN, ESQUIRE  
Deputy Public Defender

Reported by: Gayle G. Pichierri, RPR, CRR  
NV CCR No. 595, CA CSR No. 11406

PRESTIGE COURT REPORTING  
(702) 898-7676

COUNTY CLERK

DEC 09 2005

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1 (10:17 a.m.)

2 THE COURT: Good morning. We have  
3 some matters we need to take up outside the  
4 presence?

5 MR. BROOKS: Yes, Judge. Excuse me.  
6 Howard Brooks on behalf of Mr. Budd, Your  
7 Honor. On Tuesday in discussions with  
8 Mr. Kane, I asked Mr. Kane what he intended to  
9 do about the testimony of Winston Budd.  
10 Winston Budd is the uncle of Glenford Budd.  
11 Winston Budd testified at the preliminary  
12 hearing. He testified that Glenford made  
13 admissions to him. Winston Budd, as of this  
14 moment, is currently living in Belize.

15 Mr. Kane informed me he did intend to  
16 move to admit the testimony from the  
17 preliminary hearing in this case. NRS 51.325  
18 provides former testimony in the same case is  
19 not inadmissible under the hearsay rule if the  
20 declarant is unavailable as a witness.

21 NRS 51.055 defines unavailability.  
22 And Subsection 1 d regarding the statute  
23 states that the witness must be absent from  
24 the hearing and beyond the jurisdiction of the  
25 court to compel appearance and the proponent

1 of the state has exercised reasonable  
2 diligence, but has been unable to procure his  
3 attendance to take his deposition.

4 As of today, Winston Budd is in  
5 Belize. Mr. Kane has told me the state has  
6 called his telephone number and has spoken  
7 with people at his residence who confirmed  
8 that he is in fact living there. Mr. Kane has  
9 informed me that he has asked for Mr. Budd to  
10 call him back, but Mr. Budd has not done so.

11 I'm not aware that anything else has  
12 been done beyond that and I could be wrong,  
13 but that's what I understand. I have  
14 personally talked to Winston Budd on the  
15 telephone presumably at the same address, the  
16 same phone number, as where Mr. Kane talked --  
17 tried to talk to him. He does live at that  
18 house. He has a job. He can be reached on  
19 the telephone at certain hours, usually at  
20 nighttime.

21 THE COURT: Does he have a job here?

22 MR. BROOKS: No, in Belize.

23 THE COURT: Okay. So you're not  
24 disputing the fact he is out of the country?

25 MR. BROOKS: No, he is in definitely

1 in Belize right now. He has a job there. He  
2 can be reached on the telephone.

3 When we talked to him, he is willing  
4 to come here to testify. We decided not to  
5 bring him in. Belize has a consulate in Los  
6 Angeles. The consul there is available to  
7 assist the state in procuring witnesses in  
8 Belize. I believe there is a procedure by  
9 which the state could have obtained a subpoena  
10 and procured his attendance.

11 I also believe that had the state  
12 actually contacted Mr. Budd, he would be  
13 cooperative with the state.

14 Under these circumstances, we dispute  
15 the contention that simply calling and not  
16 receiving a return phone call is reasonable  
17 diligence in procuring his testimony.

18 THE COURT: Or an appropriate showing  
19 of unavailability.

20 MR. BROOKS: Correct. And because  
21 they have not exercised reasonable diligence,  
22 they have not satisfied the unavailability  
23 requirements of NRS 51.055, which therefore  
24 does not satisfy the requirement of NRS  
25 351.325 for the former testimony to be



1 admitted; therefore, we object to the  
2 admission of Mr. Budd's testimony. We object  
3 to the state referencing that testimony in  
4 opening statement.

5 And also, just so the record is  
6 clear, Judge, we are ourselves are bringing in  
7 one or two witnesses from Belize. In fact,  
8 from the same household where Winston Budd  
9 currently resides. And I'm bringing this to  
10 the Court's attention now just because we do  
11 probably have opening arguments coming up  
12 within the next several hours.

13 THE COURT: Mr. Kane, do you wish to  
14 be heard?

15 MR. KANE: Judge, I think Counsel has  
16 made the record for me better than I could  
17 have, both earlier in the trial and today.  
18 Counsel has repeatedly complained that he has  
19 had trouble getting cooperation from the  
20 victim's family in preparing a mitigation case  
21 to present to the court.

22 Now, I issued a subpoena well in  
23 advance of the trial. My investigator managed  
24 to obtain information that led him to believe  
25 that Winston Budd was living in Belize. He

1 called down there. For all I know, the person  
2 he was talking to was Winston Budd, but he was  
3 told by someone that Mr. Budd lived there. He  
4 called back on several other occasions --  
5 first of all, he explained to the person he  
6 was talking to that we were anxious to obtain  
7 Mr. Budd's appearance here in Las Vegas for  
8 this trial.

9 My investigator then called on  
10 several subsequent occasions and left messages  
11 on the phone pleading with Mr. Budd to call  
12 us. Had I received any of the information  
13 that Mr. Brooks just disclosed in open court  
14 that there might have been another number that  
15 I could call at certain hours, or that the  
16 witness was willing to travel, I certainly  
17 would have been happy to make those  
18 arrangements.

19 We wanted to, and we would much  
20 prefer to, present his live testimony than his  
21 preliminary hearing testimony.

22 The court can certainly take judicial  
23 notice that Nevada subpoenas on their face  
24 have no extraterritorial application. And I'm  
25 glad Mr. Brooks is so confident without

1 citation of authority that there are  
2 procedures in place for dragging a witness  
3 back here from Belize, because my experience  
4 has been any time that I've tried to enforce a  
5 Nevada state subpoena internationally, I've  
6 had no luck whatsoever. We can't get  
7 extraditions done most of the time, much less  
8 be dragging witnesses back here who don't want  
9 to come.

10 And if he did want to come, we would  
11 have been happy to make the arrangements. We  
12 couldn't do that because he refused to make  
13 contact with us.

14 And Mr. Brooks in his statement has  
15 now confirmed that the place we tried to make  
16 contact with him is in fact the place where he  
17 lives. So the evidence is even stronger than  
18 if it was only me saying so, that he is  
19 deliberately not returning our calls and  
20 deliberately not willing to come back and  
21 testify.

22 Under those circumstances the state  
23 has proceeded in good faith. The witness is  
24 clearly unavailable. The prior testimony fits  
25 all other requirements for admissibility, it

1 was subject to cross-examination, it was in  
2 the same case, and we asked that it be  
3 admitted.

4 THE COURT: Anything further,  
5 Mr. Brooks?

6 MR. BROOKS: Submit it, Your Honor.

7 THE COURT: I'm going to allow -- I  
8 presume there will be a formal request to use,  
9 unless you want to have this substitute as,  
10 the formal request for use of that transcript,  
11 but I presume you could provide by  
12 affidavit -- can I presume that you could  
13 provide by affidavit the representations that  
14 you made here that you attribute to your  
15 investigator?

16 MR. KANE: Absolutely, Judge. I'll  
17 make sure that that's on file.

18 THE COURT: For the time being, any  
19 concern about the use of that is, as far as  
20 I'm concerned, yet to be determined. We'll  
21 deal with it when you bring that motion. I  
22 presume you'll bring a formal motion.

23 MR. KANE: Yes, I will, Judge. What  
24 I would like to do, though, now is offer as an  
25 offer of proof the statements that I have made