

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD BUDD,

Appellant,

VS.

STATE OF NEVADA,

Respondent.

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Case No.: 66815

APPELLANT’S OPENING BRIEF

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JURISDICTIONAL STATEMENT

NRAP 3, 3C and 4 provide this Court with jurisdiction over this appeal from the *Findings of Fact, Conclusions of Law and Order*, entered on or about October 17, 2014, (the “**Dismissal Order**”), by the Clark County District Court dismissing Glenford Budd’s (the “**Appellant**”) *First Supplemental Petition for Writ of Habeas Corpus Post Conviction*, filed on May 23, 2013 (the “**First Petition**”), *Second Supplemental Petition for Writ of Habeas Corpus*, filed on October 25, 2013 (the “**Second Petition**”), *Third Supplemental Petition for Writ of Habeas Corpus and Memorandum Regarding Petitioner’s Exhibits (In Camera Review)*, filed on December 12, 2013 (the “**Third Petition**”), and *Fourth Supplemental Petition for Writ of Habeas Corpus*, which was filed on December 26, 2013 (the “**Fourth Petition**”, or collectively, all four petitions hereinafter referred to as the “**Petitions**”). A copy of the Dismissal Order is found in the Appellant’s Appendix, pp. 003091-003103 (hereinafter “ APLT. APP.”)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT MR. BROOKS WAS EFFECTIVE COUNSEL WHEN HE FAILED TO ADEQUATELY PREPARE FOR TRIAL OR RETAIN EXPERT DEFENSE WITNESSES; FAILED TO PROVIDE A DEFENSE ON PREMEDITATION THAT WAS OBJECTIVELY REASONABLE UNDER THE CIRCUMSTANCES OF THIS CASE, FAILED TO ADEQUATELY SUBJECT THE STATE’S CASE TO THE

1 **ADVERSARIAL PROCESS; AND FAILED TO OBTAIN**
2 **BUDD’S PRIOR AUTHORIZATION TO ADOPT THE**
3 **STRATEGY OF ADMITTING BUDD’S GUILT TO THE**
4 **JURY.**

5
6 **II. THE TRIAL COURT IMPROPERLY DENIED BUDD’S**
7 **CLAIM OF CUMULATIVE ERROR ON INEFFECTIVE**
8 **ASSISTANCE OF COUNSEL GIVEN THERE WAS A**
9 **REASONABLE PROBABILITY OF A DIFFERENT**
10 **RESULT IN THE OUTCOME OF THE PROCEEDINGS**
11 **ABSENT THE INEFFECTIVENESS.**

12
13 **III. THE TRIAL COURT IMPROPERLY DETERMINED ANY**
14 **ERRORS IN BROOKS’ REPRESENTATION OF BUDD**
15 **WERE HARMLESS GIVEN THE OVERWHELMING**
16 **EVIDENCE, FAILING TO FIND THE HARMLESSNESS**
17 **BEYOND A REASONABLE DOUBT AS REQUIRED FOR**
18 **ERRORS PERTAINING TO CONSTITUTIONAL RIGHTS.**

19
20 **STATEMENT OF THE CASE**

21 On May 29, 2003, a Commitment and Order to Appear was issued for
22 defendant and appellant herein, Glenford Anthony Budd (“**Budd**”). APLT.
23 APP. 000002. Glenford Budd was charged by Criminal Complaint with three
24 counts of Murder with use of a Deadly Weapon (NRS 200.010, 200.030, and
25 193.165) by the Justice Court in Las Vegas Township. APLT. APP. 000005. On
26 June 2, 2003, Budd made his initial appearance in Justice Court. APLT. APP.
27 000022. After continuance, the preliminary hearing began June 16, 2003.
28 APLT. APP. 000028.

29 The Information was filed on June 26, 2003, which charged Budd with
30 three (3) counts of Murder with Use of a Deadly Weapon pursuant to NRS

1 200.010, NRS 200.030 and NRS 193.165, for the murders of Dajon Jones,
2 Derrick Jones, and Jason Moore. APLT. APP. 000024. On July 2, 2003, an
3 arraignment was held whereat Budd pled not guilty and waived his right to a
4 speedy trial. APLT. APP. 000003-000003.

5 On July 25, 2003, the State filed its notice that it intended to seek the
6 death penalty on the basis of multiple counts of murder in the first degree.
7 APLT. APP. VOL. I. 000099. At arraignment, Budd pleaded not guilty to the
8 charges contained in the Information. APLT. APP. 000129.

9 On January 5, 2004, Budd's defense counsel, Howard S. Brooks
10 (hereinafter "**Brooks**") sought to vacate and continue the trial based on his case
11 load at the time, which consisted of eleven murder trials, three of which were
12 seeking the death penalty. APLT. APP. 000132-000134. Brooks' declaration
13 stated that he was unable to focus and prepare for the Budd murder trial and he
14 did not have all the information necessary for a mitigation case to go to trial.
15 *Id.*

16 On September 14, 2005 Brooks filed thirteen (13) motions on Budd's
17 behalf. APLT. APP. 000231-000233; 000234-000237; 000238-000242;
18 000263-000266; 000243-000247; 000248-000255; 000256-000262; 000267-
19 000275; 000276-000279; 000374-000382; 000347-000352; 000369-000373;
20 000353-000368. Among these, he filed a *Motion to Compel* for exchange of the

1 *Jury Instructions* on the first day of trial, a *Motion to Compel Recordings*
2 pertaining to all proceedings (APLT. APP. 000231-000233), a motion to
3 exclude all jurors who knew the victims or their families, and for
4 disqualification of all jurors who would vote for the Death Penalty (APLT.
5 APP. 000238-000242; 000263-000266), a motion to bifurcate the penalty phase
6 from the guilt phase of trial, and a request that the defense speak last in the
7 penalty phase (APLT. APP. 000248-000255), a motion to have all jury
8 selection completed one week prior to the trial (APLT. APP. 000267-000275), a
9 motion to preclude reference to any part of the trial as the “guilt phase” (APLT.
10 APP. 000276-000279), a motion to strike certain aggravating circumstances in
11 the State’s notice of their intention to seek the death penalty arguing they could
12 not rely on multiple counts of murder because it was unconstitutional as *ex post*
13 *facto* (APLT. APP. 000374-000382), and a *Motion of Limine Prohibiting*
14 *Prosecution in Argument, for Order Court takes Judicial Notice of Authority*
15 *Cited in Motion if Defense Objects at Trial to Improper Argument (Motion 1)*
16 (APLT. APP. 000138-000230).

17 On September 21, 2004, the State opposed the request for all recordings
18 of the proceedings stating it would be overly burdensome (APLT. APP.
19 000291-000293), opposed the exclusion of jurors who knew the victims or their
20 families arguing that a blanket exclusion would be impermissible (APLT. APP.

1 000294-000296), conceded that a juror who automatically voted for the death
2 penalty was not impartial (APLT. APP. 000300-000303), opposed bifurcation
3 and objected to having the defense speak last in the penalty phase citing NRS
4 175.14, which indicates the State is to conclude the proceedings (APLT. APP.
5 000288-000290), opposed exclusion of reference to the “guilt phase” stating it
6 had faith the jury would use evidence and not characterization to decide the
7 case (APLT. APP. 000297-000299), and opposed having jury selection
8 completed one week prior to trial citing that the current process was adequate.
9 (APLT. APP. 000308-000311).

10 On September 28, 2004, the State gave its *Notice of Witnesses*, which
11 included Winston Budd, COR, Lazon Jones, Sheryl Jones, Terry Key, Greg
12 Lewis, Celeste Palau, Tracey Richards, Krissy Smith, P. Spencer, J. Vaccaro,
13 M. Wallace, Nakia Washington, and M. Wildemann. APLT. APP. 000345-
14 000346. The State also filed a *Notice of Expert Witnesses*, including Louise
15 Renhard (crime scene analysis), David Welch (DNA analysis), James Krylo
16 (firearm, tool work analysis), Marc Washington (crime scene analysis), Dr.
17 Rexenne Maxwell (cause and manner of death), David Horn (crime scene
18 analysis), and Thomas Kern (crime scene analysis). APLT. APP. 000312-
19 000344.

1 On October 4, 2004, the State opposed Budd's motion to strike certain
2 aggravating circumstances in the State's notice to seek the death penalty.
3 APLT. APP. 000404-000410. The State argued there was nothing
4 unconstitutional regarding the factors alleged. *Id.*

5 On October 4, 2004, Brooks filed a motion to prevent, during the
6 possible penalty phase, the characterization of the victims and impact of the
7 victims' loss on the families. APLT. APP. 000347-000352. He cited *Booth v.*
8 *Maryland* 482.U.S. 496 (1987), which precluded impact evidence. *Id.* He also
9 filed a separate motion to preclude cumulative impact evidence and a motion to
10 dismiss notice of intent based on the concept that the Nevada death penalty
11 scheme violates Due Process. APLT. APP. 000353-000368.

12 On October 8, 2004, the State filed its amended intent to seek the death
13 penalty, citing the transcript of preliminary hearing as factual basis for the
14 amendment. APLT. APP. 000387. On October 12, 2004, the State opposed the
15 impact evidence motion, arguing that anyone could produce impact evidence at
16 the penalty phase of the hearing. APLT. APP. 000396-000399. The State also
17 opposed the cumulative evidence statement. APLT. APP. 000392-000395. On
18 October 13, 2004, the State filed its opposition to Budd's motion to strike notice
19 of intent. *Id.*

1 On November 21, 2005, the Defense filed its notice of expert witnesses
2 in accordance with NRS 174.234(2). APLT. APP. 000416-000420. Budd
3 designated John Paglini, Ph.D., to testify in the penalty phase of the hearing. *Id.*
4 The designation was changed December 1, 2005. NRS 174.234(2). APLT.
5 APP. 000423-000426. On November 23, 2005, the court heard the pretrial
6 motions. APLT. APP. 000427-000442.

7 The jury trial commenced on December 5, 2005, and concluded on
8 December 16, 2005. At the conclusion of trial, Budd was convicted by
9 unanimous jury of three (3) counts of Murder With Use of a Deadly Weapon.
10 APLT. APP. 001738-001740. On February 22, 2006, at the conclusion of the
11 sentencing phase, the jury returned a verdict of Life in Prison without the
12 possibility of parole on each of the three counts, to be run consecutively, with
13 credit for 995 days for time served. *Id.* The *Judgment of Conviction (Jury Trial)*
14 (the “**Judgment**”) was filed on March 1, 2006. APLT. APP. 002011-002012.
15 Budd timely appealed the Judgment on March 23, 2006 (the “**Judgment**
16 **Appeal**”). APLT. APP. 002517-002519.

17 Budd’s Opening Brief in the Judgment Appeal was filed on or about
18 August 17, 2006. (See Opening Brief). Budd argued therein a single issue
19 challenging that the evidence was insufficient to support the jury’s verdict. The
20 unpublished Order of Affirmance was entered on January 9, 2007. This Court

1 determined circumstantial evidence may support a conviction and that the direct
2 and circumstantial evidence presented to the jury reasonably inferred Budd was
3 guilty of the first-degree murders with the use of a deadly weapon. APLT. APP.
4 002561-002566. Thus, since it is for the jury to determine the weight and
5 credibility to give conflicting testimony, this Court determined not to disturb
6 the verdict due to the substantial evidence in support of the verdict. APLT.
7 APP. 002566. The Order of Remittitur was entered February 6, 2007. APLT.
8 APP. 002567.

9 Post-trial and post-appeal, Budd moved to hold Brooks in contempt for
10 failure to provide him with a copy of the entire file. APLT. APP. 002583-
11 002591. On July 12, 2007, The Clark County Public Defender filed its
12 Response to Budd's Motion to Hold Clark County Public Defender in
13 Contempt. APLT. APP. 002592-002594. Brooks averred that he turned over the
14 file and it was not his duty after having been discharged to track down missing
15 pages. *Id.*

16 On September 21, 2007, Budd filed his pro per *Petition for Writ of*
17 *Habeas Corpus (Post Conviction)* (the "**Pro Per Petition**"), which argued the
18 following grounds: (1) Brooks was ineffective for failing to conduct pre-trial
19 investigation into Budd's factual innocence, as law enforcement only focused
20 on Budd as the suspect; (2) Brooks failed to investigate the eye witness's

1 identification of Budd; (3) Brooks failed to object to the admission of
2 uncharged bad acts at trial; (4) Brooks failed to call witnesses for the defense to
3 show Budd's factual innocence; (5) Brooks had a conflict of interest in
4 representing Budd, in that Brooks had not seen Budd for one and one-half years
5 prior to the trial, Brooks gave up in his representation of Budd and, combined
6 with his failure to investigate, Brooks failed to adequately represent Budd; (6)
7 the admission of a witness's testimony from an earlier hearing violated Budd's
8 right to confrontation of that witness; (7) Brooks conceded Budd's guilt during
9 closing arguments in the guilt phase of the trial; (8) the State failed to disclose
10 an agreement it had made in exchange for a witness's testimony at trial; (9)
11 Brooks failed to obtain exculpatory evidence in contradiction of a hand-written
12 letter supposedly written by Budd; (10) Brooks failed to object to prosecutorial
13 misconduct; (11) Brooks failed to object to judicial misconduct; (12) Brooks
14 failed to object to erroneous jury instructions; (13) Brooks was ineffective as
15 appellate counsel for failing to challenge the constitutionality of the statutory
16 definition of reasonable doubt; (14) Brooks failed to present meritorious issues
17 on appeal; and (15) the accumulation of Brooks' errors was ineffective
18 assistance and violated Budd's constitutional rights. APLT. APP. 002709-
19 002749; 002750-002784. The State responded in opposition thereto. APLT.
20 APP. 002797-002807. Based on the pleadings and transcripts, the district court

1 dismissed the Pro Per Petition without a hearing or appointing counsel for
2 Budd. APLT. APP. 002808-002818, 002825-002827.

3 Budd timely appealed on January 23, 2008, from the dismissal of the Pro
4 Per Petition, at the conclusion of which this Court reversed the district court and
5 ordered that counsel be appointed to represent Budd in the post-conviction
6 proceedings. APLT. APP. 002825; 002830; 002831-002834, 002908-002818;
7 *see Budd v. State*, 281 P.3d 1158 (2009) (unpublished opinion) (the “**Appeal**
8 **Reversal**”). The matter was then remitted back to the district court. APLT.
9 APP. 002836. After the Appeal Reversal, the trial court entered its *Order*
10 *Setting Hearing Appointment of Counsel Re: Supreme Court Remand*, which
11 was filed on October 29, 2009. APLT. APP. 002837.

12 Budd filed his *First Supplemental Petition for Writ of Habeas Corpus*
13 *Post Conviction* on May 23, 2013 (the “**First Petition**”). APLT. APP. 002847-
14 002915. The First Petition raised the following claims of error on the basis of
15 ineffective assistance of counsel:

- 16 A. Brooks failed to adequately prepare for trial;
- 17 B. Brooks failed to present evidence supporting reasonable doubt on
- 18 the question of premeditation;
- 19 C. Brooks refused to allow Budd to participate in his own defense;
- 20 D. Brooks failed to object to the district court rendering legal advice
- 21 to Budd during the trial;
- 22 E. Brooks violated court orders to Budd’s prejudice;
- 23 F. Brooks failed to communicate with Budd;
- 24 G. Brooks failed to zealously represent Budd’s interests;
- 25 H. Brooks had a conflict of interest but continued to represent Budd;

- I. Brooks failed to preserve the record on appeal;
- J. Brooks made unauthorized admissions that violated Budd's right to remain silent;
- K. Brooks' unauthorized admissions eliminated Budd's presumption of innocence;
- L. Brooks' unauthorized admissions alleviated the State's burden of proof;
- M. Brooks improperly waived Budd's right to confront witnesses;
- N. Brooks failed to evaluate Budd's competency to stand trial;
- O. Brooks failed to retain expert defense witnesses, and;
- P. The cumulative effect of the foregoing errors prejudiced Budd.

Id.

On October 25, 2013, Budd filed his *Second Supplemental Petition for Writ of Habeas Corpus Post Conviction* (the "**Second Petition**"). APLT. APP. 002919-002927. The Second Petition did not contain any new argument but attached thereto as exhibits the electronic case notes from Brooks that are cited by the First Petition. *Id.* Throughout the case, Brooks maintained electronic case notes, which contain the following material entries:

- a) On January 5, 2004, Brooks notes that while the case is set for trial on February 23, 2004, he does not anticipate being ready. The note specifically states, "HSB has not been able to pay attention to this case, so before reading the letter, HSB assumed the client was unhappy with our representations." (*See Case Notes*, P. 19).
- b) On June 16, 2004, Brooks notes that he told Budd that this was not a case where he was going home anytime soon, but rather one where he would probably spend the rest of his life in prison or alternatively get the death penalty. Budd literally had no reaction to this statement at all. He was not engaged. (*See Case Notes*, P. 15).

- 1 c) On June 18, 2004, Brooks notes that he spoke with Budd's
2 grandmother, Karen who indicates that Budd tells her he will be
3 coming home soon, and that the CCDC is just like daycare. She
4 confesses that she does not believe that Budd understands what is
5 going on. (*See Case Notes, P. 14*).
6
- 7 d) On September 12, 2005, Brooks made an entry indicating that
8 Budd was disengaged in the whole process and his responses
9 were generally only one or two syllables. (*See Case Notes, P.*
10 *10*).
11
- 12 e) On October 19, 2005, Brooks made an entry in the notes
13 indicating that Budd remains disconnected from the case and
14 unwilling to deal with reality. (*See Case Notes, P. 9*).
15
- 16 f) On November 18, 2005, the State filed an Amended Notice of
17 Evidence in Aggravation. (*See Amended Notice of Evidence in*
18 *Aggravation*). The State sought to introduce evidence of
19 aggravation consisting solely of the anticipated conviction of
20 more than one count of murder in the instant case. *Id.*
21
- 22 g) On November 28, 2005, Brooks met with Bud. During this
23 meeting, Budd denied he committed the crime and when Budd
24 told him the evidence was overwhelming that Budd would be
25 convicted on all three counts. Budd responded that he would just
26 "hope for the best." (*See Case Notes, P. 7*). Brooks asked if
27 Budd wanted to testify to which Budd's response was in the
28 affirmative. *Id.*
29

30 The State responded to the First Petition and the Second Petition on
31 November 6, 2013. APLT. APP. 002928-002958. The State summarily argued
32 against each claim raised by Budd in the First Petition by arguing Brooks
33 rendered effective assistance and Budd had not suffered any prejudice. *Id.*

34 On December 12, 2013, Budd filed his *Third Supplemental Petition for*
35 *Writ of Habeas Corpus* (the "**Third Petition**"). APLT. APP. 002986-002989.

1 The Third Petition did not contain any additional argument but attached an
2 exhibit that had inadvertently not been attached to the First or Second Petition.
3 *Id.* This exhibit was an internal office memorandum created by the Office of the
4 Clark County Public Defender, which is a summary of the statement of Tamara
5 Steel. *Id.*

6 On December 26, 2013, Budd filed his *Fourth Supplemental Petition for*
7 *Writ of Habeas Corpus (Post Conviction)* (the “**Fourth Petition**” and,
8 collectively with the First Petition, Second Petition and Third Petition, the
9 “**Petitions**”). APLT. APP. 003000-003036. The Fourth Petition did not contain
10 any additional argument. *Id.* The Fourth Petition attached Brooks’ case notes in
11 their entirety that Brooks wrote during his representation of Budd. *Id.*

12 On January 10, 2014, the trial court granted the State’s request for access
13 to original trial counsel Brooks’ case notes, the original petition, and the
14 Petitions. APLT. APP. 003037-003038. It further struck ground “A” from the
15 First Petition upon Budd’s request and ordered an evidentiary hearing to be held
16 on the remaining grounds. *Id.*

17 On August 22, 2014, the Petitions and responses came for evidentiary
18 hearing. APLT. APP. 003041-003090. Brooks was sworn in and testified, and
19 found to be credible by the trial court. APLT. APP. 003045; 003087. The

1 Dismissal Order was entered on October 17, 2014. APLT. APP. 003091-
2 003103. The Notice of Appeal was filed on November 4, 2014.

3 **STATEMENT OF FACTS**

4 **A. Pertinent Events Occurring Outside the Courtroom.**

5 On October 11, 2005, the defense interviewed Tamara Grierson Steel
6 who was Budd's ex-girlfriend. *See*, Third Petition; APLT. APP. 002986-
7 002989. During this interview, Tamara informed Budd's counsel that she was
8 aware that someone had stolen marijuana from Budd and that some new
9 neighbors made fun of Budd for not doing anything about the theft. Tamara
10 then stated, "they gave him PCP, and then he 'went crazy.'" *Id.*

11 **B. Jury Trial.**

12 The trial commenced on December 5, 2005. APLT. APP. 00443-00653.
13 At the onset, Brooks made an oral motion to continue the trial due to Budd's
14 dissatisfaction with Brooks' representation, indicating that another attorney was
15 willing to take the case over. APLT. APP. 00443-44. Brooks represented to
16 the court that his relationship with Budd was non-existent and that, as to the
17 guilt phase, the lack of relationship would not make any difference in the
18 outcome of the proceedings. APLT. APP. 00449. The court then bolstered
19 Brooks and said it was absurd for Budd not to work with him. APLT. APP.
20 00451. The court denied the continuance. *Id.*

1 In violation of his own motion to exclude all references to the “guilt
2 phase” during the trial, Brooks himself referring to the trial as the “guilt phase.”
3 APLT. APP. 00482. During initial discussions with the jury venire, Brooks
4 stated “[w]hether we call witnesses in the guilt phase will be determined
5 entirely and according to what the State presents.” *Id.* This use of the phrase
6 by Brooks was not an isolated incident. APLT. APP. 00617.

7 Brooks started day two off by complaining to the Court again about his
8 frustrations regarding Budd’s family. APLT. APP. 00657-58. Brooks
9 complained that Budd’s mother said she did not know the facts of the case, to
10 which Brooks protested stating he had previously explained them to her. *Id.*
11 Brooks indicated Budd’s mother failed to appear at an appointment with him.
12 *Id.* The court responded by telling Budd that, if this was a plan to “somehow
13 segue this lack of cooperation into an ineffective assistance of counsel claim,
14 it’s not going to work.” APLT. APP. 00658. Brooks had engaged in a self-
15 protective action to the prejudice of Budd.

16 Day three of the trial commenced with Brooks arguing that the State had
17 not engaged in sufficient conduct to establish that Winston Budd was an
18 unavailable witness to allow admission of his preliminary hearing testimony.
19 APLT. APP. 00816, *et seq.* Incredibly, Brooks made the argument for the State
20 resulting in the court finding Winston unavailable and tacitly granting the oral

1 motion to use the Preliminary Hearing transcript in lieu of live testimony.
2 APLT. APP. 00820-24.

3 After jury selection concluded, in opening the State quoted from a highly
4 prejudicial letter containing a rap song allegedly authored by Budd. APLT.
5 APP. 00998-99. An objection was lodged resulting in an unrecorded sidebar.
6 APLT. APP. 00997. However, no pretrial motion in limine had been filed to
7 exclude the evidence and, after the close of opening statements, some kind of
8 record in summary was made of the sidebar, contrary to the Court's ruling that
9 all proceedings would be recorded APLT. APP. 01009-10.

10 The defense then made its very short opening statement wherein Brooks
11 admitted that Budd was responsible for the killings. APLT. APP. 00999, *et seq.*
12 Brooks stated, "Let me make it absolutely clear, some evidence will show that
13 Glenford killed these three people." APLT. APP. 01000.

14 Lazon Jones ("**Lazon**") was called to testify. APLT. APP. 01010.
15 Lazon lived at the Saratoga Apartments with his brother Dajon, two friends
16 named Derrick Jones and Jason Moore, and his mother and sister. APLT. APP.
17 01014-5. Lazon knew someone named "A.I.", and he identified Budd as that
18 person. APLT. APP. 01016.

19 Lazon testified that on May 26, 2003, he and the others spent the
20 majority of the day with A.I. playing basketball and chilling. APLT. APP.

1 01019. During the game, A.I. and Derrick got into a confrontation. APLT.
2 APP. 01020. A.I. stated that someone had stolen his weed. *Id.* During the
3 game, Jason and A.I. got into a confrontation over a foul. APLT. APP. 01021
4 According to Lazon, A.I. allegedly told Jason that there was not going to be a
5 fight, but that A.I. was going to put some “slugs” in him. *Id.* After the
6 basketball game, they all went back to the apartment where they were just
7 “kickin’ it.” APLT. APP. 01023.

8 At approximately 11:30, A.I. left the apartment to go to the store to get
9 something to drink, returning 10-15 minutes later stating he needed to use the
10 bathroom. APLT. APP. 01025. According to Lazon, A.I. entered the room
11 where Dajon was laying down, after which Lazon heard two gunshots. APLT.
12 APP. 01025 Lazon heard A.I. say “Where’s my stuff?” followed by another
13 gunshot, at which time Lazon ran. *Id.* Approximately two minutes elapsed
14 between the second and third shot. APLT. APP. 01028. Lazon ran to the 7-11
15 and called the police. APLT. APP. 01033.

16 On cross-examination, Lazon testified that A.I. was considered a friend
17 whom he trusted and of whom he was not frightened. APLT. APP. 01046.
18 Lazon testified that at no time was Krissy, who was A.I.’s girlfriend, in the
19 apartment that evening. APLT. APP. 01051-52. Lazon testified that they all
20 gave Budd money to go buy alcoholic drinks because they were drinking that

1 evening. APLT. APP. 1054-55. Lazon denied that they were smoking weed.
2 APLT. APP. 01057. Both he and A.I. were buzzed from drinking. *Id.*

3 When A.I. returned, he had returned with a single can. APLT. APP.
4 01059. When A.I. said he had to go to the bathroom, he opened and closed the
5 master bedroom door where Dajon was sleeping. APLT. APP. 01059-61.
6 Lazon testified the two gunshots came from the bedroom. APLT. APP. 01061-
7 1062. When he heard the third shot, Lazon left. APLT. APP. 01065. Lazon saw
8 Budd walking down the street with the gun in his hand after he called the
9 police. APLT. APP. 01067. Lazon testified that he knew A.I. did the shooting.
10 APLT. APP. 01073.

11 The State called Dr. Rexene Worrell, who worked for Clark County as
12 the medical examiner doing autopsies and who was qualified as an expert
13 without objection. APLT. APP. 01074-7. Worrell performed the autopsies on
14 Jason Moore, Dajon Jones and Derrick Jones. APLT. APP. 01078. Moore's
15 autopsy indicated that Moore had three (3) gunshot wounds located in the back
16 of the head, right side of the neck, and back of right shoulder, which were
17 determined to be the cause of death. APLT. APP. 01080-1, 01084. Dajon
18 Jones' autopsy indicated two fatal gunshot wounds to the neck, which were
19 determined to be the cause of death. APLT. APP. 01084-8. Derrick Jones'
20 autopsy indicated seven gunshot wounds, which were determined to be the

1 cause of death. APLT. APP. 01088;01092. In each case, Worrell ruled the
2 manners of death were homicide, which is a conclusion that one person took the
3 life of another, and is not a legal conclusion regarding the degree of culpability.
4 APLT. APP. 01096-97. All three victims tested positive for marijuana, which
5 shows up in the system for approximately thirty (30) days. APLT. APP. 01093.
6 All three victims were negative for alcohol. APLT. APP. 01094.

7 At the trial on December 9, 2005, Brooks informed the court Lewis and
8 Budd were cellmates at CCDC. APLT. APP. 01105-7; 02345-7. Brooks
9 indicated that his trial strategy was not to pretend Budd had not been in jail,
10 further waiving objections which relate to Budd's jail time. APLT. APP.
11 01106-7; 02346-7. The court warned Brooks that such references that Budd was
12 in jail would otherwise constitute impermissible prejudice. *Id.*

13 Officer Patricia Spencer was on patrol with her partner Michael Wallace
14 in an unmarked car on the evening of the incident. APLT. APP. 01116-9;
15 02356-9. They regularly patrol the Saratoga Apartments for narcotic and gang
16 activity, typically turning off their lights and rolling slowly through the
17 complex. APLT. APP. 01121; 02361. That night, Spencer believed she heard
18 gunshots. APLT. APP. 01123; 02363. She drove to their point of entrance and
19 saw a young man jogging from west to east with no shoes on. APLT. APP.
20 01124; 02365. He did not seem distressed. *Id.* Spencer also observed a group

1 of young juveniles, frantically running around and pointing upstairs. APLT.
2 APP. 01126; 02366. One juvenile ran up the stairs, turned in a panic, and came
3 back down. *Id.* She stopped and exited her vehicle, and the boy who had been
4 on the stairs ran up to her saying “somebody needs help up there. They’re
5 hurt.” APLT. APP. 01127; 02367. No objection was made to this hearsay
6 statement.

7 Detective Wallace led the way up the stairs, noting the person on the
8 balcony and indicating he had been shot and was probably not alive. APLT.
9 APP. 01130; 02370. Entering the apartment was difficult because a body was
10 blocking the door. APLT. APP. 01131; 02371. Once open, they saw an
11 unresponsive victim. *Id.* The Officers cleared the front room and kitchen, but
12 needed assistance to clear the two bedrooms, so a third detective entered the
13 apartment. APLT. APP. 01131-2; 02371-2. The third victim located was
14 breathing but labored. *Id.* After clearing the apartment, they contacted medical.
15 *Id.*

16 Spencer testified that although it is a gated community, in five years she
17 never saw the gates closed. APLT. APP. 01135; 02375. The person she saw
18 jogging was later determined to be Lazon Jones dressed in shorts, a shirt, socks,
19 but no shoes. APLT. APP. 01138-9; 02378-9. Spencer heard the shots before
20 seeing Lazon, and the shots were in rapid succession – boom, boom, boom.

1 APLT. APP. 01141; 02381. Spencer could not see the victim on the balcony
2 from the car. APLT. APP. 01148; 02388.

3 Detective Wallace was assigned to the Detective Bureau on the date of
4 the incident. APLT. APP. 01158-9; 02398-9. They were checking on reports of
5 criminal activity in the complex. APLT. APP. 01160; 02400. Wallace did not
6 hear the gunshots, but saw the young man trotting across their path. APLT.
7 APP. 01164-5; 02404-5. Their pressing concerns were the gunshots. APLT.
8 APP. 01166; 02406. Wallace saw people on the stairs, but was unsure whether
9 it was one or two people. APLT. APP. 01167; 02407. One of them said
10 something bad happened and someone got hurt. APLT. APP. 01168; 02408.
11 Wallace and Spencer exited their vehicle to investigate. *Id.* They saw Jason
12 Moore on the balcony, coiled in the fetal position, face down in a large pool of
13 blood. APLT. APP. 01169; 02409. Wallace testified they pushed a bedroom
14 door open and saw Dajon lying face down behind the door. APLT. APP.
15 01170; 02410. Wallace looked toward the hallway and saw Derrick Jones' feet
16 flailing around and could hear his labored breathing, to whom they tried to
17 attend. APLT. APP. 01170-72; 02410-12. Wallace could tell Derrick Jones was
18 struggling and they encouraged him to hold onto life as the paramedics were on
19 their way. APLT. APP. 01180; 02420. Derrick Jones did not communicate
20 with Wallace. *Id.* Wallace tried to document changes to the crime scene

1 occasioned by emergency medical arriving. APLT. APP. 01182; 02422.
2 Wallace vividly recalled the smoke and smell of gun powder when he entered
3 the apartment. APLT. APP. 01183; 02423. Wallace was subjected to only
4 nominal cross examination by Brooks. APLT. APP. 01184; 02424 *et seq.*

5 Louise Renhard, a crime scene analyst explained the scope of her work,
6 including photographing the scene, drawing diagrams, recovering evidence, and
7 taking latent fingerprints. APLT. APP. 01196-7; 02436-7. Renhard explained
8 the processes of documenting and sealing evidence such as a bullet, including
9 photographing, diagramming location recovered and sealing it for booking into
10 evidence. *Id* Renhard was one of the crime scene analysts in this case,
11 diagramming the scene and collecting evidence. APLT. APP. 01201-2; 02441-
12 2. Renhard testified that all of the cartridges recovered were for a 9mm. APLT.
13 APP. 01209; 02449. In discussing her diagram, the following exchange
14 occurred:

15 Q: And again is it your understanding, although you didn't
16 personally observe it, there is where a person was removed
17 for medical attention, and that's related in that large blood
18 stain?

19 A: My understanding was that this is where one of the victims
20 had been prior to the paramedics taking him.

21
22 APLT. APP. 01213; 02453. Despite the admission of lack of personal
23 knowledge and the lack of foundation, Brooks did not lodge an objection nor
24 cross-examine Renhard.

1 James Krylo, a firearms and tool mark examiner, explained the
2 component parts of a bullet, including individualized markings which result
3 from firing a bullet from a gun. APLT. APP. 01218-23; 02458-63. Krylo could
4 match the bullet with a particular gun if he had both. APLT. APP. 01223-4;
5 02463-4. However, he never had the gun to examine in this case. *Id.* Krylo
6 was asked to determine the caliber of the weapon or weapons from which they
7 were fired. APLT. APP. 01225; 02465. Krylo examined eleven (11) cartridges,
8 concluding they all came from the same 9mm firearm. APLT. APP. 01226;
9 02466. Krylo testified it would depend on the magazine capacity whether
10 eleven cartridges could be fired from a single gun. APLT. APP. 01228; 02468.

11 Celeste Palau lived in the apartment complex and claimed to have
12 witnessed the incident from her patio. APLT. APP. 01230-1;01245;02470-
13 1;02485. She was aware of another resident known as A.I. APLT. APP.
14 01232; 02472. Palau heard what she thought were fireworks. APLT. APP.
15 01236; 02476. She turned her attention to the apartment and saw Lazon and
16 Crissy (A.I.'s girlfriend) running out of the apartment clearly together and
17 appearing to be playing a game. APLT. APP. 01235;01248-50;02475;02488-
18 90. She saw A.I. come out of the house and shoot somebody on the patio, heard
19 three shots, then saw A.I. leave. APLT. APP. 01236-7; 02476-7. Palau gave a
20 voluntary statement to the police identifying A.I. as the assailant, whom she

1 identified as Budd. APLT. APP. 01241-3; 02481-3. Brooks introduced a
2 daytime photograph taken from Palau's patio towards where she alleged the
3 shooting occurred. APLT. APP. 01254-6; 02494-6. Palau admitted that she did
4 not have clear view into the apartment and had identified A.I. based on body
5 structure and height. APLT. APP. 01257-9; 02497-9. Additionally, Palau did
6 not speak with the police on the night of the shooting, but waited two weeks.
7 APLT. APP. 01260-2; 02500-2. On recross, despite having previously testified
8 that she did not wear glasses, Palau admitted to previously telling police she
9 had a history of nearsightedness and was not able to see long distances. APLT.
10 APP. 01265; 02505. On December 12, 2005, trial resumed with a stipulation on
11 admitting the photographs taken from Palau's patio and to the distance from
12 one patio to the other being 218 feet. APLT. APP. 01306-7; 02017-8.

13 Greg Lewis, who knew Budd from being housed on the same floor at the
14 CCDC and from the apartments, was then called by the State and identified
15 Budd. APLT. APP. 01311-3; 02022-4. Lewis admitted he was a convicted
16 felon. APLT. APP. 01314; 02025. Lewis testified Budd allegedly told Lewis
17 that some "kids" got killed at the Saratoga apartments about a half pound of
18 weed that he thought they took from him. APLT. APP. 01314-7; 02025-8.
19 Budd allegedly told Lewis that three died from gunshots and one got away,
20 additionally confessing to being the shooter. *Id.* Throughout the examination,

1 the State lead Lewis but no objection was lodged. Lewis did not believe that
2 Budd was high at the time of the shooting. *Id.* Budd allegedly told him that
3 after the shooting, he cut off his hair and went to some girl's house to hide out.
4 APLT. APP. 01318; 02029. Lewis then testified Budd told him that he was just
5 hanging out and was not the shooter. *Id.*

6 Lewis contacted and reported this information to Detective Vaccaro
7 sometime in 2004. APLT. APP. 01318-9; 02029-30. Lewis stated that the
8 Detective offered nothing in return for the statement. APLT. APP. 01320;
9 02031. However, despite the lack of promises, a letter was written to the parole
10 board by David Schwartz of the District Attorney's office. APLT. APP. 01321-
11 2; 02032-3. Lewis did not receive a sentence reduction because of the letter.
12 APLT. APP. 01324; 02035.

13 Lewis then testified about a letter he received from Budd, stating he
14 identified the handwriting as Budd's; however, he had only received one other
15 letter from Budd previously. *Id.* No objection was lodged by Brooks. Lewis
16 claims he was present when Budd was writing the contents of the letter. APLT.
17 APP. 01328; 02039. Lewis gave the letter to the detectives. APLT. APP. 01330;
18 02041. Brooks only objected regarding submission of a typed summary of the
19 letter, thus it was admitted in the form of the more difficult to read handwritten

1 letter. No objection was made regarding the prejudicial effect of the letter
2 outweighing any probative value. Lewis read the letter into the record:

3 This is part one of my song. I'm gonna release it when they
4 release me. Killer in Me off the Murda Music CD.
5 They call me Smalls aka AI.
6 Every day on the street I used to get high.
7 There's rules for a killa.
8 Don't get it confused.
9 I'm wearing county blues with my face on the news.
10 Blew these niggas off the earth.
11 That's the way it had to go.
12 I only killed three, but I should have killed four.
13 Left them dead on the floor,
14 But just right before they was crying and pleading,
15 Screaming for Jesus.
16 Ya'll can keep the weed,
17 Because you can't smoke it now, because your ass is in the ground.
18 Cross me, I blow like a bomb
19 Took three niggas from their moms.
20 I'm a thrilla killa.
21 Ask Saratoga Palms.

22
23 APLT. APP. 01335; 02046.

24 Lewis testified was acquainted with and had smoked marijuana with
25 Budd's prior to going to CCDC. APLT. APP. 01337; 02048. He and Budd
26 talked at the CCDC. *Id.* Many people in CCDC make up rap songs. APLT.
27 APP. 01338; 02049. Lewis wrote Budd letters while in the CCDC. APLT.
28 APP. 01342; 02053. Brooks produced a letter and had Lewis identify that it was
29 in his own handwriting. APLT. APP. 01341-44; 02052-55. Lewis testified that
30 he was sure that the letter allegedly from Budd was not written by Lewis.

1 APLT. APP. 01345; 02056. Lewis acknowledged that, to the best of his
2 knowledge, no one ever checked the letter for fingerprints. APLT. APP. 01345-
3 6; 02056-7.

4 Lewis admitted he did not like to be in prison and wanted to get out.
5 APLT. APP. 01347-8; 02058-9. Lewis admitted that the letter from the district
6 attorney to the parole board would help him when he appeared before the parole
7 board in March of 2006. APLT. APP. 01349,01354; 02060,02065.

8 Detective James Vaccaro was the lead homicide detective partnered with
9 Martin Wildemann, who was called out to the crime scene after it was taped off.
10 APLT. APP. 01355-60; 02066-71. Upon arriving at the crime scene, Vaccaro
11 was briefed and walked the crime scene. APLT. APP. 01362-3; 02073-4.
12 Using photographs, Vaccaro presented a pictorial statement in the order of his
13 observations. APLT. APP. 01365-81; 02076-92. Vaccaro and his partner began
14 looking for the suspect, A.I., who they learned was Glenford Budd. APLT.
15 APP. 01383;02094.

16 Approximately forty eight (48) hours later, they apprehended Budd.
17 APLT. APP. 01384; 02095. When arrested, Budd had no visible injuries and
18 his hair was different. APLT. APP. 01388; 02099. Vaccaro read Budd his
19 *Miranda* rights. APLT. APP. 01389; 02100. Budd wanted to talk to him to
20 clear up some things that happened at the apartment. APLT. APP. 01390;

1 02101. Budd told Vaccaro that he was in the apartment, but ran when he heard
2 gunshots. APLT. APP. 01391; 02102. Vaccaro testified about his contacts
3 with Greg Lewis. APLT. APP. 01392-97; 02103-8. Vaccaro testified that he
4 told Schwartz about Lewis's cooperation with the investigation, but he did not
5 ask that the letter be written. APLT. APP. 01396-7; 02107-8.

6 Vaccaro did not interview Lazon Jones. APLT. APP. 01398; 02109. By
7 the 20th, the police released Budd's information to the press in connection with
8 the three murders. APLT. APP. 01400; 02111. Vaccaro knew that the dispute
9 arose over a drug deal. *Id.* Vaccaro would not admit that a handwriting
10 analysis would have been helpful, but admitted a fingerprint one would have
11 been, although none had been conducted. APLT. APP. 01403-6; 02114-7.

12 Krissy Smith testified she and Budd were not dating on the date of the
13 incident, but they remained friends. APLT. APP. 01413-6; 02124-7. On the
14 day of the incident, she went on a picnic with Budd's family. *Id.* After the
15 picnic, Krissy and her friends were hanging around the apartment stairs where
16 the shooting occurred then followed the boys over to the basketball court.
17 APLT. APP. 01417; 02128. Krissy left the basketball game to go to her
18 friend's house. APLT. APP. 01418; 02129. After the basketball game, she
19 returned to the apartment where the events occurred. APLT. APP. 01419;
20 02130. Krissy left the apartment when Dajon asked to borrow her CD, but

1 returned again fifteen minutes later. APLT. APP. 01420; 02131. She did not
2 see A.I. when she returned, but stayed in the threshold talking with Derrick
3 Jones, then they heard the first gunshots, she saw gunpowder come out of the
4 window, and she hit the ground. APLT. APP. 01421-4; 02132-5. Lazon came
5 out of the apartment and told them to run, so Krissy ran to Shawn's apartment
6 immediately below this apartment and pounded on the door until Shawn let her
7 in. *Id.* Derrick also came out, but apparently decided to go back inside. *Id.* A
8 couple of days later, Krissy gave her statement to police. APLT. APP. 01425;
9 02136. Krissy admitted that she did not see who fired the gun. APLT. APP.
10 01427; 02138.

11 The State read the preliminary hearing testimony of Winston Budd into
12 the record, who was previously declared an unavailable witness. On Tuesday
13 morning, Winston received a telephone call from Budd asking him to pick him
14 up because someone was trying to rob him and he had shot them. APLT. APP.
15 01433-5; 02144-6. Budd allegedly told Winston he gave the gun back to a
16 friend. *Id.* Winston drove to Henderson, picked up Budd, noticed Budd had cut
17 his hair, took Budd to his house, and told Budd to turn himself in; however,
18 Budd indicated he would rather run. APLT. APP. 01436-8; 02447-9.
19 Ultimately, the police arrived looking for Budd. APLT. APP. 01437-8; 02148-
20 9.

1 Following the reading of Winston's testimony, Budd informed the court
2 that he did not intend to testify. APLT. APP. 01451; 02162. The State rested.
3 APLT. APP. 01455; 02166. Thereafter, the defense rested without calling a
4 witness. APLT. APP. 01457; 02168.

5 Brooks moved for a mistrial on Tuesday, December 13, 2005, based on
6 the State's opening statement referencing anticipated testimony from Tracey
7 Richards, which included alleged admissions by Budd, but who ultimately did
8 not testify. APLT. APP. 01513-14. The State argued she was subpoenaed, but
9 did not appear, suggesting the Court could find her an unavailable witness,
10 reopen the case, and permit the reading of her preliminary hearing testimony.
11 APLT. APP. 01514-15. Brooks argued that if the court denied the mistrial, it
12 should alternatively permit the defense to comment on the absence of the
13 evidence during closing. APLT. APP. 01515. The court denied the mistrial but
14 allowed both sides to comment on the absence of Richards' testimony. APLT.
15 APP. 01516.

16 For the first time, the State revealed it had provided relocation assistance
17 of \$300.00 to witness Palau, the alleged eyewitness to the shooting on the
18 balcony. APLT. APP. 01516-17. The State said it told Brooks about it after
19 Palau had testified and, as a tactical decision, there was no point in bringing this

1 to the jury. APLT. APP. 01517. Brooks was given an opportunity to be heard
2 on this, but declined. APLT. APP. 01518.

3 During closing argument, Brooks discussed Greg Lewis testimony and
4 specifically stated, “[a]nd we’re not going to play games here. They were in
5 jail together.” The State made rebuttal argument, and the jury left to deliberate.
6 APLT. APP. 01574; 01596. At nearly 7:00 p.m., the jury reached its verdict,
7 finding Budd guilty on all three counts. APLT. APP. 01598.

8 The actual sentencing occurred on February 22, 2006. The *Judgment of*
9 *Conviction (Jury Trial)* (previously defined as the “**Judgment**”) was entered on
10 February 26, 2006. (*See* Judge of Conviction). Budd was convicted of three (3)
11 Counts of Murder With Use of a Deadly Weapon (Category A Felony), in
12 violation of NRS 200.010, 200.030, 193.165, and sentenced to three (3)
13 consecutive sentences of Life Without the Possibility of Parole. APLT. APP.
14 002011-002012.

15 C. Evidentiary Hearing on Petitions.

16
17 Counsel herein clarified that Ground A of the First Petition was
18 withdrawn. APLT. APP. 003044.

19 Brooks testified Budd seemed uninterested, did not provide significant
20 information, and did not engage in helping his defense. APLT. APP.00346-7.

1 Brooks believed the evidence against Budd was overwhelming and informed
2 Budd of this; however, Budd did not have a response. *Id.*

3 Brooks testified as to standard motions that are filed in death penalty
4 cases known as “stock” motions, which he changed to fit the facts of this case
5 before filing them. APLT. APP. 003049. Brooks indicated the motion to
6 preclude a certain witness’s testimony from an earlier hearing was not a “stock”
7 motion. *Id.*

8 Brooks admitted to violating the court order not to refer to the “guilt
9 phase” or “penalty phase”. APLT. APP. 003049-003050. Brooks did not know
10 Greg Lewis had only ever seen one letter from Budd before attesting to Budd’s
11 handwriting in the letter containing the rap song, which could have been used to
12 attack the foundation of Lewis identifying the handwriting of the letter as
13 Budd’s. APLT. APP. 003050-003051. Brooks did not conduct a handwriting
14 analysis on the rap song letter because it was a stylized and artistic writing
15 separate from normal handwriting, and the State bore the burden of foundation.
16 APLT. APP. 003051. Brooks testified he felt the rap song was cumulative
17 given the vast evidence that Budd had committed the murders, so it was
18 unnecessary in the trial phase. *Id.* Brooks agreed the rap song was prejudicial
19 to Budd, but that he did not object to the prejudicial value of it. *Id.* Brooks
20 stated this was not any sort of strategy because it was not worth fighting when

1 the defense's plan was to be as transparent as possible. APLT. APP. 003052.
2 Brooks' strategy was to focus on the sentencing phase, because Budd was
3 facing the death penalty. *Id.*

4 Brooks thought Budd's only conceivable issue could have been to raise a
5 possible lesser included offense of second degree murder. *Id.* Brooks believed
6 Tamara Steel's testimony was gathered from other people, despite the fact that
7 Tamara provided information to Brooks' office that Budd committed the crimes
8 without premeditation. APLT. APP. 003053-003054. Brooks did not
9 investigate Tamara's statements to determine whether another person did have
10 personal knowledge, but he would do so if he was trying the case today. APLT.
11 APP.003054.

12 Brooks testified the procedure was complex to get defense witnesses
13 from Belize to testify at trial. APLT. APP. 003055-003056. Brooks did not
14 want Winston Budd to testify for the defense because Winston told him on the
15 phone that he would testify similar to the preliminary hearing. APLT. APP.
16 003055. Brooks' strategy was to attack the State's plans to deem Winston an
17 unavailable witness, because Winston was available by telephone to appear. *Id.*

18 Brooks admitted he made a mistake in failing to object to the State
19 reading the rap song into the record. APLT. APP. 003057. Brooks did not have
20 concerns about Budd's competency because he was evaluated by Dr. Paglini,

1 who suggested concerns about Budd's low intelligence, but not his competency.
2 APLT. APP.003057-003058. Brooks believed Budd was in denial about the
3 case. APLT. APP. 0003058.

4 Brooks did not get a handwriting expert because he did not think it would
5 lead anywhere. APLT. APP. 003058. Brooks did not obtain an expert to discuss
6 perception and distances regarding the eyewitness and her admitted
7 nearsightedness because it did not solve the other direct evidence pointing to
8 Budd's guilt. APLT. APP. 003058-003059. Despite Brooks' extensive trial
9 work experience, Brooks failed to focus on the fact there are single issue jurors
10 who focus on a single issue to determine a defendant's guilt. APLT. APP.
11 003059-003060. Brooks believed this case was a defense victory because Budd
12 did not receive the death penalty. APLT. APP. 003060.

13 Brooks admitted that, if he had subjected the letter to fingerprint and
14 handwriting analysis, he was not required to disclose the results to the State.
15 APLT. APP. 003078-003079. Brooks was able to have two (2) defense
16 witnesses attend the trial and, if he had been so inclined, could have arranged
17 for Winston Budd to attend. APLT. APP.003079-003080. Brooks had not called
18 Tamara Steel to testify because she did not remember telling Brooks' office
19 that Budd was on PCP, which counsel found unhelpful. APLT. APP. 003080-
20 003082.

1 The district court orally ruled that it was denying the Petitions. APLT.
2 APP. 003087. The district court determined there was overwhelming evidence
3 of guilt and did not see individual grounds for relief as well as cumulative
4 grounds due to the high standard of *Strickland. Id.*

5 The Dismissal Order determined that, to each claim raised by Budd,
6 Brooks was effective pursuant to the *Strickland* standard, that Budd had failed
7 to demonstrate Brooks' performance fell below an objective standard of
8 reasonableness and had failed to show a reasonable probability of a more
9 favorable outcome had Brooks performed differently. APLT. APP. 003091-
10 003104.

11 **SUMMARY OF THE ARGUMENT**

12 Brooks' ineffectiveness stems from his chosen strategy to be "as
13 transparent as possible" with the jury, which led to his failure to adequately
14 investigate a viable defense, erroneously admit Budd's guilt on the record at the
15 onset of the trial without having previously obtained permission to do so and
16 without creating a proper colloquy on the record of such, then failing entirely to
17 call any witnesses on Budd's behalf or submit the State's case to any
18 adversarial process. Because Budd was unhelpful with his defense, Brooks
19 decided not to put one on whatsoever, and admittedly only focused on the
20 penalty phase of the proceedings. However, there were significant matters that,

1 if challenged by Brooks and subjected to the adversarial process, would have
2 bolstered his chosen strategy to avoid the death penalty in addition to possibly
3 getting a lesser charge for Budd. Brooks, however, ignored any strategy for the
4 trial phase and only put on a farce or pretense of a trial to get to the penalty
5 phase. This denied Budd his right to the effective assistance of counsel
6 guaranteed him by the Sixth Amendment.

7 Further, the trial court erroneously interpreted the law in its
8 determination on the cumulative error argument with regard to ineffective
9 assistance of counsel. The trial court believed individual ineffectiveness
10 arguments were required to meet the *Strickland* test in order to cumulatively
11 meet the *Strickland* test; however, this is incorrect. The proper test for
12 cumulative error acknowledges that each individual error may not rise to the
13 grounds necessary to meet the test, but that taken together they do. Thus, the
14 court's decision on the cumulative error of ineffectiveness was flawed under
15 misinterpretation of the law.

16 Lastly, the court applied an incorrect standard and found that any errors
17 that occurred would have been "harmless" given the overwhelming amount of
18 evidence of Budd's guilt. It was required to find a claimed constitutional
19 violation "harmless beyond a reasonable doubt." Additionally, excluding the
20 evidence resultant from Brooks ineffectiveness herein significantly undermines

1 the “overwhelming” nature of such evidence. The jury had three erroneous
2 admissions of Budd’s guilt on the record: his own counsel improperly stating
3 such in opening arguments without obtaining Budd’s permission on the record,
4 the rap song letter not submitted to adversarial testing by motion in limine or
5 fingerprint/handwriting analysis, and Lewis’ jailhouse informant testimony that
6 was unreliable given he received compensation and not subjected to adversarial
7 challenge. Further, Lazon’s reports of the incident are inconsistent in that he
8 stated Krissy was not there at all when she testified she was with Lazon at the
9 scene when the shooting commenced. Lazon also indicated that the occupants
10 of the apartment had been drinking and not doing drugs; however, the autopsies
11 showed just the opposite. Further, the neighbor eyewitness provided
12 inconsistent testimony that she did not wear glasses and was positive it was
13 Budd who had done the shooting, but then recanted admitting to her own
14 nearsightedness and that it was just the stature of the person that led her to
15 believe it was Budd (*i.e.* she had not seen his face). The evidence was not
16 “overwhelming”. Only the erroneous admissions on the record as to Budd’s
17 guilt that went unchallenged by Brooks created such connotation. The court in
18 finding harmlessness when it pertained to Budd’s Sixth Amendment
19 constitutional rights was required to find it was harmless beyond a reasonable
20 doubt. These challenges create doubt and this standard cannot thus be met.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT MR. BROOKS WAS EFFECTIVE COUNSEL WHEN HE FAILED TO ADEQUATELY PREPARE FOR TRIAL OR RETAIN EXPERT DEFENSE WITNESSES; FAILED TO PROVIDE A DEFENSE ON PREMEDITATION THAT WAS OBJECTIVELY REASONABLE UNDER THE CIRCUMSTANCES OF THIS CASE, FAILED TO ADEQUATELY SUBJECT THE STATE'S CASE TO THE ADVERSARIAL PROCESS; AND FAILED TO OBTAIN BUDD'S PRIOR AUTHORIZATION TO ADOPT THE STRATEGY OF ADMITTING BUDD'S GUILT TO THE JURY.

A. Brooks Failed to File a Motion in Limine to Exclude the Rap Song Letter or, Alternatively, Failed to Retain a Graphology Expert Defense Witnesses to Testify at Trial or Challenge The Jailhouse Informant's Layperson Testimony as to Authenticating Budd's Handwriting.

NRS 48.035(1) states that, "[a]lthough 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."

"An attorney must make a reasonable investigation in preparation for trial, or a reasonable decision not to investigate." *Kirksey v. State*, 923 P.2d 1102, 1110, 112 Nev. 980, 992-993 (Nev. 2000), *citing Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

"Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." *Id.*, *citing Strickland* at 690-91, 104 S.Ct. at 2066.

This Court determined as follows regarding assistance of counsel:

1
2 A defendant's right to assistance of counsel is satisfied only when
3 such counsel is effective. *Powell v. Alabama*, 287 U.S. 45, 71, 53
4 S.Ct. 55, 77 L.Ed. 158 (1932). Effective counsel does not mean
5 errorless counsel, but rather counsel whose assistance is '(w)ithin
6 the range of competence demanded of attorneys in criminal cases.'
7 *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449,
8 25 L.Ed.2d 763 (1970). While Nevada law presumes that counsel
9 has fully discharged his duties, and will recognize the
10 ineffectiveness of counsel only when the proceedings have been
11 reduced to a farce or pretense, *Warden v. Lischko*, 90 Nev. 221,
12 223, 523 P.2d 6, 7 (1974), it is still recognized that a primary
13 requirement is that counsel '. . . conduct careful factual and legal
14 investigations and inquiries with a view to developing matters of
15 defense in order that he may make informed decisions on his
16 client's behalf both at the pleading stage . . . and at trial' *In re*
17 *Saunders*, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d 921, 926
18 (1970). If counsel's failure to undertake these careful
19 investigations and inquiries results in omitting a crucial defense
20 from the case, the defendant has not had that assistance to which
21 he is entitled. *In re Saunders, supra*; *People v. Stanworth*, 11
22 Cal.3d 588, 114 Cal.Rptr. 250, 522 P.2d 1058 (1974).

23
24 *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432-433, 537 P.2d 473,
25 474-475 (1975).

26 NRS 52.035 provides that "[n]on-expert opinion as to the genuineness of
27 handwriting is sufficient for authentication or identification if it is based upon
28 familiarity not acquired for the purposes of litigation."

29 Lewis testified about a letter he received from Budd, stating he identified
30 the handwriting as Budd's; however, he had only received one other letter from
31 Budd previously. *Id.* No objection was lodged by Brooks. Brooks only
32 objected regarding submission of a typed summary of the letter, thus it was

1 admitted in the form of the more difficult to read handwritten letter. No
2 objection was made regarding the prejudicial effect of the letter outweighing
3 any probative value. Lewis read the letter into the record:

4 This is part one of my song. I'm gonna release it when they
5 release me. Killer in Me off the Murda Music CD.
6 They call me Smalls aka AI.
7 Every day on the street I used to get high.
8 There's rules for a killa.
9 Don't get it confused.
10 I'm wearing county blues with my face on the news.
11 Blew these niggas of the earth.
12 That's the way it had to go.
13 I only killed three, but I should have killed four.
14 Left them dead on the floor,
15 But just right before they was crying and pleading,
16 Screaming for Jesus.
17 Ya'll can keep the weed,
18 Because you can't smoke it now, because your ass is in the ground.
19 Cross me, I blow like a bomb
20 Took three niggas from their moms.
21 I'm a thrilla killa.
22 Ask Saratoga Palms.

23
24 APLT. APP. 01335; 02046.

25 Brooks failed to file a pretrial motion in limine for exclusion of the
26 handwritten rap song letter as more prejudicial than probative, or, alternatively,
27 failed to call a graphologist and challenge the layperson testimony of Lewis for
28 foundation. Brooks did not hire a graphologist to conduct a handwriting
29 analysis on the rap song letter because it was a stylized and artistic writing
30 separate from normal handwriting, and the State bore the burden of foundation.

1 APLT. APP. 003051. However, Brooks testified at the evidentiary hearing on
2 the Petitions that he did not know Greg Lewis had only ever seen one letter
3 from Budd before attesting to Budd's handwriting in the letter containing the
4 rap song. APLT. APP. 003050-003051. He acknowledged this could have been
5 used to attack the foundation of Lewis identifying the handwriting of the letter
6 as Budd's. Brooks testified he felt the rap song was cumulative given the vast
7 evidence that Budd had committed the murders; however, cumulative evidence
8 can also be excluded under NRS 48.035(2), but he never raised that issue. *Id.*
9 Brooks agreed the rap song was prejudicial to Budd, but that he never objected
10 to the prejudicial value of it. *Id.* Brooks stated this was his plan to be as
11 transparent as possible to gain the trust of the jury for the penalty phase. APLT.
12 APP. 003052.

13 Brooks did not hire a graphologist because he did not think it would lead
14 anywhere. APLT. APP. 003058. On re-direct, Brooks admitted that more
15 information was better in defending a client and that, if he had tested the letter
16 for handwriting analysis, he was not required to disclose the results to the State
17 unless it was going to be used at trial. APLT. APP. 003078-003079.

18 Although the rap song letter could have been deemed relevant, NRS
19 48.035(1) would have allowed for its exclusion by pre-trial motion in limine on
20 the basis that its probative value was substantially outweighed by the prejudicial

1 effect and that there was a danger of misleading the jury. Brooks was required
2 to make a reasonable investigation into the foundation for Lewis' layperson
3 authentication of the rap song letter, whether Budd had actually written such
4 letter, and whether Budd had actually ever even touched the paper. *Kirksey*,
5 923 P.2d at 1110, 112 Nev. at 992-993, citing *Strickland*, 466 U.S. at 691, 104
6 S.Ct. at 2066. The evidence was being admitted by a jailhouse informant, which
7 is highly unreliable, particularly given his exchange for a favor to obtain his
8 testimony.¹ Given the stylistic/artistic writing in which Brooks claimed the

¹ “[I]nformers, accessories, accomplices, false friends, or any other betrayals which are ‘dirty business’ may raise serious questions of credibility.” *Lee v. United States*, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). “[A]nyone remotely associated with the criminal justice system recognizes that there are problems using witnesses who trade testimony for leniency.” Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 Case W. Res. L. Rev. 619, CWRLR (2007). “Jailhouse snitch testimony is notoriously unreliable, with inmates often manufacturing supposed confessions from others ... in return for lenient treatment or other benefit.” *Id.* A 9th Circuit judge, Stephen Trott, stated that, “[d]efendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike.” *Commonwealth of N. Mariana Islands v. Bowie*, 342 F.3d 1109, 1124 (9th Cir. 2001). Judge Trott further explained that, “[n]ever has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is ... to cut a deal at someone else’s expense and to purchase leniency in return for immunity, or in return for a reduced incarceration...” *Id.* at 1123. Judge Trott stated that, “[t]he most dangerous informer of all is the jailhouse snitch who claims another prisoner confessed to him.” See, Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381 (1996). It is estimated that “45.9 percent of documented wrongful capital convictions have been traced to false informant testimony.” See Alexandra Natapoff, *Beyond*

1 letter was drafted, a graphologist likely would have testified that it was
2 inconclusive whether Budd drafted it. The fact that it was in handwriting
3 different than Budd's normal writing should have prompted the hiring of a
4 graphologist rather than allowing a layperson—also jailhouse informant—
5 without sufficient familiarity of Budd's handwriting to claim it was Budd's in
6 front of the jury. *See*, NRS 52.035. Brooks failed to make a reasonable
7 investigation in preparation for the submission of the rap song letter to the jury,
8 which in essence could mislead the jury into believing Budd had confessed to
9 the crimes. *See*, NRS 48.035(1).

10 Brooks alleged “strategic choice” was made after less than complete
11 investigation and cannot be deemed reasonable given that its basis lies in
12 standard evidentiary procedure. Nothing supports Brooks' limitation on the
13 investigation, but only evidences his deliberate avoidance of preparation on a
14 vital matter such as the admission of the rap song letter. *Kirksey*, 923 P.2d at
15 1110, 112 Nev. at 992-993, *citing Strickland* at 690-91, 104 S.Ct. at 2066.

Unreliable: How Snitches Contribute to Wrongful Convictions, 37 Golden Gate
U. L. Rev. 107, 107 (2006-2007). The possibility of benefiting from snitching
is well known in the federal prison system and has evolved to inmates even
paying for information to snitch about. *See* Denny Gainer, Jerry Mosemak and
Brad Heath, “How Snitches Pay for Freedom,” *USA Today*, December 14,
2012. “Cooperation or immunity agreements and expert fee agreements, as well
as communications with the compensated witness, are discoverable fodder for
questioning by opposing counsel to establish bias.” George C. Harris,
Testimony for Sale: The Law and Ethics of Snitches and Experts, 28 Pepp. L.
Rev. 1 (2000). Brooks did not pursue this clear challenge to Lewis' testimony.

1 Budd's right to the assistance of counsel was not satisfied in this regard.
2 *Jackson*, 91 Nev. at 432-433, 537 P.2d at 474-475, *citing Powell*, 287 U.S. at
3 71, 53 S.Ct. 55. Brooks' assistance was not within the range of competence
4 demanded of attorneys in criminal cases, particularly in murder cases. *Id.*,
5 *citing McMann*, 397 U.S. at 771, 90 S.Ct. at 1449. Brooks admittedly reduced
6 the trial in this matter to a farce or pretense by not focusing whatsoever on
7 viable defenses on Budd's behalf. *Id.*, *citing Lischko*, 90 Nev. at 223, 523 P.2d
8 at 7. A minimal investigation into the rap song letter would have developed
9 several strategies to file a motion in limine which would not have tainted the
10 trust by the jury whatsoever, or by bringing in a graphologist to indicate that the
11 letter could not be authenticated, or by simply challenging the State's
12 foundation for having Lewis authenticate it. There were several defenses that
13 would not have undermined Brooks' trial strategy to be "as transparent as
14 possible" but instead he ignored them to Budd's detriment. Brooks admittedly
15 did not make an informed decision since he did not even investigate enough to
16 know that Lewis was unfamiliar with Budd's handwriting for purposes of NRS
17 52.035. *Jackson*, 91 Nev. at 432-433, 537 P.2d at 474-475, *citing Saunders*.
18 Thus, Brooks was ineffective for failing to file a motion in limine under NRS
19 48.035(1) or, alternatively, hiring a graphologist or challenging Lewis'
20 layperson authentication of the rap song letter.

1 **B. Brooks Failed to Properly Investigate Budd’s Case to Present**
2 **Evidence Towards a Viable Defense to Premeditation.**

3
4 To overcome the presumption that counsel rendered adequate assistance,
5 “...a defendant must show that counsel failed to act ‘reasonabl[y] considering
6 all the circumstances.’” *Cullen v. Pinholster*, --- U.S. ---, 131 S.Ct. 1388, 1403,
7 179 L.Ed.2d 557 (2011) citing *Strickland*, at 688, 104 S.Ct. 2052. *Cullen* held
8 as follows:

9 The Court also required that defendants prove prejudice.
10 [*Strickland*], at 691–692, 104 S.Ct. 2052. “The defendant must
11 show that there is a reasonable probability that, but for counsel’s
12 unprofessional errors, the result of the proceeding would have been
13 different.” *Id.*, at 694, 104 S.Ct. 2052. “A reasonable probability is
14 a probability sufficient to undermine confidence in the outcome.”
15 *Ibid.* That requires a “substantial,” not just “conceivable,”
16 likelihood of a different result. *Richter*, 562 U.S., at —, 131
17 S.Ct., at 791.

18
19 *Id.* The United States Supreme Court has directed as follows:

20 In assessing the reasonableness of an attorney's investigation,
21 however, a court must consider not only the quantum of evidence
22 already known to counsel, but also whether the known evidence
23 would lead a reasonable attorney to investigate further. Even
24 assuming [Wiggins’ attorneys] limited the scope of their
25 investigation for strategic reasons, *Strickland* does not establish
26 that a cursory investigation automatically justifies a tactical
27 decision with respect to sentencing strategy. Rather, a reviewing
28 court must consider the reasonableness of the investigation said to
29 support that strategy. 466 U.S., at 691, 104 S.Ct. 2052.

30
31 *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471
32 (2003).

1 Murder is defined as, “the unlawful killing of a human being...[w]ith
2 malice aforethought, either express or implied[.]” NRS 200.010. The degrees of
3 murder are set forth as follows:

4 1. Murder of the first degree is murder which is:

5 (a) Perpetrated by means of poison, lying in wait or torture,
6 or by any other kind of willful, deliberate and premeditated
7 killing[...]

8 2. Murder of the second degree is all other kinds of murder.

9 3. The jury before whom any person indicted for murder is
10 tried shall, if they find the person guilty thereof, designate by their
11 verdict whether the person is guilty of murder of the first or second
12 degree.

13
14 NRS 200.030 (alteration to the original). The penalty for murder in the first
15 degree may be punished by death, “...[o]nly if one or more aggravating
16 circumstances are found and any mitigating circumstance or circumstances
17 which are found do not outweigh the aggravating circumstance or
18 circumstances[.]” NRS 200.030 (4)(a). Murder in the first degree may also be
19 punishable by Life without the possibility of parole or for Life with the
20 possibility of parole after a minimum of 20 or 50 years have been served. NRS
21 200.030 (4)(b). However, murder in the second degree is punishable by Life
22 with the possibility of parole after a minimum of 10 years or for the definite
23 term of 25 years with the eligibility of parole after 10 years have been served.
24 NRS 200.030 (5).

1 On October 11, 2005, the defense interviewed Tamara Grierson Steel
2 who was Budd's ex-girlfriend. *See* Third Petition; APLT. APP. 002986-
3 002989. During this interview, Tamara informed Budd's counsel that she was
4 aware that someone had stolen marijuana from Budd and that some new
5 neighbors made fun of Budd for not doing anything about the theft. Tamara
6 then stated, "they gave him PCP, and then he 'went crazy.'" *Id.* Brooks testified
7 at the evidentiary hearing that he did not called Tamara Steel to testify because
8 she did not remember telling Brooks' office that Budd was on PCP, which
9 counsel found unhelpful. APLT. APP. 003080-003082. Brooks admitted that
10 Budd's only conceivable defense could have been to raise a possible lesser
11 included offense of second degree murder based on Steel's information. *Id.*
12 Brooks indicated his belief that Tamara Steel's testimony was gathered from
13 other people, although it was Tamara who provided information to Brooks'
14 office that Budd committed the crimes on PCP and thus without premeditation.
15 APLT. APP. 003053-003054. Brooks admitted he did not investigate Tamara's
16 statements to determine whether another person did have personal knowledge,
17 but he would do so if he was trying the case today. APLT. APP.003054.

18 The trial court was required to consider not only the evidence already
19 known to Brooks regarding Steel's information and recanting, but also consider
20 whether Brooks should have reasonably investigated further. *Wiggins*, 539 U.S.

1 at 527, 123 S.Ct. at 2538. Brooks himself conceded that he should have
2 investigated the matter further, specifically testifying at the evidentiary hearing
3 that he would do so if he were trying the case today. APLT. APP.003054.
4 Brooks cursory investigation undertaken by simply asking Steel if she recalled
5 the conversation in her interview with Budd's counsel did not automatically
6 justify Brooks decision to abandon that strategy. *Id.*

7 There is a reasonable likelihood that the jury could have found Budd
8 guilty of second degree murder if it had information respecting his mental state
9 as it was impacted by ingestion of PCP. The elements of first degree murder
10 required them to find that Budd committed the crime with "willful, deliberate
11 and premeditated" actions. NRS 200.030(1)(a). If Brooks' strategy was to
12 avoid the death penalty as he claimed, investigation into whether Budd's mental
13 state was impacted by ingestion of PCP would have been in line with such
14 strategy since first degree murder carries a possible death penalty, but second
15 degree murder does not. *Id.* Budd could have not only avoided the death
16 penalty, but also received the possibility of parole after a minimum of 10 years
17 had the jury found him guilty instead of second degree murder. NRS 200.030
18 (5).

19 Had Brooks conducted a reasonable investigation into Tamara Steel's
20 statement, it is probable that the evidence would have impacted the jury

1 determination. The absence of such a reasonable investigation prejudiced Budd
2 because it affected the term of Budd's imprisonment and whether he would be
3 eligible for parole in 10, 20, or 50 years, or not at all. NRS 200.030 (4)(b), (5).
4 The absence of this investigation and presentation of evidence clearly affected
5 the jury's decision to sentence Budd to Life imprisonment without the
6 eligibility for parole.

7 Brooks failed to act reasonably considering all the circumstances. *Cullen*
8 at 1403. Evidence that Budd was on PCP given to him by neighbors when the
9 incident herein occurred is substantial. *Id.* There is a reasonable probability that
10 Brooks' unprofessional errors in failing to pursue investigation into the viable
11 defense to premeditation would have affected the outcome of the jury's
12 determination on three charges of first degree murder herein. *Id.*, citing
13 *Strickland* at 694, 104 S.Ct. 2052. Thus, the trial court erred in determining that
14 Brooks rendered effective assistance in this regard and the Dismissal Order
15 should be reversed.

16 **C. Brooks Failed To Zealously Represent Budd's Interests At**
17 **Trial By Failing To Subject The State's Case To The**
18 **Adversarial Process.**

19 A lawyer's first duty is zealously to represent his or her client. *Sanders v.*
20 *Ratelle*, 21 F.3d 1446 (9th Cir. 1994). In *Anderson v. Calderon*, 276 F.3d 483
21 (9th Cir. 2001), the Court stated the failure to zealously represent the interests of
22

1 his client, an attorney “violated his duty of loyalty” to the client. *Id.* Not only
2 does this type of conduct violate the duty of loyalty and constitute ineffective
3 assistance of counsel, it actively serves the interests of the prosecution. *Id.*

4 On the same date *Strickland* was handed down by our United States
5 Supreme Court, that same court also rendered its opinion in *United States v.*
6 *Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). Therein, the Supreme Court
7 noted that certain circumstances can exist where ineffectiveness is properly
8 presumed without inquiry into actual performance at trial. *Cronic* at 661. The
9 Court dictated three trial situations where this could occur: (1) the complete
10 denial of counsel during a critical stage of the proceeding, either actual or
11 constructive; (2) counsel’s entire failure to subject the prosecution’s case to
12 meaningful adversarial testing; and (3) “where counsel is called upon to render
13 assistance under the circumstances where competent counsel very likely could
14 not.” *Cronic* at 658-62; *see also Bell v. Cone*, 122 S.Ct. 1843, 1850-51 (2002);
15 *Frazer v. United States*, 18 F.3d 778, 786 (9th Cir. 1994)(Beezer, L.,
16 concurring). The *Cronic* exception is recognition that the constitutional
17 guarantee of effective counsel is to ensure truth and fairness through adversarial
18 testing. *Cronic* at 655-56. Partisan advocacy on both sides of a case is the
19 “very premise” of our criminal justice system. *Id.* at 655. *Cronic* requires an
20 evaluation of whether counsel’s performance “require[d] the prosecution’s case

1 to survive the crucible of meaningful adversarial testing.” *Ibid.* at 656.
2 Prejudice is presumed where it did not because failure to submit the
3 prosecution’s charges to adversarial testing is a *per se* violation of the Sixth
4 Amendment. “[I]f the process loses its character as a confrontation between
5 adversaries, the constitutional guaranty [of effective counsel] is violated.”
6 *Cronic* at 656-57.

7 “[T]he adversarial process protected by the Sixth Amendment requires
8 that the accused have ‘counsel acting in the role of an advocate.’” *U.S. v.*
9 *Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984) *citing*
10 *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493
11 (1967). “...[I]f counsel entirely fails to subject the prosecution’s case to
12 meaningful adversarial testing, then there has been a denial of Sixth
13 Amendment rights that makes the adversary process itself presumptively
14 unreliable.” *Id.*, 466 U.S. at 659, 104 S.Ct. at 2047.

15 Brooks stated the defense’s plan was to be as transparent as possible.
16 APLT. APP. 003052. Brooks testified his strategy was to focus only on the
17 sentencing phase of the proceedings, as Budd was facing the death penalty. *Id.*
18 During trial, however, Brooks entirely failed to zealously advocate for Budd,
19 and entirely failed to subject the State’s case to the adversarial process, which
20 entirely deprived Budd of his Sixth Amendment rights to counsel.

1 Brooks complained to the court about his frustrations regarding Budd's
2 family. Brooks made the argument for the State resulting in the Court finding
3 Winston unavailable and tacitly granting the oral motion to use the Preliminary
4 Hearing transcript in lieu of live testimony. Brooks made an oral motion to
5 continue the trial due to Budd's unhappiness with his representation, informing
6 the court that his relationship with Budd was non-existent but that, as to the
7 guilt phase, he did not feel the lack of a relationship would make any difference
8 in the outcome of the proceedings. Brooks failed to object to Spencer's hearsay
9 statement where she testified that the boy who had been on the stairs ran up to
10 her saying, "[s]omebody needs help up there. They're hurt." Brooks failed to
11 object to Renhard's testimony regarding the blood stain to which she did not
12 have any personal knowledge. Brooks failed to object to the State leading Lewis
13 in his testimony. Brooks specifically informed the jury that Lewis and Budd
14 were in jail together. Brooks declined to even be heard upon finding out after
15 Palau's testimony (the alleged eyewitness on the balcony) that she had been
16 compensated for such testimony by the State. Brooks admitted at evidentiary
17 hearing that he made a mistake by failing to object to the State reading the rap
18 song into the record at closing arguments in the trial phase. APLT. APP.
19 003057. As argued more particularly *supra*, Brooks admittedly failed to fully
20 investigate a viable defense to premeditation. Brooks additionally failed to fully

1 investigate the foundation for the rap song letter, examine Lewis' layperson
2 authentication, or call a graphologist upon knowing the letter had been written
3 in a stylistic handwriting likely not matching that of his client. As argued more
4 particularly below, Brooks informed the jury in opening arguments that Budd
5 had committed the crimes, although Budd never authorized this strategy and has
6 always maintained his innocence. When it came time to put on a defense for
7 Budd, Brooks called no witnesses whatsoever in the guilt phase of the
8 proceedings.

9 Brooks' first duty was to zealously represent Budd. *Sanders, supra*.
10 Brooks' failure to zealously represent Budd's interests "violated his duty of
11 loyalty" to Budd. *Anderson, supra*. Brooks' lack of zealous advocacy actively
12 served the interests of the prosecution in this matter in several regards. *Id*.

13 The circumstances of Brooks' lack of zealous advocacy and failure to
14 subject the State's case to adversarial testing provide that ineffectiveness should
15 have been properly presumed without even inquiry into actual performance at
16 trial, although Brooks' trial performance further supported the claim. *Cronic* at
17 661. Brooks constructively denied Budd the assistance of counsel in the guilt
18 phase of the trial herein, even indicating to the court that a breakdown in
19 attorney-client relations would not impact that stage since such stage was
20 unimportant. Brooks believed Budd to be guilty based on the evidence and thus

1 ceased any reasonable work on preparing the case for trial. Brooks admittedly
2 put on a farce or pretense for the entire guilt phase of trial. *Cronic* dictates that
3 this behavior is both evident and even presumptive of Brooks ineffectiveness.

4 Brooks further provided evidence and presumptive ineffectiveness by
5 failing to entirely subject the prosecution's case to the adversarial process. He
6 failed to investigate, make proper objections to admission of vital portions of
7 evidence supporting the State's case, told the jury Budd was in jail and that he
8 was guilty of the crimes charged in this matter, and then called no witnesses on
9 Budd's behalf. Throughout this process, Brooks excused his actions by simply
10 saying his strategy was to be "as transparent as possible" to gain the trust of the
11 jury for the penalty portion of the trial and avoid the death penalty. However,
12 many of these failures would not have impacted the trust he expected to gain
13 with the jury because they could have been handled outside the courtroom. No
14 jury would have faulted him for rendering proper objections, nor would they
15 have mistrusted him if he had put on any witnesses for Budd's defense.
16 Transparency to gain trust does not excuse lack of zealous advocacy or failure
17 to subject the State's case to the adversarial process.

18 The constitutional guarantee of effective counsel is to ensure truth and
19 fairness through adversarial testing. *Cronic* at 655-56. Partisan advocacy was
20 requisite as the "very premise" of our criminal justice system. *Id.* at 655.

1 Brooks' performance never "require[d] the prosecution's case to survive the
2 crucible of meaningful adversarial testing." *Cronic* at 656. Prejudice to Budd is
3 thus presumed as a *per se* violation of the Sixth Amendment. The process lost
4 its character "as a confrontation between adversaries", thus violating Budd's
5 constitutional guaranty of effective counsel. *Cronic* at 656-57.

6 Budd failed to act in the role of advocate for Budd during the guilt phase
7 of trial and, in fact, instead provided more assistance to the prosecution on
8 several occasions. *Cronic* at 656 citing *Anders* at 743. Although Budd
9 maintained his innocence, Brooks improperly allowed evidence of admissions
10 onto the record from the rap song letter, Lewis, and even himself told the jury in
11 opening that the evidence showed Budd committed the murders. This is not
12 advocacy. The trial was presumptively unreliable based upon the
13 ineffectiveness of Brooks in this regard and the Dismissal Order should thus be
14 reversed. *Cronic* at 659.

15 **D. Brooks' Unauthorized Trial Strategy Violated Budd's Sixth**
16 **Amendment Rights.**

17
18 Several courts apply *Cronic* review, discussed more thoroughly *supra*,
19 when defense counsel concedes guilt or absence of reasonable doubt without
20 the defendant's consent, on the theory that to do so "entirely fails to subject the
21 prosecution's case to meaningful adversarial testing." *See, e.g., United States v.*
22 *Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991)(quoting *Cronic*, 466 U.S. at

1 659)(applying *Cronic* review where defense counsel conceded, during closing
2 argument, that no reasonable doubt existed regarding the only factual issues in
3 dispute); *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(presuming prejudice
4 where counsel admitted defendant's guilt in an attempt to persuade the jury not
5 to sentence his client to death); *State v. Anaya*, 592 A.2d 1142, 1147 (N.H.
6 1991)(finding prejudice *per se* where counsel urged the jury to convict his
7 client of a lesser-included offense, even though his client had refused to plea to
8 that offense and had testified to his complete innocence); *State v. Harbison*, 337
9 S.E.2d 504, 507 (N.C. 1985)(holding that 'when counsel to the surprise of his
10 client admits his client's guilt, the harm is so likely and so apparent that the
11 issue of prejudice need not be addressed); *Wiley v. Sowders*, 669 F.2d 386, 389
12 (C.A. 6 (Ky.) 1982)(an accused is deprived of the effective assistance of
13 counsel when his own lawyer admits his client's guilt without first obtaining
14 client's consent to strategy). "[I]n those rare cases where counsel advises his
15 client that the latter's guilt should be admitted, the client's knowing consent to
16 such trial strategy must appear outside the presence of the jury on the trial
17 record in the manner consistent with *Boykin* [*v. Alabama*, 395 U.S. 238, 89
18 S.Ct. 1709, 23 L.Ed.2d 274 (1969)]." *Wiley v. Sowders*, 647 F.2d 642, 650 (6th
19 Cir. 1981). "[T]he dividing line between a sound defense strategy and
20 ineffective assistance of counsel is whether or not the client has given his or her

1 consent to such a strategy” since only the defendant can make the fundamental
2 decision to admit guilt. *Nixon* at 623.

3 While the federal courts are split on application of *Cronic* to these types
4 of circumstances, the 9th Circuit has been very clear on its position in our
5 circuit. In *U.S. v. Swanson*, the 9th Circuit Court of Appeals found that court-
6 appointed counsel for Swanson told the jury in closing argument “that there was
7 no reasonable doubt regarding the only factual issues in dispute.” *Ibid.* at 1072.
8 The 9th Circuit recognized the prejudice standard of *Strickland* as the general
9 test for ineffective assistance of counsel claims, but decided that the
10 circumstances justified applying the *Cronic* exception since counsel’s conduct
11 had caused a “breakdown in our adversarial system of justice in this case that
12 compels an application of the *Cronic* exception to the *Strickland* requirement of
13 a showing that the outcome of the trial would have been different without
14 counsel’s errors or omissions.” *Id.* at 1074, *citing Cronic* at 659-60.

15 The 9th Circuit explained that counsel’s statements lessened the
16 government’s burden of proof, “shoulder[ing] part of the Government’s burden
17 of persuasion” and “taint[ing] the integrity of the trial.” *Swanson* at 1074.

18 A defense attorney who abandons his duty of loyalty to his client
19 and effectively joins the state in an effort to attain a conviction or
20 death sentence suffers from an obvious conflict of interest. Such an
21 attorney, like unwanted counsel, “‘represents’ the defendant only
22 through a tenuous and unacceptable legal fiction.” *Faretta v.*

1 *California*, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d
2 562 (1975). In fact, an attorney who is burdened by a conflict
3 between his client's interests and his own sympathies to the
4 prosecution's position is considerably worse than an attorney with
5 loyalty to other defendants, because the interests of the state and
6 the defendant are necessarily in opposition.

7
8 *Id.* at 1075, *citing Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988).

9 *Swanson* determined this admission of guilt was not a tactical admission of
10 certain facts in order to persuade the jury to focus on an affirmative defense,
11 such as insanity; instead, counsel admitted to the jury that no reasonable doubt
12 existed as to Swanson's identity as the perpetrator of the only crime charged in
13 the indictment. *Id.* at 1076.

14 The *Swanson* court indicated that counsel's statements were "an
15 abandonment of the defense of his client at a critical stage" of the proceedings.
16 *Ibid.* at 1074, *citing Herring v. New York*, 422 U.S. 853 (1975)(holding that
17 closing argument is a "critical stage"). The court commented that, "[w]e cannot
18 envision a situation more damaging to an accused than to have his own attorney
19 tell the jury that there is no reasonable doubt that his client was the person who
20 committed the conduct that constituted the crime charged in the indictment."
21 *Id.* at 1075. The 9th Circuit felt so strongly that Swanson's counsel's conduct
22 was indefensible that it directed its own clerk to provide the State Bar of

1 Arizona with a copy of the *Swanson* opinion so that the attorney involved
2 would be sanctioned for negligence. *Id.* at 1076.

3 In his opening statement, Brooks stated to the jury, “[l]et me make it
4 absolutely clear, some evidence will show that Glenford killed these three
5 people.” At the evidentiary hearing, Brooks stated the defense’s plan was to be
6 as transparent as possible. APLT. APP. 003052. Brooks testified his strategy
7 was to focus on the sentencing phase of the proceedings, as Budd was facing
8 the death penalty. *Id.* Brooks testified he felt this case was a defense victory
9 because Budd did not receive the death penalty. APLT. APP. 003060.

10 However, Brooks’ case notes indicate that Budd maintained his
11 innocence throughout the case. On November 28, 2005, Brooks met with Budd,
12 during which Budd denied he committed the crime when Budd told him the
13 evidence was overwhelming and that Budd would be convicted on all three
14 counts. Budd responded that he would just “hope for the best.” *See* Case Notes,
15 P. 7. Brooks asked if Budd wanted to testify to which Budd’s response was in
16 the affirmative. *Id.*

17 The application of the *Cronic* exception is proper to Brooks’ concession
18 of Budd’s guilt without Budd’s consent since such concession “entirely fail[ed]
19 to subject the prosecution’s case to meaningful adversarial testing.” *Swanson* at
20 1074 (*quoting Cronic* at 659). The *Cronic* exception provides a presumption of

1 prejudice, even where Brooks' strategy was to persuade the jury not to sentence
2 Budd to the death penalty. *Nixon, supra*. It is *per se* prejudice where Budd
3 refused to plead guilty to first degree murder and, even in office meetings with
4 Brooks, Brooks noted that Budd maintained his innocence and intended to
5 testify to such. *See, Anaya* at 1147. Nowhere in Brooks' notes is there an
6 indication that he informed Budd he intended to admit Budd's guilt to the jury,
7 which concept that Budd was guilty was only contrived by Brooks rather than
8 admitted to him by Budd, so Brooks' admissions in opening arguments was a
9 complete surprise to Budd, evidencing apparent harm where prejudice can be
10 presumed. *Harbison* at 507. Brooks never obtained Budd's consent to this
11 strategy, and Brooks did not place any such consent on the record in this matter
12 outside the jury. *Wiley*, 669 F.2d at 389; *Wiley*, 647 F.2d at 650, *citing Boykin*,
13 395 U.S. 238, 89 S.Ct. 1709. Only Budd was charged with making the
14 fundamental decision to admit his own guilt if he chose to do so. Brooks doing
15 so was ineffectiveness regardless of whether Brooks felt it was a sound defense
16 strategy. *Nixon* at 623.

17 This case is strikingly similar to the 9th Circuit's *Swanson* case wherein
18 defense counsel told the jury in closing argument that his client was guilty. *Ibid.*
19 at 1072. The 9th Circuit applied the *Cronic* exception, as this Court should do
20 herein, since Brooks' conduct has caused a "breakdown in our adversarial

1 system of justice” negating the need to show that the outcome of the trial would
2 have been different without Brooks’ errors or omissions. *Id.* at 1074, *citing*
3 *Cronic* at 659-60.

4 Brooks’ statements lessened the government’s burden of proof, even
5 “shoulder[ing] part of the Government’s burden of persuasion” and “taint[ing]
6 the integrity of the trial.” *Swanson* at 1074. Brooks abandoned his duty of
7 loyalty to Budd and joined the State in an effort to obtain a conviction,
8 effectively evidencing a conflict of interest by the unauthorized strategy he
9 concocted without Budd’s consent. *Id.* at 1075. Brooks represented Budd “only
10 through a tenuous and unacceptable legal fiction” at trial. *Id.*, *citing Faretta*,
11 422 U.S. at 821, 95 S.Ct. at 2534. Brooks conflict between Budd’s interests and
12 his own sympathies to the prosecution's position was “considerably worse than
13 an attorney with loyalty to other defendants, because the interests of the state
14 and the defendant are necessarily in opposition.” *Id.* at 1075, *citing Osborn* at
15 629. Brooks’ unauthorized admission of guilt was not a tactical decision
16 towards obtaining sympathy with the jury in the penalty phase as he tried to
17 convince the court below, but was instead a violation of his duty of loyalty to
18 Budd. *Id.* at 1076.

19 Brooks abandoned Budd at a critical stage of the trial. *Swanson* at 1074,
20 *citing Herring*. There is no situation more damaging to Budd than to have

1 Brooks tell the jury that he was the person who committed the murders. *Id.* at
2 1075. This was so damaging that, when the same thing happened in *Swanson*,
3 the 9th Circuit directed its own clerk to provide the State Bar of Arizona with a
4 copy of the *Swanson* opinion so that the attorney involved would be sanctioned
5 for negligence. *Id.* at 1076.

6 This clearly supports a finding of ineffective assistance of counsel against
7 Brooks; however, the trial court erroneously found otherwise and entered the
8 Dismissal Order on the Petitions. The Dismissal Order should be reversed if
9 only on this ground of ineffectiveness alone, but particularly given all of the
10 other claims as argued herein that warranted relief being provided to Budd.

11 **II. THE TRIAL COURT IMPROPERLY DENIED BUDD’S CLAIM**
12 **OF CUMULATIVE ERROR ON INEFFECTIVE ASSISTANCE OF**
13 **COUNSEL GIVEN THERE WAS A REASONABLE**
14 **PROBABILITY OF A DIFFERENT RESULT IN THE OUTCOME**
15 **OF THE PROCEEDINGS ABSENT THE INEFFECTIVENESS.**

16
17 “The cumulative effect of multiple errors may violate a defendant’s
18 constitutional right to a fair trial even though errors are harmless individually.”
19 *Evans v. State*, 117 Nev. 609, 648, 28 P.3d 498, 523 (2001). *Evans* continued as
20 follows:

21 Several of Evans’s claims have some merit: the admission of the
22 hearsay statement which did not fall within the co-conspirator
23 exception; evidence of some witnesses’ fear; evidence of prior
24 consistent statements; mischaracterization of the reasonable doubt
25 standard; failure to impeach Joseph Salley with his criminal
26 history; inadequate notice of aiding and abetting.

1
2 The question is: if counsel had effectively responded to these
3 errors, was there a reasonable probability that Evans would not
4 have been convicted of first-degree murder?

5
6 *Id.* at 647-648. *Evans* sets the standard a court must conduct to determine
7 whether cumulative error exists even though the deficiencies of counsel were
8 multiple and found to be harmless individually. *Id.* at 648 (“Therefore, we
9 conclude that the incriminating evidence was strong enough that the errors do
10 not undermine confidence in the trial’s result.”); *see, also, Browning v. State*,
11 120 Nev. 347, 371, 91 P.3d 39, 56 (2004) (“The question is: if we consider
12 these factors cumulatively, is there a reasonable probability that Browning
13 would not have been convicted of first-degree murder?”).

14 The State argued in the post-conviction proceedings that Budd was
15 required to argue the factors of cumulative error. *See, Valdez v. State*, 124 Nev.
16 1172, 196 P.3d 465 (2008) (When evaluating a claim of cumulative error, we
17 consider the following factors: “(1) whether the issue of guilt is close, (2) the
18 quantity and character of the error, and (3) the gravity of the crime charged.”).
19 However, these factors are only cited in cases appealing directly from the
20 judgment of conviction and not from habeas corpus proceedings where the
21 claimant has argued the constitutional impact of multiple instances of
22 ineffectiveness of counsel.

1 The district court determined Budd had failed to provide any individual
2 claim to warrant relief and therefore there was no cumulative effect. APLT.
3 APP. 003098; 003102-003103. The finding of fact determined Budd's claim on
4 this issue was a bare allegation and was therefore dismissed. APLT. APP.
5 003098. The conclusion of law determined a cumulative error finding in the
6 context of *Strickland* is rare and requires an extensive aggregation of errors.
7 APLT. APP. 003102-003103. The district court determined there could be no
8 cumulative error where the defendant failed to demonstrate a single violation of
9 *Strickland*. *Id.* In support of this assertion, the district court cites to federal
10 cases. *Id.* However, this is contrary to Nevada law.

11 Budd did in fact establish harmful error in at least four different areas, as
12 argued *supra*. However, even if he had not, the cumulative effect of these
13 multiple errors violated Budd's constitutional right to a fair trial even if
14 considered harmless individually. *Evans* at 648. At least four of Budd's claims
15 had merit and, if Brooks had effectively responded in these circumstances, there
16 was a substantial and reasonable probability that the outcome of Budd's trial
17 would have differed. *Id.* at 647-648. Budd stood trial with counsel who failed to
18 adequately investigate, call expert witnesses, challenge standard procedure
19 pertaining to layperson authentication of handwriting, challenge the testimony
20 of the jailhouse informant who claimed Budd confessed to him, openly

1 admitted Budd's guilt on the record even when Budd maintained his own
2 innocence, and failed to pursue a viable defense to premeditation. The trial in
3 this matter is significantly undermined in these errors.

4 The trial court misinterpreted the cumulative evidence requirements as
5 raised by Budd in the First Petition. The trial court indicated that, because none
6 of the grounds raised by Budd were sufficient to prove ineffective assistance
7 individually, there was no cumulative effect. However, as held by *Evans*,
8 grounds that cannot prove error in segregation from one another can culminate
9 in a larger picture of overall ineffectiveness. Although Budd believes that the
10 individual claims of ineffectiveness herein are sufficient individually, they
11 definitively culminate in error when taken together. Thus the Dismissal Order
12 should be reversed.

13 **III. THE TRIAL COURT IMPROPERLY DETERMINED ANY**
14 **ERRORS IN BROOKS' REPRESENTATION OF BUDD WERE**
15 **HARMLESS GIVEN THE OVERWHELMING EVIDENCE,**
16 **FAILING TO FIND THE HARMLESSNESS BEYOND A**
17 **REASONABLE DOUBT AS REQUIRED FOR ERRORS**
18 **PERTAINING TO CONSTITUTIONAL RIGHTS.**

19
20 "Any error, defect, irregularity or variance which does not affect
21 substantial rights shall be disregarded." NRS 178.598. In *Chapman v.*
22 *California*, the United States Supreme Court held that, "...before a federal
23 constitutional error can be held harmless, the court must be able to declare a
24 belief that it was harmless beyond a reasonable doubt." *Ibid.*, 386 U.S. 18, 25,

1 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). This standard is echoed in *Ramirez v.*
2 *State*, stating that “[t]rial error that rises to the level of constitutional magnitude
3 requires that a criminal defendant’s conviction be reversed on appeal unless
4 such error ‘was harmless beyond a reasonable doubt.’” *Ibid.*, 114 Nev. 550,
5 562, 958 P.2d 724, 731 (1998), citing *Chapman v. California*, 386 U.S. 18, 24,
6 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Reasonable doubt is defined as follows:

7 A reasonable doubt is one based on reason. It is not mere possible
8 doubt, but is such a doubt as would govern or control a person in
9 the more weighty affairs of life. If the minds of the jurors, after the
10 entire comparison and consideration of all the evidence, are in such
11 a condition that they can say they feel an abiding conviction of the
12 truth of the charge, there is not a reasonable doubt. Doubt to be
13 reasonable must be actual, not mere possibility or speculation.

14
15 NRS 175.211(1).

16 Throughout the Dismissal Order, the district court determined Budd was
17 not prejudiced by any of the ineffectiveness claims raised in the First Petition
18 because of the overwhelming amount of evidence presented. However, the trial
19 court failed to acknowledge or apply the heightened standard of beyond a
20 reasonable doubt for proving harmlessness on constitutional errors.

21 Brooks’ ineffectiveness affected Budd’s substantial Sixth Amendment
22 rights and could not be disregarded as harmless. NRS 178.598. The Sixth
23 Amendment constitutional errors required the court below to declare a belief
24 that they were “harmless beyond a reasonable doubt.” *Chapman*, 386 U.S. at

1 25, 87 S.Ct. at 828. Budd's conviction was required to be reversed absent such
2 declaration by the trial court. *Ramirez* at 562, *citing Chapman*, 386 U.S. at 24,
3 87 S.Ct. 824. The trial court could not have made such a declaration given that
4 the errors raised below and *supra* could not be reasonably dismissed as
5 harmless. There is no abiding conviction that these errors did not harm Budd's
6 right to counsel and to a fair trial. NRS 175.211(1).

7 Budd raised multiple issues for consideration in the First Petition. Of
8 most concern is Brooks' unauthorized concession of Budd's guilt throughout
9 the guilt phase. This concession supported the rap song as another unchallenged
10 confession by Budd without any contradiction by the defense regarding the lay-
11 person authentication. Brooks' entire focus was on the sentencing phase and felt
12 his defense was a success because the jury decided the penalty of Life without
13 the possibility of parole rather than the death penalty; however, Budd could
14 have received a lesser conviction on second degree murder if Brooks had
15 zealously advocated or subjected the State's case to the adversarial process.
16 This ineffectiveness in unauthorized strategy led Brooks to fall below the
17 reasonable standard of professionalism in his representation of Budd and
18 significantly prejudiced him. Accordingly, reversal of the Dismissal Order is
19 warranted.

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RESPECTFULLY SUBMITTED this 27th day of March, 2015.

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