

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 KEVIN MARQUETTE GIPSON,)

4)
5 Appellant,)

6 v.)

7)
8 THE STATE OF NEVADA,)

9 Respondent.)
10

CASE NO: 69174

Electronically Filed

Jun 03 2016 09:53 a.m.

Tracie K. Lindeman

Clerk of Supreme Court

DISTRICT COURT

CASE NO. 10C264079

11 **APPELLANT'S APPENDIX**

12 **Appeal from the Eighth Judicial District Court**

13 **Clark County, Nevada**

14 **Honorable David B. Barker and William D. Kephart**

15 CARMINE J. COLUCCI, ESQ.

16 Carmine J. Colucci, CHTD.

17 Nevada Bar #000881

18 629 South Sixth Street

19 Las Vegas, Nevada 89101

(702) 384-1274

STEVEN B. WOLFSON

Clark County District Attorney

Nevada Bar #001565

Regional Justice Center

200 Lewis Avenue

Post Office Box 552212

Las Vegas, Nevada 89155-2212

(702) 671-2500

State of Nevada

23 ADAM PAUL LAXALT

Nevada Attorney General

24 Nevada Bar No. 003926

100 North Carson Street

25 Carson City, Nevada 89701-4717

26 (775) 684-1265

27
28 Counsel for Appellant

Counsel for Respondent

INDEX

<u>DOCUMENT</u>	<u>VOL</u>	<u>PAGE NO.</u>
Case Appeal Statement Filed on November 8, 2012	1	41-42
Court Minutes of January 13, 2016	1	105
Docketing Statement- Criminal Appeals Filed on February 12, 2016	1	106-111
Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing Filed on October 15, 2012	1	25-27
Findings of Fact, Conclusions of Law and Order Filed on October 22, 2015	1	93-102
Guilty Plea Agreement Filed on December 7, 2011	1	4-12
Indictment Filed on April 28, 2010	1	1-3
Judgment of Conviction (Plea of Guilty) Filed on March 13, 2012	1	13-14
Memorandum of Points and Authorities Facts of the Case/Motion for Direct Appeal Filed on November 5, 2012	1	32-40
Motion to Proceed In Forma Pauperis Filed on October 15, 2012	1	22-24

INDEX

<u>DOCUMENT</u>	<u>VOL</u>	<u>PAGE NO.</u>
Motion to Withdraw Guilty Plea Filed on September 5, 2012	1	15-19
Notice of Appeal (Pro Per) Filed on January, 12, 2015	1	88-92
Order Denying Defendant's Pro Per Motion to Withdraw Plea Filed on September 27, 2012	1	20-21
Order Dismissing Appeal Filed on December 20, 2016	1	43-44
Order of Limited Remand for Appointment of Counsel	1	103-104
Petition for Writ of Habeas Corpus (Post-Conviction) Filed on June 6, 2014	1	45-55
Points and Authorities in Support of Petition For Writ of Habeas Corpus (Post-Conviction) Filed on June 6, 2014	1	56-75
Psychiatric Forensic Evaluation – prepared by Dodge A. Slagle	1	112-114
State's Opposition to Defendant's Motion to Appoint Counsel and Request for Evidentiary Hearing Filed on November 2, 2012	1	28-31

INDEX

<u>DOCUMENT</u>	<u>VOL</u>	<u>PAGE NO.</u>
Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) Filed on December 15, 2014	1	76-87
Transcript of 12/07/11 Guilty Plea	1	115-123
Transcript of 09/10/15 Evidentiary Hearing	1	124-172

1 IND

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 SHANON CLOWERS
6 Deputy District Attorney
7 Nevada Bar #010008
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

FILED

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CLEF. JRT

12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,

15 Plaintiff,

16 -vs-

17 KEVIN MARQUETTE GIPSON, aka,
18 Kevin Marquette Gipson, #1582343

19 Defendant(s).

Case No. C264079
Dept. No. XVIII

INDICTMENT

20 STATE OF NEVADA }
21 COUNTY OF CLARK } ss.

22 The Defendant(s) above named, KEVIN MARQUETTE GIPSON, aka, Kevin
23 Marquette Gipson, accused by the Clark County Grand Jury of the crime of MURDER
24 WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165),
25 committed at and within the County of Clark, State of Nevada, on or about the 25th day of
26 March, 2010, as follows:

27 did then and there wilfully, feloniously, without authority of law, and with malice
28 aforethought, kill BRITNEY LAVOLL, a human being, by shooting at or into the body of

///

///

1 BRITNEY LAVOLL, with a deadly weapon, to-wit: a firearm, said killing having been: (1)
2 willful, deliberate and premeditated; and/or (2) committed by Defendant lying in wait to
3 commit the killing.

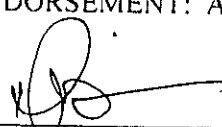
4 DATED this 27 day of April, 2010.

6 DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

9 BY

10 SHANON CLOWERS
Deputy District Attorney
Nevada Bar #010008

11
12 ENDORSEMENT: A True Bill

13
14 
15 _____
Foreperson, Clark County Grand Jury

1 Names of witnesses testifying before the Grand Jury:

2 BAILEY, CHRISTINA, c/o CCDA, 200 Lewis Ave, LV, NV

3 FLEMING, WADE, c/o CCDA, 200 Lewis Ave, LV, NV

4 LAVOLL, CHARLES, c/o CCDA, 200 Lewis Ave, LV, NV

5 LONG, DANIEL, LVMPD #3969

6 ROBERTSON, JEREMY, LVMPD

7 SIMMS, DR. LARY, CLARK COUNTY CORONER

8

9

10

11

12 Additional witnesses known to the District Attorney at time of filing the Indictment:

13

14 BENITEZ, CHRISTIAN, c/o CCDA, 200 Lewis Ave, LV, NV

15 CUSTODIAN OF RECORDS, CCDC

16 CUSTODIAN OF RECORDS, CLARK COUNTY PARK POLICE

17 CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

18 CUSTODIAN OF RECORDS, LVMPD RECORDS

19 FLOHR, GEOFFREY, LVMPD #12912

20 GILMORE, ROBERT, c/o CCDA, 200 Lewis Ave, LV, NV

21 TELGENHOFF, GARY, CLARK COUNTY CORONER

22 TREMEL, DONALD, LVMPD #2038

23

24

25

26

27

28

09AGJ167X/10F05796X/sam
LVMPD EV# 1003250682
(TK7)

ORIGINAL

GPA
DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781
SHANON CLOWERS
Deputy District Attorney
Nevada Bar #0010008
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

DEC 07 2011

BY, *April Watkins*
APRIL WATKINS, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

10C264078
GPA
Guilty Plea Agreement
1714319



THE STATE OF NEVADA,

Plaintiff,

-vs-

KEVIN MARQUETTE GIPSON, aka,
Kevin Marquette Gipson, #1582343

Defendant.

CASE NO: C264079
DEPT NO: XVII

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty to: **FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165)**, as more fully alleged in the charging document attached hereto as Exhibit "I".

My decision to plead guilty is based upon the plea agreement in this case which is as follows:

Parties stipulate to twenty (20) years to life in the Nevada Department of Corrections. Further, parties retain the right to argue the deadly weapon for a term of not less than four (4) to eight (8) years.

I agree to the forfeiture of any and all weapons or any interest in any weapons seized and/or impounded in connection with the instant case and/or any other case negotiated in whole or in part in conjunction with this plea agreement.

I understand and agree that, if I fail to interview with the Department of Parole and Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges

1 including reckless driving or DUI, but excluding minor traffic violations, that the State will
2 have the unqualified right to argue for any legal sentence and term of confinement allowable
3 for the crime(s) to which I am pleading guilty, including the use of any prior convictions I
4 may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life
5 without the possibility of parole, life with the possibility of parole after ten (10) years, or a
6 definite twenty-five (25) year term with the possibility of parole after ten (10) years.

7 Otherwise I am entitled to receive the benefits of these negotiations as stated in this
8 plea agreement.

9 CONSEQUENCES OF THE PLEA

10 I understand that by pleading guilty I admit the facts which support all the elements of
11 the offense(s) to which I now plead as set forth in Exhibit "I".

12 I understand that the Court must sentence me to the Nevada Department of
13 Corrections as follows: to a term of LIFE without the possibility of parole PLUS a
14 consecutive term of ONE (1) to TWENTY (20) years for the deadly weapon enhancement; a
15 term of LIFE with parole eligibility after TWENTY (20) years PLUS a consecutive term of
16 ONE (1) to TWENTY (20) years for the deadly weapon enhancement; OR a definite term of
17 TWENTY (20) to FIFTY (50) years PLUS a consecutive term of ONE (1) to TWENTY (20)
18 years for the deadly weapon enhancement. I understand that I am not eligible for probation
19 for the offense to which I am pleading guilty.

20 I understand that the law requires me to pay an Administrative Assessment Fee.

21 I understand that, if appropriate, I will be ordered to make restitution to the victim of
22 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
23 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
24 reimburse the State of Nevada for any expenses related to my extradition, if any.

25 I understand that I am not eligible for probation for the offense to which I am
26 pleading guilty.

27 I also understand that I must submit to blood and/or saliva tests under the Direction of
28 the Division of Parole and Probation to determine genetic markers and/or secretor status.

1 I further understand that if I am pleading guilty to charges of Burglary, Invasion of
2 the Home, Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled
3 Substance, or Gaming Crimes, for which I have prior felony conviction(s), I will not be
4 eligible for probation and may receive a higher sentencing range.

5 I understand that if more than one sentence of imprisonment is imposed and I am
6 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
7 the sentences served concurrently or consecutively.

8 I also understand that information regarding charges not filed, dismissed charges, or
9 charges to be dismissed pursuant to this agreement may be considered by the judge at
10 sentencing.

11 I have not been promised or guaranteed any particular sentence by anyone. I know
12 that my sentence is to be determined by the Court within the limits prescribed by statute.

13 I understand that if my attorney or the State of Nevada or both recommend any
14 specific punishment to the Court, the Court is not obligated to accept the recommendation.

15 I understand that if the offense(s) to which I am pleading guilty was committed while
16 I was incarcerated on another charge or while I was on probation or parole that I am not
17 eligible for credit for time served toward the instant offense(s).

18 I understand that if I am not a United States citizen, any criminal conviction will
19 likely result in serious negative immigration consequences including but not limited to:

- 20 1. The removal from the United States through deportation;
- 21 2. An inability to reenter the United States;
- 22 3. The inability to gain United States citizenship or legal residency;
- 23 4. An inability to renew and/or retain any legal residency status; and/or
- 24 5. An indeterminate term of confinement, with the United States Federal
25 Government based on my conviction and immigration status.

26 Regardless of what I have been told by any attorney, no one can promise me that this
27 conviction will not result in negative immigration consequences and/or impact my ability to
28 become a United States citizen and/or a legal resident.

1 I understand that the Division of Parole and Probation will prepare a report for the
2 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
3 sentencing, including my criminal history. This report may contain hearsay information
4 regarding my background and criminal history. My attorney and I will each have the
5 opportunity to comment on the information contained in the report at the time of sentencing.
6 Unless the District Attorney has specifically agreed otherwise, the District Attorney may
7 also comment on this report.

8 WAIVER OF RIGHTS

9 By entering my plea of guilty, I understand that I am waiving and forever giving up
10 the following rights and privileges:

- 11 1. The constitutional privilege against self-incrimination, including the
12 right to refuse to testify at trial, in which event the prosecution would
not be allowed to comment to the jury about my refusal to testify.
- 13 2. The constitutional right to a speedy and public trial by an impartial jury,
14 free of excessive pretrial publicity prejudicial to the defense, at which
trial I would be entitled to the assistance of an attorney, either appointed
15 or retained. At trial the State would bear the burden of proving beyond
a reasonable doubt each element of the offense(s) charged.
- 16 3. The constitutional right to confront and cross-examine any witnesses
17 who would testify against me.
- 18 4. The constitutional right to subpoena witnesses to testify on my behalf.
- 19 5. The constitutional right to testify in my own defense.
- 20 6. The right to appeal the conviction with the assistance of an attorney, either
21 appointed or retained, unless specifically reserved in writing and agreed
upon as provided in NRS 174.035(3). I understand this means I am
22 unconditionally waiving my right to a direct appeal of this conviction,
including any challenge based upon reasonable constitutional, jurisdictional
23 or other grounds that challenge the legality of the proceedings as stated in
NRS 177.015(4). However, I remain free to challenge my conviction
24 through other post-conviction remedies including a habeas corpus petition
pursuant to NRS Chapter 34.

25 VOLUNTARINESS OF PLEA

26 I have discussed the elements of all of the original charge(s) against me with my
27 attorney and I understand the nature of the charge(s) against me.

28 I understand that the State would have to prove each element of the charge(s) against

1 me at trial.

2 I have discussed with my attorney any possible defenses, defense strategies and
3 circumstances which might be in my favor.

4 All of the foregoing elements, consequences, rights, and waiver of rights have been
5 thoroughly explained to me by my attorney.

6 I believe that pleading guilty and accepting this plea bargain is in my best interest,
7 and that a trial would be contrary to my best interest.

8 I am signing this agreement voluntarily, after consultation with my attorney, and I am
9 not acting under duress or coercion or by virtue of any promises of leniency, except for those
10 set forth in this agreement.

11 I am not now under the influence of any intoxicating liquor, a controlled substance or
12 other drug which would in any manner impair my ability to comprehend or understand this
13 agreement or the proceedings surrounding my entry of this plea.

14 My attorney has answered all my questions regarding this guilty plea agreement and
15 its consequences to my satisfaction and I am satisfied with the services provided by my
16 attorney.


17 DATED this 7 day of December, 2011.

18

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KEVIN MARQUETTE GIPSON, aka,
Kevin Marquette Gipson
Defendant

22

AGREED TO BY:

23


24

25

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SHANON CLOWERS
Deputy District Attorney
Nevada Bar #0010008

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of the
3 court hereby certify that:

- 4 1. I have fully explained to the Defendant the allegations contained in the
5 charge(s) to which guilty pleas are being entered.
6 2. I have advised the Defendant of the penalties for each charge and the
7 restitution that the Defendant may be ordered to pay.
8 3. I have inquired of Defendant facts concerning Defendant's immigration status
9 and explained to Defendant that if Defendant is not a United States citizen any
10 criminal conviction will most likely result in serious negative immigration
11 consequences including but not limited to:
12 a. The removal from the United States through deportation;
13 b. An inability to reenter the United States;
14 c. The inability to gain United States citizenship or legal residency;
15 d. An inability to renew and/or retain any legal residency status; and/or
16 e. An indeterminate term of confinement, by with United States Federal
17 Government based on the conviction and immigration status.

18 Moreover, I have explained that regardless of what Defendant may have been
19 told by any attorney, no one can promise Defendant that this conviction will
20 not result in negative immigration consequences and/or impact Defendant's
21 ability to become a United States citizen and/or legal resident.

- 22 4. All pleas of guilty offered by the Defendant pursuant to this agreement are
23 consistent with the facts known to me and are made with my advice to the
24 Defendant.
25 5. To the best of my knowledge and belief, the Defendant:
26 a. Is competent and understands the charges and the consequences of
27 pleading guilty as provided in this agreement,
28 b. Executed this agreement and will enter all guilty pleas pursuant hereto
voluntarily, and
c. Was not under the influence of intoxicating liquor, a controlled
substance or other drug at the time I consulted with the Defendant as
certified in paragraphs 1 and 2 above.

Dated: This 12 day of December, 2011.

ATTORNEY FOR DEFENDANT

ORIGINAL

FILED

APR 28 3 32 PM '10

CLERK
COURT

1 IND
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 SHANON CLOWERS
6 Deputy District Attorney
7 Nevada Bar #010008
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,

15 Plaintiff,

16 -vs-

17 KEVIN MARQUETTE GIPSON, aka,
18 Kevin Marquette Gipson, #1582343

19 Defendant(s).

Case No. C264079
Dept. No. XVIII

INDICTMENT

20 STATE OF NEVADA }
21 COUNTY OF CLARK } ss.

22 The Defendant(s) above named, KEVIN MARQUETTE GIPSON, aka, Kevin
23 Marquette Gipson, accused by the Clark County Grand Jury of the crime of MURDER
24 WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165),
25 committed at and within the County of Clark, State of Nevada, on or about the 25th day of
26 March, 2010, as follows:

27 did then and there wilfully, feloniously, without authority of law, and with malice
28 aforethought, kill BRITNEY LAVOLL, a human being, by shooting at or into the body of

RECEIVED

APR 28 2010

CLERK OF THE COURT

EXHIBIT "1"

1 BRITNEY LAVOLL, with a deadly weapon, to-wit: a firearm, said killing having been: (1)
2 willful, deliberate and premeditated; and/or (2) committed by Defendant lying in wait to
3 commit the killing.

4 DATED this 27 day of April, 2010.

6 DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

9 BY

10 SHANON CLOWERS
Deputy District Attorney
Nevada Bar #010008

12 ENDORSEMENT: A True Bill

13 
14 _____
15 Foreperson, Clark County Grand Jury

1 Names of witnesses testifying before the Grand Jury:

2 BAILEY, CHRISTINA, c/o CCDA, 200 Lewis Ave, LV, NV

3 FLEMING, WADE, c/o CCDA, 200 Lewis Ave, LV, NV

4 LAVOLL, CHARLES, c/o CCDA, 200 Lewis Ave, LV, NV

5 LONG, DANIEL, LVMPD #3969

6 ROBERTSON, JEREMY, LVMPD

7 SIMMS, DR. LARY, CLARK COUNTY CORONER

8

9

10

11

12 Additional witnesses known to the District Attorney at time of filing the Indictment:

13

14 BENITEZ, CHRISTIAN, c/o CCDA, 200 Lewis Ave, LV, NV

15 CUSTODIAN OF RECORDS, CCDC

16 CUSTODIAN OF RECORDS, CLARK COUNTY PARK POLICE

17 CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

18 CUSTODIAN OF RECORDS, LVMPD RECORDS

19 FLOHR, GEOFFREY, LVMPD #12912

20 GILMORE, ROBERT, c/o CCDA, 200 Lewis Ave, LV, NV

21 TELGENHOFF, GARY, CLARK COUNTY CORONER

22 TREMEL, DONALD, LVMPD #2038

23

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27 09AGJ167X/10F05796X/sam

28 LVMPD EV# 1003250682
(TK7)

ORIGINAL

FILED

MAR 13 2012

CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CASE NO. C264079

DEPT. NO. XVIII

KEVIN MARQUETTE GIPSON
aka Kevin Marquette Gipson
#1582343

Defendant.

10C264079
JOC
Judgment of Conviction
1787064



JUDGMENT OF CONVICTION

(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; thereafter, on the 10TH day of February, 2012, the Defendant was present in court for sentencing with his counsels, CHRISTY CRAIG-ROHAN, Deputy Public Defender and TIMOTHY O'BRIEN, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense and, in addition to the \$25.00 Administrative Assessment Fee, and Indigent Defense Civil Assessment Fee of \$250.00, the Defendant is sentenced to the Nevada Department of

1 Corrections (NDC) as follows: LIFE with a POSSIBLE parole eligibility of TWENTY (20)
2 YEARS with a CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS
3 MAXIMUM and NINETY-SIX (96) MONTHS MINIMUM for Use of a Deadly Weapon;
4 with SIX HUNDRED EIGHTY-SIX (686) days Credit for Time Served. As the Fee and
5 Genetic Testing have been previously imposed, the Fee and Testing in the current case
6 are WAIVED.
7

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9 DATED this MAR 09 2012 day of February, 2012

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13 DAVID BARKER
14 DISTRICT JUDGE
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28

Ann L. Johnson
CLERK OF THE COURT

Defendants Motion
Kevin Gipson
1082776
P.O. Box 1989
ELY Nevada, 89301

District Court
Clark County Nevada

The State of Nevada
Plaintiff
vs.
Kevin Gipson
Defendant

Case NO: C264079
DEPT NO: XVIII
Docket NO: 1082776
Hearing: 09-24-12

MOTION TO WITHDRAW PLEA

NOW comes the Defendant, Kevin Gipson by and through CHRISTY L. CRAIG, Deputy Public Defender in the above captioned matter, and moves this Court to withdraw his plea of guilty previously entered with the assistance of Counsel. As grounds and "good cause," defendant alleges the following grounds for withdrawal of the plea.

DATED this 24th day of August, 2012

RECEIVED
AUG 30 2012
CLERK OF THE COURT

Kevin Gipson
Kevin Gipson #1082776
Defendant

POINTS AND AUTHORITIES

N.R.S. 176.165. When plea of guilty or nolo contendere may be withdrawn. Except as otherwise provided in this section, a motion to withdraw a plea of guilty. To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

ARGUMENT

ON THIS DATED 23rd day of December, 2011 I signed a deal I didn't want to sign, I want to take my case to trial but my Attorney, CHRISTYL CRAIG Coerce me by saying if I take my case to trial the Jury going to find me guilty of First Degree Murder in the Jury was going to sentence me to life w/o Parole. Finger v State 2001, 27 P.3d 66, 117 Nev. 548 1995 Senate Bill 314 Should be rejected in its entirety and all prior versions of the statutes amended or repealed therein remain in full force and effect. Hart v State, 2000, 1 P.3d 969, 116 Nev. 558 Where a defendant previously has sought relief from conviction entered upon guilty plea, failure to identify all grounds for relief in the instance Pangallo v State, 112 Nev. 1533, 930 P.2d 100 Warden v. Peters, 83 Nev. 298, 429 P.2d 549 defendants challenging a conviction entered upon guilty plea should clearly identify the nature of the relief sought as a motion to withdraw plea or a post-conviction petition for writ of habeas corpus, TO the Honorable Judge I want to withdraw my plea that my Attorney CHRISTYL CRAIG Coerce me to take because I want to take my case to trial for I can have all my appeal right.

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18 Dated this 24th day of August, 2012 I Kevin Gipson,
19 do solemnly swear, under penalty of perjury, that the
20 above text of Motion to Withdraw Plea is accurate, and
21 is correct to the best of my knowledge.
22

23 Respectfully Submitted,
24 Kevin Gipson
25 Defendant
26
27
28
29

ELY STATE PRISON

AUG 26 2012

U7

ORIGINAL

FILED 35

SEP 27 2012

Sharon L. Blum
CLERK OF COURT

1 **ORDR**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 SHANON CLOWERS
6 Chief Deputy District Attorney
7 Nevada Bar #010008
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

10C264079
DDM
Order Denying Motion
1970691



10 THE STATE OF NEVADA,
11 Plaintiff,

12 -vs-

13 KEVIN MARQUETTE GIPSON,
14 #1582343

15 Defendant.

CASE NO: C264079

DEPT NO: XVIII

16 **ORDER DENYING DEFENDANT'S PRO PER MOTION TO WITHDRAW PLEA**

17 DATE OF HEARING: 09/26/12

18 TIME OF HEARING: 8:15 A.M.

19 THIS MATTER having come on for hearing before the above entitled Court on the
20 26th day of September, 2012, the Defendant not being present, in proper person, the Plaintiff
21 being represented by STEVEN B. WOLFSON, District Attorney, through SHANON
22 CLOWERS, Chief Deputy District Attorney, and the Court having heard the arguments of
23 counsel and good cause appearing therefore,

24 //

25 //

26 //

27 //

28 //

CLERK OF THE COURT

SEP 27 2012

RECEIVED

1 IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Withdraw Plea,
2 shall be, and it is denied.

3 DATED this 27 day of September, 2012.
4
5

6 
DISTRICT JUDGE 28

7
8 STEVEN B. WOLFSON
9 Clark County District Attorney
Nevada Bar #001565

10 

11 SHANON CLOWERS
12 Chief Deputy District Attorney
13 Nevada Bar #010008
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28 mmw/GCU

DA/PP

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10/15/2012 04:42:25 PM

Inmate NO: 1082776

Alvin L. Blum

CLERK OF THE COURT

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

KEVIN M. GIPSON

CASE NO: C264079 DEPT. 18

vs. Petitioner

MOTION TO PROCEED IN FORMA
PAUPERIS

STATE OF NEVADA,

Movant.

November 7, 2012 @ 8:15AM

Comes Now Kevin M. Gipson, in Proper Person, and
moves this Court for its order allowing Petitioner to proceed
in forma pauperis. This motion is made and based in the interest of
Justice.

Pursuant to NRS 12.015(1),

Any Person who desires to prosecute or defend a civil action
may file an affidavit with the Court setting forth with
Particularity facts concerning his income, property and other
resources which establish that he is unable to prosecute or defend
the action because he is unable to pay the costs, he shall order:

(a) The Clerk of the Court:

(1) To allow the person to commence or defend the action without costs; and

(2) To file or issue any necessary writ, process, pleading or paper without charge.

(b) The sheriff or other appropriate public officer within this State to make any personal service of any necessary writ, process, pleading or paper without charge.

Petitioner is presently incarcerated at ELY State Prison, where he is unemployed, indigent and unable to retain private counsel to represent him. Petitioner hereby respectfully requests that the Court allow him to proceed in forma pauperis for the reasons State above.

DATED this 8th day of October, 2012.

Respectfully Submitted,
Kevin M. Gipson
Petitioner

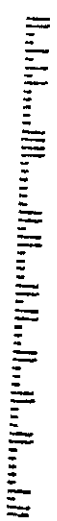
Kevin M. GILSON #1082776
E.S.P.
P.O. BOX 1489
ELY, NV 89301

LAS VEGAS NV 89000
09 OCT 2012 PM 5:1



Clerk of the Court
200 Lewis Ave, 3rd Floor Dept, 18
Las Vegas, NV. 89155

89104590000



Inmate NO. 1082776

Allen L. Blum

CLERK OF THE COURT

November 7, 2012

8:15 AM

DA/PP IN THE EIGHTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE COUNTY OF NEVADA

KEVIN M. GIBSON
VS. ~~PETITIONER~~

CASE NO. C264029
DEPT. 18

STATE OF NEVADA,
Respondent.

EX PARTE MOTION FOR
APPOINTMENT OF COUNSEL
AND REQUEST FOR EVIDENTIARY
HEARING.

Comes NOW Petitioner KEVIN M GIBSON, in proper person,
and moves this Court for its order allowing the appointment of
counsel for Petitioner and for evidentiary hearing. This motion is
made and based in the interest of Justice.

Pursuant to NRS 34.750(1),

A Petitioner may allege that the Petitioner is unable to pay the
costs of the proceedings or to employ counsel. If the court is
satisfied that the allegation of indigency is true and the Petitioner
is not dismissed summarily, the court may appoint counsel to
represent the Petitioner. In making its determination, the court may
consider, among other things, the severity of the consequences facing
the Petitioner and whether:

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(a) The issues presented are difficult.

(b) The Petitioner is unable to comprehend the proceedings.

(c) Counsel is necessary to proceed with discovery.

Petitioner is presently incarcerated at ELY State Prison, ELY, NEVADA. Where he is unemployed, indigent and unable to retain private counsel to represent him. Petitioner is unlearned and unfamiliar with the complexities of Nevada State law, particularly state post-conviction proceedings. Further Petitioner alleges that the issues in this case are complex and require an evidentiary hearing. Petitioner is unable to factually develop and adequately present the claims without the assistance of counsel. Counsel is unable to originate the claims without an evidentiary hearing.

Petitioner hereby respectfully requests that the Court appoint counsel and set a date for evidentiary hearing the reasons state above.

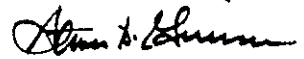
DATED this 8th day of October, 2012.

Respectfully Submitted,

Kevin M. Gipson

CERTIFICATE OF SERVICE BY MAIL

I, Kevin M. Girson, hereby certify pursuant to N.R.C.P. 5(b), that
on this 8th day of October, 2012, I handed to a prison official for
mailing a true and correct copy of the foregoing REQUEST FOR
APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY
HEARING ~~concerning~~ to: EIGHTH JUDICIAL DISTRICT COURT
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE
LAS VEGAS NV 89155


CLERK OF THE COURT

1 **OPPS**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 BRIAN J. KOICHEVAR
6 Chief Deputy District Attorney
7 Nevada Bar #005691
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 KEVIN MARQUETTE GIPSON,
16 #1582343

17 Defendant.

CASE NO: 10C264079

DEPT NO: XVIII

18 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO APPOINT COUNSEL AND
19 REQUEST FOR EVIDENTIARY HEARING

20 DATE OF HEARING: 11/07/2012
21 TIME OF HEARING: 8:15 A.M.

22 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
23 District Attorney, through BRIAN J. KOICHEVAR, Chief Deputy District Attorney, and
24 hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To
25 Appoint Counsel And Request For Evidentiary Hearing.

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

///

///

///

1
2 **POINTS AND AUTHORITIES**

3 **STATEMENT OF THE CASE**

4 On April 28, 2010, KEVIN MARQUETTE GIPSON (hereinafter "Defendant") was
5 charged by way of Grand Jury Indictment with Murder With Use of a Deadly Weapon
(Felony – NRS 200.010, 200.030, 193.165).

6 On December 7, 2011, Defendant entered into a Guilty Plea Agreement with the State
7 whereby he agreed to plead guilty to the charge as alleged in the Indictment. Pursuant to
8 negotiations, the parties stipulated to TWENTY (20) YEARS to LIFE in the Nevada
9 Department of Corrections. However, parties retained the right to argue the deadly weapon
10 enhancement for a term of not less than FOUR (4) to EIGHT (8) YEARS.

11 On February 10, 2012, Defendant was present in court with counsel, at which time he
12 was sentenced to the Nevada Department of Corrections as follows: LIFE with a POSSIBLE
13 parole eligibility at TWENTY (20) YEARS with a CONSECUTIVE TERM of to TWO
14 HUNDRED FORTY (240) MONTHS MAXIMUM and NINETY-SIX (96) MONTHS
15 MINIMUM for Use of a Deadly Weapon; with SIX HUNDRED EIGHTY-SIX (686) DAYS
16 credit for time served. Judgment of Conviction was filed on March 13, 2012. Defendant did
17 not file a direct appeal.

18 Defendant filed the instant motion on October 15, 2012. The State's Opposition is as
19 follows.

20 **ARGUMENT**

21 **II. DEFENDANT IS NOT ENTITLED TO APPOINTMENT OF COUNSEL**

22 In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court
23 ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings.
24 In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court
25 similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in
26 post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel
27 provision as being coextensive with the Sixth Amendment to the United States
28 Constitution."

1 NRS 34.750 provides, in pertinent part:

2 [a] petition may allege that the Defendant is unable to pay the
3 costs of the proceedings or employ counsel. If the court is
4 satisfied that the allegation of indigency is true and the petition is
5 *not dismissed summarily*, the court may appoint counsel at the
6 time the court orders the filing of an answer and a return. In
7 making its determination, the court may consider whether:

- 8 (a) The issues are difficult;
9 (b) The Defendant is unable to comprehend the
10 proceedings; or
11 (c) Counsel is necessary to proceed with discovery.
12 (Emphasis added).

13 Under NRS 34.750, it is clear that the court has discretion in determining whether to
14 appoint counsel *if* the petition is not summarily dismissed. McKague specifically held that,
15 with the exception of cases in which appointment of counsel is mandated by statute¹, one
16 does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction
17 proceedings. Id. at 164.

18 The Nevada Supreme Court has observed that a petitioner "must show that the
19 requested review is not frivolous before he may have an attorney appointed." Peterson v.
20 Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS
21 177.345(2)).

22 In this case, there is no petition pending and Defendant has failed to allege any
23 specific facts to demonstrate that counsel should be appointed for him. Defendant has failed
24 to demonstrate to the court any of the requirements under NRS 34.750.

25 As such, Defendant's Motion should be denied as he has failed to articulate with
26 specificity that appointment of counsel is required.

27 **II. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

28 Per NRS 34.770, the Court is to determine whether an evidentiary hearing is required
when it hears Defendant's petition and considers the State's response. ("The judge or justice,

¹ See NRS 34.820(1)(a) (Entitling appointed counsel when petitioner is under a sentence of death).

1 upon review of the return, answer and all supporting documents which are filed, shall
2 determine whether an evidentiary hearing is required.") Defendant does not have a petition
3 pending, therefore, his motion for an evidentiary hearing should be denied as premature.
4

5 **CONCLUSION**

6 Based on the foregoing arguments, the State respectfully requests that Defendant's
7 motion be denied.

8 DATED this 2ND day of November, 2012.

9 Respectfully submitted,

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

13 BY /s/ Brian J. Kochevar
14 BRIAN J. KOCHEVAR
15 Chief Deputy District Attorney
16 Nevada Bar #005691

17 **CERTIFICATE OF MAILING**

18 I hereby certify that service of the above and foregoing was made this 2ND day of
19 November, 2012, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

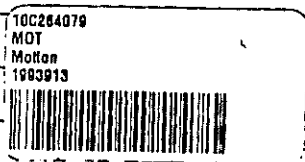
20 KEVIN MARQUETTE GIPSON, BAC #1082776
21 ELY STATE PRISON
22 PO BOX 1989
23 ELY, NV 89301

24 BY: /s/ D. Jason

25 Secretary for the District Attorney's Office

26
27
28 CR/HLS/djj

Kevin GIPSON
#1082776
ELY State Prison
P.O. Box 1989
ELY, Nevada 89301



FILED

NOV 05 2012

Electronically Filed
Nov 05 2012 02:48 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE 8th Judicial District Court of
the State of Nevada

Kevin GIPSON
Petitioner

Case NO.: C 264079

VS.

DEPT NO.: XVIII

The State of Nevada
Respondent

DOCKET NO.: 1082776

Hearing Date: 11-26-12 @ 8:15AM

MEMORANDUM OF POINTS AND AUTHORITIES
FACTS OF THE CASE

Appellant was convicted of First Degree Murder February 10th, 2012 in the 8th Judicial District Court of the State of Nevada, by Plea of guilty.

Appellant contends that he has a right to a direct appeal as a matter of law; that he was never informed by the court of his right to appeal; that he was not appointed counsel for purposes of effecting an appeal; and that he did not waive his right to a direct appeal or appellate counsel.

Appellant now requests the court allow him to file an (out of time) appeal, and all papers relevant thereto.

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CLERK OF THE COURT

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[illegible]

... the defendant in a criminal case shall not appeal a final judgment or verdict resulting from a plea of guilty but mentally ill, or nolo contendere that the defendant has entered into voluntarily and with a full understanding of the nature of the charge and the consequences of the plea, unless the appeal is based upon reasonable constitutional, jurisdictional, or other grounds that challenge the legality of the proceedings...

Appellant submits that since he is protected by both the Federal Constitution, as well as the provisions of Nevada Statutory law, his right to a direct appeal challenging his judgment of conviction by way of guilty plea, is well established.

II. Appellant was never informed by the court of his right to appeal.

Appellant submits that the district court never informed him that he had a right to direct appeal, and that the court had a duty to so inform, by way of guilty plea canvass. If a plea of guilty, or guilty but mentally ill is made orally, the court shall not accept such a plea, or a plea of nolo contendere without first addressing the defendant personally, and determining that the plea is made voluntarily, with the understanding of the nature of the charge and the consequences of the plea. NRS 174.035; Bryant v. State, 721 P.2d 364 (1986). The loss of the right to challenge certain aspects of the case that may have occurred prior to entering the guilty plea must certainly fall under the "consequences of the plea" category and would indicate that the court advise of the right to direct appeal, in order to advise what issues on appeal would be lost as a result of a guilty plea.

1 Federal courts have also held that the district
2 court has an obligation to inform a criminal defendant
3 of his right to appeal a sentence imposed after the
4 defendant pleaded guilty, and a failure to inform a
5 defendant of such, automatically entitles the defendant
6 to relief. *Gaeta v. U.S.*, 921 F.Supp. 864 (D. Mass.
7 1996)

8 III. Appellant was not appointed
9 Appellant Counsel.

10 Appellant was not provided with appellate counsel to perfect
11 his appeal. The Fourteenth Amendment to the Federal
12 Constitution guarantees a criminal appellant pursuing a first
13 appeal as of right certain minimal safeguards necessary
14 to make that appeal "adequate and effective". See *Griffin v.*
15 *Illinois*, 352 U.S. 585. Just as a transcript may by
16 rule or custom be a prerequisite to appellate review, the
17 services of a lawyer will for virtually every layman be necessary
18 to present an appeal in a form suitable for appellate consideration
19 on the merits. *Evitts*, supra at 893. And Equal Protection
20 requires that such be provided to every criminal defendant,
21 regardless of financial abilities. *Douglas v. California*, 392
22 U.S. 814. Accordingly, Appellant should have been provided
23 with appellate counsel, and such counsel should have been
24 provided at state expense if appellant was found to be
25 indigent. Denial of counsel was a clear violation of both
26 the Sixth Amendment's right to counsel, and the 14th
27 Amendment's equal protection clauses.
28
29

IV. Appellant Never Waived His Right
To Direct Appeal OR Counsel.

Appellant contends that he has never waived his right to direct appeal or appellate counsel. Since he was never informed of his right to appeal, and never knew he had such a right, it would be impossible for him to have waived such a right. It is well established that a criminal defendant can never stipulate to a waiver, and no waiver can be implied by guilty plea. All waivers must be affirmative, and must be made clear for the record that they are made knowingly, intelligently, voluntarily. This is true of both waivers of appeals and waivers of appellate counsel. A defendant can waive his right to counsel and conduct his appeal pro se; but to be valid, the waiver must be voluntary, knowing, and intelligent. *Baker v. Kaiser*, 929 F.2d 1495. Appellant contends that he made no such waiver.

Conclusion

Appellant has shown that he has a right to a direct appeal as matter of law; that he was never informed by the Court of his right to appeal; that he was not appointed appellate counsel to perfect an appeal; and that he never waived his right to a direct appeal or appellate Counsel. Appellant now requests that he be allowed to file all papers and documents relevant thereto.

Appellant further requests that if the Court finds that It cannot or will not allow appellant's to take an appeal, that It issue an ORDER directing appellant's immediate release from the custody of the judgment of conviction in the case at bar.

DATED this 15th day of October, 2012

Respectfully submitted,

Kerwin M. Lipson

Appellant in Pro Per

Ely State Prison

Ely, Nevada 89301

CERTIFICATE OF SERVICE

I hereby certify pursuant to N.R.C.P. 5(b) that I am the Petitioner/Plaintiff in the foregoing Motion for Consideration of Direct Appeal, or in the Alternative, Release from Custody, and that on this 15th day of October, 2012, I did serve a true and correct copy of the above mentioned document, by giving it to a prison official at the Ely State Prison to deposit in the U.S. Mail, sealed in an envelope, postage pre-paid, and addressed as follows:

E.S.P

P.O. Box 1989

Ely, Nevada, 89301

Regional Justice Center

200 Lewis Ave.

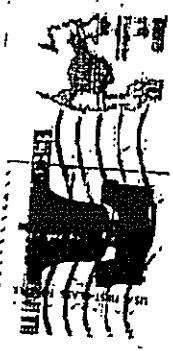
Las Vegas, NV 89101

Dated this 15th day of October, 2012

Yermin M. Lipson
Petitioner/Plaintiff

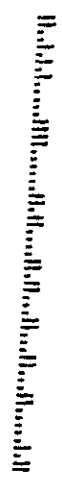
Kevin GIPSON #1082776
ESB
PO Box 1984
ELY, Nevada 89301

LAS VEGAS NV 89301
31 OCT 2012 PM 3 L

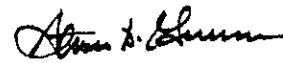


Clerk of the Court
200 Lewis Ave, 3rd Floor
Las Vegas, Nevada 89155-1160

89101530000



ELY STATE PRISON
OCT 30 2012
U7



CLERK OF THE COURT

1 ASTA

2
3
4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**
6

7 STATE OF NEVADA,

8 Plaintiff(s),

9 vs.

10 KEVIN M. GIPSON,

11 Defendant(s).
12

Case No: 10C264079
Dept No: XVIII

13
14 **CASE APPEAL STATEMENT**
15

16 1. Appellant(s): Kevin Gipson

17 2. Judge: David Barker

18 3. Appellant(s): Kevin Gipson

19 Counsel:

20 Kevin Gipson #1082776
21 P.O. Box 1989
Ely, NV 89301

22 4. Respondent: The State of Nevada

23 Counsel:

24 Steven B. Wolfson, District Attorney
25 200 Lewis Ave.
26 Las Vegas, NV 89101
(702) 671-2700


27 5. Respondent's Attorney Licensed in Nevada: Yes

28 6. Appellant Represented by Appointed Counsel In District Court: No

- 1 7. Appellant Represented by Appointed Counsel On Appeal: N/A
2 8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A
3 9. Date Commenced in District Court: April 28, 2010
4 10. Brief Description of the Nature of the Action: Criminal
5 Type of Judgment or Order Being Appealed: Judgment of Conviction
6 11. Previous Appeal: No
7 Supreme Court Docket Number(s):
8 12. Child Custody or Visitation: N/A
9

10 Dated This 8 day of November 2012.

11 Steven D. Grierson, Clerk of the Court
12

13 
14 Teodora Jones, Deputy Clerk
15 200 Lewis Ave
16 PO Box 551601
17 Las Vegas, Nevada 89155-1601
18 (702) 671-0512
19
20
21
22
23
24
25
26
27
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN GIPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62071

FILED

DEC 20 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Angerson*
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

The notice of appeal was untimely filed.¹ NRAP 4(b). Because an untimely notice of appeal fails to vest jurisdiction in this court, Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994), we conclude that we lack jurisdiction to consider this appeal, and we

ORDER this appeal DISMISSED.²

Saitta, J.
Saitta

Pickering, J.
Pickering

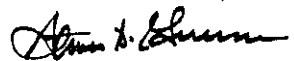
Hardesty, J.
Hardesty

¹An appeal deprivation claim must be raised in a post-conviction petition for a writ of habeas corpus filed in the district court in the first instance. NRS 34.724(2)(c); NRS 34.738(1). We express no opinion regarding the merits of any such claim or whether appellant can satisfy the procedural requirements of NRS chapter 34.

²We have considered the proper person documents submitted in this matter, and we conclude that no relief is warranted for the reason set forth above.

cc: Hon. David B. Barker, District Judge
Kevin Gipson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk





CLERK OF THE COURT

1 CARMINE J. COLUCCI CHTD.
2 Nevada Bar #000881
3 629 South Sixth Street
4 Las Vegas, Nevada 89101
5 (702) 384-1274 telephone
6 (702 384-4453 facsimile
7 Attorney for Petitioner
8 KEVIN MARQUETTE GIPSON
9

10 EIGHTH JUDICIAL DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 KEVIN MARQUETTE GIPSON,)	CASE NO.	C264079
13)	DEPT NO.	XVIII
14 Petitioner,)		
15 vs.)	6-23-14	
16 DWIGHT NEVEN, WARDEN,)		
17 HIGH DESERT STATE PRISON,)	8:15A	
18 Respondent.)		

19 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
20 (POST CONVICTION)

21 The Petition of KEVIN MARQUETTE GIPSON,, by and through, CARMINE
22 J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI CHTD., attorney for
23 the above-captioned petitioner, respectfully shows:

24 1. Name of institution and county in which Kevin Marquette Gipson is
25 presently imprisoned or where he is presently restrained of his liberty: I am
26 presently imprisoned by Nevada Department of Corrections at the High Desert
27 State Prison in Indian Springs, County of Clark, Nevada.

28 / / /

1 2.The name and location of the court which entered the judgment of
2 conviction under attack: Eighth Judicial District Court in the County of Clark,
3 State of Nevada, Department 18, 200 Lewis Ave., Las Vegas, Nevada 89155
4

5 3. Date of judgment of conviction: March 13, 2012.

6 4. Case number: C264079

7 5. (a) Length of sentence: Life with a possible parole eligibility of Twenty
8 (20) years with a consecutive term of Two Hundred Forty (240) months maximum
9 and ninety-six (96) months minimum for Use of a Deadly Weapon with six
10 hundred eighty-six (686) days credit for time served.

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

12 N/A
13

14 6. Are you presently serving a sentence for a conviction other than the
15 conviction under attack in this motion? No.
16

17 7. Nature of offense involved in conviction being challenged: Murder with
18 Use of a Deadly Weapon.

19 8. What was your plea? Guilty.
20

21 9. If you entered a plea of guilty or guilty but mentally ill to one count of an
22 indictment or information, and a plea of not guilty to another count of an
23 indictment or information, or if a plea of guilty or guilty but mentally ill was
24 negotiated, give details: The case was negotiated pursuant to the terms of the
25 Guilty Plea Agreement.
26

27 / / /

28 / / /

1 10. If you were found guilty or guilty but mentally ill after a plea of not guilty,
2 was the finding made by: N/A

3 (a) Jury N/A

4 (b) Judge without Jury N/A

5 11. Did you testify at the trial? N/A

6 12. Did you appeal from the judgment of conviction? Yes.

7 13. If you did appeal, answer the following:

8 (a) Name of Court: Eighth Judicial District Court

9 (b) Case Number or citation: 62071

10 (c) Result: Dismissed for lack of jurisdiction (See Attached Order
11 Dismissing Appeal, Exhibit 1).

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

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

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

17 (A) (1) Name of Court: Eighth Judicial District Court, Clark County,
18 Nevada.

19 (2) Nature of Proceedings: Pro Per Motion to Withdraw Plea

20 (3) Grounds raised:

21 (a) Petitioner was denied his right to appeal

22 (b) Petitioner was not appointed counsel for purposes of effecting
23 an appeal;

1 (c) Petitioner did not waive his right to a direct appeal.

2 (4) Did you receive an evidentiary hearing on your petition,
3 application or motion? No.
4

5 (5) Result: Motion Denied

6 (6) Date of Result: September 26, 2012

7 (7) If known, citations of any written opinion or date of orders
8 entered pursuant to such result: Order entered September 27,
9 2012.
10

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

13 (1) Name of Court: Eighth Judicial District Court, Clark County,
14 Nevada.
15

16 (2) Nature of Proceedings: Memorandum of Points and Authorities
17 (filed Nov. 5, 2012)
18

19 (3) Grounds raised: Petitioner's right to direct appeal violated

20 (4) Did you receive an evidentiary hearing on your petition,
21 application or motion? No.

22 (5) Result: Defendant's Pro Per Motion for Appointment of Counsel
23 Granted; Defendant's Motion for Evidentiary Hearing denied.
24

25 (6) Date of Result: January 28, 2012.

26 (7) If known, citations of any written opinion or date of orders
27 entered pursuant to such result: None.
28

///

1 (C) As to any third or subsequent additional applications or motions,
2 give the same information as above:

3
4 (1) Name of Court: Eighth Judicial District Court, Clark County,
5 Nevada.

6 (2) Nature of Proceedings: Motion for Direct Appeal/Memorandum of
7 Points and Authorities Facts of the Case.

8
9 (3) Grounds raised: Defendant's right to a direct appeal was violated
10 (November 5, 2012)

11 (4) Did you receive an evidentiary hearing on your petition,
12 application or motion? No.

13 (5) Result: Taken off Calendar

14 (6) Date of Result: February 11, 2012

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

17
18 (D) Did you appeal to the highest state or federal court having
19 jurisdiction, the result or action taken on any petition,
20 application or motion?

21
22 (1) First petition, application or motion? No.

23 (2) Second petition, application or motion? No.

24 (3) Third or subsequent petitions, applications or motions? No.

25
26 (E) If you did not appeal from the adverse action on any petition,
27 application or motion, explain briefly why you did not.

28 Defendant did not know he had the right to or the knowledge to

1 proceed with an appeal of the issues raised and was not
2 represented by and attorney for these. Petitioner tried to appeal
3 but improperly and appeal dismissed.
4

5 17. Has any ground being raised in this petition been previously presented
6 to this or any other court by way of petition for habeas corpus, motion, application
7 or any other post-conviction proceeding? If so, identify:
8

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

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

11 (c) Briefly explain why you are again raising these grounds.
12

13 N/A

14 18. If any of the grounds listed in No. 23 or listed on any additional pages
15 you have attached, were not previously presented in any other court, state or
16 federal, list briefly what grounds were not so presented, and give your reasons for
17 not presenting them. N/A
18

19 Ground 1 - Petitioner was denied the effective assistance of counsel in
20 violation of his right to counsel as guaranteed by the Sixth Amendment of the
21 Constitution of the United States.

22 19. Are you filing this petition more than 1 year following the filing of the
23 judgment of conviction or the filing of a decision on direct appeal? Yes.
24

25 Counsel was appointed to represent Gipson despite the fact that only
26 nineteen (19) days remained before the one (1) year procedural time limit ran. It
27 is apparent that neither the district court or the attorneys were aware of this. A
28 review of the transcript makes it clear that appointed counsel was not given with

1 the petitioner's file by prior counsel, the defendant, or the court. Counsel asked
2 for four (4) months in order to secure the file. That request was granted as all
3 concerned thought that there were no pending time issues. The court set a status
4 check date of June 17, 2013 which was well beyond the procedural time limit.
5

6 Therefore, in addition to the court and apparently all parties apparently being
7 unaware of the pending time limit and the court setting a status check date well
8 after the running of the time limit, it is apparent that good cause has been shown
9 for the initial delay in filing. As for the additional time taken, the State has
10 stipulated to the additional time taken to file the petition.
11

12 For the above-stated reasons, the filing of this petition may be beyond the
13 statutory time limit but nevertheless can be filed as good cause appears to be
14 shown for the delay.
15

16 Stipulation and Order to extend the time to file the petition to January 31,
17 2014, was filed on January 7, 2014. Stipulation and Order to extend the time to
18 file the petition to January 31, 2014, a further extension was stipulated to May
19 5, 2014, and an additional extension was stipulated to June 4, 2014. A final
20 extension was stipulated until June 6, 2014 for the petition to be filed.
21

22 20. Do you have any petition or appeal now pending in any court, either state
23 or federal, as to the judgment under attack? No.
24

25 21. Give the name of each attorney who represented you in the proceeding
26 resulting in your conviction and on direct appeal:

27 (A) Trial Counsel: Christy Craig, Clark County Public Defender

28 (B) Pro per- attempted direct appeal

1 22. Do you have any future sentences to serve after you complete the
2 sentence imposed by the judgment under attack? No.

3
4 23. State concisely every ground on which you claim that you are being held
5 unlawfully. Summarize briefly the facts supporting each ground.

6 (a) Ground One: Petitioner is in custody in violation of his constitutional
7 right to the effective assistance of trial counsel as guaranteed by the Sixth
8 Amendment to the United States Constitution.

9
10 1. Petitioner contends that his plea pursuant to the Guilty Plea
11 Agreement was not freely and voluntarily given as he is claiming that he was
12 coerced into taking a plea that he did not want to accept by his trial counsel.
13 Petitioner is contending that the coercion to take the plea occurred outside of the
14 recorded portions of these proceedings and that but for the coercive actions of trial
15 counsel, Appellant would not have accepted the negotiations but wanted to go to
16 trial on original charges. See Motion to Withdraw Plea filed on September 5, 2012
17 for additional facts and support for this claim.

18
19 2. Petitioner contends that his trial counsel was ineffective for not
20 advising him of his rights to appeal as the adverse pretrial rulings of the district
21 court before he agreed to the plea bargain to which he ultimately plead guilty.
22 Some of the adverse rulings that he could have appealed from were (1) Denial of
23 the Motion to Limit the Testimony of the Defective Long whose testimony was
24 going to be allowed despite being hearsay and the State failing to show that the
25 actual declarant of the offered testimony was not unavailable. (2) Denial of the
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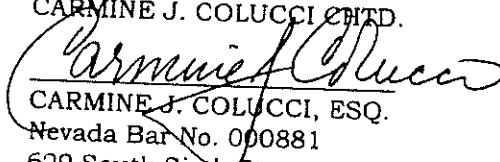
1 Defendant's Motion to Suppress or In the Alternative a Jackson v. Denno hearing
2 and (3) Order granting State's Motion in Limine to Admit Bad Acts and Other Acts
3 Against the victim.
4

5 3. Petitioner asserts that trial counsel failed to take into consideration
6 his mental health problems and even brought that issue to the court's attention
7 on September 26, 2012 (Rough Draft Transcript, p. 3) when the court even opined
8 that it seemed possible that trial counsel would ultimately have to testify
9 regarding this issue.
10

11 WHEREFORE, petitioner prays that the court grant the petition or grant him
12 an evidentiary hearing on the issues raised in his petition and supporting points
13 and authorities.
14

15 DATED this 6th day of June, 2014.

16 CARMINE J. COLUCCI CMTD.

17 
18 CARMINE J. COLUCCI, ESQ.

19 Nevada Bar No. 000881

20 629 South Sixth Street

21 Las Vegas, Nevada 89101

22 Attorney for Petitioner
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VERIFICATION

I, Carmine J. Colucci, Esq., declare that I am the attorney for the Petitioner, KEVIN MARQUETTE GIPSON, named in the foregoing petition and knows the contents thereof; that the pleading is true of mine own knowledge, except as to those matters stated on information and belief, and as to such matters I believe them to be true. Petitioner, KEVIN MARQUETTE GIPSON, has personally authorized me to commence this action on his behalf.

CARMINE J. COLUCCI CHTD.



CARMINE J. COLUCCI, ESQ.

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

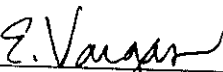
CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 6th day of June, 2014, I e-served pursuant to N.E.F.C.R 9 and mailed pursuant to NRCP 5(b), a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) addressed to:

Dwight Neven, Warden
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

Steven B. Wolfson
Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

Catherine Cortez-Masto
Nevada Attorney General
100 North Carson St.
Carson City, NV 89701


An employee of
CARMINE J. COLUCCI, CHTD.

Alan L. Quinn

CLERK OF THE COURT

1 CARMINE J. COLUCCI, CHTD.
2 CARMINE J. COLUCCI, ESQ.
3 Nevada Bar No. 0881
4 629 South Sixth Street
5 Las Vegas, Nevada 89101
6 (702) 384-1274 Telephone
7 (702) 384-4453 Facsimile
8 E-Mail: cjc@lvcoxmail.com
9 Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

8 KEVIN GIPSON,
9 Petitioner,

10 vs.

11 DWIGHT NEVIN, WARDEN,
12 HIGH DESERT STATE PRISON
13 Respondent,

Case No.: 10C264079
Dept No.: XVIII

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

16 Comes now the Petitioner, KEVIN GIPSON, by and through his appointed
17 attorney, CARMINE J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI,
18 CHTD., who submits these points and authorities in support of his Petition for
19 Writ of Habeas Corpus (Post-Conviction).

20 These points and authorities are submitted pursuant to NRS 34.720, et.seq.
21 DATED this 6th day of June, 2014.

22 CARMINE J. COLUCCI CHTD.

23 *Carmine J. Colucci*
24 CARMINE J. COLUCCI, ESQ.
25 Nevada Bar No. 0881
26 629 South Sixth Street
27 Las Vegas, Nevada 89101
28 Attorney for Petitioner

I.

STATEMENT OF THE CASE

On April 28, 2010, Defendant, KEVIN GIPSON, was charged by way of Grand Jury Indictment with Murder with Use of a Deadly Weapon (Felony - NRS200.010, 200.030, 193.165).

On December 7, 2011, the defendant entered into a Guilty Plea Agreement with the State whereby he agreed to plead guilty to the charge as alleged in the Indictment. Pursuant to negotiations, the parties stipulated to twenty (20) years to Life in the Nevada Department of Corrections. However, parties retained the right to argue the deadly weapon enhancement for a term of not less than four (4) to eight (8) years.

On February 10, 2012, the defendant was present in court with counsel, at which time he was sentenced to the Nevada Department of Corrections as follows: Life with a possible parole eligibility of Twenty (20) years with a consecutive term of Two Hundred Forty (240) months maximum and Ninety-Six (96) months minimum for Use of a Deadly Weapon with Six Hundred Eighty-Six (686) days credit for time served. Judgment of Conviction was filed on March 13, 2012.

Thereafter the defendant filed a Pro Per Motion to Withdraw Plea on September 5, 2012. That motion was denied by the court on September 26, 2012, and an order entered on September 27, 2012. The defendant filed a Pro Per Motion to Proceed in Forma Pauperis on October 15, 2012. That motion was granted on November 7, 2012. The defendant then filed an Ex Parte Motion for Appointment of counsel and Request for Evidentiary Hearing on October 15, 2012, and Defendant's Pro Per Motion for Direct Appeal/Memorandum of Points and Authorities Facts of the Case on November 26, 2012. On January 28, 2012, the defendant's Motion for appointment of Counsel was granted and his Motion for Evidentiary Hearing was denied.

///

1 The defendant's Pro Per Motion for Direct Appeal/Memorandum of Points
2 and Authorities Facts of the Case "may have been construed as a notice of appeal.
3 "...Further, at the same time, case appeal statement was filed which triggered
4 Supreme Court review..." (see court minutes dated January 28, 2013). The
5 Nevada Supreme Court issued its Order Dismissing Appeal on December 20,
6 2012, stating, "an appeal deprivation claim must be raised in a post-conviction
7 petition for a writ of habeas corpus filed in the district court in the first instance."

8 Thereafter, on February 22, 2013, Carmine J. Colucci, Esq., was appointed
9 counsel for the defendant. Defendant's Motion for Direct Appeal/Memorandum
10 of Points and Authorities Facts of the Case was taken off calendar on February 11,
11 2012. On June 17, 2013, a briefing schedule was set scheduling the initial brief
12 due by December 16, 2013. A stipulation and order was entered on January 7,
13 2014, continuing the due date for the initial brief to January 31, 2014.

14 II.

15 STATEMENT OF THE FACTS

16
17 On March 25, 2010, Brittany Lavoll was shot in the parking lot of the Jack
18 In The Box where she worked. According to witnesses, the shooting occurred at
19 approximately 5:45 a.m.

20 The three witnesses described to police a male dressed in a dark hooded
21 sweatshirt who was seen running from the scene. Witness Wade Fleming
22 observed Lavoll and thought she was dead. Robert Gilmore, another witness,
23 called 911. Christina Benitez was the third witness who claimed to have seen the
24 man in the dark hoody running from the scene. Fleming and Gilmore were drawn
25 to the area where Brittany Lovall was found by the sound of what they felt was a
26 gunshot.

27 Bailey, who worked at a grocery store in the same shopping center as the
28 Jack In The Box, initially saw a woman lying on the ground and the man in the

1 dark hoody standing over her. Bailey thought the man was helping the woman
2 who Bailey thought might be drunk.

3 Police arrived at the scene located at 7541 West Lake Mead Boulevard and
4 Brittany Lovall was immediately transported to UMC where she was pronounced
5 dead at 6:15 a.m. An autopsy conducted on March 26, 2010, determined that the
6 cause of death was a gunshot to the head.

7 Brittany Lovall's father met police at the scene and told police that Brittany
8 had been in an abusive relationship with Kevin Gipson and that they had two (2)
9 children together. He related that they had broken up a year before but that he
10 had been stalking her.

11 Detectives of the LVMPD ultimately located Gipson and arranged to meet
12 him on the afternoon of March 25th. Gipson allegedly agreed to speak with the
13 detectives, which he ultimately did. Gipson provided them with an alibi to support
14 his statement that he could not have been at the scene of the shooting when it
15 occurred. Gipson denied having an abusive relationship with Lovall. Gipson said
16 that he had recently tried to contact Lovall in order to arrange a visit with his
17 children.

18 The next day the police gave Gipson a Concealed Information Test. The
19 detectives Mirandized him and Gipson took the test. According to the detectives
20 he failed it. He was told by Geoffrey Flohr that by failing, he must have knowledge
21 of the murder that only the killer would know.

22 Gipson, without the services of an attorney, was confronted with this
23 accusation. Gipson told them that he had been in and out of the mental hospital
24 and that he killed Brittany Lovall because she drove him crazy. Allegedly Gipson
25 managed to find out where Lovall worked prior to meeting her on March 25, 2010.
26 Police theorized that Gipson went to the Jack In The Box and layed in wait for
27 Lavoll and then shot her. During questioning, the detectives stated that Gipson
28 confessed.

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III.

STATEMENT OF THE ISSUES

1. Whether the Petition for Writ of Habeas Corpus (Post-Conviction) was untimely filed and therefore procedurally barred?

2. Whether petitioner was denied his right to the effective assistance as guaranteed under the Sixth and Fourteenth Amendments of the Constitution of the United States.

IV.

ARGUMENT

A. THE PETITION IS NOT PROCEDURALLY BARRED

The threshold question which must be decided by this court is whether this petition is procedurally barred. The district court must dismiss an untimely petition under NRS 34.726 unless the petitioner shows good cause for the delay. See State v. District Court, 121 Nev. 225, 112 P.3d 1070 (2005). Good cause means a "substantial reason, one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

Good cause exists if the petitioner demonstrates that the delay was not the petitioner's fault and dismissal of the petition as untimely would unduly prejudice the petitioner. See NRS 34.726(1). Good cause also exists if the failure to consider the claims would result in a fundamental miscarriage of justice. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

To show "good cause," a petitioner must demonstrate that an impediment, external to the defense, prevented him from complying with the procedural requirements. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005); Pellegrini, supra at 886.

The Nevada Supreme Court has applied the same standards for determining good cause and prejudice to overcome the procedural bars for untimely petitions under NRS 34.726, and waived claims under NRS 34.810(2). See e.g. Pellegrini,

1 supra, at 886-887, 34 P.3d 519, 537.

2 The statute also specifically provides that the petitioner has the burden of
3 pleading and proving "specific facts" demonstrating good cause and actual
4 prejudice. NRS 34.810(3); see also State v. Haberstroh, 119 Nev. 173, 69 P.3d 676
5 (2003).

6 An appeal deprivation claim will provide good cause to delay filing a post-
7 conviction petition if the petitioner asked counsel to file an appeal; reasonably
8 believed that counsel had filed an appeal and filed the petition within a reasonable
9 amount of time of learning that a direct appeal had not been filed. Hathaway v.
10 State, 119 Nev. 248, 71 P.3d 503 (2003).

11 If the court determines that the petitioner cannot demonstrate good cause,
12 the district court may nevertheless excuse a procedural bar if petitioner can
13 demonstrate that the failure to consider the petition would result in a
14 fundamental miscarriage of justice. Pellegrini, supra at 887.

15 In the instant case, the defendant executed the Guilty Plea Agreement on
16 December 7, 2011. The defendant was sentenced on February 10, 2012. The
17 Judgment of Conviction was filed on March 13, 2012. A direct appeal was not
18 filed. On September 5, 2012, the defendant filed his Pro Per Motion to Withdraw
19 Plea. That motion was denied on September 26, 2012.

20 The defendant filed a motion in district court requesting the appointment
21 of counsel to pursue his post-conviction rights. On February 22, 2013 Carmine
22 J. Colucci, Esq. appeared in court in order to be appointed to represent the
23 defendant. The following colloquy between the court and counsel took place.

24 . . .
25 THE COURT: C264079, State of Nevada versus Kevin Gipson. The record
26 should reflect the presence of Mr. Colucci. Mr. Gipson in the Nevada Department-
27 in the Nevada Department of Corrections, not present here in court, and Ms.
28 Edwards for the state.

1 This is time set for confirmation of counsel. My notes reflect Mr. Christensen
2 has indicated - - Mr. Colucci, you can accept this appointment; is that true?

3 MR. COLUCCI: Yes.

4 THE COURT: All right. What's your pleasure? Do you want to set a briefing
5 schedule or I have an opportunity to review the file and then come back?

6 MR. COLUCCI: Actually- - yes. Actually what I'd like to do is actually get the
7 file. So I'd ask for a four month status check and then we could set a briefing
8 schedule at that point.

9 THE COURT: Four month status check.

10 THE COURT CLERK: June 17th, 8:15.

11 MR. COLUCCI: Thank you very much.

12 THE COURT: Thank you.

13

14 See Exhibit 2, transcript of February 22, 2013 proceeding attached hereto.

15 Counsel was appointed to represent Gipson despite the fact that only
16 nineteen (19) days remained before the one (1) year procedural time limit ran. It is
17 apparent that neither the district court or the attorneys were aware of this. A
18 review of the transcript makes it clear that appointed counsel was not presented
19 with the petitioner's file. Counsel asked for four (4) months in order to secure the
20 file. The court set a status check date of June 17, 2013 which was well beyond the
21 procedural time limit.

22 Therefore, in addition to the court and apparently all parties apparently
23 being unaware of the pending time limit and the court setting a status check date
24 well after the running of the time limit, it is apparent that good cause has been
25 shown for the initial delay in filing. As for the additional time taken, the State has
26 stipulated to the additional time taken to file the petition.

27 For the above-stated reasons, the filing of this petition may be beyond the
28 statutory time limit but nevertheless can be filed as the affidavit of counsel shows,

1 good cause appears to be shown for the delay.

2 **B. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL**
3 **IN VIOLATION OF HIS RIGHT TO COUNSEL AS GUARANTEED UNDER**
4 **THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED**
5 **STATES.**

6 **Standard of Review**

7 A claim of ineffective assistance of counsel presents a mixed question of law
8 and fact, which is subject to independent review upon appeal. Kirksey v. State,
9 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Petitioner must prove the facts
10 underlying an ineffective assistance of counsel claim by preponderance of the
11 evidence. The Court's review of defense counsel's performance is highly deferential.
12 There are circumstances warranting relief. Means v. State, 120 Nev. 1001, 1011,
13 103 P.3d 25, 32 (2004); Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct.
14 2052, 2065 (1984). In the context of an appeal deprivation claim, prejudice may
15 be presumed if the petitioner was deprived of the right to direct appeal due to the
16 ineffective assistance of counsel. Hathaway v. State, 199 Nev. 248, 71 P.3d 503
17 (2003); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

18 Nevada has adopted the two-pronged test outlined in Strickland for
19 determining the effectiveness of counsel. Under Strickland, in order to assert a
20 claim for ineffective assistance of counsel, the defendant must prove that he was
21 denied "reasonably effective assistance" of counsel by satisfying a two-pronged test.
22 Strickland 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064; see State v. Love,
23 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

24 Under the Strickland, id. test, the defendant must show: first that his
25 counsel's representation fell below an objective standard of reasonableness, and
26 second, that but for counsel's errors, there is a reasonable probability that the
27 result of the proceedings would have been different. See Strickland, supra, at 687-
28 688 and 694, 104 S.Ct. 2052, 2065, 2068. The defendant bears the burden to
satisfy both requirements in order to prevail. Strickland, id. at 697; Means v.

1 State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). Inadequate performance is
2 representation that falls below an objective standard of reasonableness. *Id.* (citing
3 Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992)). The role of a court
4 in considering allegations of ineffective assistance of counsel is "not to pass upon
5 the merits of the action not taken but to determine whether, under the particular
6 facts and circumstances of the case, trial counsel failed to render reasonably
7 effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
8 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

9 In considering whether the defendant has an ineffective assistance of counsel
10 claim, the court must determine whether counsel conducted a reasonable
11 investigation of the facts relevant to the defendant's case. Doleman v. State, 112
12 Nev. 843, 846, 921 P.2d 278 (1996). Next, the court must consider whether
13 counsel made "a reasonable strategy decision on how to proceed with his client's
14 case." Doleman, *id.* at 846; citing Strickland, *supra*, at 690-691, 104 S.Ct. at 2066.
15 While counsel's strategy decision is a "tactical" decision and will be "virtually
16 unchallengeable absent extraordinary circumstances." Doleman, *supra*, at 846;
17 see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland,
18 *supra*, at 691, 104 S.Ct. at 2066. It is not without limitation. The defendant has
19 the burden of overcoming the presumption that trial counsel's actions were the
20 product of sound trial strategy. Means, 120 Nev. At 1012, 103 P.3d at 33 (citing
21 Strickland, 466 U.S. at 689, quoting Michel v. Louisiana, 350 U.S. 91, 101, 76
22 S.Ct. 158 (1955)).

23 Even if counsel's representation fell below an objective standard of
24 reasonableness, he must still demonstrate prejudice and show a reasonable
25 probability that, but for counsel's errors, the result of the trial would have been
26 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 263, 1268 (1999) (citing
27 Strickland, 466 U.S. at 687.) "A reasonable probability is a probability sufficient
28 to undermine confidence in the outcome." *Id.*

1 Claims asserted in a petition for post-conviction relief must be supported
2 with specific factual allegations, which if true, would entitle the petitioner to relief.
3 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and
4 "naked" allegations are not sufficient, nor are those belied and repelled by the
5 record. Id.

6 Petitioner contends that his plea pursuant to the Guilty Plea Agreement was
7 not freely and voluntarily given as he is claiming that he was coerced into taking
8 a plea that he did not want to. Petitioner is contending that the coercion to take the
9 plea occurred outside of the recorded portions of these proceedings and that but
10 for the coercive actions of trial counsel, Appellant would not have accepted the
11 negotiations but wanted to go to trial on original charges. See Motion to Withdraw
12 Plea filed on September 5, 2012 for additional facts and support for this claim.

13 Petitioner contends that his trial counsel was ineffective for not advising him
14 of his rights to appeal as the adverse pretrial rulings of the district court before he
15 agreed to the plea bargain to which he ultimately plead guilty. Some of the adverse
16 rulings that he could have appealed from were (1) Denial of the Motion to Limit the
17 Testimony of the Defective Long whose testimony was going to be allowed despite
18 being hearsay and the State failing to show that the actual declarant of the offered
19 testimony was not unavailable. (2) Denial of the Defendant's Motion to Suppress
20 or In the Alternative a Jackson v. Denno hearing and (3) Order granting State's
21 Motion in Limine to Admit Bad Acts and Other Acts Against the victim.

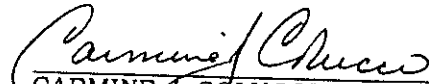
22 Petitioner asserts that trial counsel failed to take into consideration his
23 mental health problems and even brought that issue to the court's attention on
24 September 26, 2012 (Rough Draft Transcript, p. 3) when the court even opined that
25 it seemed possible that trial counsel would ultimately have to testify regarding this
26 issue.

27 Petitioner herein asserts that he can meet his burden of proof and is entitled
28 to the relief sought herein. For the reasons stated below, Defendant has

1 demonstrated both that counsel was ineffective as to each issue and that he was
2 prejudiced by counsel's actions. Accordingly, his petition must be granted.

3 DATED this 6th day of June, 2014.

4
5 CARMINE J. COLUCCI CHTD.

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7 
8 CARMINE J. COLUCCI, ESQ.
9 Nevada Bar No. 0881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

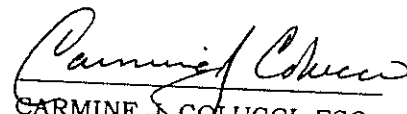
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VERIFICATION

I, Carmine J. Colucci, Esq., declare that I am the attorney for the
Petitioner, KEVIN GIPSON, named in the foregoing petition and knows the
contents thereof; that the pleading is true of mine own knowledge, except as to
those matters stated on information and belief, and as to such matters I believe
them to be true. Petitioner, KEVIN GIPSON, has personally authorized me to
commence this action on his behalf.

DATED this 6th day of June, 2014.

CARMINE J. COLUCCI CHTD.


CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 0881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 6th day of June, 2014, I e-served pursuant to N.E.F.C.R 9 and mailed pursuant to NRCP 5(b), a true and correct copy of the foregoing POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) addressed to:

Dwight Neven, Warden
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

Steven B. Wolfson
Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

Catherine Cortez-Masto
Nevada Attorney General
100 North Carson St.
Carson City, NV 89701

E. Vargas

An employee of
CARMINE J. COLUCCI, CHTD.

Exhibit 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN GIPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62071

FILED

DEC 20 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Angela
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

The notice of appeal was untimely filed.¹ NRAP 4(b). Because an untimely notice of appeal fails to vest jurisdiction in this court, Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994), we conclude that we lack jurisdiction to consider this appeal, and we

ORDER this appeal DISMISSED.²

Saitta, J.
Saitta

Pickering, J.
Pickering

Hardesty, J.
Hardesty

¹An appeal deprivation claim must be raised in a post-conviction petition for a writ of habeas corpus filed in the district court in the first instance. NRS 34.724(2)(c); NRS 34.738(1). We express no opinion regarding the merits of any such claim or whether appellant can satisfy the procedural requirements of NRS chapter 34.

²We have considered the proper person documents submitted in this matter, and we conclude that no relief is warranted for the reason set forth above.

cc: Hon. David B. Barker, District Judge
Kevin Gipson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

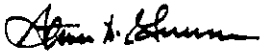
SUPREME COURT
OF
NEVADA

101 1847A



THE COURT'S OFFICE
CERTIFIED COPY
This document is a full, true and correct copy of
the original on file and of record in my office.
DATE: January 14, 2013
Supreme Court Clerk, State of Nevada
By: [Signature] Deputy

Exhibit 2


CLERK OF THE COURT

1 RTRAN
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DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9

Plaintiff,

10 vs.

11 KEVIN MARQUETTE GIPSON,
12

Defendant.
13

CASE#: C264079

DEPT. XVIII

14 BEFORE THE HONORABLE DAVID BARKER, DISTRICT COURT JUDGE
15 MONDAY, FEBRUARY 11, 2013

16 **RECORDER'S ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS**
17 **DEFENDANT'S PRO PER MOTION FOR DIRECT APPEAL MEMORANDUM OF**
18 **POINTS AND AUTHORITIES FACTS OF THE CASE;**
19 **CONFIRMATION OF COUNSEL**

20 APPEARANCES:

For the State:

MICHELLE Y. EDWARDS, ESQ.
Deputy District Attorney

22 For the Defendant:

CARMINE J. COLUCCI, ESQ.

24
25 RECORDED BY: CHERYL CARPENTER, COURT RECORDER

1
2 MONDAY, FEBRUARY 11, 2013 AT 8:59 A.M.

3 THE COURT: C264079, State of Nevada versus Kevin Gipson. The record
4 should reflect the presence of Mr. Colucci. Mr. Gipson in the Nevada Department --
5 in Nevada Department of Corrections, not present here in court, and Ms. Edwards
6 for the State.

7 This is time set for confirmation of counsel. My notes reflect Mr.
8 Christensen has indicated -- Mr. Colucci, you can accept this appointment; is that
9 true?

10 MR. COLUCCI: Yes.

11 THE COURT: All right. What's your pleasure? Do you want to set a briefing
12 schedule or I have an opportunity to review the file and then come back?

13 MR. COLUCCI: Actually -- yes. Actually what I'd like to do is actually get the
14 file. So I'd ask for a four month status check and then we could set a briefing
15 schedule at that point.

16 THE COURT: Four month status check.

17 THE COURT CLERK: June 17th, 8:15.

18 MR. COLUCCI: Thank you very much.

19 THE COURT: Thank you.

20 [Proceedings concluded at 9:00 a.m.]

21 *****
22 ATTEST: Pursuant to Rule 3(c)(d) of the Nevada Rules of Appellate Procedure, I
23 acknowledge that this is a rough draft transcript, expeditiously prepared, not
24 proofread, corrected, or certified to be an accurate transcript.

25 Sandra A Pruchnic
SANDRA PRUCHNIC
Court Transcriber

Alan J. Colucci

CLERK OF THE COURT

1 CARMINE J. COLUCCI, CHTD.
2 CARMINE J. COLUCCI, ESQ.
3 Nevada Bar No. 0881
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9 Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

8 KEVIN GIPSON,
9 Petitioner,
10 vs.
11 DWIGHT NEVIN, WARDEN,
12 HIGH DESERT STATE PRISON
13 Respondent,

Case No.: 10C264079
Dept No.: XVIII

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

15 Comes now the Petitioner, KEVIN GIPSON, by and through his appointed
16 attorney, CARMINE J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI,
17 CHTD., who submits these supplemental points and authorities in support of his
18 Petition for Writ of Habeas Corpus (Post-Conviction).

19 These supplemental points and authorities are submitted pursuant to NRS
20 34.720, et.seq.

21 DATED this 15th day of December, 2014.

CARMINE J. COLUCCI CHTD.

Carmine J. Colucci

CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 0881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

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I.
STATEMENT OF THE CASE

On April 28, 2010, Defendant, KEVIN GIPSON, was charged by way of Grand Jury Indictment with Murder with Use of a Deadly Weapon (Felony - NRS200.010, 200.030, 193.165).

On December 7, 2011, the defendant entered into a Guilty Plea Agreement with the State whereby he agreed to plead guilty to the charge as alleged in the Indictment. Pursuant to negotiations, the parties stipulated to twenty (20) years to Life in the Nevada Department of Corrections. However, parties retained the right to argue the deadly weapon enhancement for a term of not less than four (4) to eight (8) years.

On February 10, 2012, the defendant was present in court with counsel, at which time he was sentenced to the Nevada Department of Corrections as follows: Life with a possible parole eligibility of Twenty (20) years with a consecutive term of Two Hundred Forty (240) months maximum and Ninety-Six (96) months minimum for Use of a Deadly Weapon with Six Hundred Eighty-Six (686) days credit for time served. Judgment of Conviction was filed on March 13, 2012.

Thereafter the defendant filed a Pro Per Motion to Withdraw Plea on September 5, 2012. That motion was denied by the court on September 26, 2012, and an order entered on September 27, 2012. The defendant filed a Pro Per Motion to Proceed in Forma Pauperis on October 15, 2012. That motion was granted on November 7, 2012. The defendant then filed an Ex Parte Motion for Appointment of counsel and Request for Evidentiary Hearing on October 15, 2012, and Defendant's Pro Per Motion for Direct Appeal/Memorandum of Points and Authorities Facts of the Case on November 26, 2012. On January 28, 2012, the defendant's Motion for Appointment of Counsel was granted and his Motion for Evidentiary Hearing was denied.

1 The defendant's Pro Per Motion for Direct Appeal/Memorandum of Points
2 and Authorities Facts of the Case "may have been construed as a notice of appeal.
3 "...Further, at the same time, case appeal statement was filed which triggered
4 Supreme Court review..." (see court minutes dated January 28, 2013). The
5 Nevada Supreme Court issued its Order Dismissing Appeal on December 20,
6 2012, stating, "an appeal deprivation claim must be raised in a post-conviction
7 petition for a writ of habeas corpus filed in the district court in the first instance."
8 See Exhibit A attached hereto.

9 Thereafter, on February 22, 2012, Carmine J. Colucci, Esq., was appointed
10 counsel for the defendant. Defendant's Motion for Direct Appeal/Memorandum
11 of Points and Authorities Facts of the Case was taken off calendar on February 11,
12 2012. On June 17, 2013, a briefing schedule was set scheduling the initial brief
13 due by December 16, 2013. A stipulation and order was entered on January 7,
14 2014, continuing the due date for the initial brief to January 31, 2014.

15 II.

16 STATEMENT OF THE FACTS

17 On March 25, 2010, Brittany Lavoll was shot in the parking lot of the Jack
18 In The Box where she worked, which was located at 7541 West Lake Mead
19 Boulevard, Las Vegas, Nevada 89128. According to witnesses, the shooting
20 occurred at approximately 5:45 a.m.

21 Three witnesses described to police a male dressed in a dark hooded
22 sweatshirt who was seen running from the scene. Witness Wade Fleming
23 observed Lavoll and thought she was dead. Robert Gilmore, another witness,
24 called 911. Christina Benitez was the third witness who claimed to have seen the
25 man in the dark hoody running from the scene. Fleming and Gilmore were drawn
26 to the area where Brittany Lovall was found by the sound of what they felt was a
27 gunshot.

28 / / /

1 Bailey, who worked at a grocery store in the same shopping center as the
2 Jack In The Box, initially saw a woman lying on the ground and the man in the
3 dark hoody standing over her. Bailey thought the man was helping the woman
4 who Bailey thought might be drunk.

5 Police arrived at the scene a short time after the shooting and Brittany
6 Lovall was immediately transported to UMC where she was pronounced dead at
7 6:15 a.m. An autopsy conducted on March 26, 2010, determined that the cause
8 of death was homicide by a gunshot to the head.

9 Brittany Lovall's father met police at the scene and told police that Brittany
10 had been in an abusive relationship with Kevin Gipson and that they had two (2)
11 children together. He related that they had broken up a year before but that he
12 had been stalking her.

13 Detectives of the LVMPD ultimately located Gipson and arranged to meet
14 him on the afternoon of March 25th. Gipson allegedly agreed to speak with the
15 detectives, which he ultimately did. Gipson provided them with an alibi to support
16 his statement that he could not have been at the scene of the shooting when it
17 occurred. Gipson denied having an abusive relationship with Lovall. Gipson said
18 that he had recently tried to contact Lovall in order to arrange a visit with his
19 children.

20 After interviewing Gipson, the police asked him to take a modified polygraph
21 test. They called it a Concealed Information Test. The next day the police gave
22 Gipson a Concealed Information Test. The detectives Mirandized him and Gipson
23 took the test. The voluntariness of the test remains in dispute as does the
24 legitimacy of this purported test. According to the detectives he failed it. He was
25 told by Geoffrey Flohr that by failing, he must have knowledge of the murder that
26 only the killer would know.

27 Gipson, without the services of an attorney, was confronted with this
28 accusation. Gipson told them that he had been in and out of the mental hospital

1 and that he killed Brittany Lovall because she drove him crazy. Allegedly Gipson
2 managed to find out where Lovall worked prior to meeting her on March 25, 2010.
3 Police speculated that Gipson went to the Jack In The Box and laid in wait for
4 Lavoll and then shot her. During questioning, the detectives stated that Gipson
5 confessed after being given the Concealed Information Test.

6
7 **III.**

8 **STATEMENT OF THE ISSUES**

9 1. Whether petitioner was denied his right to the effective assistance of
10 counsel as guaranteed under the Sixth and Fourteenth Amendments of the
11 Constitution of the United States.

12 **IV.**

13 **ARGUMENT**

14 On September 15, 2014, this court ruled upon a portion of the State's
15 Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus
16 (Post-Conviction), denying the motion to dismiss. Petitioner now submits the
17 following points and authorities.

18 **A. Petitioner Was Denied the Effective Assistance of Counsel in Violation of**
19 **His Right to Counsel as Guaranteed under the Sixth Amendment of the**
20 **Constitution of the United States.**

21 **Standard of Review**

22 A claim of ineffective assistance of counsel presents a mixed question of law
23 and fact, which is subject to independent review upon appeal. Kirksey v. State,
24 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Petitioner must prove the facts
25 underlying an ineffective assistance of counsel claim by preponderance of the
26 evidence. The Court's review of defense counsel's performance is highly
27 deferential. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004);
28 Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984). In
the context of an appeal deprivation claim, prejudice may be presumed if the

1 petitioner was deprived of the right to direct appeal due to the ineffective
2 assistance of counsel. Hathaway v. State, 199 Nev. 248, 71 P.3d 503 (2003);
3 Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

4 Nevada has adopted the two-pronged test outlined in Strickland, Supra for
5 determining the effectiveness of counsel. Under Strickland, in order to assert a
6 claim for ineffective assistance of counsel, the defendant must prove that he was
7 denied "reasonably effective assistance" of counsel by satisfying a two-pronged
8 test. Strickland; see State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
9 (1993).

10 Under the Strickland test, the defendant must show: first that his counsel's
11 representation fell below an objective standard of reasonableness, and second,
12 that but for counsel's errors, there is a reasonable probability that the result of
13 the proceedings would have been different. See Strickland, at 687-688 and 694.
14 The defendant bears the burden to satisfy both requirements in order to prevail.
15 Strickland, at 697; Means v. State, Supra, at 1011.

16 Inadequate performance is representation that falls below an objective
17 standard of reasonableness. *Id.* (citing Dawson v. State, 108 Nev. 112, 115, 825
18 P.2d 593, 595 (1992)). The role of a court in considering allegations of ineffective
19 assistance of counsel is "not to pass upon the merits of the action not taken but
20 to determine whether, under the particular facts and circumstances of the case,
21 trial counsel failed to render reasonably effective assistance." Donovan v. State,
22 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d
23 1162, 1166 (9th Cir. 1977)).

24 In considering whether the defendant has an ineffective assistance of
25 counsel claim, the court must determine whether counsel conducted a reasonable
26 investigation of the facts relevant to the defendant's case. Doleman v. State, *id.*.
27 Next, the court must consider whether counsel made "a reasonable strategy
28 decision on how to proceed with his client's case." Doleman, *id.* at 846; *citing*

1 Strickland, *supra*, at 690-691, 104 S.Ct. at 2066. While counsel's strategy
2 decision is a "tactical" decision and will be "virtually unchallengeable absent
3 extraordinary circumstances." Doleman, *supra*, at 846; see also Howard v. State,
4 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, *supra*, at 691, 104 S.Ct
5 at 2066. It is not without limitation. The defendant has the burden of overcoming
6 the presumption that trial counsel's actions were the product of sound trial
7 strategy. Means, 120 Nev. At 1012, 103 P.3d at 33 (*citing* Strickland, 466 U.S. at
8 689, *quoting* Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158 (1955)).

9 Even if counsel's representation fell below an objective standard of
10 reasonableness, he must still demonstrate prejudice and show a reasonable
11 probability that, but for counsel's errors, the result of the trial would have been
12 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 263, 1268 (1999) (*citing*
13 Strickland, 466 U.S. at 687.) "A reasonable probability is a probability sufficient
14 to undermine confidence in the outcome." *Id.*

15 Claims asserted in a petition for post-conviction relief must be supported
16 with specific factual allegations, which if true, would entitle the petitioner to relief.
17 Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and
18 "naked" allegations are not sufficient, nor are those belied and repelled by the
19 record. *Id.*

20 **A. GUILTY PLEA NOT FREELY AND KNOWINGLY GIVEN**

21 Petitioner contends that his plea pursuant to the Guilty Plea Agreement was
22 not freely and voluntarily given as he is claiming that he was coerced into taking
23 a plea that he did not want to take. Petitioner is contending that the coercion to
24 take the plea occurred outside of the recorded portions of these proceedings and
25 that but for the coercive actions of trial counsel, Petitioner would not have
26 accepted the negotiations but wanted to go to trial on original charges. However,
27 he was only able to discuss the terms of the plea bargain and to review his Guilty
28 Plea Agreement for a few minutes in court just before the Judge called the case.

1 See Motion to Withdraw Plea filed on September 5, 2012 for additional facts and
2 support for this claim. See also NRS 174.035.

3 **B. TRIAL COUNSEL NOT INFORM WAIVING APPEAL**

4 Petitioner contends that his trial counsel was ineffective for not advising him
5 that he had to give up the right to post-trial appeal of the adverse pretrial rulings
6 of the district court before he agreed to the plea bargain to which he ultimately
7 plead guilty. Some of the adverse rulings that he could have appealed if he had
8 not taken the plea bargain were (1) Denial of the Motion to Limit the Testimony of
9 the Detective Long whose testimony was going to be allowed despite being hearsay
10 and despite the State failing to show that the actual declarant of the offered
11 testimony was not unavailable; (2) Denial of the Defendant's Motion to Suppress
12 or In the Alternative a Jackson v. Denno hearing and (3) Order granting State's
13 Motion in Limine to Admit Bad Acts and Other Acts Against the victim which
14 precluded the defense from admitting this evidence.

15 Petitioner asserts that he informed his trial counsel that he had mental
16 health issues prior to the acceptance of his plea and had received mental health
17 treatment and medication before the crime charged in this case had occurred and
18 before he entered his plea. Petitioner asserts that he had been prescribed Invega
19 for his schizophrenia and Risperdal as anti-psychotic medication. Petitioner
20 claims that trial counsel was aware that he had been prescribed this medication
21 before the incident and before he entered his guilty plea but that he was not able
22 to get this medication for some time before the shooting occurred and before his
23 guilty plea because he did not have the money or insurance needed to pay for the
24 medication. He was therefore off of his medications when the crime occurred and
25 at the time that his plea was taken.

26 Petitioner also asserts that he advised his trial counsel that he had spent
27 time at the Rawson Neal mental facility, North Vista Hospital and the Las Vegas
28 Mental Health Center before this incident and before entering his plea. He was

1 therefore suffering the effects of his schizophrenia and bipolar disorder at the time
2 of the crime as well as at the time of his plea. The record is clear that Petitioner
3 never received a psychological evaluation to address these issues. The issue of his
4 competency was never addressed. Determining Petitioner's competency was
5 critical to the determination of whether his plea was freely and knowingly given.
6 Petitioner contends that due to his mental health problems and the lack of
7 necessary medication he did not fully understand the nature of his plea and the
8 consequences thereof.

9 **C. TRIAL COUNSEL DID NOT INVESTIGATE PETITIONER'S MENTAL**
10 **HEALTH ISSUES**

11 Petitioner asserts that trial counsel failed to investigate his mental illness
12 issues and even brought that issue to the court's attention on September 26, 2012
13 (Rough Draft Transcript, p. 3) when the court even opined that it seemed possible
14 that trial counsel would ultimately have to testify regarding this issue. This issue
15 was so apparent that trial counsel felt that she should withdraw as defendant's
16 counsel due to a possible conflict.

17 Petitioner asserts that his trial counsel was aware prior to the entry of his
18 plea that he suffered from schizophrenia and bipolar disorder. The investigation
19 of these issues and proof thereof would at least have had an effect on the degree
20 of murder of which he was convicted. This issue should have been investigated
21 and discussed with Petitioner before he accepted the plea bargain and entered his
22 plea so that he could have done so with full knowledge and an understanding of
23 all available defenses and mitigation.

24 / / /

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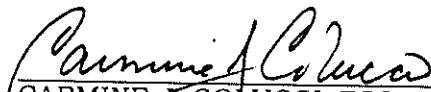
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V. CONCLUSION

Petitioner herein asserts that he can meet his burden of proof and is entitled to the relief sought herein. For the reasons stated below, Defendant has demonstrated both that counsel was ineffective as to each issue and that he was prejudiced by counsel's actions. Accordingly, his petition must be granted.

DATED this 15th day of December, 2014.

CARMINE J. COLUCCI CHTD.


CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 0881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

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DATED this 15th day of December, 2014.

Carmine J. Colucci
CARMINE J. COLUCCI, ESQ.

CHARMINE J. COLUCCI, ESQ.
Nevada Bar No. 0881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of December, 2014, I e-served pursuant to N.E.F.C.R 9 and a true and correct copy of the foregoing SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) addressed to:

Dwight Neven, Warden
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

Steven B. Wolfson
Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

Catherine Cortez-Masto
Nevada Attorney General
100 North Carson St.
Carson City, NV 89701

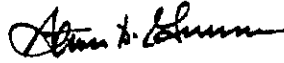
J. Vargas

An employee of CARMINE J. COLUCCI, CHTD.

Please Return
Filed Stamped

Electronically Filed
11/12/2015 12:48:42 PM

1 Kevin Gipson #1082776
2 Petitioner In Proper Person
3 P.O. Box 650 H.D.S.P.
4 Indian Springs, Nevada 89018


CLERK OF THE COURT

5 Eighth DISTRICT COURT
6 Clark COUNTY NEVADA

7
8 Kevin M. Gipson,
9 #1082776
10 Petitioner,

Case No. 10C264079
Dept. No. XIX
Docket _____

11 Dwight Neven, Warden, et.al.
12 Respondent,
13 _____

14 NOTICE OF APPEAL

15 Notice is hereby given that the Petitioner, Kevin M.
16 Gipson, by and through himself in proper person, does now appeal
17 to the Supreme Court of the State of Nevada, the decision of the District
18 Court Findings of Fact, Conclusion's of Law and Order
19 Denying Petition for Post-Conviction Relief
20 _____

21 Dated this date, November 8th, 2015.
22
23

Respectfully Submitted,


In Proper Person

RECEIVED
NOV 12 2015
CLERK OF THE COURT

CERTIFICATE OF SERVICE BY MAILING

I, Kevin M. Gipson, hereby certify, pursuant to NRCP 5(b), that on this 8th
day of November, 20 15, I mailed a true and correct copy of the foregoing, "Notice
of Appeal"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
addressed as follows:

Steven B. Wolfson
District Attorney
200 Lewis Ave.
Carlsbad, NV 89155-2212

Attorney General
Herby Memorial Bldg.
100 N. Carson St.
Carson City, NV 89710

DATED: this 8th day of November, 20 15

Kevin M. Gipson
Petitioner In Propria Persona # 1082772
Post Office box 650 (HDSP)
Indian Springs, Nevada 89018

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice
of Appeal
(Title of Document)

filed in District Court Case number 10C264079

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

-OR-

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

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

(State specific law)

-or-

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

Kevin M. Gipson
Signature

11/8/15
Date

Kevin M. Gipson
Print Name

Petitioner
Title

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice
of Appeal
(Title of Document)

filed in District Court Case number 10C264079

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

-OR-

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

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

(State specific law)

-or-

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

Kevin M. Gipson
Signature

11/8/15
Date

Kevin M. Gipson
Print Name

Petitioner
Title

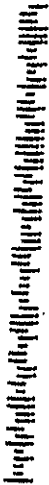
Indian Springs, NV 89018

Legal Mail
Confidential

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Steven D. Grierson
Clerk of the Court
200 Lewis Ave, 3rd Fl.
Las Vegas, NV 89155 - 1160



NOV 10 2015
CLERK OF THE COURT
LAS VEGAS, NV



FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

Alvin L. Schuman
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

KEVIN MARQUETTE GIPSON, aka,
Kevin Marquett Gipson, #1582343,
Defendant.

CASE NO: 10C264079
DEPT NO: XIX

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: September 10, 2015
TIME OF HEARING: 9:30 AM

THIS CAUSE having come on for hearing before the Honorable WILLIAM D. KEPHART, District Judge, on the 10th day of September, 2015, the Petitioner being present, REPRESENTED BY CARMINE J. COLUCCI, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through RYAN J. MACDONALD, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

This is Defendant Kevin Marquette Gipson's post-conviction petition for a writ of habeas corpus. On April 28, 2010, Defendant was charged by way of Indictment with one count of Murder with Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165).

1 On December 7, 2011, at Calendar Call, the parties informed the court that the matter was
2 resolved via negotiations. Defendant's Guilty Plea Agreement was filed in open court and he
3 entered a plea of Guilty to the charge of First Degree Murder With Use of a Deadly Weapon.
4 The Guilty Plea Agreement provided that the parties stipulated to a sentence of 20 years to
5 Life in the Nevada Department of Corrections and the State retained the right to argue for a
6 deadly weapon term of not less than four to eight years.

7 Defendant was present with counsel for sentencing on February 10, 2012. The court
8 adjudicated him guilty as charged in the Indictment and sentenced him to a term of 20 years
9 to life, plus a consecutive term of 96 to 240 months for Use of a Deadly Weapon; Defendant
10 received 686 days credit for time served. The Judgment of Conviction was filed March 13,
11 2012. Defendant did not file a direct appeal.

12 Defendant filed a Pro Per Motion to Withdraw Plea on September 5, 2012. The State
13 filed its Opposition on September 21, 2012. The court denied the motion on September 26,
14 2012.

15 On October 15, 2012, Defendant filed a Pro Per "Ex Parte Motion for Appointment of
16 Counsel and Request for Evidentiary Hearing." The State filed its Opposition on November
17 2, 2012. On November 5, 2012, Defendant filed a Pro Per "Memorandum of Points and
18 Authorities Facts of the Case." That Memorandum sought to file a direct appeal and the
19 Memorandum was transmitted to the Nevada Supreme Court as a Notice of Appeal. On
20 December 20, 2012, the Nevada Supreme Court dismissed Defendant's appeal. See Gipson
21 v. State, Docket No. 62071, Order Dismissing Appeal (December 20, 2012).

22 On January 28, 2013, the court granted Defendant's Motion for Appointment of
23 Counsel. On February 11, 2013, Carmine Colucci, Esq., was confirmed as counsel for
24 Defendant. On June 17, 2013, counsel advised the court that all the documents had been
25 received and a briefing schedule was set.

26 Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction) and Points
27 and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) on June
28 6, 2014. The State filed its Response and Motion to Dismiss on June 13, 2014. Defendant

1 filed a Reply on August 7, 2014. The court denied the State's Motion to Dismiss and ordered
2 briefing on the merits.

3 Defendant filed a Supplemental post-conviction Petition for Writ of Habeas Corpus and
4 Supplemental Points and Authorities in support on December 15, 2014. The State filed its
5 Response on February 24, 2015. Finally, this court convened an evidentiary hearing on
6 September 10, 2015.

7 **Defendant Received Effective Assistance of Counsel**

8 Defendant makes various claims of ineffective assistance of counsel. The Sixth
9 Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions,
10 the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The
11 United States Supreme Court has long recognized that "the right to counsel is the right to the
12 effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052,
13 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

14 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
15 he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of
16 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
17 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
18 representation fell below an objective standard of reasonableness, and second, that but for
19 counsel's errors, there is a reasonable probability that the result of the proceedings would have
20 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
21 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
22 "[T]here is no reason for a court deciding an ineffective assistance claim to approach the
23 inquiry in the same order or even to address both components of the inquiry if the defendant
24 makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

25 The court begins with the presumption of effectiveness and then must determine
26 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
27 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel
28 does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of

competence demanded of attorneys in criminal cases.” Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove, 100 Nev. at 503, 686 P.2d at 225. “Bare” and “naked” allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed.” (emphasis added).

Defendant contends that plea counsel did not adequately investigate petitioner's mental health issues and that counsel was aware he was off his medication during the crime and the plea canvass. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Defendant pointed to plea counsel's comments during the hearing on his Motion to Withdraw Guilty Plea as evidence that she was aware of potential issues regarding his mental health. He misconstrues trial counsel's actions by making it seem as though plea counsel admitted to her ineffectiveness, where in actuality it is standard for counsel to withdraw if the defendant is

1 trying to withdraw his guilty plea based on ineffectiveness. Supplemental Points and
2 Authorities (SPA), Dec. 15, 2014, p. 9. Plea counsel stated to the court that the best course of
3 action may be for new counsel to be appointed, as it appeared Defendant wanted to move
4 forward on an ineffectiveness claim. Rough Draft Transcript, Sept. 26, 2012, p. 3. Trial
5 counsel also stated "I would remind the Court that Mr. Gipson does suffer from a mental illness
6 and that is probably a legitimate ground. . .," referring to Defendant's attempt to withdraw the
7 guilty plea. Id.

8 Additionally, it is clear based on the arraignment that plea counsel had investigated
9 Defendant's mental illness. Plea counsel requested the Court allow Defendant to enter a plea
10 of guilty but mentally ill. Recorder's Transcript (Arraignment), Dec. 7, 2011, p. 2. This Court
11 acknowledged that both plea counsel and the State had informed the Court that it was the intent
12 of Defendant to enter a plea of guilty but mentally ill consistent with NRS 174.035.
13 Arraignment at 2. The parties agreed that the plea canvass would move forward in a typical
14 fashion, and the decision regarding whether Defendant was mentally ill would occur at
15 sentencing with the burden on the defendant. Arraignment at 2-3. The Court finds Defendant's
16 claim lacks merit because the above is evidence that plea counsel knew of Defendant's alleged
17 mental health issues, and attempted to bring them before the court at multiple junctures.

18 Defendant does not adequately explain how further investigation would have changed
19 the outcome of the plea. Defendant contends, without a factual basis, that "the investigation
20 and these issues and proof thereof would at least have had an effect on the degree of murder
21 of which he was convicted." SPA at 9. But Defendant also asserts plea counsel was aware
22 prior to the entry of the plea that Defendant suffered from schizophrenia and bipolar disorder.
23 Id. There is no explanation as to what further investigation should have been done, and what
24 facts would have been uncovered that would have changed the negotiations. The Court finds
25 this is a bare claim that is belied by the record. See infra II; see Hargrove, 100 Nev. at 503,
26 686 P.2d at 225.

27 Further, Defendant has the burden of showing he was legally mentally incompetent at
28 the time he pleaded guilty. Specifically, per Riker v. State, 111 Nev. 1316, 905 P.2d 706

(1995), and Calambro v. 2nd Judicial Dist. Court, 114 Nev. 961, 965 P.2d 794 (1998), the mere fact that Defendant may have had mental health issues at the time he pleaded guilty does not render him incompetent to enter a guilty plea.

The Court finds this claim is without merit because an evidentiary hearing was held on the specific issue of Defendant's mental health issues and prior counsel's advice and this Court found sufficient information and/or investigation into Defendant's mental health background was performed by counsel to the extent possible.

Defendant's Plea Was Given Freely, Knowingly, and Voluntarily

Defendant alleges that he was coerced into taking the plea agreement by counsel and that the "coercion to take the plea occurred outside of the recorded portions of these proceedings." SPA at 7. Defendant points to his Motion to Withdraw Plea for additional support for this claim. In the Motion, Defendant contends this alleged coercion consisted of his counsel telling him it was likely he would be found guilty of First Degree Murder and go to prison for life if he did not take the plea. Motion to Withdraw Guilty Plea, Sept. 5, 2012, p. 2. Defendant further contends that he was never told of his appellate rights, and would not have signed the GPA if he had been so informed. The Court finds that Defendant's allegation that he was coerced and did not understand he was waiving certain rights is belied by the record and therefore insufficient to warrant relief. See Hargrove, 100 Nev. at 503, 686 P.2d 225.

The law in Nevada clearly establishes that a plea of guilty is presumptively valid and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant, 102 Nev. 272, 721 P.2d 364, 368 (1986); Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975). Furthermore, the Nevada Supreme Court makes it clear in the case of Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973), that the guidelines for voluntariness of pleas of guilty do "not require the articulation of talismanic phrases." Rather, "the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." Id. (quoting Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970)).

1 In determining whether a guilty plea is knowingly and voluntarily entered, the Court
2 will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102
3 Nev. at 271. The proper standard set forth in Bryant requires the Court to personally address
4 a defendant at the time he enters his plea in order to determine whether he understands the
5 nature of the charges to which he is pleading. Id. at 271.

6 In Wilson v. State, 99 Nev. 362, 366-67, 664 P.2d 328, 330-31 (1983), the Nevada
7 Supreme Court stated the following regarding the acceptance of a guilty plea:

8 In Higby v. Hisiff, 86 Nev. 774, 476 P.2d 950 (1970), we
9 concluded that certain minimum requirements must be met when
10 a judge canvasses a defendant regarding the voluntariness of a
11 guilty plea. We held that the record must affirmatively show the
12 following: 1) the defendant knowingly waived his privilege
13 against self-incrimination, the right to trial by jury, and the right
14 to confront his accusers; 2) the plea was voluntary, was not
15 coerced, and was not the result of a promise of leniency; 3) the
16 defendant understood the consequences of his plea and the range
17 of punishment; and 4) the defendant understood the nature of the
18 charge, i.e., the elements of the crime.

19 In State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000), the Nevada Supreme Court held
20 that a failure to conduct a ritualistic oral canvass does not mandate a finding of an invalid plea.
21 Instead, the Court found that a district court should not invalidate a plea as long as the totality
22 of the circumstances, as shown by the record, demonstrates that the plea was knowingly and
23 voluntarily made and that the defendant understood the nature of the offense and the
24 consequences of the plea. Freese, 116 Nev. at 1105. Furthermore, "[w]hen an accused
25 expressly represents in open court that his plea is voluntary, he may not ordinarily repudiate
26 his statements to the sentencing judge." Lundy v. Warden, 89 Nev. 419, 422, 514 P.2d 212,
27 213-14 (1973).

28 Defendant signed his GPA on December 7, 2011. By signing the GPA, Defendant
acknowledged the stipulation to twenty years to life in the Nevada Department of Corrections;
the parties retention of the right to argue the deadly weapon for a term of not less than four to
eight years; and his waiver of rights, including the right to appeal the conviction. GPA, p. 1,
4. Further, Defendant acknowledged that he was pleading guilty freely and voluntary. GPA,
p. 4-5.

1 Within the guilty plea agreement, Defendant's counsel made the representation that to
2 the best of her knowledge and belief, the Defendant was competent and understood the charges
3 and consequences of pleading guilty and executed the agreement and entered all guilty pleas
4 voluntarily. GPA, p. 6.

5 Additionally, during Defendant's plea canvass, the Court addressed Defendant and
6 asked if more time was needed to speak with Ms. Craig about the elements of the offense and
7 the allegation before asking whether he wanted to change his plea again, and Defendant
8 responded "No." The Court asked Defendant how he pleaded to the charge of murder with use
9 of a deadly weapon—first degree murder with use of a deadly weapon, and Defendant
10 responded "Guilty." Before the Court accepted his plea of guilty, in order to be satisfied that
11 Defendant's plea was freely and voluntarily entered and was doing so knowingly, the Court
12 asked if Defendant was pleading guilty because in truth and in fact he was guilty and Defendant
13 responded "Yes." The Court asked if anyone forced Defendant or coerced him to enter this
14 plea and Defendant responded "No." The Court asked Defendant to verify his signature on the
15 guilty plea, which he did. The Court verified that he signed it after he read it and asked
16 Defendant if he carefully read it and went through it with his attorney and Defendant responded
17 "Yes." The Court asked Defendant if when he carefully read this document he realized he was
18 waiving valuable constitutional and procedural rights by entering the plea and Defendant
19 responded "Yes." Arraignment at 4-5. The Court explained the stipulation of 20 years to life
20 with the possibility of parole, and a consecutive four to eight years for the deadly weapon
21 enhancement and asked if this changed Defendant's mind about any nature of his plea to
22 confirm that he was still doing it voluntarily and Defendant responded "Yes." Id. at 6-7.

23 Defendant acknowledged that he was made no promises of leniency, that he was aware
24 of the possible punishment he could receive, and that any questions arising from the GPA had
25 been answered by his attorney. RT at 6-7, GPA at 3. Defendant agreed that pleading guilty
26 and accepting the plea bargain was in his best interest and a trial would be contrary to his best
27 interest. GPA at 5. Defendant clearly acknowledged that he was entering into his GPA
28 voluntarily and not under duress or coercion and that he was not under the influence of any

substance that would impair his ability to understand the GPA or the circumstances surrounding his plea. GPA at 4-5, RT at 4-5. Finally, by admitting the facts as outlined in the Information, Defendant acknowledged that he understood the nature of the charges against him. GPA at 1, RT at 4, 7-8, see Wilson v. State, 99 Nev. 362, 366-67 (As to the requirement that a defendant understand the nature of the charge, this Court previously held that "in order for the record to show an understanding of the nature of the charge it is necessary that there be either a showing that the defendant himself understood the elements of the offense to which the plea was entered or a showing that the defendant has made factual statements to the court which constitute an admission to the pleaded to offense.") (internal citation omitted). Accordingly, the State affirmatively demonstrated each element of a plea canvass as required by Wilson v. State, 99 Nev. 362, 366-67, and Defendant failed to satisfy his burden of proving his plea was entered into unknowingly or involuntarily. See Bryant, 102 Nev. 268. Additionally, Defendant's GPA in conjunction with the Court's canvass indicates that Defendant knew he was waiving certain appellate rights. GPA at 4, RT, 4-5.

Defendant alleges that he was coerced into pleading guilty as he was not given enough time to consider the offer and that his attorney threatened him by saying he would likely lose at trial and go to prison for life. The Court finds this is belied by the record, because not only was Defendant given multiple opportunities to tell the court he needed more time or had further questions, he also told the court he was not being coerced. RT 4-5. Further, at the evidentiary hearing his plea counsel, Christy Craig, explained that she did not coerce him or threaten him; counsel was being honest with Defendant in telling him the State had a strong case against him, and a plea offer was an opportunity for eventual parole. The Court credits Ms. Craig's testimony and also finds that she was highly effective as she counseled Defendant with good advice subsequent to which Defendant knowingly, freely, and voluntarily entered a plea of guilty. Further, the Court finds the issue of Defendant withdrawing his guilty plea lacks merit because counsel addressed any issue coming to light and counsel would have informed the Court if there was any question of competency at the time of entry of plea. The Court finds the issue of Defendant's mental health and prior counsel's advice is satisfied after having

1 conducted the evidentiary hearing. The Court further finds that future counsel would be unable
2 to bring another claim on these issues under these circumstances.

3 ORDER

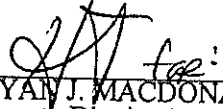
4 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
5 shall be, and it is, hereby denied.

6 DATED this 20th day of October, 2015.

7 
8 DISTRICT JUDGE
9 

10 STEVEN B. WOLFSON
11 Clark County District Attorney
12 Nevada Bar #007565

13 BY

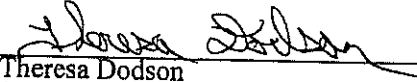

14 RYAN J. MACDONALD
15 Deputy District Attorney
16 Nevada Bar #012615

17 CERTIFICATE OF SERVICE

18 I certify that on the 7th day of October, 2015, I mailed a copy of the foregoing
19 proposed Findings of Fact, Conclusions of Law, and Order to:

20 Carmine Colucci, Esq.
21 629 South Sixth Street
22 Las Vegas, Nevada 89101

23 BY


24 Theresa Dodson
25 Secretary for the District Attorney's Office
26
27
28

no/RJM/td/dvu

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN MARQUETTE GIPSON, A/K/A
KEVIN MARQUETT GIPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69174

FILED

DEC 08 2015

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

**ORDER OF LIMITED REMAND
FOR APPOINTMENT OF COUNSEL**

This is a pro se appeal from an order denying a post-conviction petition for a writ of habeas corpus. Appellant was represented by appointed counsel in the proceedings below. We remand this appeal to the district court for the limited purpose of securing counsel for appellant. The district court shall have 30 days from the date of this order to appoint counsel for appellant. Within 5 days from the date of appointment, the district court clerk shall transmit to the clerk of this court a copy of the district court's written or minute order appointing appellate counsel.

It is so ORDERED.¹

J. J. J. C.J.

¹The pro se motion to appoint counsel filed on December 2, 2015, is denied as moot.

cc: Hon. William D. Kephart, District Judge
Kevin Marquette Gipson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****January 13, 2016****10C264079****The State of Nevada vs Kevin M Gipson****January 13, 2016****8:30 AM**

**Further Proceedings:
Appointment of Counsel
for Purposes of Appeal
Pursuant to Supreme Court
Order of Limited Remand**

HEARD BY: Kephart, William D.**COURTROOM:** RJC Courtroom 03E**COURT CLERK:** Tia Everett**RECORDER:** Christine Erickson**PARTIES****PRESENT:**

Colucci, Carmine J.
Laurent, Christopher J.

Attorney for Defendant
Deputy District Attorney

JOURNAL ENTRIES

- Court noted Defendant not present and in custody with the Nevada Department of Corrections. Upon Court's inquiry, Mr. Laurent advised Findings of Fact was sent to Mr. Colucci. COURT ORDERED, Matter CONTINUED. RECALLED. Court noted Mr. Colucci present. Upon Court's inquiry, Mr. Colucci confirmed as counsel for purposes of appeal. Court so noted.

PRINT DATE: 01/19/2016**Page 1 of 1****Minutes Date:** January 13, 2016

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

KEVIN M. GIPSON,
Appellant,
vs.
STATE OF NEVADA,
Respondent.

No. 69174

Electronically Filed
Feb 12 2016 04:17 p.m.

DOCKETING STAGE KEVIN
CRIMINAL APPEALS Clerk of Supreme Court

(Including appeals from pretrial and post-
conviction rulings and other requests for post-
conviction relief)

GENERAL INFORMATION

1. Judicial District Eighth County Clark
Judge David Barker District Ct Case No. 10C264079

2. If the defendant was given a sentence,

(a) what is the sentence?

Murder with use of Deadly Weapon - Twenty (20) years with a consecutive term of Two Hundred Forty (240) months maximum and Ninety-six (96) months minimum with Six Hundred Eighty-six (686) days credit for time served.

(b) has the sentence been stayed pending appeal?

No

(c) was defendant admitted to bail pending appeal?

No

3. Was counsel in the district court appointed ☒ or retained ☐?

4. Attorney filing this docketing statement:

Attorney CARMINE J. COLUCCI, ESQ. Telephone 702-384-1274

Firm: CARMINE J. COLUCCI, CHTD.

Address: 629 South Sixth Street
Las Vegas, NV 89101

Client(s) KEVIN M. GIPSON, APPELLANT

5. Is appellate counsel appointed ☒ or retained ☐?

If this is a joint statement by multiple appellants, add the names and addresses of other counsel on an additional sheet accompanied by a certification that they concur in the filing of this statement.

6. Attorney(s) representing respondent(s):

Attorney Steven B. Wolfson Telephone 702-671-2500
Firm: Clark County District Attorney
Address: 200 Lewis Avenue
Las Vegas, NV 89155
Client(s) State of Nevada

Attorney Adam Paul Laxalt Telephone _____
Firm: Attorney General
Address: 100 North Carson Street
Carson City, NV 89701
Client(s) State of Nevada

(List additional counsel on separate sheet if necessary)

7. Nature of disposition below:

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Grant of pretrial habeas |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Grant of motion to suppress evidence |
| <input type="checkbox"/> Judgment upon guilty plea | <input checked="" type="checkbox"/> Post-conviction habeas (NRS ch. 34) |
| <input type="checkbox"/> Grant of pretrial motion to dismiss | <input type="checkbox"/> grant <input checked="" type="checkbox"/> denial |
| <input type="checkbox"/> Parole/Probation revocation | <input type="checkbox"/> Other disposition (specify) |
| <input type="checkbox"/> Motion for new trial | |
| <input type="checkbox"/> grant <input type="checkbox"/> denial | |
| <input type="checkbox"/> Motion to withdraw guilty plea | |
| <input type="checkbox"/> grant <input type="checkbox"/> denial | |

8. Does this appeal raise issues concerning any of the following:

- ☐ death sentence
☒ life sentence

- ☐ juvenile offender
☐ pretrial proceedings

9. **Expedited appeals:** The court may decide to expedite the appellate process in this matter. Are you in favor of proceeding in such manner?

Yes ☒ No ☐

10. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g, separate appeals by co-defendants, appeal after post-conviction proceedings):

Kevin Gipson v. The State of Nevada - 62071

11. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts that are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):

Kevin Gipson v Dwight Nevin, Warden, High Desert State Prison - 10C264079

12. **Nature of action.** Briefly describe the nature of the action and the result below:

Appellant, Kevin M. Gipson appeals the District Court's Findings of Fact Conclusions of Law and Order denying his Petition for Writ of Habeas Corpus (Post-Conviction). Appellant was convicted of: Count One: Murder, Count 2 - Degrees of Murder, Count 3 - Use of a Deadly Weapon or Tear Gas in Commission of Crime. A Judgment of Conviction was entered on March 13, 2012. He then filed a Petition for Writ of Habeas Corpus (Post-Conviction) and an Evidentiary Hearing was held on September 10, 2015. The Findings of Fact Conclusions of Law and Order was filed on October 26, 2015. The court denied the petition. This appeal follows.

13. **Issues on appeal.** State concisely the principal issue(s) in this appeal:

1. Whether the District Court abused its discretion when it denied Appellant's Petition for Writ of Habeas Corpus (Post-conviction).

14. **Constitutional issues.** If the State is not a party and if this appeal challenges the constitutionality of a statute or municipal ordinance, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A ☒ Yes ☐ No ☐
If not, explain

15. **Issues of first-impression or of public interest.** Does this appeal present a substantial legal issue of first-impression in this jurisdiction or one affecting an important public interest?

First-impression: Yes ☐ No ☒
Public interest: Yes ☐ No ☒

16. Length of trial. If this action proceeded to trial or evidentiary hearing in the district court, how many days did the trial or evidentiary hearing last?

N/A days

17. Oral argument. Would you object to submission of this appeal for disposition without oral argument?

Yes ☐ No ☒

TIMELINESS OF NOTICE OF APPEAL

18. Date district court announced decision, sentence or order appealed from 10/22/15

19. Date of entry of written judgment or order appeal from 10/26/15

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

N/A

20. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the district court

(a) Was service by delivery ☐ or by mail ☒.

21. If the time for filing the notice of appeal was tolled by a post judgment motion,

(a) Specify the type of motion, and the date of filing of the motion:

Arrest judgment _____

Date filed _____

New trial _____

Date filed _____

(newly discovered evidence)

New trial _____

Date filed _____

(other grounds)

(b) Date of entry of written order resolving motion N/A

22. Date notice of appeal filed 11/12/15

23. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015(2), or other
NRAP 4(b)

SUBSTANTIVE APPEALABILITY

24. Specify statute, rule or other authority that grants this court jurisdiction to review from:

NRS 177.015(1)(b) _____	NRS 34.560 _____
NRS 177.015(1)(c) _____	NRS 34.575(1) _____
NRS 177.015(2) _____	NRS 34.575(2) _____
NRS 177.015(3) _____	Other (specify) <u>NRAP 4(b)</u>
NRS 177.055 _____	

VERIFICATION

I certify that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief.

KEVIN M. GIPSON

Name of appellant

2/12/16
Date

CARMINE J. COLUCCI, ESQ.

Name of counsel of record

Carmine J. Colucci
Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the ____ day of ____, 2016, I served a copy of this completed docketing statement upon all counsel of record:

☐ by personally serving it upon him/her; or

☒ by mailing it by first class mail with sufficient postage prepaid to the following address(es):

Dated this 12th day of February, 2016.

Kevin M. Gipson
Signature

DODGE A. SLAGLE, DO

1090 Wigwam Parkway, Suite 100
Henderson, Nevada 89074

(702)-454-0201

Emily Reeder, MSW, Mitigation Specialist
Christy L. Craig, Deputy Public Defender
Office of the Public Defender
309 S. Third Street, Second Floor
P.O.Box 552610
Las Vegas, NV 89155-2610

Client Name: Kevin Gipson
Case No. 10F05796X
Date of Evaluation: April 8, 2010

Dear Ms. Reeder and Ms. Craig:

The results of my evaluation of Kevin Gipson are summarized in this report. It is my opinion that Mr. Gipson is competent to stand trial and assist his attorney in the defense of his case.

PSYCHIATRIC FORENSIC EVALUATION

IDENTIFYING INFORMATION: Kevin Gipson is a 26-year-old single African-American male who is in the Clark County Detention Center. Mr. Gipson is charged with First Degree Murder. This evaluation was requested by Christy L. Craig, Deputy Public Defender, to determine whether Mr. Gipson is competent to stand trial and assist counsel with his defense.

Mr. Gipson was evaluated in the Clark County Detention Center on April 8, 2010 for this evaluation. Mr. Gipson was advised that his answers to my questions would be summarized in my report and submitted to his attorney, and likely the Court, and that the usual rules of confidentiality would therefore not apply. He agreed to this interview and evaluation.

Other sources of information for this evaluation include:

1. Case Expense Approval Form
2. News reports, Las Vegas Review-Journal and Channel 8 news.

HISTORY OF CURRENT PROBLEM: Mr. Gipson is accused of murdering his former girlfriend.

CURRENT PSYCHIATRIC SYMPTOMS: Mr. Gipson reports he is having anxiety attacks and anxiety. He reports normal appetite, problems sleeping, and a low energy level. He denies homicide or suicide ideation. He has auditory hallucinations of whispering and laughing, and he has visual hallucinations of dead personages at times. He has had a delusion he was "Jason" (from the horror movies). He reports normal concentration but problems with memory. He has mood swings and racing thoughts. He

Kevin Gipson

Date of Evaluation: April 8, 2010

Case No. 10F05796X

denies having any hallucinations or delusions with reference to the legal process he is involved in.

PAST PSYCHIATRIC HISTORY: Mr. Gipson reports he has taken Invega and Risperdal in the past. He was hospitalized three times in 2009 (at Rawson-Neal and North Vista hospitals). Though he has had periods of depression in the past, he denies any history of suicide attempts. He reports he has only had hallucinations and delusions in the presence of mood disturbance. He stated he had run out of medicine due to losing his insurance in November 2009. He reports he was diagnosed both schizophrenia and bipolar disorder in the past. He denies any history of drug or alcohol rehabilitation treatments.

PAST MEDICAL HISTORY: Mr. Gipson reported he suffers from an irregular heart beat, but he is not getting any treatment. He began taking Invega (an antipsychotic medication) on the day before this evaluation. He has no known drug allergies. He smokes approximately one pack of cigarettes per day. He denies alcohol use. He has used marijuana in the past. He denies any other history of recreational substance use.

FAMILY AND SOCIAL HISTORY: Mr. Gipson has never been married and has three sons. He has seven siblings by his mother and an unknown number of siblings with his father. His mother, sister, a cousin, and a maternal aunt have a history of depression. He is unaware of any other family history of psychiatric illness.

He graduated from high school, and states he was a C-student. He has worked in the past as a telemarketer.

LEGAL HISTORY: He has previously been arrested for traffic tickets, domestic violence, and robbery.

MENTAL STATUS EXAMINATION: Mr. Gipson was alert and oriented to person, place and time during the interview. His speech was normal rate, tone and inflection. He was generally cooperative with the interview. His affect was of restricted range, stable, and appropriate to content. His mood was mildly anxious. His thoughts were goal-oriented with tight associations. No hallucinations or delusions were apparent during the interview. His memory for recent and remote events was intact as judged by ability to recount historical information. His intellectual capacity was judged to be average by vocabulary and general fund of knowledge. He named the current President as Obama. He spelled the word "world" backward as "d-l-r-o-w." He was able to recall one of three items at five minutes. His judgment for self-preservation was intact. He denied current homicide or suicide ideation. His insight into his current situation was fair to good.

Mr. Gipson reported he was charged with "Murder." He understood that he could be sentenced to "up to the death penalty" if found guilty. He reported the role of the Judge was "sentences you" and "maintains order." He reported the role of the Prosecuting Attorney was "tries to make a case to put you in prison." He understood the Prosecuting

Kevin Gipson
Date of Evaluation: April 8, 2010
Case No. 10F05796X

Attorney was working against him. He reported the role of his attorney was "try to get the best deal possible." He understood the adversarial nature of the trial process. He reported the role of a jury would be "tell if guilty or innocent." He understood the nature and use of a plea bargain. When asked what he would do if someone told a lie about him in court, he replied, "be upset" and "tell the attorney." He felt able to control himself in court. He believes he is competent to stand trial.

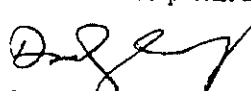
IMPRESSION:

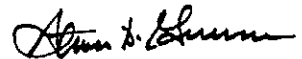
AXIS I: PROBABLE BIPOLAR DISORDER, RECENTLY MANIC,
WITH PSYCHOTIC FEATURES
POSSIBLE SCHIZOAFFECTIVE DISORDER
AXIS II: DEFERRED
AXIS III: NO DIAGNOSIS
AXIS IV: PSYCHOSOCIAL STRESSORS: SEVERE (LEGAL
DIFFICULTIES)
AXIS V: CURRENT GAF:
PAST YEAR GAF: UNKNOWN

FINDINGS:

It is my reasonable medical opinion that Kevin Gipson is currently competent to stand trial and assist his attorney in the defense of his case. Mr. Gipson has the capacity to reasonably understand the charges against him, the possible ramifications of conviction, and the roles of the officers of the court. He has the capacity to cooperate with his attorney in planning a legal strategy and to disclose to him some pertinent facts surrounding the alleged offense. He has the capacity to testify relevantly and to realistically challenge prosecution witnesses. He has the capacity to control his behavior in a courtroom. He has a reasonably self-serving motivation. He is able to learn information relevant to his legal situation and is capable of using the knowledge he has to assist himself.

Mr. Gipson is suffering from delusions and hallucinations, but these symptoms do not render him incompetent at this time. He is in need of continuing psychiatric treatment.


Dodge A. Siegle, DO
Diplomate, American Board of Psychiatry and Neurology, Inc.



CLERK OF THE COURT

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

KEVIN MARQUETTE GIPSON,

Defendant.

CASE#: C264079

DEPT. XVIII

BEFORE THE HONORABLE DAVID BARKER, DISTRICT COURT JUDGE
WEDNESDAY, DECEMBER 7, 2011

RECORDER'S ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS
STATE'S MOTION IN LIMINE REGARDING THE DEFENDANT'S EXPERT
WITNESSES AND REQUEST FOR DISCOVERY; DEFENDANT'S MOTION IN
LIMINE TO PRECLUDE THE STATE FROM MOVING TO ADMIT INTO
EVIDENCE PHOTOGRAPHS PREJUDICIAL TO KEVIN GIPSON; DEFENDANT'S
MOTION IN LIMINE TO BAR THE ADMISSION OF CUMULATIVE VICTIM
IMPACT EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE;
CALENDAR CALL

APPEARANCES:

For the State:

ROBERT BRAD TURNER, ESQ.
Deputy District Attorney

For the Defendant:

CHRISTY CRAIG, ESQ.
Deputy Public Defender

RECORDED BY: CHERYL CARPENTER, COURT RECORDER

1 WEDNESDAY, DECEMBER 07, 2011 AT 9:02 A.M.

2
3 THE COURT: C264079, State of Nevada versus Kevin Marquette Gipson.
4 The record should reflect the presence of Mr. Gipson in custody with counsel and
5 representative of the State.

6 Time set for pending motions in limine from both -- both sides and
7 calendar call. The information I have is this matter is negotiated. I received the
8 Guilty Plea Agreement. Ms. Craig is assisting Mr. Gipson in custody.

9 Is this case negotiated?

10 MS. CRAIG: It is, Judge.

11 THE COURT: What is the negotiation?

12 MS. CRAIG: Mr. Gipson is going to be pleading guilty today to one count of
13 first degree murder with use of a deadly weapon. We have agreed to stipulate to a
14 sentence of 20 to life on the count of first degree murder. We've retained the right to
15 argue on the deadly weapon for between 4 and 8 years on the bottom end on the
16 deadly weapon enhancement. The State's agreed that life without possibility of
17 parole is not going to be considered as a potential penalty in this case.

18 THE COURT: Counsel, is that an accurate statement of the negotiations?

19 MR. TURNER: Yes, Your Honor.

20 MS. CRAIG: I'm also going to ask the Court to allow Mr. Gipson to enter a
21 plea of guilty but mentally ill, additionally.

22 THE COURT: Now, let's make the record clear that I was informed this
23 morning by both sides in chambers that it was the intent of the Defendant to enter
24 the plea of guilty by mentally ill consistent with NRS 174 -- the provisions of NRS
25 174 that all have agreed procedurally that the method by which we take this plea or

1 that decision is not reflected in the Guilty Plea Agreement, and that the plea -- the
2 procedure for taking the plea would be the same as we would in any other action.
3 That the balance of the decisions that need to be made as a consequence of that
4 decision would occur at sentencing with the burden on the defense by
5 preponderance of the evidence as outlined under those provisions.

6 Is true, Ms. Craig?

7 MS. CRAIG: Yes, Judge.

8 MR. TURNER: And it's correct, Judge. The State isn't agreeing to that, but
9 the State recognizes the Court needs to make that finding if the evidence supports
10 it.

11 THE COURT: All right. So that's -- the minutes will reflect it's -- that -- it's
12 contemplated that that is the decision.

13 Mr. Gipson, is your full name Kevin Marquette Gipson?

14 THE DEFENDANT: Yes, it is.

15 THE COURT: How old are you, Mr. Gipson?

16 THE DEFENDANT: Twenty-eight.

17 THE COURT: How far did you go in school?

18 THE DEFENDANT: I graduated.

19 THE COURT: High school?

20 THE DEFENDANT: [Inaudible response.]

21 THE COURT: Is that a yes?

22 THE DEFENDANT: Yes.

23 THE COURT: So you read, write and understand the English language?

24 THE DEFENDANT: Yes.

25 THE COURT: Now your attorney has been assisting you. Ms. Craig indicates

1 that based upon her conversations and efforts with you, in her mind, and based
2 upon her background, training and expertise frankly, that she's comfortable in you
3 proceedings this morning that you appear to her, at least, to understand what this
4 process is. Is that true?

5 THE DEFENDANT: Yes.

6 THE COURT: Okay. Have you received a copy of the -- well, frankly, the
7 original charging document that was filed in this case that you indicated you were
8 not guilty of, that's the Indictment, that's attached as Exhibit 1 to a Guilty Plea
9 Agreement. Do you have a copy of that with you right now?

10 THE DEFENDANT: Yes.

11 THE COURT: Now, you recall when you went -- entered your original plea
12 you went through it and you indicated you understood the elements of that offense;
13 that you had a chance to talk to your lawyer. Do you need any more time to talk to
14 Ms. Craig about those -- the elements of that offense and the allegation there before
15 I ask you again whether you've changed your plea?

16 THE DEFENDANT: No.

17 THE COURT: All right. So how do you plead to that charge, murder with use
18 of a deadly weapon -- first degree murder with use of a deadly weapon; guilty or not
19 guilty?

20 THE DEFENDANT: Guilty.

21 THE COURT: Before I accept your plea of guilty I must be satisfied that the
22 plea is freely and voluntarily entered and that you're doing so knowingly. Are you
23 pleading guilty because in truth and in fact you are guilty?

24 THE DEFENDANT: Yes.

25 THE COURT: Has anyone forced you or coerced you to enter this plea?

1 THE DEFENDANT: No.

2 THE COURT: Has anybody made any promises other than what's been
3 stated here in open court and frankly contained in the first page of the Guilty Plea
4 Agreement to get you to plead guilty?

5 THE DEFENDANT: No.

6 THE COURT: You understand -- so no promises. Now the Guilty Plea
7 Agreement I just referred to -- I'm looking at the original of that document. On page
8 five of that Guilty Plea Agreement I see a signature under what I believe to be the
9 signature line for you, Mr. Gipson. Is this your signature on this document?

10 THE DEFENDANT: Yes.

11 THE COURT: All right. Did you sign it today?

12 THE DEFENDANT: Yes.

13 THE COURT: Did you sign it after you read it -- carefully read it and went
14 through it with your lawyer?

15 THE DEFENDANT: Yes.

16 THE COURT: Did she -- when you carefully read this document did you
17 realize that you were waiving valuable constitutional and procedural rights by
18 entering this plea?

19 THE DEFENDANT: Yes.

20 THE COURT: Did you talk to your lawyer about all those rights?

21 THE DEFENDANT: Yes.

22 THE COURT: Did she explain to you all this important information to your
23 satisfaction?

24 THE DEFENDANT: Yes.

25 THE COURT: Are you satisfied with her presentation of you?

1 THE DEFENDANT: Yes.

2 THE COURT: So you understand that the range of punishment for first
3 degree murder with use of a deadly frankly is potentially life without the possibility of
4 parole. That is a consequence of this negotiation -- parties are stipulating. That
5 means they're agreeing to a 20 years on the bottom in Nevada Department of
6 Correction, life with the possibility of parole on the top, and a consecutive 4 years to
7 8 years for the enhancement of deadly weapon. And those will run consecutive to
8 one another. So you're looking at a life with 20, plus a consecutive on top of that of
9 4 to 8 years structured. Does that make sense to you?

10 THE DEFENDANT: Yes.

11 THE COURT: Based upon knowing that that's the anticipated penalty in this
12 case does that change your mind at all regarding the voluntary nature of this plea?
13 Are you doing this freely and voluntarily?

14 THE DEFENDANT: Yes.

15 THE COURT: Okay. You understand frankly that sentencing is up to me.
16 That no one is in a position to promise you leniency, probation, any special
17 treatment. In fact, this is a non-probationable case. You're looking at a life
18 sentence and you're headed to prison as a consequence. Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: Does that again change your mind at any -- about any nature
21 of this plea; that you're still doing this voluntarily?

22 THE DEFENDANT: Yes.

23 THE COURT: Do you have any questions that you would like to ask me?

24 THE DEFENDANT: No, sir.

25 THE COURT: Any questions that you would like to ask Ms. Craig?

1 THE DEFENDANT: No.

2 THE COURT: Now you indicate that you're guilty of this offense. You
3 understand that at the time of sentence, based upon what your attorney said, that
4 this plea is going to be noted in the minutes and the public record as guilty but
5 mentally ill. Do you understand that?

6 THE DEFENDANT: Yes.

7 THE COURT: That at the time of sentence we're going to have a hearing and
8 Ms. Craig is going to present the information to me and I have to make a finding --
9 the burdens on the defense to prove that mental illness. That if you are -- if it's
10 proved to my satisfaction I make findings that ultimately might affect your custody
11 status, what happens to you in prison and how you are handled in prison, but it
12 won't change the fact you're headed to prison for the same life structure that we've
13 been talking about today. Do you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: Does that change your mind at all?

16 THE DEFENDANT: No.

17 THE COURT: All right. Let's look to see if there's a factual basis to support
18 this plea. The Indictment alleges that on the 25th day of March, 2010, that you did
19 wilfully, feloniously, without authority of law, and with malice aforethought kill
20 Britney Lavoll, a human being, by shooting at or into the body of Britney Lavoll with
21 a deadly weapon, to-wit: a firearm, said killing having been, one, willful, deliberate
22 and premeditated and or committed by Defendant lying in wait to commit the killing.
23 Do you admit your guilt to that offense?

24 THE DEFENDANT: Yes.

25 THE COURT: Do you admit to the -- shooting Ms. Lavoll I believe in the head

1 with a firearm?

2 THE DEFENDANT: Yes.

3 THE COURT: All right. The Court finds the guilty plea of Mr. Gipson appears
4 to be freely and voluntarily made. He appears to understand the nature of the
5 offense, the consequences of his plea. I therefore accept his plea of guilty.

6 This matter's referred to the Department of Parole and Probation for the
7 preparation of a Presentence Investigation and Report and it's passed for
8 sentencing on this date?

9 MR. TURNER: And, Judge, we we're requesting a Friday date, if the Court
10 recalls.

11 THE COURT: Let's set it on one of the pretrial conference dates.

12 THE COURT CLERK: It's going to be February 10th at 1:30.

13 MR. TURNER: Thank you.

14 THE COURT: Now we're going to vacate State's motion in limine regarding
15 defense expert witness; defense motion in limine to preclude State from admitting
16 evidence of photographs. Frankly, all pending motions. Trial date for Monday is
17 vacated as a consequence of entry of plea. Also the 12-12 notice of motion in limine
18 regarding jail phone all off calendar pending sentencing on February 10th.

19 Mr. Gipson, do you understand we're headed to sentence -- sentencing
20 hearing on the 10th of February?

21 THE DEFENDANT: Yes.

22 THE COURT: And we're not having a trial. Do you understand that?

23 THE DEFENDANT: Yes.

24 THE COURT: Anything else either side?

25 MR. TURNER: No, Your Honor.

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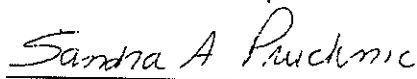
MS. CRAIG: We're good. Thank you.

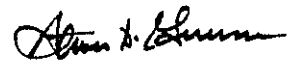
THE COURT: All right. Very good.

MR. TURNER: Thank you, Judge.

[Proceedings concluded at 9:11 a.m.]

ATTEST: Pursuant to Rule 3(c)(d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.


SANDRA PRUCHNIC
Court Transcriber



CLERK OF THE COURT

1 RTRAN

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5 STATE OF NEVADA,

6 Plaintiff,

7 vs.

CASE NO. C264079

DEPT. XIX

9 KEVIN MARQUETTE GIPSON,

10 Defendant.
11
12

13 BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE
14 THURSDAY, SEPTEMBER 10, 2015

15 **RECORDER'S TRANSCRIPT OF**
16 **EVIDENTIARY HEARING**
17

18 **APPEARANCES:**

19 For the State:

RYAN MACDONALD, ESQ.
Deputy District Attorney

21 For the Defendant:

CARMINE COLUCCI, ESQ.

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25 RECORDED BY: CHRISTINE ERICKSON, COURT RECORDER

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I N D E X

PAGE

WITNESS: KEVIN M. GIPSON

DIRECT EXAMINATION BY MR. COLUCCI 6

CROSS-EXAMINATION BY MR. MACDONALD 12

WITNESS: CHRISTY CRAIG, ESQ.

DIRECT EXAMINATION BY MR. COLUCCI 21

CROSS-EXAMINATION BY MR. MACDONALD 31, 43

1 Thursday, September 10, 2015 -- 9:50 a.m.

2
3 THE COURT: On my criminal calendar, State of Nevada versus Kevin
4 Gipson in C264079.

5 THE CLERK: Can you state your appearances and Bar number for the
6 record.

7 MR. MACDONALD: Ryan MacDonald for the State, 12615.

8 MR. COLUCCI: Carmine Colucci for Kevin Gipson. He is in custody.
9 Bar Number 000881.

10 THE COURT: Let's see if he's here. I'm sure that -- yeah.

11 MR. COLUCCI: He's here.

12 [Pause]

13 THE COURT: Okay. This is on for Defense petition for writ of habeas
14 corpus. I've limited the hearing to argument regarding a hearing regarding his
15 mental issue and prior counsel's advice.

16 As reading back through this, he entered into negotiations. Part
17 of his claim was that his counsel failed to investigate his mental issues;
18 coerced him into his plea. A lot of it was already addressed with regards to a
19 motion to dismiss and that. But I've read through Judge Barker's minutes and
20 his position on allowing a hearing. There was even an argument about being
21 time barred that the State applied with the Court. A previous judge had
22 already ordered that this be held.

23 And when I went back through it, I think it can be determined
24 only on the issues involving his mental issues, what counsel did with regards
25 to that and what advice that she gave him with respect to that in regards to

1 his plea. Right?

2 MR. COLUCCI: Right. And I think the coercion comes into that --
3 because if he had mental health issues at the time he entered his plea, the
4 coercion aspect of it as he's outlined is he -- he was not fully aware of what
5 was going on, and he felt coerced to take the negotiation and because he
6 wasn't on his meds and the other reasons that we've set forth.

7 THE COURT: Okay. I understand that. I understand what your
8 position is, and that's why --

9 MR. COLUCCI: So it's just -- we're just going to touch that
10 tangentially. We're not going to make a big deal out of that, but I just wanted
11 to let you know because --

12 THE COURT: Okay.

13 MR. COLUCCI: -- I don't want to be precluded from discussing that.

14 THE COURT: No, that's fine. You're fine.

15 MR. MACDONALD: And before we get started, I'd like to clarify the
16 procedural issue. From looking at the record -- I wasn't here at the time -- but
17 it looks like what happened is that Mr. Colucci was appointed, and a briefing
18 schedule was set outside of the one-year time bar. And so the Court found
19 that since it set the briefing schedule like that, that there was good cause to
20 excuse the untimely filing of petition. Is that understanding --

21 THE COURT: Yeah, that's --

22 MR. MACDONALD: Is that what you understand?

23 THE COURT: Yes, but it was Judge Barker.

24 MR. COLUCCI: It was Judge Barker and --

25 THE COURT: And so what I've done, to be honest with you, in reading

1 his ruling, rather than to readdress it, I just went ahead and looked at the
2 allegations in the petition, and I narrowed them down to these two -- these
3 issues. I figured I'd go ahead and hear -- if, in fact -- to be honest with you, if,
4 in fact, we are hearing this independent of any time bar issue, these would be
5 the issues, I believe, that need to be brought, brought to hearing.

6 MR. COLUCCI: And very briefly on that -- that one issue. I was called
7 in. I was appointed. Did not have any part of the record. Didn't have the
8 time -- the time limit on the filing of the petition. I had 19 days before the
9 one-year time ran. Did not get the full record until after that time period, and
10 the judge had already set out 40 days or 45 days or something like that past
11 the time bar period. So I just wanted to make that clear.

12 THE COURT: Okay. That's fine. All right. Let's get started.

13 MR. COLUCCI: I'm going to call Mr. Gipson first.

14 THE COURT: Okay. Mr. Gipson, you can stay right there.

15 THE DEFENDANT: All right.

16 THE COURT: You're fine.

17 THE MARSHAL: Stand and raise your right hand.

18 **KEVIN M. GIPSON**

19 being first duly sworn as a witness, testified as follows:

20 THE CLERK: Go ahead and have a seat. Will you please state your full
21 name, spelling your first and last name for the record.

22 THE WITNESS: Kevin Marquette Gipson, K-E-V-I-N, G-I-P-S-O-N.

23 THE CLERK: Thank you.

24 ///

25 ///

1
2 **DIRECT EXAMINATION**

3 **BY MR. COLUCCI:**

4 Q You are the Defendant in this case?

5 A Yes.

6 Q And you were convicted previously of murder with use of a
7 deadly weapon?

8 A Yes, sir.

9 Q Is that right? You're presently incarcerated at High Desert?

10 A Yes.

11 Q And prior to the time -- you took a plea in this case; is that
12 correct?

13 A Yes.

14 Q And part of the time you took a plea, you consulted with your
15 attorney? That would be Ms. Christy Craig.

16 A On the day I was to sign the plea.

17 Q Okay. You had previously -- she's been your lawyer throughout
18 this whole case; is that right?

19 A Yes.

20 Q And you talked to her specifically prior to entry of plea about
21 your mental health issues; is that correct?

22 A Yes.

23 Q Did you tell her what your mental health issues were?

24 A Yes.

25 Q What were your mental health issues at that time?

A I was diagnosed as being bipolar and schizophrenic.

1 Q And were you prescribed medication?
2 A Yes.
3 Q And at the time of the crimes in this case, were you on your
4 medication?
5 A No, I was not.
6 Q As part of Ms. Craig's preparation to take you through the plea
7 bargain process, were you ever evaluated by a psychologist or psychiatrist?
8 A No.
9 Q Okay. Did you advise her that you had previously been in --
10 under healthcare at an institution?
11 A Yes.
12 Q When did you first tell Ms. Craig about your medical -- your
13 health -- mental health issues?
14 A The first day I met her, but I don't remember what the date
15 was.
16 Q Okay. Prior to accepting the negotiation, did you have
17 discussions with Ms. Craig about the guilty plea agreement?
18 A I did -- did she come talk to me before I signed it?
19 Q Yes.
20 A No.
21 Q When did you first get the guilty plea agreement?
22 A When I went to court.
23 Q And when you went to court to enter your plea, is that what
24 your testimony is?
25 A Yes.

1 Q Okay. Did you spend any time with her prior to entry of the
2 guilty plea? Did you spend any time with her going over the guilty plea
3 agreement?

4 A Before I went to court?

5 Q Yes.

6 A No.

7 Q And in court did you spend time with her?

8 A She came and talked to me for a couple minutes. She told me
9 to look it over.

10 Q While you were in custody?

11 A Yes.

12 Q And did she sit there and go over anything in there with you?

13 A Not really.

14 Q At that time were you on any medication?

15 A I was on Evadra (phonetic).

16 Q What's that?

17 A It's an anti-psychotic, anti-depressant.

18 Q And what was that for?

19 A For hearing voices and seeing moving objects.

20 Q Did you feel like you were in your right state of mind to consider
21 the offer and to accept it?

22 A No, because the medicine wasn't working.

23 Q Did you later change medicine?

24 A Yes.

25 Q What did you change to?

1 A Xyprexa and Benadryl and two other medicines that I don't take
2 no more, Topamax and Risperdal.
3 Q Okay. Prior to entering into your guilty plea agreement, did you
4 go through the facts and circumstances of your case with Ms. Christy?
5 A What do you mean by that?
6 Q Did you discuss your case with her?
7 A Before the guilty plea?
8 Q Yes. Before you went to court. Not that day, but prior to that.
9 A I can't remember. I don't even remember talking -- I'm not --
10 Q Okay. Let me simplify it. Did you -- at any time during Ms.
11 Christy's representation, did she come to visit you and go over your case with
12 you?
13 A Oh. Yes.
14 Q How many times; do you remember?
15 A No, I don't remember. It was probably like three or four times.
16 Q And did you discuss the facts of your case with her?
17 A What do you mean the facts?
18 Q Did you discuss what happened?
19 A Oh. Yes.
20 Q Did she provide you with a copy of the discovery?
21 A No.
22 Q Did you ask for a copy of the discovery?
23 A Yes, several times.
24 Q You -- subsequently, after you were sentenced, you filed a
25 motion to withdraw your plea?

1 A Yes.

2 Q Why did you do that?

3 A Because I never wanted to take the -- take the guilty plea

4 anyways. I wanted to go to trial. But the day I came to court, she handed me

5 the guilty plea and said I was going to accept that, guilty but mentally ill, and

6 I was -- that day I felt like I was put on the spot, pressured to take the deal.

7 So that's why I signed it.

8 Q Did you plead guilty to guilty but mentally ill?

9 A That's what she said I was pleading to.

10 Q Did you discuss with her at any point the possibility of appealing

11 the-adverse pretrial rulings?

12 A No.

13 Q And any time during her representation, did you go through any

14 mental health treatment or evaluation?

15 A No.

16 Q When you talk about coercion, was there any kind of force or

17 pressure used against you in order to get you to plead guilty?

18 A Well, I felt like it was pressure because she was -- she was like

19 saying that you need to take this and all that. It was right on the spot. It was

20 like she came with it and said, this is the deal, you should sign it. So I was

21 going by what she said, so I just signed it.

22 Q Did you tell her you wanted to go to trial?

23 A Yes.

24 Q And how did she respond to that?

25 A I didn't tell her that day I wanted to go to trial, but when she

1 came and met me, I was like, I want to go to trial.

2 Q What do you mean when she came down --

3 A When she came to visit me.

4 Q Is that before that?

5 A Before that.

6 Q Before you took the deal?

7 A Uh-huh.

8 Q Now, you were questioned by the District Court judge at the

9 entry of plea wherein he went through your understanding of what the plea

10 bargain was.

11 A Uh-huh.

12 Q Do you remember that?

13 A I -- I vaguely remember that. I don't remember the whole thing

14 because the medicine I take messes with my memory.

15 Q Okay. Were you on any -- you were on medication at the time

16 you entered your plea, right?

17 A Yes.

18 Q And you said it wasn't working?

19 A No.

20 Q What effect did it not working have on you?

21 A Because I'm still hearing voices and still seeing things.

22 Q Did you tell Ms. Christy that?

23 A I can't remember.

24 Q You appeared to answer all of the questions put to you by the

25 judge. If you're hearing voices and not understanding the questions the judge

1 is asking you, how are you able to answer those questions?

2 A I was just going -- I was just answering from what Ms. Christy
3 Craig told me to answer.

4 Q Was she supposedly telling you things during the course of the
5 plea?

6 A Uh-huh.

7 Q Were you asking her --

8 THE COURT: Is that a yes, sir?

9 THE WITNESS: Yes.

10 BY MR. COLUCCI:

11 Q Were you answering questions -- or were you asking questions?

12 A No, I wasn't asking any questions.

13 MR. COLUCCI: I have nothing further.

14 THE COURT: Cross?

15 MR. MACDONALD: Thank you.

16 **CROSS-EXAMINATION**

17 **BY MR. MACDONALD:**

18 Q Are you saying that during your plea, Ms. Craig was actually
19 telling you what each answer to these questions should be?

20 A Well, right before I would answer, she -- she looked at me and
21 shake her head yes, so that's what I said, yes.

22 Q So when she -- when you're supposed to be responding no,
23 she's shaking her head no to each and every question?

24 A What do you mean?

25 Q How many questions did she tell you how to answer?

1 A I can't remember.

2 Q So only the questions where you would answer yes, she gave
3 you the answer?

4 A Well, when he asked me do I understand, she said yes, too.
5 And that's when I said yes.

6 Q But the questioning was a lot longer than that. Do you recall
7 that, sir?

8 A I can't remember.

9 Q So you only recall one answer where she told you -- where she
10 supplied the response for you?

11 A From what I remember.

12 Q Okay. Do you remember if Ms. Craig talked to the press about
13 your case?

14 A I don't know, but it was really -- it was news.

15 Q Yeah. So you don't -- you don't have any recollection of that?

16 A I don't know if she talked to them.

17 Q Do you know if she talked to them about your significant mental
18 issues?

19 A I don't know. Like I say, when the news was there, she would
20 just stand by me. She said -- she would stand in front of me so the camera
21 couldn't get a picture of me.

22 Q Okay. Sir, what's your understanding of the effect of winning
23 this petition?

24 MR. COLUCCI: Objection; relevancy.

25 THE COURT: Overruled.

1 THE WITNESS: What's my understanding?

2 BY MR. MACDONALD:

3 Q Yes, sir.

4 A All I know is it's an evidentiary hearing.

5 Q So this is -- this is a petition for a writ of habeas corpus, so this
6 proceeding is to test the legality of your custody. Do you know what the
7 effect is if you win?

8 A No.

9 Q Okay. Do you know that this goes back to a pretrial posture,
10 and you could potentially go to trial and get a different sentence?

11 A Nobody talked to me about this.

12 MR. MACDONALD: I have nothing further.

13 MR. COLUCCI: Nothing additional.

14 THE COURT: Mr. Gipson, do you recall when you -- when the court
15 was asking you questions about -- about the crime and what you were
16 pleading to?

17 THE WITNESS: I can't -- I really can't say because it was so long ago,
18 I really don't remember what he was asking me.

19 THE COURT: And you read through the paperwork that --

20 THE WITNESS: I glanced through it. I didn't get to read through it.

21 THE COURT: So you've not looked at your own transcripts where -- to
22 every particular question the court asked -- for example, "Has anyone forced
23 you or coerced you to enter this plea," your response was no"?

24 THE WITNESS: Well, she told me to say no. She was -- she was --
25 she was right next to me.

1 THE COURT: Okay. So when someone says -- when the court asked
2 you, "Has anyone forced you or coerced you to enter this plea," you're telling
3 me that she coerced you into entering this plea, and you stood in front of that
4 judge and said no?

5 THE WITNESS: Yes.

6 THE COURT: Because she told you no?

7 THE WITNESS: She said -- no, she didn't actually tell -- she looked at
8 me and she just shake her head like this.

9 THE COURT: Then why would you -- if she's coercing you into doing
10 something, into entering this plea, tell me what it was in your mind that was
11 coercing you into entering into this plea? What was she doing to force you to
12 take this plea?

13 THE WITNESS: (No audible response).

14 THE COURT: What was she telling you or what was she doing that
15 you felt coerced you or forced you to take a plea to murder with use of a
16 deadly weapon?

17 THE WITNESS: I only took a plea because I didn't -- I didn't want the
18 life without.

19 THE COURT: Okay. So tell me where she was coercing you in that.

20 THE WITNESS: Because she was standing next to me. She was
21 telling me what to say.

22 THE COURT: So if someone's standing and telling you what to say,
23 that's coercive as far as you're concerned?

24 THE WITNESS: I don't know. I don't understand really what you
25 saying.

1 THE COURT: Okay. Well, it says here, another question: "You
2 carefully read this document. Did you realize that you were waiving valuable
3 constitutional and procedural rights by entering this plea?" and you said yes.
4 Did she tell you to say yes to that, too?

5 THE WITNESS: I can't remember.

6 THE COURT: Okay. Do you recall the Court talking to you specifically
7 what you were agreeing to; that you were stipulating to 20 years to life with
8 the possibility of parole and a consecutive 4 to 8 years for the deadly weapon
9 enhancement? Do you recall that?

10 MR. COLUCCI: 48 months, Your Honor.

11 THE COURT: It's 4 years to 8 years. Yeah.

12 MR. COLUCCI: I'm sorry, maybe I misunderstood what you said.

13 THE COURT: A consecutive 4 to 8 years for the deadly weapon
14 enhancement. It says 20 to life with the possibility of parole, plus you have to
15 do 4 to 8 years on top of that for the weapon enhancement. Do you recall the
16 Court asking you about that?

17 THE WITNESS: (No audible response).

18 THE COURT: Do you recall that?

19 THE WITNESS: Something similar to that, but I don't know if it was
20 exactly that.

21 THE COURT: Okay. Do you recall when the Court asked you: "Are
22 you satisfied with her representation of you?"

23 THE WITNESS: I don't -- I don't remember him asking me that.

24 THE COURT: Okay. And then the Court said: "Based upon knowing
25 that there's an anticipated penalty" -- in this case meaning that you are going

1 to prison, and the question then is: "Are you freely and voluntarily entering
2 into this plea knowing that?" Do you recall answering yes?

3 THE WITNESS: I don't remember that question.

4 THE COURT: Okay. And the Court said: "You're looking at a life
5 sentence, and you're headed to prison as a consequence. Do you understand
6 that?" and you answered yes.

7 THE WITNESS: I don't remember that question.

8 THE COURT: And then the Court says: "Does that change your mind
9 about any nature of this plea? Are you still doing this voluntarily?" and you
10 said yes.

11 THE WITNESS: I don't remember that question either.

12 THE COURT: So you don't remember as she stood there and shook her
13 head and told you to answer those questions yes?

14 THE WITNESS: No.

15 THE COURT: And it says: "Do you have any questions of the Court?"
16 You said: "No, sir." Did she say to say no, sir?

17 THE WITNESS: She didn't -- we didn't talk about that.

18 THE COURT: Well, it says: "Do you have any questions of the Court?"
19 Did you have any questions of the judge, and your answer to the judge was:
20 "No, sir." Did she say, "Say no, sir"?

21 THE WITNESS: No.

22 THE COURT: And then he said: "Do you have any questions of Ms.
23 Craig?" and you said no.

24 THE WITNESS: I don't remember that one either.

25 THE COURT: Okay. Now, you also signed the guilty plea agreement;

1 do you recall that?

2 THE WITNESS: Well, I thought I was signing the guilty but mentally ill
3 plea.

4 THE COURT: Okay. Well, the Court asked you if you read the guilty
5 plea agreement before you signed it, and you said you did. Are you telling me
6 that you didn't read it?

7 THE WITNESS: I didn't read the whole thing. I only glanced through it
8 because I only had a couple minutes to read it.

9 THE COURT: Now, it says here: "Now, you recall when you went --
10 entered your original plea, you went through it, and you indicated you
11 understood the elements of the offense," that you had the chance -- "have you
12 had a chance to talk with your lawyer?" And then Court says: "Do you need
13 more time to talk to Ms. Craig about these elements and the offense and the
14 allegations before I ask you again when you change your plea?"

15 THE WITNESS: I don't remember him asking me if I need more time. I
16 don't even think I ever heard that.

17 THE COURT: Okay. Sir, how long -- if you remember, how long was
18 this case from the beginning of when you first started litigated it, meaning
19 when you were first in court, possibly in Justice Court, until you took your
20 plea, do you know how long that was?

21 THE WITNESS: Well --

22 THE COURT: Can you estimate it?

23 THE WITNESS: Like two years maybe.

24 THE COURT: Who was your attorney throughout that whole time?

25 THE WITNESS: Christy Craig.

1 THE COURT: Okay. And it's your testimony here today that she came
2 and talked to you three times about this case?
3 THE WITNESS: She didn't -- she only came three or four times. She
4 didn't come that much.
5 THE COURT: Did she come before you did your -- went to your
6 preliminary hearing stage down in Justice Court?
7 THE WITNESS: I don't think so. I can't remember. I don't know.
8 THE COURT: Well, what happened in the preliminary hearing stage?
9 THE WITNESS: I can't remember.
10 THE COURT: Okay. His indictment --
11 MR. MACDONALD: Judge, I believe it was an indictment.
12 THE COURT: I know, but he's being held at the preliminary hearing
13 stage. Were you told that this was possibly going to go to an indictment?
14 THE WITNESS: No.
15 THE COURT: So you were never furnished with a --
16 THE WITNESS: I got the indictment papers.
17 THE COURT: But were you ever furnished --
18 THE WITNESS: That's when I was locked up.
19 THE COURT: Were you ever furnished with what they call a *Markham*
20 notice, saying if you want to testify at the -- at the indictment, you can do so?
21 THE WITNESS: No, I never got that. I never --
22 THE COURT: So your attorney never gave that to you?
23 THE WITNESS: No.
24 THE COURT: Okay. And -- so did you have a hearing at all down in
25 Justice Court, do you recall, before another judge?

1 THE WITNESS: About the -- when I got indicted?

2 THE COURT: No, before that. When you get indicted, they send you
3 up here. I know that.

4 THE WITNESS: Oh. I can't remember.

5 THE COURT: Did you have any hearing on bail or anything like that?

6 THE WITNESS: No.

7 THE COURT: Okay. What about when you got to District Court, did
8 you have a hearing on your indictment?

9 THE WITNESS: I never went to court. I -- I didn't -- when I got --
10 when I got served the indictment papers, I didn't go to court for that.

11 THE COURT: Did you come up here, though, to District Court on the
12 indictment? You were being charged with murder with use of a deadly
13 weapon.

14 THE WITNESS: Yes.

15 THE COURT: Okay. So how long do you think you were up in District
16 Court before you entered into your plea?

17 THE WITNESS: Almost two years.

18 THE COURT: Was it scheduled for trial a number of times?

19 THE WITNESS: I can't remember.

20 THE COURT: Did it -- did it come up for trial and get continued?

21 THE WITNESS: I -- I can't remember that either. I think so, but I'm
22 not sure.

23 THE COURT: When was it that Ms. Craig -- if you remember, when
24 was it that she started talking to you about negotiations that you -- the one
25 that you entered -- that you signed your agreement to?

1 THE WITNESS: She never talked to me about it. I -- one time --

2 THE COURT: So it was the day you signed it?

3 THE WITNESS: The day I signed it.

4 THE COURT: Okay. All right. Do you have any questions as a result
5 of my questions, Mr. Colucci?

6 MR. COLUCCI: No, Your Honor.

7 THE COURT: Do you have any questions as a result of my questions?

8 MR. MACDONALD: No, Your Honor.

9 THE COURT: Okay. All right. Thank you, Mr. Gipson. You can just
10 stay right there. He's got -- you guys weren't taking him, were you?

11 THE CORRECTIONS OFFICER: No.

12 THE COURT: Okay. Okay. Do you have any other witnesses?

13 MR. COLUCCI: Yes, Ms. Craig.

14 THE COURT: Okay. Jim, can you get Ms. Craig for me.

15 [Pause]

16 **CHRISTY CRAIG, ESQ.**

17 being first duly sworn as a witness, testified as follows:

18 THE CLERK: Please be seated. Can you please state your full name,
19 spelling your first and last name for the record.

20 THE WITNESS: Christy Craig, C-H-R-I-S-T-Y, C-R-A-I-G.

21 THE CLERK: Thank you.

22 **DIRECT EXAMINATION**

23 **BY MR. COLUCCI:**

24 Q Your occupation, please.

25 A I'm a lawyer at the Clark County Public Defender's Office.

1 Q How long have you been there?
2 A 1998.
3 Q Are you acquainted with Mr. Gipson?
4 A I am.
5 Q And did you represent Mr. Gipson in his murder case?
6 A I did.
7 Q Okay. Did you represent Mr. Gipson from the inception of that
8 case?
9 A Yes.
10 Q And you -- during the course of your preparation for that case,
11 of course, you investigated his background?
12 A Yes.
13 Q And during this pretrial investigation process, you became aware
14 that he had some mental health issues?
15 A Yes, very early on.
16 Q And do you know what those mental health issues were? Do
17 you remember?
18 A I think -- I think it was schizophrenia maybe and bipolar disorder.
19 I'm just not -- I haven't relooked at his diagnoses.
20 Q Okay. Prior to the time -- first of all, this case was negotiated
21 instead of tried, correct?
22 A Yes.
23 Q And as part of that negotiation, you discussed the potential plea
24 bargain with Mr. Gipson, correct?
25 A Yes.

1 Q And was there more than one offer to resolve the case or was
2 there just the ultimate final offer to resolve the case?

3 A I don't think there was more than one offer than just the one.

4 Q And the pretrial phase of Mr. Gipson's case lasted approximately
5 two years?

6 A Yes.

7 Q And during that two-year time period, you went and visited Mr.
8 Gipson?

9 A Yes.

10 Q Do you remember approximately how many times?

11 A No.

12 Q And what was the purpose of those visits?

13 A Each one was different. There were all kinds of reasons.

14 Sometimes it was to talk about very specific things; other times it was just to
15 check in and let him know how things were going.

16 Q Did you go over and talk to him about -- prior to the plea hearing
17 where he accepted the plea bargain, did you go over to the jail and discuss the
18 proposed plea bargain?

19 A I have some notes with me. Is it all right if I take a look?

20 Q Sure, please.

21 A See if I --

22 Q If that would refresh your memory, please do.

23 A It would.

24 [Witness looking through documents]

25 THE WITNESS: You know, I don't have any notes that -- and I just

1 don't recollect how the plea came about. It was after some of the motions
2 were heard. I just don't recall. I don't have a specific note. Typically, I talk
3 about what I think will happen in the event the State makes an offer long
4 before they make an offer.

5 BY MR. COLUCCI:

6 Q And in this case, prior to the time that you went to the actual
7 plea hearing itself, do you recall having a discussion with Mr. Gipson about the
8 proposed contents of that plea bargain?

9 A Do you mean the actual deal or the --

10 Q The actual deal.

11 A I don't recall.

12 Q Do you recall whether or not the initial negotiation was to
13 plead -- for him to plead guilty but mentally ill?

14 A I'm sure that's something I asked for. I don't think the State
15 just offered it. They normally make an offer, and then someone like Mr.
16 Gipson who has a mental illness, I'll ask for the guilty but mentally ill.

17 Q Okay. Do you know whether, in fact, he pled guilty to the first
18 degree murder with use of a deadly weapon, guilty but mentally ill? Do you
19 remember that?

20 A Yes.

21 Q Did he plead to that?

22 A Yes. As I recall, he did.

23 Q Do you recall whether or not you received a proposed guilty plea
24 agreement before the plea hearing was scheduled or at the time of the plea
25 hearing?

1 A I have no idea.

2 Q Do you recall how much time you would've spent with Mr.
3 Gipson to go over the guilty plea agreement?

4 A I don't have a specific memory of talking to Kevin. I can tell you
5 that normally when the State gives me an offer, I go over and explain it and
6 get their agreement. And then the guilty plea agreement is prepared, and I
7 provide it to them and talk about the consequences.

8 Sometimes if the offer is right at the last minute, those things
9 may happen very quickly in time, But usually I have some idea of where I
10 think the State's going to go, and I will have talked about that and told them
11 to consider what they would do in the event the offer did come very quickly so
12 that it wouldn't be the first time they heard it. But I don't have an
13 independent memory of doing that with Kevin.

14 Q Do you recall having a discussion with Mr. Gipson about the
15 waiver of appellate rights that would be contained in the guilty plea
16 agreement?

17 A I don't have an independent memory of that, but I always go
18 over it.

19 Q You're not sure as we -- as you sit here right now whether you
20 did or not?

21 A I'm sure I did, but I don't have an independent memory of doing
22 it specifically with Kevin. I mean, I say the same thing every time. I could
23 probably repeat what I tell everybody quite easily because I literally do the
24 same spiel when it comes to the waiver or rights.

25 Q Did you do any independent investigation into Mr. Gipson's

1 mental health issues?

2 A Yes.

3 Q And what did you do?

4 A We ordered his records from every available source. He had a
5 private doctor named Nwokike that was a little bit hard to track down. We
6 got those records. We got records from a -- I can't remember the name of the
7 private facility. We got -- we kept an eye on his jail records routinely. And I
8 had Dr. Slagle go and see him to do evaluations just for me with regard to
9 Kevin's competency and how he was doing with his mental illness as well
10 whether or not an NGRI plea would be appropriate.

11 Q And did you send Dr. Slagle in to see Kevin; do you remember
12 that?

13 A Twice.

14 Q Twice? Okay.

15 A Yeah.

16 Q Now, prior to Mr. Gipson's sentencing, did you have an
17 opportunity to go over the PSI with him?

18 A I really don't have an independent memory of whether or not we
19 talked about the PSI. I typically ask if there's been any -- if there's any
20 grievous errors that we need to correct before he goes to prison. I do recall
21 that the sentencing was extremely difficult. Despite the fact that it was a -- a
22 set sentence, there was quite a lengthy hearing.

23 Q I'm sorry?

24 A It was a very lengthy hearing that the State presented despite
25 the fact that the sentence was, you know, what it was.

1 Q Was the lengthy hearing caused by the State --

2 A Yes.

3 Q -- reciting the facts and going through their --

4 A No. Well, I mean, it was, but they also -- I recall they played a
5 video, I think, and -- it was just -- it was very long, and it was -- it was
6 emotionally a very difficult sentencing.

7 Q When you went over the plea agreement with Mr. Gipson, was
8 he on any kind of medication?

9 A We were keeping an eye on his medication. As I recall, I don't
10 think that he was taking any, and he seemed to be doing quite well at the jail.
11 I wasn't extraordinarily concerned about whether or not he was competent
12 pursuant to *Dusky*. I had felt fairly confident, plus I had had him evaluated by
13 Dr. Slagle. So it was something I was really keeping an eye on, and if I had
14 concerns, I would have stopped and had a quick eval done to make sure.

15 Q Okay. Mr. Gipson filed a motion to withdraw his plea at some
16 point after sentencing, correct?

17 A He did.

18 Q Did you attend that motion or did you represent him at that
19 motion?

20 A Yes. I think I was still -- I was still appointed, and I requested --
21 and I thought it was appropriate. In fact, I think the Court should have done
22 it. I think given his mental health history, I thought it was prudent for the
23 Court to appoint alternative counsel to represent him just to determine
24 whether or not as a result of his mental illness there was any grounds to
25 withdraw his plea. And I believe I requested that alternative counsel be

1 appointed for that purpose.

2 Q And the judge denied that?

3 A I believe he did.

4 Q Did you discuss with Mr. Gipson appealing that ruling?

5 A No, I think I withdrew. I think my request to withdraw was
6 granted that same day so that he could pursue whatever -- because -- you
7 know, he was really in some way saying that I was ineffective, and that's not
8 really an appeal that I could do for him, and I thought it was appropriate that
9 someone else should be appointed.

10 But in the event the Court didn't do that, I withdrew so that he
11 could -- he could proceed that way, and I believe I sent him a letter describing
12 the appellate process and explaining -- you know, there's timing issues that are
13 critical, I think, and I had sent him a letter in the prison kind of describing how
14 that process works.

15 Q Do you specifically recall doing that?

16 A I know that I did it because I printed the letter off -- I mean, I'm
17 assuming that my secretary now that I told her to.

18 Q Okay. Did you -- after sending that letter, did you ever get a
19 response from Mr. Gipson?

20 A Not that I recall. And I'm fairly certain that the Court granted
21 my request to withdraw.

22 Q And I'll just tell you that it did. They did. He did on September
23 26th of 2012.

24 A And that's the same day that I sent the letter. I must have
25 come back from court and sent the letter on September 26th.

1 Q Do you recall telling me -- the Court at the time that you
2 withdrew that Mr. Gipson does suffer from mental illness and that you thought
3 it was a legitimate ground for some type of action?

4 A I thought that -- he absolutely suffered from a mental illness,
5 and I know because of my -- my work in competency court that those kind of
6 illnesses can cycle; people can be better, and then they can get worse. And
7 given his mental health history, which was legitimate and real and I had
8 documents to prove that, that I thought if that was his grounds, it should be
9 explored.

10 And I thought it was prudent for the Court to appoint someone
11 to represent him, to make that determination whether or not his mental health
12 history, you know, could have supported a legitimate motion to withdraw his
13 guilty plea. I don't think that something that I could do. I thought the Court
14 needed to appoint someone to make that assessment.

15 Q Okay. And with respect to -- he made a coercion claim in the
16 PCR that you exerted some type of pressure on him to accept the negotiation
17 the way it was put to him at the time of the plea agreement. Can you address
18 kind of a -- what you did with him at the time that you discussed with him
19 accepting the plea agreement?

20 A Well, one thing that I am, as a defense attorney, is I am brutally
21 frank. I don't hide the bad things, and I share them. In Kevin's case, there
22 was literally no physical evidence of any kind to tie him to this crime. There
23 were no witnesses. There was no DNA. There was no gun. There was
24 literally nothing except for a statement that Kevin had made when they did the
25 pseudo polygraph examination, which was very difficult.

1 And the -- the facts of the murder were difficult. You know,
2 she was shot, I think, in the back of the head. There was a lying-in-wait
3 allegation that I was gravely concerned about. And they were essentially
4 going to tie him up with his own words, and I did not think that he would be
5 successful at trial once I lost the right to prevent his statement from being
6 used. And we went pretty hard core trying to prevent the statement from
7 being used. We went after the person who conducted the statement. In fact,
8 I think I got a material witness warrant to get that guy back from Michigan
9 because he was fired or let go by Metro.

10 So if his statement had been suppressed, I think he probably
11 would've walked free. I don't think the State could've proven their case. But
12 with his statement, I didn't think that we would be successful at trial, and I
13 was worried that with the lying-in-wait allegation and she was a mother and
14 the nature of the shooting, that life without the possibility of parole was a
15 grave concern.

16 And I'm always worried as well when somebody has a mental
17 illness and it's a factor, that juries are going to want to hang the crazy, scary
18 murder guy, and that's always a concern that I have. And when they consider
19 that when they're making a decision about life without, I think juries typically
20 will hold a mental illness against the defendant. And then finally -- I lost my
21 train of thought, so forget my "finally."

22 Q When -- when you were discussing the guilty plea agreement
23 with Mr. Gipson, did you discuss with him -- I may have asked you this, and I
24 don't remember. Did you discuss with him the waiver of any appellate rights
25 he would be making by accepting the guilty plea?

1 guilty plea and the judge says, is this plea forced or coerced, do you ever tell
2 the -- do you ever whisper to the defendant or supply -- otherwise supply their
3 responses?

4 A Yeah.

5 Q You do?

6 A Sure. Sometimes I'll nod my head and remind them of what
7 we've talked about or if they look to me like they're not sure where -- what's
8 going on, I'll whisper to them and remind them what we discussed. Yes.

9 Q Okay. Do you feel that practice is coercive?

10 A No.

11 Q Why is that?

12 A Well, because I'm generally responding to something that
13 they've done. Either they looked at me quizzically or they're not sure. Maybe
14 they whispered something. Maybe they're hesitating. And so sometimes I'll
15 nod that they're doing the right thing or if I need to, I'll whisper in their ear,
16 this is the part we talked about, this is where you have to plead guilty. Or
17 sometimes -- and there's all sorts of reasons, but generally I'm responding to
18 body language. If somebody's doing just fine, I don't -- I don't do anything at
19 all. They're doing well. Sometimes I might hold their hand and squeeze them.

20 Q Okay.

21 A I may put my arm around them and pat them on the back to let
22 them know that everything's going okay and I'm paying attention. I typically
23 stand right beside them when they're taking a plea unless a court won't let
24 me.

25 Q Okay. And you talked about the sentencing hearing being quite

1 lengthy and emotional. So you would agree that a penalty phase hearing
2 would perhaps be even more lengthy and --

3 A Oh, that would've been brutal.

4 Q -- and more emotion --

5 A It would've been awful.

6 Q And that's -- that's where the State could definitely get its life
7 without?

8 A I think the life without would've been a combination of the fact
9 that she was ambushed and shot in the back of the head; the fact that she
10 was a mother with, I think, three young children and that -- and then the
11 emotional impact of all the stuff that they presented at the hearing. All those
12 three things together would've been -- I would've been really concerned that
13 I'd have a hard time talking a jury out of life without as well as his mental
14 illness as the icing on that difficult case.

15 Q So in light of that -- and I realize you don't remember the
16 circumstances of this plea precisely, but do you think that this negotiation is a
17 good negotiation given all of those circumstances?

18 A Yes.

19 Q Now, do you recall filing a notice of expert witnesses where you
20 noticed the two physicians or psychiatrists that you talked about, Dr. Slagle
21 and Dr. Nowocki (phonetic)?

22 A Nwokike.

23 Q Nwokike.

24 A I don't recall doing it, but I noticed that I did file it, so --

25 Q Would you disagree with me that you filed that in April of 2011?

1 A No.

2 Q And do you recall when this plea -- when he was arraigned on
3 this plea?

4 A No, but I could look.

5 Q Would you disagree that it was about in December of 2011?

6 A Oh, that sounds about right.

7 Q Okay. So you were -- you filed many pretrial motions in this
8 case, correct?

9 A Yes.

10 Q So you were prepared to go to trial if it came to that?

11 A Yes.

12 Q So this isn't a case where you're going to push a plea on a
13 client, if you ever do that, because you're not ready for trial or you have too
14 many balls in the air and you want to get this one done?

15 A I would -- I appreciate the fact that you said "if you would do
16 that" because I would never do that. I would fall on the sword in front of the
17 Court first and tell them I wasn't ready and why I wasn't ready.

18 Q That's what I thought.

19 A I would never push it, so no. I was ready to go to trial. I just
20 didn't think it was in his best interest, and when the -- when it was clear that
21 his statement was going to be able to be used against him, I was gravely
22 concerned about what the outcome would be.

23 Q So this suppression motion that you filed was probably one of
24 the most important things that happened in this case?

25 A That is the only evidence that ties him to the crime. The only

1 evidence. There's literally nothing else.

2 Q Are there ever circumstances where you coerce a client into a
3 plea?

4 A No. No.

5 Q Okay.

6 A I'll be really strong with them and super frank about what I think
7 is going to happen. I'll get exasperated. I'll bring in as many people as I think
8 could have an impact on someone's decision. If I think that they're not
9 hearing me, I will go to great lengths. I'm not going to -- how would a coerce
10 somebody? I mean, I guess I could physically twist their fingers and cause
11 them pain, but I don't know what I could hold over someone's head.
12 Literally what I'm saying to them is, if you go to trial, the outcome is going to
13 be bad, and this is how bad I think it's going to be.

14 And I know that a lot of the people that are in Kevin's position
15 feel coerced by the circumstances that they're in, and I get that, because it is.
16 I mean, I'm asking them to choose between really, really bad and bad, and
17 that decision in and of itself is coercive, I suppose, in some -- in some
18 respects, I get how they feel that, but it doesn't change the fact that they
19 have to make that decision.

20 Q So having a life without hanging over your head is somewhat
21 coercive? That's what you're saying?

22 A That is massive coercive. That's a very painful place to be.

23 Q But to be clear, if Mr. Gipson had said, I don't care, I want to go
24 to trial, you would have taken this to trial?

25 A I do that all the time.

1 MR. MACDONALD: Nothing further.
2 MR. COLUCCI: No additional questions.
3 THE COURT: Ms. Craig --
4 THE WITNESS: Yes.
5 THE COURT: -- were you able to communicate with Mr. Gipson?
6 THE WITNESS: Oh, yeah, he was a lovely man. He was
7 extraordinarily -- probably one of the nicest clients I've ever had. We never
8 had a cross word. He was pleasant. He made clear when he didn't
9 understand things. He was gracious. So, no, I never had any trouble talking
10 to him.
11 THE COURT: At the time of the actual plea being entered --
12 THE WITNESS: Uh-huh.
13 THE COURT: -- if he had any feelings of his inability to understand
14 what was proceeding, possible competency issues as to the plea, would you
15 have continued with the plea?
16 THE WITNESS: No. I would've stopped, and I probably would not
17 have told the Court or anybody my concern. I probably just would've asked
18 for a delay in order to talk to him, and I would've ordered an internal psyche
19 evaluation. I probably would've had Dr. Slagle go see him again because
20 Slagle had already seen him twice, so he had a history with him. And I
21 would've made sure that we have updated jail records to see if he had any
22 issues in the jail. But if I had any concerns at all, I would not have gone
23 forward because it was something I was watching out for.
24 THE COURT: The Public Defender's Office has a specific -- I don't
25 want to say program, but a specific set of cases that you oversee; is that

1 correct?

2 THE WITNESS: I'm now kind of like the godfather of it. I'm not
3 literally doing it day to day, but I did at the time that Kevin was -- he was my
4 client. I was the competency person --

5 THE COURT: Okay.

6 THE WITNESS: -- as far as that goes.

7 THE COURT: So you kind of handled the cases where individuals had
8 concerns with their mental stability; is that correct?

9 THE WITNESS: Every single case that went through our office from
10 2005 to about 2012-ish, I appeared on those people's behalf in competency
11 court.

12 THE COURT: You've had a lot of experience with regards to individuals
13 with mental health issues?

14 THE WITNESS: Yes.

15 THE COURT: Okay. And in this particular case, you had elicited the
16 assistance of Dr. Slagle?

17 THE WITNESS: Yep.

18 THE COURT: And you've also noticed another doctor for purposes of
19 going to trial; is that correct?

20 THE WITNESS: It was his personal physician who had treated him in
21 the past, to establish that he had a mental health history that predated the --
22 the death. It showed he wasn't making it up.

23 THE COURT: Okay. With respect to using or investigating information
24 regarding his mental issues, were you of the opinion that there was anything
25 that you failed to do at the time where the Defendant was given an offer to

1 plea in this case?

2 THE WITNESS: We got -- we got his psychiatric history from every
3 available source that we were aware of that he had been treated at. We had
4 his school records. We had him evaluated by our own expert. I was
5 contemplating an NGRI, but just couldn't figure out a way to make that work
6 under the factual circumstances that were in this case given the limitations of
7 the NGRI defense.

8 He's born and raised here, as I recall. I think we even had the
9 Department of Family Services records because he kind of had some
10 difficulties in his childhood. And Judge Barker evaluated those records, and I
11 don't recall offhand what he gave us, but I don't think that there was any
12 other sources of information that we could've tapped that I was aware of with
13 regard to his mental health history and his personal history.

14 THE COURT: Okay. You were assigned this case from the inception;
15 is that correct?

16 THE WITNESS: Yes.

17 THE COURT: And from there being an indictment, this didn't go to
18 preliminary hearing that you remember?

19 THE WITNESS: I don't remember. I'd have to look through it.

20 THE COURT: Do you recall the first time you met the Defendant?

21 THE WITNESS: Yes.

22 THE COURT: He was in custody?

23 THE WITNESS: Yes.

24 THE COURT: Was it in the Justice Court level?

25 THE WITNESS: Yes.

1 THE COURT: And did you have -- obviously, did you have a charging
2 document?

3 THE WITNESS: I don't know that the first time I saw him I actually
4 had the charging document yet. Back in those days, we used to get notice
5 from the jail when someone was arrested on a murder. I may have seen him
6 before. I don't really recall.

7 THE COURT: Okay.

8 THE WITNESS: But I do remember seeing him. He was --

9 THE COURT: So when you -- when the question was asked of you, if
10 you recall how many times you had visited him, would you agree it was
11 multiple times?

12 THE WITNESS: Oh, yeah.

13 THE COURT: And you had indicated that -- and sometimes you would
14 check in with him?

15 THE WITNESS: Yeah.

16 THE COURT: Kind of just let him know that you're still handling the
17 case?

18 THE WITNESS: Right.

19 THE COURT: And then other times you talked about specifics?

20 THE WITNESS: Right. Sometimes there's not a lot that's happening
21 like when we're getting records.

22 THE COURT: Uh-huh.

23 THE WITNESS: I describe it all the time to defendants as, when you
24 see a duck swimming in the water, it looks like nothing's going on on top, but
25 on bottom, the feet are going.

1 THE COURT: Okay.

2 THE WITNESS: So my -- my mitigation specialist and my investigator
3 were doing their part collecting records. And then we had a fairly large span
4 of time where we were going hot and heavy after the guy, Jeff Florr,
5 F-L-O-R-R, who had gone -- he was the polygraph guy, had disappeared into
6 Michigan, so I was getting material witness warrants. We were really going
7 hard against that.

8 So there wasn't a lot specifically that was happening, so I would
9 just check in with him because it was all duck feet under the water, stuff that
10 he really couldn't see or know was happening.

11 THE COURT: Independent of -- you indicated that he was raised here.

12 THE WITNESS: Yeah.

13 THE COURT: Did you have a discussion with family members at all
14 then?

15 THE WITNESS: Yes. His mother's in the back. We maintained
16 contact with his family. They were gracious and cooperative and very, very
17 helpful, and they were always in court. I can't remember who my mitigation --
18 I think it was probably Emily, and Emily would maintain direct contact. But I
19 think I might have given -- I typically give parents -- unless they're really
20 dangerous in some way, I usually give them my cell phone number, and they
21 can text me or call me. And I think his mom came in to see me a couple times
22 in my office.

23 THE COURT: Oftentimes, individuals are handed copies of guilty plea
24 agreements on the day that they enter their plea, and they review it then. Do
25 you recall in this case if on that day that offer was one that was extended to

1 you for the first time?

2 THE WITNESS: I have absolutely no memory of it. I really don't.

3 THE COURT: Okay. Well, let me ask it this way. Under the
4 circumstances of this case, would it be -- would it be -- would you accept a
5 guilty plea agreement in the nature that was being offered here if you had
6 never discussed that with -- with your client?

7 THE WITNESS: No.

8 THE COURT: And would there be reason, if you know, for the State
9 to have prepared the guilty plea agreement under these circumstances if you
10 hadn't discussed it with them?

11 THE WITNESS: Generally what happens is, as we go along, I will -- I
12 can usually look at the case and figure out where it's going, you know, what I
13 might be able to ask for, and I will oftentimes start to gently lead the
14 defendant in that way so that it's not a big shock to them.

15 THE COURT: Okay.

16 THE WITNESS: And so we'll talk about, well, what do you think an
17 outcome would be? And then if it's gets closer, I will tell them what I think
18 the State may offer so that it's not -- and I'll tell them, think about it now,
19 think about what you want to say in the event it happens. Because it could
20 happen at the last second, so I want you to think about it and ask me
21 questions. And then --

22 But what happens is, is that either I will reach out and try to
23 press the State for a negotiation or they'll come to me, but at some point they
24 will make an offer, and I have to talk to Kevin about it because I can't accept
25 it without his permission. Once he accepts it, then I tell the D.A., prepare a

1 guilty plea agreement.

2 THE COURT: Okay.

3 THE WITNESS: Now, sometimes that can all happen very quickly, and
4 I just don't have any independent memory of it.

5 THE COURT: If your client is -- and under the circumstances, under the
6 type of cases you handle --

7 THE WITNESS: Uh-huh.

8 THE COURT: -- if your client is having difficulty understanding the
9 guilty plea agreement on the day that they're asked to sign it, would you --
10 would you want to proceed further or would you ask the Court for additional
11 time?

12 THE WITNESS: I'd ask the Court for additional time, and I -- it's rare
13 that they don't give it to me. It would be -- unless it was like the jury's
14 walking in the door, and I don't think that's where we were at in this case.
15 So there would be no reason not to just turn to the judge and ask for a day or
16 two.

17 THE COURT: And you said it's rare that the Court wouldn't give it to
18 you. Isn't it even common that the Court would even ask if you needed
19 additional time?

20 THE WITNESS: Yes. If they -- if they saw there was some hesitation,
21 they surely would, but they would have to ask me. I would asking them for it.

22 THE COURT: Okay.

23 THE WITNESS: And sometimes, you know, even in -- even literally in
24 court, I'll ask to have the defendant taken back to the room in the -- by the
25 sally ports --

1 THE COURT: Uh-huh.

2 THE WITNESS: -- and sit there quietly with them in the room while
3 court goes on to answer questions and see how much -- if I need that kind of
4 time.

5 THE COURT: Okay.

6 THE WITNESS: But I don't recall needing to do that in this case.

7 THE COURT: Mr. Colucci, did you have any questions as a result of my
8 questions?

9 MR. COLUCCI: No, Your Honor.

10 THE COURT: Do you have any further questions as a result of my
11 questions?

12 MR. MACDONALD: Yes, Judge.

13 THE COURT: Okay.

14 **CROSS-EXAMINATION (CONTINUED)**

15 **BY MR. MACDONALD:**

16 Q Can you explain how you typically go through a guilty plea
17 agreement since you don't recall this one specifically.

18 A If I actually -- sometimes I'll take over a -- like a blank guilty plea
19 agreement because, you know, most of it is routine, and I will leave that with
20 them to read. But if I'm holding the actual guilty plea agreement, I will tell
21 them that the first page is the part that's specific to them. I will tell them that
22 that outlines the specifics of their contract with the State, and I'll point it out
23 to them and read it to them.

24 The bottom of the first page has some language that usually
25 doesn't apply to my clients. It's something about like multiple DUI's, I think,

1 or failure to appears or something. My clients aren't usually out of custody,
2 so they're not going to not appear for that, and I'll tell them, that part doesn't
3 apply to you.

4 Then the next part is the potential penalties, and I'll -- we'll talk
5 about the potential penalties, and I'll explain what they are. And then I think
6 there's a part about if you're not an American citizen, and I'll tell them that
7 part doesn't apply to you. There's a significant chunk that's just routine; it
8 doesn't apply to a lot of my clients.

9 Then I think it's the waiver of rights. Then there's a part, again,
10 I think, that talks about -- there's another part -- oh, then it will ask -- it'll talk
11 about whether or not, you know, you talked about the elements with your
12 attorney, whether or not you talked about defenses, and I'll remind them that
13 we've been talking about what your defense is going to be almost since the
14 day you were arrested. Here's where we stand today. The elements of
15 murder, we'll go over that again. I usually talk about the elements of murder
16 when they're first arrested and explain how to do premeditation, deliberation
17 and how to get them first in this particular case.

18 I'll remind them what an element is and what the judge will be
19 asking them. Then it gets to the part where it asks whether they're intox --
20 under intoxications, and I usually say the judge is going to want to know if
21 you're drunk, high or stupid, and that's what that next part is.

22 And then -- then I'll explain to them the judge is going to ask
23 how old you are, how far you went in school. If you're concerned, you have
24 questions, I'll be standing right next to you. All you have to do is ask me.
25 And then depending on the judge, I'll explain that either the judge will read

1 the -- the --

2 THE COURT: Indictment.

3 THE WITNESS: -- indictment or he'll ask you if on this day, you did
4 blah, blah, blah, and you'll have to say yes or no. And that's generally the
5 path that I take when I'm going through a guilty plea agreement.

6 BY MR. MACDONALD:

7 Q So you would say it's pretty likely that's exactly what you did in
8 this case as well?

9 A I've been saying the same thing for 17 years, so, yeah, likely
10 that's exactly how it went.

11 Q And you agree with the judge that you saw him multiple times.
12 Could you possibly estimate how many times?

13 A No.

14 Q Would it be more than a dozen?

15 A Probably.

16 Q So if he said three or four, that's probably not correct?

17 A I don't think that's accurate. And also my team goes in as well.
18 I will send over my social worker to do a psychosocial history, to meet with
19 him, to get releases, to talk to him about his family. And sometimes there's
20 stuff maybe that my social worker needs to poke at, you know. So she'll go
21 over multiple times. My investigator will have gone over and had personal
22 discussions with him, although there was less in this case. We were really
23 spending a lot of time finding that Florr guy and attacking the -- his statement.

24 MR. MACDONALD: Nothing further, Judge.

25 MR. COLUCCI: Nothing further.

1 THE COURT: I want to ask one additional question.
2 THE WITNESS: Sure.
3 THE COURT: I neglected to do so. I started to, but -- you said that
4 you had a pretty good relationship, discussion relationship with his family.
5 THE WITNESS: Uh-huh.
6 THE COURT: In some cases, oftentimes individuals will ask time to
7 speak to their family before they'll enter into negotiations. Do you recall if
8 that was something that happened in this case?
9 THE WITNESS: I don't recall other than he asked to speak to his
10 mom. I know they were in contact, and I know I was talking to his family.
11 But they were really concerned about whether or not he was doing the right
12 thing, and I made sure that they understood, and I answered their questions.
13 THE COURT: So you conversed with them --
14 THE WITNESS: I had his permission to talk to them.
15 THE COURT: When you say doing the right thing, you're talking about
16 the plea?
17 THE WITNESS: Yes.
18 THE COURT: So you believe you conversed with --
19 THE WITNESS: Well, I know I did.
20 THE COURT: -- his family about it?
21 THE WITNESS: Oh, I know I did.
22 THE COURT: Okay. Okay. All right. Any questions as a result of
23 that?
24 MR. MACDONALD: No.
25 MR. COLUCCI: No.

1 THE COURT: Okay. Ms. Craig, thank you so much. You may step
2 down.

3 THE WITNESS: You're welcome. Good to see you.

4 THE COURT: You, too.

5 MR. COLUCCI: We have no additional witnesses.

6 THE COURT: State?

7 MR. MACDONALD: No witnesses.

8 THE COURT: Do you want to argue?

9 MR. COLUCCI: Can we approach?

10 THE COURT: Sure.

11 [Bench conference - not transcribed]

12 THE COURT: Okay. Mr. Colucci, did you have any further argument?

13 MR. COLUCCI: Your Honor, after our discussion at the bench, I am
14 just going to submit it on the pleadings.

15 MR. MACDONALD: The State concurs.

16 THE COURT: Okay. Mr. Gipson?

17 THE DEFENDANT: Yes.

18 THE COURT: Your petition for a writ of habeas corpus, at this point in
19 time, I'm going to deny it on the two issues, the issue with respect to whether
20 or not there was sufficient information -- or investigation into -- into your
21 mental issue background. I believe that the Public Defender in this case
22 expended their resources with -- quite honestly, Ms. Craig is their top person
23 that handles those type of cases, so I'm very confident based on her
24 testimony here today that she did what she could, to the extent that she could
25 and used whatever information that she had to the extent that she could.

1 So for that reason, I'm denying that.

2 As to any claims that you were coerced in your plea, I believe
3 that you understood your plea. I don't believe that Ms. Craig had coerced
4 you. And that's why I asked the questions whether or not you discussed it --
5 or she discussed it with your family and that you knew what you were doing.
6 It was in your best interest to enter into this.

7 You got a deal that was probably pretty favorable to you under
8 the circumstances; that it was -- I believe under those circumstances that she
9 was highly effective in obtaining that and that any advice that she had
10 addressed you with, I believe, was probably good advice. I believe also that
11 you knowingly and freely and voluntarily entered into this plea under that
12 advice.

13 Also just as a quick caveat with regards to her representation
14 that she felt that motion to withdraw his plea should've been addressed with
15 another attorney to address those issues, I believe that she -- my questioning
16 her with respect to her addressing any issue that would have come to light
17 with her, she did so. I believe that she would have informed the Court if there
18 was any question of incompetency at the time of your plea.

19 And so kind of in a roundabout way, that issue, I believe, is
20 satisfied at this point, and I don't believe that any attorney would've been able
21 to bring in another case with that under those circumstances. So we address
22 that in kind of in a roundabout way. So for that reason I'm denying your
23 motion, sir. Good luck in your future. Okay? All right.

24 Anything further from the parties?

25 MR. COLUCCI: No, Your Honor.

1 THE COURT: I'm going to ask the State to prepare the motion -- I
2 mean, prepare the order.

3 MR. MACDONALD: Yes, sir.

4 THE COURT: Okay. Thank you. All right. We're off the record on
5 this.

6 [Proceedings concluded at 10:57 a.m.]
7

8 ATTEST: I do hereby certify that I have truly and correctly transcribed the
9 audio-visual recording of the proceeding in the above entitled case to the
10 best of my ability.

Renee Vincent

11 Renee Vincent, Court Recorder/Transcriber
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