

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN MARQUETTE GIPSON,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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Tracie K. Lindeman
Clerk of Supreme Court

Case No. 69174

RESPONDENT'S APPENDIX

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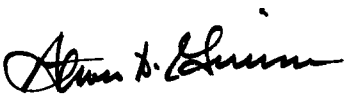
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO: C264079
)	
-vs-)	DEPT NO: XVIII
)	
KEVIN MARQUETTE GIPSON,)	
#1582343)	
)	
Defendant.)	

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS

DATE OF HEARING: 05/02/2011
TIME OF HEARING: 8:15 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through SHANON CLOWERS, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's State's Opposition To Defendant's Motion To Suppress.

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

STATEMENT OF FACTS

On March 25, 2010, at approximately 5:45 a.m., Robert "Lee" Gilmore and Wade Fleming were leaving Einstein Bagels located at 7541 West Lake Mead Boulevard, Las Vegas, Nevada. As they were nearing Fleming's truck they heard what they thought was a

1 woman screaming loudly across the street at the Jack in the Box restaurant located at 7510
2 West Lake Mead Boulevard, Las Vegas, Nevada. Gilmore and Fleming then heard a single
3 gunshot from the Jack in the Box area and immediately called 911.

4 As they approached the area of the gunshot, they were joined by another individual,
5 Christian Benitez, who had been at Starbucks just next to Einstein Bagels. All three noticed
6 what appeared to be a male in a dark hooded sweatshirt running south easterly down Lake
7 Mead Boulevard. Neither Benitez, nor Gilmore, nor Fleming could identify the individual
8 running away from the Jack in the Box. Fleming approached the victim as she lay in a
9 parking stall at the Jack in the Box. Fleming noticed the victim's Jack in the Box name tag
10 and yelled "Brittney" over and over to see if she would respond. Fleming got no response
11 and thought she was dead.

12 Christina Bailey works at the Vons grocery store located in the same shopping
13 complex as the Jack in the Box. She works the graveyard shift at Vons and was leaving the
14 store in her vehicle when she heard the scream coming from Jack in the Box. Bailey drove
15 towards the Jack in the Box and noticed a female laying on the ground with a male in a dark
16 hooded sweatshirt standing over her. It appeared to Bailey that the male was helping the
17 female, who appeared drunk, to her vehicle. Bailey did not hear a gunshot and thought
18 everything appeared to be okay.

19 Bailey proceeded to the stoplight at the intersection of the Vons shopping center and
20 Lake Mead. She was there for approximately 30 seconds when she noticed the same male
21 with the hooded sweatshirt sprint past her vehicle onto Lake Mead Boulevard heading east.
22 Bailey decided to follow the individual as he raced down Lake Mead, but eventually lost him
23 as he darted between buildings. Bailey could not identify the individual other than to say he
24 was an African-American.

25 Homicide Detectives arrived to the scene and were notified that the victim had been
26 transported to UMC Trauma as she was still showing signs of life. Detectives were able to
27 determine that the victim was Brittney Lavoll, who was on her way into work as an assistant
28 manager at the Jack in the Box. At 6:15 a.m., Dr. Cousins of UMC Trauma pronounced

1 Brittney dead of an apparent gunshot wound to the head. An autopsy performed by Dr.
2 Telgenhoff on March 26, 2010, revealed that the cause of death was a distant penetrating
3 gunshot wound to the head.

4 At the scene, detectives located two sets of keys belonging to Brittney Lavoll, a
5 cartridge case bearing the head stamp "25 AUTO CBC." Brittney's 1995 Jeep Grand
6 Cherokee was parked in a stall near the Jack in the Box. Inside the vehicle, Detectives
7 located a black jacket with apparent blood stains.

8 Charles Lavoll, Brittney's father, came to the scene and spoke to detectives. Upon
9 learning that his daughter was shot, Charles immediately advised that the shooter was likely
10 Kevin Gipson. Charles intimated that Gipson and Brittney had been in a dating relationship
11 for several years and had two children together. They broke up because Gipson was abusive
12 towards Brittney and refused to leave her alone. Brittney had to switch Jack in the Box
13 locations due to Gipson harassing her at work, as well as move to a different apartment.
14 According to Mechele Lavoll, Brittney's mother, Gipson was looking for Brittney
15 approximately four to five months before the shooting and had threatened Mechele that he
16 would shoot Brittney.

17 In an attempt to locate Gipson, Detectives went to the Summerhill Apartment
18 Complex at 3630 E. Owens, Las Vegas, Nevada where Gipson's mother Lenda Jackson
19 resided. While at the apartment, Gipson called his mother. Lenda handed the phone to
20 Detective Long. Gipson denied any involvement in the murder saying that he had spent the
21 night at a friend's house and did not learn of the murder until his mother called and notified
22 him. Gipson stated he would get a ride to the Summerhill Apartment Complex to meet with
23 the Detectives. Detective Long informed Gipson that there were numerous relatives of the
24 victim at the complex and therefore they would come meet him. Gipson at first said he
25 didn't want the "cops" to come to where he was. Gipson then asked someone in the
26 background a question and agreed that detectives could come to his location, which was 824
27 Levy – the home of Denise Nelson. Detectives went to that location and came into contact
28 with Gipson. He then agreed to go to the Detective's offices, known as the ISD building,

1 and was driven there.

2 1. Defendant's First Statement – March 25, 2010, 3:20 p.m. (Exhibit One)

3 On March 25, 2010 at approximately 3:20 p.m., detectives met with Gipson at the
4 ISD building. Gipson was told that he was not under arrest and could stop the interview at
5 any time. He was not handcuffed at anytime. He was interviewed by Detectives Long and
6 Tremmel. Both out of uniform. The interview lasted for 15 minutes. Gipson completely
7 denied killing Brittney.

8 Gipson stated that he dated Brittney for five years and had two children with her, but
9 broke up approximately one year before. The previous night, Gipson had spent the night at
10 Denise Nelson's house located at 824 Levy, Las Vegas, Nevada. Gipson, Denise, and her
11 boyfriend Larry "Mississippi" Glinsey went to a party at a friend's house named Rosie.
12 During the drive they were stopped by LVMPD and Glinsey was taken in for outstanding
13 warrants. Gipson and Nelson drank alcohol and played cards until 2:30-3:00 a.m. when they
14 went back to Nelson's place to sleep.

15 Gipson stated he received a call from his mother at approximately 8:00 a.m. stating
16 that something had happened to Brittney. Eventually, Gipson's cousin, Isaiah Martin,
17 notified Gipson that everyone was looking for him.

18 According to Gipson, the reason he and Brittney broke up was because he was
19 cheating on her. Gipson denied any kind of abuse towards Brittney during their relationship.
20 After the initial breakup, Gipson unsuccessfully attempted to get back together with Brittney.
21 Gipson said he had no contact with Brittney for five months until he tried to contact her at
22 her work but was informed that Brittney no longer worked at that location. Gipson recently
23 had been trying to get in touch with Brittney to see his son on his birthday on March 23 but
24 was unable to.

25 Gipson was then asked about taking a polygraph test. Detectives explained it as an
26 investigative tool, and told Gipson even if he failed it they could not arrest him because the
27 examinations were not. (Exhibit one pp. 18-19). Gipson agrees to schedule the test. Gipson
28 also agreed to provide a DNA sample and have a Gunshot Residue Kit performed at the

1 same time. The interview then ends after fifteen minutes.

2 Detectives Tremmel and Long prepared to do a polygraph examination, but were
3 informed by Officer Flohr that it would be preferable that Gipson take a Concealed
4 Information Test (CIT).

5 2. Defendant's Second Recorded Statement – March 25, 2010 at about 6:55 p.m.
6 (Exhibit Two).

7 Detective Long then introduced Gipson to Officer Geoff Flohr and the following
8 colloquy occurred:

9 Q: "...you have the right to remain silent. Tell me what that means to you."

10 A: "That I don't gotta say nutten [sic].

11 Q: That's right. All you gotta do is say, 'You know Geoff (Flohr), I don't wanna talk
12 anymore' and we are done. I wont get angry. I'm not gonna get upset. Okay. Uh,
13 anything that you say can and will be used against you in a court a law. Tell me what
14 that means to you?"

15 A: Whatever I say y'all gonna use it against me.

16 Q: If you were to say anything in here about this case, okay, and ultimately be charged in
17 this case, I could be subpoenaed and then have to testify to everything that you said.
18 Okay?. Um, you have the right to have an attorney with before or during any
19 questioning, and if you can't afford an attorney, attorney would be appointed to
20 represent ya [sic] at public expense. Do you understand that right?

21 A: Shouldn't I have a attorney for this?

22 Q: Well, that's up to you

23 DL (Dan Long): Completely up to you.

24 Q: That's completely up to you.

25 A: Oh, okay. Think I seen a story on the history channel about these things and they not
26 always accurate.

27 Q: Well, the examination that I'm gonna provide you with today is not about deception.
28 It's about knowledge. Okay. So all the questions that I'm going to ask you on this

1 thing would only be known by the person that did this. If you didn't do it, you wont
2 know any information about this case. Does that make sense to ya? So anyway, you
3 understand the right about the attorney?

4 A: Mmm Hmmm.

5 Q: Okay. If you waive your right to remain silent and later change your mind all
6 questioning will stop. Tell me what that means to ya.

7 A: I'm, I'm not sure.

8 Q: Okay. If you agree to talk to me and say, hey Geoff, Ill start out talking to ya, and
9 you change your mind and say 'Oh, I don't wanna talk to you anymore.' All you
10 gotta do is just say, "Geoff, I don't wanna talk anymore," and all questioning is gonna
11 stop. Okay. Do you understand that? I need a verbal.

12 A: Oh, yes.

13 Q: Okay. Um, if you waive your right to have an attorney present and later change your
14 mind, the questioning will stop until you've had a chance to speak with an attorney.
15 Do you understand that right? What's it mean to ya?

16 A: I can get a attorney if I want one.

17 Q: Yeah. At any point in time. You could say 'Hey, you know what Geoff. Before we
18 go any further, I'm gonna want an attorney.'

19 A: Mmm hmm.

20 Q: You just gotta verbalize that to me. I'm gonna stop. I won't get angry. I won't get
21 upset. Okay. We'll just stop.

22 A: Well, could I get an attorney then?

23 Q: It's up to you.

24 A: I just wanna ax [sic] him a couple of questions before I take this.

25 Q: Okay. Okay. We'll be with you in just a second.

26 A: I mean, I'm not opposed to taking it. I just wanna get some counsel about this cause I
27 don't _____ (inaudible).

28 Q: Okay.

1 A: ...not sure about that.

2 Q: Alright. Okay.

3 A: _____.

4 Q: Okay. We understand.

5 A: I, I seen the show man. It's got me skeptical about this.

6 Q: Okay.

7 (Sound of Geoff leaving the room, door opening/closing) (pause) (Geoff returns)

8 Yeah. Okay. Do you have a name of an attorney that you need to call or, or you

9 wanna contact?

10 A: I thought y'all was gonna provide me one.

11 Q: _____. (Inaudible) If you're charged in this investigation ...

12 A: (Both talking-inaudible)

13 Q: ... yeah. When, if you're charged in the investigation, okay, and you don't have the

14 funds to have an attorney then one would be provided for ya. Uh, right now this is in

15 the investigative stage as I understand at this point. So if, if you know a name of an

16 attorney we'll provide you with a phone and you can make a call and talk to him

17 about it and make a decision on what you wanna do.

18 A: I don't understand.

19 DL: We're, we're not arresting you.

20 A: _____. (Both talking-inaudible)

21 **DL: You're not under arrest.**

22 **A: Yeah. I know that.**

23 DL: So we don't provide you an attorney for you because you're not under arrest.

24 Q: You're not under arrest.

25 Q: If you have an attorney you wanna consult with, then you can consult with ... because

26 this involves a criminal investigation and because it involves this type of, ah, ah,

27 information test, okay, examination here. Um, we have to advise you of these rights.

28 So if you say to me 'Hey Geoff, you know what, I think I wanna talk to an attorney

1 before I go in through this process here'. Um, then I have to stop, mmm, and afford
2 you that opportunity to go ahead and go, go do that if that's what you wanna do. Um,
3 but like he said, you're not under arrest at this point so we don't have to provide you
4 with an attorney, but we provide you the means to make a phone call tonight if you
5 want.

6 DL: Absolutely.

7 Q: To call an attorney and talk to him.

8 A: I don't know any attorneys.

9 Q: Well, give him a phone book I guess, if you wanna call. What do you wanna do?

10 A: I wanna make sure this is right.

11 Q: The examination that you're going to go under is called concealed information test.
12 Okay. And basically it's based on knowledge. If you didn't have anything to do
13 with this you wouldn't know specific information about this case. That's what this is
14 gonna involve.

15 A: Come on. Let's get it over with.

16 Q: Okay. Hold on for just a second. Alright, So, you're telling me Geoff you know
17 what, you don't wanna consult with an attorney at this point? Verbalize that to me
18 so...

19 A: No.

20 Q: No. You don't. It's okay to continue?

21 A: Yeah.

22 Q: Okay. Hold on for just a second. (Leaves room) (pause)

23 A: _____ (inaudible)

24 Q: (returns to room) Okay. Here's the deal. I wanna give you an opportunity here
25 tonight to, to leave. Okay. So what I'd like to do is I wanna administer, ah, this
26 examination, the concealed information test, tomorrow at noon. Okay. So, I'm gonna
27 kick you outta [sic] here. These guys will come and pick ya [sic] up and bring you
28 down here if that's alright with ya [sic], tomorrow morning, and I'll see you here at

1 noon. Well enough?

2 DL: Tomorrow noon. (Laughs)

3 Q: Yeah. Tomorrow. Tomorrow at noon.

4 A: _____ (both talking – inaudible)

5 DL: Because if they, the, the, they, I mean, you, you wanna consult with, go consult with
6 attorneys.

7 Q: Yeah. We got, we gotta give you that opportunity. That's the right thing to do....

8 (Exhibit Two, pp. 2 – 7).

9 Gipson was unsure of taking the test and wanted to talk it over with his mother or an
10 attorney. Gipson again was advised that he was not under arrest and was told he would be
11 taken home. (Exhibit Two, pp. 9). Gipson was then taken back to Nelson's apartment with
12 the understanding that Gipson would again meet with detectives the following day at 11:30.

13 On March 26, 2010, at approximately 11:20 a.m., detectives went back to Nelson's
14 apartment and picked up Gipson. Gipson agreed to take the CIT and to go with detectives.
15 He was not placed in cuffs, not arrested, nor in custody.

16 3. The Defendant's Third Statement March 26, 2011 at 11:57. (Exhibit Three)

17 The Defendant was Mirandized again by Officer Flohr:

18 Q: ... Let's go through your rights though. Okay? 'Cause this is a criminal
19 investigation again, I have to advise you of your Miranda Rights. Okay?

20 A: Uh huh (yes).

21 Q: Number one, you have the right to remain silent. Tell me what that means to you.

22 A: I ain't gonna say nothin'.

23 Q: That's right. At any point in time you can say Geoff, I don't wanna talk. We're done,
24 stop right where we're at, out we go. Okay? Anything that you say can and will be
25 used against you in a court of law. Tell me what means to you.

26 A: Whatever I say that'll be used against me.

27 Q: Right. If charges should be brought in this investigation against you, I can
28 subpoenaed and I have to testify to what you may have said to me. Okay? You have

1 the right to have an attorney present with you before or during any questioning, and if
2 you can't afford one, one will be appointed to represent you at public expense. Do
3 you understand that?

4 A: Sure.

5 Q: Okay. If you waive your right to remain silent, and later wish to stop answering
6 questions, the questions will stop. Tell me what that means to you.

7 A: If I don't wanna say nothing I don't have to.

8 Q: Right. If you decide you're gonna talk to me, and then you change your mind, all you
9 gotta do is just say Geoff, I don't wanna answer anymore questions, and we're done.
10 Okay? If you waive your right to have attorney present and later change your mind,
11 all questioning will stop until you've had a chance to speak with an attorney. Tell me
12 what means to you.

13 A: I _____ (unintelligible).

14 Q: Right. All you gotta do is just say hey, Geoff, I wanna talk to an attorney before I go
15 any further, and I'm done. Okay? Do you understand each of these rights, Kevin,
16 that I've advised you of?

17 A: Uh huh (yes).

18 Q: Are you willing to waive them at this time, and continue this, ah, interview with me
19 here today?

20 A: Sure.

21 (Exhibit Three, pp. 2 – 3).

22 Officer Flohr advised Gipson that the CIT does not test deception but only knowledge
23 of events. Officer Flohr then administered the test by asking him a series of questions
24 regarding the murder of which only someone who had distinct knowledge of the murder
25 would be able to answer. Gipson took the CIT and failed, meaning that he had knowledge of
26 the murder that only the killer would know.

27 Detectives confronted Gipson with the fact that he failed the CIT. Gipson explained
28 that he had been “in and out of the mental hospital” and that he killed Brittney because “she

drove me crazy.” Gipson further stated that he would not see his kids for months.

Gipson previously had called the Jack in the Box and found out that Brittney worked at the West Lake Mead location. He walked to the Jack in the Box and waited for Brittney to arrive. He hid in the bushes behind a van.

Shortly thereafter, the victim arrived. When she got out of her car, a brown Jeep, Gipson approached her from behind and shot her one time in the head. Gipson did not know where she had been shot but that she collapsed on the ground next to her vehicle. Gipson then stated that he ran across the Vons shopping center intersection as Christina Bailey had described and ran all the way back to the 824 Levy address.

Gipson bought the .25 caliber gun on March 24, 2010, from an individual he knew only as Tramaine. He paid \$50 in cash and \$50 worth of Marijuana for the gun. After the shooting, he returned the gun to Tramaine without telling him he had used it in the murder. Gipson also discarded the shoes he was wearing as well as the dark hooded sweatshirt.

POINTS AND AUTHORITIES

I. THE DEFENDANT WAS NOT ENTITLED TO COUNSEL UNDER MIRANDA V. ARIZONA

A. The Defendant Was Not Subject to a Custodial Interrogation

The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning. Miranda v. Arizona, 384 U.S. 436, at 479, 86 S.Ct. 1602. An individual is not in custody for purposes of Miranda where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process, or where the individual questioned is merely the focus of a criminal investigation. Garcia v. Singletary, 13 F.3d 1487, 1489 (11th Cir.1994), United States v. Jones, 21 F.3d 165, 170 (7th Cir.1994).

The fact that he was Mirandized does not create a custodial situation. See in U.S. v. Akin 435 F.2d 1011, 1013 (1970) (“a custodial situation cannot be created by the mere

1 giving of modified Miranda warnings”), cert. denied Akin v. U.S., 401 U.S. 1011 (1971).

2 In State v. Lanning, the defendant voluntarily went to the police station to discuss
3 forged checks. 109 Nev. 1198 (1993). The defendant was not given any Miranda warnings.
4 The Defendant told the detective that “she should see an attorney because she did not want to
5 incriminate herself.” Id. at 1199. The detective informed her that she was not in custody
6 and she was free to leave at any time. Id. The defendant then confessed to the crimes. Id.
7 The defendant appealed challenging the admissibility of her confession; she claimed her
8 right to counsel was violated. Id. at 1199 - 1200. The court held that “a suspect questioned
9 in a non-custodial setting is not entitled to legal counsel...” Id. at 1200.

10 A determination of whether an interrogation is custodial must be made under a
11 totality of the circumstances, including the site of the interrogation, whether the objective
12 indicia of an arrest are present, and the length and form of questioning. Alward v. State, 112
13 Nev. 141, 155, 912 P.2d 243, 252 (1996). Factors to consider are:

- 14 1. whether the suspect was told that the questioning was voluntary or that he was
15 free to leave;
- 16 2. whether the suspect was not formally under arrest;
- 17 3. whether the suspect could move about freely during questioning;
- 18 4. whether the suspect voluntarily responded to questions;
- 19 5. whether the atmosphere of questioning was police-dominated;
- 20 6. whether the police used strong-arm tactics or deception during questioning;
- 21 and
- 22 7. whether the police arrested the suspect at the termination of questioning.

23 United States v. McKinney, 88 F.3d 551, 554 (8th Cir.1996). All seven factors need not be
24 present in order to determine that the suspect was or was not in custody. Id.

25 In this case, the Defendant was not in custody, therefore, not entitled to the rights as
26 provided by Miranda. Each of the seven factors listed above will be addressed in kind as
27 follows:
28

1 1. The Defendant Was Told the Questioning was Voluntary and He Was Free
2 to Leave.

3 In this case, the Defendant was informed multiple times that he was not under arrest.
4 Specifically, On March 25, 2010 the Defendant voluntarily went with Detectives Long and
5 Tremmel to their offices. Gipson was informed that he was not under arrest and could stop
6 the interview at any time. He was informed such by both Detectives. He was not handcuffed
7 at anytime. He was interviewed by Detectives Long and Tremmel both in civilian clothing.
8 The initial interview lasted for fifteen minutes, during which Gipson completely denied
9 killing Brittney.

10 Gipson was asked about taking a polygraph test. Gipson agrees to schedule the test.
11 Gipson also agreed to provide a DNA sample and have a Gunshot Residue Kit performed at
12 the same time. The Defendant was then asked to stay so that the examination could be
13 scheduled. During which time Officer Flohr informed the Detectives that it would be
14 preferable that Gipson take a Concealed Information Test (CIT). It was immediately
15 available to be done.

16 The Defendant then met with Detective Long and Officer Flohr. Officer Flohr read
17 the Defendant his Miranda rights. The Defendant was told unequivocally that ““You’re not
18 under arrest.” The Defendant’s response was “Yeah. I know that.” (Exhibit Two, pp. 5).

19 The Defendant brought up the issue of speaking with an attorney, at which point
20 Detectives informed him it was his choice to make and they took him home. Detective Long
21 specifically encouraged him to speak with whomever he needed to. He also informed the
22 Defendant that it was his choice whether he wanted to come and speak to him the next day,
23 that he did not have to. The Defendant said multiple times that he just wanted to remove any
24 suspicion that he was the murderer.

25 The next day, March 26, 2010, the Defendant then again voluntarily agreed to go with
26 Detectives to the ISD building. He was again informed that he was not under
27 arrest. The Defendant then voluntarily participated in the CIT examination.

28 2. The Defendant Was Not Formally Under Arrest.

1 Not only was the Defendant not under formal arrest, he was informed of such and
2 acknowledged such. Detective Long stated: ""You're not under arrest." The Defendant's
3 response: "Yeah. I know that." (Exhibit Two, pp. 5).

4 3. The Defendant Was Free to Leave.

5 The Defendant was told he could leave at any time. In fact, the Defendant was given
6 a ride home on March 25, 2011. Twice during the interviews the Defendant was allowed to
7 use the bathrooms. Twice during the interviews the Defendant stood up and the Detectives
8 allowed him to move freely. They did not instruct him to sit down and the interviews
9 continued.

10 4. The Defendant Voluntarily Responded to Questions.

11 The Defendant answered questions without hesitation and appropriately.

12 5. The Atmosphere was Not Police Dominated.

13 All officers involved in the questioning of the Defendant were in civilian clothing.
14 All officers that work in the ISD building are out of uniform and wear civilian clothing. The
15 office in which the Defendant was taken is not within the Clark County Detention Center.
16 The building has multiple floors and is essentially an office building.

17 6. Strong Arm Tactics, Nor Deception was Utilized During the Questioning

18 The Defendant was never subjected to any "strong-arm tactics" nor deception.
19 Detectives never presented any untrue information to the Defendant during any of the three
20 statements. Detectives did not scream or yell at the Defendant. They did not bang on the
21 table, nor attempt to intimidate the Defendant. Twice during the interview the Defendant
22 actually stood up, and the Detectives did not; they allowed him to make his point and
23 continue with the statement.

24 7. The Defendant Was Arrested After He Confessed to Killing the Victim.

25 The Defendant not arrested on March 25, 2010. He was actually driven home by the
26 Detectives. He was arrested March 26, 2010, after he admitted to facts that only the
27 murderer would have known and ultimately admitting to killing the victim.

28 In summary, the Defendant was not in custody during the statements he gave. He was

1 told such and specifically acknowledged that he was not under arrest. The Defendant was
2 even taken home after his statement on March 25, 2010. He was allowed to move about
3 freely during his interviews. He was not subject to strong arm tactics or deception. The
4 Defendant was asked open ended questions. The Defendant never asked to leave. The
5 Defendant never complained about the circumstances in which he was being questioned. It
6 was not until the Defendant admitted to killing the victim that he was ultimately arrested and
7 questioning stopped. Under a totality of these circumstances, it is clear the Defendant was
8 not in custody, and therefore, not entitled to his Miranda rights.

9 B. In the Alternative, If the Defendant Was "In Custody," he was properly
10 Mirandized, Any "Invocation" Was Equivocal, and There Was A Break In
11 Custody Following The "Invocation."

12 a) The Defendant Was Extensively Explained the Rights Under Miranda.

13 As noted supra, "a custodial situation cannot be created by the mere giving of
14 modified Miranda warnings" U.S. v. Akin 435 F.2d 1011, 1013 (1970). Nevertheless, in this
15 case the Defendant was sufficiently and more than adequately explained the rights that exist
16 under Miranda twice. As noted in the Statement of Facts supra, the Defendant was read the
17 rights under Miranda line by line. After each line was read to him on both occasions, he was
18 then asked the question: "[w]hat does that mean to you?" If the Defendant's answer did not
19 comport with the right read to him, Officer Flohr took the time to explain to the Defendant
20 what the right meant. Officer Flohr would not proceed with the next right until he felt the
21 Defendant understood the right he was being explained.

22 b) Any "Invocation" Was Equivocal.

23 "A suspect must actually invoke the right to counsel in order for officers to be barred
24 from questioning the suspect." Davis v. United States, 512 U.S. 452, 458, 114 S.Ct. 2350,
25 129 L.Ed.2d 362 (1994); United States v. Washington, 462 F.3d 1124, 1134 (9th Cir.2006).
26 "If a suspect merely makes an equivocal or ambiguous reference to an attorney, this is
27 insufficient to require the cessation of questioning." Davis, 512 U.S. at 459 ("reference to an
28 attorney that is ambiguous or equivocal in that a reasonable officer in light of the
circumstances would have understood only that the suspect might be invoking the right to

1 counsel ... do[es] not require the cessation of questioning”) (emphasis in original);
2 Washington, 462 F.3d at 1134.

3 The basis of the Defendant’s claim that he unequivocally requested an attorney is as
4 follows:

5 Q: Okay. Um, if you waive your right to have an attorney present and later change your
6 mind, the questioning will stop until you’ve had a chance to speak with an attorney.
7 Do you understand that right? What’s it mean to ya?

8 A: I can get a attorney if I want one.

9 Q: Yeah. At any point in time. You could say ‘Hey, you know what Geoff. Before we
10 go any further, I’m gonna want an attorney.’

11 A: Mmm hmm.

12 Q: You just gotta verbalize that to me. I’m gonna stop. I won’t get angry. I won’t get
13 upset. Okay. We’ll just stop.

14 A: Well, could I get an attorney then?

15 Q: It’s up to you.

16 A: I just wanna ax [sic] him a couple of questions before I take this.

17 Q: Okay. Okay. We’ll be with you in just a second.

18 A: I mean, I’m not opposed to taking it. I just wanna get some counsel about this cause I
19 don’t _____ (inaudible).

20 Q: Okay.

21 A: ...not sure about that.

22 Q: Alright. Okay.

23 A: _____.

24 Q: Okay. We understand.

25 A: I, I seen the show man. It’s got me skeptical about this.

26 Q: Okay.

27 (Sound of Geoff leaving the room, door opening/closing) (pause) (Geoff returns)

28 Yeah. Okay. Do you have a name of an attorney that you need to call or, or you

1 wanna contact?

2 A: I thought y'all was gonna provide me one.

3 Q: _____. (Inaudible) If you're charged in this investigation ...

4 A: (Both talking-inaudible)

5 Q: ... yeah. When, if you're charged in the investigation, okay, and you don't have the

6 funds to have an attorney then one would be provided for ya. Uh, right now this is in

7 the investigative stage as I understand at this point. So if, if you know a name of an

8 attorney we'll provide you with a phone and you can make a call and talk to him

9 about it and make a decision on what you wanna do.

10 A: I don't understand.

11 DL: We're, we're not arresting you.

12 A: _____. (Both talking-inaudible)

13 DL: You're not under arrest.

14 A: Yeah. I know that.

15 DL: So we don't provide you an attorney for you because you're not under arrest.

16 Q: You're not under arrest.

17 Q: If you have an attorney you wanna consult with, then you can consult with ... because

18 this involves a criminal investigation and because it involves this type of, ah, ah,

19 information test, okay, examination here. Um, we have to advise you of these rights.

20 So if you say to me 'Hey Geoff, you know what, I think I wanna talk to an attorney

21 before I go in through this process here'. Um, then I have to stop, mmm, and afford

22 you that opportunity to go ahead and go, go do that if that's what you wanna do. Um,

23 but like he said, you're not under arrest at this point so we don't have to provide you

24 with an attorney, but we provide you the means to make a phone call tonight if you

25 want.

26 DL: Absolutely.

27 Q: To call an attorney and talk to him.

28 A: I don't know any attorneys.

1 Q: Well, give him a phone book I guess, if you wanna call. What do you wanna do?
2 A: I wanna make sure this is right.
3 Q: The examination that you're going to go under is called concealed information test.
4 Okay. And basically it's based on knowledge. If you didn't have anything to do
5 with this you wouldn't know specific information about this case. That's what this is
6 gonna involve.
7 A: Come on. Let's get it over with.
8 Q: Okay. Hold on for just a second. Alright, So, you're telling me Geoff you know
9 what, you don't wanna consult with an attorney at this point? Verbalize that to me
10 so...
11 A: No.
12 Q: No. You don't. It's okay to continue?
13 A: Yeah.
14 Q: Okay. Hold on for just a second. (Leaves room) (pause)
15 A: _____ (inaudible)
16 Q: (returns to room) Okay. Here's the deal. I wanna give you an opportunity here
17 tonight to, to leave. Okay. So what I'd like to do is I wanna administer, ah, this
18 examination, the concealed information test, tomorrow at noon. Okay. So, I'm gonna
19 kick you outta [sic] here. These guys will come and pick ya [sic] up and bring you
20 down here if that's alright with ya [sic], tomorrow morning, and I'll see you here at
21 noon. Well enough?
22 DL: Tomorrow noon. (Laughs)
23 Q: Yeah. Tomorrow. Tomorrow at noon.
24 A: _____ (both talking – inaudible)
25 DL: Because if they, the, the, they, I mean, you, you wanna consult with, go consult with
26 attorneys.
27 Q: Yeah. We got, we gotta give you that opportunity. That's the right thing to do....
28 (Exhibit Two, pp. 2 – 7).

1 As shown above, at no point does the Defendant unequivocally request an attorney.
2 At the end of the first set of Miranda rights they Defendant discussed the idea of getting an
3 attorney; nevertheless, he never unequivocally asked for one and instead he chose to proceed
4 with the test. (Exhibit Two, pp. 6). The Defendant stated he did not want to consult with an
5 attorney. (Exhibit Two, pp. 7). Nevertheless, at that point Detectives decided to end the
6 interview and take him home. They encouraged him to speak with whomever he needed to.
7 Id. At no point during the interview does the Defendant unequivocally invoke the rights
8 under Miranda.

9 The Defendant's "request" was similar to the one made by the defendant in State v.
10 Lanning. In Lanning, the defendant stated, "she should see an attorney because she did not
11 want to incriminate herself." 109 Nev. 1198, 1199. The court held the defendant's statement
12 was merely equivocal. Id. at 1201.

13 Here, as opposed to the Detective in Lanning, when the Defendant mentions the mere
14 idea of an attorney, the Detectives encourage such and do not proceed with the CIT
15 examination. They even tell him it's the right thing to do. Clearly the Defendant is more
16 concerned with the reliability of the examination as opposed to seeking the aid of counsel.
17 When specifically asked if he wants an attorney, the Defendant says no and that he wants to
18 take the examination. Even after that, the Detectives stop the interview and take him home.
19 They wait until the next day to perform the test, allowing the Defendant the opportunity to
20 speak with whomever he chooses and decide whether he wants to take the test. Clearly,
21 there is not an unequivocal request for an attorney.

22 c) There Was A Break In Custody Following The "Invocation."

23 Even if this court were to find that the Defendant was "in custody" and that the
24 Defendant unequivocally invoked the right to counsel, it is the subsequent release from
25 custody and return to his residence and the Defendant then being re-Mirandized the
26 following day that allowed resumption in questioning. See Maryland v. Shatzer, 130 S.Ct.
27 1213, 1222 (2010) ("The protections offered by Miranda, which we have deemed sufficient
28 to ensure that the police respect the suspect's desire to have an attorney present the first time

1 police interrogate him, adequately ensure that result when a suspect who initially requested
2 counsel is re-interrogated after a break in custody that is of sufficient duration to dissipate its
3 coercive effects.”).

4 II. THE DEFENDANT’S STATEMENTS WERE VOLUNTARY

5 In Rosky v. State, the Nevada Supreme court held that

6 “...voluntariness analysis involves a subjective element as it
7 logically depends on the accused’s characteristics. In this
8 context, the prosecution has the burden of proving by a
9 preponderance of the evidence that the statement was voluntary
10 i.e. the defendant’s will was not overborne. A confession is
11 involuntary if it was coerced by physical intimidation or
12 psychological pressure. Several factors are relevant in deciding
13 whether a suspect’s statements are voluntary: the youth of the
14 accused; his lack of education or his low intelligence; the lack of
15 any advice of constitutional rights; the length of detention; the
16 repeated and prolonged nature of questioning; and the use of
17 physical punishment such as the deprivation of food or sleep. A
18 suspect’s prior experience with law enforcement is also a
19 relevant consideration.

20 111 P.3d, 690, 121 Nev. 184, 194 (2005). In order to make a determination the court
21 must look at the totality of the circumstances. Jackson v. Denno, 378 U.S. 368 (1964).

22 In this case, the Defendant was twenty-six (26) years old at the time of the interview
23 with Detectives. There’s no indication that he has a low IQ. In fact, the Defendant
24 answered all the questions appropriately, explained what each of his rights meant to him and
25 even expressed some prior knowledge of the CIT prior to it being explained to him. The
26 Defendant did represent any mental issues until after he confessed to minimize his
27 culpability. As previously indicated, the Defendant was Mirandized not once, but twice over
28 a two day period. The Defendant was never detained during the entire interview process. In
the course of his first Miranda warning, and while repeatedly being told he was not under
arrest, the Defendant, himself, explicitly stated that he knew he was not under arrest.
(Exhibit Two, pp. 5). He was even given a ride home after the first day’s interviews on
March 25, 2010. The following day, prior to his confession, the Defendant stated that he
got seven (7) hours sleep, ate breakfast, and was not on any medication. The Defendant was
finally placed under arrest after the final interview was over. He did not complain of any

1 physical maladies that affected him. (Exhibit Three, pp. 19-20). The questioning was not
2 repetitious and no deceit was used. There was absolutely no physical force or threat offered.
3 There was no intimidation or deprivation of any kind. The Defendant had bathroom breaks
4 and never complained for the lack of food, water, sleep or any other deprivation. The
5 Defendant never expressed any desire to terminate any of his interviews. He never
6 expressed any discomfort. The Defendant told detectives multiple times that he just wanted
7 to clear his name. The Defendant also has a lengthy criminal record and, on at least two
8 prior occasions was read Miranda rights and agreed to speak with officers.

9 In case C-221452 , the Defendant was convicted of Robbery. In relation to that
10 robbery case, on April 1, 2006, the Defendant was read Miranda rights by Detective
11 Wolfenbarger. (Exhibit Four). The Defendant was asked if he understood those rights, to
12 which he responded "yes." Id. The Defendant was then asked if he wanted to talk, to which
13 he responded "yes." Id. In another case, 03F20632X, the Defendant was being investigated
14 for attempting to cash a fraudulent check. (Exhibit Three). Officer Mueller made contact
15 with the Defendant and informed him of the Miranda rights. Id. The Defendant indicated he
16 understood those rights and again spoke with the officer. Id.

17 Under a totality of the circumstances as noted above, it is clear that the Defendant's
18 statement was given voluntarily.

19 CONCLUSION

20 The Defendant was never in custody in this case until after his confession. Therefore,
21 the Defendant was not entitled to the rights under Miranda v. Arizona. Nevertheless, if the
22 Defendant was entitled to such, he was given his rights, and he did not unequivocally invoke
23 them. Finally, even if this court finds that he was not in custody and he unequivocally
24 invoked his rights, there was a break in custody such that his subsequent Miranda warning
25 and confession was proper.

26 ///

27 ///

28 ///

Additionally, the Defendant's confession was voluntarily given. The State requests this court set a Jackson v. Denno hearing to establish such.

DATED this _____ day of April, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ SHANON CLOWERS

SHANON CLOWERS
Deputy District Attorney
Nevada Bar #0010008

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Opposition To Defendant's Motion To Supress
Statement Of Facts, was made this _____ day of April, 2011, by Electronic Filing to:

PUBLIC DEFENDER
Email: pdclerk@co.clark.nv.us

/s/ T. SCHESSLER

Secretary for the District Attorney's
Office


CLERK OF THE COURT

1 **SAO**

2 CARMINE J. COLUCCI, CHTD.
3 CARMINE J. COLUCCI, ESQ.
4 Nevada Bar No. 881
5 629 South Sixth Street
6 Las Vegas, Nevada 89101
7 (702) 384-1274 Telephone
8 E-Mail: cjc@lvcoxmail.com
9 Attorney for Respondent

10
11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

13 KEVIN GIPSON,)

14 Petitioner,)

15 vs.)

16 D.W. NEVIN, WARDEN,)
17 HIGH DESERT STATE PRISON)
18 Respondent,)

Case No.: 10C264079
Dept No.: XVIII

19
20 **STIPULATION AND ORDER**

21 IT IS HEREBY STIPULATED AND AGREED by the parties hereto through their
22 respective counsel that the previous briefing schedule set by this Court on the
23 Petition for Writ of Habeas Corpus shall be modified and extended as follows:

24 THAT the Petitioner shall have until and through January 31, 2014 within
25 which to file his Points and Authorities in Support of Petition for Writ of Habeas
26 Corpus (Post-Conviction).

27 THAT the State shall have until and through April 1, 2014 to file a Response.

28 THAT the hearing date of March 31, 2014 presently set by the Court for
hearing and decision on whether to set an evidentiary hearing in this matter shall
be vacated and reset to a date convenient for the court as set forth below in this

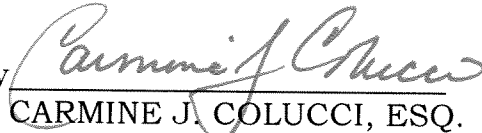
1 attached Order. Further stipulated that the State shall retain the right to raise the
2 argument that Petitioner's petition is time barred

3
4 Dated this 6th day of December, 2013.

5 CARMINE J. COLUCCI, CHTD.

STEPHEN B. WOLFSON
CLARK COUNTY DISTRICT ATTORNEY

7
8 By



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



LEON SIMON, ESQ.
Nevada Bar No. 0411
200 E. Lewis Ave
Las Vegas, Nevada 89101
Attorney for Respondent

12
13 **ORDER**

14 IT IS HEREBY ORDERED that the previously ordered briefing schedule shall
15 be modified as follows:

16 THAT the Petitioner shall have until and through January 31, 2014 within
17 which to file his Supplemental Brief;

18
19 THAT the State shall have until and through April 1, 2014 within which to file
20 its Response and further that the State shall retain the right to raise the argument
21 that Petitioner's petition is time barred.

22 THAT THE HEARING AND DECISION on the issue raised in these briefs shall
23 be set for 14th day of April, 2014 at the hour of 8:15 A.M. in
24 the District Court 18.

25
26 DATED this ____ day of DEC 17 2013, 2013.

27
28 
DISTRICT JUDGE 


CLERK OF THE COURT

SAO

CARMINE J. COLUCCI, CHTD.
CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 881
629 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-1274 Telephone
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Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

KEVIN GIPSON,

Petitioner,

vs.

D.W. NEVIN, WARDEN,
HIGH DESERT STATE PRISON

Respondent,

Case No.: 10C264079

Dept No.: XVIII

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED by the parties hereto through their respective counsel that the previous briefing schedule set by this Court on the Petition for Writ of Habeas Corpus (Post-Conviction) shall be modified and extended as follows:

THAT the Petitioner shall have up to and including May 5, 2014, within which to file his Petition for Writ of Habeas Corpus (Post-Conviction) and Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

THAT the State shall have up to and including July 7, 2014, to file a Response.

1 That the Petitioner shall have up to and including August 7, 2014, within
2 which to file his Reply.

3 THAT the hearing date of April 14, 2014, presently set by the Court for
4 hearing and decision on whether to set an evidentiary hearing in this matter shall
5 be vacated and reset to a date convenient to the Court.
6

7 THAT it is further stipulated that the State shall retain the right to raise the
8 argument that Petitioner's petition is time barred.
9


10 Dated this 31 day of January, 2014.

11 CARMINE J. COLUCCI, CHTD.

STEPHEN B. WOLFSON

CLARK COUNTY DISTRICT ATTORNEY

12
13
14 By


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



LEON SIMON, ESQ.
Nevada Bar No. 0411
200 E. Lewis Ave
Las Vegas, Nevada 89101
Attorney for Respondent

18 **ORDER**

19 IT IS HEREBY ORDERED that the previously ordered briefing schedule shall
20 be modified as follows:
21


22 THAT the Petitioner shall have up to and including May 5, 2014, within which
23 to file his Petition for Writ of Habeas Corpus (Post-Conviction) and Points and
24 Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).
25

26 THAT the State shall have up to and including July 7, 2014, within which to
27 file its Response and further that the State shall retain the right to raise the
28 argument that Petitioner's petition is time barred.

1 THAT the Petitioner shall have up to and including August 7, 2014, within
2 which to file his Reply.

3 THAT THE HEARING AND DECISION on the issue raised in these briefs shall
4 be set for 18th day of August, 2014 at the hour of 8:15 A.M.
5

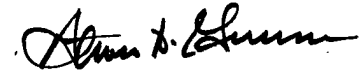
6 DATED this ____ day of FEB 03 2014, 2014.

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DISTRICT JUDGE *ps*

1 **RSPN**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 H. LEON SIMON
6 Chief Deputy District Attorney
7 Nevada Bar #000411
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: 10C264079

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

DEPT NO: XVIII

14 Defendant.

15 STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR
16 WRIT OF HABEAS CORPUS (POST-CONVICTION)

17 DATE OF HEARING: June 23, 2014
18 TIME OF HEARING: 8:15 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through H. LEON SIMON, Chief Deputy District Attorney, and hereby
21 submits the attached Points and Authorities in Response to Defendant's Petition for Writ of
22 Habeas Corpus (Post-Conviction).

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

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1 2013, Carmine Colucci, Esq., confirmed as counsel for Defendant. On June 17, 2013, counsel
2 advised the court that all the documents had been received and a briefing schedule was set.

3 On January 7, 2014, the parties stipulated to extend the briefing schedule. Notably,
4 they also stipulated that the State retained the right to argue that Defendant's Petition was time-
5 barred. See Stipulation and Order, filed January 7, 2014, pg. 2. The parties again stipulated
6 to extend the briefing schedule on February 6, 2014; the State again retained the right to argue
7 that the Petition was time-barred. See Stipulation and Order, filed February 6, 2014, pg. 2.
8 Finally, on May 19, 2014, the parties stipulated for a third time to extend the briefing schedule.
9 See Stipulation and Order, filed May 19, 2014.

10 Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction) and Points
11 and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) on June
12 6, 2014. The State responds as follows.

13 ARGUMENT

14 **I. DEFENDANT'S INSTANT PETITION IS PROCEDURALLY BARRED** 15 **WITHOUT GOOD CAUSE**

16 **A. Defendant's Instant Petition For Writ Of Habeas Corpus (Post-** 17 **Conviction), Is Procedurally Barred By The One-Year Time Limit Of NRS** 18 **34.726**

19 Defendant's Judgment of Conviction was filed on March 13, 2012; Defendant did not
20 file a direct appeal. NRS 34.726 provides in relevant part as follows:

21 NRS 34.726 Limitations on time to file; stay of sentence.

22 1. Unless there is good cause shown for delay, a petition that
23 challenges the validity of a judgment or sentence **must be filed**
24 **within 1 year after entry of the judgment of conviction or, if**
25 **an appeal has been taken from the judgment, within one year**
26 **after the Supreme Court issues its remittitur.** For the purposes
of this subsection, good cause for delay exists if the petitioner
demonstrates to the satisfaction of the court:

- (a) That the delay is not the fault of the petitioner; and
- (b) That dismissal of the petition as untimely will
unduly prejudice the petitioner.

...

27 NRS 34.726 (emphasis added). "Absent a showing of good cause as defined by this statute,
28 untimely post-conviction claims that arise out of the proceedings involving the initial

1 conviction or the direct appeal and that could have been raised before the judgment of
2 conviction was amended are procedurally barred.” Sullivan v. State, 120 Nev. 537, 541, 96
3 P.3d 761, 764 (2004). As per the language of the statute, the one-year time bar prescribed by
4 NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from
5 a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-
6 34 (1998); see Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that
7 NRS 34.726 should be construed by its plain meaning).

8 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme
9 Court rejected a habeas petition that was filed just two (2) days late, pursuant to the “clear and
10 unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance
11 of filing the petition with the district court within the one-year mandate, absent a showing of
12 “good cause” for the delay in filing. Gonzales, 118 Nev. at 593, 590 P.3d at 902. The one-
13 year time bar is therefore strictly and exactly construed. In contrast with the short amount
14 of time to file a notice of appeal, a prisoner has an ample full year to file a post-conviction
15 habeas petition, so there is no injustice in a strict application of NRS 34.726(1), despite any
16 alleged difficulties with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

17 The instant Petition for Writ of Habeas Corpus (Post-Conviction) was filed on June 6,
18 2014, approximately 2 years, 2 months, and 24 days after Defendant’s Judgment of Conviction
19 on March 13, 2012. Defendant’s instant Petition for Writ of Habeas Corpus (Post-Conviction)
20 was filed beyond the one-year time bar of NRS 34.726(1). Therefore, it should be dismissed
21 because it is procedurally barred by NRS 34.726(1) and Defendant fails to show good cause
22 and prejudice. See Argument §I(B), infra.

23 **B. Defendant Fails to Demonstrate Good Cause and Prejudice to Overcome**
24 **the Procedural Bars**

25 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the
26 following: 1) “[t]hat the delay is not the fault of the petitioner” and 2) that the petitioner will
27 be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726(1). Under the
28 first requirement, “a petitioner must show that an impediment external to the defense prevented

1 him or her from complying with the state procedural default rules.” Hathaway v. State, 119
2 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Pellegrini v. State, 117 Nev. 860, 886-87, 34
3 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi
4 v. Director, Dep’t Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989) (overruled on other grounds
5 by Harris v. State, 130 Nev. Adv. Op. 47, *16-18). “An impediment external to the defense
6 may be demonstrated by a showing ‘that the factual or legal basis for a claim was not
7 reasonably available to counsel, or that some interference by officials, made compliance
8 impracticable.’” Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639 (1986)
9 (citations and quotations omitted)). Good cause for the delay is defined as “a substantial
10 reason; one that affords a legal excuse.” Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229,
11 1230 (1989).

12 Once a petitioner has established cause, he must show actual prejudice resulting from
13 the errors of which he complains, i.e., “a petitioner must show that errors in the proceedings
14 underlying the judgment worked to the petitioner’s actual and substantial disadvantage.” State
15 v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 94-95 (2012) (citing Hogan v. Warden, 109
16 Nev. 952, 959–60, 860 P.2d 710, 716 (1993)).

17 Defendant alleges as good cause, that the parties and court were unaware of the
18 impeding time bar when Mr. Colucci was appointed approximately 1 month prior to the
19 running of the 1 year time-bar under NRS 34.726(1). See Defendant’s Petition for Writ of
20 Habeas Corpus (Post-Conviction), filed June 6, 2014, pgs. 6-7. He argues that the setting of a
21 Status Check past the 1 year time-bar date of March 13, 2013, and the filing of Stipulations
22 and Orders to extend the briefing schedule support his argument and constitute good cause to
23 overcome the procedural bar. Id. What Mr. Colucci fails to mention, is that in the Stipulations
24 and Orders filed on January 7, 2014, and February 6, 2014, the State specifically retained the
25 right to assert the procedural time-bar of NRS 34.726(1). See Stipulation and Order, filed
26 January 7, 2014, pg. 2; see also Stipulation and Order, filed February 6, 2014, pg. 2.
27 Furthermore, the State is prohibited from waiving the procedural time-bar and district courts
28 are prohibited from disregarding procedural bars even if parties stipulate to do so:

1 ... we hold that the parties in a post-conviction habeas proceeding cannot
2 stipulate to disregard the statutory procedural default rules. We direct all counsel
3 in the future not to enter into stipulations like the one in this case and direct the
district courts not to adopt such stipulations.

4 State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 682 (2003). Therefore, the date of the
5 status check and the Stipulations and Orders, even if they had not reserved the right to assert
6 the time-bar, cannot constitute good cause. Thus, Defendant fails to demonstrate good cause
7 and prejudice. Defendant's instant Petition for Writ of Habeas Corpus (Post-Conviction)
8 should be dismissed pursuant to NRS 34.726(1). See Argument §I(A), supra; §§I(C), I(D),
9 infra.

10 C. Application of Procedural Bars is Mandatory

11 The Nevada Supreme Court has specifically found that the district court has a duty to
12 consider whether the procedural bars apply to a post-conviction petition and not arbitrarily
13 disregard them. In State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), the Court
14 held that "[a]pplication of the statutory procedural default rules to post-conviction habeas
15 petitions is mandatory," and "cannot be ignored when properly raised by the State." Id. at 231,
16 233, 112 P.3d at 1074, 1075. There, the Court reversed the district court's decision not to bar
17 the defendant's untimely and successive petition:

18 Given the untimely and successive nature of [defendant's]
19 petition, the district court ***had a duty imposed by law*** to consider
20 whether any or all of [defendant's] claims were barred under NRS

21 34.726, NRS 34.810, NRS 34.800, or by the law of the case . . .
22 [and] the court's failure to make this determination here
constituted an arbitrary and unreasonable exercise of discretion.

23 Id. at 234, 112 P.3d at 1076 (emphasis added). The Court justified this holding by noting that
24 "[t]he necessity for a workable system dictates that there must exist a time when a criminal
25 conviction is final." Id. at 231, 112 P.3d 1074 (citation omitted); see also State v. Haberstroh,
26 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003) (wherein the Nevada Supreme Court held
27 that parties cannot stipulate to waive, ignore or disregard the mandatory procedural default
28 rules nor can they empower a court to disregard them). Defendant is required to show good

1 cause and prejudice to overcome the procedural bars before his petition may be considered on
2 the merits. Defendant's instant Petition for Writ of Habeas Corpus (Post-Conviction) cannot
3 be considered on the merits because it is subject to procedural bars and Defendant fails to show
4 good cause and prejudice. See Argument §§I(A), I(B), supra.

5 **D. Consistent Application of Procedural Bars is Required**

6 Legislatively mandated procedural bars are not simply a legal technicality. They serve
7 a vital role in maintaining the viability of the criminal justice system.

8 "[R]easonable adherence to clear, reasonable and known rules of
9 procedure is essential to the administration of justice. Justice
10 cannot be administered in chaos. Moreover the administration of
11 justice involves not only meticulous disposition of the conflicts in
12 one particular case but the expeditious disposition of hundreds of
13 cases. If the courts must stop to inquire where substantial justice
14 on the merits lies every time a litigant refuses or fails to abide the
15 reasonable and known rules of procedure, there will be no
16 administration of justice. Litigants must be required to cooperate
17 in the efficient disposition of their cases."

18 United States v. Seigel, 168 F.2d 143, 146 (D.C., 1948).

19 As the Nevada Supreme Court noted in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519,
20 530 (2001), "the legislative history of the habeas statutes shows that Nevada's lawmakers
21 never intended for petitioners to have multiple opportunities to obtain post-conviction relief
22 absent extraordinary circumstances." Furthermore, legislative imposition of statutory time
23 limits "evinces intolerance toward perpetual filing of petitions for relief, which clogs the court
24 system and undermines the finality of convictions." Id. 34 P.3d at 529. Defendants are entitled
25 to "one time through the system absent extraordinary circumstances" Id.

26 "Where the intention of the Legislature is clear, it is the duty of the court to give effect
27 to such intention and to construe the language of the statute so as to give it force and not nullify
28 its manifest purpose." Woofert v. O'Donnell, 91 Nev. 756, 762, 542, P.2d 1396, 1400 (1975);
see also Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 528-529 (2001).

29 Nevada courts, and the Nevada Supreme Court in particular, have been under regular
30 attack by petitioners who claim Nevada does not consistently apply its procedural bars. See,
e.g., Loveland v. Hatcher, 231 F.3d 640 (9th Cir.2000) (denying claim made that Nevada does

1 not consistently apply NRS 34.726(1), the one-year limit for filing habeas petition). These
2 attacks have continued even though both the Nevada Supreme Court and the Ninth Circuit
3 have recently ruled that “a petitioner must establish ‘good cause’ and ‘actual prejudice’ to
4 overcome a post conviction procedural bar.” Valerio v. State, 112 Nev. 383, 390, 915 P.2d
5 874 (1998); Loveland, supra. As long as the State rules are consistently applied, the federal
6 courts must show deference to the State court’s application of procedural bars. Loveland,
7 supra. In Petrocelli v. Angelone, 248 F.3d 877 (9th Cir, 2001) the Ninth Circuit Court of
8 Appeals, citing its earlier decision in Moran v. McDaniel, 80 F.3d 1261 (9th Cir.1996) found
9 that the Nevada Supreme Court had consistently applied the procedural bar in NRS 34.800.

10 The United States Supreme Court has also addressed the importance of procedural bars.
11 In Bousley v. United States, 523 U.S. 614, 629, 118 S.Ct. 1604, 1614 (1998), the Court stated
12 that “[n]o criminal law system can function without rules of procedure conjoined with a rule
13 of finality.”

14 In Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986), the United States Supreme
15 Court stated that “[a] State’s procedural rules serve vital purposes on appeal as well as at trial
16 and on state collateral attack, and the standard for cause should not vary depending on the
17 timing of a procedural default.” The Court went on to say “[a]ttorney error short of ineffective
18 assistance of counsel does not constitute cause for a procedural default even when that default
19 occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal
20 ordinarily requires a showing of some external impediment preventing counsel from
21 constructing or raising the claim.” Murray, 477 U.S. at 492, 106 S.Ct. at 2648.

22 Even in the context of capital cases, courts have recognized the important function of
23 procedural bars in appellate litigation. Recently the California Supreme Court held:

24 California law also recognizes that in some circumstances there
25 may be matters that undermine the validity of a judgment or the
26 legality of a defendant’s confinement or sentence, but which are
27 not apparent from the record on appeal, and that such
28 circumstances may provide a basis for a collateral challenge to the
judgment through a writ of habeas corpus. At the same time,
however, our cases emphasize that habeas corpus is an
extraordinary remedy that “was not created for the purpose of
defeating or embarrassing justice, but to promote it” (In re Alpine
(1928) 203 Cal. 731, 744, 265 P. 947), and that the availability of

1 the writ properly must be tempered by the necessity of giving due
2 consideration to the interest of the public in the orderly and
3 reasonably prompt implementation of its laws and to the important
4 public interest in the finality of judgments. For this reason, a
variety of procedural rules have been recognized that govern the
proper use of the writ of habeas corpus, including a requirement
that claims raised in a habeas corpus petition must be timely filed.

5 In re Robbins, 18 Cal.4th 770, 777, 959 P.2d 311, 316-316, 77 Cal.Rptr.2d 153, 158 (1998).

6 Finally, in United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979),
7 the United States Supreme Court stated that “[e]very inroad on the concept of finality
8 undermines confidence in the integrity of our procedures; and, by increasing the volume of
9 judicial work, inevitably delays and impairs the orderly administration of justice. Thus,
10 Defendant’s instant Petition for Writ of Habeas Corpus (Post-Conviction) cannot be
11 considered on the merits because it is subject to procedural bars which must be applied and
12 Defendant fails to show good cause and prejudice. See Argument §§I(A), I(B), supra.

13 **II. THE COURT MAY ELECT TO ALLOW DEFENDANT ADDITIONAL TIME**
14 **TO OPPOSE THE INSTANT MOTION TO DISMISS**

15 NRS 34.750(4) provides that Defendant is entitled to 15 days to respond to the State’s
16 Motion to Dismiss. However, the State did not receive this Petition for Writ of Habeas Corpus
17 (Post-Conviction) until June 9, 2014. Therefore, the State was unable to file its instant
18 Response and Motion to Dismiss Defendant’s Petition for Writ of Habeas Corpus (Post-
19 Conviction) 15 days prior to the hearing currently set on June 23, 2014, which would have
20 necessitated filing the Response and Motion to Dismiss on or before Friday, June 6, 2014.
21 Therefore, the State has no objection to this Court continuing the hearing so Defendant can
22 have his statutory 15 days to respond.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 CONCLUSION

2 Based on the foregoing, the State respectfully requests that Defendant's Petition for
3 Writ of Habeas Corpus (Post-Conviction) be DISMISSED.

4 DATED this 13th day of June, 2014.

5 Respectfully submitted,

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

9 BY 

10 H. LEON SIMON
11 Chief Deputy District Attorney
12 Nevada Bar #000411

13 CERTIFICATE OF FACSIMILE TRANSMISSION

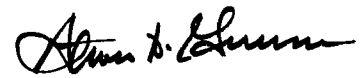
14 I hereby certify that service of State's Response and Motion to Dismiss Defendant's
15 Petition for Writ of Habeas Corpus (Post-Conviction), was made this 13th day of June,
2014, by facsimile transmission to:

16 CARMINE COLUCCI, ESQ.
17 FAX #702-384-4453

18 BY: 

19 Theresa Dodson
20 Secretary for the District Attorney's Office
21
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28

sk/HLS/td/dvu



CLERK OF THE COURT

CARMINE J. COLUCCI CHTD.
Nevada Bar #000881
629 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-1274 telephone
(702) 384-4453 facsimile
Attorney for Petitioner
KEVIN MARQUETTE GIPSON

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	CASE NO.	C264079
)	DEPT NO.	XVIII
Plaintiff,)		
)		
vs.)		
)		
KEVIN MARQUETTE GIBSON aka, Kevin)		
Marquette Gibson, #1582343)		
)		
Defendant.)		

REPLY TO STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S
PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Comes now Defendant, KEVIN GIPSON, by and through his appointed attorney, CARMINE J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI, CHTD., and moves this court to consider the Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) on the merits and to deny the State's Motion to Dismiss.

///

///

///

1 This Reply is made and based upon all of the pleadings and papers on file
2 herein, the points and authorities submitted herewith, and the argument of
3 counsel, if allowed by the Court at the time of the hearing on this matter.
4

5 DATED this 7th day of August, 2014.

6 CARMINE J. COLUCCI, CHTD.

7 
8 CARMINE J. COLUCCI, ESQ.

9 Nevada Bar No. 000881

10 629 South Sixth Street

11 Las Vegas, Nevada 89101

12 Attorney for Petitioner

13 ARGUMENT

14 **Defendant's Petition is Not Procedurally Barred**

15 Under NRS 34.726, limitations on time to file a petition for writ of habeas
16 corpus must be filed within one (1) year after the entry of the judgment of
17 conviction unless there is good cause shown for the delay. Further, "good cause"
18 for the delay exists if the petitioner demonstrates to the satisfaction of the court
19 that the delay is not the fault of the petitioner; and the dismissal of the petition
20 as untimely will unduly prejudice the petitioner.
21

22 The defendant has alleged that the Court and the parties, especially
23 petitioner's counsel, was unaware of the impending time bar when he accepted the
24 appointment. This was a court-appointment and the file was not immediately
25 made available to him. The district court set a status check, past the one (1) year
26 time bar date of March 13, 2013. Even the initial briefing schedule set by the
27 district court set dates that were beyond the procedural bar time line date of
28

1 March 13, 2013.

2 Further, appointed counsel had to review the portions of the file that he was
3 provided with which took some time. He initially requested four months to review
4 the file and the Court ordered that. See **Exhibit A** attached hereto.

5
6 On May 19, 2014, defense counsel ordered the preparation of transcripts
7 of the various proceedings which had not previously been provided to him. See
8 entries in Exhibit 1 extending from June 17, 2013 through June 6, 2014. See
9 **Exhibit B**. It was only after those transcripts had been provided that petitioner's
10 counsel had the complete file. On June 17, 2013, defense counsel appeared in
11 court and the district judge set a briefing schedule.

12
13 The undue prejudice of dismissal of the petition is obvious. A dismissal will
14 serve to deny petitioner the opportunity to have the issues raised in his petition
15 considered on the merits.

16 CONCLUSION

17
18 For the reasons set forth above, petitioner respectfully requests that this
19 court deny the State's request to dismiss and consider the issues raised in the
20 petition for the writ of habeas corpus (post-conviction) on the merits.

21 DATED this 7th day of August, 2014.

22 CARMINE J. COLUCCI CHTD.

23
24 
25 CARMINE J. COLUCCI, ESQ.

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

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addressed to:

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

E. Vargas
An employee of
CARMINE J. COLUCCI, CHTD.

Exhibit A

REGISTER OF ACTIONS

CASE No. 10C264079

The State of Nevada vs Kevin M Gipson

www.ck12.org

Case Type:	Felony/Gross Misdemeanor
Date Filed:	04/28/2010
Location:	Department 18
Reference Case Number:	C264079
Case Scope ID #:	1582343
Case Number:	09GJ00167
Case Court No.:	62071

PARTY INFORMATION

Defendant **Gipson, Kevin M**
 Other Agency Numbers
 1582343 Scope ID Subject Identifier

Lead Attorneys
Carmine J. Colucci
Retained
7023841274(W)

Plaintiff State of Nevada

Steven B Wolfson
702-671-2700(W)

CHARGE INFORMATION

Charges: Gipson, Kevin M

	Statute	Level	Date
1. MURDER	200.010	Felony	01/01/1900
1. DEGREES OF MURDER	200.030	Felony	01/01/1900
1. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME	193.165	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

02/11/2013 | **All Pending Motions** (8:15 AM) (Judicial Officer Barker, David)

Minutes

02/11/2013 8:15 AM

- CONFIRMATION OF COUNSEL (COLUCCI)...DEFT'S PRO PER MOTION FOR DIRECT APPEAL / MEMORANDUM OF POINTS AND AUTHORITIES FACTS OF THE CASE Mr. Colucci CONFIRMED as counsel and requested matter be set for status check in for months for him to have time to review file. COURT ORDERED, matter SET for status check and Deft's Pro Per Motion OFF CALENDAR. NDC 6/17/13 8:15 AM STATUS CHECK: SET BRIEFING SCHEDULE CLERK'S NOTE: The above minute order has been distributed to: Kevin Marquette Gipson BAC #1082776, Ely State Prison, P.O. Box 1989, Ely, NV 89301. aw

Parties Present

[Return to Register of Actions](#)

12/07/2011 **All Pending Motions** (8:15 AM) (Judicial Officer Barker, David)
Parties Present
Minutes
 Result: Matter Heard

12/12/2011 **CANCELED Jury Trial** (10:00 AM) (Judicial Officer Barker, David)
Vacated - per Judge

12/12/2011 **CANCELED Motion in Limine** (8:15 AM) (Judicial Officer Barker, David)
Vacated - per Judge

02/10/2012 **Sentencing** (1:30 PM) (Judicial Officer Barker, David)
Minutes
 Result: Defendant Sentenced

02/21/2012 **Criminal Order to Statistically Close Case**
Criminal Order to Statistically Close Case

03/13/2012 **Judgment of Conviction**
Judgment of Conviction (Plea of Guilty)

09/05/2012 **Motion**
Motion To Withdraw Plea

09/21/2012 **Opposition to Motion**
State's Opposition to Defendant's Motion Pro Per Motion to Withdraw Plea

09/26/2012 **Motion** (8:15 AM) (Judicial Officer Barker, David)
Deft's Pro Per Motion to Withdraw Plea
Parties Present
Minutes
 Result: Motion Denied

09/27/2012 **Order Denying Motion**
Order Denying Defendant's Pro Per Motion to Withdraw Plea

10/15/2012 **Motion**
Motion To Proceed In Forma Pauperis

10/15/2012 **Motion**
Ex Parte Motion For Appointment Of Counsel And Request For Evidentiary Hearing

11/02/2012 **Opposition**
State's Opposition to Defendant's Motion to Appoint Counsel and Request for Evidentiary Hearing

11/05/2012 **Motion**
Motion for Direct Appeal / Memorandum of Points and Authorities Facts of the Case

11/07/2012 **Motion** (8:15 AM) (Judicial Officer Barker, David)
Deft's Pro Per Motion To Proceed In Forma Pauperis
 Result: Motion Granted

11/07/2012 **Motion** (8:15 AM) (Judicial Officer Barker, David)
11/07/2012, 01/09/2013, 01/28/2013
Deft's Pro Per Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing
 Result: Matter Continued

11/07/2012 **All Pending Motions** (8:15 AM) (Judicial Officer Barker, David)
Parties Present
Minutes
 Result: Matter Heard

11/08/2012 **Case Appeal Statement**
Case Appeal Statement

11/26/2012 **Motion** (8:15 AM) (Judicial Officer Barker, David)
11/26/2012, 01/09/2013, 01/28/2013, 02/11/2013
Deft's Pro Per Motion for Direct Appeal / Memorandum of Points and Authorities Facts of the Case
Parties Present
Minutes
 Result: Matter Continued

01/09/2013 **All Pending Motions** (8:15 AM) (Judicial Officer Cory, Kenneth)
Parties Present
Minutes
 Result: Matter Heard

01/17/2013 **NV Supreme Court Clerks Certificate/Judgment - Dismissed**
Nevada Supreme Court Clerk's Certificate Judgment - Dismissed

01/28/2013 **All Pending Motions** (8:15 AM) (Judicial Officer Barker, David)
Parties Present
Minutes
 Result: Matter Heard

02/11/2013 **Confirmation of Counsel** (8:15 AM) (Judicial Officer Barker, David)
 Result: Matter Heard

02/11/2013	All Pending Motions (8:15 AM) (Judicial Officer Barker, David) <u>Parties Present</u> <u>Minutes</u> Result: Matter Heard
06/17/2013	Status Check (8:15 AM) (Judicial Officer Barker, David) <i>Status Check: Set Briefing Schedule</i> <u>Parties Present</u> <u>Minutes</u> Result: Briefing Schedule Set
01/07/2014	Stipulation and Order <i>Stipulation and Order</i>
02/06/2014	Stipulation and Order <i>Stipulation and Order</i>
05/19/2014	Stipulation and Order <i>Stipulation and Order</i>
05/21/2014	Recorders Transcript of Hearing <i>Recorder's Rough Draft Transcript of Proceedings Defendant's Pro Per Motion for Direct Appeal Memorandum of Points and Authorities Facts of the Case; Confirmation of Counsel - 2/11/2013</i>
05/23/2014	Recorders Transcript of Hearing <i>Recorder's Rough Draft Transcript of Proceedings Defendant's Motion to Compel Discovery; Defendant's Motion to Suppress or in the Alternative A Jackson V. Denno April 25, 2011</i>
05/23/2014	Recorders Transcript of Hearing <i>Recorder's Rough Draft Transcript of Proceedings Defendant's Motion in Limine to Admit Bad Acts and Other Acts of the Defendant Against the Victim; Defendant's Motion to Compel Discovery; Defendant's Motion to Suppress or in the Alternative a Jackson V. Denno; State's Motion in Limine Regarding the Defendant's Expert Witnesses and Request for Discovery Monday, May 2, 2011</i>
05/23/2014	Recorders Transcript of Hearing <i>Recorder's Rough Draft Transcript of Proceedings Calendar Call; Defendant's Motion in Limine to Admit Bad Acts and Other Acts of the Defendant Against the Victim; Defendant's Motion to Suppress or in the Alternative a Jackson V. Denno; State's Motion in Limine Regarding the Defendant's Expert Witnesses and Request for Discovery Wednesday, May 4, 2011</i>
05/23/2014	Recorders Transcript of Hearing <i>Recorder's Rough Draft Transcript of Proceedings Defendant's Notice of Motion and Motion to Bar the Admission of Cumulative Victim Impact Panel Evidence in Violation of the Due Process Clause; Hearing-counsel to Notify Staff of Pending Motions; Defendant's Motion in Limine to Preclude the State from Moving to Admit into Evidence Photographs Prejudicial to Kevin Gipson Wednesday, August 17, 2011</i>
05/23/2014	Recorders Transcript of Hearing <i>Recorder's Rough Draft Transcript of Proceedings State's Motion in Limine Regarding Defendant's Expert Witnesses and Request for Discovery; State's Motion in Limine to Admit Bad Acts and Other Acts of the Defendant Against the Victim; 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 Monday, October 24, 2011</i>
05/23/2014	Recorders Transcript of Hearing <i>Recorder's Rough Draft Transcript of Proceedings Defendant's Motion for In Camera Review of Personnel Records Monday, November 21, 2011</i>
05/23/2014	Recorders Transcript of Hearing <i>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 Wednesday, December 7, 2011</i>
05/23/2014	Recorders Transcript of Hearing <i>Recorder's Rough Draft Transcript of Proceedings Defendant's Pro Per Motion to Withdraw Plea Wednesday, September 26, 2012</i>
06/06/2014	Petition <i>Petition for Writ of Habeas Corpus (Post-Conviction)</i>
06/06/2014	Points and Authorities <i>Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post Conviction)</i>
06/13/2014	Response <i>State's Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)</i>
06/23/2014	CANCELED Petition for Writ of Habeas Corpus (8:15 AM) (Judicial Officer Barker, David) <i>Vacated - Duplicate Entry</i> <i>Deft's Petition for Writ of Habeas Corpus</i>
09/15/2014	Petition for Writ of Habeas Corpus (8:15 AM) (Judicial Officer Barker, David) <i>Petition for Writ of Habeas Corpus (Post Conviction)</i> <i>03/31/2014 Reset by Court to 04/14/2014</i> <i>04/14/2014 Reset by Court to 08/18/2014</i> <i>08/18/2014 Reset by Court to 09/15/2014</i>

FINANCIAL INFORMATION

8/7/2014	https://www.clarkcountycourts.us/Secure/CaseDetail.aspx?CaseID=7577358	
	Defendant Gipson, Kevin M	
	Total Financial Assessment	275.00
	Total Payments and Credits	0.00
	Balance Due as of 08/07/2014	275.00
12/18/2012	Transaction Assessment	275.00

Exhibit B

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: (702) 671-4458

From: Liz Vargas, Legal Secretary to Carmine J. Colucci, Esq.
Client/Matter: State v. Kevin Gipson
Date: May 14, 2014

Hi Cheryl,

We have amended the Request for Transcripts to include one additional date of February 13, 2013 (the last one). This should be the complete list. We really appreciate your help with this.

Thank you

Liz Vargas
Secretary to Carmine J. Colucci, Esq.

1 REQT
2 CARMINE J. COLUCCI, ESQ.
3 CARMINE J. COLUCCI, CHTD.
4 Nevada Bar No. 881
5 629 South Sixth Street
6 Las Vegas, Nevada 89101
7 (702) 384-1274 Telephone
8 (702) 384-4453 Facsimile
9 E-Mail: liz@lvcoxmail.com
10 Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

11 STATE OF NEVADA,

12 Plaintiff,

13 vs.

14 KEVIN GIPSON,
15 Defendant.

Case No.: 10C264079
Dept No.: XVIII

AMENDED REQUEST FOR TRANSCRIPTS

16 TO: CHERYL CARPENTER, Reporter/Recorder

17 KEVIN GIPSON, Defendant named above, requests preparation of a rough
18 draft transcript of certain portions of the proceedings before the district court, as
19 follows:

20 Date of Proceeding:

- 21 1) **April 25, 2011**- Defendant's Motion to Compel Discovery
- 22 2) **May 2, 2011** - State's Motion in Limine Regarding the Defendant's Expert
- 23 3) **May 4, 2011** - All pending motions- Calendar Call, Defendant's Motion in
24 Limine to Admit Bad Acts
- 25 4) **August 17, 2011**- All pending motions- Defendant's Notice of Motion and
26 Motion to Bar the Admission of Cumulative Victim Impact Panel
- 27 5) **October 24, 2011**- All pending motions
- 28 6) **November 21, 2011**- Motion for Camera Review of Personnel Records
- 7) **December 7, 2011**- Calendar Call

1 8) **September 26, 2012**- Defendant's Pro Per Motion to Withdraw

2 9) **February 13, 2013**- Confirmation of Counsel, Defendant's Pro Per Motion
3 for Direct Appeal

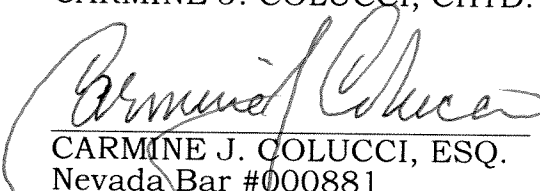
4 Portions of the transcript requested: Defendant requests a transcript of the
5 entire hearing.

6 This notice requests a transcript of only those portions of the district court
7 proceedings which counsel reasonably and in good faith believes are necessary to
8 prepare the Points and Authorities in Support of Writ of Habeas Corpus (Post-
9 Conviction).

10 I recognize that I must personally serve a copy of this form on the above
11 named court reporter and opposing counsel, and that the above named court
12 reporter.

13 DATED this 14th day of May, 2014.


14 CARMINE J. COLUCCI, CHTD.

15 
16 CARMINE J. COLUCCI, ESQ.
17 Nevada Bar #000881
18 629 South Sixth Street
19 Las Vegas, Nevada 89101
(702) 384-1274
Attorney for Defendant

20 CERTIFICATE OF FACSIMILE TRANSMISSION

21 I hereby certify that service of REQUEST FOR TRANSCRIPT was made this
22 13th day of May, 2014, by facsimile transmission to:

23 Cheryl Carpenter
24 Reporter/Recorder
25 Eighth Judicial District Court Department XII
Facsimile (702)671-4458

26 
27 An employee of Carmine J. Colucci, Chtd.
28

Transmission Report

Date/Time
Local ID 1

05-14-2014
702 384 4453

09:57:16 a.m.

Transmit Header Text
Local Name 1

CARMINE J COLUCCI,CHTD.

This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: (702) 671-4458

From: Liz Vargas, Legal Secretary to Carmine J. Colucci, Esq.
Client/Matter: State v. Kevin Gipson
Date: May 14, 2014

Hi Cheryl,

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Thank you

Liz Vargas
Secretary to Carmine J. Colucci, Esq.

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Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
RP: Report
FF: Fax Forward

CP: Completed
FA: Fail
TU: Terminated by user

TS: Terminated by system
G3: Group 3
EC: Error Correct

1 RA 000051

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

September 15, 2014

10C264079

The State of Nevada vs Kevin M Gipson

September 15, 2014 8:15 AM

All Pending Motions

HEARD BY: Barker, David

COURTROOM: RJC Courtroom 11B

COURT CLERK: April Watkins

RECORDER: Cheryl Carpenter

REPORTER:

PARTIES**PRESENT:**

Colucci, Carmine J.
Duncan, Wesley K.
State of Nevada

Attorney for Deft.
Attorney for Pltf.
Plaintiff

JOURNAL ENTRIES

- DEFT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)...STATE'S RESPONSE AND MOTION TO DISMISS DEFT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Court stated he is inclined to allow action to be decided on merits and ORDERED, State's Motion to Dismiss DENIED.

Mr. Colucci submitted. Colloquy. COURT ORDERED, the following briefing schedule: Deft's Supplemental Petition due by December 15, 2014, State's Opposition due by February 17, 2015, Deft's Reply due by March 17, 2015, and matter SET for hearing. FURTHER ORDERED, Deft's petition CONTINUED.

NDC

CONTINUED TO: 3/30/15 8:15 AM

3/30/15 8:15 AM HEARING: DEFT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-

PRINT DATE: 09/15/2014

Page 1 of 2

Minutes Date: September 15,
2014

1 RA 000052

10C264079

CONVICTION) & SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-
CONVICTION)


CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CASE NO: 10C264079

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

DEPT NO: XIX

Defendant.

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

DATE OF HEARING: March 30, 2015
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through RYAN MACDONALD, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

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

///

///

///

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On April 28, 2010, Kevin Marquette Gipson (hereinafter "Defendant") was charged by
4 way of Indictment with one count of Murder With Use of a Deadly Weapon (Felony – NRS
5 200.010, 200.030, 193.165). On December 7, 2014, at Calendar Call, the parties informed the
6 court that the matter was resolved via negotiations. Defendant's Guilty Plea Agreement was
7 filed in open court and he entered a plea of Guilty to the charge of First Degree Murder With
8 Use of a Deadly Weapon. The Guilty Plea Agreement provided that the parties stipulated to
9 a sentence of 20 years to Life in the Nevada Department of Corrections and the State retained
10 the right to argue for a deadly weapon term of not less than four to eight years.

11 Defendant was present with counsel for sentencing on February 10, 2012. The court
12 adjudicated him guilty as charged in the Indictment and sentenced him to a term of 20 years
13 to life, plus a consecutive term of 96 to 240 months for Use of a Deadly Weapon; Defendant
14 received 686 days credit for time served. The Judgment of Conviction was filed March 13,
15 2012. Defendant did not file a direct appeal.

16 Defendant filed a Pro Per Motion to Withdraw Plea on September 5, 2012. The State
17 filed its Opposition on September 21, 2012. The court denied the motion on September 26,
18 2012.

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

26 On January 28, 2013, the court granted Defendant's Motion for Appointment of
27 Counsel. On February 11, 2013, Carmine Colucci, Esq., was confirmed as counsel for
28

1 Defendant. On June 17, 2013, counsel advised the court that all the documents had been
2 received and a briefing schedule was set.

3 Defendant filed his Petition for Writ of Habeas Corpus (Post-Conviction) and Points
4 and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) on June
5 6, 2014. The State filed its Response and Motion to Dismiss on June 13, 2014. Defendant
6 filed a Reply on August 7, 2014. The court denied the State's Motion to Dismiss and ordered
7 briefing on the merits.

8 Defendant filed a Supplemental post-conviction Petition for Writ of Habeas Corpus and
9 Supplemental Points and Authorities in support on December 15, 2014. The State's Response
10 is as follows.

11 **ARGUMENT**

12 Defendant contends that his plea was not freely and knowingly given because: 1) plea
13 counsel should have investigated Defendant's alleged mental health issues; 2) he was allegedly
14 coerced by counsel into taking the plea and only had a few minutes to review the plea
15 agreement; and 3) Defendant was not informed that he would be waiving his right to appeal.
16 These claims are without merit as Defendant entered his plea knowingly, freely, and
17 voluntarily and with effective assistance of counsel.

18 **I. Defendant Did Not Receive Ineffective Assistance of Counsel**

19 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal
20 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
21 defense." The United States Supreme Court has long recognized that "the right to counsel is
22 the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,
23 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
24 (1993).

25 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
26 he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of
27 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
28 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's

1 representation fell below an objective standard of reasonableness, and second, that but for
2 counsel's errors, there is a reasonable probability that the result of the proceedings would have
3 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
4 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
5 “[T]his is no reason for a court deciding an ineffective assistance claim to approach the inquiry
6 in the same order or even to address both components of the inquiry if the defendant makes an
7 insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

8 The court begins with the presumption of effectiveness and then must determine
9 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
10 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
11 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
12 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
13 537 P.2d 473, 474 (1975).

14 Even if a defendant can demonstrate that his counsel's representation fell below an
15 objective standard of reasonableness, he must still demonstrate prejudice and show a
16 reasonable probability that, but for counsel's errors, the result of the trial would have been
17 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
18 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
19 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
20 694, 104 S. Ct. at 2064-65, 2068).

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

1 to allege specific facts rather than just conclusions may cause your petition to be dismissed.”
2 (emphasis added).

3 Defendant contends that plea counsel did not adequately investigate petitioner’s mental
4 health issues, and that counsel was aware he was off his medication during the crime and the
5 plea canvass. A defendant who contends his attorney was ineffective because he did not
6 adequately investigate must show how a better investigation would have rendered a more
7 favorable outcome probable. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).
8 Defendant points to plea counsel’s comments during the hearing on his Motion to Withdraw
9 Guilty Plea as evidence that she was aware of potential issues regarding his mental health. He
10 misconstrues trial counsel’s actions by making it seem as though plea counsel admitted to her
11 ineffectiveness, where in actuality it is standard for counsel to withdraw if the defendant is
12 trying to withdraw his guilty plea based on ineffectiveness. Supplemental Points and
13 Authorities (SPA), Dec. 15, 2014, p. 9. Plea counsel stated to the court that the best course of
14 action may be for new counsel to be appointed, as it appeared Defendant wanted to move
15 forward on an ineffectiveness claim. Rough Draft Transcript, Sept. 26, 2012, p. 3. Trial
16 counsel also stated “I would remind the Court that Mr. Gipson does suffer from a mental illness
17 and that is probably a legitimate ground. . . ,” referring to Defendant’s attempt to withdraw the
18 guilty plea. Id.

19 Additionally, it is clear based on the arraignment that plea counsel had investigated
20 Defendant’s mental illness. Plea counsel requested the Court allow Defendant to enter a plea
21 of guilty but mentally ill. Recorder’s Transcript (Arraignment), Dec. 7, 2011, p. 2. The Court
22 acknowledged that both plea counsel and the State had informed the Court that it was the intent
23 of Defendant to enter a plea of guilty but mentally ill consistent with NRS 174.035.
24 Arraignment at 2. The parties agreed that the plea canvass would move forward in a typical
25 fashion, and the decision regarding whether Defendant was mentally ill would occur at
26 sentencing with the burden on the defendant. Arraignment at 2-3. This is evidence that plea
27 counsel knew of Defendant’s alleged mental health issues, and attempted to bring them before
28 the court at multiple junctures.

1 Defendant does not adequately explain how further investigation would have changed
2 the outcome of the plea. Defendant contends, without a factual basis, that “the investigation
3 and these issues and proof thereof would at least have had an effect on the degree of murder
4 of which he was convicted.” SPA at 9. But Defendant also asserts plea counsel was aware
5 prior to the entry of the plea that Defendant suffered from schizophrenia and bipolar disorder.
6 Id. There is no explanation as to what further investigation should have been done, and what
7 facts would have been uncovered that would have changed the negotiations. This is a bare
8 claim that is belied by the record. See infra II; see Hargrove, 100 Nev. at 503, 686 P.2d at 225.

9 Further, Defendant has the burden of showing he was legally mentally incompetent at
10 the time he pleaded guilty. Specifically, per Riker v. State, 111 Nev. 1316, 905 P.2d 706
11 (1995) and Calambro v. 2nd Judicial Dist. Court, 114 Nev. 961, 965 P.2d 794 (1998), the mere
12 fact that Defendant may have had mental health issues at the time he pleaded guilty—an
13 assertion the State in no way concedes— did not render him incompetent to enter a guilty plea.

14 **II. Defendant’s Plea Was Given Freely, Knowingly, and Voluntarily**

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

25 The law in Nevada clearly establishes that a plea of guilty is presumptively valid and
26 the burden is on a defendant to show that the plea was not voluntarily entered. Bryant, 102
27 Nev. 272, 721 P.2d 364, 368 (1986); Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295,
28 1295 (1975). Furthermore, the Nevada Supreme Court makes it clear in the case of Heffley v.

1 Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973), that the guidelines for voluntariness
2 of pleas of guilty do “not require the articulation of talismanic phrases.” Rather, “the record
3 must affirmatively disclose that a defendant who pleaded guilty entered his plea
4 understandingly and voluntarily.” Id. (quoting Brady v. United States, 397 U.S. 742, 747-748,
5 90 S.Ct. 1463, 1470 (1970)).

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

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

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

1 Defendant signed his GPA on December 7, 2011. By signing the GPA, Defendant
2 acknowledged the following:

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

6 WAIVER OF RIGHTS

7 By entering my plea of guilty, I understand that I am waiving and
8 forever giving up the following rights and privileges. . . .

- 9 6. The right to appeal the conviction with the assistance of
10 an attorney, either appointed or retained, unless
11 specifically reserved in writing and agreed upon as
12 provided in NRS 174.035(3). I understand this means I
13 am unconditionally waiving my right to a direct appeal of
14 this conviction, including any challenge based upon
15 reasonable constitutional, jurisdictional or other grounds
16 that challenge the legality of the proceedings as stated in
17 NRS 177.015(4). However, I remain free to challenge my
18 conviction through other post-conviction remedies
19 including a habeas corpus petition pursuant to NRS
20 Chapter 34.

21 GPA, p. 1, 4. Further, Defendant acknowledged that he was pleading guilty
22 freely and voluntarily:

23 VOLUNTARINESS OF PLEA

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

27 I understand that the State would have to prove each element of
28 the charge(s) against me at trial.

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

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

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

***I am signing this agreement voluntarily, after consultation with
my attorney, and I am not acting under duress or coercion or by***

1 *virtue of any promises of leniency, except for those set forth in*
2 *this agreement.*

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

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

10 GPA, p. 4-5 (emphasis added).

11 Within the guilty plea agreement, Defendant's counsel made the following
12 representations:

13 To the best of my knowledge and belief, the Defendant:

14 a. Is competent and understands the charges and the
15 consequences of pleading guilty as provided in this agreement,

16 b. Executed in this agreement and will enter all guilty
17 pleas pursuant to hereto voluntarily...

18 GPA, p. 6.

19 Additionally, during Defendant's plea canvass, the Court addressed Defendant as
20 follows:

21 COURT:- Okay. Have you received a copy of the – well
22 frankly, the charging document that was filed
23 in this case that you indicated you were not
24 guilty of, that's the Indictment, that's
25 attached as Exhibit 1 to a Guilty Plea
26 Agreement. Do you have a copy of that with
27 you right now?

28 DEFENDANT: Yes.

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

DEFENDANT: *No.*

1 COURT: All right. So how do you plead to that charge,
2 murder with use of a deadly weapon—first
3 degree murder with use of a deadly weapon;
4 guilty or not guilty.

5 DEFENDANT: Guilty.

6 COURT: Before I accept your plea of guilty I must be
7 satisfied that the plea is freely and voluntarily
8 entered and that you're doing so knowingly.
9 Are you pleading guilty because in truth and
10 in fact you are guilty?

11 DEFENDANT: Yes.

12 COURT: *Has anyone forced you or coerced you to*
13 *enter this plea?*

14 DEFENDANT: *No.*

15 ...
16 COURT: Now the Guilty Plea Agreement I just
17 referred to – I'm looking at the original of
18 that document. On page five of that Guilty
19 Plea Agreement I see a signature under what
20 I believe to be the signature line for you, Mr.
21 Gipson. Is this your signature on this
22 document?

23 DEFENDANT: Yes.

24 COURT: All right. Did you sign it today?

25 DEFENDANT: Yes.

26 COURT: Did you sign it after you read it – carefully
27 read it and went through it with your lawyer?

28 DEFENDANT: Yes.

COURT: *Did he—when you carefully read this*
document did you realize you were waiving
valuable constitutional and procedural
rights by entering this plea?

DEFENDANT: *Yes.*

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

DEFENDANT: Yes.

COURT: Did he explain to you all this important
information to your satisfaction?

DEFENDANT: Yes.

1 COURT: Are you satisfied with his presentation [sic]
2 of you?

3 Arraignment at 4-5. The court explained the stipulation of 20 years to life with
4 the possibility of parole, and a consecutive four to eight years for the deadly
5 weapon enhancement:

6 COURT: Based upon knowing that that's the
7 anticipated penalty in this case does that
8 change your mind at all regarding the
9 voluntary nature of this plea? Are you doing
10 this freely and voluntarily?

11 DEFENDANT: Yes.

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

19 DEFENDANT: Yes.

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

23 DEFENDANT: Yes.

24 COURT: Do you have any questions you would like to
25 ask me?

26 DEFENDANT: No, sir.

27 COURT: Any questions you would like to ask Ms.
28 Craig.

DEFENDANT: No.

Id. at 6-7.

Defendant acknowledged that he was made no promises of leniency, that he was aware of the possible punishment he could receive, and that any questions arising from the GPA had been answered by his attorney. RT at 6-7, GPA at 3. Defendant agreed that pleading guilty and accepting the plea bargain was in his best interest and a trial would be contrary to his best interest. GPA at 5. Defendant clearly acknowledged that he was entering into his GPA

1 voluntarily and not under duress or coercion and that he was not under the influence of any
2 substance that would impair his ability to understand the GPA or the circumstances
3 surrounding his plea. GPA at 4-5, RT at 4-5. Finally, by admitting the facts as outlined in the
4 Information, Defendant acknowledged that he understood the nature of the charges against
5 him. GPA at 1, RT at 4, 7-8, see Wilson v. State, 99 Nev. 362, 366-67 (As to the requirement
6 that a defendant understand the nature of the charge, this Court previously held that “in order
7 for the record to show an understanding of the nature of the charge it is necessary that there be
8 either a showing that the defendant himself understood the elements of the offense to which
9 the plea was entered or a showing that the defendant has made factual statements to the court
10 which constitute an admission to the pleaded to offense.”) (internal citation omitted).
11 Accordingly, the State has affirmatively demonstrated each element of a plea canvass as
12 required by Wilson v. State, 99 Nev. 362, 366-67, and Defendant has failed to satisfy his
13 burden of proving his plea was entered into unknowingly or involuntarily. See Bryant, 102
14 Nev. 268. Additionally, Defendant’s GPA in conjunction with the Court’s canvass indicate
15 that Defendant knew he was waiving certain appellate rights. GPA at 4, RT, 4-5.

16 Defendant alleges that he was coerced into pleading guilty as he was not given enough
17 time to consider the offer and that his attorney threatened him by saying he would likely lose
18 at trial and go to prison for life. This is belied by the record, as not only was Defendant given
19 multiple opportunities to tell the court he needed more time or had further questions, he also
20 told the court he was not being coerced. RT 4-5. Furthermore, it is counsel’s duty to candidly
21 advise a defendant regarding whether they believe it would be beneficial for a defendant to
22 accept a plea offer, but the ultimate decision of whether or not to accept a plea offer is the
23 defendant’s. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 163 (2002). Counsel was being
24 honest with Defendant in telling him the State had a strong case against him, and a plea offer
25 was an opportunity for eventual parole. Accordingly, counsel’s candid advice regarding the
26 possible outcomes cannot be deemed coercive. In fact, any failure to render such advice would
27 certainly be deemed ineffective on counsel’s part. See Lester v. State, 15 So.3d 728 (Fla. 4th
28 DCA 2009).

1 Based on the foregoing, and based on the totality of the circumstances, it is clear that
2 Defendant's plea was knowingly and voluntarily entered into. Defendant's claims that his
3 counsel was ineffective for coercing him into entering the Guilty Plea Agreement, that he was
4 not aware he was waiving certain appellate rights, and that plea counsel did not investigate his
5 mental health issues are belied by the record. Because Defendant's allegations are belied by
6 the record, he is not entitled to relief on this claims. See Hargrove, 100 Nev. at 503, 686 P.2d
7 at 225.

8 **CONCLUSION**

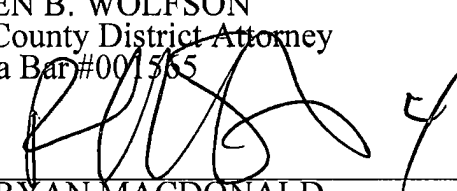
9 Based on the foregoing the State requests the Defendant's post-conviction Petition for
10 Writ of Habeas Corpus be DENIED.

11 DATED this 24th day of February, 2015.

12 Respectfully submitted,

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

16 BY

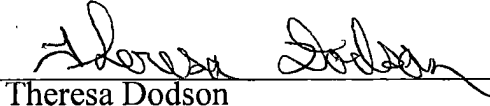
17 
18 RYAN MACDONALD
19 Deputy District Attorney
20 Nevada Bar #012615

21 **CERTIFICATE OF FACSIMILE TRANSMISSION**

22 I hereby certify that service of State's Response to Defendant's Supplemental Points and
23 Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), was made this
24 24th day of February, 2015, by facsimile transmission to:

25 CARMINE COLUCCI, ESQ.
26 FAX #702-384-4453

27 BY:

28 
Theresa Dodson
Secretary for the District Attorney's Office

gc/RM/td/dvu