

IN THE SUPREME COURT OF THE STATE OF NEVADA

KUPAA KEA

Appellant,

v.

STATE OF NEVADA

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO. 73016

Appeal from an Order Denying Petition and Supplemental Petition for Writ of
Habeas Corpus (Post-Conviction) in Case CR12-0110
The Second Judicial District Court of the State of Nevada, Washoe County
Honorable Scott Freeman, District Judge

APPELLANT'S APPENDIX – VOLUME 2

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INDEX TO APPELLANT'S APPENDIX

<i>Document</i>	<i>Date</i>	<i>Vol.</i>	<i>Page</i>
Answer to Petition for Writ of Habeas Corpus (Post-Conviction)	02.23.15	1	0146
Confidential Evaluation	05.31.12	1	0027
Criminal Complaint (RCR 2011-064429)	11.02.11	1	0001
Findings of Fact, Conclusions of Law, and Judgment	04.04.17	2	0182
Guilty Plea Memorandum	02.08.12	1	0008
Information	01.23.12	1	0005
Judgment	06.01.12	1	0078
Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	08.08.16	2	0171
Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)	02.23.15	1	0123
Notice of Entry of Order	04.05.17	2	0187
Opposition to Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	09.19.16	2	0176
Order of Affirmance	02.13.13	3	0417
Order to Set Evidentiary Hearing	12.05.16	3	0414
Petition for Writ of Habeas Corpus (Post-Conviction)	02.14.14	1	0080

INDEX TO APPELLANT'S APPENDIX (continued)

<i>Document</i>	<i>Date</i>	<i>Vol.</i>	<i>Page</i>
Reply to State's Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)	03.20.15	2	0149
Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	06.22.16	2	0161
Transcript of Proceedings - Arraignment	02.08.12	1	0014
Transcript of Proceedings - Evidentiary Hearing (Petition for Post-Conviction)	01.23.17	2 3	0194-0298 0299-0413
Transcript of Proceedings - Sentencing	06.01.12	1	0042
Waiver of Preliminary Examination	01.19.12	1	0004

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JACQUELINE BRYANT
CLERK OF THE COURT

BY DEPUTY

1 Kupaci Kea #1086980

2 Ely State Prison

3 P.O. Box 1484

4 Ely NV 89301

5

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8

* * *

9 Kupaci Kea
Petitioner

10

v

11 THE State of Nevada
Respondent

12

Case No. CR12-0110

Dept No. IX

13

14 Reply to State's Motion to Dismiss
15 petition For Writ of Habeas Corpus (post-conviction)

16

17 Comes Now Kupaci Kea said petitioner pro se
18 to move this honorable court to allow an evidentiary
19 hearing for petitioner's Petition For Writ of Habeas
20 Corpus (post-conviction) and grant his request for
21 appointment of counsel. This reply is based off of
22 respondents motion to dismiss...

23

POINTS AND AUTHORITIES

24

25 The State's response to petitioner's Motion/petition
26 For Writ of Habeas Corpus of Ground One is claiming
27 that a motion to suppress evidence would have
28 in fact been unsuccessful. However, petitioner
29 disagrees.

29

It is true petitioner pled guilty early on in
(4) of 12

1

2 the process. But the only reason in fact that petitioner
3 pled guilty was through professional counsel from
4 attorney. Petitioner believes if Counsel was effective
5 and sincere about assisting petitioner in the early
6 stages of this process counsel would first seek to
7 suppress evidence before leading petitioner to an
8 early plea bargain. You must assume and take every
9 lawful action possible before entering a plea bargain.
10 Otherwise, there is no use of due process and
11 preparation for trial. Petitioner's counsel did not
12 seek any other action prior to plea bargain and
13 ultimately had no other plan of action other than
14 the plea bargain.

15 Secondly, the state says because my car was
16 reported stolen that the police has the authority to
17 recover the car and then to inventory the contents.
18 The inaccuracy of this statement is that when
19 did petitioner file a report claiming his car was
20 stolen? If in fact he did file a report when was
21 the report filed? Before or after the car was
22 initially seized? There is no report claiming his car
23 was stolen.

24 Finally on this issue the State believes there was
25 no evidence that defense counsel had any reason to
26 believe that a motion to suppress would be successful.
27 That is not the State's duty to presume whether or
28 not defense counsel had reason to believe a motion to
29 suppress would be successful or not. That is solely

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2 defense counsels duty. In the police reports it does
3 in fact show petitioner's car was seized but how
4 did the police come to find Kea's car? The car was
5 not registered in ~~date~~ petitioner's name and there
6 was no way to legally link the car to Kea. So
7 how did the car become a part of a crime scene?

8 Through bias and subjectable witness testimony from
9 Asael Mariscal and Monica Herrera (see exhibit 4 pgs 11-15).
10 Through these bias testimonies police seized the vehicle
11 illegally. If defense counsel would have had her mind
12 on petitioner's best interest, she would have investigated
13 this issue sought a suppression, then once successful
14 proceeded to trial. Defense counsel was ineffective.

15 According to U.S. Ex. Rel. Henderson v. Brierly, 300
16 F. Supp. 638 (E.D. Pa. 1969), Counsel's failure to move to
17 suppress evidence and failed to object to the admission of
18 evidence seized illegally amounted to Ineffectiveness of
19 counsel.

20 Through Kirkpatrick v. Blackburn, 777 F.2d 272 (5th
21 circuit, 1985) petitioner believes grand one amounts
22 to Ineffective Assistance of Counsel and requires an
23 evidentiary hearing.

24

25 Petitioner's claim that his plea was not
26 a knowing plea is as is. True, in open court
27 during plea hearing, petitioner was read the
28 plea agreement. Where he confirmed he understood
29 what had been read. Taking in the circumstance

1

2 that petitioner had barely turned (18) eighteen years
3 of age, put his unconditional youth trust in his
4 attorney, and had never been in an adult court. How
5 could he have been fully aware of what was taking
6 place? Up until his appeal, petitioner had every
7 reason to trust his attorney with utmost regards.
8 Without experience and understanding of most
9 of the terms used in the plea hearing, petitioner
10 was simply present physically but not mentally.
11 Therefore his plea should be rendered "unknowingly."
12 In Tower V. Phillips 979 F.2d 807 (1992), a guilty
13 plea ~~was~~ is not voluntarily or intelligently entered
14 if counsel to defendant misrepresents plea. Petitioner
15 believes this has occurred.

16 Petitioner believes the State has erred by
17 not giving reasoning for their use of the gang
18 enhancement. The initial complaint about the
19 gang enhancement was the "stacking" or
20 "trumping" of charges including two counts
21 of gang enhancement in order to pursue the
22 petitioner to enter a plea agreement. The basis
23 of the gang enhancement was illegal and
24 therefore no charges should have been stacked against
25 petitioner. Just like the success of a motion to
26 suppress, if defense counsel thought to challenge
27 the validity of the gang enhancement, petitioner
28 would have chosen to proceed to trial instead of
29 accepting plea bargain. Thus, gang enhancement

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2 should never have existed and defense counsels lack
3 of investigation/objection was ineffective in itself.

4

5 Grand Two part A shows defense counsels
6 instrategic method to allow hearsay evidence to
7 be the foundation of parole and probation's
8 recommendation of (2) two consecutive (3) three to
9 (13) thirteen^{year} sentences prosecution's recommendation of
10 (2) consecutive (6) six to (15) fifteen year sentences
11 and ultimately the honorable Judge Scott Freeman
12 decision to sentence petitioner to (2) two consecutive
13 (3) three to (13) thirteen year sentences. The State
14 believes hearsay evidence is not barred from pre-
15 sentence report as well as sentencing hearing, however
16 when a sentence is induced based off of inaccurate
17 and misleading belief statements or otherwise evidence
18 a sentence can call for relief. As in the case
19 at hand the judge was told that petitioner
20 ambushed his victims by lying in wait with firearms.
21 The prosecutions argument revolved solely around the
22 ambush and probation and parole believed this.
23 to be true as well. The judge who relied on
24 the pre-sentence report for his decision making,
25 also believed the "ambush" theory to be true.
26 Defense counsel has not once tried to challenge
27 this evidence as hearsay leaving the petitioner
28 to be viewed more sadistic and dangerous than
29 he really is. In the case of Gaines v. Thieret

1.

2 846 F.2d 402 (7th Cir. 1988) failure to object to
3 the introduction of hearsay evidence may constitute
4 ineffective assistance of counsel and call for
5 relief. Same with Bolander v. State of Iowa 978
6 F.2d 1079 (8th Cir 1996) which implies the same
7 relief when hearsay evidence is principal factor
8 when determining premeditation and malicious
9 forethought element. Prosecution fails to acknowledge
10 the fact that their argument came from uncontroverted
11 hearsay testimony. This argument is also implied
12 in part of Grand Two part C.

13 In the second part of Grand Two part C
14 the State states that parole and probations lack
15 of knowledge of Dr. Mahaffey's psychological report
16 in their pre-sentence report means "nothing." The
17 psychological report explains in detail petitioner's
18 youthful state of mind and other mitigating factors
19 that show petitioner was mentally impaired distraught
20 and young during offense. With that this professional
21 report and unbiased opinion (professionally) parole and
22 probation recommended (2) two consecutive (3)
23 three to (13) thirteen year sentences. They had no idea
24 of petitioner's psychological state of mind at that
25 time. The Honorable Judge Scott Freeman sentenced
26 petitioner to parole and probations exact recommendation
27 (see sentencing hearing transcripts). So for the state
28 to say this meant "nothing" is not only downplaying
29 what could have been another outcome but avoiding

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2 the division's errors.

3 Grand Two Part D's claim that sentence was
4 unlawful based on the fact that petitioner's actions in
5 the course of the crime, does not fairly represent the
6 amount of years he was sentenced to. For a person
7 whom did not intend to kill anyone; whom was only
8 (17) seventeen years of age (still a high school student); and
9 had psychological problems at the time of the commission
10 of the crime, to be sentenced to an aggregated
11 term of (26) twenty-six years is cruel and unusual
12 punishment. Unless it is a capital offense a person
13 who committed a crime as a teenager should never
14 have to serve such a mandated time. The law calls for
15 fairness and equality and a teenager should never
16 have to serve (10) ten or more years for any non-capital
17 offense.

18

19 Grand Three Part A is also explained in page
20 (3) three line (25) twenty-five through page (4) four line
21 (15) fifteen of this reply.

22 Grand Three Part B is again explained in page
23 (3) three line (25) twenty-five through page (4) four line
24 (15) fifteen and his youthfulness must also be taken into
25 full consideration.

26

27 Grand Four's implication of the court's improper
28 use of the certification against Kea is represented
29 as harsh in perspective. During the juvenile hearing
(7) of 12

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2 petitioner's defense counsel did not know he was
3 adjudicated for any felony. During the arraignment
4 when petitioner was certified, defense counsel stated:

5 "I wish I would've known he was charged with
6 a felony." (please see: juvenile arraignment transcripts).

7 Defense Counsel did not know he was ever charged with
8 a felony, and petitioner truly doesn't know either. He
9 was only told he was charged with a burglary. Aside
10 from the fact that a firearm was used in this
11 situation, this is petitioner's first non-violent offense
12 with a weapon. If the burglary was in fact the cause
13 for an automatic certification, then can anyone
14 honestly say it is fair that petitioner was certified
15 and not given a chance to stay in the juvenile court
16 for a non-violent burglary that must have taken place
17 when he was (13) thirteen or (14) fourteen years of age.
18 Frankly, a junior-high student should never have to
19 answer for his current actions years later. The court
20 erred by not allowing petitioner to hear his case
21 in the juvenile courts.

22

23 Grand Five concerning the appeal supports
24 itself in-and-out. The state believes that even though
25 my defense counsel—who was still the attorney on
26 record post-sentencing—did not wish to file my
27 notice of appeal, I still got an appeal and
28 therefore Grand Five should be dismissed.

29 Taking into consideration petitioner's youthful age,

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lack of knowledge of the law and all related contents, and inexperience in the court of law, how can one really expect a person to file timely petitions when first entering N.D.C.? By allowing time to exceed before replying to petitioner's request, defense counsel could have possibly sabotaged petitioner's chance at an appeal. Petitioner did file a timely notice of appeal and was then assigned the same defense counsel who refused to file his initial notice of appeal. That conflict should have barred this defense counsel from filing petitions in his name. Petitioner then filed for a withdrawal of attorney but the same defense counsel proceeded with appeal irregardless. Can we safely say defense counsel/appellante counsel had petitioner's best interest at hand? I think not. The attorney did not want to file a notice of appeal so why would she put her utmost effort into the appeal? It doesn't make sense. This claim constitutes ineffective Assistance of counsel in *Stinson v. U.S.* 102 F. Supp. 2d 912 (M.D. Tenn. 2000) and *Slater v. U.S.* 38 F. Supp. 2d 587 (M.D. Tenn. 1999).

Aside from the above grounds raised in the petition, the state believes petitioner does not need a counsel. However in the 6th Amendment in the Constitution of the United

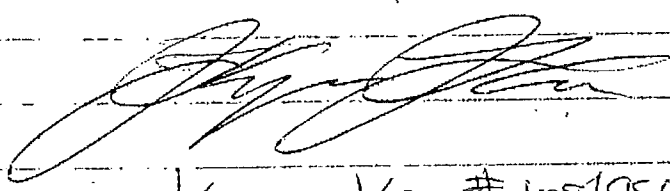
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2 States of America an indigent person has a right
3 to counsel. To diagnose this need of counsel
4 we must first understand what it takes to be
5 a counsel. To become an attorney of the law
6 you must have (4) four years of college education
7 then an additional (4) four years of law school
8 education. During the total (8) eight years there
9 are many high standards that needs to be met,
10 including but not limited to; Grade Point Average
11 Tests and exams scores as well as consistent
12 attendance. Then the possibility of becoming a
13 legal attorney is determined by passing the BAR
14 Exam after (8) years of expensive education.
15 How can a person who was arrested at the age
16 of (17) seventeen and is only (21) years old as of
17 now, represent himself against qualified legal attorneys
18 who have had years to become educated on legal
19 matters? In addition to the unqualified experience;
20 the petitioner is currently in Ely State Prison where
21 it is a (23) twenty-three hour (7) seven days a week
22 maximum-security lockdown facility. Petitioner has
23 no physical access to law library and correspondence
24 with officials could take weeks to solve dilemmas.
25 Petitioner is untrained in the law and is too young
26 to comprehend all of these matters. Is there an
27 honest chance for a person who did not attend
28 law school to combat the state whom all of
29 its attorneys are alumnus of a law school? That
(10) of 12

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is an unfair battle that ~~was~~ a qualified attorney would be lucky to win. Therefore, petitioner needs to be represented by an appointed counsel, through his motions and hearings

All of the foregoing and above is true to the best of my knowledge.
Dated this 15th day of March 2015.

Respectfully submitted,



Kupaa Kea # 1086980
Ely State Prison
P.O. Box 1989
Ely NV 89301

Certificate of Mailing

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I hereby certify that I mailed a true and correct copy of the Reply to State's Motion to Dismiss Petition for Writ of Habeas Corpus (post-conviction) to Clerk of the Court of Washoe County.

Dated this 15th day of March 2015

Respectfully Submitted,



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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

KUPAA KEA,

Petitioner,

Case No.: CR12-0110

vs.

Dept. No.: 9

THE STATE OF NEVADA,

Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

Petitioner Kupaa Kea, ("Petitioner"), through his appointed counsel Victoria T. Oldenburg, hereby files the following Supplemental Petition for Writ of Habeas Corpus (Post Conviction). Petitioner alleges as follows, incorporating by reference his original Petition for Writ of Habeas Corpus (Post Conviction) and all pleadings and papers on file herein.

CURRENT CUSTODY

Petitioner is currently incarcerated in the Ely State Prison, 4569 North State Route 490, Ely, Nevada 89702, pursuant to a Judgment entered on June 5, 2012 by District Court Judge Scott Freeman of the Second Judicial District Court, Washoe County, Nevada.

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(1) On October 31, 2011, Petitioner was arrested by the Reno Police Department under charges of two counts of battery with a deadly weapon causing substantial bodily harm, possession of methamphetamine, possession of drug paraphernalia, and conspiracy battery with intent to commit a crime.

(3) On or about January 19, 2012, the defendant waived his right to a Preliminary Examination.

(4) On January 23, 2012, the State filed an Information, charging Petitioner with Count I, Battery with a Deadly Weapon Causing Substantial Bodily Harm, a violation of NRS 200.481 (2) (e), a felony; and, Count II, Battery with a Deadly Weapon Causing Substantial Bodily Harm, a violation of NRS 200.481 (2) (e), a felony.

(6) On June 1, 2012, Petitioner was sentenced and on June 5, 2012, Judgment was entered wherein Petitioner was sentenced to imprisonment in the Nevada Department of Corrections for the minimum term of thirty-five (35) months to a maximum term of one hundred

1 fifty-six (156) months as to each of Counts I and II, to run consecutively to each other. The
2 Petitioner was also ordered to pay a twenty-five (\$25) dollar administrative assessment fee, and a
3 one hundred fifty (\$150) dollar DNA testing fee. The Petitioner was given credit for one
4 hundred and sixty-four (164) days' time served.

5 **Supreme Court**

6 (7) On June 26, 2012, the Petitioner filed a Notice of Appeal of the District Court
7 Judgment on the grounds that the sentence he received constituted cruel and unusual punishment.

8 (8) On February 13, 2013, the Supreme Court affirmed the Judgment and issued its
9 Remittitur.

10 **Petition for Writ of Habeas Corpus (Post Conviction)**

11 On February 14, 2014, Petitioner timely submitted his Petition for Writ of Habeas Corpus
12 (Post-Conviction).

13 **Supplemental Ground One:** Petitioner received ineffective assistance of counsel
14 in violation of the Constitution and Laws of Nevada and the United States Constitution Nev.
15 Const. Art 1, §§ 4, 5, 6 & 14, and U.S. Constitution, Amendments IV and VI.

16 **Supporting Facts:**

17 (1) Petitioner incorporates all previous paragraphs as though fully set forth herein,
18 and all facts set forth in Ground One of his Petition for Writ of Habeas Corpus.

19 (2) The Sixth Amendment to the United States Constitution guarantees to a defendant
20 the right to effective assistance of counsel in a criminal prosecution. *McMann v. Richardson*, 397
21 U.S. 759, 771 n.14 (1970); *Strickland v. Washington*, 466 U.S. 668 (1984); *Kirksey v. State*, 112
22 Nev. 980, 923 P.2d 1102 (1997).

23 (3) On a claim for ineffective assistance of counsel, a petitioner must demonstrate
24 that counsel's performance was deficient in that it fell below an objective standard of
25 reasonableness and resulting prejudice such that there is a reasonable probability that, but for
26 counsel's errors, the outcome of the proceedings would have been different. *Strickland v.*
27 *Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 90 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100
28 Nev. 403, 432-33, 668 P.2d 504, 505 (1984).

1 (4) Petitioner contends that his guilty plea was not knowing and voluntary because he
2 was induced into pleading guilty with the understanding that he would receive concurrent rather
3 than consecutive sentences.

4 (5) The Due Process and Equal Protection Clauses of the Fourteenth Amendment
5 mandate that a guilty plea be knowingly and intelligently entered. *Smith v. O'Grady*, 312 U.S.
6 329, 334 (1941); *accord*, *Bryant v. Smith*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), *limited*
7 *on other grounds by Smith v. State*, 110 Nev. 1009, 879 P.2d 60 (1994).

8 (6) In *Iaea v. Sunn*, 800 F.2d 861 (9th Cir. 1986), the United States Court of Appeals
9 for the Ninth Circuit observed that voluntariness is determined based on an examination of the
10 totality of the circumstances and, therefore, "[w]hen a guilty plea is challenged as being the
11 product of coercion, [the court's] concern is not solely with the subjective state of mind of the
12 defendant, but also with the constitutional acceptability of the external forces inducing the guilty
13 plea." *Id.* at 866.

14 (7) Petitioner contends that if counsel had informed him he could receive consecutive
15 sentences he would have insisted on going to trial, especially in light of the fact, as set forth
16 below, there was no ballistics evidence tying him to the shooting. Moreover, there was no
17 independent, reliable corroborating evidence which placed Petitioner at the scene.

18 (8) Petitioner further contends that trial counsel was ineffective for failing to
19 investigate ballistics evidence of the shooting. Petitioner contends that had trial counsel done so,
20 counsel would have discovered that the State did not have evidence to prove, beyond a
21 reasonable doubt, the two charged counts of Battery with a Deadly Weapon.

22 (9) In *State v. A.N.J.*, 168 Wash. 2d 91, 225 P.3d 956 (2010), the court held that
23 counsel must reasonably evaluate the evidence against the accused and the likelihood of a
24 conviction if the case proceeds to trial so that the Defendant can make a meaningful decision as
25 to whether or not to plead guilty. Counsel has a duty to make reasonable investigations or to
26 make a reasonable decision that makes particular investigations unnecessary. *Strickland v.*
27 *Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984).
28

1 (10) Petitioner contends that if counsel had investigated the ballistics evidence she
2 would have discovered that there was no evidence tying the Petitioner to the gun, or tying the
3 gun allegedly used by Petitioner to the bullets that wounded the victims. With no evidence to
4 establish two counts of Battery with a Deadly Weapon, Petitioner would not have plead guilty
5 and would have insisted on going to trial because the State could not prove its case beyond a
6 reasonable doubt.

7 **Supplemental Ground Two:**

8 **NO SUPPLEMENT**

9 **Supplemental Ground Three:**

10 (11) Petitioner incorporates all previous paragraphs as though fully set forth herein,
11 and all facts set forth in Ground Three of his Petition for Writ of Habeas Corpus.

12 (12) The Sixth Amendment to the United States Constitution guarantees to a defendant
13 the right to effective assistance of counsel in a criminal prosecution. *McMann v. Richardson*, 397
14 U.S. 759, 771 n.14 (1970); *Strickland v. Washington*, 466 U.S. 668 (1984); *Kirksey v. State*, 112
15 Nev. 980, 923 P.2d 1102 (1997).

16 (13) On a claim for ineffective assistance of counsel, a petitioner must demonstrate
17 that counsel's performance was deficient in that it fell below an objective standard of
18 reasonableness and resulting prejudice such that there is a reasonable probability that, but for
19 counsel's errors, the outcome of the proceedings would have been different. *Strickland v.*
20 *Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 90 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100
21 Nev. 403, 432-33, 668 P.2d 504, 505 (1984).

22 (14) Petitioner contends that on February 7, 2012, when he signed the Guilty Plea
23 Memorandum, and on February 8, 2012, when he was arraigned on the guilty plea, he was under
24 the influence of two strong medications, Vistaril, a sedative, and Risperdal, an anti-psychotic
25 drug used to treat his schizophrenia. Petitioner further contends that because he was under the
26 influence of these drugs he was not competent, and did not have the present ability or rational, to
27 enter a guilty plea.
28

1 (15) The standard for competence when pleading guilty is the same as the standard for
2 standing trial. *Godinez v. Moran*, 509 U.S. 389, 398. The Nevada Supreme Court has found
3 that a defendant is competent to stand trial if he has adequate “present ability to consult with his
4 lawyer with a reasonable degree of rational understanding” and if “he has a rational as well as
5 factual understanding of the proceedings against him.” *Melchor-Gloria v. State*, 98 Nev. 174,
6 179-180, 680 P.2d 109, 113 (1983).

7 (16) In *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 453 (2009), the Court found
8 that counsel’s failure to uncover and present any evidence of defendant’s mental health or
9 impairment did not reflect reasonable professional judgment. *See also U.S. v. Howard*, finding
10 that the defendant’s statement that he was under the influence of a strong narcotic was sufficient
11 to trigger an inquiry into his competence, unless counsel had other means of knowing that he was
12 competent. *U.S. v. Howard*, 381 F.3d 873 (9th Cir. 2004).¹

13 (17) Petitioner contends that trial counsel knew he was under the influence of such
14 drugs and therefore should have obtained a psychological evaluation to determine whether he
15 was competent to enter a guilty plea. Petitioner contends that had counsel obtained such
16 psychological evaluation, the psychologist would have concluded he was not competent to enter
17 a guilty plea.

18 **Supplemental Ground Four:**

19 **NO SUPPLEMENT**

20 **Supplemental Ground Five:**

21 **NO SUPPLEMENT**

22 **Supplemental Ground Six:**

23 Petitioner received ineffective assistance of counsel in violation of the Constitution and
24 Laws of Nevada and the United States Constitution Nev. Const. Art 1, §§ 4, 5, 6 & 14, and U.S.
25 Constitution, Amendments IV and VI.

26
27 ¹ *See Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990), where the court found ineffective assistance of counsel
28 where counsel failed to investigate his client’s sanity at the time of the offense, and his competency during plea
proceedings.

1 **Supporting Facts:**

2 (18) Petitioner incorporates all previous paragraphs as though fully set forth herein.

3 (19) The Sixth Amendment to the United States Constitution guarantees to a defendant
4 the right to effective assistance of counsel in a criminal prosecution. *McMann v. Richardson*, 397
5 U.S. 759, 771 n.14 (1970); *Strickland v. Washington*, 466 U.S. 668 (1984); *Kirksey v. State*, 112
6 Nev. 980, 923 P.2d 1102 (1997).

7 (20) On a claim for ineffective assistance of counsel, a petitioner must demonstrate
8 that counsel's performance was deficient in that it fell below an objective standard of
9 reasonableness and resulting prejudice such that there is a reasonable probability that, but for
10 counsel's errors, the outcome of the proceedings would have been different. *Strickland v.*
11 *Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 90 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100
12 Nev. 403, 432-33, 668 P.2d 504, 505 (1984).

13 (21) During Petitioner's first interview with the police on October 28, 2011, Petitioner
14 was informed that he was likely going to be arrested and that he could not go home.
15 Notwithstanding, Petitioner was not read his *Miranda* rights until way into the interview. *See*
16 *Miranda v. Arizona*, 384 U.S. 346 (1966). In addition, early in the interview Petitioner had
17 invoked his right to counsel clearly and unequivocally by stating that he wanted to call his sister
18 so that she could talk to a lawyer, and again by stating that he wanted to ask a lawyer for an
19 opinion before he kept talking to the police. *See Dewey v. State*, 123 Nev. 483 (2007).
20 Notwithstanding, the interview continued in violation of Petitioner's constitutional rights and
21 Petitioner was eventually arrested as the police had originally intended. In addition, the
22 statements of the Petitioner illegally obtained during the interview formed the basis for the
23 charges levied against Petitioner in the Information as there was no independent, reliable, or
24 corroborating evidence that Petitioner committed a crime.

25 (22) On November 7, 2011, when Petitioner was in jail, the police conducted a second
26 interview of Petitioner knowing that Petitioner had previously invoked his right to remain silent
27 and his right to an attorney. While the Petitioner was again read his *Miranda* rights, Petitioner
28 told the detective that he had not had a chance to speak with his lawyer. Notwithstanding, the

1 interview continued in violation of Petitioner's constitutional rights, and the statements of the
2 Petitioner illegally obtained during the interview formed the basis for the charges levied against
3 Petitioner in the Information as there was no independent, reliable, or corroborating evidence
4 that Petitioner committed a crime.

5 (23) On a claim for ineffective assistance of counsel, a petitioner must demonstrate
6 that counsel's performance was deficient in that it fell below an objective standard of
7 reasonableness and resulting prejudice such that there is a reasonable probability that, but for
8 counsel's errors, the outcome of the proceedings would have been different. *Strickland v.*
9 *Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 90 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100
10 Nev. 403, 432-33, 668 P.2d 504, 505 (1984).

11 (24) Petitioner contends that counsel was ineffective for failing to raise a claim that
12 Petitioner's statements to the police were obtained in violation of his *Miranda* rights. Petitioner
13 contends that had counsel raised the *Miranda* issue during the pre-trial proceedings, the Court
14 would have found that Petitioner's constitutional rights were violated and that Petitioner's
15 statements to the police were obtained illegally. Without the illegal statements the State would
16 not have been able to sustain the charges against Petitioner.

17 **PRAYER FOR RELIEF**

18 Petitioner respectfully requests that this Court grant an evidentiary hearing of allegations
19 in his Petition and Supplemental Petition in order to properly and fully develop his claims, and
20 for any other relief as this Honorable Court may deem necessary in the interests of justice.

21 RESPECTFULLY SUBMITTED THIS 22nd day of June, 2016.

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23
24 /s/ Victoria T. Oldenburg
25 Victoria T. Oldenburg
26 Nevada Bar No. 4770
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DATED this 22nd day of June, 2016.

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The undersigned affirms that this Supplemental Petition for Writ of Habeas Corpus (Post Conviction) does not contain the social security number of any person.

/s/ Victoria T. Oldenburg
Victoria T. Oldenburg
Nevada Bar No. 4770

CASE NUMBER: CR12-0110

I am over the age of eighteen years, a member of Oldenburg Law Office in the County of Washoe, State of Nevada, and I am not a party to this action.

Terrence P. McCarthy
Chief Appellate Deputy
Washoe County District Attorney's Office
P.O. Box 11130
Reno, NV 89520

Victoria T. Oldenburg
Nevada Bar No. 4770

1 CODE #2315
CHRISTOPHER J. HICKS
2 #7747
P. O. Box 11130
3 Reno, Nevada 89520-0027
(775) 328-3200
4 Attorney for Respondent

5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 KUPAA KEA,

10 Petitioner,

11 v.

Case No. CR12-0110

12 THE STATE OF NEVADA,

Dept. No. 9

13 Respondent.
14 _____/

15 MOTION TO DISMISS PETITION AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS
16 CORPUS (POST-CONVICTION)

17 COMES NOW, the State of Nevada and as directed and approved in the Order of July 1,
18 2015, renews and supplements its earlier motion to dismiss. This motion is based upon the
19 records of this court and of the Supreme Court, and the following points and authorities.

20 POINTS AND AUTHORITIES

21 Petitioner Kea pleaded guilty to two counts of battery with a deadly weapon causing
22 harm. This court imposed consecutive prison terms. Kea appealed but the judgment was
23 affirmed. *Kea v. State*, Docket No. 61160, Order of Affirmance (February 13, 2013). The
24 remittitur issued in March, 2013. On February 14, 2014, petitioner filed a timely petition for
25 writ of habeas corpus. This court ordered a response. The State answered and moved to
26 dismiss. This court then appointed counsel, but the Order also recognized that the State could

1 renew or supplement the motion to dismiss once the supplemental petition was filed. That
2 supplemental petition has been filed and the case still does not warrant a hearing.

3 The supplement to Ground One of the original petition includes the claim that the
4 petitioner thought, when he pleaded guilty, that he was guaranteed concurrent sentences. That
5 claim is repelled by the record showing that the petitioner denied any promises and that the
6 court repeatedly informed him that the sentences could be concurrent or consecutive. Claims
7 repelled by the record do not warrant a hearing. A petition warrants a hearing only if it “asserts
8 specific factual allegations that are not belied or repelled by the record and that, if true, would
9 entitle him to relief.” *Nika v. State*, 124 Nev. 1272, 1301, 198 P.3d 839, 858 (2008).

10 Ground One also includes the assertion that counsel rendered ineffective assistance in
11 failing to investigate and discover the absence of evidence. This lacks the specifics required by
12 *Nika, supra*. There is nothing indicating that there were circumstances that would have
13 inspired reasonable lawyers to undertake a specific line of investigation. More importantly,
14 *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984), approved in *Nika, supra*, requires that
15 the petitioner not only make specific allegations, but that the petition identify the proposed
16 witnesses that would have been discovered and to give a summary of their proposed testimony.
17 No witness is identified in the instant petition. Thus, Ground One of the original and of the
18 supplement, should be dismissed.

19 Ground Two has no supplement and it should be dismissed for the reasons stated in the
20 original motion to dismiss.

21 Ground Three is an assertion that at the time of the plea, petitioner was incompetent
22 due to the use of psychotropic drugs. What is lacking is an explanation of just what the
23 defendant did not understand. The transcript of the arraignment, on June 1, 2012, shows that
24 the defendant answered the court’s inquiries clearly and cogently. The claim that Kea did not
25 understand is repelled by the transcript showing that he did understand and that he responded
26 appropriately to the court and clearly understood the proceedings. That could sometimes be

1 overcome by more specific allegations, but in this case there is only the bare claim of
2 incompetence and that is repelled by the record. In the absence of something more specific, no
3 hearing is warranted.

4 Grounds Four and Five have no supplement and should be dismissed for the reasons
5 stated in the original motion to dismiss.

6 Ground Six is a claim that counsel was ineffective in failing to seek suppression of the
7 defendant's statements to police. That claim need not result in a hearing because the record
8 reveals that Kea pleaded guilty and therefore no statements were admitted in evidence.¹ The
9 notion that counsel should have overridden the decision to plead guilty and required the
10 prisoner to await the decision on a motion to suppress is faulty. "[C]ounsel does not have the
11 authority to override a defendant's decision to plead guilty. That decision is reserved to the
12 client." *McConnell v. State*, 125 Nev. 243, 253, 212 P.3d 307, 314 (2009), *as corrected* (July
13 24, 2009). It follows that once a client decides to plead guilty, counsel has a duty to take care
14 not to take steps that would avoid the plea agreement. That includes filing a motion to
15 suppress. Therefore, no hearing is warranted on Ground Six, the original or as supplemented.

16 Every claim in the original petition and in the supplement is flawed in some way.
17 Therefore, the petition and supplement should be dismissed.

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24 ¹The State also contends that the motion would have been denied. The original
25 statements of Kea were just denials, not admissions. The alleged request for counsel
26 was not clear or unambiguous and the defendant clearly re-initiated the questioning.
Still, there is no need for a hearing on the subject because counsel had no duty to avoid
the plea bargain by seeking suppression.

1 AFFIRMATION PURSUANT TO NRS 239B.030

2 The undersigned does hereby affirm that the preceding document does not contain the
3 social security number of any person.

4 DATED: August 8, 2016.

5 CHRISTOPHER J. HICKS
6 District Attorney

7 By /s/ TERRENCE P. McCARTHY
8 TERRENCE P. McCARTHY
 Chief Appellate Deputy

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Victoria T. Oldenburg, Esq.

/s/ DESTINEE ALLEN
DESTINEE ALLEN

Code: 4100
VICTORIA T. OLDENBURG
OLDENBURG LAW OFFICE
P.O. Box 17422
Reno, Nevada 89511
Telephone: (775) 971-4245
Facsimile: (775) 853-9460

Attorney for Petitioner Kupaa Kea

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

KUPAA KEA,

Petitioner,

Case No.: CR12-0110

vs.

Dept. No.: 9

THE STATE OF NEVADA,

Respondent.

OPPOSITION TO MOTION TO DISMISS PETITION
AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

Petitioner Kupaa Kea, ("Petitioner"), through his appointed counsel Victoria T. Oldenburg, hereby files the following Opposition to the State's Motion to Dismiss Petition for Writ of Habeas Corpus (Post Conviction), and its Motion to Dismiss Supplemental Petition for Writ of Habeas Corpus (Post Conviction). Petitioner incorporates his Petition for Writ of Habeas Corpus (Post-Conviction), his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), and all pleadings and paper on file herein.

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1 the influence of two strong medications (prescribed for schizophrenia) at the time he signed the
2 guilty plea memorandum and at the time of the guilty plea arraignment, and that because of the
3 medication he was not competent and did not have the present ability or rational to enter a guilty
4 plea. Petitioner further alleges in Ground Three that counsel told him he would be receiving a
5 sentence of two (2) - two (2) to fifteen (15) years concurrent, and would likely receive probation.
6 Therefore, Petitioner has met the standard set forth in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839
7 (2008) as to his claim that at all times understood the Court would sentence him to concurrent
8 rather than consecutive sentences in exchange for pleading guilty.

9 With regards to Ground One wherein Petitioner specifically alleges that trial counsel was
10 ineffective for failing to investigate and discover ballistics evidence, the State's reliance on
11 *Hargrove v. State* and *Nika v. State* is misplaced. Petitioner alleges that the eye witnesses in the
12 case, which are clearly identified in the confidential police reports which are a part of the record
13 herein, did not identify Petitioner as the sole shooter, and could not identify whether or not the
14 Petitioner shot one or more persons. Petitioner further alleges that due to the inconsistency in
15 witness reports to the police, counsel had a duty to investigate the ballistics evidence and in
16 doing so would have found that the State did not have the necessary evidence to prove two
17 counts of Battery with a Deadly Weapon. In addition, the ballistics evidence shows that the
18 police were only able to gather two (2) casings and one () 1 cartridge from a .22 caliber weapon,
19 and no fragments or projectiles were removed from the victims. This raises questions as to
20 Petitioner's culpability given that witnesses stated to the police that more than one person was in
21 the bushes, and that over ten (10) shots were fired. Therefore, Petitioner has alleged facts
22 sufficient to warrant an evidentiary hearing on the issues of whether counsel was ineffective for
23 not requesting and examining the ballistics evidence.

24 With regards to Ground Two of the Petition, Petitioner opposes the State's Motion to
25 Dismiss on the grounds that he contends he has pleaded sufficient facts to warrant an evidentiary
26 hearing.

27 In Ground Three of the Petition and Supplemental Petition, Petitioner has alleged that due
28 to the medication he was on for schizophrenia, he was not competent and did not have the

1 present ability or rational to enter the guilty plea, and that counsel knew he was taking
2 medication for diagnosed schizophrenia at the time he signed the guilty plea memorandum and at
3 the time he was canvassed on the guilty plea. This claim is not bare – Petitioner is alleging that
4 he was not competent at the time he entered the guilty plea and when he was arraigned by the
5 court on the plea. Nothing more is required to allege his claim, for purposes of an evidentiary
6 hearing, that counsel failed to meet the objectively reasonable standard set forth in *Strickland v.*
7 *Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) and related case law, by not obtaining a
8 psychiatric evaluation prior to entry of the guilty plea and subsequent arraignment.

9 With regards to Grounds Four and Five of the Petition, Petitioner opposes the State's
10 Motion to Dismiss on the grounds that he contends he has pleaded sufficient facts to warrant an
11 evidentiary hearing.

12 Ground Six of the Supplemental Petition alleges that trial counsel was ineffective for
13 failing to raise the fact that Petitioner's statements to the police were obtained in violation of his
14 *Miranda* rights. Petitioner is not raising this claim as a collateral attack on his guilty plea, but
15 rather as a habeas claim of ineffective assistance of counsel which goes to the knowing and
16 voluntary nature of his guilty plea. This claim is properly raised in a post-conviction petition for
17 writ of habeas corpus which is predicated on allegations of ineffective assistance of counsel. *See*
18 *Lowe v. Lattimore*, 2015 WL 9701185 (U.S. Dist. Ct., C.D. California, December 23, 2015).

19 Based upon the foregoing, had Petitioner not been prejudiced by his counsel's
20 ineffectiveness, there is a reasonable probability that he would not have pleaded guilty and would
21 have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In addition, Petitioner
22 has alleged sufficient facts which warrant an evidentiary hearing. Therefore, Petitioner
23 respectfully requests that the State's motions to dismiss be denied.

24 SUBMITTED THIS 19th day of September, 2016.

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27 /s/ Victoria T. Oldenburg
28 Victoria T. Oldenburg
Nevada Bar No. 4770

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The undersigned affirms that this Opposition to Motion to Dismiss Petition and Supplemental Petition for Writ of Habeas Corpus (Post Conviction) does not contain the social security number of any person.

/s/ Victoria T. Oldenburg
Victoria T. Oldenburg
Nevada Bar No. 4770

CASE NUMBER: CR12-0110

I am over the age of eighteen years, a member of Oldenburg Law Office in the County of Washoe, State of Nevada, and I am not a party to this action.

Terrence P. McCarthy
Chief Appellate Deputy
Washoe County District Attorney's Office
P.O. Box 11130
Reno, NV 89520

/s/ Victoria T. Oldenburg

Victoria T. Oldenburg
Nevada Bar No. 4770

1 CODE No. 1750

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
6
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 KUPAA KEA,

10 Petitioner,

11 v.

Case No. CR12-0110

12 THE STATE OF NEVADA,

Dept. No. 9

13 Respondent.

14 _____/
15 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

16 This cause is before the court upon a Petition for Writ of Habeas Corpus (Post-
17 Conviction). Petitioner Kupaa Kea was represented by experienced Attorney Kathrine Berning
18 when he faced charges stemming from a shooting at Paradise Park in Reno. He faced two
19 counts of battery with a deadly weapon causing substantial bodily harm.

20 He pleaded guilty to the two battery charges in exchange for dismissal of Conspiracy to
21 Violate the Controlled Substances Act SJC case number 12-12. He was thoroughly canvassed
22 by Judge Robison and then the cause was set for sentencing with this judge. At sentencing,
23 this judge imposed consecutive sentences of 35 to 156 months. Kea appealed but the judgment
24 was affirmed. *Kea v. State*, Docket No., 61160, Order of Affirmance (February 13, 2013). On
25 February 14, 2014, Kea filed a timely Petition for Writ of Habeas Corpus. This court appointed
26 counsel and allowed a supplement to the petition. The State's motion to dismiss was denied

1 and the cause was set for a hearing on January 23, 2017. At that hearing the court received
2 testimony from Officer Crow of the Reno Police Department and received transcripts and a
3 recording of the questioning of Kea by Officer Crow. The court also heard testimony from
4 Petitioner Kea and from Attorney Berning. These findings are based on the relative credibility
5 of those witnesses.

6 The court first notes that at the outset of the hearing, counsel for Kea announced that
7 several claims would not be supported by evidence or argument and indeed they were not. For
8 those claims, including Grounds Two, Five, and Six, the court finds them unproven.

9 The remaining claims were addressed at the hearing. The court initially finds that
10 Kathrine Berning was credible and Kea was not. Where they disagreed, the court finds Berning
11 to be more credible than Kea. For example, Kea testified that Berning never discussed the
12 evidence with him or even explained that he had the right to trial. The court finds that
13 testimony to be untrue and finds Berning's contrary testimony to be true.

14 Ground One of the original petition and the supplemental Ground One, is a combination
15 of a claim of ineffective assistance of counsel and a claim that the guilty plea was not a knowing
16 and voluntary plea. To the claim that counsel was ineffective in failing to investigate and
17 uncover favorable evidence, no such favorable evidence was uncovered. There was evidence
18 that the interrogation of Kea might have led to arguable grounds for a motion to suppress some
19 of his admissions, but Berning testified credibly that she noted those arguable grounds and
20 discussed the options with Kea, but that Kea was adamant that he wished to reach a plea
21 bargain and not stand trial. She testified credibly that a motion to suppress would have led to
22 the prosecutor withdrawing the plea bargain, contrary to the wishes of her client.

23 Ground One also has a claim about the absence of evidence. Kea alleges that counsel
24 was ineffective in failing to discover that there was scant physical evidence establishing that he
25 was the shooter. There was, for example, no comparison between bullets and rifles because no
26 rifle was recovered. Berning testified credibly that she was aware of the lack of additional

1 physical evidence and discussed that with Kea, but that Kea insisted on pleading guilty. She
2 also discussed the availability of other evidence including the testimony of the person who
3 handed the rifle to Kea before the shooting and recorded telephone conversations.

4 Incorporated within Ground One is the assertion that Kea was unaware of the full range
5 of allowable sentences when he pleaded guilty. The court notes that the transcript of the
6 canvass shows that Judge Robison clearly informed Kea that the sentences could be
7 consecutive and that he was probably going to prison. In addition, Berning testified credibly
8 that she also went through that same process with Kea. One bit of testimony is notable. Kea
9 established his lack of credibility when he swore that Berning and he went over each of the
10 questions of the canvass and that she told him how to respond to each. That testimony was
11 absurd and was contradicted by Berning who testified credibly that she merely informed Kea
12 that he should answer the judge's questions honestly.

13 Ground Three of the petition asserts that Kea was incompetent at the time of the entry
14 of the plea and that counsel knew that and should have sought a competency evaluation. The
15 court notes that there was no evidence tending to show that a competency evaluation would
16 have led to a finding of incompetency. Furthermore, the court finds that Berning testified quite
17 credibly that Kea was fully aware of the nature of the charges and was able to assist in his
18 defense. The transcript of the canvass by Judge Robison also tends to show that Kea was
19 competent. The court finds, then, that Kea was in fact competent when he pleaded guilty and
20 that Berning had no reason to think otherwise.

21 Ground Six is a claim that counsel rendered ineffective assistance in failing to seek
22 suppression of Kea's admissions. Berning testified credibly that Kea insisted on a plea bargain
23 and that a motion to suppress would have led to the prosecutor withdrawing the plea bargain
24 contrary to the wishes of the client. "[C]ounsel does not have the authority to override a

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1 defendant's decision to plead guilty. That decision is reserved to the client." *McConnell v.*
2 *State*, 125 Nev. 243, 253, 212 P.3d 307, 314 (2009), *as corrected* (July 24, 2009). It follows
3 that once a client decides to plead guilty, counsel has a duty to avoid steps that would result in
4 losing the plea agreement. That includes filing a motion to suppress. Therefore, the court
5 finds that Kea has failed to prove that some objective standard of reasonableness required
6 Berning to file the motion to suppress. The court makes no findings on the merits of such a
7 motion and finds only that it has not been proven that Berning had a duty to file the motion to
8 suppress.

9 When a conviction arises by a guilty plea, one who would claim ineffective assistance of
10 counsel bears the burden of proving, by a preponderance of the evidence that the specific acts,
11 omissions or decisions of counsel fell below an objective standard of reasonableness and that
12 but for the failings of counsel, the defendant would have insisted on standing trial. *Kirksey v.*
13 *State*, 112 Nev. 980, 923 P.2d 1102 (1996); *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).
14 The court has carefully considered the entire record and the evidence adduced at the hearing,
15 including the credibility of the witnesses, and remains unpersuaded.

16 Kea has failed to persuade this court that the specific acts, omissions or decisions of
17 counsel was deficient or, that but for the alleged failings of counsel he would have insisted on
18 standing trial.

19 Accordingly, and good cause appearing the Court HEREBY DENIES the petition and
20 supplemental petition.

21 DATED this 4 day of April, 2017.

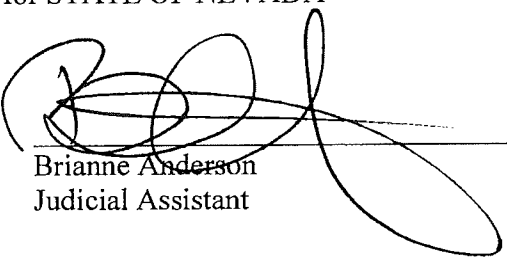
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24 _____
25 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of _____, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Further, I certify that on the 4th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

VICTORIA OLDENBURG, ESQ. for KUPAA KEA (TN)
KATHRINE BERNING, ESQ. for KUPAA KEA (TN)
KATHERINE LYON, ESQ. for STATE OF NEVADA
DIV. OF PAROLE & PROBATION
DEREK DREILING, ESQ. for STATE OF NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF NEVADA



Brianne Anderson
Judicial Assistant

1 CODE: 2540
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE

7 ***

8 KUPAA KEA,

Petitioner,

CASE NO: CR12-0110

9
10 vs.

DEPT. NO.: 9

11 THE STATE OF NEVADA,

12
13 Respondent,
14 _____/

15 **NOTICE OF ENTRY OF ORDER**

16 PLEASE TAKE NOTICE that on the 4th day of April, 2017 the Court entered a
17 decision or order in this matter, a true and correct copy of which is attached hereto.

18 You may appeal to the Supreme Court from the decision or order of the Court. If
19 you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-
20 three (33) days, after the date this notice is mailed to you. This notice was mailed on the
21 5th day of April, 2017.
22

23 JACQUELINE BRYANT
24 Clerk of the Court

25 By /s/ Mia Cholico
26 Deputy Clerk
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28

1 **CERTIFICATE OF SERVICE**

2 CASE NO. CR12-0110

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial
4 District Court of the State of Nevada, County of Washoe; and that on the 5th day of April,
5 2017, I electronically filed the Notice of Entry of Order with the Clerk of the Court by using
6 the ECF system which will send a notice of electronic filing to:

7 Victoria Oldenburg, Esq. for Kupaa Kea
8 Kathrine Berning, Esq. for Kupaa Kea
9 Div. of Parole & Probation
10 Katherine Lyon, Esq. for State of Nevada
11 Derek Dreiling, Esq. for State of Nevada
12 Terrence McCarthy, Esq. for State of Nevada

13
14 I further certify that on the 5th day of April, 2017, I deposited in the Washoe County mailing
15 system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true and
16 correct copy of the Notice of Entry of Order, addressed to:

17
18 Kupaa Kea #1086980
19 c/o HDSP
20 P.O. Box 650
Indian Springs, NV 89070

21 Attorney General's Office
22 100 N. Carson Street
23 Carson City, NV 89701-4717

24 /s/ Mia Cholico
25 Mia Cholico
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1 CODE No. 1750

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
6
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 KUPAA KEA,

10 Petitioner,

11 v.

Case No. CR12-0110

12 THE STATE OF NEVADA,

Dept. No. 9

13 Respondent.

14 _____/
15 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

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17 Conviction). Petitioner Kupaa Kea was represented by experienced Attorney Kathrine Berning
18 when he faced charges stemming from a shooting at Paradise Park in Reno. He faced two
19 counts of battery with a deadly weapon causing substantial bodily harm.

20 He pleaded guilty to the two battery charges in exchange for dismissal of Conspiracy to
21 Violate the Controlled Substances Act SJC case number 12-12. He was thoroughly canvassed
22 by Judge Robison and then the cause was set for sentencing with this judge. At sentencing,
23 this judge imposed consecutive sentences of 35 to 156 months. Kea appealed but the judgment
24 was affirmed. *Kea v. State*, Docket No., 61160, Order of Affirmance (February 13, 2013). On
25 February 14, 2014, Kea filed a timely Petition for Writ of Habeas Corpus. This court appointed
26 counsel and allowed a supplement to the petition. The State's motion to dismiss was denied

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4 Petitioner Kea and from Attorney Berning. These findings are based on the relative credibility
5 of those witnesses.

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7 several claims would not be supported by evidence or argument and indeed they were not. For
8 those claims, including Grounds Two, Five, and Six, the court finds them unproven.

9 The remaining claims were addressed at the hearing. The court initially finds that
10 Kathrine Berning was credible and Kea was not. Where they disagreed, the court finds Berning
11 to be more credible than Kea. For example, Kea testified that Berning never discussed the
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13 testimony to be untrue and finds Berning's contrary testimony to be true.

14 Ground One of the original petition and the supplemental Ground One, is a combination
15 of a claim of ineffective assistance of counsel and a claim that the guilty plea was not a knowing
16 and voluntary plea. To the claim that counsel was ineffective in failing to investigate and
17 uncover favorable evidence, no such favorable evidence was uncovered. There was evidence
18 that the interrogation of Kea might have led to arguable grounds for a motion to suppress some
19 of his admissions, but Berning testified credibly that she noted those arguable grounds and
20 discussed the options with Kea, but that Kea was adamant that he wished to reach a plea
21 bargain and not stand trial. She testified credibly that a motion to suppress would have led to
22 the prosecutor withdrawing the plea bargain, contrary to the wishes of her client.

23 Ground One also has a claim about the absence of evidence. Kea alleges that counsel
24 was ineffective in failing to discover that there was scant physical evidence establishing that he
25 was the shooter. There was, for example, no comparison between bullets and rifles because no
26 rifle was recovered. Berning testified credibly that she was aware of the lack of additional

1 physical evidence and discussed that with Kea, but that Kea insisted on pleading guilty. She
2 also discussed the availability of other evidence including the testimony of the person who
3 handed the rifle to Kea before the shooting and recorded telephone conversations.

4 Incorporated within Ground One is the assertion that Kea was unaware of the full range
5 of allowable sentences when he pleaded guilty. The court notes that the transcript of the
6 canvass shows that Judge Robison clearly informed Kea that the sentences could be
7 consecutive and that he was probably going to prison. In addition, Berning testified credibly
8 that she also went through that same process with Kea. One bit of testimony is notable. Kea
9 established his lack of credibility when he swore that Berning and he went over each of the
10 questions of the canvass and that she told him how to respond to each. That testimony was
11 absurd and was contradicted by Berning who testified credibly that she merely informed Kea
12 that he should answer the judge's questions honestly.

13 Ground Three of the petition asserts that Kea was incompetent at the time of the entry
14 of the plea and that counsel knew that and should have sought a competency evaluation. The
15 court notes that there was no evidence tending to show that a competency evaluation would
16 have led to a finding of incompetency. Furthermore, the court finds that Berning testified quite
17 credibly that Kea was fully aware of the nature of the charges and was able to assist in his
18 defense. The transcript of the canvass by Judge Robison also tends to show that Kea was
19 competent. The court finds, then, that Kea was in fact competent when he pleaded guilty and
20 that Berning had no reason to think otherwise.

21 Ground Six is a claim that counsel rendered ineffective assistance in failing to seek
22 suppression of Kea's admissions. Berning testified credibly that Kea insisted on a plea bargain
23 and that a motion to suppress would have led to the prosecutor withdrawing the plea bargain
24 contrary to the wishes of the client. "[C]ounsel does not have the authority to override a

25 ///

1 defendant's decision to plead guilty. That decision is reserved to the client." *McConnell v.*
2 *State*, 125 Nev. 243, 253, 212 P.3d 307, 314 (2009), *as corrected* (July 24, 2009). It follows
3 that once a client decides to plead guilty, counsel has a duty to avoid steps that would result in
4 losing the plea agreement. That includes filing a motion to suppress. Therefore, the court
5 finds that Kea has failed to prove that some objective standard of reasonableness required
6 Berning to file the motion to suppress. The court makes no findings on the merits of such a
7 motion and finds only that it has not been proven that Berning had a duty to file the motion to
8 suppress.

9 When a conviction arises by a guilty plea, one who would claim ineffective assistance of
10 counsel bears the burden of proving, by a preponderance of the evidence that the specific acts,
11 omissions or decisions of counsel fell below an objective standard of reasonableness and that
12 but for the failings of counsel, the defendant would have insisted on standing trial. *Kirksey v.*
13 *State*, 112 Nev. 980, 923 P.2d 1102 (1996); *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).
14 The court has carefully considered the entire record and the evidence adduced at the hearing,
15 including the credibility of the witnesses, and remains unpersuaded.

16 Kea has failed to persuade this court that the specific acts, omissions or decisions of
17 counsel was deficient or, that but for the alleged failings of counsel he would have insisted on
18 standing trial.

19 Accordingly, and good cause appearing the Court HEREBY DENIES the petition and
20 supplemental petition.

21 DATED this 4 day of April, 2017.

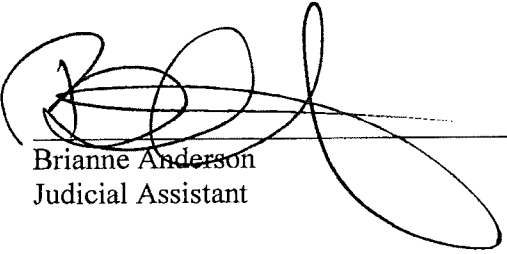
22
23 
24 _____
25 DISTRICT JUDGE
26

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of _____, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Further, I certify that on the 4th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

VICTORIA OLDENBURG, ESQ. for KUPAA KEA (TN)
KATHRINE BERNING, ESQ. for KUPAA KEA (TN)
KATHERINE LYON, ESQ. for STATE OF NEVADA
DIV. OF PAROLE & PROBATION
DEREK DREILING, ESQ. for STATE OF NEVADA
TERRENCE MCCARTHY, ESQ. for STATE OF NEVADA



Brianne Anderson
Judicial Assistant

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
THE HONORABLE SCOTT N. FREEMAN, DISTRICT JUDGE

-oOo-

KUPAA KE-A,

Petitioner,

vs.

STATE OF NEVADA,

Defendant.

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Case No. CR12-0110

Dept. No. 9

TRANSCRIPT OF PROCEEDINGS

Evidentiary Hearing

Monday, January 23, 2017

Reno, Nevada

Reported By: SUSAN KIGER, CCR No. 343, RPR

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A P P E A R A N C E S

For the Petitioner: VICTORIA OLDENBURG, ESQ.
Attorney at Law
150 Country Estates Circle.
Suite 108
Reno, Nevada 89511

For the Defendant: TERRENCE MCCARTHY, ESQ.
Deputy District Attorney
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Reno, Nevada 89520

The Petitioner: KUPAA KE-A

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I N D E X

<u>WITNESS</u>	<u>PAGE</u>
CHAD CROW	
DIRECT EXAMINATION BY MS. OLDENBURG	7
REDIRECT EXAMINATION BY MS. OLDENBURG	35
KUPAA KE-A	
DIRECT EXAMINATION BY MS. OLDENBURG	40
CROSS-EXAMINATION BY MR. MCCARTHY	53
KATHERINE BERNING	
DIRECT EXAMINATION BY MR. MCCARTHY	64
CROSS-EXAMINATION BY MS. OLDENBURG	76

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page</u>
1	Exhibit 1 marked and admitted	6
2, 3	Exhibits 2 and 3 marked and admitted	11
5, 6	Exhibits 5 and 6 marked and admitted	34

1 RENO, NEVADA, MONDAY, JANUARY 23, 2017, 10:26 A.M.

2 -oOo-

3
4 THE COURT: All right. We are on the record in
5 CR12-0110, Kupaa Ke-a versus State of Nevada. Appearances,
6 please.

7 MS. OLDENBURG: Good morning, Your Honor. Vickie
8 Oldenburg on behalf of Petitioner Kupaa Ke-a.

9 MR. MCCARTHY: Terry McCarthy for the State.

10 You have a quizzical look on your face.

11 THE COURT: You're lined up on different tables.

12 MR. MCCARTHY: I do that from time to time as a
13 reminder of who bears the burden of proof in these actions.

14 THE COURT: That's okay. I'm not that confused. I
15 appreciate it. Thank you.

16 MR. MCCARTHY: Okay.

17 THE COURT: I have a petition for Habeas Corpus. I
18 will hear from you now.

19 MS. OLDENBURG: Thank you, Your Honor. I'm going to
20 waive oral argument with the exception of just informing the
21 Court that as to ground two of the petition, that trial
22 counsel was ineffective for failing to object to statements
23 made at sentencing by the State regarding an ambush of the
24 victims of the shooting.

1 Ground four, that trial counsel was ineffective for
2 failing to object to Petitioner being certified as an adult.

3 And as to ground five, that trial counsel was
4 ineffective in her handling of the direct appeal. I'm going
5 to request that those be submitted to the Court for decision
6 without any additional evidence today.

7 THE COURT: All right. Very good.

8 MS. OLDENBURG: You don't have an opening?

9 MR. MCCARTHY: No, I'm not going to make a
10 statement.

11 MS. OLDENBURG: All right. Your Honor, I would like
12 to invoke the exclusionary rule as to Ms. Berning.

13 THE COURT: All right. I think when you invoke the
14 exclusionary rule, you invoke it as to everyone.

15 MS. OLDENBURG: As to everyone.

16 I'm calling Detective Brown.

17 THE COURT: Thank you. The exclusionary rule to
18 invoke, Ms. Berning, you're familiar with what that means?

19 MS. BERNING: Yes, I am.

20 THE COURT: Don't discuss your testimony with anyone
21 except the lawyers, and please sit outside. Thank you.

22 MS. BERNING: Thank you.

23 MS. OLDENBURG: Your Honor, I had subpoenaed Marci
24 Margritier, who is a forensics investigator and had handled

1 the ballistics evidence in this matter. She's not here. We
2 are not sure if it was the weather or whatever. But
3 Mr. McCarthy has agreed to stipulate to the admission of her
4 report. So if I may admit that right now as Exhibit 1.

5 MR. MCCARTHY: That's fine. I agree. Yes, I agree
6 it's admissible.

7 MS. OLDENBURG: Thank you.

8 THE COURT CLERK: Exhibit 1.

9 THE COURT: And it's admitted.

10 (Exhibit 1 marked and admitted into evidence.)

11 MS. OLDENBURG: I would like to call Detective Crow
12 to the stand.

13 THE COURT: All right. Please step forward and be
14 sworn.

15 (The witness was sworn.)

16 THE COURT: Please take the witness stand and make
17 yourself comfortable. We'll know you're comfortable because
18 you're going to tell us your first and your last name,
19 spelling your last name for the record.

20 THE WITNESS: My name is Chad Crow. Last is spelled
21 C-R-O-W.

22 THE COURT: Thank you.

23 Please proceed.

24 MS. OLDENBURG: Thank you.

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CHAD CROW,
having been first duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MS. OLDENBURG:

Q Thank you for being here today, Detective Crow.
What is your occupation?

A I'm a police officer for the Reno Police Department.

Q Okay. And how long have you been a police officer?

A 15 years.

Q And have you received training on interviewing and
interrogating a suspect?

A Yes.

Q Okay. And what are you trained to do when a suspect
says he wants to talk to a lawyer?

A At that time, you conclude the interview and you do
not question any further.

Q Okay. And what are you trained to do when a
juvenile suspect says he wants to talk to his guardian?

A You stop questioning and you bring the guardian in.

Q Is your training any different with regard to
interrogation and questioning when the suspect is a juvenile?

A Not really, not as long as you provide a Miranda and

1 include the juvenile admonishment.

2 Q Thank you. Were you assigned to investigate a
3 shooting at Paradise Park on October 27, 2011?

4 A Yes, I was.

5 Q And why were you assigned to that particular
6 incident?

7 A Because I was the gang detective, and it was a gang
8 matter.

9 Q As part of your investigation, did you question the
10 Petitioner, Kupaa Ke-a?

11 A Yes, I did.

12 Q Okay. And do you recall what date that was?

13 A No, I don't.

14 MS. OLDENBURG: Okay. Your Honor, I would like to
15 approach the witness with a transcript of the interview on
16 October 28, 2011, with Mr. Ke-a.

17 THE COURT: Sure.

18 MS. OLDENBURG: And, Your Honor, I was provided with
19 two tapes of the interviews which we are going to discuss
20 today with Officer Crow, and it is my understanding that the
21 State will stipulate to the authenticity of those tapes. So I
22 would like to move for them to be admitted.

23 MR. MCCARTHY: Yes, I agree they're authentic.

24 THE COURT: All right.

1 MS. OLDENBURG: So Exhibit 2 will be the first
2 interview with Kupaa Ke-a of October 28, 2011, and Exhibit 3
3 will be the second interview of Kupaa Ke-a.

4 THE COURT: Were you planning to play both of those?

5 MS. OLDENBURG: Pardon me?

6 THE COURT: Were you planning to play both of those
7 before I admit them?

8 MS. OLDENBURG: I was planning to play them, but the
9 audio -- and I had scheduled audio visual here, but apparently
10 it's not set up. It's not set up for me to play them.

11 THE COURT: Oh, okay. Well, my inquiry for the
12 record was I sense that the -- although you haven't laid the
13 foundation, but I read the pleadings, is that there's a
14 Miranda issue involved. I wouldn't need to hear all the disks
15 for the purpose of a Miranda challenge as to whether or not
16 his trial counsel was ineffective for raising a Motion to
17 Suppress, even though this was a plea. That's what you're
18 going to get to. So my comments are sort of irrelevant in
19 some ways because you can't play them anyway. But what was
20 the purpose of you introducing them both?

21 MS. OLDENBURG: I would like them to be part of the
22 record.

23 THE COURT: To play them both for my consideration?

24 MS. OLDENBURG: Not right now. But it's going to be

1 part of the record on appeal. You don't have to right now.

2 THE COURT: I'm with you so far. But you want both
3 of the -- you want the entire transcript of his statement to
4 be part of the record, and that's why you're introducing them,
5 not just for the purpose of the Miranda issue?

6 MS. OLDENBURG: The trans -- yes. I can't introduce
7 the transcripts, obviously. Even though they are certified,
8 they are hearsay. So I'm seeking to introduce the State's
9 evidence which was provided to me of the police interviews.

10 THE COURT: And the relevance would be?

11 MS. OLDENBURG: The Miranda issue.

12 THE COURT: Okay. But you're not --

13 MS. OLDENBURG: I had intended to play them for
14 you -- bits and pieces for you today if the witness could not
15 recollect the questioning of the Petitioner, but apparently
16 there was a misunderstanding. I had put in my request for
17 audio visual. They were going to be here this morning.
18 Apparently I was supposed to bring my own computer. And I'm
19 not sure what screen is being used because I haven't done this
20 in the courtroom before. So I came early hoping I could work
21 with them and make sure I have that down and I could --

22 THE COURT: All right. That wasn't my question.
23 You have no objection to them being admitted for the purpose
24 of supplementing the record on this petition?

1 MR. McCARTHY: I would think they can be admitted
2 for whatever purpose someone wants. It's okay.

3 THE COURT: All right. They will be admitted.

4 THE COURT CLERK: Those are Exhibits 2 and 3.

5 (Exhibits 2 and 3 marked and admitted into evidence.)

6 MS. OLDENBURG: Thank you, Your Honor.

7 THE COURT: Go ahead.

8 MS. OLDENBURG: Thank you.

9 BY MS. OLDENBURG:

10 Q All right. Detective Crow, do you want to take a
11 look at the first couple pages of that and answer the question
12 as to what date you interviewed Mr. Ke-a?

13 A I don't see the date of the interview anywhere on
14 the transcript.

15 The date the interview took place -- should be
16 notated in my report, if you have it.

17 Q I do.

18 MS. OLDENBURG: May I approach the witness, Your
19 Honor?

20 THE COURT: Sure.

21 BY MS. OLDENBURG:

22 Q I'm handing you a copy of a narrative of your report
23 on your interview with Mr. Ke-a.

24 A Okay. It says here the date should have been

1 October 28, 2011.

2 Q Is that your recollection of that date, that that's
3 a correct date?

4 A Well, using the report refreshes me, yeah.

5 Q Okay. Thank you. And where did the questioning
6 take place of Ke-a?

7 A I believe it was -- yeah, it was at the Reno Police
8 Department in an interview room.

9 Q Okay. Did you have an opportunity to review your
10 report before today?

11 A No.

12 Q Or the police interviews?

13 A No.

14 Q Okay. And what was the purpose of the questioning
15 of Mr. Ke-a?

16 A It was in reference to the double shooting at
17 Paradise Park.

18 Q And why did you initially bring Mr. Ke-a to the
19 police station that day?

20 A Excuse me? Why?

21 Q Yeah.

22 A Or when?

23 Q Was that your sole purpose --

24 A Oh, yes.

1 Q -- of bringing Mr. Ke-a to the police station that
2 day?

3 A Yes.

4 Q Prior to your questioning of Ke-a on October 28th,
5 had you interviewed Mr. Edwin Baccha?

6 A The name sounds familiar. I believe I did.

7 Yes.

8 Q Okay. And was Mr. Baccha involved in the shooting
9 of October 27th?

10 A Yes.

11 Q And what was the extent of his involvement?

12 A He was one of the members of the suspect group.

13 Q Was Mr. Baccha considered to be an accomplice to the
14 shootings?

15 A I can't remember. If you let me read what I wrote,
16 I can answer that for you.

17 Yes.

18 Q Okay. Did you also interview Manual Gatika?

19 A Manual Gatika.

20 Q Manual Gatika.

21 A Yes.

22 Q And what was Mr. Gatika's involvement in the
23 shootings? Or was he involved in the shootings?

24 A Hold on a second.

1 Yeah, he was also a member of what I would refer to
2 as the suspect group.

3 Q And by "the suspect group," what specifically do you
4 mean?

5 A Well, as I recall, there was two groups that agreed
6 to meet to fight at the park. I'm referring to the suspect
7 group as the group from which the shots came from.

8 Q Thank you. And was Mr. Gatika ever considered an
9 accomplice?

10 A Not charged as an accomplice, as I recall, but he
11 was listed as a suspect.

12 Q Did you have occasion to interview Mr. Marcos
13 Rodriguez?

14 A Yes.

15 Q And was Mr. Rodriguez involved in the shootings?

16 A Yes.

17 Q And what was the extent of his participation?

18 A He was a member of the suspect group, too, if I
19 recall right.

20 Q And was Mr. Rodriguez charged with anything?

21 A No, not to my recollection.

22 Q Not to your recollection?

23 A No.

24 Wait. Actually, he was listed as an arrestee. I

1 mean, I'm not familiar with this report. I would need to take
2 a break to read it thoroughly if that would help with the
3 questioning. It's been four years.

4 Q Okay. I believe this is my last question with
5 regards to that report, but I do have another document that
6 might refresh your memory.

7 A Okay.

8 MS. OLDENBURG: If I may approach.

9 THE COURT: Sure.

10 MS. OLDENBURG: Your Honor, I'm handing, and
11 Detective Crow, I'm handing you a copy of an e-mail I received
12 from the State dated November 16, 2011, from you to Mr. Chris
13 Wilson.

14 And if you could just -- you don't need to read this
15 out loud, just read this highlighted section to refresh your
16 memory.

17 THE WITNESS: Okay. I've had a chance to read it.

18 BY MS. OLDENBURG:

19 Q All right. So what was Mr. Marcos's involvement in
20 the -- Mr. Rodriguez's involvement in the shooting?

21 A Both Marco and Kato were handed a weapon by
22 Mr. Gatika, is my impression.

23 Q My question is what was Mr. Rodriguez's involvement
24 in the shooting?

1 A It would appear through the e-mail that he's an
2 accomplice.

3 Q Okay. Let me approach you with another section of
4 that e-mail.

5 THE COURT: Sure.

6 MS. OLDENBURG: It's also dated --

7 THE COURT: I'm not adverse to you leading a little
8 bit, too. So the record is clear, the officer made it clear
9 that he doesn't remember anything from 2011, and if you're
10 trying to get to a point of Mr. Rodriguez's involvement, I
11 don't have a problem if you want to lead him and say: Isn't
12 it true he did X or he did Y?

13 That would be helpful to me, and it would move along
14 faster.

15 MS. OLDENBURG: Thank you, Your Honor.

16 BY MS. OLDENBURG:

17 Q Officer Crow, does this e-mail state that Marco
18 Rodriguez was the person who shot victim Christian Anton? The
19 paragraph above the highlighted version is what I'm referring
20 to.

21 A Yes, yes.

22 Q So it's fair to say that Mr. Rodriguez was also an
23 accomplice to the shooting?

24 A Yes.

1 Q So is it fair to say that when you brought Mr. Ke-a
2 to the station on October 28th, that he was a primary suspect
3 in the incident?

4 A Yes.

5 Q Is this based on --

6 A You're referring to Ke-a, right?

7 Q Yes.

8 A Or Marco?

9 Q Mr. Ke-a.

10 A Yes.

11 Q And was this based on your interviews with these
12 other witnesses?

13 A Yes.

14 Q And how did Mr. Ke-a get to the police station that
15 morning?

16 A RGU officers located him and transported him to the
17 station.

18 Q And those are Regional Gang Unit officers?

19 A Yes.

20 Q RGU?

21 A Yes.

22 Q Do you recall whether Mr. Ke-a was on parole at that
23 time?

24 A No, I don't.

1 Q Youth parole?

2 A I don't remember.

3 Q When Mr. Ke-a got to the station, what did you tell
4 him the purpose was of you bringing him down?

5 A Initially, based upon my report, it refreshes my
6 memory a bit, that after the shooting in which his grey
7 Cadillac was on scene, he had tried to report it stolen. So
8 he needed to be interviewed in reference to that also, in
9 addition to the shooting.

10 Q When he arrived at the station, did you tell him
11 that he was just there to follow up on a police report he had
12 made earlier that morning?

13 A Yes, I did.

14 Q And when he arrived, did you tell him he was also
15 there because he was a suspect in the shooting?

16 A I can't remember if it's in my report at all. Give
17 me a second. I know I initially told him it was about him
18 reporting his car stolen, which was related to the shooting.

19 Q All right. Thank you. Did you tell Mr. Ke-a he was
20 free to leave at any time? And you can also refer to the
21 transcript of the police interview, probably starting at
22 page 5, which does not indicate that he was informed that.

23 A I don't see where I told him if he was free to
24 leave, but I know I read him Miranda around page 30.

1 Q Right. And we'll get to that.

2 A And he understood his rights.

3 Q Thank you. We'll get to that in a minute.

4 So around page 28, it appears you started to
5 question Mr. Ke-a about the incident at Paradise Park,
6 correct?

7 A Yes.

8 Q And it also indicates that when you started to
9 question Mr. Ke-a, you stated, "You know and I know you were
10 in a fight, some shots got fired, you were there." Talked to
11 him about evidence you had against him; is that correct?

12 A What page are you on?

13 Q Page 28 through 31.

14 A Yes.

15 Q Okay. Did you tell him that the police had gotten a
16 .22 rifle out of his car, page 29, line 6?

17 A I see we got a .22 right out of his car, and then
18 there was .22 rounds fired. So that's in reference to -- I
19 believe I was meaning .22 ammunition.

20 Q Did you also tell him that this was his opportunity
21 to tell you whether it was preplanned or to give him your side
22 of the story?

23 A Yes.

24 Q Or for him to give you his side of the story?

1 A Yes, that sounds appropriate.

2 Q You also told him you knew he was present at
3 Paradise Park?

4 A Yes.

5 Q Did you also tell him prior to reading him his
6 Miranda rights that he could be certified as an adult and may
7 face premeditated murder charges?

8 A What page are you on reading that?

9 Q Page 30.

10 A What line?

11 Q Line 17 through 18, and line 24 through 25.

12 A Yes.

13 Q Thank you.

14 Okay. If you want to turn to page 31 of the
15 transcript, line 8 through 9 indicates that after discussing a
16 few more issues about -- after telling Mr. Ke-a he was going
17 to be part of a murder, you did exit the interview room at --
18 on the tape is 1.6.42 minutes, and you returned back to the
19 room after that, correct?

20 A Yes.

21 Q And that's about maybe 15 minutes -- 45 minutes
22 later you returned to the room?

23 A I turned the light off at 1:06. Came back in at
24 1:20. So that's about 15 minutes. Are you talking about the

1 bottom at line 19?

2 Q Yeah. Line 19 where it states you re-entered the
3 room, not a different officer.

4 A Yes.

5 Q So about 45 minutes later you re-entered the room?

6 A Yes.

7 Q And did you read him his Miranda rights at that
8 time? I'm looking at page 32, lines 14 through 20.

9 A Yes.

10 Q All right. After you read him his rights, did he
11 ask for his sister, which is his guardian, to be present --
12 was his guardian at that time to be present?

13 A He did.

14 Q And did he also ask for a lawyer?

15 A Yes.

16 Q And did you stop the interview?

17 A I can't remember. Hold on.

18 Q Okay. I want to refer you to pages 35 through 36.

19 A I'm sorry. What was the original question? Did I
20 stop the interview?

21 Q After you read him his Miranda rights and Mr. Ke-a
22 asked for his guardian, his sister, to be present, as well as
23 a lawyer to be present, did you stop the interview?

24 A It does not appear to. But I believe he was

1 initiating conversation.

2 Q Okay. And then the transcript indicates that you --
3 on page 37, line 17, you left the room about -- at about
4 1.57.57 minutes, re-entered approximately 15 minutes later; is
5 that correct?

6 A Yes.

7 Q Okay. At that time, did you continue to question
8 Mr. Ke-a regarding the shooting? And I'll refer you to
9 page 37, lines 18 through 25, page 38, page 39 and page 40.

10 A Yes.

11 Q And why did you continue your questioning of
12 Mr. Ke-a after he had already invoked his right to counsel and
13 asked for his guardian to be present?

14 A Well, we were attempting to locate his guardian, and
15 during that process, I remember him asking simple questions
16 like, "So, like, what am I looking at," and other things which
17 I interpreted as reinitiation of dialogue.

18 Q Did you say to Mr. Ke-a that the case was very
19 strong against him, "They'll be getting the .22 round out of
20 your car"? I'm looking at page 38, lines 17 through 19.

21 A Yeah, that sounds about right.

22 Q Did you also inform Mr. Ke-a that you had found meth
23 in his car, didn't know whose it was? That's lines 2 through
24 25.

1 A Yes.

2 Q And on page 39, did you talk about the shooting and
3 the potential way the judge might look at it, the sentence he
4 could get?

5 A Yes.

6 Q Did you ask him -- did you state to him that, "So
7 much depends on your honesty"?

8 A Yes.

9 Q Did you say to him that you didn't know if he was
10 going to do years or not, but if Christian Anton, who was in
11 serious condition, if he died, that Mr. Ke-a would do a lot of
12 years?

13 A I possibly did. What line are you looking at?

14 Q I'm looking at page 39, lines 15 through 19.

15 A Yes.

16 Q Did you also state to him at lines 20 through 22,
17 "That's normally not a good sign long-term. The people you
18 shot you shot in the F'ing leg. All right," and continued to
19 question him on the evidence?

20 A Yes.

21 Q Okay. And were you trying to elicit a confession --
22 a confession after he invoked his right to counsel through
23 this additional questioning?

24 A Yes.

1 Q While Mr. Ke-a was waiting for his sister and her
2 lawyer, did he ask you if he could make a deal?
3 A I can't recall.
4 Q Okay. If you could look at page --
5 A Are you looking at a paragraph?
6 Q I'm sorry. I didn't mean to interrupt you.
7 A I'm sorry. Where are you looking at right now?
8 Q I'm looking at page 40, line 4.
9 A Yes.
10 Q Okay. And what was your response to that question?
11 A He asked me on line 4, "I can make a deal." My
12 response was about -- oh, the shot placement. I mean, maybe
13 trying to prove the attempt at murder. Like, I didn't know if
14 he was intentionally aiming for somewhere on the body that
15 would likely kill a person or if he was just aiming at the leg
16 like where he had shot.
17 Q Okay. When you read -- reading line 12, did you
18 question him as to if there was a reason why he allegedly shot
19 someone?
20 A Yes.
21 Q Okay. And on question 19 -- excuse me -- line 19,
22 paragraph 40, did Mr. Ke-a state that he wanted legal advice
23 again?
24 A Yes.

1 Q Okay. Would you consider the fact that Mr. Ke-a
2 asked if he could make a deal any kind of admission of guilt?

3 A Kind of.

4 Q Okay.

5 A In my experience.

6 Q And then looking at page 41, you continued to
7 question Mr. Ke-a, correct?

8 A Yes.

9 Q Okay. And on line 14, did you state to Mr. Ke-a you
10 had very strong evidence against him, but that you were not
11 here to F up his life?

12 A Yes.

13 Q And what did he say in response on line 17?

14 A That he F'd up his own life.

15 Q Would you consider that an admission of guilt?

16 A A tacit admission, but not a confession.

17 Q On line -- I'm looking at page 41, line 22. Did
18 Mr. Ke-a ask for a second time to talk to a lawyer?

19 A Yes.

20 Q Okay. Did you stop the interview at that time?

21 A I believe I offered him a chance to make a phone
22 call to the lawyer, but he did not know the number.

23 Oh, it was a phone call to his sister's lawyer.

24 Q Okay. And after that conversation -- I'm looking at

1 page 43, line 17 -- did you start to question him again about
2 the shooting, asking him to tell you his side of the story?

3 A Which page and line now? 43?

4 Q Page 43. I'm looking at lines 17 through 25.

5 A They were pretty much statements, not questions.

6 Q Okay. Could you please read lines 17 through 25.

7 A I told him -- this is after he mentioned making a
8 deal. I told him, "I can talk to you later at Jan Evans,
9 okay, as long as you agree to talk to me. All right? I'm not
10 going to do anything to jeopardize the case, dude. It's
11 clean, dude. Okay? I'm not going to risk talking to you
12 outside of" -- blank -- "or anything like that. I don't know
13 what the blank would have been. Probably Miranda.
14 "Everything I'm doing for you at this point is just -- is
15 letting you just tell me your side, okay? Because that's
16 going to help the people that look at this case to determine
17 what decisions they make."

18 Q Okay. You can continue into page 44, lines 1
19 through 4.

20 A I told him, "I don't make the decisions on your
21 future, okay? I don't make the decisions to say, oh, you're
22 going to prison for three years, five years. That's for a
23 Judge, okay?

24 Q Okay. And would you please read lines 5 through

1 10 -- excuse me, lines 5 through 10 of the same page.

2 A I said, "Now, listen, what I do make the decision
3 on, do I think this is premeditated or lying-in-wait for the
4 victims based upon what I've seen, the evidence I've seen, or
5 do I think it's accidental, or do I think it's not accidental?
6 It's intentional, but it's like a heat-of-the-passion-type
7 thing. That's what I do. Okay," referencing to him basically
8 I was looking at the case as is this a premeditated case? Is
9 it an ambush? Is this kind of like a heat-of-the-moment
10 scenario? And the intent was trying to figure out his intent
11 as to whether this was perhaps attempted murder.

12 Q All right. But he had already invoked his right to
13 counsel twice at that point in time, correct?

14 A He did, but then he starts talking to me asking
15 questions like, "What am I looking at?" Saying things like,
16 "I can make a deal."

17 Q I understand. Thank you.

18 Going through pages 44 through 48, you continued to
19 have discussions, ask questions of Mr. Ke-a regarding the
20 shooting, the evidence, snitching, et cetera?

21 A Possibly, yes.

22 Q Do you want to take a minute to take a look at those
23 pages.

24 A Okay. I'm done reading through page 48. Is that

1 what you wanted me to do, read 44 through 48, right?

2 Q Yes. Thank you.

3 On page 47, looking at lines 8 through 9, you stated
4 to Mr. Ke-a, "But what I can tell you is your honesty makes
5 you look good for other people, okay?"

6 Was that an attempt to elicit a confession?

7 A Yes.

8 Q Turn to page 48, lines 7 through 8, did Mr. Ke-a
9 again, for the third time, ask for his lawyer?

10 A Yes.

11 Q All right. And did you stop the interview at that
12 time?

13 A I said, "Okay, that's fine."

14 Yeah.

15 Q You did?

16 A I believe so.

17 Q Okay. Could you please read line -- you can read
18 this to yourself, lines 18 through 25 of page 48.

19 A Which lines? 18 through 25?

20 Q 18 through 25 of page 48.

21 A Okay. I'm done.

22 Q All right. Thank you. All right. So you continued
23 to question Mr. Ke-a, correct?

24 A Not on 18 through 28. I think I was summarizing

1 where we were at.

2 Q Okay. That's true.

3 A Huh?

4 Q Would you read lines 18 through 25, please.

5 A "I know. But you're still a minor, and I know you
6 weren't trying to kill somebody. I know you weren't trying to
7 because you didn't shoot them in the vital organs or lower
8 extremities, okay? And you were a distance away, a little bit
9 of a distance away, at least not as close as eight feet that I
10 believe he was. All right? I mean, his case was bad as far
11 as what happened."

12 Q Thank you. And then you continue to talk to
13 Mr. Ke-a. I'm looking at page 51 through 50. On page 51,
14 lines 6 through 10, didn't you again ask Mr. Ke-a to tell you
15 his side of the story, if you're missing something, you want
16 to know about it?

17 A Page 51, what line?

18 Q I'm sorry. Am I going too fast? 51, lines 6
19 through 10.

20 A Yes.

21 Q And then your conversation went on for a few more
22 pages, up to page 54, line 12, when it indicates that
23 Mr. Ke-a's sister arrived, correct?

24 A I'm sorry. What was your question? His sister

1 arrives at that time, yes.

2 Q And did Mr. Ke-a eventually speak with his attorney?
3 To refresh your memory, if you want to turn to page 56.

4 A Yes. Line 15.

5 Q Okay. Where Mr. Ke-a says his attorney told him not
6 to say anything, correct?

7 A Yes.

8 Q When you concluded your interview, did you send in
9 an officer from the Reno -- excuse me -- regional gang unit
10 into the interrogation room to interview Mr. Ke-a?

11 A I don't believe so.

12 Q Okay. If you'll turn to page 57, line 9.

13 MS. OLDENBURG: And if I had the tape, it would,
14 Your Honor, show that there was an officer, Reno gang unit on
15 the back of her shirt.

16 THE WITNESS: I see that, and she was likely filling
17 out the basic questions for the probable cause sheet.

18 BY MS. OLDENBURG:

19 Q Okay. Was this -- you weren't in the room, so you
20 probably can't answer this question, but the tape will show
21 that Mr. Ke-a's lawyer was not present and his guardian was
22 not present.

23 Did you inform this deputy that Mr. Ke-a had invoked
24 his right to counsel?

1 A I can't remember.

2 Q Okay. The record indicates that Mr. Ke-a on page 60
3 through 61 did admit to being in the Deadside Gang to this
4 Regional Gang Unit officer?

5 A Okay.

6 Q Okay. So after she left -- and I'm turning now to
7 tape 2. So if you'll look at the book, there's a paperclip
8 there, and that is a transcript. And from the best I can tell
9 from the record, it appears to be right after Mr. Ke-a was
10 arrested, he was in the room by himself, and you went back in.
11 And so we'll turn to page 2 of the transcription that states
12 "11.51 minutes." Okay. Did you ask Mr. Ke-a if -- again if
13 there was anything he wanted to say to you?

14 A I did.

15 Q Okay. Were you still trying to elicit a confession?

16 A Probably.

17 Q Okay. All right. We're finished with those
18 transcripts now, Officer Crow. Officer Crow, we are finished
19 with those. I just have a couple more quick questions for
20 you. Thank you for your patience, and the Court's.

21 Were there ever any independent corroborating
22 witnesses; in other words, witnesses that were not involved in
23 the shooting or didn't shoot someone who saw Mr. Ke-a shoot
24 the victims?

1 A No.

2 Q Okay. And so you spoke with Oscar Valencia, one of
3 the victims?

4 A Yes.

5 Q And he stated that he didn't know who shot him,
6 correct?

7 A I can't remember. That sounds right.

8 Q And you also spoke with Caesar Anton, the other
9 victim?

10 A Yes.

11 Q And he also couldn't remember who shot him, correct?

12 A I believe so.

13 Q Okay.

14 MR. OLDENBURG: Thank you, Officer Crow. I don't
15 have any further questions for you.

16 THE COURT: Thank you. Cross-examination.

17 BY MR. MCCARTHY:

18 Q Good morning.

19 A Good morning.

20 Q Is it still Detective?

21 A It's Officer.

22 Q You rotated out of detectives?

23 A Yes.

24 Q Okay. If no one told you that Mr. Ke-a was the

1 shooter, how did you come to suspect him?

2 A His -- his vehicle on scene was one of the leads.

3 Q Okay.

4 A Marcos also said he was a shooter.

5 Q Who is Marcos?

6 A It was one of the Defendant's friends. I believe it
7 was Marcos Rodriguez.

8 Q Okay. Another suspect in the case?

9 A Yes.

10 Q All right. And it was -- was it shell casings in
11 his car or something like that?

12 A .22 ammunition in his vehicle which was left on
13 scene. And .22 casings found at the park where the shooting
14 occurred. And in addition to the fact that the Defendant
15 tried to report his car stolen was a big indicator.

16 Q Okay. All right. So your view of the interview
17 with Mr. Ke-a, the several times he mentioned lawyers and
18 then -- were each of those a clear and ambiguous --
19 unambiguous request for counsel?

20 A They weren't really clear. Initially they would be,
21 and then he would reinitiate dialogue and make statements as
22 to "I'll tell you everything after I talk to my lawyer," or "I
23 can make a deal."

24 Q Okay. Something other than sitting there silently?

1 A Yes.

2 Q Okay. All right.

3 MR. McCARTHY: Your Honor, my memory fails me. Were
4 those transcripts offered in evidence?

5 THE COURT: They were not.

6 MR. McCARTHY: I think we've acted as though they
7 were accurate transcripts, and so I would like to mark and
8 admit those two transcripts.

9 THE COURT: Any objection?

10 MS. OLDENBURG: No, Your Honor, I don't object.

11 MR. McCARTHY: I have a copy.

12 THE COURT: They are admitted for that purpose.

13 THE COURT CLERK: Your Honor, those are Exhibits 5
14 and 6.

15 (Exhibits 5 and 6 marked and admitted into evidence.)

16 BY MR. McCARTHY:

17 Q Do you recall, Officer, after Mr. Ke-a first
18 mentioned a lawyer, talking to his sister, getting clear
19 admissions of guilt after that?

20 A It's admissions but not confessions.

21 Q Right, okay. Like what?

22 A As if he had knowledge, saying things like "I'll
23 tell you everything after I talk to my sister's lawyer" --

24 Q Okay.

1 A -- was the statements. It's not as if he had a
2 lawyer on retainer, but it was -- but there was reference to
3 lawyer, so it was not a clear invocation to me of Miranda.

4 Q I understand, okay. And also no clear admissions of
5 guilt?

6 A And -- exactly.

7 Q Okay. And I guess the two transcripts you were
8 looking at, did they seem to be fairly accurate and compliant?

9 A They seemed accurate.

10 Q All right.

11 MR. MCCARTHY: And that's all I have. Thank you.

12 THE WITNESS: Okay. Thank you.

13 THE COURT: Anything further?

14 MS. OLDENBURG: Thank you, Your Honor. Just a
15 couple of questions.

16 THE COURT: Sure.

17

18 REDIRECT EXAMINATION

19 BY MS. OLDENBURG:

20 Q Officer Crow, you just testified that you -- you
21 learned of evidence of Mr. Ke-a being at the scene by Marcos
22 Rodriguez, correct?

23 A Yes.

24 Q And Marcos Rodriguez shot Christian Anton in the

1 chest that evening, correct, at Paradise Park?

2 A Yes.

3 Q Do you think Mr. Rodriguez would have any reason to
4 lie to you about who might have shot the other two victims?

5 A Not really. I mean, almost everybody we talk to
6 lies. But I mean, he seems to be forthright with his portion.

7 Q Okay. Is he someone that would have been called as
8 a witness given that he was an accomplice?

9 A No.

10 MR. MCCARTHY: Your Honor -- I was too slow to
11 object. Sorry.

12 THE COURT: That's all right. The answer stands.
13 BY MS. OLDENBURG:

14 Q You talked a little bit about the casings. Were
15 those casings ever matched to a weapon?

16 A I can't recall.

17 Q The evidence will indicate in Exhibit 1 that they
18 were not.

19 Were they ever, to your knowledge, matched to any
20 bullets? Were any bullets recovered?

21 A I believe that they were .22 bullets found in his
22 vehicle, the Cadillac at the scene.

23 Q Actually, I'll refresh your memory on that.

24 MS. OLDENBURG: Okay. May I approach the witness?

1 Thank you.

2 BY MS. OLDENBURG:

3 Q I have a copy of Forensic Investigator Marci
4 Margritier's report which has been admitted as Exhibit 1, and
5 if you can take a look at page 3 and what was recovered from
6 the scene.

7 A I'm sorry. What am I supposed to be doing here now?

8 Q I believe, if I heard your testimony correctly, you
9 said that there was ammunition recovered from the Cadillac.

10 A I don't see that on this report, but in the Tiburon
11 report, the original, Detective Clark obtained a search
12 warrant where he located a .22-caliber bullet inside the
13 Cadillac.

14 Q Okay. Well, I don't have the Tiburon report, and
15 I'm not aware of that evidence.

16 A Okay.

17 Q So I want to take a minute to look at your police
18 report.

19 A This was --

20 THE COURT: Counsel, the Tiburon report is the
21 police report.

22 MS. OLDENBURG: Oh.

23 THE COURT: That's okay. If it assists you --

24 MS. OLDENBURG: I don't know if I have the correct

1 one.

2 THE COURT: Ask him what he's referring to.

3 MS. OLDENBURG: Well, it's not admitted into
4 evidence, so it's not really relevant to me -- to us.

5 I'll take that back from you.

6 THE WITNESS: You want the report?

7 BY MS. OLDENBURG:

8 Q Yeah. All right. You had stated that Mr. Ke-a
9 didn't make a clear and unambiguous request for counsel; is
10 that correct?

11 A Yes.

12 Q What do you consider a clear and unambiguous
13 request?

14 A Where they basically say "I'm done talking. I want
15 my lawyer," and they don't follow it up with other statements
16 such as "I can make a deal," or "I want to talk to my sister's
17 lawyer before I say anything."

18 Q Okay. And Mr. Ke-a was a juvenile, correct?

19 A Yes.

20 Q With no experience in the adult criminal justice
21 system, correct?

22 A Yes. We did attempt to get his guardian, which was
23 his sister.

24 Q Correct. Okay. And you had stated that Mr. Ke-a

1 did make some admissions that you would consider admissions of
2 guilt. Could those have been used against him at trial?

3 A Yes.

4 Q Was part of your questioning Mr. Ke-a an attempt to
5 intimidate him?

6 A No.

7 Q Scare him? Shake him up?

8 A Possibly. I mean --

9 MS. OLDENBURG: I don't have any further questions,
10 Your Honor.

11 MR. MCCARTHY: No, thank you.

12 THE COURT: You're excused. You may step down.
13 Call your next witness.

14 MS. OLDENBURG: Your Honor, I would like to call
15 Mr. Ke-a.

16 THE COURT: All right.

17 (The witness was sworn)

18 THE COURT: Take the witness stand. Tell us your
19 first and you last name, and spell your last name for the
20 record when you sit down.

21 THE WITNESS: Kupaa Ke-a. Last name K-E hyphen A.

22 THE COURT: Thank you.

23 Ms. Oldenburg.

24 MS. OLDENBURG: Thank you, Your Honor.

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KUPAA KE-A,
having been first duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MS. OLDENBURG:

Q Mr. Ke-a, how old were you on October 27, 2011?

A I was 17 years old.

Q Had you ever been in the adult criminal justice
system before that time?

A No, ma'am.

Q Did officers of the Reno gang unit come to your home
on the morning of October 28, 2011?

A I believe so.

Q And why did they tell you they were there?

A About my car. They were talking about my car.
Yeah. They said they needed to talk to me about my car.

Q And were you on youth parole at that time?

A Yes, I was.

Q Okay. And did they tell you they were going to take
you to the station to meet with Detective Crow?

A They told me they were going to take me downtown but
they didn't tell me who specifically was going to talk to me.
They just said that the detectives are going to talk to me

1 downtown.

2 Q Okay. Did you believe that had you a choice as to
3 whether you had to accompany them downtown?

4 A No, ma'am. I was on youth parole, so I didn't
5 really think I could tell them no.

6 Q Okay. When you arrived at the station and Detective
7 Crow -- Officer Crow began to question you, did he ever tell
8 you you were free to leave?

9 A Could you repeat that, please.

10 Q When you arrived at the station and Officer Crow,
11 then Detective Crow, began to question you, did he ever tell
12 you you were free to leave?

13 A No, ma'am.

14 Q Did you feel like you were free leave?

15 A No, ma'am.

16 Q And what did Detective Crow tell you initially as to
17 why he brought you down to the station?

18 A Concerning my car.

19 Q Okay. And did Detective Crow eventually read you
20 your Miranda rights?

21 A He did.

22 Q Did you fully understand what those rights meant?

23 A Not really. I mean, just watching movies, but I
24 didn't know what it really -- what it was. I didn't -- I

1 didn't know. I thought it was just like a name or something.
2 I didn't know it was actually rights.

3 Q Did you understand that once you were read your
4 Miranda rights and you asked to speak to an attorney -- let me
5 rephrase this.

6 Did you understand that once you had told
7 Detective Crow that you wanted to speak to an attorney, that
8 you were entitled to say nothing further until your attorney
9 arrived?

10 A No, ma'am.

11 Q Okay. Did Ms. Berning ever discuss Detective
12 Crow's -- he was a detective then. I don't want to confuse
13 you, so I'll say "detective" for purpose of this.

14 Did Ms. Berning ever discuss Detective Crow's
15 interview with you?

16 A Not that I recall. I don't believe she did.

17 Q Did she ever inform you that the State could use the
18 statements you made during that interview as evidence against
19 you?

20 A We never really discussed like evidence and things
21 like that during our -- I don't know what you call it. During
22 our sessions. She never told me anything about that they
23 could use it, just kind of saying like it was kind of damning,
24 but she never told me that they could use it against me,

1 things like that.

2 Q Did she specifically discuss with you any evidence
3 the State had against you?

4 A No, ma'am.

5 Q Did she generally allude to any evidence the State
6 had against you?

7 A Besides like testimony, she never really
8 specifically ever said they got this, that or the other. It
9 was just really kind of just talking. It wasn't really ever
10 just laid out and this is what they got, this is what -- you
11 know, she really never discussed that type of stuff with me.

12 Q What did she talk to you about?

13 A Mainly working as a CI for Crow, for Detective Crow.

14 Q Okay.

15 A For Officer Crow.

16 THE COURT: Say that again, please.

17 THE WITNESS: She -- we discussed mainly about
18 working as a CI for Detective Crow.

19 THE COURT: In other matters unrelated to this?

20 THE WITNESS: Yeah, in like other gang-related --

21 THE COURT: Thank you.

22 BY MS. OLDENBURG:

23 Q Did she talk to you about your personal life?

24 A Yeah. She did, like how was -- like my family

1 history. How did I grow up. Where I grew up. The type of
2 drugs I did, like those type of things.

3 Q Do you feel that she focused more on your personal
4 life rather than informing you about the evidence against you?

5 A Can you repeat that.

6 Q Do you believe that the focus was more on your
7 personal life rather than the evidence the State had against
8 you?

9 A Yes, definitely.

10 Q Did Ms. Berning ever inform you that the State could
11 use the statements you made during your interview with
12 Detective Crow during sentencing?

13 A I don't recall, but I'm going to say she did
14 because --

15 MR. MCCARTHY: I'm going to object to speculation by
16 the witness. He said he doesn't know.

17 THE COURT: I'm going to allow your answer. You
18 were starting to say that -- you're going to say she did, and
19 then you got the objection. So finish your answer.

20 THE WITNESS: Because she would tell me that I,
21 like, told them did I it, is what she would tell me. But I
22 don't remember ever telling them that I did it.

23 BY MS. OLDENBURG:

24 Q Okay. So you never had an opportunity to look at

1 any witness statements? Did you ever have any opportunity to
2 look at witness statements?

3 A Like on the tape or just --

4 Q Just statements that people that were at the scene
5 might have made.

6 A No. We didn't get all that until I came -- I came
7 back from jail and working with Crow. So like by then, it was
8 already sealed and done, when we already signed the prelim and
9 everything.

10 Q Okay.

11 A Or waived the prelim.

12 Q Would you have pled guilty if you thought your
13 Miranda rights might have been violated?

14 A No.

15 Q Okay. To your knowledge, did Ms. Berning interview
16 any witnesses?

17 A I don't think she did.

18 Q Okay. Do you understand what ballistics evidence
19 is?

20 A I believe that's like -- for, like, if you've got a
21 gun and they find a gun, then that's like the evidence they
22 can use against you. That's what I think it is. I'm not
23 sure.

24 Q Okay. Did Ms. Berning ever discuss any ballistics

1 evidence with you?

2 A No. She told me that they didn't have the guns, so
3 there was no ballistics to run, or something like that.
4 That's what she was telling me when we were in County Jail --
5 or when I was in County Jail.

6 Q Okay. Did you and Ms. Berning ever discuss the
7 possibility of going to trial?

8 A No, ma'am.

9 Q Okay. So do you know whether you might have a
10 chance at trial, whether the State -- I'll ask you one
11 question at a time.

12 Did you ever discuss whether you might have a
13 chance --

14 A No, ma'am.

15 Q -- in going to trial?

16 Did you ever discuss whether the State had enough
17 evidence --

18 A No, ma'am.

19 Q -- to take you to trial?

20 If you had been aware that there was no ballistics
21 evidence tying you to the shooting or that you shot both
22 victims, would you have pled guilty to two counts of
23 intentional battery?

24 A Definitely not.

1 Q Did Ms. Berning explain to you the difference
2 between concurrent and consecutive sentences?

3 A Somewhat. She somewhat did.

4 Q Did Ms. Berning tell you the sentence that you were
5 likely to receive?

6 A Yes, ma'am.

7 Q And what was that?

8 A I believe it was a 2 to 15 or a 2 to 5. It was
9 something with a 5 at the end. I believe it was a 2 to 15.
10 And since there was two -- two cases or two charges or
11 whatever, that means that because it happened at the same
12 time, it was going to be all in one sentence, so I wouldn't
13 have to do two sentences.

14 Q Okay. What does that mean to you?

15 A Well, now that like, you know, I know, like, legal
16 terms, that means 2 to 15 concurrent, so I just do one
17 sentence for both cases.

18 Q So it was your understanding you were only going to
19 do one sentence for both Count I and Count II?

20 A Yes, ma'am.

21 Q Did she tell you you might get probation?

22 A Yes, ma'am. She said because of my age, it was very
23 likely that, you know, that was probably going to happen.

24 Q And because this was your first adult felony?

1 A Yes, exactly. Exactly.

2 Q You alleged in your petition you were on some strong
3 medication at the time you pled guilty?

4 A Yes, ma'am.

5 Q What was that medication?

6 A Risperdal and an antidepressant. I don't know what
7 it was called. It was like a small pill. But I know the
8 other one for sure was Risperdal.

9 Q Why were you on those medications?

10 A I was diagnosed with bipolar and schizophrenia while
11 I was in County Jail, and I had, I guess, severe depression
12 from starting this, like, adult system time. So I was just
13 medicated while I was there to help me get through whatever I
14 needed to get through.

15 Q Okay. And did you ever tell Ms. Berning you were on
16 these medications?

17 A We never, like, laid out groundwork, I guess, but
18 she knew I was on it because she would visit me in County
19 Jail. And when we were going to sentencing, she was -- she
20 was aware of that, and it was supposed to be used. I don't
21 know if it was or not.

22 Q Okay. And how did those medications make you feel?

23 A Sleepy. Tired. It didn't make me feel good at all.
24 It was -- it was weird. It was weird.

1 Q Did the medications affect your ability to
2 understand the nature of what was going on including your
3 guilty plea?

4 A Yeah, yeah.

5 Q And how did they affect that ability?

6 A It wouldn't allow me to be me. It wouldn't allow me
7 to freely think and like fundamentally get through a day. It
8 didn't help me do what it was meant to do, I guess.

9 Q Okay. Did it -- did you feel spacey?

10 A There would be times where I wouldn't want to move
11 or do anything. And it was like as if -- I wouldn't think
12 about anything. I would just absentmindedly do things.

13 Q Did you feel incoherent?

14 A I don't really know what that word means.

15 Q Did you not understand things as they were occurring
16 around you?

17 A I would say so, yes.

18 Q So why did you plead guilty to intentionally
19 shooting two people?

20 A Honestly, you know, through the juvenile system, you
21 don't have like real a choice per se to -- to plead not guilty
22 or guilty. They just kind of tell you: This is what you're
23 going to do and this is what you're going to get. So when you
24 go in there, just say this, this and that.

1 And that's kind of what I took it as, the same as it
2 was with Mr. Berning. She told me that: When we go in there,
3 this is what they are going to tell you. This is what is
4 going to happen and, you know, pretty much, you're going to be
5 able to go home. If not that day, you're going to be able to
6 go home soon.

7 You know what I mean? It wasn't -- it wasn't like I
8 thought it over and had a million reasons why not to plead
9 guilty. They didn't really know that, like, all the things,
10 like all of the rights I had. I didn't know all of that. I
11 just kind of went along with it. She made me feel like she
12 cared, and I had no reason not to trust her, I felt.

13 Q So you pled guilty because you thought you would be
14 going home or getting out soon, correct?

15 A Yes, ma'am.

16 Q Did you understand, though, that had you a right to
17 go to trial?

18 A I mean, from, like, watching, like, Law and Order
19 and, like, dumb things on TV, I knew what trial was. But I
20 never experienced that through juvenile. So I didn't really
21 know, like, what all that really meant and what all that
22 really was. I didn't understand that.

23 Q So you signed a guilty plea memo where you admitted
24 to two counts of Battery With a Deadly Weapon which requires

1 intent. Why did you sign that memo?

2 A Ms. Berning told me pretty much what I just said,
3 that I would be going home. She kind of laid out papers, said
4 sign this, sign this, sign here, and sign there. I didn't
5 really read it as I probably should have. I didn't do that.
6 I just signed it, what she told me to sign, and we went along
7 from there.

8 Q And when this Honorable Court sentenced you -- or
9 excuse me -- did the canvass on your guilty plea and asked you
10 if anyone made you any promises about what sentence you would
11 receive, you answered no. Why did you answer no?

12 A Ms. Berning told me -- before we went to the court
13 for that hearing, she had told me that they were going to ask
14 me this, and she pretty much just said: When they ask you
15 this, say yes, say no, say that, say this.

16 And kind of I went along. I didn't really sit there
17 and think about what they were really asking or saying to me.
18 It just kind of like reflex, kind of like, something like
19 verbal reflex.

20 Q And is that the same reason why you informed the
21 Court that your plea was voluntary when Judge Freeman asked
22 you?

23 THE COURT: I didn't ask. For the record, Judge
24 Robinson did.

1 MS. OLDENBURG: Oh, I apologize.

2 THE COURT: That's all right. It will be in the
3 transcript.

4 MS. OLDENBURG: You did the sentencing. I
5 apologize.

6 THE COURT: That's all right. Just a second so the
7 record is clear.

8 While you were asking those questions, I was
9 reviewing the transcript of the arraignment. I had done so
10 earlier as well. Seems Judge Robinson did the Entry of Plea,
11 and I did the sentencing in this case.

12 MS. OLDENBURG: My apologies, Your Honor.

13 THE COURT: No apology necessary. I just want the
14 record to be clear.

15 MS. OLDENBURG: I did know that, but I forgot.

16 BY MS. OLDENBURG:

17 Q So when you told Judge Robinson you were entering
18 your plea voluntarily, why did you tell him that?

19 A It was just kind of one of the same things, just
20 going along with just whatever they ask. I don't -- I don't
21 know if he asked me if this was voluntary or not, to be honest
22 with you. I'm assuming if that's like a legal procedure, then
23 he probably did. But if he did ask me, I probably just
24 reflexed and said yes or no, whatever it was supposed to be.

1 Q Because you felt that you had no choice?

2 A I didn't -- I didn't know that I could really speak
3 what I felt. I just was told by the attorney, so I did what
4 the attorney said, as they do in the juvenile system.

5 MS. OLDENBURG: All right. I have no further
6 questions.

7 THE COURT: Thank you.

8 Cross-examination?

9 MR. McCARTHY: Thank you.

10

11

CROSS-EXAMINATION

12 BY MR. McCARTHY:

13 Q You met with Ms. Berning before you pleaded guilty,
14 right? You said she --

15 A Yes, sir.

16 Q -- told you what to expect when you went into court;
17 is that right?

18 A Can you say that one more time.

19 Q She told you what to expect the day you pleaded
20 guilty?

21 A Yes, sir.

22 Q Did you memorize the questions and answers?

23 A Of what?

24 Q When -- did she tell you what questions the judges

1 would be asking -- the judge would be asking?

2 A She did run that by me.

3 Q And did you memorize those questions?

4 A I can't say whether I did at that time or not.

5 Q Okay. Did you memorize the answers?

6 A If it sounded like a yes, say yes; if it sounded
7 like a no, say no.

8 Q All right. So you answered whatever you thought
9 would get the judge to accept the plea; is that correct?

10 A If Ms. Berning says so, yes.

11 Q I'm asking you what you thought.

12 MS. OLDENBURG: I believe he answered that,
13 Your Honor.

14 MR. McCARTHY: I don't believe he did.

15 MS. OLDENBURG: He just said, "If Ms. Berning says
16 so."

17 THE COURT: Well, I'll let him ask the question
18 again. I don't think he answered his question because he
19 asked him what he thought, and his response was: What
20 Ms. Berning told him.

21 That didn't really answer the question. I'll let
22 you ask it again.

23 BY MR. McCARTHY:

24 Q What were you thinking?

1 A When he was asking me the questions?

2 Q Yes.

3 A To get this over with.

4 Q So you object then, you would say whatever you
5 thought was going to help you out that day, right?

6 A Whatever Ms. Berning told me to do, I said it.

7 Q I'm not -- what did you hope to accomplish?

8 A I hoped to go home that day.

9 Q You wanted the judge to accept your guilty plea so
10 you didn't have to go to trial, right?

11 A So I could go home.

12 Q You didn't understand there was a right to trial?

13 A I didn't. I don't really know what that was at that
14 time.

15 Q The Judge asked you if you understand that there was
16 a right to trial. Do you know how you responded? Do you?

17 A I don't. I don't recall, sir.

18 Q I'm going to show you a transcript of the
19 proceedings dated February 8, 2012, at page 8. See if this
20 helps you recall. Why don't you start about -- can you read
21 and write English okay?

22 A (The witness nods.)

23 Q Okay. Start about line 3, go through line 8, if you
24 would. And just read it to yourself and see if that helps you

1 remember.

2 A You said 3 through 8?

3 Q Yeah. Okay. Do you now remember the Judge asking
4 you if you understand you have a right to trial?

5 A Yes, sir. I read it.

6 Q Okay. And how did you respond to the Judge?

7 A "Yes, sir."

8 Q Okay. Because you did understand you had a right to
9 trial, right?

10 A I just said "Yes, sir" because I was told to say it.

11 Q So that specific question -- when Ms. Berning told
12 you: Listen, if Judge Robinson asks you 'You understand you
13 have the right to trial,' you should answer yes; is that
14 correct?

15 A I would say so.

16 Q Was that for every question the Judge asked? She
17 mentioned that question specifically before you came into
18 court?

19 A If it was supposed to be yes, say yes; if it's
20 supposed to be no, say no.

21 Q How did you know what it was supposed to be?

22 A Because it was supposed to be back and forth, back
23 and forth. I'm assuming that if you look at the tape, it will
24 show there was really no time to contemplate what he was

1 saying. It was just: Yes, sir. Yes, sir. Yes, sir.

2 Q How did you decide?

3 A Just say whatever he said.

4 Q Some you answered "Yes, sir" and some you answered
5 "No, sir." How did you decide?

6 A I think I can read a question when somebody is
7 asking me a question, yes, no.

8 Q It was truthful?

9 A If he asked me if I wanted to stop, I would probably
10 say no.

11 Q Were your answers truthful?

12 A To what degree?

13 Q Were you being completely truthful that day?

14 A I don't know how to answer that question.

15 Q Well, what part is difficult?

16 A My counsel said do this, and I did what my counsel
17 said.

18 Q Did your client -- did your lawyer tell to you lie
19 to the Court?

20 A She never used those words, "Lie to the Court." She
21 never used those words.

22 Q And she didn't go through the specific questions the
23 Judge was going to ask?

24 A She did run those by me when we were in the back

1 room.

2 Q Okay. And told you which way to answer each one?

3 A She told me exactly what was going to be asked.

4 Q Okay.

5 A And she said say this, say that, and so on.

6 Q All right. So you just had the one rehearsal
7 though. You didn't do it more than once?

8 A It was quick because we were next. So she didn't --
9 she told me she didn't have enough time to come down earlier,
10 but it was like quick.

11 Q Okay. And on the subject of concurrent and
12 consecutive sentences, do you remember what the Judge said to
13 you about that?

14 A No, sir. Can you refresh my memory?

15 Q Okay. I'll show you page 7 in that same transcript
16 and see if that helps you remember. Start at line 19 and read
17 to the bottom.

18 MS. OLDENBURG: Sorry. What page are you on?

19 MR. McCARTHY: 7.

20 THE WITNESS: All right. I read it.

21 BY MR. McCARTHY:

22 Q Do you remember now what the Judge said?

23 A Yes, sir.

24 Q Did you understand it? You're not answering.

1 A It was those terms, like they just -- they're
2 confusing.

3 Q Okay.

4 A Because he's saying I can get probation, and he's
5 saying I don't have to get probation. So I'm assuming that
6 means that if I don't get to go to prison, I'm getting
7 probation.

8 Q When the Judge asks you, "Do you understand," you
9 said, "Yes, sir." Did you understand?

10 A No, sir.

11 Q Did you know you didn't understand?

12 A To be honest, yeah, I didn't really understand any
13 of it.

14 Q Okay.

15 A This was the first time --

16 Q So you just kept saying yes because you wanted to
17 get the Judge to accept your plea?

18 A I was saying yes because that's what my attorney
19 told me to say.

20 Q Okay. All right. I noticed in -- when you were
21 talking with Detective Crow in that transcript and the subject
22 of Miranda rights came up, you used the word "Miranda rights."
23 Did you know what those rights were?

24 A I could recite them because I was told a hundred

1 times what they were.

2 Q So go ahead, give it a shot. See if you can tell
3 us.

4 A You have the right to remain silent. Anything you
5 say will be used in court.

6 MS. OLDENBURG: Your Honor, I object to the
7 relevance of this testimony --

8 THE COURT: Overruled.

9 MS. OLDENBURG: -- as we are going back in time.

10 THE COURT: I made my ruling. Overruled.

11 You may continue.

12 MS. OLDENBURG: Thank you.

13 THE WITNESS: It's been so long since I've heard
14 them, so --

15 BY MR. MCCARTHY:

16 Q You said "a hundred times." Was that an
17 exaggeration?

18 A More than likely, yeah.

19 Q But you've heard it many times like on television
20 and such?

21 A Television or when I was, like, shoplifting and, you
22 know, things like that.

23 Q Oh, okay. So this isn't the first time you've been
24 interviewed by a police officer and told your rights?

1 A No, sir.

2 Q Okay. And the part about you have the right to an
3 attorney and if you cannot afford one, one will be appointed
4 for you, you've heard all that before, haven't you?

5 A Sure.

6 Q Okay. All right. Do you recall the first time you
7 met Kathy Berning?

8 A I don't.

9 Q Okay. Do you recall if it was while you were in
10 jail?

11 A I don't.

12 Q Okay. Do you recall what you told her in that first
13 meeting?

14 A I don't. I don't remember meeting her. I just
15 remember the aftereffects of everything, like going through
16 those court -- court dates and things like that.

17 Q Uh-huh. Can you remember how it was that you
18 decided to plead guilty?

19 A I don't recall.

20 Q Okay. Do you recall what influenced your decision?

21 A Just the fact that I would be going home soon.

22 Q Okay. But now you -- you describe what you
23 understood ballistics to be. It's kind of relating a bullet
24 to a gun, right?

1 A Yes.

2 Q Okay. And you were aware when you pleaded guilty
3 that no one had the gun. Were you?

4 A I didn't know -- I didn't know anything like that.
5 I didn't know anything about evidence or anything beside they
6 said that I said I admitted it. I didn't know any of that.

7 Q Okay. Did you and Ms. Berning have any discussions
8 on the subject of probation?

9 A Yes, sir.

10 Q And she said that with the plea bargain, it was
11 possible; is that correct?

12 A She told me that it's more than likely.

13 Q Okay. Was the subject of probation related in any
14 way to the potential for a gang enhancement?

15 A What do you mean?

16 Q Did Ms. Berning tell you that your eligibility to
17 get probation was dependent on not having the gang
18 enhancement?

19 A I don't recall her ever telling me something like
20 that.

21 Q All right. On the day you pleaded guilty, was there
22 any part of it that you did understand?

23 A What do you mean, like did I recall the whole -- the
24 whole conversation?

1 Q Just any part at all. Is there any part where the
2 Judge talked and you responded and you understood?

3 A Competently, no.

4 MR. McCARTHY: That's all I have. Thank you.

5 THE COURT: Thank you.

6 Anything on redirect?

7 MS. OLDENBURG: No, Your Honor.

8 THE COURT: Thank you. You're excused. You may
9 step down. Thank you for your testimony.

10 Call your next witness.

11 MS. OLDENBURG: Your Honor, Petitioner rests.

12 THE COURT: All right.

13 MR. McCARTHY: Kathy Berning.

14 THE COURT: Please have Kathy Berning come in,
15 Mr. Deputy.

16 Please step forward and be sworn. Step forward
17 right here.

18 THE WITNESS: Oh, I forget this part.

19 (The witness was sworn.)

20 ///

21 THE COURT: Thank you. Please take the witness
22 stand. Make yourself comfortable. We'll know you're
23 comfortable because you're going to tell us your first and
24 last name, spelling your last name for the record.

1 THE WITNESS: Thank you. My name is Katherine
2 Berning. B-E-R-N-I-N-G.

3 THE COURT: Thank you.
4 Mr. McCarthy.

5
6 KATHERINE BERNING,
7 having been first duly sworn, was examined
8 and testified as follows:

9
10 DIRECT EXAMINATION

11 BY MR. MCCARTHY:

12 Q Your occupation, ma'am?

13 A I'm a lawyer.

14 Q Currently what sort of practice do you have?

15 A I have a practice of family law, trust estate work.
16 I -- for many years I was a prosecutor, and I did a fair
17 number of criminal defense cases.

18 Q Okay. In that capacity, did you represent Mr. Kupaa
19 Ke-a?

20 A Yes, I did.

21 Q Do you recall when you were first licensed to
22 practice law in this state?

23 A Yeah, 1989.

24 Q Do you recall when you -- under what circumstances

1 you first met Mr. Ke-a?

2 A Mr. Ke-a was incarcerated. I was a -- it was an
3 appointment for the Bell conflict group. So I was appointed
4 to represent him.

5 Q And you met him at the jail?

6 A Yes, I met him a couple of times. I met him at the
7 jail. And then when he made bail and was released to give --
8 and wanted to do substantial assistance, I also met with him
9 at my office.

10 Q That part, when he was released in order to do
11 assistance, was that before or after he pleaded guilty; do you
12 know?

13 A That was after.

14 Q Okay. When you first met him in the County Jail --

15 A Uh-huh.

16 Q -- did he give you any instructions?

17 A Yeah. We had a -- a pretty good conversation. What
18 he had basically said was that he wanted to make a deal. I
19 asked him if he had, in fact, you know, shot -- if he had shot
20 these folks, and he said yes, he did. And he wanted to do
21 whatever he could because he understood that it was -- we
22 talked, and I made sure he understood it was a 2-to-15
23 sentence. And with what he was looking at, with a gang
24 enhancement, it would not be probatable. And so he was

1 very -- we had talked about that. I told him what his options
2 were, and he was clear that the direction he wanted to go was
3 to get -- to get a deal, see what we could do about lessening
4 the sentence and see if it was possible to get probation.

5 Q Before your client pleaded guilty, did you review
6 the evidence against him?

7 A Yes.

8 Q Did you look at or read his interrogation when you
9 met with him?

10 A Yes, I did.

11 Q Okay.

12 A I also did, as part of the review, the -- his
13 telephone conversations that he had had that had been taped.
14 We also reviewed the interviews with the codefendants, with
15 Mr. Gatika, with Mr. Rodriguez, I believe, and exactly -- I
16 reviewed absolutely everything that there was to review before
17 we had that conversation.

18 Q Now, you saw in your client's interrogation he did
19 mention lawyers?

20 A Yes.

21 Q Okay. So you knew you might be able to work with
22 that some?

23 A Yep.

24 Q Okay. Why didn't you?

1 A Say that -- maybe I'm not understanding the
2 question.

3 Q Why didn't you file a Motion to Suppress his
4 statements?

5 A The -- there was -- where he wanted to go was to --
6 was to enter a plea and to get the best plea negotiation that
7 I could. Our -- we did that, and that was where everything
8 went. It was very clear -- he made it very clear very quickly
9 that he did not want to contest the evidence that was there.
10 He wanted to look at what we were going to do as far as
11 sentencing and what could happen. And frankly, as far as some
12 of the evidence, like the -- we didn't pursue that because
13 that wasn't the direction. I didn't get that direction from
14 him.

15 Q Okay. Do you know who the prosecutor was?

16 A Yes. Chris Wilson.

17 Q Is he the kind of prosecutor you can take a plea
18 bargain and make a Motion to Suppress?

19 A No.

20 Q What happens?

21 A Well, what happens is your deal goes away. And we
22 had a pretty good deal coming out of prelim. The Sparks case
23 against my client was going to be dismissed and the drug --
24 the drug stuff was going to be dismissed, and the only thing

1 that was going to be left was two batteries with a deadly
2 weapon causing substantial bodily harm, which was a 2 to 15,
3 and the best part was all the gang affiliation stuff went
4 away, so we had a chance of working at probation.

5 Q And that was the significance of the possible gang
6 enhancement?

7 A Yes.

8 Q To prohibit probation?

9 A Right.

10 Q Okay. So did your client appear to understand what
11 was happening when you talked about his options?

12 A Oh, yes. It was very -- in my estimation, Mr. Ke-a
13 is a very smart man, and he asked very good questions, and I
14 believe he understood exactly what he was doing.

15 Q Okay. Did you have any discussions at all about the
16 prospect of going to trial, what that may consist of?

17 A Yes, but he very quickly dismissed that.

18 Q Okay.

19 A And the other thing was that one thing he wanted
20 from the very start was he wanted to make -- and the whole
21 idea of make a deal is he wanted to get out of jail so he
22 could be of assistance to the police because there was another
23 homicide, I recall, at the time, and he had some information
24 he thought he could associate with folks who did have

1 information, and he could feed that to the police for
2 substantial assistance so when he appeared before the Judge,
3 that would be helpful in hopefully getting him probation.

4 Q Okay. Did that work out at all?

5 A No, it didn't. What actually occurred as far as
6 when I talked to, briefly, my client and also when I talked
7 with Officer Crow, Detective Crow at the time, was that he
8 didn't trust my client anymore, that apparently what my client
9 wanted to do was wear a GPS monitoring only during the daytime
10 and not during the nighttime, that he made statements that he
11 was trying to get in good with this one gang, and it turned
12 out that they were his friends. And ultimately, that was the
13 case where there was a gentleman who was shot in the neck when
14 my client -- as -- what I saw in the police report was, and it
15 talked to Mr. Crow and also my client that there was a --
16 there was stuff that was going on, and this person lunged at
17 my client, and my client was also -- I don't know if he was
18 lunging at him, but there was some force going the other way.
19 And so at that point, with that incident and what had happened
20 before, Chris Wilson basically filed a motion for a retake
21 warrant, and my client was back in jail. So at that point, we
22 didn't -- now we knew we weren't going to get substantial
23 assistance. So I had to see what else we could do in order
24 to -- in order to see what we could do for a sentence for my

1 client.

2 Q So with that you prepared for sentencing?

3 A Right. Oh, yeah.

4 Q We'll go on that.

5 Prior to your client pleading guilty, on the day of
6 the plea or any other time, did you rehearse the canvass?

7 A We -- we went through -- no. I wouldn't say we
8 rehearsed it. I told him the elements of the canvass, and I
9 told him that the Judge was going to go down what -- the
10 statements within the guilty Plea Memorandum and that the
11 Judge was going to ask him some questions and that he needed
12 to answer honestly.

13 Q Did you tell him how to answer the Judge's
14 questions?

15 A No. Just to be honest.

16 Q Okay. Did he read the plea bargain -- the plea memo
17 in your presence?

18 A Yes.

19 Q Did you and he discuss it?

20 A I asked him if he had any questions, and he said he
21 didn't.

22 Q Okay. And you were present when he pleaded guilty?

23 A Yes.

24 Q Did he appear to understand what was happening at

1 that time?

2 A Yes. And my recollection was that the Judge at the
3 time canvassed him very -- quite at bit as far as what was
4 going on. I believe that Judge Freeman had taken the bench
5 just a few -- three or four months before, and things -- he
6 was very, very careful about asking Mr. Ke-a questions, and he
7 was very -- and what I recall was that no stone was left
8 unturned as far as that canvass went.

9 Q And if that was actually Judge Robinson --

10 A Oh, it might have been. It might have been. I
11 can't remember the judge.

12 Q Okay. But it was fairly thorough whoever it was?

13 A It was thorough. It was very thorough.

14 Q Okay.

15 A I recall leaving there and thinking, wow, that was a
16 really good canvass.

17 Q At any time after he plead, did your client tell
18 you, "I didn't understand. I wish to withdraw my plea," or
19 anything like that?

20 A No.

21 Q Did he give indications that he did, in fact,
22 understand what was happening when he pleaded guilty?

23 A At the time he plead guilty?

24 Q After. Did you have any more --

1 A Yes, yes. Because then we had to review the
2 documents from Parole and Probation, and we went -- we went
3 over those so that I could prepare the paperwork for the
4 actual day when he was going to -- when he was going to be
5 sentenced. So we spent, I want to say two or three hours --
6 in fact, when I went into jail, the jail, they have those
7 rooms that are on the side where we could sit apart from all
8 the other inmates so that it was a lot more private than the
9 room where you walk back and forth where people can come and
10 go. And so we had quite a bit of time where we could go
11 through everything. And I met with him twice.

12 And on the basis of the review that we did, getting
13 information, I talked to his sister. I talked to his -- I
14 believe his aunt or grant more who lived in -- lived in Hawaii
15 and actually came here for the hearing. And who else did we
16 talk to? He also directed me to a Mrs. Ford, I believe, who
17 was a teacher, and another teacher in order to get additional
18 information as background for his sentencing and see who could
19 come and who could write letters.

20 Q Did you have Dr. Mahaffey involved?

21 A Yes, I did. In fact, Mr. Wilson was kind enough to
22 agree to a continuance of the sentencing in order to have
23 Dr. Mahaffey do the -- to do an evaluation of Kupaa Ke-a. I
24 believe it was very important to do that because of his age

1 and because -- relative to somebody who had been in the
2 criminal justice system for 20 or 30 years, he didn't have as
3 much going on as far as -- as far as convictions go. So I
4 felt it was very important to get that information before the
5 Court and so that the Court could understand who he was
6 better.

7 Q Did her report lead you to question whether he was
8 able to understand that he had pleaded guilty?

9 A No.

10 Q Did it give any indication he was incompetent?

11 A Oh, no.

12 Q And you never had such a belief that he was
13 incompetent?

14 A No. In fact, what I recall Dr. Mahaffey telling me
15 was that she thought that Mr. Ke-a was a very bright person.

16 Q Okay. Did you ever mislead your client about what
17 evidence was available against him?

18 A No.

19 Q Did you tell him that there was a slam dunk against
20 him?

21 A No.

22 Q Okay. Did you tell him it was defensible?

23 A I told him where I saw that -- that it was a tougher
24 case. The fact that there were two independent witnesses that

1 saw him do the shooting, the fact that one person would
2 testify that they actually handed him the gun to do the
3 shooting. I told him that I thought that's going to be
4 difficult testimony. So what I did was I laid all of that out
5 and then I asked him, I said, "This is what you're looking at,
6 and these are the things that if we go to trial, we are going
7 to have to meet those."

8 Q You used the phrase "independent witnesses." What
9 did you mean by that?

10 A Well, there were witnesses -- Mr. -- and I might get
11 the names wrong. It's been awhile. Mr. Gatika and
12 Mr. Rodriguez, who were actually part of the same group of
13 young men as my client, and they were going to -- and I might
14 get the names wrong. But they were the ones who basically
15 said that -- had also said what he had told me, that he had
16 shot -- he was handed the gun and the weapon and that he did
17 the shooting. So we were going to have to contend with those
18 independent witness, two of them if we were going to go to
19 trial.

20 Q All right. Now you know they might be considered
21 accomplices in some ways?

22 A That's true.

23 Q Did you consider that?

24 A Yes, I did.

1 Q Okay. Did you anticipate an acquittal if you went
2 to trial?

3 A No, I did not. I didn't think there would be
4 acquittal in this matter.

5 Q Okay. So you followed your instructions and you
6 sought a plea bargain?

7 A That's correct.

8 Q How was the -- did it seem like a good result to
9 you?

10 A It seemed like a great result to me. And the
11 reason -- the reason it seemed like a good result was that we
12 had the opportunity to argue for concurrent time on charges
13 that were 2 to 15 years. So there was an option, at least for
14 my client, I believed, that he could get probation. And to
15 that end, what I did was I contacted an inpatient program in
16 Alameda, California, and another one in Hawaii where my client
17 had contacts on Oahu called Habilitat and to try to -- before
18 we went to sentencing, try to have a place for him to go
19 knowing that if he could go into some sort of inpatient
20 program, that there might be at least an option that the Court
21 might give him concurrent time and that they might -- there at
22 least would be the option for the judge for probation. And so
23 those were -- we spent a lot of time doing that. I got
24 letters from folks to support him. I can't remember exactly

1 who they were right now. But I got letters to put him in the
2 best possible situation for probation.

3 Q Okay. Now, after pleading guilty, your client got
4 temporarily out of jail?

5 A That's correct.

6 Q Did you tell him before he pleaded guilty that if he
7 pleaded guilty, he would just get out of jail?

8 A No, no. I told him that that's always independent
9 of the Court.

10 Q Okay.

11 MR. MCCARTHY: I have no other questions. Thank
12 you.

13 THE COURT: Thank you.

14 Cross-examination?

15 MS. OLDENBURG: Thank you, Your Honor.

16

17 CROSS-EXAMINATION

18 BY MS. OLDENBURG:

19 Q Thank you, Ms. Berning, for being here today.

20 Did you ever interview Mr. Gatika or Mr. Rodriguez?

21 A I did not.

22 Q Okay. In your experience, does the State go forward
23 on a case when there are only two witnesses or accomplices
24 facing charges themselves?

1 A Sure.

2 Q Really?

3 A Yes.

4 Q Okay. And so what's -- what evidence do you think
5 the State had to prove beyond a reasonable doubt that Mr. Ke-a
6 actually shot the two victims?

7 A Well, I think what they had first of all was my
8 client's statements from the get-go about making a deal. His
9 admission, the fact that he -- I think those were very
10 problematic. I think that they had --

11 Q What admission? Excuse me for interrupting.

12 A One of the things first things he says, as I recall,
13 is "Let's make a deal" -- "make a deal" because I remember
14 highlighting that in the report when I first read it before I
15 met Mr. Ke-a thinking this is going to be a problem.

16 And he made an additional statement about
17 admissions. There were -- and I can't remember exactly
18 where -- where they were, but when I talked to him, talked to
19 my client, it was going to be difficult to get around those
20 statements given what he had said and the fact that he had
21 said different things at different times.

22 Q But you don't recall specifically what those
23 statements were?

24 A No. At this time I don't. It's 2017. This

1 happened in 2011, 2012.

2 Q Right.

3 A So it's been a few years.

4 Q Do you recall, were those statements made to
5 Detective Crow?

6 A I don't recall.

7 Q Okay. You don't recall whether the statement "Let's
8 make a deal" was made to Detective Crow?

9 A I don't remember.

10 Q Who would it have been made to?

11 A I don't know. But I can tell you that it was made
12 to law enforcement because I read it in a police report.

13 Q Okay. So some police officer?

14 A Right. I don't want to -- Ms. Oldenburg, if I knew,
15 I would tell you, but I can't really remember.

16 Q You testified to have a pretty good recollection of
17 everything.

18 A Sure.

19 Q So I'm trying to figure out what statements, what
20 evidence we are talking about here that Mr. Ke-a was allegedly
21 informed of when he made that very difficult decision as to
22 whether to go forward on a plea with a certain understanding
23 that he had that he would be out soon or on probation.

24 So what I want to ask you is are you aware -- you

1 said you reviewed the police interviews by Detective Crow?

2 A I reviewed every police interview. There were
3 numerous -- there were numerous reports in this matter --

4 Q Okay.

5 A -- and I reviewed them all.

6 Q So you --

7 A I reviewed the transcripts of the -- of the
8 interviews as well as the actual -- the reports, and I
9 listened to those interviews on the CDs that I were given --
10 that I was given. So I listened to all the evidence.

11 Q Okay. So you watched the videotape of
12 Detective Crow questioning Mr. Ke-a on October 28, 2011?

13 A I cannot remember -- I remember listening. I don't
14 know -- I don't have a recollection of seeing any interview.
15 It may have been just a tape -- not a tape, but a -- where you
16 hear it and you don't see anything. I can't remember.

17 Q Okay. Did you -- do you remember reading the
18 transcript of an interview between Detective Crow and Mr. Ke-a
19 on October 28, 2011?

20 A I can remember -- I can't remember -- I can tell you
21 that I remember that I read every transcript. I don't know
22 the date of any -- as I sit here today of any particular
23 transcript that I read.

24 Q So is your answer, no, you can't recall whether you

1 read the transcript of the interview between Detective Crow
2 and Mr. Ke-a?

3 A I can tell you that I read --

4 Q Just yes or no. Did you read that transcript,
5 Ms. Berning?

6 A If there was a transcript between Detective Crow and
7 Mr. Ke-a, I read it.

8 Q Okay. And did you see any Miranda issues on that
9 day of the interview between Detective Crow and Mr. Ke-a?

10 A What I recall was that he was -- that Mr. Ke-a was
11 given his Miranda rights and that at a point he wanted to talk
12 to a lawyer, and then at that time, the interview terminated
13 fairly shortly after that.

14 Q Would it surprise you to learn that it didn't
15 terminate after that and that Mr. Ke-a asked two more times to
16 speak to a lawyer?

17 A I wouldn't know that.

18 Q Okay. So when you have a client who was potentially
19 beat up by the police, interrogated, not really sure, you
20 know, if he shot anybody, might have shot at the ground, might
21 have shot at somebody, and he told you "I'm just going to
22 plea" --

23 A That wasn't what he said.

24 Q -- is that the end of it?

1 A That wasn't what he said.

2 MR. McCARTHY: You Honor, I'm going to object to the
3 question. It assumes facts in evidence, the part about being
4 beat up by the police.

5 THE COURT: What I got from Ms. Oldenburg is a
6 hypothetical.

7 MS. OLDENBURG: You're correct, Your Honor.

8 THE COURT: It's not related to the case. So I'll
9 allow you to ask a hypothetical. You said: When you have a
10 case with these kind of facts, which I assume you'll tie up to
11 our case, but if it's assuming facts in this case, I'm going
12 to sustain the objection. If it's asking a hypothetical, I
13 will allow it. Which one was it?

14 MS. OLDENBURG: It was a hypothetical, Your Honor.

15 THE COURT: Go ahead.

16 THE WITNESS: Could you restate it then, please.

17 BY MS. OLDENBURG:

18 Q Sure. When you have a case and you have a client
19 who might have been potentially heavily interrogated, he's a
20 juvenile, first time in the adult system, might have been
21 beaten up by the police and you meet with him, and he says, "I
22 just want to plea," he may not even be aware of the evidence
23 because he's had no direct information on that, is that the
24 end of it to you? Do you say "Okay. Let's work on a plea"?

1 A That wasn't what happened.

2 Q No. But, hypothetically speaking, is -- you
3 testified that's what happened. He told you he wanted to
4 plea, and you moved toward the pleading.

5 A No. What I told you was is that -- what I testified
6 was is that I presented all the information that I had to him,
7 we talked about the case and that he very quickly moved on to
8 want to plead, and that he also at that time told me that he
9 had shot those two people.

10 Q Did you review the ballistics evidence?

11 A The -- after my client said -- was going the
12 direction that he wanted to plea, because this happened -- he
13 did it very quickly, and I kept trying to encourage him that
14 this was an important decision and he needed to think about
15 this.

16 Q Did you explain to him the ballistics evidence?

17 A What we did was I talked to him about that we could
18 get the -- that we could get the testing done but if he had,
19 in fact, done the shooting, which he had told me, it was
20 actually going to work against him.

21 Q So, Mr. Berning, if you could just answer my
22 question.

23 Did you go over the ballistics evidence that was
24 acquired by the police?

1 A No. There was no need to at that time --

2 Q Okay. Thank you.

3 A -- because my client had already made a decision.

4 Q Thank you. You've answered my question. Thank you.

5 MS. OLDENBURG: The Court's indulgence, please?

6 THE COURT: Sure.

7 MS. OLDENBURG: Thank you. I have no further

8 questions.

9 THE COURT: Thank you.

10 Anything?

11 MR. McCARTHY: No, thank you.

12 THE COURT: Thank you. You're excused. You may

13 step down. Thank you for your testimony.

14 Call your next witness.

15 MR. McCARTHY: No other witnesses for the State.

16 THE COURT: All right. I'll hear argument at this

17 time.

18 MS. OLDENBURG: Thank you, Your Honor.

19 In ground one of this petition, Ke-a contends his
20 trial counsel was ineffective and his guilty plea was not
21 knowing, intelligent, and voluntary and, therefore, was made
22 in violation of his constitutional rights.

23 In support of this ground, trial counsel was
24 ineffective for failing to investigate witnesses to the

1 October 27, 2011, shooting. Had counsel done so, she would
2 have discovered that the State could not prove its case
3 against Ke-a, as the witnesses who supposedly implicated him
4 as shooting Oscar Valencia and Caesar Anton were all
5 accomplices to the October 27th shooting.

6 In addition, neither of the victims identified Ke-a
7 as their shooter. Mr. Ke-a argues that had he known there was
8 a complete absence of independent corroborating witness
9 testimony to prove two counts of intent to commit battery,
10 that he would not have pled guilty and he would have insisted
11 on going to trial.

12 Mr. Ke-a further alleges that trial counsel was
13 ineffective for failing to investigate the ballistics evidence
14 in the case. The evidence will show -- the evidence has shown
15 that there was no ballistics evidence that establishing that
16 Ke-a shot Oscar Valencia and Caesar Anton. All that was
17 recovered were two .22-caliber casings and one .22-caliber
18 cartridge. There were no weapons, no bullets, nothing matched
19 to those casings.

20 Ke-a argues that had trial counsel investigated the
21 ballistics evidence and informed him of the lack thereof, he
22 would not have pled guilty and would have insisted on going to
23 trial.

24 Finally, in ground one of his petition, Mr. Ke-a

1 argues that counsel was ineffective by not adequately
2 informing him that he could receive consecutive rather than
3 concurrent sentences.

4 THE COURT: Do you have a -- what's your response to
5 the fact that the transcript of the arraignment clearly states
6 that Judge Robinson described that to him?

7 MS. OLDENBURG: My response is essentially what
8 Mr. Ke-a has testified, that if he went into that plea -- plea
9 canvass with the understanding that he just needed to be
10 cooperative, wasn't to question anything, needed to get
11 through it because he was going to get out, he was either
12 going to get probation or get out soon -- that's why he didn't
13 challenge or question the fact that he could get consecutive
14 sentences.

15 THE COURT: I didn't ask if he questioned it. I
16 just asked what would be your response, because you're
17 indicating that counsel didn't explain it to him, but
18 Mr. McCarthy was very clear during his cross-examination of
19 your client that Judge Robinson did. So I just need to know
20 what your distinction was. The distinction was it doesn't
21 matter it was explained to him. His position is he didn't
22 understand it.

23 MR. OLDENBURG: Yeah, I understand, Your Honor, that
24 is arguably belied by the record. But I believe -- you know.

1 THE COURT: I just ask questions at these.

2 MS. OLDENBURG: Did I answer your question,
3 Your Honor?

4 THE COURT: You did.

5 MS. OLDENBURG: Thank you.

6 THE COURT: It's a question for the Court as to
7 credibility.

8 MS. OLDENBURG: Correct.

9 THE COURT: Go ahead.

10 MS. OLDENBURG: In ground three of the petition,
11 Mr. Ke-a alleges that at the time of the plea, he was under
12 the influence of two strong medications and thus was not
13 competent to enter his plea.

14 He also alleged that trial counsel knew he was under
15 the influence of these medications and should have obtained a
16 competency evaluation, which under *Strickland* that is a
17 reasonable thing to do when you know your client is under
18 strong prescription medication for bipolar and schizophrenia.

19 THE COURT: Other than your client's statement in
20 that regard, what other evidence do you have that Ms. Berning
21 knew that he was under the influence of the medications your
22 client testified to?

23 MS. OLDENBURG: The only evidence we have is the
24 testimony today.

1 THE COURT: Of your client?

2 MS. OLDENBURG: Yes.

3 THE COURT: Because Ms. Berning clearly denied that.

4 MS. OLDENBURG: I understand, Your Honor.

5 THE COURT: All right. I just want to make sure I
6 don't miss anything.

7 Go ahead.

8 MS. OLDENBURG: Therefore, Mr. Ke-a contends that
9 his guilty plea was not knowing and voluntary on the day that
10 he made it.

11 In ground six, Ke-a alleges counsel was ineffective
12 for not investigating the illegalities of Detective Crow's
13 questioning of Mr. Ke-a on October 28, 2011, and thus his
14 guilty plea was not knowing, voluntary, and intelligently
15 made.

16 This interview occurred almost six years ago. While
17 Mr. Ke-a can sit here today and tell you what Miranda -- what
18 Miranda says is probably because he spent quite a bit of time
19 in prison watching television. That does not go to what he
20 felt it meant when he raised his right to counsel three times
21 and was continued to be questioned by Detective Crow. Even
22 Ms. Berning testified that some of the admissions he had made
23 which we know were made during that interview could have hurt
24 him at trial.

1 He was, you know, like I said, a minor, never been
2 in the adult criminal justice system before.

3 THE COURT: He had been in the juvenile justice
4 system.

5 MS. OLDENBURG: He had been, correct.

6 THE COURT: I know you made that distinction in all
7 of your questions, adult versus juvenile, but I thought I
8 heard the evidence was that your client had heard the term
9 "Miranda" hundreds of times, and then Mr. McCarthy clarified
10 that was an exaggeration, that he was very familiar with
11 Miranda, is what the Court got out of that cross-examination
12 exchange. And then he said this is the first time in the
13 adult system, but he was no stranger to the juvenile system.
14 In fact, I believe that's one of the qualifying factors to
15 certify him as an adult is that he had been adjudicated in the
16 offense as a juvenile to allow him to certify as an adult; is
17 that correct?

18 MS. OLDENBURG: That's correct.

19 MR. COURT: All right. Please continue.

20 MS. OLDENBURG: He also testified, however, that he
21 did not understand that Miranda -- at that time that Miranda
22 meant he could just be quiet, that he didn't have to keep
23 answering the questions of the police officer.

24 THE COURT: I heard it.

1 MS. OLDENBURG: Mr. Ke-a was on youth parole at the
2 time the Regional Gang Unit officers arrived at his home to
3 take him to the police station to be interviewed by Detective
4 Crow. He testified he had no choice but to accompany the
5 officers, and he also testified that he didn't feel like he
6 was free to leave the interrogation room.

7 We submit that he was in custodial interrogation at
8 the time that he was brought down to the police station.

9 THE COURT: I'm with you. I have more questions.
10 My question is I anticipated you were going to make a Miranda
11 challenge at this level, but could you reconcile for me the
12 testimony of Ms. Berning that once her client told her very
13 quickly in the proceeding that he wanted to plea, she didn't
14 pursue anything else? And what I would like you to do is tie
15 in the fact that it sounded like your client waived, by way of
16 his actions and information to his lawyer, any challenges to
17 the Miranda issue because of his desire to plead.

18 MS. OLDENBURG: I understand. And that is the
19 argument the State made in its Motion to Dismiss. And I think
20 we have to take a look at it under the totality of the
21 circumstance in that, yes, you know, he decided to plead, but
22 did he know his Miranda rights might have been violated? No.
23 Obviously Ms. Berning told him: You made some admissions that
24 are going to hurt you.

1 Did he know those were made in the absence of a --
2 in violation of his Miranda rights? Had he known all of that,
3 we contend that maybe he wouldn't have pled guilty, if he had
4 been fully knowledgeable about what that meant.

5 THE COURT: Let's follow up for just one second
6 because I have another question about that as I review this.

7 So, essentially, your client's position would have
8 to be that he did it, but -- in other words, he's guilty of
9 the crime, but that he wanted to challenge whether or not the
10 State could prove it in court legally. Because if I take the
11 testimony of Ms. Berning, what I heard, she said that your
12 client admitted to her on no less than at least two occasions,
13 maybe more, that he was the shooter and he did shoot those
14 people.

15 So if I was to follow that, those admissions that
16 she said that he gave her within an attorney-client
17 relationship, which of course is waived because you put her at
18 issue and her conduct at issue and she can be released of that
19 privilege for the purpose of her testimony, assuming that's
20 the case, then your position would be that even though he did
21 it -- he's not innocent but he did it, he should challenge the
22 sufficiency of the evidence and possibly get an acquittal even
23 though he was guilty of the crime by way of maybe having the
24 statement suppressed, maybe going to trial if only accomplices

1 are the witnesses against him. But from a general
2 perspective, a justice perspective, he did it because was
3 looking for defenses; is that correct?

4 MS. OLDENBURG: I'm not saying that I agree with
5 Ms. Berning's statements. She had some convenient memory in
6 some areas and a lack of memory in others.

7 Mr. Ke-a, when he was interviewed by Parole and
8 Probation regarding the sentencing recommendation, he stated
9 that he pointed the gun at -- he pointed the gun to the ground
10 and didn't really know, it was all a blur, where those shots
11 went. But I think, you know, the State has a burden to prove
12 beyond a reasonable doubt many -- assuming arguendo that, you
13 know, there was evidence that he actually shot Oscar and
14 Caesar, which there was no direct evidence, other than what
15 Ms. Berning said, that he shot either of those people, you
16 know, her obligation as an attorney was to take a look at
17 whether the State could prove its case. That's what this is
18 all about. You have a right to go to trial, and the State has
19 to prove its case. And I understand that some of these cases
20 are hard to prove, and this was one of them.

21 THE COURT: Well, there --

22 MS. OLDENBURG: And I think an attorney has an
23 obligation to tell their client: You know what? They can't
24 prove it.

1 THE COURT: Let me share with you what my -- maybe I
2 wasn't clear on my question. My question was Ms. Berning's
3 testimony was that he told her early on that he wanted to
4 accept responsibility for what he had done, according to her,
5 and that's why she didn't look at these additional issues that
6 you're raising.

7 My question was if your client had made those
8 admission to Ms. Berning, that he shot the two individuals,
9 and then the focus was to go for a plea, I'm trying to fit in
10 your challenge related to Miranda as well as her lack of
11 investigation to use some of the facts most favorable to your
12 client's side n trying to reconcile that. So that's my
13 question.

14 MS. OLDENBURG: Well, and no one really -- we don't
15 know his state of mind when he told Ms. Berning he wanted to
16 plead. I don't think he really knew what happened himself,
17 quite frankly. And, again, there's no independent
18 verifiable -- well, independent credible testimony that he
19 actually aimed, fired, and hit two people. And I think that
20 an attorney has an obligation to, you know, while trying to
21 negotiate a plea, which I know is a difficult situation, also
22 has an obligation to look at the case and to make further
23 advisement on a plea. And she, you know, didn't see in
24 Miranda -- Ms. Berning didn't see a Miranda issue. She

1 thought the interview stopped when he first asked for a
2 lawyer, which it didn't. So I'm not sure her recollection on
3 whether she evaluated that interview and made a determination
4 and informed her client. That's the most important thing, is
5 we have to tell our clients: This is the evidence. This is
6 what I think about it, and here is my advice.

7 And I don't believe the testimony establishes that
8 that was done before he entered his guilty plea.

9 I left off on custodial interrogation. Again, we
10 believe he was in custodial interrogation when he was picked
11 up from the police at his home. As I've stated, you know,
12 Mr. Ke-a asked for a lawyer on at least three occasions, and
13 Detective Crow continued to question him. You know,
14 Detective Crow testified that: Well, I was just answering
15 questions or I was just, you know, chatting.

16 I'm not quite sure what he was trying get at.

17 THE COURT: What I got, at least on two of your
18 questions, was the fact that your client reinitiated contact
19 after he invoked.

20 MS. OLDENBURG: That's correct. And my client
21 testified --

22 THE COURT: Just a second. I just need to make my
23 record, and then you can make your record.

24 My recollection was that it wasn't just chatting. N

1 two of the responses to whether the -- why he kept on asking
2 questions, he said your client reinitiated, which arguably is
3 not a Miranda violation, if you think that your client
4 initiates the conversation. That was his explanation. So I
5 want to make sure I understood that correctly from him.

6 Now you can make your record.

7 MS. OLDENBURG: That was the explanation on a few
8 points. But I'm glad the transcripts are in because I'm
9 trying to be efficient here. We could have spent all day
10 reading those transcripts, and, quite frankly, next time maybe
11 that's what we'll do. But I think if you read the
12 transcripts, you'll see that it was more than just that, and
13 we submit that there was. They are in evidence now. So I'm
14 not disagreeing with what you're saying.

15 THE COURT: You're telling me that the transcripts
16 speak for themselves.

17 MS. OLDENBURG: You've seen certain context, yes, of
18 the transcripts. You've seen bits and pieces of it.

19 THE COURT: I would share with you I see the context
20 that were presented to me as far as the evidence was
21 concerned.

22 MS. OLDENBURG: As you know, Mr. Ke-a did testify
23 that he didn't understand his Miranda rights to the extent
24 that maybe he thought he could just shut up, and maybe he

1 should shut up. I think given the totality of the
2 circumstances, he was on youth parole, he was young, you know,
3 he -- a big felony he was being charged with. He's being told
4 he's going to be charged with premeditated murder, you know.
5 That's pretty scary for someone who goes out one night and
6 makes a really stupid mistake and point a gun at the ground
7 and shoots it.

8 Also problematic is that Detective Crow continued to
9 question Mr. Ke-a in the absence of his guardian. The law is
10 very clear that if you want your guardian there, the guardian
11 should be present. And, again, Detective Crow stated that the
12 statements he elicited from the Petitioner could have been
13 used against him as admissions of guilt. Ms. Berning also
14 agreed with that. Although she couldn't articulate the
15 admissions, she did note the admission that he wanted to make
16 a deal. And also, at the end of the interview, Mr. Ke-a
17 admitted to being a member of the Deadside Gang, which we
18 argue was particularly relevant to the Department of Parole
19 and Probation when making their sentencing recommendation, and
20 it was an admission obtained in violation of his Miranda
21 rights, and clearly it would have been used at trial against
22 him.

23 Ke-a contends that had trial counsel investigated
24 these interviews and informed him that his Miranda rights were

1 violated, he would not have pled guilty but would have
2 insisted on going to trial.

3 And looking at the totality of the circumstances,
4 there was really no reliable evidence to people who were out
5 there shooting themselves, or accomplices to the shooting, and
6 the absence of any ballistics evidence that tied Mr. Ke-a to
7 shooting the two victims, we contend that his plea was not
8 knowingly and voluntarily made, and due to ineffective
9 assistance of counsel, his constitutional rights were
10 violated. Thank you.

11 THE COURT: Thank you.

12 I'll give you will a chance to reply. Go ahead.

13 MR. MCCARTHY: Thank you, Your Honor. I think this
14 case is going to turn on credibility, at least some parts of
15 it. Other parts are easy. I suppose we should start with the
16 standard, and it's fairly well-known. But when a conviction
17 arises by guilty plea, the prisoner must have the
18 opportunity -- must bear the burden of proving that specific
19 advice, decisions, lack of decisions, fell below an objective
20 standard of reasonableness and that but for the failings of
21 counsel, he would have insisted on a trial on all the
22 available charges and enhancements. You may notice that the
23 enhancements would include the gang enhancement, which
24 everyone seems to agree would have made it particularly

1 difficult for him at sentencing. It would have eliminated
2 probation as an option. So anyway, that is the standard. So
3 ground one seems to be ineffective assistance and lack of
4 knowing and voluntary plea.

5 To the claim that counsel failed to -- counsel was
6 ineffective in failing to gather new evidence, there is none.
7 No one came forward and said: This is what I would have told
8 her.

9 No one came up. The officer did very little more
10 than identify the transcripts. So we don't know what further
11 investigation would have revealed.

12 As to investigate ballistics, I don't know how one
13 investigates the lack of evidence. It appears that
14 Ms. Berning was aware that there was no relationship between
15 the shell casings, bullets, and guns. In fact, I think that
16 her testimony was there were no bullets. No projectiles were
17 recovered, just some shell casings, and no gun. So I don't
18 know how you make a claim out of that. But if the claim is
19 something along the lines of *Laughler versus Cooper*, then the
20 Court should reject it. You may recall in *Laughler versus*
21 *Cooper*, a U.S. Supreme Court case, the lawyer tells the
22 client: They can't convict you because you shot the guy below
23 the waste. So they can't prove the intent to kill.

24 That was not disputed. That was stupid advice.

1 That advice fell below the standard, yet it seems to be the
2 convention that that is the standard, that Ms. Berning should
3 have said: You can't be convicted because the gun wasn't
4 recovered or because you say you shot at the ground.

5 Well, that is not the standard. What you do -- what
6 we do is we give frank advice based on professional evaluation
7 of the evidence and reasonable investigation. But I would
8 remind the Court in the *McConnell* case, the -- our Supreme
9 Court, Nevada Supreme Court, said you cannot -- counsel may
10 not queer the deal. They didn't use that language, but I use
11 it because I'm irreverent, so --

12 THE COURT: For illustrative purposes.

13 MR. MCCARTHY: Yes, thank you.

14 Let's see. Within ground one is ineffective
15 assistance, a failure to inform the client of a possibility of
16 concurrent and consecutive sentences. Question is, did he
17 know? And Judge Robinson told him. He made -- even if it
18 were true, that he was totally ignorant of that when he walked
19 into the courtroom, by the time he entered the plea, he was
20 aware. So it makes no difference who told him.

21 I also suggest that Kathy Berning testified
22 credibly, that she told him, they had a long discussion of it,
23 a long discussion of concurrent sentences, consecutive
24 sentences, probation, and all the various options.

1 Let's see. Ground three seems to be a claim that
2 the Defendant was incompetent when he pleaded guilty. I would
3 notice two things; one a lack of evidence of any psychologist,
4 psychiatrist, counselor, or bartender who was willing to voice
5 the opinion that he was incompetent when he pleaded guilty.

6 I suppose a Defendant might be able to voice his own
7 opinion on his competence, but he's unable to identify with
8 any specificity how he failed to understand.

9 Now, I would note for the Court that his responses
10 to Judge Robinson's questions were appropriate; that is, the
11 yeses and the nos came when they ought to. That seems to
12 indicate he knows what's was going on. In fact, by his own
13 testimony, he wanted -- he chose his answers to get the Court
14 to do what he wanted, although he waffled on that a little
15 bit. Sometimes he said that Kathy Berning told him what to
16 say. By the way, if you find that is true, then you should
17 probably grant me leave. I didn't find it, but I'm not the
18 trier of fact.

19 So zero evidence that Kathy Berning had some
20 obligation to arrange a competency evaluation. She at that
21 time, and Dr. Mahaffey later, found no reason to inquire into
22 his competency. I didn't present the evidence of who
23 Dr. Mahaffey is, but I suppose the Court is aware.

24 THE COURT: The Court is aware.

1 MR. MCCARTHY: Yeah. The failure to make a Motion
2 to Suppress. Well, I mean, she didn't -- you know, Kathy
3 Berning didn't. The question is whether there's an obligation
4 to do so. Now, one thing that will happen when one makes a
5 Motion to Suppress in cases involving Chris Wilson as the
6 prosecutor, is you lose the deal. I don't think there's a
7 standard that requires counsel to take steps that will void
8 the plea bargain that the client instructed her to seek. In
9 fact, I'm pretty certain there is no such standard as
10 evidenced in *McConnell*. She was aware. She mentioned that
11 she, yeah, was aware that there were problems with invoking,
12 and maybe she could have made some hay with that, but she
13 couldn't do it without disregarding the instructions of her
14 client. So what do you do then? Well, you have a frank
15 discussion with your client, which they apparently did. But
16 again, there's a credibility issue. You know, Mr. Ke-a seems
17 to say no, they didn't: She never discussed anything with me.

18 And Ms. Berning says: I did my duty.

19 Well, Judge, I'm glad it's you and not me that has
20 to make that decision. But I would ask you to evaluate the
21 relative credibility of the witnesses and come to the
22 conclusion that the one that is telling the truth is not the
23 one that is trying to get out of prison.

24 My colleague used the term "obligation" quite a few

1 times. Counsel has an obligation, true, but it is not that
2 obligation to say: You're going to be okay. To blow smoke,
3 as it were. That's not the obligation. The obligation is to
4 give frank advice, and it appears from the testimony of Kathy
5 Berning that she did exactly that, and she followed those
6 instructions. That's what you're supposed to do.

7 You know, I suppose every criminal defense lawyer
8 has cases where they really want to go to trial, and they just
9 can't get the client to do it. I don't think this is such a
10 case. It sounds to me like the client was determined to plea
11 bargain, but it seemed to be a pretty good idea to
12 Ms. Berning. Well, there's nothing wrong with that. There's
13 no standard that requires a different evaluation.

14 And I seem to recall Nevada is one of those states
15 that does not have the enhanced Miranda warning for juveniles.
16 So even though this officer may have been overly generous in
17 talking about guardians, I don't believe there's any such
18 obligation; although, I have to admit, I haven't looked it up
19 lately. But in any event, he couldn't have made hay with that
20 without avoiding the plea bargain, and there is no such --
21 there is no such obligation.

22 Now, the transcripts of the interrogation shows
23 maybe -- you know, maybe it's a good invocation; maybe it
24 isn't. Maybe there's admissions; maybe there isn't. But the

1 point is you don't get to explore that without disregarding
2 the instructions of the client to seek the plea bargain. And
3 so there is no obligation to disregard the instructions of
4 your client, and so the petition should be denied. And I
5 think that will do it.

6 Submit.

7 THE COURT: Do you think that the testimony from
8 Ms. Berning is tantamount to a waiver when she was speaking
9 about the client instructing her to move forward with the plea
10 agreement as opposed to filing any type of Motion to Suppress?

11 MR. McCARTHY: Well, I think that's the legal effect
12 of entering into a plea agreement, is the waiver. I don't
13 know if they use that language.

14 THE COURT: Sometimes you can file a memorandum --
15 you can file a Motion to Suppress, preserve that issue, enter
16 a plea, and appeal it later.

17 MR. McCARTHY: With the agreement of the prosecutor.
18 There's no evidence that this prosecutor was ever going to
19 agree to that.

20 THE COURT: Well, there's no evidence that there was
21 a Motion to Suppress.

22 MR. McCARTHY: The instructions were, you know, "Get
23 me a plea bargain," and seeking a motion -- filing a Motion to
24 Suppress would have avoided the plea bargain.

1 THE COURT: It just strikes me that the evidence
2 might have been that the Defendant, from his juvenile
3 experience, thought if he just pled guilty, he was going to
4 get out, and so he wanted to do it as quickly as possible.
5 But then he would have to ignore Judge Robinson when he said
6 at page 10, line 20 of the arraignment transcript, "Do you
7 understand you've got a good chance of going to prison because
8 of this?"

9 The Defendant answered, "Yes, sir."

10 And then he said, "Do you still want to plead
11 guilty?"

12 And he said, "Yes, sir."

13 So those are some interesting facts.

14 MR. MCCARTHY: I think defendants ignore judges at
15 their peril, and quite a few petitioners come before the Court
16 and said, "Well, I just disregarded what the judge said," and
17 I can't help them. The judge has an obligation to tell people
18 and ensure they're understanding, but the judge has no
19 objection to just beat the knowledge into them. We can't give
20 each defendant a class on criminal constitutional procedure,
21 but we tell them what might happen when they plead guilty, and
22 Judge Robinson did that. So the petition ought to be denied.

23 THE COURT: Thank you.

24 Reply, please.

1 MS. OLDENBURG: Thank you, Your Honor. Very
2 briefly.

3 Just to reiterate on your question about whether
4 Mr. Ke-a waived any Miranda issues. Again, going back to --
5 this really boils down to whether it was knowingly,
6 voluntarily, and intelligently made and had he known his
7 Miranda rights were violated, which we believe they were, and
8 had the admissions made would have been not admitted under the
9 fruit of the poisonous tree, he might have made a different
10 decision, and he might have decided to go to trial. He didn't
11 know that, so his counsel was ineffective for not telling him
12 that. It had nothing to do with filing a motion to suppress.
13 It was the attorney-client relationship that's required under
14 *Strickland*. And --

15 THE COURT: Finish that -- for the record, just
16 finish that statement. You said it's the attorney-client
17 relationship for *Strickland*.

18 MS. OLDENBURG: What I meant by that is whether that
19 was objectively reasonable under *Strickland* for Ms. Berning to
20 not investigate that, one, and to not then inform her client
21 of the results of that investigation. The law is very clear,
22 as you know, that you can't just rely on the prosecutor's case
23 or the prosecutor's file. You have to do some independent
24 investigation of your own. As busy as we all are, that is

1 required.

2 THE COURT: Busy is not an excuse.

3 MS. OLDENBURG: I know that. I'm just trying -- we
4 are not saying that Ms. Berning was to say: Well, you can't
5 be convicted, so let's go for it.

6 That's not what this is about. It's about whether
7 she met the *Strickland* standard in investigating the evidence
8 the State had against her client, talking to the witnesses,
9 looking at the ballistics evidence, listening to the police
10 interviews and seeing that it wasn't just once, and the
11 interview didn't end when his Miranda rights were invoked. So
12 we are requesting that the petition be granted. Thank you.

13 THE COURT: Thank you. All right. Thank you.
14 Submitted?

15 MR. MCCARTHY: Yes, Your Honor.

16 THE COURT: Thank you.

17 Submitted.

18 MS. OLDENBURG: Yes.

19 THE COURT: Thank you. I carefully reviewed the
20 allegation and heard the testimony. The petition is denied.
21 The petition is denied as to each ground. I have carefully
22 reviewed the credibility of the witnesses. I found
23 Ms. Berning to be credible. It's an interesting piece where a
24 client instructs the lawyer to get the first available plea.