

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 **BRYAN FERGASON,**
4 Appellant,
5 vs.
6 **THE STATE OF NEVADA**
7 Respondent.

Supreme Court No.: 74469
District Court Case No.: 06C228752-3

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1 came up dealing with that at a preliminary hearing.
2 That's when he was in the Clark County Detention Center.
3 There was a lot of times before his first appearance in
4 district court where I was able to go talk to him in
5 person at the jail, but I do remember there was -- I
6 want to say there was a point in time where he went up
7 to prison, but we got him back down here, because I
8 remember I got him clothes to be booked back into the
9 Clark County Detention Center. It's been so long I
10 can't give you an amount of time, but I know there were
11 definitely multiple times that I was past talking to
12 him.

13 Q In discussing any pretrial offers, did you
14 ever tell Mr. Ferguson that he wouldn't get a life
15 sentence if convicted?

16 A No.

17 Q During pretrial discussions did you ever talk
18 about the ranges of punishment that were possible if
19 convicted?

20 A I want to say yes because he had -- he had a
21 pretty good exposure. He -- at that time, Mr. DiGiacomo
22 was the habitual repeat offender deputy. I think she
23 was team chief at that point, but she was on the ROPE
24 team. And whenever the ROPE team got the file, not to
25 cast anything bad upon Judge Kephart, but if you saw

1 Judge Kephart had the file, usually life was always
2 playing around there. Ms. DiGiacomo was a little bit
3 more willing to discuss smalls but she -- the fact that
4 she had her hands on the case suggests that he had
5 exposure to habitual, so I'm sure -- I don't think I
6 would have talked to him about life without, but I'm
7 sure I would have talked to him about the large habitual
8 exposure that he did face.

9 Q After conviction and prior to sentencing, did
10 you ever meet with Mr. Fergason?

11 A I would like to say that I did, but I cannot
12 be for sure because it was so many years ago, and I
13 honestly cannot remember whether they were pulling him
14 back up and down to NDOC at that particular time on the
15 case that Judge Walli had revoked him on, and then he had
16 another case that Frank Kocka represented him on that he
17 had already been adjudicated on, so I know sometimes
18 that would have played a dynamic, so I cannot say for
19 sure or not the level of discussion prior to sentencing
20 I had with him face to face.

21 Q Do you recall any communication either by
22 phone or post regarding the potential ranges of
23 punishment at sentencing?

24 A I think the discussion that I had to him,
25 probably knowing he, is it -- had a small on the table

1 with a chance I might be able to get it run together
2 with the other case that Mr. Kocka had represented him
3 on, I'm sure there was probably a discussion that if he
4 didn't take that deal he was probably facing life in
5 prison.

6 Q Did you have an opportunity to go over the
7 presentence investigation report with Mr. Ferguson prior
8 to sentencing?

9 A Usually we get that so close to the sentencing
10 date it's not a situation at that time that you could
11 sit down and go over it with him. We know that he had
12 the other presentence investigation report that was on
13 Mr. Kocka's case that I think he probably had a copy of.
14 So I don't know. I think I may have provided him a copy
15 prior to sentencing, but like I said, sometimes we were
16 handed those a couple days before the hearing date.

17 Q Do you recall meeting with Mr. Ferguson the
18 day of sentencing?

19 A Well, yeah. I would have had to see him in
20 court. He would have been present in court for the
21 sentencing, and I would have probably talked to him then
22 to explain what was going on, and at that point if I had
23 a copy of the presentence investigation report prepared
24 for him, it was my standard to give them a copy of it
25 because it assists when they have to go back up if they

1 have to go through a classification process.

2 Q And do you recall if Mr. Fergason raised any
3 concerns about the presentence investigation report the
4 day of sentencing?

5 A No, I do not.

6 Q Do you recall discussing with Mr. Fergason any
7 issues regarding mitigation?

8 A No, Mr. Fergason's main concern, which was a
9 driving, I want to say, defense along in the case was
10 the Fourth Amendment stop issue, which had been a big
11 issue that had been raised quite a bit through there. I
12 know there was a lot of discussion. He was concerned
13 about the forfeiture of items that weren't shown as
14 evidence, but there really wasn't any discussion about
15 mitigation as opposed to I think he still was, I want to
16 say, shellshocked as to how fast the jury came back with
17 convictions even at that date of sentencing.

18 Q Do you recall having any discussion with
19 Mr. Fergason as to why both co-defendants were being
20 sentenced on the same day?

21 A No.

22 Q Was that odd to you?

23 A No.

24 Q I want to draw your attention to the first day
25 of trial after jury selection. Opening statements. Did

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1 the State show pictures, a picture of the defendant in
2 an opening statement on the screen?

3 A That I cannot recall. But I would say if the
4 State did show a picture, it would not be unusual in how
5 the State probably on this case would have done an
6 opening statement.

7 Q Have you had an opportunity to read
8 Mr. Ferguson's supplemental position in this matter?

9 A No, I have not.

10 Q And are you aware that he's alleging that the
11 State showed a picture in opening with "guilty" across
12 his face?

13 A Now that you're telling me that, I'm aware of
14 that allegation. I would say if they did do that in
15 opening, I would have been jumping up on my feet
16 objecting, and if the judge had overruled my objections,
17 I would have demanded that a copy of the PowerPoint
18 presentation for opening be included into the record. I
19 believe that did happen during the closing PowerPoint
20 though.

21 Q And do you recall if there were any sound
22 effects in the opening presentation?

23 A No, I don't recall.

24 MR. CARLINS: I'll pass the witness.

25 THE COURT: Go ahead with cross.

1 A Unfortunately, while I'm not in agreement with
2 that, I mean, it's closing. The testimony is the
3 testimony, and honestly, you've done that before in
4 closing statements when we've had a trial together, so
5 yeah, that's kind of part and parcel.

6 Q Have you ever known me in the trials we've had
7 together do it in opening statement?

8 A No.

9 Q All right. Now, let's discuss the offers.
10 You had Mr. Fergason's case from the inception, correct?

11 A Yes.

12 Q So that would have been somewhere around the
13 end of September, beginning of October 2006 -- well, let
14 me stop. If the car stop case was end of
15 September 2006, when would you have been retained?

16 A I got retained pretty quickly. He was in
17 custody because I remember pushing -- I remember pushing
18 the JP to try to get him out of custody because we were
19 trying to get him out of custody.

20 Q Right. But at the time that he had the new
21 case, he also was pending revocation in front of Judge
22 Wall?

23 A Yes.

24 Q All right. Do you recall discussing offers
25 then that entailed closing the revocation case but the

3 A That was usually a discussion that -- I know
4 that's what was requested very frequently. I know that
5 I had discussed that with Mr. Ferguson back way at the
6 start before everything else kind of evolved, and he was
7 completely unwilling to do that, but at that point, we
8 thought it was literally only a car stop. We thought it
9 was only a car stop where he was a passenger in a
0 minivan that was driven by the co-defendant, and we
1 thought it was much, much less than what it turned out
2 to be.

17 | A Yes.

22 A Yes.

25 | A Yes.

1 Q And actually before this case went to trial he
2 had already been sentenced, correct?

3 A Yes.

4 Q So if any hearing was were dismissed before the
5 trial, we already knew he was already in prison on
6 another case?

7 A Yes.

8 Q All right. And, in fact, during the time that
9 we went to trial, did you have to get the defendant
10 remanded here so he wasn't in the prison while we were
11 going to trial?

12 A Yeah, I needed to have him down here housed at
13 the Clark County Detention Center.

14 Q And that would only last through conviction by
15 the jury?

16 A Yes.

17 Q All right. And then he would have gone back
18 to prison to await his sentencing in your case?

19 A Depending on how the prison picks them up and
20 stuff like that, yes.

21 Q Okay. So if he's in prison during that time,
22 you wouldn't even have the opportunity to see him face
23 to face unless you drove to where he was being housed in
24 the prison?

25 A Right. And I can't remember if he was done

1 And Mr. Gutierrez had an active very serious case in the
2 system that I want to say was tracking before
3 Judge Mosley, I want to say. It's been a long time.
4 And Mr. Gutierrez, without my knowledge, wore a wire to
5 participate in conversations with Daimon Monroe, and
6 based upon information that Mr. Gutierrez was later
7 claiming about what he obtained in this wire, I had
8 concerns that if Mr. Gutierrez was called, not
9 necessarily by the State but by Mr. Monroe's counsel, I
10 would be standing up in the middle of trial and having
11 to withdraw mid trial because there was no way I could
12 effectively represent Mr. Ferguson and maintain
13 representing Mr. Gutierrez at the same time.

14 And I always had the belief that if I got him
15 away from Daimon Monroe and I got him separated from
16 Daimon Monroe, I had a stronger chance at, one, getting
17 an offer from you, the State, because now we were having
18 to do the trial again, and two, if I got him away from
19 Mr. Monroe, there was a chance I could get him to take a
20 deal.

21 Q All right. So the case that you were talking
22 about with Mr. Gutierrez, that's the murder-for-hire
23 case, correct?

24 A Correct.

25 Q All right. So when you were bringing your

1 motion because of this issue, I guess orally, there was
2 a discussion with the Judge and yourself and myself
3 regarding the situation. Do you remember that?

4 A Yes.

5 Q All right. And that was in April of 2008?

6 A Yes.

7 Q All right. And even though the State stated
8 it would not go into the murder for hire regardless,
9 whatsoever, the Court still did sever the case.

10 A Yes.

11 Q And at that time, now that your defendant is
12 taken out of the picture of the original trial, did the
13 State make you an offer?

14 A Yes.

15 Q And what was that offer, if you recall?

16 A I want to say -- I can't remember. I think
17 the offer definitely was at least one burglary, and I
18 think one or two other felonies. Small habitual. I
19 want to say I think it was no opp to concurrent between
20 the counts but right to argue as to concurrent or
21 consecutive to the other case that he was already
22 serving time on, and that diminished his exposure a lot
23 and that I felt that he was in a much better position
24 where I could probably get where it was a 5 to 12 and
25 maybe make the argument to run it together with the

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1 other case because it was kind of part and parcel about
2 what was going on.

3 Q All right. Now, because you got the case
4 severed, that was probably the best deal you felt you
5 were going to get for your client at that time.

6 A Wasn't going to get anything better.

7 Q All right. Now, that was approximately --
8 well, strike that.

9 The trial for Mr. Ferguson, that went
10 immediately after the trial concluded for Mr. Monroe,
11 correct?

12 A Case was submitted to the jury. I want to say
13 in the afternoon, the day before, and Judge Bell wanted
14 us to kick off with jury selection the next day.

15 Q Correct. So is it fair to say you had for the
16 offer that was made after you got the case successfully
17 severed, that offer was made and you had time to discuss
18 it at least for weeks before you went to trial if it was
19 made the end of April, beginning of May and your trial
20 didn't go until the end of May?

21 A No, I think what it was, was I think the offer
22 came. There was discussion but not a lot firmed up,
23 because I believe there was roughly, I want to say, 150
24 to 200 witnesses subpoenaed plus over 1,500 exhibits
25 that you and your co-counsel were putting together to

1 get ready to go to trial. I think that there was some
2 discussion that you were going to extend an offer, but
3 it really wasn't firmed up.

4 When I got the actual firmed up offer that I
5 was able to start communicating with Mr. Ferguson as to
6 the real parameters, I want to say I think we had less
7 than a day for him to make the call or not. Because I
8 was very hopeful that we weren't going to go immediately
9 back-to-back on things. Because I know you were really
10 unavailable, realistically, during Daimon Monroe's trial
11 because you were dealing with over 100 witnesses and
12 over 1,000 exhibits. So I know there wasn't a lot of
13 discussion then as to finalization. But I think I
14 started discussing with Mr. Ferguson that there was an
15 offer coming. I think he also wanted to wait to see
16 what happened with Mr. Monroe's trial.

17 Q But is it fair to say before Mr. Monroe's
18 trial began, you had an idea of what the general offer
19 would have been?

20 A Yes.

21 Q All right. And you began discussing that with
22 your client to see if he wanted to take it, but
23 obviously there's no firm offer at that point to discuss
24 with him?

25 A Yes.

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3	A	No.
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5 | A No.

9 A I want to say the jury went out late in the
0 afternoon. We started jury selection the next morning
1 first thing, and I believe that jury met, and I remember
2 that we had to stop proceedings for the jury. I think
3 Judge Bell actually had the jury go into another judge
4 to take the verdict, and I think we had a quick break
5 for the verdict to come in because that verdict came in
6 literally, I believe, the first day of jury selection on
7 ours.

23 A Well, I went and talked to -- because he was
24 in the Clark County Detention Center, so I believe I
25 went to talk to him to say, okay, this is it, and you

1 don't have a lot of time, and we're starting
2 immediately. And he didn't want to talk the deal
3 because he thought that -- he wanted to see what was
4 going to happen with Mr. Monroe's case. He wanted to
5 see how long it was going to take for the jury.

6 He still felt -- we still had discussions
7 about the Fourth Amendment issue could be an
8 appellateable issue and just talking about the variety
9 of dynamic of taking the deal, not taking the deal,
10 going to trial, and that jury came back real fast, and I
11 think you withdrew the offer right at the start of jury
12 selection.

13 Q All right. Start of jury selection, or could
14 it be possible it was before witnesses began?

15 A Possibly.

16 Q All right. But, still, as we were beginning
17 the trial for Mr. Ferguson, there was still the
18 possibility of an offer, he had needed time to think
19 about it?

20 A Yes, but he didn't have a lot of time because
21 I think we had the jury seated by the end of the day.

22 Q Okay. But fair to say he rejected it until he
23 found out what Mr. Monroe's jury did, or he didn't want
24 to taken an offer before?

25 A He didn't even accept it after he found out

2 Q All right. Now, any of the offers that were
3 discussed or possible negotiations that were discussed
4 after the case was severed in April 2008 until the trial
5 went, did any of those entail, any of that discussion
6 ever entail that the defendant would have to testify
7 against Mr. Monroe?

12 Q Okay. So now when you were saying, say, if
13 you could limit his exposure, get him a small habitual,
14 et cetera, you thought that was, I guess, in his
15 interest somewhat, because he was looking at a life
16 sentence.

24 THE COURT: Any redirect? Let me ask you, how
25 much time of redirect do you have?

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1 MR. CARLING: One question.

2 THE COURT: Okay.

3 REPERRECT EXAMINATION

4 BY MR. CARLING:

5 Q After the cases were severed and you received
6 that offer, I believe you said a small habitual with a
7 few felonies, did you have an opportunity to discuss
8 that with Mr. Fergason?

9 A Yes.

10 Q And do you recall the dynamics or what was
11 discussed during that conversation?

12 A Mr. Fergason didn't want to take an offer. He
13 maintained his innocence. He wanted to keep the Fourth
14 Amendment issue alive. I think I even had a discussion
15 it was a constitutional issue so it could still have
16 some parameters that it could still be alive. He
17 maintained his innocence all along.

18 He -- I think there was a lot of discussions
19 about the dynamics of the defense, and I think -- I want
20 to say -- I'm trying to remember when the conspiracy --
21 there was a conspiracy charge that got added in late,
22 but before Mr. Monroe went to trial, that dealt with the
23 car stop that essentially tied a lot more together, but
24 Mr. Fergason was very adamant about his innocence,
25 adamant about some of the stuff that was seized. They

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1 seized his bank accounts and froze them. They seized
2 safe deposit boxes in his name. He -- even up to after
3 trial he was concerned about stuff that -- can you get
4 some of the stuff that the State didn't present as
5 evidence back.

6 I think even if he leaned over in the middle
7 of trial and said that he would take the deal, I
8 probably could have really had a discussion with
9 Ms. DiGiacomo about taking the deal because it would
10 have saved her a lot more witnesses, redoing another
11 hundred witnesses over again.

12 MR. CARLING: I'll pass.

13 THE COURT: Any further recross?

14 MS. DiGIACOMO: No, Your Honor. Thank you.

15 THE COURT: All right. Thank you, ma'am.
16 You're excused.

17 Do you have any other witnesses?

18 MR. CARLING: Court's indulgence.

19 THE COURT: While you're discussing, let me
20 take one quick break. I have a jury out that has a
21 question. I'll be back in about five minutes.

22 (Recess taken from 2:40 p.m. to
23 2:46 p.m.)

24 THE COURT: Counsel, do you have any other
25 witnesses?

1 MR. CARLING: No further witnesses.

2 THE COURT: Does the State have any further
3 witness?

4 MS. DIGIACOMO: No, Your Honor.

5 THE COURT: Do you want to do any final
6 arguments at this point in time?

7 MR. CARLING: Well, Your Honor, on the issue
8 of the PowerPoint, I'm going to submit it. It's going
9 to be a credibility issue, Your Honor, there as to who
10 the Court is going to believe.

11 As far as preparing for sentencing and the
12 advice, I think we have contradicting testimony.
13 Mr. Ferguson states that he didn't receive those
14 officers. If he received a small notebook, he would have
15 taken it. I know Ms. Cruz stated that she did,
16 especially after bifurcation she received an offer and
17 she did discuss it with him. It seems logical he
18 probably would have taken it if he was facing a life
19 sentence if it was presented to him, so I will argue
20 that it wasn't presented.

21 THE COURT: All right.

22 MR. CARLING: And I'll submit.

23 THE COURT: Anything from the State?

24 MS. DIGIACOMO: Yes, Your Honor. I think one
25 thing you have to look at, who has got the incentive to

1 possibly not be truthful there? It's the defendant who
2 wants to get out of his sentence.

3 Judge Cruz clearly stated there were offers.
4 They were presented to him. Exact opposite of what the
5 defendant said. Defendant said there was never an offer
6 at pretrial, which wasn't true. Defendant said it
7 always included testifying against the defendant, which
8 wasn't true, and it doesn't even make sense if the
9 trials were severed and the defendant -- the
10 co-defendant had already been convicted.

11 With regard to the PowerPoint, she clearly
12 said it was done in closing, I remember that, and had it
13 been done in opening, I would have totally -- I would
14 have objected. I would have asked for it to be made
15 part of the record.

16 And I would submit to you that that is what
17 happened, because, you know, defendant got on the stand
18 and said, oh, it happened in opening, and it was guilty
19 above all of our pictures. I tried to tell my attorney
20 and she shooshed me.

21 Again, I'm going to refer the Court back to
22 the defendant's pro per petition, Page 13, where he says
23 it should be noted that in closing the state put up a
24 picture of the petitioner and then had a
25 computer-generated "guilty" stamp placed across it. So

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14 Essentially for the grounds and basis
15 discussed by counsel just now from the State, I don't
16 find a Point D or Ground Number 4. Ms. Cruz -- Ms. Cruz
17 was infinitive that there would have been -- there was
18 no PowerPoint slides with the defendant's picture that
19 came up in the opening statement with the words "guilty"
20 superimposed on top of the picture, and it is a good
21 point the State raises that the defendant's original
22 petition only makes reference to this occurring in
23 closing, which Ms. Cruz does remember at that point in
24 time. So I find that the facts here, looking at the --
25 everything established that it did not happen in

1 opening, the flashing pictures with the superimposed
2 "guilty."

3 As to C, Ground 3, it seems very clear that
4 Ms. Cruz did not ever say that the defendant would not
5 receive a life sentence. It would be unusual for a
6 defense attorney to do that, that she did discuss a
7 small habitual sentence with the defendant, that he
8 maintained his innocence throughout the process and that
9 the -- as counsel for the state notes, that makes sense
10 in terms of the small habitual without the requirement
11 of testimony once the one defendant had been found
12 guilty.

13 Looking at the various bases for credibility
14 determination, that would include issues of bias or
15 prejudice from whether his reasonableness -- reasonable
16 in light of all of the facts involved in the case, and
17 it would make sense that there would be an offer without
18 a requirement of testimony and before -- before the
19 trial as Mrs. Cruz outlined it, that the defendant
20 rejected it. So I would find also that Ground 3 -- or
21 Point C does not justify a petition, granting a petition
22 in this case.

23 Does the State want to prepare an order for
24 the Court?

25 MS. DIGIACOMO: It would be findings of facts

1 and conclusions of law.

2 THE COURT: Right.

3 MS. DIGIACOMO: Yes.

4 THE COURT: Okay. That's going to be the
5 order of the Court.

6 Anything else?

7 MR. CARLING: Yes, one housekeeping. On the
8 original pro per petition, can we get that included in
9 the findings of fact, denials on all of those for the
10 record?

11 MS. DIGIACOMO: And we would do that. I think
12 we address that in our supplemental opposition, all the
13 different points.

14 MR. CARLING: Okay.

15 THE COURT: Yeah. Go ahead.

16 MS. DIGIACOMO: That's fine.

17 THE COURT: All right. Anything else?

18 MR. CARLING: No.

19 MS. DIGIACOMO: Thank you.

20 THE COURT: Okay. Thank you, everybody.

21 (The proceedings were concluded at

22 2:52 p.m.)
23
24
25

REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I, Leah Armendariz, CCR #21, RPR, CRK, do hereby certify that I took down in Stenotype all of the proceedings had in the before-entitled matter at the time and place indicated and that thereafter said shorthand notes were transcribed into typewriting by me and that the foregoing transcript constitutes a full, true, and accurate record of the proceedings had.

IN THE WITNESS WHEREOF, I have hereto set my hand and affixed my signature in the County of Clark, State of Nevada, this 28th day of June, 2016.

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<p>BY MR. CARLING: [7] 7/3 7/16 12/23 13/12 29/18 31/4 50/3</p> <p>BY MS. DIGIACOMO: [2] 14/19 38/1</p> <p>MR. CARLING: [26] 4/11 4/19 4/22 5/12 5/15 6/5 6/12 6/24 12/16 12/20 13/9 14/17 30/2 30/9 31/2 37/23 49/25 51/11 51/17 51/25 52/6 52/21 54/5 56/6 56/13 56/17</p> <p>MS. DIGIACOMO: [23] 3/17 3/23 3/25 4/6 5/3 5/10 5/19 6/8 7/9 12/14 12/18 13/5 29/15 30/4 49/21 51/13 52/3 52/23 55/24 56/2 56/10 56/15 56/18</p> <p>MS. DUSTIN-CRUZ: [1] 6/10</p> <p>THE BAILIFF: [1] 7/12</p> <p>THE CLERK: [2] 6/21 30/19</p> <p>THE COURT: [44] 3/2 3/22 3/24 4/2 4/7 4/17 4/21 5/1 5/6 5/11 5/13 6/11 6/14 7/1 7/7 7/10 7/13 12/15 12/21 13/7 13/11 29/16 30/3 30/5 30/11 30/25 37/24 49/23 50/1 51/12 51/14 51/18 51/23 52/1 52/4 52/20 52/22 54/4 54/6 56/1 56/3 56/14 56/16 56/19</p> <p>THE WITNESS: [1] 30/23</p>	<p>5</p> <p>50 [1] 2/21</p> <p>51 [1] 2/9</p> <p>7</p> <p>702 [2] 2/5 2/10</p> <p>8</p> <p>8065 [1] 2/10</p> <p>84720 [1] 2/9</p> <p>89101 [1] 2/4</p> <p>9</p> <p>921 [3] 1/25 57/5 57/16</p> <p>A</p> <p>able [4] 33/4 35/1 42/3 46/5</p> <p>about [59]</p> <p>above [1] 53/19</p> <p>Absolutely [1] 38/14</p> <p>accept [1] 48/25</p> <p>accounts [1] 51/1</p> <p>accurate [1] 57/11</p> <p>across [21] 3/16 13/23 13/23 14/7 14/24 15/2 15/3 16/7 16/21 16/25 17/2 17/11 17/13 17/15 17/21 17/25 18/6 18/11 18/16 37/11 53/25</p> <p>active [1] 43/1</p> <p>actual [1] 46/4</p> <p>actually [4] 8/4 23/19 41/1 47/13</p> <p>adamant [2] 50/24 50/25</p> <p>add [1] 13/9</p> <p>added [1] 50/21</p> <p>addition [1] 8/6</p> <p>address [1] 56/12</p> <p>adjudicated [1] 34/17</p> <p>admit [1] 24/18</p> <p>advice [7] 4/16 5/1 5/21 6/3 10/3 12/9 52/12</p> <p>advised [1] 5/23</p> <p>affixed [1] 57/13</p> <p>after [25] 6/10 9/3 9/10 11/23 11/23 11/24 20/16 21/25 22/7 22/15 22/25 23/11 24/4 27/10 32/6 34/9 36/25 45/10 45/16 47/20 48/25 49/4 50/5 51/2 52/16</p> <p>afternoon [2] 45/13 47/10</p> <p>again [5] 7/18 14/13 43/18 51/11 53/21</p> <p>against [11] 14/14 19/13 19/15 20/5 20/6 21/18 29/10 29/12 40/1 49/7 53/7</p> <p>ago [6] 23/11 23/20 24/16 24/18 24/19 34/12</p> <p>agree [1] 4/4</p> <p>agreement [1] 39/1</p> <p>ahead [6] 7/2 7/14 13/12 31/1 37/25 56/15</p> <p>alarm [1] 29/4</p> <p>alive [2] 50/14 50/16</p> <p>all [65]</p> <p>allegation [2] 5/24 37/14</p> <p>alleging [1] 37/10</p> <p>almost [1] 18/17</p> <p>alone [2] 18/2 42/15</p> <p>along [2] 36/9 50/17</p> <p>already [13] 15/22 16/2 16/4 20/17 29/5 34/7 40/23 41/2 41/5 41/5 42/11 44/2 53/10</p>	<p>o [4] 16/24 39/21 46/15 55/20</p> <p>always [4] 27/21 34/1 43/14 53/7</p> <p>am [1] 3/17</p> <p>Amendment [3] 36/10 48/7 50/14</p> <p>amount [1] 33/10</p> <p>another [6] 5/8 32/25 34/16 41/6 47/13 51/10</p> <p>answering [1] 24/11</p> <p>any [41] 3/12 7/6 7/18 7/21 8/6 9/11 9/22 10/9 11/3 11/12 11/14 11/15 12/3 12/9 13/15 13/24 14/4 19/19 21/23 28/3 29/17 30/4 31/12 33/13 34/21 36/2 36/6 36/14 36/18 37/21 41/4 49/2 49/5 49/5 49/9 49/24 51/13 51/17 51/24 52/2 52/5</p> <p>anybody [3] 8/23 13/15 20/8</p> <p>anything [12] 5/9 13/20 20/16 25/22 28/10 28/20 33/25 45/6 52/23 54/5 56/6 56/17</p> <p>anywhere [1] 6/2</p> <p>apologize [1] 4/16</p> <p>appearance [2] 31/17 33/3</p> <p>appealable [1] 48/8</p> <p>approximately [2] 32/19 45/7</p> <p>April [4] 42/4 44/5 45/19 49/4</p> <p>April 2008 [1] 49/4</p> <p>are [6] 4/17 4/20 14/2 29/23 32/23 37/10</p> <p>argue [4] 31/24 32/9 44/20 52/19</p> <p>argument [3] 14/9 14/10 44/25</p> <p>arguments [2] 52/6 54/11</p> <p>Armendariz [3] 1/25 57/5 57/16</p> <p>around [4] 31/16 34/2 39/12 54/2</p> <p>arrested [1] 19/11</p> <p>as [26] 3/19 4/5 5/16 6/21 9/24 10/6 30/19 32/9 36/13 36/15 36/16 36/19 44/20 46/5 46/13 48/16 51/4 52/9 52/11 52/11 54/8 54/8 54/11 55/3 55/9 55/19</p> <p>ask [2] 28/26 49/24</p> <p>asked [4] 19/23 21/22 24/5 53/14</p> <p>asking [1] 19/9</p> <p>assists [1] 35/25</p> <p>assuming [3] 8/17 8/24 8/24</p> <p>assured [1] 26/6</p> <p>attempts [1] 11/12</p> <p>attention [3] 36/24 38/8 38/21</p> <p>attorney [36] 2/3 5/17 5/18 7/22 11/23 8/11 9/4 9/7 9/11 9/16 9/22 10/3 10/12 10/23 11/13 11/16 12/4 12/7 12/9 13/24 17/17 19/2 20/20 21/3 21/9 22/5 22/23 23/6 24/14 26/1 26/6 27/19 29/13 53/19 55/6</p> <p>attorney-client [1] 5/17</p> <p>audible [2] 14/15 14/22</p> <p>Avenue [1] 2/4</p> <p>await [1] 41/18</p> <p>aware [2] 37/10 37/13</p> <p>away [2] 43/15 43/18</p> <p>B</p> <p>B-r-y-a-n [1] 6/25</p> <p>back [17] 25/9 32/7 33/7 33/8 34/14 35/25 36/16 40/5 41/17 46/9 46/9 47/6 47/7 48/10 51/5 51/21 53/21</p> <p>back-to-back [1] 46/9</p> <p>background [1] 25/15</p> <p>bad [2] 6/3 33/25</p>
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

BRYAN FERGASON,
aka Bryan Michael Fergason, #1299193
Defendant.

CASE NO: 06C228752-3
DEPT NO: XX

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: MAY 6, 2016
TIME OF HEARING: 1:30 P.M.

THIS CAUSE having come on for hearing before the Honorable ERIC JOHNSON, District Judge, on the 6th day of May, 2016, the Petitioner present and represented by MATTHEW D. CARLING, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SANDRA DiGIACOMO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On December 13, 2006, BRYAN FERGASON, aka Bryan Michael Fergason (hereinafter "Defendant") was charged by way of Indictment with the following: COUNT 1 - Conspiracy to Possess Stolen Property and/or to Commit Burglary (Gross Misdemeanor -

1 NRS 205.275, 199.480); and COUNTS 2-27 – Possession of Stolen Property (Felony – NRS
2 205.275).¹ On February 1, 2007, Defendant filed a pre-trial Petition for Writ of Habeas
3 Corpus. The State filed its Return on February 14, 2007. The Court denied Defendant's pre-
4 trial Petition on November 8, 2007.

5 On April 25, 2008, Defendant filed a Motion to Sever. The State filed its Opposition
6 on April 28, 2008. On May 1, 2008, the Court granted Defendant's Motion.

7 On May 7, 2008, Defendant filed a Motion in Limine to Bar Admission of Evidence
8 that the Defendant Committed Burglary in the Instant Case. The State filed its Opposition on
9 May 8, 2008. On May 12, 2008, the Court granted in part and denied in party Defendant's
10 Motion. After further pre-trial litigation, Defendant's jury trial commenced on May 21, 2008.²
11 On May 29, 2008, the jury found Defendant guilty of: COUNT 1 – Conspiracy to Possess
12 and/or Commit Burglary; COUNTS 2, 5-6, 12, 18-21, 25, & 27 – Possession of Stolen
13 Property, Value \$250.00 or more; COUNTS 4, 7-11, 13-17, 22-24, & 26 – Possession of
14 Stolen Property, Value \$2,500.00 or more. The jury found Defendant not guilty of COUNT
15 3.

16 On October 1, 2008, Defendant was adjudicated guilty and sentenced to: COUNT 1 –
17 12 months in the Clark County Detention Center ("CCDC"); COUNT 2 – 20 years to Life in
18 the Nevada Department of Corrections ("NDC"); COUNTS 4-14 – 20 years to Life in the
19 NDC, COUNTS 1-2 & 4-14 to run concurrent to each other; COUNTS 15-27 – 20 years to
20 Life in the NDC, COUNTS 15-27 to run concurrent with each other, but consecutively to
21 COUNTS 1-2 & 4-14 and Defendant's convictions in Case Number C227874. Ferguson
22 received zero days credit for time served. The Judgment of Conviction was filed on November
23 4, 2008. Defendant filed a Notice of Appeal on December 4, 2008.

24 On April 6, 2009, the Court filed an Amended Judgment of conviction, wherein, the
25 minimum term on COUNTS 4-14 & 15-27, was amended from 20 years to 10 years.

26 //

27
28 ¹ On December 15, 2006, the State filed an Amended Indictment, containing the same charges.

² The same day, in open court, a Third Amended Indictment, which included only Defendant.

1 On August 4, 2010, the Nevada Supreme Court affirmed Defendant's judgment of
2 conviction. Remittitur issued on December 14, 2010.

3 On June 16, 2011, Defendant filed a pro per post-conviction Petition for Writ of Habeas
4 Corpus ("Petition"). The State filed its Response on August 9, 2011. On August 25, 2011,
5 the Court denied Defendant's Petition. Defendant filed a Notice of Appeal on September 22,
6 2011. The Court filed its Findings of Fact, Conclusions of Law and Order on November 9,
7 2011. April 6, 2012, the Nevada Supreme Court ordered the denial of Defendant's Petition
8 reversed and remanded the case back for appointment of counsel, without reaching the merits
9 of any other claims.

10 On May 15, 2012, Mathew Carling, Esq., was appointed as counsel. On November 2,
11 2015, Defendant filed a Supplemental post-conviction Petition for Writ of Habeas Corpus
12 ("Supplement"). The State filed its Response on January 15, 2015. Defendant filed his Reply
13 on February 19, 2016.

14 This Court heard arguments on the Petition and Supplement on March 29, 2016, and
15 set the matter for a limited Evidentiary Hearing on Defendant's issues C & D, but not as to A
16 & B, for May 6, 2016.

17 And the Court now denies Defendant's Petition for Writ of Habeas Corpus.

18 Defendant raised four claims of ineffective assistance of counsel before the Court,
19 arguing that counsel was ineffective for: (a) failing to object to certain testimony of Tonya
20 Trevarthen, (b) failing to investigate and present evidence regarding Trevarthen's testimony
21 about Defendant not having contact with Damion Monroe from 2001-2006, (c) for not
22 presenting a defense at Defendant's sentencing hearing, and (d) for failing to object during the
23 State's opening statement.

24 After the reading the briefs and hearing argument on March 29, 2016, the Court found
25 no merit to Claims A & B, but did order an Evidentiary Hearing on Claims C & D. At that
26 hearing, Defendant and his trial counsel, the Honorable Cynthia Dustin-Cruz, testified to those
27 claims.

28 //

1 Defendant originally testified that trial counsel told him that the Court would not
2 sentence him to Life in prison, and that he was looking more at five to 20 years. Evidentiary
3 Hearing ("EH") at 7-8. He went on to say that his decision to proceed to trial was partly based
4 on counsel's advisement of the possible range of punishment, but that he would have taken
5 any offer that did not require him to testify against co-defendants. EH, at 10. However, Ms.
6 Cruz testified that she never told Defendant that he would not get a Life sentence if he was
7 convicted. *Id.*, at 33. Furthermore, the State did make an offer that did not require Defendant's
8 testimony after the conviction of Mr. Monroe. *Id.*, at 45-49. In fact, once Defendant's trial
9 was severed from Mr. Monroe's trial and Monroe was convicted, counsel discussed with him,
10 in detail, that the plea offer that would be in his best interest, which included a small habitual.
11 *Id.* However, Defendant refused to accept any plea deal. *Id.*

12 Defendant also claimed that between trial and sentencing, he did not have any contact
13 with counsel, aside from her mailing him a sentencing memorandum and, additionally, was
14 not afforded the opportunity to read the Pre-Sentence Investigation (PSI) Report before
15 sentencing. *Id.*, at 10-11, 23-24. However, Defendant made no attempts to contact counsel
16 between trial and sentencing. *Id.*, at 12.

17 Defendant testified further that counsel did not advise him at all on what to do at
18 sentencing. *Id.*, at 26. Ms. Cruz testified that while she did not recall if he had any direct
19 contact with Defendant prior to the day of sentencing, she was certain that she gave him a copy
20 of the PSI on the day of sentencing and met with him to discuss what was going on. *Id.*, at 35-
21 36. Additionally, though she could not recall discussing particular mitigating factors with
22 Defendant, Ms. Cruz testified that the main concern for Defendant was about forfeiture of
23 items that were not shown as evidence at trial. *Id.*, at 36.

24 Additionally, Defendant testified about the State's opening argument at trial and
25 claimed that in its PowerPoint slides, the State had pictures of Defendant and his co-defendants
26 and all of the photos had the word "Guilty" stamped across the faces in red lettering. *Id.*, at
27 13. He claims to have pointed this out to trial counsel, but that she ignored it and did not
28 object. *Id.*, at 14.

1 Ms. Cruz convincingly refuted that testimony, noting that while she could not recall if
2 the State showed photos during opening arguments, she was adamant that if photos would have
3 had the word "Guilty" across faces of the Defendant and co-defendants, she would have, "been
4 jumping on my feet objection, and if the judge had overruled my objections, I would have
5 demanded that a copy of the PowerPoint presentation for opening be included in the record."
6 *Id.*, at 37.

7 Defendant's claims regarding counsel's failure to objection and investigate fall well
8 short of demonstrating ineffective assistance of counsel. Counsel's tactical decisions are
9 virtually unchallengeable absent extraordinary circumstances. *Doleman v. State*, 112 Nev.
10 843, at 846, 921 P.2d 280 (1996). Courts must determine whether counsel made a "sufficient
11 inquiry into the information . . . pertinent to his client's case," *Id.*, and then whether counsel
12 made "a reasonable strategy decision on how to proceed with his client's case." *Id.*, (citing
13 *Strickland v. Washington*, 466 U.S. at 690-91, 104 S. Ct. at 2066).

14 During pre-trial litigation, trial counsel filed a Motion in Limine to Bar Admission of
15 Evidence that eventually came out in Trevarthen's testimony. And the Court found that that
16 evidence would be admissible. Reporter's Transcript ("RT"), 5/2/2008, at p. 33-34. Pursuant
17 to the Court's ruling, counsel did not objection to Trevarthen's testimony. Further, counsel
18 did express concern, outside the presence of the jury, about Trevarthen's generalized
19 comments of other crimes, but noted that she did not want to draw the jury's attention to the
20 statements. RT, 5/27/2008, at 221-223.

21 When a defendant contends that his attorney was ineffective because she did not
22 adequately investigate the case, he must show how a better investigation would have rendered
23 a more favorable outcome probable. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538
24 (2004). That defendant must allege with specificity what the investigations would have
25 revealed and how it would have altered the outcome of the trial. *United States v. Porter*, 924
26 F.2d 395, 397 (1st Cir. 1991) (quoting *United States v. Green*, 882 F.2d 999, 1003 (5th Cir.
27 1989)). And a claim of ineffective assistance of counsel alleging a failure to properly
28

1 investigate will fail where the evidence or testimony sought does not exonerate or exculpate
2 the defendant. *Ford v. State*, 105 Nev. 850, 854, 784 P.2d 951, 953 (1989).

3 During State's questioning, Trevarthen testified that she saw Defendant "pretty often,"
4 at least few times a week. RT, 5/27/2008, at p.198. She then clarified that it was not a few
5 times a week the entire time she knew him, but at least the last year or so. *Id.* Afterward,
6 outside the presence of the jury, counsel discussed with the Court her intention to question
7 Trevarthen about the timeframe when Defendant was not around. *Id.* at p.224. However,
8 counsel explained that she did not want to go into the details of why because Defendant was
9 not around due to his having drug issues at that time and Monroe did not want to work with
10 him. *Id.* The Court stated that it would allow counsel to question Trevarthen without opening
11 the door, but it had to be narrowed to whether there were a few months, during which
12 Defendant was not around, but nothing more specific. *Id.* During cross-examination, counsel
13 did just that:

14 COUNSEL: And then going back to when you -- regarding
15 Mr. Ferguson coming past, wasn't there a
16 period of time, and we're going to stick with
17 a yes or no. Wasn't there a period of time
18 during the timeframe when you said in 2001
19 when you first met him to 2006 when he
20 started being around more frequently, wasn't
21 there a period of time that he wasn't coming
22 around?

23 TREVARTHEN: Yes
24 RT, 5/27/2008 p. 239.

25 Defendant has failed to make any showing regarding what further investigation would
26 have revealed regarding that time and how that would have rendered a more favorable
27 outcome. To the contrary, the record created outside the presence of the jury shows that further
28 inquiry would not only not exonerate or exculpate Defendant, but would have been
detrimental. Additionally, counsel's strategic decision was a tactical decision. *Doleman*, 112
Nev. at 846, 921 P.2d at 280.

//

//

1 Counsel's handling of the Trevarthen testimony was objectively reasonable and was
2 not ineffective and Defendant has not demonstrated prejudice. Both of those claims are
3 denied.

4 As to Defendant's third claim, the Court, finding Ms. Cruz to be more credible than
5 Defendant, finds that trial counsel did not ever say that the defendant would not receive a life
6 sentence. Further, the Court does find that, before Defendant's trial and after Mr. Monroe was
7 convicted, the State would make an offer that did not require Defendant's testimony.
8 Defendant was informed of that offer and advised that it was in his best interest, and he chose
9 to decline it.

10 Moreover, Defendant's reliance on *Brown v. State*, 110 Nev. 846, 877 P.2d 1071, to
11 support his claim that counsel was ineffective is misplaced. In *Brown*, trial counsel not only
12 failed to request that the defendant's sentences run concurrently, a statutory possibility that
13 was available, but also failed to present any mitigating evidence. *Id.* 110 Nev. at 850, 877
14 P.2d at 1074. Also, counsel testified that he was unaware that the defendant's sentence could
15 run concurrently and evidence indicated that counsel was not even aware of what the minimum
16 available sentence was. *Id.* In this case, unlike *Brown*, counsel was not only well aware of
17 the minimum sentence, but argued for the imposition of the minimum sentence and for the
18 sentences run concurrent. And finally, Ms. Cruz presented mitigating factors.

19 Defendant has failed to demonstrate deficiency or prejudice. This claim is denied.

20 Lastly, this Court finds that there are no grounds on which Defendant can succeed on
21 his final claim. Trial counsel was adamant in her testimony that if photos on the State's
22 opening PowerPoint would have flashed the word "guilty" across any faces, she would have
23 acted accordingly. Additionally, the State has correctly pointed out that Defendant's first
24 Petition makes no mention of this occurring at opening, and only notes it happening during
25 closing arguments. The Court finds that no photos with the word "guilty" superimposed were
26 shown during State's opening argument. Defendant's last claim is denied.


27 //

28 //

ORDER

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

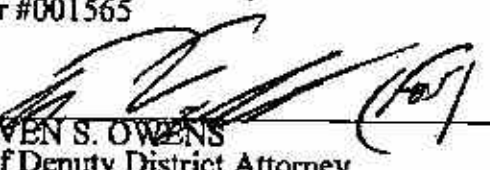
DATED this 12 day of August, 2016.



DISTRICT JUDGE
ERIC JOHNSON

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

BY



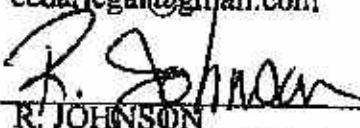
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF SERVICE

I certify that on the 8th day of August, 2016, I e-mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

MATTHEW D. CARLING, Esq.
cedarlegal@gmail.com

BY



R. JOHNSON
Secretary for the District Attorney's Office

AR/SSO/rj/M-1

COPY

Electronically Filed

08/18/2016

Chaunte Pleasant
CLERK OF THE COURT

1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 **BRYAN FERGASON,**

6 **Petitioner,**

7 **vs.**

8 **THE STATE OF NEVADA,**

9 **Respondent,**

Case No: 06C228752-3

Dept No: XX

10 **NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

11 **PLEASE TAKE NOTICE** that on August 16, 2016, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on August 18, 2016.

16 **STEVEN D. GRIERSON, CLERK OF THE COURT**

17 /s/ Chaunte Pleasant

18 Chaunte Pleasant, Deputy Clerk

19 **CERTIFICATE OF MAILING**

20 I hereby certify that on this 18 day of August 2016, I placed a copy of this Notice of Entry in:

21 ☒ The bin(s) located in the Regional Justice Center of:
22 Clark County District Attorney's Office
Attorney General's Office - Appellate Division-

23 ☒ The United States mail addressed as follows:

24 Bryan Ferguson # 96803
25 P.O. Box 650
Indian Springs, NV 89070

Matthew D. Carling, Esq.
1100 S. 10th Street
Las Vegas, NV 89101

26 /s/ Chaunte Pleasant

27 Chaunte Pleasant, Deputy Clerk


CLERK OF THE COURT

1 FCL
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 STEVEN S. OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #004352
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 BRYAN FERGASON,
13 aka Bryan Michael Fergason, #1299193
14 Defendant.

CASE NO: 06C228752-3
DEPT NO: XX

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: MAY 6, 2016
TIME OF HEARING: 1:30 P.M.

18 THIS CAUSE having come on for hearing before the Honorable ERIC JOHNSON,
19 District Judge, on the 6th day of May, 2016, the Petitioner present and represented by
20 MATTHEW D. CARLING, the Respondent being represented by STEVEN B. WOLFSON,
21 Clark County District Attorney, by and through SANDRA DiGIACOMO, Chief Deputy
22 District Attorney, and the Court having considered the matter, including briefs, transcripts,
23 arguments of counsel, and documents on file herein, now therefore, the Court makes the
24 following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

26 On December 13, 2006, BRYAN FERGASON, aka Bryan Michael Fergason
27 (hereinafter "Defendant") was charged by way of Indictment with the following: COUNT 1
28 - Conspiracy to Possess Stolen Property and/or to Commit Burglary (Gross Misdemeanor -

1 NRS 205.275, 199.480); and COUNTS 2-27 – Possession of Stolen Property (Felony – NRS
2 205.275).¹ On February 1, 2007, Defendant filed a pre-trial Petition for Writ of Habeas
3 Corpus. The State filed its Return on February 14, 2007. The Court denied Defendant's pre-
4 trial Petition on November 8, 2007.

5 On April 25, 2008, Defendant filed a Motion to Sever. The State filed its Opposition
6 on April 28, 2008. On May 1, 2008, the Court granted Defendant's Motion.

7 On May 7, 2008, Defendant filed a Motion in Limine to Bar Admission of Evidence
8 that the Defendant Committed Burglary in the Instant Case. The State filed its Opposition on
9 May 8, 2008. On May 12, 2008, the Court granted in part and denied in part Defendant's
10 Motion. After further pre-trial litigation, Defendant's jury trial commenced on May 21, 2008.²
11 On May 29, 2008, the jury found Defendant guilty of: COUNT 1 – Conspiracy to Possess
12 and/or Commit Burglary; COUNTS 2, 5-6, 12, 18-21, 25, & 27 – Possession of Stolen
13 Property, Value \$250.00 or more; COUNTS 4, 7-11, 13-17, 22-24, & 26 – Possession of
14 Stolen Property, Value \$2,500.00 or more. The jury found Defendant not guilty of COUNT
15 3.

16 On October 1, 2008, Defendant was adjudicated guilty and sentenced to: COUNT 1 –
17 12 months in the Clark County Detention Center ("CCDC"); COUNT 2 – 20 years to Life in
18 the Nevada Department of Corrections ("NDC"); COUNTS 4-14 – 20 years to Life in the
19 NDC, COUNTS 1-2 & 4-14 to run concurrent to each other; COUNTS 15-27 – 20 years to
20 Life in the NDC, COUNTS 15-27 to run concurrent with each other, but consecutively to
21 COUNTS 1-2 & 4-14 and Defendant's convictions in Case Number C227874. Ferguson
22 received zero days credit for time served. The Judgment of Conviction was filed on November
23 4, 2008. Defendant filed a Notice of Appeal on December 4, 2008.

24 On April 6, 2009, the Court filed an Amended Judgment of conviction, wherein, the
25 minimum term on COUNTS 4-14 & 15-27, was amended from 20 years to 10 years.

26 //

27
28 ¹ On December 15, 2006, the State filed an Amended Indictment, containing the same charges.

² The same day, in open court, a Third Amended Indictment, which included only Defendant.

1 On August 4, 2010, the Nevada Supreme Court affirmed Defendant's judgment of
2 conviction. Remittitur issued on December 14, 2010.

3 On June 16, 2011, Defendant filed a pro per post-conviction Petition for Writ of Habeas
4 Corpus ("Petition"). The State filed its Response on August 9, 2011. On August 25, 2011,
5 the Court denied Defendant's Petition. Defendant filed a Notice of Appeal on September 22,
6 2011. The Court filed its Findings of Fact, Conclusions of Law and Order on November 9,
7 2011. April 6, 2012, the Nevada Supreme Court ordered the denial of Defendant's Petition
8 reversed and remanded the case back for appointment of counsel, without reaching the merits
9 of any other claims.

10 On May 15, 2012, Matthew Carling, Esq., was appointed as counsel. On November 2,
11 2015, Defendant filed a Supplemental post-conviction Petition for Writ of Habeas Corpus
12 ("Supplement"). The State filed its Response on January 15, 2015. Defendant filed his Reply
13 on February 19, 2016.

14 This Court heard arguments on the Petition and Supplement on March 29, 2016, and
15 set the matter for a limited Evidentiary Hearing on Defendant's issues C & D, but not as to A
16 & B, for May 6, 2016.

17 And the Court now denies Defendant's Petition for Writ of Habeas Corpus.

18 Defendant raised four claims of ineffective assistance of counsel before the Court,
19 arguing that counsel was ineffective for: (a) failing to object to certain testimony of Tonya
20 Trevarthen, (b) failing to investigate and present evidence regarding Trevarthen's testimony
21 about Defendant not having contact with Damion Monroe from 2001-2006, (c) for not
22 presenting a defense at Defendant's sentencing hearing, and (d) for failing to object during the
23 State's opening statement.

24 After the reading the briefs and hearing argument on March 29, 2016, the Court found
25 no merit to Claims A & B, but did order an Evidentiary Hearing on Claims C & D. At that
26 hearing, Defendant and his trial counsel, the Honorable Cynthia Dustin-Cruz, testified to those
27 claims.

28 //

1 Defendant originally testified that trial counsel told him that the Court would not
2 sentence him to Life in prison, and that he was looking more at five to 20 years. Evidentiary
3 Hearing ("EH") at 7-8. He went on to say that his decision to proceed to trial was partly based
4 on counsel's advisement of the possible range of punishment, but that he would have taken
5 any offer that did not require him to testify against co-defendants. EH, at 10. However, Ms.
6 Cruz testified that she never told Defendant that he would not get a Life sentence if he was
7 convicted. *Id.*, at 33. Furthermore, the State did make an offer that did not require Defendant's
8 testimony after the conviction of Mr. Monroe. *Id.*, at 45-49. In fact, once Defendant's trial
9 was severed from Mr. Monroe's trial and Monroe was convicted, counsel discussed with him,
10 in detail, that the plea offer that would be in his best interest, which included a small habitual.
11 *Id.* However, Defendant refused to accept any plea deal. *Id.*

12 Defendant also claimed that between trial and sentencing, he did not have any contact
13 with counsel, aside from her mailing him a sentencing memorandum and, additionally, was
14 not afforded the opportunity to read the Pre-Sentence Investigation (PSI) Report before
15 sentencing. *Id.*, at 10-11, 23-24. However, Defendant made no attempts to contact counsel
16 between trial and sentencing. *Id.*, at 12.

17 Defendant testified further that counsel did not advise him at all on what to do at
18 sentencing. *Id.*, at 26. Ms. Cruz testified that while she did not recall if he had any direct
19 contact with Defendant prior to the day of sentencing, she was certain that she gave him a copy
20 of the PSI on the day of sentencing and met with him to discuss what was going on. *Id.*, at 35-
21 36. Additionally, though she could not recall discussing particular mitigating factors with
22 Defendant, Ms. Cruz testified that the main concern for Defendant was about forfeiture of
23 items that were not shown as evidence at trial. *Id.*, at 36.

24 Additionally, Defendant testified about the State's opening argument at trial and
25 claimed that in its PowerPoint slides, the State had pictures of Defendant and his co-defendants
26 and all of the photos had the word "Guilty" stamped across the faces in red lettering. *Id.*, at
27 13. He claims to have pointed this out to trial counsel, but that she ignored it and did not
28 object. *Id.*, at 14.

1 Ms. Cruz convincingly refuted that testimony, noting that while she could not recall if
2 the State showed photos during opening arguments, she was adamant that if photos would have
3 had the word "Guilty" across faces of the Defendant and co-defendants, she would have, "been
4 jumping on my feet objection, and if the judge had overruled my objections, I would have
5 demanded that a copy of the PowerPoint presentation for opening be included in the record."
6 *Id.*, at 37.

7 Defendant's claims regarding counsel's failure to objection and investigate fall well
8 short of demonstrating ineffective assistance of counsel. Counsel's tactical decisions are
9 virtually unchallengeable absent extraordinary circumstances. *Doleman v. State*, 112 Nev.
10 843, at 846, 921 P.2d 280 (1996). Courts must determine whether counsel made a "sufficient
11 inquiry into the information . . . pertinent to his client's case," *Id.*, and then whether counsel
12 made "a reasonable strategy decision on how to proceed with his client's case." *Id.*, (citing
13 *Strickland v. Washington*, 466 U.S. at 690-91, 104 S. Ct. at 2066).

14 During pre-trial litigation, trial counsel filed a Motion in Limine to Bar Admission of
15 Evidence that eventually came out in Trevarthen's testimony. And the Court found that that
16 evidence would be admissible. Reporter's Transcript ("RT"), 5/2/2008, at p. 33-34. Pursuant
17 to the Court's ruling, counsel did not objection to Trevarthen's testimony. Further, counsel
18 did express concern, outside the presence of the jury, about Trevarthen's generalized
19 comments of other crimes, but noted that she did not want to draw the jury's attention to the
20 statements. RT, 5/27/2008, at 221-223.

21 When a defendant contends that his attorney was ineffective because she did not
22 adequately investigate the case, he must show how a better investigation would have rendered
23 a more favorable outcome probable. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538
24 (2004). That defendant must allege with specificity what the investigations would have
25 revealed and how it would have altered the outcome of the trial. *United States v. Porter*, 924
26 F.2d 395, 397 (1st Cir. 1991) (quoting *United States v. Green*, 882 F.2d 999, 1003 (5th Cir.
27 1989).). And a claim of ineffective assistance of counsel alleging a failure to properly
28

1 Counsel's handling of the Trevarthen testimony was objectively reasonable and was
2 not ineffective and Defendant has not demonstrated prejudice. Both of those claims are
3 denied.

4 As to Defendant's third claim, the Court, finding Ms. Cruz to be more credible than
5 Defendant, finds that trial counsel did not ever say that the defendant would not receive a life
6 sentence. Further, the Court does find that, before Defendant's trial and after Mr. Monroe was
7 convicted, the State would make an offer that did not require Defendant's testimony.
8 Defendant was informed of that offer and advised that it was in his best interest, and he chose
9 to decline it.

10 Moreover, Defendant's reliance on *Brown v. State*, 110 Nev. 846, 877 P.2d 1071, to
11 support his claim that counsel was ineffective is misplaced. In *Brown*, trial counsel not only
12 failed to request that the defendant's sentences run concurrently, a statutory possibility that
13 was available, but also failed to present any mitigating evidence. *Id.* 110 Nev. at 850, 877
14 P.2d at 1074. Also, counsel testified that he was unaware that the defendant's sentence could
15 run concurrently and evidence indicated that counsel was not even aware of what the minimum
16 available sentence was. *Id.* In this case, unlike *Brown*, counsel was not only well aware of
17 the minimum sentence, but argued for the imposition of the minimum sentence and for the
18 sentences run concurrent. And finally, Ms. Cruz presented mitigating factors.

19 Defendant has failed to demonstrate deficiency or prejudice. This claim is denied.

20 Lastly, this Court finds that there are no grounds on which Defendant can succeed on
21 his final claim. Trial counsel was adamant in her testimony that if photos on the State's
22 opening PowerPoint would have flashed the word "guilty" across any faces, she would have
23 acted accordingly. Additionally, the State has correctly pointed out that Defendant's first
24 Petition makes no mention of this occurring at opening, and only notes it happening during
25 closing arguments. The Court finds that no photos with the word "guilty" superimposed were
26 shown during State's opening argument. Defendant's last claim is denied.

27 //

28 //


CLERK OF THE COURT

1 ASTA
2 MATTHEW D. CARLING, ESQ.
3 Nevada Bar No. 007302
4 1100 S. Tenth Street
5 Las Vegas, NV 89101
6 Telephone: (702) 419-7330
7 Facsimile: (702) 446-8065
8 CedarLegal@gmail.com
9 Attorney for Petitioner/ Defendant
10 BRYAN FERGASON

11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA
14

15 *****
16
17
18

BRYAN FERGASON,
Petitioner,

Case No.: 06C228752-3
Dept. No.: XX

-vs-

THE STATE OF NEVADA,
Respondent.

19
20 CASE APPEAL STATEMENT
21 (NRAP 3(d)(4))
22

- 23 1. Name of appellant filing this case appeal statement:
24 BRYAN FERGASON
25
26 2. Identify the judge issuing the decision, judgment, or order appealed
27 from:
28 Eric Johnson
29
30 3. Identify all parties to the proceedings in the district court:
31 Bryan Ferguson
32
33
34

1 The State of Nevada
2

3 4. **Identify all parties involved in this appeal:**

5 Bryan Fergason
6 The State of Nevada
7

8 5. **Name, law firm, address, and telephone number of all counsel on
9 appeal and party or parties whom they represent:**
10

MATTHEW D. CARLING
Nevada Bar #007302
1100 S. Tenth Street
Las Vegas, NV 89101
(702) 419-7330
Counsel for Appellant,
Bryan Fergason

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
P.O. Box 552212
Las Vegas, NV 89101-2212
Counsel for Appellee,
State of Nevada

11 6. **Indicate whether appellant was represented by appointed or retained
12 counsel in the district court:** Appointed
13

14 7. **Indicate whether appellant is represented by appointed or retained
15 counsel on appeal:** Appointed
16

17 8. **Indicate whether appellant was granted leave to proceed in forma
18 pauperis, and the date of entry of the district court order granting such
19 leave:** N/A
20

21 9. **Indicate the date the proceedings commenced in the district court:**
22

23 Indictment filed December 13, 2006.
24

25 Dated this 2nd day of September, 2016.
26

27 CARLING LAW OFFICE, PC
28

29 /s/ Matthew D. Carling
30

31 MATTHEW D. CARLING, ESQ.
32 Nevada Bar No.: 007302
33 *Court-Appointed Attorney for Defendant,*
34 BRYAN FERGASON
35

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Steven B. Wolfson, Esq.
Clark County District Attorney
Post Conviction Unit
Jennifer.Garcia@clarkcountynv.com

/s/ Matthew D. Carling
MATTHEW D. CARLING, ESQ.
Court-Appointed Attorney for Defendant,
BRYAN FERGASON


CLERK OF THE COURT

1 NOASC
2 MATTHEW D. CARLING, ESQ.
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4 1100 S. Tenth Street
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6 Telephone: (702) 419-7330
7 Facsimile: (702) 446-8065
8 CedarLegal@gmail.com
9 Attorney for Petitioner/ Defendant
10 BRYAN FERGASON

11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA
14

15 * * * * *

16
17
18 BRYAN FERGASON,
Petitioner,

Case No.: 06C228752-3
Dept No.: XX

-vs-

THE STATE OF NEVADA,
Respondent.

19
20
21 NOTICE OF APPEAL
22
23

24 TO: THE STATE OF NEVADA

25 STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and
26 DEPARTMENT 20 OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE
27 STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

28
29 NOTICE is hereby given that BRYAN FERGASON, presently incarcerated at High
30 Desert State Prison, Indian Springs, Nevada, appeals to the Supreme Court of the State of

1 Nevada from the Findings of Fact, Conclusions of Law and Order denying his Petition for a Writ
2 of Habeas Corpus (Post-Conviction) issued on or about August 18, 2016.

3 DATED this 2nd day of September, 2016.

4
5 CARLING LAW OFFICE, PC

6
7 /s/ Matthew D. Carling

8 MATTHEW D. CARLING, ESQ.

9 Nevada Bar No.: 007302
10

11 **DECLARATION OF MAILING**

12 MATTHEW D. CARLING, ESQ., hereby declares that he is, and was when the herein
13 described mailing took place, a citizen of the United States, over 21 years of age; that on the 2nd
14 day of September, 2016, Declarant deposited in the United States mail at Las Vegas, Nevada, a
15 copy of the Notice of Appeal in the above-mention case, enclosed in a sealed envelope upon
16 which first class postage was fully prepaid, addressed to the following:

Bryan Fergason (#96803)

HDSP

P.O. Box 650

Indian Springs, Nevada 89070-0650

Steven B. Wolfson, Esq.

Clark County District Attorney

200 Lewis Avenue

Las Vegas, Nevada 89101

17 I declare under penalty of perjury that the foregoing is true and correct.

18 Executed on the 2nd day of September, 2016.

19
20 CARLING LAW OFFICE, PC

21
22 /s/ Matthew D. Carling

23 MATTHEW D. CARLING, ESQ.

24 Nevada Bar No.: 007302
25
26