IN THE SUPREME COURT OF THE STATE OF NEVADA

MACK MASON
APPELLANT

VS.

WARDEN JO GENTRY;
STATE OF NEVADA
RESPONDENT

71296

FILED
OCT 25 2016
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MACK MASON
APPELLANT

VS

WARDEN JO GENTRY,
STATE OF NEVADA
RESPONDENT(S)

APPELLANT'S OPENING BRIEF

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT BELOW ABUSED ITS DISCRETION BY NOT HAVING AN EVIDENTIARY HEARING AND ADJUDICATING ON THE CLAIM OF ACTUAL INNOCENCE BASED ON THE MERITS BECAUSE OF A NEW CONSTITUTIONAL RULE OF LAW.

II WHETHER PETITIONER'S TRIAL COUNSEL WAS INNEFECTIVE AND HIS PERFORMANCE DEFICIENT AND BELOW AN OBJECTIVE STANDARD OF REASONABLENESS IN FAILING TO BRING IN AN EXPERT TO TESTIFY FOR THE DEFENSE AND REFUTE THE EVIDENCE PUT FORTH BY THE STATE IN TESTIMONY THAT WAS INCONCLUSIVE AS TO FIREARM AND TOOLMARKS IN ORDER TO SAY FOR CERTAIN THE BULLET CAME FROM THE GUN FOUND NEAR THE SCENE.

III. WHETHER THE JURY RENDERED AN AMBIGIOUS VERDICT DUE TO INADEQUATE JURY INSTRUCTIONS THAT WERE AMBIGIOUS WHEN INSTRUCTION #43 STATED: "YOU MAY DRAW REASONABLE INFERENCES FROM THE EVIDENCE IN A SPECIFIC INTENT OFFENSE.

IV. WHETHER PETITIONER'S TRIAL COUNSEL'S PERFORMANCE FELL BELOW NORMAL OBJECTIVE STANDARDS OF PROFESSIONALISM RENDERING INEFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING PETITIONER MACK'S 6th, 8th, AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. PROCEDURAL HISTORY

STATEMENT OF THE CASE

PETITIONER MASON WAS TAKEN TO TRIAL ON THE 12th DAY OF APRIL, 2001, AND FOUND PETITIONER GUILTY ON THE 30th DAY OF FEBRUARY, 2001, OF COUNTS 1 AND 3, BURGLARY WHILE IN POSSESSION OF A FIREARM; COUNT 4, MURDER WITH USE OF A DEADLY WEAPON, AND COUNT 5, SECOND DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON. WHILE ON COUNTS #2 AND #6 RESPECTIVELY, GRAND LARCENY OF A FIREARM, AND EX-FELON IN POSSESSION OF A FIREARM. THE GRAND LARCENY OF A FIREARM CHARGE, PETITIONER WAS FOUND NOT GUILTY OF. WHILE THE CHARGE OF EX-FELON IN POSSESSION OF A FIREARM WAS DISMISSED OUTRIGHT.

PETITIONER WAS SENTENCED ON THE 6th DAY OF MARCH, 2001 FOR THE MURDER WITH A DEADLY WEAPON CHARGE TO A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE. OVER A MONTH LATER, PETITIONER WAS FOUND GUILTY OF SECOND DEGREE KIDNAPPING WITH A DEADLY WEAPON, AND SENTENCED TO 40 MONTHS MINIMUM TO 180 MONTHS MAXIMUM ON THE 30th DAY OF APRIL, 2001.

PETITIONER MASON FILED A NOTICE OF APPEAL ON THE 25th DAY OF MAY, 2001. PETITIONER MASON FILE A PREMATURE PETITION FOR A WRIT OF HABEAS CORPUS ON THE 5th DAY OF SEPTEMBER, 2002. THE NEVADA SUPREME COURT AFFIRMED ON DIRECT APPEAL ON THE 16th DAY OF SEPTEMBER, 2002.

PETITIONER FILED ANOTHER PETITION FOR WRIT OF HABEAS CORPUS ON THE 23rd DAY OF JANUARY, 2003. ON THE 2nd DAY OF JUNE, 2003, PETITIONER FILED A MOTION FOR ENLARGEMENT OF TIME, (FIRST REQUEST), ON THE 2nd DAY OF JUNE, 2003, PETITIONERS REQUEST FOR AN ENLARGEMENT OF TIME WAS DENIED. PETITIONER WAS UNAWARE THAT THE PETITION FILED ON JANUARY 23 WAS DENIED AND COURT STATED: DEFENDANT HAS NOT SET FORTH GROUNDS

FOR A BASIS FOR THE PETITION FOR THE NECESSITY OF APPOINTMENT OF COUNSEL; JUST BARE ALLEGATION.

PETITIONER CONTENDS THAT NONE OF HIS CLAIMS WERE EVER ADJUDICATED ON THE MERITS. THE WRIT THAT WAS FILED ON THE 23rd DAY OF JANUARY, 2003, THE STATE NEVER FILED A REPLY AND PETITIONER WAS NEVER GIVEN AN OPPORTUNITY AT A MEANINGFUL APPEAL BY GRANTING BY THE COURT OF APPOINTMENT OF COUNSEL IN ORDER TO FRAME HIS ISSUE(S), ESPECIALLY ONES OF SUCH MAGNITUDE OF CONSTITUTIONAL VIOLATION(S). THE PETITION WAS DENIED ON THE 14th DAY OF MAY, 2003.

"THE SUPREME COURT AS WELL AS OTHER CIRCUITS HAVE HELD:

"THAT PRO SE LITIGANTS ARE HELD TO A LESS STRINGENT STANDARD THAN A COMPLAINT DRAFTED BY A LAWYER. (See HAINES V. KERNER, 92 S. Ct. 594 (1972); RODI V. VENTETUOLO, 941 F.2d 22; and LIBERALLY CONSTRUE A PRO SE COMPLAINT. See STRAHAN V. COXE, 127 F.3d 155 (1997)." and WATSON V. CANTON, 984 F.2d 537." AND MAY GRANT A MOTION TO DISMISS "ONLY IF PLAINTIFF CANNOT PROVE ANY SET OF FACTS ENTITLING HIM TO RELIEF". See AHMED V. ROSENBLATT, 118 F.3d 886 (1997).

THE NOTICE OF ENTRY OF DECISION AND ORDER WAS FILED ON THE 16th DAY OF JULY, 2003. THE PETITIONER FILED ANOTHER PETITION FOR WRIT OF HABEAS CORPUS ON THE 31st DAY OF JANUARY, 2011, ALONG WITH AN AFF-IDAVIT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS. AN ORDER FOR PETITION OF WRIT WAS GRANTED ON THE 10th DAY OF FEBRUARY, 2011, AND THE STATE FILED A RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS. THE DEFENDANT FILED AN OPPOSITION TO RESPONDENTS MOT-ION TO DISMISS ON THE 20th DAY OF APRIL, 2011, AND THE WRIT WAS SUBSEQUENTLY DENIED ON THE 13th DAY OF MAY, 2011, AND THE NOTICE OF ENTRY OF DECISION

AND ORDER WAS FILED ON THE 6th DAY OF JUNE, 2011. AN APPEAL WAS FILED BY DEFENDANT ON THE 7th DAY OF JUNE, 2011, AND THE JUDGMENT WAS AFFIRMED ON THE 19th DAY OF DECEMBER, 2011. THE PLEADING FILED ON THE 9th DAY OF OF JUNE, 2016, THE STATE MISTAKENLY CONSTRUED THIS APPELLANT'S WRIT FOR PETITION OF HABEAS CORPUS ON THE ISSUE(S) OF INEFFECTIVE ASSISTANCE OF COUNSEL AND ACTUAL INNOCENCE AS A COMMON MOTION. THE STATE FILED A RESPONSE ON THE 28th DAY OF JUNE, 2016, AND A MOTION TO DISMISS DEFENDANT'S PLEADING ALLEGING ACTUAL INNOCENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL. SEE CASE SUMMARY CASE# C161426; Pg 16 HEREBY INCORPORATED BY REFERENCE.

THE STATES ARGUMENT CHALLENGES THE VEHICLE THAT PETITIONER USED TO ADDRESS HIS JUDGMENT OF CONVICTION, CLASSIFYING IT AS A MOTION INSTEAD OF A PETITION WHEN ON THE CAPTION PAGE IT CLEARLY STATES:

"NOW COME MACK MASON IN CASE # C161-426 FROM THIS POINT ON KNOWN AS PETITIONER". SEE PLEADING CLASSIFIED AS A MOTION FILED ON 6/9/2016; HERBY INCORPORATED BY REFERENCE.

AS HAINES COURT HAS RULED THAT "PRO SE LITIGANTS ARE HELD TO A 'LESS. STRINGENT STANDARD AND SHOULD BE CONSTRUED LIBERALLY."

THE STATE FURTHER ARGUED THAT PETITIONER'S PLEADING WAS BARRED PROCEDURALLY BECAUSE IT IS UNTIMELY, SUCCESSIVE, AND FAILS TO ALLEGE NEW GROUNDS. THE STATE GOES ON TO MAKE ALLEGATION(S) THAT THE DEFENDANT FAILS TO SHOW GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS. THE STATE IS GRAVELY MISTAKEN ON ALL THOSE STATEMENTS MADE IN THEIR RESPONSE FILED ON THE 28th DAY OF JUNE, 2016 ON PAGE 3, LINES 24-27 AND PAGE 4 LINES 1-6, PAGE 5, LINES 5-28. THE LATEST PLEADING FROM PETITIONER MASON FILED ON THE 9th DAY OF JUNE, 2016 MADE AN ACTUAL INNOCENCE CLAIM, AND AN INEFFECTIVE

ASSISTANCE OF COUNSEL CLAIM. THE PETITIONER CONTENDS THAT HIS CLAIM OF ACTUAL INNOCENCE IS STRONG ENOUGH TO OVERCOME THE PROCEDURAL BARS AND SUFFICIENT IN FORM AND CONTENT TO MERIT DISCOVERY AND AN EVIDENTIARY HEARING ON DEFENDANT(S) GATEWAY ACTUAL INNOCENCE CLAIM. ALL ABOVE STATED FACTS HEREIN ARE INCORPORATED BY REFERENCE FROM CASE SUMMARY # 99C161 PAGES 14 THROUGH 16.

B. STATEMENT OF FACTS

FIRST EVIDENTIARY HEARING

AFTER PETITIONER, THEN APPELLANT'S CONVICTIONS WERE AFFIRMED ON THE 16th DAY OF SEPTEMBER, 2002, PETITIONER FILED A PETITION FOR WRIT OF HABEAS CORPUS ON THE 23rd DAY OF JANUARY, 2003. AN ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS WAS RETURNED AND A HEARING WAS SET FOR WITHDRAWAL OF ATTORNEY OF RECORD ON MARCH 13, 2003. THE NEXT WAS FOR DEFENDANT'S MOTION TO SECURE, FILED ON MARCH 31, 2003, AND HEARD ON APRIL 14, 2003. THE MOTION TO SECURE, FILED BY DEFENDANT, PRO PER WAS DENIED AS UNTIMELY BY THE COURT AND NO REPLY WAS FILED AS IT WAS DUE ON MAY 14, 2003. ON MAY 14, 2003, THE DEFENDANTS PRO PER PETITION FOR WRIT OF HABEAS CORPUS WAS DENIED AS THE COURT SAW FIT TO NOT GRANT PETITIONER'S MOTION FOR ENLARGEMENT OF TIME, OR TO GRANT PETITIONERS MOTION TO APPOINT COUNSEL, NOR GRANT THE MOTION TO SECURE. THE RECORD BELOW DOES NOT REFLECT THAT THE DEFENDANT WAS EVER PRESENT AT THE EVIDENTIARY HEARING, AND WITH NO APPOINTMENT OF COUNSEL HOW COULD A PRO PER LITIGANT EXPECT TO FRAME HIS ISSUES WELENOUGH FOR ACCESS TO A MEANINGFUL APPEAL?

AFTER THE NOTICE OF ENTRY OF DECISION AND ORDER WAS FILED ON JULY 16, 2003, PETITIONER FILED A SECOND PETITION FOR WRIT OF HABEAS CORPUS ON JANUARY 31, 2011, AND AN ORDER FOR PETITION OF WRIT WAS RETURNED ON FEBRUARY 10, 2011. THE EVIDENTIARY HEARING WAS HELD ON APRIL 19, 2011, WITHOUT THE PETITIONER PRESENT, AND NO APPOINTED COUNSEL TO REPRESENT MR. MASON. (See CASE SUMMARY PAGE 16 AND CRIMINAL COURT MINUTES PAGE 61 OF 62; INCORPORATED BY REFERENCE.). PETITIONER CONTENDS THAT THERE COULD NOT POSSIBLY BEEN EVEN A REMOTE CHANCE THAT WITHOUT APPOINTED COUNSEL, NOR PETITIONER HIMSELF PRESENT THAT HE COULD FRAME THE ISSUE ANY WAY WITH WHICH TO HAVE ACCESS TO A MEANINGFUL APPEAL NOR PRESENT THE STRUCTURAL ERROR FOR THE RECORD.

ON THE 9th DAY OF JUNE, 2016, PETITIONER FILED A PLEADING CLEARLY STATING ON THE CAPTION PAGE: "FROM THIS POINT ON, KNOWN AS PETITIONER". IN THE STATE'S RESPONSE FILED ON JUNE 28, 2016, THE STATE REFERS TO THE PLEADING AS A MOTION AND NOT A PETITION RIGHT ON THE CAPTION PAGE. THEN ON PAGE 3, LINE 24-26, THE STATE DOES REFER TO THE DOCUMENT IN QUESTION AS A PETITION ALTHOUGH THEY ATTACK IT AGAIN AS UNTIMELY. THE STATE MISTAKENLY REFERS TO THIS PETITIONER'S WRIT AS UNTIMELY, SUCCESSIVE, AND PROCEDURALLY BARRED, AND WHILE THE DOCUMENT MAY BE SUCCESSIVE, IT CAN NEVER BE BARRED PROCEDURALLY ESPECIALLY IF THE PETITIONER'S ALLEGATIONS OF ACTUAL INNOCENCE ARE FOUND TO BE WITH MERIT AND UNDER BERRY IT WAS HELD THAT: "THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT AN EVIDENTIARY HEARING WHERE AN ACTUAL INNOCENCE CLAIM IS SUFFICIENT IN FORM AND CONTENT TO MERIT DISCOVERY AND AN EVIDENTIARY HEARING. See BERRY V. STATE 131 NEV. ADV. REP. 96 (2015).

C. ARGUMENT

I. THE DISTRICT COURT BELOW ABUSED IT DISCRETION BY NOT HAVING AN EVIDENTIARY HEARING WITH PETITIONER PRESENT WHEN PETITIONER HAD NO COUNSEL TO PRESENT HIS ISSUE OF ACTUAL INNOCENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL IN A MEANINGFUL MANNER IN VIOLATION OF HIS 5th, 6th, 8th, AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ON THE 5th DAY OF JULY, 2016, PETITIONER MASON FILED A PLEADING, (PETITION FOR WRIT OF HABEAS), CLAIMING ACTUAL INNOCENCE AND THE STATE IN THEIR RESPONSE ALLEGED EVERYTHING FROM PROCEDURALLY BARRED TO THE PETITION BEING SUCCESSIVE, AND UNTIMELY. THE STATE IS EITHER MISTAKEN OR MISINFORMED AS TO THE LAW BECAUSE A CONVICTION THAT IS FAULTY AND BASED UPON A STRUCTURAL ERROR.

FIRST AND FOREMOST, TRIAL COUNSEL FAILED TO INVESTIGATE AND TO PRESENT EVIDENCE CHALLENGING THE EVIDENCE PRESENTED BY THE STATE THROUGH THE TESTIMONY OF THEIR FORENSIC EXPERT AND THEIR FIREARM AND TOOLMARK EXPERT WHO SPENT THE BETTER PART OF HIS TESTIMONY IN QUANTIFYING HOW WEAPONS MANUFACTURED, EVEN CONSECUTIVELY OFF THE SAME ASSEMBLY LINE WOULD HAVE DIFFERENCES MICROSCOPICILY ENOUGH TO DIFFERENTIATE BETWEEN THE WEAPONS. (See TRIAL TRANSCRIPT; DIRECT EXAMINATION OF KRYLO; TRANSCRIPT PAGE V-14, LINES 12 THROUGH 25; HEREIN INCORPORATED BY REFERENCE.). (See TRIAL TRANSCRIPT; DIRECT EXAMINATION OF KRYLO; TRANSCRIPT PAGE V-15 1THROUGH 25 AND PAGE V-16; LINES 1 THROUGH 25, AND PAGE V-17 LINES 1THROUGH 3.) WHERE THE TOOLMARK EXPERT

SAYS "IT'S NOT ALWAYS POSSIBLE TO COME TO A CONCLUSIVE RESULT", AND "IT'S FAIRLY EASY TO OBSCURE SOME OF THOSE MICROSCOPIC MARKINGS AND YOU JUST MAY NOT HAVE ENOUGH MARKINGS LEFT TO USE FOR A CONCLUSIVE IDENTIFICATION".

THE FIREARM EXPERT FOR THE STATE COULD NOT EVEN DETERMINE THE ACTUAL CALIBER OF THE BULLET RECOVERED, NOR WERE THERE ANY PRINTS OR BIOLOGICAL MATTER. (DNA.) ON THE BULLETS OR GUN WHICH MATCHED THE PETITIONER.

D. GROUND ONE

MR. MASON IS ACTUALLY INNOCENT AND FILES A CLAIM OF ACTUAL INNOCENCE UNDER BERRY V. STATE, 131 Nev. Adv. Rep. 96 AN IN VIOLATION OF THE 5th, 6th, 8th, AND 14th AMENDMENT(S) TO THE UNITED STATES CONSTITUTION.

MR MASON WAS CONVICTED OF FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON AND SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE AND A CONSECUTIVE LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR THE WEAPON ENHANCEMENT, AND A CONCURRENT SENTENCE OF 40 MONTH(S) MINIMUM TO 180 MONTHS MAXIMUM FOR A BURGLARY WITH A DEADLY WEAPON. PETITIONER WAS ALSO GIVEN A CONSECUTIVE SENTENCE OF 40 MONTH(S) MINIMUM TO 180 MONTH(S) MAXIMUM FOR A KIDNAPPING, SECOND DEGREE WITH A DEADLY WEAPON.

PETITIONER MASON CONTENDS THAT THE DISTRICT COURTS DISMISSAL OF HIS THIRD PETITION WHICH UNDER HAINES V. KERNER, IS TO BE HELD TO A LESS STRINGENT STANDARD. UNDER HINTON V. ALABAMA, 134 S.Ct 1081 (2014) THE COURT HELD THAT: RECONSIDERATON OF A PRIOR ORDER IS

APPROPRIATE IF 1) THE COURT WAS PRESENTED WITH NEW EVIDENCE, AND 2) THE COURT COMMITTED CLEAR ERROR RESULTING IN A VERDICT THAT WAS MANIFESTLY UNJUST, OR 3) AN INTERVENING CHANGE IN CONTROLING LAW (See U.S. V GYPSUM CO., 333 U.S. 364.

PETITIONER, MACK MASON ASKS THE NEVADA SUPREME COURT TO CONSIDER WHETHER THE DISTRICT COURT BELOW(S)' FAILURE TO CONSIDER THE PETITION WITH CLAIMS OF ACTUAL INNOCENCE BY HOLDING AN EVIDENTIARY HEARING WHERE THE APPELLANT HAD AN OPPORTUNITY TO PRESENT EVIDENCE THAT DEVELOPS THE CLAIM; SINCE THE HEARING WAS HELD WITHOUT PETITIONER PRESENT AND WITHOUT REPRESENTATION A FUNDAMENTAL MISCARRIAGE OF JUSTICE UNDER BERRY V. STATE, NEV. ADV. REP 96 (2015)".

NOT INTRODUCING EVIDENCE VIA DEFENDANT MASON'S TRIAL COUNSEL TO REFUTE THE STATES FIREARM AND TOOLMARK EXPERT AND THE STATES FORENSIC EXPERT WITH AN EXPERT OF THEIR OWN COULD NOT HAVE BEEN VIEWED AS REASONABLE TRIAL STRATEGY. ESPECIALLY SINCE THE STATE'S EXPERT COULD NOT SAY CONCLUSIVELY THAT THE RECOVERED BULLET CAME FROM THE WEAPON IN QUESTION. (See TRIAL TRANSCRIP PAGE V-16 LINES 18-19, PAGE V-17 LINES 2-3, (INCORPORATED BY REFERENCE).

THE FIREARM EXPERT COULD NOT EVEN DETERMINE THE CALIBER OF THE BULLET CONCLUSIVELY. (See TRANSCRIPT PAGE V-18, LINES 20-21, AND PAGE V-19, LINES 23-25).

WITHOUT APPELLANT MASON'S TRIAL COUNSEL OBTAINING AN FIREARMS EXPERT FOR THE DEFENSE, IT PREJUDICED THE DEFENDANT RESULTING IN THE CAUSE OF MR. MASON'S UNJUST CONVICTION. ALL THE MORE EGREGIOUS BY THE FACT THAT PETITIONER WAS POTENTIALLY ELIGIBLE FOR THE DEATH PENALTY. NO REASONABLE JUROR WOULD HAVE CONVICTED IN LIGHT OF A DEFENSE FIREARM EXPERT THAT REFUTED THE TESTIMONY BY THE STATES EXPERT.

GROUND II

PETITIONER CLAIMS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHICH DID DEPRIVE APPELLANT MASON OF DUE PROCESS UNDER THE 6th, 8th, AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION

ALL FACTS ALLEGED IN APPELLANT'S BREEF IN GROUND 1, AND PARAGRAPH 1 OF GROUND 2 ARE REITERATED HEREIN. PETITIONER MASON'S TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBTAINING FOR THE DEFENSE A FIREARM EXPERT, OR A FORENSIC EXPERT TO PUT THE STATES EXPERTS TESTIMONY IN PERSPECTIVE SINCE NOTHING THE EXPERT STATED IN THIER TESTIMONY WAS CONCLUSIVE OR CERTAIN.

APPELLANT ALSO ASKS THIS REVIEWING COURT TO CONSIDER IF: DEFENDANT(S) TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO INSTRUCTION # 43 WHICH WAS AMBIGUOUS AND OVERBROAD, AND THEREBY RELIEVED THE STATE OF ITS BURDEN ALLOWING THE JURY TO BASE ITS RULING ON GENERAL INTENT INSTEAD OF THE REQUIRED SPECIFIC INTENT?

ALSO, WHETHER OR NOT A DEFENSE ATTORNEY FOR NOT HIRING A DEFENSE EXPERT TO REFUTE THE STATE'S PRESENTATION OF FIREARM AND TOOLMARK EVIDENCE THAT WAS INCONCLUSIVE, ESPECIALLY SINCE PETITIONER NEVER HAD CONSTRUCTIVE POSSESSION OF THE FIREARM TO FIND HIM GUILTY OF BURGLARY OF THE SAME WEAPON, BEING THAT THERE WAS NO BIOLOGICAL EVIDENCE (DNA) OF THE PETITIONER FOUND. FUNDS WERE AVAIABLE FROM THE COURT FOR DEFENSE TO HIRE THEIR OWN EXPERT(S), i.e. FIREARM AND TOOLMARK EXPERT AND FORENSIC ANALYST. DOES THIS RENDER DEFENSE TRIAL COUNSEL INEFFECTIVE?

CONCLUSION

PETITIONER MASON'S ACTUAL INNOCENCE CLAIMS WARRANT RELIEF. AT LEAST, THEY WARRANT AN EVIDENTIARY HEARING IN ORDER TO ESTABLISH THE BASIS FOR APPELLANTS CLAIMS OF ACTUAL INNOCENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL. IN THE STATE'S RESPONSE FILED ON THE 28th DAY OF JUNE, 2016, ON PAGE 3, LINES 11 THROUGH 15 THE STATES ARGUMENT IS THAT ASIDE FROM DIRECT REVIEW, A HABEAS CORPUS POST CONVICTION WRIT IS THE EXCLUSIVE REMEDY FOR CHALLENGING THE VALIDITY OF A CONVICTION OR SENTENCE THAT ARE INCIDENT TO THE PROCEEDINGS IN THE TRIAL COURT. HARRIS V. STATE, 329 P.3d 619 (2014).

UNDER BERRY V. STATE, 131 Nev. Adv. Rep. 96 (2015), APPELLANT SHOULD BE ALLOWED TO PASS THROUGH THE Schlup V. Delo GATEWAY WHEREFORE IN THE CONTEXT OF THE INNOCENCE PROTECTION ACT OF 2004 UNDER 18 U.S.C. § 3600 et.seq., A CHANGE IN SCIENTIFIC EVIDENCE POTENTIALLY AVAILABLE CONCERNING CERTAIN OBJECTS CONSTITUTES "NEWLY DISCOVERED EVIDENCE" WHEN THE OBJECTS TO BE INVESTIGATED ARE NOT NEWLY DISCOVERED. ESPECIALLY IF THE NEW METHOD IS "SUBSTANTIALLY MORE PROBATIVE". See UNITED STATES V. De WATSON, 792 F.3d 1174 (2014) infra. IN PETITIONER MASON'S FILING, A THEORY OF DEFENSE WAS IDENTIFIED THAT WOULD GIVE CREDENCE TO HIS ACTUAL INNOCENCE CLAIM. UNDER 18 U.S.C § 3600, (a)(6); 18 U.S.C.S. § 3600 et seq. "NEW DNA TESTS THAT MAKE PREVIOUSLY USELESS DNA (INCONCLUSIVE - DOES THAT AMOUNT TO NEWLY DISCOVERED EVIDENCE?

THE INNOCENCE PROTECTION ACT OF 2004, OPENS THE DOOR TO REVISITING MISTAKEN CONVICTIONS, WHEN THE NEW SCIENCE OF IDENTIFYING PEOPLE BY THEIR DNA LEFT AT A CRIME SCENE, OR ON EVIDENCE MAY EXONERATE THE WRONGLY CONVICTED. WHERE THE ONLY EVIDENCE WAS WEAK AND INCONSIS-

TENT TESTIMONY BY FELECIA JACKSON, WHO WAS ARRESTED AND CHARGED AS WELL. MS. JACKSON'S TESTIMONY WAS WEAK AND INCONSISTENT AND HER CREDIBILITY SHOULD HAVE BEEN AN ISSUE BECAUSE SHE IS A KNOWN NARCOTICS USER WHO HAD BEEN INGESTING CRACK COCAINE, PLUS, BEING CHARGED WITH THE OFFENSE OF MURDER HERSELF, MS JACKSON HAD AN INCENTIVE TO NOT BE FORTHCOMING WITH ANY TRUTH OR VERACITY.

MR. MASON CONTENDS THAT BECAUSE THE EVIDENCE WHICH THE STATE PROOFFERED THROUGH THE TESTIMONY OF THEIR FIREARM AND TOOLMARK EXPERT WAS INCONCLUSIVE AND GAVE NO PROBATIVE VALUE IN TIEING PETITIONER MASON TO THE WEAPON OR THE CRIME. See UNITED STATES V. DeWATSON, 792 F.3d 1174. (2014) AS STATED:

> "NO TRADITION IS MORE FIRMLY ESTABLISHED IN OU SYSTEM OF LAW THAN ASSURING TO THE GREATEST EXTENT THAT IT'S INEVITABLE ERRORS ARE MADE IN FAVOR OF THE GUILTY, RATHER THAN AGAINST THE INNOCENT. OUR LEGAL TRADITION HAS ALWAYS FOLLOWED BLACKSTONE'S PRINCIPLE THAT "IT IS BETTER THAT TEN GUILTY PERSONS ESCAPE THAN THAT ONE INNOCENT SUFFER". THE MORAL FORCE OF OUR CRIMINAL LAW REQUIRES THIS ALLOCATION OF RISK OF ERROR, BOTH WITH RESPECT TO THE STANDARD OF PROOF AND TO SCIENTIFIC TESTING OF NEWLY DISCOVERED EVIDENCE CRITICAL TO GUILT. "IT IS CRITICAL THAT THE MORAL FORCE OF THE CRIMINAL LAW NOT BE DILLUTED BY A STANDARD OF PROOF [OR WE SUGGEST, A REJECTION OF SCIENTIFIC TESTING,] THAT LEAVES PEOPLE IN DOUBT WHETHER INNOCENT MEN ARE BEING CONDEMNED.

AND FOR THE FOREGOING REASONS, MR. MASON SHOULD AT THE VERY LEAST, BE GIVEN A NEW EVIDENTIARY HEARING WITH THE ASSISTANCE OF COUNSEL WHO IS COMPETENT TO HAVE THE CLAIM OF ACTUAL INNOCENCE ADJUDICATED FAIRLY UPON THE MERITS OF IT, AND WITHIN THE STANDARDS ESTABLISHED BY CONSTITUTIONALLY SOUND DUE PROCESS.

AFFIDAVIT OF: MACK MASON

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

TO WHOM IT MAY CONCERN:

I, MACK MASON the undersigned, do hereby swear that all statements, facts and events within my foregoing Affidavit are true and correct of my own knowledge, information and belief, and as to those, I believe them to be True and Correct. Signed under the penalty of perjury, pursuant to, NRS. 29.010; 53.045 ; 208.165, and state the following: THAT ANY FACTS NOT SPECIFICALLY MENTIONED IN THIS AFFIDAVIT ARE NOT WAIVED AS ADDITIONAL FACTS MAY COME TO MEMORY AFTER THIS AFFIDAVIT IS SIGNED. THAT THE CONTENTS OF THIS AFFIDAVIT ARE TRUE AND ACCURATE TO THE BEST OF MY PERSONAL KNOWLEDGE

THAT THIS AFFIDAVIT IS EXECUTED UNDER THE PENALTY OF PERJURY PURSUANT TO NRS 208.165.

1) I AM, MACK MASON, OVER THE AGE OF 21 AND AN INMATE WHO IS INCARCERATED AT SDCC, INDIAN SPRINGS, NEVADA.

2) THAT ANY OF THE EVIDENTIARY HEARINGS HELD BETWEEN MAY 14, 2003 AND JULY 5th, 2016, OF WHICH FOR NONE OF THE COURT APPEARANCES WERE I PRESENT FOR, NOR DID I HAVE COUNSEL TO REPRESENT ME.

3) THAT THE PETITION FILED ON THE 9th DAY OF JUNE, 2016. ALLEGED ACTUAL INNOCENCE CLAIMS WHICH WARRANTED A FULL AND FORMAL EVIDENTIARY HEARING WITH APPOINTED COUNSEL

FURTHER YOUR AFFIANT SAYETH NAUGHT.

EXECUTED At: Indian Springs, Nevada, this 20th Day Of October, 2016.

BY: Michael McLaw
for: Mack Mason #69060
Post Office Box-208(SDCC)
Indian Springs, Nevada. 89070./
Affiant, In Propria Personam:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

APPELLANTS OPENING BRIEF
(Title of Document)

filed in District Court Case number C161426; Supreme Court No. 71296

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

-OR-

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

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

_____
(State specific law)

-or-

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

Mack Mason
Signature

10/20/16
Date

MACK MASON
Print Name

PETITIONER PROPER PERSON
Title

CERTFICATE OF SERVICE BY MAILING

I, MACK MASON, hereby certify, pursuant to NRCP 5(b), that on this 20th day of OCTOBER, 2016, I mailed a true and correct copy of the foregoing, "APPELLANTS OPENING BRIEF"

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
201 S. CARSON STREET #201
CARSON CITY, NEVADA
89701

ADAM P. LAXALT
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
100 N CARSON STREET
CARSON CITY, NEVADA
89701-4717

CC:FILE

DATED: this 20th day of OCTOBER, 2016.

Mack Mason
MACK MASON # 69060
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS: