

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

TOMMY STEWART,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Dec 28 2020 09:42 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

SUPREME COURT CASE NO. 80084

DISTRICT COURT CASE NO.  
C-15-305984-1

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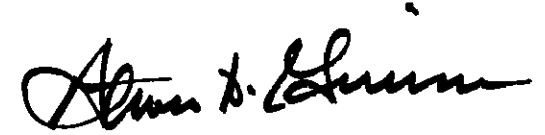
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4 IN THE JUSTICE COURT OF THE LAS VEGAS TOWNSHIP

5 COUNTY OF CLARK, STATE OF NEVADA Electronically Filed  
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7



CLERK OF THE COURT

8 THE STATE OF NEVADA, )

9 Plaintiff, )

10 Vs ) Case No. 15F02411X

11 TOMMY STEWART, )

12 Defendant. )

13

14 REPORTER'S TRANSCRIPT  
15 OF  
16 PRELIMINARY HEARING

17 BEFORE THE HONORABLE ERIC A. GOODMAN

18 JUSTICE OF THE PEACE

19 TAKEN ON THURSDAY, APRIL 16, 2015  
AT 9:00 A.M.

20 APPEARANCES:

21 For the State: TIERRA JONES  
Deputy District Attorney

22 For the Defendant: KATRINA ROSS  
23 Deputy Public Defender

24

25 REPORTED BY: PATSY K. SMITH, C.C.R. #190

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1 LAS VEGAS, NEVADA, THURSDAY, APRIL 16, 2015

2 \* \* \* \* \*

3

4 THE COURT: Let's go on the record with  
5 Thomas Stewart.

6 This is the date and time set for the  
7 preliminary hearing.

8 Is the State ready to proceed?

9 MS. JONES: Yes, your Honor.

10 THE COURT: Is the defense ready?

11 MS. ROSS: Yes, your Honor.

12 We'd invoke the exclusionary rule.

13 THE COURT: It's my understanding there  
14 was a Sargent Notice filed in this case?

15 MS. ROSS: Correct, your Honor.

16 THE COURT: So the defendant's presence is  
17 waived at this point.

18 You have four to five witnesses?

19 MS. JONES: We have actually six, your  
20 Honor.

21 THE COURT: Six witnesses?

22 MS. JONES: Yeah.

23 THE COURT: Was there an offer, just for  
24 the record?

25 MS. JONES: There was never an offer

1 extended on this case at this point, your Honor.

2 THE COURT: Okay.

3 Are you able to do this without the  
4 defendant being present?

5 MS. JONES: We are, your Honor. We do  
6 have his booking photo. We intend to have that admitted  
7 into the evidence.

8 THE COURT: Has that been marked?

9 MS. JONES: It has.

10 THE COURT: Counsel, did you have receive  
11 a copy of the photograph?

12 MS. ROSS: Yes, I did, your Honor.

13 THE COURT: Is it just the photo or did  
14 you remove the other information?

15 MS. JONES: Yeah, just the one that has  
16 the photo, no information.

17 THE COURT: Okay. Just wanted to make  
18 sure, okay.

19 All right, the exclusionary rule has been  
20 invoked. It looks like the courtroom is empty.

21 State, why don't you call your first  
22 witness.

23 MS. ROSS: Your Honor, just as a matter of  
24 housekeeping, on one of the exhibits, I talked to the State  
25 about it, I believe the fingerprint exhibit, I don't have

1 any objection. I haven't received a copy, but, for the  
2 record, I would request a copy.

3 MS. JONES: The actual archive fingerprint  
4 where the defendant's fingerprints were collected, it's  
5 something we DT'd the lab to bring. She brought it today.

6 Today is the first time I have seen it.  
7 I'm going to ask it be admitted. I told counsel we don't  
8 have a copy for our file. That's the only copy. We will  
9 get it from her, but we will give her a copy, but the lab  
10 tech brought it this morning.

11 MS. ROSS: Thank you.

12 THE COURT: Who is first?

13 MS. JONES: Natasha Lumba.

14

15 (Off the record discussion not reported.)

16

17 NATASHA LUMBA,

18 having been first duly sworn to tell the truth, the whole  
19 truth and nothing but the truth, testified and said as  
20 follows:

21

22 THE CLERK: Please be seated.

23 State your name and spell it for the  
24 record.

25 THE WITNESS: My name is Natasha Lumba,

1 N-A-T-A-S-H-A L-U-M-as-in-Mary-B-as-in-boy-A.

2 THE CLERK: Thank you.

3 THE COURT: State, you may proceed.

4 MS. JONES: Thank you, your Honor.

5

6 DIRECT EXAMINATION

7 BY MS. JONES:

8 Q Natasha, I would like to draw your  
9 attention back to January 20th, 2015. Were you here in Las  
10 Vegas on that day?

11 A Yes.

12 Q Did something different happen to you that  
13 day?

14 A Yes.

15 Q Okay, can you tell the Court what  
16 happened -- what were you doing on that day?

17 A Well, I went home at around 11 P.M. and I  
18 was walking from my parking spot to my front door.

19 As I got to the front gate of my patio, I  
20 noticed, in the corner of my eye, two black men walking  
21 very quickly towards me. They kind of came out of no where  
22 and I could tell, by the way they were looking at me, they  
23 were -- they were -- they weren't just walking by, they  
24 were looking at me and I -- you know, I started saying  
25 like, Oh, my God, oh, my God, and, as soon as I did that,

1 the shorter one of them said, Don't yell or we'll hurt you,  
2 and the other one held up a gun to me.

3 Q When he held up the gun, where was the gun  
4 pointed?

5 A It was pointed me.

6 Q At you?

7 A Yes.

8 Q At what part of your body?

9 A I guess my torso.

10 Q In the front or in the back?

11 A The front. I was facing them kind of at  
12 this point.

13 Q Okay.

14 You said you were going to your home.  
15 What is your address?

16 A 805 Rock Springs Drive, apartment 101, Las  
17 Vegas, Nevada, 89128.

18 Q Is that located here in Clark County?

19 A Yes.

20 Q Okay.

21 And so you said that one of them was  
22 holding a 2 to you. When he was holding the gun, what else  
23 happened after that?

24 A They told me to open my front door and so  
25 I did. They followed me inside and I walked in. I dropped

1 everything that I had. They told me to go into my bedroom  
2 and lay face down on the ground.

3 Q Okay, I'm going to back up and ask you a  
4 couple clarifying questions about that.

5 When you said they told you to open your  
6 front door, did you want to let them in your house?

7 A Absolutely no.

8 Q Did you know these individuals?

9 A No.

10 Q Okay.

11 So you opened the front door at their  
12 direction?

13 A Yes.

14 Q When you opened your front door, you said  
15 they came in. Were they in front of you or behind you?

16 A Behind me.

17 Q Okay, so they were behind you.

18 Did they still have the gun at this point?

19 A Well, I had my back to them, so I'm not  
20 sure if they were still pointing it at me, but, you know,  
21 they showed me that they had a gun.

22 Q And did you have a reason to believe that  
23 they no longer had the gun?

24 A No.

25 Q Okay.

1                   So you went into your house at this point  
2           and you said they. Were they both acting together?

3                   A           Yes.

4                   Q           Okay.

5                   And so when they told you to go into your  
6           bedroom and lie on the ground, did you do that?

7                   A           Yes.

8                   Q           Okay.

9                   Then what happened after you got on the  
10          ground?

11                  A           They asked me where my purse, wallet, and  
12          phone were. I told them it was on the ground where I  
13          dropped it about five feet from my front door.

14                  They then started asking me questions  
15          like, you know, where the money was. They were ransacking  
16          my apartment pretty much, just looking for money.

17                  They asked me what they could sell for  
18          money. They went into my second bedroom and got my laptop.

19                  They also -- yeah, they got my phone out  
20          of my purse and my wallet and there was only two dollars in  
21          my wallet. They asked for the pin for my -- they first  
22          asked if it was a debit or credit card that I had. They  
23          were debit cards. They asked what the pins were and I told  
24          them and, for most of the time, one of them was kind of  
25          watching me while the other one was, you know, looking

1 around, and is like looking through everything and they  
2 were kind of taking turns doing that.

3 They looked into my jewelry box and I told  
4 them that it was all costume --

5 Q Okay, Natasha, I will kind of stop you for  
6 a second.

7 You said they were kind of taking turns.  
8 Did they take turns like one was watching while the other  
9 one would go through your things?

10 A Yes.

11 Q Did they go through almost all of your  
12 things?

13 A Yes.

14 Q Did they appear to ransack your apartment?

15 A Yes.

16 Q When you said they went through the  
17 jewelry box, where was your jewelry box located?

18 A It was located in the hallway. There are  
19 two. There is one hung up on the wall and another one that  
20 was like a chest. It was sitting below it.

21 Q You saw them go through your jewelry box?

22 A Yeah. Well, they actually had me open it  
23 for them and then, you know, I showed them. I said, It's  
24 all costume, you know, it's not valuable.

25 There was one item, it was a fake gold

1 chain. They asked me if it was real. I told them it was  
2 not.

3 Q Did there come a point in time where they  
4 asked if you had money hidden in your bra?

5 A Yes.

6 Q Did they ask you if you have money hidden  
7 anywhere else?

8 A Yes.

9 Q Where else did they ask you?

10 A They were actually going to flip my  
11 mattress. I told them, There is no money there. They kept  
12 asking me, you know, Where is the cash? Like, How do you  
13 have so much shit if you have no cash?

14 So they -- one of them had me turn over  
15 and he stuck his hand up my bra and down my pants.

16 Q When you say he stuck his hand down your  
17 pants, did he go underneath your underwear or was it over  
18 your underwear?

19 A Underneath my underwear.

20 THE COURT: We need to clarify it. There  
21 are two different people.

22 Short one or the taller one?

23 THE WITNESS: Shorter one.

24 Q (BY MS. JONES) So the shorter one stuck  
25 his hand under your pants and up your bra?

1 A Yes, up my bra.

2 Q What was the taller one doing when the  
3 shorter one was doing this?

4 A He was somewhere else in the apartment.

5 Q Okay.

6 And you said that his -- when he stuck his  
7 hand down your pants, his hand went under your underwear?

8 A Yes.

9 Q So did he touch your skin?

10 A Yes.

11 Q Okay.

12 And did you want the defendant to do that?

13 A No.

14 Q Okay.

15 And you said that he also ran his hand up  
16 your bra?

17 A Uh-huh.

18 Q Okay.

19 And at any point did he penetrate you when  
20 he did that?

21 A No.

22 Q But he did run his hand down your  
23 underwear?

24 A Yes.

25 Q Okay.

1                               And how did this end? How did this -- how  
2    did they leave?

3                   A       Well, they told me that if I called the  
4    cops, they would come back and kill me.

5                   Q       Who said that, the tall one or the short  
6    one?

7                   A       Both of them at different times. I  
8    overheard them talking when they were in the living room.  
9    The short one -- the tall one said that. I said I wasn't  
10   going to call the cops. The shorter one said, I don't  
11   believe her. So he came back in and told me that if I  
12   called the cops, they would come back and kill me, they  
13   knew where I lived.

14                           They also asked if I had my social  
15   security card, which I did not, and they -- they took my  
16   laptop, my phone, and my camera and then they left quietly.

17                   Q       Okay.

18                           And what was the brand name on your  
19   laptop, do you remember?

20                   A       Toshiba.

21                   Q       And what type of phone did they take?

22                   A       It was a yellow 5C.

23                   Q       And you said they also took your camera?

24                   A       Yes.

25                   Q       And, earlier, you said that you had two

1       dollars in your wallet. Did they take that?

2                   A       Yes.

3                   Q       And that was the only cash that you had?

4                   A       Yes.

5                   Q       And you said that when they were leaving,  
6       they said if you called the police, they were going to kill  
7       you?

8                   A       Yes.

9                   Q       Did you call the police?

10                  A       Later, yes.

11                  Q       And why did you wait?

12                  A       I was really scared. I was really scared.  
13       I also didn't have my phone.

14                               So I then got in my car, which I was  
15       afraid to do because before they left, they also asked me  
16       what kind of car I had and so I was afraid that, I don't  
17       know, they might follow me, they might have been waiting  
18       for me or something, but -- so I got in my car and I drove  
19       to my friend's place and, you know, I felt safe there and  
20       that's when I called 911.

21                  Q       And about how long after they had left  
22       your house was it that you called 911?

23                  A       I would say about 20 minutes.

24                  Q       Okay.

25                               And you called 911 after you got to your

1 friend's house because you felt safe there?

2 A Yes.

3 Q And the entire time that they were in your  
4 house, were you afraid?

5 A Yes.

6 Q The entire time?

7 A Yes.

8 Q Did you want them to have your cell phone,  
9 your laptop, your camera or any of those things?

10 A No.

11 Q And did you ever voluntarily let them into  
12 your house?

13 A No.

14 Q While they had you down on the ground, did  
15 you feel like you were free to leave?

16 A No.

17 Q And one of them was watching you at all  
18 times?

19 A There were a few points at which neither  
20 of them were watching me, but where I was, you know, in my  
21 bedroom in relation to the rest of the apartment, you know,  
22 they could see me from the living room, the kitchen, the  
23 hallway, so, yeah, I couldn't like make a run for it or  
24 anything.

25 Q Did they still have the gun while they

1       were inside your house?

2                   A        I mean I can't know for certain.  They  
3       didn't, you know, wield it while they were in my house,  
4       but, I mean, I assumed that they did.

5                   Q        You thought that they did?

6                   A        Yes.

7                   Q        Okay.

8                           And you had no reason to believe they  
9       didn't bring it in?

10                  A        No, I had no reason to believe that.

11                  Q        After you called the police, did Metro  
12       respond?

13                  A        Yes.

14                  Q        Did there come a point in time where you  
15       talked to a detective named Detective Abell?

16                  A        Yes.

17                  Q        Okay.

18                           Was that at a substation or where did you  
19       talk to him?

20                  A        I talked to him over the phone and then he  
21       met with me at my work.

22                  Q        Okay, so he came down to your work?

23                  A        Yes.

24                  Q        When he came down to your work, did he  
25       show you a photo lineup?

1                   A       Yes.

2                               MS. JONES:  Your Honor, if I may approach  
3   the witness?

4                               THE COURT:  You may.

5                   Q       (BY MS. JONES)  I'm showing you what's  
6   been marked as State's Proposed Exhibit 2, do you recognize  
7   what that is?

8                   A       Yes, this is my handwritten testimony  
9   about the photo lineup and what I wrote out.

10                  Q       Okay, we will get to that in just a  
11   second.

12                  A       Okay.

13                  Q       And so this is what you hand-wrote when  
14   you did the photo lineup with Detective Abell?

15                  A       Yes.

16                  Q       I'm showing you the second page of State's  
17   Proposed Exhibit 2, does that appear to be the photo lineup  
18   Detective Abell showed you?

19                  A       Yes.

20                  Q       Does that fairly and accurately depict the  
21   photo lineup he showed you?

22                  A       Yes.

23                  Q       There is markings on pictures two and  
24   three.  Did you make those markings?

25                  A       Yes, that's my signature.

1 MS. JONES: Your Honor, at this point, the  
2 State would move for the admission of State's Proposed  
3 Exhibit 2.

4 THE COURT: Any objection?

5 MS. ROSS: Not for purposes of the  
6 preliminary hearing.

7 THE COURT: Okay, State's Proposed 2 will  
8 come in as State's 2.

9 Q (BY MS. JONES) When Detective Abell came  
10 to your work and talked to you about this, did he go over  
11 the instructions with you before you did this?

12 A Yes.

13 Q So you understood what was going on?

14 A Yes.

15 Q Were you able to identify anyone in this  
16 photo lineup?

17 A Well, I told him that these number two and  
18 three looked a lot like them in certain ways. Like number  
19 two, he looked more like the shorter one because of his  
20 face shape, but there were a few differences like his  
21 lips -- number two's lips are bigger and he was also a  
22 little bit darker or this picture is a little bit darker  
23 and the nose -- the eyes are a little different.

24 Like there are some differences, but, you  
25 know, there are similarities as well and then, with number

1       three, he looked more like the taller one.

2                   Q       And what were the similarities?

3                   A       The similarities being the eyes and the  
4       face shape.

5                   Q       Okay, on number three?

6                   A       Yeah.

7                   Q       Okay.

8                            So those were the markings that you put on  
9       this photo lineup?

10                  A       Yes.

11                  Q       Okay.

12                           And you said that number three had similar  
13       characteristics and looked like the tall guy?

14                  A       Yes.

15                  Q       Okay.

16                           MS. JONES: Your Honor, if I can just have  
17       the Court's brief indulgence?

18                  Q       And the entire time that this was  
19       happening, did it appear to you that the two defendants  
20       were acting together?

21                  A       Yes.

22                  Q       Was any of your property ever returned to  
23       you?

24                  A       No.

25                  Q       So you have never gotten anything back?

1 A No.

2 MS. JONES: Pass the witness, your Honor.

3 THE COURT: Okay.

4 Any cross?

5 MS. ROSS: Yes. Thank you, your Honor.

6

7 CROSS-EXAMINATION

8 BY MS. ROSS:

9 Q Good morning, Ms. Lumba.

10 I just want to do a little clarification  
11 before we start because you keep saying taller and shorter.

12 Did you fill out a statement in this case?

13 A Fill out a statement?

14 Q A handwritten statement that you gave to  
15 the police in this case?

16 A Yes.

17 Q Did you tell the police how tall you  
18 thought that these people were?

19 A Yes.

20 Q And do you remember how tall you thought  
21 they were?

22 A I thought that they were about -- the  
23 shorter one was maybe 5-9 to 5-11.

24 Q Okay.

25 A And the taller one was maybe like maybe

1 two inches taller than the shorter one.

2 Q Okay.

3 So the shorter one 5-9 to 5-11 and the  
4 taller one 5-11 to 6 feet or so?

5 A Yeah, I believe so.

6 Q Okay.

7 How tall are you?

8 A I'm 5-3, but I wear like high heels. I'm  
9 actually wearing the same shoes I was wearing that day.

10 Q Okay.

11 How about tall are you with your heels?

12 A About 5-6.

13 Q And were these two men taller than you on  
14 that night?

15 A Yes.

16 Q Okay.

17 I'm 5-11. Were they taller than me or  
18 about my height?

19 A I would say about your height.

20 Q Okay.

21 So closer to my height than your height?

22 A Yes.

23 Q All right, Thank you.

24 And then I wanted to go back just a little  
25 bit to when they first approached you.

1                   You stated that one had a gun and that was  
2   the tall one, correct?

3                   A       Yes.

4                   Q       Okay.

5                   Did you see the gun?

6                   A       Yes.

7                   Q       What color was it?

8                   A       Black.

9                   Q       Could you tell what type of gun it was?

10                  A       I mean I don't know that much about guns,  
11   but it was a handgun.

12                  Q       Like a pistol?

13                  A       It looked more like a semi-automatic.

14                  Q       Okay.

15                  Was it big or small?

16                  A       Small, like this big maybe.

17                  Q       Okay, for the record, you are holding your  
18   hands maybe six to eight inches?

19                  A       Yes.

20                  Q       Okay.

21                  And what were the people wearing when they  
22   approached you?

23                  A       They were wearing dark hoodies.

24                  Q       Okay.

25                  A       And dark pants. The taller one was

1 wearing dark jeans and the taller one was wearing Adidas  
2 sneakers with the black stripes on the side.

3 Q Okay.

4 You said they were wearing hoodies. Were  
5 they pulled over their face?

6 A When they first approached me outside,  
7 they were not, but once they were inside, they had pulled  
8 the draw strings really tight so that I can pretty much  
9 see, you know, only half of their faces.

10 Q Okay, you could see their eyes?

11 A Yes, I could see their eyes.

12 Q Could you see their nose?

13 A Yes.

14 Q Could you see their mouths?

15 A No.

16 Q You testified earlier, when they  
17 approached you, you noticed them coming out from the corner  
18 of your eyes?

19 A Yes.

20 Q Were they coming from the parking lot?

21 A I'm honestly not sure. I didn't realize  
22 anyone was there until they were really close by. I don't  
23 know what direction they came from because by the time that  
24 I noticed they were there, they were probably five feet  
25 away, if not closer.

1 Q Okay.

2 And this was late at night, correct?

3 A Yes.

4 Q So it was dark outside?

5 A Yes, but there's a, you know, street light

6 right outside of my house.

7 Q Okay.

8 And you testified that the taller one held

9 the gun at first. Did the shorter one ever hold the gun?

10 A No, I don't think so.

11 Q Okay.

12 Then you testified they made you go inside

13 your house?

14 A Yes.

15 Q And they made you lay down in your

16 bedroom, correct?

17 A Yes.

18 Q With the layout of your house, is the

19 bedroom secluded in your apartment?

20 A Yes, kind of. It's in the back corner.

21 Q Okay.

22 And, also, just for clarification and I

23 think the State got a little bit into this, you kept saying

24 they during this whole time?

25 A Yes.

1 Q Did one speak more than the other?

2 A The shorter one spoke more than the --  
3 more than the other one.

4 Q Okay.

5 And you did not see the gun once you got  
6 in the apartment?

7 A No, I did not.

8 Q Okay.

9 You testified that one would watch you  
10 while the other one ransacked the apartment. Who was  
11 watching you during this time, was it the tall one or the  
12 short one?

13 A During which time?

14 Q During this whole time.

15 Did they take turns?

16 A They took turns.

17 Q They took turns.

18 You testified you could see them  
19 ransacking your apartment, correct?

20 A Well, I heard them ransacking it and, you  
21 know, after they left, I saw what they had done.

22 Q Okay.

23 A But in terms of what I actually saw, I saw  
24 them looking in my closet in the hallway because that's  
25 where I could see from where I was lying down and when they

1       were looking through my bedroom.

2                   Q       Okay.

3                            You couldn't see anything that was  
4       happening in the living room?

5                   A       I could see part of the living room from  
6       where I was laying down.

7                   Q       Okay.

8                            And then you also testified that you had a  
9       jewelry box. That was in the hallway, correct?

10                  A       Yes.

11                  Q       And you testified that they had you open  
12       the jewelry box, correct?

13                  A       Yes.

14                  Q       Okay.

15                           And then you testified that the shorter  
16       one was the one who went through your bra and underwear,  
17       correct?

18                  A       Yes.

19                  Q       And the taller one was not in the room  
20       when that happened?

21                  A       No.

22                  Q       You also testified that they took a  
23       laptop, a phone, and a camera, correct?

24                  A       Yes.

25                  Q       They did not take any jewelry?

1                   A        They did not take any jewelry.

2                   Q        And then you testified -- brief

3       indulgence.

4                           And then, ma'am, you testified that you

5       went to a friend's house, correct?

6                   A        Yes.

7                   Q        What friend?

8                   A        My friend Hunt.

9                   Q        Hund (sic)?

10                  A        Hunt.

11                  Q        Do you have a last name?

12                  A        No, his last name is Hunt.

13                  Q        First name Bridgeford (phonetic)?

14                  A        Bidgeford (phonetic).

15                  Q        Bidgeford, I apologize. I didn't

16       understand you.

17                  A        Last name Hunt.

18                  Q        Thank you.

19                           That's where you called the police?

20                  A        Yes.

21                  Q        Okay, when you called the police, you

22       wrote a statement that night, correct?

23                  A        Yes.

24                  Q        And you signed that statement, correct?

25                  A        Yes.

1                   Q       On that statement, do you remember that  
2       you marked you could not identify the suspect?

3                   A       I did not mark that. The police officer  
4       asked me if I could identify them in a lineup and I said I  
5       wasn't sure --

6                   Q       Okay.

7                   A       -- and he marked that.

8                   Q       So the police officer checked that box?

9                   A       Yes.

10                  Q       Did the police officer write anything else  
11       on the report or is this your handwriting?

12                  A       I can't see it.

13                  Q       Sure.

14                         MS. ROSS: If I may briefly?

15                         THE COURT: You can approach.

16

17                         (Off the record discussion not reported.)

18

19                         MS. ROSS: I'm just showing her the copy  
20       of the police report.

21                  Q       Did you personally write that out?

22                  A       Yes, that's my handwriting.

23                  Q       And you signed that there at the bottom?

24                  A       Yes, yes.

25                  Q       Just to go the testimony, I'm pointing to

1 the box that says, Can you identify the suspect, the  
2 officer checked that?

3 A Yes.

4 Q Okay.

5 Then, Ms. Lumba, you stated later you met  
6 with Detective Abell to go through a photo lineup, correct?

7 A Yes.

8 Q And you were shown that photo lineup -- if  
9 I may approach to grab it, please?

10 THE COURT: Yes, you may.

11 MS. ROSS: And if I may approach the  
12 witness?

13 Q Ms. Lumba, I'm showing you what is  
14 previously admitted as State's Exhibit 2. This is the  
15 lineup and you have identified or the person in the slot  
16 that's number two as the shorter one, correct?

17 A Yes.

18 Q So that suspect would be around 5-9,  
19 correct, based on what we previously talked about?

20 A Or 5-10, yeah, ish.

21 Q And the person in number three you  
22 identified as the taller suspect?

23 A Yes.

24 Q That would be around my height, 5-11,  
25 maybe 6 foot?

1 THE REPORTER: Yes? No?

2 THE WITNESS: Yes, yes, sorry.

3 MS. ROSS: Sorry.

4 Q So the person in number three, you stated  
5 had similar features to the taller one you saw?

6 A Yes.

7 Q And you described some of those similar  
8 features. What is different than the suspect you saw?

9 A What's different?

10 The nose.

11 Q Okay.

12 A I would say the -- the face shape is  
13 similar, but it's a little wider.

14 Q This picture is wider than the person you  
15 remember from that night?

16 A Yes.

17 Q Okay. Thank you.

18 Anything else that sticks out?

19 A The nose.

20 Q The nose is different?

21 A Different.

22 Q Okay.

23 And then you have also testified that you  
24 wrote this statement on the fingerprints (sic) and signed  
25 it in the presence of the officer. Did the officer tell

1       you anything about the pictures before he let you view  
2       them?

3                   A       Tell me anything about them?

4                   Q       Did he describe anything about what you  
5       would be seeing?

6                   A       No.

7                   Q       Okay.

8                           MS. ROSS: Just brief indulgence.

9                   Q       Ms. Lumba, you testified that you didn't  
10      invite these two people into your apartment, correct?

11                  A       Correct.

12                  Q       Do you ever have people over to your  
13      apartment?

14                  A       Yes, people that I know.

15                  Q       Okay.

16                           Do you ever host any parties at your  
17      apartment?

18                  A       I have never had a party at my apartment.

19                  Q       Do you have people come over just to  
20      hangout sometimes?

21                  A       Sometimes, yes.

22                  Q       And, just very briefly, you have testified  
23      that while you were in the bedroom, there were points that  
24      the two people were not in there with you?

25                  A       Correct.

1 MS. ROSS: No further questions. Thank  
2 you.

3 THE COURT: All right.  
4 Any redirect?

5 MS. JONES: Yes, your Honor, just a  
6 couple.

7

8 REDIRECT EXAMINATION

9 BY MS. JONES:

10 Q Ms. Lumba, when you were talking about  
11 maybe 5-9, are you giving an estimate about the height?

12 A Yes.

13 Q Okay, because you didn't measure anybody?  
14 You don't know for sure?

15 A No, I don't know for sure.

16 Q Okay.

17 And do you know whether or not either of  
18 the people went through your jewelry box while you were in  
19 the room?

20 A While I was in the room --

21 Q While you were in the bedroom on your  
22 floor, could you see your jewelry box?

23 A Oh, yes. I heard them going through it  
24 and after they left, I saw that they taken all the drawers  
25 out.

1 Q Okay.

2 A So, yeah, they went through it while I was  
3 not there.

4 Q Okay.

5 And the photo lineup, you saw that later  
6 on, you didn't view it that night; is that correct?

7 A Correct.

8 Q And counsel asked you whether or not you  
9 invite people over and your response was people that I  
10 know. Is that fair?

11 A Yes.

12 Q Do you know someone by the name of Tommy  
13 Stewart?

14 A No.

15 Q Do you know -- have you ever invited that  
16 person over to your house?

17 A No.

18 Q Are you aware of a time that that person  
19 was ever in your house?

20 A I don't know who Tommy Stewart is.

21 Q Okay.

22 So you are not aware that he's ever been  
23 to your house?

24 A I am not aware.

25 MS. JONES: Nothing further, your Honor.

1 THE COURT: Okay.

2 Anything else before I excuse her?

3 MS. ROSS: Just very briefly, your Honor.

4 Thank you.

5 THE COURT: Okay.

6

7 RECROSS EXAMINATION

8 BY MS. ROSS:

9 Q Ms. Lumba, I agree with the State that you  
10 did not measure how tall those people were that night,  
11 correct?

12 A Right.

13 Q But you stated you were wearing heels and  
14 you were about 5-6 that night, correct?

15 A Yes.

16 Q And both of them were taller than you?

17 A Yes.

18 Q By a few inches, correct?

19 A Yes.

20 Q And then the State asked you if you knew  
21 anyone by the name of Tommy Stewart. Do you know anyone by  
22 the name of Raymond?

23 A Raymond?

24 Q Raymond. Do you have any friends named  
25 Raymond?

1                   A       No, not that I can think of.

2                   Q       Do you have any acquaintances named  
3       Raymond?

4                   A       I have a cousin in the Philippines named  
5       Raymond.

6                   MS. ROSS: No further questions. Thank  
7       you.

8                   THE COURT: Can I excuse her?

9                   MS. JONES: Yes, your Honor.

10                  THE COURT: Okay, ma'am, thank you for  
11       testifying here today. You are free to stick around to  
12       find out what happens. You are free to take off at this  
13       point.

14                  THE WITNESS: Okay.

15                  THE COURT: Do you want her to stay here  
16       or can she go?

17                  MS. JONES: She's free to go, your Honor.

18                  THE COURT: Did you sign off -

19                  MS. JONES: I have got it right now. I  
20       will give it to her on her way out.

21                  THE COURT: Okay. Thank you.

22                  THE WITNESS: Thanks.

23                  MS. JONES: Your Honor, the State's next  
24       witness is Noreen Charlton.

25                  THE COURT: Okay.

1

2

(Off the record discussion not reported.)

3

4

CRIME SCENE ANALYST NOREEN CHARLTON,

5

having been first duly sworn to tell the truth, the whole

6

truth and nothing but the truth, testified and said as

7

follows:

8

9

THE COURT: Please be seated.

10

State your name and spell it for the

11

record.

12

THE WITNESS: Noreen Charlton, N-O-R-E-E-N

13

C-H-A-R-L-T-O-N.

14

THE CLERK: Thank you.

15

THE COURT: You may proceed.

16

MS. JONES: Thank you, your Honor.

17

18

DIRECT EXAMINATION

19

BY MS. JONES:

20

Q

Noreen, can you tell us how you are

21

employed?

22

A

I'm a Senior Crime Scene Analyst with the

23

Las Vegas Metropolitan Police Department.

24

Q

And how long have you been employed there?

25

A

Six and a half years.

1                   Q       Noreen, I would like to draw your  
2       attention back to I believe it's January -- late night  
3       January 20th, but actually the morning hours of January  
4       21st?

5                   A       Correct.

6                   Q       Were you dispatched to 805 Rock Springs?

7                   A       Yes, I was.

8                   Q       Do you remember what time you were  
9       dispatched out there?

10                  A       I don't know the dispatch time, but I  
11       arrived at approximately midnight:50.

12                  Q       So that would actually be January 21st?

13                  A       Yes.

14                  Q       So you arrived at 805 Rock Springs,  
15       apartment 101?

16                  A       Correct.

17                  Q       And, Noreen, what type of background do  
18       you have? Can you tell us what type of training you have  
19       to be a crime scene analyst?

20                  A       I have a Bachelor of Science Degree in  
21       Bioscience from John Carroll University in Cleveland, Ohio.

22                               When I was hired on the Las Vegas  
23       Metropolitan Police Department, I completed a 10 week crime  
24       scene analyst academy followed by 12 weeks in the field  
25       training and evaluation program.

1                   In 2012, I was promoted to the position of  
2   Senior Crime Scene Analyst and over the past six and a half  
3   years, I have completed approximately 1200 hours of  
4   training.

5                   Q       And, Noreen, approximately how many crime  
6   scenes have you responded to?

7                   A       Oh, goodness. Somewhere in the area of  
8   3,000ish.

9                   Q       When you responded to the Rock Springs  
10   address, what were your duties at the Rock Springs address?

11                  A       My duties were to document the scene  
12   through my notes and photography. I then completed a crime  
13   scene search to identify any possible evidence and then I  
14   conducted latent print processing.

15                  Q       And so did you take some photos in this  
16   case?

17                  A       Correct.

18                  Q       Let's talk about the latent print  
19   processing.

20                         What did you do to conduct the latent  
21   print processing?

22                  A       So after I completed the photography, I  
23   went through the residence to look for anything out of  
24   place, potentially disturbed or anything reported to me as  
25   having been disturbed.

1 I may have looked at surfaces that may  
2 have had latent prints and then I continued to powder and  
3 process them to look for any positive results.

4 Q Were you able to powder process and get  
5 any positive results?

6 A Yes, I was.

7 Q Where were those positive results  
8 obtained?

9 A Positive results were on the exterior side  
10 of the front door, on a jewelry box on top of the washer in  
11 the laundry room, and also on a coin bank from the bedroom.

12 Q And those were the areas where you  
13 recovered possible prints?

14 A Correct.

15 Q When you recover a possible latent print,  
16 what do you do with the print?

17 A Once it's developed and I can see there is  
18 enough detail to recover it, I place a piece of tape on it  
19 and that tape is affixed to a latent print card.

20 Once I take it back to the lab, I affix a  
21 label on that, name on it, my P-number, the date I  
22 recovered it, the location of the crime, and the location  
23 of the print.

24 I then initial both the label and the tape  
25 on the card so that it's known that I'm the one that placed

1       them there.

2                       They are then placed into an envelop and  
3       sealed and that's dropped off for the latent print  
4       examiners.

5               Q       Is there an event number that's associated  
6       with that so that we know what event number it comes from?

7               A       Correct.

8               Q       What is the event number on this event?

9               A       It was 150120-4490.

10              Q       And would that be the event number that  
11       would be associated with all the evidence from this case?

12              A       Yes.

13              Q       So the photos you took, the prints,  
14       everything would have that event number?

15              A       Correct.

16              Q       That's how we would know it came from this  
17       case?

18              A       Yes.

19              Q       Once the prints are dropped for the print  
20       examiner, do you do anything else with the prints?

21              A       No. Once I drop them off, I log them, and  
22       them someone else comes and picks them up and they take  
23       custody of it.

24              Q       And is there a chain of custody  
25       established at this point?

1 A Correct.

2 Q Did you do that in this case?

3 A Yes, I did.

4 Q Did you do that for the latent prints  
5 recovered from the jewelry box?

6 A Yes, I did.

7 MS. JONES: Pass the witness, your Honor.

8 THE COURT: All right.

9 Any cross?

10 MS. ROSS: Just very briefly.

11

12 CROSS-EXAMINATION

13 BY MS. ROSS:

14 Q Did you test any other area in the  
15 apartment for fingerprints?

16 A Yes, I did.

17 Q You did not find any fingerprints located  
18 anywhere except the three places you told us?

19 A Correct.

20 MS. ROSS: No further questions.

21 THE COURT: Any redirect?

22 MS. JONES: No, your Honor.

23 THE COURT: Okay, ma'am, thank you for  
24 testifying here today. You are free to stick around to  
25 find out what happens. You are free to take off.

1 Thank you.

2 THE WITNESS: Thank you.

3 THE COURT: All right, next witness.

4 MS. JONES: Your Honor, State's next  
5 witness is Heather Gouldthorpe.

6

7 (Off the record discussion not reported.)

8

9 THE COURT: Was she the one who brought  
10 the copy of the prints?

11 MS. JONES: Yes.

12 THE COURT: Did we make a copy?

13 MS. JONES: Yes.

14 MS. ROSS: I have a copy now, your Honor.

15 THE COURT: Do you have a copy?

16 MS. ROSS: Yes.

17 THE COURT: Okay.

18

19 (Off the record discussion not reported.)

20

21 FORENSIC SCIENTIST HEATHER GOULDTHORPE,  
22 having been first duly sworn to tell the truth, the whole  
23 truth and nothing but the truth, testified and said as  
24 follows:  
25

1 THE CLERK: Please be seated.  
2 State your name and spell it for the  
3 record.

4 THE WITNESS: My name is Heather  
5 Gouldthorpe, H-E-A-T-H-E-R, Gouldthorpe,  
6 G-O-U-L-D-T-H-O-R-P-E.

7 THE COURT: You may proceed.

8 MS. JONES: Thank you.

9

10 DIRECT EXAMINATION

11 BY MS. JONES:

12 Q Heather, can you tell us how you are  
13 employed?

14 A I'm a forensic scientist in the Las Vegas  
15 Metropolitan Police Department's Forensics Laboratory in  
16 the Latent Print Unit.

17 Q And how long have you been employed there?

18 A I have employed with Metro for 10 years.  
19 I have been in the forensic lab for approximately seven and  
20 a half years, but I have been a scientist for three years.

21 Q Okay.

22 And when something comes in the lab for  
23 you to test, is there something that identifies what case  
24 this goes to?

25 A Yes.

1 Q Does that make sense?

2 A We have what is called event numbers.

3 Q Okay.

4 A As well as, in the laboratory, we work our  
5 cases under lab numbers.

6 Q Okay.

7 So do you have event numbers that come in?

8 A That's correct, yes.

9 Q Okay.

10 Heather, I'd like to draw your attention  
11 to some time in January of this year, were you provided and  
12 requested from CSA to do an AFIS hit?

13 A I was requested to do an AFIS search on a  
14 latent print packet.

15 Q A latent print packet?

16 A Uh-huh.

17 Q Is that latent print packet provided to  
18 you?

19 A It's in our evidence storage.

20 Q Okay.

21 So it's provided to you in your evidence  
22 storage?

23 A Right.

24 Q And then what happens after you get it out  
25 of the evidence storage?

1                   A       After I get it out of the evidence  
2       storage, I look at it, make sure they are the lift cards  
3       that were supposed to be in there, so the total number of  
4       lift cards are the actual total number I have, and then I  
5       look to see if there is any suitable latent prints that I  
6       can run through the AFIS, which is the Automated  
7       Fingerprint Identification System, and if there are, then I  
8       go ahead and run those through the system to see if I have  
9       any potential matches, in which if I do have a potential  
10      match, I will go ahead and compare those.

11                  Q       Heather, I would like to draw your  
12      attention to event number 150120-4490, are you familiar  
13      with that event number?

14                  A       I'd have to look at the report.

15                  Q       Did you prepare a report in the case of  
16      the State of Nevada versus Tommy Stewart?

17                  A       That's correct.

18                           MS. JONES: May I approach the witness,  
19      your Honor?

20                           THE COURT: You may.

21                           Has this been marked?

22                           MS. JONES: Yes.

23                  Q       Heather, showing you what's been marked as  
24      State's Proposed Exhibit 5, do you recognize what that is?

25                  A       Yes, it is my report.

1 Q Okay, that's your report?

2 A Yes.

3 Q Can you tell us the event number that's on  
4 that report?

5 A Yes. It's 150120-4490.

6 Q Okay.

7 And are you familiar with that report?

8 A I am.

9 Q And, in that particular case, were you  
10 provided with a print sample for you to examine?

11 A I was.

12 Q And can you tell us how that happened.

13 A Like I say, it was a request that came in  
14 through Crime Scene to run any prints through the AFIS  
15 system that I can. I had three lift cards and, on those  
16 three lift cards, I was able to run latents through the  
17 system.

18 Q And you were able to run those.

19 And what were the results of you running  
20 those latent prints?

21 A On three of them -- well, on one of them,  
22 I searched through the AFIS system and I hit upon a Natasha  
23 Lumba. I identified her subsequently to three other latent  
24 prints in the case on two lift cards and then I also ran  
25 another print through the AFIS system and it hit to a Tommy

1       Stewart and I hit him on one of the cards --

2                   Q       Okay.

3                   A       -- and identified him on one of the  
4       cards --

5                   Q       Okay.

6                   A       -- to one latent print.

7                   Q       You said you had three cards?

8                   A       Correct.

9                   Q       Okay, on the first lift card, where did  
10       the first lift card come from?

11                  A       It came from the exterior side of the west  
12       facing front door and it was marked lift card number one.

13                  Q       And what were the results of the testing  
14       on that lift card?

15                  A       On that one, there was two suitable latent  
16       prints and I identified both Natasha Lumba, one the left  
17       ring finger and the other to the left middle finger.

18                  Q       Where were the prints obtained from card  
19       number two?

20                  A       From the jewelry box atop of the washer in  
21       the laundry area, which is marked number two.

22                  Q       And what were the results of that?

23                  A       I identified that to the left middle  
24       finger of Tommy Stewart.

25                  Q       What about the prints from lift card

1 number three?

2 A Lift card number three came from the coin  
3 bank atop the dresser at the west wall of the master  
4 bedroom, which was marked number three, and I identified it  
5 to the left index finger of Natasha Lumba.

6 Q After this testing was completed and you  
7 had the print for Tommy Stewart, what did you do?

8 A After we get the AFIS -- subsequent AFIS  
9 hit, which is a possible association, I go ahead and I take  
10 the ID number and pull the archive prints of that ID number  
11 and then I go ahead and do a full on comparison to that  
12 case.

13 Q And what was the ID number that was used  
14 in this case?

15 Do you need to look at your report --

16 A Yes.

17 Q -- to refresh your recollection?

18 A For Tommy Stewart?

19 Q Yes, ma'am.

20 A 2731067.

21 Q And when you obtained that ID number, you  
22 said that you then pulled the archive prints?

23 A That's correct.

24 Q Okay.

25 MS. JONES: Your Honor, if I can approach

1 the witness again?

2 THE COURT: You may.

3 Q (BY MS. JONES) Just, for the record,  
4 Heather, I'm showing you what has been marked as State's  
5 Proposed Exhibit 1, do you recognize what that is?

6 A Yes.

7 Q What is that?

8 A That is the archive exemplars of a Tommy  
9 Stewart.

10 Q Those were archives that you pulled?

11 A That's correct, yes.

12 Q And you actually provided those to me  
13 today?

14 A I did.

15 Q Does this fairly and accurately represent  
16 the archive of the prints for Tommy Stewart that you  
17 pulled?

18 A Yes.

19 MS. JONES: Your Honor, move for State's  
20 Proposed 1 into evidence.

21 THE COURT: Any objection?

22 MS. ROSS: Not for the purposes of the  
23 preliminary hearing.

24 THE COURT: All right, State's Proposed 1  
25 will come in as State's 1.

1                   Q           (BY MS. JONES) And if I can refer back to  
2   State's Proposed Exhibit 5, is this the report you prepared  
3   in this case?

4                   A           Yes.

5                   Q           That you've been referencing?

6                   A           Yes.

7                   Q           Does it fairly and accurately reflect the  
8   fingerprints you found?

9                   A           Yes.

10                   MS. JONES: Your Honor, move for admission  
11   of State's Proposed 5.

12                   THE COURT: Any objection?

13                   MS. ROSS: Not for the purpose of the  
14   preliminary hearing.

15                   THE COURT: Okay, that will come in as  
16   State's 5.

17                   Q           (BY MS. JONES) In this case, did you do a  
18   manual comparison?

19                   A           I did, yes.

20                   Q           And how are you trained to do that?

21                   A           Well, I started back as a forensic  
22   laboratory technologist back in 2007. As a forensic  
23   laboratory technologist, I was trained to do basic  
24   comparisons, how to enter prints into the AFIS system, and  
25   how to recover latent prints from evidence.

1 I then was promoted, after three and a  
2 half years, to a forensic scientist trainee, which for a  
3 whole year, I trained on how to do more complex, more  
4 harder latent print comparisons, how to issue reports, how  
5 to effect identifications, exclusions, and in our inclusive  
6 categories.

7 And then I promoted from there. After I  
8 passed a series of proficiency tests, I promoted to a  
9 forensic training -- or a forensic scientist, in which I  
10 have held the position for over three years.

11 Q And about how many manual comparisons have  
12 you done?

13 A I couldn't even tell you.

14 Q Hundreds, thousands?

15 Is it more than a thousand?

16 A I'd say I think last year my case total  
17 was like 200 something, so...

18 Q Okay, that's like an average for the year?

19 A Yeah.

20 Q You have been doing that for three years?

21 A Correct.

22 MS. JONES: Okay, pass the witness, your  
23 Honor.

24 THE COURT: Any cross?

25 MS. ROSS: Yes, very briefly.

1

2

## CROSS-EXAMINATION

3

BY MS. ROSS:

4

Q Ma'am, when you do manual comparison,

5

how many points of commonality are you looking for?

6

A We don't have a specific number of points.

7

What we do is look at the entire print in itself. We look

8

at the flow of the ridges, how are they flowing is what you

9

would think of as fingerprint types, so your whirls, your

10

loops, your arches.

11

We kind of look at that first, then we go

12

ridge-by-ridge to see what each ridge does, then once we

13

have enough of that, then we can affect an ID or exclusion

14

at that time.

15

Q Okay.

16

So you essentially do a visual comparison

17

of the prints that you got a hit on AFIS for and the prints

18

that you have on file?

19

A Correct.

20

MS. ROSS: No further questions.

21

THE COURT: Any redirect?

22

MS. JONES: No, your Honor.

23

THE COURT: Ma'am, thank you for

24

testifying here today. You are free to stick around to

25

find out what happens. You are free to take off today.

1 Thank you.

2 THE WITNESS: Thank you very much.

3 MS. JONES: State's next witness is  
4 Officer Jackson.

5

6 (Off the record discussion not reported.)

7

8 OFFICER BRIAN JACKSON,  
9 having been first duly sworn to tell the truth, the whole  
10 truth and nothing but the truth, testified and said as  
11 follows:

12

13 THE CLERK: Please be seated.

14 State your name and spell it for the  
15 record.

16 THE WITNESS: Officer Brian Jackson,  
17 B-R-I-A-N J-A-C-K-S-O-N.

18 THE COURT: You may proceed.

19 MS. JONES: Thank you, your Honor.

20

21 DIRECT EXAMINATION

22 BY MS. JONES:

23 Q Officer Jackson, can you tell us how you  
24 are you employed?

25 A Currently as a police officer employed

1 with the Las Vegas Metropolitan Police Department and I  
2 work at the Bolden Area of Command.

3 Q How long have you been employed there?

4 A Eight and a half years.

5 Q I want to draw your attention back to  
6 February 14th, 2014, were you conducting surveillance on  
7 Owens and H Street?

8 A Yes, ma'am.

9 Q Who were you looking for?

10 A We were there looking for two individuals.  
11 One was a subject that we knew with the moniker of Tae and  
12 we were aware of another subject that had -- was wanted  
13 that went with the name Thomas Stewart, Tommy Stewart.

14 Q So that's who you were looking for?

15 A Yes, ma'am.

16 Q Did there come time when you saw Tommy  
17 Stewart?

18 A Yes.

19 Q Where did you see him?

20 A Walking through a parking lot to Bells  
21 Market on H Street.

22 Q What did you do once you saw Tommy  
23 Stewart?

24 A As soon as I saw him, I pulled into the  
25 parking lot of the Bells Market and drove passed him. As I

1       drove passed him, I saw for sure that it was him and I went  
2       to the gas pump and parked my vehicle.

3                   Q       You were able to ID the person you saw as  
4       Tommy Stewart?

5                   A       Yes, ma'am.

6                   MS. JONES: Your Honor, if I may approach  
7       the witness?

8                   THE COURT: You may.

9                   Q       (BY MS. JONES) Officer Jackson, I'm  
10       showing you what's been marked as State's Proposed 3, do  
11       you recognize that individual in that photo?

12                  A       Yes, ma'am.

13                  Q       Who is that?

14                  A       Tommy Stewart.

15                  Q       And does this fairly and accurately depict  
16       how Tommy Stewart looked that day?

17                  A       Yes.

18                  MS. JONES: Your Honor, State would move  
19       for admission of State's Proposed 3.

20                  THE COURT: Any objection?

21                  MS. ROSS: Not for purposes of the  
22       preliminary hearing.

23                  THE COURT: Okay, that will come in as  
24       State's 3.

25                  MS. JONES: I apologize, your Honor.

1 Q Once you saw him, what did you do after  
2 that?

3 A As I pulled in, I drove passed him  
4 approximately five feet. He looked into my car and I  
5 looked at him and so I drove passed him to the gas pump and  
6 parked. I was in a plain car.

7 Q Were there other officers also surveilling  
8 the same area?

9 A Yes, there was.

10 Q Were you in contact with them?

11 A Yes, I was.

12 Q Was Officer Vorce one of those officers?

13 A Yes, ma'am.

14 Q And you were communicating with him?

15 A Yes, ma'am.

16 Q Did you guys work together --

17 A Yes, ma'am.

18 Q -- on that day?

19 A Yes, ma'am.

20 Q And, at some point, did you take Tommy  
21 Stewart into custody?

22 A Yes.

23 Q Did you take him into custody with  
24 resistance or without?

25 A Without.

1 Q Was that the extent of your involvement?

2 A Yes.

3 MS. JONES: Pass the witness, your Honor.

4 MS. ROSS: Just very briefly, your Honor.

5

6 CROSS-EXAMINATION

7 BY MS. ROSS:

8 Q You stated you were there doing  
9 surveillance looking for a Tae?

10 A Yes.

11 Q And Tommy Stewart?

12 A Yes.

13 Q Correct?

14 A Yes.

15 THE COURT: Is that one word, A-T-A-Y?

16 MS. ROSS: No, T-A-E.

17 THE WITNESS: Tae.

18 MS. ROSS: I said as Tae.

19 THE COURT: Tae?

20 THE WITNESS: Tae is the second  
21 related/unrelated person.

22 THE COURT: I keep hearing Tae.

23 THE WITNESS: It's the moniker for the  
24 other witness.

25 MS. ROSS: My apologies, your Honor.

1 THE COURT: No, that's okay. Thank you.

2 Q (BY MS. ROSS) How did you know those  
3 people might be in the area?

4 A They are known to frequent the area, they  
5 have a residence in the area, and we've seen them in the  
6 area in the past numerous times.

7 MS. ROSS: No further questions.

8 THE COURT: Anything else?

9 MS. JONES: No, your Honor.

10 THE COURT: Officer, thank you for  
11 testifying here today.

12 THE WITNESS: Thank you, your Honor.

13 THE COURT: You are free to stick around  
14 to find out what happens. You are free to take off.

15 THE WITNESS: Thank you, sir.

16 THE COURT: Thanks.

17 MS. JONES: Your Honor, State's next  
18 witness is Officer Vorce.

19

20 (Off the record discussion not reported.)

21

22 OFFICER MATTHEW VORCE,  
23 having been first duly sworn to tell the truth, the whole  
24 truth and nothing but the truth, testified and said as  
25 follows:

1

2

THE CLERK: Please be seated.

3

State your name and spell it for the

4

record.

5

THE WITNESS: Matthew Vorce, Matthew,

6

M-A-T-T-H-E-W, Vorce, V-as-in-Victor-O-R-C-E.

7

THE COURT: You may proceed.

8

MS. JONES: Thank you.

9

10

DIRECT EXAMINATION

11

BY MS. JONES:

12

Q

Officer Vorce, can you tell us how you are

13

employed?

14

A

I'm employed with the Las Vegas

15

Metropolitan Police Department, Bolden Area of Command's

16

Problem Solving Unit.

17

Q

How long have you been employed there?

18

A

Just under 13 years.

19

Q

And I would like to draw your attention

20

back to February 14, 2013, were you working for Metro that

21

day?

22

A

Yes, I was.

23

Q

Were you conducting surveillance on Owens

24

and H Street?

25

A

Yes, I was.

1 Q And who were you looking for?

2 A At that time, we were looking for two  
3 different suspects, but one of them was going to be a Tommy  
4 Stewart.

5 Q You were looking for Tommy Stewart?

6 A Correct.

7 Q Did you see Tommy Stewart while conducting  
8 surveillance?

9 A Yes, I did.

10 Q Where was he?

11 A He was located near -- he was located at  
12 the Bells property, which is going to be located at the  
13 northeast intersection of H Street and Owens. He was at  
14 the north end of the parking lot.

15 Q What was he doing?

16 A He was standing with a group of four other  
17 black male adults.

18 Q Were you just surveilling the area?

19 A Yes, I was.

20 Q And did you know that the person you had  
21 seen was Tommy Stewart?

22 A At that time, I received over the radio  
23 transmission from Officer Jackson that provided a detailed  
24 clothing description of Tommy Stewart and I was able to  
25 confirm that it was Tommy Stewart.

1 Q So that was Tommy Stewart?

2 A Yes.

3 MS. JONES: May I approach the witness?

4 THE COURT: Yes.

5 Q (BY MS. JONES) Officer Vorce, I'm showing  
6 you State's Exhibit 3, do you recognize the person depicted  
7 in that photo?

8 A Yes.

9 Q Who is that?

10 A Tommy Stewart.

11 Q Does that fairly and accurately depict how  
12 he looked that day?

13 A Yes.

14 Q While you are surveilling Tommy Stewart,  
15 did you see him do anything?

16 A I observed Officer Jackson's pickup truck  
17 pull into the parking lot, which is a silver Dodge Ram, and  
18 I lost surveillance on Mr. Stewart for half a second, as my  
19 vehicle passed him, and, at this point, I saw Mr. Stewart,  
20 as well as other black male adults move or park a Toyota  
21 Corolla over at the end of the parking lot facing the  
22 business. They opened up the rear passenger side door and  
23 I observed Mr. Stewart remove a firearm and place it in the  
24 rear floorboard area of the vehicle.

25 Q How far away from the Toyota Corolla were

1       you?

2                   A       I was approximately between 100 to 150  
3 yards, but I was using binoculars at the time.

4                   Q       You were using binoculars?

5                   A       Yes.

6                   Q       So how sure are you the item Tommy Stewart  
7 placed in the Toyota Corolla was a handgun?

8                   A       Hundred percent.

9                   Q       You saw him put it on the floorboard?

10                  A       Yes.

11                  Q       Was there another male there?

12                  A       Yes.

13                  Q       Did you see him do anything?

14                  A       When I saw Mr. Stewart, the subject, he  
15 was grouped up in the back of the vehicle with the door  
16 ajar and they all wedged themselves in the vehicle.  
17 Mr. Stewart happened to be the closest person out of the  
18 group. I was able to observe him.

19                           I also observed the motion of another arm  
20 coming up and I could see at this point in the back of the  
21 vehicle with the door ajar, I could see a hand go in and  
22 put a gun on the floorboard. I could not tell you which  
23 other subjects on scene placed the second firearm on the  
24 floorboard of the vehicle.

25                  Q       Was there a female subject there?

1                   A       Yes.

2                               Go ahead.

3                   Q       I'm sorry.

4                               What did you see her do?

5                   A       At this point, the subjects began to close  
6 the door, the door was approximately two inches ajar, and  
7 they all stepped away from the vehicle, approximately 15  
8 feet from the vehicle.

9                               At this point, Officer Jackson had parked  
10 over by the gas pumps, had walked over and contacted  
11 Mr. Stewart. The black female, she had came over to the  
12 group, talked to them for a brief second, and then she  
13 actually went and sat -- opened the door and sat on the  
14 back seat of the vehicle with her feet out on the ground on  
15 the pavement and was sitting in the vehicle.

16                   Q       Okay.

17                               And did Officer Jackson eventually take  
18 Mr. Stewart into custody?

19                   A       Yes, he did.

20                   Q       And when you were out at the scene, what  
21 happened?

22                   A       Yes, at this point, as soon as I saw  
23 Officer Jackson taking Mr. Stewart in custody, I moved up  
24 to the scene, secured the vehicle, as well as the  
25 additional occupants that were around the vehicle.

1                   Q       And when you secured the vehicle, did you  
2 notice anything about the vehicle?

3                   A       I noticed the odor of marijuana emitting  
4 from the interior of the vehicle.

5                   Q       And based upon you noticing that, what did  
6 you do next?

7                   A       Conducted a search of the vehicle, a  
8 probable cause search.

9                   Q       Probable cause search of the vehicle?

10                  A       Yes.

11                  Q       You yourself conducted the search?

12                  A       Yes.

13                  Q       What did you recover during that search?

14                  A       During my initial search, the first place  
15 I looked was the back floorboard of the passenger vehicle.  
16 There was no items there.

17                        I moved to the front passenger side of the  
18 vehicle, there was a white bag, backpack-type sitting on  
19 the floorboard. I opened the top of the bag. I smelled  
20 marijuana emitting from the bag, as well as seeing the  
21 bottom of the firearm, the vehicle was secured at that time  
22 and we contacted our CSI ID to come process the vehicle.

23                  Q       And did CSI recover any other firearms  
24 from the vehicle?

25                  A       There was two firearms recovered from

1       within the interior of the vehicle.

2                   Q       Did those appear to be the firearms you  
3       saw put inside the vehicle?

4                   A       Yes.

5                   MS. JONES: Pass the witness, your Honor.

6                   THE COURT: All right.

7                   Any cross?

8                   MS. ROSS: Just very briefly, your Honor.

9

10                               CROSS-EXAMINATION

11       BY MS. ROSS:

12                   Q       You testified that you were able to see  
13       two guns being thrown into the back of a car?

14                   A       Yes.

15                   Q       What color were they?

16                   A       I was able to see the black on the bottom  
17       of the firearms. I know there were two different firearms.  
18       One had a chrome slide. I couldn't tell which was which,  
19       but I was able to see the bottom half of the firearm and  
20       the bottom half of the slide.

21                   Q       You testified you were about 150, 200 feet  
22       away?

23                   A       No. I said approximately 100 yards to 150  
24       yards.

25                   Q       My apologies.

1                   What type of binoculars do you use?

2                   A        I use DuBois or Tasco.

3                   Q        Okay.

4                   A        I have used the same binoculars for  
5       approximately seven years because I have found them  
6       effective at night.

7                   Q        You did not take Mr. Stewart into custody?

8                   A        No, I did not.

9                   Q        You did not charge Mr. Stewart with any  
10      crimes?

11                  A        No, I did not.

12                   MS. ROSS: No further questions.

13                   THE COURT: Anything else?

14                   MS. JONES: No, your Honor.

15                   THE COURT: Officer, thank you for  
16      testifying here today. You are free to stick around to  
17      find out what happens. You are free to take off at this  
18      point.

19                   THE WITNESS: I'll take off.

20                   THE COURT: Thank you.

21                   I need 30 seconds.

22                   MS. JONES: Okay. I only have one more  
23      witness.

24                   THE COURT: Is it quick?

25                   MS. JONES: He is going to be lengthy.

1 THE COURT: All right, I'm going to take  
2 30 seconds.

3

4 Off the record at 11:05 A.M. and back on the  
5 record at 11:10 A.M.)

6

7 (Off the record discussion not reported.)

8

9 DETECTIVE JEFFERY ABELL,  
10 having been first duly sworn to tell the truth, the whole  
11 truth and nothing but the truth, testified and said as  
12 follows:

13

14 THE CLERK: Please be seated.  
15 State your name and spell it for the  
16 record.

17 THE WITNESS: Jeffery Abell, J-E-F-F-E-R-Y  
18 A-B-E-L-L.

19 THE COURT: You may proceed.

20 MS. JONES: Thank you, your Honor.

21

22 ///

23 ///

24 ///

25 ///

1 DIRECT EXAMINATION

2 BY MS. JONES:

3 Q Detective Abell, can you tell us how you  
4 are employed?

5 A With the Las Vegas Metropolitan Police  
6 Department.

7 Q And how long have you been employed there?

8 A Over nine years.

9 Q Detective Abell, I would like to draw your  
10 attention to the case of State of Nevada versus Tommy  
11 Stewart, when were you assigned to this case?

12 A I don't know when I exactly got assigned  
13 the case.

14 Q Would looking at your report refresh your  
15 recollection?

16 A Yes.

17 MS. JONES: May I approach the witness,  
18 your Honor?

19 THE COURT: Yes.

20 Q (BY MS. JONES) Detective, I'm showing you  
21 page two of the arrest report, if you could just read this  
22 section right here to yourself and just let us know when  
23 you are finished.

24 A (Witness complying.)

25 Okay.

1 Q Okay.

2 Do you remember when you were assigned to  
3 the case?

4 A Well, the case gets assigned through our  
5 computer system, so the exact date when it got put in my  
6 cue, I do not know, but I did construct a photo lineup on  
7 the 4th day of February.

8 Q So you would have had the case some time  
9 prior to the 4th day of February?

10 A Yes.

11 Q So, on February 4th, did you meet with a  
12 lady by the name of Natasha Lumba?

13 A Yes.

14 Q And what were -- what was the purpose of  
15 meeting with her?

16 A To discuss the details of the case and  
17 show her a photo lineup.

18 Q Oh, you showed her a photo lineup?

19 A Correct.

20 Q Did you put that lineup together?

21 A Yes.

22 Q How did you do that?

23 A We have a system that we use. It pulls up  
24 pictures and we just select the pictures and put them in  
25 the photo lineup.

1                   Q       And then you met with her and showed her  
2       the photo lineup?

3                   A       Correct.

4                   MS. JONES:   Your Honor, if I may approach  
5       the witness?

6                   THE COURT:   Uh-huh.

7                   Q       (BY MS. JONES)   Detective, I'm showing you  
8       what's previously been admitted as State's Exhibit 2, do  
9       you recognize what that is?

10                  A       Yes, I do.

11                  Q       And what is that?

12                  A       That's the photo lineup that I constructed  
13       and showed to Natasha.

14                  Q       So is that the photo lineup you showed to  
15       Natasha?

16                  A       Yes.

17                  Q       Before you showed Natasha the photo  
18       lineup, did you go over the lineup instructions with her?

19                  A       Yes.

20                  Q       And you instructed her what to do?

21                  A       Yes.

22                  Q       But she is the person who made the  
23       identification?

24                  A       She is.

25                  Q       Did she identify two people in the lineup?

1 A She did.

2 Q Which persons were those?

3 A The person in the number two position and  
4 the person in the number three position.

5 Q Are you aware of who the person is -- who  
6 is in the number three position?

7 A Yes.

8 Q Who is in the number three position?

9 A It's Tommy Stewart.

10 Q And are you familiar with someone by the  
11 name of Tommy Stewart?

12 A Yes.

13 MS. JONES: Your Honor, if I can approach  
14 the witness again?

15 THE COURT: You may.

16 Q (BY MS. JONES) Detective Abell, I'm  
17 showing you what's previously been admitted as State's  
18 Exhibit 3, do you recognize the person in that photo?

19 A Yes. That's Tommy Stewart.

20 Q That is Tommy Stewart?

21 A Correct.

22 Q That's the same person who is in photo  
23 number three in the photo lineup?

24 A That is correct.

25 Q Ms. Lumba was able to identify the person

1 in photo number three as one of the persons in her house?

2 A That's correct.

3 Q Do you remember what she said about the  
4 person in photo number three?

5 A That he had the face shape, same nose,  
6 same complexion, and she thought he was the taller suspect.

7 Q Okay.

8 Did there come a time, on February 14th,  
9 where you were informed that Tommy Stewart was in custody?

10 A Yes.

11 Q Were you present when he was arrested?

12 A Well, we were called out to the scene  
13 after he was taken into custody.

14 Q After he was taken in, you were called out  
15 to the scene?

16 A Yes.

17 Q Was that H Street and Owens?

18 A Yes.

19 Q And was he already in custody when you  
20 arrived?

21 A Yes, he was.

22 Q Who transported him to robbery  
23 headquarters?

24 A I'm not sure. It was a patrol officer --  
25 I believe it was a patrol officer.

1 Q And they transported him to robbery  
2 headquarters?

3 A Yes.

4 Q Was that at your direction?

5 A Yes.

6 Q Do you meet him there?

7 A Yes.

8 Q Once you got to robbery headquarters, what  
9 did you do?

10 A We interviewed Mr. Stewart.

11 Q And prior to that interview, did you read  
12 him his Miranda rights?

13 A Yes.

14 Q Did he agree to waive those right and  
15 speak with you?

16 A Yes.

17 Q So was an interview conducted?

18 A Yes.

19 Q What happened during the interview?

20 A Mr. Stewart placed himself inside the  
21 apartment in Natasha's apartment.

22 Q Okay, let's just start from the beginning.  
23 Did you show him something in the  
24 beginning of the interview?

25 A I showed him a few things, yes.

1                   Q       Did you ever show him a map of the 805  
2       Rock Springs address?

3                   A       Yes.

4                   Q       Okay.

5                               And what was his response to you showing  
6       him that map?

7                   A       He did not recognize that area.

8                   Q       He said he didn't recognize the area?

9                   A       Yes.

10                  Q       So what happened after he said he didn't  
11       recognize the area?

12                  A       I confronted him about his fingerprints  
13       being in Natasha's apartment.

14                  Q       Because, at this point, you knew his print  
15       had been found in the apartment?

16                  A       Yes.

17                  Q       Is the print what led you to him as a  
18       suspect?

19                  A       Yes, it is.

20                  Q       Okay.

21                               When you confronted him about the print,  
22       what happened then?

23                  A       His first response was, That's impossible,  
24       but then he later changed his story and we got into the  
25       details.

1                   Q       Okay, so take us through that. Once he  
2       said that's impossible, then what happened?

3                   A       Well, we confronted him again that it  
4       can't be impossible because your print was recovered from  
5       inside her apartment. So it's a fact.

6                               So then we just tried to say, you know,  
7       what's the reason or explanation of why your prints were in  
8       that apartment.

9                   Q       And what did he say?

10                  A       He finally said that him and another --  
11       the co-defendant met a girl down on the Strip and then they  
12       exchanged phone numbers and they followed her to her  
13       apartment.

14                  Q       Did he tell you what this other guy's name  
15       was?

16                  A       He said it was Raymond.

17                  Q       Okay.  
18                               What did he say happened after they got to  
19       the apartment?

20                  A       He said Raymond and Natasha went into the  
21       bedroom and had sex.

22                  Q       Did he know her by her name?

23                  A       No, he did not.

24                  Q       Okay.

25                               What was he referring to her as?

1                   A       Well, he first called her the white bitch  
2       and then he just called her the female.

3                   Q       The female?

4                   A       Yes.

5                   Q       Okay.

6                           And what did he say happened after they  
7       got to the house?

8                   A       He said that his co-defendant or his  
9       partner Raymond went in and had sex with her and, while  
10      they were having sex, he rummaged through her stuff and  
11      stole some property.

12                  Q       What did he say he stole?

13                  A       He said he stole a watch, a ring, and I  
14      believe some change.

15                  Q       At some point, do you confront him about  
16      contact with her jewelry box?

17                  A       Yes.

18                  Q       And what did you say?

19                  A       I asked him if he had recognized the box.  
20      He first said, No. I said, Well, then how did your print  
21      get on the box? He explained, well, he may have touched  
22      the box and went through it, but there wasn't nothing in it  
23      of value.

24                  Q       He said there was nothing in there of  
25      value?

1                   A           It was just sewing stuff in there.

2                   Q           And at any point did you discuss with him  
3 whether or not he stole any electronics out of the  
4 apartment?

5                   A           I did.

6                   Q           What did he say?

7                   A           He said he did not.

8                   Q           He said he never stole any electronics?

9                   A           Correct.

10                  Q           But he admitted to taking a ring and a  
11 watch?

12                  A           Correct.

13                  Q           And rummaging through her things?

14                  A           Correct.

15                               MS. JONES: Pass the witness, your Honor.

16                               MS. ROSS: Very briefly.

17

18                               CROSS-EXAMINATION

19 BY MS. ROSS:

20                  Q           Detective Abell, when you constructed the  
21 photo lineup, you said that there's just a system that  
22 pulls the picture?

23                  A           Yes.

24                  Q           Do you personally pick the pictures or is  
25 it randomly generated?

1           A       Well, there is a bunch of pictures and I  
2       select pictures and then it randomly puts them in a spot.

3           Q       And how did you select the pictures to go  
4       in this lineup?

5           A       I just selected them. You want to select  
6       them with physical characteristics that are similar in  
7       nature so that one doesn't stand out from the other, but  
8       they are not all exactly the same.

9           Q       And what kind of pool did you elect from?

10          A       Just the pool that comes up automatically.

11          Q       Do you put any criteria into that pool to  
12       get a selection?

13          A       It's a set from his profile that's already  
14       in the system. It automatically selects the draw.

15          Q       This is a computer program?

16          A       Yes.

17          Q       When you met with Ms. Lumba, what  
18       instructions did you give her regarding the lineup?

19          A       I read the photo lineup instructions to  
20       her.

21          Q       Did you tell her anything else about the  
22       pictures?

23          A       No.

24          Q       How long did you give her to view the  
25       pictures?

1 A As long as she wanted.

2 Q You testified that you did an interview  
3 with Mr. Stewart at robbery headquarters, correct?

4 A Correct.

5 Q And he was handcuffed at that time?

6 A Yes.

7 Q Was he handcuffed to anything?

8 A To the desk.

9 Q Okay.

10 And you kept saying we. Who did the  
11 interview with you?

12 A Myself and Detective Turner.

13 Q Was Detective Turner present the entire  
14 time?

15 A Yes.

16 Q During this interview, did Mr. Stewart  
17 ever give a description of the female?

18 A Yes, he did.

19 Q And what did he describe her as?

20 A A white female, petite, a little taller  
21 than him, possibly red hair.

22 Q And you testified that he said he did not  
23 take any electronics?

24 A That's correct.

25 Q That there was maybe a watch, a ring, and

1       some change?

2                   A       Correct.

3                   MS. ROSS:  No further questions.

4                   THE COURT:  Any redirect?

5                   MS. JONES:  No, your Honor.

6                   THE COURT:  Okay.

7                   Detective, thank you for testifying here  
8       today.

9                   THE WITNESS:  Thank you.

10                  THE COURT:  You are free to stick around  
11       to find out what happens.  You are free to take off.

12                  THE WITNESS:  Thank you, sir.

13                  THE COURT:  Thank you.

14                  All right, any other witnesses?

15                  MS. JONES:  State has no more witnesses,  
16       your Honor.  I do have one amendment to make to the  
17       Complaint.

18                  THE COURT:  Okay.

19

20                  (Off the record discussion not reported.)

21

22                  THE COURT:  Are you going to add or change  
23       the language?

24                  MS. JONES:  Add, your Honor, on line one,  
25       page two.

1 THE COURT: Okay.

2 MS. JONES: After money, I would like to  
3 add and/or a camera -- I'm sorry, after United States.

4 THE COURT: Okay.

5 MS. ROSS: I'm sorry, can we have one  
6 moment so I can find the Complaint?

7 THE COURT: Sure.

8 MS. ROSS: My apologies. I have too much  
9 paper.

10

11 (Off the record discussion not reported.)

12

13 THE COURT: Okay, so line one of page two,  
14 it says, computer and/or cellular telephone and/or lawful  
15 money of the United States, you wanted to add what word?

16 MS. JONES: And/or a camera to conform to  
17 the testimony that was given here, your Honor.

18 THE COURT: Okay.

19 MS. JONES: And, your Honor with that, the  
20 State would rest.

21 THE COURT: Okay, I realize your client is  
22 not here, that you have filed a Sargent Motion previously,  
23 but before you filed it, did you talk to him about his  
24 right to testify?

25 MS. ROSS: I did, yes, your Honor.

1 THE COURT: That he had a right to be  
2 here?

3 MS. ROSS: Correct.

4 THE COURT: Okay.

5 Any potential witnesses or evidence on his  
6 behalf?

7 MS. ROSS: No, your Honor.

8 THE COURT: Okay, so the defense rests?

9 Do you rest?

10 MS. ROSS: Yes. Thank you, your Honor.

11 THE COURT: Okay, all right.

12 State, waive and reserve?

13 MS. JONES: Yes, your Honor.

14 THE COURT: Any argument?

15 MS. ROSS: Yes, your Honor. If I may just  
16 have a few moments, just very briefly?

17 THE COURT: Sure.

18 MS. ROSS: Thank you, your Honor.

19 I'm going through the counts, as they are  
20 in the Criminal Complaint.

21 First one is conspiracy to commit robbery.

22 The State presented no evidence of an agreement between  
23 Mr. Stewart and any individual in this case.

24 First of all, the identification of  
25 Mr. Stewart by Natasha Lumba is thin at best. She stated

1       that the person in position number three looked like the  
2       taller of the individuals.  However, she did declare that  
3       there were some distinct differences.  She said the nose  
4       was different.  She said the face was wider.  Those were  
5       the only parts she could see on the individual that was  
6       there.  She did not -- during her written report to the  
7       police, she stated that she would probably not be able to  
8       recognize them out of a lineup.

9                       The burglary while in possession of a  
10       firearm, during the testimony, it was stated that a gun was  
11       never seen once the apartment -- once they entered into the  
12       apartment.  Ms. Lumba indicated she did not know whether or  
13       not the firearm was in the apartment or whether or not they  
14       had it.

15                      Also, the robbery with use of a deadly  
16       weapon, same argument there, they had -- no gun was ever  
17       found.  Ms. Lumba did not see a gun while they were in the  
18       apartment.

19                      Count 4, first degree kidnapping with use  
20       of a deadly weapon, your Honor, kidnapping has to be more  
21       than just incidental to the robbery.  In this case, it was  
22       clear that the robbery was an entrance into the apartment  
23       with use or threat of violence.

24                      Here, the kidnapping is not a separate  
25       incident.  There was not movement of Ms. Lumba from one

1 place to another in the apartment.

2 THE COURT: They moved her from the  
3 outside to the inside. She wasn't robbed -- her person  
4 wasn't robbed outside.

5 MS. ROSS: Correct.

6 THE COURT: They didn't rob her at  
7 gunpoint, take her purse and leave. They didn't rob --  
8 they robbed her inside. There is a measure of safety  
9 outside with the public around. You remove that by going  
10 inside. That takes her out of the safety area where it is  
11 less safe to rob her in the house.

12 MS. ROSS: And, your Honor, that is  
13 incidental to the robbery. The robbery was going into the  
14 house to ransack the apartment. Once they were in the  
15 apartment, Ms. Lumba --

16 THE COURT: They had to get her to open  
17 the door.

18 MS. ROSS: Correct, your Honor.

19 THE COURT: If they robbed her outside, I  
20 would agree with the argument, but they took her inside the  
21 house.

22 MS. ROSS: And, your Honor, I would  
23 analogize the situation --

24 THE COURT: Do you have case law, not just  
25 to analogize, do you have case law that says somebody that

1       you take inside the house at gun point to be robbed inside,  
2       that's not first degree kidnapping?

3                       MS. ROSS: I don't have any case law, but,  
4       as an example, a robbery at a bank, people come in with  
5       guns to the bank, they have people there, they move them  
6       into the room with the safe, that's not kidnapping.

7                       THE COURT: Right, but they are in --

8                       MS. ROSS: Correct, your Honor.

9                       THE COURT: -- in the bank. She is not in  
10       the house.

11                      MS. ROSS: While in the bank, they are  
12       moved.

13                      THE COURT: She wasn't in her house. She  
14       is moved from outside into the position where they moved  
15       into the house in order to rob her.

16                      MS. ROSS: Understood, your Honor, but  
17       during the commission of ransacking the house, she was not  
18       removed from the bedroom. She was not restrained. There  
19       were times when the people were not even in the room with  
20       her. She didn't see a gun during that point in time.

21                      I don't believe that there is anything  
22       different than that bank robbery example where there is a  
23       different crime occurring of kidnapping. I believe that  
24       this was one incident of a robbery and a burglary, not a  
25       specific kidnapping.

1                   Also, as to the open and gross lewdness,  
2       Ms. Lumba clearly stated that it was the shorter of the two  
3       that had groped her. The taller one was not involved. The  
4       taller one was not in the room at that time.

5                   What it seems to me is that the State has  
6       a print that was traced back to Mr. Stewart. They have  
7       included all of anything that took place in the incident  
8       and charged Mr. Stewart with it, even though there is no  
9       slight or marginal evidence that Mr. Stewart was the one  
10      who committed the open or gross lewdness. There is also no  
11      evidence that he conspired with an unknown person to commit  
12      that open and gross lewdness. I believe that one should be  
13      dismissed.

14                  And overall, your Honor, during the  
15      identification of Ms. Lumba describing Mr. Stewart, when  
16      she looked at the lineup, she said there were differences,  
17      she couldn't see their face. The State has no other  
18      conspirator. They apparently have the name of Raymond that  
19      they could have tracked down and found. No one else has  
20      been charged with this right now.

21                  Specifically, on the open and gross  
22      lewdness, I definitely don't think the State has met their  
23      burden, but, overall, I don't believe the State has met  
24      their burden that Mr. Stewart was the one committing these  
25      crimes.

1                   THE COURT: That's the one I was going to  
2 ask you about, was the open and gross lewdness because she  
3 did say he was the shorter one and then today, apparently,  
4 Mr. Stewart is the taller one, which, for some parts,  
5 that's good because, apparently, he is not the one who  
6 touched her, but, on the other hand, he is the one who has  
7 the gun when she was approached outside the house or  
8 apartment and go inside.

9                   So the taller one is with the gun and they  
10 are saying the taller one, not the shorter one. So it's  
11 kind of --

12                  MS. JONES: Your Honor, if I can respond  
13 to that?

14                  That's the reason that the robbery, the  
15 kidnapping, and the open and gross lewdness are all pled  
16 under all three theories of liability because it goes under  
17 the conspiracy theory of liability where if you and I have  
18 an agreement to go and rob somebody, I'm responsible for  
19 everything that you do because I am aiding and abetting you  
20 in the commission of the crime of robbery and all the  
21 crimes that you are committing in order to facility this  
22 robbery.

23                  They are continuing the robbery as they  
24 are going through her underwear. Now I have seen people be  
25 patted down on numerous occasions. You have heard that

1 people are being patted down and they are saying, You have  
2 money, but they went into her underwear to see if she was  
3 hiding money there because he was looking for money.

4 THE COURT: You say they. It wasn't they.

5 MS. JONES: One of them.

6 THE COURT: Apparently, the short one.

7 MS. JONES: That's her testimony, but  
8 that's part of facilitating the robbery, which both are  
9 involved in the robbery and part of the robbery is him  
10 going through her bra and underwear in order to obtain  
11 money, to see if she was hiding any money because she only  
12 had two dollars in her wallet, when they went through her  
13 wallet, and took everything out of there and that's why  
14 it's charged under a conspiracy theory, aiding and  
15 abetting, and direct liability in Count 3, 4, and 5.

16 THE COURT: Do you consider this to be a  
17 fondling or do you find by putting his hand there to see if  
18 there's money there and that's it?

19 MS. JONES: I consider this to be a demand  
20 to see if there's any money and he touched her genital area  
21 while he was down there against her will.

22 THE COURT: That's a new one for me. In  
23 15 years, 16 years in all the robberies, I have never seen  
24 that happen before. I'm not comfortable in finding what  
25 you'd expect during the course of a robbery when the

1 co-defendant decided to reach his hand in to the get money  
2 into the bra or panties.

3 As to Count 1, I'm going to find there is  
4 probable cause as to conspiracy to commit robbery, as to  
5 Count 2, burglary while in possession of a firearm, same  
6 thing, same thing as to Count 3, robbery with use of a  
7 deadly weapon, same thing as to Count 4, first degree  
8 kidnapping with use of a deadly weapon, but I'm going to  
9 dismiss Count 5, open and gross today, but he's going to be  
10 held on the others.

11 I don't think there is bail at this point.  
12 I don't think there is a bail setting. I think I have to  
13 set bail today.

14 MS. ROSS: Correct, your Honor.

15 THE COURT: Does he have -- he has another  
16 North Las Vegas case? Is that another robbery? Do you  
17 know what that is?

18 MS. JONES: If I can just have the Court's  
19 indulgence, your Honor.

20 THE COURT: Sure.

21 MS. JONES: In my file there is not any.

22 THE COURT: I just know there's a North  
23 Las Vegas detainer.

24 MS. JONES: He has a North Las Vegas  
25 detainer. I don't know what that's for.

1 MS. ROSS: Your Honor, it's my belief the  
2 North Las Vegas detainer, they are traffic tickets that  
3 have gone into warrant. I remember, when I looked this up,  
4 I didn't see any other new pending charges.

5 MS. JONES: There's nothing on his scope  
6 out of North Las Vegas, so I don't know what that is.

7 THE COURT: Okay.

8 All right, in terms of bail, I mean it is  
9 going to be a high bail, Madame PD, what are you asking  
10 for?

11 MS. ROSS: Your Honor, due to the fact  
12 that Mr. Stewart is deemed indigent, I believe \$100,000  
13 would be as prohibitive as a million dollars at this point  
14 in time.

15 THE COURT: Your client has a 2009  
16 conviction out of Nevada for battery with substantial  
17 bodily harm, 2012 conviction out Nevada for voluntary  
18 manslaughter. This is a gun crime. They dragged a young  
19 lady into her house, robbed her at her house at gunpoint  
20 basically.

21 At this point, since you mentioned a  
22 million, I'm just going to make it a million. Bail is  
23 going to be set at a million dollars.

24 We will get a date in the District Court  
25 for arraignment.

1 THE CLERK: May 4th, 9:30 A.M., Lower  
2 Level Courtroom A.

3 MS. JONES: Is it 9:30, Madame Clerk?

4 THE CLERK: Yes.

5 MS. JONES: Thank you, your Honor.

6

7 (Off the record discussion not reported.)

8

9 (Off the record at 11:50 A.M. and back on  
10 the record at 11:35 A.M.)

11

12 THE COURT: We will go back on the record  
13 in 15F02411X, Tommy Stewart.

14 Apparently we just received some  
15 information that while the parties were outside, the  
16 girlfriend -- do we have name for the girlfriend?

17 DETECTIVE ABELL: We do not.

18 THE COURT: The girlfriend of Mr. Stewart  
19 was out there apparently taking pictures of the victim.  
20 That's a concern of mine. The detective was not able to  
21 stop her before she actually left the courthouse, but there  
22 is some information out there that she was taking pictures  
23 of the victim out in the hallway.

24 So we just want to make a record of that  
25 fact for the future.

1 MS. JONES: Thank you, your Honor.

2 THE COURT: Thanks.

3

4 (Off the record at 11:36 A.M.)

5

6 \* \* \* \* \*

7

8 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF  
9 PROCEEDINGS.

10

11 /s/ Patsy K. Smith  
12 PATSY K. SMITH, C.C.R. #190

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LAS VEGAS JUSTICE COURT  
FILED IN OPEN COURT

JUSTICE COURT, LAS VEGAS TOWNSHIP  
CLARK COUNTY, NEVADA

FEB 18 2015

THE STATE OF NEVADA,  
Plaintiff,

-vs-

TOMMY STEWART, aka,  
Tommy Laquade Stewart #2731067,  
Defendant.

BY: 

CASE NO: 15F02411X

DEPT NO: 11

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147); BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - NOC 50426); ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055) and OPEN OR GROSS LEWDNESS (Gross Misdemeanor - NRS 201.210 - NOC 50971), in the manner following, to-wit: That the said Defendant, on or about the 20th day of January, 2015, at and within the County of Clark, State of Nevada,

COUNT 1 - CONSPIRACY TO COMMIT ROBBERY

did wilfully, unlawfully, and feloniously conspire with an unknown individual to commit a robbery.

COUNT 2 - BURGLARY WHILE IN POSSESSION OF A FIREARM

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit larceny and/or robbery, that certain structure occupied by NATASHA LUMBA, located at 805 Rock Springs, Apartment No. 101, Las Vegas, Clark County, Nevada, said Defendant did possess and/or gain possession of a firearm during the commission of the crime and/or before leaving the structure.

COUNT 3 - ROBBERY WITH USE OF A DEADLY WEAPON

did wilfully, unlawfully, and feloniously take personal property, to-wit: a laptop

15F02411X  
CRM  
Criminal Complaint  
4754336

AA000104

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1 computer and/or a cellular telephone and/or lawful money of the United States, from the  
2 person of NATASHA LUMBA, or in her presence, by means of force or violence, or fear of  
3 injury to, and without the consent and against the will of NATASHA LUMBA, with use of a  
4 deadly weapon, to-wit: a firearm, the Defendant being criminally liable under one or more of  
5 the following principles of criminal liability, to-wit: (1) by directly committing this crime  
6 and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime  
7 be committed, by providing counsel and/or encouragement and by entering into a course of  
8 conduct whereby Defendant and/or an unknown co-conspirator approached Victim from  
9 behind, one of the Defendant and unknown co-conspirator was armed with a handgun,  
10 demanded that NATASHA LUMBA open the door to her residence, when the Defendant and  
11 an unknown co-conspirator and NATASHA LUMBA entered the said NATASHA LUMBA'S  
12 residence, one or more of the Defendant and unknown co-conspirator forced the said  
13 NATASHA LUMBA to go to her bedroom and lie on the floor, one of the Defendant and  
14 unknown co-conspirator stayed with NATASHA LUMBA while the other went through  
15 NATASHA LUMBA'S personal property and/or ransacked her residence, thereafter one of  
16 the Defendant and unknown co-conspirator demanded to know if the said NATASHA  
17 LUMBA was hiding money in her bra or panties and groped NATASHA LUMBA'S breasts  
18 and/or genital area while searching for money, thereafter Defendant and unknown co-  
19 conspirator fled the scene together; and/or (3) pursuant to a conspiracy to commit this crime..

20 COUNT 4 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

21 did wilfully, unlawfully, and feloniously, seize, confine, inveigle, entice, decoy,  
22 abduct, conceal, kidnap, or carry away NATASHA LUMBA, a human being, with the intent  
23 to hold or detain the said NATASHA LUMBA against her will, and without her consent, for  
24 the purpose of committing robbery, with use of a deadly weapon, to-wit: a firearm, the  
25 Defendant being criminally liable under one or more of the following principles of criminal  
26 liability, to-wit: (1) by directly committing this crime and/or (2) by aiding or abetting in the  
27 commission of this crime, with the intent that this crime be committed, by providing counsel  
28 and/or encouragement and by entering into a course of conduct whereby Defendant and/or an

1 unknown co-conspirator approached Victim from behind, one of the Defendant and unknown  
2 co-conspirator was armed with a handgun, demanded that NATASHA LUMBA open the door  
3 to her residence, when the Defendant and an unknown co-conspirator and NATASHA  
4 LUMBA entered the said NATASHA LUMBA'S residence, one or more of the Defendant  
5 and unknown co-conspirator forced the said NATASHA LUMBA to go to her bedroom and  
6 lie on the floor, one of the Defendant and unknown co-conspirator stayed with NATASHA  
7 LUMBA while the other went through NATASHA LUMBA'S personal property and/or  
8 ransacked her residence, thereafter one of the Defendant and unknown co-conspirator  
9 demanded to know if the said NATASHA LUMBA was hiding money in her bra or panties  
10 and groped NATASHA LUMBA'S breasts and/or genital area while searching for money,  
11 thereafter Defendant and unknown co-conspirator fled the scene together; and/or (3) pursuant  
12 to a conspiracy to commit this crime.

13 COUNT 5 - OPEN OR GROSS LEWDNESS

14 did wilfully and unlawfully commit an act of open or gross lewdness by fondling  
15 NATASHA LUMBA'S breasts and/or genital area, the Defendant being criminally liable  
16 under one or more of the following principles of criminal liability, to-wit: (1) by directly  
17 committing this crime and/or (2) by aiding or abetting in the commission of this crime, with  
18 the intent that this crime be committed, by providing counsel and/or encouragement and by  
19 entering into a course of conduct whereby Defendant and/or an unknown co-conspirator  
20 approached Victim from behind, one of the Defendant and unknown co-conspirator was armed  
21 with a handgun, demanded that NATASHA LUMBA open the door to her residence, when  
22 the Defendant and an unknown co-conspirator and NATASHA LUMBA entered the said  
23 NATASHA LUMBA'S residence, one or more of the Defendant and unknown co-conspirator  
24 forced the said NATASHA LUMBA to go to her bedroom and lie on the floor, one of the  
25 Defendant and unknown co-conspirator stayed with NATASHA LUMBA while the other  
26 went through NATASHA LUMBA'S personal property and/or ransacked her residence,  
27 thereafter one of the Defendant and unknown co-conspirator demanded to know if the said  
28 NATASHA LUMBA was hiding money in her bra or panties and groped NATASHA

1 LUMBA'S breasts and/or genital area while searching for money, thereafter Defendant and  
2 unknown co-conspirator fled the scene together; and/or (3) pursuant to a conspiracy to commit  
3 this crime.

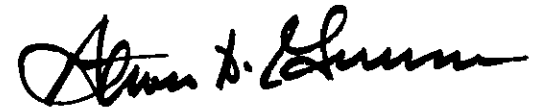
4 All of which is contrary to the form, force and effect of Statutes in such cases made and  
5 provided and against the peace and dignity of the State of Nevada. Said Complainant makes  
6 this declaration subject to the penalty of perjury.

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28 LVMPD EV# 1501204490  
(TK11)

AA000107

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CLERK OF THE COURT

1 **INFM**  
2 **STEVEN B. WOLFSON**  
3 **Clark County District Attorney**  
4 **Nevada Bar #001565**  
5 **AGNES M. LEXIS**  
6 **Chief Deputy District Attorney**  
7 **Nevada Bar #011064**  
8 **200 Lewis Avenue**  
9 **Las Vegas, Nevada 89155-2212**  
10 **(702) 671-2500**  
11 **Attorney for Plaintiff**

12 **I.A. 05/04/2015**  
13 **9:30 A.M.**  
14 **PD ROSS**

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

15 **THE STATE OF NEVADA,**

16 **Plaintiff,**

17 **-vs-**

18 **TOMMY STEWART, aka,**  
19 **Tommy Laquade Stewart, #2731067**  
20 **Defendant.**

**CASE NO: C-15-305984-1**

**DEPT NO: VIII**

**I N F O R M A T I O N**

21 **STATE OF NEVADA        )**  
22 **) ss.**  
23 **COUNTY OF CLARK        )**

24 **STEVEN B. WOLFSON, Clark County District Attorney within and for the County of**  
25 **Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the**  
26 **Court:**

27 **That TOMMY STEWART, aka, Tommy Laquade Stewart, the Defendant(s) above**  
28 **named, having committed the crimes of CONSPIRACY TO COMMIT ROBBERY**  
29 **(Category B Felony - NRS 200.380, 199.480 - NOC 50147); BURGLARY WHILE IN**  
30 **POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - NOC 50426);**  
31 **ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380,**  
32 **193.165 - NOC 50138) and FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY**  
33 **WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055), on or about**  
34 **the 20th day of January, 2015, within the County of Clark, State of Nevada, contrary to the**  
35 **form, force and effect of statutes in such cases made and provided, and against the peace and**

1 dignity of the State of Nevada,

2 COUNT 1 - CONSPIRACY TO COMMIT ROBBERY

3 Did wilfully, unlawfully, and feloniously conspire with an unknown individual to  
4 commit a robbery.

5 COUNT 2 - BURGLARY WHILE IN POSSESSION OF A FIREARM

6 Did then and there wilfully, unlawfully, and feloniously enter, with intent to commit  
7 larceny and/or robbery, that certain structure occupied by NATASHA LUMBA, located at 805  
8 Rock Springs, Apartment No. 101, Las Vegas, Clark County, Nevada, said Defendant did  
9 possess and/or gain possession of a firearm during the commission of the crime and/or before  
10 leaving the structure.

11 COUNT 3 - ROBBERY WITH USE OF A DEADLY WEAPON

12 Did wilfully, unlawfully, and feloniously take personal property, to-wit: a laptop  
13 computer and/or a cellular telephone and/or lawful money of the United States and/or a  
14 camera, from the person of NATASHA LUMBA, or in her presence, by means of force or  
15 violence, or fear of injury to, and without the consent and against the will of NATASHA  
16 LUMBA, with use of a deadly weapon, to-wit: a firearm, the Defendant being criminally liable  
17 under one or more of the following principles of criminal liability, to-wit: (1) by directly  
18 committing this crime and/or (2) by aiding or abetting in the commission of this crime, with  
19 the intent that this crime be committed, by providing counsel and/or encouragement and by  
20 entering into a course of conduct whereby Defendant and/or an unknown co-conspirator  
21 approached Victim from behind, one of the Defendant and unknown co-conspirator was armed  
22 with a handgun, demanded that NATASHA LUMBA open the door to her residence, when the  
23 Defendant and an unknown co-conspirator and NATASHA LUMBA entered the said  
24 NATASHA LUMBA'S residence, one or more of the Defendant and unknown co-conspirator  
25 forced the said NATASHA LUMBA to go to her bedroom and lie on the floor, one of the  
26 Defendant and unknown co-conspirator stayed with NATASHA LUMBA while the other went  
27 through NATASHA LUMBA'S personal property and/or ransacked her residence, thereafter  
28 one of the Defendant and unknown co-conspirator demanded to know if the said NATASHA

1 LUMBA was hiding money in her bra or panties and groped NATASHA LUMBA'S breasts  
2 and/or genital area while searching for money, thereafter Defendant and unknown co-  
3 conspirator fled the scene together; and/or (3) pursuant to a conspiracy to commit this crime..

4 COUNT 4 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

5 Did wilfully, unlawfully, and feloniously, seize, confine, inveigle, entice, decoy,  
6 abduct, conceal, kidnap, or carry away NATASHA LUMBA, a human being, with the intent  
7 to hold or detain the said NATASHA LUMBA against her will, and without her consent, for  
8 the purpose of committing robbery, with use of a deadly weapon, to-wit: a firearm, the  
9 Defendant being criminally liable under one or more of the following principles of criminal  
10 liability, to-wit: (1) by directly committing this crime and/or (2) by aiding or abetting in the  
11 commission of this crime, with the intent that this crime be committed, by providing counsel  
12 and/or encouragement and by entering into a course of conduct whereby Defendant and/or an  
13 unknown co-conspirator approached Victim from behind, one of the Defendant and unknown  
14 co-conspirator was armed with a handgun, demanded that NATASHA LUMBA open the door  
15 to her residence, when the Defendant and an unknown co-conspirator and NATASHA  
16 LUMBA entered the said NATASHA LUMBA'S residence, one or more of the Defendant and  
17 unknown co-conspirator forced the said NATASHA LUMBA to go to her bedroom and lie on  
18 the floor, one of the Defendant and unknown co-conspirator stayed with NATASHA LUMBA  
19 while the other went through NATASHA LUMBA'S personal property and/or ransacked her  
20 residence, thereafter one of the Defendant and unknown co-conspirator demanded to know if  
21 the said NATASHA LUMBA was hiding money in her bra or panties and groped NATASHA  
22 LUMBA'S breasts and/or genital area while searching for money, thereafter Defendant and

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 unknown co-conspirator fled the scene together; and/or (3) pursuant to a conspiracy to commit  
2 this crime.

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

5 BY /s/ Agnes M. Lexis  
6 AGNES M. LEXIS  
7 Chief Deputy District Attorney  
Nevada Bar #011064

8  
9 Names of witnesses known to the District Attorney's Office at the time of filing this  
10 information are as follows:

11	<u>NAME</u>	<u>ADDRESS</u>
12	ABELL, Jeffery	LVMPD # 8744
13	CHARLTON, Noreen B.	LVMPD # 13572
14	CUSTODIAN OF RECORDS	Clark County Detention Center,
15	OR DESIGNEE	330 S. Casino Center Blvd., Las Vegas, NV
16	CUSTODIAN OF RECORDS	Clark County Detention Center, Communications
17	OR DESIGNEE	330 S. Casino Center Blvd., Las Vegas, NV
18	CUSTODIAN OF RECORDS	LVMPD Communications, 400 E. Stewart
19	OR DESIGNEE	Las Vegas, NV
20	CUSTODIAN OF RECORDS	LVMPD Records, 400 E. Stewart
21	OR DESIGNEE	Las Vegas, NV
22	DOUGHERTY, Ed	INVESTIGATOR
23	GOULDTHORPE, Heather	C.C. DISTRICT ATTORNEY
24	HAGER, David	LVMPD # 8646
25	JACKSON, Brian	LVMPD # 8716
26	LUMBA, Natasha	LVMPD # 9690
27		C/O District Attorney's Office

28 ///

**DO NOT READ TO THE JURY**

**UNDER NO CIRCUMSTANCES IS THE LANGUAGE CONTAINED  
HEREINAFTER TO BE READ TO A JURY HEARING THE PRIMARY OFFENSE  
FOR WHICH THE DEFENDANT IS PRESENTLY CHARGED.**

**NOTICE OF INTENT TO SEEK PUNISHMENT AS A HABITUAL  
CRIMINAL**

The State of Nevada hereby places Defendant TOMMY STEWART, aka, Tommy Laquade Stewart on notice of the State's intent to seek punishment of Defendant TOMMY STEWART, aka, Tommy Laquade Stewart pursuant to the provisions of NRS 207.010 and 207.012 as a violent habitual criminal in the event of a felony conviction in the above-entitled action.

The State will seek punishment as a habitual criminal based upon the following felony convictions, to wit:

1. That in 2012, the Defendant was convicted in the Eighth Judicial District Court, County of Clark, State of Nevada, for the crime of VOLUNTARY MANSLAUGHTER (Category B Felony - NRS 200.040, 200.050, 200.080 - NOC 50020), in Case No. C275532.

2. That in 2009, the Defendant was convicted in the Eighth Judicial District Court, County of Clark, State of Nevada, for the crime of BATTERY WITH SUBSTANTIAL BODILY HARM (Category C Felony - NRS 200.481 - NOC 50214), in Case No. C257625.

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

BY /s/ Agnes M. Lexis  
AGNES M. LEXIS  
Chief Deputy District Attorney  
Nevada Bar #011064

**DO NOT READ TO THE JURY**

DA#15F02411X/saj/L-1  
LVMPD EV#1501204490  
(TK11)

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2 VER



ORIGINAL

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

MAR 17 2016 12:10 pm

5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA BY, Denise Husted  
DENISE HUSTED, DEPUTY

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 TOMMY STEWART, aka  
11 Tommy Laquade Stewart,

12 Defendant.

CASE NO: C-15-305984-1

DEPT NO: XXI

13 VERDICT

14 We, the jury in the above entitled case, find the Defendant TOMMY STEWART, as  
15 follows:

16  
17 COUNT 1 – CONSPIRACY TO COMMIT ROBBERY

18 *(please check the appropriate box, select only one)*

19 ☒ Guilty of Conspiracy to Commit Robbery

20 ☐ Not Guilty

21 COUNT 2 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

22 *(please check the appropriate box, select only one)*

23 ☐ Guilty of Burglary while in Possession of a Deadly Weapon

24 ☒ Guilty of Burglary

25 ☐ Not Guilty  
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AA000113

**COUNT 3 – ROBBERY WITH USE OF A DEADLY WEAPON**

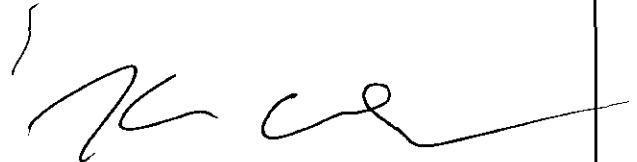
- ☐ Guilty of Robbery with Use of a Deadly Weapon  
☒ Guilty of Robbery  
☐ Not Guilty

**COUNT 4 – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON**

*(please check the appropriate box, select only one)*

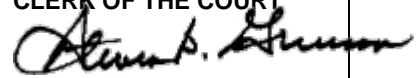
- ☐ Guilty of First Degree Kidnapping with Use of a Deadly Weapon  
☒ Guilty of First Degree Kidnapping  
☐ Not Guilty

DATED this 17 day of March, 2016



\_\_\_\_\_  
FOREPERSON

AA000114



1 **RTRAN**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5 THE STATE OF NEVADA,

6 Plaintiff,

7 vs.

8 TOMMY STEWART, aka TOMMY  
9 LAQUADE STEWART,

10 Defendant.

CASE NO. C-15-305984-1

DEPT. NO. XXI

11  
12 BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

13 TUESDAY, MAY 10, 2016

14  
15 **RECORDER'S TRANSCRIPT OF HEARING:**  
16 **SENTENCING**

17  
18 **APPEARANCES:**

19 For the State:

AGNES M. LEXIS  
Chief Deputy District Attorney

20  
21 For the Defendant:

JESS R. MARCHESE, ESQ.

22  
23  
24  
25 RECORDED BY: SUSIE SCHOFIELD, COURT RECORDER

AA000115

1 LAS VEGAS, NEVADA, TUESDAY, MAY 10, 2016, 11:29 A.M.

2 \*\*\*\*\*

3 THE COURT: State versus Tommy Stewart. Mr. Stewart is present in  
4 custody with Mr. Marchese. This is the time set for the rendition of sentence. Are  
5 both sides ready to go forward?

6 MS. LEXIS: We are.

7 MR. MARCHESE: We are, Your Honor. Just one minor detail in the PSI,  
8 under the instant offense on page 5, said that it was kidnapping, first degree,  
9 resulting in substantial bodily harm with use of a deadly weapon. Your Honor heard  
10 the trial, knows the facts and circumstances. There was no substantial bodily harm.

11 I don't think it's a material fact given what the actual conviction was but  
12 I just wanted to bring it to the Court's attention.

13 THE COURT: Okay.

14 MR. MARCHESE: Yeah.

15 THE COURT: Well, as long as the JOC is correct, I don't see a problem.

16 MR. MARCHESE: Yeah. Yeah, then we're ready to go forward. We went  
17 over the PSI, Mr. Stewart and I together.

18 THE COURT: Okay. It says first degree kidnapping on page 2 of the PSI.

19 All right. State, this being a jury verdict -- so you're referring to page 5,  
20 but I think it's clear so. This being a jury verdict, Ms. Lexis, you obviously have the  
21 right to argue.

22 MS. LEXIS: Your Honor, the State did file on June 3<sup>rd</sup>, 2015, a notice of intent  
23 to seek habitual criminal treatment. That is filed with the Court so may I approach  
24 your clerk and make a record of his two prior felony convictions.

25 THE COURT: You may, and has Mr. Marchese been given an opportunity to

AA000116

1 review those two prior felony convictions?

2 MS. LEXIS: Yes, I believe we provided it in discovery.

3 THE COURT: You got that in discovery, Mr. Marchese?

4 MR. MARCHESE: That's correct, Your Honor.

5 MS. LEXIS: Your Honor, in March of 2010, in Case No. C257625, the  
6 defendant was convicted of battery with substantial bodily harm, and in August 24<sup>th</sup>  
7 of 2012, under Case No. C275532, the defendant was convicted by way of *Alford* of  
8 voluntary manslaughter.

9 THE COURT: All right. Those will be filed with the Clerk.

10 MS. LEXIS: Your Honor, as to Count 1, the State is asking for 28 to 72  
11 months. As to Count 2, the State is asking for 4 to 10 years. As to Count 3, the  
12 robbery, the State is asking that you impose the small habitual criminal treatment  
13 and sentence the defendant to 8 to 20 years in the Nevada Department of  
14 Corrections. As to Count 4, first degree kidnapping, the State is asking for the 5-to-  
15 life penalty.

16 Your Honor, the defendant is 24 years old -- all to run concurrent. The  
17 defendant is 24 years old and as you can see from the judgments of convictions, he  
18 has already gotten a very, gotten two very serious felony convictions. He has taken  
19 a life, and the battery with substantial bodily harm actually involved him, I believe,  
20 being certified up as an adult for shooting at individuals multiple times.

21 The defendant is a known gang member as indicated also in his Pre-  
22 sentence Investigation Report. I pulled the reports from his priors. They appear to  
23 have been gang related activity.

24 The defendant presents a very, very clear and overwhelming threat to  
25 the community. You heard the trial, you heard about how this young woman was

AA000117

1 coming home from being out --

2 THE COURT: With the boyfriend.

3 MS. LEXIS: Correct. And she is accosted by the defendant and another  
4 individual with a gun. The jury didn't find the weapon which baffles me, but I respect  
5 their decision. And they made her lie down in a bedroom while they robbed her.

6 THE COURT: And the State's requesting concurrent time, you said, with the  
7 habitual criminal of an age 20?

8 MS. LEXIS: Correct. With those priors, particularly with the voluntary  
9 manslaughter, I don't think the defendant was in any kind of position to commit  
10 crimes ever again. Actually, I take that position with the first conviction with the  
11 battery with substantial. I think all breaks at this point stop.

12 If he is released or he's not supervised for the life term, or if he's  
13 released before the 8-to-20-year habitual sentence is imposed, I think he will just do  
14 it again as he has proven in his very short adult life, given his convictions.

15 The strength of our evidence was pretty strong at trial so I don't think  
16 there's a doubt that he committed this offense, and I think he needs to go away for  
17 as long as possible.

18 THE COURT: All right. Mr. Stewart, what if anything would you like to state  
19 to the Court before the Court pronounces sentence against you.

20 THE DEFENDANT: Nothin' at all, Your Honor.

21 THE COURT: All right, thank you. Mr. Marchese?

22 MR. MARCHESE: That's correct, Your Honor. I spoke to him and he just  
23 wishes that I speak on his behalf.

24 Obviously, the Court heard the facts and circumstances of the case.  
25 I'm not going to go over anything. You know the facts just as well as I do. So really

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1 what we're here for is just to see how long he's going to prison. He's obviously  
2 going to get a sentence of incarceration, and I did have some serious doubts and I  
3 think that there's some great appellate issues as to the kidnapping. But the other  
4 cases or charges were well proven and I'm not going to dispute that. It is what it is  
5 at this point, so.

6 What I would ask for is give him 5 to 15 on the robbery and give him the  
7 rest of the counts to run concurrent. On the kidnapping I would ask for, I think it's,  
8 what does it go -- I would not ask for the life sentence on that, Your Honor. What I  
9 would ask for is the 5-to-15 as well. Given his prior record, he's probably going to  
10 have to get pretty darn close to expiring that.

11 But also, in looking at the prior record, I mean, I don't know the facts  
12 and circumstances of the 2011 case. I was not the attorney of record on that,  
13 however, I would submit to the Court, and I don't think I'm out of bounds by saying  
14 this, that if someone's pleading going down from a murder with use down to a  
15 voluntary manslaughter with an *Alford* plea, I would submit to the Court, and only  
16 winding up with 24 to 60 months, that there probably --

17 THE COURT: There were significant issues.

18 MR. MARCHESE: Yeah, there were probably some significant issues. I  
19 mean, there was probably something going on there and as Your Honor said on one  
20 of your other cases that the truth lies somewhere in between.

21 So that's what we would be asking for, Your Honor. I don't think it's  
22 necessary to repeat what the Court already knows. With that, we'll submit.

23 THE COURT: All right.

24 Mr. Stewart, by virtue of the jury's verdict, you are hereby adjudged  
25 guilty of Count No. 1, conspiracy to commit robbery, Count No. 2, burglary, Count

AA000119

1 No. 3, robbery, and Count No. 4, first degree kidnapping.

2 In addition to the \$25 administrative assessment, your DNA was  
3 already taken so we don't need that again, and the \$3 DNA administrative  
4 assessment, on conspiracy to commit robbery you are sentenced to a minimum  
5 term of 13 months in the Nevada Department of Corrections, and a maximum term  
6 of 60 months.

7 On burglary you're sentenced to 22 to 96 months. That is imposed  
8 concurrently with the time you received on Count No. 1.

9 On Count No. 3, robbery, you're adjudged guilty under the habitual  
10 criminal statute and sentenced to a minimum term of eight years in the Nevada  
11 Department of Corrections, and a maximum term of twenty years, and you're also  
12 ordered to pay restitution in the amount of \$2,875.00. Count 3 is imposed  
13 concurrently with the time I gave you on Count No. 2.

14 On Count No. 4, first degree kidnapping, you're sentenced to life with a  
15 minimum parole eligibility beginning after five years has been served. That is  
16 imposed concurrently with the time I gave you on Count No. 3.

17 And you are entitled to four hundred and -- oh wait, you have more than  
18 that.

19 MR. MARCHESE: Yeah, I think they were five days off.

20 THE COURT: Okay, so that would give you 552 days, is that right?

21 MS. LEXIS: Yes, I'll submit.

22 THE COURT: I'm sorry, four hundred.

23 MR. MARCHESE: Four hundred, yeah, I'll take it, but -- 452.

24 THE COURT: Credit for time served.

25 Thank you, Mr. Marchese.

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1 MR. MARCHESE: Thank you.

2 MS. LEXIS: Thank you.

3 THE COURT: All right.

4

5

\* \* \* \*

6

PROCEEDING CONCLUDED AT 11:38 A.M.

7

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ATTEST: I do hereby certify that I have truly and correctly transcribed the  
audio/video proceedings in the above-entitled case to the best of my ability.

17

18

19

20

  
SUSAN SCHOFIELD  
Court Recorder/Transcriber

21

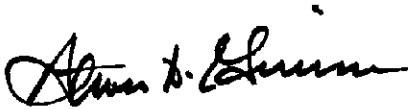
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AA000121

  
CLERK OF THE COURT

JOC

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TOMMY STEWART aka  
Tommy Laquade Stewart  
#2731067

Defendant.

CASE NO. C305984-1

DEPT. NO. XXI



JUDGMENT OF CONVICTION  
(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in violation of NRS 200.380, 199.480, COUNT 2 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony) in violation of NRS 205.060, COUNT 3 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165, and COUNT 4 – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in

1 violation of NRS 200.380, 199.480, COUNT 2 – BURGLARY (Category B Felony) in  
2 violation of NRS 205.060, COUNT 3 – ROBBERY (Category B Felony) in violation of  
3 NRS 200.380, and COUNT 4 – FIRST DEGREE KIDNAPPING (Category A Felony) in  
4 violation of NRS 200.310, 200.320; thereafter, on the 10<sup>th</sup> day of May, 2016, the  
5 Defendant was present in court for sentencing with counsel JESS R. MARCHESE,  
6 ESQ., and good cause appearing,  
7

8 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in  
9 addition to the \$25.00 Administrative Assessment Fee, \$2,875.00 Restitution plus \$3.00  
10 DNA Collection Fee, the Defendant is SENTENCED to the Nevada Department of  
11 Corrections (NDC) as follows: **COUNT 1** - to a MAXIMUM of SIXTY (60) MONTHS with  
12 a MINIMUM parole eligibility of THIRTEEN (13) MONTHS; **COUNT 2** - to a MAXIMUM  
13 of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of TWENTY-TWO (22)  
14 MONTHS, CONCURRENT with COUNT 1; **COUNT 3** - to a MAXIMUM of TWENTY  
15 (20) YEARS with a MINIMUM parole eligibility of EIGHT (8) YEARS, CONCURRENT  
16 with COUNT 2; and **COUNT 4** - LIFE with the eligibility for parole after serving a  
17 MINIMUM parole eligibility of FIVE (5) YEARS, CONCURRENT with COUNT 3; with  
18 FOUR HUNDRED FIFTY-TWO (452) DAYS credit for time served. As the \$150.00  
19 DNA Analysis Fee and Genetic Testing have been previously imposed, the Fee and  
20 Testing in the current case are WAIVED.  
21  
22

23  
24 DATED this 16<sup>th</sup> day of May, 2016

25  
26   
27 VALERIE P. ADAIR   
28 DISTRICT COURT JUDGE



CLERK OF THE COURT

JESS R. MARCHESE, ESQ.  
Nevada bar No. 8175  
601 S. Las Vegas Blvd.  
Las Vegas, NV 89101  
(702) 385-5377 Fax (702) 474-4210  
Attorney for Defendant – TOMMY STEWART

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,	)	Case No.: C-15-305984-1
	)	Dept. No.: XXI
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
TOMMY STEWART,	)	
	)	
Defendant.	)	

**NOTICE OF APPEAL**


TO: THE STATE OF NEVADA

STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and  
DEPARTMENT NO XXI OF THE EIGHTH JUDICIAL DISTRICT COURT OF  
THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that Defendant, Tommy Stewart, presently incarcerated in the  
Nevada Department of Corrections, appeals to the Supreme Court of the State of Nevada from  
the judgment entered against said Defendant on the 17<sup>th</sup> day of May, 2016 whereby he was  
convicted of COUNT 1-CONSPIRACY TO COMMIT ROBBERY, 13-60 months, concurrent  
with COUNT 2; COUNT 2-BUGLARY, 22-96, concurrent with COUNT 3; COUNT 3-  
ROBBERY, 8-20 years concurrent with COUNT 4; COUNT 4-FIRST DEGREE KIDNAPPING,

1 5 years to life with the possibility of parole with FOUR HUNDRED AND FIFTY TWO (452)  
2 DAYS credit for time served.

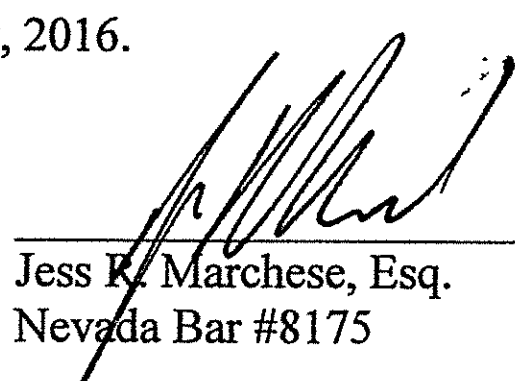
3 DATED this 18<sup>th</sup> day of May, 2016

4  
5   
JESS R. MARCHESE, ESQ.  
Nevada Bar #8175

6  
7  
8 **DECLARATION OF MAILING**

9 Jess R. Marchese, hereby declares that he is, and was when the herein described mailing  
10 took place, a citizen of the United States , over 21 years of age, and not a party to, nor interested  
11 in, the within action; that on the 18<sup>th</sup> day of May 2016, declarant deposited in the United States  
12 mail at Las Vegas, Nevada, a copy the Notice of Appeal in the case of the State of Nevada vs  
13 Tommy Stewart, Case No. C305984, enclosed in a sealed envelope upon which first class  
14 postage was fully prepaid, addressed to Tommy Stewart #2731067, PO Box 650, Indian Springs,  
15 Nevada 89070. That there is regular communication by mail between the place of mailing and  
16 the place so addressed. I declare under penalty of perjury that the foregoing is true and correct.

17 EXECUTED on the 18<sup>th</sup> day of May, 2016.

18  
19   
20 Jess R. Marchese, Esq.  
21 Nevada Bar #8175

22 **RECEIPT OF COPY**

23 RECEIPT OF COPY of the foregoing Notice of Appeal is hereby acknowledged this

24 15 day of May, 2016.

25 STEVEN B. WOLFSON  
26 CLARK COUNTY DISTRICT ATTORNEY  
27 

28 By: \_\_\_\_\_

CASE NO. C-15-305984-1

DEPT. NO. XXI

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

Electronically Filed  
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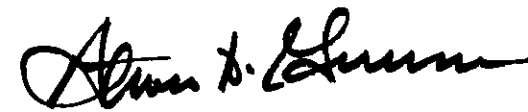
THE STATE OF NEVADA,

Plaintiff,

-VS-

TOMMY STEWART,

Defendant.



CLERK OF THE COURT

**CASE APPEAL STATEMENT**

1. **Appellant filing this case appeal statement:** Tommy Stewart.

2. **Judge issuing the decision, judgment, or order appealed from:**

Honorable Valerie Adair.

3. **Identify each Appellant and their name and address:** Louis Taylor,

Defendant/Appellant.

JESS R. MARCHESE for Appellant  
601 S. Las Vegas Blvd.  
Las Vegas, NV 89101  
702-385-5377

STEVEN B. WOLFSON for Respondent  
Clark County District Attorney  
200 Lewis Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89155  
702-671-2700

4. **Identify each Respondent and their name and address:** The State of

Nevada, Plaintiff/Respondent.

STEVEN B. WOLFSON for Respondent  
Clark County District Attorney  
200 Lewis Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89155  
702-671-2700

5. **Indicate whether any attorney identified in above response to question 3 or 4 is not licensed to practice law in Nevada:** All parties are licensed to practice law in Nevada.

6. Whether appellant was represented by appointed or retained counsel  
in the district court: Appointed.

7. Whether appellant is represented by appointed or retained counsel  
on appeal: Appointed.

8. Whether appellant was granted leave to proceed in forma pauperis,  
and the date of entry of the district court order granting such leave: N/A.

9. Date proceedings commenced in the district court (e.g., date  
complaint, indictment, information, or petition was filed): Information 4/24/15.

10. Brief description of the action: Criminal appeal from a jury verdict.

11. Indicate whether the case has previously been the subject of an appeal  
or original writ in the Supreme Court: No, it has not.

12. Indicate whether this appeal involves child custody or visitation: No.

13. This is not a civil case.

DATED this 18<sup>th</sup> day of May, 2016.

By: 

JESS R. MARCHESE, ESQ.  
Nevada Bar #8175  
601 S. Las Vegas Blvd.  
Las Vegas, Nevada 89101  
702-385-5377

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LAQUADE STEWART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 70069  
District Court Case No. C305984

FILED

JUN 12 2017

*Elizabeth A. Brown*  
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Affirmed."

Judgment, as quoted above, entered this 4<sup>th</sup> day of May, 2017.

IN WITNESS WHEREOF, I have subscribed  
my name and affixed the seal of the Supreme  
Court at my Office in Carson City, Nevada this  
May 30, 2017.

Elizabeth A. Brown, Supreme Court Clerk

By: Dana Richards  
Deputy Clerk

C-15-305984-1  
CCJA  
NV Supreme Court Clerks Certificate/Judgn  
4856851



AA000128

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LAQUADE STEWART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70069

**FILED**

MAY 04 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, burglary, robbery, and first-degree kidnapping. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

*Affirmed.*

Marchese Law Offices, PC, and Jess R. Marchese, Las Vegas,  
for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson,  
District Attorney, and Jonathan VanBoskerck, Chief Deputy District  
Attorney, Clark County,  
for Respondent.

---

BEFORE DOUGLAS, GIBBONS and PICKERING, JJ.

*OPINION*

By the Court, GIBBONS, J.:

In this appeal, we are asked to analyze issues related to dual convictions for first-degree kidnapping and robbery, as well as the sufficiency of the warning given pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant Tommy Stewart, along with another unidentified

man, demanded entry into victim Natasha Lumba's apartment at gunpoint, ordered Lumba to lie face down in her bedroom while being guarded, and stole electronics, cash, and other personal items from the apartment. After a three-day jury trial, Stewart was found guilty on all counts and given a sentence of life with the possibility of parole. On appeal, Stewart argues that (1) there was insufficient evidence to support a conviction of both robbery and kidnapping and (2) the *Miranda* warning given by police was legally insufficient.

We hold that (1) there was sufficient evidence to support Stewart's convictions for kidnapping and robbery and (2) the *Miranda* warning was legally sufficient. Accordingly, we affirm the district court's judgment of conviction.

### *FACTS AND PROCEDURAL HISTORY*

#### *The crime*

On January 20, 2015, Stewart and another unidentified man approached Lumba as she entered her apartment, held her at gunpoint, and told her to let them into the apartment. Once in the apartment, the men told Lumba to lie face down on the ground in the back bedroom. The men took turns guarding Lumba while ransacking her apartment and looking for things to steal. While Lumba was on the floor, one of the attackers put his hand under her bra and underwear to search for money or items she might have concealed.

After approximately 10 or 15 minutes, the two men finished their search of the apartment. Just before leaving, the two men told Lumba not to call the police or they would come back to kill her. The two men left Lumba's apartment, taking with them various electronics and cash. Lumba later called 911, and Las Vegas Metropolitan Police Department (LVMPD) personnel arrived on scene.

AA000130

### *The investigation*

During their investigation, LVMPD evidence technicians found Stewart's fingerprints on Lumba's jewelry box. Additionally, LVMPD detectives conducted a follow-up interview and photographic lineup, wherein Lumba identified two potential suspects, one of whom was Stewart. The LVMPD located Stewart and detained him for further questioning.

### *The interrogation*

Prior to questioning, an LVMPD detective read Stewart the warning from the LVMPD *Miranda* card:

You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to have the presence of an attorney during questioning. If you cannot afford an attorney one will be appointed before questioning. Do you understand these rights?

Stewart indicated that he understood his rights and agreed to talk with the detective. Stewart initially denied being at Lumba's apartment but later admitted to being there after being confronted with the fingerprint evidence. Stewart admitted to being in Lumba's apartment on the night in question with another man and admitted to stealing her personal effects, but Stewart stated that he had not entered the bedroom.

### *The trial*

The State charged Stewart with conspiracy to commit robbery, burglary while in possession of a firearm, robbery with use of a deadly weapon, and first-degree kidnapping with use of a deadly weapon.

Stewart filed two pretrial motions to suppress his statement to LVMPD detectives, arguing that the LVMPD's *Miranda* warning was legally insufficient. The district court denied both motions.

After a three-day trial, the jury found Stewart guilty on all counts. Stewart was sentenced to life with the possibility of parole, and he then filed the instant appeal.

### ANALYSIS

*Sufficient evidence exists to support Stewart's dual convictions of first-degree kidnapping and robbery*

Stewart challenges the evidence underlying the first-degree kidnapping conviction, arguing his conviction for first-degree kidnapping is not supported by the evidence because the movement of Lumba was incidental to the robbery, it did not substantially increase the risk of harm to her, nor did it go beyond that contemplated for completion of the robbery. We disagree.

In order to determine “whether a verdict was based on sufficient evidence to meet due process requirements, this court will inquire whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (internal quotation marks omitted). “The jury’s verdict will not be disturbed on appeal when there is substantial evidence supporting it.” *Brass v. State*, 128 Nev. 748, 754, 291 P.3d 145, 150 (2012).

The crime of first-degree kidnapping is described in NRS 200.310(1), while the crime of robbery is defined in NRS 200.380. A conviction for first-degree kidnapping requires that a “person . . . willfully seizes, confines, . . . conceals, kidnaps or carries away a person by any means whatsoever . . . for the purpose of committing . . . robbery upon or from the person.” NRS 200.310(1). A conviction for robbery requires “the unlawful taking of personal property from the person of

AA000132

another . . . against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property.” NRS 200.380. Dual convictions under both statutes are permitted based upon the same conduct. *Mendoza v. State*, 122 Nev. 267, 274-75, 130 P.3d 176, 180 (2006). However, in such cases:

[T]o sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.

*Id.* at 275, 130 P.3d at 181. In general, “[w]hether the movement of the victim is incidental to the associated offense and whether the risk of harm is substantially increased thereby are questions of fact to be determined by the trier of fact in all but the clearest cases.” *Curtis D. v. State*, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982); *see also Gonzales v. State*, 131 Nev., Adv. Op. 49, 354 P.3d 654, 666 (Ct. App. 2015).

Here, we conclude that there is sufficient evidence to support Stewart’s dual convictions for robbery and first-degree kidnapping. The jury heard evidence that Stewart took Lumba’s personal property against her will by means of force, violence, or fear of injury. Further, the jury heard evidence that Lumba’s movement substantially exceeded the movement necessary to complete the robbery and/or substantially increased the harm to her. Indeed, Lumba was accosted as she entered her residence, taken to the back bedroom, guarded at gunpoint, face down, while Stewart and the other suspect rummaged through her house and stole her belongings. Whether Lumba’s movement was incidental to the

AA000133

robbery, and whether the risk of harm to her was substantially increased, are questions of fact to be determined by the jury in "all but the clearest of cases." *Curtis D.*, 98 Nev. at 274, 646 P.2d at 548. This is not one of the "clearest of cases" in which the jury's verdict must be deemed unreasonable; indeed, a reasonable jury could conclude that Stewart forcing Lumba from her front door into her back bedroom substantially exceeded the movement necessary to complete the robbery and that guarding Lumba at gunpoint substantially increased the harm to her. We conclude that the evidence presented to the jury was sufficient to convict Stewart of both robbery and first-degree kidnapping.

*The district court did not err in denying Stewart's motion to suppress statements made to police because the Miranda warning given to Stewart was sufficient*

Stewart argues the *Miranda* warnings given to him failed to advise him that he could consult with an attorney before and during interrogation. Stewart contends the warnings simply indicated that he had the right to an attorney, while failing to convey directly or indirectly, that he could actively consult with that attorney throughout the questioning. We disagree.

*Miranda* establishes procedural safeguards "to secure and protect the Fifth Amendment privilege against compulsory self-incrimination during the inherently coercive atmosphere of an in-custody interrogation." *Dewey v. State*, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007). *Miranda* prescribed the four now-familiar warnings:

[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if

he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

*Florida v. Powell*, 559 U.S. 50, 59-60 (2010) (alterations in original) (quoting *Miranda*, 384 U.S. at 479). To be constitutionally adequate, *Miranda* warnings must be “sufficiently comprehensive and comprehensible when given a commonsense reading.” *Powell*, 559 U.S. at 63.

Stewart first argues the *Miranda* warning given in this case did not inform him that he could consult an attorney before and during questioning. This argument is not supported by the record. The *Miranda* warning given to Stewart stated, in part, “You have the right to have the presence of an attorney during questioning. If you cannot afford an attorney one will be appointed before questioning.” Given a commonsense reading, these two clauses provide a constitutionally adequate warning—the warning informed Stewart he had the right to counsel before and during questioning, as specifically required by *Miranda*. See *Powell*, 559 U.S. at 63. Although the warnings were perhaps not the clearest possible formulation of *Miranda*’s right-to-counsel advisement, they were constitutionally sufficient. *Id.* Thus, we conclude Stewart’s first *Miranda* argument fails.

Additionally, Stewart argues that the warning only advised him that he had the right to an attorney but not that he could actively consult with that attorney throughout the questioning. We conclude this argument is without merit. Indeed, the right to an attorney is the right to consult with that attorney, and the argument to the contrary relies on an absurd interpretation of the *Miranda* warning. See *Powell*, 559 U.S. at 62-63. Thus, we conclude Stewart’s second *Miranda* argument fails.

Therefore, we hold that the district court did not err in determining Stewart received an adequate *Miranda* warning prior to making statements to police and, thus, did not err in denying Stewart's motions to suppress those statements.

**CONCLUSION**

We conclude that there was sufficient evidence to support Stewart's convictions for kidnapping and robbery and that the *Miranda* warning was legally sufficient. Accordingly, we affirm the district court's judgment of conviction.

Gibbons J.  
Gibbons

We concur:

Douglas J.  
Douglas

Pickering J.  
Pickering

**CERTIFIED COPY**

This document is a full, true and correct copy of  
the original on file and of record in my office.

DATE May 30, 2017

Supreme Court Clerk, State of Nevada

By D. Richards Deputy

AA000137

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

TOMMY LAQUADE STEWART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

**Supreme Court No. 70069**  
District Court Case No. C305984

**REMITTITUR**

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: May 30, 2017

Elizabeth A. Brown, Clerk of Court

By: Dana Richards  
Deputy Clerk

cc (without enclosures):

Hon. Valerie Adair, District Judge  
Tommy LaQuade Stewart  
Clark County District Attorney  
Attorney General/Carson City  
Marchese Law Office

**RECEIPT FOR REMITTITUR**

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on JUN 12 2017.

HEATHER UNGERMANN

Deputy District Court Clerk

**RECEIVED**

**JUN 05 2017**

CLERK OF THE COURT

AA000138

17-17858

RECEIVED  
3/8/18  
JMP/CLERK

HC-1803006  
Case No: 615-305984-1  
Dept. No. 2

FILED

2018 MAR -8 PM 12:56

FILED  
WHITE PINE COUNTY CLERK  
BY Ym

IN THE 7<sup>th</sup> JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR THE COUNTY OF White Pine

Tommy Stewart  
Petitioner,

v.

Timothy Filson  
Respondent.

PETITION FOR WRIT  
OF HABEAS CORPUS  
(POSTCONVICTION)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED  
APR 04 2018  
CLERK OF THE COURT  
40

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

### PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison

2. Name and location of court which entered the judgment of conviction under attack: 8<sup>th</sup> Judicial District Court

3. Date of judgment of conviction: May 10 2016

4. Case number: C-15-305984-1

5. (a) Length of sentence: Thirteen to Sixty, Twenty-two to Ninety six months, Eight to twenty years, Five to life All counts ran concurrent

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

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

If "yes", list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: Robbery/First Degree Kidnapping

8. What was your plea? (check one):

(a) Not guilty   ✓   (b) Guilty    (c) Nolo contendere   

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details:

N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury   ✓   (b) Judge without a jury   

11. Did you testify at the trial? Yes    No   ✓  

12. Did you appeal from the judgment of conviction? Yes   ✓   No   

13. If you did appeal, answer the following:

(a) Name of Court: 8<sup>th</sup> Judicial District Court

(b) Case number or citation: 70069

(c) Result: Denied

AA000140

(d) Date of result: MAY 4, 2017  
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: \_\_\_\_\_

N/A

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

Yes ☒ No ☐

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

(a)(1) Name of court: 8<sup>th</sup>

(2) Nature of proceeding: \_\_\_\_\_

(3) Grounds raised: Suppress Defendant Statement  
Miranda warning inaccurate

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☒ No ☐

(5) Result: Denied without counsel present

(6) Date of result: March 9 2016

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: \_\_\_\_\_

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

(1) Name of court: 8<sup>th</sup>

(2) Nature of proceeding: \_\_\_\_\_

(3) Grounds raised: Intrinsic Fraud

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result: Cancelled

(6) Date of result: August 10, 2015

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: \_\_\_\_\_

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

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

(1) First petition, application or motion? Yes ☐ No ☒

Citation or date of decision: \_\_\_\_\_

(2) Second petition, application or motion? Yes ☐ No ☒

Citation or date of decision: \_\_\_\_\_

(3) Third or subsequent petitions, applications or motions? Yes ☐ No ☒

Citation or date of decision: \_\_\_\_\_

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Ineffective assistance of counsel

AA000141

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

(a) Which of the grounds is the same: Double punished for both Robber/Kidnapping

The Supreme Court of the State of Nevada

(b) The proceedings in which these grounds were raised: Direct Appeal IN

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) The kidnapping charge may not lie because of the movement of the victim was incidental to the commission of the robbery itself.

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) I was not allowed to file any motions to raise any of my issues do to the fact that I had counsel. Counsel failed to raise these issues.

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ☐ No ☒  
If yes, state what court and case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Katrina Ross (Public Defender)  
Jess A. Marchese (Appointed)

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ☐ No ☒  
If yes, specify where and when it is to be served, if you know: \_\_\_\_\_

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

AA000142

1 (a) Ground ONE: Ineffective assistance of counsel Six<sup>th</sup> & Fourteen Admendment  
2 Petitioner's Sixth Amendment right to effective assistance of counsel was  
3 violated. Strickland v. Washington, Counsel was constitutionally Ineffective for  
4 not filing motion to suppress defended statement within the guidelines.  
5 Supporting FACTS (Tell your story briefly without citing cases or law.): Mr. Jess Marchese was  
6 my attorney for eight months prior too calendar call and did not file any  
7 pre-trial motions on my behalf. Calendar call was on March 2, 2016, The State  
8 announced ready. Marchese agree and case was sent to over flow. On March  
9 6, 2016 Marchese attempted to file a motion to suppress defendant which  
10 was denied without Mr. Marchese being present. Mr. Marchese had plenty of  
11 time to file any and all motions that needed to be filed befor the deadline,  
12 However Marchese was Ineffective for not filing Motion to suppress defendant  
13 Statement Fifhteen days befor trial in that regards the motion was untimely,  
14 which was the beginging of the states opposition and why Judge Valerie  
15 Adams stated Judge Douglass Smith had grounds to consider the motion  
16 without counsel present. If counsel would have file this motion  
17 within the guidelines there's a possibility The Judge would have ruled in our  
18 favor. If he filed the motion on time. This is the same motion that three separate  
19 Judge in Federal court have found merit in basically that they Metro card was  
20 Inadequate. This harmful error cause the defendant harm because the state  
21 use my incriminating statement against me which was harmful evidence. MR.  
22 Marchese was so InEfective and has failed to follow Nevada rules of  
23 professional conduct states under rule, 1.0A 1.2, 1.3, 1.4 and the ADKT 411  
24 Standards. Counsel failed to move for a mistrial or post verdict, Judgment of  
25 acquittal when victim stated during trial (Trial Transcripts) pg. 43<sup>#</sup> 22-25 pg. 44<sup>#</sup> 1-3  
26 pg. 46<sup>#</sup> 1-11 pg. 55<sup>#</sup> 10-25 I wasn't saying these were defenely the people they just have  
27 Similar to the people who robbed me. When ask can you identify anyone in this  
28 Court room victim stated she wasn't sure.

1 (b) Ground TWO: Due process Fourteen & Six Admendment

2 InEffective assistance of counsel

3  
4  
5 Supporting FACTS (Tell your story briefly without citing cases or law.): Counsel Katrina Ross  
6 public defender was InEffective for waiving my presence at preliminary  
7 hearing without my consent (pg. 4<sup>#</sup>4-17). There was a preliminary hearing  
8 On April 16, 2015 preliminary hearing transcript the court states "It's my under-  
9 standing there was a sargent notice filed in this case". There are no other records  
10 showing that this sargent notice was filed other then the preliminary hearing  
11 transcript. This sargent notice doesn't show anywhere in the minutes or the  
12 system isn't showing a notice on file. Right after that occur There was a conflict  
13 of Interest Katrina Ross (PD) withdrew herself as counsel and Jess Marchese  
14 was appointed when I told Jess Marchese that counsel Katrina Ross had  
15 waived my presences at preliminary hearing and that I did not want my  
16 present waived, he told me there was nothing he could do about it and  
17 that I would have to take that up with my last counsel. Counsel had NO  
18 rights to waive my presence at preliminary hearing which violated my  
19 Fourteen Admendment to Due process. I never sign a waiver therefor  
20 my presence at preliminary hearing should have not been allow  
21 to be waived by counsel. I have the right to confront the accuser  
22 against me, The right to testify in my own defense, The right to compel  
23 witness to appear and testify on my behalf, these rights has been  
24 violated do to the fact that my presence was waived without  
25 my consent.  
26  
27  
28

(c) Ground THREE: Abuse of discretion Fourth, Six, Fourteen Admendment  
Judicial Misconduct Fourteen, Six, 3 Fourth Admendment

Supporting FACTS (Tell your story briefly without citing cases or law.): Judge Douglass Smith denied petitioner's right to counsel when he wrongfully ruled on the motion to suppress defendant statement without counsel being present to argument the merits on the motion. Defendant never waived Counsel, Defendant has a right to counsel. If counsel wasn't present at the time of the hearing the motion should have been put back on calendar. The judge should have not ruled on the motion without Defendant having representation and allowing harmful evidence into my trial. The case was sent to overflow. The motion to suppress Defendant Statement was brought back up in front of Judge Valerie Adair and she said she was not gonna revisit his rulings. When Judge Douglass Smith made his ruling on the motion, Counsel was never aware or advise of the ruling that was made until trial. Therefor counsel wasn't given enough time to rebuttal the decision that was made.

1 (d) Ground FOUR: Violated Sixth Amendment right to Speedy trial  
2 Ineffective assistance of counsel Fourteen Admendment  
3  
4

5 Supporting FACTS (Tell your story briefly without citing cases or law.): On May 4, 2015 defendant  
6 pled Not guilty, and Invoked the 60-Day rule trial was set for June 15, 2015.  
7 On June 3, 2015 Counsel Katrina Ross (public defender) Motion to Continue  
8 was Denied Ms. Ross said she was in the process of hiring an expert witness,  
9 If the defendant waived his speedy trial she would be requesting a  
10 continuance. Upon court's inquiry, defendant stated he does not wish to  
11 waive his right to a speedy trial court ordered trial date vacated and set  
12 trial for June 25, 2015. On June 10, 2015 counsel attempted to get me to waive  
13 my speedy trial again do to the fact she wasn't ready to proceed to trial.  
14 The court asked me if I would waive my right to a speedy trial and  
15 I refused. Court stated The only issue was if the continuance was  
16 warranted. Based on representations, counsel was Ineffective for not being  
17 prepared for trial, trial date was vacated and reset for August 3, 2015.  
18 Counsel was notified by the state on May 26<sup>th</sup> 2015 that detective Abell  
19 an essential witness was unavailable for the Jun 15, trial date the delay  
20 of trial was no fault of defendant The delay results in Mr. Stewart  
21 remaining in custody past the date of his speedy trial. On July 29, 2015 Following  
22 Conference at the bench, court ordered public Defender withdrawn due to  
23 a conflict of Interest. Appointment of counsel was set for August 12, 2015  
24 Mr. Marchese accepted appointment of counsel trial date was vacated and  
25 reset for March 14, 2016. The seven month delay clearly violated  
26 my Sixth Amendment right to speedy trial. Counsel filed to  
27 represent client Sixth Amendment right to speedy trial. When  
28 defendant told counsel about his speedy trial counsel said there was  
nothing he could do about it.

(a) **Ground Five:** Challenging the dual convictions for Robbery and First Degree Kidnapping.

Supporting **FACTS** (Tell your story briefly without citing cases or law.): Petitioner can not be convicted of both robbery and First Degree Kidnapping because the acts constituting the kidnapping occurred contemporaneously with those comprising the robbery. Victim detention was only for a short period of time, necessary to consummate the robbery. The movement of the victim was incidental to the robbery and did not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself. The kidnapping conviction cannot stand. People v. Daniels, 459 P.2d 225 (Cal. 1969)

(b) **Ground Six:**

Supporting **FACTS** (Tell your story briefly without citing cases or law.):

(c) **Ground Seven:**

Supporting **FACTS** (Tell your story briefly without citing cases or law.):

(d) **Ground Eight:**

Supporting **FACTS** (Tell your story briefly without citing cases or law.):

AA000147

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 20 day of the month of Feb of the year 2018.

Tommy Stewart  
Signature of petitioner

Ely State Prison  
Post Office Box 1989  
Ely, Nevada 89301-1989

MESA

Signature of Attorney (if any)

Attorney for petitioner

Address

#### VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Tommy Stewart  
Petitioner

Attorney for petitioner

AA000148

**CERTIFICATE OF SERVICE BY MAIL**

I, Tommy Stewart, hereby certify pursuant to N.R.C.P. 5(b), that on this 20 day of the month of Feb, of the year 2018 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

\_\_\_\_\_  
Respondent prison or jail official

\_\_\_\_\_  
Address

Attorney General  
Heroes' Memorial Building  
100 North Carson Street  
Carson City, Nevada 89710-4717

\_\_\_\_\_  
District Attorney of County of Conviction

\_\_\_\_\_  
Address

Tommy Stewart  
Signature of Petitioner

AA000149

**AFFIRMATION PURSUANT TO NRS 239B.030**

I, Tommy Stewart, NDOC# 1048467,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE  
ATTACHED DOCUMENT ENTITLED Petition For writ of Habeas  
Corpus (Post conviction)

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY  
PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 20 DAY OF Feb, 20 18.

SIGNATURE: Tommy Stewart

INMATE PRINTED NAME: Tommy Stewart

INMATE NDOC # 1048467

INMATE ADDRESS: ELY STATE PRISON  
P. O. BOX 1989  
ELY, NV 89301

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27

FILED  
APR 13 2018  
CLERK OF COURT

PPOW

DISTRICT COURT  
CLARK COUNTY, NEVADA

TOMMY STEWART,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: C-15-305984-1  
Department 21

ORDER FOR PETITION FOR  
WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on April 04, 2018. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

**IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

**IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's Calendar on the 19th day of June, 2018, at the hour of 9:30am o'clock for further proceedings.

*Valerie Adams*

District Court Judge

MB

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APR 13 2018  
CLERK OF THE COURT

C-15-305984-1  
OPWH  
Order for Petition for Writ of Habeas Corp  
4738076

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*Steven D. Grierson*

Case No. C-15-305984-1

Dept. No. ILC

IN THE 8<sup>th</sup> JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR  
THE COUNTY OF Nevada

Hearing : June 19, 2018 at 9:30 am

Tommy Stewart  
Petitioner,

**MOTION FOR THE APPOINTMENT  
OF COUNSEL**

-vs-

State of Nevada  
Respondents.

**REQUEST FOR EVIDENTIARY HEARING**

COMES NOW, the Petitioner, Tommy Stewart, proceeding pro se, within the  
above entitled cause of action and respectfully requests this Court to consider the appointment of counsel  
for Petitioner for the prosecution of this action.

This motion is made and based upon the matters set forth here, N.R.S. 34.750(1)(2), affidavit of  
Petitioner, the attached Memorandum of Points and Authorities, as well as all other pleadings and  
documents on file within this case.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

This action commenced by Petitioner Tommy Stewart, in state custody,  
pursuant to Chapter 34, et seq., petition for Writ of Habeas Corpus (Post-Conviction).

**II. STATEMENT OF THE FACTS**

To support the Petitioner's need for the appointment of counsel in this action, he states the  
following:

1. The merits of claims for relief in this action are of Constitutional dimension, and  
Petitioner is likely to succeed in this case.

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APR 25 2018  
CLERK OF THE COURT

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2. Petitioner is incarcerated at the Ely State Prison in Ely, Nevada. Petitioner is unable to undertake the ability, as an attorney would or could, to investigate crucial facts involved within the Petition for Writ of Habeas Corpus.
3. The issues presented in the Petition involves a complexity that Petitioner is unable to argue effectively.
4. Petitioner does not have the current legal knowledge and abilities, as an attorney would have, to properly present the case to this Court coupled with the fact that appointed counsel would be of service to the Court, Petitioner, and the Respondents as well, by sharpening the issues in this case, shaping the examination of potential witnesses and ultimately shortening the time of the prosecution of this case.
5. Petitioner has made an effort to obtain counsel, but does not have the funds necessary or available to pay for the costs of counsel, see Declaration of Petitioner.
6. Petitioner would need to have an attorney appointed to assist in the determination of whether he should agree to sign consent for a psychological examination.
7. The prison severely limits the hours that Petitioner may have access to the Law Library, and as well, the facility has very limited legal research materials and sources.
8. While the Petitioner does have the assistance of a prison law clerk, he is not an attorney and not allowed to plead before the Courts and like Petitioner, the legal assistants have limited knowledge and expertise.
9. The Petitioner and his assisting law clerks, by reason of their imprisonment, have a severely limited ability to investigate, or take depositions, expand the record or otherwise litigate this action.
10. The ends of justice will be served in this case by the appointment of professional and competent counsel to represent Petitioner.

## **II. ARGUMENT**

Motions for the appointment of counsel are made pursuant to N.R.S. 34.750, and are addressed to the sound discretion of the Court. Under Chapter 34.750 the Court may request an attorney to represent any

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such person unable to employ counsel. On a Motion for Appointment of Counsel pursuant to N.R.S. 34.750, the District Court should consider whether appointment of counsel would be of service to the indigent petitioner, the Court, and respondents as well, by sharpening the issues in the case, shaping examination of witnesses, and ultimately shortening trial and assisting in the just determination.

In order for the appointment of counsel to be granted, the Court must consider several factors to be met in order for the appointment of counsel to be granted; (1) The merits of the claim for relief; (2) The ability to investigate crucial factors; (3) whether evidence consists of conflicting testimony effectively treated only by counsel; (4) The ability to present the case; and (5) The complexity of the legal issues raised in the petition.

### **III. CONCLUSION**

Based upon the facts and law presented herein, Petitioner would respectfully request this Court to weigh the factors involved within this case, and appoint counsel for Petitioner to assist this Court in the just determination of this action

Dated this 20 day of April, 20 18.

Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301

Tommy Stewart  
Petitioner.

### **VERIFICATION**

I declare, affirm and swear under the penalty of perjury that all of the above facts, statements and assertions are true and correct of my own knowledge. As to any such matters stated upon information or belief, I swear that I believe them all to be true and correct.

Dated this 20 day of April, 20 18.

Tommy Stewart  
Petitioner, pro per.

AA000154

**CERTIFICATE OF SERVICE BY MAIL**

I, Tommy Stewart, hereby certify pursuant to N.R.C.P.

5(b), that on this 20 day of April, of the year 20 18 mailed a true and correct copy of the foregoing, MOTION FOR THE APPOINTMENT OF COUNSEL; REQUEST FOR EVIDENTIARY HEARING, to the following:

_____ Name	_____ Name	_____ Name
_____ _____ Address	_____ _____ Address	_____ _____ Address

Tommy Stewart  
Petitioner

AA000155

**AFFIRMATION PURSUANT TO NRS 239B.030**

I, Tommy Stewart, NDOC# 1048467,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE  
ATTACHED DOCUMENT ENTITLED Motion for the appoint of  
counsel / Request For Evidentiary Hearing

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY  
PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 20 DAY OF April, 2018.

SIGNATURE:

Tommy Stewart

INMATE PRINTED NAME: Tommy Stewart

INMATE NDOC # 1048467

INMATE ADDRESS: ELY STATE PRISON  
P. O. BOX 1989  
ELY, NV 89301

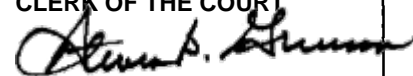
Tommy Stewart #1048467  
P.O. Box 1989  
Elizabethtown, NV 89301



Steven D. Grierson  
State of Nevada Court 3rd Floor  
225 E. 3rd Avenue  
Las Vegas, NV 89155-116

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ELY STATE PRISON  
APR 22 2018  
U5



**RSPN**  
**STEVEN B. WOLFSON**  
Clark County District Attorney  
Nevada Bar #001565  
**JONATHAN E. VANBOSKERK**  
Chief Deputy District Attorney  
Nevada Bar #006528  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,

-vs-

TOMMY STEWART,  
#2731067

Defendant.

CASE NO: C-15-305984-1

DEPT NO: XXI

**STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS  
CORPUS (POST-CONVICTION)**

DATE OF HEARING: JUNE 19, 2018  
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN E. VANBOSKERK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction).

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

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On February 18, 2015, Tommy Stewart ("Petitioner") was charged by way of Criminal  
4 Complaint with Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS  
5 200.380, 199.480); Count 2 – Burglary While In Possession of a Firearm (Category B Felony  
6 – NRS 205.060); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony –  
7 NRS 200.380, 193.165); Count 4 – First Degree Kidnapping With Use of a Deadly Weapon  
8 (Category A Felony – NRS 200.310, 200.320, 193.165); and Count 5 – Open or Gross  
9 Lewdness (Gross Misdemeanor – NRS 201.210).

10 Petitioner's preliminary hearing was held on April 16, 2015, and he was bound over for  
11 trial. On April 25, 2016, the State filed an Information charging Petitioner with four counts:  
12 Count 1 – Conspiracy to Commit Robbery; Count 2 – Burglary While in Possession of a  
13 Firearm; Count 3 – Robbery with Use of a Deadly Weapon; and Count 4 – First Degree  
14 Kidnapping with Use of a Deadly Weapon..

15 On March 7, 2016, Petitioner filed a "Motion to Suppress Defendant's Statement." In  
16 his motion, Petitioner alleged that the Miranda warning provided by the Las Vegas  
17 Metropolitan Police Department ("LVMPD") was legally insufficient. The motion was denied  
18 on March 10, 2016.

19 Petitioner's jury trial began on March 14, 2016. Prior to jury selection, Petitioner again  
20 tried to raise the issue of the legal sufficiency of the LVMPD Miranda warning. The District  
21 Court denied Petitioner's renewed motion. On March 17, 2016, the jury found Petitioner guilty  
22 on all counts.

23 On May 10, 2016, the District Court held a sentencing hearing, adjudged Petitioner  
24 guilty, and sentenced him as follows: Count 1 – a maximum of 60 months with minimum  
25 parole eligibility of 13 months; count 2 – a maximum of 96 months with a minimum parole  
26 eligibility of 22 months, concurrent with Count 1; Count 3 – to a maximum of 20 years with  
27 a minimum parole eligibility of 8 years, concurrent with Count 2; and Count 4 – life with the  
28

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1 eligibility of parole with a minimum parole eligibility of five years, concurrent with Count 3;  
2 and 452 days' credit for time served. The Judgment of Conviction was filed on May 17, 2016.

3 Petitioner filed a Notice of Appeal through his attorney on May 25, 2016. On May 4,  
4 2017, the Nevada Supreme Court issued its Order of Affirmance. Remittitur issued on June  
5 12, 2017.

6 On April 13, 2018, Petitioner filed the instant Petition for Writ of Habeas Corpus (post-  
7 conviction), and on April 25, 2018, Petitioner filed a Motion for the Appointment of Counsel  
8 and Request for Evidentiary Hearing ("Motion"). The State responds herein to the Petition  
9 and Motion.

### 10 ARGUMENT

11 Defendant claims that (1) counsel was ineffective for not filing a motion to suppress  
12 Petitioner's statement; (2) trial counsel was ineffective for waiving Petitioner's presence at the  
13 preliminary hearing; (3) there was judicial misconduct by the Court with regards to Petitioner's  
14 motion to suppress without defense counsel being present; (4) Petitioner's Sixth Amendment  
15 right to a speedy trial was violated and counsel was ineffective for waiving Petitioner's right  
16 to a speedy trial; (5) there was judicial error when the Court allowed Petitioner's dual  
17 convictions for robbery and first degree kidnapping.

#### 18 **I. PETITIONER'S SUBSTANTIVE CLAIMS ARE NOT PROPERLY BROUGHT** 19 **IN A POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS**

20 Petitioner alleges that the District Court erred in denying his motion to suppress, that  
21 the District Court erred in denying the motion to suppress without trial counsel being present,  
22 that his right to speedy trial was violated, and that the District Court erred with regards to his  
23 dual convictions for kidnapping and robbery.

24 To the extent Petitioner is alleging substantive allegations of judicial error in claims  
25 (1), (3), (4) and (5), these claims are not appropriately brought in a post-conviction petition  
26 for writ of habeas corpus. NRS 34.724(1) and (2)(b) read:

- 27 1. Any person convicted of a crime and under sentence of death  
28 or imprisonment who claims that the conviction was obtained, or  
that the sentence was imposed, in violation of the Constitution of

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1 the United States or the Constitution or laws of this State, or who  
2 claims that the time the person has served pursuant to the judgment  
3 of conviction has been improperly computed, may, without paying  
4 a filing fee, file a postconviction petition for a writ of habeas  
5 corpus to obtain relief from the conviction or sentence or to  
6 challenge the computation of time that the person has served.

7 2. Such a petition:

8 . . . .

9 (b) *Comprehends and takes the place of all other common-*  
10 *law, statutory or other remedies which have been available*  
11 *for challenging the validity of the conviction or sentence,*  
12 *and must be used exclusively in place of them.*

13 . . .

14 (emphasis added).

15 Moreover, NRS 34.810(1) reads:

16 (1) The court shall dismiss a petition if the court determines that:

17 (a) The petitioner's conviction was upon a plea of guilty or  
18 guilty but mentally ill and the petition is not based upon an  
19 allegation that the plea was involuntarily or unknowingly or  
20 that the plea was entered without effective assistance of  
21 counsel.

22 (b) The petitioner's conviction was the result of a trial and the  
23 grounds for the petition could have been

24 . . .

25 (2) Raised in a direct appeal or a prior petition for a writ of  
26 habeas corpus or postconviction relief.

27 (emphasis added).

28 The Nevada Supreme Court has held that "challenges to the validity of a guilty plea  
and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-  
conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be  
pursued on direct appeal, or they will be considered waived in subsequent proceedings."  
Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)  
(disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A  
court must dismiss a habeas petition if it presents claims that either were or could have been  
presented in an earlier proceeding, unless the court finds both cause for failing to present the

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1 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,  
2 117.

3 Here, Petitioner fails to provide good cause for failing to raise these substantive claims  
4 in his direct appeal, as all the facts available to him now were available to him at the time of  
5 his direct appeal. Petitioner further fails to show what prejudice he has suffered as a result of  
6 failing to do so. Accordingly, Petitioner’s substantive challenges are waived on habeas  
7 review, and his claims should be denied.

## 8 **II. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL**

### 9 **A. Standard of Review**

10 Nevada has adopted the standard outlined in Strickland v. Washington, 466 U.S. 668,  
11 104 S. Ct. 2052 (1984), for determinations regarding the effectiveness of counsel. Warden v.  
12 Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984); Kirksey v. State, 112 Nev. 980, 998,  
13 923 P.2d 1102, 1113 (1996). Under Strickland, in order to assert a claim of ineffective  
14 assistance of counsel, the defendant must prove that he was denied “reasonably effective  
15 assistance” of counsel by satisfying a two-pronged test. Strickland 466 U.S. at 686–687, 104  
16 S. Ct. at 2064; see State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this  
17 test, the defendant must show that his counsel’s representation fell below an objective standard  
18 of reasonableness, and that, but for counsel’s errors, there is a reasonable probability that the  
19 result of the proceedings would have been different. See Strickland, 466 U.S. at 687–688, 694,  
20 104 S. Ct. at 2064, 2068.

21 “Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559  
22 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney’s  
23 representations amounted to incompetence under prevailing professional norms, “not whether  
24 it deviated from best practices or most common custom.” Harrington v. Richter, 562 U.S. 86,  
25 88, 131 S. Ct. 770, 778 (2011). Furthermore, “[e]ffective counsel does not mean errorless  
26 counsel, but rather counsel whose assistance is ‘[w]ithin the range of competence demanded  
27 of attorneys in criminal cases.’” Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432,  
28

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1 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441,  
2 1449 (1970)).

3 A court begins with a presumption of effectiveness and then must determine whether  
4 the defendant has demonstrated by a preponderance of the evidence that counsel was  
5 ineffective. Means v. State, 120 Nev. 1001, 1011-12, 103 P.3d 25, 35 (2004). The role of a  
6 court in considering allegations of ineffective assistance of counsel is “not to pass upon the  
7 merits of the action not taken but to determine whether, under the particular facts and  
8 circumstances of the case, trial counsel failed to render reasonably effective assistance.”  
9 Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (emphasis added) (citing  
10 Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

11 In considering whether trial counsel was effective, the court must determine whether  
12 counsel made a “sufficient inquiry into the information . . . pertinent to his client’s case.”  
13 Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S.  
14 at 690–691, 104 S. Ct. at 2066. Once this decision is made, the court will consider whether  
15 counsel made “a reasonable strategy decision on how to proceed with his client’s case.”  
16 Doleman, 112 Nev. at 846, 921 P.2d at 280; citing Strickland, 466 U.S. at 690–691, 104 S. Ct.  
17 at 2066. Counsel’s strategy decision is a “tactical” decision and will be “virtually  
18 unchallengeable absent extraordinary circumstances.” Doleman, 112 Nev. at 846, 921 P.2d at  
19 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466  
20 U.S. at 691, 104 S. Ct. at 2066.

21 This analysis does not indicate that the court should “second guess reasoned choices  
22 between trial tactics, nor does it mean that defense counsel, to protect himself against  
23 allegations of inadequacy, must make every conceivable motion no matter how remote the  
24 possibilities are of success.” Donovan, 94 Nev. at 675, 584 P.2d at 711; citing Cooper, 551  
25 F.2d at 1166 (9th Cir. 1977). In essence, the court must “judge the reasonableness of counsel’s  
26 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s  
27 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. However, counsel cannot be deemed  
28

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1 ineffective for failing to make futile objections, file futile motions, or for failing to make futile  
2 arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

3 Even if a defendant can demonstrate that his counsel's representation fell below an  
4 objective standard of reasonableness, he must still demonstrate prejudice and show a  
5 reasonable probability that, but for counsel's errors, the result of the trial would have been  
6 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing  
7 Strickland, 466 U.S. at 687). "A reasonable probability is a probability sufficient to undermine  
8 confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A defendant who  
9 contends his attorney was ineffective because he did not adequately investigate must show  
10 how a better investigation would have rendered a more favorable outcome probable. Molina  
11 v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

12 Finally, claims asserted in a petition for post-conviction relief must be supported with  
13 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.  
14 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not  
15 sufficient, nor are those belied and repelled by the record. Id. As discussed *infra*, each of  
16 Defendant's claims are without merit.

17 **B. Counsel Was Not Ineffective for Failing to File a Motion to Suppress**  
18 **Petitioner's Confession**

19 Petitioner first claims that counsel was ineffective for failing to timely file a motion to  
20 suppress his statements to the police. However, on March 7, 2016, trial counsel *did* file a  
21 Motion to Suppress Defendant's Statements. Moreover, Petitioner already raised the  
22 substantive issue of the validity of the Miranda warning before the Nevada Supreme Court,  
23 and the Supreme Court denied this claim, holding that the Miranda warnings given to  
24 Petitioner were constitutionally adequate and that the District Court had not erred in  
25 determining that Petitioner's statements to police were admissible. Stewart v. State, Docket  
26 No. 70069 (Order of Affirmance, May 4, 2017) at 6-8.

27 Petitioner thus fails to show that trial counsel's representation fell below an objective  
28 standard of reasonableness, as counsel did file the motion. Counsel cannot be ineffective for

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1 failing to file – or failing to timely file, as Petitioner alleges – futile motions. Ennis, 122 Nev.  
2 at 706, 137 P.3d at 1103. Accordingly, Petitioner’s claim of ineffective assistance of counsel  
3 fails under either Strickland prong, and should be denied.

4 **C. Counsel Was Not Ineffective for Waiving Petitioner’s Presence at His**  
5 **Preliminary Hearing.**

6 Petitioner then alleges that counsel was ineffective for waiving Petitioner’s presence at  
7 the preliminary hearing by Sargent notice, and alleges that successor counsel, Mr. Marchese,  
8 was ineffective for failing to challenge that waiver by preliminary hearing counsel (Ms. Ross).  
9 However, Petitioner cannot establish either deficient performance or prejudice.

10 There is no constitutional right to a preliminary hearing. Azbill v. Fisher, 84 Nev. 414,  
11 418, 442 P.2d 916, 918 (1968). A preliminary hearing is “the legislative grant of a substantial  
12 right to the accused for his protection. . . . Its purpose is to determine the basis for prosecution  
13 and the issue involved in the proceedings is not the question of guilt or innocence, but whether  
14 there is sufficient evidence for probable cause to hold the accused over to answer and stand  
15 trial.” Id. An accused is only required to be present at arraignment, trial, and sentencing: he  
16 is not required to be present at a preliminary hearing. NRS 178.388; State v. Sargent, 122  
17 Nev. 210, 214-15, 128 P.3d 1052, 1055 (2006). Here, as in Sargent, a waiver of Petitioner’s  
18 presence was filed. Petitioner therefore cannot demonstrate that counsel’s performance was  
19 deficient, as he has no constitutional right to appear at a preliminary hearing, and as a Sargent  
20 notice was filed in his case. Similarly to the defendant in Molina who alleged a failure by  
21 counsel to investigate, Petitioner here fails to demonstrate that a different result would have  
22 resulted had he been present at the preliminary hearing. Molina, 120 Nev. at 192, 87 P.3d at  
23 538.

24 As such, Petitioner fails to meet either Strickland prong, and his claim should be denied.

25 **D. Counsel Was Not Ineffective as to Petitioner’s Right to a Speedy Trial.**

26 Petitioner finally contends that counsel was ineffective for violating his Sixth  
27 Amendment right to a speedy trial. Here, Petitioner pled not guilty on May 4, 2015. Trial was  
28 reset for June 25, 2015 – within sixty days. At Calendar Call on June 10, 2015, Ms. Ross

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1 announced not ready due to evidence still being examined, and while Petitioner objected to a  
2 continuance, the Court reset the trial date to August 3, 2015, explaining that there was no  
3 requirement that Petitioner waive his speedy trial right in order to continue the trial, as long as  
4 the continuance was warranted. At Calendar Call on July 29, 2015, Ms. Ross withdrew due to  
5 a conflict of interest, and the Court vacated the trial date of August 3, 2015, and set a status  
6 check for the appointment of counsel. On August 12, 2015, Mr. Marchese accepted  
7 appointment of counsel. Trial was reset for March 14, 2016, and Petitioner's jury trial  
8 proceeded on that date in Overflow.

9 The Sixth Amendment to the Constitution guarantees that "in all criminal prosecutions,  
10 the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The  
11 United States Supreme Court held in Smith v. Hooey, 393 U.S. 374, 89 S. Ct. 575 (1969) that  
12 a state is under an affirmative obligation by virtue of the Sixth Amendment, as interpreted in  
13 Klopper v. North Carolina, 386 U.S. 213, 87 S. Ct. 988 (1967), to make every good faith effort  
14 to bring the accused to trial. The United States Supreme Court also held that both the accused  
15 and society have an interest in having a speedy trial. Barker v. Wingo, 407 U.S. 514, 519, 92  
16 S. Ct. 2182, 2186 (1972). The Court recognized that the three basic interests of an accused  
17 are "(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety  
18 and concern accompanying public accusation and (3) to limit the possibilities that long delay  
19 will impair the ability of an accused to defend himself." Smith, 393 U.S. at 378, 89 S. Ct. at  
20 577. See also United States v. Ewell, 383 U.S. 116, 120, 86 S. Ct. 773, 776 (1966); Klopper  
21 v. North Carolina, 386 U.S. at 221-26, 87 S. Ct. at 993-95; Dickey v. Florida, 398 U.S. 30, 37-  
22 38, 90 S. Ct. 1564, 1568-69 (1970). Therefore, "one of the major purposes of the provision is  
23 to guard against *inordinate delay* between public charge and trial, which, wholly aside from  
24 possible prejudice to a defense on the merits, may seriously interfere with the defendant's  
25 liberty, whether he is free on bail or not, and that may disrupt his employment, drain his  
26 financial resources, curtail his associations, subject him to public obloquy, and create anxiety  
27 in him, his family, and his friends." Barker, 407 U.S. at 537, 92 S. Ct. at 2195 (White, J.,  
28 concurring) (citing United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 463 (1971)).

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1           In Barker, the United States Supreme Court held that a defendant's constitutional right  
2 to a speedy trial cannot be established by any inflexible rule but can be determined by  
3 balancing certain factors including length of delay, reason for delay, the defendant's assertion  
4 of his speedy trial right, and prejudice to the defendant. Id. at 530, 92 S. Ct. at 2192. These  
5 factors, however; "have no talismanic qualities; courts must still engage in a difficult and  
6 sensitive balancing process." Id. at 533, 92 S. Ct. at 2193. In that case, there was more than  
7 a five (5) year delay between Appellant's arrest and trial because, in part, the prosecution  
8 wanted to try Appellant's accomplice first so Appellant's testimony could be used at trial. Id.  
9 at 533-534, 92 S. Ct. at 2193-94. The Court held that Appellant's Sixth Amendment right was  
10 not violated even though there had been a lengthy and unjustified delay because there was no  
11 showing of prejudice and Appellant did not assert his right to a speedy trial. Id. at 534-35, 92  
12 S. Ct. at 2194. The United States Supreme Court explained that society has an interest as well  
13 because the inability of courts to provide a prompt trial can cause a backlog of cases which  
14 enable defendants to negotiate guilty pleas to lesser offenses and "otherwise manipulate the  
15 system." Id. at 519, 92 S. Ct. at 2186. If an accused is incarcerated prior to trial, lengthy  
16 detentions can be costly. Id. at 520, 92 S. Ct. at 2187. On the other hand, if an accused is  
17 released prior to trial, lengthy periods of time provide an opportunity for the accused to commit  
18 other crimes or jump bail and escape. Id. at 519-520, 92 S. Ct. at 2186-87. Finally, delay  
19 between arrest and punishment may have a detrimental effect on rehabilitation. Id. at 520, 92  
20 S. Ct. at 2187.

21           Despite these various interests, the United States Supreme Court recognized that  
22 pretrial delay is often "both inevitable and wholly justifiable." Doggett v. United States, 505  
23 U.S. 647, 656, 112 S. Ct. 2686, 2693 (1992). "*The essential ingredient is orderly expedition*  
24 *and not mere speed.*" Smith v. United States, 360 U.S. 1, 10, 79 S. Ct. 991, 997 (1959)  
25 (emphasis added). For instance, the government may need time to collect witnesses, oppose  
26 pretrial motions, or track down the accused. Doggett, 505 U.S. at 656, 112 S. Ct. at 2693.  
27 Thus, "in large measure because of many procedural safeguards provided an accused, the  
28 ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A

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1 requirement of unreasonable speed would have a deleterious effect both upon the rights of the  
2 accused and upon the ability of society to protect itself.” United States v. Ewell, 383 U.S. 116,  
3 120, 86 S. Ct 773, 776 (1966).

4 The Nevada Supreme Court has stated that the length of delay may be the only analysis  
5 required to determine whether a defendant’s right to speedy trial was violated. For example,  
6 in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), Byford, who invoked his right to a  
7 speedy trial, was charged with murder. Byford’s trial was continued on three separate  
8 occasions, resulting in a one (1) year delay, because the co-defendant requested two (2)  
9 continuances and the State moved for a continuance due to the unavailability of witnesses. Id.  
10 at 229-230, 994 P.2d at 710. The Nevada Supreme Court specifically stated that “[u]nless the  
11 delay is long enough to be presumptively prejudicial, inquiry into the other factors is not  
12 necessary.” Id. (citing Barker, 407 U.S. at 530, 92 S. Ct. at 2192). The Court found that the  
13 delay was “not extreme, but long enough to conceivably cause prejudice.” Id. at 230, 994 P.2d  
14 at 710.

15 The court must consider, as one factor among several, the extent to which the delay  
16 stretches beyond the bare minimum needed to trigger judicial examination of the claim.  
17 Doggett, 505 U.S. at 652, 112 S. Ct. at 2690-91. There are absolutely no federal cases that the  
18 State has found that would even come close to suggesting that a sixty-three (63) or two hundred  
19 and twelve (212) day delay should be weighed against the prosecution. See Barker, 407 U.S.  
20 514, 92 S. Ct. 2182; Doggett, 505 U.S. 647, 112 S. Ct. 2686 (eight and a half-year delay  
21 violated Appellant’s Sixth Amendment right); United States v. Gregory, 322 F.3d 1157 (9<sup>th</sup>  
22 Cir. 2003)(22 month delay “was not excessively long, however it did not weigh heavily in  
23 Gregory’s favor”); Hoskins v. Wainwright, 485 F.2d 1186 (5th Cir. 1973) (eight and a half-  
24 year delay did violate the Sixth Amendment); United States v. Turner, 926 F.2d 883 (9<sup>th</sup> 1991)  
25 (a four-month delay is insufficient for a Sixth Amendment violation). In Sheriff v. Povey, 87  
26 Nev. 603, 604, 491 P.2d 54, 55 (1971), Povey was in Arizona on unrelated charges but had  
27 sent a written document to the trial court requesting a speedy trial. On February 4, 1970, the  
28 trial court appointed counsel for Povey and notified the District Attorney of Washoe County

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1 of his demand. Id. Povey was transferred to Reno and was arraigned on June 19, 1970. Id.  
2 Trial was set for September 8, 1970. Id. The Nevada Supreme Court ruled that the 216-day  
3 delay could not be considered an “inordinate delay...as would require his release and the  
4 dismissal of the charge against him.” Id. at 605, 491 P.2d at 55-56.

5 In the instant case, the delay is by no means “extraordinary” or “presumptively  
6 prejudicial” to warrant dismissal. Rather, the delay was both inevitable and justifiable.  
7 Petitioner’s trial was continued twice beyond the sixty-days since Petitioner’s entry of plea:  
8 once, on June 10, 2015, when defense counsel announced that she was not ready to proceed to  
9 trial because she was still in the process of collecting evidence, and a second time, after Ms.  
10 Ross withdrew as counsel and Mr. Marchese was appointed, on August 12, 2015. While  
11 Petitioner may not have waived his right to a speedy trial, the court must balance his right to  
12 a speedy trial to his right to effective assistance of counsel. Here, the original six week delay  
13 – between June 25, 2015, and August 3, 2015, was not sufficient to trigger a violation of  
14 Petitioner’s speedy trial rights. The second continuance was necessitated by the fact that a  
15 new attorney, with a pre-set calendar, had to be appointed once Ms. Ross withdrew. In total,  
16 Petitioner’s trial was delayed by less than nine months, and this delay is not, in sum, unduly  
17 prejudicial to Petitioner, but was necessary to a good defense.

18 There is an inherent conflict between a defendant’s speedy trial rights and his Sixth  
19 Amendment right to the effective assistance of counsel that arises when a defendant invokes  
20 his speedy trial rights. People v. Frye, 18 Cal. 4th 894, 959 P.2d 183, 202 (1998). Here, given  
21 the nature of the two continuances required by the defense, Petitioner’s claim of a violation of  
22 his speedy trial right is meritless, and as counsel cannot be ineffective for failing to argue futile  
23 motions. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Accordingly, Petitioner’s claim of  
24 ineffective assistance of counsel fails under either Strickland prong, and should be denied.

25 ///

26 ///

27 ///

28 ///

AA000169

1 **III. PETITIONER'S SUBSTANTIVE CLAIM OF JUDICIAL ERROR**  
2 **REGARDING HIS DUAL CONVICTIONS FOR KIDNAPPING AND**  
3 **ROBBERY IS BARRED BY THE DOCTRINE OF LAW OF THE CASE.**

4 Finally, Petitioner claims that there was judicial error in his dual conviction for  
5 kidnapping and robbery. Not only is this a substantive claim that is suited for direct appeal,  
6 as detailed supra, § I, but his claim is further barred by the doctrine of law of the case.

7 Under the law of the case doctrine, an issue that has already been decided on the merits  
8 by the Nevada Supreme Court is law of the case and the holding will not be revisited in a  
9 habeas petition. Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); McNelson  
10 v. State, 115 Nev. 396, 415, 990 P.2d 1263, 1276 (1999); Valerio v. State, 112 Nev. 383, 386,  
11 915 P.2d 874, 876 (1996). "The law of a first appeal is law of the case on all subsequent  
12 appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535  
13 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969). The  
14 law of the case doctrine may not be avoided by a more detailed and precisely focused argument  
15 made after reflection upon previous proceedings. Hall, 91 Nev. at 316, 535 P.2d at 798-99.  
16 Furthermore, this Court cannot overrule the Nevada Supreme Court or Court of Appeals. NEV.  
17 CONST. Art. VI § 6.

18 Here, the Nevada Supreme Court has already addressed Petitioner's claim in its Order  
19 of Affirmance from Petitioner's direct appeal, finding that "there [was] sufficient evidence to  
20 support Stewart's dual convictions for robbery and first-degree kidnapping." Stewart v.  
21 State, Docket No. 70069 (Order of Affirmance, May 4, 2017) at 4-6.

22 Accordingly, Petitioner's claim should be denied.

23 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

24 NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

25 1. The judge or justice, upon review of the return, answer and all  
26 supporting documents which are filed, shall determine whether an  
27 evidentiary hearing is required. A petitioner must not be  
28 discharged or committed to the custody of a person other than the  
respondent unless an evidentiary hearing is held.

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2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that “[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The district court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”).

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel’s actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a “strong presumption” that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind. 466 U.S. at 688, 104 S. Ct. at 2065.

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1 Here, Petitioner's claims are without merit, and there is thus no need to expand the  
2 record. Petitioner's request for an evidentiary should therefore be denied.

3 **V. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL**

4 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-  
5 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566  
6 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada  
7 Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right  
8 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to  
9 counsel provision as being coextensive with the Sixth Amendment to the United States  
10 Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a)  
11 (entitling appointed counsel when petitioner is under a sentence of death), one does not have  
12 "any constitutional or statutory right to counsel at all" in post-conviction proceedings. *Id.* at  
13 164, 912 P.2d at 258.

14 However, the Nevada Legislature has given courts the discretion to appoint post-  
15 conviction counsel so long as "the court is satisfied that the allegation of indigency is true and  
16 the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

17 A petition may allege that the Defendant is unable to pay the costs  
18 of the proceedings or employ counsel. If the court is satisfied that  
19 the allegation of indigency is true and the petition is not dismissed  
20 summarily, the court may appoint counsel at the time the court  
21 orders the filing of an answer and a return. In making its  
22 determination, the court may consider whether:

- 23 (a) The issues are difficult;  
24 (b) The Defendant is unable to comprehend the  
25 proceedings; or  
26 (c) Counsel is necessary to proceed with discovery.

27 Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint  
28 counsel.

In the instant case, none of Petitioner's claims have merit, and none of them are  
difficult. Petitioner is clearly able to comprehend the proceedings, and as such, this Court  
should deny Petitioner's Motion for Appointment of Counsel.

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1 CONCLUSION

2 For all the foregoing, the State respectfully requests that Petitioner's Petition for Writ  
3 of Habeas Corpus, as well as his Motion for Appointment of Counsel and Request for an  
4 Evidentiary Hearing, be DENIED.

5 DATED this \_\_\_\_\_ day of June, 2018.

6 Respectfully submitted,

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

10 BY 

11 JONATHAN E. VANBOSKERK  
12 Chief Deputy District Attorney  
13 Nevada Bar #006528

14 CERTIFICATE OF SERVICE

15 I certify that on the 1<sup>st</sup> day of June, 2018, I mailed a copy of the foregoing document  
16 to:

17 JESS R. MARCHESE, ESQ.  
18 marcheselaw@msn.com

19 BY 

20 M. HERNANDEZ  
21 Secretary for the District Attorney's Office  
22  
23  
24  
25  
26  
27

28 JV/mah/L1

AA000173

DA  
PP

1 Tommy Stewart # 1048467  
2 P.O. Box 1989  
3 Ely, Nevada 89301  
4 To Proper Person

Steven D. Grierson

5  
6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA  
8

9 TOMMY STEWART  
10 Petitioner, Case No. C-15-305984-1  
11 vs.  
12 WARDEN, ELY STATE Dept. No. XXI  
13 PRISON,  
14 Respondent. 1  
15  
16

17 PETITIONER'S 10<sup>th</sup> SUPPLEMENTAL  
18 PETITION FOR A WRIT OF HABEAS  
19 CORPUS (POST-CONVICTION)

CLERK OF THE COURT  
JUN 06 2018  
RECEIVED  
JUN 06 2018  
CLERK OF THE COURT

20 Comes Now, Petitioner, Tommy Stewart,  
21 appearing in proper person, to supple-  
22 ment his previously filed petition for  
23 a writ of habeas corpus (post-conviction)  
24 filed in the above-entitled matter.

25 This Supplement is supported by the  
26 below stated grounds for relief RA000174  
27 papers pleadings and documents on file  
28 in this case.  
29

1 GROUND ONE: PETITIONER'S CONVICTION AND SENTENCE ARE  
2 UNLAWFUL AS HE WAS DENIED THE EFFECTIVE ASSISTANCE  
3 OF APPELLATE COUNSEL IN VIOLATION OF THE 6<sup>th</sup> and 14<sup>th</sup>  
4 AMENDMENTS TO THE UNITED STATES CONSTITUTION.

5  
6 Supporting facts:

7  
8 1. Tommy Stewart (Petitioner herein) asserts his cou-  
9 nsel that represented him in the direct appeal  
10 was ineffective to his prejudice when counsel  
11 failed to raise the state's failure to prove the  
12 crimes against him beyond a reasonable doubt  
13 as guaranteed by the 5<sup>th</sup> and 14<sup>th</sup> Amendments  
14 to the United States Constitution. Had counsel  
15 raised the issue there was a reasonable likelih-  
16 hood of success on the merits of the claim under  
17 the test of Jackson v. Virginia, 443 U.S. 307, 319 (1979)  
18 (after viewing the evidence in the light most favorab-  
19 le to the prosecution no reasonable jurist could find  
20 the defendant guilty).

21 2. After a preliminary hearing held in the Justice  
22 Court of Las Vegas Township accusing Petitioner  
23 of crimes against victim Natasha Lumba that are  
24 alleged to have occurred in Las Vegas, Nevada on  
25 January 20, 2015 Petitioner was held to answer  
26 in the Eighth Judicial District Court of Nevada  
27 in State of Nevada v. Tommy Stewart, No. C-15-305984-  
28 1, pleaded not guilty, proceeded to trial held on

AA000175

1 March 14-16, 2015 for the crimes of: Count 1: Consp-  
2 1racy to Commit Robbery, a Category B Felony under  
3 NRS 200.380, 199.480; Count 2: Burglary while in Possess-  
4 ion of A Deadly Weapon, a Category B Felony under  
5 NRS 205.060; Count 3: Robbery with Use of A Deadly  
6 Weapon, A Category B Felony under NRS 200.380, 193.165;  
7 ; Count 4: First Degree Kidnapping with use of A Deadly  
8 Weapon, A Category A Felony under NRS 200.310, 200.320  
9 , 193.165. Petitioner was acquitted of being in  
10 Possession of A Firearm but found guilty of Burglary  
11 as to Count 2 and Petitioner was acquitted of with  
12 use of A Deadly Weapon in counts 1, 3 and 4 but  
13 found guilty of the underlying charges in each count  
14

15 3. Petitioner was sentenced, a judgement of convicti-  
16 on entered on the 17<sup>th</sup> day of May, 2016, petitioner  
17 received for count 1 thirteen (13) to sixty (60) months in  
18 prison, concurrent to count 2, twenty-two (22) to ninety  
19 -six (96) months, concurrent to count 3, eight (8) to twenty  
20 (20) years, concurrent with count 4, ~~five~~ five (5) years  
21 to life with the possibility of parole, with Four hundred  
22 and fifty-two (452) days credit for time served.  
23

24 4. Notice of appeal was filed on May 19, 2016. Appeal  
25 proceeded in Tammy Stewart v. State of Ne-  
26 vada, Docket NO. C-15-305984-1. The Nevada  
27 Supreme court affirmed conviction.  
28

AA000176

1 A. ADOPTION OF POSSESSION OF A GUN AND/OR THE  
2 WITH USE OF A FIREARM OR DEADLY WEAPON DEMON  
3 STRATES INSUFFICIENT EVIDENCE UNDER THE STATE'S  
4 THEORY AND THE NOTICE GIVEN TO THE DEFENSE IN  
5 THE CHARGES ALLEGED.

6  
7 5. On Day 1 of trial victim Natasha Lumba testified  
8 that she was returning home at night when two persons  
9 approached as she was about to enter her home and  
10 they instructed her to enter her home, one held  
11 up a gun, she did not see the gun once inside  
12 the home, she was told to go to her bedroom  
13 and lay face down which she did. Id at 13, 16-17 and  
14 22.<sup>1</sup>

15 6. In cross-examination trial counsel confronted vict-  
16 im Lumba with prior statements made to police, recorded,  
17 and she admitted she told police she could not clearly  
18 see a gun in the events because it was dark. Id at 53  
19 , 11 8-10.

20  
21 7. Petitioner asserts that based on the notice of charges  
22 and the state's theory as to each charge that petitioner  
23 possessed ~~and~~ a handgun and/or a handgun or  
24

25 8. Petitioner refers to the transcripts of the trial sub-  
26 mitted in the direct appeal; the transcripts of  
27 proceedings "Day 1", "Day 2", "Day 3" of the trial  
28 held on March ~~at~~ 14-16 2015.

AA000177

1 deadly weapon was used to commit each crime and  
2 the jury is acquitted on the possession or with use  
3 of a deadly weapon charge attached to count 2:  
4 Burglary while in possession of a deadly weapon  
5 and count 4: First Degree Kidnapping with use of  
6 A Deadly weapon. The state's theory is as follows:  
7

8 8. Count 2: Burglary while in possession of a deadly  
9 Weapon.  
10

11 Closing Argument By Prosecutor:  
12

13 count 2 is the burglary while in possession of  
14 a firearm. The state has proven to you that the  
15 defendant did then and there, willfully, unlaw-  
16 fully, and feloniously enter with intent to  
17 commit larceny and/or robbery that certain  
18 building occupied by Natasha Lumba, located  
19 at 865 Rock Springs, Apartment 101, in Las  
20 Vegas, Clark County, Nevada and that defen-  
21 dant did possess and/or gain possession of  
22 a firearm during the commission of this crime  
23 Day 3 at 4.

24 . . . .

25 You have a jury instruction that tells you  
26 that every person who commits the crime  
27 of burglary, who has in his possession or  
28

AA000178

1 gains possession of a firearm or deadly weapon  
2 at any time during the commission of a crime  
3 is guilty of a burglary while in possession of  
4 a deadly weapon. What did Natasha tell you? She  
5 told you when the defendant and the other person  
6 approached her outside of her residence he told  
7 her he had a gun as well as she saw a black  
8 semi-automatic handgun is what she said. She  
9 said he held it up, they pointed it at her, and  
10 that they told her that they had a gun, and she  
11 told you that during the entirety of this event  
12 she had no reason to believe that they no longer  
13 had that weapon. She believed that they still  
14 had the gun the entire time that they were in her  
15 house.

16  
17 Day 3 at 6.

18  
19 9. Count 4: First Degree Kidnapping with use of A  
20 Deadly Weapon.

21  
22 Closing Argument by Prosecutor:

23  
24 Count 4 is the first degree kidnapping with use  
25 of a deadly weapon. The state has submitted to you  
26 that we have proven that the defendant did  
27 willfully, unlawfully, and feloniously seize or  
28

AA000179

1 or confine Natasha Lumba, that being a human  
2 being, with the intent to hold her, detain her,  
3 against her will and without her consent for the  
4 purpose of committing a robbery against her and  
5 that was done with a deadly weapon. And again  
6, the state has alleged the defendant is guilty of  
7 this offense by the three different theories of  
8 liability. He directly committed this act, he aided  
9 and abetted in the commission, or he conspired to  
10 commit this act. And I submit to you he did  
11 all three, just as he did the robbery. He directly  
12 committed the kidnapping because he's part of  
13 forcing Natasha into her home. He forced her in  
14 there at gunpoint, forced her on the ground, and  
15 what did she tell you? I couldn't make a run  
16 for it. There was not a clear path to the front  
17 door. I had no reason to believe that they were  
18 not still armed, I know they were in my house  
19, they're taking turns watching me, I can't  
20 make a run for it. She's confined in her own  
21 home because she cannot make a run for it  
22 because the people that have a gun is still  
23 in her house. They're detaining her in her own  
24 house."

25  
26 Day 3 at 9-10.

AA000180

B. THE VICTIM'S FAILURE TO IDENTIFY PETITIONER  
AND DISSIMILARITIES IN THE DESCRIPTION OF  
THE ASSAILANT AND PETITIONER CREATED PROOF  
BEYOND A REASONABLE DOUBT.

10. Victim Lumba testified at trial she could not identify Petitioner as the assailant who robbed her. Day 1 at 14.

11. Victim Lumba was shown a photo line-up six pack (6 pictures on one page) and testified at trial that she could not pick ~~out~~ her assailant from the photos but two different people in the line-up had different similarities of the attackers. Id at 42-45.

12. Las Vegas Metropolitan Police Department (LVMPD) Detective Terry Abell testified about the line-up procedure and Victim Lumba's statements when during the line-up. Day 2 at 82-84. Detective Abell testified that it appeared Victim Lumba was confused and believed both of her assailants were in the line-up. Id at 83. Detective Abell testified that the person depicted in photo #2 was said by the victim to be similar to the "shorter" robber. Id at 82. And the physical similarities of the person in ~~number~~ photo #3 were similar to the "taller" robber. Id. It is true that

AA000181

1 Petitioner is the person in photo #3. However,  
2 Detective Abell testified that Victim Lumba stated  
3 that the person in photo #3 had similarities to  
4 the taller "5'11" "robber and petitioner was only  
5 5'5" at the time he was booked into the county  
6 jail. Day 2 at 105. Also, the testimony of Victim  
7 Lumba at trial was that she could not definit-  
8 ively say the persons in the line-up were  
9 her attackers. Day 1 at 44.

10  
11 11. The lack of identification of Petitioner created  
12 a reasonable doubt. The fact, petitioner is only  
13 5'5" tall and could not be identified by the  
14 victim and is not even close to the description  
15 of the victim initially creates a reasonable doubt.

16  
17  
18 C. THE FINGERPRINT EVIDENCE DOES NOT PASS  
19 MUSTER AS PROOF BEYOND A REASONABLE  
20 DOUBT.

21  
22 12. LUMPD Crime Scene Analysis (CSA) expert  
23 Nooreen Charlton testified to collecting a print  
24 from inside Victim Lumba's residence from a  
25 jewelry box inside of the residence sitting  
26 atop the washer. Day 2 at 102-11.

AA000182

1 13. Expert Heather Goodthorpe from LVMPD's Latent  
2 Print Unit testified to results of fingerprint compar-  
3 isons of the print left on the jewelry box and those  
4 of petitioners'. Day 2 at 20-42. When looked at  
5 closely her comparison does not create proof beyond  
6 a reasonable doubt petitioners is the assailant.

8 14. The court must first look at the testimony of  
9 Expert Goodthorpe defining "data" which is created  
10 by "minutia points" in a print. Id at 29. In  
11 short the expert testified that the skin on the finger  
12 is different than other parts of the human body  
13 and contains "ridges and furrows" that have a  
14 "flow to them" and at some point either stops  
15, which is a "ridge ending" or it "merges" with ano-  
16 ther flow of ridges which is called a "bifurcat-  
17 ion". These points where the ridge ends ~~or~~ or  
18 merges into another flow are called "minutia  
19 points". These minutia points are marked and  
20 are "data" for comparison in the fingerprint  
21 database known as "AFIS" id. This marking  
22 is the experts "encoding" of the print for  
23 entry into AFIS.

24 By Expert Goodthorpe (Redirect examination)

26 Q. Ms. Goodthorpe, just so we are clear, when  
27 a print comes in and you're asked to run

AA000183

1 it through AFIS, that AFIS is a computer program  
2 that does the initial comparison, is that correct?  
3

4 A. Right. What happens is I scan the print into  
5 AFIS and I manually encode it looking at the  
6 data points, the minutia points. I manually encode  
7 that and it searches the algorithm and comes up  
8 with the closest candidate list. And then I look at  
9 the candidate list, do an onscreen comparison  
10 and then from that comparison, on screen comparison  
11 , if I find something that's a potential hit, which  
12 in this case I did, I pull those exemplar  
13 prints and do a manual comparison on those.  
14

15 Day 2 at 36.  
16

17 15. Expert Gouldthorpe specifically testified that  
18 based on her code there is a list of "potential" candi-  
19 dates provided by AFIS:

20 THE COURT: When a print is run through AFIS and  
21 there's a hit, like you testified, is that 100 percent  
22 that it's the same print or is there something else  
23 that has to be done to verify that the AFIS hit  
24 and the known print are from the same individ-  
25 ~~individual~~ idual? Can you kind of explain that  
26 for us?

27 THE WITNESS: Yeah. What it is it's a potential

AA000184

1 match and that's why we do a manual comparison  
2 to determine whether or not it actually is a true hit.  
3

4 THE COURT: AND WERE THERE ANY OTHER, DID AFIS COME  
5 UP WITH ANY OTHER POTENTIAL MATCHES?  
6

7 THE WITNESS: WHAT WE DO IS WE LOOK AT THE Candidate  
8 list and we determine -- it's basically an on screen  
9 comparison  
10

11 THE COURT: SO YOU CAN KIND OF, BASED ON YOUR EXP-  
12 IRIENCE NARROW IT DOWN?   
13

14 THE WITNESS: CORRECT. WE LOOK AT ALL OF THE DETAILS  
15 ON SCREEN AND WE DETERMINE WHETHER OR NOT THAT  
16 HAS THE POTENTIAL TO BE A TRUE MATCH. AND THAT'S  
17 WHEN WE PULL THE ACTUAL EXEMPLARS OF THAT  
18 PERSON AND THEN DO A MANUAL COMPARISON.  
19

20 THE COURT: AND DID YOU DO THE ONE MANUAL COM-  
21 PARISON IN THIS CASE, MEANING BETWEEN THE  
22 DEFENDANT'S PRINTS AND THE LATENT PRINTS?  
23

24 THE WITNESS: YES.  
25

26 Day 2 at 35.  
27

AA000185

1 16. Expert could therefore testified that her comp-  
2 arison is simply to match what she considers  
3 minutia points to minutia points of Petitioner's  
4 prints (which is what the computer algorithm already  
5 did) but she did not mark inconsistent  
6 points:

7 THE WITNESS: When I say we look at ridge  
8 flow you can see how the ridges are flowing  
9 here [indicating], so they go up and they kind  
10 of curve around. This is indicative of a left  
11 slant loop, which in this case it is, and you can  
12 see how the ridges they're not straight, they  
13 don't do - they kind of have a little bit of  
14 shape to them, so we look at that. And  
15 then we also look at the minutia points. And  
16 you can see the red dots where I said there  
17 was a minutia marking, so it's either bifur-  
18 cation or ridge ending. And then I went  
19 ridge by ridge and I marked all the  
20 minutia that I found in agreement and  
21 that's only a representation, there are  
22 other minutia points that are in there  
23 that I did not mark. But, I look at all  
24 the detail and come to the conclusion of  
25 identification in this case.

26 Day 2 at 39-40.

27

AA000186

28 The "other" minutia points are not marked  
because they are not in agreement.

1 If Expert Gouldthorpe made however many  
2 markings of marked points on the print found  
3 and those markings created a list of numerous  
4 hits all she has demonstrated is that her  
5 marking points can be consistent with the  
6 prints of numerous people.

7  
8 Expert Gouldthorpe then compares those same  
9 markings to the print in AFIS - a hit - Tommy  
10 Stewart. Of course it's going to be the same  
11 because that's how the computer found it. The  
12 fact she goes and gets an exemplar and  
13 again compares the points is meaningless  
14 because it's the same print in AFIS. The  
15 fact she conversely does not mark points  
16 that are not in agreement evidences the  
17 conclusion is as conclusive as the AFIS  
18 find itself which at best can only be  
19 said to be a "potential" candidate. Expert  
20 Gouldthorpe disregarded, without comparison,  
21 all of the numerous people in the list ~~which~~  
22 AFIS gave her. This testimony is not proof  
23 beyond a reasonable doubt / petitioner is the  
24 assailant.

25

26 2. IF the court finds the experts testimony  
27 sufficient petitioner demonstrates reversible  
28 error and impeachment in Grounds 3 thru 8 below.

D. THE ADMISSIONS OF PETITIONER ARE NOT  
PROOF BEYOND A REASONABLE DOUBT.

17. Detective Abell testified that Petitioner repeatedly denied being at Victim Lumba's residence when questioned and petitioner denied being part of any robbery. Day 2 at 92. However, Detective Abell testified petitioner later admitted that he was at a residence with a friend Raymond who was having sex with a female while he rummaged through stuff in a house. Id at 92-95. There are several defects with these admissions.

18. First, Detective Abell testified that petitioner admitted he stole a watch, a ring and some buffalo nickels from a jewelry box. Id at 94-95. However, petitioner denied stealing any electronics. Id at 96. The problem is that there were no buffalo coins, nor a watch or a ring stolen. See testimony of Victim Lumba, Day 1 at 25.

19. The jewelry box was found on top of the washer. See testimony of CSA Karen Chalkton Day 2 at 10-11. Detective Abell testified petitioner said he threw the box behind the washer Id at 102. Abell testified to petitioner being "confused" about the box. Id.

AA000188

1 It makes no sense Petitioner would make an  
2 admission to stealing jewelry and buffalo nickels  
3 (an item of value in this mind) and such wasn't  
4 even present or stolen from the box. It makes  
5 no sense the box would be on the washer if it  
6 was thrown behind it by him. why deny stealing  
7 electronics but admit stealing jewelry and  
8 valuable coins? Petitioner was not there.<sup>3</sup>

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23

24 3. If the court finds Petitioner's admissions  
25 sufficient petitioner demonstrates in Ground  
26 that counsel was ineffective for not demonstrat-  
27 ing petitioner was intoxicated when interviewed in  
28 Ground 9 below. 16

1 GROUND TWO: PETITIONER'S CONVICTION AND SENT-  
2 ENCE ARE UNLAWFUL AS HE WAS DENIED THE  
3 EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL  
4 IN VIOLATION OF THE 6<sup>th</sup> and 14<sup>th</sup> AMENDMENTS  
5 TO THE UNITED STATES CONSTITUTION.

6  
7 Supporting facts.

8  
9 20. Petitioner incorporates all of the facts and  
10 arguments above as though fully stated here.

11  
12 21. Petitioner asserts his appellate counsel was  
13 ineffective to his prejudice when counsel  
14 failed to federalize his claims and/or  
15 failed to raise that petitioner has a liberty  
16 interest created by state law to not be  
17 convicted ~~by~~ of both Robbery and kidnapping  
18 under the circumstances of his case which  
19 is protected by the 14<sup>th</sup> Amendment and/or  
20 counsel was prejudicially ineffective when  
21 not raising the same claim as a violation  
22 of the Double Jeopardy Clause of the 5<sup>th</sup>  
23 Amendment to the United States Constitution.  
24 There is a reasonable likelihood of a diff-  
25 erent result and conviction reversed had  
26 the issue been raised, please see e.g. Tacks-  
27 on v. Leonardo, 162 F.3d 81, 85 (2<sup>nd</sup> Cir. 1988) AA000190  
28 (Failure to raise federal Double Jeopardy Claim was  
29 prejudicial performance on appeal).

## A. STATE LAW.

1 22. NRS 200.380(1) defines robbery as:

2  
3 The unlawful taking of personal property from  
4 the person of another, or in the person's presence,  
5 against his or her will, by means of force or  
6 violence or fear of injury, immediate or future  
7 to his or her person or property, or the person or  
8 property of a member of his or her family, or  
9 of anyone in his or her company at the time of  
10 the robbery. A taking is by means of force or  
11 fear if force or fear is used to: (a) obtain or retain  
12 possession of the property; (b) Prevent or overcome  
13 the resistance to the taking; or (c) Facilitate escape.  
14 The degree of force used is immaterial if it is used  
15 to compel acquiescence to the taking of or escaping  
16 with the property.

17  
18 23. NRS 200.310 provides that a person is guilty of  
19 kidnapping in the first degree who:

20 unlawfully seizes, confines, inveigles, entices, decoys  
21, abducts, conceals, kidnaps or carries away a person  
22 by any means whatsoever with the intent to hold or  
23 detain, the person for ransom or reward, or for  
24 the purpose of committing sexual assault, extortion  
25 or robbery upon or from the person.

AA000191

1 24. Wright v. State, 94 Nev. 415, 416-418, 518  
2 P.2d 442, 443-44 (1978) Holding that if movement  
3 of the victim is "incidental to the robbery itself  
4 , it would be unreasonable to believe the legislature  
5 intended a double punishment").  
6

7 25. Mendoza v. State, 122 Nev. 267, 130 P.3d  
8 176 (2006):

9 movement or restraint incidental to an under-  
10 lying offense where restraint or movement is  
11 ~~independent~~ inherent, as a general  
12 matter, will not expose the defendant to  
13 dual criminal liability will not expose  
14 the defendant to dual criminal liability  
15 under the first or second degree kidnapping  
16 Statutes. However, ~~where~~ where the move-  
17 ment or restraint serves to substantially  
18 increase the risk of harm to the victim  
19 over and above that ~~necessarily~~ necess-  
20 arily present in an associated offense  
21 or where the seizure, restraint or  
22 movement of the victim substantially  
23 exceeds that required to complete the  
24 associated crime charged, dual  
25 convictions under the kidnapping and  
26 robbery ~~statutes~~ statutes are proper.  
27 Id at 274-275

AA000192

1 "To sustain convictions for both robbery  
2 and kidnapping arising from the same course  
3 of conduct, any movement or restraint  
4 must stand alone with independent signifi-  
5 gance from the act of robbery itself, create  
6 a risk of danger to the victim substantially  
7 exceeding that necessarily present in the  
8 course of robbery, or involve movement,  
9 seizure or restraint substantially in excess  
10 of that necessary to its completion.  
11 Id at 275.

12  
13 26. The testimony of Victim Lumba was that  
14 the assailants told her to go to her bedroom  
15 , lay on the floor upon ~~padding~~ padding of  
16 the apartment, and during the event they  
17 searched her person while on the floor  
18 of the bedroom. Day 1 at 16-18, The fact  
19 she was "told" to go lay on the floor and  
20 no increased violence occurred and the  
21 fact the assailants pat searched her (not  
22 stripping her naked or with violence) demon-  
23 strates the kidnapping was incidental  
24 to the robbery. See Wright Supra (movement  
25 of the victims to a back office 20-40 feet  
26 away while robbing the cash register in  
27 a hotel was conduct incidental to the robbery  
28 and did not support a charge of kidnapping)

B. FEDERAL LAW / DOUBLE JEOPARDY.

27. The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offense to twice be put in jeopardy of life or limb." U.S. Const. amend. V. The prohibition of double jeopardy applies not only to "life or limb" but also to "imprisonment." Dept of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994). The Fourteenth Amendment's Due Process Clause extends the Double Jeopardy Clause's protections to state prosecutions. Bouillon v. McEl, 395 U.S. 784, 794 (1969).

28. Under Blockburger v. United States, if the same transaction violates two distinct statutory provisions the test to determine whether there are multiple offenses is whether each provision requires proof of a fact that the other does not. 284 U.S. 299, 304 (1932). Double jeopardy bars

4. Separate conduct or transaction occur if ~~distinct~~ distinct and separate acts take place at different times. 284 U.S. at 301

AA000194

1 Petitioner's convictions for Burglary, Robbery  
2 and First Degree Kidnapping. It was ineffective  
3 assistance of counsel to not litigate the  
4 Blockburger test and Double Jeopardy in the  
5 direct appeal which prejudiced petitioner as  
6 it is controlling precedent and a meritorious  
7 claim that likely would have resulted in the  
8 reversal of conviction for First-Degree Kidn-  
9 apping.

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AA000195

1 GROUND THREE: PETITIONER'S CONVICTION AND  
2 SENTENCE ARE UNLAWFUL AS HE WAS DENIED  
3 THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL  
4 IN VIOLATION OF THE 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDME-  
5 NTS TO THE UNITED STATES CONSTITUTION.

6  
7 29. Petitioner reiterates and incorporates by  
8 reference all of the facts and arguments above  
9 as though fully restated here.

10  
11 30. Petitioner asserts his counsel was ineffect-  
12 ive to his prejudice ~~when~~ at trial when counsel  
13 failed to investigate LVMPO's policy and/or  
14 information regarding fingerprint comparison  
15 technique and/or failed to impeach the  
16 collection or testing of the fingerprints collect-  
17 ed, including but not limited to DNA  
18 evidence contained in the print collected.  
19 There is a reasonable likelihood of a  
20 different result had counsel investigated  
21 and/or impeached the evidence.

22  
23 31. Petitioner does hereby request the appo-  
24 intment of counsel to conduct discovery  
25 and seeks order of the court to allow  
26 for expert review and testing of the fing-  
27 erprint/DNA evidence within the possess-

AA000196

1 of the prosecutrix.

2

3 The Due Process Clause of the 14<sup>th</sup> Amendment  
4 requires the prosecutor and or its agents to  
5 produce evidence favorable to the accused that  
6 is either material to guilt or punishment. Brady  
7 v. Maryland, 373 U.S. 83, 87 (1963); Kyles v.  
8 Whitely, 514 U.S. 419, 437 (1995). The requirements  
9 of disclosure under Brady and its progeny ext-  
10 end to post-conviction. Mazzan v. Marston,  
11 116 Nev. 48, 993 P.2d 25 (2000). Impeachment  
12 evidence is also of course subject to Brady  
13 disclosure requirements. Turner v. State, 112  
14 Nev. 610, 618, 918 P.2d 687 (1996); Lay v.  
15 State, 116 Nev. 1185, 14 P.3d 1256 (2000).  
16 counsel's performance was prejudicially  
17 deficient where counsel failed to exercise  
18 this right and seek disclosure of the  
19 following.

20

## 21 A. DNA TESTING.

22

23 32. Prior to trial the defense had the right  
24 to to inspect/test DNA evidence contained  
25 in the fingerprint on the jewelry box the  
26 State claimed to be petitioner's. See generally  
27 NRS 174.235 (c) (The prosecuting attorney shall

AA000197

1 permit the defendant to inspect... tangible  
2 objects... which the prosecuting attorney  
3 intends to introduce during the case in chief  
4 of the state and which are in the possession  
5 , custody or control of the state. Petitioner  
6 is also now entitled to the same.

7  
8 NRS 176.0918 states the following, in relevant  
9 part:

10  
11 A person convicted of a felony, who  
12 otherwise meets the requirements of this  
13 Section may file a ~~petition~~ post-conviction  
14 petition requesting a genetic marker analysis  
15 of evidence within the possession or  
16 custody of the state which may contain  
17 genetic marker information relating to  
18 the investigation or prosecution that  
19 resulted in the judgment of conviction

20  
21 33. "Touch DNA" is expected to be found  
22 that will demonstrate petitioner is not  
23 the contributor of the print found on  
24 the jewelry box which was claimed by  
25 the prosecution at trial.

26  
27 AA000198

1 B. PROCEDURES, POLICIES AND INFORMATION  
2 PERTAINING TO THE COMPARISON/TECHNIQ-  
3 UE OF FINGERPRINTS.  
4

5 34. At trial LVMPD Expert Gouldthorpe  
6 testified that LVMPD Expert Kathryn Aoyama  
7 did a double check review of ~~Mr~~ Gouldthorpe's  
8 testing of fingerprints;  
9

10 Testimony of Heather Gouldthorpe, direct  
11 examination:

12 Q. Okay. And then after your report did you  
13 do anything else or did you just submit it  
14 to the detectives and go from there?

15 A. After I do my report it goes to technical  
16 review and verification by another  
17 ~~expert~~ forensic scientist, and in this  
18 case it was Kathryn Aoyama that did  
19 my technical review.

20 Day 2 at 31.  
21

22 35. Forensic scientist Aoyama did not testify  
23 at trial which is a confrontation clause /

24 Hearsay Violation, argued in the next ground.

25 The information sought, listed below, i.e.

26 necessary to demonstrate defective testing  
27 conclusions by Gouldthorpe and/or Aoyama.

28

AA000199

1 36. Peltone seeks any and all information  
2 relating to policy of LUMAP or persons it  
3 uses to conduct fingerprint analysis. This  
4 information should include, but is not limited  
5 to:

6  
7 37. Requirement of points necessary for a  
8 determination that a fingerprint is in  
9 fact a match. The testimony at trial is  
10 devoid of such information (i.e. How many  
11 minutia points/markers are required to  
12 allow an expert to assert a print is a match?).

13  
14 38. Requirement of double checking by two  
15 independent experts.

16  
17 39. Any and all information, including instructions  
18 to the use of the AFIS or IAFIS system.

19 This should include any instructions as to  
20 the way a person marks and enters a print  
21 into the system for analysis, any cautionary  
22 instructions relating to entry or conclusions  
23 by the system and how the system reaches  
24 matches or excludes candidates based on  
25 "data", "minutia detail", "ridge ending"  
26 "ridge bifurcation" or "encoded entry"  
27 any and all information pertaining to  
28 process of entry of data for comparison

AA000200

1 or related to conclusion(2) by the system.

2

3 40. The names of any candidate produced by  
4 the system in this case. At Trial Expert  
5 Gouldthorpe testified that AFIS or IAFIS  
6 produced a list of candidates and she only  
7 manually compared one - Petitioner's Day  
8 2, at 34-35.

9

10 41. Any and all information, including, policy  
11 procedure ~~operational~~ etcetera requiring comparison  
12 ~~process~~ or exclusion of other candidates pro-  
13 vided by AFIS.

14

15 42. Petitioner expects to find that AFIS or  
16 IAFIS produces numerous candidates based  
17 upon the data, encoding entered by Gould-  
18 thorpe because such is common ~~amongst~~  
19 amongst these candidates which compares  
20 the state's claims at trial the print on the  
21 jewelry box is petitioner's.

22

23 43. At Trial Expert Gouldthorpe pointed out  
24 "mismatch points" she did not mark but  
25 others she did mark that were "in agree-  
26 ment" with the print of petitioner's "She  
27 compared. Day 2 at 39-40. Petitioner Seeks

28

1 the above requested information is expected  
2 to demonstrate that the failure to mark  
3 or encode all marked points creates a  
4 controlled or limited result/conclusion  
5 that would otherwise be discredited if  
6 all points were compared or encoded.  
7

8 44. The above information requested does  
9 not only include information, policy,  
10 procedure etcetera related to AFIS or  
11 IAFIS but also to "manual comparison"  
12 by any person.  
13

14 45. Appointment of counsel, to seek  
15 expert review and an evidentiary hearing  
16 are required to fully develop and support  
17 this claim.

18 /  
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AA000202

1 GROUND FOUR: PETITIONER'S CONVICTION AND  
2 SENTENCE ARE UNLAWFUL AS HE WAS DENIED  
3 DISCLOSURE OF EXCULPATORY EVIDENCE IN  
4 VIOLATION OF THE 14<sup>TH</sup> AMENDMENT TO THE  
5 UNITED STATES CONSTITUTION.  
6

7 46. Petitioner reiterates and incorporates by  
8 reference all of the facts and arguments  
9 above as though fully restated here.  
10

11 47. Petitioner asserts the information disclosed  
12 in above Ground Three violated Brady and its  
13 progeny when it was not disclosed. There  
14 is a reasonable likelihood the outcome of  
15 trial would have been different had it been  
16 disclosed at the information would impeach  
17 the State's case.  
18

19 48. Upon production petitioner can use such  
20 information to demonstrate both cause and  
21 prejudice for not raising issues in the direct  
22 appeal in accordance with MRS 34.810  
23 and Mazzari. Said cause and prejudice  
24 would also apply for any failures at trial.  
25

26

27

28

AA000203

1 GROUND FIVE: PETITIONER'S CONVICTION AND  
2 SENTENCE ARE UNLAWFUL AS HE WAS DENIED  
3 THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL  
4 IN VIOLATION OF THE 6<sup>th</sup> and 14<sup>th</sup> AMEND-  
5 MENTS TO THE UNITED STATES CONSTITUTION.

6  
7 49. Petitioner incorporates by reference all  
8 of the facts and arguments above as though  
9 fully restated here.

10  
11 50. Petitioner asserts counsel at trial was  
12 ineffective to his prejudice when counsel  
13 failed to investigate and raise as issue the  
14 State's failure to preserve evidence and/or the  
15 State's ~~failure~~ destruction of touch DNA evidence  
16 from the fingerprint on the jewelry box  
17 which violated petitioner's rights to fair trial  
18 and to confront adverse witnesses in violat-  
19 ion of state law and the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup>  
20 Amendments to the United States Constitution.  
21 The failure to preserve and/or the destruction  
22 of evidence prejudiced ~~defendant~~ petitioner as  
23 he could not prove the fingerprint was not his  
24 by DNA comparison. please see Crockett v. State  
25 95 Nev. 380 (1970) (failure to preserve evidence  
26 was prejudicial); Sparks v. State, 109 Nev. 316 (1988)  
27 (Same); U.S. v. Martin, 984 F.2d 308, 312 (1993)  
28 (Failure to preserve urine sample was prejudicial  
29 requiring reversal of conviction).

1 51. For the same reasons in Ground Three  
2 petitioner seeks appointment of counsel and  
3 if necessary an expert to conduct discovery  
4 , to demonstrate the evidence was destroyed  
5 and not preserved (DNA from the fingerprint  
6 on the jewelry box). This will demonstrate  
7 due process and fair trial were violated  
8 to petitioner's prejudice which if raised  
9 by counsel would have caused dismissal  
10 of the charges or prevented prosecution or  
11 would have impeached the prosecution's  
12 case or would have reduced the evidence  
13 below reasonable doubt.

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AA000205

1 Ground Six: PETITIONER'S CONVICTION AND SEN-  
2 TENCE ARE UNLAWFUL AS HE WAS DENIED THE  
3 EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND  
4 VIOLATION OF THE 6<sup>th</sup> AND 14<sup>th</sup> AMENDMENTS  
5 TO THE UNITED STATES CONSTITUTION.

6  
7 52. Petitioner incorporates by reference all of  
8 the facts and ~~circumstances~~ arguments raised  
9 above as though fully restated here.

10  
11 53. Petitioner asserts his counsel was ineffective  
12 to his prejudice for not consulting or hiring  
13 an expert to review the collection, testing  
14 or conclusion of the State's analysis and  
15 conclusion related to the fingerprint on  
16 the jewelry box and/or for failing to indep-  
17 endently test and compare the fingerprint  
18 or DNA in the fingerprint to that of petito-  
19 ner's. Had counsel done such the State's  
20 case would be crushed, the print proven  
21 to not be petitioner's, comparable to others  
22 with like type prints, or not, and the  
23 outcome of trial would have been different.  
24 Strickland v. Washington, 466 U.S. 668, 691 (1984)  
25 (counsel has a duty to make reasonable investigations  
26 or to make a reasonable decision that makes  
27 particular investigations unnecessary).  
28 54. Appointing of counsel and an expert to investig-  
29 ate the State's fingerprint analysis/conclusion and/or

1 to test / compare fingerprints and touch DNA  
2 from the fingerprint on the jewelry box, and  
3 an evidentiary hearing to further develop  
4 this claim / and support it as required. Petitioner  
5 expects to demonstrate the fingerprint  
6 and state case is impeached, the ~~prosecution~~  
7 DNA was destroyed and counsel was ineffective.

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AA000207

1 GROUND SEVEN: PETITIONER'S CONVICTION AND  
2 SENTENCE ARE UNLAWFUL AS HE WAS DENIED  
3 THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL  
4 IN VIOLATION OF THE 6<sup>th</sup> AND 14<sup>th</sup> AMENDME-  
5 NTS TO THE UNITED STATES CONSTITUTION.  
6

7 54. Petitioner reiterates and incorporates by  
8 reference all of the facts and arguments above  
9 as though fully restated here.  
10

11 55. Petitioner asserts his counsel was ineffec-  
12 tive to his prejudice at trial when counsel  
13 allowed the introduction of hearsay information  
14 , by exhibit and/or testimony by state witness  
15 Heather Gould Thorpe who testified that  
16 Scientist Kathryn Aoyama did a technical  
17 review of her finding, referencing by reference  
18 , through Gould Thorpe's ~~Memorandum~~ report (a  
19 signing off by Aoyama on the report) that  
20 Aoyama also confirmed the fingerprint  
21 comparison of petitioner's print and that on  
22 the jewelry box. Day 2 at 31. Counsel failed  
23 to object at that moment, the testimony was  
24 prejudicial hearsay in violation of FRS 50.035  
25 , 51.035 and violated the confrontation  
26 clause and right to fair trial guaranteed  
27 by the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments. please  
28 See e.g. ~~McLender-Diaz v. Mass.~~ AA000208  
29 McLender-Diaz v. Mass., 129 S.Ct. 2527,

1 , 2531 (2009) Testimony of defendant of expert  
2 who did not testify violated confrontation clause).  
3 LUMPDO scientist Aoyama did not testify and  
4 Caldwellthorne bolstered her own findings through  
5 her hearsay claim that Aoyama double checked  
6 her comparison. There is a reasonable likelihood  
7 of a different result had counsel raised this  
8 issue, objected or moved for mistrial. The  
9 State could not have noticed late a new  
10 expert under provision of CRS 174.234. Aoyama  
11 was not noticed as a witness which counsel  
12 knew or should have known. Aoyama's results  
13 were not admissible.

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AA000209

1 GROUND EIGHT: PETITIONERS CONVICTION AND  
2 SENTENCE ARE UNLAWFUL AS HE WAS DENIED  
3 THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL  
4 IN VIOLATION OF THE 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENTS  
5 TO THE UNITED STATES CONSTITUTION.

6  
7 56. Petitioner reiterates and incorporates by  
8 reference all of the facts and arguments  
9 above as though fully restated here.

10  
11 57. Petitioner asserts his appellate counsel  
12 was ineffective for not raising Ground Seven  
13 in the direct appeal. Petitioner was prejudi-  
14 ced as there is a reasonable likelihood of a  
15 different result, reversal of conviction, had  
16 the issue been raised.

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AA000210

1 GROUND NINE: PETITIONER'S CONVICTION AND  
2 SENTENCE ARE UNLAWFUL AS HE WAS DENIED  
3 THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL  
4 THE VIOLATION OF THE 6<sup>TH</sup> AND 14<sup>TH</sup> AMENDMENTS  
5 TO THE UNITED STATES CONSTITUTION.

6

7 58. Petitioner reiterates and incorporates by  
8 reference all of the facts and arguments above  
9 as though fully restated here.

10

11 39. Petitioner asserts that the testimony of LUMPH  
12 Abell that petitioner admitted to being in the  
13 crime scene is already unbelievable because  
14 the items he claimed to take "watch", "ring"  
15 and "buffalo nickles" were not taken nor  
16 were they in the jewelry box. Petitioner also  
17 was repeatedly denying being present on  
18 part of a robbery. please see 8/9/17-18 Sept.

19

20 60. Petitioner asserts counsel was ineffective  
21 because petitioner told counsel he was high  
22 on alcohol, ecstasy and marijuana at  
23 the time of the interview by Detective Abell  
24 and counsel failed to; A. Hire an expert to  
25 testify to the effects of the drugs and use  
26 such to impeach the claimed highly  
27 prejudicial admissions; and/or B.)  
28 counsel failed to suppress the admissions  
29 as inadmissible. There is a reasonable

AA000211

1 Likelihood of a different result had the  
2 admissions been impeached or excluded.

3

4 b1. The appointment of counsel and an  
5 expert are necessary, as is an evidenti-  
6 ary hearing to fully develop and support  
7 these claims.

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1 II. Conclusion.

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Wherefore, Petitioner prays this Honorable Court, for the reasons stated above, well:

A. Appoint counsel to assist petitioner with discovery, development of the claims, research and at an evidentiary hearing;

B. Allow counsel the opportunity to consult and/or hire an expert in testing and comparison of fingerprint and DNA evidence; to submit evidence of effects of intoxication.

C. Allow petitioner to retest and compare physical evidence in the case;

D. Grant petitioner an evidentiary hearing;

E. Find petitioner is unlawfully convicted and sentenced;

F. Grant petitioner whatever relief the Court deems appropriate.

I, Tommy Stewart, do hereby swear the above information is true and correct to the best of my knowledge, except where information of others is provided.

AA000213

1 Sworn under penalty of perjury,

2

3

This 21 day of MAY 2018

4

5

Tommy Stewart

6

Tommy Stewart

7

8

9 I do hereby verify the above document  
10 does not contain the social security number  
11 of any person.

12

13

Tommy Stewart

14

Tommy Stewart

15

16

### Certificate of Service

17

18 Pursuant to MRCP Rule 5(b) E, Tommy  
19 Stewart, do hereby certify that on the date  
20 signed below I did mail a true and  
21 correct copy of the foregoing Supplemental  
22 petition to:

23

24

25

Signed, Tommy Stewart

26

27

AA000214  
Tommy Stewart

28

Tommy Stewart

1 Ground: Six: Ineffective assistance of counsel Six & Fourteen Admendment  
2 Petitioners Sixth Amendment right to effective assistance of counsel was  
3 violated Strickland v. Washington.  
4 Counsel Katrina Ross (Deputy public Defender) was constitutionally  
5 Ineffective for not being properly pre-pare At Preliminary hearing. On April 16  
6 2015 Befor the Honorable Eric A. Goodman, Katrina Ross was arguing the  
7 criminal complaint, Kidnapping with use of a deadly weapon Count 4,  
8 pg. 84-86 (preliminary Hearing Transcripts) MS. Ross argument was that  
9 The kidnapping is not a separate incident but did not OR Failed To  
10 have case law to support her argument, (clearly Ineffective) AT some point  
11 Judge Eric A. Goodman ask Katrina Ross If she had any case law pg. 85-86  
12 "That says somebody that you take inside the house at gun point to be robbed  
13 inside that's not first degree kidnapping?" Katrina Ross stated I don't have  
14 any case law. If counsel would have had case laws that would have  
15 supported her argument there a possibility that the Judge would have  
16 dismiss count 4 first degree kidnapping.  
17 The landmark case on this issue in Nevada is Mendoza. In that  
18 case the victim was took in to the resident at gun point and tied  
19 up. Supreme court held that a defendant in a robbery case will be  
20 subjected to dual liability Robbery and either 1<sup>st</sup> OR 2<sup>nd</sup> degree Kidnapping  
21 only where (1) The movement or restraint substantially increases the risk of harm  
22 to the victim over and above that necessarily present to effect the  
23 Robbery, OR (2) The movement or restraint of the victim substantially  
24 exceeds that required to complete the robbery.

AA000215

*Steven D. Grierson*

MC  
DP  
PP

1 Tommy Stewart  
2 Po Box 1989  
3 Ely, Nevada 89301  
4 Pro Se

5  
6  
7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA  
9

10 Tommy STEWART,  
11 Petitioner, Case No. C-15-305984-1  
12 vs. Dept. No. XXI  
13 Warden, ESP, et al., June 28, 2018 at 9:30 am,  
14 Respondents.  
15  
16

17 MOTION TO APPOINT COUNSEL /

18 REQUEST FOR EVIDENTIARY HEARING

19 comes now, Petitioner, Tommy Stewart,  
20 who respectfully requests this honorable  
21 court appoint counsel to assist him in  
22 his petition for writ of Habeas corpus /  
23 proceedings (Post-conviction, non-Death  
24 penalty case).

25 This motion is based upon the record  
26 and all papers, pleadings and documents  
27 on file in this case.

28 Respectfully Submitted;

AA000216

29 *Tommy Stewart*  
30 Tommy Stewart

RECEIVED

JUN 28 2018

MEMORANDUM OF POINTS AND AUTHORITIES

A. LEGAL ARGUMENT.

I. COUNSEL SHOULD BE APPOINTED.

Simultaneously to the filing of this motion petitioner files a supplemental petition for a Writ of Habeas corpus alleging nine (9) additional grounds for relief. All grounds assert ineffective assistance of counsel other than Ground 4 which alleges the prosecutrix withheld evidence violation of the 14<sup>th</sup> Amendment to the United States constitution and Nevada law. In the grounds petitioner attacks the State's fingerprint analysis experts credibility and information at trial and counsel's deficient performance for not consulting and/or calling as witness an expert on fingerprints and DNA as well as an expert on intoxication due to petitioner telling counsel he was intoxicated when making alleged admissions that were a focal point in the trial. New counsel is necessary to conduct discovery as outlined in each ground, to consult and hire an expert and to subpoena and secure witnesses at an evidentiary hearing which is

AA000217

1 necessary to support the meritorious grounds  
2 asserted.

3

4 Petitioner is assisted by another inmate. The  
5 issues are complex to him. The need for disc-  
6 overy and to conduct an evidentiary hear-  
7 ing constitute cause for counsel to be app-  
8 ointed. MRS 34.750.

9

10 II. CONCLUSION.

11

12 Wherefore petitioner prays this honorable  
13 court will appoint counsel to investigate  
14 and assist in discovery and presentation  
15 of evidence and arguments in an  
16 evidentiary hearing.

17

18 Respectfully Submitted, Tommy Stewart

19

20

Tommy Stewart  
Tommy Stewart

21

22

23 I, Tommy Stewart, do hereby verify this  
24 document does not contain the ~~same~~  
25 ~~any~~ Social Security number of any  
26 person.

AA000218

Tommy Stewart

Certificate of Service.

Pursuant to MRCP Rule 5 (b) I, Tommy Stewart, do hereby certify that on the date signed below I did mail a true and correct copy of the foregoing Motion to Appoint Counsel And Request For Evidentiary Hearing to: \_\_\_\_\_

Signed, Tommy Stewart

Tommy Stewart  
Tommy Stewart

Tommy Stewart #1048467  
ENY State Prison  
P.O. Box 1989  
ENY NY, ~~89301~~  
~~89301~~

[illegible]

AA000220

Steven D. Grierson

Clerk of the Court

200 Lewis Avenue 3<sup>rd</sup> Floor  
Las Vegas NV 89155-1160

CONFIDENTIAL

1 Tommy Stewart # 1048467  
2 PO Box 1989  
3 ELY, NEVADA 89301  
4 In Proper Person

*Steven D. Grierson*

5  
6 DISTRICT COURT  
7 CLARK COUNTY, NEVADA  
8

9 Tommy Stewart  
10 Petitioner, Case NO. C-15-305984-1  
11 vs.  
12 WARDEN, ELY STATE Dept. No XXI  
13 PRISON,

14 Respondent,  
15  
16

17 Petitioner's 2<sup>nd</sup> Supplemental  
18 Petition FOR A WRIT OF HABEAS  
19 CORPUS (post-conviction)  
20

21 Comes now, Petitioner, Tommy Stewart, appearing in  
22 proper person, to Supplement his previously filed petition  
23 for a writ of habeas corpus (post-conviction) filed in the  
24 above-entitled matter.

25 This Supplemental is supported by the below stated  
26 ground for relief and all papers pleadings and  
27 documents on file in this case.

//////

AA000221

CLERK OF THE COURT

JUN 14 2018

RECEIVED

JUN 13 2018

CLERK OF THE COURT

1 Ground ONE: Petitioner's conviction and sentence  
2 ARE UNLAWFUL AS HE WAS DENIED THE RIGHT  
3 TO A FAIR TRIAL IN VIOLATION OF THE Fourteen & Six  
4 AMENDMENTS TO THE UNITED STATES CONSTITUTION  
5 JURY WAS GIVING IMPROPER JURY INSTRUCTIONS  
6 ON FIRST DEGREE KIDNAPPING

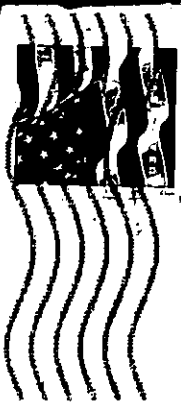
7 Supporting facts

8 The Jury wasn't given any Instructions for a  
9 lesser offense for first Degree Kidnapping which would  
10 have been; Second Degree Kidnapping OR False Imprison-  
11 ment. The Jury's should have been given Instructions  
12 for second Degree Kidnapping and False Imprisonment  
13 along with first Degree Kidnapping. The Jury wasn't  
14 Giving the option to find the petitioner guilty of a  
15 lesser offense for first Degree Kidnapping because there  
16 was no Jury INSTRUCTIONS on Second Degree  
17 Kidnapping and False Imprisons. The Jury never know  
18 petitioner could be found guilty of a lesser offense. If  
19 The Jury's would have been given the proper Jury  
20 Instructions on First Degree Kidnapping including the lesser  
21 offense for ~~first~~ <sup>Second</sup> Degree Kidnapping There's a likelihood possibility  
22 that petitioner would have got found guilty for second  
23 Degree kidnapping OR False Imprisonment do to the fact there  
24 was doubt petitioner was Acquitted of possession of A GUN/  
25 with the use of a deadly weapon, The Jury was given  
26 Improper Jury INSTRUCTION on First Degree Kidnapping  
27 because they were INSTRUCTED to find petitioner guilty of  
28 first Degree Kidnapping/with the use or without the use <sup>AA000222</sup> there was  
29 no Instructions for second Degree kidnapping OR false imprisonment.

Tommy Stewart # 10484167  
ELY state prison  
P.O. Box 1989  
ELY NV, 89301

LAS VEGAS NV 890

11 JUN 2018 PM 3 L



Steven D. Grierson Clerk of court  
200 Lewis Avenue

89101-630000



ELY STATE PRISON

JUN 10 2018

U5

AA000223

*Steven D. Grierson*

1 Tommy Stewart # 1048467  
PP 2 P.O. Box 1989  
DA 3 ELY, Nevada 89301  
4 In Proper Person  
5

6 District Court  
7 Clark County NEVada  
8

9 Tommy Stewart

10 Petitioner,

Case No. C-15-305984-1

11 VS.

12 Warden Ely State

Dept. No XXI

13 Prison

14 Respondent  
15

16  
17 Petitioner's 3<sup>rd</sup> Supplemental  
18 Petition For A writ OF HABEAS  
19 CORPUS (post-conviction)  
20

21 Comes now, Petitioner Tommy Stewart appearing in  
22 proper person to Supplement his previously filed petition  
23 for a writ of habeas corpus (post-conviction) filed in the  
24 above - entitled matter.

25 This Supplemental is supported by the below stated ground  
26 for relief and all papers pleading and documents on  
27 file in this case.

28 ~~11/11/11~~ **RECEIVED**

**RECEIVED**

AA000224

JUL 09 2018

JUL 18 2018

CLERK OF THE COURT CLERK OF THE COURT

1 Ground ONE: Petitioner's conviction and sentence are  
2 unlawful as he was Denied the Effective Assistance  
3 of trial counsel In violation of the 6<sup>th</sup> and 14<sup>th</sup>  
4 Amendments to the United States Constitution /  
5 Trial counsel failed to give the court's  
6 Lesser-included offense instructions on First Degree Kidnapping

7  
8 Supporting facts:

9  
10 Jess R. Marchese was Ineffective for not giving Lesser-included  
11 offense instructions to the court for the jury on first  
12 Degree Kidnapping. First Degree Kidnapping involve Second Degree  
13 Kidnapping I.e., Seizing, inveigling, taking carrying away, OR  
14 Kidnapping another person and in any manner holding to service  
15 or detaining that person against his or her will.

16 NEV. Rev. Stat. 200.310 Smith v. State 120 Nev. 944, 946, 102 P.3d

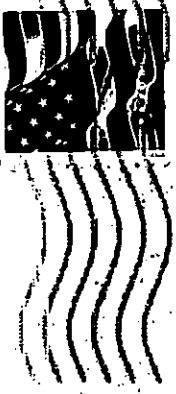
17 569, 571 (2004). First Degree Kidnapping can not be committed  
18 without committing Second Degree Kidnapping, all of the  
19 elements of the lesser offense are included in the greater offense.

20 Counsel was Ineffective for not giving a Lesser-included  
21 instructions on First Degree Kidnapping when petitioner  
22 was clearly intitle to one. If counsel would have gave  
23 the trial court Lesser-included instructions on Second  
24 Degree Kidnapping there's a reasonable likelihood of  
25 a different result had counsel given a lesser-included offense  
26 instructions for Second Degree Kidnapping. Counsel failed to  
27 give a Lesser-included offense instructions therefore counsel  
28 was Ineffective In violation of the 6<sup>th</sup> and 14<sup>th</sup> amendments.

Tommy Stewart #10484167  
P.O. Box 1989  
Eliz NV 89301

LAS VEGAS NV 890

06 JUL 2018 PM 4 L



Steven D Grierson  
Clerk of the Court  
200 Lewis Avenue 3<sup>rd</sup> floor  
Las Vegas NV 89101-6300

69101-630000

*Steven D. Grierson*

1 Tommy Stewart T# 1048467

2 P.O. Box 1989

3 Ely Nevada 89301

4 In proper person

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District Court  
Clark County Nevada

C-15-305984-1

XXI

9 Tommy Stewart

10 Petitioner

11 vs

12 Warden, Ely State

13 Prison

14 Respondent

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Petitioner's 4<sup>th</sup> Supplemental  
Petition For A writ OF Habeas  
CORPUS (Post-conviction)

21 Comes now, petitioner Tommy Stewart appearing in  
22 proper person to supplement his previously filed petition  
23 for a writ of habeas corpus (post-conviction) filed in the  
24 above entitled matter.

25 This supplemental is supported by the below stated  
26 grounds for relief and all papers pleadings and  
27 documents on file in this case.

28 // // // //

AA000227

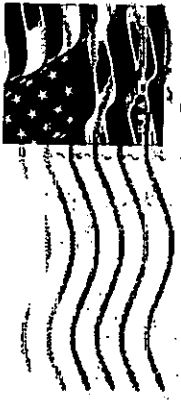
1 Ground one: Petitioner's conviction and sentence  
2 are unlawful as he was DENIED the effective assistance  
3 of appellate counsel in violation of the 6<sup>th</sup> and 14<sup>th</sup> Amendments  
4 to the United States constitution appellate counsel failed  
5 to raise or challenge issue on District court Abuse of discretion  
6 for not giving an lesser included offense instructions  
7 on First Degree kidnapping.  
8

9 Supporting facts  
10

11 Appellate counsel was ineffective for not raising or challenging  
12 issue on District court Abuse of discretion for not giving an  
13 lesser included offense instruction on First Degree kidnapping.  
14 A defendant is entitled to a lesser-included offense instruction, and failure  
15 to provide such an instruction constitutes reversible error. *Id.* at 1264, 1269,  
16 147 p.3d at 1106, 1109. All acts of first-degree kidnapping involve second  
17 degree kidnapping i.e. seizing, inveigling, taking, carrying away, or kidnapping  
18 another person and in any manner holding to service or detaining that  
19 person against his or her will. NEV. REV. STAT. 200.310 *Smith v. State* 120 NEV.  
20 944, 946, 102 p.3d 569, 571 (2004). If appellate counsel would have  
21 raised such issue there's a likelihood possibility petitioner's appeal  
22 would have been reversed or resolved in a different manner.  
23 Appellate counsel Jess R. Marchese was ineffective, if  
24 an lesser included offense instruction was given there's a  
25 possibility petitioner would have only got found guilty of an  
26 lesser offense which is second degree kidnapping which holds  
27 lesser time due to the 5 to life the first degree holds.  
28 which is a major difference, so yes the outcome would have been different.

Tommy Stewart #1048467  
P.O. Box 1989  
ELY Nevada 89301

LAS VEGAS NV 890  
23 JUL 2018 PM 4 L



Steven D. Grierson  
Clerk of the Court  
200 Lewis Avenue, 3rd Floor  
Las Vegas, NV 89101

000000-10158

ELY STATE PRISON  
JUL 22 2018  
US

DISTRICT COURT  
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

July 31, 2018

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C-15-305984-1      State of Nevada  
                                 vs  
                                 Tommy Stewart

---

July 31, 2018      09:30 AM      All Pending Motions

HEARD BY:      Adair, Valerie      COURTROOM: RJC Courtroom 11C

COURT CLERK: Chambers, Jill

RECORDER:      Schofield, Susan

REPORTER:

PARTIES PRESENT:

Brianna K. Lamanna      Attorney for Plaintiff

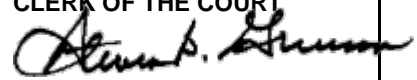
State of Nevada      Plaintiff

Travis D Akin      Attorney for Defendant

**JOURNAL ENTRIES**CONFIRMATION OF COUNSEL....PETITION FOR WRIT OF HABEAS CORPUS...PETITIONER'S PRO  
PER MOTION FOR THE APPOINTMENT OF COUNSELMr. Akin CONFIRMED as counsel for the Deft. Upon inquiry of the Court, Mr. Akin stated he had not  
been able to review everything. COURT ORDERED, MATTER CONTINUED.

NDC

CONTINUED TO: 8/28/18 9:30 AM



**SUPP**  
**THE LAW OFFICE OF TRAVIS AKIN**  
Travis Akin, Esq.  
Nevada Bar No. 13059  
9480 S. Eastern Ave., Suite 257  
Las Vegas, NV 89123  
Phone: (702) 510-8567  
Fax: (702) 778-6600  
*Attorney for Petitioner*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

\*\*\*\*\*

THE STATE OF NEVADA

Plaintiff,

vs.

TOMMY STEWART,

Defendant.

CASE NO. : C-15-305984-1

DEPT. NO.: 21

**SUPPLEMENTAL PETITION FOR POST-  
CONVICTION WRIT OF HABEAS  
CORPUS**

**COMES NOW**, Petitioner TOMMY STEWART, by and through his undersigned counsel, Travis Akin, Esq., hereby submits Petitioner's SUPPLEMENTAL PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS. Petitioner incorporates the arguments made in his pro se Petition for Writ of Habeas Corpus into the instant pleadings. In addition to all documents, pleadings, and oral arguments in this case, Petitioner asserts:

**MEMORANDUM OF POINTS AND AUTHORITIES**

**FACTS**

The State charged Stewart with conspiracy to commit robbery, burglary while in possession of a firearm, robbery with use of a deadly weapon, and first-degree kidnapping with use of a deadly weapon. (Exhibit 1, Supreme Court Affirmance, STEW05-06).

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1 After a three-day trial, the jury found Stewart guilty on all counts, but did not find that a  
2 deadly was used in in the burglary, robbery, and kidnapping counts. (Id. & Exhibit 7, Verdict,  
3 STEW0276).

4 To obtain separate convictions for kidnapping and robbery, the State relied on jury  
5 instruction #27:

6 In order for you to find the defendant guilty of First Degree Kidnapping and an  
7 associated offense of robbery, you must also find beyond a reasonable doubt either:

- 8 ( 1) That any movement of the victim was not incidental to the robbery;  
9 (2) That any incidental movement of the victim substantially increased the  
risk of harm to the victim over and above that necessarily present in the robbery;  
10 (3) That any incidental movement of the victim substantially exceeded that  
required to complete the robbery;  
11 ( 4) That the victim was physically restrained and such restraint substantially  
increased the risk of harm to the victim; or  
12 (5) The movement or restraint had an independent significance or purpose.  
13 "Physically restrained" includes but is not limited to tying, binding, or taping.

14 (Exhibit 2, Jury Instructions, STEW027).

15 The State argued alternatively that (1)-(4) were present in this case. (Exhibit 3,  
16 Transcript of Closing Arguments, STEW0269-70). The jury instructions did not include a  
17 lesser-included instruction for the first-degree kidnapping charge as to second-degree  
18 kidnapping.

### 19 ARGUMENT

20 “Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674  
21 (1984), an ineffective assistance claim ‘has two components. First, the [petitioner] must show  
22 that counsel's performance was deficient.... Second, the [petitioner] must show that the deficient  
23 performance prejudiced the defense.’” *Tilcock v. Budge*, 538 F.3d 1138, 1146 (9th Cir. 2008).

24 This requires showing that counsel made errors so serious that counsel was not  
25 functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Strickland v.*  
26 *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The defendant  
27 must show that there is a reasonable probability that, but for counsel's unprofessional errors, the  
28

AA000232

1 result of the proceeding would have been different. A reasonable probability is a probability  
2 sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668,  
3 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984).

4 In order to show that he received ineffective assistance of counsel sufficient to render his  
5 guilty plea invalid, the defendant must demonstrate: "(1) that his counsel's performance fell  
6 below an objective standard of reasonableness; and (2) that he suffered prejudice as a result, i.e.,  
7 that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have  
8 pleaded guilty and would have insisted on going to trial." *Avery v. State*, 122 Nev. 278, 285, 129  
9 P.3d 664, 669 (2006) (citing *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052); *Warden v. Lyons*,  
10 100 Nev. 430, 683 P.2d 504 (1984) (adopting the *Strickland* test); *Hill v. Lockhart*, 474 U.S. 52,  
11 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); and *Kirksey*, 112 Nev. at 988, 923 P.2d at 1107  
12 (adopting the *Hill* standard for prejudice where the conviction is the result of a guilty plea).

13  
14 The constitutional right to effective assistance of counsel extends to a direct appeal.  
15 *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance  
16 of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in  
17 *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Effective  
18 assistance of appellate counsel does not mean that appellate counsel must raise every non-  
19 frivolous issue. See *Jones v. Barnes*, 463 U.S. \*1114 745, 751-54, 103 S. Ct. 3308, 3312-15, 77  
20 L. Ed. 2d 987 (1983). An attorney's decision not to raise meritless issues on appeal is not  
21 ineffective assistance of counsel. *Daniel v. Overton*, 845 F. Supp. 1170, 1176 (E.D.Mich. 1994);  
22 *Leaks v. United States*, 841 F. Supp. 536, 541 (S.D.N.Y.1994), aff'd, 47 F.3d 1157 (2d Cir.), cert.  
23 denied, \_\_\_ U.S. \_\_\_, 116 S. Ct. 327, 133 L. Ed. 2d 228 (1995). To establish prejudice based on  
24 the deficient assistance of appellate counsel, the defendant must show that the omitted issue  
25 would have a reasonable probability of success on appeal. *Duhamel v. Collins*, 955 F.2d 962, 967  
26  
27  
28

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1 (5th Cir.1992); *Heath*, 941 F.2d at 1132. In making this determination, a court must review the  
2 merits of the omitted claim. *Heath*, 941 F.2d at 1132.

3 INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO REQUEST A JURY  
4 INSTRUCTION OF THE LESSER-INCLUDED KIDNAPPING OFFENSE

5 NRS 175.501 provides that a “defendant may be found guilty. . . of an offense necessarily  
6 included in the offense charged.” The Supreme Court of Nevada has held that this rule entitles a  
7 defendant to an instruction on a “necessarily included” offense, i.e., a lesser-included offense, as  
8 long as there is some evidence to support a conviction on that offense. *Rosas v. State*, 122 Nev.  
9 1258, 1267-69, 147 P.3d 1101, 1108-09 (2006).

10 This court has held “to determine whether an offense is necessarily included in the  
11 offense charged, the test is whether the offense charged cannot be committed without committing  
12 the lesser offense.” *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966) (citing *State v.*  
13 *Carter*, 79 Nev. 146, 379 P.2d 945 (1963); *State v. Holm*, 55 Nev. 468, 37 P.2d 821 (1935)).  
14 Where “there is evidence which would absolve the defendant from guilt of the greater offense or  
15 degree but would support a finding of guilt of the lesser offense or degree,” an instruction on the  
16 lesser-included offense is mandatory even if not requested. *Id.* at 187, 414 P.2d at 595. The  
17 Nevada Supreme Court has opined on when a lesser included offense instruction is necessary:  
18

19  
20 First, is that in which there is evidence which would absolve the defendant from  
21 guilt of the greater offense or degree but would support a finding of guilt of the lesser  
22 offense or degree. The instruction is mandatory, without request. *See State v. Moore*, 48  
23 Nev. 405, 233 P. 523 (1925).

24 Second, where the evidence would not support a finding of guilty of the lesser  
25 offense or degree, e.g., where the defendant denies any complicity in the crime charged  
26 and thus lays no foundation for any intermediate verdict or where the elements of the  
27 defenses differ, and some element essential to the lesser offense is either not proved or  
28 shown not to exist. The instruction is not only unnecessary but is erroneous because it is  
not pertinent.

Third is the intermediate situation where the elements of the greater offense  
include all of the elements of the lesser offense because it is the very nature of the greater  
offense that it could not have been committed without the defendant having the intent and  
doing the acts which constitute the lesser offense, e.g., kidnapping involving false  
imprisonment, sale of narcotics involving possession, felonious assault involving simple  
assault. In this intermediate situation, it is not error for a trial court to give instructions on

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1 the lesser included offenses since all elements of the lesser offenses have been proved.  
2 However, if the prosecution has met its burden of proof on the greater offense and there  
3 is no evidence at the trial tending to reduce the greater offense, an instruction on a lesser  
4 included offense may properly be refused. But, if there is any evidence at all, however  
5 slight, on any reasonable theory of the case under which the defendant might be  
6 convicted of a lower degree or lesser included offense, the court must, if requested,  
7 instruct on the lower degree or lesser included offense. *State v. Millain*, 3 Nev. 409  
8 (1876); *State v. Donovan*, 10 Nev. 36 (1875); *State v. Johnny*, 29 Nev. 203, 87 P. 3  
9 (1906); *State v. Enkhhouse*, 40 Nev. 1, 160 P. 23 (1916); *State v. Moore*, 48 Nev. 405, 233  
10 P. 523 (1925); *State v. Oschoa*, 49 Nev. 194, 242 P. 582 (1926); *State v. Fisko*, 58 Nev.  
11 65, 70 P.2d 113 (1937).

12 *Lisby v. State*, 82 Nev. 183, 187-88 414 P.2d 592, 595 (Nev., 1966).

13 In *Rosas v. State*, the Nevada Supreme Court went to great lengths to clarify *Lisby*:

14 *Lisby* sets forth the established tenet: where a lesser offense is included in the  
15 charged offense, an instruction on the lesser-included offense should not be given if  
16 "there is no evidence at the trial tending to reduce the greater offense," but should be  
17 given "if there is any evidence at all, however slight," to support a conviction for the  
18 lesser-included offense.<sup>25</sup> *Lisby* also provides an example of when an instruction should  
19 not be given: "e.g., where the defendant denies any complicity in the crime charged and  
20 thus lays no foundation for any intermediate verdict."<sup>26</sup>

21 This example has led to some misunderstanding. A few subsequent decisions have  
22 focused only on the first part of the example—"where the defendant denies any  
23 complicity in the crime charged"—and misconstrued it as setting forth an independent  
24 requirement that a defendant must admit culpability to obtain a lesser-included  
25 instruction. But the example is not divisible in this way. It must be read as a whole:  
26 "where the defendant denies any complicity in the crime charged and thus lays no  
27 foundation for any intermediate verdict." The controlling factor is the lack of an  
28 evidentiary foundation for the lesser offense, not denial of guilt. Consequently, if there is  
no foundation for an "intermediate verdict," a lesser-included instruction should not be  
given. But if any evidence does lay such a foundation, then an instruction should be  
given—regardless of whether the defendant denies complicity.

Thus, *Lisby* is not authority for requiring a defendant to present evidence of or  
admit culpability for a lesser-included offense in order to receive a lesser-included jury  
instruction.<sup>27</sup> Elsewhere, this court has expressly rejected such a limit on a defendant's  
right to instruction on a defense theory:

In every criminal case, a defendant is entitled to have the jury instructed on any  
theory of defense that the evidence discloses, however improbable the evidence  
supporting it may be.

It makes no difference which side presents the evidence, as the trier of the fact is  
required to weigh all of the evidence produced by either the state or the defense before  
arriving at a verdict. The test for the necessity of instructing the jury is whether there is  
any foundation in the record for the defense theory.<sup>28</sup>

Furthermore, conditioning a defendant's right to an instruction on a lesser-  
included offense on its consistency with his overall defense is also unsound because the  
law has never held the prosecution to the same condition. As noted earlier, the common  
law first recognized the prosecution's right to instruct a jury on lesser-included offenses,

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1 and NRS 175.501 makes no distinction between prosecution and defense in providing  
2 that a defendant "may be found guilty of an offense necessarily included in the offense  
3 charged." This court has upheld the propriety of lesser-included instructions obtained by  
4 the State over objections by defendants, even where the lesser-included instruction was  
contrary to the theory of defense.<sup>29</sup> These decisions are incompatible with imposing on  
defendants the burden of presenting evidence or a theory of the case consistent with a  
lesser-included offense in order to obtain instruction on the offense.

5 Finally, denying a defendant's right to an instruction on a lesser-included offense,  
6 simply because he has not presented the evidence supporting it or has argued a disparate  
theory, is also contrary to a defendant's right to have the jury decide questions of fact.  
7 The Nevada Constitution declares that "[t]he right of trial by Jury shall be secured to all  
and remain inviolate forever"<sup>30</sup> and provides that "[j]udges shall not charge juries in  
8 respect to matters of fact."<sup>31</sup> And this court has held that if there is any evidence to  
support a lesser-included offense, the trial court should instruct on it, "leaving the jury to  
9 determine all questions of fact about which there might be any controversy among  
reasonable men."<sup>32</sup>

#### 10 CONCLUSION

11 We reverse Rosas's conviction and overrule our prior cases insofar as they have  
required a defendant to present a defense or evidence consistent with or to admit  
12 culpability for a lesser-included offense in order to obtain an instruction on a lesser-  
included offense. The governing principle is that a defendant is entitled to a jury  
13 instruction on his or her theory of the case as long as there is some evidence to support it,  
regardless of who introduces the evidence and regardless of what other defense theories  
14 may be advanced.

15 *Rosas v. State*, 147 P.3d 1101, 1107-10 (Nev., 2006).

#### 16 *Second-degree Kidnapping is a Lesser-included Offense of First Degree Kidnapping*

17 A lesser offense is included in a greater offense "when all of the elements of the lesser  
18 offense are included in the elements of the greater offense." *Rosas v. State*, 147 P.3d 1101, 122  
19 Nev. 1258 (Nev., 2006) (quoting *Barton v. State*, 117 Nev. 686, 690, 30 P.3d 1103, 1106 (2001)).  
20 *Rosas v. State*, 147 P.3d 1101, 122 Nev. 1258 (Nev., 2006)).

21  
22 NRS 200.310 promulgates the difference between first degree kidnapping and second-  
23 degree kidnapping:

#### 24 **NRS 200.310 Degrees.**

25 1. A person who willfully seizes, confines, inveigles, entices, decoys, abducts,  
26 conceals, kidnaps or carries away a person by any means whatsoever with the intent to  
hold or detain, or who holds or detains, the person for ransom, or reward, or for the  
27 purpose of committing sexual assault, extortion or robbery upon or from the person, or  
for the purpose of killing the person or inflicting substantial bodily harm upon the person,  
28 or to exact from relatives, friends, or any other person any money or valuable thing for  
the return or disposition of the kidnapped person, and a person who leads, takes, entices,

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1 or carries away or detains any minor with the intent to keep, imprison, or confine the  
2 minor from his or her parents, guardians, or any other person having lawful custody of  
3 the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the  
4 person of the minor any unlawful act is guilty of kidnapping in the first degree which is a  
5 category A felony.

6 2. A person who willfully and without authority of law seizes, inveigles, takes,  
7 carries away or kidnaps another person with the intent to keep the person secretly  
8 imprisoned within the State, or for the purpose of conveying the person out of the State  
9 without authority of law, or in any manner held to service or detained against the person's  
10 will, is guilty of kidnapping in the second degree which is a category B felony.

11 NRS 200.310.

12 Here, all of the elements of NRS 200.310(2) are included in the elements of NRS  
13 200.310(1). NRS 200.310(1) only specifies that a robbery, ransom, reward, sexual assault,  
14 extortion, killing, inflicting substantial bodily harm, or minor be involved. Any argument to the  
15 contrary is simply ridiculous.

16 *Stewart Was Entitled to a Lesser-included Kidnapping Instruction*

17 In its closing argument distinguishing between the robbery and kidnapping counts, the  
18 State argued:

19 In order for you to find the defendant guilty of first degree kidnapping and an  
20 associated offense of robbery -- because here we have a kidnapping and a robbery  
21 charged, you must also find beyond a reasonable doubt either -- I circled or right here  
22 because you only need to find one of these five factors, okay -- you must also find  
23 beyond a reasonable doubt either: (1) that the movement of the victim was not incidental  
24 to the robbery.

25 What does that mean? The movement that we're talking about here is the moving  
26 of Natasha from that front porch, and I know that this is a very technical argument, but  
27 moving her from the gate from outside of her front door to the back bedroom.

28 Did they need to move her to commit a robbery upon her? Did they need to move  
her into that back bedroom? And I submit to you, no, because they could have just as  
easily robbed her while she was standing outside her front door or if she had her purse  
with her. The ATM cards that they asked about the PIN, her two dollars, they could have  
easily robbed her outside of her front door. They could have easily robbed her while she  
stood in her living room as opposed to being in the very far back bedroom.

(STEW0269-70).

The State later argued that "They did not need to put her in her back bedroom - in her  
bedroom to rob her." (Id.).

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1 Here, the State argued that the movement of the victim that constituted kidnapping was  
2 not for the purpose for the robbery. Under NRS 200.310, confinement must be for the purpose  
3 of robbing. There was no ransom, reward, sexual assault, extortion, killing, inflicting substantial  
4 bodily harm, or minor involved or alleged to be involved here. If the kidnapping was not  
5 committed for the purposes of the robbery, as the state argued it was not, then there is nothing in  
6 NRS 200.310 that would move the charge from second-degree kidnapping to first degree  
7 kidnapping.  
8

9 When it came to obtaining separate convictions for robbery and kidnapping, the State  
10 argued and presented evidence that the two counts were unrelated. As to first-degree kidnapping  
11 count itself, the State argued and presented evidence that Stewart confined the victim to rob her.  
12 These alternative theories of the case were not appropriate without a lesser-included instruction  
13 as to the kidnapping, it was Stewart's counsel's responsibility to rectify this situation through a  
14 jury instruction, and it was the Court's obligation, under *Rosas*, to include the lesser-included  
15 instruction without request. "In every criminal case, a defendant is entitled to have the jury  
16 instructed on any theory of defense that the evidence discloses, however improbable the evidence  
17 supporting it may be." *Rosas v. State*, 147 P.3d 1101, 1109-10.  
18

19 *Trial Counsel was Ineffective for Failing to Request a Lesser-included Kidnapping Instruction*

20 Trial counsel was deficient for failing to request the lesser-included jury instruction  
21 because Stewart had everything to gain, and nothing to lose, if this instruction were included.  
22 The maximum sentence for first-degree kidnapping is life with parole, whereas the sentence for  
23 second-degree kidnapping is 2 to 15 years. This was not a strategic play or within the discretion  
24 of counsel; *Rosas* demands that such an instruction is mandatory. NRS 200.320 & NRS  
25 200.330.  
26

27 The simple analogy here would be for defense counsel to fail to present second-degree  
28 murder, voluntary manslaughter, and involuntary manslaughter instructions when his client is

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1 facing a first-degree murder charge. Such a decision would be inexcusable and would fall way  
2 outside of objectively reasonable counsel guaranteed by the Sixth Amendment.

3 Stewart has been prejudiced because, but for trial counsel's deficient performance, there  
4 is a reasonable likelihood that the result of the trial would have been different. It would have  
5 made it impossible for the jury to convict on both the first-degree kidnapping and robbery  
6 charge. The jury would have been forced to choose between: only a robbery conviction or a  
7 conviction for robbery and second-degree kidnapping. Either way, but for trial counsel's  
8 deficient performance, Stewart would be in a much better position as he is now. Stewart is  
9 serving a sentence with a life tail on the first-degree kidnapping charge, whereas his maximum  
10 sentence on a second-degree kidnapping charge would be a minimum of 6 and maximum of 15  
11 years. (Exhibit 8, Judgment of Conviction, STEW0280).

12  
13 Furthermore, the jury here declined to find that a deadly weapon was used in the  
14 commission of the burglary, robbery, and kidnapping. As the jury had already compromised on  
15 three convictions, the logical conclusion follows that had the jury been presented with a second-  
16 degree kidnapping instruction and a first-degree kidnapping instruction, there is a reasonable  
17 likelihood that the jury would have compromised on the kidnapping count as well.

18  
19 *Appellate Counsel was Ineffective for Failing to Raise the Lesser-included Instruction Issue*

20 Stewart's appellate counsel was ineffective for failing to bring the instant issue on appeal.  
21 Appellate counsel was deficient because Stewart had everything to gain and nothing to lose by  
22 bringing the claim.

23  
24 "The instruction is mandatory, without request" if "there is evidence which would absolve  
25 the defendant from guilt of the greater offense ... but would support a finding of guilt of the  
26 lesser offense." *Lisby*, 82 Nev. 183, 187, 414 P.2d at 595, *Rosas v. State*, 147 P.3d 1101, 122  
27 Nev. 1258 (Nev., 2006). In the appellate context, Stewart's trial counsel's failure to request the  
28 lesser-included instruction did not prevent appellate counsel from raising the issue as the

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1 instruction was mandatory without a request. Appellate counsel simply missed an issue that  
2 entitled Stewart to automatic reversal. Such a failure cannot fall within the discretion of  
3 appellate counsel or be brushed aside as a sound strategic decision.

4 Stewart has been prejudiced because, but for appellate counsel's failure to bring the  
5 instant issue, Stewart was entitled to reversal under *Rosas* and *Lisby*. Therefore, there is a  
6 reasonable likelihood that the result of the appeal would have been different: Stewart was  
7 entitled to reversal.

### 8 *Request for Evidentiary Hearing*

9  
10 NRS 34.770 requires that the Court hold an evidentiary hearing prior to granting the  
11 instant writ:

#### 12 **NRS 34.770 Judicial determination of need for evidentiary hearing:** 13 **Dismissal of petition or granting of writ.**

14 1. The judge or justice, upon review of the return, answer and all supporting  
15 documents which are filed, shall determine whether an evidentiary hearing is required. A  
petitioner must not be discharged or committed to the custody of a person other than the  
respondent unless an evidentiary hearing is held.

16 2. If the judge or justice determines that the petitioner is not entitled to relief  
17 and an evidentiary hearing is not required, the judge or justice shall dismiss the petition  
without a hearing.

18 3. If the judge or justice determines that an evidentiary hearing is required, the judge or  
justice shall grant the writ and shall set a date for the hearing.

19 NRS 34.770.

20 Stewart asserts that the instant briefing has shown his claims to be meritorious and  
21 requests that the Court schedule an evidentiary hearing so that it may grant the instant petition.

### 22 **CONCLUSION**

23 Stewart was entitled to a lesser-included jury instruction on the first-degree kidnapping  
24 charge. Under *Rosas*, such an instruction was mandatory without a request. Stewart's trial  
25 counsel was ineffective for failing to request said instruction and appellate counsel was  
26 ineffective for failing to bring the issue on appeal. As *Rosas* requires mandatory reversal,  
27 Stewart is entitled reversal of his first-degree kidnapping conviction. Stewart asks that this Court  
28

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1 schedule an evidentiary hearing so that it may grant Stewart's claims.

2 DATED this 20<sup>th</sup> day of February, 2019.

3 **THE LAW OFFICE OF TRAVIS AKIN**

4 /s/ Travis Akin

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of February, 2019, I served a true and correct copy of the above and foregoing SUPPLEMENTAL PETITION FOR POST-CONVICTION WRIT OF HABEAS CORPUS electronically and via mail addressed to the following:

**CLARK COUNTY DISTRICT ATTORNEY**

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Las Vegas, Nevada 89101  
*Attorney for the State of Nevada*

**NEVADA ATTORNEY GENERAL**

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/s/ Travis Akin

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Travis Akin, Esq.

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