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IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN PORTER,

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Supreme Court Case No.:80738
District Court No.: A-19-798035-W
e-file

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN PORTER, Appellant, vs. THE STATE OF NEVADA Respondent.	Supreme Court Case No.: 80738 District Court No.: A-19-798035-W ***e-file***

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 and must be disclosed.

1. Attorney of Record: Betsy Allen
2. Publicly-held Companies Associated: None
3. Law Firm(s) Appearing in the Court(s) Below: Law Office of Betsy Allen

DATED this 5th day of April, 2021.

s/s Betsy Allen
BETSY ALLEN, ESQ.

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I. STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the instant matter pursuant to Nev. Rev. Stat. § 177.015(3). The Appellant appeals from the Finding of Fact and Conclusion of Law and Order, entered on June 4, 2020.

II. ROUTING STATEMENT

This case does invoke the original jurisdiction of the Nevada Supreme Court. This is an appeal from a post-conviction, with a life sentence.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The Petitioner received Ineffective Assistance of Counsel

A) Counsel was ineffective for failing to present the appropriate defense on behalf of Petitioner.

B) The State improperly brought in evidence of Appellant's co-defendant's plea of guilt to these charges

STATEMENT OF THE CASE

On or about April 26, 2001, an Information was filed in District Court charging Justin Porter (hereinafter referred to as Petitioner) with the following crimes: Burglary While in Possession of a Firearm (NRS 205.060, 193.165) First Degree Kidnapping with Use of a Deadly Weapon (NRS 200.310, 200.320, 193.165), Sexual Assault with Use of a Deadly Weapon (NRS 200.364, 200.366, 193.165), Robbery with Use of a Deadly Weapon (NRS 200.380, 193.165), First Degree Kidnapping With Use of a Deadly Weapon with Substantial Bodily Harm (NRS 200.310, 200.320, 193.165), Sexual Assault with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (NRS 200.364, 200.366, 193.165) Attempt Murder with Use of a Deadly Weapon (NRS 200.010, 200.300, 193.330, 193.165), First Degree Arson with Use of a Deadly Weapon (NRS 205.010, 193.165), First Degree Kidnapping with Use of a Deadly Weapon, Victim 65 Years of Age or Older (NRS 200.310, 200.320, 193.165, 193.167), Sexual Assault with Use of a Deadly Weapon, Victim 65 Years of Age or Older (NRS 200.364, 200.366, 193.165, 193.167) Robbery with Use of a Deadly Weapon, Victim 65 Years of Age or Older (NRS 200.380, 193.165, 193.167), Battery with Intent to Commit a Crime, Victim 65 Years of Age and Older (NRS 200.400, 193.167), Attempt Robbery with Use of a Deadly Weapon (NRS 200.380, 193.165, 193.330), Murder with Use of a Deadly Weapon (Open Murder, NRS 200.010, 200.030, 193.165)

and Battery with Use of a Deadly Weapon (NRS 200.481). There were forty-two (42) counts in total. (See AA, Vol. 1, pp. 001-017)

On or about May 2, 2001, and Amended information was filed in District Court, only to fix a typographical error. Petitioner pled not guilty to all counts. (See AA, Vol. 1, pp. 018-034)

On or about July 3, 2001, Petitioner's attorneys filed a Pre-Trial Writ of Habeas Corpus, challenging the Amended Information and various counts/charges bound up by the Justice of the Peace. (See AA, Vol. 1, pp. 035-065) The District Court granted the Writ in part and as a result, the State, on or about October 11, 2001, filed a Second Amended Information reducing the total charges to 38 counts. (See AA, Vol. 1, pp. 066-076)

On or about May 15, 2008, Petitioner filed a Motion to Sever, related to Counts 30-32, which involved the Murder with Use of a Deadly Weapon. On or about June 18, 2008, the Court granted the Petitioner's Motion to Sever and ordered the murder event tried separately. (See AA, Vol. 1, pp. 077-090) A third Information was filed on April 30, 2009 based upon this ruling.

On May 8, 2009, Petitioner was found guilty of Second Degree Murder with Use of a Deadly Weapon and Not Guilt on the remaining counts. Petitioner was

sentenced to Life with the possibility of parole after 120 months, with a consecutive term of Life with the possibility of parole after 120 mon0ths.

Judgement of conviction was filed on October 13, 2009 and a Notice of Appeal was filed on October 29, 2009. The judgement was affirmed on November 8, 2010 and remittitur was issued on December 3, 2010.

On February 10, 2012, Petitioner filed his first pro per Post-Conviction Petition, the State filed its Response and Motion to Dismiss on March 21, 2012. (See AA, Vol. 6, pp. 571-589) The Court denied the Petition as untimely on April 23, 2012. Petitioner appealed the denial of his first Petition and the Nevada Supreme Court affirmed the denial.

On or about August 26, 2013, Petitioner filed his second pro-per Post-Conviction Petition, along with a separate Motion to Appoint Counsel. The Court denied his second petition as time-barred. Petitioner appealed the denial to the Nevada Supreme Court and on June 11, 2014, the appeal was denied and the remittitur was filed on July 15, 2014.

On or about October 26, 2015, Petitioner filed his third pro per Post-Conviction petition, which was subsequently denied. The Nevada Supreme Court affirmed the dismissal and remittitur was issued on January 24, 2017.

Petitioner filed his fourth pro per Post-Conviction Writ.[1] The District Court denied the petition but appointed counsel to handle the instant appeal. Supplemental petitions were then filed on July 16 and 25 in District Court. (See AA, Vol. 7, pp. 590-649)

Notice of Appeal was filed on September 27, 2019, the appeal was denied. It came back to District Court on December 9, 2019, wherein it was continued for appointment of counsel.

STATEMENT OF FACTS

Mark Misuraca testified for the State first. He testified that he worked for Las Vegas Metropolitan Police Department (hereinafter LVMPD) and is a sergeant at the Detective Bureau. In June of 2000, he was a patrol officer and was dispatched to 415 S. Tenth Street, Las Vegas. (AA, Vol. 2, pp. 134-135)

The details of the call were that a person was reporting that a friend of his was inside his apartment and possibly dead. (AA, Vol. 2, pp. 135-136) He was the first person to respond. He describes for the jury the layout of the apartment complex and pictures of the same are admitted through him. (AA, Vol. 2, pp. 135-136)

[1] The subject of the instant appeal.

He entered the apartment, observed damage to the door and blood. He further saw a deceased male on the floor. He immediately removed himself from the apartment and contacted detectives. (AA, Vol. 2, pp. 138-139) While he waited for detectives, he secured the apartment and made sure no one else entered. (AA, Vol. 2, pp. 139)

Nan Winters was the next witness to testify for the State. She lives in Clark County and in June of 2000, lived at 415 Tenth Street, across from the apartment of the victim. (AA, Vol. 2, pp. 140-141) She did not know him well but would say hello to him when she saw him. She described him as tall, slim and Asian. (AA, Vol. 2, pp. 142)

She testified that police talked to her on June 10 regarding what she might know about his death. She indicated that in the early morning hours, she heard something that sounded like kicking on a door. (AA, Vol. 2, pp. 143-144) She looked out her window but did not see anything. She then testified that she heard a cry or screaming. (AA, Vol. 2, pp. 144-145)

Alemayehu Awalom testified next for the State. He also lived at 415 Tenth Street, but in the back, behind the victim. (AA, Vol. 2, pp. 155-156) In June of 2000, he would drink in the evenings with his friend Derrick. Sometimes Derrick and his brother Daryl would get rowdy and fight.

In June of 2000, a few nights before the death of Lungtok, Derrick punched the glass on a fire extinguisher and left a trail of blood. When the police responded to the call for Lungtok's death, they questioned Derrick, who in turn, told them to talk to Awalom, to verify the story. (AA, Vol. 2, pp. 159-163)

Jay Cleveland testified next for the State. He called the victim Gee. They worked together at the Golden Gate Casino, both as dealers. (AA, Vol. 2, pp. 172-174) Gee did not have a car and sometimes Jay would take Gee home after a shift at the casino. (AA, Vol. 2, pp. 174-175) He and Gee were friends.

Jay had a cell phone but Gee did not. When Jay called Gee, it would be on a land line. (AA, Vol. 2, pp. 176-177) Leading up to Gee's death, Jay stated they had plans to have lunch with another friend of theirs, Emmy. (AA, Vol. 2, pp. 177-178)

Jay had contact with Gee multiple times prior to the 10th, both in person and on the telephone. (AA, Vol. 2, pp. 179-180) Jay then attempted to call Gee on June 8th but the number was busy. (AA, Vol. 2, pp. 179-180) He repeatedly called him on the 8th, 9th and 10th of June, however the phone was busy the entire time. (AA, Vol. 2, pp. 182-183)

On June 10th, Jay went over to Gee's apartment, as they had lunch plans and Jay had not been able to get in touch with Gee. (AA, Vol. 2, pp. 185-186) As

he arrived at Gee's apartment, he attempted to call him again but the phone was still busy. He decided to go upstairs.

When he got to the top of the stairs, he saw that the door was cracking, around the doorknob and there was also a little hole in the middle of the door. (AA, Vol. 2, pp. 188-189) Jay then called out to Gee a couple of times but received no answer. (AA, Vol. 2, pp. 188-189)

Jay testified that he entered the apartment. (AA, Vol. 2, pp. 189) He saw nothing in the living area so walked back to the bedroom. The bedroom door was closed. He called out Gee's name again and knocked on the door but again received no response. (AA, Vol. 2, pp. 189-190) He opened the bedroom door and saw Gee sitting against the bed with the phone next to him. As he got closer, he saw three holes in his back. (AA, Vol. 2, pp. 190-191) He indicated that Gee was completely naked and there did not appear to be any signs of life. (AA, Vol. 2, pp. 191)

At this point, Jay left the apartment and called 911. He waited for the police to arrive and then gave a statement. (AA, Vol. 2, pp. 191-192)

Under cross-examination, he admitted it did not appear as if there was any sort of struggle inside the apartment. (AA, Vol. 2, pp. 198)

Rebecca Regalado testified that in June of 2000, she lived at 415 Tenth Street, the same complex as the victim. (AA, Vol. 3, pp. 203-204) She indicated that around 3 in the morning, while they were all asleep, she heard a loud noise that woke her up. (AA, Vol. 3, pp. 206-207) She thought it was an earthquake due to the fact that the lamp in the living room was moving. (AA, Vol. 3, pp. 207)

She further stated that she heard someone going down the stairs and in her bathroom, she could hear someone moaning like they were dying. (AA, Vol. 3, pp. 207) She did not call the police. (AA, Vol. 3, pp. 207)

Dina Rejalado testified that in June of 2000, she lived with her sister Rebeca at the apartment complex on 415 Tenth Street. (AA, Vol. 3, pp. 211-212) She indicated, like her sister, in June of 2000, she was asleep and some loud banging noise work her up. She then heard the man upstairs yell the same thing two times. (AA, Vol. 3, pp. 213-215)

The police came a few days later and she gave them a statement about what she heard. (AA, Vol. 3, pp. 215)

Chanel Matthews testified that in 1999-2000, she dated someone named Justin Porter, and identified him in the courtroom. (AA, Vol. 3, pp. 217) She described around Valentine's Day in 2000, she and Justin went to the swap meet

and bought matching outfits. She described the clothing they purchased, including the white gym shoes, the brand was Saucony. (AA, Vol. 3, pp. 217-220)

Edward Cunningham testified that he was a detective from Chicago, Illinois and worked for the Chicago police department. (AA, Vol. 3, pp. 221-222) In August of 2000, he was contacted by members of LVMPD in reference to Justin Porter. LVMPD needed someone to make contact with Mr. Porter, who lived in Chicago. (AA, Vol. 3, pp. 222-223)

He testified that on August 12, at approximately 12:45 a.m., he and a number of other detectives went to the address given to them by LVMPD. (AA, Vol. 3, pp. 223) They had an arrest warrant for Mr. Porter and knew he was alleged to be involved in violent offenses. (AA, Vol. 3, pp. 223-224)

The address given to Officer Cunningham was 2nd floor apartment. They knocked on the door and the door was answered by a woman. They asked for Justin Porter and she stepped back from the door and nodded toward where he was, which was crouching behind a couch. (AA, Vol. 3, pp. 224-225)

Detective Cunningham identified Justin Porter for the jury, as the person crouching behind the couch. (AA, Vol. 3, pp. 225) He was taken into custody and brought back to his offices around 1 am. Detectives from LVMPD arrived around 5 am. (AA, Vol. 3, pp. 226-227) He was held in an interview room.

Maria Lopez testified that she is a crime scene investigator, with Huntington Beach Police Department, however prior to her employment in Huntington Beach, she was employed with LVMPD.[2] (AA, Vol. 3, pp. 229-230)

She testified that she composed the crime scene diagram for the homicide at 415 Tenth Street, on June 10, 2000. The diagram, which she described in detail, lists and documents each and every piece of evidence that was discovered. Each piece is numbered and listed on the diagram, in the place the piece is found. (AA, Vol. 3, pp. 230-245)

David LeMaster testified that he is a senior crime scene analyst for LVMPD. He generally described his duties as a crime scene analyst. (AA, Vol. 3, pp. 248-250)

He was called out to 415 Tenth Street, to help process the scene of Lungtok's murder. He was in charge of photography and generating a report. (AA, Vol. 3, pp. 251) He then identified a number of photographs and what the evidentiary value of each one was.

He identified the foot print found at the scene and the photographs associated with it. (AA, Vol. 3, pp. 254) He also identified the photographs taken

[2] It is important to note that this trial took place approximately nine (9) years after the crime itself.

of the Lungtok and injuries that were visible. (AA, Vol. 3, pp. 265-267) He further testified about the bullets, bullet fragments and impact sites located inside and outside of the apartment. (AA, Vol. 3, pp. 268-275)

Jeffery Smink testified that he is a crime scene analyst supervisor with LVMPD. He was also called out to the homicide scene of Lungtok at 415 Tenth Street. (See AA, Vol. 4, pp. 312-313)

He documented the broken glass on the fire extinguisher and the apparent blood near the fire extinguisher. He also took photographs of Mr. Stirling, who had punched the glass and been cut. (AA, Vol. 4, pp. 315-316)

He further documented and attempted to preserve the footprint found outside Lungtok's apartment. He explained the steps he took to preserve this footwear impression. (AA, Vol. 4, pp. 318-327)

Alane Olson testified next for the State. He was employed as a medical examiner for Clark County and determined the cause and manner of death for Lungtok. (AA, Vol. 4, pp. 339) He described the various wounds he observed on Lungtok. (AA, Vol. 4, pp. 348-354) He determined the cause of death to be a gunshot wound and the manner of death to be homicide. (AA, Vol. 4, pp. 358)

Joel Gellar testified that he was a print examiner for LVMPD, prior to retiring. He described his experience and education. (AA, Vol. 4, pp. 367-368) He

was asked to compare foot ware impressions with a specific pair of shoes provided to him by Detective Barry Jensen. (AA, Vol. 4, pp. 370-372)

He testified to all the steps he took to compare the foot ware photographs and impressions to the shoe provided to him by Detective Jensen. (AA, Vol. 4, pp. 374-376) He found it had a similar design and further contacted other shoe manufacturers to determine that none of them had the same design. (AA, Vol. 4, pp. 376-378) While it could have been made by many types of Saucony shoes, it could ONLY be made by a Saucony shoe. (AA, Vol. 4, pp. 378)

Barry Jensen testified that he is a detective with LVMPD with the robbery/homicide section. (AA, Vol. 4, pp. 385) He indicated that he was involved in the investigation of the homicide of Lungtok, along with Detective LaRochelle. By August 2000, he had developed a suspect by the name of Justin Porter. Jensen indicated that he tried to visit Porter at his home, located at 208 North 13th Street, which was approximately .6 miles from Lungtok's apartment. (AA, Vol. 4, pp. 388-390)

He obtained a search warrant for Porter's home on 13th Street, specifically looking for the shoes that left a foot ware impression at the apartment of Lungtok. Officers observed Angela Porter and her husband leaving the apartment and stopped the car a few blocks away. (AA, Vol. 4, pp. 389-391)

Angela Porter informed detectives that Justin Porter had moved to Chicago with his father. Her husband signed a consent to search card for the apartment, thus a search warrant was not necessary. (AA, Vol. 4, pp. 391-393) Jensen provided Angela with his business card at this time.

Detectives nonetheless waited for a search warrant. (AA, Vol. 4, pp. 392) Upon searching the apartment, they found a pair of white Saucony shoes, which were Porter's. These were taken into evidence. (AA, Vol. 4, pp. 393)

The next day, Jensen received three messages from Justin Porter. He was then sitting at his desk when Justin Porter called him again, this time he was there to answer. (AA, Vol. 4, pp. 396-397) Porter told him that he had not committed any crimes in Las Vegas but that there was a guy named "Dude" who might be in jail who likely committed the crimes and was trying to frame him. (AA, Vol. 4, pp. 397-398)

Detectives in Nevada located Justin Porter's address, through his father, and contacted Chicago PD for assistance. Jensen further got an arrest warrant for Justin Porter. (AA, Vol. 4, pp. 398-399) Once they received information that Porter was in custody in Chicago, three of them (Jensen, LaRochelle and Sargent Cricket) flew to Illinois. (AA, Vol. 4, pp. 399-400) Jensen identified the person in court as being Porter, the person he met in Chicago. (AA, Vol. 5, pp. 401)

Jensen indicated that he read Porter his Miranda rights and had him sign a card indicating that he understood the same. (AA, Vol. 5, pp. 403)

James LaRochelle testified that he is also a detective with LVMPD and had been so for many years. He was a detective in June of 2000 and was involved in the investigation of the death of Lungtok. He was in charge of interviews at the scene. (AA, Vol. 5, pp. 415-417)

He described the crime scene: the blood spatter, the location of the victim, bullets and bullet fragments and the shell casings. (AA, Vol. 5, pp. 418-419) He testified about the separate blood trail that involved Derrick Sterling, which ended up having nothing to do with the death of Lunktok. (AA, Vol. 5, pp. 420-421) He also described the shoe print pattern on the door, as well as the shell casings. (AA, Vol. 5, pp. 424-425) He then testified that he developed a suspect by the name of Justin Porter. (AA, Vol. 5, pp. 428)

He indicated that he spoke with Justin Porter's mother and she told him (as well as Detective Jensen) that Justin was in Chicago, Illinois, with his father. (AA, Vol. 5, pp. 429-430)

Detective LaRochelle testified that he took a statement from Mr. Porter in Chicago. Mr. Porter initially told LaRochelle that he was with someone named Dionne had done the murder. (AA, Vol. 5, pp. 444-436)

After the first interview, the detectives left but noticed him pacing in the room. They re-interviewed him and he told them a different story. He admitted that he shot Lungtok. (AA, Vol. 5, pp. 445-450)

ARGUMENT

I. THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL STAGE.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984), the United States Supreme Court established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a petitioner's claim of ineffective assistance of counsel.

First, the petitioner must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the petitioner. This requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial whose result is reliable. Unless both showings can be made, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

The Nevada Supreme Court has held, "claims of ineffective assistance of counsel must be reviewed under the reasonably effective assistance standard articulated by the U.S. Supreme Court in Strickland, thus requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." *See*, Bennet v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

"The defendant carries the affirmative burden of establishing prejudice." Riley v. State, 110 Nev, 638, 646, 878 P.2d 272, 278 (1994). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a petitioner must show a reasonable probability that, but for counsel's error, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine the confidence in the outcome. *See*, Kirksey, 112 Nev. at 980, 923 P.2d at 1102. "Strategy or decisions regarding the conduct of a defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745, 783 P.2d 430 (1989); Olausen v. State, 105 Nev. 110, 771 P.2d 583 (1989).

This Court reviews the denial of a post conviction petition for writ of habeas corpus for an abuse of discretion. Nobles v. Warden, Nevada Dept. of Prisons, 106 Nev. 67, 787 P.2d 390 (1990). To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, the petition must

demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's errors were so severe that they rendered the verdict unreliable. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) *citing* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 205, (1984).

Once the petitioner establishes that counsel's performance was deficient, the petitioner requesting post-conviction relief must next show that, but for counsel's errors the result of the trial would probably have been different. Strickland, 266 U.S. at 694, 104 S.Ct. 2068; Davis v. State, 107 Nev. 600, 601, 602, 817 P.2d 1169, 1170 (1991). The petitioner must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceedings fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993) *citing* Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed. 2d 180 (1993); Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

A. COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT THE APPROPRIATE DEFENSE ON BEHALF OF PETITIONER.

If trial counsel's performance was "so deficient as to render the trial result unreliable," Petitioner is entitled to a new trial. Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986); see also, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 674 (1984). The case at bar is eerily similar to the issues presented in Buffalo v. State, 901 P.2d 647, 111 Nev. 1139 (Nev., 1995) in which the Court

found that counsel for Buffalo presented a "defense" which fell into exactly two categories: 1) the wrong defense, and 2) no defense. Id at 650. In Buffalo, counsel defended a sexual assault allegation by arguing that the sexual assault was impossible because there was no sexual gratification, which is not required in the statutory scheme. Further, there was no defense to the remaining charges.

Porter's first statement to police blamed someone else. However, his second statement, given while he appeared to be extremely emotional[3], detailed a different story. One that, if argued correctly, could be correctly argued as a manslaughter.

Manslaughter is defined under NRS 200.070:

> 1. Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation.
> 2. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

Based upon the confession of Mr. Porter, this is the **only** reasonable defense. Furthermore, the jury verdict, which acquitted him of the burglary and attempt

[3] In his second statement, he admitted that he was running from some form of police activity in the area and went into, what he thought, was a vacant apartment. Upon entry, a man approached him and he fired his weapon thinking his life was in danger.

robbery charges, is congruent with this defense. However, it was never presented to the jury or argued.

In determining whether an uncharged offense is a lesser-included offense of a charged offense so as to warrant an instruction pursuant to NRS 175.50, the Court must apply the "elements test" from Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 6 L.Ed. 306 (1932), Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by* Rosas, 122 Nev.1258, 147 P.3d 1101.[4] Under the elements test, an offense is "necessarily included" in the charged offense if "all of the lements of the lesser are included in the elements of the greater offense," Id at 690, 30 P.3d at 1106, such that "the offense charged cannot be committed without committing the lesser offense," Id. (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966).[5]

Counsel's failure to argue the most compelling and, frankly, only defense, is ineffective, per se. Furthermore, it is clear from the verdict and evidence that the jury was convinced this was NOT a felony murder or even first degree murder. There was nothing tactical that came from failing to request that particular instruction.

[4] Rosas v. State, 122 Nev. 128, 147 P.3d 1101 (2006)
[5] Alotaibi v. State, 404 P.3d 761, 764 (Nev. 2017)

B. THIS CASE WAS INCORRECTLY SUBJECTED TO A TIME BAR UNDER NRS 34.726

NRS 34.726 states in pertinent part:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction…..

As this Court is aware, Mr. Porter was a juvenile defendant, who was certified to adult status due to the gravity of the crime. He was then sent to prison, after his conviction, as a juvenile as well. The nuances of the statutory scheme which control this case, namely NRS 34.726, are complex, even for a legal mind.

Approximately fourteen (14) months after his remittitur was issued, the District Court received his first pro per IAC petition. (AA, Vol. #, pp. #). In it, Mr. Porter details things which must be considered prior to continuing to deny his Petition, which incidentally has a basis in law and fact.

Mr. Porter, attempting to explain to the Court his issues with filing a writ, states that he was unable to get in touch with his appellate counsel, Mr. Brooks. When he contacted his trial counsel, they simply told him to file a writ. He further states, and arguably this may be the most important point, that his IQ is 77, well below average, and he cannot understand what he is supposed to do.

This case was severed at the District Court level, the murder was the sole crime to proceed to trial, leaving the numerous other felonies to be tried at a later

date. It is not beyond the realm of possibilities that someone, particularly someone who started in prison as a juvenile and with an IQ less than average, would think that all of the charges had to be appealed in one document and was waiting for that to occur.

The statute, as detailed above, states "good cause", leaving open the possibilities that this Court can find that a low intelligence, coupled with the unique circumstances of this case, warrant good cause. Furthermore, counsel has not been appointed to assist Mr. Porter until now.

There has not been one court to review any of his claims, however untenable or based on solid legal ground. Pursuant to Harris v. State, 407 P.3d 348 (Nev. App. 2017), one must show three things: 1) that petitioner believed counsel filed a petition on petitioner's behalf; 2) this belief was objectively reasonable; 3) counsel abandoned the petitioner without notice and failed to timely file the petition; and 4) the petitioner filed the petition within a reasonable time after the petitioner should have known counsel did not file a petition.

In this particular case, all four prongs have been met. Mr. Porter did believe, and rightfully so, that he was represented by counsel, as technically, he was. The public defender was still his counsel of record for the remaining charges, as well as his appellate counsel.

While this belief may not be "objectively reasonable" to a lawyer, well versed in appellate law, there is no doubt that someone with below average intelligence would objectively think this was the case. In fact, someone of average intelligence would likely believe the same.

While Mr. Porter was not "abandoned," he was never appointed an attorney, regardless of the fact that he should have been. This was a category "A" felony conviction, for a person who basically spent his formative years in a prison cell, who had been deemed to have a low IQ and had zero ability to understand or navigate the law. In essence, he was abandoned.

However, he did file a petition two months past the deadline, which would have had no prejudice on the State. This petition, along with every successive one, has received no analysis from the courts, always simply dismissed under NRS 34.726. He has never had an opportunity to flesh out his claims. And, as noted above, at least one of his claims has merit.

VI. CONCLUSION

Based upon the foregoing arguments, Appellant is entitled to an evidentiary hearing on the MERITS of his petition.

Dated this 5th day of April, 2021.

/s/ Betsy Allen

Betsy Allen, Esq,

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 Edition in Times New Roman 14 point font; or

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2. This brief exceeds the with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby declares that on April 5, 2021 a copy of the foregoing APPELLANT'S OPENING BRIEF was delivered to the following:

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