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IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN PORTER,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
)
_____)

Case No: 80738

APPELLANT'S APPENDIX
Volume VI

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1 probably should not plan to start before 10:30. I just think
2 realistically I don't want you to stay out in the hall longer
3 than we need you to. So just plan to be here at 10:30 tomorrow
4 morning outside the courtroom.

5 And as usual, during this recess you're admonished
6 not to talk or converse among yourselves or with anyone else on
7 any subject connected with this trial or to read, watch or
8 listen to any report of or commentary on the trial or any
9 person connected with this trial by any medium of information,
10 including, without limitation, newspapers, television, the
11 Internet and radio, or to form or express any opinion on any
12 subject connected with this trial until the case is finally
13 submitted to you.

14 Thanks. You're excused for the night.

15 THE MARSHAL: All rise. Folks, leave your books and
16 make your way out.

17 (Outside the presence of the jury)

18 THE COURT: All right. The jurors have left the
19 courtroom. Everyone can have a seat.

20 Before we go ahead and talk about the instructions, I
21 want to go ahead and advise the defendant of his rights before
22 I -- to make that we do that today.

23 Now, Mr. Porter, under the Constitution of the United
24 States and under the Constitution of the State of Nevada you
25 cannot be compelled to testify in this case. Do you understand

1 that?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: And you may at your own request give up
4 this right and take the witness stand and testify. If you do,
5 you will be subject to cross-examination by the deputy district
6 attorneys and anything that you may say on direct or
7 cross-examination will be the subject of fair comment when the
8 State speaks to the jury in their final argument. Do you
9 understand that?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: Okay. Now if you choose not to testify,
12 the Court will not permit State to make any comments to the
13 jury because you have not testified. Do you understand that?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: And if you elect not to testify, the
16 Court will instruct the jury if your attorney requests as
17 follows: That the law does not compel a defendant in a
18 criminal case to take the stand and testify and no presumption
19 may be raised and no inference of any kind may be drawn from
20 the failure of a defendant to testify.

21 Do you have any questions about these rights?

22 THE DEFENDANT: No.

23 THE COURT: Now, if you have a felony conviction and
24 more than 10 years have not elapsed from the date you've been
25 convicted or discharged from prison, parole or probation,

1 whichever is later, unless it's previously been taken up by the
2 Court, if you take the stand and testify the deputy district
3 attorneys in the presence of the jury will be permitted to ask
4 you the following: Have you been convicted of a felony, what
5 was the felony, and when did it happen. However, no details
6 may be gone into. Do you understand that?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: All right. Now, we're going to talk some
9 more about jury instruction things before we break for the
10 evening. But before we pick up tomorrow, before we continue
11 these proceedings and before you make your final decision about
12 whether to testify or not to testify, you should discuss that
13 decision with your counsel keeping in mind these rights that I
14 have just explained to you. Do you understand that?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: All right. Thank you. All right. You
17 can go ahead and have a seat. Sorry.

18 (Pause in proceedings)

19 THE COURT: Apparently there is an Exhibit 105. The
20 clerk had made an error. Apparently, Exhibit 105 which is a
21 voluntary statement was not moved into evidence. You want to
22 take a look at it and see if it's something that you intended?

23 MS. LUZAICH: Probably just another copy of what I
24 moved in as No. 107.

25 THE COURT: I don't know.

1 (Pause in proceedings)

2 THE COURT: Let's go off the record for just a
3 minute.

4 (Off the record at 4:26 p.m. until 4:27 p.m.)

5 COURT RECORDER: Back on the record.

6 THE COURT: Okay. So State doesn't need and will not
7 be offering 105.

8 MR. TOMSHECK: Correct. In reviewing 105, it's not
9 something we intended to offer for admission, yes.

10 THE COURT: Okay.

11 MR. TOMSHECK: That it not go back to the jury
12 (indiscernible).

13 THE COURT: Okay. It's not admitted. It won't be
14 going to the jury.

15 MR. ABOOD: I'd even ask that we remove it from the
16 area so it doesn't run the risk of going back.

17 THE COURT: I trust Keith to not send anything back
18 that hasn't been admitted.

19 MR. BROWN: While we're at it, Your Honor, the
20 Court's aware of the history of this case and the order in
21 which some of the evidence was collected. There was at least
22 one evidentiary bag that was containing the shoes that
23 specifically was not moved into admission because it references
24 sexual assault.

25 THE COURT: Right.

1 MR. BROWN: I Just want to point out that any of the
2 cover bags -- and I think that may be the only one that
3 mentions the sexual assault and wasn't moved in, but those do
4 not accidentally make their way back to the jury.

5 THE COURT: Right. So that was --

6 MS. LUZAICH: That's the only bag that there is at
7 all.

8 MR. BROWN: I think the shoes were put back into that
9 bag is the only reason I bring it up --

10 THE COURT: Yep.

11 MR. BROWN: -- when they were cleared and set back on
12 the counter.

13 THE COURT: Right.

14 MR. BROWN: And we just want to make sure that the --

15 THE COURT: All right. They're not.

16 MR. BROWN: Okay.

17 THE COURT: So, right, the bag that the shoes were in
18 was not moved into evidence and shouldn't go back. All right.
19 Got it? And, right, the others were moved into evidence.

20 MR. BROWN: Yeah. And I think those are fine.

21 THE COURT: Okay. All right. Are you ready to go
22 through the proposed jury instructions? We received today one,
23 two, three, four additional instructions from the State. Did
24 defense receive those?

25 MR. BROWN: I have, Your Honor.

1 THE COURT: Okay. All right.

2 (Pause in proceedings)

3 THE COURT: On the State's proposed instructions it's
4 always hard to go through this because they're not numbered
5 yet. But if we just kind of flip through the pages one by one,
6 hopefully, we have the same pages, and you can tell me if
7 there's any objection to them unless you have a better method.

8 MR. BROWN: I'm trying to pull them up now, Your
9 Honor. I inadvertently left my copy sitting on a desk, so I'm
10 going to pull them up and follow along with the Court.

11 THE COURT: Oh, okay.

12 MR. TOMSHECK: Do you have a copy of the full set
13 that we provided you, Judge?

14 THE COURT: I think so. I have the one that I've had
15 all week, and I've had the other four that I got today.

16 MR. TOMSHECK: The only reason I ask is neither Ms.
17 Luziach or Mr. Brown have a hard copy. I don't know if they're
18 comfortable following along with (indiscernible). I am.
19 That's how I'm prepared to proceed but --

20 THE COURT: Go make a couple copies including those
21 other four.

22 Do you have the defense instructions?

23 MR. TOMSHECK: I have them in electronic form.

24 THE COURT: I know. But do other people need them
25 while he's making copies?

1 MR. BROWN: That would be nice, Your Honor.

2 THE COURT: Okay. Thank you. All right. Let's go
3 off for a minute while we're waiting for the --

4 (Off the record at 4:30 p.m. until 4:39 p.m.)

5 COURT RECORDER: We're on.

6 THE COURT: Okay. Does everyone have the sets of the
7 proposed instructions now?

8 MR. TOMSHECK: We do, Judge.

9 MR. BROWN: Yes, Your Honor.

10 THE COURT: Okay. All right. So looking at the
11 State's proposed instructions are there any instructions in
12 there to which the defense objects? And try to direct me to
13 the page or general vicinity.

14 MR. BROWN: It's the instruction called the
15 transition instruction, Judge.

16 THE COURT: Yeah.

17 MR. BROWN: It should be after larceny, verdict,
18 murder. Okay. It's dang near right in the middle. It starts
19 with, "You are instructed that if the State has established the
20 defendant's committed first-degree murder."

21 THE COURT: Okay.

22 MR. BROWN: It's immediately after --

23 THE COURT: I got it.

24 MR. BROWN: -- all murder which is not murder of the
25 first degree. That's the transition instructions which the

1 State has agreed to submit my transition instruction which I
2 submitted to the Court which starts off exactly the same.

3 MR. TOMSHECK: And just for the Court's edification,
4 really the only difference is in the first paragraph, the last
5 sentence Mr. Brown has added after "first fully and carefully
6 considering murder of the first degree" and then the first
7 portion of the enumerated No. 1 is slightly different.

8 THE COURT: "Any of you are not convinced."

9 MR. BROWN: That's correct.

10 THE COURT: Okay. All right.

11 MR. TOMSHECK: So the Court's aware, it comes from
12 the Green (phonetic) case. I think some of the language that
13 he pulls is directly from the Green case. The instruction that
14 the State offered is the one we've always given, but I think
15 it's just a minute difference I certainly have no objection to
16 it.

17 THE COURT: Okay. So we're going to switch out the
18 defendant's proposed instruction on that point, that you are
19 instructed that if you find that the State has established and
20 so on.

21 MR. TOMSHECK: Correct, Your Honor.

22 THE COURT: And we'll substitute that for what the
23 State had proposed.

24 Anything else? Any other objections to the State's
25 proposed instructions? And I'm including the four additional

1 ones that we received today.

2 MR. BROWN: I understand, Your Honor. I've reviewed
3 those. No further objections.

4 THE COURT: Okay. Now let me just ask on -- in the
5 State's instruction -- let's see -- looks like about six back
6 from that transitional one we were just looking at in the
7 State's set is an instruction that says, "In your deliberation
8 you may not discuss or consider the subject of penalty or
9 punishment."

10 MR. TOMSHECK: Yes.

11 THE COURT: You had put in there a second sentence
12 that if it was murder of the first degree you will at a later
13 hearing determine the penalty or punishment, so we're going to
14 take out that sentence.

15 MR. TOMSHECK: Right. At the time I had submitted
16 them we had not yet agreed upon it.

17 THE COURT: I understand. I just want to be clear
18 that we need to change that.

19 MR. BROWN: I would agree.

20 THE COURT: Okay. And -- okay. Sorry. Further
21 towards the front of the stack, a few before the transitional,
22 there's the burglary instruction. "Every person who by day or
23 night enters any building." Let me let you get there and then
24 I'll ask you a question.

25 MR. BROWN: You said before that was before the

1 transitional instruction, Your Honor?

2 THE COURT: Yes. Like four before.

3 MR. BROWN: Okay.

4 THE COURT: Are you there?

5 MR. TOMSHECK: I am.

6 THE COURT: Every person who by day or night?

7 MR. BROWN: It says robbery, not burglary.

8 THE COURT: Yeah.

9 MR. BROWN: Yeah. I circled that as well.

10 MR. TOMSHECK: No. It's supposed to say robbery.

11 THE COURT: Why?

12 MR. TOMSHECK: What that instruction says is it
13 defines what burglary is and in the definition of burglary it's
14 with the intent to commit a larceny and/or a felony therein is
15 guilty of a burglary.

16 THE COURT: Oh, that robbery is a felony offense.

17 MR. BROWN: Robbery --

18 THE COURT: So if that was the crime they intended to
19 commit, then it's a felony. So that's correct.

20 MR. TOMSHECK: Correct.

21 THE COURT: Okay.

22 MR. TOMSHECK: And then immediately thereafter it
23 defines what larceny is in the next instruction. I don't have
24 an objection either way, if you want it in one instruction or
25 two. And I would suggest to the Court that the four additional

1 instructions that we submitted should go immediately after
2 those instructions because they're burglary instructions as
3 well.

4 MR. BROWN: And, you know, the way it is is fine, but
5 it almost seems like it would be easier on this instruction if
6 it said with the intent to commit larceny and/or robbery
7 therein because those are the only allegations that we have.
8 It includes it. It doesn't -- because the way it was written
9 was confusing to me as well.

10 THE COURT: Yeah. I --

11 MR. BROWN: And now I understand what he's talking
12 about.

13 THE COURT: Right. Me too.

14 MR. BROWN: But it almost appeared originally as a
15 typo.

16 THE COURT: That makes sense and, well, how is the
17 charge?

18 MR. TOMSHECK: Except that in the charging document
19 Count 1 --

20 THE COURT: Yeah. That's why I was just looking.

21 MR. TOMSHECK: -- (indiscernible) appears in
22 Instruction No. 3.

23 THE COURT: Larceny and/or robbery under any other
24 felony.

25 MR. TOMSHECK: Correct.

1 THE COURT: So how about commit larceny, robbery,
2 and/or another felony? At least it explains the connection to
3 the below sentence to robbery.

4 MR. BROWN: Okay.

5 THE COURT: I mean, that's the way the charge reads,
6 "Intent to commit larceny and/or robbery and/or any other
7 felony."

8 MR. BROWN: I have no objection to that.

9 THE COURT: All right. So it will read, "Every
10 person who by day or night enters any building, house or
11 apartment with the intent to commit larceny, robbery and/or
12 another felony therein is a burglary. You are instructed that"
13 -- actually, then we don't need that other sentence, actually.

14 MR. BROWN: We wouldn't need it because is what I
15 originally was trying to do, but it's the State's
16 (indiscernible).

17 THE COURT: Right. We don't need that other
18 sentence.

19 MS. LUZAICH: Good. So larceny, robbery and/or any
20 other felony?

21 THE COURT: I could make it any other.

22 MR. BROWN: They (indiscernible) allege one. I know
23 it's in there but (indiscernible) --

24 MR. TOMSHECK: (Indiscernible).

25 MR. BROWN: Oh, the attempt. Okay.

1 (Pause in proceedings)

2 MR. TOMSHECK: Judge, something that might help clear
3 something up is the subsequent instruction defines larceny. If
4 we were in the burglary instruction to put after the sentence
5 every person day or night, then put the definition of larceny,
6 and then at the conclusion of that say you are instructed that
7 robbery is a felony, I think it might help.

8 THE COURT: I'm fine with putting the larceny
9 sentence in there, but I don't understand why we need to tell
10 them that robbery is a felony if we're telling them that if
11 they entered with intent to commit robbery they're guilty of a
12 felony.

13 MR. TOMSHECK: We don't. If you think it reads clear
14 that way, I certainly don't oppose it.

15 THE COURT: So we've got the definition of robbery in
16 another instruction already, correct?

17 MR. TOMSHECK: We do.

18 MR. BROWN: Yes, Your Honor.

19 THE COURT: Okay. So we're moving the larceny
20 sentence --

21 MR. TOMSHECK: If you want to take out that robbery
22 sentence in the first one?

23 THE COURT: And just leave it as separate?

24 MR. TOMSHECK: Just leave them separate.

25 THE COURT: Okay.

1 MR. TOMSHECK: And then after the larceny
2 instruction --

3 THE COURT: So there will be one instruction that
4 says, "Every person who by day or night enters any building,
5 house or apartment with the intent to commit larceny, robbery
6 and/or another felony therein is guilty of burglary." Next
7 page, "Larceny is defined as the stealing, taking and carrying
8 away." Then after that, you want the other four that you've
9 proposed. Okay. Okay.

10 Are there any other objections to any of the State's
11 proposed instructions?

12 MR. BROWN: No, Your Honor.

13 THE COURT: Okay. Then looking at the defendant's
14 proposed instructions, now we already did the transition
15 instruction as you've referred to it that we're going to
16 substitute in.

17 MR. BROWN: Yes, Your Honor.

18 THE COURT: Are there -- let's look at what else you
19 have that defense is proposing. I'm sorry. You had an
20 instruction in the defense proposed behind that transition
21 instruction that is partly duplicative I think.

22 MR. BROWN: It would have been a transition
23 instruction for second-degree to voluntary manslaughter --

24 THE COURT: Oh, I got you.

25 MR. BROWN: -- in the event --

1 THE COURT: So we still need to look at that.

2 MR. BROWN: Yes.

3 THE COURT: Okay. All right. I got you. I was just
4 looking at it on the whole without reading it in detail. All
5 right.

6 So let's start at the first of the defendant's
7 proposed instructions that I have is the heat of passion which
8 will reduce a homicide to voluntary manslaughter must be such
9 an irresistible passion and so on.

10 MR. BROWN: Correct. And, Your Honor, I also
11 submitted to the Court a felony murder instruction, but the
12 State's is virtually identical, so that's -- if you were
13 looking at that one, obviously there's no need for me resubmit
14 that instruction.

15 The other instruction submitted were the voluntary
16 manslaughter and the heat of passion instructions that were
17 offered on behalf of Mr. Porter. And if the Court's inclined
18 to allow them, it would be the accompanying transition
19 instruction that transitions a second-degree murder to a
20 voluntary manslaughter.

21 THE COURT: Okay.

22 MR. TOMSHECK: And obviously, Judge, the State has an
23 objection to any --

24 MR. BROWN: I think before we get into the nuts and
25 bolts and details of the voluntary manslaughter instructions

1 I've submitted and whether the State feels that these are what
2 they would submit if it were a voluntary manslaughter case, we
3 probably ought to first decide whether or not the Court's even
4 going to offer voluntary manslaughter instructions and a
5 voluntary manslaughter verdict option to the jury. The defense
6 would be asking for it. It was pled as an open murder. It was
7 pled, you know, that includes the multiple homicides.
8 Obviously that includes first-degree murder and second-degree
9 murder.

10 In this case, one of the primary distinctions between
11 a second-degree murder and a voluntary manslaughter is going to
12 be the actions, the heat of passion actions, based upon a
13 provocation. The provocation would be the startling event of
14 the gentleman coming out of the house.

15 Now, that maybe a little different. Obviously, we
16 didn't ask for self-defense instructions --

17 THE COURT: No.

18 MR. BROWN: -- in light of the accompanying
19 circumstances. However, the reaction of Mr. Porter based upon
20 being startled provoked him into shooting.

21 Now whether or not that's reasonable or not, that of
22 course is up to the jury to decide. And if they determine his
23 reaction was not a reasonable provocation or his actions and
24 response to a provocation were certainly unreasonable, they
25 don't have to consider them at all and they can disregard the

1 manslaughter, focus on whether or not he committed the offense
2 and whether it was first- or second-degree murder.

3 But I think that with respect to considering that the
4 standard's pretty low as to getting an instruction, that we
5 would ask that the Court consider it and submit them to the
6 jury.

7 MR. TOMSHECK: I mean, I obviously have an opinion
8 about that, Judge.

9 THE COURT: I'm sure. All right. Let me go ahead
10 and hear what you have to say.

11 MR. TOMSHECK: I think Mr. Brown's correct. The
12 standard's pretty low, but there has to be some evidence in
13 order to obtain a theory of the case instruction. If they want
14 to argue voluntary manslaughter, there's got to be some
15 evidence that there was some type of provocation that would
16 lead a reasonable person to shoot.

17 I don't understand especially under -- as how the
18 facts came out at trial that could even be raised given the
19 fact that this individual in the middle of the night who's home
20 in his own apartment with the door dead bolted, the lights are
21 out, and it's clear that he was shot in the back and at an
22 angle that suggests he was bending over.

23 And when we were discussing earlier, Mr. Brown and I
24 kind of discussed the idea of how that would have to occur.
25 And essentially what the argument would have to be is that

1 Justin Porter kicks in the door and the owner of the house, the
2 lawful residence, in the dark runs at him backwards bent over
3 and that is sufficient to arouse a provocation that would lead
4 to the defendant firing shots that ultimately kill him. I
5 don't see how an argument can even be fashioned that would
6 allow for that instruction to be given.

7 THE COURT: Okay. So let me ask you this because --
8 and I'm sorry. You have more experience in this area at this
9 point than I do, and I freely admit that.

10 To get even second-degree murder you need to have
11 malic, right? Okay. Now, so what if you -- what if you don't
12 prove malic but there isn't a provocation? There's nothing in
13 between.

14 MR. BROWN: Well --

15 THE COURT: Sorry I have to ask these questions but I
16 do.

17 MR. ABOOD: The malice, Your Honor, is expressed or
18 implied.

19 THE COURT: Right.

20 MR. ABOOD: So I don't know that there's any
21 circumstance where they wouldn't be able to show malice.

22 MR. TOMSHECK: If you point a gun at someone and pull
23 the trigger, it --

24 THE COURT: And shoot then it's intentional under
25 malice.

1 MR. TOMSHECK: Yeah.

2 THE COURT: Okay.

3 MR. TOMSHECK: Even if he were to say the
4 circumstances that he just suggested, it would certainly be
5 implied malice, but the firing of the gun itself, I --

6 THE COURT: Any unjustifiable. I'm just reading the
7 instruction on malice. Okay.

8 MR. BROWN: I mean, what that would be, Your Honor --
9 and you're touching on close to where we're at -- is if the
10 theory was he was shot based upon a sudden and irresistible
11 heat of passion, that's a manslaughter if the jury thinks that
12 he was maybe acting reasonable.

13 If the jury thinks that your response to that was
14 unreasonable but doesn't rise to the level to the first-degree
15 murder, it can be second-degree murder. But what that also
16 would require would be that basically that level of
17 provocation.

18 And I understand what the State is saying is to
19 having some standard. I disagree that Mr. Lungtok had to be
20 walking out backwards. The Court recalls he was shot seven
21 times, some in the front chest. At some point he was facing
22 clearly turning around and bending and moving, very well could
23 have been --

24 THE COURT: Apparently near the front door.

25 MR. BROWN: Very well could have been heading away.

1 You know, I mean, that's, you know, that's not -- we really
2 can't tell, but he did get shot in the back, so he was at least
3 facing that way at some point.

4 But Mr. Tomsheck's example that he was backing into
5 him in the dark and that couldn't be a provocation I would
6 disagree with.

7 The startling event which he -- you know, all the
8 evidence in the case essentially the State's relying on as Mr.
9 Tomsheck said in his opening statement are the words that come
10 out of Mr. Porter's mouth. So we have to look to there to find
11 out what the provocation would be, what the startling event is.
12 There can be no doubt based upon how he described his reaction
13 to the man being there as startling.

14 THE COURT: Right.

15 MR. BROWN: Now whether or not it's reasonable or not
16 the jury has to decide, and I suspect most of them will find
17 probably not.

18 THE COURT: Right.

19 MR. BROWN: But that's not the standard for giving
20 them the option and the --

21 THE COURT: Right.

22 MR. BROWN: -- opportunity to at least argue.

23 THE COURT: "A sudden heat of passion caused by a
24 provocation apparently sufficient to make the passion
25 irresistible."

1 MR. TOMSHECK: And that's precisely the point. That
2 sentence and the next paragraph in the instructions which
3 should say something to the effect of the provocation required
4 (indiscernible) consistent with serious or highly-provoking
5 injury sufficient to excite an irresistible passion in a
6 reasonable person. I don't know how you get there, Judge, is
7 the State's problem.

8 MR. ABOOD: Well, the injury doesn't have to be
9 direct physical contact. I mean, injury could consist of a
10 frightening event itself, I mean, responding to a shocking, you
11 know -- again, whether or not it's reasonable is a different
12 question.

13 But in terms of whether or not we'd be entitled to
14 that instruction, I think you can conclude that charging open
15 murder in this circumstance where the defendant himself has
16 said that when he walked in there he believed nobody lived
17 there, he fully expected nobody would live there and then
18 someone --

19 THE COURT: No. Right. I mean, I think --

20 MR. ABOOD: -- rushes him at him from the dark.

21 THE COURT: I mean, I think that the jury could find
22 that he was startled to have someone come out of that bedroom.
23 That certainly can be a reasonable inference to draw given the
24 evidence.

25 MR. BROWN: Your Honor, I think the final note I

1 would make or the comparative prejudices versus giving it and
2 not giving it, the -- by not providing it he's denied even the
3 opportunity to have a jury evaluate it, look at it and make a
4 reasonable judgment.

5 If it is provided to the jury, the worst that can
6 happen if the State is correct is they convince them of their
7 position and the jury doesn't even consider it.

8 So I think that when you compare relatively the
9 prejudices or potentially that it should err on the side -- if
10 it's a close call -- and I can see that Your Honor's pensive at
11 least thinking about it. If it's a close call, the err should
12 be on providing it and letting the State argue that.

13 You know, we didn't ask for an instruction that says
14 the State has to prove beyond a reasonable doubt that it's not
15 voluntary manslaughter. I've seen those proffered but that's
16 -- we didn't include that in the packet. The State would just
17 merely meet -- you know, my guess is they're going to be
18 arguing why it is felony murder or first-degree murder and --

19 MR. TOMSHECK: The prejudice, Judge, is offering a
20 confusing instruction which is not legally appropriate. Open
21 murder as a charge carries with it all the lesser-included
22 offenses including involuntary manslaughter. So I guess my
23 point is where do we draw the line. I mean, I've had cases
24 before --

25 MR. ABOOD: Well, I think we draw it before

1 involutory.

2 MR. TOMSHECK: -- where an involuntary manslaughter
3 instruction is requested in a situation where a gun's used.
4 It's not legally appropriate. It's not a correct application
5 of the law. There has to be some evidence that there was not
6 only a provocation but that it was the type that would make the
7 urge to kill him irresistible. In other words, the classic
8 example catching your wife in bed with someone else.

9 THE COURT: Right.

10 MR. TOMSHECK: There has to be something like that.

11 MR. BROWN: I think our record's pretty fully clear,
12 Judge. I'm ready to submit.

13 THE COURT: Okay. So the serious and
14 highly-provoking injury that what you would argue is some
15 evidence of that is scaring him?

16 MR. BROWN: Well, in essence, Your Honor, yeah. He
17 was frightened.

18 THE COURT: Startling him?

19 MR. BROWN: Yeah. I mean, he was frightened for his
20 life. The question -- you know, he was scared. It's not self
21 defense because he couldn't reasonably be scared when you go
22 into somebody else's house and they resist you or show up or
23 startle you.

24 But when you're not expecting anybody to be in there,
25 I mean, let's -- we'll move it from being a house for a second.

1 Let's assume it's a warehouse or some other place you believe
2 to be abandoned, you kick in the door going in --

3 THE COURT: Okay.

4 MR. BROWN: -- and somebody pops out and startles you
5 and frightens you and you shoot them.

6 THE COURT: Right.

7 MR. BROWN: Okay. That's where we're at. Is it a
8 manslaughter, have you murdered that person, did you go -- is
9 it felony first-degree murder? Because we're kind of doing a
10 little bit of analogy on the only evidence we have is Mr.
11 Porter's mind-set which was empty, abandoned place, and he went
12 in there for shelter.

13 THE COURT: Right.

14 MR. BROWN: Okay. Now it's up to the jury --

15 THE COURT: So my question is about the instruction
16 which says there has to be a serious and highly-provoking
17 injury or an attempt to commit a serious personal injury. So,
18 sorry. What are you contending would be the serious and
19 highly-provoking injury?

20 MR. BROWN: I think Your Honor's touched on it. It
21 would be --

22 THE COURT: The startling is --

23 MR. BROWN: Yes.

24 THE COURT: -- considered an injury.

25 MR. BROWN: Right. I mean, what also is an injury, a

1 serious highly-provoking injury, is walking into your bedroom
2 and seeing your wife with another man.

3 THE COURT: Correct.

4 MR. BROWN: That is considered --

5 THE COURT: Right.

6 MR. BROWN: -- a serious, highly-provoking injury.
7 Obviously, nothing happened to you. But in the framework of
8 how they're describing it --

9 THE COURT: Right.

10 MR. BROWN: -- you know, that is a serious --

11 THE COURT: It's used in that context.

12 MR. BROWN: -- highly-provoking injury.

13 THE COURT: Okay.

14 MR. BROWN: This is not quite exactly that, but it is
15 an event, a startling event that has the reaction on him. It
16 -- you know, slight or marginal at least to the point where we
17 can argue it. But --

18 MR. TOMSHECK: And I think maybe if the roles were
19 reversed and Gyaltsso Lungtok shot Justin Porter, then Gyaltsso
20 Lungtok might be entitled to a voluntary manslaughter
21 instruction. You don't get one if you kick in someone's house
22 and they happen to get out of their bed naked in the dark and
23 say, hey, and you don't get to shoot them and get a voluntary
24 manslaughter instruction.

25 MR. BROWN: Only the State of Nevada would charge

1 Gyaltso Lungtok for a crime when he did that in his own house.

2 THE COURT: Yeah. Didn't we charge the pawnshop guy?
3 Sorry.

4 Anyway, given the definition of voluntary
5 manslaughter, I don't think there is any evidence to base that
6 instruction on.

7 MR. BROWN: Thank you, Your Honor.

8 THE COURT: So I'm going to deny it.

9 MR. BROWN: Do we at least mark -- I mean, they're --
10 for the record they're basically just standard. I know that
11 the State disagrees, but I would be offering these or
12 alternative instructions provided by the State in the general
13 area of voluntary manslaughter.

14 THE COURT: Right. So --

15 MR. BROWN: But we should go ahead and at least mark
16 the ones that I've proposed?

17 THE COURT: Right.

18 MR. BROWN: Thank you.

19 THE COURT: Right. Right.

20 MR. TOMSHECK: And just so the record's complete on
21 that --

22 THE COURT: I need a clean copy to do that with.
23 Okay. But yes, it should be marked and in the record,
24 absolutely.

25 MR. TOMSHECK: Just so the record's complete on that

1 in the event there's ultimately an appeal, the State would also
2 have an objection to the form of the instruction should the
3 Court have given them. They're not an appropriate definition
4 of voluntary manslaughter.

5 MR. BROWN: Well, I'm pliable. I'd be willing to
6 listen to their argument.

7 THE COURT: All right.

8 MR. TOMSHECK: I just wanted that on the record.

9 THE COURT: So there's a proposed -- you know, I
10 guess all of the proposed instructions should be on the record.
11 The heat of passion instruction, the manslaughter, the unlawful
12 killing instruction is being rejected for the reasons just
13 discussed.

14 The next proposed by the defense related to the
15 felony murder which is duplicative, and we don't need that.

16 MR. BROWN: Correct.

17 THE COURT: The next one is the transition
18 instruction we are using.

19 The next one is the one we now -- we don't need
20 because I've rejected the manslaughter instruction, so that's
21 not being used.

22 Now, the right to testify, did you have one in your
23 set?

24 MR. TOMSHECK: I did.

25 THE COURT: On not drawing any inference.

1 MR. BROWN: Correct.

2 THE COURT: So there's already one -- yeah. Let me
3 take look back here. Okay. So we don't need that one because
4 it's duplicative of what we've already got in. Yeah.

5 We'll need to make sure that we have sets of the
6 proposed instructions on the record.

7 (Pause in proceedings)

8 THE COURT: Okay. So when we pick up at 10:30
9 tomorrow, we will see if defense has any evidence to present.
10 And after that, we can go ahead with instructions and argument
11 and hopefully get it to them around lunch and --

12 MR. BROWN: You think we'll start at 10:30?

13 THE COURT: You know, nothing ever takes what I think
14 it will so who knows.

15 MR. BROWN: One is relative to when we start, but I
16 think we'll have to them early afternoon, Your Honor.

17 THE COURT: Okay. Let's see. How long do you
18 anticipate closings?

19 MR. BROWN: (Indiscernible).

20 THE COURT: Yeah. That's the way it works.

21 MR. TOMSHECK: Mine's last, so it depends on what he
22 has to say.

23 THE COURT: All right.

24 MR. BROWN: Like he hadn't already written it.

25 THE COURT: Okay. Well, unless my morning hearing

1 takes significantly longer than what I'm hoping it will, I
2 mean --

3 MR. BROWN: (Indiscernible).

4 THE COURT: -- if we get started really late, I don't
5 know what we'll do. But I'd rather get through all the
6 arguments before we break and then just let them go deliberate
7 and eat or eat and deliberate I guess is more properly --

8 MR. BROWN: How long do you think you'll keep them
9 here tomorrow, Judge?

10 THE COURT: Tomorrow, that's a good question. I
11 mean, I'd probably let them stay tomorrow night for a while. I
12 don't know that I want to be here until midnight tomorrow night
13 if it goes there.

14 UNIDENTIFIED SPEAKER: I agree.

15 THE COURT: I don't know. It will partly depend on
16 talking to them and see if they're still deliberating what they
17 prefer to do. If they'd rather -- you know, if they think
18 they'll have a verdict by 8:00 o'clock, I might let them stay.
19 If they think it's going to be awhile, I might just bring them
20 back Monday morning and they can deliberate while we're picking
21 another jury. I'll kind of feel them out and see how it looks.
22 Okay?

23 (Pause in proceedings)

24 THE COURT: All right. Good night.

25 MR. BROWN: Thank you, Your Honor, appreciate it.

1 MR. TOMSHECK: Judge, are we going to number them
2 prior to going on the record or is it -- because Ms. Luziach is
3 going to put numbers in her PowerPoint presentation.

4 MS. LUZAICH: Well, I mean, I can go without. That's
5 fine.

6 MR. TOMSHECK: Where is the --

7 THE COURT: We'll be numbering them.

8 MR. TOMSHECK: Where is the right of the defendant
9 instruction going to go (indiscernible)?

10 THE COURT: Yes.

11 MR. TOMSHECK: Because we had submitted it behind the
12 verdict form in the event they (indiscernible).

13 THE COURT: Where do you want it?

14 MS. LUZAICH: I usually put it after --

15 THE COURT: Oh, sorry.

16 MS. LUZAICH: -- reasonable doubt.

17 THE COURT: The verdict form, there was nothing --
18 given that I've rejected the voluntary manslaughter which I
19 understand you disagree with, other than that is the verdict
20 form acceptable?

21 MR. BROWN: You know, I didn't double-check. Did
22 they put a not guilty on there?

23 MS. LUZAICH: No.

24 THE COURT: They did.

25 MR. BROWN: Okay. That's rare.

1 THE COURT: It's a small box, but it's there.

2 MR. BROWN: It's smaller? All right. Your Honor, I
3 think that the defendant testifying is a good place for it.
4 All other things being equal, probably right after the
5 reasonable doubt instruction or in that area, you know.

6 THE COURT: Okay.

7 MR. BROWN: Kind of with the nine neutral legal
8 instruction, not specific to any --

9 MR. TOMSHECK: I think the appropriate place is right
10 behind the reasonable doubt instruction.

11 MS. LUZAICH: That's where I've always put it.

12 THE COURT: Okay. So right behind the reasonable
13 doubt instruction. And then what about -- we'll have to throw
14 the playback in somewhere.

15 MR. TOMSHECK: We don't need that if you don't want
16 it. I prefer not to give it. That's why I put it in the back.
17 A lot of courts don't give it, and I think it's a pain when we
18 do.

19 THE COURT: I give it. I haven't had anyone ask for
20 it, and I hope that will continue. I'll put it right before
21 the last instruction, right before the now you will listen to
22 the arguments, the playback one I'm talking about. It should
23 be after the ones that you're focusing on for your argument
24 purpose.

25 (Court recessed at 5:07 p.m., until May 8, 2009, at 10:43 a.m.)

INDEXWITNESSES

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EXHIBITS

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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1-22-10

DATE

1 INST

FILED IN OPEN COURT
MAY - 8 2009 4:00 PM
EDWARD A. FRIEDLAND
CLERK OF THE COURT
BY Keith Reed DEPUTY
KEITH REED

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4
5
6 DISTRICT COURT
CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,)

9 Plaintiff,)

10 -vs-)

11 JUSTIN D. PORTER,)

12 Defendant.)

Case No. C174954

Dept No. VI

13 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

14 MEMBERS OF THE JURY:

15 It is now my duty as judge to instruct you in the law that applies to this case. It
16 is your duty as jurors to follow these instructions and to apply the rules of law to the facts as
17 you find them from the evidence.

18 You must not be concerned with the wisdom of any rule of law stated in these
19 instructions. Regardless of any opinion you may have as to what the law ought to be, it
20 would be a violation of your oath to base a verdict upon any other view of the law than that
21 given in the instructions of the Court.
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INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in a Third Amended Information that on or about the 8th day of June, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a gun, with intent to commit larceny, and/or robbery and/or any other felony, that certain building occupied by GYALTSO LUNGTOK, located at 415 South 10th Street, Apartment No. H, Las Vegas, Nevada, Clark County, Nevada.

COUNT 2 – ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously attempt to take personal property, to-wit: lawful money of the United States and/or jewelry and/or any other property of GYALTSO LUNGTOK, from the person of GYALTSO LUNGTOK, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said GYALTSO LUNGTOK, said defendant using a deadly weapon, to-wit: a gun, during the commission of said crime.

COUNT 3 – MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation and malice aforethought, kill GYALTSO LUNGTOK, a human being, by shooting at and into the body of the said GYALTSO LUNGTOK with use of a deadly weapon, to-wit: a gun, the defendant being responsible under one or more of the following theories of criminal liability, to-wit: 1) Premeditation and deliberation: by the defendant directly committing said felony offense as the perpetrator, and/or 2) Felony murder: by the defendant committing said felony offense during the perpetration or attempted perpetration of the crime(s) of burglary and/or robbery.

1 It is the duty of the jury to apply the rules of law contained in these instructions to the
2 facts of the case and determine whether or not Defendant is guilty of the offenses charged.
3 Each charge and the evidence pertaining to it should be considered separately. The fact that
4 you may find a defendant guilty or not guilty as to one of the offenses charged should not
5 control your verdict as to any other defendant or offense charged.
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INSTRUCTION NO. 4

In this case the defendant is accused in a Third Amended Information alleging an open charge of murder. This charge may include murder of the first degree and murder of the second degree.

The jury must decide if the defendant is guilty of any offense and, if so, of which offense.

INSTRUCTION NO. 5

Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

INSTRUCTION NO. 6

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, from anger, hatred, revenge, or from particular ill will, spite or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 7

Express malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

INSTRUCTION NO. 8

Murder of the First Degree is murder which is (a) committed in the perpetration or attempted perpetration of a robbery and/or burglary and/or (b) perpetrated by any kind of willful, deliberate and premeditated killing.

INSTRUCTION NO. 9

Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements -- willfulness, deliberation, and premeditation -- must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.

Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.

Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the actions.

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

INSTRUCTION NO. 10

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

INSTRUCTION NO. 11

There is a kind of murder which carries with it conclusive evidence of premeditation and malice aforethought. This class of murder is murder committed in the perpetration or attempted perpetration of robbery or burglary. Therefore, a killing which is committed in the perpetration or attempted perpetration of such a robbery or burglary is deemed to be Murder of the First Degree, whether the killing was intentional or unintentional or accidental. This is called the Felony-Murder rule.

The intent to perpetrate or attempt to perpetrate a robbery or burglary must be proven beyond a reasonable doubt.

INSTRUCTION NO. 12

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:

- (a) Obtain or retain possession of the property;
- (b) Prevent or overcome resistance to the taking; or
- (c) Facilitate escape.

The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear. The victim of a robbery need not own the property, so long as he possesses the property. Robbery is a general intent crime.

For the purposes of the Felony Murder Rule, the intent to commit the robbery must have arisen before or during the conduct resulting in death. However, in determining whether the defendant had the requisite intent to commit robbery before or during the killing, you may infer that intent from the defendant's actions during and immediately after the killing. There is no Felony Murder where robbery occurs as an afterthought of the killing.

The elements of an attempt to commit a crime are:

- 1) the intent to commit the crime;
- 2) performance of some act towards its commission; and
- 3) failure to consummate its commission.

INSTRUCTION NO. 14

Every person who, by day or night, enters any building, house or apartment, with the intent to commit larceny, robbery and/or any other felony therein is guilty of Burglary.

INSTRUCTION NO. 15

Larceny is defined as the stealing, taking and carrying away of the personal goods or property of another with the intent to permanently deprive the owner thereof.

INSTRUCTION NO. 16

The intention with which an entry was made is a question of fact which may be inferred from the defendant's conduct and all other circumstances disclosed by the evidence.

INSTRUCTION NO. 17

It is not necessary that the State prove the defendant actually committed a larceny or robbery inside the house after he entered in order for you to find him guilty of burglary. The gist of the crime of burglary is the unlawful entry with criminal intent. Therefore, a burglary was committed if the defendant entered the house with the intent to commit a larceny or robbery regardless of whether or not that crime occurred.

INSTRUCTION NO. 18

Every person who commits the crime of burglary, who has in his possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure, or upon leaving the structure, is guilty of burglary while in possession of a weapon.

INSTRUCTION NO. 19

Every person who, in the commission of a burglary, commits any other crime, may be prosecuted for each crime separately.

INSTRUCTION NO. 20

Although your verdict must be unanimous as to the charge, you do not have to agree on the theory of guilt. Therefore, even if you cannot agree on whether the facts establish premeditated murder or felony murder, so long as all of you agree that the evidence establishes the defendant's guilt of murder in the first degree, your verdict shall be Murder of the First Degree.

INSTRUCTION NO. 21

All murder which is not Murder of the First Degree is Murder of the Second Degree. Murder of the Second Degree is Murder with malice aforethought, but without the admixture of premeditation and deliberation.

INSTRUCTION NO. 22

1
2 You are instructed that if you find that the State has established that the defendant has
3 committed first degree murder you shall select first degree murder as your verdict. The crime
4 of first degree murder includes the crime of second degree murder. You may find the
5 defendant guilty of second degree murder if after first fully and carefully considering murder
6 of the first degree:
7

8 1. Any of you are not convinced beyond a reasonable doubt that the defendant is
9 guilty of murder of the first degree, and
10

11 2. All twelve of you are convinced beyond a reasonable doubt the defendant is
12 guilty of the crime of second degree murder.

13 If you are convinced beyond a reasonable doubt that the crime of murder has been
14 committed by the defendant, but you have a reasonable doubt whether such murder was of
15 the first or of the second degree, you must give the defendant the benefit of that doubt and
16 return a verdict of murder of the second degree.
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INSTRUCTION NO. 23

You are instructed that if you find a defendant guilty of first or second degree murder, or attempted robbery you must also determine whether or not a deadly weapon was used in the commission of this crime.

If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon".

If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

INSTRUCTION NO. 24

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death, or, any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

You are instructed that a firearm is a Deadly Weapon.

INSTRUCTION NO. 25

The State is not required to have recovered the deadly weapon used in an alleged crime, or to produce the deadly weapon in court at trial, to establish that a deadly weapon was used in the commission of the crime.

INSTRUCTION NO. 26

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

INSTRUCTION NO. 27

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 28

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

INSTRUCTION NO. 29

In you deliberation you may not discuss or consider the subject of penalty or punishment.

INSTRUCTION NO. 30

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 31

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

INSTRUCTION NO. 32

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 33

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 34

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 35

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and the Defendant and his/her counsel.

Playbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony to be played back so that the court recorder can arrange his/her notes. Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 36

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN:

Elaine F. Godich 5/8/09
DISTRICT JUDGE

9
FILED

FEB 10 2012

Ann L. Quinn
CLERK OF COURT

1 Justin Jug Capri Porter
2 Petitioner/In Propria Persona
3 Post Office Box 650 [HDSP]
4 Indian Springs, Nevada 89018

5 District Court, ~~8th~~
6 Eighth Judicial County, Nevada

01C174954
PWHC
Petition for Writ of Habeas Corpus
1767433



8 Justin Jug Capri Porter

9 Petitioner,

10 vs.

11 The State of Nevada

12 _____
13 _____
14 Respondent(s).

Case No. 54866

Dept. No. N/A VI

Docket N/A

15 **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

16 **INSTRUCTIONS:**

- 17 (1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.
- 18 (2) Additional pages are not permitted except where noted or with respect to the facts which you
19 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.
- 20 (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to
21 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
22 institution.
- 23 (4) You must name as respondent the person by whom you are confined or restrained. If you are
24 in a specific institution of the department of corrections, name the warden or head of the institution. If
you are not in a specific institution of the department within its custody, name the director of the
department of corrections.
- 25 (5) You must include all grounds or claims for relief which you may have regarding your
conviction and sentence.

1 Failure to raise all grounds I this petition may preclude you from filing future petitions challenging
2 your conviction and sentence.

3 (6) You must allege specific facts supporting the claims in the petition you file seeking relief from
4 any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your
5 petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that
6 claim will operate to waive the attorney-client privilege for the proceeding in which you claim your
7 counsel was ineffective.

8 (7) If your petition challenges the validity of your conviction or sentence, the original and one
9 copy must be filed with the clerk of the district court for the county in which the conviction occurred.
10 Petitions raising any other claim must be filed with the clerk of the district court for the county in
11 which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney
12 general's office, and one copy to the district attorney of the county in which you were convicted or to
13 the original prosecutor if you are challenging your original conviction or sentence. Copies must
14 conform in all particulars to the original submitted for filing.

15 PETITION

16 1. Name of institution and county in which you are presently imprisoned or where and who you
17 are presently restrained of your liberty: High Desert State Prison (HDS P)

18 2. Name the location of court which entered the judgment of conviction under attack: _____
19 Eighth Judicial District Court, Clark County; Eliss F. Cadish, Judge.

20 3. Date of judgment of conviction: October 13, 2009

21 4. Case number: C-174954

22 5. (a) Length of sentence: Life in prison with parole eligibility after 20 years.

23 (b) If sentence is death, state any date upon which execution is scheduled: _____

24 6. Are you presently serving a sentence for a conviction other than the conviction under attack in
25 this motion:

26 Yes _____ No X If "Yes", list crime, case number and sentence being served at this time: _____

27 7. Nature of offense involved in conviction being challenged: Violate of Porter's
28 Fifth Amendment, ^{NRS/NA} Remand case to juvenile, NRS 193.165.
Additional Penalty

1 8. What was your plea? (Check one)

2 (a) Not guilty ☒

3 (b) Guilty _____

4 (c) Nolo contendere _____

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

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

10 (a) Jury ☒

11 (b) Judge without a jury _____

12 11. Did you testify at trial? Yes _____ No ☒

13 12. Did you appeal from the judgment of conviction?

14 Yes ☒ No _____

15 13. If you did appeal, answer the following:

16 (a) Name of court:

17 (b) Case number or citation: C-174954

18 (c) Result: Conviction is Affirmed.

19 (d) Date of appeal: Jul 23, 2010

20 (Attach copy of order or decision, if available).

21 14.) If you did not appeal, explain briefly why you did not: _____
22 _____
23 _____

24 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously
25 filed any petitions, applications or motions with respect to this judgment in any court, state or
26 federal? Yes _____ No ☒

27

28

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

2 (a) (1) Name of court: _____

3 (2) Nature of proceedings: _____

4
5 (3) Grounds raised : _____

6
7
8 (4) Did you receive an evidentiary hearing on your petition, application or motion?

9 Yes ____ No ____

10 (5) Result: _____

11 (6) Date of result: _____

12 (7) If known, citations of any written opinion or date of orders entered pursuant to each
13 result: _____

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

15 (1) Name of Court: _____

16 (2) Nature of proceeding: _____

17 (3) Grounds raised: _____

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

19 Yes ____ No ____

20 (5) Result: _____

21 (6) Date of result: _____

22 (7) If known, citations or any written opinion or date of orders entered pursuant to each
23 result: _____

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

1 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or action
2 taken on any petition, application or motion? NO

3 (1) First petition, application or motion?

4 Yes X No

5 Citation or date of decision: _____

6 (2) Second petition, application or motion?

7 Yes _____ No _____

8 Citation or date of decision: _____

9 (e) If you did not appeal from the adverse action on any petition, application or motion, explain
10 briefly why you did not. (You may relate specific facts in response to this question. Your response
11 may be included on paper which is 8 1/2 x 11 inches attached to the petition. Your response may not
12 exceed five handwritten or typewritten pages in length). _____

13
14 17. Has any ground being raised in this petition been previously presented to this or any other
15 court by way of petition for habeas corpus, motion or application or any other post-conviction
16 proceeding? If so, identify:

17 (a) Which of the grounds is the same: Motion to suppress Admission or
18 Confession by Defendant, Motion to Remand Case to Juvenile Court.

19 (b) The proceedings in which these grounds were raised: N/A

20
21 (c) Briefly explain why you are again raising these grounds. (You must relate specific facts in
22 response to this question. Your response may be included on paper which is 8 1/2 x 11 inches attached
23 to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

Questionnaire (19)

To question 19

My case is difficult and complex for me to understand. The Attorney that did my direct Appeal did not get in touch with me at all. And I tried to get in touch with Mr. Brooks through letters and phone calls but I was unable to. And so when I found out that I lost my Appeal about a year later from my Attorneys I went to trial with Mr. Brown and Mr. Aboud I ask them what to do and they tell me to file a writ. And tell you about my low IQ of 77 and my special needs class in school. I'm not a educate person. I have no GED or graduate High School. But I'm going to school for my GED. And this is why I'm filing a year later.

1 18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages
2 you have attached, were not previously presented in any other court, state or federal, list briefly what
3 grounds were not so presented, and give your reasons for not presenting them. (You must relate
4 specific facts in response to this question. Your response may be included on paper which is 8 1/2 x
5 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten
6 pages in length). _____
7 _____

8 19. Are you filing this petition more than one (1) year following the filing of the judgment of
9 conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay.
10 (You must relate specific facts in response to this question. Your response may be included on paper
11 which is 8 1/2 x 11 inches attached to the petition. Your response may not exceed five handwritten or
12 typewritten pages in length). _____
13 _____
14 _____

15 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the
16 judgment under attack?

17 Yes _____ No X

18 If "Yes", state what court and the case number: _____
19 _____

20 21. Give the name of each attorney who represented you in the proceeding resulting in your
21 conviction and on direct appeal: Curtis Brown - AND - Joseph Aboud, And
22 appeal attorney is Howard Brooks.
23 _____

24 22. Do you have any future sentences to serve after you complete the sentence imposed by the
25 judgment under attack?

26 Yes _____ No X If "Yes", specify where and when it is to be served, if you know: _____
27 _____
28 _____

1 Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating
2 additional grounds and facts supporting same.

3 23. (a) GROUND ONE: The Evidence at trial failed to prove beyond
4 a reasonable doubt that Justin Porter killed the man who died in this
5 case, and a conviction not supported by the Evidence violates
6 Federal and State due Process guarantees.

7 23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): There
8 is no doubt that a man was killed and no one saw
9 the killing happen. There is no doubt that no
10 one saw a person enter or leave the residence
11 where the dead man lived. We do know a footwear
12 impression of a Saucony shoe was found outside the
13 apartment of the deceased, and Justin Porter owned
14 a Saucony shoe, but no one could establish that his
15 shoe made the footwear impression. There was no
16 blood evidence on his shoe, nor did any other
17 evidence connect his shoe to the footwear impression
18 outside the apartment. The state produced no
19 evidence that Justin Porter had any motive to
20 kill the deceased. The state produced no evidence
21 that Justin Porter had any property from the
22 dead man's apartment. The state's entire case
23 was built on the alleged statements of
24 Justin Porter to Las Vegas police detectives.
25 Those statements were contradictory. In
26 one statement, Porter said he committed
27 no crime in Las Vegas. In another statement,

1 he said he knew someone named "Dionne" who
2 committed a robbery at the dead man's apartment.
3 The police never made any effort to find or
4 interview Dionne. In yet another statement Porter
5 said he was running from the police and tried
6 to take refuge in an apartment he thought to be
7 vacant. When he obtained entry into the apartment,
8 a man approached him, and Porter shot the man.
9 Under these circumstances, the state can hardly claim
10 they proved Porter's guilt beyond a reasonable doubt.
11 Therefore, the conviction for second ~~degree~~ degree
12 murder should be vacated.

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28 CONCLUSION Page 4

1 23. (b) GROUND TWO: THE district court violated Porter's Fifth
2 Amendment right against self-incrimination by allowing the state to
3 present evidence of involuntary statements allegedly made by
4 Porter to Police Detectives

5 23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): The
6 United States Supreme Court held that Custodial inter-
7 rogations can undermine the Fifth Amendment privilege against
8 self-incrimination by exposing a suspect to physical or ~~psychological~~
9 Psychological coercion. To guard against such coercion, the Supreme
10 Court established a procedural mechanism requiring police
11 to give a warning to a suspect before a Custodial interrogation.
12 If the police fail to provide the warning, the suspect's
13 statements are ~~inadmissible~~ inadmissible at trial. Because any
14 waiver of the Miranda rights must be "voluntary, knowing and
15 intelligent," the United States Supreme Court has adopted a
16 "totality of the circumstances" test in determining whether
17 an alleged waiver of the rights is valid. This test requires
18 evaluation of the defendant's age, experience, education, background
19 and intelligence in determining whether the defendant had
20 the capacity to understand the warnings provided to him.
21 If a ~~suspect~~ suspect or defendant does not understand the
22 Miranda rights he cannot make a "voluntary, knowing, and
23 intelligent" waiver of those rights. When question juveniles
24 the police should caution the juvenile that his state
25 ment can be used against him in adult court.
26 In this case, the ~~state~~ Defense filed a motion to suppress
27 Admissions or confessions by Defendant Porter.

23. ~~(c) STUNNING FACTS~~ The motion and the accompanying hearing summarized the history of Porter's interaction with police. The Chicago Police arrested Porter after Las Vegas police failed to them an arrest.

23. ~~(c) STUNNING FACTS~~ (Tell your story briefly without citing cases or law): Warrant for other charges pending against Porter. Las Vegas detectives flew to Chicago to question Porter. Las Vegas detectives Jensen and Larochelle say they read Porter the miranda rights. The miranda warnings was not recorded on the audiotape of the interview. The audiotape of the interview has Porter stating to ~~the~~ the detective Jensen when he ask Porter if he understand the rights that was read to him and Porter say "Hm, kinda I do, but sometimes I, I don't, yes." Porter later testified he was trying to say he did not understand. Detective Jensen testified that Porter had trouble pronouncing the words when he read the card. Porter's equivocal waiver can best be understood by considering the testimony of Dr. John Paglini, a forensic psychologist who tested Porter and found that he had Verbal I.Q. of 78, which placed him in the 4th percentil of people his age. Porter Perception I.Q. is 80 (9th percentile) and his full-scale I.Q. was 77 (6th percentile). ~~the I.Q. of Porter was 77, which placed him in the 6th percentil of people his age. Porter Perception I.Q. is 80 (9th percentile) and his full-scale I.Q. was 77 (6th percentile).~~

Continued

1 23. ~~Dr. Gregory Brown~~ Dr. Paglini opined that Porter
2 was not mentally retarded, but had "severely
3 impaired" scores which evidenced a borderline intelligence
4 Paglini also administered achievement tests to Porter and

5 23. ~~Dr. Gregory Brown~~ ~~Dr. Gregory Brown~~ discovered
6 his reading skills were equivalent to a second grader's
7 skills. With other achievement scores were comparable.
8 Dr. Gregory Brown, a forensic psychiatrist, evaluated
9 the tests performed by Dr. Paglini and the
10 transcripts of the interviews Porter had with police.
11 and he also administered a test to ascertain whether
12 Porter could comprehend and understand the
13 Miranda rights which were all administered to him.
14 Dr. Brown opined that Porter has significant
15 difficulties with vocabulary, reading, verbal processing.
16 Dr. Brown concluded by stating "To a reasonable
17 degree of psychiatric certainty it's my professional
18 opinion that he [Porter] would have had significant
19 difficult understanding the Miranda rights, both with
20 regards to the vocabulary and the comprehension."
21 Porter testified at a hearing on the suppression
22 motion and explained being arrest by Chicago police,
23 and the resulting interrogations by Chicago police
24 threatened to beat him with a phone book.
25 under these circumstances, the District Court erred
26 by denying the Defense motion to suppress the
27 statements made to police officers.

28 CONCLUSION¹⁰

(a) Ground Five: District Court erred in Porter sentencing. By sentencing Porter to 10 years to life for the murder. And 10 years to life for the weapon.

Supporting FACTS (Tell your story briefly without citing cases or law.): Any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a

(b) ~~Ground Six~~: minimum term of not less than 1 year and a maximum term of not more than 20 years.

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.):

(a) Ground Nine: _____

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

(b) Ground Ten: _____

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

(c) Ground Eleven: _____

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

(d) Ground Twelve: _____

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

1 WHEREFORE, Justin Porter, prays that the court grant Petition
2 relief to which he may be entitled in this proceeding.
3 EXECUTED at NEVADA DEPARTMENT OF CORRECTIONS (H.D.S.P)
4 on the 2-3- day of 2012.

5
6 Justin Porter
Signature of Petitioner

7
8 **VERIFICATION**

9 Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is
10 the Petitioner named in the foregoing petition and knows the contents thereof, that the pleading is
11 true and correct of his own personal knowledge, except as to those matters based on information and
12 belief, and to those matters, he believes them to be true.

13
14 Justin Porter
Signature of Petitioner

15
16
17 _____
Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAILING

I, Justin Porter, hereby certify, pursuant to NRCP 5(b), that on this
day of 2-3-, 2012, I mailed a true and correct copy of the foregoing, "

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
addressed as follows:

CC:FILE

DATED: this ____ day of 2-3-, 2012.

Justin Jug Capri Porter # 1092949
/In Propria Persona
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

(Title of Document)

filed in District Court Case number N/A



Does not contain the social security number of any person.

-OR-



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

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

(State specific law)

-or-

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

Justin Porter
Signature

2-3-12
Date

Justin Porter
Print Name

N/A
Title

[illegible]

1822671

150

NDC No. 1842449

LEGAL
Mail

Box 650

Indian Springs, NV 89076

RECEIVED

FEB 03 2012

HIGH DESERT STATE PRISON
LAW LIBRARY

LEG 7

AA589

27
FILED

JUL 05 2019

1 Case No. C-174954
2 Dept. No. 6

John L. Williams
CLERK OF COURT

3 IN THE 8th JUDICIAL DISTRICT COURT OF THE
4 STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

5 Justin Porter
6 Petitioner,

v.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

A-19-798035-W
Dept: VI

7 Brian Williams, Warden
8 Respondent.

9 INSTRUCTIONS:

- 10 (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
11 (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to
12 support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted,
13 they should be submitted in the form of a separate memorandum.
14 (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in
15 Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of
16 money and securities on deposit to your credit in any account in the institution.
17 (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific
18 institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific
19 institution of the Department but within its custody, name the Director of the Department of Corrections.
20 (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence.
21 Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction
22 and sentence.
23 (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction
24 or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If
25 your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-
26 client privilege for the proceeding in which you claim your counsel was ineffective.
27 (7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state
28 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: High Desert State Prison, CLARK COUNTY

2. Name and location of court which entered the judgment of conviction under attack: 8th
Judicial District Court, County of Clark, State of Nevada

3. Date of judgment of conviction: Oct. 13th, 2009

4. Case number: C-174954

5. (a) Length of sentence: 10 yrs. to life with a consecutive 10 yrs. to life

A-19-798035-W
IPWHC
Inmate Filed - Petition for Writ of Habeas
4847377



RECEIVED

JUL 05 2019

CLERK OF THE COURT

(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:

7. Nature of offense involved in conviction being challenged:Homicide.....

8. What was your plea? (check one)

(a) Not guilty ☒

(b) Guilty

(c) Guilty but mentally ill

(d) Nolo contendere

9. If you entered a plea of guilty or guilty but mentally ill 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 or guilty but mentally ill was negotiated, give details:N/A.....

10. If you were found guilty or guilty but mentally ill 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:SUPREME COURT OF NEVADA.....

(b) Case number or citation:54866.....

(c) Result:AFFIRMED.....

(d) Date of result:December 3rd, 2010.....

(Attach copy of order or decision, if available.)

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

~~NA~~

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: 8th Judicial District Court

(2) Nature of proceeding: Petition for writ of Habeas Corpus - Post-conviction

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☒

(5) Result: Denied

(6) Date of result: April 23, 2012

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

Findings of Facts and Conclusions of Law Filed June 11, 2012

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

(1) Name of court: 8th J.D.C.

(2) Nature of proceeding: Petition for writ of Habeas Corpus Post-conviction

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☒

(5) Result: Denied

(6) Date of result: JANUARY 13, 2014

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

"Time Barred"

(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.

C. THIRD PETITION

- (1) NAME OF COURT: 8th, J.D.C.
- (2) NATURE OF PROCEEDING: Petition For writ of Habeas CORPUS, POST-CONVICTION.
- (3) Grounds Raised:
- (4) Did you receive an evidentiary hearing on your petition? ~~no~~
- (5) Result: DENIED
- (6) DATE OF RESULT: MARCH 10th, 2016
- (7) IF KNOWN, CITATIONS OF ANY WRITTEN OPINION OR DATE OF orders entered Pursuant to such Result:

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

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

Citation or date of decision: MARCH 11, 2013

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

Citation or date of decision: JUNE 11, 2014

(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.) Petitioner was denied appointment of counsel. Petitioner is layman to the law. DENIAL OF FAIR PROCEDURES.

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: NO

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: N/A

(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.) N/A

18. If any of the grounds listed in Nos. 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.) Petitioner was denied effective

1 Assistance of Trial and Appellate Counsel / See Memorandum Attached hereto

2 19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing
3 of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in
4 response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the
5 petition. Your response may not exceed five handwritten or typewritten pages in length.) Petitioner was denied

6 effective Assistance of Counsel at Trial and on Appeal / See Memorandum Attached hereto

7 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment
8 under attack? Yes No ☒

9 If yes, state what court and the case number: N/A

10
11 21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on
12 direct appeal:

13
14 22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under
15 attack? Yes No ☒

16 If yes, specify where and when it is to be served, if you know: N/A

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18 23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the
19 facts supporting each ground. If necessary you may attach pages stating additional grounds and facts
20 supporting same.
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1 (a) Ground ONE: Petitioner is ACTUALLY INNOCENT. DENIAL
2 OF DUE PROCESS OF LAW, 14th amendment to the U.S.C.,
3 AND ARTICLE ONE sec. 8 of the Nevada state
4 constitution.

5 Supporting FACTS (Tell your story briefly without citing cases or law.): See Petitioners
6 memorandum with points and authorities, Attached
7 to this Petition.
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1 (b) Ground TWO: INEFFECTIVE ASSISTANCE OF TRIAL
2 COUNSEL. (DENIAL OF the 6th Amendment to
3 the U.S.C.)
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5 Supporting FACTS (Tell your story briefly without citing cases or law.): See Petitioners
6 MEMORANDUM with POINTS AND AUTHORITIES
7 Attached to this Petition.
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1 (c) Ground THREE: INEFFECTIVE ASSISTANCE OF
2 APPELLATE COUNSEL, (DENIAL of the 6th
3 Amendment to the U.S.C.)
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5 Supporting FACTS (Tell your story briefly without citing cases or law.): See Petitioners
6 MEMORANDUM with Points and Authorities
7 Attached to this Petition.
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1 (d) Ground FOUR: PROSECUTORIAL MISCONDUCT
2 (violating the 5th, 6th, AND 14th Amendment(s)
3 to the U.S.C.)
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5 Supporting FACTS (Tell your story briefly without citing cases or law.): See Petitioners
6 memorandum with Points AND Authorities
7 Attached to this Petition.
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23. (b) GROUND ^{FIVE!} TRIAL COURT ABUSED ITS
DISCRETION, (violating the 5th and 14th
amendments to the U.S.C.)

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): See
Petitioners memorandum with points and
authorities attached to this petition.