IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN PORTER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80738

RESPONDENT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 5, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ E. Davis*
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN D. PORTER, aka Jug Capri Porter,
#1682627

Defendant.

Case No. C174954
Dept No. VI

THIRD AMENDED

INFORMATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JUSTIN D. PORTER, aka Jug Capri Porter, the Defendant(s) above named, having committed the crimes of **BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165); ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 193.330, 200.380, 193.165) and MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Felony - NRS 200.010, 200.030, 193.165)**, 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 therein, 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.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY /s//LISA LUZAICH
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

DA#00F13901X/mmw/SVU
LVMPD EV#0006101143
(TK6)

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ORIGINAL

FILED
JAN 27 2010
CLERK OF COURT

THE STATE OF NEVADA Plaintiff, vs. JUSTIN D. PORTER, Defendant.	CASE NO. C-174954 DEPT. NO. 6 **Transcript of Proceedings**

BEFORE THE HONORABLE ELISSA CADISH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 5

FRIDAY, MAY 8, 2009

APPEARANCES:

FOR THE PLAINTIFF: LISA LUZAICH, ESQ.
Chief Deputy District Attorney

JOSH TOMSHECK, ESQ.
Deputy District Attorney

FOR THE DEFENDANT: CURTIS BROWN, ESQ.
JOSEPH ABOOD, ESQ.
Deputy Public Defenders

COURT RECORDER:

JESSICA RAMIREZ
District Court

TRANSCRIPTION BY:

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LAS VEGAS, NEVADA, FRIDAY, MAY 8, 2009, 10:43 A.M.

(Outside the presence of the jury.)

THE MARSHAL: All rise. This court, Department 6, is now in session, the Honorable Judge Elissa Cadish presiding.

Please be seated. Come to order.

THE COURT: Good morning.

MR. ABOOD: Good morning, Your Honor.

THE COURT: All right. Obviously, we'll do this in front of the jury, but will the defense -- sorry, go ahead and have a seat.

Will the defense be presenting any evidence?

MR. BROWN: No, Your Honor. Thank you.

THE COURT: All right. You have been handed the prepared instructions 1 through 36. Are there any objections problems, issues with them?

MR. BROWN: None in addition to yesterday's record.

THE COURT: Right. Thank you. I appreciate that.

MR. TOMSHECK: No, Your Honor.

THE COURT: Okay. All right. And the verdict form as well, have you seen that in final form?

MR. ABOOD: Yes, Your Honor.

THE COURT: And any objections to that?

MR. BROWN: No, Judge.

MR. ABOOD: No, Your Honor.

THE COURT: All right. Let's go ahead and bring in

the jury.

(In the presence of the jury.)

THE MARSHAL: Please rise.

THE COURT: Everybody can go ahead and have a seat. Counsel stipulate to the presence of the jury?

MS. LUZAICH: Yes, Judge.

MR. ABOOD: Yes, Your Honor.

THE COURT: All right. Good morning, everybody. We didn't keep you waiting too long today I hope. We do our best.

All right. At the end of the day yesterday the State rested.

Does defense have any evidence to present?

MR. ABOOD: No, Your Honor.

THE COURT: Okay. Thank you.

MR. ABOOD: Thank you.

THE COURT: All right. In that case, it --

THE CLERK: (Indiscernible).

THE COURT: Yes, defense rested --

MR. ABOOD: Yes, Your Honor.

THE COURT: -- has nothing to present. No need for any rebuttal since defense presented nothing.

In that case, it is time for me to instruct you on the law which will be followed by the closing arguments. Now, you know, I would like to be able to just sit here and have a conversation with you about the law and just look at you the

whole time, but as you can see, there are some fairly detailed instructions on the law. It will take some time to go through and they have been carefully prepared. So I will need to read from them, but you do have them there with you to read along, and it does help to do that.

And understand that you will be able to take those copies of the instructions back to the jury room with you. So if it sounds kind of confusing as we're reading through it, just know that you'll be able to take your time with it in the jury room as well and look back at anything that may seem confusing as we're reading through it.

JUROR NO. 4: Can we write on it?

THE COURT: Yes. They're your copies, so you can make notes on them as you would in your note pads, and you'll be able to take all that back. All right.

(Instructions read; not transcribed.)

THE COURT: Counsel.

STATE'S CLOSING ARGUMENT

MS. LUZAICH: Andrew Young once observed it is a blessing to die for a cause, because you can so easily die for nothing. Oftentimes in cases of homicides, we are left asking the question why, and many times as in this case we may never know.

What we do know is Gyatso Lungtok died senselessly. He was a quiet man who bothered no one. He certainly didn't

deserve what happened to him on June 8th of the year 2000. Today, the State of Nevada asks you for justice.

First, I'd like to thank you all for your time and attention in this case. Being jurors is a difficult job. We know that. It calls for many sacrifices. And fortunately, although this case didn't last very long, it is dependent on you, people like yourselves who are willing to take time out of your lives and sit as jurors. Without people like yourselves, our system simply couldn't function, so for that we do thank you.

Today we are here to give you what is commonly called closing arguments. And, you know, I never really understand why anyone calls them closing arguments. I am not going to argue with defense counsel. Defense counsel's not going to argue with myself or Mr. Tomsheck, and we are certainly not going to argue with any of you all. What it is, really, is our opportunity to talk to you about what we believe the evidence has shown and how it applies to the law that the Court just read to you.

Please keep in mind what we say is not evidence. The only evidence that you can consider is what came from right here.

When the witnesses came, they raised their right hands, they swore to tell the truth, and they told you what they know. We showed you evidence, physical pieces of

evidence. That is what you could consider. What we say is not evidence.

You all were here all week. You took careful notes. So if any discrepancy arises, check your notes, pay attention to your notes, talk to each other.

In this case there are several different counts, and what you have to decide is did the State of Nevada prove beyond a reasonable doubt each and every count.

Count No. 1 is burglary while in possession of a firearm, and what Instruction No. 14 tells you is what is burglary. Anybody who enters a building, an apartment, with the intent to commit larceny, robbery or another felony is guilty of burglary.

Burglary is a crime of entry. The crime of burglary is complete upon entry. So technically it doesn't matter what happens once inside. What is the person's intent at the time they enter the apartment.

Instruction No. 17 talks to you about that. We don't have to provide that anything bad happened in the apartment, just what happened or what was in his mind at the time of entry. Well, if he entered with the intent to commit larceny. And what is larceny? It's simply to steal.

Did he enter with the intent to commit robbery? What is robbery? It's taking by means of force or violence.

Intent, now how do we prove intent? How do we prove

what was his intent at the time that he entered? I mean, we can't crawl inside a person's mind and figure out what they actually meant. So what do we do? We look at what is the conduct of the individual and the circumstances that are disclosed by the evidence.

And what evidence did we have of the intent at the time of entry? Well, first of all, the door was kicked in. Now, when people are going for a reasonable, lawful purpose, you don't generally kick in a door.

And how do we know the door was kicked in? Well, first of all, it's broken. Second of all, it was kicked in with so much force that the lock was actually found on the floor inside the apartment.

And then, finally, we have a shoe print. So we know at the time the person entered the apartment they had the intent to do something wrong. You don't kick a door in unless you're going there to do something wrong.

Additionally, we know that the person went with a gun. How do we know that? Well, you heard from the crime scene analyst and you saw the photographs there was a bullet found in the bathroom. There was a casing found right outside the door. There was another bullet found in the apartment. Actually, there was a third bullet found. I forgot that picture. Sorry.

So we know that the person kicked the door in and

went in with a gun. What other intent could there be but to do something evil, evil intent.

Burglary with a deadly weapon. Well, we know, like I said, that there was a gun because we have all the evidence that the gun left behind, the bullets, the casing.

But there is an instruction. Instruction No. 25, tells you that we are not required to find and show you the weapon for you to find that a weapon was used at the time of the crime. So burglary with a deadly weapon, proven. A firearm -- sorry -- you are instructed is a deadly weapon.

Count 2 charges the defendant with attempt robbery with a deadly weapon. Now, robbery we know is the unlawful taking of property by means of force or violence.

Now, an attempt robbery is somebody enters with the intent -- well, or enters -- goes with the intent to commit a crime. There is performance of some act towards its commission, but the act is not actually consummated.

And how do we know that that's what happened? Well, the intent to commit the robbery is shown by the fact that he goes there at 2:00 o'clock in the morning, and he goes with a gun. If you're going for a lawful purposes, why are you going to go at 2:00 o'clock in the morning with a gun?

Performance of an act. The door is kicked open, so he has tried to do something in furtherance of the robbery.

Failure to consummate. Well, Mr. Lungtok surprised

him. Had Mr. Lungtok not been there, what would have happened? We expect the apartment might have been cleaned out. But because he was there, uh-oh, bang, bang, and runs away.

So we know that he went there with the bad intent, the intent to steal, to commit robbery, but he got foiled by poor Mr. Lungtok.

Count 3, murder with use of a deadly weapon. We begin with Instruction No. 5, and Instruction No. 5 tells you that murder is the unlawful killing of a human being with malice aforethought. Killing with malice is murder, so you have to decide was the killing of Gyatso Lungtok done with malice. Certainly it was.

Okay. Now, Instruction No. 6 defines malice aforethought for you. Malice aforethought is a very complex phrase for a very simple concept. What malice aforethought means is ill will.

Instruction No. 7 tells you that malice can be either expressed or implied. Express malice, an intentional killing. You have to decide did he intentionally kill Gyatso Lungtok. And as I said before, we can't crawl up inside somebody's head to determine what their intent is. So what do we do? We look at the circumstances surrounding the actions.

So an example of express malice. You take somebody up to the 25th floor of a building out on the roof. You walk up to the edge and you push them off the edge. Everyone knows

that if you push somebody off the top of a 25-story building, that person's going to die. So if you push them off, you intended for them to die. Express malice, intent to kill.

Implied malice, on the other hand, there's still ill will, but you don't necessarily intend for the person to die. Here seven gunshot wounds. Sorry about that. Seven. He kept shooting until Mr. Lungtok was dead.

So once you've decided that it was a murder because there was malice, you must determine whether it was murder of the first degree or murder of the second degree.

Instruction No. 4 tells you that in Nevada in every case of murder it is the jury, you guys, who decide is it first- or second-degree murder. Now, the Judge differentiates between first- and second-degree murder in a number of instructions.

Instruction No. 8 tells us that murder of the first degree is murder that is committed in the perpetration or attempted perpetration of a robbery and/or a burglary or murder that is perpetrated by any kind of willful, deliberate and premeditated killing.

So if there's a killing that's willful, deliberate and premeditated or if it's committed during the perpetration of a robbery or a burglary, that is first-degree murder.

We are then told in Instruction No. 21 that all murder that's not first degree is second degree. So let's talk

about was the killing of Gyatso Lungtok done in a willful, deliberate and premeditated manner, and I would submit to you that, yes, the evidence shows that it was.

Okay. First, willful. Willful is another word for intentional. Was there intent to kill. And remember, seven gunshot wounds. Not one, not two, not three, not four, seven gunshot wounds. He kept on shooting.

He pulled that trigger again and again until Mr. Lungtok was dead. First in the back again -- well, maybe not first. Two shots in the back, a shot in the chest that remember Dr. Olson talked about could have even been standing right over him. Not done yet. More shots in the arm, in the upper arm. He shot again and again and again. Intentional, willful.

Now, deliberate. Deliberation is the process of determining upon a course of action. It's merely thinking about something and deciding upon a course of action. And it doesn't have to be a great thought process. A deliberation -- or, sorry, a deliberate determination can be arrived at in a very short period of time Instruction No. 9 tells us.

So when Mr. Lungtok surprised this stranger in his home, that stranger could have just left, but he did not. He raised the gun and he shot and he shot.

Look how small that apartment was. He could have been out of that apartment in about three seconds, but he chose

not to. Rather than leave, he shot again and again.

Premeditation, the determination to kill Instruction No. 9 tells us. By the time he committed the intentional killing, he had the determination to do so. He had decided he was going to do it. It was not just a reflex action killing Mr. Lungtok. Each time he pulled the trigger he chose to keep on going.

Now, you know, most people have this preconceived idea about what premeditation is. You know, people watch too much TV and movies and stuff, and there they always show premeditation involving a great deal of planning.

You know, you see your wife with another guy. And you go home and you get your gun, and you try and figure out where are they going to be, and you follow them around town. That, of course, is premeditation. But that is not what premeditation requires.

Instruction No. 9 tells us that premeditation need not be for a day or an hour or even a minute. It can be as instantaneous as successive thoughts of the mind. Bang, bang, bang.

So when you have a willful, which is on purpose, deliberate, something that you thought about, and premeditated, made a decision, murder, that is first-degree.

Now, you know, it sounds with all these instructions like a whole lot is required for this premeditation, willful,

deliberate killing, but it's not, okay? An example that everybody can relate to.

You wake up one morning and you look at your clock. Oh my God, I forgot to set the alarm. You're late for work. You don't have time to take a shower. You don't even have time for coffee. You race out the door, get in your car, and you're driving down the street. And what do you see? That pesky yellow light.

So you have to decide as you're driving down the street late for work what am I going to do. You think, well, how far am I from the light? How fast am I going? Are there any police cars around? Are there any pedestrians around? Is somebody coming in the other direction?

In all of those decisions that you're making in about two-and-a-half seconds, that is premeditation and deliberation. So when you put your foot on the gas and choose to cruise through that red light, yellow, orange, red, when you make that decision you have willfully, deliberately and premeditated your decision to run the red light. It is as quick -- as instantaneous as successive thoughts of the mind.

In addition to premeditation and deliberation which I would submit that we have shown by the bang, bang, bang, repeated shots, another way to get to first-degree murder is what we call the felony murder rule. The felony murder rule tells us that there are certain types of offenses that are

conclusive evidence of malice aforethought, and that would be murder that is committed in the perpetration or attempted perpetration of a robbery or a burglary.

If you find, which you already have, the burglary with a weapon and the attempt robbery with a weapon that the killing occurred during the commission of those crimes whether it's intentional or not, that is first-degree murder, first-degree felony murder.

Now, because there -- Instruction No. -- sorry -- 20 tells us, you have heard many, many times in order for there to be a verdict you have to be unanimous, so everybody has to agree that there was a murder or that there was a first-degree murder.

What you do not have to be unanimous about is the theory upon which you find him guilty of first-degree murder. So, for example, you're back in the deliberation room and you're talking, and seven of you believe that it's felony murder. You're not quite convinced that it's premeditation, deliberation. You're convinced that there's felony murder.

The other five of you aren't quite sure about the felony murder, but you're sure that there was premeditation and deliberation.

All 12 of you agree that it's first-degree murder. You do not all 12 have to agree whether it's felony murder or premeditation and deliberation as long as you all agree that

one or the other is present. So you do not have to be unanimous about that, just the fact that it is first-degree murder.

So once you've decided that it was first-degree murder and obviously with use of a deadly weapon, a firearm is a deadly weapon, you have to determine who was it who did it.

Well, we heard from the defendant's own mouth that it was him. We also heard from the defendant's mouth about Dion, but we heard that it was him. But you don't even have to accept I did it from him.

Who is the person who knew only things that person at the scene could know. Who is the person who has the Saucony tennis shoes that we heard kicked in the door. Who is the person who called Detective Jensen -- oops, spelling, sorry -- four times within such a short period of time right after his mother heard from Detective Jensen that the police were looking for him. Who is the one who hid behind the couch when the police were knocking at his door at 1:00 o'clock in the morning. Who is the person who had the reaction to the photo of the murder location but the defendant, Justin Porter.

Now, the defendant, Justin Porter, knew things that only the killer could know. We heard from his own mouth he was talking -- he knew it was a semiautomatic weapon as opposed to something else. And how do we know that? Because he was talking about the shells. He was talking about shells being

left behind. And we know that it is a semiautomatic weapon that leaves shells behind that a revolver does not.

We know that he knew it was a small-caliber weapon because you heard him talking about the small bullets.

He knew that the shells were missing. There was only one shell found at the location, but there were seven shots fired. Unless he went back and grabbed the shells himself, how else would he know that the shells were missing.

He knew that there was blood on the door tread. Unless he was physically there and having committed the offense, how else could he know?

He knew that the door was kicked in. He talked about the door being kicked in and that it was near the door nob. We saw the pictures of where the tread was, and he told the detectives that the door was kicked right by the knob.

And he knew that the gun was not recovered. Only the killer and the police knew that the gun was not recovered.

But not only did he know things that only the killer could know, the stories that he told kept evolving. Remember, you heard first I had nothing to do with any crimes in Las Vegas. When he calls Detective Jensen on the phone, I did nothing. Somebody's lying on me. And he comes up with some guy named Dude who's lying on him.

The detectives then go to Chicago, and they talk to him, and they show him a picture, and that changes everything.

Remember, you heard about his reaction to the picture of the apartment. He paled, he stood up and he paced around, I didn't do it, I didn't do it, I had nothing to do with that. Just by seeing the picture, that reaction.

So then his story evolves into Story No. 2. Dion did it. I was there, but I didn't go in. He talks about that nonexistent phone booth. He talks about the fact that it was his gun, but Dion did it and he didn't do it.

And then they give him a little bit of time. And what do they say? While he's out of the -- or while they are out of the room, he's pacing around, pacing around. They come back in, and now we have Story No. 3 that evolves yet again.

I did it but I didn't mean to do it. It starts off with I know nothing to yes, I did, but I didn't mean to do it. What does he do? He minimizes.

But think about it. I mean, even his minimization story doesn't really make any sense because he's talking about how he's trying to get away from the police; therefore, he has to kick in the door and go inside.

Well, you know, when you heard from the detective and you can see in the pictures, there are tons of places he could have gone to get away from a police car because what he told you was -- on the tape -- that the police were driving down the street and lit him up with a spotlight.

All he had to do was run behind a building, run

behind a bush, run anywhere. There was no reason he had to run up the stairs and kick in a door unless he was going to commit a robbery or a larceny, to steal.

And he says, well, I knew that nobody lived there. But when you listen more carefully to what he said, they asked him -- they showed him the picture and they asked him was the shade up or down. He says at first, well, in the picture it's up. But they said no, but when you were there was the shade up or down. He says he can't remember is what he says if the shade was up or down.

Well, he's trying to tell you that every time he went by there it looked like nobody was home because it was always open. But then he says, well, I only walked passed a few times. So he can't even keep track of his own lies and stories.

Ladies and gentlemen, use your common sense. I asked everybody. You have common sense. You'll bring it with you. Use your common sense. Each and every one of you has lived through your lives, gone through your experiences. You all have common sense.

Listen to the evidence. Go back and listen to his statement to the police. Read through the transcripts. Your common sense will tell you there's a killer in the courtroom. He's sitting right there, and he is guilty of all the charges.

Thank you.

THE COURT: Thank you. Defense?

DEFENDANT'S CLOSING ARGUMENT

MR. BROWN: Thank you, Your Honor. Morning, ladies and gentlemen.

COURT RECORDER: Do you need the overhead?

MR. BROWN: Pardon me?

COURT RECORDER: Do you need the overhead (indiscernible)?

MR. BROWN: I am going to need the overhead. Thank you.

This is a tale of two stories. But instead of the best of times and the worst of times, this truly is the most tragic of times. Gyatso Lungtok should not be dead, but he is. We all shouldn't be here going through this trial with this young man for murder, but we are.

So where do we go from here? How do we decide what happened? How do we decide responsibility? Who do we believe, Justin or Justin? Do you have to believe him at all? Well, that's entirely up to you. You are the commanders of that ship. You get to make those decisions.

But keep in mind that without Justin's words, without his statements to the police, where would this case be? What would the evidence of this case be?

Well, we know without Justin's statements to the police nothing from the crime scene was ever found on Justin

Porter either in Las Vegas or in Chicago. And we know that nothing from Justin Porter was ever found at the crime scene. There were no fingerprints. There was no DNA. There was no blood on any of his clothing. There was none of his blood at the scene. There were no valuables of Mr. Lungtok's in Mr. Porter's possession either at his house in Vegas or in Chicago.

And although not required to, the police never did recover a firearm. We do have a shoe print, but keep in mind with that shoe print without Mr. Porter putting into context and explaining the shoe and his shoe, what you have is a shoe print that may or may not match that but also matches any shoe made by Saucony between a 10-and-a-half and an 11-and-a-half with up to 60 different top patterns because they all have the same outsole design. So without Mr. Porter's input, that really doesn't connect anything to anybody.

And I bring these points up simply to underscore the importance of his statements and the reliability of what Mr. Porter says himself to the police in their investigation and to the State in their prosecution.

But what you're going to discover -- and you got a little bit of it listening to Ms. Luzaich, and you probably will get some in listening to Mr. Tomsheck -- is they're going to want you to pick and choose things to believe that fit, puts Mr. Porter at the scene and makes him a killer, absolutely believe it. But if it explains why he may have been there,

what he was feeling, what he was thinking, what he was doing, please disregard it.

They want you to belive but not believe. They want you to hear, but they don't want you to listen.

And I concur. I want you to go back and I, too, want you to listen to that statement again. I think that you owe it to yourselves, and we've introduced into evidence a copy of the transcripts. You can follow along with it. But rely on the statement itself if you have any questions about what was said.

Now, you got a clear message from Detective LaRochelle that he didn't really put a whole lot of stock into what Mr. Porter was saying with regard to Dion. And yes, I'm aware that the State takes the position that this is a tale of three stories.

But when you think about that first phone call, you know, Detective Jensen had left a business card with Justin's mother and said please have your son call me about some crimes. He never said that they were investigating a murder. Certainly didn't indicate to Ms. Porter they were investigating a murder. There's no evidence Justin Porter ever knew they were talking about a murder, just a generalized phone call by have him call us.

He tried calling back. He left him a message, somebody's lying on me. You know, whether that's the initial beginnings of a story or just a denial of a 17-year-old, that's

up to you to decide. Regardless, the State didn't do anything with it.

Didn't investigate, didn't look into it. You know, it was a phone call that he just basically disregarded similar to Detective LaRochelle disregarding the entire first statement that Justin Porter gave him when he's talking about what happened with Dion.

And the reason that the State is disregarding the first statement about Dion and the reason that Detective LaRochelle and the police have disregarded that first statement with respect to Dion is because if you believe the first statement that Dion perpetrated these offenses, then you have to find this young man not guilty. Based upon the crimes charged and the instruction that you have before you, you would have to return a verdict of not guilty for Mr. Porter.

Now, what I will tell you with respect to the Dion case is it's obvious that they didn't put any stock into it. They didn't -- you know, he told them where you could find this gentleman, what he looks like, who he lives, where he's at. Very easy to do, very easy to follow up, go look. Just tie up your loose ends.

They neglected to do that. They decided that they're putting all their eggs in the number two story basket and didn't even bother to disprove anything that Justin was trying to tell them with respect.

Now whether those were reasonable actions by the police is up to you. But what's also reasonable is for you as a jury to accept the first story that Justin gave the police as what happened because they didn't go any -- they didn't do anything with regards to the Dion story to disprove those facts and that what Justin told them explains many of the things that they found. You are well within reason in believing that that first story is true, and that would mean that Mr. Porter's not guilty of these charges.

But what I want to spend the remainder of my time with you this morning about and what I want to get down to talking about is Statement No. 2. This is the one that you heard. This is the one that was played in the courtroom. This is the one that the State of Nevada is relying on in asking you to convict Mr. Porter of certain offenses.

What we have is first-degree murder, burglary and attempt robbery. The way I'm going to discuss first-degree murder with you -- and you'll recall from the instructions and you have them with you, and I have a copy of them as well -- is that murder of the first degree can be committed one of two ways. And this is Instruction No. 8.

Essentially -- hopefully I'll get this right at some point. You can get to first-degree murder two ways. Ms. Luzaich very thoroughly explained this. You can either have committed premeditation and deliberation in the execution to

get to first-degree murder, or it could have been committed during the perpetration of a felony.

In this case, the felonies are burglary and attempt robbery. Interesting that it's charged as an attempt robbery. It's acknowledging that nothing was taking -- taken from the house, and we'll talk about that in just a minute. But they've charged with attempt robbery.

And when I discuss felony murder with you, that's really the time to talk about the burglary and the robbery offenses because if you find Mr. Porter guilty of burglary or robbery, then the felony murder attaches. If you don't find him guilty of those offenses, then it's not felony murder, and we're really deciding is the premeditated first-degree murder a second-degree murder.

And I think when you're done looking at the instructions and listening to arguments, that you're going to conclude that what the second statement does if you believe it is -- convicts Mr. Porter of a second-degree murder but not a first-degree murder. Keep in mind your choice between the two statements.

So what is premeditation and deliberation? Ms. Luzaich showed you a few highlights of the instruction. And, you know, it's going to be hard for you, probably, to follow on the monitor, but you have your own copies.

So if I would ask you to look at your own copy and

this is Instruction No. 9. And premeditated and deliberated murder is kind of what we think about. It is an intentional killing. You want to kill somebody, you plan to kill somebody, that's your purpose, that's your intent, you go about doing it, and you're successful at it, okay? But that's just our generalized knowledge.

The specific law really says that for you to convict an individual of a first-degree premeditated and deliberated killing, three elements have to be met. And they're listed for you right here; willfulness, deliberation, premeditation. And we'll talk about those.

You have to have all three. Not two out of three, not one out of three. You have to have all three. And you have to have all three at the time or before the killing, and that's important as well.

The State emphasizes successive thoughts in mind. There is a following instruction which we'll talk about that tells you that it doesn't take forever to figure these things out, even a day or an hour, but you do have to have all three of those elements.

So let's look at it. Willfulness simply is the intent to kill. Justin Porter's pulling the trigger. Is he intending to kill Gyatso Lungtok? Well, you listen to the statement. You decide whether he was intending to kill him or intending to shoot and get out of there.

Now, the point has been made about this firearm, seven shots. But what's also important to recall is that the seven shots -- even Detective LaRochelle testified about this -- will occur very rapidly.

There's very little trigger pull on a.22. It can be as quick as you could pull your trigger. So seven shots theoretically could happen in a very short period of time. I won't attempt to quantify it for you, but I can at least tell you that it would be very quick.

There's no evidence to suggest which is why we asked the coroner any of those shots take place after the person may have been deceased. There's no evidence to support that.

You know, so they -- what's a more likely scenario is exactly what Justin Porter said. When he went in the house and he closed the door, he's hiding. So close the door made sense. Somebody came out of the bedroom he wasn't expecting, he was startled, he turned, and he pulled the trigger on that gun until it was empty.

Now, Ms. Luzaich talked about seven shots. Those are seven bullets. There may have been more. We don't know. There may have been eight or nine. Remember, one bullet went through the door and one ricochet off the wall. There may have been more.

The point is the gun was fired in a panic and it was fired until it was empty. Very short period of time.

But whether those actions rose to the intent to kill, I don't think you decide just from looking at the number of shots. You would have to look at the evidence, and the evidence is his statement. And listen to that and decide.

But let's move on to what deliberation is because that puts intent into context. In order for there to be first-degree murder, you also have deliberation. This is a process. Interesting word, "process" of determining upon a course of action as a result of thought, okay? Not just thought, thought that includes weighing the reasons for and against the ation.

So as he's pulling the trigger, after he's just been startled, you have to believe that he's doing this process. He's actually thinking including the reasons -- including weighing the reasons for and against and considering the consequences of the action. That all has to take place at a very short period of time in order for you to conclude this was truly a deliberated killing as opposed to what Justin said it was.

In addition to the premeditation, the deliberation, well, deliberation, it does say it can happen in a short period of time, but in all cases it can't be formed in passion. If formed in passion, it has to be carried out after that has time to subside and the deliberation to occur. So basically, you have to be thinking a little more clearly than just under the

stress of a startling event.

A mere unconsidered rash impulse is not deliberate even though it includes the intent to kill. And that's important because very often what you recognize is maybe there was an intent, but it was I didn't have time to think it through to deliberate what I was doing. I didn't have the time to collect myself and realize everything that was going on around me and weigh the consequences for and against my behavior. I didn't have the time because I was merely unconsidered and rashly impulsive and not deliberate. So in addition to the premeditation you have to have deliberation -- I'm sorry -- willfulness and then premeditation.

Premeditation, a design, a determination. That's more than intent. That's a determination to kill, and it has to be distinctly formed in the mind at the time of the killing. That is more than just simple intent. That's another process taking it to another level, and it's important that it's included in the elements here. You have to have all three; intent, deliberation with the weighing, and this determination. Now, it's true this can all happen in a very short period of time.

And I think trivializing this entire process down to running a red light is insulting. We've all been in traffic situations. We're very familiar with driving. We approach intersections every day.

I know right now how I'd react to a yellow light, what the consequences are. I thought about that for my whole life since I've been driving. And to suggest that the first time I ever have to make a decision as to what I'm going to do in that intersection occurred in that instant is inaccurate, and it trivializes the requirements of reasonable doubt with respect to premeditation and deliberation because sitting in that intersection is nothing like being in the apartment and having somebody come out and startling you.

Now, with respect to the startling and Mr. Lungtok, please understand he bears zero responsibility whatsoever, of course. He's in his own house.

The point is is that when Justin went in the house, if you believe the statement, he wasn't expecting him. So when he came out, that's when he was surprised.

The other point I want to make with respect to deliberation because this may come up in your -- when you're deliberating. I don't think the State would make this point. Is that weighing the consequences, thinking about what's going to happen must occur before the killing.

In other words, when Justin tells the detectives in this statement that he ran to the field, sat and then went back and got the shells, that in the field is when he's thinking about what's going to happen. That has to take place beforehand, okay?

Now he's just scared. He's 17. He doesn't know what he's doing -- if you listen to the statement -- goes back. Hears the man who's clearly still alive, the groaning, the moaning. He hears that. He tells them that in the statement. He didn't want to believe it.

He wants to believe the guy's gone to the hospital. He's hoping amongst hope that that man has taken himself or had somebody take him to the hospital. But he hears it. Well, that's consistent with the neighbors who heard the same thing, so we know he didn't shoot him until he was dead. We knew he shot him until he was out and ran away.

If he truly, truly wanted this man dead, if that's all his intention was was to premeditate and kill this person, he had another opportunity. He goes back, the guy's still groaning, he's still alive.

If his intention had been before to kill him, his intention would still be that, and that's what would have happened. If he had another shot, he probably would have shot him in the head. We would have seen that or bashed him in the head something to effectuate the death which is consistent with a premeditation and deliberation and not with the story that Justin told.

While we're on this point, lest you think perhaps that maybe that he was shot while he was in the bedroom, and I mean Mr. Lungtok, and I don't know that the State would even

take this position, but I feel I better address it just in case one of you think about it.

Recall the testimony of the pathologist that the shots that would have been in his back would have been entirely consistent -- inconsistent with anybody walking in. The shots on Mr. Lungtok altogether are very consistent with a person who came out, was surprised to hear the noise, and all of a sudden found himself being peppered. He either heard a shot that went through the door or he felt the first shot, and we don't know where that was.

But the angle of the bullets going straight through-and-through, some of them at different angles, is entirely consistent with a person who does this. And that's a reasonable reaction of anybody in a very short period of time, and it didn't kill him. The unfortunate realty is one bullet was capable of killing him.

And he walked around. That even suggest he walked outside, maybe hit the porch light. There was blood on that light panel. Went at least down a couple of steps, then retreated back into the apartment, made his way to the bedroom where he tried to make a phone call it appears and expired.

And so the suggestion, if there is one, that maybe when Justin come back that he had shot this man in the back is inconsistent. The lower bullet never even penetrated the body. It traveled along the back and ended up in the left tissue.

You recall the coroner's testimony. And the bullet that was fatal was at an angle from low to up, through the lung and out. It could not have happened with Mr. Lungtok sitting in that position.

Now, we need to address another theory of first-degree murder, okay? And that's felony murder. Now, I'll come back to premeditation as it relates to second-degree murder in just a minute, but we first have to discuss the felony murder rule.

Well, what is the felony murder rule, okay? You have the instructions. But basically what it's telling us is even though you don't intend to kill somebody, that may not be your purpose, that may not be your plan. But if you engage in such activities that put people at risk and they die as a result of that, we're going to call it felony murder.

Now, the activity has to be a felony. If I'm committing a robbery, I walk into a 7-Eleven. I want to take the money from the cashier. I pull out a gun to scare him. He resists or is fumbling around, and I start shaking the gun to scare him into giving me the money, and it discharges and kills him. I didn't mean to kill him. I'm as surprised as the next guy. But he, nonetheless, is dead.

I was in the process of committing a robbery. That's felony murder. Makes perfect sense. You know, it doesn't let people off of the killings because they didn't intend to kill.

We've decided as a society that if someone dies during the commission of one of these felonies, and burglary and robbery or attempt robbery are two of them, that we call it felony murder.

So what that means is was Justin Porter committing an underlying felony when he went into the apartment. If you believe statement one with regard to Dion, no. Dion was doing that. Mr. Porter's not guilty.

If you do what Detective LaRochelle did and what the State has done and you rely on what they call is the true statement -- you heard him talk about that -- then you're relying on the second statement. And under the second statement the facts that were provided by Mr. Porter do not support felony murder. They do not support entering with the intent to commit a crime. They do not support wanting to commit a robbery. They support second-degree murder.

Now, the State's going to suggest to you that this young 17-year-old kid is capable of negotiating the statement mind field of confessing to a second-degree murder but avoiding somehow a premeditation and a felony murder through his discussions. But his statement if believed on the four corners never acknowledges that he was there to commit a felony. No burglary, no robbery.

He was there hiding. He went there to seek shelter, to seek refuge, and that was his purpose. And his story, of

course, is consistent with what he says, and we'll talk about that in just a second as well.

So robbery. What is robbery? Well, The State pointed it out to you. And it's interesting how this is playing out because robbery, you can't rob an empty place, okay?

We've all heard or we've said somebody breaks into your car, breaks into your house, I was robbed. Well, you weren't. You were burgled. Doesn't sound as good, so we say we were robbed. But the truth of the matter is you rob people, you burgle places, okay?

And so if Mr. -- and Ms. Luzaich touched on this. If he hadn't been home, the place would have been emptied out. Yeah, but it wouldn't have been a robbery. There would have been nobody home. You can't commit robbery on an empty structure.

And so this gets us to the point is do you believe Mr. Porter's statement when he says I thought no one was home. And you're going to have to listen to it and believe it. You're the ones that are going to have to decide that.

I thought it was empty. Because if he thought it was empty, he couldn't have been committing a robbery because when he went in, nothing happened other than he got surprised, fired the gun and left. He made no attempt whatsoever to steal anything.

There's no evidence presented to you that he made any attempt to steal anything. Now, we went to pains to have the detectives and the crime scene people talk about things that were of value there. And maybe if the State is right and the place was empty, that would have been somebody's plan. But there's no evidence to support that.

And what the truth is is that the things of value that were there were still there. Now had something been missing, a watch was missing, they found it at Mr. Porter's house in Las Vegas or Chicago, now you got something. That's evidence that he went there with a plan to take it and took it. But since nothing was taken -- and they acknowledge this by filing it as an attempt.

They're telling you that he knew a man was in the house, but then when he got in the house he was so surprised a man was in the house he left without taking anything. That doesn't make sense. Use your common sense on the logic of that flow, because if he knew someone was in the house, he couldn't have been surprised.

And if his intention was to kill him to take his property, then there would have been property missing. So those don't all line up quite right.

So what is the evidence? What is the actual evidence that you have? It's his statement. That's the only thing that places into context what happened.

What the State is asking you to do is to disregard the portions of that that don't fit their theory and believe what they want you to believe. They used the word use your common sense, but that's a substitute for speculate because they should apply evidence to support your common sense.

Yes. Could somebody have been going up the stairs? Could somebody have been kicking in a door to take property? Could somebody have been doing those things? Absolutely. But they got to prove it. They want to claim it, they got to prove it. And they've got to prove it beyond a reasonable doubt.

Asking you to disregard what they call the true statement and believe what they want to speculate and suggest, that's not fair to you and that's not fair to Mr. Porter. That's not evidence. So I submit to you that with respect to the attempt robbery they have not met their burden, and he's not guilty of attempt robbery.

The bigger question is was a burglary committed because you don't have to be intending to commit a robbery when you commit a burglary. You can be intending to steal anything. Burglary -- excuse me. Burglary is weird. It's a mental crime. You don't have to do anything after you're thinking.

Here's an example of a burglary. You're standing outside of the Walmart, you don't have any money, you know your kid wants the latest, you know, Wiggles DVD, and you can't afford it. So you figure out, all right, nobody's going to

notice if I just take it, so I'm going to go get me the DVD.

You walk into the Walmart. All of a sudden you start looking around. You see there's a camera. There's a guy in his nice blue vest that's keeping an eye on you. You get scared and you abandon it altogether. You decide I'm not taking the DVD, I'm going home.

You committed a burglary. You committed a felony in the State of Nevada by being outside the structure and intending on stealing something. And the moment you went in, you've committed the burglary.

How does the State prove that? How do they prove what's going on in your head? Well, one way, of course, is they ask you and you tell them. If you tell somebody, yeah, I was outside, I didn't have any money, I really needed it, and I went in and changed my mind, you've admitted to them that it's a burglary, and they can prosecute you based on that.

The real way they prosecute those plans, the real way they know what people had intended, what they were planning is what they do. Nine times out of ten the person actually gets caught trying to steal the DVD. Once he's caught, they start looking at other evidence. Okay. You attempted to larcen. You attempted to steal something.

How do we know whether you made your mind up once you got in or you made it when you were outside which would be the burglary? Well, you got any money on you? He didn't have any

money on him. When he came in here, he had to have been intending on stealing this, okay?

Now, these are examples of things that they have. We call that evidence, proof of things that they have to establish what is going on in the mind of somebody who's comitting a burglary.

What they want you to accept is that his intention going up the stairs before he goes into the building was to break in there, they've alleged it, to rob the man. We talked about that, particularly if he's not home.

But he could have been going in there with the intention of just stealing anything. Well, how do you know what he's thinking? They want you to look at the circumstances, and you should, surrounding the entry. Kicked in the door. Okay. That's fair. But that's also consistent with what he said, what the evidence suggests, what Mr. Porter explained what he was doing.

Now, keep in mind who was in control of the interview process. Wasn't a 17-year-old kid. It was the two detectives sitting in Chicago. They were in charge of the direction of this interview. They are the ones that need to ask him the specific questions. But they were satisfied with his answers.

You know, it's interesting because there's at least one point in the statement later on when he's talking about, you know, I told the dude I met once, and Detective LaRochelle

says that doesn't make sense, okay? And then he cleared it up. And I can point that out if I need to, but the point is he didn't say anything on any of the other parts. Because why? It did make sense.

The detectives didn't feel the need to follow that up, but they were the ones that needed to do that. So what the evidence is that you actually have is what Justin said happened.

How else do you prove what's going on in his mind? How could we know that his intention was to steal something? Certainly after he had -- this man had been shot he had the opportunity. If you take the property, now we know what your intention was. It's pretty clear. You didn't go in there for why you said. You went in there to take items that didn't belong to you.

When Justin went into the apartment -- and you have to listen to the statement -- and he tells Detective LaRochelle and Detective Jensen that I was scared, I was scared, man. And you heard it. Listen to it. You're going to have to feel it.

No one is suggesting that when he made the decision -- and that is an accurate statement by the State -- the decision to pull the gun and shoot it, that he was acting reasonably. If that were the case, for example, if we were trying for a moment to suggest that that statement suggests reasonable behavior by Mr. Porter, you would have jury

instructions on self-defense.

But of course it's not self-defense. A man in his own house is not going to -- you know, you can't defend yourself when you go in there even if your reason -- even if you go into a -- what you appear to be an abandoned warehouse and you're startled, it's not self-defense. You're aware you're not supposed to be (indiscernible).

And no one's suggesting to you that Justin's statement is rising to the level or the facts are suggesting a level of a manslaughter. We're talking about murder.

The question is first-degree murder or second-degree murder. So I just wanted to clarify for you please don't mistake these comments suggesting that his actions if believed in the statement were reasonable, acceptable or justified.

So how do we go about deliberating this case? How do you go about thinking through everything that's been presented to you and then what your obligations are, what your duties are, what the evidence is?

I suggest to you Instruction 22 helps guide through that. And if you could turn to 22 now, I would appreciate that.

The State went to great pains to explain to you that your theory does not have to be unanimous, okay? The seven for felony murder and the five for first-degree murder all equal a happy first-degree murder finding. And that's true.

But you do have to be unanimous, 100-percent unanimous, with respect to any finding of guilt. What this instruction tells you is that in order to find Mr. Porter guilty of second-degree murder, you have to do a couple of things.

First, you have to consider first-degree murder. That's the primary charge. And you're asked to do that. You talk about it.

Then after first carefully -- fully and carefully considering first-degree murder, if any one of you, any one of you has a reasonable doubt as to either premeditation or felony murder -- well, let's put first-degree murder. If any one of you has a doubt based on reason as to whether this is a first-degree murder, then you have not reached a unanimous verdict as to first-degree murder.

And if all 12 of you think it's second-degree murder, and I submit that it is based upon the evidence, based upon the definition of malice provided by Ms. Luzaich, it's not a manslaughter, it's not self-defense. It's either second- or first-degree. All 12 of you agree that it's second-degree murder and one of you thinks that it's not first-degree murder, it's second-degree murder.

So you see that all 12 of you don't have to agree that I don't think it's first, only one of you does. But all 12 of you do have to agree that it's a second.

Not to beleaguer (sic) this, but this is probably one of the most important arguments and points that I get to make to you this morning. It underscores the importance of the individuality in the jury process. Yes, you are a collective group. You are a jury. You deliberate. You try to work together as a unit.

But your individual interpretations, your individual feelings and thoughts and the applications of the law to the facts are critical to the process. That's why if all 12 of you agree, we as a community and a society have confidence in that verdict because all 12 of you have individually thought it out, carefully weighed and evaluated it and came to a collective finding. Then we have confidence.

If somebody in the jury never offers an opinion, doesn't think it and just signs off with everybody else, we lose confidence in the process. That's why if one of you or two or three or four, but it only requires one of you, to have a reasonable doubt as to whether it's first-degree, then this case is a second-degree murder.

It would be very easy to convict Justin Porter of first-degree murder just based on a couple of things, seven shots without thinking through the law, without applying premeditation and deliberation. Feeling bad for Mr. Lungtok which we all do. But that would be a disservice to the system.

Justin Porter deserves a very thorough deliberation.

The State is correct. Mr. Lungtok deserves his justice. Submit that it's a second-degree homicide conviction. But Mr. Porter deserves a very thorough deliberation process. And as tragic as this is, the facts support second-degree murder and second-degree murder should be your verdict.

Now, I don't get to talk anymore after this. Mr. Abood doesn't get to talk anymore after this. Mr. Tomsheck does. State goes twice. That is to emphasize the importance of the burden they have. They have to prove the case, so they get to go, we address it, and they go.

And so he's a very smart gentleman, of course. You watched him throughout the trial. He's going to make some very good points. He's going to make some good arguments to you. They're going to make sense. But you know that if I had an opportunity, I'd probably have something to say about it.

And so I'm asking you before you just put stock into something, think what I would say. What would Brown have said I guess is what I would ask you to do, and then evaluate the importance of the comments with my suggestions or comments. You can disregard them and say something, yeah, he'd have been crazy. But I'm asking you to at least consider what we would have said from the defense perspective if an argument is made.

When you go to the jury room and you retire, I ask you to do a couple of things. I'm going to ask you, of course, to discuss this entire case. Listen to the tapes again,

deliberate as the process requires, and please respect each other and each other's thought process and opinions. You do these things, I'm sure that you will be able to arrive at a proper and just verdict for all.

Thank you for your time.

THE COURT: Thank you. Rebuttal?

STATE'S REBUTTAL CLOSING ARGUMENT

MR. TOMSHECK: This trial, ladies and gentlemen, really isn't unlike any other trial. Every trial is the same. Now, granted, the facts and circumstances of each individual trial are unique to that trial, and the individuals involved in every trial are individual to that trial. But at the end of the day, when all is said and done, each and every trial that takes place in each and every court is about exactly the same thing.

A trial, ladies and gentlemen, is a search. It's a search for the truth. And you as jurors in this case are in a rather unique position because you, as the Judge told you way back on the very first day, are the judges of fact. You as jurors are the finders of fact and you, ladies and gentlemen, get to decide the answer to the question what is the truth.

Now, sometimes the jury to get to the truth, you take a long and interesting path. And, certainly, the defendant took us on a winding road when he took us through his stories and his versions to get where we are today. But we know it

took us nine years to get here. But here, today, you, ladies and gentlemen, will decide what the truth is.

When you do, I would submit to you that probably the most important of it is are the words of the defendant. So when you go back and deliberate, I would ask that you consider two things about the stories he tells.

First and foremost, and probably the most obvious I'd ask that you consider what he said in those statements. That I would ask for each of those statements when you consider what the defendant said, you consider what he had to know when he said it.

When the defendant makes the phone call to Detective Barry Jensen at 11:00 o'clock in the morning on August 11th of the year 2000, what does he know? He knows that Detective Jensen's left a business card with his mother, so he makes a phone call. And when he does, that's all he knows. That Detective Jensen wants to talk to him. So he places that phone call.

And in that phone call, what does he say? I didn't commit any crimes. Somebody's lying about me. It's a guy by the name of Dude, and I think he's in jail. That's all he says.

But, oh, how his story changes in 24-hours following when those detectives get on a plane and they fly to Chicago. Because when they sit down, Detective LaRochelle -- and I think

seeing him on the witness stand you can picture him doing this, sitting down across the table from this defendant and very calmly sliding that photograph in front of him.

And when he does that, ladies and gentlemen, the defendant knows that they know. He knows why they're there, and he knows that they know he's responsible for the homicide of Gyatso Lungtok. So he has to come up with a story. And I'll submit to you that unlike on the telephone when he's calm and cooperative, he jumps back, he puts up his hands.

And bear in mind, before this interview takes place, he's hiding. He knows that they're coming when they knock on the door. When Chicago detectives including Ed Cunnigham knock on the door, where is he? He's on all fours up against a wall behind a couch, and then he sees that photograph.

So what does he say? It's at that point the defendant introduces Dion to the story. And unlike what Mr. Brown told you, I would suggest to you that the story about Dion is absolutely, positively, every bit as important as that third story. I'll come back to that in just a minute.

He talks about Dion and he tells the detectives that this is a robbery, this is a lick. It's an attempt to get money. That Dion tells me he's going to do a lick, so I give him my gun and I go with him. I stand outside at the phone booth, he goes up the stairs, kicks in the door, blau (phonetic), blau, a couple shots, he comes skipping down, they

run away.

Ladies and gentlemen, what the defendant doesn't realize at the time he makes that story and when he does, he makes a drawing. Outside that drawing to the right of that window, if you look out the front door, is where he says he is, in a phone booth, something that we know not to be true because that phone booth doesn't exist.

And what the defendant doesn't realize is the thing he'll hang his hat on in his third story about those windows being open does him in because he doesn't realize that back on June 10th of 2000 when the police are taking photographs, they don't know that two months and two days later the defendant's going to be claiming he's at a phone booth. So they don't take pictures across the street.

But what they do is they take pictures inside the apartment. And when they do, they take a photograph that peers out the window as it is open to the area where he says that phone booth would be in front of that school. And if you look at that photograph, there isn't any phone booth. So we know that story is not true.

You have to ask yourselves the question why is the defendant when he tells that story putting Dion in the motive and mind-set that he is? Because what is the defendant say Dion is doing? He says he's comitting a robbery. He says he's going in there to get some money. He's going to do a lick.

Those are the defendant's words when he's talking about what Dion is supposedly doing.

And the defense would have you believe that the police somehow made an error by not investigating Dion. That they did something wrong when they didn't look or Dion after the interview. I would ask you the question how much investigation were they supposed to do a half hour before they left the building before he tells them the Dion story isn't true?

And then ask yourselves this. I ask you to ask yourselves this. Did the police really do something wrong by not looking for Dion after that interview or maybe, just maybe, the police were looking at Dion during that interview?

Ladies and gentlemen, I present to you Dion. For each and everything the defendant says about Dion in that first statement, take out the name Dion and put in the name Justin Porter.

And if you do, I would submit to you that that story, ladies and gentlemen, makes perfect sense. That story, ladies and gentlemen, is consistent with the evidence at the crime scene, the evidence that we know is there that was put into evidence and we have proven beyond a reasonable doubt in this case, which brings us to Story No. 3.

At the time the defendant makes Story No. 3, think about what Detective LaRochelle told him when he walked back in

that room. And think about what the defendant had to have going through his mind at that point in time, because Detective LaRochelle comes back in the room and he looks Justin Porter in the eye and he says, Justin, I don't think you've been telling us the truth. He says we have evidence that says the story you just told us isn't true.

Now, Justin Porter's in Chicago, and he knows the police have traveled 1750 miles to see him. He knows they have to know something, but he doesn't know what. So think about what he has to say in his third story because he doesn't know what proof they have.

He has to find a way to put his foot on the door, so he does. He doesn't know if the police have the gun at that time because what does he say during that third interview when Detective LaRochelle says, Justin, where do you think the gun is? He says I don't know. I gave it to my cousin. I think maybe the police have it.

The defendant's probably thinking at that point in time that they have the gun. They have evidence that can put him inside. So by his third story he has to put himself inside that apartment. But when he does that, he knows he has to remove the aspect of the Dion story that this is a burglary and it's a robbery because he knows if he does that, he's admitting to something that's going to put him on the hook for a big punishment.

And it's no secret what he's concerned about during that statement. He may cry and say he was scared. But what does he really say? When Detective LaRochelle asks him why are you telling us this third story, why do you now want to tell us the truth, his words, the defendant says I don't want to go to jail for the rest of my life. That's what he says through those tears. That's what the defendant's concerned about when he makes that third statement to the police.

See, at that point in time the defendant has to admit all of those things he thinks the police might be able to prove, but he can't admit the one thing that he knows would make him guilty. So he has to come up with a story like kicking in the door in order to hide.

And I submit to you, ladies and gentlemen, that you probably know that makes no sense because what's his story at that point? He's got a gun on him and he's afraid the cops are going to catch him, so he goes up some stairs, boots in a door to run in and hide.

Wouldn't it be more reasonable if he's concerned about the cops that just drove by a moment ago flashing a light at him because he's got a gun to toss his gun into one of those bushes, to throw it over the roof of the school, to hide in the stairwell?

It's the middle of the night. It's dark out. He could hide behind a bush, and we know he can do that because he

can certainly hide behind a couch when he knows the police are looking for him. But he's got to create a story that makes it seems as if he didn't really mean to kill Gyatso Lungtok.

Ladies and gentlemen, there are a million phrases about the truth. I'm sure you've heard the phrase, "There's two sides to every story." I'm sure you've heard the phrase, "There's three sides to every story." There's his side, there's her side, and then there's the truth.

Ladies and gentlemen, I would submit to you that if you look at the evidence and listen to both of those statements, they're both true. And if you put them together, that is what the truth of what occurred on June 10th of 2002 is. The defendant was Dion and the defendant, just like he told you, pulled the trigger. And if you do that, the State has proven that this is a first-degree murder, and we've proven it beyond a reasonable doubt.

And I want to touch on reasonable doubt for just a second because it's obvious that if someone would have asked you a week or a month ago to define what reasonable doubt is and what it means to be beyond a reasonable doubt, you would have had an impossible time doing that because it's a very difficult concept to put into words. But as you sit here today you should take comfort in the fact that you don't have to do that because Judge Cadish defined or you reasonable doubt and what it means.

She told you in your jury instructions that a reasonable doubt is one based on reason. It's not mere possible doubt, but it's the kind of doubt that would govern or control a person in the more weighty affairs of life.

If in the minds of the jurors after comparing and considering all the evidence -- and this is the important part -- you are in such a condition that you feel an abiding conviction of the truth of the charge, there's not a reasonable doubt. If you right now believe and have an abiding conviction that the defendant's guilty of the crimes the State's charged him with, you don't have reasonable doubt, and you can in good conscious and good faith check the top box on each of those counts and find it him guilty of what he's charged.

The last thing I want to leave you with is this, and that's why this crime is a first-degree murder. And I think you should take careful -- pay careful attention to the fact that Mr. Brown spent a large part of his argument trying to explain to you why this isn't a first-degree murder and why it is a second-degree murder. I'd submit to you that the law and the evidence says otherwise, and this is a first-degree murder, and here's why.

There's two types of first-degree murder. You heard about felony murder and you heard about premeditated murder.

How do we know that this is a felony murder? Well, there should be no doubt in anyone's mind when you go back and

deliberate that he's the guy that pulled the trigger. I mean, he told you he pulled the trigger.

Elissa Luzaich pointed out to you that there are a number of things that only he knew, that only the person that fired the gun would know. He's the shooter. There's no doubt about that.

So, really, the only question you have to determine is what was his intent at the time he went into the house and at the time he pulled the trigger. If he went in there to commit a burglary, to steal something or to commit a robbery, to take something by force, then he went in there and it's a felony murder. There's no doubt about that. That's what the law tells you.

Well, how do we know that this is an attempted burglary or an attempted robbery? Well, why when the defendant tells the second story if this was not an attempt to steal money or to commit a robbery would he have his imaginary Dion committing one? Why would he do that?

If he was just trying to separate himself from the events and say, look, I didn't kill anybody, I was standing outside, why wouldn't he say Dion was hiding inside?

He says Dion went in there to do a robbery, and you don't go in someone else's apartment in the middle of the night armed with a gun kicking in a door unless it's to take something or do something that you shouldn't be doing. And in

a very general sense, that's what burglary and robbery is.

The last thing I want to talk to you about is premeditated murder. A first-degree murder of a premeditated (indiscernible), and Mr. Brown spent a lot of time talking to you about premeditation, willfulness and deliberation. And, really, they're kind of simple concepts.

Willfulness just means the intent to kill. Why but for to kill someone would you point a gun and fire it seven times? It's not to injure and it's not to just get away.

The defendant fired seven shots, seven. He would have wiped out the entire front row of this jury box. Seven shots. That is an intent to kill. It's not just because he's scared. It's because he intends to do something that will end someone else's life.

Deliberation, a determination to kill as a result of thought. Now, Mr. Brown would have you believe that it's trivializing premeditation, deliberation to give you an example of a stop light. That's a real-life, everyday experience that we can all relate to because most of us haven't shot someone. So that's an example of premeditating and deliberating. And we all know that going through a red light you have your life in your hands. That's not a trivial example.

I'll give you an example of premeditation and deliberation. It's what this defendant did back on June 10th when he pointed a gun at someone who was coming towards him and

shot him. And then as that person ran away because there are shots in his back, he continued to shoot. That is trivializing something, ladies and gentlemen. It is trivializing human life.

Gyatso Lungtok died for nothing when this defendant shot him in the back. The shot that killed him went in his back and through his lung. That, ladies and gentlemen, is a premeditated and deliberate act. And how do you know it's premeditated and deliberate? A deliberation is considering something, going through it.

What does the defendant tell you on that audio tape? He says he's deliberating. He says I was scared. I was thinking about it. It was like it was in slow motion. This is what's going on in my mind, and this is what I chose to do. I can experience the emotion of fear and I can make the choice to point a gun at someone and shoot it. That is deliberation. And out of his own mouth he defines deliberation for you and tells you what he was doing was deliberate.

Premeditation, premeditation can be very quickly or it can be over a long period of time. If I walk up to the first juror here, and I've got a gun pointed at him, and I decided yesterday I don't like him, and I'm going to take him out, and I shoot him, that's premeditation.

If I have a gun in my pocket and don't like the second juror, he looks at me funny, I pull out a gun and I

shoot him, that's premeditation. If I'm standing here pointing a gun at Juror No. 3, and I don't intend to shoot her at all, and all of a sudden I make the decision to squeeze the trigger, in one second I have premeditated and taken a life. That is a premeditated murder.

And Mr. Brown can say the seven shots happen quickly, but walk yourselves through that. Think about it. The time he pulls the trigger on the first shot, do you think he's thinking? What about the second shot? Is he thinking yet? The third, the fourth, the fifth, the sixth. (Slapping hands together.) One, two, three, four, five, six, seven. Again and again and again he made the decision to pull the trigger. That is a premeditated act, ladies and gentlemen, and this was a premeditated murder.

And then he goes back to pick up the shells. What does that action tell you about the defendant's mind-set? The same thing was going on in his mind then as was going on his mind two months later in the city of Chicago. He wanted to get away with it. That is what he was concerned about.

Ladies and gentlemen, the evidence in this case tells you that at the time Gyatso Lungtok breathed his last, died and left this earth, he had at his fingertips a telephone. He never had the opportunity to call out to anyone that could help him. He never had the chance to reach someone who could save his life.

In a few moments you're going to have at your fingertips this verdict form, and the evidence in this case is calling out to you to reach a verdict that is fair, that is just, and that is true. The evidence in this case is calling out to you to reach a verdict of guilty of first-degree murder.

THE COURT: Thank you. The clerk will now swear the marshal and my assistant to take charge of the jurors.

(Court officers sworn.)

THE COURT: All right. Let's go ahead and select the alternates. We discussed this at the beginning of the case, ladies and gentlemen. Two of you will be identified as alternates.

Those of you who are the alternates, you'll need to give us -- number one, you'll need to give us your contact information in case for any reason we would later need to reach you if there were an issue with one of the jurors that had to be excused. You might be called back to deliberate.

And, alternatively, when a verdict is reached, we will contact those alternates, of course, and let you know what the verdict was because I would expect that after sitting here all week any of you would certainly want to know what the outcome was.

Because of the possibility that you might be called back to participate in deliberation, you remain under those admonitions I've been reading throughout the trial, and, most

importantly, not to discuss the case, yet. Until you get the call that says there's a verdict, continue to refrain from discussing the case with anyone.

THE CLERK: Alternate No. 1, Juror No. 1, George Tyrell. Alternate No. 2, Juror No. 3, Terry Phillips.

THE COURT: All right. So I appreciate if you follow my instructions in that regard as to the alternates, and the other 12 of you will be deliberating in the jury room.

(Pause in proceedings)

THE COURT: Counsel, make sure we know how to reach you.

THE MARSHAL: All rise.

(Court recessed at 12:33 p.m. until 3:59 p.m.)

(Outside the presence of the jury.)

THE MARSHAL: Please be seated. Come to order.

THE COURT: Good afternoon.

THE MARSHAL: Ready, Judge?

THE COURT: Yep.

(In the presence of the jury.)

THE MARSHAL: Please rise.

THE COURT: Go ahead and have a seat, everybody. Counsel stipulate to the presence of our 12 jurors?

MR. BROWN: Yes, Judge.

MR. TOMSHECK: Yes, Judge.

MR. ABOOD: Yes, Your Honor.

THE COURT: All right. Has the jury selected a foreperson?

JUROR NO. 5: Yes.

THE COURT: All right. Has the jury reached a verdict?

THE JURORS: Yes.

THE COURT: Would you go ahead and hand that to the marshal.

Defendant and his attorneys please stand. The clerk will now read the verdict out loud.

THE CLERK: Yes, Your Honor. District Court, Clark County, Nevada, the State of

Nevada, Plaintiff, versus Justin D. Porter, Defendant, Case No. C-174954, Department 6.

Verdict. We the jury in the above-entitled case find the defendant, Justin D. Porter, as follows:

Count 1, burglary while in possession of a firearm, not guilty.

Count 2, attempt robbery with use of a deadly weapon, not guilty.

Count 3, murder with use of a deadly weapon, guilty of second-degree murder with use of a deadly weapon.

Dated this 8th day of May 2009, Foreperson. Ladies and gentlemen of the jury, are these your verdicts as read so say you one, so say you all?

THE JURORS: Yes.

THE CLERK: Thank you.

THE COURT: All right. Do either of the parties desire to have the jury polled?

MR. BROWN: We don't, Your Honor.

MR. TOMSHECK: No, Judge.

THE COURT: Okay. All right. The clerk will now record the verdict and the minutes of the Court.

Ladies and gentlemen, I want to thank you. You can go ahead and have a seat, folks. Ladies and gentlemen, I want to thank you very much for your service here this week as jurors. As we've discussed all week, a trial by jury is one of the most fundamental constitutional guarantees that we have in this country, and it's so important that people be willing to serve as jurors for cases like this that come before the Court system. We need folks like you who are willing to give the time and attention that you did give to this case and the consideration that you gave to reaching your verdict. So I thank you very much.

I think Anthony has probably let you know I'm going to want to talk to you for just a minute back in the jury room before you go home, but we won't hold you for too long. I promise you that.

Thank you so much. We'll see you in just a couple minutes.

THE MARSHAL: Please rise.

(Outside the presence of the jury.)

THE COURT: All right. The jury's left the room. Is there anything else that we need to take up, counsel?

MS. LUZAICH: Sentencing date.

THE COURT: Good point.

THE CLERK: June 17th, 8:30.

MS. LUZAICH: You know what, I think it needs to be closer to 60 days. I'm sorry.

THE CLERK: (Indiscernible) 60 days. More than 60 days?

THE COURT: That's our typical in-custody.

MR. BROWN: Do you need more time?

MS. LUZAICH: Well, P&P's got to go through not only the murder, but the rest for background.

MR. BROWN: Yeah, 60 days or even a little further might be --

THE COURT: Do 60.

THE CLERK: Yes, Your Honor. July 8, 8:30.

THE COURT: Okay. That will be the date for sentencing.

MS. LUZAICH: Thank you.

THE COURT: Thank you.

MR. ABOOD: Thank you, Your Honor.

(Court concluded Friday, May 8, 2009, at 4:05 p.m.)

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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Michele Phelps — 1-25-10

MICHELE PHELPS, TRANSCRIBER — DATE

JOC

FILED
OCT 1 3 2009
CLERK OF COURT

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN D. PORTER
aka Jug Capri Porter
#1682627

Defendant.

CASE NO. C174954

DEPT. NO. VI

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony) in violation of NRS 205.060, 193.165, COUNT 2 – ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 193.330, 200.380, 193.165, COUNT 3 – MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crime of COUNT 3 – SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030, 193.165;

thereafter, on the 30TH day of September, 2009, the Defendant was present in court for sentencing with his counsel JOSEPH A. ABOOD, Deputy Special Public Defender and CURTIS BROWN, Deputy Special Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said crime as set forth in the jury's verdict and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee including testing to determine genetic markers, $425.00 Resstitution and $2,421.50 Extradition Costs, the Defendant is SENTENCED as follows: TO LIFE with a MINIMUM parole eligibility after ONE HUNDRED TWENTY (120) MONTHS plus a CONSECUTIVE term of LIFE with a MINIMUM parole eligibility after ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC), with THREE THOUSAND THREE HUNDRED THIRTY-EIGHT (3,338) DAYS credit for time served. COUNTS 1 & 2 – NOT GUILTY

DATED this 12 day of October, 2009.

ELISSA CADISH
DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN D. PORTER A/K/A JUG CAPRI PORTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60843

FILED

FEB 13 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on February 10, 2012, more than one year after issuance of the remittitur on direct appeal on December 3, 2010. Porter v. State, Docket No 54866 (Order of Affirmance, November 8, 2010). Thus, appellant's petition was untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See NRS 34.726(1).

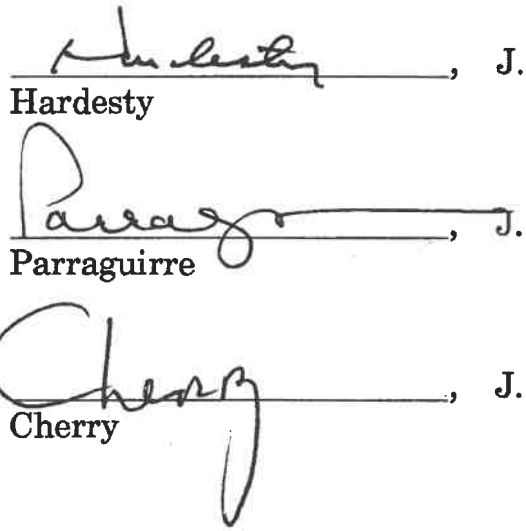
[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

First, appellant claimed he had good cause to excuse the delay because he has a low IQ and is uneducated. This failed to demonstrate good cause for filing an untimely post-conviction petition. See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition).

Second, appellant appeared to claim he had good cause because he did not learn of the denial of his direct appeal in a timely manner, as he asserted he had poor communication with his appellate counsel and learned of the denial of his direct appeal from attorneys representing him for a different matter. Appellant provided no facts as to when he learned of the denial of his direct appeal or how his ability to file a timely post-conviction petition for a writ of habeas corpus was affected by any lack of communication with appellate counsel. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (stating that bare or naked claims which are unsupported by any specific factual allegations are insufficient to demonstrate that a petitioner is entitled to relief). Accordingly, appellant failed to demonstrate that this claim should provide good cause to excuse the procedural time bar. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, the

district court did not err in denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]



_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Elissa F. Cadish, District Judge
Justin D. Porter
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN D. PORTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64996

FILED

JUN 11 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on August 26, 2013, more than two years after issuance of the remittitur on direct appeal on December 3, 2010. *Porter v. State*, Docket No. 54866 (Order of Affirmance, November 8, 2010). Thus, appellant's petition was untimely filed. *See* NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.[2] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally

[1]This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. *See Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[2]*Porter v. State*, Docket No. 60843 (Order of Affirmance, February 13, 2013).

barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Appellant claimed that he had good cause because the case was difficult and complex to understand and he only learned when he looked at his paperwork that his trial counsel made an improper argument during trial. Appellant's lack of legal knowledge is not good cause. *See Phelps v. Director, Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988). Appellant's claim that his trial counsel made an improper argument during trial was reasonably available to be raised in a timely petition as appellant was present during trial and aware of the argument made by counsel at that time. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Because appellant failed to demonstrate good cause, we conclude that the district court did not err in denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Elissa F. Cadish, District Judge
Justin D. Porter
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUSTIN D. PORTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70206

FILED

AUG 17 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Justin Porter contends the district court erred in denying his habeas petition filed on October 26, 2015, as untimely and successive because he made a colorable showing of actual innocence. In his petition, Porter claimed he was actually innocent of second-degree murder because he was accused of committing open murder under the felony-murder rule and he was acquitted of the underlying felonies.

A colorable showing of actual innocence may overcome procedural bars under the fundamental miscarriage of justice standard. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "'Actual innocence' means factual innocence, not mere legal insufficiency." *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks and brackets omitted). "'To be credible,' a claim of actual

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

innocence must be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schulp v. Delo*, 513 U.S. 298, 324 (1995). And, to demonstrate actual innocence of the underlying crime, the petitioner must show "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition.'" *Id.* (quoting *Schulp*, 513 U.S. at 327).

The district court found Porter's actual-innocence claim was a legal claim, it had nothing to do with him being innocent based on the facts, and it was not supported with newly discovered evidence. The district court's factual findings are supported by the record and we conclude the district court did not err in denying Porter's procedurally-barred petition. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

[2]To the extent Porter claims the district court erred by failing to consider his reply brief, we conclude he has not demonstrated error. Porter was not allowed to file the additional pleading because the State did not move to dismiss his petition. *See* NRS 34.750(4) & (5).

cc: Hon. Elissa F. Cadish, District Judge
Justin D. Porter
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

27

FILED
JUL 05 2019
CLERK OF COURT

Case No. C-174954
Dept. No. 6

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

Justin Porter
Petitioner,

v.

Brian Williams - Warden
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

A-19-798035-W
Dept: VI

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

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

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

PETITION

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

RECEIVED
JUL 05 2019
CLERK OF THE COURT

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

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

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

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

.....N/A.....

.....

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

.....

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: N/A

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

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

(a) (1) Name of court: 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 Laws 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 Proceedures.

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

Assistance of TRIAL and Appellate Counsel / See MEMORANDUM Attached hereto

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

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

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

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

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

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

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: Petitioner is actually Innocent. Denial of Due Process of Law. 14th Amendment to the U.S.C., and Article one sec. 8 of the Nevada state constitution

Supporting FACTS (Tell your story briefly without citing cases or law.): See Petitioners Memorandum with Points and Authorities, Attached to this Petition.

(b) Ground TWO: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. (Denial of the 6th Amendment to the U.S.C.)

Supporting FACTS (Tell your story briefly without citing cases or law.): See Petitioners MEMORANDUM with POINTS AND AUTHORITIES Attached to this Petition.

(c) Ground THREE: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. (Denial of the 6th Amendment to the U.S.C.)

Supporting FACTS (Tell your story briefly without citing cases or law.): See Petitioners MEMORANDUM with Points and Authorities Attached to this Petition.

(d) Ground FOUR: PROSECUTORIAL MISCONDUCT. (violating the 5th, 6th, AND 14th Amendment(s) to the U.S.C.)

Supporting FACTS (Tell your story briefly without citing cases or law.): See Petitioners MEMORANDUM with Points AND Authorities Attached to this Petition.

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.

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the 28 day of the month of June, 2019.

*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number C-174954 Does not contain the social security number of any person.

*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

CERTIFICATE OF SERVICE BY MAIL

I, Justin Porter, hereby certify pursuant to N.R.C.P. 5(b), that on this 28 day of the month of June, 2019, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

D.W. Neven, Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

*

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

* Print your name and NDOC back number and sign

JUSTIN PORTER #1042449
P.O. Box 650
INDIAN SPRINGS, NV. 89070

8th Judicial District Court
CLARK County, Nevada

JUSTIN PORTER
Petitioner

CASE NO. C174954
DEPT. NO. 8

-VS-

WARDEN - BRIAN Williams
Respondent(s).

"MEMORANDUM WITH POINTS AND AUTHORITIES"

COMES NOW, Petitioner, AFORE-named, for the above captioned CAUSE, Who Submits this MEMORANDUM IN SUPPORT of his ACCOMPANYING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION). PURSUANT to N.R.S. CHAPTER 34., ARticle 1. sec., 5 AND ARTICLE 1. Sec., 8 of the NEVADA CONSTITION. The Fifth, Sixth, AND Fourteenth Amendment to the UNITED STATES CONSTITUTION, ARTICLE 1. sec., 9 AND ARTICLE 6 PARAGRAPH 2, OF the UNITED STATES CONSTITUTION, AND the Eighth Judicial DISTRICT COURT RULE(S). Attached Points AND AUTHORITIES, Exhibits, AFFidavits, AND All PAPERS, PLEADINGS AND Documents ON file herein

DATED This 28 DAY OF June, 2019

Submitted by: Justin Porter

POINTS AND AUTHORITIES

A. Procedural Background, in Pertinate Part(s).

ON OR about the 26 DAY of APRIL, 2001, Petitioner WAS Illegally charged with murder. ON OR about the 30 DAY of APRIL, 2009 the STATE filed it's Third Amended Information, charging Petitioner with: COUNT 1- Burglary while in Possession of A Deadly WEAPON; COUNT 2- Attempt Robbery with use of A Deadly WEAPON, AND COUNT 3- murder with use of A Deadly WEAPON.

ON MAY 8, 2009, A JURY Illegally found Petitioner Guilty of Count 3, of Second Degree murder with use of A Deadly WEAPON. Petitioner WAS found Not Guilty of COUNTS 1 AND 2.

ON September 30, 2009 This COURT SENTENCED Petitioner to the Nevada DEPARTMENT of CORRECTIONS for 120 months to life, Plus A CONSECUTIVE term of 120 months to life for the use of A Deadly WEAPON, with 3,338 days credit for time Served. Judgment of CONVICTION WAS filed on Oct. 13, 2009.

Petitioner Filed NOTICE of APPEAL ON Oct. 29, 2009, on NOV. 8, 2010 The NEVADA SUPREME COURT AFFIRMED the Judgment of CONVICTION, AND ISSUED it's Remittur ON December 3, 2010.

ON Feb. 10, 2012 Petitioner filed his First Pro. Per. Post-conviction Petition for Writ of Habeas corpus. The state Filed it's Response and motion to Dismiss on March 21, 2012. On April 23, 2012 the State District court Denied Petitioners' Petition as untimely. Findings of fact, conclusions of law and order were filed on June 11, 2012. Petitioner Appealed the denial of his first Petition on May 8, 2012 and on March 11, 2013, the Nevada Supreme Court Affirmed the Denial. Remittitur issued on March 19, 2013.

On August 26, 2013 Petitioner filed his second Pro. Per. Post-conviction Petition for Writ of Habeas corpus, and a separate motion to Appoint Counsel. The State filed it's Response and motion to Dismiss on Jan. 3, 2014. On Jan. 13, 2014, the court denied Petitioner's Second Petition as Time-barred. Petitioner filed Notice of Appeal from the Denial of His Second Petition on Feb. 7, 2014 and on June 11, 2014 the Nevada Supreme Court Affirmed the denial, Remittitur issued on July 15, 2014.

On Oct. 26, 2015 Petitioner filed His Third Pro. Per. Post-conviction Petition for Writ of Habeas Corpus. The state filed it's Response and motion to Dismiss on Jan. 26, 2016. On March 10, 2016 the court Denied Petitioners Petition. On April 20, 2016 Petitioner filed Notice of Appeal. Pro. Per. and on Aug. 17, 2016, court of Appeal(s)

for the STATE OF NEVADA, ISSUES it's ORDER OF AFFIRMANCE.

That ON OR about the 31 DAY OF December, 2018 Petitioner met AN INMATE, who Prepared the INSTANT Petition FOR Writ of Habeas CORPUS, POST-CONVICTION.

DATED this 28 DAY of June, 2019.

BY: Justin Porter 6/28/2019
JUSTIN PORTER - Petitioner - PRO. PER.

POINTS AND AUTHORITIES

B. GROUNDS AND SUPPORTING FACT(s).

THE EVIDENCE OF ACTUAL INNOCENCE AND INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL REFERRED TO AND EVIDENCED HEREIN CONSTITUTES "GOOD CAUSE" TO OVERCOME ANY PROCEDURAL BAR., to wit:

1. N.R.S. 34.726 states the following:

(1.) unless there is good cause shown for delay, a petition that challenges the validity of a judgement or a sentence must be filed within one (1) year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after the Supreme court enters it's remittitur.

For the purpose of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court [that]:

(A) the delay is not the fault of the petitioner; AND

(b)... dismissal of the petition will unduly prejudice the petitioner.

The precedent for which to determine whether the one (1) year filing time for this petition should be waved pursuant to N.R.S. 34.726 has been decided and given by the Supreme court of our state, in Pellegrini V. State, 117 Nev. 860 (2001).

wherein it was rightly reasoned that:

TO Show good CAUSE, the Petitioner must demonstrate that AN impediment external to the defense Prevented him From raising his claims earlier. (see Pellegrini V. State at 863) AND See MARTINEZ V. RYAN, 132 S.Ct. 1309, 182 L.Ed 2d. 272, 80 U.S.L.W 4216 (2012)

Wherein, ON MARCH 20, 2012, the UNITED STATES SUPREME COURT decided MARTINEZ V. RYAN, SUPRA,

Therein the COURT stated:

"... when A State Requires A Prisoner to RAISE AN INEffective-Assistance-of-TRIAL-COUNSEL CLAIM IN A COLLATERAL Proceeding, A Prisoner MAY establish CAUSE FOR A default of AN INEffective-Assistance-CLAIM IN TWO CIRCUMSTANCES ONE IS where the State COURTS did NOT APPOINT COUNSEL IN the INITIAL-REVIEW COLLATERAL Proceeding FOR A claim of INEffective-ASSISTANCE AT TRIAL." id. 132 S.Ct. AT 1318, 182 L.Ed. 2d. AT 286 (EMPHASIS ADDED).

AS NOTED ANTE, Petitioner WAS NOT APPOINTED COUNSEL IN His INITIAL-REVIEW COLLATERAL Proceeding, despite His efforts. Petitioner So Submits. See WALKER V. McCAUGHTRY, 72 F. SUPP. 2d. 1025 (E.D. Wis. 1999) (DENIAL of APPEALATE COUNSEL Resulted IN AUTOMATIC PREJUDICE AND REQUIRED REINSTATEMENT

of State Appeal); Wisc ex.Rel Toliver V. McCaughtry, 72 F.Supp. 960 (ED. Wisc. 1999) (Denial of Right to Counsel on the first direct Appeal WARRANTED Conditionally granting The WRIT and ORDERING That Toliver be Released within 120 days unless the State Re-instates The Direct Appeal and Providing Toliver with Appointed Counsel (within 120 days). See Also, U.S. V. Wadsworth, 830 F.2d. 1500 (9th cir. 1987) (The TRIAL Court's denial of the defendants Rights to Counsel [redacted], is Per Se Reversal).

Nevertheless, failure to Properly Present constitutional Issues by Habeas Counsel will Also Constitute INeffective Assistance of Counsel as well. See GRIFFIN V. Delo, 961 F.2d 793, 794 (8th. Cir. 1992)

DEMONSTRATION OF A SUBSTANTIAL CLAIM (PREJUDICE)

In MARTINEZ, SUPRA, the Court Stated:

"To overcome the default, A Prisoner must Also demonstrate that the underlying ineffective-Assistance-of-TRIAL-Counsel Claim is a Substantial one, which is to say that the Prisoner must demonstate that the Claim has Some merit. (citation Omitted)" id. 132 S.Ct. At 1318, 182 L.Ed. 2d, At 286

IN Douglas V. California, 372 U.S. 353, 357, 85 S.Ct. 814, 816 (1963) The Court stated:

"When an indigent is forced to run this gantet of a preliminary showing of merit, the right to appeal does not comport with the fair procedure!" id.

Martinez also acknowledges that the initial-review collateral proceding is in many ways the equivalent of a prisoners first appeal (as a right (direct appeal), as to the precluded ineffective-assistance claim. id. 132 S.Ct. at 1315-1317.

Petitioner believes that the required showing of "some merit" clearly run afoul of the authority of Douglas, regarding his right to an appeal on his ineffective-assistance-of-trial-counsel--claims.

Petitioner, further states that the state scheme of precluding ineffective assistace of counsel claims on direct appeal, heightening the standard to present and obtain counsel in the initial-review collateral proceeding, is contrary to the jurisprudence underlying his right to appeal, (direct appeal), noted in Douglas, ante, which does not comport with a fair procedure.

Again; Walker v. McCaughtry, 72

F. Supp. 2d 1025, ____ (ED. Wisc. 1999) (Denial of Appellate Counsel Resulted in Automatic Prejudice and Required Reinstatement of State Appeal); Wisc. Ex Rel Toliver Vs. McCaughtry, 72 F. Supp. 2d. 960 ____ (ED. Wisc. 1999) (Denial of the Right to Counsel on the first direct Appeal warranted conditionally granting the Writ and ordering that Toliver be Released within 120 days unless the State Reinstates the direct Appeal and Providing Toliver with appointed Counsel within 120 days). See Also, U.S. V. Wadsworth, 830 F.2d. 1500 ____, (9th. Cir. 1987) (the Trial Courts Denial of the defendants Right to Counsel is Per se Reversal).

In the Case now at bar, the Petitioner, "Porter", was found Guilty of 2nd Degree murder, on May 8th. 2009, and more than one (1) Year has Passed from his being so convicted, until the filing of this Petition, and the Instant Petition is an Successive Petition. However... good Cause exists, for the delay of over a Year, and for the Successive Petition, because:

The Cause of this Action is based upon

Petitioners Actual Innocence of 2nd. Degree murder and... Ineffective Assistance of trial Counsel;

That Dismissal of this Petition will unduly Prejudice the Petitioner, [Porter], because:

If this Petition is dismissed, Porter will be Convicted wrongfully, for crimes he is "Actually Innocent" of, and will Never have had an opportunity to Show the Court his Innocence.

That Petitioner's Conviction will be the Result of Ineffective Assistance of Trial Counsel.

Wherein the In Competance of Trial Counsel did ACT AS AN Impediment External to Petitioners defense, did deny Petitioner's Theory Of His defense to be Presented to the Jury, in a Jury Instruction, (Involuntary Manslaughter)

That If this Petition is Dismissed Petitioner would Not have the Opportunity

to Present the AFORE-STATED CLAIMS to the COURT, AND... SUCH PREJUDICE IS BENEATH the DIGNITY OF this HONORABLE COURT to CONDONE; AND;

Petitioner's CONVICTION will be the RESULT of MANIFEST INJUSTICE to Petitioner, AS thier IS A SUFFICIENT BASIS to show GOOD CAUSE to EXCUSE the "PROCEDURAL BAR(S)" OR CONCLUDE that A "FUNDAMENTAL MISCARRIAGE OF JUSTICE, will OCCURE From the FAILURE to CONSIDER his CLAIMS FOR RELIEF ON the MERITS, PER. RULE ANNOUNCED IN PELLEGRINI V. STATE, 117 NEV. 860 (2001) AND MURRAY V. CARRIER, 477 U.S. 478, 489 91 L.Ed. 2d. 397, 106 S. Ct. 2639 ... AND SEE MARTINEZ V. RYAN, 132 S. Ct. 1309, 182 L.Ed. 2d. 272, 80 U.S.L.W. 4216 (2012).

N.R.S. 34.810 (3) STATES IN PART: PURSUANT to SUBSECTIONS 1 AND 2 [34.810], the PETITIONER HAS the BURDEN of PLEADING AND PROVING SPECIFIC FACTS that DEMONSTRATE: (A) GOOD CAUSE FOR... PRESENTING the CLAIM AGAIN; AND (b) ACTUAL PREJUDICE to the PETITIONER ...

In the foregoing Petition, Porter is now stating a colorable claim of actual innocence. The Supreme Court of our state has recognized that the standards in N.R.S. 34.810(3)(a)(b), above, can be met where the Petitioner "makes a colorable showing that he is actually innocent of the crime". (see Pellegrini v. State, id; at 863).

more over, binding federal authority, as related by the Supreme Court of our United States in Bousely v. United States, citing Murray v. Carrier, Holds:

Procedural hurdles can be overcome if the Petitioner can demonstrate either, "cause and actual prejudice", e.g.; Murray v. Carrier, or that He is "actually innocent". (see Bousely v. United States, 523 U.S. 614 (1998).

Accordingly, it is clear by demonstrations above that:

Petitioner's claims concerning ineffective assistance of trial counsel, are actionable because they are being raised herein as a direct result of being denied appointed counsel in his initial-review-collateral

Proceding, for a claim of Ineffective Assistance at Trial, MARTINEZ V. RYAN, supra

Petitioner's claims of Actual Innocence are actionable because they are beyond Procedural Bars pursuant to state and federal binding Authorities.

These claims should be considered herein on there merits without regard to ANY Procedural bar. ("Truth is not only violated by falsehood; it may be equally outraged by silence".)(Henri Fredric Amiel: Swiss Philosopher, Amiel's Journal, 1883".)

POINTS AND AUTHORITIES

B. GROUNDS AND SUPPORTING FACTS

GROUND ONE: Petitioner is actually Innocent. Denial of Due Process of Law, 14th Amendment to the U.S.C., and Article one sec.; 8 of the Nevada Constitution.

Supporting facts:

Petitioner Asserts that there is no evidence in the Instant Case to Support His unlawful Conviction for second degree murder.

That He, [Petitioner] is actually and factually Innocent of the complained of second degree

murder CONVICTION. That A CURSORY GLANCE into the Record of this CASE will DEMONSTRATE, _____, that Your Petitioner did not EXERCISE felonious INTENT, NOR willful, DELIBERATE, NOR PREMEDITATION to murder, NOR MALICIOUS INTENT, NOR malice AFORETHOUGHT, The ESSENTIAL ELEMENTS AND... NECESSARY GRAVEMAN to obtain AND SUSTAIN A SECOND DEGREE MURDER CONVICTION, [LAWFULLY], see Due Process of LAW CLAUS(ES) of the 5th AND 14th AMENDMENT(S) to the UNITED STATES CONSTITUTION. AND See IN: Voluntary Statement of Petitioner: [JUSTIN PORTER], ON file with this COURT, ENTERED into the Record of this CASE AT TRIAL, MARKED AS EXHIBIT # 104, ATTACHED HERETO BY REFERENCE, THEREIN, Petitioner ASSERTED, IN His IN-VOLUNTARY STATEMENT that "He ENTERED A APARTMENT, believed by Himself, to be UNOCCUPIED, while ATTEMPTING to EVADE Police, WHEN out of the DARK, A PERSON SUDDENLY ADVANCED towards Him, FRIGHTENING Petitioner, AND CAUSING Petitioner to Shoot his FIREARM, out OF PURE FEAR FOR His SAFETY. See BAILEY V. STATE, 100 NEV. 562, 688 P.2d. 320; 1984 NEV. LEXIS 424 NO. 14827 OCT. 4, 1984 IN BAILEY SUPRA, The HIGH COURT OF OUR GREAT STATE OF NEVADA, RIGHTLY

Reasoned that "Involuntary manslaughter is by definition an unintentional killing". see N.R.S. 200.070; See Also Parson Vs. State, 74 Nev. 302, 329 P.2d. 1070 (1958). is That before this Honorable Court is an unlawful Conviction for Second degree murder, wherein all the evidence Adduced at Trial Supported ONLY A conviction for Involuntary murder, Thus Giving Rise to Petitioners Lawful claim(s) of Actual and Factual Innocent.

That this "WRIT" is the Proper Remedy For Petitioners Actual Innocent claim, Per. Snow V. Nevada, 105 Nev. 521 (1989)

That Although it has been more than 1 yr. since Petitioners Remittur was filed, And Petitioner's Instant Petition may be Considered Successive, The Procedural Hurdles Afore-cited, can be overcome [if] the Petitioner can demonstrate either "cause and Actual Prejudice", E.g.; Murray V. Carrier, 477 U.S. 478, 489, 91 L.Ed 2d. 397, 106 S.Ct. 2639 OR... that he is "Actually Innocent". Id.; At 496. Bousley V. United States, 523 U.S. 614 (1998).

Therefore in the Instant Case, A conviction obtained absent Constitutional Guarantees of the 6th Amendment to the United

states Constitution, I.E., EFFECTIVE Assistance of TRIAL and APPellate Counsel AND the 5th Amendment to the UNITED STATES Constitution, AND the 14th amendment to the United States CONSTITUTION, the Due Process of LAW Clause(s), I.E., Actual INNOCENCE, "THEN"... Provides A WAIVER FOR BOTH, The time AND Successive, PROCEDURAL BAR(S).

IN Bousley, the Petitioner Plecl to A COUNT OF USING AND CARRYING A GUN during AND IN relation to A drug trafficking crime, UPON the REINTERPRETATION, of this law; IN Bailey Vs. UNITED STATES, 516 U.S. 137 (1995). Defendants' PLEA WAS Allowed to be set Aside, despite the FACT that Such AN ACTION would be Procedural BARRED. [The] Supreme Court stated that Petitioner's claim MAY still be reviewed IN this Collateral Proceeding IF he CAN establish that the Constitutional ERROR has; "Probably Resulted in the Conviction OF ONE Who is ACTUALLY INNOCENT", Murray V. Carrier, 477 U.S. 496.

To establish Actual INNOCENCE, Petitioner must demonstrate that "IN light of All the evidence, it is more likely than NOT that NO reasonable Juror would have CONVICTED him". Schup Vs Delo, 513 U.S. 298 327-328, 130 L. Ed 2d. 808, 115 S.Ct. 851 (1995). (Quoting friendly; is

INNOCENCE irrelevant Collateral Attack ON CRIMINAL Judgment(S) 38 U. Chi. L. Rev. 142, 160 (1970).

IN that CASE the Supreme COURT held there WAS NO Procedural default IF, good CAUSE existed, OR there WAS error that resulted IN the CONVICTION OF AN INNOCENT PERSON.

FINALLY, There IS NO EVIDENCE to SUPPORT the COMPLAINED-OF, UNLAWFUL CONVICTION FOR SECOND degree murder. To the CONTRARY the EVIDENCE adduced AT TRIAL CLEARLY ONLY SUPPORTED A INVOLUNTARY MANSLAUGHTER CONVICTION, I.E., "A Killing without MALICE AFORETHOUGHT."

SEE AGAIN, IN-VOLUNTARY STATEMENT OF PETITIONER, [JUSTIN PORTER], ON file WITH this COURT, ENTERED INTO the Record OF this CASE AT TRIAL, MARKED AS exhibit # 104, Attached Hereto bY Reference.

The administration OF JUSTICE, will REQUIRE that the INSTANT CONVICTION be VACATED, OR IN the ALTERNATIVE, REMAND the SAME FOR AN "EVIDENTIARY HEARING", to give Petitioner A LAWFUL OPPORTUNITY to Prove the FACTS SUPPORTING his claim(s).

POINTS AND AUTHORITIES

B. GROUNDS AND SUPPORTING FACTS

GROUND TWO: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. (Denial of the 6th Amendment to the U.S.C.)

SUPPORTING FACTS.

The HIGH COURT... OF OUR Great COUNTRY, HAS ARTICULATED the meritorious /ineffective ASSISTANCE OF COUNSEL CLAIM HAS TWO COMPONENTS; FIRST, the Petitioner must Show that the Counsel's PERFORMANCE WAS deficient, falling well below A Professional Standard of Reasonableness... Second, the Petitioner must Show that the deficient PERFORMANCE PreJudiced Petitioner.

ON the deficiency PRONG, because OF the difficulties inherent IN MAKING the evaluation, A court must indulge A strong Presumption that COUNSEL'S Conduct falls within the wide RANGE OF REASONABLENESS, Professional ASSISTANCE" I.E; The Petitioner must OVERCOME the Presumption that under the CIRCUMSTANCES, the CHALLENGED ACTION(S) might be Considered Sound strategy.

" HERE THE FACT(S), AS ALLEGED BY PETITIONER, OVERCOME THAT PRESUMPTION".

Id, EST;

A. Petitioner's Attorney(s) of Record, CLARK COUNTY Public Defender Philip J. Kohn, did, by and through his DeputY(S), CURTIS BROWN, ESQ, AND

Joseph Abood, Esq, deliberately, and knowingly, act as an impediment external to Petitioner's defense, did Refuse and or failed to Instruct the Jury on Petitioners Theory of the case.

That the failure of trial Counsel to Profer The Jury Instruction of/on In Voluntary manslaughter, IS Ineffective Assistance of Trial Counsel.

Your Petitioner maintains that there is nothing Professional or strategic about failing and or Refusing to Profer Petitioners Theory of the case, to the Jury in an Jury Instruction, which was/is Supported by Convicing evidence in the case. (see Petitioner's Justin Porter's, IN-VOLUNTARY STATEMENT).

On the Pre Judice Prong, The facts Alleged by Petitioner herein, Show that there is A Reasonable Probability that but for Counsel's unProfessional, unethical, deficient, In Effective Assistance of counsel, the Results of the Proceedings would have been different.

Petitioner Asserts that He is actually and factually Innocent of Second Degree murder and would not have the Illegal Conviction Complained of Herein, absent Ineffective Assistance of Trial Counsel, see Williams V. State, 99 Nev. 530; 665 P.2d. 260; 1983 Nev. Lexis 481 No. 13911 June 22, 1983.

Petitioner PRAYS this Honorable Court VACATE the Illegal Conviction(s) complained of Herein, or in the Alternative, Remand this Cause for an Evidentiary Hearing, to Give Petitioner a lawful opportunity to Prove the facts Supporting His claims.

B. Petitioner's Attorney(s) of Record, Clark County Public Defender, Philip J. Kohn, did, by and through his Deputy(s), Curtis Brown, Esq., and Joseph Abood, Esq., deliberately, and knowingly, Act as an impediment external to Petitioner's defense, did Relieve the State of it's Duty, to Prove Petitioners Guilt of second Degree murder, beyond A Reasonable Doubt, by conceding to, and Directing the Jury to find Petitioner Guilty of second Degree murder. See Trial Transcripts, Day 5 of Trial, Pg. No. 33 Line 16 and see also Pg. No. 43 Line(s) 3 thru 5., Attached Hereto by Reference. Thus... Petitioner was deprived of Due Process of Law and a Fair Trial. That the Performance evidenced Herein by Petitioners Trial Counsel, Philip J. Kohn, His Deaties, Fall well below an objective standard of Reasonableness, and but for the complained

OF UNPROFESSIONAL, INEFFECTIVE ASSISTANCE of COUNSEL, SUFFERED bY Petitioner DURING His TRIAL, the OUTCOME OF TRIAL WOUID HAVE BEEN DIFFERENT, That NO RATIONAL TRIER OF FACT WOULD HAVE FOUND Petitioner GUILTY beyound A REASONABLE Doubt of second Degree murder.
Petitioner PRAYS this HONORABLE COURT VACATE The ILLEGAL CONVICTION(S) COMPLAINED OF HEREIN, OR IN the ALTERNATIVE, REMAND this CAUSE FOR AN EVIDENTIARY HEARING, to GIVE Petitioner A LAWFUL OPPORTUNITY to Prove the FACTS SUPPORTING His CLAIMS.

C. Petitioner's ATTORNEY(S) of Record, CLARK COUNTY Public Defender, Philip J. KOHN, did bY AND through his DEPUTY(S), CURTIS BROWN, ESQ. AND JOSEPH ABOOD, ESQ., deliberatelY, AND KNOWINGLY, ACT AS AN IMPEDIMENT EXTERNAL to Petitioner's defense, did Relieve/failed to SubJect Prosecutions CASE to A MEANINGFUL Adverse TESTING Process. See TRIAL TRANSCRIPTS, DAY NO. 5, FridaY, MAY 8th, 2009, PG. NO. 33 LINE NO. 16 "<u>They SUPPORT second degree murder</u>". AND ALSO see TRIAL TRANSCRIPTS, DAY NO. 5, FridaY, MAY 8th, 2009 PG. NO. 43, LINE(S) 3 thru 5" <u>Porter deserves A Thorough deliberation Process</u> AND AS TRAGIC

As this is, the facts support second degree murder and second degree murder should be your verdict."

See U.S. V. CRONIC, 466 U.S. 648, 80 L.Ed. 2d. 657, 104 S.Ct. 2039 (1984).

In CRONIC supra, the High Court stated that "Trial Counsel's failure to subject the Prosecution's case to a meaningful adversary testing process may constitute a denial of Due Process and establish a Per se violation of defendant's right to effective Assistance of Counsel."

Further, Defense Counsel's Performance was not only ineffective, but Counsel's abandonment of the required duty of loyalty to His client was also abridged; Counsel did not simply make poor strategic or tactical choices; He acted with Reckless disregard for His Clients best interest, and ... There is because of which, no need for a showing of Prejudice as ineffective Assistance of Trial Counsel has been/is/was herein the Record of this cause, established Per se.

The same requires reversal of conviction, or in the Alternative, an Evidentiary Hearing wherein Petitioner can establish His factual allegations.

D. Petitioner's Attorney(s) OF Record, Clark County Public Defender, Philip J. Kohn, did by and through his Deputy(s), Curtis Brown, Esq. AND Joseph Abood, Esq. deliberately, AND Knowingly, Act AS AN IMPEDIMENT External to Petitioner's DEFENSE. COUNSEL'S Failed to PROTECT and PRESERVE Petitioner's 4th, 5th 6th AND 14th U.S. Const. Amendment Rights, When Counsel's ALLOWED the prosecution to use inadmissible evidence, Petitioner's INVOLUNTARY STATEMENT, the coerced confession is the result OF A warrantless arrest OF MR. Porter your Petitioner.

ON the day of August 12, 2000, Chicago Police Dept ARRESTED the Petitioner at his home, by violating Petitioner Fourth Amendment Right. Because OF the Police entered Petitioner's dwelling without A WARRANT the Petitioner. was "ILLEGALLY SEIZED" Without Probable Cause. PAYTON V. NEW YORK, 445 U.S 573, 63 L Ed 2d 639, 100 S Ct 1371 (1980). The arrest warrant Procedure Serves to insure that the deliberate, impartial Judgment of a Judicial officer will be interposed between the Citizen and the Police, to assess the weight and credibility of the information

which the complaining officer adduces as Probable Cause. A vague suspicion cannot be transformed into Probable cause For arrest by reason OF the suspect's ambiguous conduct which the arresting officers themselves have Provoked. The essence of the constitutional Provision Prohibiting unreasonable searches and seizures is not merely ... -that evidence so acquired shall not be used before a court but that it shall not be used at all. The Rule excluding evidence obtained by an unlawful search bars from trial not only Physical, tangible materials obtained either during or as a direct Result of an unlawful invasion, but also verbal evidence, such as declarations made by accused. WONG SUN V. UNITED STATES, 371 US 471, 9 L Ed 2d 441, 83 S Ct 407 (1963); ARTERBURN V. STATE, 111 Nev. 1121; 901 P.2d 668, (1995).

Petitioner PRAys this Honorable Court Vacate the illegal conviction(s) complained of Herein, OR in the Alternative, Remand this cause for an Evidentiary Hearing, to give Petitioner A lawful opportunity to PROVE the FACTS ... supporting his claims.

POINTS AND AUTHORITIES

B. GROUNDS AND SUPPORTING FACTS

GROUND THREE: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. (DENIAL OF THE 6th Amendment to the U.S.C.)

SUPPORTING FACTS.

Herein Your Petitioner ASSerts that Appellate's counsel, MR. Howard S. BROOKS, Rendered INEFFECTIVE ASSISTANCE OF COUNSEL, ON APPEAL / DIRECT APPEAL. IN degradation to long standing, well established law. See EVITTS V. LUCEY, 469 U.S. 387, 83 L.Ed. 2d. 821, 105 S.Ct. 830 (1985).

That MR. Howard S. BROOKS. (Appellate Counsel), did Refuse and/or did fail to RAISE ISSUE(s) OF Prosecutorial misconduct in Petitioner's DIRECT APPEAL.

That before this HONORABLE COURT is A "VAST" AMOUNT of evidence, Testimonial evidence, witnessing the UN-questionable FACT(s) that the Prosecution did ACQUIRE admission(s) / confession(s), from "Petitioner" / JUSTIN PORTER, who, At that time was Just 17yrs. old, who was/is "BORDERLINE RETARDED", UNDENIABLY "severely IMPAIRED", that He, "DR. PAGLINI", (Forensic Psychologist Also administered Achievement tests to "PORTER" AND discovered his Reading Skills were equivalent to A Second grader's Skills. See transcripts OF HEARING to SUPPress admissions OR confessions,

(VII:1403) AND...
At SAME, AFORE-SAID HEARING(S), DR. GREGORY BROWN, A FORENSIC PHYCHIATRIST, TESTIFIED THAT, AFTER EVALUATING THE TESTS PERFORMED BY DR. PAGLINI AND THE TRANSCRIPTS OF THE INTERVIEWS PORTER HAD WITH POLICE, AND THE TESTS HE ADMINISTERED TO ASCERTAIN WHETHER PORTER COULD COMPREHEND AND UNDERSTAND MIRANDA RIGHTS, WHICH WERE ALLEGEDLY ADMINISTERED TO HIM (VII:1426), DR. BROWN OPINED THAT PORTER HAD "SIGNIFICANT DIFFICULTIES WITH VOCABULARY, READING, VEBAL PROCESSING" (VII:1433) DR. BROWN CONCLUDED BY STATING, "TO A REASONABLE DEGREE OF PSYCHIATRIC CERTAINTY IT'S MY PROFESSIONAL OPINION THAT HE [PORTER] WOULD HAVE HAD SIGNIFICANT DIFFICULT UNDERSTANDING THE MIRANDA RIGHTS, BOTH WITH REGARDS TO THE VOCABULARY AND THE COMPREHENSION." (VII:1434)

HERE, YOUR PETITIONER DID NOT UNDERSTAND HIS MIRANDA RIGHTS, THEREFORE HE COULD NOT MAKE A "VOLUNTARY, KNOWING, AND INTELLIGENT" WAIVER OF THOSE RIGHTS. SEE UNITED STATES V. MALE JUVENILE, 121 F.3d. 34 (2d. CIR. NY 1997).

CLEARLY, THE "TOTALITY OF THE CIRCUMSTANCES" [TEST] SEE DAVIS V. UNITED STATES, 512 U.S. 452 (194). HAS BEEN ABANDONED AND... REDRESS OF THE SAME BY THE HIGH COURT

OF OUR GREAT STATE OF NEVADA, [IS], WAS, REQUIRED IN ORDER TO PRESERVE AND PROTECT OUR "FIFTH AMENDMENT PRIVILEGES AGAINST SELF-INCRIMINATION".

APPELLATE COUNSEL'S FAILURE TO RAISE AND ARGUE THE PROSECUTORIAL MISCONDUCT EVIDENCED HEREIN PETITIONERS UNLAWFUL CONVICTION ACQUIRED THROUGH PLAIN, OVERT VIOLATIONS OF THE 6th AND 5th AMENDMENTS TO THE U.S.C., IS THE PROXIMATE CAUSE OF THE ILLEGAL CONVICTION(S) AND/ SUBSEQUENT INSTANT PETITION FOR WRIT OF HABEAS CORPUS.

THAT A REVERSAL OF PETITIONERS CONVICTION(S) IS REQUIRED OR IN THE ALTERNATIVE, AN EVIDENTIARY HEARING, TO EXPAND/ THE RECORD, AND PROVE PETITIONERS FACTUAL ALLEGATIONS.

Further, Appellate Counsel is ALSO INEFFECTIVE ON APPeal, IN that [HE] Refused AND OR FAiled to RAISE AND ARGUE INEffective Assistance of trial Counsel Claims, Where TRIAL Counsel;

1. omitted his Professional Duty (ies), to Profer A Jury INSTRUCTION ON Petitioners Theory OF His Defense Which was/is INVoluntary manslaughter. See INVOLUNTARY STATEMENT OF Petitioner [Justin Porter], ON File with this Court, ENtered into the Record OF this Case At trial, MARKed as EXhibit #104, Attached Hereto by Reference, Therein Petitioner Asserted that "He Entered A Apartment, believed by Himself, to be unoccupied, While attempting to Evade Police, When out of the DARK, A person Suddenly Advanced towards Him, Frightening Petitioner, and Causing him to Shoot his firearm, out of Pure fear for his safety. The Same is an ARticulation by Petitioner OF INVoluntary manslaughter. See BAiley Supra, and See U.S. EX Rel. BARNARd V. LANE, 819 F.2d, 798 (7th. CiR. 1987).

2. Further, APPellate Counsel, MR. HOWARD S. BROOKS, Failed to Protect and Preserve Petitioners 4th, 5th, 6th and 14th U.S. Const. Amendment Rights,

When Appellate Counsel did Refuse and OR did Fail to raise Issue of Petitioner being "ILLEGALLY SEIZED" without Probable Cause, and the inadmissible evidence allowed to be used by prosecution by TRIAL Counsel's. ARTERBURN V. STATE, 111 Nev, 1121, 901 P.2d 668 (1995). Petitioner Prays this court Vacate the illegal convictions Herein, OR in the alternative, Remand this cause for an Evidentiary Hearing, to give Petitioner A lawful opportunity to Prove the Facts supporting his Claims.

3. Relieved the State OF its Duty to Prove to the Jury beyound A Reasonable Doubt that Petitioner was Guilty OF second degree MURDER, BY... CONCeding to, AND Directing the Jury to Find Petitioner Guilty OF Second Degree murder. See Trial Transcripts, Day NO. 5 OF TRIAL, Pg. NO. 33 Line NO. 16 ALSO see Pg. NO. 43 Line(S) 3 thrus, Attached Hereto by Reference.

That Appellant's Counsel's Failure to RAise INeffective Assistance OF trial Counsel Claim(s) ON

Direct Appeal Appeal Constitutes "cause" for Procedural default(s). see MARTINEZ SUPRA, Here, Petitioner Has Articulated several Colorable IN EFFective Assistance of Appellate Counsel Claims, which Are true and Entitle Him to, At a minimum, AN EVIDENTIARY Hearing wherein Petitioner CAN EXPAND the Record and Prove His Factual Allegations.

POINTS AND AUTHORITIES

B. Grounds and Supporting Facts,

GROUND FOUR: PROSECUTORIAL MISCONDUCT, (Violation(s) of the 5th 6th and 14th amendments to the U.S.C.)

SUPPORTING FACTS,

Herein Your Petitioner Asserts that the State of Nevada, it's Agent(s), The CLARK COUNTY DISTRICT ATTORNEY, His Agent(s), Det. Chris KATO, Det. BARRY JENSEN and Det. James LaRochelle, did unlawfully obtain, A "IN-VOLUNTARY" Statement/Admission(s)/Confession, From A 17 yr old, Mentally Challenged, Juvenile, under the threat of Death, Beating(s), Intimidation and through Coercion, In degradation to Fundamental Fairness, In Violation to Well established Law

See Holyfield V. Townsell, 101 Nev. 793, 711 P.2d. 845 (1985). And See Miranda V. Arizona, 384 U.S. 436 (1966).

That the Afore-stated Illegally obtained, Involuntary Statement/admission/confession, was taken From Your Petitioner August 12, 2000. Illegally Admitted into evidence, At Petitioners TRIAL ON DAY NO. 4.

That Appellate Counsel's failure to Raise and Argue Prosecutorial misconduct amounts to violations of the 6th amendment to the U.S.C., and the Due Process of law clause(s) of the 5th and 14th amendments to the U.S.C., Also see Affidavit of Petitioner Justin Porte, attached Hereto by Reference.

That Absent the complained of Ineffective Assistance of Appellate Counsel, the outcome of Petitioner's Direct Appeal would Have been different.

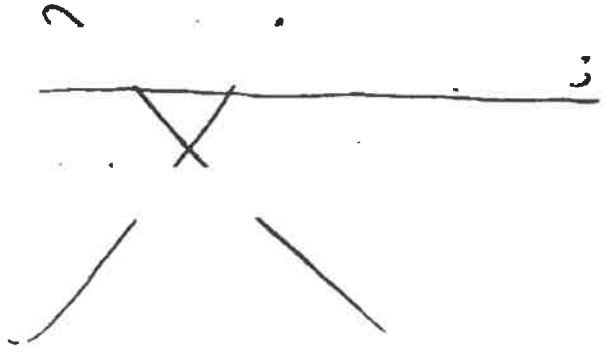
Here Your Petitioner Requests the Reversal of His unlawful Conviction, Acquired by unlawful means, OR in the Alternative, an order for an evidentiary Hearing, wherein the facts alleged Herein can be Proven.

Dated: ___/___/___

xx _____

2. Herein your Petitioner Asserts that the District Attorney Violated Petitioners 4th, 5th, 6th and 14th U.S. Const. Amendment Rights, When using at trial inadmissible evidence, Petitioners INVOLUNTARY STATEMENT Obtained by an unlawful Searches and Seizures. WONG SUN V. UNITED STATES, 371 US 471, 9L Ed 2d 441, 83 S Ct 407 (1963); ARTERBURN V. STATE, 111 Nev, 1121, 901 P.2d 668, (1995). Petitioner was arrested on the day of August 12, 2000, without A warrant.

Petitioner Prays this Honorable Court Vacate the illegal Conviction(s) complained of herein, OR in the alternative, Remand this Cause for an Evidentiary Hearing, to give Petitioner A lawful opportunity to Prove the FACTS Supporting his Claims.



B. GROUNDS AND SUPPORTING FACTS

GROUND FIVE: TRIAL COURT ABUSED IT'S DISCRETION, (violating the 5th AND 14th Amendment(s) to the U.S.C.)

SUPPORTING FACTS,

That ON OR about the 19th DAY of Dec. 2006, THE DISTRICT COURT, (8th Judicial DISTRICT COURT), CLARK COUNTY, NEVADA, DEPT. NO. Did, bY AND through the Honorable Judge JOHN McGROARTY, Abuse IT'S DISCRETION, Did UNLAWFULLY DENY Petitioner's "MOTION TO SUPPRESS DEFENDANTS CONFESSION(S), AND ADMISSION(S).

That At the time Petitioner IN-VOLUNTARILY GAVE the RESPONDENT(S), the ADMISSION(S), AND/OR CONFESSION(S) IN QUESTION, [HE], Petitioner WAS ONLY 17 YEARS old, A JUVENILE, NOT LEGALLY Able to WAIVE His MIRANDA Rights,

FURTHER...

AS EVIDENCED IN the INSTANT CASE, Your Petitioner WAS then AND WAS thereafter, 6 ½ YEARS LATER; "OPINIONED" BY EXPERT, DR. JOHN PAGLINI, A FORENSIC PSYCHOLOGIST, Who Tested Petitioner, THAT, "HE [PORTER] Had A VERBAL I.Q. of 78, which PLACED Him IN the 7th Percentile of People His AGE. (VII:1402). His Perception I.Q. WAS 80 (9th PERCENTILE) AND His Full SCALE I.Q. WAS

77 (6th Percentile). (VII:1402). DR. PAGLINI ALSO OPINED that "PORTER" WAS NOT MENTALLY RETARDED, but... HAd "SEVERELY IMPARED" SCORES which evidenced A BORDERLINE INTELLIGENCE.

EXPERT TESTIMONIAL EVIDENCE BY DR. GREGORY BROWN, A FORENSIC PSYCHIATRIST, who EVALUATED the tests PERFORMED bY DR. PAGLINI AND the transcripts of the INTERVIEWS "PORTER" HAd WITH POLICE. AND the tests He, DR. BROWN ADMINISTERED, to ASCERTAIN whether PORTER could COMPREHEND AND UNDERSTAND the MIRANDA RIGHTS which were ALLEGEDLY ADMINISTERED to PORTER. . . . I.E. DR. BROWN CONCLUDED bY STATING "TO A REASONABLE degree of PSYCHIATRIC CERTAINTY it's MY PROFESSIONAL OPINION that He [PORTER] WOULD HAVE HAD SIGNIFICANT difficult UNDERSTANDING the MIRANDA RIGHTS, BOTH with REGARDS to the VOCABULARY AND the COMPREHENSION"

PETITIONER [JUSTIN PORTER] DID NOT "VOLUNTARY, KNOWING, NOR INTELLIGENTLY WAIVE HIS MIRANDA RIGHTS, BECAUSE . . . HE, [JUSTIN PORTER] COULD NOT

"VOLUNTARILY, KNOWINGLY, NOR INTELLIGENTLY WAIVE His MIRANDA Rights".

AGAIN Please See testimonial EVIDENCE of DR. PAGLINI "His [PORTER] READING SKILLS WERE EQUIVALENT to A second grader's skills (VII:1402). With SPELLING, he SCORED in the ONE FIFTH of ONE Percentile AND had the SKILLS of A beginning first grader".

Chicago detectives never discussed the MIRANDA Rights OR WARNINGS with Petitioner [PORTER] AND... has Vegas Detectives MAY" Have Read the MIRANDA WARNINGS to Him but... He did NOT understand what it meant." (VII:1450) He Did NOT KNOW He Had A Right to AN ATTORNEY, NOR Did He understand He did NOT Have to talk to the Detectives. (VII:1451).

UNDER the AFORE-STATED CIRCUMSTANCES, the DISTRICT COURT ERRORED, BY DENYING Defendant (Petitioners)' MOTION TO SUPPRESS the statements made to Police officers.

STATE COURTS, EQUALLY with Federal COURTS, ARE UNDER AN OBLIGATION to GUARD AND enforce every right secured by the Federal CONSTITUTION, see 5th and 14th AMEND.(S) to the U.S.C.

The DISTRICT COURT VIOLATED PORTER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, BY ALLOWING THE STATE TO PRESENT EVIDENCE OF INVOLUNTARY STATEMENTS ALLEGEDLY MADE BY PORTER TO POLICE DETECTIVES. see MIRANDA SUPRA.

THE STATE'S ENTIRE CASE WAS built on the Alleged Statements of JUSTIN PORTER to LAS VEGAS Police Detectives. AND... absent those UNLAWFULLY ACQUIRED AND ILLEGALLY ADMITTED STATEMENTS, NO RATIONAL TRIER OF FACT would HAVE FOUND Petitioner GUILTY BEYOUND A REASONABLE DOUBT of SECOND DEGREE MURDER.

FUNDAMENTAL FAIRNESS REQUIRES that the COMPLAINED of STATEMENTS, MADE UNDER EXTREME DURESS, INVOLUNTARILY, UNKNOWINGLY, AND UNINTELLIGENTLY be SUPPRESSED, AND... BE CAUSE the SUBSEQUENTLY ILLEGAL CONVICTION UNDER ATTACK HEREIN IS... the FRUIT of A POISONOUS TREE, HERE Petitioner ALSO PRAYS the VACATION of His UNLAWFUL CONVICTION, OR... IN the ALTERNATIVE, AN EVIDENTIARY HEARING, to GIVE Petitioner A LAWFUL AND FAIR OPPORTUNITY to Prove the FACTS SUPPORTING his CLAIMS.

"AFFIDAVIT OF Justin PORTER"

STATE OF NEVADA)
ss.
COUNTY OF CLARK)

I, Justin Porter, being first duly Sworn upon oAth, deposes And Swears to the Following:

That I Am the AFFiant Herein, that I Am of Sound mind, good Physical Health and Above the Age OF 21yrs. old, therefore Qualified to testify to ALL Matters Herein.
That I MAKe this AFFidavit in support OF ANY motion, Pleading, Petition, OR Document Filed by OR ON behalf of the STATE OF NEVADA. That ON OR About the 12 DAy OF August, 2000 Police Officers ILLEGALLY Search and seized ME From My home, And did threaten to take me to the DOCK'S AND OR Beat me with A Phone BOOK. That I was in Fear of my life From Officers. THAT I ASKed OFficers severial times to Let me talK to my mother. That ON OR About the 12 DAy OF August 2000, OFficers From Las Vegas, Did manipulate Coerce and force me to Speak in Violation of my 4th U.S. Const. Amendment Right to them AgAinst my will, without my mother, Legal GUARDIAN being Present.

A

FURther AFFiant says Nought

Subscribed AND Sworn to under the Penalties AND Pains OF PURJURY, without the benifit OF NOTARY PUBLIC, PURSUant to N.R.S. 208.165

DATED THIS 28 DAY OF June, 2019

By: Justin Porter 6-28-19
JUSTIN PORTER- PETITIONER- PRO. PER.

EVIDENTIARY HEARING

Petitioner herein maintains that he has Presented Several Colorable Claims in his Post-conviction Petition for a Writ of Habeas Corpus.

That he has alleged Specific facts, that if true, would entitle Petitioner to Relief, Requiring, At a minimum, an evidentiary hearing.

Incorporation By Reference

Petitioner Incorporates by Reference, the following, All Supporting document(s), Including All Supporting exhibits Previously filed and or Received by this Court, and All document(s) Submitted contemporaneously by Reference herein Petitioner's Petition for Writ of Habeas Corpus-Post Conviction.

Prayer for Relief

Wherefore, the reasons set forth herein, and in the documents incorporated by Reference, Petitioner Respectfully Requests that the Court: (1) Grant Petitioner's Writ of Habeas Corpus-Post conviction, Reverse Petitioner's conviction(s), and Order a New Trial

(2) Order an evidentiary Hearing; and

(3) Grant All other Appropriate relief.

DATED THIS 28 DAY OF June, 2019 BY: Justin Porter

JUSTIN PORTER-Petitioner-Proper.

Case No. C-174954

Dept. No. 6

IN THE 8TH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK.

Justin D. PORTER,
Petitioner,

-vs-

BRIAN Williams-WARDEN
Respondents.

MOTION FOR THE APPOINTMENT OF COUNSEL

REQUEST FOR EVIDENTIARY HEARING

COMES NOW, the Petitioner, Justin D. PORTER, proceeding pro se, within the above entitled cause of action and respectfully requests this Court to consider the appointment of counsel for Petitioner for the prosecution of this action.

This motion is made and based upon the matters set forth here, N.R.S. 34.750(1)(2), affidavit of Petitioner, the attached Memorandum of Points and Authorities, as well as all other pleadings and documents on file within this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

This action commenced by Petitioner Justin D. PORTER, in state custody, pursuant to Chapter 34, et seq., petition for Writ of Habeas Corpus (Post-Conviction).

II. STATEMENT OF THE FACTS

To support the Petitioner's need for the appointment of counsel in this action, he states the following:

1. The merits of claims for relief in this action are of Constitutional dimension, and Petitioner is likely to succeed in this case.

2. Petitioner is incarcerated at the Petitioner is unable to undertake the ability, as an attorney would or could, to investigate crucial facts involved within the Petition for Writ of Habeas Corpus.
3. The issues presented in the Petition involves a complexity that Petitioner is unable to argue effectively.
4. Petitioner does not have the current legal knowledge and abilities, as an attorney would have, to properly present the case to this Court coupled with the fact that appointed counsel would be of service to the Court, Petitioner, and the Respondents as well, by sharpening the issues in this case, shaping the examination of potential witnesses and ultimately shortening the time of the prosecution of this case.
5. Petitioner has made an effort to obtain counsel, but does not have the funds necessary or available to pay for the costs of counsel, see Declaration of Petitioner.
6. Petitioner would need to have an attorney appointed to assist in the determination of whether he should agree to sign consent for a psychological examination.
7. The prison severely limits the hours that Petitioner may have access to the Law Library, and as well, the facility has very limited legal research materials and sources.
8. While the Petitioner does have the assistance of a prison law clerk, he is not an attorney and not allowed to plead before the Courts and like Petitioner, the legal assistants have limited knowledge and expertise.
9. The Petitioner and his assisting law clerks, by reason of their imprisonment, have a severely limited ability to investigate, or take depositions, expand the record or otherwise litigate this action.
10. The ends of justice will be served in this case by the appointment of professional and competent counsel to represent Petitioner.

II. ARGUMENT

Motions for the appointment of counsel are made pursuant to N.R.S. 34.750, and are addressed to the sound discretion of the Court. Under Chapter 34.750 the Court may request an attorney to represent any

such person unable to employ counsel. On a Motion for Appointment of Counsel pursuant to N.R.S. 34.750, the District Court should consider whether appointment of counsel would be of service to the indigent petitioner, the Court, and respondents as well, by sharpening the issues in the case, shaping examination of witnesses, and ultimately shortening trial and assisting in the just determination.

In order for the appointment of counsel to be granted, the Court must consider several factors to be met in order for the appointment of counsel to be granted; (1) The merits of the claim for relief; (2) The ability to investigate crucial factors; (3) whether evidence consists of conflicting testimony effectively treated only by counsel; (4) The ability to present the case; and (5) The complexity of the legal issues raised in the petition.

III. CONCLUSION

Based upon the facts and law presented herein, Petitioner would respectfully request this Court to weigh the factors involved within this case, and appoint counsel for Petitioner to assist this Court in the just determination of this action

Dated this 28 day of June 20 19

Justin Borter
Petitioner.

VERIFICATION

I declare, affirm and swear under the penalty of perjury that all of the above facts, statements and assertions are true and correct of my own knowledge. As to any such matters stated upon information or belief, I swear that I believe them all to be true and correct.

Dated this 28 day of June 20 19.

Justin Borter
Petitioner, pro per.

Case No. C-174954

Dept. No. 6

IN THE 8TH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK.

Justin D. Porter
Petitioner,

-vs-

BRIAN Williams-Warden
Respondents.

ORDER APPOINTING COUNSEL

Petitioner, Justin Porter, has filed a proper person REQUEST FOR APPOINTMENT OF COUNSEL, to represent him on his Petition for Writ of Habeas Corpus (Post-Conviction), in the above-entitled action.

The Court has reviewed Petitioner's Request and the entire file in this action, and Good Cause Appearing, IT IS HEREBY ORDERED, that petitioner's Request for Appointment of Counsel is GRANTED.

IT IS FURTHER ORDERED that _____, Esq., is appointed to represent Petitioner on his Post-Conviction for Writ of Habeas Corpus.

Dated this ____ day of _____, 20__.

_____
DISTRICT COURT JUDGE

Submitted by:

Justin Porter
Petitioner, In Proper Person

DISTRICT COURT

CLARK **COUNTY, NEVADA**

THE STATE of NEVADA,
Plaintiff,

vs. Justin D. PORTER,
Defendant,

Case No. C-144454
Dept. No. 6
Docket _____

ORDER

Upon reading the motion of defendant, _____, requesting withdrawal of counsel, _____, Esq., of the Clark county Public Defender's Office, and Good Cause Appearing,

IT IS HEREBY ORDERED that defendant's Motion for Withdrawal of Counsel is GRANTED.

IT IS HEREBY FURTHER ORDERED that Counsel deliver to defendant at his address, all documents, papers, pleadings, discovery and any other tangible property in the above-entitled case.

DATED and DONE this ____ day of _____, 20___.

_____
DISTRICT COURT JUDGE

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion for the Appointment of Counsel/Request for Evidentiary Hearing.
(Title of Document)

filed in District Court Case No. C-174954

☑ 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)

6-28-19
(Date)

CERTIFICATE OF SERVICE BY MAILING

I, Justin Porter, hereby certify, pursuant to NRCP 5(b), that on this 28 day of June, 2019, I mailed a true and correct copy of the foregoing, "Petition for writ of Habeas Corpus (post-conviction)" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Steven D Grierson,
200 Lewis Ave, 3rd Fl.
Las Vegas, NV 89155-1160

Steven B. Wolfson
200 Lewis Ave
Las Vegas, NV 89155-2212

CC:FILE

DATED: this ___ day of _____, 2019.

/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Justin Porter #1042149
P.O. BOX 650 (HDSP)
Indian Springs, NV 89070

3762

LEGAL MAIL

CONFIDENTIAL

Steven Grierson, Clerk
200 Lewis Ave, 3rd Floor
Las Vegas, NV 89155-1160

Electronically Filed
6/4/2020 9:27 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

JUSTIN PORTER,

Petitioner,

vs.

BRIAN WILLIAMS,

Respondent,

Case No: A-19-798035-W

Dept No: VI

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

PLEASE TAKE NOTICE that on June 1, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on June 4, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 4 day of June 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN D. PORTER, #1682627

Defendant.

CASE NO: **A-19-798035-W**

DEPT NO: **VI**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: **FEBRUARY 19, 2020**
TIME OF HEARING: **9:30 AM**

THIS CAUSE having presented before the Honorable JACQUELINE BLUTH, District Court Judge, on the 19th day of February, 2020; Petitioner present, represented by ADAM GILL, ESQ.; Respondent represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through LISA LUZAICH, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On April 26, 2001, the State of Nevada, by way of Information, charged Justin Porter (hereinafter "Petitioner") with over 40 felony counts, including sexual assault, kidnapping, murder, burglary, and robbery, related to 9 events over a 4-month period, involving 12 victims. On May 2, 2001, an Amended Information was filed in open court to correct a typographical error. On October 11, 2001, a Second Amended Information was filed reducing the total charges to 38 counts. Counts 30, 31 and 32 alleged Burglary while in Possession of a Deadly Weapon; Attempt Robbery with Use of a Deadly Weapon; and Murder with Use of a Deadly Weapon (Open Murder), respectively. These three counts involved a single victim.

On May 15, 2008, Petitioner filed a Motion to Sever Counts 30-32 from the remainder of the charges. On June 12, 2008, the State filed its Opposition. On June 18, 2008, the Court granted Petitioner's Motion to Sever, and ordered the murder event be tried separately. The State subsequently filed a Third Amended Information in the instant case on April 30, 2009, charging Petitioner with: Count 1 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165); Count 2 – Attempt Robbery With Use of a Deadly Weapon (Felony – NRS 193.330, 200.380, 193.165), and Count 3 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165).

On May 8, 2009, a jury found Petitioner guilty on Count 3 of Second Degree Murder with Use of a Deadly Weapon. Petitioner was found not guilty of Counts 1 and 2.

On September 30, 2009, the Court sentenced Petitioner to the Nevada Department of Corrections for 120 months to Life, plus a consecutive term of 120 months to Life for the use of a deadly weapon, with 3,338 days credit for time served. The Judgment of Conviction was filed on October 13, 2009. On October 29, 2009, Petitioner filed a Notice of Appeal. On November 8, 2010, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued December 3, 2010.

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On February 10, 2012, Petitioner filed his first pro per Post-Conviction Petition for Writ of Habeas Corpus. The State filed its Response and Motion to Dismiss on March 21, 2012. On April 23, 2012, the Court denied Petitioner's first Petition as untimely. The Findings of Fact, Conclusions of Law, and Order were filed on June 11, 2012. Petitioner appealed the denial of his first Petition on May 8, 2012, and on March 11, 2013, the Nevada Supreme Court affirmed the denial. Remittitur issued on March 19, 2013.

On August 26, 2013, Petitioner filed his second pro per Post-Conviction Petition for Writ of Habeas Corpus, and a separate Motion to Appoint Counsel. The State filed its Response and Motion to Dismiss on January 3, 2014. On January 13, 2014, the Court denied Petitioner's second Petition as time-barred. Petitioner filed a Notice of Appeal from the denial of his second Petition on February 7, 2014, and on June 11, 2014, the Nevada Supreme Court affirmed the denial. Remittitur issued on July 15, 2014.

On October 26, 2015, Petitioner filed his third pro per Post-Conviction Petition for Writ of Habeas Corpus. On August 17, 2016, the Nevada Supreme Court affirmed the district court's ruling. Remittitur issued on January 24, 2017.

On July 5, 2019, Petitioner filed the instant pro per Post-Conviction Petition for Writ of Habeas Corpus (the "instant Petition"). Petitioner then filed a "Supplement" to his Petition on July 16, 2019. Petitioner filed another "Petition" on July 25, 2019.

On September 27, 2019, Petitioner filed a Notice of Appeal in the instant case. The Nevada Supreme Court dismissed the appeal on October 18, 2019, as there was no order to be appealed from. Remittitur issued on November 19, 2019. While the appeal was pending, Petitioner filed a "Motion for Respondent to Petitioner's Habeas Corpus (Post-Conviction)."

On December 2, 2019, the State filed its Response and Motion to Dismiss Petitioner's Petition for Writ of Habeas Corpus, and Motion to Strike Petitioner's Rogue Filings. The matter came before this Court on December 9, 2019, at which time it was continued for the appointment of counsel for Petitioner.

On February 19, 2020, this matter came before this Court for argument. After hearing representations of the parties, this Court now finds and concludes as follows:

ANALYSIS

I. PETITIONER'S INSTANT PETITION DOES NOT ENTITLE PETITIONER TO HABEAS RELIEF

A. The instant Petition is time-barred

The mandatory provision of NRS 34.726(1) states:

> 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 or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur.* For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

(emphasis added). "[T]he statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." State v. Dist. Court (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

Per the language, the one-year time bar prescribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998); see Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be construed by its plain meaning).

In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance of filing the petition with the District Court within the one-year mandate, absent a showing of "good cause" for the delay in filing. Gonzales, 118, Nev. at 593, 590 P.3d at 902. The one-year time bar is therefore strictly construed. In contrast with the short amount of time to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas

petition, so there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the postal system. Id. at 595, 53 P.3d at 903.

In the instant case, Petitioner's instant Petition is beyond the one-year time bar. The Nevada Supreme Court affirmed Petitioner's judgment of conviction on November 8, 2010, and Remittitur issued on December 3, 2010. As such, Petitioner had until December 3, 2011 to file a post-conviction petition for writ of habeas corpus. The instant Petition was filed on July 5, 2019, nearly eight (8) years after the time allowed by statute. Therefore, this Court finds the instant Petition is time-barred pursuant to NRS 34.726(1).

B. The instant Petition is successive and an abuse of the writ

Petitioner's instant Petition is also procedurally barred because it is successive. NRS 34.810(2) reads:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added). Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on

the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

On February 10, 2012, Petitioner filed his first petition for habeas relief, which was denied as untimely because the district court concluded that Petitioner did not demonstrate good cause to overcome the time-bar. On August 26, 2013, Petitioner filed his second petition for habeas relief, which was once again denied as untimely. Petitioner filed a third petition for habeas relief on October 26, 2015, which the district court denied as procedurally barred under NRS 34.726(1), finding that Petitioner's actual innocence claims were insufficient to overcome those procedural bars. Petitioner appealed each denial of his respective petitions, and every denial was affirmed by the Nevada Supreme Court. Petitioner has clearly had the opportunity to raise the grounds he now alleges are "new and different" in each of these prior Petitions. Therefore, this Court finds the instant Petition is successive and constitutes an abuse of the writ; as such, it is subject to denial pursuant to NRS 34.810(2).

C. The instant Petition is subject to Laches

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction..." The Nevada Supreme Court observed in Groesbeck v. Warden, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches in its motion to dismiss the petition. NRS 34.800(2). The State affirmatively pleads laches in the instant case.

The instant Petition was filed over ten (10) years after the verdict and the sentencing hearing, and almost nine (9) years after the Nevada Supreme Court affirmed the judgment of conviction. Because these time periods exceed five (5) years, this Court finds the State is entitled to a rebuttable presumption of prejudice. NRS 34.800(2).

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D. Petitioner's claim of "actual innocence" is not, itself, a cognizable claim for habeas relief

Petitioner's first claim is that he is "actually innocent" of those crimes for which he was convicted at trial. Instant Petition at 13. The United States Supreme Court has held that actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995). In order for a petitioner to obtain a reversal of his conviction based on a claim of actual innocence, he must prove that "'it is more likely than not that *no* reasonable juror would have convicted him in light of the 'new evidence' presented in habeas proceedings." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup).

Petitioner seems to acknowledge that his "actual innocence" claim is merely a vehicle for overcoming the other procedural bars to the instant Petition. Instant Petition at 13. However, the substance of this claim is merely a challenge to the sufficiency of the evidence used to convict Petitioner at trial. Id. Petitioner does not offer any evidence that could be considered "new" or that could support the requisite showing under Calderon. Therefore, this Court concludes that Petitioner has failed to demonstrate that "actual innocence" establishes good cause enough to overcome his procedural defaults, and the instant Petition is therefore subject to dismissal.

E. Petitioner fails to demonstrate good case or prejudice for failing to timely raise his claims of ineffective assistance of counsel

To avoid procedural default, under NRS 34.726, a petitioner has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his

claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again *and* actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001) (emphasis added).

1. Petitioner has failed to establish good cause.

"To establish good cause, appellants *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Petitioner has failed to address good cause to overcome this late filing, instead relying upon allegations of "actual innocence" to excuse the procedural bars to the instant Petition. As addressed in Section I(D), *supra.*, Petitioner fails to meet the standard under Calderon. Thus, this Court finds that Petitioner does not assert good cause and so fails to overcome the mandatory procedural bar.

2. Petitioner has failed to establish prejudice.

In addition, this Court finds Petitioner does not establish prejudice necessary to ignore the procedural default because the underlying claims of ineffective assistance of counsel are meritless.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been

different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Here, Petitioner alleges his trial counsel was ineffective in four ways: (1) failing to instruct the jury on Petitioner's theory of the case; (2) conceding guilt as to second degree murder; (3) failing to subject prosecution's case to a meaningful adverse testing process; and (4) failing to object to Petitioner's statement as involuntary. Instant Petition at 19-24. However, Petitioner's allegations are subject to the law of the case doctrine, as they have been previously raised, and rejected, in earlier petitions.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not

be reargued in a habeas petition. Pellegrini v. State, 117 Nev. at 879, 34 P.3d at 532 (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6.

i. Failure to Instruct the Jury on Petitioner's Theory of the Case

Petitioner raised the allegation that trial counsel failed to proffer proper jury instructions in his third Petition. The district court determined that this allegation was without merit in that Petition, and the district court's determination was upheld on appeal. See, Findings of Fact, Conclusions of Law and Order, filed on March 14, 2016 in Case Number 01C174954 ("3/14/16 FCL") at 5; see also, Order of Affirmance, filed on August 17, 2016 in Supreme Court Case 70206 ("8/17/16 Affirmance"). Therefore, this Court finds this issue has already been raised and addressed and that it is therefore subject to the law of the case doctrine.

ii. Conceding Second Degree Murder

Petitioner raised the allegation that trial counsel improperly conceded the issue of guilt as to second degree murder in his second Petition. See Third Petition at 7. The district court rejected this allegation and dismissed Petitioner's third Petition, a ruling that was also upheld on appeal. See generally, 2/14/14 FCL; see also, 6/11/14 Affirmance. Because Petitioner already unsuccessfully raised this allegation, and because there are no new facts that would affect the Nevada Supreme Court's earlier determination of this issue, this Court finds this claim is subject to the law of the case doctrine and cannot demonstrate prejudice.

iii. Failure to Subject Prosecution's Case to a Meaningful Adverse Testing Process

Petitioner's third allegation in support of his claim of ineffective assistance of trial counsel relies on the same actions of trial counsel as addressed in Section I(E)(2)(ii), *supra.* – namely, that trial counsel conceded the issue of guilt as to second degree murder. As addressed above, this claim has already been substantively addressed, and Petitioner's position has been rejected by both the district court and the Nevada Supreme Court. Because both courts have already ruled on this specific issue, this Court finds this claim is subject to

the law of the case doctrine. Furthermore, because it has no merit, this Court further finds this claim cannot demonstrate prejudice.

iv. Failure to Object to Petitioner's Statement as Involuntary

Petitioner initially raised trial counsel's alleged failure to object to his statement to police as involuntary on his direct appeal. See, Appellant's Opening Brief, filed on April 21, 2010 in Supreme Court Case 54866 at 7-10. However, the Nevada Supreme Court expressly rejected the notion that Petitioner's statement to police was involuntary or unknowing, instead concluding "[t]he totality of the circumstances reveals that Porter voluntarily, knowingly, and intelligently waived his Miranda rights... and the district court therefore did not err in admitting his confession." 11/08/2010 Affirmance at 2. Because the Nevada Supreme Court found the issue of voluntariness to be without merit, trial counsel could not be ineffective for failing to raise the issue.

Petitioner's allegation is further belied by a review of the district court record. On September 26, 2002, trial counsel filed a "Motion to Suppress Defendant's Confessions and Admissions to Metro and Chicago Detectives Based on Violation of his Miranda Rights and Involuntariness and Request for Jackson v. Denno Hearing." Because Petitioner's allegation is belied by the record and subject to the law of the case doctrine, this Court finds this claim cannot demonstrate prejudice to overcome the procedural bars to the instant Petition.

Petitioner further alleges his appellate counsel was ineffective in two ways: (1) failing to raise prosecutorial misconduct on appeal; and (2) failing to allege ineffective assistance of trial counsel on appeal, both of which have also been addressed and rejected.

i. Failure to Raise Issue of Prosecutorial Misconduct on Direct Appeal

Petitioner's argument that his appellate counsel was ineffective for not alleging prosecutorial misconduct is based on Petitioner's argument that mental disability rendered his voluntary statement to detectives inadmissible, and that the statement should not have been used at trial. See, Instant Petition at 26. This claim was, in fact, substantively raised on direct appeal, and was rejected by the Nevada Supreme Court as being without merit. 11/08/2010 Affirmance at 2. Because this claim was previously substantively raised, and

rejected, this Court finds it is subject to the law of the case doctrine. It further cannot be used to overcome the procedural bars precluding the instant Petition from being reviewed on its merits.

ii. Failure to Raise Issue of Ineffective Assistance of Trial Counsel

Petitioner repeats his earlier four arguments regarding ineffectiveness of trial counsel, and argues that appellate counsel was ineffective for failing to raise these issues on appeal. Aside from the same conclusory statements made in support of his earlier claims, which were all addressed and rejected on Petitioner's direct appeal, or in one of Petitioner's numerous habeas petitions since, Petitioner fails to support his claim, and fails to show how any of these justify overcoming the procedural bars to the instant Petition. Therefore, this Court finds that Petitioner's claim is subject to the procedural bars.

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F. Petitioner's remaining claims of Prosecutorial Misconduct and Abuse of Discretion are subject to the law of the case doctrine

Petitioner also claims that admission of his statement to detectives at trial amounted to prosecutorial misconduct, and that the trial court abused its discretion when it allowed the statement to be used at trial. Instant Petition at 30-36. However, these claims are substantively the same as Petitioner's claims regarding ineffective assistance of trial and appellate counsel, as they all rely on Petitioner's argument that mental or cognitive handicaps prevented his knowing and/or voluntary waiver of his Miranda rights. As addressed, *supra.*, Petitioner substantively raised this issue on direct appeal. The Nevada Supreme Court rejected the claim, concluding that the totality of the circumstances supported the notion that Petitioner's statement was knowing and voluntary. 11/08/2010 Affirmance at 2. Therefore, this Court finds that, pursuant to Hall, these claims are subject to the law of the case doctrine.

Because Petitioner's substantive claims are subject to the law of the case doctrine, and further, because Petitioner fails to demonstrate good cause or prejudice to overcome the

procedural bars to the instant Petition, this Court concludes the instant Petition is ripe only for summary dismissal.

II. PETITIONER'S SUPPLEMENT AND SUBSEQUENT "PETITION" ARE STRICKEN

NRS 34.750(5) precludes the filing of any supplemental pleadings to a post-conviction petition for writ of habeas corpus without leave of the court. The instant Petition was filed on July 5, 2019. On July 16, 2019, absent any order or leave of this Court, Petitioner filed a "Supplement to Habeas Corpus Postconviction." Then, on July 25, 2019, again without order or leave of this Court, Petitioner filed another "Petition for Writ of Habeas Corpus." Petitioner was not granted, nor did he even seek, leave of this Court to supplement the instant Petition. NRS 37.750(5). Therefore, this Court concludes the subsequent filings should be stricken as rogue and improper.

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CONCLUSION

THEREFORE, **COURT ORDERED**, the State's Motion to Dismiss Pursuant to Laches shall be and is GRANTED.

IT IS FURTHER ORDERED, Petitioner Justin Porter's Petition for Writ of Habeas Corpus (Post-Conviction) shall be and is DISMISSED.

IT IS FURTHER ORDERED, Petitioner Justin Porter's July 16, 2019 Supplement to Habeas Corpus Petition and July 25, 2019 Petition for Writ of Habeas Corpus shall be and are STRICKEN.

DATED this 21st day of May, 2020.

DISTRICT COURT JUDGE

Respectfully submitted,

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

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BY _____
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

hjc/SVU