

1 up punching Mr. Cash in the face.

2 He goes it was a strong punch that kind of took him by surprise.

3 He wound up letting go of Kyriell and then the three of them
4 wound up squaring off. They all three were kind of squaring off. Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

5 Q And was, squaring off, the term -- the exact term he used?

6 A Yes, it's the term he used. That all them of them were squaring
7 off.

8 Now, when they square off he goes, he winds up getting
9 punched by Kyriell again. And they're fighting. And then he sees Ezekiel
10 coming towards him. When he sees Ezekiel coming towards him, he
11 takes out a knife and winds up stabbing Ezekiel one time.

12 After that, Ezekiel jumps back and he's making like a jumping
13 motion, and then Brittney Turner comes in between them telling them to
14 stop.

15 Mr. Cash sees that his nose a bleeding and he says he goes --
16 he walks into the residence and he hears Kyriell say that he's going to get
17 a gun and shoot him. So he locks the front door. And because he'd
18 heard him say that he's going to get a gun, he goes -- he decides that he's
19 going to go out the back of the residence and he leaves the residence.

20 Now, after he tells us that initial story, we then take him back
21 through the events again. So we go, we understand that what you just
22 said but we want to kind of break this down a little bit further.

23 So he tells us the story again. Says he's upstairs in the
24 bedroom when he's alerted by Angel that Brittney and Kyriell are in a
25 tussle. He leaves his residence, goes outside, and that, once again,

1 Brittney has already broken away from -- from Kyriell and that he's trying
2 to, again, grab Brittney.

3 He approaches. He says he throws the first punch. He
4 punches Kyriell and then the struggle starts. He has him down. And then
5 the male -- when he -- Kyriell yells out, get 'em, get 'em, the other male
6 gets out of the car, someone he doesn't know. He's never seen him
7 before. Never met him before. Comes out of the car and punches him
8 and hits him in the face.

9 And then we asked him, can you describe, you know, when he
10 hits you, does he have anything in his hands?

11 He goes, well, I wasn't really paying a lot of attention, but he's --

12 We asked him specifically, was it a gun? He goes, no, it was
13 not a gun.

14 Asked him if it was a knife. No, it wasn't a knife. He goes, I
15 think it was a bar of some type. But he didn't see a weapon. He states he
16 doesn't see a weapon.

17 When he gets -- after he gets hit, they square off. After they've
18 squared off, we asked him, when you guys were squared off, could you
19 possibly have retreated back to the resident?

20 He goes, in hindsight --

21 MR. LONG: Your Honor, I'm going to object to, you know, it's
22 testimony, he's speculating.

23 MS. DIGIACOMO: He's repeating what the Defendant told him.

24 THE COURT: He's just reviewing what the Defendant said.

25 Overruled.

1 BY MS. DIGIACOMO:

2 Q Okay. I'm sorry, go ahead.

3 A So we asked him, is it possible that you could have retreated
4 back to the residence and called the police?

5 He goes, in hindsight, he goes, yes, I could have. But in the
6 heat of things, no.

7 So after he goes -- once again he starts tussling with Kyriell
8 again. And then he sees that Ezekiel starts to come towards him.

9 And we asked him, is that when you stabbed me?

10 He goes, yes. And he goes, I do a stabbing motion. He's
11 describing his stabbing motion is just going straight. The one time so.

12 So when --

13 Q And, I'm sorry, just for the record, you took your right arm and
14 extended it straight out in front of you?

15 A That's correct.

16 Q Okay.

17 A We'd also asked him, you know, where was the knife? The
18 knife was in his right-hand pocket. It was a black folding knife. He
19 retrieved that from his pocket and wound up stabbing Ezekiel.

20 We asked him, you know, why did you stab Ezekiel, can you
21 explain to us why you stabbed him?

22 He goes, because I didn't want to get hit again.

23 After he winds up stabbing Ezekiel, Ezekiel -- he says, actually,
24 all of them kind of backup a little bit. Ezekiel had jumped away. Kyriell
25 was on his left, Ezekiel was on his right, and Brittney winds up coming in

1 between them telling them to stop.

2 And then that's when Mr. Cash then sees that his nose is
3 bleeding. He goes in, walks into his residence to grab something for his
4 nose. He hears Kyriell saying that he's going to get a gun and he locks
5 that door. And then he winds up fleeing the residence.

6 We asked him where he went after he left the residence. He
7 stated that he went to a gas station on Cheyenne and Lamb. And while
8 he's in that area he winds up getting a call from his wife. His wife tells him
9 that the boy died. He said when he was told that the boy died that he took
10 the knife that he had and he wound up breaking it. He broke the blade off
11 the knife.

12 We asked him, why did you do that? Why did you break the
13 knife?

14 He goes, because I didn't want to have it anymore.

15 Q Did he tell you what he did with the knife?

16 A He said that along the path in between Cheyenne and
17 Alexander he had thrown the knife into a desert area. He didn't know
18 exactly where but he knew between Cheyenne and Alexander,
19 somewhere in desert, that's where he wound up taking that knife and
20 throwing that -- and throwing that knife away.

21 Q Okay. Did -- at the time that he comes to speak to you, from
22 the time of the crime, how many hours has it been?

23 A From the time of the incident, to when he's actually there
24 speaking with us, or when he contacted us?

25 Q When he contacted you?

1 A Okay. From the time, from when the incident happened to
2 when he contacted Detective McCarthy, was roughly about seven hours.

3 Q Okay.

4 A So we asked him, where were you in those seven hours? And
5 he didn't have -- he couldn't give us a location. We asked him if he went
6 to someone's residence, did someone come pick you up? He goes, no,
7 and I wound up walking home.

8 Q All right. So he never told you where he was all those hours?

9 A No.

10 Q Okay. So let's backup a little bit, do you recall whether or not,
11 when he was telling you the story initially as to what happened when he
12 was in his room upstairs, do you recall what he -- or did he tell you what
13 he was doing in that bedroom with his three year old?

14 A Yes. He said he was upstairs with the three year old and that
15 he was wrapping Christmas presents.

16 Q And did he tell you he was doing it specifically on the floor?

17 A Yes.

18 Q Okay. Did he ever -- I know you said that he told you that it was
19 a pocketknife he took out of his right pocket, did he ever describe it to
20 you?

21 A Yes. We asked him to describe the knife. He stated that it was
22 a black folding knife. He described it being initially the size of his pinky
23 finger, is the way he's describing it to us. Later on when my partner asked
24 him a little bit further can, you know, about the size of the knife. Then he
25 changed it to, it was roughly the size, when it's extended, the length of a

1 pin.

2 Q Did he tell you more details about how long the blade was or
3 what kind of blade it was?

4 A That I'd have to look at my report or the statement to recall.

5 Q Okay. But he did tell you it was a black and a small one?

6 A Correct.

7 Q Okay. And when he was talking about the size of his finger,
8 was he talking about the blade or the entire thing?

9 A The way I took it is when he's describing his pinky finger, I -- I'm
10 thinking he's talking about the blade. The blades roughly the size of his
11 pinky finger. And then later when he says, it was the size of the pin. He's
12 saying that when it's fully extended that it's the size of a pin fully extended.

13 Q Okay. Now, if you were to review the transcription of his
14 statement, would that refresh your recollection --

15 A Yes.

16 Q -- as to whether or not he said the length of it?

17 A Yes.

18 MS. DIGIACOMO: All right. Page ten, Counsel.

19 BY MS. DIGIACOMO:

20 Q All right. Sir, I'm going to show you -- is this the transcription of
21 the statement by Mr. Cash?

22 A Yes.

23 Q In fact, I never asked you, do see the person that you talked to
24 on December 12th, 2017, in the early morning hours here in the
25 courtroom?

1 A Yes, I do.

2 Q Would you point to the person you're referring to and describe
3 an article of clothing he's wearing.

4 A He's wearing a gray button up shirt.

5 THE COURT: Record reflect he's identified the Defendant.

6 MS. DIGIACOMO: Thank you, Your Honor.

7 BY MS. DIGIACOMO:

8 Q All right. I'm going to show you page ten, roughly in the middle
9 of the page, if you can read that to yourself, from this question down and
10 let me know when you're done, please.

11 A [Witness complies.]

12 I'm done.

13 Q Okay. Thank you.

14 So does that refresh your recollection as to his exact
15 description of the knife?

16 A Yes.

17 Q Okay. And what was it?

18 A He was describing it as a three-inch knife.

19 Q All right. Did he also call it a little, bitty small one?

20 A Yes.

21 Q And then do you recall if he told you if how many blades it had?

22 A How many blades it had?

23 Q Yes.

24 A Oh, just one blade, just one blade.

25 Q All right. And so when he tells you the story and then you go

1 through it again and kind of break it down; correct?

2 A Correct.

3 Q All right. When he is talking about when the friend got out of the
4 car, that he never seen before, and punched him, did he tell you what
5 position he was -- him and Kyriell were in at the time that he got punched?

6 A He said that Kyriell was down, he had him down.

7 Q In a hold?

8 A In a hold. With his head around his abdomen and that he was
9 above him.

10 Q Okay. So he was actually locked with Kyriell when the
11 Defendant told you he got punched by Ezekiel?

12 A That's correct.

13 Q Now, you talked about that the Defendant said that when he
14 was inside the residence he heard Kyriell saying, get the gun, or I'm going
15 to shoot, or something to that affect?

16 A He said that when he went back to the residence, he heard
17 Kyriell stating that he was going to get a gun and shoot him and so he
18 locked the door.

19 Q Okay. Did you ask or did Detective McCarthy ask the
20 Defendant about seeing a weapon in Kyriell's hand?

21 A Asked him if he saw a weapon, he said he never saw a gun,
22 never saw a weapon.

23 Q In Kyriell's hands?

24 A Yeah, we asked him, did you ever see any weapons and he
25 said no.

1 Q All right. What about with the person who got out of the car,
2 Ezekiel, did the Defendant say he ever saw him with a weapon?

3 A Yes. Asked him if he saw -- saw him with a -- he said he
4 thought he had something in his hands. I asked him if it was a gun? No.

5 Asked him if it was a knife. He said, no, he thought it was a --
6 he didn't see anything but he thought from the way he -- the punch was
7 that he had something possibly a bar or something in his hand. Because
8 it was a hard punch. But he didn't actually see anything.

9 Q Okay. And when he was trying to explain about, you know, the
10 different times that that, I guess, everyone would back away from each
11 other, do you recall, like, how many times in his story he said that there
12 was a break in the action?

13 A I believe it was twice.

14 Q Twice; all right.

15 So there was -- was the first time just with Kyriell or were both
16 of these times with?

17 A Both. I believe both, they were both with both of them.

18 Q When all three are there?

19 A Yes.

20 MS. DIGIACOMO: I'll pass the witness.

21 THE COURT: Cross.

22 **CROSS-EXAMINATION**

23 BY MR. LONG:

24 Q Good morning, Detective Gillis.

25 A Good morning.

1 Q Isn't it true that Thomas was always cooperative with you?

2 A Yes.

3 Q He came down voluntarily?

4 A Correct.

5 Q Okay. And isn't it true that when you interviewed him this punch
6 that hurt his nose, caused him to bleed, he said it could have been --
7 thought it was maybe a brass knuckle?

8 A No, I asked him that. When I'm asking him to describe what he
9 was he getting hit with. I asked him, was it a gun. He said no. I said was
10 it a knife. He said no. I said was it a brass knuckle. He goes, I thought it
11 was a like a bar.

12 Q Okay. So something more than a fist; correct?

13 A Yes.

14 Q And it was a hard punch that disorientated him?

15 A That's correct.

16 Q Okay. Now, at no time during this interview did Thomas ever
17 allege that he threatened Kyriell with that knife?

18 A No.

19 Q And Kyriell wasn't stabbed, you interviewed him, you looked?

20 A No.

21 Q He didn't have any marks on him at all; correct?

22 A No.

23 MR. LONG: Okay. Now, referring to page 20, Counsel.

24 MS. DIGIACOMO: Thank you.

25

1 BY MR. LONG:

2 Q When the State asked as to whether or not Thomas believed he
3 could retreat, could you please read from this asterisks to the end of the
4 page.

5 MS. DIGIACOMO: Objection, Your Honor. This is improper.
6 It's not a question. He's just asking him to read.

7 MR. LONG: I just haven't established that he can't remember
8 yet.

9 THE COURT: Well, you asked -- yeah, lay a foundation and.

10 MR. LONG: Yeah.

11 BY MR. LONG:

12 Q Detective, isn't it true that Thomas said he could not have
13 retreated during this fight?

14 A Initially he stated that in hindsight, looking back, he could have.
15 And then he said but in the heat of things, no.

16 Q And isn't it true that he said, so I would say, no?

17 A That's correct.

18 MR. LONG: Okay. I don't need to refresh his memory.

19 BY MR. LONG:

20 Q And there's no indication or you didn't develop anything in the
21 interview that Thomas at all incited Ezekiel, he never called him out, or
22 anything to that affect?

23 A No.

24 Q Ezekiel surprised him?

25 MS. DIGIACOMO: Objection, calls for speculation.

1 THE COURT: Sustained.

2 BY MR. LONG:

3 Q Based on your interview with Thomas, did Ezekiel surprise him?

4 A When he got out of the car and punched him?

5 Q Yes.

6 A Yes.

7 Q Okay. And Thomas described this knife as a little small one?

8 A A small knife, yes.

9 Q And he stated that he could open it with one hand; correct?

10 A That's correct.

11 Q And he stated that he only stabbed once?

12 A That's correct.

13 Q And every time you asked him, why did you stab Ezekiel, he
14 said, because he was coming at me; correct?

15 A That's correct.

16 Q Nothing in your investigation, Thomas didn't, that you
17 determined, you don't believe Thomas chased Ezekiel down and stabbed
18 him?

19 A Well, there were conflicting statements. But during his
20 statement, he said that Ezekiel was coming towards him.

21 Q And that's why he stabbed him?

22 A And that's why he stabbed him because he didn't want to get hit
23 again.

24 Q And you asked him that several times; correct?

25 A Correct.

1 Q And every time he said, because he was coming at him?

2 A Correct.

3 Q And during this altercation, Kyriell or someone else was yelling,
4 get the gun, shoot him?

5 A I don't know that. I remember him saying that after the stabbing
6 that he heard, and he's retreating back to the residence, he hears Kyriell
7 saying, I'm gonna -- I'm gonna get a gun and shoot him. And that's why
8 he locks the door.

9 MR. LONG: No further questions.

10 MS. DIGIACOMO: I do, Your Honor.

11 THE COURT: Okay.

12 MS. DIGIACOMO: Court's indulgence.

13 **REDIRECT EXAMINATION**

14 BY MS. DIGIACOMO:

15 Q All right. Before I forget again, I'm going to show you, what I
16 forgot to show you before, State's Exhibit 268, do you recognize what's
17 depicted in this photograph?

18 A Yes.

19 Q And what is it for the record?

20 A This is the booking photo of Thomas Cash at Clark County
21 Detention Center.

22 Q And this would have been taken after he was allowed to be
23 booked into the jail --

24 A That's correct.

25 Q -- after medical saw him; correct?

1 A Correct.

2 Q Okay. So in the initial statement that was given when the
3 Defendant kind of came in and gave you the first brief synopsis of what
4 happened --

5 A Correct.

6 Q -- before more details were asked?

7 He stated to you that that he and Kyriell were wrestling, the
8 other guy's hitting him, they break loose, all three then start fighting again,
9 so he reached in his pocket and stabbed him one time; correct?

10 A Correct.

11 Q Okay. And then when you ask for some more detail, he -- you
12 said he gave kind of conflicting statements about what was going on when
13 he stabbed Ezekiel. Is that what you just testified to?

14 A I don't know about that.

15 MR. LONG: Object, mistakes testimony.

16 MS. DIGIACOMO: Okay.

17 THE COURT: No, I think she's trying to clarify.

18 MS. DIGIACOMO: Maybe I misunderstood; okay.

19 BY MS. DIGIACOMO:

20 Q Did -- was the Defendant ever to give -- able to tell you this
21 specific thing that was happening at the time that he stabbed Ezekiel?

22 A He got punched by Kyriell and then Ezekiel was coming
23 towards him and that's when he stabbed Ezekiel.

24 Q Okay. Did he -- okay. Did he also state that when -- okay, let
25 me get this straight.

1 So he is in a lock with Kyriell when he gets hit by Ezekiel?

2 A Correct.

3 Q Okay. He then tells you he let Kyriell go?

4 A Yes.

5 Q And then they all three square off, meaning they kind of break
6 apart and they're all looking at each other?

7 A That's correct.

8 Q But then they all three go at again; is what he tells you?

9 A Correct.

10 Q Okay. Do you recall him saying that he backed up first and then
11 he rushed the kid or Ezekiel?

12 A I heard him say that he backed up first. But when he said he
13 rushed I took it he was referring to --

14 Q The other one?

15 A -- yeah, Ezekiel.

16 Q Okay. But he did tell you after he backs up he's now focused
17 on Ezekiel not Kyriell?

18 A Correct.

19 Q And then he tells you he goes after Ezekiel and that's when
20 Kyriell starts hitting him?

21 A Could I look at the statement to refresh my recollection?

22 MS. DIGIACOMO: Page nine, Counsel.

23 BY MS. DIGIACOMO:

24 Q Maybe I'm confused too. But so if you could just read the
25 middle of the page. It's hard to tell who all the he's are.

1 A Okay.

2 Q All right. So just explain to me what's going on?

3 A Okay. So when he's saying that he backed up.

4 Q That's the Defendant backed up?

5 A Defendant backed up. He winds up getting hit by Kyriell.

6 Q But he's looking at --

7 A And he's -- yeah.

8 Q -- Ezekiel --

9 A Correct.

10 Q -- as Kyriell hits him?

11 A Correct.

12 Q Okay. And then -- then he says, so he goes to Kyriell and

13 Ezekiel starts hitting him and that's when he stabbed him?

14 A Yes. Going towards him, yes.

15 Q Okay. And he told you he stabbed him because he didn't want

16 to get hit again?

17 A Correct.

18 Q Because he thought, the Defendant thought Ezekiel must have

19 a weapon because it was a hard punch?

20 A Correct.

21 Q Because he never saw a weapon?

22 A Correct.

23 Q And, in fact, do you recall whether or not the Defendant

24 explained or described to you when he was talking about how small the

25 knife was, whether or not anyone would be able to see it in his hand?

A He was asked that. And he said they wouldn't have been able to see it.

Q Yeah, he said that it was --

A It's a small black knife and you wouldn't have seen it.

MS. DIGIACOMO: Okay.

Nothing further.

RECROSS-EXAMINATION

BY MR. LONG:

Q Detective, yesterday when we talked about Thomas's injury, you stated that you wouldn't hypothesize whether or not his nose was broken or swollen because you didn't know what his nose looked like originally; correct?

A Yeah. I didn't know -- when you were talking about his nose being broke, I didn't know that his -- or would know if his nose was broken at the time.

Q Okay.

A And I didn't, at the time, I didn't know what his nose normally looked like. He didn't have any, you know, black eyes. He didn't, you know.

Q Okay. Showing you what's been marked as State's Exhibit 268, you said that this is a photo taken after he was booked or is this taken before booking, this is--

A Well, this picture would have been taken after he's processed in, the next step would be the photos.

Q Okay. And being able to look at Thomas now from the witness

1 stand and being able to look at his nose here, isn't it true that he has
2 suffered dam -- at least a swollen nose?

3 A Yeah, his --

4 MS. DIGIACOMO: Objection, Your Honor. It's speculation.

5 MR. LONG: I'm asking --

6 THE COURT: I'm going to overrule.

7 MS. DIGIACOMO: We're six months later. It's not what he
8 looked like before. We don't know what his look like -- his nose looked
9 like before.

10 THE COURT: All right. I'm going to let him answer it.

11 BY MR. LONG:

12 Q Okay. You can go ahead and answer.

13 A From looking at him now and looking at the picture, the top of
14 his nose does look -- it appeared to be a little bit swollen.

15 Q Okay. And Thomas said that this blow that hurt his nose he
16 thought that it was done with something more than a fist; correct?

17 A That's correct.

18 Q Okay. Now, isn't it true that when you asked Thomas whether
19 or not he saw a weapon in either of the hands of these young men that he
20 was fighting with, he stated he wasn't looking for a weapon?

21 A He stated that he wasn't looking. But then we asked him
22 specific questions, did you see a gun, did you see a knife, did you see. In
23 fact, he goes, no, I didn't see a weapon.

24 Q Okay. And as you were going over this with the State, the knife
25 was in Thomas's right pocket; correct?

1 A Correct.

2 Q And he said he always carried it?

3 A I'd have to refresh my recollection if he stated he always carried
4 it. He said that he had a knife on his -- in his right pocket and he pulled it
5 out with his right hand and extended it with the one hand. I don't know if
6 he --

7 MR. LONG: Your Honor, if I could approach.

8 THE COURT: Sure.

9 MS. DIGIACOMO: Page number, Counsel.

10 MR. LONG: Ten.

11 MS. DIGIACOMO: Thank you.

12 BY MR. LONG:

13 Q Starting here, where I just made this line, down to --

14 A Okay.

15 Q Now, Detective, based on your refreshed recollection, isn't it
16 true that Thomas stated that he always carried that knife in his pocket?

17 A Yes.

18 Q He didn't stop and pick up a weapon before this altercation?

19 A He stated that he always carried that knife.

20 MR. LONG: Nothing further, Your Honor.

21 MS. DIGIACOMO: Just briefly.

22 **FURTHER DIRECT EXAMINATION**

23 BY MS. DIGIACOMO:

24 Q You were at the scene and saw where the body was, the pool of
25 blood, everything. Was there any weapon found in the victim's hands or

1 around that scene?

2 A No.

3 Q And then when the body is -- well, the body at the scene is not
4 touched or searched; correct?

5 A That's -- not by us. It is done by the coroner investigator, the
6 coroner investigator does that there.

7 Q Okay. But everything that's on the body of the victim is placed
8 in the body bag and taken to autopsy?

9 A Correct.

10 Q And you were present at the autopsy?

11 A Correct.

12 Q And when the body bag was open, there was no weapons or
13 anything found in pockets or any clothing of the Defendant?

14 A No.

15 Q -- or excuse me, of the victim; correct?

16 A No.

17 MS. DIGIACOMO: I have nothing further.

18 MR. LONG: Nothing further, Your Honor.

19 THE COURT: Jury have any questions of this rebuttal witness?
20 Seeing no hands. You're free to go. Thank you.

21 THE WITNESS: Thank you, Your Honor.

22 THE COURT: Do you have any other rebuttal?

23 MS. DIGIACOMO: No, Your Honor. The State will rest.

24 THE COURT: Do you have any surrebuttal?

25 MR. LONG: Do not, Your Honor. The defense rests.

1 THE COURT: All right. I'll read the jury instructions. Let's pass
2 the jury instructions out to the jury.

3 Make notes on these, you'll have them to take back to the jury
4 room with you.

5 [The Court reads the jury instructions]

6 THE COURT: Now, you'll have these instructions, you'll be able
7 to take yours back with you.

8 This will be in a blue folder, like this, and you'll have -- this is the
9 verdict form. And you should have a copy on the back of yours. This is
10 the official one.

11 Your jury foreperson will be -- will check the boxes, that they
12 believe are necessary, sign it and date it and file it with the Court.

13 State ready?

14 MS. BLUTH: Your Honor, I'm going to need a five minute break
15 before we start.

16 THE COURT: All right. Take a five minute recess.

17 During the recess you're admonished not to talk or converse
18 among yourselves or with anyone else on any subject connected with this
19 trial. Or read or watch or listen to any report of or commentary on the trial
20 or any person connected with this trial by any medium of information,
21 including, without limitation, newspapers, television, radio, or the Internet.
22 Or form or express an opinion on any subject connected with the trial until
23 the case is finally submitted to you.

24 Remember, no social media. No research on the Internet.

25 Jury is excused for five minutes. Keep the visitors here.

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[Outside the presence of the jury]

THE COURT: All right. The juries out.

And I want the family to stay in here. If you have to use the restroom, you've got to wait until the jury comes back.

I don't want any, any accusation that there is any talking or -- with the jury. So just stay in here.

Now, for the record, one of the jurors had this on their car yesterday. Hey, give me a call and the number, 609-464-4970.

MS. DIGIACOMO: Is that going to be marked?

THE COURT: I've got an investigator checking it out.

MS. DIGIACOMO: Okay. Is that going to be marked as a Court's exhibit?

THE COURT: It's going to be marked as a Court's exhibit.

MR. LONG: Has juror number one expressed any concern --

THE COURT: Just --

MR. LONG: -- as to that note?

THE COURT: -- just didn't know what it meant.

MR. LONG: Okay.

THE COURT: All right. Take five minutes so that you guys can be prepared.

[Recess taken at 10:55 a.m.]

[Jury trial resumed at 11:04 a.m.]

[In the presence of the jury]

THE MARSHAL: All rise, please.

And be seated.

1 THE COURT: Stipulate to the presence of the jury.

2 MS. BLUTH: Yes, Your Honor.

3 THE COURT: All right. Go ahead.

4 **CLOSING ARGUMENT BY THE STATE**

5 MS. BLUTH: People must be held accountable for the
6 decisions they make and the actions they take. And in December of
7 2017, Thomas Cash made decisions and he took actions and those
8 actions cost Ezekiel Devine his life.

9 But the question is, is how did we get here? How did simple fist
10 fight that happens every day or every night in the United States of
11 America end up with 21 year old Ezekiel Devine laying dead in the middle
12 of a street.

13 In less than three minutes the Defendant made the decision to
14 pull out a knife and plunge it through Ezekiel's chest going through his
15 heart. Those were his actions and those were his decisions. And those
16 two things have consequences.

17 Today you will get to hear about the law that applies in this
18 case, and we talked a lot about the law during voir dire, during that jury
19 selection process, and we couldn't really tell you what the law was
20 because that wasn't the appropriate time to do so. But today is. And what
21 you'll find out about that law is that the law does not support what you see
22 in that photograph. What you see in that photograph is not remanence of
23 what the law defines as self-defense.

24 Now, we've all heard the saying, there are two sides to every
25 story. And in this case you heard testimony from several different people.

1 Some of which had two different stories themselves.

2 But what the State would ask you not to do, is not go back there
3 and say, oh, my gosh, everybody is saying so many different things, I just
4 give up, I don't know what happened.

5 Because when it really gets boiled down to the basic facts,
6 there really are only two sides to the story. At one point it's either Ezekiel
7 and the Defendant by themselves fighting or it's two-on-one.

8 And I will go through the law that applies to each of those
9 situations.

10 But what you will learn is, it doesn't matter which of those
11 stories you believe, whether it was two-on-one or whether it was
12 one-on-one. The law does not protect Thomas Cash's actions.

13 In a moment I'm going to breakdown what the witnesses that
14 were there and saw what they said.

15 But before I do that, I'd like to talk to you about a jury instruction
16 and that jury instruction discusses the fact that you are here to determine
17 the guilt or innocence of the Defendant in this case. You are not called
18 upon to return a verdict as to the guilt or innocence of any other person.

19 And what that saying is, is today, is about judging Thomas
20 Cash's actions and whether or not those were criminal.

21 So you may have been frustrated with a certain witness, you
22 may have not liked a certain witness, you may have thought, hey, if so
23 and so didn't do this, then this wouldn't have happened.

24 That's not what today's about. Today is about looking at
25 Thomas Cash's actions and deciding if those were criminal or not.

1 I'd like to start with Kyriell and what Kyriell testified to. And what
2 Kyriell said is that he and Brittney were arguing at the car. And he was
3 asked about that argument and how it started. And it was about them
4 arguing about things that were going on in their relationship. And they
5 were yelling things back and forth at one another. And during that
6 argument, he told Brittney, fine, you're going to behave like that, you're
7 never going to see your daughter again.

8 And at that point in time, Brittney became angry, and she went
9 to grab Lyndon back, and he grabs her and he has her by the hands. And
10 that's how that argument or that -- what's going on outside begins.

11 At that point in time, Kyriell states that Thomas comes out. And
12 when Thomas comes out, he asked Brittney, Brittney, what's going on? Is
13 everything okay?

14 And then Brittney starts in on Thomas, yelling at him, this is her
15 business, she's a grown woman, he needs to stay out of it.

16 At that point in time, Kyriell turns into the car, he bends down,
17 and from behind him he feels Thomas swing and miss and Thomas lands
18 his hand into a portion of the vehicle.

19 That's when he takes his hands and he goes towards the
20 Defendant's face. He doesn't know if he pushes towards the Defendant's
21 face or he punches the Defendant in the face, but they lock onto one
22 another. And while they're locking onto one other, they're kind of doing,
23 like, a Ring around the Rosie up the street.

24 It's at that point that Ezekiel gets out of the car and breaks up
25 the fight.

1 Now, what Kyriell says about breaking up the fight is that
2 Ezekiel puts his arm through to break it up, and you'll remember he says,
3 he doesn't know -- or, excuse me, he knows it's Ezekiel's arm because of
4 the blue sweater and the tattoo.

5 Now, what he says is, I don't know when he put -- when Ezekiel
6 put his arm through, I don't know if he punched the Defendant in the face
7 or he just pushed him up. All I know is that it broke us up.

8 And at that point in time is when the two cars come through.
9 And when the two cars come through, Kyriell is on one side and the
10 Defendant and Ezekiel are on the other. And Kyriell sees through the
11 headlights something glimmering in the Defendant's hand. And he says,
12 Zek, watch out. And as the cars pass, Kyriell kind of gets nipped by the
13 car, he falls back, and then he sees Ezekiel fall to the ground.

14 After that he sees the Defendant run up to the house and he
15 follows the Defendant until he realizes that Ezekiel is hurt.

16 Kyriell told you that this entire thing happens in less than three
17 minutes. So this is a very quick interaction.

18 Now, I want you to turn on -- turn to what Brittney talked about.
19 At the very beginning of her testimony Brittney talked about this is not an
20 easy situation for Brittney to be in, as many can imagine; right? I mean.
21 And she said, she said, I don't want to be here, this is not an easy
22 situation for me to be in, I feel like I'm stuck in the middle.

23 And I asked, well, who do you -- are you stuck in the middle
24 between Thomas and Kyriell.

25 And she said, no, not, Kyriell. It's just Thomas and the situation,

1 you know, she doesn't want to hurt anybody.

2 But when Brittney came in and she told you what happened she
3 discussed basically the same thing as what Kyriell was saying in regards
4 to what was happening. And they both stated that this was happening in
5 the front of the driveway. So not in the driveway but in the front of the
6 driveway where Kyriell had parked his friend's vehicle. And that they're
7 arguing same thing about relationship issues and she's pretty heated.
8 She's yelling at him.

9 And that during that argument, Kyriell tells her that she is never
10 going to see Lyndon again. And so she attempts to grab Lyndon back
11 and Kyriell grabs her by the wrist.

12 And Brittney is very open, she says, I was yelling at him, he's
13 trying to calm me down. And she said, when she spoke to the police, she
14 said, at no point did I ever feel threatened, at no point did I ever feel
15 scared, we argued all the time.

16 Now, when the defense was asking her questions she said --
17 they said, did you feel like you could have been hurt? And she said, well,
18 yeah, in that situation I guess I could have been hurt. But she had said
19 multiple times she didn't feel like she was in danger. She didn't feel like
20 she was about to be hurt.

21 And if you remember, some people are audio; right? So they --
22 it's easier for them to understand things. But other people are visual. So I
23 asked Brittney to come down. Brittney, show me what exactly was going
24 on. And I acted like I was Brittney and she acted like she was Kyriell.

25 She -- so I'm Brittney, I go to reach for the baby, Kyriell grabs

1 her by the hands, she's trying to take her hands back, he's holding onto
2 them, and they're going like this. Nobody's swinging at each other,
3 nobody's slamming anybody against the car. She's not laid out on the
4 hood of the car. They're right there and they're arguing back and forth.

5 At that point in time, the Defendant comes out of the house, and
6 according to Brittney, he goes right for Kyriell and he swings right at
7 Kyriell and he misses. That's when Thomas and Kyriell lockup onto one
8 another, which is what Kyriell was discussing, and that's when Ezekiel
9 gets out of the vehicle.

10 Brittney states that she's not sure if Ezekiel pushed the
11 Defendant or if he punched the Defendant in the attempt to break the two
12 up. But then it's those two that start fighting. Meaning, at that point in
13 time, Ezekiel and the Defendant are now fighting and they're moving up
14 the street.

15 But Brittney was very clear that during that time period she's
16 holding Kyriell back. And it's at the very, very end, in the last seconds,
17 she lets Kyriell. And by the time that Kyriell gets to Ezekiel and Thomas, it
18 is over. She sees Ezekiel running at one point from Thomas, running
19 away from Thomas as Thomas is chasing Ezekiel.

20 But she's very clear, at no point in time, at no point in time was
21 it ever two-on-one.

22 Again, at the end of this when we talk about the law I'm going to
23 show you that it doesn't matter if it was two-on-one. But Brittney's
24 testimony is that it was not two-on-one. She also talked about the fact
25 that this whole thing lasted about two to three minutes.

1 Now, I want to talk to you about the testimony of Angel Turner
2 and Tamisha Kinchron.

3 Before I get into their statements to police and their testimony, I
4 want to talk to you about a jury instruction that has to be with credibility.
5 And in that instruction it says, the credibility or believability of a witness
6 should be determined by his or her manner upon the stand, their
7 relationship to the parties, their fears, their motives, their interest or their
8 feelings, their opportunity to have observed the actual event, and the
9 reasonableness of their statements, and the strengths and weakness of
10 their recollection.

11 I'd also ask you to read the specific jury instruction that talks
12 about, if you believe that a witness has lied about any material fact in this
13 case, you may disregard the entire testimony of that witness or any
14 portion of his or her testimony, which is not proven by other evidence.

15 We like to call these things the three C's. When you're looking
16 at someone's testimony consider their credibility, consider corroboration,
17 is there other evidence or are there other people that are corroborating
18 what they're saying, and lastly consistency. If someone has told the story
19 multiple times, is their story consistent or does it flop back and forth or
20 does it change completely?

21 And I would ask you to look at those three things when you're
22 looking at everyone's testimony.

23 The one thing I would ask you to look at when you look at Angel
24 and Tamisha is how their -- both of their stories changed, how it evolved
25 from the time that they spoke to the police, to the time that they spoke to

1 the preliminary hearing, and to the time that they testified here at trial.

2 And the first one I'd like to talk to you about is Angel. And, you
3 know, make no bones about it, I think Brittney's in a -- Brittney said, she
4 was in a very difficult position. And it's obvious, I mean, Angel, Angel's
5 just a kid. I mean, she might be 18 years old, but she's just a sweet kid
6 trying to do the best that she can and this is really, really crappy situation
7 for her to be in.

8 And she cried in the very first couple of seconds when I said,
9 this is very hard for you. And she said, yeah. And the one thing where
10 she really started to cry is when she said it's hardest for Payton. And that
11 make sense. You know, Payton might be the daughter of Thomas Cash
12 but that's also Angel's little sister. And she knows that this is hard for her
13 little sister.

14 And the State would ask you to consider that and how it may
15 affect or influence her testimony.

16 What I want to focus on first is what Angel told the police
17 originally. And so what Angel talked about originally to the police is she
18 said that -- originally when she's speaking to the police, she says, I didn't
19 see my sister being slammed into the car, I heard, I heard what was going
20 on.

21 She gets Thomas and they run outside. Kyriell, when she gets
22 outside he has his hands on her sister and Angel herself says to Kyriell,
23 what are you doing? Why are you doing that? What are you doing that
24 for?

25 And that point in time Kyriell drops his hands. At that point no

1 physical force is being used, Kyriell's hands are down, Brittney's hands
2 are down, and Thomas goes for Kyriell and they lockup on one another.

3 Brittney is telling Thomas to stop, she's yelling at Thomas to
4 stop, and she's trying to pull Thomas off of Kyriell.

5 During this time period Ezekiel gets out of the car and at that
6 point the three are fighting together, meaning the three males.

7 She sees Thomas run towards the house and a second fight
8 starts between he and Kyriell. So as Thomas is running towards the
9 house, a second new fight starts between Thomas and Kyriell. This is
10 when Kyriell punches the Defendant in the nose and his nose begins to
11 bleed.

12 She runs into the house with Lyndon, and when she gets into
13 the house she turns around, Ezekiel is still standing outside. Thomas
14 follows her into the house but he falls before he gets into the home. And
15 then Thomas leaves out of the front door of the residence and his car is
16 gone. So she believes he takes his car and leaves.

17 Now, I want you to look at her testimony at trial. And I'm sure
18 as a juror it gets frustrating when we have to keep walking back and forth
19 and back and forth with people's statements to show them. But the point
20 in doing that is to show that there is a difference in what they're saying at
21 the day they are testifying in compared to what they either told the police
22 or what they testified at a preliminary hearing.

23 And when you look at Angel's testimony at trial, you will see
24 differences in that not only did she -- yesterday when she testified, she
25 said, not only did she hear the fight but she actually saw from the window

1 her sister being slammed into the car from upstairs.

2 When she and Thomas gets outside, she physically sees Kyriell
3 slamming her sister into the car, and Thomas has to get Kyriell away from
4 Brittney using force. That is completely different than what she told the
5 police within an hour or two hours of the incident.

6 She does say that Thomas is the original person to go after
7 Kyriell and that Thomas and Kyriell lockup. Ezekiel gets out of the car, it's
8 now two-on-one, and everybody is squaring up, and both Kyriell and
9 Ezekiel are landing punches on Thomas. She states that it was Ezekiel,
10 not Kyriell that punched the Defendant in the nose. It was Ezekiel that
11 punched Thomas in the nose. And after about five to six punches
12 between the three of them, she grabs Lyndon, she runs inside, and she
13 doesn't see anything else that happens. She doesn't -- when she goes to
14 the house, Ezekiel is standing up, when she runs inside. And Thomas
15 comes in, he's bleeding, and at some point he runs out the back door.

16 There many critical differences between when she speaks to
17 the police. The number one -- or the first one, the State would like to point
18 out, is the fact that when she first spoke to the police, she states that it at
19 the time her and Thomas come out, she says, Kyriell, what are you doing?
20 Why are you doing that? Kyriell drops his hands, Brittney drops her
21 hands, and it's off. It's done. It's over. No violence is being used.

22 But when she testified yesterday that had changed and when
23 they get out there Kyriell has Brittney and she's slamming -- he's
24 slamming her into the car and Thomas has to physically go in and prevent
25 Kyriell from causing any damage to Brittney.

1 During my examination of Brittney -- or let me backup. The
2 other thing that the State would ask you to consider is in the first rendition
3 to police she talks about this second fight completely happening before
4 Thomas goes back in the house, just between him and Kyriell. And she
5 said nothing about that when she testified at trial. And so I asked her
6 during cross-examination, when you talked to the police you said that
7 there was this completely separate fight between Kyriell and Thomas
8 before Thomas goes into the house, and that's when Kyriell punches
9 Thomas in the nose. Which of those stories is the correct rendition? And
10 she said the original story, the one that I told police.

11 One thing you could also consider is individuals, like we talked
12 about, motives, biases, their feelings, their ability to tell the story
13 consistently. But, also, the State would ask you to consider that Angel
14 stated that she spoke with family members, including Tamisha, for a
15 minimum of 40 minutes before she sat down to speak with the police.

16 She saw Thomas, again, once he came home, before he turned
17 himself into police. She spoke with family members before she testified at
18 the preliminary hearing about what had gone on. And then she stated
19 though she had spoken to her family members about what had happened
20 before she spoke to the police, and though she had spoken to her family
21 members what had gone on before the preliminary hearing, between the
22 preliminary hearing and the time she testified at trial, she stated that she
23 never spoke to anybody about what had happened.

24 We talked a lot about, you know, you can't bring anything in
25 from outside these doors. None of your, you know, not your life

1 experiences, not like this happened to me when I was 15 and now I'm
2 angry about it.

3 But the one thing you can bring in is your commonsense as
4 every day men and woman.

5 Is it reasonable to believe that between -- several months
6 between a preliminary hearing and a trial, Angel has not had any
7 conversations about what she saw or about what anybody else saw from
8 the preliminary hearing to the trial.

9 I also want to talk to you about a few things that simply do not
10 add up with what Angel has said. She -- when she testified she stated
11 that when she looked out her window, she saw Kyriell slamming Brittney
12 into the car in the driveway. And if you remember, I took out the map, and
13 I actually pulled out the driveway because I wanted to make sure are we
14 talking about actually in the driveway or we talking about in the front
15 where the -- where Kyriell's car was parked. And she said, no, I looked
16 out my window and I saw Kyriell slamming my sister into my car or that
17 family car that everybody drives.

18 Well, we know from the testimony from Brittney and from Kyriell,
19 that number one, there was no slamming going on, and, number two,
20 everything that was happening, was happening at the end of the driveway
21 at Kyriell's car or Kyriell's friend's car that he was driving that day.

22 Brittney had -- or excuse me, Angel had told the police originally
23 that when she's on her way out there she can hear Brittney screaming.
24 She's saying things like, I hate you, I don't want to see you anymore. And
25 that Kyriell at that point in time is actually trying to calm Brittney down.

1 And he's saying, I love you too much to keep doing this. That's what she
2 said on the night she spoke to police. That differs very much from her
3 testifying that she had -- that she came out and Kyriell was slamming her
4 sister against the car.

5 Brittney -- Angel, sorry, Angel continues to say that when she
6 gets inside that house that Ezekiel's standing up in the street and that
7 Thomas is right behind her. Ezekiel has been mortally wounded and
8 stabbed through his heart. Ezekiel is not standing up in the middle of the
9 street. He has already been stabbed.

10 And then, lastly, the State would ask you to look at Angel and
11 Tamisha's conduct after Ezekiel has been stabbed and he's dying in the
12 street. They don't call 9-1-1, they don't bring out towels, they don't render
13 aid, they stay in that house. They have to be bullhorned to get out of that
14 house. Does that make sense? Why would someone do that?

15 Now, Tamisha, I mean, I'm not going to go back and forth and
16 back and forth about what she said to the police and what she said at the
17 preliminary hearing because honestly we don't have enough time to do it.
18 But I would have to go -- literally go on for hours in regards to talking
19 about how many times Tamisha's story has changed. And when she was
20 confronted by Ms. DiGiacomo yesterday, you know, you would agree with
21 me that you said this on this date. And she said, I, well, I'm sorry, I'm
22 going through a lot, my heads kind of a mess. I'm not sure.

23 The State would ask you to consider that. I mean, one of the
24 things you're supposed to consider when discussing -- or thinking about
25 the credibility of a witness, is their ability to recollect what they saw and to

1 be consistent.

2 But there are a few things I would like to point out. When she
3 originally spoke to the police and testified, she stated -- or excuse me, at
4 the preliminary hearing, she said that when she got out there Kyriell had
5 his hands on Brittney. Yesterday when she testified, not only did Kyriell
6 have his hands on Brittney, he had Brittney slammed up onto the hood of
7 the car, her back completely laying down. That has evolved greatly in a
8 period of several months.

9 She originally said that during the fight Kyriell says, excuse my
10 language, go get my shit. But yesterday when she testified it evolved
11 from, go get my shit, to I'm going to kill that old motherf'r and blowup his
12 house. Again, that changed drastically over a period of few months.

13 When she spoke to the police she said she never saw her uncle
14 and Ezekiel tussling. She never saw those two close to each other. No
15 physical contact. But yesterday it was that Kyriell and Ezekiel were
16 attacking Thomas. It was two-on-one. They were punching Thomas.
17 Thomas kept trying to backup. Again, completely different rendition of
18 facts from when she originally told the police.

19 In her statement to police she said it was dark outside, it was
20 very hard to see. But yesterday when Ms. DiGiacomo pointed that out
21 that she had previously said that. She said, well, I could -- I could, it was
22 dark but I could see just fine as to what was going on outside.

23 When she talked to the police she told the police that once she
24 got inside, and looked out the window, she saw Ezekiel had been hurt and
25 he was on the ground. But yesterday when she testified she said she

1 didn't know that Ezekiel was hurt. In fact, she went -- this had stressed
2 her out so much she had to go get some cigarettes. And so she got in her
3 car and she left and she didn't even know Ezekiel was -- this 21 --

4 MR. LONG: Your Honor, I'm going to object to laughing.

5 MS. BLUTH: I didn't laugh, I mean.

6 THE COURT: You know, I just remind you what the attorneys
7 say is not evidence, jury instruction 32 will tell you that.

8 MS. BLUTH: So Ezekiel is dying or she said this is happening
9 before the police even get there. So Ezekiel is dying in the middle of the
10 street and she doesn't know he's out there. It's in front of her house and
11 she's going to pick up some cigarettes.

12 You can give her testimony the weight that you deem it
13 appropriate.

14 And when she told the police that when she went inside Ezekiel
15 was still standing up and it was only Kyriell and Ezekiel out there. So it
16 didn't make sense to her. Kyriell must have been the one that stabbed
17 Ezekiel.

18 The last person I want to talk to you about is Carolina Flores.
19 And what I would ask you to consider when you think of Carolina Flores,
20 she has no dog in this fight. She has no skin in this game. She doesn't
21 know people. She knows them from like hi or bye. But she is not related
22 through friendship or a familial relationship with anybody else in this case.

23 And so, if you remember, Carolina is the neighbor who lives
24 across the street. And when she first -- when she -- she has three
25 different vantage points in this very short time period. She also said she

1 believed it was under three minutes.

2 The first vantage point is she hears something going on from
3 her upstairs bathroom. She had just gotten down taking either a bath or a
4 shower. And she tries to see but her window is fogged and so she can
5 only see like silhouettes in the driveway. But the noises are getting
6 louder, there's yelling. And so she moves downstairs, she throws her
7 clothes in the dirty clothes, she moves downstairs and that's when she
8 has this second vantage point. And this is downstairs, and I can't
9 remember which room, forgive me, I think she said it was like the living
10 room. But she's able to open the window and she can see the driveway.
11 What she sees and what she hears at this second vantage point is
12 important, and that's because at that time she sees that -- she doesn't
13 know their names. But she sees Kyriell and Brittney. And she says it
14 looked like he was trying to calm her down, but it looks like he's trying to
15 get her to go somewhere and she's not wanting to go. And that's -- and
16 then right after that is when Carolina hears an impact.

17 So the State submits to you this is why that's important. When
18 she's looking outside and Kyriell is -- it looks to her like Kyriell is trying to
19 get Brittney to go somewhere, the State would submit to you that at that
20 point that's when Kyriell is trying to go to where Zek and the Defendant
21 are.

22 MR. LONG: Objection, this is her opinion, her speculation.

23 MS. BLUTH: It's the state's theory of the case, Your Honor.

24 THE COURT: Ladies and gentlemen, just remember, what the
25 attorneys say is not evidence, jury instruction 32 will tell you that. It's what

1 you remember.

2 MS. BLUTH: The State would submit to you, I mean, ask you to
3 consider the fact that when Carolina looks out and she sees Kyriell, and
4 she thinks Kyriell's attempting to get Brittney to go somewhere, that's at
5 the point when Kyriell is going to Zek and to the Defendant and Brittney is
6 trying to pull him back and hold him back. And how do we know that
7 that's true? Because the very next thing she hears is an impact. And she
8 runs outside and Zek has just fallen. She said his -- one of his -- he's in a
9 fetal position and one of his legs is still up in the air.

10 So we know it's not when Brittney and Kyriell are in the
11 driveway arguing because that has already happened. She doesn't see
12 Brittney and Thomas and Angel outside. That's all already happened.
13 She sees Brittney and Kyriell struggling while Ezekiel and Thomas are
14 doing what they're doing further up the street. And then she hears the fall.
15 She then runs out to her third vantage point. By the time she runs out, the
16 Defendant isn't out there anymore. Neither is Angel or Tamisha because
17 they've already gone inside.

18 The reason why the State submits to you that that's important is
19 it shows it wasn't two-on-one. At that point in time, before Ezekiel falls
20 and hits the ground, that's when him and Thomas are together.

21 The State would submit to you that when you look at those
22 stories, and when you boil them down to the most basic facts, what
23 happened that day is that the situation with Brittney and Kyriell happens
24 out front; right? They are arguing, they're tugging on each other, and the
25 Defendant comes out and he gets involved. And that's when him and

1 Kyriell start locking up. When he and Kyriell lockup, that's when Ezekiel
2 gets out, he breaks up the fight.

3 Now, whether Ezekiel punches the Defendant or whether he
4 shoves them apart, he breaks them up. At that point in time it becomes
5 Ezekiel and the Defendant. Because Brittney and Kyriell are off to the
6 side. Kyriell's trying to get loose, Brittney's pulling him, they're fighting
7 back and forth.

8 And it's at that time when it's Ezekiel and the Defendant that the
9 Defendant stabs Ezekiel. He then flees. He runs into his house, runs out
10 the backyard, hops two to three fences, and he gets rid of the knife. He
11 destroys the knife and he gets rid of it.

12 If you look at every one's stories and you boil it down, those are
13 the most basic facts of how it worked out.

14 I talked -- in a second I'm going -- we're going to talk about the
15 Defendant's actions. But the State would ask you to consider Kyriell's
16 actions. Kyriell stays there. He speaks to the police. He allows them to
17 search his vehicle. He doesn't leave Ezekiel's side. He stays there and
18 he cooperates.

19 What doesn't make sense are the Defendant's actions. Don't
20 just look at his actions after, but you need to consider his actions before
21 this whole fight starts, his actions during the fight, and his actions after the
22 fight.

23 Ask yourself, was there a need for him to get involved in the first
24 place? If you listen to Brittney, she was not in danger, there was no
25 physical violence happening; okay. Was there a need for him to even get

1 involved, for him to come out swinging at Kyriell?

2 But let's say that there was a need to get involved. Let's say,
3 hey, he hears his stepdaughter out there and he hears her screaming and
4 he thinks that he does need to get involved. He thinks she might be in
5 danger. So he comes outside. There wasn't -- why was there a need to
6 get violent? Why was there a need to punch Kyriell? Why couldn't -- let's
7 say, he got out there and Kyriell's hands were on Brittney, why can't he
8 just push them away, get Brittney, go inside.

9 Every single person that testified, besides Tamisha, testified
10 that Kyriell had taken his hands off of Brittney and that there was no
11 physical violence happening at that same -- that time.

12 In fact, per Brittney and per Angel, Kyriell was trying to calm
13 Brittney down at that point. There was no need to bring physical violence
14 into it.

15 You also heard that during the fight there were multiple times in
16 the fight where he could have stopped. Before the fight started, after
17 Brittney and Kyriell broke up, and after Ezekiel breaks up him and Kyriell.
18 What about once the cars come into the area? Once the cars come into
19 the area and separate the parties, he could have stopped then.

20 There are so many -- first of all, maybe he shouldn't even have
21 gotten involved at all. Once he did get involved, there shouldn't have
22 been any violence. And once the violence started, there was more than
23 one time where he could have stopped it from continuing. He could have
24 ran inside. He could have yelled for help.

25 What if he -- he had a weapon; right, you know that now. He

1 had a weapon in his pocket. Could he have just reached it out and
2 brandished the weapon and said, you guys, enough is enough.

3 There are so many decisions that could have been made
4 instead of plunging that knife through Ezekiel's heart. But those decisions
5 were not made.

6 There are also -- the State would ask you to also consider his
7 actions afterwards.

8 Now, I just talked about and you just heard -- you have heard,
9 that the Defendant fled the scene. There is an actual instruction that
10 deals with flight. And what that says is the flight of a person immediately
11 after committing the crime is not sufficient in and of itself to establish his
12 guilt. But it is a fact which if proved can be considered by you in light of all
13 of the other proved facts in deciding the question of his guilt or his
14 innocence. Whether or not evidence of flight shows a consciousness of
15 guilt and the significance to be attached to such a circumstance are
16 matters for your deliberation.

17 Lawyers use literally 80 words to say something we can
18 probably say in five. And what that's basically saying is, just because
19 someone flees the crime scene, doesn't mean you can say, oh, he fled, he
20 must be guilty. But it is something that you can consider. Why would he
21 do that? What did he do? What reasons does someone have to flee? So
22 it is something that you can consider.

23 The State would also ask you, I mean, he doesn't just flee from
24 the police, he shuts off his phone. He goes radio silent. He's not
25 answering text messages. He's not answering phone calls. It's going

1 straight to voicemail. He's gone for somewhere between eight and nine
2 hours before he goes back home. He destroys the knife. He doesn't
3 come back to police and say, I'm sorry, this got out of control, here's the
4 knife I used, it's just this small knife. No, he destroys it. He breaks it and
5 destroys it and throws it in some field.

6 When he calls his niece Tamisha, Tamisha says, that boy is
7 stabbed, that boy is dead. And he doesn't say, oh, I know, I know things
8 get out of control. He said, well, I didn't do it. If that boy's dead, I didn't do
9 it. I didn't even touch that boy.

10 Yet within hours he goes to the police and he says, yeah, I did
11 do it, I did stab him, but it was in self-defense.

12 When he talks to Tamisha he doesn't say to Tamisha, Tamisha,
13 things get so out of control, I didn't know what to do, I was so scared for
14 my life, I had to protect myself, I had to protect Brittney, so I just took out a
15 knife and I stabbed him. He doesn't say that. He completely denies ever
16 having physical contact with him, with ever stabbing Ezekiel.

17 It's not until eight or nine hours later, he's had time to gather
18 everything, speak to people, that he goes in and says, oh, it was
19 self-defense.

20 When we started this in opening Ms. DiGiacomo said to you
21 that in every criminal case the State has to prove to you two things. Was
22 a crime committed and who committed that crime? We call those things
23 the who and he what. And we have to prove to you those things beyond
24 what's referred to as a reasonable doubt. And you will have the jury
25 instruction. A reasonable doubt is one based on reason. It's not mere

1 possibility of a doubt. It's not a tiny doubt. It's a reasonable doubt. And in
2 order for it to be reasonable, it must -- it's not mere possibility or
3 speculation; okay.

4 So in this case, let's talk about those two things, the who. I
5 mean, this is not -- this isn't a whodunit; right. There are many cases that
6 are probably being heard right now where it's, who did it. This isn't a
7 whodunit. We know who did it.

8 But the issue is, is, what did he do? What did Thomas Cash do
9 and is it criminal in nature?

10 When you get back there, there will be a verdict form, and it will
11 have two charges. It'll be murder with use of a deadly weapon and battery
12 with intent to kill.

13 And I'm going to start with murder with use of a deadly weapon.
14 But the one thing that I want to say before I get into the law, is that the --
15 like I said, lawyers use so many words that can be so simplified. But if
16 you get into a hitch back there, where something doesn't make sense,
17 turn to the jury instructions, they are explanatory and they can help and
18 they will explain to you how the law applies; okay.

19 So I want to talk about murder. Murder is the unlawful killing of
20 a human being with malice aforethought either express or implied. Within
21 murder there are degrees of murder. I'm sure we've all heard first degree
22 murder, second degree murder.

23 MR. LONG: And, Your Honor, just for the record, I object, it's
24 the judge that instructs the jury as to matters of law, not counsel.

25 THE COURT: They've been instructed. This is -- what jury

1 instruction 32 will tell you what the attorneys say is not evidence.

2 MS. BLUTH: So my job to explain to you how the law applies to
3 the facts in this case and that's what we're going to do right now.

4 So underneath the class of murder you will have three options,
5 murder in the first degree, murder in the second degree, and voluntary
6 manslaughter. I want to talk about the differences between those three
7 things.

8 So we're going to start with first degree murder. In order for
9 something to be first degree there have to be three things. Murder of the
10 first degree is murder which is perpetrated by means of any kind of willful,
11 deliberate, and premeditated killing. So a first degree murder has to be
12 three things, it has to be willful, it has to be deliberate, and it has to be
13 premeditated. So willfulness is the intent to kill. There need be no
14 appreciable space of time between formation of the intent to kill and the
15 act of killing.

16 So what's that saying, is this is not about timing. It's, if you
17 willfully mean -- if you mean to do something and you do it, that's
18 willfulness. If you take a knife and you mean to stab into somebody, that's
19 willfulness; okay.

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

23 Premeditation is a design, a determination to kill, distinctly
24 formed in the mind by the time of the killing. So that means premeditation
25 is, you have to have the intent to kill someone before you do it.

1 But I would caution you, because the next part of the law says
2 that premeditation it's not about time. It need not be for a day, an hour, or
3 even in a minute. It may be as instantaneous as successive thought of
4 the mind. It can be this fast. For if the jury believes that the action
5 constituting the killing has been preceded by and has been the result of
6 premeditation, no matter how rapidly that happens, it is premeditated.

7 And then, lastly, malice aforethought means an intentional
8 doing of a wrongful act without legal cause or excuse or what the law
9 considers adequate provocation.

10 Malice aforethought it doesn't imply -- the word aforethought
11 sometimes makes people think that it has to do with timing. It has nothing
12 to do with timing.

13 It does not imply deliberation or the lapse of any considerable
14 time between the malicious intention to injure another and the actual
15 execution of the intent, but denotes an unlawful purpose and design as
16 opposed to accident in this chance.

17 So what malice is is it's you are doing something with the
18 purpose to injure. It's not an accident. It's not by mischance. You're
19 doing something with a purpose to injure.

20 So I want to give you an example, the one place where people
21 get confused about first degree murder is they think that by premeditation
22 that you have to have this, you're sitting in your room and you're brooding
23 and you're planning this intense murder. That's actually not what first
24 degree murder is.

25 Let's say you guys have -- one of you, but pretend like it's you --

1 has an important job interview tomorrow at 9:00 a.m.; right. And so that
2 night you go to bed, you set the alarm, you're like I got to be early, I got to
3 show these people that I'm the person for the job. So the alarm on your
4 iPhone doesn't go off; right, or you snooze. So you're running late and
5 you're on the freeway and you're speeding, you're about five minutes
6 away, you get off the freeway and you got one stoplight to get through.
7 You're driving up, you're speeding, and that light hits yellow.

8 At that point in time, how fast does your mind think, I got to
9 brake because there's probably a cop around or I'm going to hurt
10 somebody or I've got to get this interview and I'm going through it. That's
11 how fast decisions can be made to kill somebody.

12 It's this idea of premeditation is not about this preconceived
13 plan. If you -- this is what first degree murder is, you have in your mind
14 you're going to kill somebody and you kill them. You take out a knife, you
15 stab them, that's premeditation. It can be as fast as successive thoughts
16 of the mind.

17 Now, facts of this case, if you believe that at the time Thomas
18 pulled that knife out of his pocket and stabbed Ezekiel in the heart, if you
19 believed in his mind that that was willful and that was deliberate and that
20 there was a thought process, I take out the knife and I'm going to stab
21 him, he is guilty of first degree murder. It can be made that fast.

22 Now, I want to talk to you about second degree murder; okay.
23 Now, second degree murder is defined much quicker and much easier.
24 And what the law says is that murder of the second degree is murder with
25 malice aforethought but without the admixture of premeditation and

1 deliberation. All murder which is not murder of the first degree is murder
2 of the second degree.

3 So what that saying is, is if you find that there was in fact
4 premeditation, if there wasn't that deliberation, it was just a hasty decision
5 made, that's second degree murder. So any murder that's not first that
6 you don't find that premeditation, and willfulness, deliberation, that's
7 second degree murder.

8 So let me give you an example of second degree murder. For
9 instance, let's say somebody is drunk or very high and they make the
10 decision, sloppily to pull out a gun or a knife and kill somebody. Perhaps
11 they did not have the mental ability at that time to form the requisite intent.
12 They didn't have all the wherewithal to premeditate or to commit a
13 premeditation. That's a second degree murder. Where you don't have
14 that added, that, those thoughts that I was talking about. You don't have
15 the time or you don't make up that intent to kill somebody but you still kill
16 somebody, that is second degree murder.

17 So how does that apply to this case? If you believe that
18 Thomas took out that knife and stabbed it into Ezekiel and it was willfully
19 done, he willfully took out that knife and stabbed him, but you don't find
20 that he had the wherewithal to make those decisions, he didn't have the
21 premeditation, like, I'm going to take this knife and I'm going to willfully do
22 it and kill him, then he is guilty of second degree murder; okay.

23 There's one last choice and that's voluntary manslaughter.
24 Voluntary manslaughter is a voluntary killing upon a heat of passion
25 caused by a provocation apparently sufficient to make this passion

1 irresistible. The provocation must either consist of a serious and highly
2 provoking injury inflicted upon the person killing. Sufficient to excite an
3 irresistible passion in a reasonable person or an attempt by the person
4 killed to commit a serious personal injury on the person killing. For the
5 sudden violent impulsive passion to be irresistible, resulting in the killing,
6 which is voluntary manslaughter, there must not have been an interval
7 between the assault or provocation and the killing sufficient for the voice
8 of reason and humanity to be heard. For if there should appear to have
9 been an interval between the assault or provocation given and the killing,
10 sufficient for the voice of reason and humanity to be heard, then the killing
11 shall be determined by you to be murder.

12 Again, let me give you an example because we don't need to
13 read all those words over and over again; okay.

14 So police officer is getting off work and he has his gun on his
15 belt, he comes up, goes up the stairs, he finds his wife in bed with his best
16 friend. He immediately takes out his gun and shoots them both. That's a
17 killing done in a heat of passion. That can be arguably a voluntary
18 manslaughter.

19 But, let's say the police officer leaves his car down in -- leaves
20 his gun down in his car or his truck. He goes upstairs, he finds his wife in
21 bed with his best friend, he leaves them, walks downstairs, goes and
22 grabs his gun, goes back, and shoots them both. That's not a voluntary
23 manslaughter. During that time period, you should have the wherewithal
24 to think to yourself, I'm not going to get my gun and kill my wife and my
25 best friend. It has to be a heat of passion.

1 And if you go back and you look at the law -- excuse me, look at
2 the law, it has to be sufficient to excite an irresistible passion in a
3 reasonable person.

4 So it's a reasonable person standard. If you get punched in the
5 nose, is it reasonable for you to take out a knife and stab somebody or for
6 you to take out a gun and shoot somebody. Is that reasonable behavior?
7 That is not reasonable behavior.

8 If you look at your three options in this case, voluntary
9 manslaughter is not one of them. For you this decision is between first
10 degree murder and second degree murder. The facts of this case do not
11 match the law of voluntary manslaughter.

12 And when you go back there, the State would request that you
13 look through the instructions, and you look at voluntary manslaughter, and
14 you compare them to the facts in this case, and you will see that the facts
15 of this case do not support voluntary manslaughter.

16 The last thing that when you -- well, two things is, we need to
17 talk about is a deadly weapon. I think that that's probably an obvious
18 thing. But that's any instrument, which if used in the ordinary manner
19 contemplated by its design and construction will or is likely to cause
20 substantial bodily harm or death.

21 So, obviously, we know that a knife was used and we know that
22 a knife can cause death. So a deadly weapon was used in this case.

23 But one thing about a deadly weapon is you can look at the way
24 in which it was used. And you can consider the way in which it was used
25 and how that shows you what the Defendant's mindset was.

1 And what the State would ask you to look at is not only the
2 pictures but also the testimony of Dr. Roquero, who was the medical
3 examiner. And what did he say? He said that there were two sharp force
4 injuries to Ezekiel. One of them was a stab wound, that would be from
5 like a jabbing or a plunging type action. And then the second one was an
6 incised wound, meaning that it's longer than it is deep into the body.

7 So the State would ask you to look at manner in which this
8 weapon was used and what does that tell you about what was in the
9 Defendant's mind. That knife, in order to get to where it got in the heart, it
10 had to go through, obviously, the skin, through the cartilage, through the
11 rib cage, and through the heart. Had to go into the body at least four
12 inches to get where it needed to be.

13 He didn't stab him in the arm. He didn't stab him in the leg. He
14 stabbed him in the chest, in the heart. What do you think is going to
15 happen to someone when you take a knife and plunge it through their
16 heart?

17 That was not a mistake. That was not an accident. When you
18 take a knife and plunge it in that area, you have the intention to kill
19 someone. And when you look, that is what's referred to as a gaping stab
20 wound. That ain't no nick. That's no slice. That is a real, deal stab
21 wound.

22 And I didn't circle it. But you can clearly see the stab wound in
23 the middle of the heart.

24 The State is never required to recover a deadly weapon. So,
25 you know, if someone gets rid of a gun or gets rid of a knife and we don't

1 have the ability to recover it, we are not required to do so by the law in
2 order for you to find that a deadly weapon was used.

3 The last thing I want to talk about is we talked what this is and
4 that's a case of either first degree murder or second degree murder
5 depending on the facts that you apply with the law.

6 What this is not, is this not a valid case of self-defense. And
7 what I'm going to do now is I'm going to go through the law on
8 self-defense and explain what the evidence in this case shows.

9 Before I do so, the first -- for the first time this morning, you
10 heard the Defendant's story, so the Defendant's rendition of the facts.

11 And in that the Defendant stated that it was Angel who came in
12 and got him. And when she came in and got him, she said, hey, Brittney
13 and Kyriell are tussling out front. So he goes downstairs. Through the
14 Defendant's own words, he stated that when he got downstairs and went
15 outside, Kyriell hands were no longer on Brittney. He had just let Brittney
16 go. He goes for Kyriell and he punches Kyriell. Therefore he's the
17 original aggressor. That's when those two lock onto each other and when
18 they're locked onto each other, he hears Kyriell say, get 'em, get 'em, and
19 that's when Ezekiel gets out of the car and punches him in the nose.

20 Now, you heard some testimony today that the Defendant said
21 that the punch was pretty forcible, it was pretty shocking to him, so he
22 thought that maybe Kyriell had -- excuse me, Ezekiel had something in his
23 hand, like a little small bar or something. But he never saw any weapon.

24 That's when they all three square up and Ezekiel comes
25 towards him, lunges for him, and that's when he pulls out his knife and he

1 stabs him. And what was the reasoning he gave for why he stabbed
2 Ezekiel? I don't -- I didn't want to get hit again. Not, I didn't want to get
3 stabbed, not I didn't want to die, not I didn't want to get shot. I simply did
4 not want to get hit again.

5 He goes inside, flees, destroys the knife, and gets rid of it.

6 That is not self-defense. This is what the law says self-defense
7 is, the killing of another person in self-defense is justified when the person
8 who does the killing actually and reasonably believes two things.

9 So you have to actually believe this and that belief has to be
10 reasonable.

11 That there is an imminent danger that the assailant will either
12 kill him or another person or cause him great bodily injury. And that it is
13 absolutely necessary under the circumstances for him to use in
14 self-defense force or means that might cause the death of the another
15 person for the purposes of avoiding death or great bodily injury to himself
16 or another.

17 Here, what evidence do we have that there was imminent
18 danger or great bodily injury.

19 First of all, I'd ask you to look at the size difference between
20 these individuals. At the time of booking, the Defendant was booked in at
21 about six feet tall, six-feet, six-feet-one, 206 pounds. Kyriell,
22 five-foot-eight, 150 pounds. Ezekiel, six-foot-one, 134 pounds.

23 The Defendant stated he knew that there were no weapons, no
24 knife, no guns.

25 And then I'd also ask you, when you go in there, you'll have full

1 body pictures of both Ezekiel and the Defendant.

2 This wasn't some brutal, you know, dual to the death fight you
3 see on Game of Thrones. I mean, this is a fist fight in the middle of the
4 street. If you look at their bodies, first of all, look at the difference in size.
5 I mean this respectfully, but Ezekiel is an incredibly, incredibly thin human
6 being. The Defendant had quite a degree of bulk to him.

7 This is not great bodily injury, this is not death, this doesn't
8 mean you get to pull out a knife and do that. Look at their differences in
9 injury. He doesn't have two black eyes, he doesn't have a busted head
10 open, busted arms, bloody knuckles.

11 In three minutes he made this decision.

12 That is not what self-defense says. Self-defense must be an
13 honest but unreasonable belief in the necessity for self-defense does not
14 negate malice and does not reduce the offense from murder to
15 manslaughter.

16 The belief that you're about to die or you're about to suffer
17 imminent great bodily injury has to be reasonable. It has to be what a
18 reasonable person would think and do.

19 A bare fear of death or great bodily injury is not sufficient to
20 justify a killing. To justify taking the life of another in self-defense, the
21 circumstances must be sufficient to excite the fears of a reasonable
22 person placed in a similar situation. The person killing must act under the
23 influence of those fears alone and not in revenge. Where a person
24 without voluntarily seeking, provoking, inviting, or willingly engaging in a
25 difficulty of his own free will, is attacked by an assailant, he has the right

1 to stand his ground and not retreat when faced with the threat of deadly
2 force.

3 So what that says is, you know, someone's coming at you, you
4 have the right to stand your ground, you have the right to protect yourself.

5 There was absolutely no deadly force being used against
6 Mr. Cash. At no point in time was there any testimony from anyone,
7 including the Defendant, that he was ever faced with the threat of deadly
8 force.

9 In his own words, ladies and gentlemen, I did it because I did
10 not want to get hit again.

11 Now, there is a little bit different law, if you are the original
12 aggressor. So if I go and I pick a fight with Ms. DiGiacomo, I don't get to
13 ever say, oh, well, if, let's say I kill her, I can't then say, well, I did it in
14 self-defense because I'm the original aggressor. I'm the one that started
15 it.

16 At the only time that I can ever kill her in self-defense, when I'm
17 the original aggressor, is if I go after her and we're fighting and at some
18 point there's a break in the conduct and I say, I'm done, like I don't want
19 any more of this, and I go to retreat, and she comes back at me and I kill
20 her, that is a little bit different.

21 But when you look at the law for self-defense, it says, the right
22 of self-defense is not available to an original aggressor.

23 What evidence do we have that the Defendant was the original
24 aggressor? In this situation, he is the first person to throw a punch.

25 Kyriell says that, Brittney says that, Angel says that, and the Defendant

1 himself says that.

2 This is very simple, if you believe the Defendant was the
3 original aggressor, he is not entitled to self-defense. He is not entitled to
4 self-defense.

5 And this supports what I was saying to you with my hypothetical
6 with Ms. DiGiacomo. The original aggressor is only entitled to exercise
7 self-defense if he makes a good faith endeavor to decline any further
8 struggle before the mortal blow is given.

9 There is no evidence in this case that Thomas ever made a
10 good faith effort to stop this struggle. There were several breaks during
11 this fight where he could have stopped this struggle. He could have
12 retreated.

13 A lot of the time people want to know why. Why do people kill
14 other people? Why do people do this? Why do people do that? Motive is
15 not something that the State ever has to prove. But it is something that
16 you can consider.

17 The Defendant himself states, Ezekiel got out of that car and
18 punched him hard in the nose and it hurt. I mean, there's no doubt it hurt.
19 There's swelling to that nose. There's a cut up nose. And he was angry.
20 He was angry and he was hurt. And within seconds, moments, he pulled
21 out a knife and stabbed Ezekiel. That wasn't because it was two-on-one,
22 that was because he was angry and he was hurt.

23 Battery with intent to kill is the second charge and it is very
24 easy. And what it says is this, battery is any willful or unlawful use of
25 force of violence upon the person of another. So if I come up to you and I

1 push you, that's a battery. I've used force that's not lawful. I've made
2 contact with you that that's -- and that's not lawful. If I do that with the
3 intent to kill you, so if I take a knife and I stab you with it, I meant to have
4 an unlawful contact with you, and I meant that you could would die from
5 that contact. That's battery with intent to kill.

6 It's very easy to get lost in all of the minutia and all of the
7 stories.

8 The last thing I'd like to say is that keep it simple, keep it simple.
9 It really boils down to two stories and that's how I started; right? It's either
10 it was one-on-one, Ezekiel and the Defendant were engaged in
11 something, or it was two-on-one. Either way, it doesn't matter. Even if it's
12 two-on-one, you don't get to pull out a knife and plunge it through
13 somebody's heart. If you could do that, that means that every bar fight,
14 every fight that happens on a football field, or after a game, people could
15 be pulling out weapons and killing each other and claiming self-defense.
16 That's not what self-defense is about. It doesn't matter which story you
17 believe. If you believe if it was two-on-one or if it was one-on-one, you
18 don't get to do what Thomas Cash did to Ezekiel Devine.

19 I started out this morning when I said, you know, people have to
20 be accountable for the decisions they make and the actions that they take.
21 And Thomas made those -- he made that decision. He made that
22 decision to get involved in that fight. He made the decision to pull out a
23 weapon. And he made a decision to plunge it into Ezekiel's chest. And a
24 life was lost because of that.

25 You don't get to do that and then walkout, hands up, sorry, it

1 was a fight. No. You don't get to do that. There are consequences for
2 taking another person's life. And it doesn't get to be, I didn't want to get
3 hit again.

4 He made those decisions and it's up to a jury of his peers to
5 decide what those decisions were.

6 If you believe he took out that knife and in those seconds had
7 the intention to kill Ezekiel Devine, he is guilty of first degree murder.

8 And if you believe he took out that knife and didn't think that
9 quickly, oh, I'm going to kill him but he still had the willfulness and the
10 malice aforethought, he is guilty of second degree murder. Any other
11 choice is not supported by the law.

12 Thank you.

13 THE COURT: Go ahead.

14 **CLOSING ARGUMENT BY THE DEFENSE**

15 MR. LONG: Ladies and gentlemen of the jury, thank you for
16 your time, thank you for your patience during this trial.

17 In the beginning of this trial, a week ago, I asked you to come
18 with me to Pistachio Nut Avenue on the night of December 11th, 2017.

19 What happened that night, the past week, you have heard
20 differing versions. If you believe Kyriell, he went over to Brittney's house
21 to pick up a daughter that he has in common with Brittney Turner. During
22 the exchange, Thomas came out, a fight started, and Ezekiel got out of
23 the car and we are where we are.

24 If you believe Angel, Angel was sitting in her bedroom window,
25 whatever she saw and whatever she heard, was sufficient for her to run to

1 Thomas for help.

2 Now, Kyriell was out there for 15 minutes. He made five or six
3 phone calls. Was there any problem? Did Thomas go out and say, get
4 out of my yard? Did he initiate that fight? No.

5 Angel saw her pregnant sister grabbed by the arms. Brittney
6 says it was by the wrist and shaken against a car.

7 There's a white car in the driveway, there's the car Kyriell came
8 up in, which is parked blocking the driveway. Does it matter if she's being
9 shaken against the car in the driveway or the car in the street?

10 Thomas did not look out the window and say, h'm, it looks like
11 Brittney is in trouble. I better get out there. He was summoned by his
12 stepdaughter to go out and help his other stepdaughter, his six months'
13 pregnant stepdaughter.

14 Were there any marks on Brittney? She just said she was
15 grabbed by her wrists. Angel says she was grabbed here. The police
16 didn't look.

17 In the beginning of her -- of their closing statement, the State
18 said, this is a simple fist fight, how did we get to murder?

19 Ladies and gentlemen, this was not a simple fist fight. It started
20 as possibly a simple fist fight between Kyriell and Thomas but it didn't end
21 that way. Thomas is not sitting there accused or charged of doing
22 anything to Kyriell.

23 What started as a fist fight, a one-on-one, quickly escalated into
24 a two-on-one. Two young men, Kyriell saying he's in perfect physical
25 condition. Not even half of this man's age, ganging up on him.

1 It was not a simple fist fight. It was two-on-one.

2 And in the versions you've heard, you've heard a version of
3 Kyriell, he's told you what he remembers. He was in a fight, Ezekiel got
4 out to break up the fight, he said that Ezekiel was just trying to be neutral.
5 He was trying to calm everything down. And then Ezekiel fell. Kyriell
6 takes a look at him, looks okay. I'm going to run. I'm going to try to kick in
7 his door. That's what he testified to.

8 Kyriell never testified Brittney was trying to hold him back.
9 That's Kyriell's version.

10 How much credibility do you give Kyriell? He wasn't supposed
11 to be at Brittney's house. He says that he put his hands on her to calm
12 her down.

13 Ladies and gentlemen, he'd been waiting for 15 minutes. He's
14 made five or six phone calls. The yelling is so loud that the neighbor next
15 door can hear. If he was really trying to calm the situation down, how
16 could anybody hear his voice? He put his hands on the mother of his
17 children. How much credibility do you give a person like that?

18 If you believe Brittney, Kyriell was just grabbing her right here,
19 on the wrist, shaking her. But not like a shaken baby. And that's when
20 Thomas comes out, the fight starts, Brittney tries to break it up, something
21 that Kyriell said didn't happen.

22 You know, Brittney is six months pregnant. There's a lot of
23 yelling, there's a lot of pandemonium. And then what happened?

24 Then Angel testified. Angel testified that she looked out her
25 window and she saw her sister getting shaken against the car by Kyriell.

1 Whatever she saw was enough for her to go to Thomas for help. She got
2 Thomas, they engage in fighting, they broke apart. She testified over and
3 over again that they were chasing each other.

4 And then there's Tamisha. Tamisha testifies that when Thomas
5 came out they had recently let go. Different versions.

6 But there is one common denominator in all of these stories and
7 there has not been a scintilla of evidence to say otherwise. The State
8 puts up there on the screen, consistency. What is one consistent fact with
9 all of these versions? Ezekiel is sitting in the car, in the passenger seat,
10 and he gets out to join the fray.

11 Who is the original aggressor between Thomas and Ezekiel? It
12 is Ezekiel. The officer who sat there this morning testified, was there
13 anything to show that Thomas verbally or physically incited a fight with
14 Ezekiel? No.

15 Ezekiel gets out of the car, there is a fight going on, and wham.
16 Now it's two-on-one. Now it is not a simple fist fight. Now, this man is
17 outnumbered. He's 52 years old. Two athletic young men who are
18 starting the beating. That is the common denominator through all those
19 stories.

20 So does it matter where was the car parked, was it backed in,
21 was it pulled in, how far away, how many steps?

22 Take a step back, like the State said, keep it simple. We are
23 not here to judge the actions, the fight, that occurred between Thomas
24 and Kyriell. We're not here to determine whether or not Kyriell committed
25 domestic battery against the mother of two of his children. We are here to

1 determine whether or not Thomas should be criminally responsible for
2 taking the life of Ezekiel Devine. And as I'm going to explain, he should
3 not.

4 The common denominator is that Ezekiel willingly, knowingly,
5 got out and joined this fight.

6 So who is the original aggressor? If you take a look at jury
7 instruction 24, self-defense is not available to an original aggressor. The
8 State wants to paint Thomas as the original aggressor, that his action
9 coming downstairs to defend his stepdaughter makes him the aggressor.

10 But as I have said, we are not here to talk about the fight
11 between Kyriell and Thomas. Ezekiel became the aggressor when he got
12 out of the car.

13 The State, in its closing, they just said there's three choices.
14 First degree murder, second degree murder, voluntary manslaughter.
15 There's a fourth choice, there is self-defense.

16 The State has to prove beyond a reasonable doubt that Thomas
17 did not act in self-defense. And so remember, not only do you have the
18 two-on-one, not only do have you a hard punch to the face that he thinks
19 might be a bar or, as the detective said, maybe, you know, the detective
20 suggested maybe a brass knuckle. What are they saying when this is
21 going on? Get my gun. Kill this motherf'r. Get my shit.

22 So you've got two people beating on you and they're yelling that
23 they're going to kill you.

24 Self-defense reasonable under these circumstances? Yes.

25 And so you say it's just a simple fist fight, how could it escalate

1 into murder? Well, ladies and gentlemen of the jury, let me ask you, when
2 did the knife come out? When it was a simple fist fight, when Thomas
3 was coming to the aid of his daughter, did he have a knife in his hand?

4 No.

5 Every witness who sat up there said they engaged each other
6 with their hands. Just Thomas and Kyriell they were just going at it. That
7 is a simple fist fight.

8 When it becomes two-on-one Thomas is now at a considerable
9 disadvantage, not only because of his age, but because there's two
10 people now. And they are getting ready to attack. That is when the knife
11 comes out.

12 And he says, yes, he doesn't want to get hit again, but he's also
13 coming towards me. What is going to follow getting hit again? Hit again,
14 again, again.

15 And the State says, Thomas could have stopped this fight at
16 any time. Yes, he could have laid down and let them beat him senseless
17 and beat him to death.

18 But remember, his granddaughter is out there. So is his
19 pregnant stepdaughter, so is Angel. So is his niece. And these two
20 young men hollering about getting guns and killing and shooting all the
21 while it's two-on-one.

22 Thomas never tried to stab Kyriell. Kyriell doesn't have a single
23 wound on him. He never threatened him.

24 You've heard the evidence, ladies and gentlemen.

25 Now, Carolina Flores lives next door. Her English is bad. She

1 spoke through with an interpreter. And the first thing that she testifies is
2 that she hears voices outside. They're yelling, there's arguing. The lights
3 on, the bathroom window is covered with steam, there's no testimony that
4 she wiped it off, that she opened it. But the noise is getting worse and
5 worse. And then she goes downstairs and it's getting so bad that she
6 decides to open the front door and let's see what all this commotion is
7 about. And as all this yelling is going on, that's when she hears a thud,
8 when she goes outside, Ezekiel is already on the ground.

9 Do we know what that impact was? Was it Thomas hitting the
10 ground? No. Was it Ezekiel hitting the ground? We don't know. Was it
11 Kyriell hitting? Was it a punch? Was it a body falling on the ground? We
12 don't know.

13 She heard a thud, she went out, by then Ezekiel is on the
14 ground, Kyriell is over him asking for help. And so, I guess, Kyriell has
15 already run back to the front door and tried to kick it down and then come
16 back. That's what he testified to. And she brought him towels.

17 The State has made arguments that the Defendant and his
18 families conduct afterwards perhaps show something amiss. They had to
19 be called out with a bullhorn. The police officer testified they didn't go to
20 the door, they didn't know what they were dealing with. They first get the
21 bullhorn, they walked out the first time. Everybody was cooperative.
22 Nobody yelled, I'm not saying anything. Nobody yelled, don't come into
23 my house. Completely cooperative. Everybody was on board.

24 Yeah, Tamisha left to go get cigarettes. She didn't know
25 anybody had been killed at this point.

1 And it's interesting, you know, the State says, I want to tell you
2 the real story. And in this real story, supposedly Thomas and Ezekiel are
3 just -- just the two of them fighting, while Kyriell is doing whatever and
4 Thomas takes out his knife and stabs Ezekiel and then Ezekiel falls and
5 Kyriell is there over the body of his dear friend crying out for help.

6 The real story that the State told you by the State -- just told you
7 in closing, isn't the story that Kyriell said.

8 Remember, Kyriell said, he looked at Ezekiel, he was okay, he
9 ran to the front of the house, because they started beating on Thomas
10 and he was going to finish it. The door was locked. He used his
11 shoulder. He used his foot. He tried to kick it in but the door was locked.
12 And all the while, according to the detective saying today, I'm going to
13 shoot you, I'm going to shoot you.

14 The question that the State asked you is, did Thomas have to
15 get involved? I've said it before. Thomas was summoned. And I suspect
16 at the end of the day, no, he didn't have to. You can see a car accident
17 on the roadway, you can see somebody lying there bleeding, and you can
18 drive on by minding your own business.

19 Your daughter, your stepdaughter, your pregnant stepdaughter
20 because she can be out in the front yard getting beaten by her boyfriend,
21 and you can say, eh, I'm busy, I've got to wrap these present.

22 That's not the type of man Thomas is. Thomas's daughter
23 came to him for help. Angel saw that her sister needed help. And it
24 wasn't because she saw an argument. I guarantee you, two sisters have
25 had arguments before, they know the difference between an argument

1 and a battery. Angel knows when her sister needs help and knows when
2 it's just more, more drama. She needed help. If she didn't need help, she
3 wouldn't have got up and went and got Thomas.

4 So why did this escalate into violence? Was there even a bit of
5 evidence that when Thomas came out Kyriell said, whoa,
6 misunderstanding. What Thomas saw he knew that he had to take action.
7 He had to engage Kyriell to prevent further injury to his stepdaughter, to
8 her unborn child, and the little baby that is out there.

9 The State just seems to want to put all of the onus on Thomas.
10 Run out there, let's see, is he touching her, is he shaking her, h'm? The
11 law doesn't require you to do that.

12 If you look at the self-defense jury instruction, it not only allows
13 for defense of yourself but for defense of others. A person kills another in
14 self-defense it must appear that the danger was so urgent and pressing
15 that in order to save his own life or the life of another person or to prevent
16 anyone from receiving death or substantial bodily harm. You can take
17 that life.

18 Do you really believe that Kyriell is this patient, saintly man just
19 trying to calm down Brittney? Just trying to make this situation go
20 peaceful. Were those his actions that night? Does a peaceful man like
21 that say, get my gun, kill this motherf'r? Of course not.

22 Are there times that this fight could have stopped? Throughout
23 this trial we have seen witnesses testify and the State has brought out
24 possible inconsistencies. And the best example is when Toni, Thomas's
25 wife testified yesterday, if you'll remember Toni testified, Kyriell is not

1 allowed in my house. And on cross-examination, well, isn't it true that you
2 just said he wasn't allowed inside your house. When, in fact, the exact
3 line was, he's not allowed at my house. He's not allowed inside.

4 Are there times that this could have stopped? And the answer
5 is, possibly, if Thomas wanted to just lay there. But the law does not
6 require him to do that.

7 If you look at jury instruction number 27 -- actually number 25,
8 actual danger is not necessary to justify a killing in self-defense. A person
9 has a right to defend from apparent danger.

10 Thomas has no duty to lay down and say, bring it on young
11 men. Young men who play football, who are in perfect physical condition,
12 you just go ahead and beat me into next week.

13 The killing or attempted killing, if you look at jury instruction 21,
14 is justified and not unlawful when the person who does the killing
15 reasonably believes that there is an imminent danger that the assailant, in
16 this case, Ezekiel, is going to kill him or cause him great bodily injury to
17 himself or to another person.

18 What's going to happen to Thomas's granddaughter outside --

19 MS. DIGIACOMO: Objection, relevance.

20 THE COURT: Sustained.

21 MS. DIGIACOMO: Improper argument too.

22 MR. LONG: Now, let's talk about a weapon. A weapon, what
23 the police officer said Thomas testified, a tiny, little work knife that he
24 always had. Something that felt so innocuous in his pocket. It was just
25 like carrying car keys or a pen or anything else.

1 When Thomas left his house to defend his stepdaughter on the
2 night of December 11th, he didn't stop by the kitchen, where the officer
3 testified, there was a big selection of knives.

4 He went out as quickly as he could because he believed
5 Brittney was in imminent danger. He just so happened, as I said in
6 opening argument, the man is an HVAC technician. His daughter testified
7 he fixes machines, fixes the vending machine at McDonald's. He works at
8 Sears. He always has this little knife clipped right here.

9 And he said that.

10 Is that when someone's going out to kill? Is that when
11 somebody wants to use? Is that the weapon of choice.

12 And then when it comes to Tamisha, the State basically says,
13 don't believe her. She said her head is a little messed up. She gave
14 conjecturing stories. But when it comes to the statement that Thomas
15 supposedly made to her on a cell phone, believe every word she says,
16 believe that Thomas denied stabbing Ezekiel.

17 First of all, what Thomas said to his relative is completely
18 immaterial. Look at Thomas's actions. He hears, he's dead, let's go down
19 to the police.

20 There has been a lot of evidence that Ezekiel was not that big,
21 skinny. Kyriell testifies that he weighs 150 pounds, that he's in perfect
22 physical shape.

23 And you've heard the testimony about the fight. Was there any
24 evidence presented in this trial, ladies and gentlemen, that this fight began
25 with the parties announcing their weight? Is this a WWE fight where they

1 say, weighing in at this corner is Ezekiel Devine at 135 pounds, weighing
2 in this corner.

3 Ezekiel Devine introduced himself to Thomas Cash on a dark
4 December night with a punch to the face so he could help his friend,
5 Kyriell, beat this man to a pulp or kill him. That's what they were yelling,
6 about killing.

7 He was wearing how many layers of clothes when we saw the
8 autopsy pictures? Big black sweater, sweatpants. On a dark December
9 night Thomas is supposed to have the ability to say, h'm, he's only a 30,
10 only a 130 pounds, only 140 pound, I can take a few more of those
11 because he's not that big.

12 This isn't an old western movie where the two stood at opposite
13 ends and sized each other up and talked a lot of trash. That is not how
14 this fight started. It was dark. Both men were wearing jackets.

15 And it's not just the punch to the face, it's everything else that
16 accompanies it. It's the fact that there's two people beating on him and it's
17 the yelling, get my gun, kill him.

18 Even the night that it happened, Thomas said they were going
19 to get a gun and, you know, blowup his house. That's why he locked his
20 door when he ran inside.

21 If you look at jury instruction number 25, confronted by the
22 appearance of imminent danger, even if it develops afterwards, that the
23 person killing was mistaken about the imminent danger. Even if the next
24 day Ezekiel's body is taken down to the coroner's office and layers of
25 black sweat suits are removed and he turns out to be a skinny little kid,

1 Thomas didn't know it at the time.

2 Two-on-one, in a dark night, with Ezekiel using the element of
3 surprise. Talking about a gun. Does a gun hurt any less if it's fired by a
4 150 pound man or 250 pound man.

5 Now, the State has talked about Thomas's flight. You're all
6 supposed to use your commonsense. You know what happens when
7 you're in a fight. A lot of adrenaline. Fight or flight responses kicking in.
8 Flight in and of itself does not establish guilt. It alone is not. It's up to you
9 to decide what significance, if any, to attach to it.

10 But if you look at flight, I would also ask you to look at what
11 happens after the flight. Nobody knew when Thomas ran out the back
12 door that Ezekiel was dead. Even Kyriell did not know. Kyriell said he
13 looked at Ezekiel, looked good, runs to the front door. It isn't until Ezekiel
14 is crying out from the street for help that he realizes the extent of his
15 wound.

16 So when Thomas left, he didn't know anybody had been killed.
17 He knew there was a fight. He probably knew there were going to police
18 ramifications. But when he heard that he was killed, what did Thomas
19 do? He went back home and he went to the police station, after being
20 told, you're probably going to jail. Three o'clock in the morning. He didn't
21 even wait until business hours the next morning. I am going to tell you my
22 side of the story. Why? Because I defended myself and I defended my
23 daughter. I defended my house. My children.

24 The police officer said he had wounds consistent with a fight.
25 He had a cut on his nose. His nose, he testified this morning, it was

1 swollen. He had abrasions on his arm consistent with the struggle that he
2 had with Kyriell. And he told the police that night that he had been
3 threatened with having his house shot up by the man that he was fighting
4 with.

5 Now, how did Ezekiel die? The first witness, Dr. Roquero, he
6 said it was a single stab wound traveling upward.

7 Now, Ezekiel, who we just saw in the State's closing argument,
8 is six-foot-one. He's taller than Thomas. Why is this wound traveling
9 upward? If the two squared off and Thomas said, I'm not going to take a
10 punch, I'm just going to get out my knife instead, which direction would the
11 wound go? It's up to you to decide.

12 There is no opinion from the doctor as to the causation of the
13 marks around Ezekiel's right eye. But every witness who was there, you
14 know, relating to law enforcement, say that this body was dragged,
15 somewhere between 10 and 12 feet by the decedent's brother. That
16 could account for the line across the chest. And as we showed early on,
17 he was dragged on the right side of his head.

18 You've seen the pictures, the marks, are those from a punch or
19 are they from being dragged across asphalt?

20 Thomas stabbed Ezekiel one time in self-defense because
21 that's all that's necessary. If this was truly a case of first degree murder,
22 where Thomas was out after revenge, how dare you break my nose,
23 wouldn't you expect to see multiple stab wounds. That's up for you to
24 decide.

25 Thomas not only went down to the police, he waived his rights.

1 Policeman confronts you, you don't have to say anything. Thomas could
2 have sat in his house and never said a word. But he didn't. He wanted
3 his story told and that is the story that I am telling you.

4 But look at the consistencies in Thomas's story that he gave
5 early in the morning of December 12th. They were threatening to shoot
6 up my house, hit me so hard, two-on-one fight. Every time, three different
7 times, where the policeman asked him, why did you stab Ezekiel?
8 Because he was coming towards me.

9 Now, ladies and gentlemen, you don't leave your commonsense
10 at the door. He wasn't coming towards him to give him a Christmas gift. It
11 was that time of year. We know what Ezekiel was up to. He and Kyriell
12 were determined to beat that man possibly to death.

13 What started this altercation? Well, the State has gone through
14 great lengths to portray Thomas as the initial aggressor. Has there been
15 any evidence that Thomas was just not in the Christmas spirit and just
16 decided he wanted to go pick a fight. Kyriell was outside of Thomas's
17 house for 15 minutes with no problem whatsoever.

18 Thomas was summoned. Is a person really the aggressor
19 when his stepdaughter comes in and says help? Is that the same as
20 somebody who wakes up and says, h'm, I feel like a fight tonight? No.
21 This difficulty was brought to him.

22 What evidence has been presented of any malice aforethought?
23 What evidence has been presented that Thomas even had the time, that
24 most of us use to run a red light or a yellow light or a pink one, to
25 formulate an intent to kill? None.

1 Can you imagine the pandemonium that Thomas stepped into
2 when he went outside his house. You have Brittney, Brittney is already
3 yelling so loud that the neighbor next door can hear her. And she
4 continues to yell all through the altercation. You have not one but two
5 people yelling about shooting and killing, you have a crying baby, you
6 have Angel. And in that whole mix you're fighting two people less than
7 half your age.

8 How fast did this happen? Does Thomas have even the split
9 second that we use to run yellow lights? Did he even have that? And the
10 answer, of course, is a resounding, no.

11 What happened on December 11th, 2017, was a tragedy. No
12 one is going to deny that. Not me; not anybody.

13 But one of your jury instructions says you are not to let your
14 passions, your sympathies, anything like that cloud your judgment. Was
15 Thomas, in your opinion as jurors, was he right to believe that he was in
16 imminent danger of great bodily harm or death?

17 So in the end of her closing statement, where -- of the State's
18 closing statement, the State said, what did Thomas do? And they said,
19 Thomas killed Ezekiel. It's not what Thomas did. Thomas protected his
20 stepdaughter. Thomas protected himself. Thomas was attacked.

21 The one thing that I want to emphasize again, when this was a
22 simple fist fight, the knife was nowhere to be seen. The knife doesn't
23 come out until it's two-on-one.

24 And there are more than three choices you can make. You can
25 make a choice to say, yeah, what happened there was a tragedy, and I'm

1 sorry, and people have suffered greatly. But Thomas does not have any
2 criminal liability because Nevada allows a man to stand his ground. There
3 is no duty to retreat. And when Thomas or me or anyone else, for that
4 matter, is in danger of death or substantial bodily harm or is trying to
5 protect someone else from that danger, they are justified in taking a
6 human life.

7 So, ladies and gentlemen, I would ask that when you go back in
8 and consider the jury instructions and consider the evidence that you've
9 seen, but like the State says, keep it simple. Has there been even a
10 scintilla, an iota of evidence that indicates Thomas was the aggressor to
11 Ezekiel? Ezekiel lost his life because he got out and decided to join his
12 friend, who he called K2, they had monikers for each other, Zek, and K2,
13 and Twin. He decided to help him beat Thomas, kill him, wound him,
14 maim him.

15 And Thomas used his statutory right to defend himself and
16 defend his family.

17 And when you agree that this happened in self-defense, it
18 doesn't mean that Ezekiel Devine's life was lost in vain. It doesn't mean
19 that it's not a tragedy. It doesn't mean that people can't be sad. It means
20 that under the definition of murder in the laws of Nevada, this man is not
21 guilty.

22 Thank you.

23 THE COURT: Ready?

24 MS. DIGIACOMO: We need to switch over.

25 THE COURT: Switch over.

1 MS. DIGIACOMO: Oh, sweet. Hold on. Let me start the show;
2 okay.

3 **CLOSING ARGUMENT BY THE STATE**

4 MS DIGIACOMO: As my co-counsel stated earlier we're here --
5 and -- oh, wait, sorry.

6 We're here because of the actions of one person, the
7 Defendant, Mr. Cash, over there. That's why we're here. He is the one
8 that night that chose to pull out a knife and chose to stab Ezekiel through
9 the heart. He chose --

10 MR. LONG: Your Honor, could you ask counsel to stand closer
11 to the microphone. I'm sorry, he can't hear you.

12 MS. DIGIACOMO: Is that better? Okay, sorry about that.

13 THE COURT: Be careful you don't pull that wire out.

14 MS. DIGIACOMO: I'm sorry, if I -- it's still good though; all right.
15 Let me start over. All right.

16 So as I stated the Defendant is the one that made these
17 decisions that night that cost Ezekiel Devine his life. Nobody else. It's
18 Ezekiel. And defense counsel can stand up here and tell you, well, it's
19 Kyriell's fault because he went over to the house to pick up the baby he's
20 not allowed to be at. Or it's Ezekiel's fault because he got out of the car to
21 help his friend. It's anybody else's fault except the Defendant's. Even
22 though he is the one that stabbed him through the heart.

23 So let's look why this is not self-defense. It doesn't fit. This is
24 not he had - he was justified in doing what he did. As we stated
25 previously, you have to look at what he did before, what he did during this

1 situation, and what he did after.

2 His actions during this incident it epitomizes nothing except
3 murder. His actions show he murdered, either first or second degree,
4 Ezekiel that night.

5 And we're going to talk next about his actions afterwards
6 because his behavior afterwards shows the Defendant's just trying to get
7 away with murder. This is not justified.

8 If you look, he went outside, okay, and there was no reason to
9 engage in Kyriell. We are not saying that Angel coming to him and telling
10 him, hey, there's something going on outside, you need to see. The State
11 is not submitting that he wasn't justified in going down and seeing what
12 the situation was. Any parent would probably do that.

13 But what the State is submitting, he did not need to engage and
14 start this fight. Because it was clearly the Defendant that did it.

15 And even in his own statement he admitted there was a break
16 in the contact. There was where the fight had stopped. There was no
17 reason for him to escalate it to murder and pull out a knife.

18 You know, and defense counsel can say, oh, well, you know,
19 these two young strappy football players, you know, and they're such
20 better shape. Really? From the time that the Defendant -- Ezekiel got out
21 of the car, the Defendant had this strappy football player, who's in better
22 shape than him in a hold that he couldn't get out of.

23 And the Defendant, who's not in such good shape, well, we'll
24 talk about, he had no problem jumping over a couple of walls with a long
25 drop.

1 But the Defendant even admitted he never saw the other two
2 with a weapon. The Defendant is the only one that brought the weapon to
3 the fist fight. He's the only one.

4 And then after what did he do? If he's really so, oh, my gosh,
5 they came at me, I was scared for my life. I had to defend myself with a
6 weapon. Did he call 9-1-1? Nope. Did he change his appearance?
7 Absolutely. He goes into the house to try and stop the bleeding. And
8 what does he do? He puts on sweatshirt and he -- he -- takes off from the
9 house.

10 So nobody, you know, he's not walking around the streets with
11 blood down the front of him where somebody might call the police. No, he
12 changes his appearance.

13 He doesn't call 9-1-1 even though he says he's, you know, he
14 tells the police, I'm so scared because the -- the -- Kyriell was saying he
15 was going to shoot up the house so I locked the door and I went out the
16 back leaving a crippled woman, a three year old, a 17 year old, and his
17 niece in the house. Not scared they're going to get shot at. But he took
18 off over the back wall.

19 He ran from the scene. And, again, went over two walls,
20 including a big drop. Look at that photograph where the light pole is on
21 the Spruce Fern address, that second wall he had to jump over, it's pretty
22 big drop. He had no problem doing that to getaway.

23 And what does he do after he finds out Ezekiel is dead from his
24 stabbing him? He destroys the knife. He breaks off the blade and the
25 handle and he tosses it. He gets rid of it.

1 That's not some -- that's the way a person who's acting in
2 self-defense acts. That's somebody who's, ew, shoot, I just murdered
3 somebody. I got to get out of here because I don't want to get caught.
4 That's what the Defendant's actions relay.

5 And, again, after the incident he called Tamisha. And, yes, that
6 is what she told the police that night.

7 But she called -- he called her and she spoke to him while
8 they're all the house, with all the police activity outside, before their
9 bullhorned, and she told him, he's dead.

10 And, again, his reaction was not, oh, my gosh, I had to. I
11 couldn't help myself. He came at me. I felt threatened. No. It was, oh, I
12 didn't do it. I never touched him. If he's dead, I didn't do it. It wasn't me.
13 That's his first reaction. That is not somebody who just acted in
14 self-defense.

15 And he didn't immediately, as defense counsel say, oh, well, the
16 minute he found out he was dead, he turned himself into the police. He
17 did the right thing. Ah, no, he didn't. He went somewhere. He didn't even
18 tell the police where he went between 7 o'clock and 2 o'clock in the
19 morning when he went back to his residence just after police left, of
20 course. Didn't turn himself in, didn't walk back to the residence and turn
21 himself in to the 40 patrol officers that were there until 1:30 in the morning.
22 Nope. He did not take responsibility. He turned himself in when he
23 thought he didn't see another way out. That's what happened.

24 And it's at that time now it's self-defense. Right after the crime,
25 when he called out what was going on at the house, are the police there.

1 It was, I didn't do it. Now it's self-defense. Think about that.

2 I told you in the beginning when we started, keep in mind when
3 you hear these witnesses, you know, think about their motives, their
4 consistent stories, and don't leave your commonsense outside. Use your
5 commonsense. And when you do, you can tell, when you whittle down
6 the different versions, really what happened.

7 Let's look at Kyriell first; okay. Why should you believe his
8 version? Why should you find his version credible? Well, think about it.
9 He's not trying to get the Defendant in trouble. He's not making up what
10 happened. He's not even trying to justify what happened, nothing, when
11 he's with the police. He told you, when he's on the phone with 9-1-1 and
12 they're trying to send police, he's, like, I don't need police. I don't want
13 police. I just want a paramedic. I want somebody to come here and save
14 my friend. That's what he was thinking.

15 And he also told you when the police first got there, he wasn't
16 cooperative with them. He wasn't. He admitted that to you. But he
17 speaks to the police; okay, and he tells them what happens. Before he
18 has a chance to talk to anybody else; right?

19 The arriving officer got there within 30 seconds of the call
20 coming out because he just happened to be in the adjacent neighborhood.
21 And at the time, and you saw those pictures, they're there by the body
22 with -- there was -- the people who stopped to help him. There's nobody
23 else. You didn't see Brittney. You didn't see any of the family members.
24 It was just him. And then the police took him and he stayed in their keep
25 until he gave his statement later to them.

1 He didn't have a chance; right, to think, to talk to anybody else,
2 like the Defendant did. He didn't have a chance to talk to family members,
3 ew, this is what we're going to say. He just told them this is what
4 happened.

5 And he, think about too, you know, there's a lot of things going
6 on and a lot of drama that you hear from the different witnesses, but he's
7 the one in the fight and he's the one that's concentrating on the fight and
8 he's the one that can tell you exactly what happened.

9 You know, with Brittney, she's an upset and screaming and
10 yelling at Thomas and worried about her baby. She's not paying attention
11 to blow by blow of these three minutes.

12 Angel, she's worried about the baby and she ends up taking her
13 in. And she says she's yelling at Kyriell and. But both of them also
14 admitted they weren't fully paying attention to the fight. And, I think, even
15 Brittney said, I didn't have my glasses on. And, Tamisha, you know, she
16 didn't have her glasses on.

17 But who is in this fight and telling you what happened? It's
18 Kyriell. And you can tell too he's telling you what really happened
19 because he's not -- embellishing or whatnot. He says exactly what
20 happened.

21 And he even says -- and I think I deleted it accidentally. But he
22 even says, when Ezekiel gets out of the car and breaks them up, he says,
23 Ezekiel said to me, chill out dude, don't do this, this is somebody's home.
24 As if he was the one that started it.

25 That tells you, he's telling you exactly what happened. Because

1 he's not playing favorites. He's not trying to make himself look good or
2 Ezekiel look good. He's just saying this is what happened.

3 Oh, wait, there is it. Ezekiel told him to chill out.

4 But also too, you know, defense counsel said that, you know,
5 Kyriell saying, he's trying to calm down Brittney, but, you know, that's just
6 his story. But Brittney, Carolina, the neighbor, and Kyriell, and even
7 Angel, the defense witness, even said that he was trying to calm her
8 down.

9 So, you know, you can't just look at all this in a vacuum. But
10 look at at the time he gave a statement and also how consistent he's
11 been. You know, the only thing he told you, I don't remember Brittney
12 being there. But he remembers the fight and he was consistent with what
13 he told the police that night, to what he told you, to what he testified to
14 previously. So consider that when looking at, should we believe Kyriell.

15 With Brittney, clearly she's kind of in the middle of this. But
16 even though she did talk to her mom that night and was with her mom
17 before she talked to the police, because remember she left the scene, she
18 still said that it was the Defendant that threw the first punch and it was the
19 Defendant who started the fight; okay. And she stated that she was not in
20 fear at the time that the Defendant intervened. And she said that to the
21 police in her prior testimony.

22 Here in court, she now has said, well, no, I was, I was worried
23 about, you know, I didn't know what he could do. But look at what she
24 told the police and look at what she testified to previously. Despite the
25 fact this is her family. This is her stepdad. She still testified that he's --

1 the Defendant's the one that started it. And at the time he started it, she
2 was not in fear or -- of danger.

3 Now, look at the opposite, let's look at the Defendant's family
4 and the witnesses that came in and testified for him. Things to consider
5 when looking at their motive and their believability and credibility. They
6 know this fight just happened, they go back inside, they know, you know,
7 and they've testified that Angel and Tamisha that, you know, they're
8 talking about they're out there with guns and going to blow us up. Not one
9 call. Not one person inside that house called 9-1-1, not one person. Even
10 after the Defendant leaves.

11 Not only, as co-counsel talked about flight, can be
12 consciousness of guilt and you have that instruction. But the family isn't
13 acting like the Defendant was just wrong to either, or that Kyriell did
14 something wrong, or that Ezekiel did something. They don't call the
15 police. They go in the house and shut the door. They don't even bring
16 out towels or water. Can we help? Can we get? They don't even call
17 9-1-1 because there's a guy dying in the street. Nothing. They don't help
18 him. They do not come out of that house until the bullhorn and the police
19 make them. And that's -- they're in there about 40 minutes before they
20 come out.

21 And you know because Angel admitted talking to them.
22 Tamisha admitted that she talked to the Defendant. They talked about
23 what happened before they came out of the house. And they also talked
24 with the Defendant before he turned himself into the police. They all have
25 a motive to help their family member.

1 And they told you they don't know Ezekiel. Ezekiel to them they
2 don't know him. Not interested, you know, that's not what -- who they
3 care about. They care about the Defendant. So, of course, they're going
4 to try and do something or say something to help him.

5 Now, let's look at the Defendant, when you're looking at his
6 credibility or, you know, with his statement that he made to the police. He,
7 and his wife even testified, he came home like seven hours later after the
8 police had just cleared. He didn't even tell the detectives where he was
9 that whole time or why he didn't come home or an opportunity to come
10 home. But he was gone for seven hours. Comes home right after.

11 This is not, again, somebody who is -- appears to have been
12 acting in self-defense and turns himself into the police or wants to go to
13 the police for -- to let them know what happened. He waits a long time.
14 Talks to people. Then he goes in.

15 You know, he told detectives that he called his wife. Yet, she
16 testified she never talked to him. So does he mean Tamisha? Who's he
17 talking to? The State submits he's probably talking to multiple people that
18 were at the house.

19 He did not find out Ezekiel was dead and immediately turn
20 himself in. And also, you got to think about, he's the one charged here;
21 okay. He's the one. It's his actions that we're judging and he's the one
22 that's going to have to suffer any consequences of his actions.

23 And also, just to throw it out there, so, like, just one thing he
24 tells the police, and Angel said it too, that he's up there wrapping
25 Christmas presents. Well, look at the photos of the room. Where was he

1 on the floor wrapping Christmas presents? I mean, just -- this is where
2 you can look at the photos and really layout what happened. I mean,
3 that's just one example.

4 So, here's what I want to do for you now; okay, so let's think
5 about this, Kyriell's at the scene, never -- the police show up, he's not
6 allowed to leave, he doesn't talk to anybody; right? He gives his story.

7 The Defendant is seven, or, well, really eight and a half hours
8 after the fact when he tells the police his version. But I want you, and
9 these are the two people that are really in the fight. Because the State
10 submits to you, Ezekiel was getting out just to help his friend. He wasn't
11 trying to attack the Defendant. He sees his friend in a hold so he's getting
12 out to help him.

13 But let's look at how similar and consistent their stories are. If
14 you see where they differ, is just where the Defendant has a self-serving
15 motivation to try and make himself look like it was, you know, not his fault.

16 So Kyriell testified -- and I'm sorry if I got away from the mic
17 again -- that Brittney and him were in a heated argument. And he admits,
18 he used his hands to push her away from him. And then Angel tells the
19 Defendant that Kyriell is, you know, banging Brittney against the car. So
20 that's why he comes down.

21 There is -- we're not saying that there's not physical contact
22 between Kyriell and Brittney. But it's not what the Defendant was told.
23 But he comes downstairs, fine, let's check out and see what's happening.

24 Kyriell says that they are separated when the Defendant comes
25 outside. Because if you remember, Kyriell says he's got his back, trying to

1 put the baby -- well, originally, when he comes out, he's facing them,
2 they're not touching anymore, and Defendant asks Brittney, you know, did
3 he hit you? And she says, no. He turns his back, because if you
4 remember he said he was kind of smirking, and goes to put Londyn in the
5 car. So they're separated.

6 And the Defendant, in his version, says that Brittney's pulling
7 away from Kyriell when he gets out there. So they are separated. There's
8 no need for the Defendant to get involved because there's no force being
9 used against Brittney.

10 Kyriell says when he's putting Londyn in the car, Defendant
11 swings at him and misses. And Defendant admits that he punches Kyriell
12 and grabs him first; okay. Very consistent.

13 Kyriell uses his open hand to hit the Defendant's face or to push
14 him away. And Defendant even says, both were throwing punches at
15 each other.

16 Kyriell says a car comes down the street and separates them
17 and that he saw something shiny in the Defendant's hand. Defendant
18 admits he had a small knife in his hand.

19 Ezekiel falls to the ground. And the Defendant admits he has
20 stabbed him one time. And as you heard from the coroner, that stab
21 wound that went to his heart, it was going to be a rapid death. So he was
22 going to drop. He's not going to be walking around and still fighting after
23 that injury.

24 Defendant -- Kyriell said the Defendant then runs back in the
25 house. Defendant says the same thing. He ran back in the house.

1 Kyriell says he ran after the Defendant. The Defendant says,
2 too, he did. Because, if you remember, the Defendant stated that he
3 heard, after he shut and locked the door, that Kyriell was saying he was
4 going to shoot up the house.

5 Kyriell tried to get into the house but he was unable to.
6 Defendant admitted he locked the door.

7 Kyriell said neither of them had a weapon, not him nor Ezekiel.
8 And the Defendant admitted the same thing. He never saw either of them
9 with a weapon.

10 Kyriell said that, you know, oh -- sorry, my slides are out of
11 order.

12 Kyriell said in the beginning that he and the Defendant started
13 tussling. Defendant said the same thing. And they both described that
14 hold where the Defendant's arms are on top of Kyriell and he's
15 underneath hunkering down to keep his weight low so he can't slam him.
16 They both say that.

17 Kyriell said that he had his head in the Defendant's chest and
18 his weight down. And the Defendant said, yeah, Kyriell's head was
19 towards his stomach area as he was holding him.

20 Kyriell said, Ezekiel got out of the car and used his arm to break
21 them apart. The Defendant said, Ezekiel got out of the car and hit him in
22 the nose while they were still locked up and then at that point he let's go.

23 Kyriell said, he and the Defendant push each other as they
24 were breaking apart. And the Defendant says, you know, at that point he
25 let him go.

1 So very consistent stories as to what happened from the two
2 people that were in the fight.

3 And Brittney, again, she supports this version because she said
4 she wasn't threatened that night. She said, as well, the Defendant threw
5 the first punch. And she said, at no point was it ever two-on-one. Not that
6 it matters for self-defense, but it was never two-on-one. It was just Kyriell
7 and the Defendant and then Ezekiel when he broke it up, they all got
8 separated, and that's when the victim was stabbed.

9 So there's -- as you have heard already, so there's two ways
10 that the Defendant -- or the defense is trying to say it was self-defense.
11 The first way is that he was defending Brittney and the other way is he'll
12 say he was defending himself. Both from fear of death or bodily injury.

13 So but when Defendant started the fight, Brittney was not in
14 immediate danger of death or great bodily injury. She wasn't. How do
15 you know that? Well, Kyriell said his back was turned away from the
16 Defendant when he threw the first punch. He wasn't holding her. Brittney
17 said same thing. He wasn't -- she wasn't being held. And the Defendant
18 came out and immediately punched Kyriell.

19 Angel said that she yelled at Kyriell and he let Brittney go. And
20 then it was that time that the Defendant started fighting with Kyriell and
21 she could not say who threw the first punch. But, again, there's no danger
22 to Brittney. There's no reason for the Defendant to engage them.

23 And then the Defendant said that he grabbed Kyriell's arms as
24 he was reaching for Brittney. Not he had his arms on him, I was trying to
25 save her. He was reaching for her. Again, that's the Defendant starting

1 this. He started this whole fight. And it was not necessary.

2 He's 52 years old. You have Kyriell who said he was about 24
3 years old. Who should know better? Absolutely, he can come downstairs
4 and check on Brittney. But why did the Defendant start this fight? Clearly
5 he wasn't scared about Kyriell and his, you know, playing football all the
6 time and his physique.

7 He started it because he had -- I don't know. He just was angry
8 or he wanted to get in a fight. I don't know. But he started it.

9 And during the fight that he started, he was never himself in
10 immediate danger of death or great bodily injury. He was never.

11 He admitted, he never saw them with a weapon. He admitted,
12 he stabbed Ezekiel because he did not want to be hit again. Not wanting
13 to get punched and, ow, that's going to hurt. Is not the same as, oh, my
14 gosh, if I do not react right now, I could die or I could have substantial
15 bodily injury. That's the difference. And Defendant was not there.

16 Plus, he was the original aggressor. So according to the State's
17 theory, he started this whole fight. He doesn't get to start a fight and then
18 claim, oh, I'm in fear of my life, I need to pull out a knife. You just don't
19 get to do that and that's what the law tells you.

20 And the physical differences between him, Kyriell, and Ezekiel
21 doesn't matter. And for the Defendant to, you know, or the defense to
22 say, well, the Defendant was just old 52 year old guy, out of shape, you
23 know. He was holding Kyriell to where Kyriell couldn't break free. So he's
24 obviously pretty strong.

25 He was able to run back to the house and jump over two fences

1 without, if you look, there's no chair, there's no piece of furniture. He just
2 jumped the two walls and he ran away.

3 So clearly he's --and, you know, he started the fight. So clearly
4 he wasn't afraid.

5 But, you know, defense counsel told you that when Ezekiel got
6 out of the car to break up the fight that he became the original aggressor
7 and that's not true. Think about it. Kyriell said that Ezekiel's sitting in the
8 car on a video chat on his phone. He's not even paying attention to the
9 fight.

10 And think about the timing. And it's Defendant's version and
11 Kyriell's version. When Kyriell gets out of the car, it's not when they're
12 screaming, because Brittney admitted she had been screaming. It's not
13 when they're in the original fight. He's not paying attention to that. He
14 gets out of the car when he sees the Defendant have Kyriell in a hold and
15 they're going down the street. So he gets out to break it up. And he even
16 says, chill out. That's why he gets out. And if he is the one that punched
17 the Defendant at the time he's trying to break it up, well, it's not that he's
18 now become the original aggressor, he is trying whatever he can to get
19 the Defendant off his friend. The Defendant had the upper hand at that
20 time.

21 And. Again, Defendant was the original aggressor. He is the
22 one that threw the first punch. He is the one that grabbed Kyriell. He is
23 the one that instigated this.

24 And, you know, defense counsel was saying about, well, you
25 know, there was all this talk in the fight about, they're getting a gun. But

1 everybody admitted, nobody went back to the car. And the Defendant
2 what he told the police was that he only heard those statements after he
3 was already inside the house. So that doesn't justify pulling out a knife.

4 And, you know, look at the injuries. Kyriell looks fine. The
5 Defendant, yes, he's got that cut on his nose. Does he have any other
6 injuries? You've got the pictures, none to his hands. It's not like he was,
7 you know, throwing blows. It's not like his head was all, you know,
8 bashed in. I mean, other than the blood from the nose, which that kind of
9 wound will bleed a lot, there's no other injury to him. There's none to
10 Kyriell. And, well, you already saw the injury. The only one that's got an
11 injury really is Ezekiel. Who's just trying to break up the fight. He had no
12 dog in the fight.

13 And so, you know, look at that when considering who's telling --
14 telling you what really happened that night.

15 So, again, Ezekiel had no dog in this fight. Got out of the car
16 just to break it up.

17 And at that time, the Defendant had the upper hand over Kyriell.
18 He did break them apart, a car comes through and separates them, Kyriell
19 sees a shiny object in the Defendant's hand, and then he stabbed him, the
20 Defendant stabbed him with not provocation.

21 You know, the Defendant in his statement to the police said,
22 well, he was running at me. But you don't have that from Kyriell's version.
23 You have that a car separated them, he saw it, he warned his friend,
24 watch out, and the next thing he knows he falls on the ground. He didn't
25 see what happened because he fell on the ground himself but.

1 And, you know, there's reasons why by the time the Defendant
2 gets to the police eight and a half hours later that he says certain things,
3 you know, like, for you to believe that this was self-defense, you'd have to
4 believe that Brittney was in imminent danger and Kyriell was attacking her
5 to the point that she could lose her life. You have to believe that. Well,
6 guess what, it's not self-defense.

7 And, you know, him saying to the -- the Defendant saying to the
8 detectives, well, it felt like he had something in his hand but I didn't see
9 anything in his hand. And we know there was nothing in the street with
10 Ezekiel and there was nothing that went with him to the autopsy that was
11 a weapon.

12 He has to say that because he's not justified in using deadly
13 force and a weapon if one's not being used against him. So that's why
14 he's going to throw that in.

15 He also tells, you know, the detectives that he didn't go down
16 the street, that the fight stayed right there in front of his house, which, you
17 know, goes to his needing to protect his home. But that's not what
18 happened.

19 And the two versus one. You know, he says that because, I'm
20 being attacked from two sides and I don't have any other options but to
21 pull a weapon. So that's why he's saying that.

22 And he says he had a little, bitty knife that he always carries.
23 Like, oh, you know, who knew that such knife could, you know, kill
24 somebody or go four inches and plunge into their chest and hit the heart.

25 You know, he's got to twist it so that it's good for him and he's

1 got to minimize that, which is bad for him.

2 Defense counsel stated that, you know, that the Defendant
3 was -- even if the Defendant was wrong in his assessment of whether or
4 not he or Brittney were in fear of imminent death or bodily harm, that it's
5 still self-defense. And that is incorrect. It has to be a reasonable belief.

6 And State submits, there's no way that it was reasonable in that
7 situation in a fist fight for the Defendant to feel he needed to, that he
8 started, that he needed to pull a knife.

9 Defense counsel asked why the stab wound was upward. But
10 think about it. It depends on where Ezekiel is standing and how he's
11 standing at the time that the knife is plunged into his chest.

12 You know, when you had the coroner up here testifying, he
13 goes, I can tell you the path it traveled when the body is laying in a flat
14 position and not moving. So that's how he measures it.

15 And, but, that doesn't equate to, you know, it's not as if Ezekiel
16 was standing there, you know, straight, flat back and, you know, he gets
17 stabbed.

18 This is a fluid situation and he could be moving and especially
19 when he hears, watch out, you know.

20 So that could be -- that could affect. It's not that the Defendant
21 was down on the ground and Ezekiel's above him and that's why it's
22 upward. I mean, you have the pictures, look at the wound yourself, and
23 you have the testimony of the doctor. But it really don't mean anything,
24 you know.

25 A stab wound to the chest like that, is -- it's a kill shot. When,

1 you know, if Defendant was on the other ground and is trying -- it's not
2 that he's reaching up. If he really is just trying to defend himself like
3 getaway, there would be wounds other places. Not just straight to the
4 heart. And you do have that second wound as well across the chest. But
5 that's a sideways swipe and that could have been done trying to get at the
6 chest the first time.

7 Defense counsel stated there was no evidence of intent to kill or
8 premeditation and deliberation. And he's wrong; okay.

9 The example that you were given of the traffic light. You know,
10 you're late and you want to make sure you get there. And it's just -- it's
11 not just, hey, should I go through this light or should I stop my car.
12 There's a lot of other things that go through somebody's mind in a matter
13 of seconds before they make that decision to stop or go forward.

14 You know, as you're going, you know, you're looking, okay, it's
15 yellow, how much time do I have before I can make it, is there a cop
16 around, what are the cars next to me doing, are they going for it. What's
17 going to happen if I slam on my brakes, is somebody going to hit me from
18 behind. You can make a calculated thought out decision in a matter of
19 seconds.

20 And think about what the Defendant did. He had to -- it's not as
21 if he had something in his hand already. He had to -- remember, he had
22 that knife in his pocket that he always carries. He had to take it out of his
23 pocket. He had to open it, a folding knife. He had to open it. And if you
24 remember Kyriell's testimony, he was in the front of the car that kind of
25 had to screech to a stop when they were in the fight. He's there and

1 Kyriell's on the other side and -- excuse me, Ezekiel's on the other side.
2 And Kyriell had enough time to say to him before the Defendant stabbed
3 him, watch out. That is more time the Defendant had to think about his
4 actions and pull out that knife.

5 And there is intent to kill. You don't stab somebody right in the
6 chest or the heart if you're not trying to kill them. It's not trying to wound
7 them or, you know, get away from me and cut his arm.

8 And he had plenty of time to deliberate, to, I guess, due to the
9 consequences of his actions, you know, am I going to stab this boy or not.
10 And he had plenty of time to formulate the plan. Especially when he's
11 pulling the knife out, opening it, and stabbing.

12 There is evidence here of premeditation, deliberation, and
13 intent to kill. Absolutely. But if you find one of those three are not there,
14 then it's second degree murder. This is murder. The Defendant
15 murdered Ezekiel Devine, plain and simple. This is not voluntary
16 manslaughter. This is it not it was self-defense. He should be found not
17 guilty.

18 He needs to be held accountable for his actions and the -- his
19 decision to stab Ezekiel in the chest. It was not absolutely necessary to
20 save his life.

21 At the time, he's not right next to him, he's far away. He's at
22 least an arm's length or more away when he went to Ezekiel to stab him.

23 And the State submits, he's probably, the Defendant was
24 probably pissed that he was bleeding because from his nose or he got hit
25 so hard and that's why he stabbed Ezekiel. It wasn't that there's a

1 weapon. It wasn't he was in fear of his life. It was simple revenge or
2 vengeance.

3 At the end, obviously, we are finally there, you know, the State
4 is going to ask to you return a verdict of guilty of murder with use of a
5 deadly weapon, be it first degree or second degree. It's up to you but the
6 facts are there for both.

7 And with that, I will submit it.

8 Thank you.

9 THE COURT: Thank you.

10 Swear the officers of the court in, please.

11 [The Court Clerk swore in the officers to take charge of the jury during
12 deliberations.]

13 THE COURT: Okay. I can tell you that the alternates are
14 Anthony Pile and Irma Alatorre. If you'll go with Jill and she'll get your
15 phone numbers. Be within 20 minutes of the courthouse, please.

16 The rest of you will take your property and follow Tom.

17 [Outside the presence of the jury]

18 THE COURT: Make sure we have your cell numbers in case
19 there's a jury question.

20 MS. DIGIACOMO: Tom already got 'em.

21 THE COURT: Got 'em all?

22 MS. DIGIACOMO: Yes.

23 THE COURT: Okay.

24 Good job everyone. See you when the verdict is done.

25 MS. DIGIACOMO: Thank you.

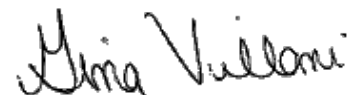
1 THE COURT: I will probably keep them until 4:30 tonight and
2 have them come back tomorrow morning at 9:00.

3 MS. DIGIACOMO: Great.

4 [Jury trial, Day 7, concluded at 1:30 p.m.]

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

22 

23 _____
24 Gina Villani
25 Court Recorder/Transcriber

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THE STATE OF NEVADA,
Plaintiff,
vs.
THOMAS CASH,
Defendant.

CASE#: C-18-329699-1

DEPT. VIII

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:
JURY TRIAL - DAY 8**

For the State:

For the Defendant:

RECORDED BY: GINA VILLANI, COURT RECORDER

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Las Vegas, Nevada, Thursday, June 28, 2018

[Jury Trial, Day 8, began at 11:26 a.m.]

[In the presence of the jury]

THE MARSHAL: All rise, please.

THE COURT: Where is -- is Jacqueline not coming?

MS. DIGIACOMO: She's in pretrial. She just wants to be
on the phone.

THE MARSHAL: And be seated.

THE COURT: The record will reflect the presence of the
defendant, his attorney, the deputy district attorney for the State, and all
12 members of the jury.

Who is the jury foreperson?

JUROR NUMBER 6: I am.

THE COURT: Were you able to reach a verdict?

JUROR NUMBER 6: Yes, sir.

THE COURT: Was it unanimous?

JUROR NUMBER 6: Yes, sir.

THE COURT: Would you hand it to the marshal, please.

The clerk will now read the verdict out loud and poll the jury.

THE COURT CLERK: Yes, Your Honor.

District Court, Clark County, Nevada, the State of Nevada,
Plaintiff, versus Thomas Cash, Defendant. In Case Number
C-18-329699 in Department 8.

We, the jury in the above entitled case, find the Defendant

1 Thomas Cash, as follows:

2 Count 1, murder with use of a deadly weapon, guilty of second
3 degree murder with use of a deadly weapon.

4 Count 2, battery with intent to kill, not guilty.

5 Dated the 28th day of June 2018.

6 Ladies and gentlemen of the jury, is this your verdict as read?

7 THE JURY PANEL: Yes.

8 THE COURT CLERK: So say you one so say you all?

9 THE JURY PANEL: Yes.

10 THE COURT: Poll the jury, please.

11 THE COURT CLERK: Yes, Your Honor.

12 Juror number 1, is this your verdict as read?

13 JUROR NUMBER 1: Yes.

14 THE COURT CLERK: Juror number 2, is this your verdict as
15 read?

16 JUROR NUMBER 2: Yes.

17 THE COURT CLERK: Juror number 3, is this your verdict as
18 read?

19 JUROR NUMBER 3: Yes.

20 THE COURT CLERK: Juror number 4, is this your verdict as
21 read?

22 JUROR NUMBER 4: Yes.

23 THE COURT CLERK: Juror number 5, is this your verdict as
24 read?

25 JUROR NUMBER 5: Yes.

1 THE COURT CLERK: Juror number 6, is this your verdict as
2 read?

3 JUROR NUMBER 6: Yes.

4 THE COURT CLERK: Juror number 7, is this your verdict as
5 read?

6 JUROR NUMBER 7: Yes.

7 THE COURT CLERK: Juror number 8, is this your verdict as
8 read?

9 JUROR NUMBER 8: Yes.

10 THE COURT CLERK: Juror number 9, is this your verdict as
11 read?

12 JUROR NUMBER 9: Yes.

13 THE COURT CLERK: Juror number 10, is this your verdict as
14 read?

15 JUROR NUMBER 10: Yes.

16 THE COURT CLERK: Juror number 11, is this your verdict as
17 read?

18 JUROR NUMBER 11: Yes.

19 THE COURT CLERK: Juror number 12, is this your verdict as
20 read?

21 JUROR NUMBER 12: Yes.

22 THE COURT: The clerk will now record the verdict in the
23 minutes of the court.

24 Ladies and gentlemen, as you know, the right to trial by jury is
25 one of our basic and fundamental constitutional guarantees.

1 I firmly believe in that right, that is, that the right of every
2 person accused of a crime to be judged by a fair and impartial jury but to
3 have a fair and impartial jury, you have to have people willing to sit on
4 the jury. And as you saw a lot of people tried to shirk that responsibility.

5 That's why I'm so pleased that you 12 men and women have
6 been willing to give of your valuable time. You've been most attentive
7 and conscientious.

8 On behalf of counsel, the parties, and the Eighth Judicial
9 District, I wish to thank you for your careful deliberation in this case. The
10 question may arise now as to whether you can talk to other persons
11 regarding this matter. I advise you that you may, if you wish, talk to
12 other persons and discuss your deliberation which you gave to this case.
13 You're not required to do so, however. If any person persists in
14 discussing the case after you have indicated that you do not wish to do
15 so or raises an objection as to your result, or as to how you deliberated,
16 you'll report that fact directly to me through the marshal and I'll take care
17 of it. I can guarantee you.

18 The jury is excused with the thanks of the Court.

19 [Outside the presence of the jury]

20 THE COURT: The Defendant is now remanded without bail
21 and we'll set a sentencing date in custody of --

22 THE COURT CLERK: That'll be August 15th, 8:00 a.m.

23 THE COURT: Thank you.

24 MS. DIGIACOMO: Thank you.

25 MR. LONG: Thank you.

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THE DEFENDANT: Thank you.

MS. DIGIACOMO: Do you --

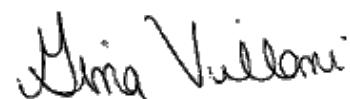
THE COURT: If you -- the attorneys you can go down to the
third floor.

MS. DIGIACOMO: Third floor. Thank you.

[Jury Trial, Day 8, concluded at 11:30 a.m.]

* * * * *

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



Gina Villani
Court Recorder/Transcriber

ORIGINAL

AINF
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
SANDRA K. DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006204
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

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

APR 19 2018

BY 
DEBORAH MILLER, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

C-18-329699-1
AINF
Amended Information
4739586



THE STATE OF NEVADA,

CASE NO: C-18-329699-1

Plaintiff,

DEPT NO: III

-vs-

THOMAS CASH,
#7053124

AMENDED

INFORMATION

Defendant.

STATE OF NEVADA }
COUNTY OF CLARK } ss.

STEVEN B. WOLFSON, Clark County 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 THOMAS CASH, the Defendant(s) above named, having committed the crimes of **MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001)** and **BATTERY WITH INTENT TO KILL (Category B Felony - NRS 200.400.3 - NOC 50153)**, on or about the 11th day of December, 2017, 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,

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AA1342

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1 COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

2 did willfully, unlawfully, feloniously and with malice aforethought, kill EZEKIEL
3 DEVINE, a human being, with use of a deadly weapon, to wit: a knife, by stabbing the said
4 EZEKIEL DEVINE about the chest and/or body, the said killing having been willful,
5 deliberate and premeditated.

6 COUNT 2 - BATTERY WITH INTENT TO KILL

7 did then and there willfully, unlawfully, and feloniously use force or violence upon the
8 person of another, to wit: EZEKIEL DEVINE, with intent to kill EZEKIEL DEVINE, by
9 stabbing the said EZEKIEL DEVINE about the chest and/or body with a knife.

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

13 BY

14 SANDRA K. DIGIACOMO
15 Chief Deputy District Attorney
16 Nevada Bar #006204

17 ///

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

<u>NAME</u>	<u>ADDRESS</u>
CUSTODIAN OF RECORDS	CCDC COMMUNICATIONS
CUSTODIAN OF RECORDS	CCDC RECORDS
CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
CUSTODIAN OF RECORDS	LVMPD RECORDS
DAVIS, KYRIELL	5370 E. Craig Rd., #B / 12 / 2058, LV, NV
DEVINE, SHERIDA	6557 Arrow Creek Ct., LV, NV
GILLIS, M.	LVMPD P# 6432
MCCARTHY, J.	LVMPD P# 4715
ROQUERO, L.	ME # 0146
SMITH, C.	LVMPD P# 13800
STARKES, D.	LVMPD P# 6927
TURNER, BRITTANY	3999 Pistachio Nut Ave., LV, NV
WATTS, J.	C/O CCDA'S OFFICE

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

///

1 That in the event of a violent felony conviction pursuant to NRS 207.012(2) in
2 the above-entitled action, the Court must sentence Defendant THOMAS CASH as a
3 habitual felon based upon the following violent felony convictions, to wit:

4 1. That on 9/27/91, the Defendant was convicted in the County of Los
5 Angeles, State of California, for the crime of Robbery – Second Degree in Case No.
6 TA008691.

7 2. That on 6/19/96, the Defendant was convicted in the County of Los
8 Angeles, State of California, for the crimes of Robbery – Second Degree (2 counts) in
9 Case No. XCNBA13179801.

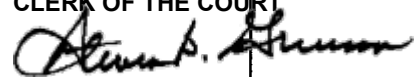
10 STEVEN B. WOLFSON
11 Clark County District Attorney
12 Nevada Bar #001565

13 BY

14 SANDRA K. DIGIACOMO
15 Chief Deputy District Attorney
16 Nevada Bar #006204

17 **DO NOT READ TO THE JURY**

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27 DA#17FN2591X/erg/L-5
28 LVMPD EV#1712113361
(TK)



JOC

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

THOMAS CASH
#7053124

Defendant.

CASE NO. C-18-329699-1

DEPT. NO. VIII

JUDGMENT OF CONVICTION
(JURY TRIAL)

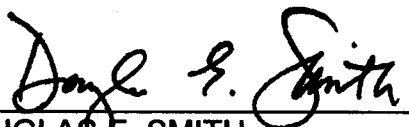
The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; and COUNT 2 – BATTERY WITH INTENT TO KILL (Category B Felony) in violation of NRS 200.400.3; and the matter having been **tried before a jury** and the Defendant having been found guilty of the crime of COUNT 1- 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 20th day of August, 2018, the Defendant was present in court for **sentencing** with counsel, KENNETH LONG, ESQ., and good cause appearing,

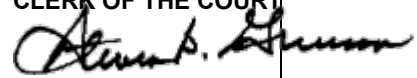
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|---|--|
| <input type="checkbox"/> Nolle Prosequi (before trial) | <input type="checkbox"/> Bench (Non-Jury) Trial |
| <input type="checkbox"/> Dismissed (after diversion) | <input type="checkbox"/> Dismissed (during trial) |
| <input type="checkbox"/> Dismissed (before trial) | <input type="checkbox"/> Acquittal |
| <input type="checkbox"/> Guilty Plea with Sent. (before trial) | <input type="checkbox"/> Guilty Plea with Sent. (during trial) |
| <input type="checkbox"/> Transferred (before/during trial) | <input type="checkbox"/> Conviction |
| <input checked="" type="checkbox"/> Other Manner of Disposition | |

AA1347

1 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense as set forth in
2 the Jury's verdict under the LARGE HABITUAL CRIMINAL STATUTE (NRS 207.012)
3 and, in addition to the \$25.00 Administrative Assessment Fee, \$250.00 Indigent
4 Defense Civil Assessment Fee, \$3,389.00 Restitution payable to Victims of Crime and
5 \$150.00 DNA Analysis Fee including testing to determine genetic markers plus \$3.00
6 DNA Collection Fee, the Defendant is SENTENCED to the Nevada Department of
7 Corrections (NDC) as follows: COUNT 1 – LIFE WITHOUT THE POSSIBILITY OF
8 PAROLE; with TWO HUNDRED FIFTY-TWO (252) DAYS credit for time served.
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11 DATED this 23 day of August, 2018.

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15 DOUGLAS E. SMITH
16 DISTRICT COURT JUDGE *gd*
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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
THOMAS CASH,
Defendant.

CASE#: C-18-329699-1
DEPT. VIII

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE
MONDAY, AUGUST 20, 2018

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:
SENTENCING**

APPEARANCES:

For the State: SANDRA K. DIGIACOMO, ESQ.
Chief Deputy District Attorney

For the Defendant: KENNETH W. LONG, ESQ.

ALSO PRESENT: DALILA LOGAN
TYAHNA DRUMMOND
SHERIDA DEVINE
Victim Impact Speakers

RECORDED BY: GINA VILLANI, COURT RECORDER

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MONDAY, AUGUST 20, 2018 AT 9:05 A.M.

THE COURT: C329699, Thomas Cash.

This is the time set for rendition of sentence. Is there any cause or reason why sentencing should not proceed today?

MS. DiGIACOMO: No, Your Honor.

MR. LONG: No, Your Honor.

THE COURT: State wish to be heard?

MS. DiGIACOMO: Yes.

THE COURT: Do you have -- do you have victim witness speakers?

MS. DiGIACOMO: I do. I'm going to -- I have three out of the five noticed that are going to speak.

THE COURT: Okay.

MS. DiGIACOMO: But before we begin, Your Honor, I have three Judgments of Convictions I would like to have marked and admitted. The first one is the date of conviction is January 26, 1989, from the Superior Court of California, County of Los Angeles. It is for possession or sale of cocaine base.

The next one I have is -- the date of conviction is -- and I'm sorry, on that first one, the case number is A891299.

The next one I have is also from the Superior Court of California, County of Los Angeles. The conviction is from 9 -- September 27th, 1991. It's for robbery, second degree, as well as there was a deadly weapon enhancement. That is case number TA008691.

1 And the third one I have is also from the Superior Court of
2 California, County of Los Angeles. The conviction date is February 6th,
3 1997. It is two counts of robbery, second degree, also with the deadly
4 weapon enhancement as well as having prior conviction enhancement.

5 I would ask that these be marked and admitted, Your Honor,
6 as support of the habitual felon and habitual criminal adjudication.

7 THE COURT: You have seen them, Mr. Long?

8 MS. DiGIACOMO: He has been provided of copies in
9 discovery and they were also all attached to my sentencing
10 memorandum filed July 6th or 9th.

11 MR. LONG: That's correct.

12 THE COURT: They'll be filed. They appear to be certified
13 Judgments of Conviction.

14 MS. DiGIACOMO: And may I, Your Honor?

15 THE COURT: Please.

16 MS. DiGIACOMO: Okay. Your Honor, first of all, I mention
17 the PSI doesn't really even address the habitual felon. It gives this
18 Court just options under the habitual criminal statute which is 207.010.
19 However, I would submit to this Court that we are dealing today with the
20 habitual felon statute which is 207. 012 which is mandatory. If you have
21 two prior violent felony convictions, which the Defendant has and has
22 been provided to this Court with his prior robbery convictions, and you're
23 convicted of a violent felony, which the Defendant has in his second
24 degree murder conviction, all falling within the statute, then the -- the
25 statute says this Court must adjudicate him as a habitual felon, the State

1 must file it, the Court cannot strike account of it. And so he must be
2 adjudicated as a habitual felon.

3 And as I addressed in my sentencing memorandum, the next
4 part of that is if you look at 207.016 it says that if you're going to give
5 somebody adjudication under habitual criminal or habitual felon
6 treatment, that the purpose, the legislative purpose of this is to provide
7 for a sentence greater than what would be provided under the normal
8 statutory scheme.

9 And in this case it's very unique, Your Honor, because you
10 have somebody that's been found guilty of second degree murder with
11 use and he is also a mandatory habitual felon. However, the only option
12 for this Court to give him greater than he could get under second degree
13 with use is life without.

14 And so the State submits to you, under our statutory scheme
15 and under the legislative intent, this Court must adjudicate him as a
16 large -- excuse me -- as a habitual felon and give him the life without.

17 But I would like to address as well why that is not only
18 necessary in this case but also why it is deserved. Even if this Court
19 wasn't looking at habitual felon, he deserves to be adjudicated as a
20 habitual criminal felon, however you want, based upon who he is and his
21 criminal history. If there was ever somebody habitual that is deserving
22 of life without, it is Mr. Cash.

23 Defense counsel brings up in his sentencing memorandum
24 how I keep harping on his juvenile history which I think is important,
25 Your Honor. If you look, his criminal history begins as a juvenile in

1 1979. He has been committing crimes for decades, almost his entire
2 life, and he committed serious felonies and was convicted of them as a
3 juvenile in California. And then when he gets out including he's killed
4 somebody at the age of 15, and here we are rounding out his criminal
5 career at age 52 killing another human being that did not deserve to be
6 killed.

7 He gets out of the California Youth Authority and immediately
8 almost is arrested for the possession of cocaine base for sale and
9 obstructing an officer. He then gets probation, he's sentenced to
10 probation on that; however, he's arrested a few months later for
11 kidnapping and robbery with a firearm, which is what he was convicted
12 of with the second degree with a firearm. And then -- so that probation
13 gets revoked because he picks up another case.

14 Then in 1990 that -- he is convicted, sentenced to a total of
15 nine years. Well, first his probation gets revoked, he gets the four years.
16 Then he gets convicted of second degree robbery and on that one he
17 gets four years for the robbery and five years for the deadly weapon
18 enhancement, a total of nine years in 1991 when he was convicted. He
19 gets paroled in 1995, and then in 1996 he's arrested again for robbery,
20 and then he's convicted that year with the robbery with deadly weapon
21 times two. On count one he got six years for the robbery plus four years
22 for the deadly weapon. On count two, he got two years for the robbery
23 and 16 years for the deadly weapon. Then he gets an additional year
24 for his -- because he's got priors, and then he gets an additional five
25 years because he's a prior violent -- he has prior felonies that are

1 violent. So, he gets 19 years four months. He's paroled in 2013 and
2 discharged in 2016, and then he commits this murder December 11th of
3 2017.

4 So, in -- even if this Court had discretion to give him habitual
5 criminal, one, the State submits you should, and life without is clearly
6 appropriate with somebody who has killed two people in his life, who has
7 committed multiple violent felonies. This is exactly who the legislature
8 had in mind when it created habitual criminal and the habitual felon
9 statute.

10 In the Defendant's sentencing memorandum, he argues the
11 juvenile records is not relevant, Your Honor, don't consider that. But you
12 can consider it because here we are sentencing, and the State's
13 provided the proof of those convictions. So, it's not to be used for
14 habitual criminal or habitual felon, but it can be used to show why this
15 Court gives him or should give him the sentence that it should.

16 Also, with regard to Defendant's counsel's argument that his
17 priors are stale or trivial because they're so old, they're not stale or trivial
18 because he has been consistently in the justice system since 1979. The
19 longest break he had was after he was discharged for parole in 2016
20 until he was arrested on this case in 2017.

21 It's not that he had a conviction back in 1990 and stayed clean
22 and did well for last 25 years. That's not what we have here. We have
23 somebody who, despite his sentences getting escalated, nine years on
24 the first robbery with use, 19.4 years on the second robbery with use, he
25 is still committing crimes. He is still a danger to this community.

1 And, you know, defense counsel in his sentencing
2 memorandum makes light or argues to this Court well he has been
3 rehabilitated; that he went out there defending his daughter, this was
4 self-defense, et cetera. But you know what? We're not at that point
5 anymore. A jury has found he is guilty of murder with -- second degree
6 murder with use of a deadly weapon. A jury does not believe this was
7 self-defense. A jury believes he committed murder and that's where
8 we're at.

9 I'm not going to re-argue the facts. I know this Court heard
10 the trial, but the jury didn't believe, and also the Defendant didn't act like
11 somebody who just went out there and acted in self-defense when he
12 ran away, destroyed the murder weapon, and only turned himself in
13 hours later after first denying he did it and then being able to talk to all
14 his family members to concoct this story that it was two against one.

15 You know, this is hard because both families are affected and
16 the State understands that. Defendant does have a three year old child.
17 But you have the victim's family who has lost a young son, brother,
18 cousin, friend who did not deserve to die that night. He was sitting in a
19 car playing on Kyriell's phone, not paying attention to what was going
20 on; never thought it was a bad enough to get out of the car when
21 Brittany and him were arguing, but didn't get out of the car until he saw
22 the Defendant had Kyriell in that like headlock, and he only got out to
23 break them up. He did not deserve to be stabbed in the heart. He did
24 not deserve to be die -- to die that night.

25 But the difference between the Defendant's family and the

1 victim's family is the Defendant's family can still come visit him in prison,
2 can still celebrate birthdays with him, can still share moments of his
3 daughter's life with him. The victim's family does not have that
4 opportunity. They will never be able to see Ezekiel again.

5 And the fact that the Defendant goes away for life and is never
6 eligible for parole is exactly what's deserving in this case.

7 I do have three speakers, Your Honor. But I would just like to
8 point out that, obviously, it's the State's position that life without is
9 appropriate here, and not just appropriate but is mandatory under the
10 habitual felon. And I'll submit it.

11 THE COURT: Do you want your speakers to speak?

12 MS. DiGIACOMO: They can go last, Your Honor.

13 THE COURT: All right.

14 MR. LONG: Well, Your Honor, we can have the speakers first
15 and then I can go.

16 MS. DiGIACOMO: Pursuant to statute, they are allowed to go
17 last.

18 THE COURT: They're allowed to go last.

19 Before your attorney has an opportunity to speak, is there
20 anything you'd like to say?

21 THE DEFENDANT: Yes. First, I'd like to apologize to the
22 Devine family because this wasn't something I seeked out to do. I was
23 called down there to defend my step-daughter and things went, you
24 know, they went -- got kind of hectic out there. You know, and I
25 understand they lost a young person. I understand that. And I'm sorry

1 for that. That wasn't my intention to do nothin' like that. When I got off
2 work I was wrapping Christmas presents.

3 So, I'd like to apologize to you all because -- I don't know --
4 because this is a tragedy for both families.

5 MS. DiGIACOMO: Your Honor, I'd ask that the Defendant
6 address you.

7 THE COURT: Yeah. You need to address the Court and stop
8 looking at them.

9 THE DEFENDANT: I mean, that's all I can say to the Court
10 that when this happened, this was a -- this was people should have --
11 when domestic violence happens, this is sometimes the consequences
12 of domestic violence. That's when people get hurt 'cause -- and Ezekiel
13 wasn't involved in this. This wasn't a fight. This was somebody else's
14 fight and we are the two innocent people who got caught up in it. And
15 it's a tragedy that a young man lost his life and I'm truly sorry for that.

16 That's it.

17 THE COURT: Thank you. Mr. Long.

18 MR. LONG: Your Honor, if I could be heard. The Defendant
19 was released from prison more than four years before this happened.
20 While he was in prison, he learned how to be an HVAC technician.
21 When he got out, he finished up his certifications at Antelope Valley
22 Community College, and he was working in his field. He was working at
23 Sears. I presented a letter from his employer that said, if he could get
24 out, he could come back to work.

25 He didn't have any problems in prison. His sentence wasn't

1 extended for any reason. And to look at the age of the cases, okay, they
2 are 22 and almost 30 years old. And I know he spent time in prison but
3 he has been punished for his prior crime. And is this instant offense
4 anything like his adult record. He got caught with cocaine base, with
5 crack, in 1989. That's when the crack epidemic was sweeping Southern
6 Los Angeles and decimating African-American communities.

7 Mr. Cash is one of 17 siblings. He wanted to be a
8 longshoreman. He wanted to be a teamster. And when there wasn't
9 work, he committed robberies. But he has been punished for that.

10 And, Your Honor, what the jury did not do, despite the State's
11 very persuasive and very impassioned pleas, is they did not convict him
12 of first degree murder. Now, even though we admonished the jury that
13 you're not to think about punishment when you decide to whom he's
14 guilty, everyone who has watched an episode of television in the past 30
15 years knows that first degree means life without and second degree
16 does not.

17 This Court is not mandated to sentence Mr. Cash to life
18 without parole. He must serve 11 years for the second degree murder
19 conviction and then there must an increase. The legislature doesn't say
20 that the increase has to be life without parole. Your Honor, 11 years is
21 an exceptionally long time.

22 THE COURT: Hold on a second.

23 [Colloquy between the Court the Law Clerk]

24 THE COURT: Go ahead.

25 MR. LONG: Your Honor knows the facts of this case. This

1 was not a difficulty that Mr. Cash started. This was not a problem that
2 Mr. Cash sought. This was a problem that came to his house. That's
3 where it's occurred, and the State said that he conspired with his family
4 to concoct this story about it being two-on-one. Your Honor, the State's
5 witnesses said that it was two-on-one as well as the defense witnesses.

6 Ezekiel got out of the car so it could be two-on-one, two young
7 men versus a 52 year old man and he stabbed one. That is not
8 deserving of life without parole. If Your Honor sentences him as I
9 requested in my memorandum, he will be out when his three year old
10 daughter -- she's turning four in December -- is a teenager, and he can
11 still be a part of her life. Children do better when they're raised by
12 mothers and fathers.

13 And even though Thomas has to go away, Your Honor, give
14 him a chance. Prison worked for him last time. I don't think the State
15 believes, and I know I don't believe, that we wouldn't be here today if
16 Kyriell wouldn't have brought that violence to his house.

17 THE COURT: We wouldn't have been here today if he hadn't
18 come downstairs with a shiv in his hand.

19 MR. LONG: Well, Your Honor, it wasn't in his hand, it was in
20 his pocket.

21 THE COURT: Oh, yeah.

22 MR. LONG: Because he always keeps a knife in his pocket.
23 It was part of his job.

24 MS. DiGIACOMO: For the record, that was -- there was no
25 evidence that came out at trial.

1 THE COURT: No, I -- just let him go.

2 MR. LONG: And, Your Honor, as I stated, you're right, he
3 didn't have to intervene. He didn't have to run down to protect his
4 daughter. All of us have the option to drive by a fight, put our hand over
5 our eyes and say, that's not my, never mind. And there's been
6 arguments in this Court that maybe it should have, I mean.

7 But, Your Honor, I believe that the majority of men in this
8 country, certainly in Clark County, would have done exactly the same
9 thing.

10 THE COURT: Thanks.

11 Let me hear from the witnesses.

12 MS. DiGIACOMO: Yes. Your Honor, the first one is Dalila
13 Logan.

14 **DALILA LOGAN**

15 [having been called as a victim impact speaker and being first duly
16 sworn, testified as follows:]

17 THE COURT CLERK: Please state and spell your name for
18 the record.

19 THE VICTIM IMPACT SPEAKER: Dalila Logan, D-A-L-I-L-A,
20 last name L-O-G-A-N.

21 THE COURT: Go ahead.

22 THE VICTIM IMPACT SPEAKER: I'm just going to read.

23 I'm Ezekiel Devine's Aunt Delila. Before Ezekiel was
24 senselessly and cruelly taken from his family, he was loving, funny,
25 vibrant, full of energy. Ezekiel was also very talented. He was an

1 intelligent young man. I know without a shadow of a doubt my nephew
2 was on his way to doing great things. He now has been robbed of all of
3 this.

4 I will never get to see my nephew dance again. I will never
5 get to hear his laugh again. I will never get to see him clean out my
6 refrigerator of all my food again. I will never hear him ask me to sing for
7 him again. Instead, I get to watch my sister try and keep his siblings
8 together while she slowly unravels. I get to watch Ezekiel's twin lose
9 himself because literally he has lost his other half. I get to watch his
10 other siblings just merely exist in this life as their life spiral downward
11 because they truly miss and love their brother.

12 Even with the max sentence of being served, Mr. Cash still
13 has his life and has lived a long life. My nephew was taken at 21 years
14 old and he will never get to talk to us again. He'll never get to hug us
15 again. He'll never get to be with his family again. I just ask that the
16 Court just keep all of this in mind.

17 THE COURT: Thank you.

18 Do you have any questions?

19 MR. LONG: No.

20 THE COURT: Thank you.

21 MS. DiGIACOMO: Tyahna Drummond.

22 **TYAHNA DRUMMOND**

23 [having been called as a victim impact speaker and being first duly
24 sworn, testified as follows:]

25 THE COURT CLERK: Please state and spell your name for

1 the record.

2 THE VICTIM IMPACT SPEAKER: My name is Tyahna
3 Drummond, spelled T-Y-A-H-NA, D-R-U-M-M-O-N-D.

4 Ezekiel was my big cousin and it's like -- I always like to tell
5 people, like, I have three sides of my family. You've got the Logans, the
6 Kimballs [phonetic], and the Drummonds, and two of those sides were
7 like my mom's side, then my dad's, and then the Kimballs would be like
8 my grandfather. We lost my granddad back when I was like four or five.
9 And like my grandad had like a super big family. So, it's like some
10 sides, you know, where you know all your family. But the first -- the first
11 people I met on their side were Seth, Azariah, Ezekiel, Shay, Shareena,
12 my auntie. And it's like -- it's like coming up -- it's like -- it seemed like I
13 as always around them, you know. Like we even went up the state
14 together through [indiscernible], and they still have that same car. And
15 no track meets, their dance shows. There was a year when I was in
16 third grade they came and picked me up every day.

17 It's just like, that night, I'm still reliving it, I was sleeping. My
18 sister -- I was sleeping and I was dreaming. I had a dream where I was
19 sitting down and I was at, like, this party and it's like the twins were
20 known, and they were like, they were like -- they were pretty popular
21 around here. And, you know, were usually like -- I don't know. But we
22 were at this party and then I got up and I seen them, I seen Zeke, I seen
23 Riah, and then all of a sudden it's like a fight broke out and the next
24 thing you know, like, I woke up to my sister telling me I had to watch my
25 niece and that the twin is gone.

1 And, like, it just didn't make sense because, like, Zeke, he
2 was, like, really one of those people you wouldn't expect that from. Like
3 you wouldn't expect that news to be upon, like, you know, everybody
4 had their moments, everybody, you know, but he was always one of
5 those people that might tell you to chill out, like, it's not worth it.

6 So, you know, it was just unfortunate, and no matter how
7 much we go back and say what could have been different, it's nothing
8 we could change. You know, like, it's my mom, like, no [indiscernible]
9 year, you know, we still can't even see my cousin again, you know.

10 Like the prosecutor said, that man still gets to see his kids, he
11 still gets to breathe and eat, you know, and we, -- all we got is memories
12 and pictures and barely that, and we, you know, there's nothing we can
13 change at the end of the day, but that's it.

14 THE COURT: Thank you.

15 Do you have any questions?

16 MR. LONG: No.

17 MS. DiGIACOMO: And lastly Ms. Devine.

18 **SHERIDA DEVINE**

19 [having been called as a victim impact speaker and being first duly
20 sworn, testified as follows:]

21 THE COURT CLERK: Please state and spell your name for
22 the record.

23 THE VICTIM IMPACT SPEAKER: Sherida Devine, Sherida,
24 S-H-E-R-I-D-A, Devine, D-E-V-I-N-E.

25 Good morning, Honorable Judge Smith.

1 THE COURT: Good morning.

2 THE VICTIM IMPACT SPEAKER: Thank you for this
3 opportunity.

4 I've delivered many speeches, messages and presentations in
5 my profession and reigning as Ms. Black Nevada, but never in my
6 wildest nightmares did I ever imagine myself delivering an impact
7 message regarding my son's murder.

8 Before I really get started, I do want to make one thing --
9 share what I know about the law when it comes to second degree
10 murder. First and foremost, it is not 10 years. The minimum is 25 years
11 to life. So, I just wanted to say that because it's not 11 years, it's 25
12 years to life even if an individual is not habitual.

13 I have to read my letter from my daughter that she wrote on
14 behalf of her little twin brother, Ezekiel, and this letter broke my heart
15 because out of all my children, Shareena has demonstrated the most
16 internal and emotional strength. She is in Reno in college and trying to
17 get into the -- become an officer in the military so she was not unable to
18 come down. So, I asked if I could read this.

19 She says, Dear Honorable Judge Smith, My mother has
20 requested that I write a letter to you about the loss of -- how my brother's
21 loss has affected me. To tell you the truth, I really don't want to do this.
22 I even asked her if I had to. Obviously she said I did.

23 I want to give you a little context about me before I start it.
24 You may or may not know this but I'm the oldest of my siblings. There is
25 at least seven years difference between my brothers and me. This

1 means that I have more responsibilities than most seven or eight year
2 olds. I had to help my mom out because she was a single parent. I
3 helped with taking care of everyone, ranging from changing diapers to
4 cooking and cleaning. For as long as I can remember, I wasn't really a
5 child that displayed or showed my emotions easily. Other than being
6 irritated with something that my siblings were or were not doing and
7 having to do it myself to relieve the pressure from my mother, I wasn't
8 really one to cry. Even when my grandfather passed away, it didn't hit
9 me until the next year on the anniversary of his death, which was very
10 unexpected for my mother and I.

11 With Ezekiel dying I have started to notice that I avoid
12 situations that cause me too much pain. I push the feeling aside,
13 burying myself in work and school so I don't have to think about it.
14 Doing this has caused me to be more aggressive with people and more
15 easily irritated. This has led me to having a slight breakdown at work
16 and I was instructed at the time to leave work early.

17 It has been suggested that I go to therapy or counseling or
18 even a shrink that was used by my friend. Every time I see a friend I
19 haven't talked to in a while I've told them that my brother is gone.
20 Sometimes I could do it without crying, other times it hits me like a wave.
21 Each and every time I have to test it saying the words, my brother was
22 killed, stabbed in his chest, and left to die alone and literally bleeding to
23 death.

24 My emotional side is constantly at war with my logical side,
25 and I know that I need to grieve, but I feel like if I start I won't stop.

1 Everyone advised on -- advice on how to deal with this, but I don't want
2 to hear any of it. I don't want to think about it or dwell on it. I want to
3 forget that it ever happened. I had to take time off of work to fly down to
4 Vegas for the wake and the funeral, but when I saw his body, how
5 lifeless he laid there, how gray his skin looked, I couldn't believe that
6 that was my brother. I even said it out loud that it wasn't Zeke. He
7 didn't look like that. He was always full of life and energy.

8 I can't put into words the gut-wrenching sound that came from
9 Azariah, a wail, a cry that came from his soul and broke the hearts of
10 every person there. My mother crying, trying to comfort him, and unable
11 to; Seth, my sister and me silent. How can I put it into words? I hate
12 having to do this, putting myself through this. I'm never going to forget
13 it. I won't be allowed to.

14 Every year, every birthday, and holiday my family and I have
15 to experience this loss all over again. I feel like this pain is a festering
16 wound that will never heal for us, and the one thing that hurts the most is
17 that there isn't anything that I can do to solve this. I can't take this pain
18 from them, I can't help, I can't do anything. I'm the one that helps out
19 and advises and takes care of my family but I can't.

20 This whole thing is out of my control and all I can do is think
21 why, why us, why now. The only thing that I have prayed to God since I
22 was a child was for my mother to be happy, but no matter how much I
23 pray, I feel this is never going to happen, and if anyone deserves it, it's
24 her.

25 I have always believed in God and that he cared for his

1 children, but how can I continue to believe that God hears my prayers,
2 the prayers of a little girl for her mother and her family. This has shaken
3 my belief to its core. I'm so mad at him for allowing this to happen.

4 I'll never be able to see my brother in love, he will never get
5 married, or be there if I do. Zeke and Riah would always joke about
6 giving my first boyfriend a hard time, puffing out their chests like they
7 would do something. It was a moment I dreaded but I was always
8 curious about it. I'll never be able to see if he has twins for himself and if
9 I have twins will they ever be able to -- if I have twins they will never be
10 able to see the kind of man he becomes, none of us will. I will never be
11 able to see him take that first step into maturity, finally becoming a man.
12 It's a moment that I've been waiting for, for all of them.

13 My brothers have always been in competition with me. They
14 will make more money, have better dreads, dance better, be taller, and
15 I've always wanted them to be better than me. I just really hope this
16 whole situation doesn't lead the other two down the wrong path. We
17 have enough pain to last us several lifetimes.

18 There is so much that I'm feeling that I don't know how to
19 explain to you. I know that I'm not only one that hurts like this and I
20 really don't want to write this. I didn't want to think about it or cry about it
21 or anything. I just wish it was a bad dream, a nightmare that I'm going to
22 wake up from, but I have this sinking feeling that I won't.

23 Before I could write this today, I talked to someone from work
24 who is the boss of my supervisor's supervisor. She got promoted
25 recently. She sent me an email to send to you on her view of how the

1 death of my brother has affected me. Reading it has helped me write
2 my letter to you.

3 The letter says, I have known Shareena for the last five years
4 and since the death of her brother in December, she has changed so
5 drastically that I've made it a point to make regular wellness checks on
6 her, the changes that one illustrate tremendously suffering from which I
7 believe to differ from pain. Suffering is a guttural pain that cannot be
8 consoled or comforted. Time does not resolve it and there is no solution
9 one can apply to offer relief.

10 In my experience, the only thing that can resolve suffering is
11 the relationship with God who could offer gracious healing that
12 surpasses understanding. When I learned of her loss, I was hopeful she
13 would find healing in her pain because of her close relationship with
14 God. Sadly, the death of Shareena's brother resulted in her severing
15 that relationship because she could not and cannot conceive a God that
16 would allow this type of unnecessary death to have occurred.

17 It is devastating to watch the suffering that Shareena wears
18 like a yoke each day. My desire is to offer a time she was comforted,
19 her feelings over the loss of her brother.

20 I would never envy your position, Your Honor, to decide what
21 justice looks like in exchange for a human life. I would never want to be
22 in a position like Shareena finds herself in where she tries to find words
23 to articulate the scope of loss one feels over a sibling. Shareena will
24 never be the same because of this tragedy, her life, and that of her
25 family is forever changed. My prayer is that she will find her way back to

1 a gracious God she once knew who can give healing of harden and
2 broken heart. Amy S. Associate Director Technical Operations of
3 Charles River.

4 So, had Shareena been able to be here, she would have had
5 the opportunity to share that with you.

6 You have no idea how bad it hurts to hear my oldest child who
7 gave up her childhood to assist me in caring for my children express
8 such deep pain, then to learn of the pain through another person's eyes
9 because my child has tried to hold it together, hold it in, and be strong
10 for me.

11 Then there's my youngest daughter, who is older than the
12 boys yet closer in age, who has been so traumatized from the situation
13 that she could not talk about the loss. She leaves the room when we try
14 to get her to listen or speak about what happened. She would not come
15 to the trial; she is not here today, and she could not face her pain to
16 even write a letter. She was finishing her degree at San Diego State
17 University when this occurred and it took everything in me to hold it
18 together and push her to finish her courses.

19 Then I have a baby boy who is present that has carried the
20 emotional load for this entire family. He has endured the angry
21 outbursts from his remaining twin brother. He has helped me in my
22 meltdowns. He has given room to avoid our pain or to allow anyone to
23 see his, yet he has been present for me because others could not.

24 Lastly, there is my oldest son, who I am not even sure is the
25 oldest because I mixed him and his brother up at birth and I never had

1 their fingerprints or footprints checked to see who is who.

2 Azariah has been tormented since the night he awoke from
3 his sleep at the very moment Ezekiel was stabbed. He didn't know
4 where the pain in his chest came from and felt an unexplainable intense
5 fear of dread and emptiness. His phone was dead and he could not
6 receive calls from his panicking brother. He couldn't go back to sleep so
7 he went downstairs to charge his phone.

8 Azariah shared that the moment he turned the phone on his
9 baby brother was calling. That's when he learned his twin had been
10 stabbed. Can you imagine the chaos of a mother having two children
11 calling her at the same time and nobody really knowing what was going
12 on. All they knew was that their brother was injured. They were
13 panicking and I was at a work event and now I'm panicking. I will never
14 forget which one it was that called and said Ezekiel was dead.

15 Azariah has not been the same since. Not only did he lose his
16 other half, as he will certainly share with all. He was arrested on the
17 scene because he followed me past the tape. People ask why didn't I
18 run.

19 There was a man who told me he was a nurse and he was
20 with Ezekiel. He told me that my baby was still alive, but there were no
21 medics on the scene and not knowing how long ago this had occurred, I
22 ran to my baby. Azariah and Seth both followed me, but when I saw the
23 sheets I collapsed. Azariah continued to the body. He uncovered him
24 and we all discovered Ezekiel's lifeless body in a pool of blood. Azariah
25 gently lifted Ezekiel's head as he pleaded with him to say something. I

1 listened to my child plead with his dead twin, please tell me everything's
2 okay, please tell me you're still here. Please talk to me, Zeke. I
3 remembered the repeated wailing cries of no, no, no, no, no coming
4 from the depths of his soul and then he pulled Ezekiel to his chest.

5 The police attempted to pull him off but Azariah wouldn't let
6 go. They drug them both and then eventually Azariah's arms went up
7 which broke his grasp causing Ezekiel's head to slam on the ground.
8 Now they're dragging both Ezekiel -- Azariah and Ezekiel's body in the
9 street. I'm watching this as the police are handcuffing me. I watched
10 them place cuffs on Azariah, and once I was in the back of the police car
11 I began to panic because I could not see Seth. Azariah's emotions that
12 night went from despair to tormenting wails, to pleads, to cries for me, to
13 cries for his twin, and on and on. We were all helpless.

14 Your Honor, he spent that night and half the next day in jail,
15 unable to receive the emotional support he needed. Now this young
16 man that was so full of life, happily working a job he adored, struggles to
17 find a reason to live for himself. We are trying counseling again, but it's
18 hard for anyone to relate to what it is like to lose the other half of your
19 DNA.

20 This monster has sucked life from my family. Identical twins
21 are a miracle that scientists can't even explain. It's hard enough if one is
22 lost to an illness or an accident. But as Azariah would explain it, if he
23 could, this is another level.

24 Now, let's get to me, the woman that was blessed by God to
25 bring identical twins into this world. I have to share first my prayer as a

1 little girl. My family has many sets of twins and I always prayed to God
2 for my own. I was and I still am very fascinated with twins, especially
3 identical twins. When I learned I was pregnant I wasn't happy because I
4 didn't want any more children at the time and I remember praying and
5 asking God to forgive me but I was going to have an abortion. So, if he
6 wanted me to continue this pregnancy, he needed to make it twins.
7 Well, a couple of weeks later at the abortion clinic I learned I was six
8 weeks pregnant with twins.

9 My baby boys are -- were -- are my blessings from God. It's
10 sad that I don't know how to refer to my twins now. I don't know how to
11 refer to the number of children I have or had. I don't know how to stop
12 anticipating my check-in calls from Ezekiel just to see how I'm doing. I
13 don't know how to adjust to the absence of his strong impressionable
14 articulate and deep philosophical discussions. I don't know how to see
15 one without looking for the other to walk around the corner or call when
16 the other one is present. I don't know how to ask -- how not to ask
17 which one are you? I don't know how to accept not being able to ever
18 mix them up again. I won't ever see his smile again, feel that infectious
19 lively personality, feel his protection; hear him tell me I can't have a
20 boyfriend because he's my only boyfriend, and then say when I start
21 dating, if I date, he's going to run them away.

22 I will never experience the many facets of his talent, which
23 included dancing, rapping, writing, sign language, football, soccer, his
24 patience with babies and children.

25 As a matter of fact, Your Honor, he loved that little baby that

1 was in the car with him, the very baby that they were arguing or
2 whatever about. He had a way with them that was purely nurturing.

3 I don't know how to accept the miraculous concept that my
4 twin's children would have been first cousins yet have siblings due to
5 them sharing the same DNA. I don't know I will accept not being able to
6 see my grandchildren look at them both in awe. I will never, ever, ever
7 have grandchildren from Ezekiel. I won't see him get married or achieve
8 his dreams. I will never see the man he was destined to become, and I
9 will never be able to tell him to stop trying to help everybody, stop
10 getting in the middle of people's domestic problems.

11 On December 5th, the day before my birthday, was the last
12 time I saw my baby alive. Ezekiel shared with me that he had just
13 stopped a man from beating up his girlfriend. I told Zeke at that time to
14 stop. He told me, mommy, you taught us to help and protect. I told him
15 I knew but it's dangerous these days and that people are crazy.
16 Unfortunately, it was ingrained in his personality.

17 Also on this day Ezekiel said that a friend brought me my
18 favorite cake for my birthday. It was a red velvet cake and he was so
19 proud to be able to buy me my favorite cake. His friend said that he
20 dared anybody to touch it. That evening was the last time I touched my
21 child alive. The next time I spoke to him I was chastising him like a
22 typical mother about his first love that he would not stop seeing. I didn't
23 get a chance to speak with him after that. Why? Because I thought I
24 had another chance, another day, another opportunity.

25 That day Ezekiel was murdered I was supposed to go by their

1 apartment to drop something off. I went to my work event and I told
2 myself I'll go by there after the event. This was the last time I heard my
3 child's voice in the background asking his baby brother to tell me
4 something. I honestly thought that I was going to see my son that night.
5 Well, Your Honor, I did see my son that night. I saw him lying in the
6 street murdered by that monster over there. My son did not deserve to
7 lose his life especially from a knife through his heart.

8 I remember when Ezekiel was in middle school and he asked
9 me why men never fulfill their promises. He asked why is it that they
10 don't step up to teach the younger men. Now I have to -- now he has to
11 lose his life to an older black man. He won't ever receive the apology
12 from his dad or have the relationship from his father he desperately
13 desired.

14 A 53 year old man took the life of a 21 year old with a love for
15 life that was contagious. This man should have known better. I replay
16 in my mind how the situation could have been different. Here is how it
17 could have been different.

18 On December 12th I went to the scene in hopes of touching
19 my son's blood and setting up a memorial. Antoniette White, the man's
20 girlfriend, not wife, he didn't marry her, girlfriend came outside and
21 called my children and their friends over to her. She antagonized my
22 children by stating it was my child's fault that he was killed. I saw my
23 twin begin to react and I grabbed him by the waist and I ordered them all
24 into the car. That situation could have went in another direction had I
25 not been the adult, an adult with commonsense, the adult that leads by

1 example.

2 The same woman that attempted to create constant chaos
3 was the very person I spoke to the night before. She apologized to me
4 because, as she stated, I'm sorry, I have children too. My husband
5 accidentally killed your son. I am so sorry. Now it has turned to blaming
6 my child for his death. Even if my son was fighting this man, Your
7 Honor, you do not bring a knife to a fight that you have started. Life is
8 not prison.

9 I am begging you to send this man away without the possibility
10 of ever walking free again. He is dangerous. He's killed before, he's
11 robbed with a weapon not once but twice, and now after only two or
12 three or however many years of being released he's killed my 21 year
13 old son.

14 He is amongst those hoodlums that come from California, run
15 from the three strikes to life. On top of that, he has a bad attitude. He
16 has demonstrated his arrogant attitude towards Judge Herndon, his own
17 attorney. He has stared at me as if trying to trying to intimate me.

18 I am a native and I love my city and state, and this monster is
19 dangerous to our community. It's not safe for him outside those bars.
20 He is a menace to not just our communities but anywhere his feet land.
21 Is he someone you want living next door to you or your family or your
22 friends or even the people that you work with? This demon has taken
23 the miracle that no one but God can explain.

24 I cannot talk to my other twin son without triggering his anger
25 and pain. I can't talk to my daughters without one running to her room

1 and the other one feeling hopeless. I can't talk to my friends because I
2 bring them down. I have no one to talk to other than a therapist which
3 leaves me with limited opportunities to grieve. I have to be strong for my
4 children so I don't lose them.

5 Your Honor, Ezekiel's twin says that he died as well on
6 December 11th. He also states that the only reason he has not taken
7 own life is because of me. My youngest son and I live in constant fear of
8 losing Azariah as well. So, why should this murdering, robbing, bastard
9 be allowed to ever walk free after all the hurt, harm, and danger he has
10 inflicted in this world, not just me, not just my family, not even that just
11 his family, but we're talking about repetitive families throughout the
12 California community.

13 I am begging, you, Your Honor, to sentence him to life without
14 the possibility of parole. This is for me, my children, my community, and
15 our state.

16 Thank you.

17 THE COURT: Thank you.

18 Questions?

19 MR. LONG: No.

20 Your Honor, before court -- that's your last speaker?

21 THE COURT: Yeah.

22 MS. DiGIACOMO: Correct.

23 MR. LONG: Your Honor, before court I showed the
24 prosecution a letter that Antoinette had written, and she doesn't have
25 any objection.

1 THE COURT: I got it.

2 MR. LONG: No, this is a new one. There's no way you could
3 have gotten it. I printed it off this morning.

4 MS. DiGIACOMO: It looks the same.

5 THE COURT: Let me see it. Yeah, this is the one I got.

6 Left side file, please.

7 First, let me say it's not mandatory to find someone habitual.

8 I'm referring to *Clark versus State*, 109 Nevada 426, cited in *Walker*
9 *versus Deeds*, 50 Fed. 3d 670; *O'Neill versus State*, 123 Nevada 9.

10 MS. DiGIACOMO: And, Your Honor, just for the record, those
11 were discussing 207.010, which is the --

12 THE COURT: Right. That's all right.

13 MS. DiGIACOMO: -- the discretionary.

14 THE COURT: I -- it's -- I still have discretion, I believe.

15 MS. DiGIACOMO: Well, and the State would submit that
16 under 207.012 that that is the one for violent felons. You only need two
17 prior violent felony convictions, and then if you're convicted of a violent
18 felony conviction, it states the State must file it and the Court may not
19 dismiss it, which is where the State got that it was mandatory. And he
20 does --

21 THE COURT: I believe there's broad discretion to the courts
22 in sentencings. I just don't want it on the record to think that it's
23 mandatory.

24 MS. DiGIACOMO: That's fine, Your Honor.

25 THE COURT: All right.

1 MS. DiGIACOMO: Well, I would also submit under 207.010,
2 the discretionary, he is eligible for the same penalties as habitual felon --

3 THE COURT: No, I understand.

4 MS. DiGIACOMO: -- because he has three priors and he's
5 eligible for large, which also includes life without.

6 THE COURT: I understand. You've made your argument.
7 I'm trying to make a decision.

8 MR. LONG: And, Your Honor, I --

9 THE COURT: And I don't want to hear any more argument,
10 I'm sorry, from either of you. I've heard from everybody.

11 Sometimes we think that the judges can solve all of life's
12 problems and they can't. Nobody wins in this, especially Ezekiel.

13 I truly think that if Mr. Cash had not gone down there, we
14 wouldn't be in this situation. And whether the knife was picked up in the
15 house or it was in his pocket there had to be some thought process of
16 Mr. Cash taking it out and using it.

17 And the sadness in the mother's family is understandable. I
18 can't imagine what it's like to have lost a child like that.

19 I am using my discretion in finding you a habitual criminal.
20 That shouldn't make anyone happy to treat another person that way but
21 that's what I believe is required in this situation.

22 And you're sentenced to life without the possibility of parole.

23 Restitution of \$3,389 and credit for time served of 270 --

24 MS. DiGIACOMO: It's 252 days now, Your Honor.

25 THE COURT: 252 days. Thank you.

1 THE COURT CLERK: Is that the large habitual?
2 THE COURT: That's the large habitual.
3 MR. LONG: Your Honor, Mr. Cash asked about being
4 appointed, the Public Defender can't represent him.
5 THE COURT: We'll get him an attorney.
6 MR. LONG: Okay. Is that something that I can file an order
7 for today?
8 THE COURT: No, you don't need to file an order. I'll just --
9 we'll call Drew today. We'll get him an attorney to do the appeal.
10 MS. DiGIACOMO: And, Your Honor --
11 THE COURT: But you should file, if there's anything speedy
12 that needs to file, until --
13 MR. LONG: Well, I have to file a notice within 30 days.
14 THE COURT: Just file the notice and then we will get
15 Mr. Cash an attorney.
16 MR. LONG: Okay. Thank you.
17 MS. DiGIACOMO: And, Your Honor, are you also doing the
18 \$25 administrative assessment fee?
19 THE COURT: Yes, \$25 administrative fee, a \$3 DNA
20 assessment, \$150 DNA analysis, \$250 indigent defense fee.
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MS. DiGIACOMO: Thank you.

THE COURT: Thanks.

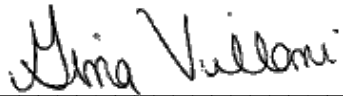
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Court Recorder/Transcriber

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH)
)
Appellant,)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

S.C. Case No. 77018

Electronically Filed
Mar 14 2019 12:50 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

(Appeal from a Judgment of Conviction Following a Jury Trial and Verdict)

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons and entities as
3 described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These
4 representations are made so that the justices of this Court may evaluate any potential
5 conflicts warranting disqualification or recusal.

6 1. Attorney of Record for Appellant: Brian Rutledge

7 2. Publicly held Companies Associated: a. N/A

8 3. Law Firm(s) Appearing in the Court(s) Below:

9 Clark County District Attorney

10 Kenneth Long, Esq.

11
12
13 DATED this 14th day of March, 2019.

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JURISDICTIONAL STATEMENT

This is an appeal from a verdict following a jury trial held before the Honorable Douglas Smith in the Eighth Judicial District Court and the subsequent Judgment of Conviction. This Court has jurisdiction to hear this appeal pursuant to NRS 177.015(3), which provides for the right to appeal a final judgment in a criminal case.

RULE 17 ROUTING STATEMENT

This appeal is presumptively assigned to the Supreme Court because it relates to convictions for a category A felony. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

I. Whether there was sufficient evidence produced by the State to meet their burden of proving the Defendant did not act in self-defense.

II. Whether the District Court Judge abused his discretion in adjudicating Defendant a Habitual Criminal and imposing a sentence of Life Without the Possibility of Parole.

STATEMENT OF THE CASE

Defendant Thomas Cash was charged via an Amended Information on April 19, 2018 with Murder with use of a deadly weapon and Battery with intent to kill. Appellant's Appendix (hereafter AA) 1342. Trial for Mr. Cash commenced on June 18, 2018. AA 001. Trial concluded on June 28, 2018, when the jury found Mr. Cash guilty of Second Degree Murder With Use of a Deadly Weapon, and Not Guilty of

1 Battery With Intent to Kill. AA1339. On August 20, 2018, Mr. Cash was sentenced
2 by Judge Douglas Smith to Life Without the Possibility of Parole under the Large
3 Habitual Criminal enhancement for the Second Degree Murder conviction.
4
5 AA1349-1380.

6 STATEMENT OF THE FACTS

7
8 On December 11, 2017, Kyriell Davis went to pick up his daughter from his
9 girlfriend, Brittney Turner. At the time Brittney was pregnant with Davis' second
10 child, and was living at 3999 Pistachio Nut Drive with her Mother (Antoinette),
11 stepfather (Defendant Thomas Cash), and sister (Angel Turner). Appellant's
12 Appendix (hereafter AA) 873-875, 954. Davis was driving a borrowed car, and
13 asked a roommate, Ezekiel Devine, to come with him. AA879. Davis waited outside
14 the house for Brittney to bring out their daughter, but she left him waiting 15-20
15 minutes while he called and texted her numerous times. AA884.

16
17 Davis testified that she was yelling at him from the time she came out of the
18 house. AA 886. A neighbor, Isidra Carolina Araiza Flores, testified that the
19 argument was very loud, and she looked out a window and saw "a man and a
20 woman were fighting." AA844-845.

21
22 Brittney testified that as she and Davis were arguing, he threatened her, it
23 "escalated" and he grabbed her by the arms. AA956. Davis testified that while
24 Brittney was yelling at him he "got her off me" by "pushing her shoulders", which
25 he claimed "wasn't a hard push because she was pregnant", but rather a "get out of
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1 my face type push". AA886-889. Brittney testified she was scared, and noticed her
2 sister Angel looking out the window at the fight. AA959-960. Angel testified she
3 heard a commotion out front, and looking out the window she could see Davis
4 battering her sister, holding her arms and "banging her up against the car". AA1118-
5 1119. Angel said she went to her step-father Cash and told him "come real quick,
6 Kyriell is banging up Brittney against the car". AA1120. Tamisha Kinchron (Cash's
7 niece) testified she heard Angel scream to Cash, saying "that boy" was jumping on
8 her sister. AA1173. Cash told police that he was wrapping Christmas presents when
9 Angel ran in and said Davis was attacking Brittney in front of the house, so he
10 immediately ran outside. AA1239.

14 Kinchron testified she saw Cash and Angel run down the stairs and out the
15 front door. AA1175. Angel testified Cash ran outside, and Davis still had Brittney
16 by the arms, so Cash got Davis off Brittney by putting him in a headlock. Angel said
17 the two men then started "squaring up" to fight and circling each other. AA1121-
18 1123. Kinchron testified Cash ran up to Brittney and Davis and tried to break them
19 apart, and she saw Davis punch Cash. AA1178. Cash told police he immediately ran
20 outside and saw Brittney breaking away, and Davis trying to grab her again, so he
21 punched at and grabbed Davis. AA1239-1240. Davis testified that Thomas Cash ran
22 outside and swung at him (Davis), but Cash missed and Davis grabbed Cash's face
23 and they started to wrestle. AA891-895. Brittney testified that Cash came out of the

1 house and sort of swung at Davis (but missed), and then they grabbed onto each
2 other. AA961.

3 Davis testified that Ezekiel then ran over and interjected himself into the
4 fight, and pushed them apart. AA 895-896. Brittney testified Ezekiel got out of the
5 car and started to fight Cash. AA965. She told the police that Ezekiel broke Davis
6 and Cash apart by punching Cash in the face (not by shoving them apart as Davis
7 had testified). AA1009. Cash told police he was wrestling with Davis when he heard
8 Davis say "get 'em, get 'em", and a man he has never seen before (Ezekiel) got out
9 of a car and punched Cash in the face. AA1240-1241. Brittney testified that Davis
10 yelled that he was going to get a gun or shoot somebody, that he said he will shoot.
11 AA986-987. Angel heard Davis tell Ezekiel "go get my thing out of the car" which
12 she believed was in reference to a gun. AA1125-1126. Kinchron testified she saw
13 Davis and Cash swinging at each other, with some punches landing, when she heard
14 Davis say to someone "bring my shit". AA1180. Brittney said that Ezekiel punched
15 Cash in the face with a closed fist, damaging Cash's nose and knocking Cash to the
16 ground. AA989, 1006-1007. Angel also testified Ezekiel got out of the car and
17 joined the fight, and Angel testified she saw both Davis and Ezekiel land punches on
18 Cash. AA1125. Kinchron testified she saw Ezekiel get out of the car and join Davis
19 in attacking Cash, two on one. AA1181-1182. Cash told police that when Ezekiel
20 punched him in the face, the punch was so strong it took him by surprise, and he
21 believed it was more than just a fist - like Ezekiel had a metal bar in his hand.
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1 AA1242, 1250. Cash was being held by Davis when Ezekiel punched him, and the
2 blow was so powerful that it disoriented him. AA1248, 1250. Cash said Ezekiel was
3 coming at him again and he was afraid of being hit like that again, so he pulled out
4 the small pocket knife he used for work and stabbed Ezekiel once as Ezekiel came at
5 him. AA1242,1243,1252. Davis said he stumbled back and warned Ezekiel to
6 "watch out" because he saw a glint in Cash's hand. AA896. Davis saw Ezekiel fall,
7 but did not yet know Ezekiel was injured. AA896.

10 Davis testified he is a football player in what he described as "perfect shape".
11 AA939. Brittney said Cash was in his 50s, while both Davis and Ezekiel were
12 football players in their early 20s. AA984.

14 Cash told police he then heard Davis say he's going to get a gun and shoot
15 him, so Cash ran into the house. AA1242. Davis said Cash ran to his house, and
16 Davis said he ran after him and "tried to kick the door down" and only failed to kick
17 the door in because Cash had his weight pressed against the other side of the door.
18 AA896. Davis said he wanted to kick in the door so he could "fight" Cash some
19 more, to "finish" the fight. AA910. At that point Davis heard Ezekiel calling his
20 name and went back and found out Ezekiel was hurt. AA897.

24 The medical examiner testified that the cause of death was a single stab wound to
25 the chest, a wound that traveled in an upward motion. AA707,711.

27 Detective Gillis testified when he came into contact with Cash, Cash had a
28 nose injury and blood on his shirt and pants consistent with the injury to his face,

1 however when they checked Cash's hands to see if he had any injuries consistent
2 with punching someone there were no injuries to Cash's hands. AA1042, 1047. Cash
3 also had injuries to one arm. AA1048.

4 SUMMARY OF THE ARGUMENTS

5
6 There was substantial evidence that Mr. Cash was acting in self-defense when
7 he stabbed Ezekiel a single time, and the prosecutors produced insufficient evidence
8 to meet their burden of proving Mr. Cash did not act in self-defense.

9
10 Judge Smith abused his discretion by sentencing Mr. Cash to Life Without the
11 Possibility of Parole under the habitual criminal enhancement when all of Cash's
12 priors were stale and unrelated to the alleged crime at issue.

13 ARGUMENT ON THE ISSUES

14 I. There was insufficient evidence produced by the State to meet their burden 15 16 of proving the Defendant did not act in self-defense.

17
18 This case began as a domestic violence situation, with an argument between
19 Brittney Turner and her former boyfriend Kyriell Davis that was so loud that it was
20 noticed by the neighbors. AA844-845,886. Although the level of physical violence
21 Davis inflicted upon Brittney was in dispute (Davis claiming he only grabbed and
22 pushed her and that it "wasn't a hard push because she was pregnant", but rather a
23 "get out of my face type push", while Brittney, Angel Davis, and Tamisha Kinchron
24 all testified as to greater violence)(AA 956, 886-889, 1118-1119), what was not in
25 dispute is that Brittney's sister Angel saw the altercation and believed Brittney
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1 needed help - and ran and told their stepfather (Thomas Cash, the Defendant) that
2 Davis was battering Brittney and she needed help. AA118-1120, 1173, 1239. All the
3 testimony also agreed that after Angel told Cash, Cash immediately ran outside and
4 confronted Davis. Id.

6 Although the exact description of the initial altercation between Cash and
7 Davis is in some dispute, the differing versions agree that there was minimal
8 successful punching and it was mostly wrestling. At that point Ezekiel interjected
9 himself into the fight - either on his own or at Davis' request. All the testimony
10 showed Ezekiel exited the car and joined the fray, starting by "breaking apart" Davis
11 and Cash. Davis said that Ezekiel just shoved them apart, but the State's other
12 witness (Brittney) said that Ezekiel broke them apart by punching Cash in the face -
13 and Angel and Kinchron also testified that Ezekiel punched Cash in the face, and
14 Cash told police that the first time he had ever seen Ezekiel was when Ezekiel
15 punched him in the face. Thus there was virtually unanimous testimony that
16 Ezekiel's first interaction with Cash was to punch Cash in the face while Cash was
17 being held by Davis. AA895-896, 965, 1009, 989, 1006-1007, 1125, 1181-1182.
18 The only slight dissent was Davis claiming it was a "shove" rather than a punch, and
19 Davis also claimed he never saw Cash punched in the face - even though everyone
20 else did, and the Police said Cash had the facial injuries and bloody clothes to match
21 the punch to the face. AA1042, 1047.

1 Once Ezekiel hit Cash while Cash was wrestling Davis, it was a two-on-one
2 fight, and it was a fight between a man over 50 years old who was now facing a
3 *second* attacker who was also a football player in his early 20's and in prime
4 physical shape. AA984, 939. Furthermore, there was nothing to dispute Cash's
5 characterization of Ezekiel's punch to the face as a massive blow that stunned Cash
6 and made him believe that Ezekiel must have a weapon in his hand to cause such an
7 impact, and the police testimony of Cash's injury (blood from the facial injury
8 soaked his shirt and pants and left a bloody trail up to and through the house and
9 even into the backyard) makes Cash's supposition at the time reasonable (even
10 though no such weapon was found). AA1042, 730-737. Further supporting his belief
11 Ezekiel might be using a weapon were two different witnesses testifying they heard
12 Davis request Ezekiel bring some kind of weapon from the car (Angel heard "go get
13 my thing out of the car" while Kinchron heard "Bring my shit"). AA1125-1126,
14 1180. It was only at this point - after the second assailant hit him in the face so hard
15 he believed it must be with a weapon, and that assailant coming at him for additional
16 blows - that Cash pulled his work knife out of his pocket and stabbed Ezekiel a
17 single time to prevent further attack. Nevada's "decisional law with regard to self-
18 defense has construed Nevada's statutory scheme to be consistent with the common
19 law, recognizing that self-defense is a justification for homicide not only in
20 instances of actual danger but also in instances of apparent danger", and "the State
21 must prove beyond a reasonable doubt that the defendant did not act in self-

1 defense". *Runion v State*, 116 Nev 1041, 13 P.3d 52 at 56 (2000), *Barone v. State*,
2 858 P.2d 27, 28, 109 Nev 778, 781 (1993). Under the testimony elicited at trial, no
3 reasonable jury could find that that State proved Cash did not act in self-defense.
4

5 Nevada case law and statutes have also long held that there is no duty to
6 retreat before exercising your right to self-defense. *State v. Grimmett*, 33 Nev. 531,
7 534, 112 P. 273, 273 (1910)(recognizing " the right to stand his ground and slay his
8 adversary"), NRS 200.120(2)("A person is not required to retreat before using
9 deadly force"). This court has also held that one good reason that Nevada does not
10 require a person to retreat is that "it is often quite difficult ... to determine whether a
11 person should reasonably believe that he may retreat from a violent attack in
12 complete safety." *Culverson v. State*, 106 Nev. 484, 489, 797 P.2d 238, 240 (1990).
13 This rationale strongly supports Cash's self-defense claim - he did not resort to
14 deadly force until attacked by the *second* man (who, like the first, was a much
15 younger football player in prime physical condition) and not until that man had hit
16 him in the face so hard (and caused so much bodily harm) that Cash believed that he
17 must be holding a metal bar or other weapon to enhance his punch. After the single
18 use of his work knife to fend off the second attacker, Cash did in fact try to retreat
19 by running into his house - and the other person beating him (Davis) chased Cash to
20 the house and in Davis' own words "tried to kick the door down" so he could beat
21 Cash and "finish" him. AA896, 910. It is important to note that Davis trying to break
22 into Cash's home to batter him further was not in response to the stabbing (Davis
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1 said at that point he did not know Ezekiel was hurt), but rather his desire to "finish"
2 the fight. AA893, 910. Under these facts it is clear that Cash could not have safely
3 retreated from both Ezekiel (who was striking him) and Davis without the use of his
4 knife, as he barely was able to escape even with the use of his knife. It is important
5 to note that this retreat was not required by Nevada law, but had to be taken by Cash
6 to save himself even after the use of deadly force. Under these facts it is clear that
7 the State failed to meet their burden of proving beyond a reasonable doubt that Cash
8 did not act in self-defense. In fact, the State not once but *twice* incorrectly and
9 improperly told the jury that Cash *had* the duty to retreat, telling the jury that "He
10 could have retreated" (AA1296) and "He could have ran inside. He could have
11 yelled for help." (AA1281). Not only were these arguments incorrect and
12 prosecutorial misconduct, they show that the prosecutor was well aware that they
13 had failed to prove beyond a reasonable doubt that Cash did not act in self-defense,
14 and only by improperly convincing the jury that Cash should have retreated did they
15 have a chance of convicting him.

21 ///

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II. The District Court Judge abused his discretion in adjudicating Cash a Habitual Criminal and imposing a sentence of Life Without the Possibility of Parole

As stated above, the State sought to enhance any penalty imposed against Cash due to priors that were 29, 27 and 21 years old respectively.¹ In *Sessions v. State*, 106 Nev. 186, 789 P.2d 1242 (1990), the State sought to adjudicate the defendant a habitual criminal due to convictions from that were 23 to 30 years old (very similar to the age of Cash's convictions), and the Supreme Court of Nevada ruled this was an abuse of discretion because the statute was only to be used on "career criminals" and not on a defendant with such old convictions. *Id.* at 1245. Subsequent cases discussing *Sessions* further show that the habitual enhancement is only to be used individuals who have lived a life of crime. See, e.g., *Tillma v State*,

¹ The State tried to use both the "violent" habitual NRS 207.012 (for 2 enumerated priors), which they argued was mandatory, and the "large" habitual NRS 207.010 (for 3 priors) which they conceded was discretionary. AA1351-1352. However, the District Court specifically rejected the mandatory violent habitual as an option (AA1377-1389), as was proper considering the State never made a required showing that the California Second Degree Robbery convictions would qualify as Robbery convictions under NRS 207.012 (they likely would not qualify - *see, e.g. United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir 2015)). The Judgement of Conviction confusingly states it is under the "Large Habitual Criminal Statute" which would be NRS 207.010 but then says "NRS 207.012"- however the sentencing transcript clears up the discrepancy by making it crystal clear the judge said he was adjudicating under the discretionary Large Habitual NRS 207.010 and not the mandatory Violent Habitual NRS 207.012 (AA1348,1378-1379)("I am using my discretion in finding you a habitual criminal...THE COURT CLERK: Is that the large habitual? THE COURT: That's the large habitual.")

1 112 Nev 266, 914 P.2d 605 (1996) (citing "a career of criminal activity, including
2 sixty-five arrests, nine felony convictions, and eighteen misdemeanor convictions").
3 This simply does not apply to Thomas Cash. The priors used by the State at
4 sentencing were for a 29 year old possession of cocaine conviction, a 27 year old
5 robbery second degree conviction, and a 21 year old robbery second degree
6 conviction. There is no evidence Cash had any problems in prison and on the
7 contrary, he earned a certificate in HVAC repair. When Thomas was released from
8 prison, he honorably completed parole as well as additional I-1VAC training at
9 Antelope Valley Community College. Upon moving to Las Vegas so his wife could
10 study criminal justice, Thomas found employment at Sears. Thomas was such a
11 good employee that Sears stated it would re-hire him if he was released on bail even
12 when the case was pending in District Court. Furthermore, there is nothing about
13 this case that relates in any way to the crimes Cash committed in his youth 21 to 29
14 year previously - it is undisputed that the incident involved Cash rushing to the
15 defense of his pregnant stepdaughter after being told by her sister that she was being
16 battered by her boyfriend. Even if the State was correct and his use of deadly force
17 in the ensuing fight was excessive, that does not change the fact that the incident at
18 its core was the attempt of a father to protect his daughter, and could not be
19 considered in any way related to the drug and robbery cases of his younger years.
20 For Judge Smith to determine these wholly unrelated cases from 20 years prior
21 somehow justified sentencing as a habitual criminal and giving a sentence of life
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without the possibility of parole is clearly an abuse of discretion and this case should be remanded to a different District Court judge for a fair re-sentencing.

CONCLUSION

Although there were differences in how the various eyewitnesses testified about the incident in issue, it is clear that the State did not meet their burden of proving that Thomas Cash did not act in self-defense when he stabbed his second attacker a single time to permit his escape from a serious beating. The verdict should be overturned. Furthermore, sentencing Cash to spend his entire life in prison under the Large Habitual enhancement was clearly an abuse of discretion when the prior convictions were all over 20 years old and none were related to the instant offense, and if the verdict is not overturned by this court it should overturn the sentence and send the case back to a new District Court Judge for re-sentencing.

DATED this 14th day of March, 2019.

Respectfully Submitted by:

/s/ /Brian Rutledge/

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CERTIFICATE OF COMPLIANCE

1
2
3 1. I hereby certify that this brief complies with the formatting requirements of
4 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style
5 requirements of NRAP 32(a)(6) because this brief has been prepared in a
6 proportionally spaced typeface using Microsoft Word in 14 point Times New
7 Roman type style.
8

9
10 2. I further certify that this brief complies with the page- or type-volume
11 limitations of NRAP 32(a)(7)(A) as it contains 3596 words in 13 pages as computed
12 under NRAP 32(a)(7)(C).
13

14 3. Finally, I hereby certify that I have read this appellate brief, and to the best
15 of my knowledge, information, and belief, it is not frivolous or interposed for any
16 improper purpose. I further certify that this brief complies with all applicable
17 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
18 every assertion in the brief regarding matters in the record to be supported by a
19 reference to the page and volume number, if any, of the transcript or appendix where
20 the matter relied on is to be found. I understand that I may be subject to sanctions in
21 the event that the accompanying brief is not in conformity with the requirements of
22 the Nevada Rules of Appellate Procedure.
23
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25
26

27 ///

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1 DATED this 14th day of March, 2019.

2
3
4 /s/ /Brian Rutledge/

5 Brian Rutledge, Esq.

6 Nevada State Bar No. 4739
7
8

9 **CERTIFICATE OF SERVICE**

10 I, the undersigned, hereby certify that on this 14th day of March, 2019, the foregoing
11 **APPELLANT'S OPENING BRIEF** and **APPENDIX** was served upon the appropriate
12 parties hereto via the Supreme Court's notification system in accordance to the Master
13 Service List as follows:
14

15 _____
16 STEVEN S. OWENS, ESQ. Chief Deputy District Attorney

17
18 AARON FORD, ESQ. Nevada Attorney General

19 *Attorneys for Respondent*

20 DATED this 14th day of March, 2019.
21
22

23 /s/ /Brian Rutledge/

24 Brian Rutledge, Esq.

25 Nevada State Bar No. 4739
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28

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Electronically Filed
Apr 15 2019 02:52 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 77018

RESPONDENT'S ANSWERING BRIEF

**Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County**

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IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

Case No. 77018

RESPONDENT’S ANSWERING BRIEF

**Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County**

STATEMENT OF THE ISSUE(S)

- I. WHETHER THE STATE INTRODUCED SUFFICIENT EVIDENCE TO CONVICT APPELLANT**
- II. WHETHER DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANT**

STATEMENT OF THE CASE

On April 19, 2018, the State filed an amended information charging Appellant with MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001) and BATTERY WITH INTENT TO KILL (Category B Felony - NRS 200.400.3 - NOC 50153). 6 Appellant’s Appendix (“AA”) 1342.

Thereafter, Appellant pleaded not guilty and went to trial. Appellant's trial started on June 18, 2018, 1AA001. The jury trial lasted eight days and concluded on June 28, 2018. 6AA1339. On that date, the jury found Appellant guilty of Second Degree Murder with Use of a Deadly Weapon and not guilty of Battery with Intent to Kill. 6AA1339. On August 20, 2018, District Court sentenced Appellant to life without the possibility of parole under the large habitual criminal statute. 6AA1347-1348.

STATEMENT OF THE FACTS

On December 11, 2017, a verbal argument led to Appellant, a fifty-two-year-old man, stabbing and killing Ezekiel Devine, thirty-one years his junior, in the middle of the street. 4AA983.

The events of this day started when Kyriell Davis, twenty-eight years Appellant's junior, and his girlfriend Brittney had a heated verbal argument while exchanging their children. 4AA878-879, 886-887, 983. Eventually, Kyriell pushed Brittney away from him with his hands. 4AA887-888. Upon hearing this verbal argument, Appellant came down to intervene. 4AA889-890. Appellant asked whether Kyriell hit Brittney—Brittney answered no and told Appellant to mind his own business. 4AA889.

Thereafter, Appellant and Kyriell tussled. Appellant started this fight with Kyriell: multiple witnesses observed Appellant punch towards Kyriell when Kyriell

had his back turned to Appellant, without provocation by Kyriell. 4AA889-892, 910-911, 967. Appellant later admitted that he threw the first punch. 6AA1242. Ezekiel, who had been sitting in the car having a video chat and who only came to help with the child exchange, was alerted to the fight and attempted to break it up. 4AA878-879, 885, 895, 937. At about that time, two cars drove up the road and separated Ezekiel and Appellant from Kyriell. 4AA896. Kyriell saw a flash in Appellant's hand as the cars came by and tried to warn Ezekiel. 4AA896. While Appellant and Kyriell were separated, Appellant stabbed Ezekiel straight through the heart. 3AA698; 4AA896. Ezekiel collapsed in the middle of the street and quickly died. 3AA702-703, 730.

Kyriell testified about his recollection of the fight and the events leading up to it. Kyriell remembered the verbal argument between Brittany and himself starting when Brittany began ranting and calling Kyriell names. 4AA889. He then observed Brittany yelling at Appellant. 4AA890. Appellant took a swing at Kyriell as he attempted to put his baby in his car seat, when his back was towards Appellant. 4AA890, 892. After Appellant tried to punch Kyriell, Kyriell and Appellant interlocked and Appellant tried to slam him to the ground. 4AA891. Kyriell never swung his fist at Appellant. 4AA892-893. Appellant and Kyriell wrestled for a while until they ended up in the street and Ezekiel intervened to break up the fight by pushing his hand through the middle of the two. 4AA893-4AA895. Kyriell saw a

flash from Appellant's hand as a car came drove in between the group, leaving Appellant and Ezekiel on one side of the street and Kyriell on the other side of the street—far apart. 4AA895-897. Soon after, Ezekiel fell to the ground after being stabbed by Appellant. See 4AA896.

Appellant's actions after the victim died demonstrated his consciousness of guilt. Appellant did not call 911—even though he later told police that Kyriell said that he would shoot up the house after Kyriell and Brittany verbally fought. 5AA1001; 6AA1248. Despite these alleged threats and after he killed Ezekiel, Appellant locked the door, left his home, and ran from the scene. 4AA900. In his haste to leave, Appellant left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home. 4AA822-823, 829, 954. Appellant escaped the scene by climbing over two walls and jumping down from a high point of one of the walls. 5AA1032-1035. Appellant also destroyed and hid the murder weapon, a knife. 6AA1244. Appellant did not go back to his home until just after the police left and did not account for where he went between 7:00pm and 2:00am the night of the crime, when he finally turned himself in to police. 5AA1041; 6AA1245.

Appellant initially denied killing the victim, but then later argued that he killed the victim in self-defense, despite multiple witnesses seeing Appellant throw the first punch. 4AA889-892, 910-911, 967; 5AA1094-1095, 1166. Brittney told police that Appellant, Brittney's stepdad, threw the first punch. 4AA967. Brittney also stated

that she never felt in danger and that Kyriell did not hit her. 4AA976, 979. Moreover, multiple witnesses stated, including Appellant, that no one but Appellant had a weapon. 4AA921-922, 5AA1148-1149, see 6AA1242. Appellant told police that he stabbed Ezekiel because he did not want to get hit again. 6AA1243.

Brittany also testified about her recollection of the fight. After she argued with Kyriell, Appellant came out of the house and tried to punch Kyriell. 4AA962. After Appellant started this fight with Kyriell, both Appellant and Kyriell locked together in a bear hug and after Appellant's first punch, no one threw punches. 4AA962-963. Both men were "equally locked up." 4AA963. Brittany also testified that she held Kyriell after Ezekiel attempted to break up the fight. 4AA966-967. Brittany told police that she did not feel scared or threatened during her verbal argument with Kyriell. 4AA976. She also said that during the argument, Kyriell did not hit her or slam her into a car. 4AA979.

Through their actions, Appellant's family telegraphed that Appellant did not act in self-defense. Appellant's family did not call the police; instead, they went back into the house and shut the door. 5AA1148, 1151. Furthermore, Appellant's family did not bring out towels or water or ask if the victim needed any help. 4AA925; 5AA1148. Ultimately, Appellant's family did not come out of the house until police made them, through use of a bullhorn, about forty minutes later. 4AA820-821, 925; 5AA1148. After Appellant left the scene, Appellant spoke with family members

while police were outside his home. 5AA1228. Appellant told his family that he did not kill Ezekiel and did not even touch him—and his family informed him that Ezekiel was dead. 5AA1228.

SUMMARY OF THE ARGUMENT

Appellant cannot entice this Court into invading the province of the jury by mislabeling a credibility argument as a sufficiency of the evidence claim. Appellant fails to demonstrate that no rational jury could have convicted him on the evidence presented. Instead, Appellant invites this Court to discredit the testimony of witnesses in favor of his self-serving version of the events. Such an invitation to error is beyond the scope of a sufficiency review since this Court does not sit as a thirteenth juror, with veto power over the other twelve.

This Court should also find that District Court did not abuse its discretion by sentencing Appellant, a four-time violent felon who has spent the vast majority of the last thirty-to-forty years in prison, to large habitual criminal treatment. Appellant stands convicted of Second-Degree Murder with Use of a Deadly Weapon and has four prior felonies: one count of Possession of Cocaine, and three counts of Robbery with Use of a Firearm. Large habitual treatment fits Appellant. To the extent that this Court disagrees, any error was harmless because Appellant also is a habitual felon as a matter of law.

ARGUMENT

I. THE STATE INTRODUCED SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION

Appellant alleges that the State produced insufficient evidence to prove that he did not act in self-defense. AOB at 6.¹

When reviewing a sufficiency of the evidence claim, the relevant inquiry is *not* whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the defendant guilty, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable

¹ Appellant also briefly argues that the State incorrectly and improperly told the jury that Appellant had the duty to retreat and thereby committed prosecutorial misconduct. AOB at 10. Appellant does not seriously present this issue for this Court's consideration because he does not cite any authority for prosecutorial misconduct. It is Appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this Court. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (refusing to consider prosecutorial misconduct argument where no authority is presented). Moreover, the record belies this argument. The State argued that he could have retreated, in the context of explaining that self-defense claims are not available to the original aggressor unless the original aggressor attempts to retreat. Culverson v. State, 106 Nev. 484, 481, 797 P.2d 238, 241 (1990) ("a person who as a reasonable person believes that he is about to be killed or seriously injured by his assailant does not have a duty to retreat unless he is the original aggressor."). This statement of law directly applies to the facts of the case; multiple witnesses stated that Appellant threw the first punch during the fight and Appellant claimed that he killed Ezekiel, the victim, in self-defense. 4AA889-892, 910-911, 967; 5AA1094-1095, 1166.

doubt.” Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (internal quotation and citation omitted).

Thus, the evidence is only insufficient when “the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury.” Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (emphasis removed) (overruled on other grounds). “[I]t is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses.” Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury’s role “[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, “circumstantial evidence alone may support a conviction.” Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

In order to claim self-defense, [a] person who does the killing [must] actually and reasonably believe: [t]hat there is imminent danger that the assailant will either kill him or cause him great bodily injury; and [t]hat it is absolutely necessary under

the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself. Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000). Moreover, the right of self-defense is not available to an original aggressor, Id. Whether a defendant reasonably believed he was in fear of death or great bodily harm is a question of fact for the jury. Davis v. State, 130 Nev. 136, 143, 321 P.3d 867, 872 (2014).

The State introduced credible and sufficient evidence proving that Appellant did not act in self-defense. Multiple witnesses stated that Appellant threw the first punch during the fight. 4AA889-892, 910-911, 967; 5AA1094-1095, 1166. Runion, 116 at 1051, 13 P.3d at 59 (2000) (“[t]he right of self-defense is not available to an original aggressor.”). Moreover, multiple witnesses testified, including Appellant, that no one but Appellant had a weapon. 4AA921-922, 5AA1148-1149, see 6AA1242. Appellant stated that he stabbed the victim, Ezekiel, because he did not want to get hit again. 6AA1243. Appellant’s reason for stabbing the victim does not seriously demonstrate that he was afraid for his life—in his own words he just wanted to not get hit again. Id. A “reasonable” person would not find it necessary to resort to deadly force in this situation—particularly where a car came by and split up the fight.

The State introduced credible and sufficient evidence of Appellant's actions after the crime, which demonstrated that Appellant did not have a reasonable fear of death. Appellant did not call 911—even though he later told police that Kyriell said that he would shoot up the house after Kyriell and Brittany verbally fought. 5AA1001; 6AA1248. Despite these alleged threats and after he killed Ezekiel, Appellant locked the door, left his home, and ran from the scene. 4AA900. In his haste to leave, Appellant left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home while claiming that Kyriell would shoot up his home. 4AA822-823, 829, 954. Appellant fled the scene by jumping two walls and jumping down from a high point of one of the walls. 5AA1032-1035. Appellant also destroyed and hid the murder weapon, a knife. 6AA1244. Appellant did not go back to his home until just after the police left and did not account for where he went between 7:00pm and 2:00am the night of the crime, when he turned himself in to police. 5AA1041; 6AA1245. The State submits that these actions, after the fact, are not those of a person who feared for his life or the safety of others.

Appellant's arguments to the contrary only extensively relitigate the trial and the jury determination that Appellant did not act in reasonable fear. AOB at 6-10. For example, Appellant discusses the circumstances of the verbal argument between Kyriell and Brittney, the fight between Appellant started with Kyriell, the victim Ezekiel attempting to break up the fight, and the aftermath. Id. Even if Appellant

believed that Ezekiel was the initial aggressor and had a “bar,” and therefore had a reasonable fear of death or great bodily harm, Appellant’s arguments fail: “it is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses.” Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380 (quoting McNair, 108 Nev. at 56, 825 P.2d at 573); 6AA1032. Whether a defendant reasonably believed he was in fear of death or great bodily harm is a question of fact for the jury. Davis v. State, 130 Nev. 136, 143, 321 P.3d 867, 872 (2014). Indeed, Appellant made these same types of arguments to the jury during his closing argument. 6AA1030-1032. The jury rejected these arguments—this Court should too.

II. DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANT

Next, Appellant complains that District Court abused its discretion by adjudicating him as a habitual criminal and imposing a sentence of life without the possibility of parole. AOB at 11.

A. Standard of Review

This Court has granted district courts “wide discretion” in sentencing decisions, which are not to be disturbed “[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1248 (2004) (quoting Silks v. State, 92 Nev. 91, 94,

545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)).

B. The Court Properly Adjudicated Appellant as a Habitual Criminal

Pursuant to NRS 207.010:

[A] person convicted in this state of:

(b) Any felony, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:

- (1) For life without the possibility of parole;
- (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
- (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Adjudication of a defendant as a habitual criminal is “*subject to the broadest kind of judicial discretion.*” LaChance v. State, 130 Nev. ___, ___, 321 P.3d 919, 929 (2014) (quoting Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997)) (emphasis in original). NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations

within the discretion of the district court. Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805, (1992); French v. State, 98 Nev. 235, 645 P.2d 440 (1982). Further, the district court has the discretion to adjudge a defendant as a habitual criminal when the defendant has been convicted of a felony and has at least three prior felonies. NRS 207.010(1)(a).

For purposes of NRS 207.010 the State need only provide proof of three prior felony convictions. The felony convictions utilized to adjudicate a defendant as a habitual criminal need not follow any particular sequence. Carr v. State, 96 Nev. 936, 939, 620 P.2d 869, 871 (1980). They must merely precede the date of the underlying offense. Brown v. State, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981). “Exemplified copies of the prior felony convictions and certified fingerprint cards from the penal institutions where the defendant had been incarcerated both have been approved in habitual criminal proceedings.” Curry v. Slansky, 637 F. Supp. 947, 952 (D. Nev. 1986) (citing Plunkett v. State, 84 Nev. 145, 437 P.2d 92, 94 (1968)); Atteberry v. State, 84 Nev. 213, 438 P.2d 789, 791 (1968). “If a defendant charged pursuant to NRS 207.010, 207.012 or 207.014 pleads guilty to or is found guilty of the primary offense but denies any previous conviction charged, the court shall determine the issue of the previous conviction after hearing all relevant evidence presented on the issue by the prosecution and the defendant.” NRS 207.016. Although the district court has the discretion to look at the staleness and seriousness

of the prior felonies, it is not required to make special allowances for these types of crimes. Arajakis 108 Nev. at 983, 843 P.2d at 805.

District Court did not abuse its discretion by adjudicating Appellant as habitual criminal. In the instant matter, Appellant stood convicted of Second Degree Murder with Use of a Deadly Weapon. This Court has affirmed district courts adjudicating and sentencing defendants as habitual criminals as a punishment for far less serious felonies. E.g. LaChance, 130 Nev. at 263, 279, 321 P.3d at 919, 930 (domestic battery by strangulation, domestic battery causing substantial bodily harm, possession of a controlled substance for the purpose of sale); Yarell v. State, No. 66649, 2016 WL 830847 (Nev. Mar. 1, 2016) (two counts of possession of a controlled substance) (unpublished).

Moreover, Appellant has spent the greater part of his life in custody. Appellant committed his first felony, drug possession, in 1988. PSI at 3.² Appellant received probation for that offense but then committed new crimes while on probation and was convicted of one count of Robbery with Use of a Firearm in 1991. PSI at 3-4. The State of California paroled Appellant in 1995. But then in 1996, Appellant committed two new Robberies with Use of a Firearm—the same charge he got parole on—and spent from 1997 until 2013 in California prison. PSI at 4. California

² The State has submitted a contemporaneous Motion to Transmit Pre-Sentence Investigation Report (“PSI”) so that this Court may verify references to the PSI.

discharged Appellant from parole in 2016—Appellant murdered Ezekiel one year later in Las Vegas in the instant case. The State introduced, and District Court admitted, certified copies of Appellant’s prior Judgments of Convictions for these crimes along with a sentencing memorandum. 6AA1350-1351; Respondent’s Appendix (“RA”) at 001-055.

Appellant tries to characterize his life of crime as ancient history—but he has spent nearly his entire adult life in prison. AOB at 11. Appellant’s argument masks his true record. At first blush, Appellant’s record seems ancient but this first impression misleads: Appellant appears to have only spent three-to-six years out of custody since 1988. PSI at 3-4. In that light, Appellant’s argument that his prior felonies “were 29, 27 and 21 years old” rings hollow. AOB at 11. Appellant appears to have only spent a year or two not under sentence of prison, parole, or probation since 1989. Moreover, as a juvenile, Appellant was convicted of second degree murder and assault with a deadly weapon—in 1982 and 1980 respectively. RA007-008. Although the State referenced these convictions at sentencing to inform District Court’s sentencing discretion, it did not rely on these juvenile convictions to support habitual treatment. 6AA1350-1351.

District Court correctly decided to adjudicate Appellant as a habitual criminal. Although Appellant “earned a certificate in HVAC repair,” AOB at 12, his true career is violent crime—three convictions for Robbery with Use of a Firearm and

one adult conviction for Second Degree Murder with Use of a Deadly Weapon. PSI at 4; 6AA1350-1351. In this light, Appellant's citation to Sessions v. State is particularly unavailing. 106 Nev. 186, 187–88, 191, 789 P.2d 1242, 1243, 1234 (1990) (overruling habitual sentence supported by convictions for possession of marijuana, theft of property valued at over fifty dollars, grand theft, and escape without the use of force); AOB at 11. Moreover, the Sessions Court did not meaningfully discuss how many years in custody that defendant served, where here, Appellant has spent the vast majority of the last thirty-to-forty years in prison. Id. Appellant is not a reformed criminal—he is a habitual criminal who has spent most of his life in prison. To the extent that this Court disagrees with this characterization, nonetheless, District Court did not abuse its discretion.

Despite Sessions, this Court has affirmed large habitual treatment when supported by far less serious felonies than found in Appellant's record. E.g. LaChance, 130 Nev. at 279, 321 P.3d at 930 (battery causing substantial bodily harm, possession of controlled substance, possession of a stolen motor vehicle, trafficking in a controlled substance, possession of a controlled substance); McGervey v. State, 114 Nev. 460, 467, 958 P.2d 1203, 1208 (1998) (possession of cocaine for sale, kidnapping, and robbery); Brisbane v. State, 385 P.3d 55 (Nev. 2016) (possession of a controlled substance, aggravated assault with a deadly

weapon, possession of a firearm by an ex-felon, and larceny) (unpublished disposition).

This Court should find that District Court did not abuse its discretion.

C. If District Court Abused Its Discretion by Sentencing Appellant as a Habitual Criminal, this Error is Harmless: Appellant is a Habitual Felon as a Matter of Law

According to NRS 178.598, any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. An error is harmless if the error did not have substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

NRS 207.012 requires that district courts to sentence a defendant convicted of certain offenses as a habitual felon if two qualifying prior convictions are found. Nelson v. State, 123 Nev. 534, 551, 170 P.3d 517, 528 (2007). District courts must sentence defendants to habitual felon treatment, a Category A felony, when a person is convicted of murder or other enumerated felonies, and has been previously twice convicted of any crime which under the laws of the situs of the crime or of this State that would constitute a robbery, murder, or other enumerated felony, whether the prior convictions occurred in this State or elsewhere. NRS 207.012. This statute and this Court's case law stands for the proposition that the district court has no discretion and must sentence defendants to habitual felon treatment if the statute applies and the state makes an offer of proof. Nelson, 123 Nev. at 551, 170 P.3d at

528. Moreover, Nevada law requires that a habitual felon sentence only operates to increase, not to reduce, the sentence otherwise provided by law. NRS 207.016(1).

Appellant qualifies as a habitual felon and District Court should have adjudicated Appellant as a habitual felon. Appellant has two prior qualifying robberies. Appellant stood convicted of one count of Robbery with Use of a Firearm in 1991. PSI at 3-4. The State of California paroled Appellant in 1995. But then in 1996, Appellant committed two new Robberies with Use of a Firearm—the same charge he received parole on—and spent from 1997 until 2013 in California prison. PSI at 4. California discharged Appellant from parole in 2016. One year later, Appellant murdered Ezekiel with use of a deadly weapon and the jury ultimately convicted him for the crime in the instant case. The State introduced, and the Court admitted, certified copies of Appellant’s Judgments of Convictions for these crimes. 6AA1350-1351.

Appellant’s convictions for Robbery with Use of a Firearm would qualify as a felony under Nevada law; the elements are the same. California defines robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. Cal. Penal Code § 211 (West). Nevada similarly defines robbery, in pertinent part, as the unlawful taking of personal property from the person of another, or in the person’s presence, against his or her will, by means of force or violence or fear

of injury. NRS 200.380. Appellant's robbery convictions, based upon two separate transactions and occurrences, would qualify as prior convictions sufficient to support and require District Court to sentence Appellant to mandatory habitual felon treatment.³

Nevada law required District Court to sentence Appellant to life without parole because—mandatory—habitual felon treatment must operate to increase a sentence otherwise faced by Appellant as a matter of law. Appellant stood convicted of Second-Degree Murder with Use of a Deadly Weapon. A person standing in Appellant's shoes shall be punished by imprisonment in the state prison: for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or for a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served. NRS 200.030(5). For use of a deadly weapon, Appellant must be sentenced to a consecutive minimum term of not less than 1 year and a maximum term of not more than 20 years. NRS 193.165. Habitual criminal and felon treatment both allow District Court three choices when

³ Appellant cites federal law interpreting whether robbery in California qualifies as a violent felony under a federal statutory scheme, to argue that Appellant's Robbery with Use of a Firearm convictions do not qualify under Nevada's habitual felon statute as prior felonies. AOB at 11 n.1. This law does not apply here for obvious reasons. And this federal law is not persuasive here as the elements of both state robbery statutes are the same—and robbery qualifies as a felony sufficient to support a mandatory habitual felon sentence. NRS 207.012(2). There is no material difference between robbery in Nevada and robbery in California.

sentencing to habitual treatment, two of which are the minimum Appellant already faced for his second-degree murder conviction:

- (1) For life without the possibility of parole;
- (2) *For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or*
- (3) *For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.*

NRS 207.010(1)(b); NRS 207.012(1)(b). Thus, based upon Appellant's conviction, District Court—as a matter of law—must sentence to habitual felon treatment and must sentence Appellant to life without the possibility of parole. Appellant already faced a life with parole and a ten-years to twenty-five years sentencing range for his second-degree murder conviction, plus a consecutive minimum of one year: District Court could only *increase* his Appellant's sentencing exposure, as required by NRS 207.016(1), by sentencing him to life without parole. In this light, even if this Court believes that District Court abused its discretion by adjudicating Appellant as a habitual criminal, this error was harmless because it did not have a substantial and injurious effect or influence on Appellant's sentence as a matter of law. Knipes, 124 Nev. at 935, 192 P.3d at 1183. Appellant would have received the same sentence under either the permissive habitual criminal adjudication or the mandatory habitual felon adjudication.

CONCLUSION

For the foregoing reasons, this Court should affirm Appellant's Judgment of Conviction.

Dated this 15th day of April, 2019.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 4,867 words and 21 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of April, 2019.

Respectfully submitted

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

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
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Nevada Bar #006528
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Post Office Box 552212
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 15th day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

BRIAN RUTLEDGE, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Garcia

Employee, Clark County
District Attorney's Office

JEV/Elliot Anderson/jg

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH)
)
Appellant,)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

S.C. Case No. 77018

Electronically Filed
Apr 22 2019 02:06 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S REPLY BRIEF

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Nevada Attorney General

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Las Vegas, NV 89101

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons and entities as
3 described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These
4 representations are made so that the justices of this Court may evaluate any potential
5 conflicts warranting disqualification or recusal.

6 1. Attorney of Record for Appellant: Brian Rutledge

7 2. Publicly held Companies Associated: a. N/A

8 3. Law Firm(s) Appearing in the Court(s) Below:

9 Clark County District Attorney

10 Kenneth Long, Esq.

11
12
13 DATED this 22th day of April, 2019.

14 /s/ /Brian Rutledge/

15 Brian Rutledge, Esq.

16 Nevada State Bar No. 4739

17 Brian@BrianRutledgeLaw.com

18 10170 W. Tropicana #156-431

19 Las Vegas, Nevada 89147-2602

20 Telephone: (702) 297-7200

21 Attorney for Appellant Thomas Cash

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Argument

A. Respondent's claim that Appellant mischaracterized his 29, 27, and 21 year old prior convictions is belied by the record

The State tries to claim that the convictions that were 29, 27, and 21 years old are somehow "not old" because Mr. Cash spent a long time in prison and parole - however the very PSI cited by the State shows no disciplinary history for Mr. Cash in prison, and "no violations" on parole - parole that he successfully completed and was discharged from. PSI at 3-4. Thus the PSI also shows that the *last crime committed* by Mr. Cash was indeed *twenty-one (21) years* before the instant offense. PSI at 4. It is certainly not uncommon for criminals to commit infractions in prison or parole violations, yet Mr. Cash's record was completely clean after the 1996 offense. PSI 4-5. The fact that Mr. Cash was never observed breaking the law in that 21-year period even though he was closely watched by law enforcement in prison and while on parole during a large portion of it certainly does not support the State's claim that Mr. Cash is a habitual criminal that must be locked away forever, or their claim that the convictions are somehow not all over 20 years old. The State also cannot rebut the obvious fact that the instant offense (a stabbing that occurred while he believed he was defending his daughter) has no factual connection with the robbery crimes he committed in his youth, making the judge's finding that Mr. Cash must be given Life Without an obvious abuse of discretion.

**B. The abuse of discretion in sentencing Mr. Cash as a habitual criminal cannot
be considered "harmless error"**

The State claims that Judge Smith's abuse of discretion in finding Mr. Cash a Habitual Criminal and sentencing him to Life Without is somehow "harmless error" because the State wanted him sentenced under a different habitual statute, NRS 207.012, even though they failed to prove to Judge Smith that Mr. Cash qualified under that statute and even though Judge Smith specifically ruled that he did NOT find that Mr. Cash qualified under the mandatory provisions of NRS 207.012. AA1377-1389. Unlike the other habitual criminal statutes which allow the use of any felony conviction, NRS 207.012 is very limited, listing only 39 specific statutes that qualify for this enhancement, and the State has the burden of proving the convictions qualify. Having failed to prove to Judge Smith that Mr. Cash had the requisite priors for NRS 207.012, the State then takes the novel position that it can prove up the convictions in this appeal - and once again fails to do so. The State claims that Mr. Cash was convicted twice of "Robbery with Use of a Firearm" in California, and cites to the PSI at page 4 to support the claim (Answering Brief page 18, lines 5-9). Looking at page 4 of the PSI shows something very different - it shows that although the initial charges in both cases included at least one count of "Robbery", it also shows that he pled down both cases to the lesser charge of "Robbery-Second Degree" - a lesser offense that does not exist in Nevada law, and is not one of the 39 statutes listed in NRS 207.012. PSI at 4, NRS 207.012. The

State never made a showing to Judge Smith that a California conviction to the lesser charge of "Second Degree Robbery" qualifies as one of the 39 crimes listed in NRS 207.016 (it obviously is not in the statute as Nevada does not even have a "Second Degree" robbery), and his refusal to consider NRS 207.012 was proper given this showing was not made by the State at the sentencing hearing. The State cannot rescue the Judge Smith's improper habitual adjudication which was clearly an abuse of discretion by claiming it was "harmless error" under a theory that Judge Smith should have instead have applied NRS 207.012 when even Judge Smith recognized the State had utterly failed to prove the two qualifying priors required to impose the NRS 207.012 enhancement. This court it should overturn the sentence and send the case back to a new District Court Judge for re-sentencing.

DATED this 22th day of April, 2019.

Respectfully Submitted by:

/s/ /Brian Rutledge/

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Nevada State Bar No. 4739
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10170 W. Tropicana #156-431
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CERTIFICATE OF COMPLIANCE

1
2
3 1. I hereby certify that this brief complies with the formatting requirements of
4 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style
5 requirements of NRAP 32(a)(6) because this brief has been prepared in a
6 proportionally spaced typeface using Microsoft Word in 14 point Times New
7 Roman type style.
8

9
10 2. I further certify that this brief complies with the page- or type-volume
11 limitations of NRAP 32(a)(7)(A) as it contains 742 words in 3 pages as computed
12 under NRAP 32(a)(7)(C).
13

14 3. Finally, I hereby certify that I have read this appellate brief, and to the best
15 of my knowledge, information, and belief, it is not frivolous or interposed for any
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21 the event that the accompanying brief is not in conformity with the requirements of
22 the Nevada Rules of Appellate Procedure.
23

24 ///

25 ///

1 DATED this 22nd day of April, 2019.

2
3
4 /s/ /Brian Rutledge/

5 Brian Rutledge, Esq.

6 Nevada State Bar No. 4739
7
8

9 **CERTIFICATE OF SERVICE**

10 I, the undersigned, hereby certify that on this 22nd day of April, 2019, the foregoing
11 **APPELLANT’S REPLY BRIEF** was served upon the appropriate parties hereto via the
12 Supreme Court’s notification system in accordance to the Master Service List as follows:
13

14 _____
15 STEVEN S. OWENS, ESQ. Chief Deputy District Attorney

16 AARON FORD, ESQ. Nevada Attorney General

17
18 *Attorneys for Respondent*

19 DATED this 22nd day of April, 2019.
20
21

22 /s/ /Brian Rutledge/

23 Brian Rutledge, Esq.

24 Nevada State Bar No. 4739
25
26
27
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 77018
District Court Case No. C329699

FILED

OCT 11 2019

Elizabeth A. Brown
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

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

"ORDER the judgment of conviction AFFIRMED AND REMAND this matter to the district court to correct clerical error."

Judgment, as quoted above, entered this 12th day of September, 2019.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
October 08, 2019.

Elizabeth A. Brown, Supreme Court Clerk

By: Rory Wunsch
Deputy Clerk

C - 18 - 329699 - 1
CCJR
NV Supreme Court Clerks Certificate/Judg
4868932



IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77018

FILED

SEP 12 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

**ORDER OF AFFIRMANCE
AND REMAND TO CORRECT CLERICAL ERROR**

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Appellant Thomas Cash argues the State failed to present sufficient evidence to support the guilty verdict, and the district court abused its discretion in adjudicating him as a habitual criminal.¹ We disagree.

First, Cash argues that the State failed to prove beyond a reasonable doubt that Cash did not act in self-defense. This court will uphold a conviction if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, when viewing the

¹To the extent Cash argues that the prosecutor made incorrect statements of the law during closing argument, he does not support this contention with any cogent argument or citation to relevant authority, and therefore, we decline to address this issue. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); *see also* NRAP 28(a)(10)(A).

evidence in a light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see also *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). A jury's verdict will not be disturbed on appeal where, as in this case, sufficient evidence supports its verdict. See *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

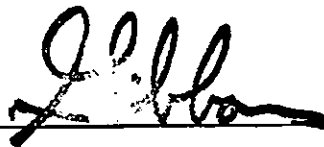
Here, Cash intervened during an argument between his stepdaughter and the father of her children K. Davis outside of Cash's home. The incident escalated to a physical fight involving Cash, Davis, and Davis's friend E. Devine. Cash produced a knife and stabbed Devine in the chest. Cash fled the scene and disposed of the murder weapon. Cash told law enforcement he killed Devine in self-defense. The jury heard testimony from several witnesses to the incident. Though Cash did not testify, a homicide detective provided testimony regarding the voluntary statements Cash made to law enforcement. The witnesses offered differing versions of the incident. This court has repeatedly held that "whenever conflicting testimony is presented, it is for the jury to determine what weight and credibility to give to that testimony." *Allen v. State*, 99 Nev. 485, 487, 665 P.2d 238, 240 (1983). The record shows that a rational fact-finder could have determined that Cash did not act in self-defense; specifically, there was evidence and testimony that Cash initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon. See *Runion v. State*, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000) ("The right of self-defense is not available to an original aggressor."). Therefore, we conclude that a rational fact-finder could have found the essential elements of second-degree murder with use of a deadly weapon beyond a reasonable doubt. See NRS 200.010; NRS 200.030; NRS 193.165.

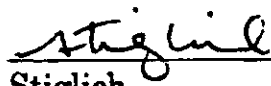
Second, Cash argues the district court erred in adjudicating him as a habitual criminal under NRS 207.010(1)(b) and sentencing him to life without the possibility of parole. This court reviews a district court's adjudication of a defendant as a habitual criminal for an abuse of discretion. *Clark v. State*, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). "The [habitual criminal] statute contains no express limitation on the judge's discretion." *Tanksley v. State*, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997).

Here, the State presented evidence of Cash's prior convictions for (1) possession/purchase of cocaine base for sale in 1989, (2) second-degree robbery with use of a firearm in 1991, and (3) two counts of second-degree robbery with use of a firearm in 1997. Cash relies on *Sessions v. State* to argue his prior felony convictions are stale, unrelated, and do not warrant his habitual criminal classification. 106 Nev. 186, 789 P.2d 1242 (1990). NRS 207.010 does not make an exception for stale or unrelated felonies; instead, the district court considers such factors within its broad discretion. See *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). The district court considered argument from the State and Cash and recognized the discretionary nature of adjudicating Cash as a habitual criminal. And Cash's history and instant conviction show repeated violent conduct involving use of a deadly weapon. Therefore, we conclude the district court did not abuse its discretion in adjudicating Cash as a habitual

criminal and imposing a sentence within the statutory limits.² Accordingly, we

ORDER the judgment of conviction AFFIRMED AND REMAND this matter to the district court to correct clerical error.³


Gibbons C.J.


Stiglich, J.


Douglas Sr. J.

cc: Chief Judge, The Eighth Judicial District Court
Eighth Judicial District Court, Dept. 8
Brian S. Rutledge
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We note the judgment of conviction contains a clerical error; it incorrectly references NRS 207.012, the habitual felon statute. The record clearly shows that the district court sentenced Cash as a habitual criminal under NRS 207.010(1)(b). Following this court's issuance of its remittitur, the district court shall enter a corrected judgment of conviction. See NRS 176.565 (providing that clerical errors in judgments may be corrected at any time); *Buffington v. State*, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (explaining that the district court does not regain jurisdiction following an appeal until this court issues its remittitur).

³The Honorable Michael Douglas, Senior Justice, participated in the decision of this matter under a general order of assignment.

CERTIFIED COPY

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

DATE: OCTOBER 8, 2019
Supreme Court Clerk, State of Nevada

By  Deputy

AA1441

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 77018
District Court Case No. C329699

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

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

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

DATE: October 08, 2019

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc (without enclosures):
Hon. Douglas Smith, District Court Judge
Brian S. Rutledge
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on OCT 11 2019.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED
APPEALS

OCT 10 2019

CLERK OF THE COURT

1 THOMAS CASH
Inmate Name

2 Prison No. 1263862

3 P.O. Box 1989

4 Ely, NV. 89301

5
6 In Propria Persona

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

9 THOMAS CASH
10 Petitioner,

11 v.

12 WILLIAM GITTERE

13 Respondent.

Case No. C-18-329699-1

Dept. No. VIII

Date of Hearing: A-20-818971-W
Dept. 9

Time of Hearing: _____
(Not a Death Penalty Cast)

14 PETITION FOR WRIT OF HABEAS CORPUS
15 (POST-CONVICTION)(NON DEATH)

16 INSTRUCTIONS:

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

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

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

27 (4) You must name as respondent the person by whom you are confined or restrained. If
28 you are in a specific institution of the department of corrections, name the warden or head of the

(COURT CLERK: COURTESY)
COPY PLEASE.

FILED

AUG 03 2020

Ann L. Blum
CLERK OF COURT

PP
DA

1 institution. If you are not in a specific institution of the department but within its custody, name the
2 director of the department of corrections.

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

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

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

17 PETITION

18 1. Name of institution and county in which you are presently imprisoned or where and
19 how you are presently restrained of you liberty: E1Y STATE PRISON, WHITE PINE COUNTY

20 2. Name and location of court which entered the judgment of conviction under attack:
21 EIGHTH JUNCIAL DISTRICT COURT

22 3. Date of judgment of conviction: 8-20-2018

23 4. Case Number: C-18-32969-1

24 5. (a) Length of sentence: Life without the possibility of
25 Parole.

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

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

7. Nature of offense involved in conviction being challenged: Second degree

murder with a deadly weapon

8. What was your plea? (check one)

(a) Not guilty X (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment of information, or if a plea of guilty was negotiated, give details: no

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

(a) Jury ✓

(b) Judge without a jury _____

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

12. Did you appeal from the judgment of conviction?

Yes ✓ No _____

13. If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT

(b) Case number or citation: 77018

(c) Result: DENIAL

(d) Date of result: OCT. 11, 2014

(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 you answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: _____

(2) Name of proceeding: _____

(3) Grounds raised: _____

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

(5) Result: X

(6) Date of result: _____

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

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

(1) Name of court: X

(2) Nature of proceeding: _____

(3) Grounds raised: _____

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

(5) Result: _____

(6) Date of result: _____

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

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

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

(1) First petition, application or motion?

Yes ☒ No ☐

(2) Second petition, application or motion?

Yes ☐ No ☒

(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 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length)

Timely Appealing.

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 post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: _____

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

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(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 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

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 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

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 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N6

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 X

If yes, state what court and the case number:

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 *

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 4th, 5th, 6th, and 14th amendments was violated when it used Petitioners' Post Arrest Silence by the State.

Supporting Facts:

The State impermissibly elicited testimony about Petitioners Post arrest silence (AA 1236-98 and 1315-35) Petitioner did not testify during the trial. However, Petitioner was not protected from self incriminating evidence that attacked Post arrest silence. The Prejudicial Inadmissible Post arrest silence (PAS) was extremely harmful to Petitioners Substantial constitutional rights and effected the outcome of the Proceedings. The State Pressed the inference of guilt through rebuttal witness calling and closing arguments, making the closure of trial Prejudicial. Such error and inclusion of other errors Persuaded the Jury to a guilty verdict. The State called Gill as a rebuttal witness without being required to state who the witness was to rebuttal, what the rebuttal was to attack, and no hearing was set to establish limitations. The State may rebuttal defense witness with the witness statements and testimonies but Petitioner P.A.S. is error that's harmful. The P.A.S. was grossly used as evidence of guilt toward Petitioner. The error seriously effected the fairness, integrity, on Public reputation of Judicial Proceedings. The States case was not strong as a sole witness incriminated Petitioner. This error falls under Judicial and Prosecutorial misconduct, the require reversal.

(b) Ground Two:

The Court violated Petitioners' 6th, 5th, 8th, and 14th amendments through an illegal sentence.

Supporting Facts:

Petitioner was acclaimed as a habitual criminal under the Nevada Revised Statute 207.010. (see Supreme Court Affirmation order No. 77018, September 12, 2019, pp. 1-4). The lower Court found Petitioner a habitual criminal by recognizing two alleged prior felony convictions. One being

See Judgment of conviction that validates two alleged prior felony convictions. Any crime of which fraud or intent to defraud is an element, or of Petit, larceny, or of any felony, who has previously been two times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, is a habitual criminal and shall be punished for a category B felony by imprisonment in the State Prison for a minimum term of not less than five years and a maximum term of not more than twenty years. Since the statute requires prior felony convictions the State can not count the present conviction as a third prior felony. Thus, Petitioner was sentenced to life without the possibility of parole.

Petitioner is currently suffering an error sentence.

(c) Ground Three:

Petitioners 4th, 5th, 6th, 8th, and 14th amendments was violated through the Prosecutorial Misconduct.

Supporting Facts:

During the trial proceedings the State misstated evidence in order to create Prejudice towards Petitioners substantial rights. The State expressed personal opinion that Davis punched Petitioner in the nose to take Devine away from that act to dilute Petitioners self defense against Davis and Devine. (see AA 1271-72) The State testified that witness Flores could see the incident just fine. (AA 1276) Though she testified her visual was good until she opened the front door and the ordeal was basically concluded. (AA 840-68). The State argued witness Flores heard the victims impact and ran outside. This is complete fabrication to create false inflammatory allege testimony. (AA 1279 and contrary 847). State also claimed that witness Flores gave testimony to seeing Petitioner deliver the first punch, which is a foul blow. (AA 1321-28). No evidence exist of the victim receiving two sharp force injuries though the State argued that Petitioner plunged the knife into the victim twice. This inflammatory argument was a foul misleading and Prejudice to Petitioners substantial rights. The State also violated Petitioners Post Arrest Silence that made it impossible for a fair trial (see ground 1) Prosecutorial Misconduct shall not afford the State to have another shot at Petitioner once such misconduct is concluded as harmful error, as it places Petitioner at risk of Double Jeopardy. The State argued Petitioners Juvenile criminal history at the sentencing hearing that was tainting and Prejudice. (AA 1350-78) The State failed to properly file the habitual criminal statute.

1. The State failed to Properly file the habitual Criminal status. The
2. State never added the habitual Criminal statute as a charged
3. Count. The State failed to show the Court that Petitioner was
4. represented by Counsel at the moment the allege Prior convictions
5. was affirmed as a conviction. Petitioner appeal Counsel failed
6. to add this ground towards Petitioners direct appeal even though
7. Petitioner Pleaded for such. The State simple file a sentencing
8. memorandum and assumed the habitual Criminal statute was
9. Properly filed. (AA1345) The Court failed to confirm if the State
10. Properly filed the Statute Properly. Such review would have
11. shown the State failed to follow the required Procedure. The
12. failure of the statute being charged as an official charged
13. Count makes the sentence under the statute invalid. It shall
14. be noted that Petitioners AA 1346-49 is not in Petitioners
15. Possession. Prior Counsel never Provided them. Please strike lines 14-15.
16. The Prosecutorial Misconduct is valid grounds for reversal.
17. The State never filed a proper notice of intent to seek the
18. habitual Criminal statute. An oral or memorandum that the State
19. may allege is not enough.
20. The State Produce the Judgment of conviction out of California to
21. establish Prior convictions but such fact infirmity could only be
22. established as fact only in the State of the conviction after conviction
23. of Primary offense. Making the States exhibits invalid and sentence a
24. error.

25. —

26. ① Petitioner allege Priors was very state and or trivial.

27. "

28.

AA1452

Page 2 of Ground No.3

(d) Ground Four:

Petitioners 6th and 14th amendments was violated through the Courts
Presentation of Jury instruction's.

Supporting Facts:

Jury instruction numbers 1, 17, 20, and 31 fails to be neutral and unbiased. It informs the Jury that they can convict on certain terms but shy's away from being unbiased by also mentioning that the contrary shall produce a verdict of not guilty. Jury instruction numbers 21, 25, and 27 expresses the position of the instruction but fails to instruct the Jury if such instruction is believed they may find the defendant not guilty. Then Jury instruction number 22 and 23 conflicts with Jury instructions 21, 25, and 27. Thus, attempts to confuse the Jury and do away with or waterdown Jury instruction numbers 21, 25, and 27. Instruction No. 23, fails to express what "negate" means and fails to express the contrary to become impartial. The instruction disputes fear as insufficient to justify a killing. This is designed to take away the belief of imminent danger of self and or others being sufficient, and attacks the Post arrest silence of the States introduce testimony, and statements of, "Defendant not wanting to get hit again." Jury instruction No. 30 express "abiding conviction," the Supreme Court already ruled not to use. Jury instruction number 37 instructs the Penalty Phase not to be considered in deliberation but then biasly express first degree murder penalty. The first degree murder penalty instruction should have been a isolated instruction and not included with a impartial instruction since such requirement literally express conviction. (see Jury instruction's No.'s 1, 17, 20, 21, 25, 22, 27, 23, 30, 31, and 37).

(e) Ground Five:

Court violated Petitioners' 6th and 14th amendments was violated through the errored Jury Instruction Proceedings.

Supporting Facts:

The Jury instruction Proceeding was conducted in a manner where Petitioner was not informed the true full context of any of the Jury instruction's. (AA 1108-1114). Instead of the instruction's being read word for word each one was given a number and title. The title consisted of the first few words of the instruction or what the instruction was encompassing. Doing this left Petitioner unaware of the true content of each Jury instruction. Thus, enabling Petitioners' objections and challenges when necessary.

The Court errored on this conduct was extremely harmful since it misinformed the Jury bias laws and confusion.

This error also falls under ineffective Counsel of Petitioners Counsel.

1. (f) Ground six: Petitioners 6th, 8th, and 14th amendments was
2. violated through Counsels ineffective assistance of Counsel.
3. SUPPORTING FACTS:
4. I. Counsel failed to investigate Petitioners' case to be adequately
5. Prepared for trial. This failure influence the outcome of
6. Petitioners trial. Petitioner inquired to Counsel of what did he
7. actually do on the case and Counsel responded that he, "reviewed
8. the States open file." Counsel did absolutely nothing on an
9. investigative stand point beside the above mentioned. Counsel
10. failed to have the investigator or himself to interview any of the witnesses
11. toward the case. In fact, Counsel manipulative Petitioner to assume that
12. investigative work was foregoing. Counsel claimed he had a big biker looking
13. dude as an investigator and would comment on how Petitioners daughter
14. looked, only to influence Petitioner to assume that he spoke to a witness.
15. In actuality Counsel interviewed no witnesses at all. Counsel did not
16. even subpoena any witnesses for trial. Thus, Counsel did not conduct
17. Proper Preparation for trial. Petitioners defense witnesses was only
18. able to testify is because Petitioner informed them to show up to
19. the Courthouse and wait outside the courtroom. Since they testified
20. at the Preliminary hearing they was allowed to testify even
21. though Counsel did not have them subpoenaed, or on the witness
22. list. What Counsel did was investigate the case during trial. (Exh. No. 1 P. 2)
23. Counsel failed to acquire a pathologist expert witness to view the evidence
24. of the case to conclude in reference to the evidence the most probable
25. position Petitioner and the victim was in at the time of the stab, the
26. number concluded on the stab, and the probability or lack of in relations
27. towards the States theory of a standing up Plunge, and two sharp force stabs.
28. This ineffectiveness contributed towards Petitioners conviction. (see
ground 3); AA1291, state argue two sharp injuries; AA694-100, pathologist

1. for State can't tell the position of the body when stabbed)

2. Counsel fatally failed to explore all avenues of the case

3. that could have change the strategy Plea bargaining stage

4. and or the outcome of the trial, and or Penalty stage. This was

5. done when Counsel failed to canvas Petitioners' neighbors to

6. see if they had relevant information to the case and other

7. relevant witnesses to introduce Ezekiel Devine Prior

8. bad act of several layers. (See Exhibit No. 1)

9. Counsels' failure to interview Sandi Cash hinder

10. Petitioner to fully cross examine Devine about him

11. being of not visiting the Place of residence of Petitioners

12. home, the recent threats Devine made toward the

13. home and Petitioner, and the intertwiness of

14. the Prior acts in relations to the case. This failure

15. to canvas Ms. Cash Presudice Petitioner. (Exh No. 1, p. 1)

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SUPPORTING facts:

1. II. Failure to adequately establish Petitioner's theory of
2. defense cause Counsel to perform well below the required
3. effective standard. Counsel failed to produce jury instructions
4. that would have showed the jury established law that Petitioner
5. had the right of Defense of Others and continue into the instruction
6. of Self Defense. Counsel lack of such afforded Petitioner to be
7. painted as the bad guy for not just calling the police or verbally
8. requesting Davis to leave. Had Counsel represented Petitioner's
9. best interest the jury would have been aware that Petitioner's
10. action of defending his daughter was completely within the law.
11. Counsel failed to establish foundational evidential evidence of
12. why Petitioner had a small work knife on Petitioner's person, so when
13. Counsel attempted to explain such it was dismissed through the
14. Court.
15. Counsel's failures left argument for the State and Court and
16. jury to view Petitioner as a weapon carrier at all times for the
17. wrong reasons.
18. Without Counsel creating a foundational defense and proffer
19. of instructions to the jury Counsel argument becomes weak
20. as jury instruction No. 41 explains attorney's argument
21. is not evidence. This ineffective Counsel negatively effected
22. Petitioner's substantial rights.

SUPPORTING facts:

23. III. Counsel failure to object to witness Kyriell Davis
24. testimony ranting establish Counsel to perform well below the
25. effective standard requirement.
26. Counsel was ineffective when Counsel allowed the State
27. to call Davis to the stand and just rant the incident through
28. testimony without the State being required to break the testimony

1. into Procedural ask and answer questioning. (AA896-900)
2. Counsel ineffectiveness of this error allows the State
3. witness the opportunity to rant the vital part of Davis
4. testimony, eliminating room for error. After such ranting
5. the State was allowed to systematically go back only
6. then to rerun the story through asked and answering
7. Procedure. Never did Counsel object to the Question's
8. being already answered through the Prior rant (AA 900-946)
9. This engrains into the jury inflammatory testimony. Such error
10. violated Petitioners substantial rights.
11. SUPPORTING FACTS: IV. Counsel failed to protect Petitioners' Post arrest
12. silence. This failure effected Petitioner substantial rights.
13. Petitioner defer supporting facts on Ground No. 1. (AA 1236-60 id).
14. Counsel should have objected to the States rebuttal
15. witness Matthew Gills. If the Court failed to recognize the
16. Presudicial effects of the rebuttal witness Counsel should
17. have the requested rebuttal witness first testify outside
18. the Presence of the Jury to renew the objection once the
19. Prejudice was shown. Petitioner basically was vacant of
20. Counsel at the moment of this ineffectiveness.
21. SUPPORTING FACTS: V. Counsel's failure to impeach witness KYriell
22. Davis created ineffectiveness. Witness Davis was the sole
23. witness for the State that testified to seeing a Knife and
24. alleging Petitioner was moving toward the victim with the
25. Knife. No testimony exist of any Person seeing Petitioner
26. chase and stab the victim. Being that the State is depending
27. on Davis testimony Primarily, an attack on his credibility
28. could have changed the outcome of the verdict. **AA1458**

1... Davis committed an obvious Perjury while giving
2... testimony for the State when he falsely testified that
3... witness Brittney Tuner left the scene once the fight with
4... himself and Petitioner occurred, and Petitioner had to call her
5... back to the scene to get the baby. (AA 912-15)

6... This false Perjury could have easily been impeached through
7... the testimony of Tuner, (AA 1114-70) through Kinchroon, (AA 1170-1233),
8... White, (AA 1081-1106), and possibly Flores, (AA 839-68). Though
9... the impeach did not strike at the stab incident, such
10... Perjury would have gone to insight to the jury that Davis
11... committed Perjury, and his testimony can be subject to full
12... waiver as a disregard of testimony, or in part, and can be
13... weighed when considering Davis credibility. This being the sole
14... witness for the State incriminating Petitioner could have changed
15... the outcome of the verdict. (see jury instruction No. 34)

16... (g) Ground seven: Petitioners' 6th and 14th amendments was violated
17... due to accumulative errors.

18... ^{Supporting Facts:} Accumulative errors of the State, Counsel, and Court effective
19... Petitioner from receiving an impartial trial proceeding that fatally effective
20... Petitioners' substantial constitutional rights. (See grounds 1-6).

21... (h) Ground eight: Petitioners 6th and 14th amendments was
22... violated when Appeal Counsel filed Petitioners writ of
23... Direct Appeal before consulting with Petitioner.

24... ^{Supporting facts:} Petitioners appeal counsel failed to
25... communicate with Petitioner before he wrote up Petitioners
26... _____

27...

28... ② Line 4; sixth word "Petitioner" is meant to be worded Davis. **AA1459**

1. Direct appeal. Petitioner had no line of communication being
2. exercised by Counsel. Once Counsel finally came to visit Petitioner
3. the direct appeal was already written. Petitioner informed Counsel
4. to hold off on filing the writ because Petitioner wanted to research
5. the grounds drafted and add additional grounds after Petitioner
6. completed research, such as Speedy trial violations and Prosecution
7. misconduct. The next day Counsel filed the disputed writ. Thus,
8. Counsel attempted to make it look like consulted with Petitioner
9. but did no such thing. This ineffective appeal Counsel hinder Petitioners
10. foundational grounds of Prosecution misconduct that Counsel address with
11. merits/citations, jury instruction and Procedure, ect. (see grounds 1-7).
12. This error was harmful to Petitioners' substantial rights.

13. (I) Ground Nine: Petitioners 6th and 14th amendments was violated
14. when the Court violated the Speedy Trial Act.

15. ^{SUPPORTING FACTS:} When it came time for the Court to honor Petitioners nonwaiver
16. of the Speedy Trial Act the Court errorly did a continuance on the trial against
17. mutual consent. Petitioner is without the minute records to defer clarity,
18. so Petitioner Preserve this Ground.

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1 WHEREFORE, petitioner prays that the court grant petitioner
2 Relief to which he may be entitled in this proceeding.

3 EXECUTED at ELY STATE PRISON, Nevada on the 16
4 Day of JULY, 2020.

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8 Thomas Cash
9 IN PROPER PERSON

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Thomas Cash
Petitioner

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STEVEN D. GRIERSON
Clerk of the Court
200 LEWIS AVE. 3RD Floor

Thomas Cash
Signature of Petitioner In Pro Se

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document. _____

Petition For writ OF Habeas Corpus (Post-Conviction) (Now Death)
(Title of Document)

filed in case number: C-18-329699-1

☒ Document does not contain the social security number of any person

-OR-

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

☐ A specific state or federal law, to wit:

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS125B.055)

Date: July 16, 2020

Thomas Cash
(Signature)

THOMAS CASH
(Print Name)

N/A
(Attorney for)

Thomas Cash #1203562
PO Box 1989
Ely, NV 89301-1989



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Steven D. Grierson, Clerk of the Court
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155-1160

AA1464

(COURT CLERK; COURTESY)
(COPY PLEASE)

District Court
CLARK COUNTY NEVADA

FILED

AUG 03 2020

THOMAS CASH

PETITIONER, CASE No. C-18-329694-1

Ann L. Blum
CLERK OF COURT

VS

A-20-818971-W
Dept. 9

STATE OF NEVADA

RESPONDENT

MEMORANDUM OF POINTS AND AUTHORITIS IN
SUPPORT OF WRIT OF HABEAS CORPUS (POST-
CONVICTION) COME NOW, THOMAS CASH, PETITION-
ER, IN PROPER PERSON UNDER HAINES V. KERNER,
92 S. CT. 594, 596 (1972) (PRO SE PLEADING ARE TO
BE HELD TO LESS STRINGENT STANDARD THAN
PLEADINGS DRAFTED BY ATTORNEYS) AND
SUBMIT THE INSTANT MEMORANDUM OF
POINTS AND AUTHORITIS IN SUPPORT OF
WRIT OF HABEAS CORPUS (POST-CONVICTION)

PREPARED BY: THOMAS CASH

(ASSISTANCE OF 2) TWO LAW CLERKS)

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5.

III

JUDGEMENT OF CONVICTION

THE JUDGEMENT OF CONVICTION WAS
FILED ON AUGUST 20, 2018, THE NEVADA SUPREME
COURT ISSUED ITS ORDER OF AFFIRMANCE ON
OCTOBER 12, 2019.

THE INSTANT WRIT OF HABEAS CORPUS
POST-CONVICTION/PETITION MADE IN
ACCORDANCE WITH NRS 34.726(1) TIMELY AND
BEFORE THIS COURT FOR REVIEW.

JURISDICTIONAL STATEMENT

THIS IS A WRIT OF HABEAS CORPUS (POST-CONVICTION) FROM A VERDICT FOLLOWING A JURY TRIAL HELD BEFORE THE HONORABLE DOUGLAS SMITH IN THE EIGHTH JUDICIAL DISTRICT COURT, THE SUBSEQUENT JUDGEMENT OF CONVICTION, AND APPEAL FROM THE SUPREME COURT OF THE STATE OF NEVADA. THIS COURT HAS JURISDICTION TO HEAR THIS WRIT OF HABEAS CORPUS (POST-CONVICTION) AND/OR APPEAL PURSUANT TO NRS 177.015 (3) WHICH PROVIDES FOR THE RIGHT TO APPEAL A FINAL JUDGEMENT IN A CRIMINAL CASE.

RULE 17 ROUTING STATEMENT

THIS APPEAL IS PRESUMPTIVELY ASSIGNED TO THE SUPREME COURT BECAUSE IT RELATES TO A CONVICTIONS FOR A CATEGORY A FELONY NRAP 17(b)(1).

ISSUES PRESENTED FOR REVIEW

WHETHER MR. CASH IS ENTITLED TO RELIEF OR IN THE ALTERNATIVE AN EVIDENTIARY HEARING, ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE COUNSEL FAILED TO INTERVIEW AND CALL WITNESSES ALSO FAILURE TO INVESTIGATE THOROUGHLY IN PREPARATION FOR TRIAL

✓

Statement of the Case

Although the exact depiction of the initial altercation between Cash and Davis is in some dispute, the differing version agree that there was minimal successful punching and it was mostly wrestling. At that point Ezekiel interject himself into the fight either on his own or at Davis request. All testimony showed Ezekiel exited the car and joined the fray, starting by "breaking apart" Davis and Cash. The States other witness (Brittney) said that Ezekiel broke them apart by punching Cash in the face, also Angel and Kinchron testified that Ezekiel punched Cash in the face, Cash told the police that the first time he had ever seen Ezekiel was when Ezekiel punched him in the face. Thus, there was virtually unanimous testimony that Ezekiel's first interaction with Cash was to punch Cash in the face while Cash was being held by Davis. The police said Cash had the facial injuries and bloody clothes to match the punch to the face, furthermore,

1 there was nothing to dispute Cash
2 characterization of Ezekiel punch to
3 the face as a massive blow that dazed
4 (him) Cash and made him believe that
5 Ezekiel must had a weapon in hand.

6 The police testimony of Cash's injury
7 from his face soaked his shirt and
8 pants. Further supporting his belief
9 Ezekiel might be using a weapon
10 were two different witness testified
11 they heard Davis request Ezekiel to
12 bring some kind of weapon from the
13 car (Angel heard "go get my thing out of
14 the car" while Kinchron heard "bring
15 my shit".)

16 This rationale strongly supports
17 Cash's self-defense claim, he did not
18 resort to deadly force until attacked
19 by the second man. And until that man
20 had hit him in the face so hard and
21 caused so much bodily harm that
22 Cash believed he was hit with a
23 weapon. Cash did reasonably believe he
24 was in danger, that Ezekiel will
25 either kill him or cause him great
26 bodily injury. Cash was in fear of his
27 life, and it was necessary under the
28 circumstance for him to use self-defense

1 FORCE OR MEANS THAT MIGHT CAUSE THE
2 DEATH OR GREAT BODILY INJURY TO
3 HIMSELF. PRIOR TO THE INCIDENT ON
4 DECEMBER 11th 2017, DAVIS HAS
5 REPEATEDLY THREATEN BRITTNEY AND
6 CASH SAYING "HE WOULD SHOOT UP THE
7 HOUSE AND "MR. CASH IF NEEDED BE.
8 ANGEL HEARD DAVIS TELL EZEKIEL GO
9 GET MY THING, AND KINCHRON HEARD
10 HIM SAY "BRING MY SHIT."

11 IT IS CLEAR UNDER THESE FACTS
12 THAT CASH COULD NOT HAVE SAFELY RETREATED
13 FROM BOTH WHO WAS STRIKING HIM AND
14 DAVIS WITHOUT THE USE OF HIS KNIFE. IT
15 IS IMPORTANT TO NOTE THAT THIS RETREAT
16 WAS NOT REQUIRED BY NEVADA LAW BEFORE
17 EXERCISING HIS RIGHT TO SELF-DEFENSE. IT
18 IS CLEAR IN THIS CASE THAT THE STATE
19 FAILED TO MEET THEIR BURDEN OF PROVING
20 BEYOND A REASONABLE DOUBT THAT CASH DID
21 NOT ACT IN SELF-DEFENSE.

22 IN ORDER TO CLAIM SELF-DEFENSE, [A]
23 PERSON WHO DOES THE KILLING [MUST] ACTUALLY
24 AND REASONABLE BELIEVE: [T]HAT THERE IS
25 IMMINENT DANGER THAT THE ASSAILANT WILL
26 EITHER KILL HIM OR CAUSE HIM GREAT BODILY
27 INJURY; AND [T]HAT IT IS ABSOLUTELY NECESSARY
28 UNDER THE CIRCUMSTANCES FOR HIM TO USE

1 IN SELF-DEFENSE FORCE OR MEANS THAT MIGHT
2 CAUSE THE DEATH OF THE OTHER PERSON, FOR
3 THE PURPOSE OF AVOIDING DEATH OR GREAT
4 BODILY INJURY TO HIMSELF. *Runion v. State*
5 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000).
6 WHETHER DEFENDANT REASONABLY BELIEVED
7 HE WAS IN FEAR OF DEATH OR GREAT BODILY
8 HARM IS A QUESTION OF FACT FOR THE JURY.
9 *Davis v. State*, 130 Nev. 136, 143, 321 P.3d 867,
10 872 (2014).

11 UNDER THE TESTIMONY ELICITED AT
12 TRIAL, NO REASONABLE JURY COULD FIND THAT
13 THE STATE PROVED CASH DID NOT ACT IN
14 SELF-DEFENSE. NEVADA CASE LAW AND STATUTES
15 HAVE ALSO LONG HELD THERE IS NO DUTY TO
16 RETREAT BEFORE EXERCISING YOUR RIGHT TO
17 SELF-DEFENSE. *State v. Grimmer*, 33 Nev. 531,
18 534, 112 P.2d 273 (1910) (RECOGNIZING "THE
19 RIGHT TO STAND HIS GROUND AND SLAY HIS
20 ADVERSITY"), NRS 200.120(2) ("A PERSON IS NOT
21 REQUIRE TO RETREAT BEFORE USING DEADLY
22 FORCE"). THIS COURT HAS ALSO HELD THAT
23 ONE GOOD REASON THAT NEVADA DOES NOT
24 REQUIRE A PERSON TO RETREAT IS THAT "IT IS
25 OFTEN QUITE DIFFICULT... TO DETERMINE
26 WHETHER A PERSON SHOULD REASONABLY
27 BELIEVE THAT HE MAY RETREAT FROM A
28 VIOLENT ATTACK IN COMPLETE SAFETY.

1 "CULVERSON V. STATE, 106 NEV. 484, 489, 791
2 P.2J 238, 240 (1990)

3 IN FACT, THE STATE NOT ONCE BUT
4 TWICE INCORRECTLY AND IMPROPERLY
5 TOLD THE JURY THAT CASH HAD THE DUTY
6 TO RETREAT, TELLING THE JURY THAT "HE
7 COULD HAVE RETREATED" AND "HE COULD
8 HAVE RAN INSIDE. HE COULD HAVE YELLED
9 FOR HELP."

10 MR. CASH TRIAL ATTORNEY (KENNETH
11 W. LONG, ESQ) FAILED TO OBJECT TO THIS
12 ARGUMENT. MR. CASH DID NOT RECEIVE
13 EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.
14 CASH INFORMED HIS DEFENSE ATTORNEY
15 THAT SANDI CASH EARL WAS PRESENT AT
16 THE SCENE OF THE ALLEGED CRIME, AND WOULD
17 CORROBORATE HIS TESTIMONY. ALTHOUGH
18 SANDI CASH EARL WAS AVAILABLE, COUNSEL
19 NEVER INTERVIEW SANDI CASH EARL OR
20 CALLED SANDI CASH EARL AS A WITNESS. THIS
21 ~~REDUCE~~ THE TRIAL TO A CREDITABLY CONTEST
22 BETWEEN MR. CASH AND THE ALLEGED VICTIM.
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STANDARD OF REVIEW

Mr. Cash contends that he was deprived of his right the effective assistance of counsel because his trial counsel failed to conduct an adequate per-trial investigation in preparation for trial communicate to secure vital information to investigate in preparation; and failed to call witnesses at trial. In violation of the Sixth Amendment and Fourteenth Amendment to the United States Constitution.

The question of whether a criminal defendant have received ineffective assistance of counsel presents a mixed question of law and facts and is subjected to independent review. *Molina V. State*, 87 P.3d 533, 537 (Nev. 2004) *Smith V. Ylst*, 826 F.2d 872, 875 (9th Cir. 1987). cert. denied, 488 US 829, 109 S.Ct. 83 (1988).

The Sixth Amendment that "in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." The Supreme Court has instructed that the Sixth Amendment recognizes the right to counsel because it envisions counsel playing a role that is critical to the ability of the adversarial

1 system to produce just results. STRICKLAND
2 V. WASHINGTON, 466 US 668, 685, 104 S. CT.
3 2052 (1984) THE NEVADA COURTS REVIEW
4 CLAIMS OF INEFFECTIVE ASSISTANCE OF
5 COUNSEL UNDER THE TWO-PART TEST SET
6 FORTH IN STRICKLAND V. WASHINGTON 104
7 S. CT. 2052 (1984) SEE RUBO V. STATE 194
8 P. 3d 1224 (NEV. 2008). UNDER STRICKLAND THE
9 DEFENDANT MUST DEMONSTRATE THAT HIS
10 COUNSEL'S PERFORMANCE WAS DEFICIENT, AND,
11 IT FELL BELOW AN OBJECTIVE STANDARD OF
12 REASONABLENESS AND THAT THE DEFICIENT
13 PERFORMANCE PREJUDICED THE DEFENSE. ID
14 AT 466 U.S. AT 687; WILLIAMS V. TAYLOR - US-
15 120 S. CT. 1166 (2003) THE UNITED STATES
16 V. CHRONIC, 466 US 648, 104 S. CT. 2039
17 (1984), DECIDED ON THE SAME DAY AS
18 STRICKLAND. THE SUPREME COURT CREATED
19 AN EXCEPTION TO STRICKLAND STANDARD
20 FOR INEFFECTIVE ASSISTANCE OF COUNSEL
21 AND ACKNOWLEDGED THAT CERTAIN
22 CIRCUMSTANCES ARE SO EGREGIOUSLY
23 PREJUDICED THAT INEFFECTIVE ASSISTANCE
24 OF COUNSEL PRESUMED. STAN V. DUGGER, 911
25 F.2d 741, 744 (11th CIR. 1991) (ENBANCE) (CITING
26 CHRONIC 466 US AT 658). CHRONIC PRESUMES
27 PREJUDICE WHERE THERE HAS BEEN AN
28 ACTUAL BREAKDOWN IN THE ADVERSIAL

1 PROCESS AT TRIAL TOOMEY V. BUNNEL, 898
2 F.2d 741, 744 (9th Cir.)

3 IN POWELL V. ALABAMA, 287 US 45 (1932)

4 THE U.S. SUPREME COURT HELD THAT COUNSEL
5 HAS A DUTY TO PERFORM ADEQUATELY
6 DURING PRETRIAL MATTERS TO INCLUDE
7 INVESTIGATION. ID - SEE SANBORN V. STATE
8 812 P.2d 1279 (NEV. 1991) (CONCLUDING COUNSEL
9 WAS INEFFECTIVE IN FAILING TO CONDUCT
10 PRETRIAL INVESTIGATION).

11 A CLAIM OF INEFFECTIVE ASSISTANCE OF
12 COUNSEL ON APPEAL IS ALSO EXAMINED
13 UNDER STRICKLAND, 104 S. CT. 2052 (1984)
14 TO ESTABLISH PREJUDICE BASED ON THE
15 DEFICIENT PERFORMANCE OF APPELLATE
16 COUNSEL, THE DEFENDANT MUST SHOW THAT
17 THE OMITTED ISSUE WOULD HAVE A
18 REASONABLE PROBABILITY OF SUCCESS ON
19 APPEAL. SEE DUHAMEL V. COLLINS 955 F.2d
20 962 (5th Cir. 1992); FIRESTONE V. STATE, 83
21 P.3d 279, 281 (NEV. 2004).

LEGAL ARGUMENTS

GROUND ONE

* TRIAL COUNSEL WAS INEFFECTIVE

* IN FAILING TO CONDUCT ADEQUATE AND THOROUGH INVESTIGATIONS IN PREPARATION FOR TRIAL.

* IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

THE NEVADA SUPREME COURT REVIEWS CLAIM OF ~~INEFFECTIVE~~ INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE REASONABLY EFFECTIVE TEST SET FORTH IN STRICKLAND V.

WASHINGTON -- U.S. --, 104 S. CT. 2052

(1984); ADOPTED IN WARDEN V. LYONS, 683 P.2D 504 (NEV. 1984) UNDER STRICKLAND,

AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM HAS TWO COMPONENTS: (1) DEFICIENT PERFORMANCE, AND (2) PREJUDICE.

TO ESTABLISH DEFICIENT PERFORMANCE, A PETITIONER MUST DEMONSTRATE THAT COUNSEL'S REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND BUT FOR COUNSEL'S ERROR, THE RESULTS OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT. AND, PREJUDICE IS ESTABLISHED WHEN PETITIONER DEMONSTRATES A REASONABLE PROBABILITY TO UNDERMINE THE CONFIDENCE IN THE OUTCOME OF THE TRIAL BASED ON COUNSEL'S

1 DEFICIENT PERFORMANCE, WILLIAMS V.
2 TAYLOR --- U.S. ---, 1205 S. CT. 1166 (2003).

3 DEFICIENT PERFORMANCE

4 A. FAILURE TO CONSULT AND COMMUNICATE

5 MR. CASH ASSERTS THAT TRIAL COUNSEL (MR. LONG)
6 WAS INEFFECTIVE IN FAILING TO PROPERLY
7 CONSULT AND COMMUNICATE WITH HIM, FAILED
8 TO REVIEW EVIDENCE AND WITNESSES
9 STATEMENTS FOR FAVORABLE INFORMATION
10 AND INCONSISTENT FACTS, FAILURE TO HAVE A
11 INVESTIGATOR TO INVESTIGATE ANY OF THE
12 CASE. AFTER TELLING HIM OVER AND OVER THE
13 NAMES OF POTENTIAL WITNESSES AND
14 ADDRESSES (SANDI CASH EARL) HE NEVER
15 INTERVIEW ANY OF THE WITNESSES IN THIS
16 CASE.

17 SUPREME COURT RULE (SCR 154)
18 CLEARLY STATES:

19 A LAWYER SHALL KEEP A CLIENT STATUS OF
20 A MATTER AND PROMPTLY COMPLY WITH
21 REASONABLE REQUEST FOR INFORMATION. (2)
22 "A LAWYER SHALL EXPLAIN A MATTER TO THE
23 EXTENT NECESSARY TO PERMIT A CLIENT TO
24 MAKE INFORMED DECISIONS REGARDING THE
25 REPRESENTATION." IN THE INSTANT CASE,
26 MR. CASH'S SWORN AFFIDAVIT ALLEGES THAT
27 FROM THAT TIME IN WHICH COUNSEL WAS
28 HIRED AND ON THOROUGH THE PRETRIAL

1 PROCEEDING TO THE DAY IN WHICH TRIAL
2 COMMENCED, TRIAL COUNSEL NEVER CAME TO SEE
3 ME MORE THEN (4) FOUR TIME WITHIN THE
4 (7) SEVEN MONTHS I WAS WAITING FOR
5 TRIAL. THE INVESTIGATOR NEVER CAME TO
6 SEE ME ~~OR~~ OR TALKED TO ME THE WHOLE TIME
7 I WAS WAITING FOR TRIAL. IN HARRIS
8 AND THROUGH RAMSEYER V. Blodgett, 853 F. Supp
9 1239 (W.D. Wash 1994) THE COURT HELD THAT
10 COUNSEL HAD A DUTY TO KEEP IN CONTACT AND
11 CONSULT WITH HIS CLIENT REGARDING
12 IMPORTANT ISSUES AND DECISIONS OF HIS
13 DEFENSE. AT A MINIMUM, THE CONSULTATION
14 SHOULD BE SUFFICIENT TO DETERMINE ALL
15 LEGAL AND RELEVANT INFORMATION KNOWN
16 TO THE DEFENDANT. ID AT 1258; SEE ALSO
17 UNITED STATES V. TUCKER 716 F.2d 882 N12.

18 HERE TRIAL COUNSEL'S OVERALL LACK OF
19 COMMUNICATION, (VISIT, TELEPHONE CALL,
20 LETTERS) DURING MR. CASH INCARCERATION,
21 CREATED AN ACTUAL BRAK DOWN IN THE
22 ADVERSIAL PROCESS, BECAUSE THE OF PROVIDING
23 CRITICAL FACTS AND INFORMATION TO ASSIST
24 TRIAL COUNSEL IN THE PREPARATION OF THE
25 TRIAL. "AN EFFECTIVE ATTORNEY MUST PLAY
26 THE ROLE OF AN ADVOCATE RATHER THAN A
27 MERE FRIEND OF THE COURT." OSBORNE V.
28 SHILLINGER, 861 F.2d 612, 625 (10th CIR 1988)

1 (quoting EVITTs V. LUCEY, 469 US 387,
2 394) (1985).

3 HERE THE CIRCUMSTANCES PRESENTED IN
4 THIS MATTER DEMONSTRATES THE CONSTRUCTIVE
5 ABSENCE OF AN ATTORNEY DEDICATED TO THE
6 PROTECTION OF HIS CLIENT'S RIGHTS UNDER
7 OUR ADVERSIAL SYSTEM OF JUSTICE. UNITED
8 STATES V. SWANSON, 943 F.2d 1070 (9th Cir.
9 1991) THEREFORE, TRIAL COUNSEL'S FAILURE TO
10 COMMUNICATE IS A DIRECT VIOLATION
11 OF THE SIXTH AMENDMENT TO EFFECTIVE
12 REPRESENTATION.

13 NOT ONLY DID KENNETH W. LONG, ESQ,
14 FAILED TO DEFEND MR. CASH PROPERLY, HE FAILED
15 TO DO A THOROUGH INVESTIGATION. HE FAILED
16 TO INTERVIEW AND CALL WITNESSES THAT
17 COULD OF HELP MR. CASH DEFENSE. HE FAILED
18 TO MAKE THE APPROPRIATE OBJECTION
19 DURING TRIAL. THE PROSECUTOR WAS WELL
20 AWARE THAT THEY FAILY TO PROVE BEYOND A
21 REASONABLE DOUBT THAT CASH DID NOT
22 ACT IN SELF-DEFENSE, AND ONLY BY
23 IMPROPERLY CONVINCING THE JURY
24 THAT MR. CASH SHOULD HAVE RETREATED DID
25 THEY HAVE OF CONVICTING HIM. KENNETH
26 W. LONG INADEQUATE INVESTIGATION,
27 CONSULTATION AND TRIAL PREPARATION
28 FELLED FAR OUTSIDE THE RANGE OF

1 REASONABLE PROFESSIONAL ASSISTANCE,
2 THEREFORE KENNETH W. LONG PERFORMANCE
3 WAS DEFICIENT, AND DID PREJUDICE MR.
4 CASH FROM RECEIVING A FAIR TRIAL. A
5 REASONABLE PROBABILITY IS A PROBABILITY
6 SUFFICIENT TO UNDERMINE CONFIDENCE
7 IN THE OUTCOME. "STRICKLAND 466 U.S.
8 AT 694.

9 THERE IS REASONABLE PROBABILITY
10 THAT, BUT FOR COUNSEL'S UNPROFESSIONAL
11 ERRORS, THE RESULT OF THE PROCEEDING
12 WOULD HAVE BEEN DIFFERENT.

13 ON AUGUST 20, 2018 MR. CASH WAS
14 SENTENCED BY JUDGE DOUGLAS SMITH TO
15 LIFE WITHOUT THE POSSIBILITY OF
16 PAROLE UNDER THE LARGE HABITUAL
17 CRIMINAL ENHANCEMENT FOR THE SECOND
18 DEGREE MURDER CONVICTION.
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1 B. FAILURE to INTERVIEW AND CALL
2 WITNESSES:

3 IN STATE V. LOVE, 865 P.2d 322 (NEV. 1993)

4 THE COURT HELD:

5 "... FAILURE OF RELATIVELY INEXPERIENCED
6 COUNSEL TO CALL POTENTIAL WITNESSES,
7 COUPLED WITH THE FAILURE TO PERSONALLY
8 INTERVIEW WITNESSES SO AS TO MAKE AN
9 INTELLIGENT, TACTICAL DECISION LEADS THIS
10 COURT TO CONCLUDE IN A CASE WITH LITTLE
11 DIRECT EVIDENCE OF GUILT, NOT ONLY WAS
12 COUNSEL INEFFECTIVE, BUT THAT THE ERRORS
13 OF COUNSEL WERE SO SERIOUS AS TO DEPRIVE
14 THE DEFENDANT OF A FAIR TRIAL WHO'S
15 RESULTS ARE UNRELIABLE AND THEREFORE TO
16 PREJUDICE HIM."

17 HERE, DESPITE TRIAL COUNSEL'S REFUSAL TO
18 COMMUNICATE AND LISTEN TO MR. CASH
19 ADVICE ON GETTING A CONTINUANCE ON
20 TRIAL AFTER COUNSEL CLAIM HE WOULD DURING
21 COURT PROCEEDING; MR. CASH PROVIDED
22 TRIAL COUNSEL WITH INFORMATION OF
23 WITNESSES AGAIN. THAT HE WANTED TO
24 HAVE INTERVIEWED AND CALLED AT TRIAL
25 TO GIVE FAVORABLE TESTIMONY. THE LIST INCLUDES:
26 1. SANDI CASH EARL Exhibit 1-A
27 2. ANGEL TURNER Exhibit 1-B
28

1 IN WARNER V. STATE, 729 P.2d 1359 (1986), THE
2 COURT, WHEN ADDRESSING A CLAIM OF
3 INEFFECTIVE OF TRIAL, THE COURT HELD:

4 ... THE FAILURE TO USE THE PUBLIC DEFENDERS
5 FULL TIME INVESTIGATORS TO INVESTIGATE
6 THE BACKGROUND OF THE VICTIM, ... AND
7 CONTACT WITNESSES, ... CONSTITUTE
8 INADEQUATE PRETRIAL INVESTIGATION
9 RESULTING IN THE INEFFECTIVE ASSISTANCE
10 OF COUNSEL.

11 IN INSTANT CASE, TRIAL COUNSEL WAS HIRED
12 AND TOLD NUMEROUS OF TIMES BY MR. CASH
13 WHAT WITNESSES TO GO INTERVIEW, THE
14 NAMES, NUMBERS AND ADDRESSES OF
15 WITNESSES AND YET COUNSEL AND
16 INVESTIGATOR DID NOT USE THE CONTACTS,
17 TO INTERVIEWED ANY WITNESSES OR
18 INVESTIGATE THE CASE TO SECURE EVIDENCE
19 REGARDING MR. CASH ACTIONS OF SELF-
20 DEFENSE

21 IN PREPARING FOR TRIAL, THUS CONSTITUTI-
22 NG INADEQUATE PRETRIAL INVESTIGATION
23 RESULTING IN THE INEFFECTIVE ASSISTANCE
24 OF COUNSEL ESPECIALLY CONSIDERING FACTS
25 THAT MR. CASH REMINDED TRIAL COUNSEL
26 OF FAVORABLE INFORMATION TO HAVE
27 INVESTIGATOR TO INVESTIGATE.
28

1 SEE BERRY V. GRAMELY, 74 F. Supp. 2d 808
2 (N.D. I 111999) (COUNSEL INEFFECTIVE IN
3 FAILING TO VISIT CRIME SCENE OR EMPLOY
4 AND INVESTIGATOR TO LOCATE AND
5 INTERVIEW WITNESSES TO CORROBORATE
6 DEFENDANT TESTIMONY)
7 HARRIS BY AND THROUGH RAMSEYER, V. WOOD,
8 64 F. 3d 1432 (9th Cir. 1995) (COUNSEL
9 INEFFECTIVE IN FAILURE TO RETAIN PRIVATE
10 INVESTIGATOR). TO ADD INSULT TO INJURY
11 MR. CASH PREVIOUS ATTORNEY HANDED OVER
12 THE FILE AND CRITICAL EVIDENCE TO TRIAL
13 COUNSEL, AND NOT A SINGLE FACT OF MR. CASH
14 INVESTIGATION WAS FOLLOWED UP BY
15 TRIAL COUNSEL OR USED DURING MR. CASH
16 TRIAL ON BEHALF OF HIS DEFENSE.
17 SEE U.S. V. ARMONTROUT, 900 F. 2d 18th Cir.
18 1990) (HOLDING THAT TRIAL COUNSEL'S FAILURE
19 TO CONDUCT A INVESTIGATIONS IN NOT
20 CONTACTING POTENTIAL WITNESSES
21 WHEN THE DEFENDANT PROVIDED COUNSEL WITH
22 THEIR NAMES WHICH WOULD HAVE SUPPORTED
23 THE DEFENSE... CONSTITUTING INEFFECTIVE
24 ASSISTANCE OF COUNSEL); REYNOSO V. GIURBINO
25 462 F. 3d 1099 (9th Cir. 2006) (SAME).
26 HERE DESPITE COUNSEL BEING PROVIDED
27 WITH COMPLETE INFORMATION AND FILE OF
28 CASE WHICH CONTAINED CRUCIAL WITNESSES

1 ACCOUNTS OF THE INCIDENT AND FAVORABLE
2 EVIDENCE THAT COULD HAVE BEEN OFFERED TO
3 BOLSTER MR. CASH DEFENSE, COUNSEL, FOR
4 ABSOLUTELY NO LOGICAL REASONING FAILED
5 TO UTILIZE SUCH INFORMATION AND HIS
6 ACTIONS, OR LACK THERE OF CAN HARDLY BE
7 SAID... [TO BE] A STRATEGIC CHOICE.

8 "SANDERS V. RATTLE, 21 F.3D 1146, 1175 (9th Cir.
9 1994) THAT IS CONSISTANT WITH THE SIXTH
10 AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE
11 OF COUNSEL TO RENDER REPRESENTATION THAT
12 "FELL BELOW AN OBJECTIVE STANDARD OF
13 REASONABLENESS," DEMONSTRATING
14 DEFICIENT PERFORMANCE UNDER STRICKLAND,
15 104 S.C.T. 2052.

16 PREJUDICIAL EFFECT

17 THE PREJUDICIAL EFFECT OF TRIAL COUNSEL
18 INEFFECTIVE ASSISTANCE IN THIS CASE IS
19 IRREPARABLE TO DENY MR. CASH HIS SIXTH &
20 FOURTEENTH AMENDMENT RIGHT TO THE U.S.
21 CONSTITUTION AND WARRANT THE REVERSAL
22 OF THE CONVICTION AND REMAND FOR A
23 NEW TRIAL.

24 WITH THIS CASE BETWEEN A CLASH OF
25 SELF-DEFENSE THEORY OF IMMINENT DANGER,
26 ACTUAL DANGER, AND IN INSTANCE OF
27 APPARENT DANGER WHICH NEVADA'S
28

1 STATUTORY RECOGNIZE THAT SELF-DEFENSE
2 IS A JUSTIFICATION FOR HOMICIDE, AND THE
3 STATE MUST PROVE BEYOND A REASONABLE
4 DOUBT. NEVADA CASE LAW AND STATUTES
5 HAVE ALSO LONG HELD THERE IS NO DUTY
6 TO RETREAT BEFORE EXERCISING YOUR
7 RIGHT OF SELF-DEFENSE.

8 IT WAS IMPORTANT FOR TRIAL COUNSEL TO
9 PRESENT THE JURY WITH EVERY FORM OF
10 VIABLE EVIDENCE TO SHOW MR. CASH ACTUAL
11 INNOCENCE. WITHOUT QUESTION, TRIAL
12 COUNSEL'S FAILURE TO COMMUNICATE WITH
13 HIS CLIENT, FAILURE TO INTERVIEW AND
14 CALL WITNESSES, FAILURE TO INVESTIGATE
15 AND CALL WITNESSES DID DEPRIVED THE
16 JURY OF VITAL TESTIMONY AND EVIDENCE
17 AND CAUSED THE JURY TO REACH AN
18 UNSUPPORTED GUILTY VERDICT OF COUNT 1
19 MURDER WITH THE USE OF A DEADLY
20 WEAPON AND LIFE UNDER THE LARGE HABITUAL
21 ENHANCEMENT WITHOUT THE POSSIBILITY
22 OF PAROLE.

23 WHEN CONSIDERING THE TOTALITY OF THE
24 CIRCUMSTANCES, TRIAL COUNSEL'S ACTION OR LACK
25 THEREOF, HAVE CREATED A UNFAIR PREJUDICE
26 AND THERE IS MORE THAN A "REASON
27 PROBABILITY" THAT BUT FOR COUNSEL'S ERROR
28 THE RESULTS OF THE TRIAL WOULD HAVE BEEN

1 EXTREMELY DIFFERENT, WILLIAM V. TAYLOR
2 120 S.C.T. 1166 (2003).

3 THE PREJUDICE CREATED HERE HAS
4 UNDERMINED THE RELIABILITY IN THE
5 JURY'S VERDICT AND ENTIRE TRIAL
6 PROCESS IN VIOLATION OF THE SIXTH
7 AMENDMENT RIGHT TO EFFECTIVE
8 ASSISTANCE OF COUNSEL, THE RIGHT TO FAIR
9 TRIAL AND EQUAL PROTECTION AND DUE
10 PROCESS UNDER THE FOURTEENTH AMENDMENT
11 TO THE U.S. CONSTITUTION. WITH GOOD
12 CAUSE APPEARING THE CONVICTION
13 MUST BE REVERSED AND REMANDED FOR
14 A NEW TRIAL.