IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 82231

CLEMON HUDSON

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction and from a denial of a Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Carli Kierny, District Court Judge
District Court Case Nos. C-15-309578-2 & A-18-783635-W

APPELLANT'S OPENING BRIEF

Christopher R. Oram, Esq.
Nevada Bar No. 4349
Rachael E. Stewart, Esq.
Nevada Bar No. 14122
520 S. Fourth Street, Second Floor
Las Vegas, Nevada 89101
Telephone: (702) 598-1471
Facsimile: (702) 974-0623
contact@christopheroramlaw.com
Attorneys for Appellant

I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

NONE

Attorney of Record for Clemon Hudson:

/s/ Christopher R. Oram

II. TABLE OF CONTENTS

I. NRAP 26.1 DISCLOSURE ii

II. TABLE OF CONTENTS iii

III. TABLE OF AUTHORITIES iv

IV. JURISDICTIONAL STATEMENT 1

V. ROUTING STATEMENT 1

VI. STATEMENT OF THE ISSUES 1

VII. STATEMENT OF THE CASE 2

VIII. STATEMENT OF FACTS 8

IX. SUMMARY OF THE ARGUMENT 15

X. ARGUMENT 15

XII. CONCLUSION 50

XIII. CERTIFICATE OF COMPLIANCE 51

XIV. CERTIFICATE OF SERVICE 53

III. TABLE OF AUTHORIES

Alcala v. Woodford,
334 F.3d 862 (9th Cir. 2003) 42

Barnier v. State,
119 Nev. 129, 67 P.3d 320 (2003) 30

Berger v. United States,
295 U.S. 78, 55 S.Ct. 629 79 L.Ed. 1314 (1935) 28

Big Pond v. State,
101 Nev. 1, 692 P.2d 1288 (1985) 41

Bolin v. State, 114 Nev.
114 Nev. 503, 960 P.2d 784 (1998) 36

Bruton v. United States,
391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) 16, 17

Burnside v. State,
131 Nev. 371, 352 P.3d 627 (2015) 17

Cage v. Louisiana,
498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) 36

Chambers v. Mississippi,
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 42

Chapman v. California,
386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 26, 38

Chartier v. State,
124 Nev. 760, 191 P.3d 1182 (2008) 15, 17, 18

Crawford v. Washington,
541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 17

Darden v. Wainwright,
477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) 26

DeChant v. State,
116 Nev. 918, 10 P.3d 108 (2000) 41

Ducksworth v. State,
114 Nev. 951, 966 P.2d 165 (1998) 19, 22

Elvik v. State,
114 Nev. 883, 985 P.2d 784 (1998) 36

Estelle v. McGuire,
502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) 36

Estes v. Texas,
381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) 39

Ewell v. State,
105 Nev. 897, 785 P.2d 1028 (1989) 31

Green v. State,
119 Nev. 542, 80 P.3d 93 (2003) 30

Guy v. State,
108 Nev. 770, 839 P.2d 578 (1992) 33, 34

Hayes v. Ayers,
632 F.3d 500 (9th Cir. 2011) 39

Hernandez v. State,
118 Nev. 513, 50 P.3d 1100 (2002) 42

Hill v. State,
114 Nev. 169, 953 P.2d 1077 (1998) 43

Holbrook v. Flynn,
475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) 39

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 48

Irvin v. Dowd,
366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) 39

Jones v. State,
111 Nev. 848, 899 P.2d 544 (1995) 18

Kirksey v. State,
112 Nev. 980, 923 P.2d 1102 (1996) 45

Lozada v. State,
110 Nev.349, 871 P.2d 944 (1994) 7

Marshall v. State,
118 Nev. 642, 56 P.3d 376 (2002) 17, 19

Mathews v. State,
134 Nev. 512, 424 P.3d 634 (2018) 30

Mazzan v. State,
105 Nev. 745, 783 P.2d 430 47

McConnell v. State,
125 Nev. 243, 212 P.3d 307 (2009) 44

McKenna v. State,
114 Nev. 1044, 968 P.2d 739 (1998) 39, 40

Means v. State,
120 Nev. 1001, 103 P.3d 25 (2004) 44

Miles v. State,
97 Nev. 82, 624 P.2d 494 (1981) 33

Miles v. United States,
103 U.S. 304, 26 L.Ed. 481 (1880) 48

Montana v. Egelhoff,
518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) 42

Pantano v. State,
122 Nev. 782, 138 P.3d 477 (2006)..... 27

Parle v. Runnels,
505 F.3d 922 (9th Cir. 2007) 42

People v. Archer,
99 Cal. Rptr. 2d 230 (2000) 20

Potter v. State,
96 Nev. 875, 619 P.2d 1222 (1980) 33

Rimer v. State,
131 Nev. 307, 351 P.3d 697 (2015) 15, 17

Rose v. State,
123 Nev. 194, 163 P.3d 408 (2007) 42

Rosky v. State,
121 Nev. 184, 111 P.3d 690 (2005) 32, 46

Sitton v. State,
439 P.3d 393 (2019) (unpublished disposition)..... 19

State v. Love,
109 Nev. 1136, 865 P.2d 322 (1993) 44

State v. Powell,
122 Nev. 751, 138 P.3d 453 (2006) 44, 45

State v. Smith,
131 Nev. Adv. Op. 63, 356 P.3d 1092 (2015) 43

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 44

Sullivan v. Louisiana,
508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) 38, 49

Tavares v. State,
117 Nev. 725, 30 P.3d 1128 (2001) 26

Theriault v. State,
92 Nev. 185, 547 P.2d 668 (1976) 33

Turner v. State,
473 P.3d 438, 136 Nev. Adv. Op. 62 (2020 ..... 19, 20, 27

United States v. Martino,
648 F.2d 367 (5th Cir. 1981) 18

United States v. Necoechea,
986 F.2d 1273 (9th Cir. 1993) 41

United States v. Roberts,
618 F.2d 530 (9th Cir. 1980) 28, 30

United States v. Sarracino,
340 F.3d 1148 (10th Cir. 2003) 19, 20

United States v. Zanin,
831 F.2d 740 (7th Cir. 1987) 18

Valdez v. State,
124 Nev. 1172, 196 P.3d 465 (2008) 25, 26, 28, 30

Vazquez v. Wilson,
550 F.3d 270 (3d Cir. 2008) 19

Victor v. Nebraska,
511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) 36

Watters v. *State*,
129 Nev. 886, 313 P.3d 243 (2013) 38, 39

Weber v. State,
121 Nev. 554, 119 P.3d 107 (2005) 33, 34, 46

Wilson v. State,
105 Nev. 110, 771 P.2d 583 (1989) 47

Zafiro v. United States,
506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) 17

Statutes

NRS 34.575 1
NRS 173.135 16
NRS 174.165 ..... 17, 18
NRS 177.015 1
Nevada Constitution Art. I 39, 44
U.S. Constitution, Amendment V 41, 44
U.S. Constitution, Amendment VI 41, 44
U.S. Constitution, Amendment XIV 39, 41, 44

Rules

NRAP 4(c) 7
NRAP 17(b) 1
NRAP 26.1 ii
NRAP 28(e)(1) 51
NRAP 32(a)(4)-(6) 51
NRAP 32(a)(6) 51
NRAP 32(a)(7) 52

IV. JURISDICTIONAL STATEMENT

The District Court sentenced Mr. Hudson on June 21, 2018, and filed the Judgment of Conviction on July 2, 2018. On December 3, 2020, the District Court granted a post-conviction petition for writ of habeas corpus and found that Mr. Hudson had been deprived of his right to file a direct appeal after his conviction. The District Court denied Mr. Hudson's remaining post-conviction claims. The District Court filed its Findings of Fact, Conclusions of Law and Order on December 16, 2020. Mr. Hudson filed a timely Notice of Appeal from the denial of his post-conviction claims on December 16, 2020. Both the District Court Clerk and Mr. Hudson filed timely Notices of Appeal from the Judgment of Conviction as granted by the habeas petition on December 17, 2020.

This Court has jurisdiction over the District Court's denial of the post-conviction claims under NRS 34.575. This Court has jurisdiction over the appeal from the Judgment of Conviction pursuant to NRS 177.015.

V. ROUTING STATEMENT

Pursuant to the Nevada Rules of Appellate Procedure (hereinafter, "NRAP") 17(b), the Supreme Court may assign this case to the Court of Appeals.

VI. STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion by not granting Mr. Hudson's Motion to Sever Defendants.

2. Whether the prosecutor committed misconduct at trial such that the conviction must be reversed.

3. Whether the District Court erred by giving improper jury instructions.

4. Whether the District Court erred by allowing uniformed officers to pack the courtroom.

5. Whether there was cumulative error in the trial proceedings.

6. Whether the District Court abused its discretion by failing to find that Mr. Hudson received ineffective assistance of Defense Counsel for failure to object to the District Court's presentation of Jury Instruction Number 38 regarding flight to the jury.

7. Whether the District Court abused its discretion by failing to find Defense Counsel ineffective for failure to object to the District Court's giving of Jury Instruction Numbers 40 and 50 in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

8. Whether the District Court erred by failing to grant an evidentiary hearing.

VII. STATEMENT OF THE CASE

This is an appeal from the District Court's Judgment of Conviction issued on July 2, 2018. This is also an appeal from the District Court's Findings of Fact, Conclusions of Law and Order denying Mr. Hudson's post-conviction claims issued on December 16, 2020.

TRIAL PROCEEDINGS

On September 23, 2015, a Clark County grand jury indicted Appellant Clemon Hudson and his co-defendant, Steven Turner, on the following charges: Count 1- Conspiracy to Commit Burglary; Count 2- Attempt Burglary while in

Possession of a Firearm or Deadly Weapon; Count 3- Attempt Murder with Use of a Deadly Weapon; Count 4- Attempt Murder with Use of a Deadly Weapon; Count 5- Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Count 6- Discharging Firearm at or into Occupied Structure, Vehicle, Aircraft, or Watercraft. (A.A. Vol. 1, pg. 174-179). Appellant pleaded not guilty to all charges on October 1, 2015. (A.A. Vol. 1, pg. 180-186).

Appellant filed a Motion to Sever on August 28, 2017. (A.A. Vol. 2, pg. 187-192). The parties argued the Motion to Sever on October 12, 2017. (A.A. Vol. 2, pg. 203-230). The District Court denied the Motion to Sever without prejudice and instructed the State to submit proposed redactions to each defendant's statement as a means to cure the *Bruton* issues alleged in the Motion. (A.A. Vol. 2, pg. 203-230). The District Court further told Defense Counsel:

> But I want to be very that the – the denial is made, I think appropriately so, without prejudice. Mean, Mr. Mueller, that if you see what they propose and you still want to come back and say, Judge, I can't adequately defend my client if they go together to trial, then I think that you get another bite of the apple because I'm telling you I think this is really close and really tight. And I am very mindful of *Chartier*, but I think right now we have a well-established, accepted way to attempt to alleviate the bias or the potential for fundamental unfairness. (A.A. Vol. 2, pg. 221).

On November 2, 2017, Mr. Hudson renewed his motion to sever the defendants. (A.A. Vol. 2, pg. 241). Defense Counsel for Mr. Hudson argued that he

had made "a good faith effort to go through the transcripts and sort them out." *Id*. Moreover, Defense Counsel for Mr. Hudson argued:

> I've had the advantage of being an aggressive prosecutor, as well as an aggressive defense attorney, and I know what I would do with my colleague's proposed redactions. They would beat Mr. Hudson left and right. It is a fatally flawed idea that those transcripts can be redacted. (A.A. Vol. 2, pg. 241).

Additionally, also during the hearing on November 2, 2017, Counsel for Mr. Hudson unequivocally stated, "I oppose the idea that we can redact those transcripts successfully." (A.A. Vol. 2, pg. 242). He further stated, "I'm ready to go. All ready – I am prepared and ready to go this time. The transcripts themselves are fatally flawed. The idea that this case can be tried together fairly is not possible." (A.A. Vol. 2, pg. 244). On the contrary, Counsel for codefendant Mr. Turner agreed with redacting the transcripts and submitted their proposed redactions. (A.A. Vol. 2, pg. 242-243). The District Court denied the renewed motion to sever without prejudice. (A.A. Vol. 2, pg. 245).

On November 16, 2017, the parties convened with the District Court on a status check for the redactions. (A.A. Vol. 2, pg. 249-254). Both the State and Counsel for Mr. Turner submitted proposed redactions. Counsel for Mr. Hudson steadfastly maintained that the statements could not be redacted:

> THE COURT: I've reviewed the redactions submitted by the District Attorney's Office and the redactions submitted by the Public Defender's Office. Mr. Mueller felt he – the statement cannot be redacted and therefore did not submit any. (A.A. Vol. 2, pg. 250-251).
>
> ...
>
> MR. MUELLER: And for the record I'm not being flippant, I got in the office early this morning again about 4:00, reread everything again. Mr. Hudson's statement goes to – Mr. Turner's statement goes to 27 pages. There was the first 3 pages where they introduced themselves and they asked how he got his leg injured are about the only pages that don't have something I wouldn't use as a prosecutor, against Mr. Hudson. (A.A. Vol. 2, pg. 251).

The District Court then asked Defense Counsel to give the Court's proposed redactions a fair reading and told Defense Counsel that he could renew the motion to sever if necessary. (A.A. Vol. 2, pg. 252-253).

During a status check on November 30, 2017, the District Court explained its redactions to the parties and gave the parties two weeks to review the redactions. (A.A. Vol. 2, pg. 255-259).

On December 14, 2017, the parties appeared for a status check. Counsel for codefendant Mr. Turner raised no challenge to the District Court's redactions of the statements. (A.A. Vol. 2, pg. 262). Counsel for Mr. Hudson did not agree with the redactions. (A.A. Vol. 2, pg. 263).

The State filed an Amended Information on April 15, 2018, charging Mr. Hudson with Count 1- Conspiracy to Commit Burglary; Count 2- Attempt Burglary while in Possession of a Firearm or Deadly Weapon; Count 3- Attempt

Murder with Use of a Deadly Weapon; Count 4- Attempt Murder with Use of a Deadly Weapon; and Count 5- Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm. (A.A. Vol. 2, pg. 275-279).

Mr. Hudson proceeded to trial from April 16, 2018, through April 27, 2018. On April 27, 2018, the jury returned guilty verdict as follows: Count 1- Guilty of Conspiracy to Commit Burglary; Count 2- Guilty of Attempt Burglary While in Possession of a Firearm or Deadly Weapon; Count 3- Attempt Murder with Deadly Weapon; Count 4- Guilty of Attempt Murder with Deadly Weapon; and Count 5- Guilty of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm. (A.A. Vol. 9, pg. 1588-1589).

On June 20, 2018, Mr. Hudson filed a sentencing memorandum and exhibits in support of the sentencing memorandum. (A.A. Vol. 10, pg. 1590-1593). On June 21, 2018, the District Court sentenced Mr. Hudson as follows: Count 1- three hundred sixty four (364) days; Count 2- sixteen (16) to seventy-two (72) months, concurrent with Count 1; Count 3- forty-eight (48) to one hundred twenty (120) months, plus a consecutive thirty-six (36) to one hundred twenty (120) months for use of a deadly weapon, concurrent with Count 2; Count 4- forty-eight (48) to one hundred twenty (120) months, plus a consecutive thirty-six (36) to one hundred twenty (120) months, consecutive to Count 3; and Count 5- thirty-six (36) to one hundred twenty (120) months, concurrent with Count 2. The District Court

rendered the aggregate total sentence as one hundred sixty eight (168) months to four hundred eighty (480) months, with 1,022 days of credit for time served. (A.A. Vol. 10, pg. 1652-1655). The District Court filed the Judgment of Conviction on July 2, 2018. (A.A. Vol. 10, pg. 1659-1661).

POST-CONVICTION PROCEEDINGS

Counsel for Mr. Hudson did not file a Notice of Appeal. On October 25, 2018, Mr. Hudson filed a Petition for Writ of Habeas Corpus. (A.A. Vol. 10, pg. 1662-1669). On December 18, 2019, Mr. Hudson filed a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). (A.A. Vol. 10, pg. 1672-1741). In the Supplemental Brief, Mr. Hudson alleged the following claims:

I. Ineffective Assistance of Counsel

II. Mr. Hudson was wrongfully deprived of his right under established law to a direct appeal and hereby requests relief pursuant to *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994) and NRAP 4(c).

III. Mr. Hudson received ineffective assistance of trial counsel for failure to object to the District Court's presentation of Instruction Number 38 regarding flight to the jury.

IV. Mr. Hudson received ineffective assistance of trial counsel for failure to object to the District Court's giving of Instruction Numbers 40 and 50 in violation of the Fifth and Fourteenth Amendment to the United States Constitution.

(A.A. Vol. 10, pg. 1680-1692).

The District Court found that Mr. Hudson had been deprived of his right to file a direct appeal, and the District Court denied all of Mr. Hudson's other claims. (A.A. Vol. 10, pg. 1787). Mr. Hudson filed a timely Notice of Appeal on December 17, 2020. (A.A. Vol. 10, pg. 1802-1803).

VIII. STATEMENT OF FACTS

Mr. Eric Clarkson was friends with codefendant Steven Turner. (A.A. Vol. 4, pg. 712-713). Mr. Clarkson did not know Mr. Hudson. (A.A. Vol. 4, pg. 734-735). Mr. Clarkson resided with his best friend Mr. Willoughby Potter de Grimaldi at a house in Las Vegas, Clark County, Nevada. (A.A. Vol. 4, pg. 716, 747).

Prior to the subject incident, Mr. Turner visited Mr. Clarkson's house on a biweekly or weekly basis. (A.A. Vol. 4, pg. 713, 735; A.A. Vol. 5, pg. 847). The pair smoked marijuana together. (A.A. Vol. 4, pg. 713). Before the subject incident, Mr. Clarkson and Mr. Turner had stopped communicating. (A.A. Vol. 4, pg. 713; A.A. Vol. 5, pg. 848).

On September 4, 2015, around 3:30 a.m., Mr. Clarkson played on his phone, watched television, and readied himself for bed. (A.A. Vol. 4, pg. 716). Once Mr. Clarkson got into bed, he heard his metal outdoor patio furniture being moved outside his window. (A.A. Vol. 4, pg. 718-719). This caused Mr. Clarkson to look out the window where he saw an African American man outside on the patio (A.A.

Vol. 4, pg. 720). Then, Mr. Clarkson grabbed his phone, let his roommate know what he saw, and contacted 911 to report that someone was in his backyard. (A.A. Vol. 4, pg. 720). Moments later, Mr. Clarkson and Mr. Grimaldi heard someone banging on the front door, and Mr. Grimaldi saw a figure outside. (A.A. Vol. 4, pg. 723, 752-753).

When Mr. Grimaldi went to the back window, he saw a shirtless African American man with a billed cap on his head, racking a shotgun. (A.A. Vol. 4, pg. 750, 774). When Mr. Grimaldi looked out the window, he saw a tall African American man with an afro wearing basketball shorts. (A.A. Vol. 4, pg. 752-753). Mr. Grimaldi then saw a third person out of the corner of his eye, describing the man as African American with a spiky afro. (A.A. Vol. 4, pg. 756-757). Mr. Grimaldi did not recognize any of the individuals. (A.A. Vol. 4, pg. 759).

When two police officers arrived (Officer Malik Grego-Smith and Officer Jeremy Robertson), Mr. Clarkson let them in the front door. (A.A. Vol. 4, pg. 726). Mr. Clarkson and Mr. Grimaldi explained to the officers how to open the back door and then Officer Robertson opened the back door. (A.A. Vol. 4, pg. 726-727). Mr. Clarkson and Mr. Grimaldi recalled that immediately after the back door was opened there were gunshots. (A.A. Vol. 4, pg. 729-730, 762-763). Mr. Grimaldi had previously told detectives he believed that an officer fired the first gunshot, but testified at trial the first shots came from outside on the patio. (A.A. Vol. 4, pg.

779, 781-782). Mr. Clarkson and Mr. Grimaldi both saw different types of bullets enter their home. (A.A. Vol. 4, pg. 730, 762-763). After the shots were fired, Mr. Clarkson and Mr. Grimaldi hid in a bedroom. (A.A. Vol. 4, pg. 731).

Officer Malik Grego-Smith, along with Officer Jeremy Robertson, responded to the dispatch call regarding a prowler. (A.A. Vol. 6, pg. 1010, 1013). After asking dispatch to inform the homeowner to open the front door, Officer Grego-Smith and Officer Robertson entered the residence. (A.A. Vol. 6, pg. 1018). Once in the residence, the officers developed a plan to "clear the backyard" to see if anyone was out there. (A.A. Vol. 6, pg. 1020). Officer Robertson was to open the back door, and as he opened the door, Officer Grego-Smith would go through with his weapon drawn, and Officer Robertson would follow. (A.A. Vol. 6, pg. 1021). Officer Grego- Smith drew his weapon, and as he stepped outside, two shots were fired from outside on the patio, one striking Officer Robertson. (A.A. Vol. 6, pg. 1021,1024). Officer Grego-Smith returned fire towards the patio, firing twelve shots. (A.A. Vol. 6, pg. 1024; A.A. Vol. 8, pg. 1241-1240).

Officer Grego-Smith testified he turned his flashlight on right when he started shooting and saw "a light-skinned black male with no shirt and purple basketball shorts" on the patio. (A.A. Vol. 6, pg. 1026). The man was approximately three to four feet from him. (A.A. Vol. 6, pg. 1038). Officer Grego-Smith recalled yelling, "Don't move, keep your hands up, don't move or I'll

fucking shoot you." (A.A. Vol. 6, pg. 1028). Officer Grego-Smith immediately radioed dispatch to inform them that shots had been fired, and Officer Robertson had been shot. (A.A. Vol. 6, pg. 1028).

Officer Jeremy Robertson recalled he had just opened the back door to the patio of the residence before he was shot and fell to the ground. (A.A. Vol. 6, pg. 1068). Officer Robertson was struck in the upper thigh, fracturing his femur (A.A. Vol. 6, pg. 1070, 1076). [1]

Sergeant Joshua Bitsko, a K-9 officer, responded to the Oveja residence. (A.A. Vol. 5, pg. 910, 918). Upon arriving at the residence, Sergeant Bitsko learned from the air unit that the suspect was laying in the backyard with a rifle next to him. (A.A. Vol. 5, pg. 923). A Beretta handgun was also located nearby. (A.A. Vol. 5, pg. 864). Sergeant Bitsko deployed his police dog into the backyard who located and bit the suspect. (A.A. Vol. 5, pg. 923-924). The suspect, Clemon Hudson, complied with all commands while being taken into custody. (A.A. Vol. 5, pg. 815, 926-928).

Police secured a perimeter around the crime scene approximately a mile and a half by a mile wide in order to search for additional suspects. (A.A. Vol. 5, pg. 936). Detective Jeremy Vance spent approximately three and a half hours driving

[1] Officer Robertson was struck by fire from the SKS file, which the State alleged at trial was fired by Mr. Turner.

around the perimeter looking for the suspect described by Officer Grego-Smith. (A.A. Vol. 5, pg. 936).

After being notified of a call concerning a suspicious person in a backyard, Detective Vance came upon Mr. Turner and began to question him. (A.A. Vol. 5, pg. 937-941). Detective Vance noticed Mr. Turner had a leg injury and blood on his pants. (A.A. Vol. 5, pg. 941). When questioned about the injury, Mr. Turner indicated his leg had been caught on a fence at his friend's house. (A.A. Vol. 5, pg. 941). Detective Vance believed a gunshot wound caused the injury. (A.A. Vol. 5, pg. 941-942).[2]

Ms. Stephanie Fletcher, a senior crime scene analyst with the Las Vegas Metropolitan Police Department responded to the Oveja Circle residence. (A.A. Vol. 6, pg. 954). Analysts recovered the following firearms from the scene: a SKS rifle, a Mossberg 12-gauge Shotgun, and a Beretta .25 caliber handgun. (A.A. Vol. 5, pg. 861, 864).

Ms. Gayle Johnson, a forensic scientist with the Las Vegas Metropolitan Police Department, conducted latent print testing on several items. (A.A. Vol. 7, pg. 1101-1109). With regard to an AK-47 firearm,[3] the analyst was unable to

---

[2] After being taken into custody, Mr. Turner was transported to the hospital regarding his leg injury. At the hospital, the physician treated Mr. Turner for a gunshot wound with apparent stippling. (A.A. Vol. 9, pg. 1395-1396).

[3] This particular firearm is also referred to as an "SKS rifle" by the parties and is referred to as such in the Amendment Indictment.

develop any suitable prints for testing. (A.A. Vol. 7, pg. 1104). Two latent prints were recovered from a shotgun, both belonging to Mr. Hudson. (A.A. Vol. 7, pg. 1107-1108). DNA testing was conducted on the firearms. (A.A. Vol. 7, pg. 1113-1132). No conclusions could be made about the DNA located on the firearms. (A.A. Vol. 7, pg. 1119, 1123-1125).

In September of 2015, Mr. Craig Jex was employed as a Detective with the Las Vegas Metropolitan Police Department. (A.A. Vol. 7, pg. 1142). Mr. Jex documented Officer Robertson's injuries at the hospital. (A.A. Vol. 7, pg. 1144-1145). While at the hospital, Mr. Jex came into contact with Mr. Hudson and interviewed him twice. (A.A. Vol. 7, pg. 1145).

Mr. Jex testified Mr. Hudson relayed to him that he went to the house to obtain marijuana that night and no one was supposed to be home. (A.A. Vol. 7, pg. 1149, 1170). Mr. Hudson told him there was only one other person involved, and the plan was to break in the back window of the residence. (A.A. Vol. 7, pg. 1150-1151, 1158). When Mr. Jex questioned Mr. Hudson as to whether he brought and carried the shotgun, he indicated he did. (A.A. Vol. 7, pg. 1150-1151, 1160-1162). Mr. Hudson informed Mr. Jex that there was an SKS rifle and a shotgun in the backyard. (A.A. Vol. 7, pg. 1160). Mr. Hudson also told Mr. Jex that he had also brought a small firearm in his shoe. (A.A. Vol. 7, pg. 1162-1164).

During the interview, Mr. Hudson told Mr. Jex he was not sure if he fired the shotgun, but if he did, he fired once. (A.A. Vol. 7, pg. 1161, 1172). Mr. Hudson indicated he shot towards the bottom of the window. (A.A. Vol. 7, pg. 1162). It was Mr. Hudson's belief that the officers started shooting first. (A.A. Vol. 7, pg. 1174).

Detective Eduardo Pazos conducted an interview with Mr. Turner. (A.A. Vol. 7, pg. 1180-1181). Mr. Turner told police that "someone came to pick him up" around midnight and it was just the two of them in the car. (A.A. Vol. 7, pg. 1185, 1188). When Mr. Turner got in the car, he saw two guns in the back. (A.A. Vol. 7, pg. 1187-1188). Mr. Turner indicated the SKS rifle belonged to his uncle. (A.A. Vol. 7, pg. 1186, 1189).

Mr. Turner explained to Detective Pazos that when he entered the backyard of the residence, shots were fired. (A.A. Vol. 7, pg. 1189). After the shots were fired, he hopped over the wall to leave. (A.A. Vol. 7, pg. 1189). Mr. Turner told Detective Pazos that after he hopped over the wall, he sat on a couch he found in the neighborhood for a while, and then began walking to a friend's house. (A.A. Vol. 7, pg. 1189). As he was walking to a friend's house, he encountered police. (A.A. Vol. 7, pg. 1189).

Mr. Turner told Detective Pazos he had been in the subject house before and knew who lived there. (A.A. Vol. 7, pg. 1192). Mr. Turner admitted he was there

to steal weed, and if there was any money in the house, he would have taken that as well (A.A. Vol. 7, pg. 1192-1194). Mr. Turner denied having a gun in his hand during the incident or firing a weapon. (A.A. Vol. 7, pg. 1200-1201). Mr. Turner indicated that when the shooting began, he ran away. (A.A. Vol. 7, pg. 1196-1197, 1200).

IX. SUMMARY OF THE ARGUMENT

Mr. Hudson appeals several claims from both his Judgment of Conviction and from the District Court's denial of his Petition for Writ of Habeas Corpus. Mr. Hudson's appeal from the Judgment of Conviction involves claims of misjoinder, prosecutorial misconduct, improper jury instructions, impermissible influence on the jury, and cumulative error. The claims from the denial of his Petition for Writ of Habeas Corpus involve claims of ineffective assistance of counsel.

X. ARGUMENT

A. DIRECT APPEAL CLAIMS

1. The District Court Abused its Discretion by not Granting Mr. Hudson's Motion to Sever Defendants.

Standard of Review

This Court reviews a district court's determination of whether to sever a joint codefendant trial for an abuse of discretion. *Rimer v. State*, 131 Nev. 307,

326, 351 P.3d 697 (2015) (citing *Chartier v. State*, 124 Nev. 760, 763-64, 191 P.3d 1182 (2008)).

The District Court should have severed the joint trial in this case.

NRS 173.135 provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Although joinder provides the benefit of judicial economy, joinder cannot always be permissible. Under *Bruton v. United States*, the admission of a codefendant's confession that implicated the defendant at a joint trial constitutes prejudicial error, even when a trial court gives clear, concise, and understandable limiting instructions that the confession only pertains to the codefendant who made the statement. *Bruton v. United States*, 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The *Bruton* Court additionally explained that where a trial court admits a codefendant's confession in a joint trial and the codefendant does not testify, the trial court denies the defendant his Sixth Amendment constitutional right to confront the witness against him. *Id*. at 127. The United States Supreme Court further provided that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for [a defendant's] constitutional right of

cross-examination. The effect is the same as if there had been no instruction at all." *Id*.

Nevada has expressly interpreted *Bruton*. In *Burnside v. State*, the Nevada Supreme Court expressed the following:

> *Bruton* holds that the admission in a joint trial of a nontestifying codefendant's incriminating statement that expressly refers to the defendant violates the Sixth Amendment Confrontation Clause, even if the jury is instructed to consider the confession only against the nontestifying codefendant. *Burnside v. State*, 131 Nev. 371, 393, 352 P.3d 627 (2015), citing *Bruton*, 391 U.S. at 124.

The *Burnside* Court further explained that *Bruton* must be analyzed "through the lens of *Crawford*" because the Confrontation Clause only applies to testimonial out of court statements. *Burnside*, 131 Nev. at 393. In *Crawford*, the United States Supreme Court expressly held that the term "testimonial" applies to police interrogations. *Crawford v. Washington*, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Moreover, a defendant seeking severance must show that the codefendants have conflicting and irreconcilable defenses and that there is danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are not guilty. *Marshall v. State*, 118 Nev. 642, 56 P.3d 376 (2002). The party seeking severance bears the burden of proof to show prejudice. *Rimer v. State*, 131 Nev. 307, 351 P.3d , 351 P.3d 697, 711 (2015), *see also Zafiro v. United States*, 506 U.S. 534,

539 (1993). Showing prejudice is the crucial factor of the analysis. See, NRS 174.165.

In *Chartier v. State*, this Court held that several issues can cause prejudice including antagonist defenses, diminished ability to present a defense, and cumulative effect of the joinder. 124 Nev. at 766-767.

NRS 174.165 provides severance as a remedy to a prejudicial joinder:

1. If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

2. In ruling on a motion by a defendant for severance the court may order the district attorney to deliver to the court for inspection in chambers any statements or confessions made by the defendants which the State intends to introduce in evidence at the trial.

The ultimate issue for a court is "whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defenses." *Jones v. State*, 111 Nev. 848, 854, 899 P.2d 544 (1995).

In order to determine the appropriateness of severance, the defendant must show that the prejudice outweighs the public interest in conducting joint trials. *United States v. Zanin*, 831 F.2d 740 (7th Cir. 1987). "[J]oint trials, especially those involving numerous defendants, on multiple charges, carry substantial risks of manifest unfairness." *United States v. Martino*, 648 F.2d 367, 385 (5th Cir. 1981).

To establish prejudice from an improper joinder, the appellant must demonstrate that the joinder had "a substantial and injurious effect on the verdict." *Marshall*, 118 Nev. at 646.

This Court has further determined that "In redacting a nontestifying codefendant's statement to satisfy *Bruton*, ordinarily the use of a term like 'the other guy' will be sufficient." *Sitton v. State*, 439 P.3d 393 (2019) (unpublished disposition) (citing *Vazquez v. Wilson*, 550 F.3d 270, 282 (3d Cir. 2008)). The *Sitton* Court further explained that there are exceptions when the redactions cannot eliminate the doubt about the individual described in the statement. *Id.* "The central question is whether the jury likely obeyed the court's instruction to disregard the statement in assessing the defendant's guilt." *Ducksworth v. State*, 114 Nev. 951, 955, 966 P.2d 165, 167 (1998).

On October 1, 2020, this Court analyzed the severance issue on behalf of Mr. Hudson's codefendant, Steven Turner. *Turner v. State*, 473 P.3d 438, 136 Nev. Adv. Op. 62 (2020). Although Mr. Turner unsuccessfully raised the severance issue on appeal, Mr. Hudson's claim differs from Mr. Turner's.

In denying Mr. Turner's claim, this Court relied upon the Tenth Circuit's decision in *United States v. Sarracino*, 340 F.3d 1148 (10th Cir. 2003). In *Sarracino*, the moving defendant agreed to cooperate with the trial judge and all other counsel to redact the defendants' pretrial statements for admission at trial,

and he also made clear on the record that he did not waive the objection. 340 F.3d at 1159; *see also Turner*, 473 P.3d at 444. The *Sarracino* Court determined that the defendant's "position was clear and that the severance issue was not waived at that point." *Id.* In *Turner*, this Court also relied upon *People v. Archer*, 99 Cal. Rptr. 2d 230 (2000). In *Archer*, the court found that the defense attorney's objection and unsuccessful motion to sever "sufficiently preserved" the argument for appeal. *Turner*, 473 P.3d at 445.

This Court extracted the following rule in deciding *Turner*:

> [W]here the defendant moves to sever trial on *Bruton* grounds but the district court determines the statements can be sufficiently redacted, the defendant does not necessarily waive the *Bruton* challenge by thereafter participating in the efforts to redact the statements. Nevertheless, to clearly preserve a *Bruton* challenge for appellate review in this context, a defendant must formally object, on the record, after the parties have agreed upon redaction and prior to the district court's admission of a codefendant's statement. *Turner*, 473 P.3d at 445.

Moreover, despite issuing the rule, this Court found that Mr. Turner waived his *Bruton* argument because he did not clarify on the record that he wished to preserve the argument for appeal after voluntarily participating in the redaction process. *Id.* at 446. This is the key difference between Mr. Turner's claim and Mr. Hudson's claim for severance.

Mr. Hudson filed the Motion to Sever on August 28, 2017. (A.A. Vol. 2, pg. 187). At every single subsequent status check where the parties discussed

redaction, Mr. Hudson renewed his motion and steadfastly opposed redaction. Defense Counsel for Mr. Hudson went so far as to say on the record, "It is a fatally flawed idea that those transcripts can be redacted." (A.A. Vol. 2, pg. 241). Defense Counsel for Mr. Hudson never veered from that position. Despite the District Court holding repeated status checks to revisit the redaction issue, and despite codefendant Turner's counsel participating with the State in the redactions, Defense Counsel for Mr. Hudson never relinquished the position and vehemently stood fast against redaction. Defense Counsel for Mr. Hudson consistently maintained the objection to redaction and renewed the motion for severance.

At trial, former detective Craig Jex testified regarding Mr. Hudson's statement. Prior to getting into the details of his statement, Detective Jex identified Mr. Hudson in court, testified that he had contacted codefendant Mr. Turner at the hospital, and identified Mr. Turner in court. (A.A. Vol. 7, pg. 1145-1146). In fact, the State showed Detective Jex a "closer-up picture" of Mr. Turner at trial while he made the identification. (A.A. Vol. 7, pg. 1146).

Immediately after having Detective Jex identify Mr. Turner, the District Court gave the jury the following limiting instruction:

> THE COURT: Ladies and gentlemen, you are about to hear testimony regarding statements made by Clemon – shucks – Clemon Hudson to detectives. These statements are to be considered by you as evidence against Clemon Hudson only. (A.A. Vol. 7, pg. 1146-1147).

Despite the entire pretrial charade of redacting Mr. Hudson's and Mr. Turner's statements to detectives to sanitize them for the jury, the prosecutor created a prejudicial situation at trial. It would have been impossible for the jury to "disregard the statement in assessing" Mr. Hudson's guilt. *See Ducksworth*, 114 Nev. at 955, 966 P.2d 165.

First, the prosecutor had Detective Jex identify Steven Turner as he saw him in connection with the subject incident. Then, the District Court gave the limiting instruction. Right after the District Court gave the limiting instruction, the prosecutor asked Detective Jex: "So, Detective, it was part of your responsibility that night interviewing Mr. Hudson, who you've just identified?" (A.A. Vol. 7, pg. 1147). Detective Jex answered, "Yes." *Id.* Next, the prosecutor tells Detective Jex that they are only talking about the portion of Mr. Hudson's statements that were legally admissible. (A.A. Vol. 7, pg. 1147). The prosecutor then proceeded to walk Detective Jex through Mr. Hudson's interrogations to explain the facts of the instant case and to implicate both Mr. Hudson and Mr. Turner. Given the sequence of events with both identifications and the subsequent limiting instruction and pointed questions, it would have been impossible for the jury not to attribute the statement to both Mr. Hudson and Mr. Turner. Although the prejudice elicited from Mr. Hudson's statement went against Mr. Turner, the fact remains that the District Court should have severed the cases.

Next, the State elicited evidence of Mr. Turner's statement through Detective Eduardo Pazos. (A.A. Vol. 7, pg. 1180). The District Court provided the following limiting instruction:

> THE COURT: Ladies and gentlemen, you are about to hear testimony regarding statements made by Steven Turner to detectives. These statements are to be considered by you as evidence against Steven Turner only. (A.A. Vol. 7, pg. 1180).

Detective Pazos testified that he conducted two interviews with Mr. Turner. (A.A. Vol. 7, pg. 1181). The prosecutor also told Detective Pazos that they would only discuss legally admissible parts of the statement. (A.A. Vol. 7, pg. 1187).

The prosecutor elicited the following statements from Detective Pazos that Mr. Turner said regarding Mr. Hudson:

1. "The wrong people pulled up and influenced me to go on a ride with them." (A.A. Vol. 7, pg. 1184).
2. "...they were actually at the house to do a lick?" (A.A. Vol. 7, pg. 1185).
3. "...someone came to pick him up." (A.A. Vol. 7, pg. 1185).
4. "...he saw a shotty or shotgun in the back of the vehicle." (A.A. Vol. 7, pg. 1187).
5. No mention of a third person. (A.A. Vol. 7, pg. 1187).
6. "...the person he was with hopped over the wall first." (A.A. Vol. 7, pg. 1189).
7. "No, there was nobody in the car with us." (A.A. Vol. 7, pg. 1190).

There would have been no way to redact Mr. Turner's statement enough not to implicate Mr. Hudson. The prosecutor elicited the facts that Mr. Turner saw the shotgun and the other person had the shotgun. The statement could not have been implicating anyone else, given the fact that other evidence showed Mr. Hudson's

fingerprints being found on the shotgun. Additionally, the way that the prosecutor elicited the statements at trial showed that the detectives identified both Mr. Hudson and Mr. Turner, then only spoke about the sanitized portions of the conversations.

In closing arguments, the State relied on the statements to draw the conclusion that Mr. Hudson brought the shotgun and Mr. Turner brought the SKS rifle. (A.A. Vol. 9, pg. 1444-1445). The State further argued that both Mr. Turner and Mr. Hudson denied a third person being involved and did not "put the blame on somebody else." (A.A. Vol. 9, pg. 1452). During the majority of the closing, the prosecutor hammered the theme that "Two people, two cell phones in that car you heard described earlier this week, two guns fired, two people. Who are they? Mr. Turner and Mr. Hudson." (A.A. Vol. 9, pg. 1453, 1504). The State knew it was eliciting the theme when Detectives Jex and Pazos testified regarding Mr. Turner's and Mr. Hudson's statements regarding two individuals. Nothing about this was accidental. The State got around the *Bruton* violation by eliciting the perfect information from the sanitized interrogations to implicate and inculpate both defendants.

Additionally, Mr. Turner's counsel relied upon Mr. Hudson's statement at trial. Counsel for Mr. Turner argued that Mr. Hudson called Mr. Turner. (A.A. Vol. 9, pg. 1456-1457). This evidence came from Mr. Turner's statement implicating

Mr. Hudson. (A.A. Vol. 9, pg. 1454). Even though this portion of the statement should have been sanitized and redacted, the District Court allowed argument about it. (A.A. Vol. 9, pg. 1457).

Mr. Hudson did not have the opportunity to cross-examine Mr. Turner about his statement. Mr. Hudson did not have the opportunity to cross-examine Mr. Turner about the shotgun. The whole jury knew Mr. Turner's references to the other person and the shotgun meant Mr. Hudson, but Mr. Hudson never could challenge Mr. Turner as a witness against him. The District Court should have recognized this error and severed the defendants. The District Court did not create a sufficient work-around or cure the prejudice by redacting the statements. Mr. Hudson's prior counsel was right. No amount of redacting could cure the prejudice.

Accordingly, Mr. Hudson respectfully requests that this Court reverse his convictions and grant him a new trial.

2. The Prosecutor Committed Misconduct at Trial such that the Conviction Must be Reversed.

Standard of Review

To determine claims of prosecutorial misconduct, this Court uses a harmless-error standard of review. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465 (2008). If the error is "of a constitutional dimension," this Court uses the "*Chapman v. California* standard and will reverse unless the State demonstrates,

beyond a reasonable doubt, that the error did not contribute to the verdict." *Valdez*, 124 Nev. at 1189, citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). A constitutional dimension means that the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Valdez*, 124 Nev. at 1189, citing *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

If the error is not "of constitutional dimension," this Court "will reverse only if the error substantially affects the jury's verdict." *Valdez*, 124 Nev. at 1189, citing *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128 (2001).

This Court only applies harmless-error review when a defendant preserves an error for appeal. *Valdez*, 124 Nev. at 1189. If the defendant does not preserve an error, the Court uses the plain-error standard of review. *Id.*

The Prosecutorial Misconduct in this Case Warrants Reversal

In *Valdez*, 124 Nev. at 1188, 196 P.3d 465, this Court provided the analysis to be applied for determining claims of prosecutorial misconduct. The *Valdez* Court provided:

> First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal. *Id.* at 1188, 196 P.3d 465.

Here, there were many instances of prosecutorial misconduct that warrant reversal.

A. Telling the jurors to Feel "Good" About Catching Mr. Hudson

The State argued the following during rebuttal closing:

> Now, if you heard this story at a bar, sitting and having a drink with somebody, and someone came up to you and said, Hey, I heard about this officer-involved shooting today. There's -- two officers respond to a residence, and those two officers opened the door. High-powered rifle round comes flying through the door, hits officer in the leg. He goes down. Second round comes through. It's from a shotgun. Cops return 12 rounds. Guys split. One of them's caught in the backyard. The other one's caught with a shrapnel in his leg about two blocks away.
>
> If I were to tell you that story over a glass of whiskey, you would look at me and go, Good. I'm glad you caught the two guys who shot the cops. That's what this is about. (A.A. Vol. 9, pg. 1499).

This Court has previously classified prosecutorial comments as improper when they "appeal to juror sympathies by diverting their attention from evidence relevant to the elements necessary to sustain a conviction." *Pantano v. State*, 122 Nev. 782, 783, 138 P.3d 477 (2006). In *Turner*, Mr. Hudson's codefendant's case, this Court found this exact statement to be improper. *Turner*, 473 P.3d at 449.

Although Defense Counsel for Mr. Hudson did not object to the prosecutor's statement, Mr. Hudson submits that the Court should find that the improper comment warrants reversal under the plain-error standard because it affected Mr. Hudson's substantial rights. Mr. Hudson had the Sixth Amendment right to a fair and impartial jury, and this comment inflamed the jurors' sentiments to put away the bad guys who tried to kill the cop. With a courtroom full of police officers, what other sentiment could have been going through the jurors' minds?

This comment completely diverted the jurors attention away from the elements of the offense toward the sentiment of pride in telling the story over whiskey about a wannabe cop-killer in prison. It is the opposite of fair and impartial.

Accordingly, Mr. Hudson respectfully requests that the Court reverse his convictions and grant him a new trial.

B. Injecting Personal Opinions into the Argument about Issues not in Evidence.

It is well established that a prosecutor must be "unprejudiced, impartial, and nonpartisan, and he should not inject his personal opinion or beliefs into the proceedings or attempt to inflame the jury's fears or passions in pursuit of a conviction." *Valdez*, 124 Nev. at 1192, 196 P.3d 465. Moreover, "the prosecutor has a special obligation to avoid improper suggestions, insinuations, and especially assertions of personal knowledge." *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935)) (internal quotation marks omitted).

The State committed misconduct by arguing to the jury: "Now, they could have been charged with four counts of attempt murder based upon the transferred intent instruction. They could have been – we could have charged them with four counts." (A.A. Vol. 9, pg. 1509). Defense Counsel objected to this comment, and the District Court sustained the objection.

Although the District Court the sustained objection, the State found it necessary to continue on with the narrative and tell the jury why it only charged two counts of attempt murder. In continuing the narrative, the State injected personal opinion regarding Mr. Hudson's guilt:

> We know they tried to kill two shapes in the door. Whether or not it's dark inside and they don't know who they're shooting at doesn't matter. **I mean, that's the truth. That's the reality of it.** Whether they thought it was Eric and Willow who finally had the, you know, whatever it's called to come to the door, or whether they know those two bodies are these two, they attempted to kill two human beings. **That's all that matters.** (A.A. Vol. 9, pg. 1510).

Here, the State could not simply move on after the sustained objection. The State first argued issues not in evidence by claiming that it could have charged Mr. Hudson with four counts of attempt murder. When the District Court sustained the objection, the State went on to inject personal opinions regarding the truth of the evidence and what really "matters." (A.A. Vol. 9, pg. 1510). As this Court provided in *Turner*, these comments were improper.

Defense Counsel raised the objection, so this Court should review this issue under the harmless-error standard and find that the conviction should be reversed. The error was not harmless because it showed the jury that the State believed Mr. Hudson to be even more criminally liable than what the jury could see. It also showed the jury that the prosecutor, himself, believed Mr. Hudson to be a bad man. As discussed in *Valdez*, improper prosecutorial comment inflames the jury's

fears and passions. *Valdez*, 124 Nev. at 1192. The improper comments also reflect insinuations of the prosecutor's insider knowledge or personal beliefs. *Roberts*, 618 F.2d at 533. Accordingly, this Court should reverse Mr. Hudson's conviction and grant him a new trial.

3. The District Court Erred by Giving Improper Jury Instructions.

Standards of Review

District Courts have broad discretion to decide jury instructions, and this Court reviews those decision for an abuse of discretion. *Mathews v. State*, 134 Nev. 512, 517, 424 P.3d 634 (2018). Moreover, this Court reviews "appellate claims concerning jury instructions using a harmless error standard of review." *Mathews*, 134 Nev. at 517, citing *Barnier v. State*, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003).

When a defendant fails to object to a jury instruction on the record, this Court must review the error under the plain-error standard. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93 (2003). To conduct plain-error review, this Court "must examine whether there was "error," whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights." *Id.* The appellant has the burden to show "actual prejudice or a miscarriage of justice." *Id.*

Jury Instruction Errors

The District Court committed several errors pertaining to jury instructions that Mr. Hudson will outline in the following sections.

a. The District Court Improperly Gave Jury Instruction 29.

Jury Instruction No. 29 provided:

> During an attack upon a group, a defendant's intent to kill need not be directed at any one individual. It is enough if the intent to kill is directed at the group. The State is not required to prove that a Defendant intended to kill a specific person in the group.

The District Court gave Jury Instruction No. 29 over defense objection. (A.A. Vol. 9, pg. 1414). This instruction comes from *Ewell v. State,* 105 Nev. 897, 899, 785 P.2d 1028 (1989) where police officers conducted a "reverse sting operation" by offering to sell narcotics near a housing project. The *Ewell* defendants drove by the operation, slowed, and fired shots in the direction of the officers. *Id.*

At trial in this case, the State argued that Instruction No. 29 applied to this case because Mr. Hudson and Mr. Turner allegedly shot at a "group." (A.A. Vol. 9, pg. 1414). According to the State, "more than one person is a group." *Id.* The State further argued that the homeowners constituted part of the group. *Id.* The District Court allowed the instruction based on the State's arguments. *Id.*

The District Court erred because the instant case is not analogous to *Ewell*. *Ewell* involved a drive-by shooting directly at the group. *Ewell,* 105 Nev. at 899.

Here, the State alleged that Mr. Hudson and Mr. Turner were in the backyard of the residence to burglarize the house for marijuana. The facts of this case are not the same as in *Ewell*. Therefore, the District Court erred by giving this instruction to the jury, and this Court should reverse Mr. Hudson's conviction.

b. The District Court Improperly Gave Jury Instruction 38.

Defense Counsel did not object to this instruction, and therefore, this Court must review the error associated with Instruction 38 under the plain-error standard.

Jury Instruction No. 38:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation (Jury Instruction No. 38).

In the instant case, a review of the record demonstrates the jury should not have been instructed on flight.

"[A] district court may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest." See *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699–700 (2005). While this Court reviews the district court's decision to issue a jury instruction for an abuse of discretion, "[b]ecause of the

possibility of undue influence by [a flight] instruction, this court carefully scrutinizes the record to determine if the evidence actually warranted the instruction." *See Weber v. State*, 121 Nev. 554, 582, 119 P.3d 107, 126 (2005).

In *Guy v. State*, 108 Nev. 770, 839 P.2d 578 (1992), the Nevada Supreme Court noted that district courts should not use a flight instruction where there is not overwhelming evidence that the flight was related to an attempt to avoid arrest because of its inherently prejudicial nature.

In *Miles v. State*, 97 Nev. 82, 624 P.2d 494 (1981), the Nevada Supreme Court reasoned that:

> However, a flight instruction may give undue influence to one phase of evidence, therefore the appellate court will carefully scrutinize it to be certain that the record supports the conclusion that appellant's going away was not just a mere leaving but was with a consciousness of guilt and for the purpose of avoiding arrest. 97 Nev. 82, 85. See also *Potter v. State*, 96 Nev. 875, 619 P.2d 1222 (1980) and *Theriault v. State*, 92 Nev. 185, 547 P.2d 668 (1976).

In *Miles*, this Court determined the flight instruction was proper where after one hour passed, Mr. Miles left the area of the crime and was arrested several months later in a neighboring state. *Miles*, 97 Nev. at 85, 624 P.2d 494.

In *Weber*, 121 Nev. at 582, this Court explained that a jury may properly receive an instruction regarding flight so long as it is supported by the evidence, but "signifies something more than a mere going away." *Id.* Additionally in *Weber*, the Court found evidence of flight where the defendant left the Las Vegas

area on a bus, traveling to California, Oregon, Washington, Idaho and Utah. *Id*. The defendant in *Weber* also purchased items for a disguise. *Id*.

In *Guy*, the Nevada Supreme Court found a flight instruction improper where the defendant engaged in a high speed automobile chase two weeks after the offense was alleged to have been committed. 108 Nev. at 773. The *Guy* Court noted that given Guy's criminal proclivities, there were numerous reasons why he would flee from police and assuming consciousness of guilt and fear of arrest arising from the offense for which he was on trial was pure speculation. *Id.* at 777.

No evidence in this case shows that Mr. Hudson fled the scene with consciousness of guilt and to evade arrest. The record does not establish that Mr. Hudson ran away to another jurisdiction, was arrested in a neighboring state or attempted to flee in any way. In fact, Mr. Hudson was located at the scene of the offense and did not move from the time officers told him to stay where he was. (A.A. Vol. 5, pg. 923; A.A. Vol. 6, pg. 1030).

The trial record makes clear that Mr. Hudson complied with all commands and was taken into custody at the scene. (A.A. Vol. 5, pg. 815, 926-929). In contrast, codefendant Turner fled the scene and caused police to secure a perimeter around the crime scene approximately a mile and a half by a mile wide. (A.A. Vol. 5, pg. 936). Despite the contrast, the District Court gave no limiting instruction that the flight instruction only applied to Mr. Turner, and not Mr. Hudson.

Clearly, the evidence adduced at trial did not warrant the giving of a flight instruction with respect to Mr. Hudson. As this Court noted in *Guy*, the giving of a flight instruction is inherently prejudicial. The jury received an instruction that did not pertain to Mr. Hudson, yet the District Court did not clarify that instruction. Therefore, Mr. Hudson respectfully requests that this Court find plain error and reverse his conviction.

c. The District Court improperly gave Jury Instruction No. 40- The Reasonable Doubt Instruction.[4]

Defense Counsel did not object to this instruction, and therefore, this Court must review the error associated with Instruction No. 40 under the plain-error standard.

The District Court's reasonable doubt instruction given improperly minimized the State's burden of proof. The District Court provided the following instruction regarding reasonable doubt:

Jury Instruction No. 40

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

[4] The undersigned has raised this issue to this Court numerous times and acknowledges that the Court has always denied the issue. The issue is presented because the Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

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

(A.A. Vol. 9, pg. 1577).

The instruction given to the jury minimized the State's burden of proof by including terms "It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life" and "Doubt to be reasonable must be actual, not mere possibility or speculation." This instruction inflated the constitutional standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the Constitution requires. See *Victor v. Nebraska*, 511 U.S. 1, 24, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (Ginsburg, J., concurring in part); *Cage v. Louisiana*, 498 U.S.39, 41, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Mr. Hudson recognizes that this Court has found this instruction to be permissible. See e.g. *Elvik v. State*, 114 Nev. 883, 985 P.2d 784 (1998); *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998). Mr. Hudson respectfully requests that this Court find plain-error and reverse his convictions

because this instruction lessened the standard of proof required for a conviction and caused prejudice because the State convicted Mr. Hudson based on a lower standard of proof than the Constitution requires.

d. District Court improperly gave Jury Instruction No. 50- The Equal and Exact Instruction.[5]

Defense Counsel did not object to this instruction, and therefore, this Court must review the error associated with Instruction No. 50 under the plain-error standard.

The District Court's "equal and exact justice" instruction improperly minimized the State's burden of proof. The District Court provided the following instruction to the jury:

> Jury Instruction No. 50
>
> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.
>
> (A.A. Vol. 9, pg. 1587).

[5] The undersigned has raised this issue to this Court numerous times and acknowledges that the Court has always denied the issue. The issue is presented because the Court may reconsider its previous decisions and because this issue must be presented to preserve it for federal review.

By informing the jury that it must provide equal and exact justice between the defendant and the State, this instruction created a reasonable likelihood that the jury would not apply the presumption of innocence in favor of Mr. Hudson and would thereby convict and sentence based on an lesser standard of proof than the Constitution requires. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

Because Instruction No. 50 reduced the constitutionally-required standard, Mr. Hudson respectfully requests that the Court find plain error and reverse his convictions.

4. <u>The District Court Erred by Allowing Uniformed Officers to Pack the Courtroom.</u>

Standard of Review

In *Watters v. State*, this Court held that a presumption-of-innocence error is "of a constitutional dimension" that requires harmless-error review under the standard set forth by *Chapman v. California*. *Watters v. State*, 129 Nev. 886, 892, 313 P.3d 243 (2013). This means that the Court will reverse "if the State fails to prove, beyond a reasonable doubt, that the error did not contribute to the verdict obtained." *Watters*, 129 Nev. at 892, citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The District Court's Error

The District Court should not have allowed the gallery of the courtroom to be packed with uniformed officers.

The Sixth and Fourteenth Amendments guarantee "to the criminally accused a fair trial by a panel of impartial, indifferent, jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Hayes v. Ayers*, 632 F.3d 500, 507 (9th Cir. 2011). The purpose of the Sixth Amendment's guarantee to a public trial is to protect the accused against unjust condemnation and unfairness. *Estes v. Texas*, 381 U.S. 532, 539, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

Nevada law also recognizes the fundamental right to a fair trial. *Watters v. State*, 129 Nev. at 889; U.S. Const. amend. XIV; Nev. Const. art. 1 § 8.

In *Estes*, the United States Supreme Court dealt with the issue of televised trials. Part of the *Estes* Court's rationale explained that "The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public." *Id*. at 549.

In *Holbrook v. Flynn*, the United States Supreme Court recognized the threat that "a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." *Holbrook v. Flynn*, 475 U.S. 560, 570-71, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

In *McKenna v. State*, 114 Nev. 1044, 1048, 968 P.2d 739 (1998), this Court dealt with an issue of SWAT officers in the court room. The *McKenna* Court found that "Even if a slight degree of prejudice existed by deployment of the state troopers, sufficient cause for the level of security was found in the state's need to maintain custody of the defendants during the proceedings." *McKenna*, 114 Nev. at 1050.

Although the issue in this case does not involve television broadcasting, the *Estes* principle applies. Here, the District Court allowed several uniformed officers to pack the courtroom for closing arguments. This case is not at all similar to this Court's prior holding in *McKenna*. The purpose of the uniformed officers packing the courtroom in this case was to show support for the officer who was shot.

Right before closing arguments, Defense Counsel learned about that several police officers were going to attend the arguments. Defense Counsel objected as follows:

> MR. PLUMMER: Your honor, this is the first time I'm hearing about it as far as a courtroom packed with officers. I would also make an objection. I believe this is a huge intimidation factor with a courtroom packed with police officers with guns. (A.A. Vol. 9, pg. 1429).

Despite both Defense Counsel forecasting this as a problem, the District Court did not take any steps to remedy the hostile and coercive impact it would have on a jury. (A.A. Vol. 9, pg. 1429). Packing the courtroom with uniformed police officers acted as a powerful weapon against Mr. Hudson as a large group of

uniformed officers would certainly be intimidating to a jury tasked with determining the fate of the accused who allegedly shot a police officer.

At this point, there is no remedy that can cure the prejudice caused by uniformed police officers packing the courtroom to put pressure on the jury into rendering a conviction. The proceedings were fundamentally unfair and caused partiality against Mr. Hudson. Therefore, Mr. Hudson respectfully requests that this Court reverse the convictions and order a new trial.

5. <u>Cumulative Error in the Trial Proceedings</u>

Mr. Hudson's convictions should be reversed because of cumulative error, even if each error standing alone is not enough for reversal. U.S. Const. Amend. V, VI, XIV. In *DeChant v. State*, 116 Nev. 918, 10 P.3d 108 (2000), this Court reversed a murder conviction because of the cumulative effect of the errors at trial. The *DeChant* Court provided, "[W]e have stated that if the cumulative effect of the errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction." *Id*. at 113, citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

Likewise, in *United States v. Necoechea*, the Ninth Circuit Court of Appeals found that although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal." *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993). Additionally,

"The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Montana v. Egelhoff*, 518 U.S. 37, 53, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)).[6]

Additionally, the "cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually." *Rose v. State*, 123 Nev. 194, 211, 163 P.3d 408, 420 (2007).[7] "Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *Alcala v. Woodford*, 334 F.3d 862, 883 (9th Cir. 2003). If an "[appellant]'s constitutional right to a fair trial was violated because of the cumulative effect of errors, [a] court will reverse the conviction." *Rose*, 123 Nev. at 212, 163 P.3d at

[6] "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) citing *Chambers*, 410 U.S. at 290 n.3.

[7] The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

420. A court should consider (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.*

Here, the question of guilt as to Counts 3 through 5 was close as the evidence showed that the officers likely shot at Mr. Hudson and Mr. Turner first. Additionally, the evidence showed that Mr. Hudson did not go to the house with the intent to kill the police officers, which undermines the specific intent required for attempt murder. Therefore, the issue of guilt as to these counts

Second, as shown in the preceding sections, the quantity and character of the errors is severe. One error, the failure to sever the defendants, fundamentally undermined Mr. Hudson's right to a fair trial. On top of that error, there are several more errors that warrant reversal. Third, the jury convicted Mr. Hudson of attempt murder, which is a very grave crime. Thus, Mr. Hudson's case meets all of the requirements to show cumulative error, and this Court must reverse Mr. Hudson's convictions and grant a new trial.

B. POST-CONVICTION CLAIMS

Standard of Review for Post-Conviction Claims

In reviewing findings of fact, this Court reviews the District Court's determinations for an abuse of discretion. *State v. Smith*, 131 Nev. Adv. Op. 63, 356 P.3d 1092, 1094 (2015). This Court has held, "Generally, a district court's findings of fact with respect to claims of ineffective assistance of counsel are

entitled to deference upon appellate review." *Hill v. State*, 114 Nev. 169, 175, 953 P.2d 1077 (1998).

Legal Authority- Ineffective Assistance of Counsel Standard

The Sixth Amendment to the United States Constitution and the Article I of the Nevada Constitution both guarantee a criminal defendant effective assistance of counsel. *See*, U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I.

The United States Supreme Court has provided the following test to determine whether counsel met his duties as effective counsel in a criminal case:

> (1) Counsel's performance is deficient, such that counsel made errors so serious he ceased to function as the "counsel" guaranteed by the Sixth Amendment, and
>
> (2) The deficiency prejudiced the defendant such that the result of the trial is rendered unreliable.

Strickland v. Washington, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McConnell v. State*, 125 Nev. 243, 252, 212 P.3d 307 (2009).

Determining whether a defendant has received ineffective assistance is a mixed question of law and fact, which is subject to independent review. *State v. Love*, 109 Nev. 1136, 38, 865 P.2d 322, 323 (1993).

Courts must judge counsel's performance against an objective standard for reasonableness. *State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006); *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). Counsel is entitled to make

strategic decisions when defending a case, but strategic decisions must indeed be reasonable. *Strickland*, 466 U.S. at 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

Prejudice to the defendant occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). A "reasonable probability" means a probability sufficient to undermine confidence in the outcome. *Id.*

In post-conviction habeas corpus petitions, a petitioner must prove factual allegations in support of an ineffective assistance of counsel claim by a preponderance of the evidence. *Powell*, 122 Nev. at 759, 138 P.3d 453.

Mr. Hudson raised several claims of ineffective assistance of counsel in his Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) filed on December 18, 2019. Mr. Hudson submits that the District Court abused its discretion by denying each of the following claims.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

1. The District Court Abused its Discretion by failing to find that Mr. Hudson Received Ineffective Assistance of Defense Counsel for failure to object to the District Court's Presentation of Instruction Number 38 Regarding Flight to the Jury.[8]

In the District Court habeas proceedings, Mr. Hudson claimed that Defense Counsel was ineffective for failing to object to Jury Instruction No. 38, the flight instruction. The District Court denied Mr. Hudson's claim without granting an evidentiary hearing on the issue. Mr. Hudson submits that the District Court abused its discretion by not finding Defense Counsel ineffective for failing to oppose Jury Instruction 38.

As explained in the proceedings below, Jury Instruction 38 was improper as it pertained to Mr. Hudson. No facts in evidence showed evidence of flight or evading arrest with respect to Mr. Hudson. See, *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699–700 (2005). As this Court held in *Weber v. State*, the District Court should have "carefully scrutinize[d] the record to determine if the evidence actually warranted the instruction." 121 Nev. 554, 582, 119 P.3d 107, 126 (2005).

At the very least, the District Court should have conducted an evidentiary hearing to determine why Defense Counsel failed to object because the evidence

[8] It is important to clarify that Mr. Hudson has raised a similar issue on direct appeal. However the issue on direct appeal deals with the propriety of giving Jury Instruction 38 at trial. Here, the issue is Defense Counsel's failure to object to the improper Jury Instruction 38. As such, it is imperative to clarify that the issues raised are not the same.

showed Mr. Hudson did not flee. (A.A. Vol. 5, pg. 923; A.A. Vol. 6, pg. 1030). "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." *Mazzan v. State*, 105 Nev. 745, 783 P.2d 430 Nev. 1989); *Wilson v. State*, 105 Nev. 110, 771 P.2d 583 (1989) Nev. 1989). There could not have been a strategic decision for failing to object to an inapplicable jury instruction.

Given the record, the District Court should have found Defense Counsel ineffective for failing to challenge Jury Instruction No. 38. It did not apply to Mr. Hudson. Mr. Hudson suffered prejudice because the result of the trial would have been different had Defense Counsel because the jury would not have attributed the flight to Mr. Hudson.

For these reasons, the District Court should have found Defense Counsel ineffective and granted Mr. Hudson a new trial. Mr. Hudson respectfully requests that this Court reverse the District Court's denial of his claim and remand the case for an evidentiary hearing.

/ / /

/ / /

/ / /

/ / /

2. The District Court Abused its Discretion by Failing to Find Defense Counsel Ineffective for Failure to Object to the District Court's Giving of Instruction Numbers 40 and 50 in Violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Mr. Hudson raised these claims of ineffective assistance of counsel in his District Court habeas proceedings. Although he raised similar issues in the preceding sections regarding the error at trial, the issues raised here pertain to the post-conviction ineffective assistance of counsel claims. For the reasons outlined below, the District Court abused its discretion by failing to find Defense Counsel ineffective in relation to these claims.

a. Jury Instruction No. 40: The Reasonable Doubt Instruction

In the District Court proceedings, Mr. Hudson explained that Jury Instruction 40 impermissibly minimized the State's burden to prove every element of the crime beyond a reasonable doubt. The State's duty to prove the elements of a crime beyond a reasonable doubt has long been the standard in America. *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), *see also Miles v. United States*, 103 U.S. 304, 312, 26 L. Ed. 481 (1880). Moreover, the United States Supreme Court explicitly held:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. at 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368.

Given the constitutional gravity of the instruction, Defense Counsel had a duty to protect his client's constitutional rights by objecting to the instruction that undermined the standard. The District Court should have seen that Defense Counsel failed to uphold his duty and caused prejudice to Mr. Hudson. At a minimum, the District Court should have granted an evidentiary hearing to question Defense Counsel about this issue. Accordingly, Mr. Hudson respectfully requests that this Court reverse the denial of his claim and remand the case for an evidentiary hearing.

b. Jury Instruction No. 50: The Equal and Exact Justice Instruction

The District Court also should have found Defense Counsel ineffective for failing to object Jury Instruction No. 50, the Equal and Exact Justice Instruction.

Like the Reasonable Doubt instruction above, the Equal and Exact Justice Instruction minimized the jury's duty to presume Mr. Hudson innocent until the State proved him guilty. This idea contradicts the very principles upon which the justice system stands. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

In *Sullivan*, the United States Supreme Court provided:

> But the essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings. *Sullivan*, 508 U.S. at 281.

The District Court should not have reviewed Defense Counsel's failure and recognized that this jury instruction misdescribed the presumption of innocence and thereby undermined the State's burden of proof. Defense Counsel's error caused Mr. Hudson prejudice because the result of the trial would have been different had Defense Counsel objected and proffered an instruction that comports with the State's duty. Furthermore, based on these principles, the District Court should have reversed Mr. Hudson's conviction and granted him a new trial. At the very least, the District Court should have granted an evidentiary hearing. Therefore, Mr. Hudson respectfully requests that this Court reverse the denial of his claim and remand the case for an evidentiary hearing.

XI. CONCLUSION

Based on the foregoing, the Appellant respectfully requests that this Court vacate his conviction and order a new trial.

Respectfully submitted this 6th day of August, 2021.

By: /s/ Christopher R. Oram

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 4349
RACHAEL E. STEWART, ESQ.
Nevada Bar No. 14122
520 S. Fourth Street, Second Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
Attorneys for Appellant

XII. CERTIFICATE OF COMPLIANCE

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 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 of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14 point Times New Roman.*

*Certificate of Compliance containing word count continued to page 52.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

I further certify that this brief complies with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains 12,655 words. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of August, 2021.

Respectfully submitted,

By: /s/ Christopher R. Oram

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 4349
RACHAEL E. STEWART, ESQ.
Nevada Bar No. 14122
520 S. Fourth Street, Second Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
Attorneys for Appellant

XIII. CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 6, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
Nevada Attorney General

STEVEN B. WOLFSON
Clark County District Attorney

BY /s/ Nancy Medina
Employee of Christopher R. Oram