IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FRANCIS DUNHAM,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 82405

RESPONDENT'S ANSWERING BRIEF

On Appeal from Denial of Petition for Writ of Habeas Corpus (Post-Conviction) in the Ninth Judicial District Court, County of Douglas, State of Nevada

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Jurisdictional Statement

This court has jurisdiction of the denial of the defendant's claim of ineffective assistance of counsel pursuant to NRS 34.575.

Routing Statement

This appeal is presumptively assigned to the Court of Appeals because it is a post-conviction appeal that involves a challenge to a judgment of conviction for an offense that is not category A felony. NRAP 17(b)(3).

Statement of the Issues

1. Whether the district court erred in denying the defendant's claim that trial counsel was ineffective for failing to argue that the defendant had a right to be in the Stateline condominium and could not, therefore, have committed the crime of Invasion of the Home.
2. Whether the district court erred in denying the defendant's claim that trial counsel was ineffective for failing to sever the two charges of Invasion of the Home and Burglary.
3. Whether the district court erred by failing to hold an evidentiary hearing on the defendant's claim of ownership of the home the defendant broke into and for which he was convicted of Invasion of the Home.

Statement of the Case

On November 18, 2016, in case number 16-CR-0159, an information was filed charging the defendant with Invasion of the Home, a violation of NRS 205.067, for acts that occurred on or about October 25, 2016, at 311 Olympic Court, Unit D, Stateline Nevada. Joint Appendix (JA) Volume I, 1-2.

On December 16, 2016, in case number 16-CR-0173, an information was filed charging the defendant with Burglary, a violation of NRS 205.060, for acts that occurred on or about October 25-26, 2016, at 311 Olympic Court, Unit D, Stateline Nevada. JA Vol. I, 5.

On December 20, 2016, the Court ordered the two cases joined. JA Vol. I, 26-28. On February 8, 2017, a Second Amended Information was filed charging the defendant with Invasion of the Home, a violation of NRS 205.067, and Burglary, a violation of NRS 205.060, both for acts that occurred on or about October 25-26, 2016, at 311 Olympic Court, Unit D, Stateline Nevada. JA Vol. I, 8-9.

A jury trial was conducted beginning on February 13, 2017. JA Vol. I, 32. On February 15, 2017, the jury returned verdicts of guilty to the crime of Home Invasion and not guilty to the crime of Burglary. JA Vol. II, 431-432.

On April 19, 2017, a Judgment of Conviction was entered in which, among other things, the defendant was sentenced to a term of 96 months in prison with a

minimum parole eligibility of 38 months. Respondent's Appendix (RA) 1-3.

On September 6, 2018, the Supreme Court affirmed the defendant's conviction. *Dunham v. State*, 134 Nev. 563 (2018). Remittitur issued on October 1, 2018.

On July 3, 2019, the defendant filed a timely pro per petition for writ of habeas corpus (post-conviction). In his petition, the defendant alleged 1) his trial counsel was ineffective for failing to file a pre-trial motion to dismiss, a violation of his 5th, 6th, and 14th Amendment rights, 2) his trial counsel was ineffective for failure to provide proof of innocence, a violation of his 5th, 6th, and 14th Amendment rights, 3) prosecutorial misconduct, a violation of his 5th, 6th, and 14th Amendment rights, and 4) judicial misconduct, a violation of his 5th, 6th, and 14th Amendment rights. JA Vol. III, 504-515.

On April 23, 2020, the defendant, through counsel, filed a supplemental petition for writ of habeas corpus (post-conviction). JA Vol. III, 518-529. In his supplemental petition, the defendant alleged 1) trial counsel was ineffective for failing to argue that the defendant had a right to be in the Stateline condominium and could not, therefore, have committed the crime of Invasion of the Home, and 2) trial counsel failed to sever the two charges thereby prejudicing the jury against the defendant.

On December 29, 2020, the district court entered its order denying the defendant's request for an evidentiary hearing and dismissing the petition. JA Vol. III, 612-619. The defendant timely filed a notice of appeal on January 22, 2021. RA 4-6.

Statement of Facts

The defendant was charged in two Informations with Invasion of the Home for breaking a window and entering into the home of Patricia Scripko on or about October 25, 2016, and Burglary, for entering the home of Patricia Scripko with the intent to commit an assault or battery on her on or about October 25-26, 2016. JA Vol. I, 1, 5. The defendant pled not guilty to both charges. JA Vol. I, 10, 26. On oral motion of the State and without objection, the two cases were joined. JA Vol. I, 26-28. Following a jury trial, the defendant was found guilty of Invasion of the Home and not guilty of Burglary. JA Vol. II, 432.

At the time of the offense, Dr. Patricia Scripko was a 33 year old physician who was married to the defendant. JA Vol. I, 195-199. In October 2015, Dr. Scripko purchased a condominium located at 311 Olympic Court in Stateline, Nevada. JA Vol. I, 210, 212. The condominium was purchased in Dr. Scripko's name only. JA Vol. I, 212. In June 2016, Dr. Scripko and the defendant separated from one another. JA Vol. I, 209-210. In August 2016, Dr. Scripko received a protective order against the defendant. JA Vol. I, 213-215. The August 2016,

protective order was effective from August 23, 2016, through February 23, 2017. JA Vol. I, 215. One of its conditions required the defendant to stay 100 yards away from 311 Olympic Court in Stateline, Nevada. JA Vol. I, 216; JA Vol. II, 285. Dr. Scripko carried a copy of the protective order with her. JA Vol. I, 214.

Dr. Scripko began pursuing an annulment of her marriage with the defendant in August 2016, and began a relationship with someone else around the end of August or early September 2016. JA Vol. I, 216-217. The defendant sent Dr. Scripko several e-mail communications between September 11, 2016, and October 21, 2016. JA Vol. I, 217-237. Some of those e-mails implored Dr. Scripko to answer the defendant and talk to him. JA Vol. I, 232-233. One of the e-mails appeared to threaten Dr. Scripko that the defendant might release a sex video of Dr. Scripko. JA Vol. I, 223. With just one exception, Dr. Scripko did not respond to the defendant's emails or communicate with him. JA Vol. I, 224. On October 2, 2016, the defendant sent Dr. Scripko an e-mail assuring her that she would never see him again. JA Vol. I, 234.

On October 21, 2016, Dr. Scripko was driving from California to her Stateline condominium. JA Vol. II, 258. Dr. Scripko was changing the locks on the condominium and preparing to rent it out. JA Vol. I, 260. At the time, she did not believe the defendant was at the condominium. JA Vol. II, 258. During the drive to Stateline, Dr. Scripko came in to possession of information that caused her

concern and she called law enforcement to see if the defendant was present at the condominium. JA Vol. II, 259. When Dr. Scripko arrived at the condominium on October 21, 2016, she found that the defendant had left a handful of various notes and papers throughout the condominium. JA Vol. II, 265-270. Dr. Scripko threw the notes away as she found them. JA Vol. II, 270. Between August 2016 and October 21, 2016, Dr. Scripko did not go to the condominium often because she had the protective order against the defendant and thought he was likely at the condominium and she wanted to avoid a confrontation. JA Vol. II, 294-295. On October 26, 2016, at about 9:45am, Deputy Eric Eissinger was dispatched to 311 Olympic Court where he discovered evidence of a forced entry into the residence. JA Vol. II, 334-339. Deputy Eissinger then located the defendant inside the residence. JA Vol. II, 339-342.

Standard of Review

1. Denial of a claim of ineffective assistance of counsel is reviewed pursuant to the standards articulated in *Kirksey v. State*, 112 Nev. 980, 987 (1996):

> A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. *State v. Love*, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993). This court evaluates a claim of ineffective assistance of trial counsel under the "reasonably effective assistance" test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and followed in *Warden, Nevada State Prison v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85

> L.Ed.2d 159 (1985). The *Strickland* analysis applies to both the guilt and penalty phases of a trial. 466 U.S. at 686–87, 104 S.Ct. at 2063–64; *see also Paine v. State*, 110 Nev. 609, 877 P.2d 1025, 1031 (1994), *cert. denied*, 514 U.S. 1038, 115 S.Ct. 1405, 131 L.Ed.2d 291 (1995).

2. The defendant is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *Mann v. State*, 118 Nev. 351, 354 (2002).

Summary of Argument

1. Counsel was not ineffective for failing to argue that the defendant had a right to be in the Stateline condominium and could not, therefore, have committed the crime of Invasion of the Home. The defendant's claim that he had a community property interest in the condominium and that he stayed there with Dr. Scripko's acquiescence, even if true, could not provide a legal defense to a charge of Invasion of the Home because, the defendant still would not have been a lawful occupant or resident of the home as required under Nevada law.
2. Counsel was not ineffective for failing to sever the two charges of Invasion of the Home and Burglary. Joinder of offenses was proper because the activity charged was part of the same transaction.

3. The district court did not err by declining to hold an evidentiary hearing on the defendant's claim of ownership of the home the defendant broke into and for which he was convicted of Invasion of the Home. The defendant's claims, even if true, would not have entitled him to relief as he still was not a lawful occupant or resident of the home as required under Nevada law.

Argument

1. The district court properly denied the defendant's claim that trial counsel was ineffective for failing to argue that the defendant had a right to be in the Stateline condominium and could not, therefore, have committed the crime of Invasion of the Home.

The United States Supreme Court has recognized that the right to counsel means the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). Claims of ineffective assistance of counsel are viewed under the "reasonably effective assistance" standard articulated in *Strickland*, 466 U.S. at 668. *See also Bejarano v. State*, 106 Nev. 840 (1990). This standard requires the petitioner to show that counsel's assistance was "deficient" and, secondly, the deficient assistance of counsel "prejudiced" the defense. *Strickland*, 466 U.S. at 687. More particularly, Petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. In order to eliminate

the distorting effects of hindsight, courts indulge in a strong presumption that counsel's representation falls within the broad range of reasonable assistance. Even if the Petitioner shows that counsel's performance was deficient, he must also show that "but for counsel's errors the result would probably have been different." *Id*., at 694; *Davis v. State*, 107 Nev. 600 (1991) (overruled as to the burden of proof by *Means v. State*, 120 Nev. 1001 (2004)). In *Means*, the Court held that when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations that form the basis for his claim of ineffective assistance by a preponderance of the evidence. *Id*. at 1012-13.

The defendant alleges that trial counsel was ineffective for not presenting evidence of ownership of the property where the crime occurred. NRS 205.067(1) states:

> A person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of invasion of the home.

The defendant alleges that he is an owner of the property by virtue of Nevada's community property laws[1] and, therefore, had permission of the owner (himself) to enter the condominium. It is correct that, "a person cannot commit the crime of home invasion by forcibly entering his or her own home *if that person is a*

[1] NRS 123.220.

lawful occupant or resident of the home." *Truesdell v. State*, 129 Nev. 194, 202 (2013) (*emphasis added*). As made clear at trial, the defendant, whether or not he had an ownership interest in 311 Olympic Court, did not have a lawful right to occupy, reside, or even be present within 100 yards of 311 Olympic Court because there was a valid protective order preventing him from being within 100 yards of the condominium at 311 Olympic Court.

This Court further analyzed the rationale behind the absence of liability for a lawful occupant or resident of a home in the context of Nevada's Burglary statute, NRS 205.060. *State v. White*, 130, Nev. 533 (2014). In *White*, the Court reviewed the historical context and legislative intent behind Nevada's Burglary statute and concluded:

> Based on this analysis, we conclude that while the Legislature has expanded common law burglary in several respects, it has at least retained the notion that: (1) burglary law is designed to protect a possessory or occupancy right in property, and (2) *one cannot burglarize his own home so long as he has an absolute right to enter the home*. Thus, while ownership may be one factor to consider, *the appropriate question is whether the alleged burglar has an absolute, unconditional right to enter the home*.

Id. at 538-39, (emphasis added). In *White* the defendant was entitled to relief because he was excluded from his home by agreement with the mother of his children. *Id*. at 535. White therefore, retained an absolute right to re-enter the residence. *Id*. at 539. By contrast, in this case the defendant was excluded from

the home by judicial order. Therefore, while White could not be convicted of Burglary, the defendant in this case did not have an absolute unconditional right to enter the structure and could be convicted of Invasion of the Home.

Defendant further argues that Dr. Scripko consented to his presence at the condominium and that that consent, while not a defense to violation of a charge of violating a protective order, is a defense to a charge of home invasion. First, there was no evidence at trial that Dr. Scripko consented to the defendant's presence at the condominium. In fact, the opposite is true. Dr. Scripko obtained a protective order prohibiting the defendant from coming within 100 yards of the property. Further, the evidence was that Dr. Scripko was not communicating with the defendant and, at most, merely suffered his presence at the condominium because she was trying to avoid a confrontation with him.

Second, assuming *arguendo* that Dr. Scripko had consented to the defendant's presence in the condominium, the defendant provides no authority or argument for his contention that such consent would be a valid defense to the crime of invasion of the home. Further, the defendant provided no facts suggesting that prejudice resulted from defense counsel's performance. *See Hansen v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001) ("And so to have the factual predicate for a habeas petition based on ineffective assistance of counsel, a petitioner must have discovered (or with the exercise of due diligence could have

discovered) facts suggesting both unreasonable performance and resulting prejudice."). Vague and speculative assertions do not meet the burden set forth is *Strickland*. *United States v. Taylor*, 802 F.2d 1108 (9th Cir. 1986). 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). In fact, the law, as quoted above from *Truesdell*, is contrary to the defendant's assertion that ownership would have provided a defense to the crime of Invasion of the Home. Under the uncontradicted facts of this case, ownership does not provide such a defense. The defendant had no lawful right to be in the condominium as there was a valid protective order prohibiting him from being within 100 yards of the property.

The state of the law is unambiguous; someone who is not a lawful occupant or resident of the home can be convicted of invasion of the home. The validity of the protective order prohibiting the defendant from being in the condominium is uncontradicted. As a result, trial counsel was not deficient for not raising the issue of ownership, as it had no relevance to any legal defense available to the defendant. Further, because ownership could not constitute a defense under the facts of this case, the defendant cannot show that the results of the trial would have been different had the evidence been presented. The defendant has failed to meet his burden to overcome the strong presumption that trial counsel's representation

was effective. As a result, the district court did not err in denying the defendant's claim.

2. The district properly denied the defendant's claim that trial counsel was ineffective for failing to sever the two charges of Invasion of the Home and Burglary.

The law regarding ineffective assistance of counsel is set forth above and is not repeated herein except as supplemented. The defendant alleges that trial counsel was ineffective for not moving to sever the two charges filed against him. As seen from the second amended information filed on February 8, 2017, the two charges arise from the same set of events and do not reflect two separate incidents. JA Vol. I, 8-9.

In his brief, the defendant misstates the law of joinder and claims, "Joinder of charges is permissible ***only*** when the charges are 'connected together or constitut[e] parts of a common scheme or plan.' NRS 173.115(2)"[2] (emphasis added). The defendant misleads this Court by inserting the word "only," and

[2] The statutory language quoted by the defendant was moved from NRS 173.115(2) to NRS 173.115(1)(b), effective October 1, 2017. Likewise, the provisions of NRS 173.115(1) in effect at the time the district court granted joinder in this case are now found in NRS 173.115(1)(a). Because the substance of these sections is unchanged, the State will employ the current statutory references, for ease of reference.

failing to inform the Court of the additional provisions of NRS 173.115(1)(a)[3]:

> 1. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or gross misdemeanors or both, are:
> (a) Based on the same act or transaction; or
> (b) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

As can be seen from the plain wording of the statute, joinder is not permissible ***only*** when the charges are connected together or constitute parts of a common scheme or plan. As shown by the use of the word "or" between subsections (a) and (b) of NRS 173.115, joinder is also permissible if the offenses are based on the same act or transaction. This Court has also stated that "joinder of offenses is proper where the activity charged ***is part of the same transaction*** or comprises a common scheme or plan." *Brown v. State*, 114 Nev. 1118, 1124 (1998) (emphasis added)[4].

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[3] In its answering brief in district court, the State included the adverse authority to defendant's position contained in NRS 173.115(1)(a). JA Vol. III, 536. The defendant has nevertheless failed to disclose this authority to the Court in these proceedings and has repeated his claim that, "[j]oinder of charges is permissible only when the charges are 'connected together or constitut[e] parts of a common scheme or plan.'" *See* Nevada Rules of Professional Conduct 3.3(a)(2).

[4] In his pleadings filed in district court, counsel for the defendant cited to the *Brown* case. JA Vol. III, 527. The State quoted the same passage from *Brown* that is quoted above showing that offenses arising out of the same transaction may be joined. JA Vol. III, 536. Despite being on notice of this adverse authority, counsel

This is clearly a case where the two charges, Invasion of the Home and Burglary, arose out of the same transaction. In *Brown*, following a jury trial, the defendant was convicted of burglary, two counts of attempted robbery, two counts of attempted murder and two counts of possession of a firearm by an ex-felon. *Id.* at 1122-1123. The latter two counts were based on the defendant's possession of the firearm at the time of the base conduct, as well as possession of the firearm when it was located in the defendant's closet two days later. *Id*. The Supreme Court upheld the joinder of all offenses even though one of the firearm offenses occurred two days later and both put forth prejudicial evidence of the defendant's status as an ex-felon.

In this case, the defendant has not identified a single piece of evidence that would not otherwise have been admissible even if the charges were tried separately. As a result, the defendant merely alleges prejudice without any argument or factual support. "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 (1987). This Court has further stated:

> [E]ven if charges could otherwise be properly joined, severance may still be mandated where joinder would

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has eliminated any reference to it in his Opening Brief in this matter. *See* Nevada Rules of Professional Conduct 3.3(a)(2).

> result in unfair prejudice to the defendant. To establish that joinder was [unfairly] prejudicial requires more than a mere showing that severance might have made acquittal more likely. Rather, the defendant carries the heavy burden of showing an abuse of discretion by the district court.

Weber v. State, 121 Nev. 554, 574–75 (2005) (rejected on other grounds) (*internal quotations and citations omitted*). Claims that are insufficiently pleaded or lack the necessary showing of deficient performance by counsel and prejudice do not entitle a defendant to post-conviction relief. *Lader v. Warden*, 121 Nev. 682 (2005).

The defendant's naked allegation that counsel was deficient for not seeking severance and that this resulted in prejudice does not entitle him to relief. This is particularly true as there are no facts or law provided by the defendant to suggest that any such motion would have been successful. In fact, because the two charges in this case arise from the same transaction, trial counsel was not objectively unreasonable and therefore, not deficient. Further, the defendant has provided nothing short of speculation to meet his burden that counsel's actions led to any prejudice. As a result, this claim should be denied.

3. The district court did not err by declining to hold an evidentiary hearing.

Inserted into page 4, lines 9-11, of his Opening Brief, under the heading Standard of Review, in a single sentence the defendant claims he was entitled to an evidentiary hearing because his claims of ownership of the condominium would

have entitled him to relief and were not belied by the record. The defendant then cites to *Hargrove v. State*, 100 Nev. 498 (1984). Though the defendant did not address this claim in his Statement of the Issues or in his Argument, the State addresses the claim out of an abundance of caution. As shown above, the defendant's claim of ownership was irrelevant because a protective order issued against him prevented the defendant from being a lawful occupant or resident of the home. *Truesdell*, 129 Nev. at 202. Thus the facts alleged by the defendant, even if true, would not have entitled him to relief. As a result, the defendant was not entitled to an evidentiary hearing. *Hargrove*.

Conclusion

Trial counsel was not ineffective for not presenting evidence of ownership of the property. Ownership did not provide a legal defense in this case and was therefore irrelevant. Trial counsel was not ineffective for not moving to sever the two charges. The charges of Invasion of the Home and Burglary arose out of the same facts. As a result, counsel was not ineffective as any such motion would have been denied. Even if such a motion would have been granted, the defendant has failed to establish any resulting prejudice. Finally, the defendant was not entitled to an evidentiary hearing because, even if true, the facts alleged by the defendant would not have entitled him to relief.

For the above reasons, the district court's denial of the defendant's post-conviction petition should be affirmed.

DATED this 21st day of June, 2021.

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CERTIFICATE OF COMPLIANCE

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 proportionately spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

I further certify 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, and contains _____ words; or

[X] Does not exceed 30 pages.

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 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 21st day of June, 2021.

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ADDENDUM

Relevant Parts of Statutes Relied Upon

Nevada Revised Statutes

NRS 34.575 Appeal from order of district court granting or denying writ.

1. An applicant who, after conviction or while no criminal action is pending against the applicant, has petitioned the district court for a writ of habeas corpus and whose application for the writ is denied, may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution from the order and judgment of the district court, but the appeal must be made within 30 days after service by the court of written notice of entry of the order or judgment.

2. The State of Nevada is an interested party in proceedings for a writ of habeas corpus. If the district court grants the writ and orders the discharge or a change in custody of the petitioner, the district attorney of the county in which the application for the writ was made, or the city attorney of a city which is situated in the county in which the application for the writ was made, or the Attorney General on behalf of the State, may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution from the order of the district judge within 30 days after the service by the court of written notice of entry of the order.

3. Whenever an appeal is taken from an order of the district court discharging a petitioner or committing a petitioner to the custody of another person after granting a pretrial petition for habeas corpus based on alleged want of probable cause, or otherwise challenging the court's right or jurisdiction to proceed to trial of a criminal charge, the clerk of the district court shall forthwith certify and transmit to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution, as the record on appeal, the original papers on which the petition was heard in the district court and, if the appellant or respondent demands it, a transcript of any evidentiary proceedings had in the district court. The district court shall require its court reporter to expedite the preparation of the transcript in preference to any request for a transcript in a civil matter. When the appeal is docketed in the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court, it stands submitted without further briefs or oral argument unless the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court otherwise orders.

(Added to NRS by 1991, 74; A 2013, 1735)

NRS 173.115 Joinder of offenses: Misdemeanor joined in error must be stricken.

1. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or gross misdemeanors or both, are:

(a) Based on the same act or transaction; or

(b) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

2. Except as otherwise provided in subsection 3, a misdemeanor which was committed within the boundaries of a city and which would otherwise be within the jurisdiction of the municipal court must be charged in the same criminal complaint as a felony or gross misdemeanor or both if the misdemeanor is based on the same act or transaction as the felony or gross misdemeanor. A charge of a misdemeanor which meets the requirements of this subsection and which is erroneously included in a criminal complaint that is filed in the municipal court shall be deemed to be void ab initio and must be stricken.

3. The provisions of subsection 2 do not apply:

(a) To a misdemeanor based solely upon an alleged violation of a municipal ordinance.

(b) If an indictment is brought or an information is filed in the district court for a felony or gross misdemeanor or both after the convening of a grand jury.

(Added to NRS by 1967, 1413; A 2017, 1242)

NRS 205.060 Burglary: Definition; penalties; venue; exception. [Effective through June 30, 2020.]

1. Except as otherwise provided in subsection 5, a person who, by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary.

2. Except as otherwise provided in this section, a person convicted of burglary is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000. A person who is convicted of burglary and who has previously been convicted of burglary or another crime involving the forcible entry or invasion of a dwelling must not be released on probation or granted a suspension of sentence.

3. Whenever a burglary is committed on a vessel, vehicle, vehicle trailer, semitrailer, house trailer, airplane, glider, boat or railroad car, in motion or in rest, in this State, and it cannot with reasonable certainty be ascertained in what county the crime was committed, the offender may be arrested and tried in any county through which the vessel, vehicle, vehicle trailer, semitrailer, house trailer, airplane, glider, boat or railroad car traveled during the time the burglary was committed.

4. A person convicted of burglary who has in his or her possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure or upon leaving the structure, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $10,000.

5. The crime of burglary does not include the act of entering a commercial establishment during business hours with the intent to commit petit larceny unless the person has previously been convicted:

(a) Two or more times for committing petit larceny within the immediately preceding 7 years; or

(b) Of a felony.

[1911 C&P § 369; A 1953, 31] — (NRS A 1967, 494; 1968, 45; 1971, 1161; 1979, 1440; 1981, 551; 1983, 717; 1989, 1207; 1995, 1215; 2005, 416; 2013, 2987)

CERTIFICATE OF SERVICE

I hereby certify that this document, **RESPONDENT'S ANSWERING BRIEF**, was filed electronically with the Nevada Supreme Court on the 21st day of June, 2021. Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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