IN THE SUPREME COURT OF THE STATE OF NEVADA

KENYA SPLOND, Appellant, v. STATE OF NEVADA, Respondent.	Docket No. 82989	Electronically Filed Oct 15 2021 02:20 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entries 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.

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JURISDICTIONAL STATEMENT

A. Basis for Supreme Court's or Court of Appeal's Jurisdiction:

This appeal is from a denial of a petition for writ of habeas corpus, and appellate jurisdiction in this case derives from NRS 177.015(3).

B. The Filing Dates Establishing the Timeliness of the Appeal:

Order Denying Petition Filed: 5/19/2021

Notice of Appeal Filed: 5/24/2021

C. Assertion that Appeal is From a Final Order or Judgment:

This Appeal is from a denial of a petition for writ of habeas corpus in a Criminal Matter; thus, jurisdiction is proper before this Court.

ROUTING STATEMENT

Appellant was convicted of a category B felony. Therefore, pursuant to NRAP (17)(b)(3), this appeal presumptively is routed to the Court of Appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. **DID THE DISTRICT COURT ERR IN DENYING THE PETITION FOR WRIT OF HABEAS CORPUS?**

STATEMENT OF THE CASE

On March 5, 2014, the State obtained a Grand Jury Indictment charging Kenya Splond ("Splond") as follows: Count 1 – Conspiracy to Commit Robbery (Felony – NRS 200.380, 199.480)); Count 2– Burglary While in Possession of a Firearm (Felony – NRS 205.060); Count 3 – Robbery with a Deadly Weapon (Felony – NRS 200.380, 193.165); and Count 4– Possession of Stolen Property (Felony – NRS 205.275(2)(c)). Appellant Appendix ("AA") 42-45.

On March 3, 2015, the State filed a Motion to Consolidate case C-14-296374-1 with case C-14-300105, in which Splond was charged with two counts of Burglary While in Possession of a Firearm, and two counts of Robbery with Use of a Deadly Weapon. AA75-80. At the time of that motion, the defense counsel did not object. AA108-113.

On April 8, 2015, the State filed an Amended Indictment charging Splond as follows: Count 1 – Conspiracy to Commit Robbery (Felony – NRS 200.380,

199.480)); Counts 2, 5 and 7– Burglary While in Possession of a Firearm (Felony – NRS 205.060); Counts 3,6 and 8 – Robbery with a Deadly Weapon (Felony – NRS 200.380, 193.165); and Count 4 – Possession of Stolen Property (Felony – NRS 205.275(2)(c)). Appellant Appendix ("AA") 114.

Trial commenced on March 15, 2016, but was continued due to discovery issues. AA38. Trial recommenced on March 21, 2016. AA38. The jury rendered a verdict on March 24, 2016. AA193. The jury found Splond guilty on all counts, as charged. AA226-228. After pre-sentence litigation regarding the contents of the presentence investigation ("PSI") report, the sentencing was held on February 6, 2017. AA257. The court sentenced Splond as follows: Count 1 – Twelve (12) to Sixty (60) months; Count 2 –Twenty-eight (28) to One hundred fifty-six (156) months, Count 2 to run concurrent to Count 1; Count 3 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, to run concurrent with Count 2; Count 4 – twenty-four (24) to sixty (60) months, Count 4 to run concurrent with Counts 1, 2 and 3; Count 5 – twenty-eight (28) to one hundred fifty-six (156) months, Count 5 to run consecutive with 1, 2, 3 and 4; Count 6 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, Count 6 to run concurrent with Count 5; Count 7 – twenty-eight (28) to

one hundred fifty-six (156) months, Count 7 to run consecutive to other counts; and Count 8 – twenty-eight (28) to one hundred fifty-six (156) months, plus a consecutive twenty-eight (28) to one hundred fifty-six (156) months for the use of the deadly weapon, Count 6 to run concurrent with Count 7. AA257-258. The aggregate sentence was one hundred sixty-eight (168) months to nine hundred thirty-six (936) months. AA258. Splond had nine hundred thirty-five (935) days credit for time served. AA258.

A Judgment of Conviction was filed on February 13, 2017. AA256. On March 2, 2017, Splond filed a Notice of Appeal on March 2, 107. AA259-261. The following issues were presented:

1. District Court erred in failing to reinstate the offer that was never conveyed to the defendant.

2. District Court erred in allowing a witness to introduce uncharged bad acts and to speculate about the loaded status of a handgun.

3. District Court erred by finding that there was no illegal stop of defendant.

4. District Court relied on a flawed PSI.

5. The cumulative effects of the errors affected Splond's rights.

On December 17, 2018, the Court of Appeals affirmed Splond's conviction. (Case No. 72545). On January 24, 2019, Remittitur was issued.

On April 24, 2019, Splond filed a Pro Per Petition for Writ of Habeas Corpus. AA937. In his petition, Splond raised the following issues:

1. The police violated his fourth amendment rights by conducting an illegal search and seizure.
2. The court State violated Splond's right to a speedy trial by conducting his trial three years after he was arrested, due to discovery issues.
3. Splond's counsel failed to convey an offer from the State, and the State did not reconvey that offer.
4. The prosecution withheld discovery.
5. Splond is actually innocent.
6. The State violated Splond's right to due process by charging him with a deficient complaint.
7. Splond's trial attorney was ineffective for failing to investigate the case, for failing to present a defense and for failing to subpoena phone records, for failing to object to the constitutionally infirm complaint, for failing to object to evidence at trial, for failing to ask for a Petrocelli hearing, for failing to object to jury instructions, and for failing to object to the PSI.
8. Splond's first attorney was ineffective for failing to communicate with him, for failing to turn over discovery, for failing to file motions. AA937-1003.

On December 16, 2019, the Court granted Splond's Motion for Appointment of Counsel, and counsel filed two supplemental petitions. AA1029, 1030. The State filed a response on January 12, 2021. AA1096 Splond filed a reply on January 25, 2021. AA1129. The supplement raised the following grounds:

1. Counsel was ineffective for failing to convey an offer.
2. Counsel was ineffective for failing to oppose the State's Motion to Consolidate cases.
3. Counsel was ineffective for failing to present expert testimony.
4. Counsel failed to ask for jury instructions on eyewitness testimony and failed to ask for jury instructions on the elements of possession of stolen property.
5. Counsel failed to elicit testimony to negate the elements of possession of stolen property.
6. Counsel failed to argue that the State had not met its burden regarding the possession of stolen property.

On February 1, 2021, the District Court denied the petition in part. AA1144. The district court set an evidentiary hearing on one ground (the allegations that counsel did not convey the offer). AA1146. The district court held the following with regards to the other grounds:

1. Splond's initial arguments in his petition were waived as he did not address them on direct appeal. AA1146
2. Counsel was not ineffective for failing to oppose the State's Motion to Consolidate. AA1148
3. Counsel was not ineffective for failing to retain an expert on eyewitness identification. AA1148
4. Counsel was not ineffective for failing to request jury instructions on the theory of defense. AA1149-50.
5. Counsel was not ineffective for failing to negate the elements of possession of stolen property. AA1150

The evidentiary hearing on the allegation regarding the conveyance of the offer was held on April 15, 2021. AA1198. At the conclusion of the hearing, the court denied the remaining ground of the petition. AA1243.

STATEMENT OF FACTS

I. PRIOR COUNSEL'S REPRESENTATION LEADING UP TO TRIAL

Frank Kocka originally represented Splond in case C296374. AA275. At the initial arraignment on March 12, 2014, Splond invoked his right to a speedy trial. AA276. At the calendar call on April 2, 2014, counsel indicated that he was unable to go to trial due to already being in a jury trial. AA278. Counsel indicated that he

was "trying to get together with the DA, get an offer on the table. I think we're probably going to get this one resolved. So if you want to set it for a status check in about 30 days?" AA278. The court set a status check for April 30, 2014. AA278.

On the April 30 status check date, counsel indicated that it was the "district attorney's request that we just set a new trial date in the case." AA280. The court then asked "did he waive?" meaning speedy trial. Counsel answered, "I believe he did. . ." AA 280. The court indicated that the ordinary course for trials was 2015, so the court suggested a status check. AA280. Counsel answered, "perfect. Because there's an offer that's floating around out there, we just need to finalize it." AA280.

On June 16, 2014, at the status check date, counsel indicated that Splond had another case set for preliminary hearing, and a sentencing set in another court. AA283. He further informed the court that the State had not yet made an offer, but has assured counsel that she would. AA283. Another status check was set for July 14, 2014. At the July 14 date, counsel was not present, so the court continued the date to July 16, 2014. AA288. On July 16, counsel was again not present. AA290.

On August 13, 2014, the court had a calendar call where counsel indicated he was not ready to go to trial. AA292. He also indicated that there was an offer outstanding that was "not that great" and he wanted a continuance and another status check date. AA292. The next status check date, counsel told the court that the State just indicted

Splond on another case, and that he had not received an offer from the State, and asked for a week's continuance. AA297.

A week later, the State indicated that it had conveyed an offer to Splond's attorney. AA300. The State indicated that it had conveyed an offer, and that counsel "did not like it very much." AA300. Counsel indicated that he would try to talk to the other prosecutor to see if he could "get a better deal." AA301. Again, counsel asked for a two week continuance, and said, "I'm going to get the offer, judge." AA302.

On October 1, 2014, counsel said the case was not negotiated and asked for a trial date. AA304. That trial date was May 26, 2015. AA304. Prior to that date, the State filed a motion to consolidate Splond's two cases. AA305. At the hearing on that date, counsel indicated that he had no opposition to the motion to consolidate, and asked for a status check in 45 days. AA308. Counsel also said, "we're either going to resolve this or I'll be filing motions, Judge." AA308. Counsel was not present at the status check April 8, so the court continued the hearing to April 15, 2015. AA275.

The next status check date was April 15, 2015, counsel indicated that he had been trying to get an offer from the State. AA313. He indicated he could not get either prosecutor on the case to give him an offer. AA313. At that time, counsel said that he had been hired to negotiate the case, not to do the trial. AA313. This was the

first time counsel ever indicated that he had not been retained to do the trial. At all other dates, counsel acted as if he was retained to handle the entirety of the case. Counsel then stated that he was going to have to withdraw. AA314. The court stated, "they will bring an offer on Monday." AA278. The court continued the case to April 20. AA314

Counsel indicated that he had received an offer and that the offer was not "acceptable to" his client, and therefore he asked to withdraw. AA316. The court appointed the public defender. AA317. The court then received word that the public defendant had a conflict, and on April 22, 2015, the court appointed trial counsel. AA319. Trial counsel continued the trial date, and trial eventually got set for January 11, 2016. AA332. At the calendar call date, counsel was not sure if he could proceed, and the case was set over to January 4. AA334. The new calendar call date saw a continuance due to counsel being injured. AA301. The court admonished trial counsel to be ready and set calendar call for January 13, and trial for January 25. AA339. There was some discussion between the state and defense about not being ready that quickly, so the court set the trial March 14. AA340.

On March 15, 2016, the trial commenced. The trial court inquired if an offer had ever been made. AA359. The State said that it had made an offer to previous counsel. AA359. The offer was to plead guilty to two robberies with use of a deadly weapon, right to argue, including for consecutive time. AA359. The court asked

Splond, "did you get that offer, sir, earlier?" AA359. Splond answered, "No." AA359. The court then told Splond he could have time to talk to his counsel about the offer. AA359. The State said that the offer had been revoked "I think well over a year ago." AA360. The court then said, "So there's no current offer?" to which the State answered, "There's no current offer." AA360. The Court then inquired further, and the State informed the court that the offer was made in 2014, and it was withdrawn in the beginning of 2015. AA360. At that, the court told Splond that "so they are telling me now it is withdrawn. So I guess they are not making an offer of any sort it sounds like . . " and that they would "deal with any issues there may be later. . ." AA361. Counsel then said, "And I don't think there's any disagreement, Your Honor, that no offer was ever conveyed to me, or conveyed to Mr. Splond." AA325. The State answered, "That's correct." AA361.

After some discussion about exhibits, defense counsel indicated that he did not have all of the discovery. AA370. The court continued voir dire, but after the conclusion of that court day, the defense asked for a continuance to obtain all of the discovery, and the court continued the trial, and set a status check for the resetting of the trial. AA401. Counsel filed a motion to preserve evidence, and the court heard that motion and reset the trial for March 21. AA409. Counsel indicated that he was also going to file a motion in limine, as "some things had come up" and he was going to "dig into them." AA412. On March 18, the court held another status

check date, the State informed the court that it provided about 1100 pages of discovery to the defense. AA419. Defense counsel then stated that based on some items in the discovery, he filed a motion to suppress. AA419. The court heard the evidentiary hearing on that motion prior to the start of trial. AA430.

II. JURY TRIAL

Samuel Echerverria

Samuel Echeverria ("Echeverria") was working on at the Cricket Wireless store at 4343 North Rancho Drive on January 22, 2014. AA518. Around 4:35 p.m., a black man wearing a black hoodie, black baseball cap, black shirt, black shoes, and blue jeans came into the store. AA518. The man was waiting for Echeverria to finish with another customer. AA519. When the customer left, the man came up to the register and asked for a specific type of battery for his girlfriend. AA519. Echeverria said that he had to check if he had that battery, and then walked to the front of the store and then walked back to the desk with the battery. AA519. As Echeverria was ringing up the battery, he was looking down at the battery to scan it. AA519. When Echeverria looked up, he saw the man pull out a black gun, saying, "Give me all the money before I blow your brains out." AA519. Echeverria described the gun as "a black revolver, like a six shooter." AA520.

Seeing the gun, Echeverria became scared. AA520. Echeverria complied with the man's demands, and then called the police. AA520. When the man left the

store, Echeverria saw the man touch the door to open it. AA530. Echeverria directed the police to where the man had touched and informed them the man was not wearing gloves. AA531.

Some time later, a detective showed Echeverria a six pack lineup. AA521. Echeverria identified someone, and indicated that he felt 100 percent certain the person he chose was the person who came into his store. AA522. When asked if he saw the person who robbed him in court, Echeverria testified that he did not. AA527-528.

Alisa Williams

On January 22, 2014, Alisa Williams ("Williams") was getting off work at A Wild Hair when she saw someone leaving the Cricket Wireless store. AA539. Williams said the man ran out of the store and jumped into the back of a car. AA540. The man was Black, and was "skinny." AA540. The car was silver, but Williams could not remember if the windows were tinted. AA540. However, in her statement to the police, Williams described the car as having tinted windows. AA549.

The person driving the car was a light-skinned Black woman, wearing white sunglasses. AA541. The man jumped into the back seat of the car. Later, police came to speak to Williams. AA541. Williams did not remember police showing her a lineup. AA541. After being shown the lineup, Williams still did not remember being shown the lineup, but did recognize her signature on a lineup form. AA542-

43. Williams was not able to identify anyone in the lineup. AA543. Williams remembered that the man had scarring on his face, from a knife or a burn. AA543 She did not believe the scars were consistent with acne scars. AA543.

Brittany Slathar

On February 2, 2014, Brittany Slathar ("Slathar") was working at the Star Mart around 2:45 in the morning. AA551. The Star Mart is located at 5001 North Rainbow. AA551. Slathar was working as a cashier on the graveyard shift. AA551. Around that time, Slathar was sitting at a table doing a crossword puzzle. AA551. A man walked in, and the door had a bell that rung. AA552. The man walked to the gum, so Slathar walked to the counter. AA552.

The man approached the register with Wrigley Spearmint gum. AA552. Slathar asked if he needed anything else, and the man responded that he wanted two packs of Newport 100 cigarettes. AA552. Slathar turned to get the cigarettes and as she was ringing them up, the man pulled out a gun. AA552. The man told her to give him all the money. AA552. Slathar said that she could not open the register. AA552. The man kept saying, "give me the money, give me the money. I'm gonna kill you. You're gonna die," and called her a "dumb white bitch." AA552. Slathar did not open the register. AA553. Slathar was in fear when she saw the gun. AA553. The man eventually left, and said he would be back. AA553.

The man grabbed the cigarettes on his way out. AA554. Slathar called the police and then locked the doors to the store. AA554. Shortly after, Slathar saw the police pull into the complex. AA554. The police then took her to another scene. AA554. The police gave her a set up instructions for a Show up. AA554. Slathar identified the man in front of the police car as the man who robbed her at gunpoint. AA555. Slathar described the gun as being a black revolver. AA558. Slathar identified Splond in court as being the man who robbed her. AA561. Slathar indicated the man had changed clothing between the robbery and the show up, and that when he was in the store, he was wearing a black sweatshirt and a camouflage beanie. AA570. She also remembered that the man was wearing gloves inside the store. AA572.

Jeffrey Haberman

Jeffery Haberman was the owner of a .38 caliber Colt revolver. AA576. That revolver was stolen from him on October 2013. AA577. Someone broke into Haberman's house and stole his entire gun safe. AA577. Haberman came home one day and his back door was open, and someone had entered his house. AA580. His gun safe had been dragged out of his house. AA580. Haberman recognized his handgun in a photo the State showed to him. AA577. Haberman did not know Splond, nor did he ever give Splond permission to "go into his house" or "borrow

his handgun." AA581. Haberman never gave anyone permission to have his handgun. AA581.

Joshua Rowberry

Joshua Rowberry ("Rowberry") was an officer with the Las Vegas Metropolitan Police Department ("LVMPD"). AA606. Rowberry was working graveyard on February 2, 2014 when he got a call about a robbery. AA607. The call was regarding 5001 North Rainbow. AA607. The call came in around 2:57 a.m., and he arrived in the area around 3:00 a.m. AA610. Rowberry had information that the suspect had gone to the north, so he proceeded to drive around Rainbow, heading north. AA610.

Rowberry did not see any pedestrians, but he did see a vehicle ahead of him traveling north. AA611. Because the car was the only car in the area, Rowberry thought it might be related to the robbery. AA613. The vehicle had some damage to the rear. AA614. Rowberry's attention was drawn to the vehicle as it had the damage to the rear, and he did not know if it had just been involved in an accident. AA615. Rowberry decided to stop the vehicle, after he followed it briefly and it pulled into a residential neighborhood. AA616. Rowberry turned on his lights and sirens and the car stopped. AA616.

Rowberry approached the vehicle, on the driver's side, and noticed that the windows were tinted dark. AA616. Because of the tint, Rowberry could not see into

the back windows. AA616. Rowberry told the driver, who he identified as Kellie Chapman, to roll down the back window. AA618. Chapman complied. AA618. Rowberry noticed a Black man lying in the back seat, covered with a blanket, breathing heavily. AA619.

Rowberry told the man to show his hands, and the man did not comply. AA619. Rowberry then called for a code red to let other officers in the area know that he needed help, and to head his way. AA620. Rowberry identified Splond as being the man in the car. AA619.

Rowberry drew his weapon and told the people in the car not to move. AA620. When other officers arrived he told the driver to step out of the car and walk backwards to officers. AA620. When she did that, officers took her into custody. AA621. The officers then told the passenger to get out of the car, which he did. AA621. With the vehicle doors open, Rowberry could see into the car, and noticed two packs of Newport cigarettes and a package of Wrigley's gum. AA622. In the back seat, officers also found a black sweater and a camouflage beanie. AA622. When Rowberry took the sweater out of the vehicle, he found a revolver. AA626.

Jeremy Landers

Jeremy Landers ("Landers") was an officer with LVMPD who was working on February 2, 2014. AA364. Landers responded to a robbery call at the Star Mart at 5001 North Rainbow. AA635. He made spoke with Williams to get her statement.

AA635. Landers learned that a suspect was in custody, and Landers drove Williams to the location of the suspect. AA636-637.

Graciela Angles

Graciela Angles ("Angles") was working at a Metro PCS store on January 28, 2014. AA642. That store was located at 6663 Smoke Ranch. AA642. Around 2:00, an Black man came into the store. AA643. The man went to look at the phones and asked her about phone plans. AA643. Angles was explaining the plans to the man, when he asked about a Galaxy S4. AA646. Angles got the phone and scanned it, and the man then asked her about a different phone. AA646. Angles scanned that other phone, and then asked the man if he was going to pay with cash or a card. AA646. The man then pulled out a gun, asked her to step back, and then told her to give him the money. AA647. Angles was in fear and she gave him the money. AA647. The man took the money and the phone and left. AA647.

About a month later, the police spoke with Angles and showed her some photographs. AA647. Angles circled photograph number 2 and wrote her name under it. AA648. Angles indicated that she was 100 percent certain the photograph was the man who robed her. AA649. In court, Angles identified Splond as the person who robbed her. AA651. Angles did not know what kind of gun the man had. AA658.

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Monte Spoor

Monte Spoor ("Spoor") worked as a Senior Crime Scene Analyst with LVMPD. AA665. On January 22, 2014, Spoor responded to a call at 4343 North Rancho Drive. AA667. Spoor processed that location for fingerprints. AA668. Spoor was able to collect prints from the interior of the north facing doors to the business. AA669. He attempted to obtain prints from the cash register but was unable to. AA673.

Shawn Fletcher

Shawn Fletcher ("Fletcher") was also a Senior Crime Scene Analyst ("CSA") for LVMPD. AA687. On January 28, 2014, Fletcher responded to 6663 Smoke Ranch to a Metro PCS store. AA690. Fletcher obtained fingerprints off a demo phone inside the store. AA692. Fletcher was not able to obtain prints from anywhere else. AA698.

Heather Goldthorpe

Heather Goldthorpe ("Goldthorpe") was a forensic scientist with the latent print unit at LVMPD. AA702. Goldthorpe was tasked with processing fingerprints collected for the instant case. AA706. Goldthorpe entered prints into the automated fingerprint identification system, and obtained a positive hit. AA706. After that hit, she went and obtained the physical prints for the match, so that she could manually

compare them. AA707. Goldthorpe was able to match the prints to Samuel Echeverria. AA707 Another lift card yielded negative results. AA707.

In another lab case number, Goldthorpe was asked to compare the prints to Splond. AA708. She was not able to make that match, and could exclude him from three of the five prints. AA708. The remaining two prints were not suitable to make a comparison due to poor quality. AA708. The prints which Goldthorpe used to exclude Splond came from the Galaxy phone that Angles indicated Splond touched. AA727.

Scott Kavon

Scott Kavon ("Kavon") was a detective with LVMPD. AA743. In 2014, Kavon was assigned to investigate a series of robberies. AA744. Kavon received the cases and began to look for commonalities. AA745. He also obtained videos from each event and was able to develop a suspect. AA745. According to Kavon, the suspect in each was "very similar." AA745. Per Kavon, the suspect had a similar method of operation, and similar build. AA746. Additionally, Kavon said that each witnesses and victim described the suspect as having scarring on his cheeks. AA746. Further, the suspect used a revolver in two of the three, and in two of them witnesses described a woman driving the getaway car. AA746. When the detective looked at the Star Mart case, he found that officers had arrested Splond. AA746. Kavon decided to make photographic lineups. AA749.

Per Kavon, Echeverria identified Splond. AA755. Angles also chose Splond out of the photo lineup. AA756. Upon cross-examination, Kavon did not know what a double blind setup for a lineup was. AA759. Kavon also did not know any police departments that were using a double blind approach. AA760.

SUMMARY OF ARGUMENT

The district court abused its discretion in denying the petition for writ of habeas corpus.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED SPLOND'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CONVEY AN OFFER.

Standard of Review: This Court reviews the denial of a post-conviction petition for writ of habeas corpus for an abuse of discretion. *Nobles v. Warden*, Nevada Dept. of Prisons, 106 Nev. 67, 787 P.2d 390 (1990).

The Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that an accused has the right to effective assistance of counsel at all criminal prosecutions. *Missouri v. Frye*, 566 U.S. 134, 138 (2012) (*citing Strickland v. Washington*, 466 U.S. 668, 686 (1984). Claims of ineffective assistance of counsel in the plea bargain context are governed by the two part test set forth in *Strickland*. *See Hill v. Lockhart*, 474 U.S. 52 (1985). The United State Supreme Court held in *Missouri v. Frye*, 566 U.S. 134 (2012), that "defense

counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id*. at 145. When defense counsel allows an offer to expire, without conveying that offer to the defendant, counsel is not rendering effective assistance of counsel. *Id.*

The defendant must show that he suffered some prejudice from not receiving an offer. *Id*. at 147. To show prejudice, the defendant must demonstrate a reasonable probability that he/she would have accepted the offer had he/she been afforded effective assistance of counsel. *Id.* It is also necessary to show that the end result would have been more favorable by a plea to a lesser charge or to a sentence of less prison time. *Id.*

The record of prior counsel's representation shows multiple continuances, spanning from March 2014 to April 2015. That is one year of time that Splond spent in custody with counsel informing the court that he was seeking an offer. Another year passed before Splond actually proceeded to trial. Counsel withdrew because the case would not negotiate, claiming that he had been retained only to negotiate the case (although he kept setting the case for trial, and indicated he was going to "file motions" AA272). AA277.

Further, the record does reflect that both Splond and his trial counsel affirmed that Splond never actually received the offer from his counsel, which Splond

maintains in his pro per petition. AA323. The record is bereft of any clear indication that Splond actually received the offer. According to Splond's girlfriend, Lisa Wallis, she would often reach out to counsel and to find out if there was an offer, and got no response from the attorney. AA2048. Ms. Wallis indicated that Splond told her counsel never conveyed an offer to him. AA2048. Instead, counsel told Splond that he was working on a better deal. AA1048. Splond had no idea what the deal was, and both Splond and Ms. Wallis were surprised when counsel withdrew. AA1197.

The court held an evidentiary hearing on April 15, 2021. Prior counsel testified, as well as Splond, and Wallis. AA1199. According to counsel, he was retained to negotiate Splond's case. AA1213. In August of 2014, counsel remembered that the State was trying to negotiate, but had also filed a new case against Splond, and was trying to negotiate the cases separately. AA1213-14. According to counsel, he did not believe this to be a sound strategy. AA1214. Counsel could not specifically remember if he conveyed the offer to Splond about the offer. AA1214. Instead, counsel testified that his general practice would have been that he would have conveyed the offer and explained why he did not believe it was a good idea to accept. AA1214.

When asked about the April 20, 2015 appearance where counsel indicated that the offer "was not acceptable to his client" counsel also could not remember what the offer was. AA1215. Again, counsel had no memory of conveying an offer, but relied on the minutes, and testified that if he said it was unacceptable to the client, then he would have conveyed it. AA1215. He did not remember if Splond had a counteroffer he asked counsel to convey to State. AA1215.

Splond testified that his girlfriend hired his first counsel, and it was his understanding that counsel was retained to handle his case, including trial. AA1216. Splond indicated that he only ever saw his counsel in court, and that many times, counsel did not make the court appearances. AA1217. Further, if counsel was in court, many times counsel was rushing and did not talk to Splond in court. AA1217. According to Splond, counsel never told him about the offer. AA1217. Splond testified that counsel came and asked him, "Do you still want to go to trial?" AA1217. Splond answered that he did. AA2068. He did not tell Splond what offer the State was making. AA1218.

On cross-examination, Splond explained that while he hired his counsel for trial, his understanding of hiring a lawyer was that the lawyer would seek out a deal, and if not, then go to trial. AA1219 When the State asked Splond if he would have accepted the offer that was made, Splond answered that he needed the "numbers

behind it." AA1220. Splond did not want to say that counsel was not truthful when he said that the offer was unacceptable to Splond. AA1225. He did reiterate, however, that counsel did not tell him "what was on the table" or what the State was offering, only if he still wanted to go to trial. AA1225.

Splond explained that when he told counsel he still wanted to go to trial, he did not know he had any other choice. AA1225. Splond was open to negotiating his case. AA1226. Splond believed that had he taken the deal, he would have been given a lesser sentence, and that would have been a better outcome for him. AA1226. Splond explained that he would need counsel to explain to him the amount of time he may have gotten on the deal. AA1228. Splond kept explaining that his counsel never explained any deals to him, and that he would need counsel to explain what kind of time he might get if he took the deal. AA1228-29.

Lisa Wallis also testified at the hearing. AA1230. Wallis retained counsel for Splond, and counsel told her that it sounded like a "fairly simple case" considering Splond had never really been in trouble before. AA1231. Her communications with counsel consisted of counsel telling her that he was "working on a deal." AA1232. Whenever Splond spoke to Wallis he asked her if she had talked to the lawyer, as Splond was not having regular communication with his counsel. AA1233.

According to Wallis, Splond asked her if she had heard from counsel that there was a deal. AA1234.

The district court found that prior counsel was credible and that Splond's testimony that he wanted the "numbers" meant that Splond did not want the offer, even today. AA1241. The district court noted that Splond wanted "certainty" and that despite Splond's testimony, Splond rejected the offer because he wanted "certainty." AA1241-42. The district court noted that Splond was incorrect that counsel had missed court dates, and that counsel was only retained to get a deal. AA1242.

The offer the State made was to plead to two counts of Robbery with Use of a Deadly Weapon, full right to argue. Had Splond accepted that offer, he would have faced two (2) to fifteen (15) years, with a consecutive term of one (1) to twenty (20) years for the use of the deadly weapon. NRS 200.380, 193.165. After trial, Splond faced sentencing on three counts of robbery with use, in addition to three counts of burglary while in possession of a firearm, and a count of conspiracy to commit robbery, and a count of possession of stolen property. Under the *Frye* analysis, Splond must show that he suffered some prejudice from not receiving an offer. *Frye,* at 147. To show prejudice, the defendant must demonstrate a reasonable probability that he/she would have accepted the offer had he/she been afforded effective

assistance of counsel. *Id.* It is also necessary to show that the end result would have been more favorable by a plea to a lesser charge or to a sentence of less prison time. *Id.* The offer exposed Splond to less charges and less prison time than proceeding to trial and being convicted on all counts. While the district court found that counsel was more credible than Splond, the court abused its discretion. First, counsel did not specifically know if he did convey the offer. Counsel only could testify to what his standard practice was. Second, counsel had no information about what he told Splond about the offer. Conveying an offer effectively is not merely stating, "the offer is to plead to two counts of robbery with use of a deadly weapon, full right to argue." Conveying an offer means, at a bar minimum, describing to the client the sentencing ranges and the attorney's advice about whether or not to accept the deal. ADKT411 provides that counsel should "convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers." ADKT Standard 9(b)(4). Further, ADKT411 provides in Standard 9(d) and (e):

> In the decision-making process, counsel should: 1. inform the client of any tentative negotiated agreement reached with the prosecution, explain to the client the full content of the agreement, and explain advantages, disadvantages, and potential consequences of the agreement; and 2. not attempt to unduly influence the decision, as the decision to enter a plea of guilty rests solely with the client. Where counsel reasonably believes that acceptance of a plea offer is in the best interest of the client, counsel should advise the client of the benefits of this course of action.

> (e) Prior to the entry of the plea, counsel should meet with the client in a confidential setting that fosters full communication and: 1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary, and intelligent; 2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering the plea; and 3. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

The standards for conveying a plea require more explanation that merely stating what the offer is. While Splond maintains that counsel did not actually convey the offer, if this Court determines the offer was conveyed, Splond argued that it was not conveyed effectively. Splond, during the hearing, never said he would not take the offer. Instead, he was asking for more information about what the offer meant. This is clear from the following exchanges:

> Q:. . . Well, let me ask you this, sir. If you had, if you were given that offer, two counts of robbery with the use of a deadly weapon, full right to argue, including for consecutive time, would you have taken that deal?
>
> A: There was no numbers behind it. What was even. . .like a 5 to 15 or 6 to==so therefore, I can't answer that.
>
> Q: Okay, But in the right to argue situation you aren't guaranteed any time. The State could argue for the maximum amount of time allowed under the statute, which under that situation, the maximum would be guilt upon representation[sic], it'll be 60 years on the top, 24 years on the bottom. So the State could argue for as much 24 to 60 years in prison. Your attorney would have been able to argue for a smaller amount in prison.
>
> A: uh huh.

> Q: And it would have been up to the Judge to determine how muc time you would have got [sic]. Would you have plead guilty to two counts of robbery with the use of a deadly weapon, State retaining the full right to argue if that offer was made to you?
>
> A: It was made to me and negotiated to something else, I like I said, I don't know because I, you can't, it wasn't explained to me like that. So I--- AA1221-22.

Upon redirect, Splond testified that he would have accepted an offer if his attorney had explained to him what the offer was, and if his attorney had told him the offer was better than going to trial. AA1226. The State again asked him if he would have accepted the two robberies with use and Splond again stated he would need more information. AA1225. Splond said that an offer was never explained to him. AA1228. Splond maintained that he would need to know which would be better—taking the deal or going to trial. Splond maintained that his counsel never told him an offer, never explained any potential outcomes, and only had conversations with him in court. AA1229.

First, the district court accepted counsel's representations that his standard practice that he conveyed the offer was what happened. The court noted that part of the reason it did not find Splond credible was that Splond indicated counsel often was not in court. However, in looking at the transcripts, it is clear that counsel did miss court dates. On July 14, 2014, counsel was not present in court and the case was continued. AA287. On July 16, 2014, counsel was again not present, with the marshal noting that he had called counsel three times, getting an answering

machine each time, and that he had given counsel this date. AA290. On September 24, 2014, counsel was late to court. AA299, 301. On April 8, 2015, counsel was not present when the State filed an amended indictment. AA311. Splond's testimony that he went to court many times is borne out by the register of actions, and Splond's contention that counsel would come late and ask for a different court date is also borne out by the transcripts. Counsel was late, counsel did miss court dates, and counsel did frequently ask for new court dates. Further, Splond testified that counsel asked him in court if he wanted to go to trial. This is certainly not a conveying of an offer, if this even counts, in a confidential setting.

Splond would ask that this Court review the transcripts of the court appearances as it is apparent that Splond, who did not want to call his counsel a liar, was accurate with his retelling of how things went in court. However, assuming *arguendo* that this Court finds that counsel did convey the offer, this Court must also determine if the conveyance of that offer meets the standards set by this Court as well as the cases regarding effective assistance of counsel on conveying offers. Not conveying an offer properly amounts to not conveying an offer. The record does not in anyway reflect that counsel did what ADKT411 mandates when conveying an offer. There is nothing in the record to reflect that counsel explained to Splond the full content of the agreement (Standard 9 (d)), or that he informed Splond that he, counsel, reasonably believed that accepting the

offer was in Splond's best interest (Standard 9(d)), or that counsel met with Splond in a confidential setting and made certain that Splond fully and completely understood the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences (Standard 9 (e)).

Splond met his burden that counsel was ineffective in conveying an offer and the district court abused its discretion when it held that there was evidence the offer was conveyed, and that it was done effectively.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED SPLOND'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OPPOSE THE STATE'S MOTION TO CONSOLIDATE

Standard of Review: This Court reviews the denial of a post-conviction petition for writ of habeas corpus for an abuse of discretion. *Nobles v. Warden*, Nevada Dept. of Prisons, 106 Nev. 67, 787 P.2d 390 (1990).

On March 3, 2015, the State filed a motion to consolidate case C-14-3001-5 with case C-14-296374-1. Case C-14-300105 involved the Cricket Wireless store, where Sam Echeverria worked, and the Metro PCS store where Graciela Angles was working. Case C-14-296374 involved the allegations from the Star Mart, with Brittany Slathar listed as the named victim. The State argued that the cases should consolidated because the were factually connected and were evidence of a common scheme or plan. Counsel did not oppose that motion, and instead allowed Splond to go to trial on more charges, which tainted his right to a fair trial. The district court

noted that joinder is within the discretion of the trial court, and that this Court favors joining cases for judicial economy. AA1320. The court further noted that the defendant did not show prejudice and that the cases were similar enough to join. AA1147. In the findings of fact drafted by the State, the argument seems to hinge on the cases being cross-admissible, and the argument that the cases show a common scheme or plan. The district court erred 1) when it found that the cases were properly joined, and 2) that Splond did not face any prejudice by the joinder.

N.R.S 173.115 provides:

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 misdemeanors or both, are:

1. Based on the same act or transaction; or
2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan

The Star Mart incident and the Cricket Wireless/Metro PCS incidents are not based on the same transaction. Therefore, the relevant portion of N.R.S. 173.115 is part 2, to determine whether the events are "connected together" or whether they constituted "a common scheme or plan."

In *Weber v. State*, the court provided guidelines for the phrase "connected together", as it pertains to N.R.S. 173.115. *Weber*, 121 Nev. 554, 573 (2005). The

court held that for two charged crimes to be "connected together", "a court must determine that evidence of either crime would be admissible in a separate trial regarding the other crime." *Id*. The *Weber* court went further and held that "cross-admissibility" of evidence was now "expressly" employed to define "connected together," as it pertains to N.R.S. 173.115(2) *Id.*

The second portion of N.R.S. 173.115 provides that two or more offenses may be charged together if they are part of a "common scheme or plan." According to *Farmer v. State*, 133 Nev. 554, 114 (2017), common plan describes crimes that "are related to one another for the purpose of accomplishing a particular goal." *Farmer*, 133 Nev. at 698, 405 P.3d at 120. Common scheme describes crimes that "share features idiosyncratic in nature." *Farmer*, 133 Nev. at 698, 405 P.3d at 120. Further, the *Farmer* court held that common scheme exists when offenses "share such a concurrence of common features as to support the inference that they were committed pursuant to a common design." *Id.* at 699, 405 P.3d at 121. The relevant factors are 1) the degree of similarity of offenses, 2) degree of similarity of victims, 3) temporal proximity, 4) physical proximity, 5) number of victims, and 6) other context specific features. *Id.*

A. The Star Mart incident and the Cricket Wireless/Metro PCS incidents are not connected together.

The State would need to show that the evidence of each set of allegations is cross-admissible in the trial of the other. To illustrate, a seminal case on severance, *Tillema v. State*, 112 Nev. 266, 914 P.2d 605 (1996), involved two vehicular burglaries and one burglary of a commercial store. Both offenses involved vehicles in casino parking garages and occurred only seventeen days apart. The burglary of the store occurred the same day as the second auto burglary, and very close in time on that day.

Tillema was arrested for a burglary of a vehicle on May 29, 1993 and was arrested again for another burglary of a vehicle and for a burglary of a store on June 16, 1993. *Tillema,* 112 Nev. 269. The *Tillema* court reasoned that "the store burglary could clearly be viewed by the district court as 'connected together' with the second vehicle burglary because it was part of a 'continuing course of conduct.' *Id*. at 268, 914 P.2d at 607, *citing* NRS 173.115(2); *Rogers v. State,* 101 Nev. 457, 465-66, 705 P.2d 664, 670 (1985), *cert. denied*, 476 U.S. 1130, 106 S.Ct. 1999, 90 L.Ed.2d 679 (1986). The court noted that the continuing course of conduct was that on June 16th, a detective viewed Tillema's burglary of a van in a casino parking garage and then observed Tillema immediately leaving the garage and walking south to a Woolworth's store. *Id.* The detective followed Tillema and saw him in the hardware section of the store, where Tillema remained for approximately five minutes. *Id.* The detective then saw Tillema go to a gas station a short distance away. *Id.* Tillema

sold a packaged lock, with "Woolworth's" and "a price of four ninety-nine" on it, to a gas station attendant for two dollars. *Id.* The *Tillema* court stated:

> We believe that Tillema's acts on June 16th demonstrate that he had an intent to steal something, anything, that he could subsequently sell. Thus, the vehicle burglary and the store burglary were certainly "connected together" due to Tillema's felonious intent and "continuing course of conduct." Moreover, we conclude that most of the evidence of the June 16th vehicle burglary would be cross-admissible in evidence at a separate trial on the store burglary to prove Tillema's felonious intent in entering the store. See NRS 48.045(2); Mitchell, 105 Nev. at 738, 782 P.2d at 1342; cf. Robins, 106 Nev. at 619, 798 P.2d at 563. Accordingly, we conclude that the vehicle burglary counts were properly joined with each other and with the store burglary count. *Id.*

The cross-admissibility of the evidence was a key factor. Here, there is no cross admissibility between cases. Any attempt by the State would constitute an impermissible use of a bad act. The district court did not note how the evidence would have been cross-admissible, and the State's briefs seem to suggest that the evidence would have been cross admissible regarding intent.

N.R.S. 48.045(2) governs admissibility of other acts:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

> It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Further, "to admit such evidence… it must be relevant, be proven by clear and convincing evidence, and have probative value that is not substantially outweighed by the risk of unfair prejudice." *Weber v. State*, 121 Nev. 554, 573 (2005).

While the defense need not place intent at issue before the State may seek admission of prior act evidence (if the evidence is relevant to prove an element of the offense such as intent for the specific intent crime of burglary), the evidence may still be inadmissible if it is not relevant or its probative value is substantially outweighed by the risk of unfair prejudice. *Hubbard v. State*, 422 P.3d 1260, 1262 (2018). In that case, the court noted that:

> where the evidence left little doubt as to the assailants' intent to commit a felony at the time of entering the home, and appellant's defense was not based on a claimed lack of intent or on mistake, but rather on a claim that he was not present and had no involvement in the crime, the evidence of his prior residential burglary conviction had little relevance or probative value as to his intent or absence of mistake when compared to the danger of unfair prejudice resulting from its propensity inference. *Id.*

The instant case is similar, in that the evidence in the State's arsenal leaves little doubt as to intent. Further, the defense did not offer a defense that put intent at issue. The State failed to establish that the evidence of the Star Mart offense

would have been cross-admissible in the trial of phone store robberies. The district court failed to explain how the cases were cross-admissible and the court abused its discretion in finding so.

B. The Star Mart incident and the cellular phone incidents are part of a common plan.

Common plan are crimes that are related to another for purposes of accomplishing a particular goal. A simple example of this would be a defendant who needs a gun to commit a robbery, so a month prior, he steals a firearm. Certainly, those acts were not committed at the same time, yet both crimes were committed with the purpose of the same goal: to effectuate a robbery. Here, the crimes were both seemingly random events, with no particular goal in mind.

C. The Star Mart robbery and the cellular store robberies are not part of a common scheme.

Common scheme describes crimes that "share features idiosyncratic in nature." *Farmer*, 133 Nev. at 698, 405 P.3d at 120. Further, the *Farmer* court held that common scheme exists when offenses "share such a concurrence of common features as to support the inference that they were committed pursuant to a common design." *Id.* at 699, 405 P.3d at 121. The relevant factors are 1) the degree of similarity of offenses, 2) degree of similarity of victims, 3) temporal

proximity, 4) physical proximity, 5) number of victims, and 6) other context specific features. *Id.*

The burglary/robberies at issue in each case here are garden variety, run of the mill robberies. The share nothing idiosyncratic in nature. Idiosyncratic is defined by Merriam-Webster as something peculiar specific to an individual. While the robberies do have some elements in common idiosyncratic requires more than such features. The robberies are plain, garden variety. In the findings of fact authored by the State the cite the following as elements that make the cases so similar they are notable: the fact that the perpetrator waited until the other customers had left; the pulling out a gun a pointing it at the clerk. AA2126. However, there is nothing idiosyncratic about those facts. Those facts instead describe a large portion of any everyday store robbery. Because the crimes share nothing peculiar to them, they are not part of a common scheme.

The district court had to balance the evidence under a probative versus prejudicial analysis. The joined was prejudicial. Splond must demonstrate deficient performance or prejudice. As far as deficient performance, an opposition to the motion to consolidate based on improper joinder would not have been futile. *See Ennis v. State,* 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). As argued above, an opposition was not futile,

and there were valid legal grounds to oppose the motion. A reading of the caselaw provides ample grounds to distinguish caselaw cited by the State to prepare a cogent argument against joinder.

To demonstrate prejudice, Splond must demonstrate "a substantial and injurious effect on the verdict." *Marshall v. State,* 118 Nev. 642, 647, 56 P.3d 376, 379 (2002); *see also* NRS 174.165(1) ("If it appears that a defendant or the State of Nevada is prejudiced by a joinder of ... defendants in an indictment or information, or by such joinder for trial together, the court may ... grant a severance of defendants or provide whatever other relief justice requires."). The district court noted that it was not enough for Splond to argue that he had a better defense with the caes severed. However, the argument is not that simplistic. The jury hearing the Star Mart evidence made it insurmountable for the defense to overcome the taint of the Star Mart offense and the jury likely closed its mind. Having the two cases joined "prevent[ed] the jury from making a reliable judgment about guilt or innocence.'" *See Marshall,* 118 Nev. at 647, 56 P.3d at 379 (quoting *Zafiro v. United States,* 506 U.S. 534, 539 (1993)). Counsel was ineffective for simply agreeing to the State's joinder of the cases, and it prejudiced Splond at trial.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED SPLOND'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EXPERT TESTIMONY

Standard of Review: This Court reviews the denial of a post-conviction petition for writ of habeas corpus for an abuse of discretion. *Nobles v. Warden*, Nevada Dept. of Prisons, 106 Nev. 67, 787 P.2d 390 (1990).

During the trial, the evidence tying Splond to the robberies of the two cellular phone stores was eyewitness identification evidence. Trial counsel then attempted to cross examine the detective about the procedures used during the photo lineups, to then argue the procedures were flawed. However, the detective was unaware of the techniques that trial counsel was asking about during cross examination. The district court found that counsel was not ineffective because counsel vigorously cross-examined the witnesses. AA1148-49. However, a reading of the record shows that while counsel attempted to cross-examine the detective regarding issues with identification procedures used by the police, counsel was stymied repeatedly during the questioning.

Counsel sought to question Kavon regarding the procedures used to perform lineups, including asking if LVMPD, at that time, was using a "double blind setup." AA759. When asked if LVMPD used a double-blind set up, the detective responded "not to my knowledge, no." AA759. Counsel then asked Kavon to explain to the jury what a double blind set up was. AA759. Kavon answered that he did not know. AA759. Counsel then indicated that some departments use such set up, and asked the detective to explain what the double blind procedure was. AA760. Kavon

testified that he did not know of any departments using such a set up for photo lineups. AA760. The State objected to speculation, and that court sustained the objection. AA760.

Counsel then sought to question the detective about why the photo lineup instructions are given in the manner proscribed on the lineup form. AA761. The detective was unfamiliar with the theory behind why the photo lineup instructions exist in their current form. AA 761. The detective remembered very little about the surrounding circumstances behind each lineup. AA766. Counsel then went back to attempting to question the detective about double blind procedures. AA768. Counsel essentially tried to testify to what a double blind set up was, and the detective did not know anything about them, and the State successfully objected to the line of questioning. AA768. In his closing, counsel attempted to explain the problems with photo lineups and why some departments use double blind set ups. This is hardly vigorous cross-examination, as the State was able to lodge successful objections because the detective was not familiar with double-blind procedures, nor did the detective have the knowledge that counsel was attempting to elicit. An expert would have been the proper vehicle to present the evidence to the State, and it was the crux of Splond's defense.

V. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED SPLOND'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST JURY INSTRUCTIONS

Standard of Review: This Court reviews the denial of a post-conviction petition for writ of habeas corpus for an abuse of discretion. *Nobles v. Warden*, Nevada Dept. of Prisons, 106 Nev. 67, 787 P.2d 390 (1990).

Splond argued that trial counsel should have proffered instructions on the eye witness identification and an inverse instruction on the possession of stolen property. The district court found that counsel was not ineffective because the jury did receive an instruction on witness credibility and on the burden of proof. AA1149. While this Court has held that those instructions negate the need for further specific instructions on eyewitness issues (*See Sparks v. State*, 96 Nev. 26, 604 P.2d 802 (1980)), that does not exempt trial counsel for fulfilling his duties to proffer instructions on the theory of defense. The *Sparks* case notes that it is not an error for a Court to not give such an instruction; however, a defendant is entitled to a jury instruction on his theory of the case if any evidence supports the theory, however improbable it may be." *Allen v. State*, 97 Nev. 394, 397, 632 P.2d 1153, 1155 (1981); *Brooks v. State*, 103 Nev. 611, 613-14, 747 P.2d 893, 894-95 (1987) (stating that a defendant is entitled to a "position" or "theory" instruction). Because Splond was entitled to an instruction on the theory of his defense, and because counsel has a duty to present a defense, counsel should have proffered an eyewitness identification instruction and instructions negating the elements of the possession of stolen property to make it clear to the jury that the State had not met its burden.

VI. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED SPLOND'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ELICIT TESTIMONY NEGATING THE ELEMENTS OF POSSESSION OF STOLEN PROPERTY AND THEN FAILING TO ARGUE THE FAILURE OF THE STATE TO PROVE THE ELEMENTS; AND COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE IN APPEAL THE SUFFICIENCY OF THE EVIDENCE REGARDING THE POSSESSION OF THE STOLEN FIREEARM

Standard of Review: This Court reviews the denial of a post-conviction petition for writ of habeas corpus for an abuse of discretion. *Nobles v. Warden*, Nevada Dept. of Prisons, 106 Nev. 67, 787 P.2d 390 (1990).

Certainly, the State proved that the handgun was stolen. However, the State must also prove that Splond knew or should have known that the gun was stolen. There was no evidence to suggest that there were overt signs (filed off serial number, etc.) that the firearm was stolen. Counsel should have elicited testimony from the witnesses to negate the element of knew or should have known. First, counsel could have established through the detective that Nevada allows private party gun sales, which means that having a gun that was not purchased at a store does not mean that gun is obviously stolen. Simply being in possession of a gun that turns out to be stolen is not evidence that Splond knew or should have known the gun was stolen. Counsel had an opportunity to elicit evidence that there was nothing overtly obvious about the gun that would lead one to believing it was stolen. That is the point of cross examination-- eliciting testimony that cuts through the State's theories. Simply

leaving alone a charge and eliciting no evidence, when evidence exists, to negate a charge is ineffective.

853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown, *Strickland,* 466 U.S. at 697.

Appellate counsel should have argued that the State failed to prove with sufficiency of the evidence that the Defendant knew or should have known that the firearm was stolen.

When reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, the appellate court will consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Stewart v. State*, 133 Nev. 142, 144, 393 P.3d 685, 687 (2017) (emphasis omitted) (internal quotations omitted). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (alteration in original) (internal quotations omitted). We will not disturb a verdict supported by substantial evidence. Stewart, 133 Nev. at 144-45, 393 P.3d at 687. "Circumstantial evidence alone may support a judgment of conviction." *Collman v. State,* 116 Nev. 687, 711, 7 P.3d 426, 441 (2000). In this case, there was not substantial evidence to support a conviction for possession of stolen property. Merely being in possession of a

stolen firearm is not enough. The State must present some evidence that the defendant knew or should have known it was stolen. Private parties are allowed to sell guns in Nevada, and there was nothing so readily apparent about the gun that someone would know when purchasing it that it was stolen. There was no evidence that Splond admitted he knew it was stolen, nor was there circumstantial evidence that he bought it from someone he should have suspected was selling him a stolen gun. Further, there was no evidence he bought it for a price that suggested the gun might be stolen. The record was devoid of any evidence. Therefore, raising such a claim to the appellate court was not frivolous and appellate counsel should have made the argument. The standard on appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Edwards v. State,* 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974). The omitted issue here would likely have been successful, as the record is devoid of evidence to sustain a conviction. Had counsel elicited the relevant evidence, and argued it to the jury, the jury could have easily been convinced that Splond did not know, nor should he have known, that the handgun was stolen. The record is bereft of any factor that would make the handgun readily apparent as stolen. The district court abused its discretion when it found that counsel was not ineffective for failing to elicit testimony, offer instructions or raise the issue on appeal. The district court did not address how the State's evidence suggested that

Splond knew or should have known, and the State simply argued that the owner of the gun said it was stolen, and then the State argued that because the gun was stolen, and Splond did not try to register it, it must have been stolen. That argument makes no sense. To argue that Splond must have known it was stolen because it was stolen sort of implies Splond stole it. There was fertile ground for trial counsel to negate the elements of the offense.

CONCLUSION

The district court abused its discretion in denying the petition.

Respectfully submitted,

By: /s/Monique McNeill
Monique McNeill, Esq.
Nevada Bar # 9862

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirement of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirement of NRAP 32(a)(6) because:

X This brief has been prepared in a monospaced typeface using Word with Times New Roman, 14 point, which does not contain more than 10 ½ characters per inch.

2. This brief does not exceed the page or type limitations found in NRAP32(a)(7) because it contains 11,639 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of October, 2021.

By: /s/Monique McNeill

Monique McNeill, Esq.
Nevada Bar # 9862

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 59 day of October, 2021 via Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

MONIQUE MCNEILL STEVEN WOLFSON

I further certify that I served a copy of this document, via United States Postal Service to KENYA SPLOND at High Desert State Prison.

Dated this 15th day of October, 2021.

/s/Monique McNeill