IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 09 2021 11:57 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

DENNIS MARC GRIGSBY,
Appellant(s),

vs.

CALVIN JOHNSON, WARDEN,
Respondent(s),

Case No: A-20-821932-W

Docket No: 83152

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
DENNIS GRIGSBY #1033640,
PROPER PERSON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-20-821932-W **Dennis Grigsby, Plaintiff(s)**
vs.
Calvin Johnson, Defendant(s)

I N D E X

A-20-821932-W Dennis Grigsby, Plaintiff(s)
vs.
Calvin Johnson, Defendant(s)

I N D E X

THIS SEALED
DOCUMENT,
NUMBERED PAGE(S)
1 - 6
WILL FOLLOW VIA
U.S. MAIL

Dennis Grigsby #1033640
P.O. Box 650 [H.D.S.P.]
Indian Springs, NV 89070

FILED
Sep 25 2020
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

A-20-821832-W
Dept: XXV

Dennis Marc Grigsby,
Petitioner,

Case No.: 08C246709
Dept. No.: XXV

v.

Calvin Johnson, Warden, et al,
Respondent.

Judicial Notice
(Evidentiary Hearing Requested)

Petition for Writ of Habeas Corpus

COMES NOW, the Petitioner, Dennis Marc Grigsby, in pro se and hereby submits this Petition for Writ of Habeas Corpus.

THIS Petition, is made and based upon all the prior papers and pleadings on file with the court clerk, and the points and authorities in support hereof, as well as attached exhibit(s).

DATED: this 15 day of September, 2020.

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SEP 21 2020
CLERK OF THE COURT

I.

Points and Authorities

Jurisdiction

This court has jurisdiction pursuant to the provisions of NRS 34.360 et seq.

NRS 34.360 states: "Every person unlawfully committed, detained, confined or restrained of his liberty under any pretense whatever, may prosecute a Writ of Habeas Corpus to inquire into the cause of such imprisonment or restraint."

"An appellate court has the discretion to review an unpreserved error if it is plain and affected the defendants substantial rights. In conducting plain error review, the appellate court must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendants substantial rights. An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights." Saletta v. State, 127 Nev. 416, 254 P.3d 111 (Nev. 2011).

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II.

Statement of the Case

On August 11, 2008, Dennis Marc Grigsby (hereinafter "Petitioner") was charged by way of Information with one count of Open Murder with Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165); and one count of Possession of a Firearm by Ex-Felon (Felony - NRS 202.360). On January 26, 2009, prior to the commencement of trial, the State filed an Amended Information wherein it removed the charge of Possession of a Firearm by a Felon. Petitioner's jury trial commenced on January 26, 2009. On the count of Open Murder, by poll of the jury the Petitioner was convicted on Febraary 4, 2009, of First Degree Murder with Use of a Deadly Weapon. On February 5, 2009, the jury set Petitioner's penalty as Life in prison without the possibility of parole.

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III.

Argument

A. An Illegal Verdict was Rendered Due to a Fundamental Constitutional Error Where the Poll of Only Ten of the Twelve Jurors Violated Petitioner's Rights to Due Process, Jury Unanimity, Fair Trial, and Effective Assistance of Counsel as Guaranteed by the United States Constitution and the Fifth, Sixth, and Fourteenth Amendments.

Because Nevada Revised Statute 175.531 is substantially similar to Federal Rules of Criminal Procedure 31(d), and provides that if the poll does not show unanimous concurrence in the verdict, the court may direct the jury to continue its deliberation or discharge the jury.

Here, Petitioner submits "newly discovered evidence", that his Sixth Amendment guarantee of unanimity was not satisfied. A review of the February 4, 2009 trial record unequivocally shows that the guilt phase jury poll of count-one was of only ten of the twelve jurors. Clearly, jurors four and nine did not provide a announced poll. See Exhibit A, attached (internal pages 11-14). The instant error of substantial compliance ineffect prejudiced the Petitioner by way of an illegal verdict and/or conviction.

Significantly, the trial record which proves there was a jury poll error, February 4, 2009. Was not transcribed, certified, and filed with the court until August 15, 2012, eleven months after the Nevada Supreme Court affirmed the direct appeal September 14, 2011.

Because of the aforementioned omission of the trial record clearly the "newly discovered evidence", could not have been discovered at the time of trial, collateral review is warranted. This "fundamental constitutional error", denied the initial collateral review of a non-unanimous jury poll and should be sufficient exception to state procedural rule of timeliness. Although one that is "rare" the jury poll error" strikes at the heart of the trial process".

Importantly, the guilt phase verdict upon only ten polled jurors not only affected the Petitioners substantial rights, the error affects the fairness, integrity, and public reputation of the judicial proceedings. See Exhibit B, attached.

Lastly, "the Supreme Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment... So if the Sixth Amendment's right to a jury trial

requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." Ramos v. Louisiana, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020).

Wherefore, the Petitioner prays that the Court GRANTS this Writ of Habeas Corpus and reverses his conviction.

DATED: this 15th day of September, 2020.

Respectfully submitted,
Dennis Grigsby
Dennis Marc Grigsby, #1033640
Pro Se

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EXHIBIT

A

Jury Trial Transcript

February 4, 2009

Page 1

ORIGINAL

CASE NO. C246709
DEPT. NO. XIV

DISTRICT COURT

CLARK COUNTY, NEVADA

-oOo-

STATE OF NEVADA,
Plaintiff,
vs.
DENNIS MARC GRIGSBY,
Defendant.

REPORTER'S TRANSCRIPT
OF
JURY TRIAL

BEFORE THE HON. DONALD M. MOSLEY, DISTRICT JUDGE
WEDNESDAY, FEBRUARY 4, 2009
2:33 p.m.

APPEARANCES:

For the State: ROBERT B. TURNER, ESQ.
Assistant District Attorney

For the Defendant: DAVID M. SCHIECK, ESQ.
CLARK PATRICK, ESQ.

Reported by: CHERYL GARDNER, RPR-RMR
CCR No. 239

08C246709
TRAN
Reporters Transcript
1932348

FILED
Dec 15 11 36 AM '12
CLERK OF THE COURT

Page 2

LAS VEGAS, CLARK COUNTY, NV, WED, FEBRUARY 4, 2009
2:33 p.m.

-oOo-

PROCEEDINGS

THE COURT: Case C246709, State of Nevada versus Dennis Marc Grigsby. Let the record reflect the presence of the defendant and his counsel, Mr. Schieck and Mr. Patrick. Mr. Tomsheck could not be with us this afternoon. His wife just gave birth.

We are in the absence of the jury for the record to take care of some housekeeping matters. At the outset I'd like to make it known on the record that we did receive a question from the foreman of the jury. I can't read his writing here very well.

Let the record reflect we'll make it a Court's exhibit. I can't read the signature. The question is Can we have the definition by the Court of the term, quote, concealment, unquote, according to instruction 10, signed the jury, and counsel and I went over that and we indicated that we would send a letter and give the Webster's dictionary version of the definition of concealment, and I have a copy of that letter in the computer which will be marked Court's exhibit next in order.

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I believe we submitted that definition. Is that correct, counsel?

MR. TURNER: That's a correct statement, Judge.

MR. SCHIECK: That's a correct statement. It was a very simple definition. It wasn't an entire definition like from a larger dictionary. I believe it was to hide or --

MR. PATRICK: To place out of sight.

MR. SCHIECK: -- to place out of sight.

THE COURT: Next counsel will recall during the omission portion of our guilt phase of this trial that it was in closing made mention by Mr. Turner that the jury could find guilt of first degree murder by either of two theories, and it could be a combination of the jurors feeling one way or the other to the two theories and if they were unanimous in finding a theory, then it would be binding.

Mr. Schieck preserved the record for appeal. He expressed it freely at the bench and I allowed it to go forward and I had indicated we would supplement the instructions. We didn't get a supplement to the instructions into the jury at the outset when they did adjourn to confer the matter,

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and we discussed it in chambers after a copy was delivered to my chambers, and I felt that the agreement was to send this in at this time after six or eight hours of deliberation. It might put a little undue emphasis. It might be unfair so I have it in my hand. It will be the next Court's exhibit, but we did not give this over to the jury.

I'm prepared to listen to arguments.

MR. TURNER: Judge, the Court stated it correctly. I think the State argued what is appropriate under the law. Obviously there wouldn't be any prejudice to the defendant because that is the current state of the law. In terms of giving the instruction to the jury in light of Mr. Schieck not wanting that given to the jury, the State understands his reasons for that. We did not object to the fact that it was not given to them.

THE COURT: Okay. Mr. Schieck.

MR. SCHIECK: I believe that's a correct statement, Your Honor. The State had a Power Point slide that presented language to the effect that the jury did not have to be unanimous as to their theory of first degree murder at which point we objected and approached the bench the record will show.

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At the bench we did object to them arguing that on the basis that there was no jury instruction to that effect and although we did concede that if an instruction had been offered that the Court probably would have allowed that instruction under the case of Shad (phonetic) versus Arizona, but if they had offered it when we settled jury instructions, we would have objected to it at that time and are putting on the record now our objection to that instruction as basically doing away with the requirement that a jury be unanimous and pick and choose liability in order to convict someone of a first degree murder charge when there are more than one theory presented.

We would request the objection preserved on the record, and we did object timely when the State argued it to the jury and that the jury did not receive an instruction they took back in the jury room with that language in it.

THE COURT: Okay. I'll not mention the failure to incorporate this additional instruction. It was merely an oversight. There was no intent I don't think, and I would point out that I think the status of the law in Nevada is that these alternate considerations can be

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considered, these alternate theories so that's why I allowed it to go forward.

Anything else?

MR. TURNER: Judge, the Court -- in the event we get a guilty verdict, it's the State's intention to proceed on the ex-felon. I know it's a little premature. I want to present an instruction for that particular count.

If we get a guilty verdict, it's my intention to file an amended Information which I have as well. Judge, in that amended Information, the original Information had a number of felony convictions. I just want the Court to know I've instructed all felonies we don't have a judgment of conviction for so the only one is one I intend to mark and admit as an exhibit.

THE COURT: Is that a Nevada conviction?

MR. TURNER: It is actually, Your Honor, a conviction out of Los Angeles, California.

THE COURT: Okay. And you'll make an offer to file an amended Information at the appropriate time. Do you have an instruction?

MR. TURNER? I do, our Honor. May I approach?

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THE COURT: Yes.

MR. TURNER: And I provided a copy to counsel.

THE COURT: Mr. Schieck.

MR. SCHIECK: Yes, Your Honor. There's a umber of things prior to the commencement of the case when it was discussed and argued or put on the record here in court that the motions were going to be severed, the second count being severed from the first, we voiced our objection and continued to voice our objection to the same jury that has heard a first degree murder trial whatever their verdict is concerning Mr. Grigsby having heard that trial and the information in that trial and the decisions and evidence that the defense chose to either present or not present in that trial.

To have the same jury hear a second trial in essence a very mini-trial on the issue of the ex-felon in possession we feel is unfair to the defendant and he's prejudiced by the jury having heard all the other facts on the other case and would argue that the procedure that should be followed in the State of Nevada is that a separate jury would have to make a decision on the severed

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count such as this.

MR. TURNER: Your Honor, the Nevada Supreme Court has ruled that these counts need to be severed not as a result of the fact that how they're arising from different facts but just by the fact if the jury were to hear that during the guilt phase of the underlying offense, they might be prejudiced. Once there is a finding of guilt beyond a reasonable doubt, we no longer have that issue.

The ex-felon count that we have we're alleging that the possession directly resulted in his possession and use of the gun in the murder itself. These jurors are in the best position to make that determination, and I believe the Supreme Court even suggested bifurcation as a means to do that and I think it would be an incredible waste of the Court's resources to have to impanel a whole new jury to hear basically the same facts that this jury has already heard.

THE COURT: I agree on the ex-felon in possession of a firearm will be held in conjunction with the underlying offense. Anything else outside the presence of the jury?

MR. TURNER: No, Your Honor.

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MR. SCHIECK: Your Honor, we are -- is it the intention of the Court to proceed directly into subsequent proceedings then?
THE COURT: It would be.
MR. SCHIECK: We would be putting on the record now our objection to the judgement of conviction as being sufficient in order to convict Mr. Grisby of the crime of ex-felon in possession. Although it is a certified document that would be admissible, there's no indication or reliability as to who this Dennis Marc Grisby is, whether or not it's the same person that is on trial in this courtroom.
There's no fingerprints. There's no proof. There's no other information that's going to be presented to this jury and as a matter of law we would ask the Court to find it is not sufficient to proceed to the jury on that issue.
MR. TURNER: Well, Judge, I think the case law is clear the judgment of convictions are inherently reliable unless they can show some basis that there's something about it from the document that you would need additional indicia of reliability to show that it's the defendant. That's why we use them in habitual criminal cases

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and everything else. They're determined inherently reliable.
THE COURT: We do use certified copies routinely. I would like to point out if it turns out now or in the midst of the proceedings or after the proceedings if it turns out we were utilizing a document that was false or in error, the Court would hear arguments to set aside the conviction so the remedy will be in that matter if that's required. Very good. Mr. Bailiff, bring in the jury.
(Whereupon the jury entered the courtroom at 2:45 p.m. and the following proceedings took place.)
THE COURT: Ms. Clerk, will you call the role of the jury and while she's doing that, counsel, could I see you here at the bench.
(Whereupon, counsel approached the bench, and after a discussion outside the hearing of the court reporter, the following proceedings took place:)

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THE CLERK: Michael Mortensen.
JUROR NO. 1: Here.
THE CLERK: William Fisher.
JUROR NO. 2: Here.
THE CLERK: Kathryn Gegen.
JUROR NO. 3: Here.
THE CLERK: Spencer Swan.
JUROR NO. 4: Here.
THE CLERK: Gary Baier.
JUROR NO. 5: Here.
THE CLERK: Alesha Howell.
JUROR NO. 6: Here.
THE CLERK: Guadalupe Aguirre.
JUROR NO. 7: Here.
THE CLERK: Marvin D. Engels.
JUROR NO. 8: Here.
THE CLERK: Paul Hunt.
JUROR NO. 9: Here.
THE CLERK: John Junio.
JUROR NO. 10: Here.
THE CLERK: Rebecca Sudberry.
JUROR NO. 11: Here.
THE CLERK: Fatima Perry.
JUROR NO. 12: Here.
THE COURT: Mr. Mortensen, you are the

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foreman of the jury.
JUROR NO. 1: Yes.
THE COURT: Has the jury reached a verdict in this matter?
JUROR NO. 1: Yes, it has.
THE COURT: Hand it, please, to the bailiff.
Ms. Clerk, will you read aloud the verdict and inquire of the jury is this in fact their verdict.
THE CLERK: District Court, Clark County, Nevada, the State of Nevada versus Dennis Marc Grigsby, defendant, Case No. C246709, Department No. XIV, Verdict, We, the jury in the above entitled case, find the defendant as follows: Count 1: Murder with use of a deadly weapon, guilty of first degree murder with use of a deadly weapon, dated this 2nd day of February, 2009.
Ladies and gentlemen, is this how the jury has held so say you one, so say you all.
THE COURT: Does the defense wish to have the jury polled?
MR. SCHIECK: Yes, Your Honor.
THE COURT: Michael Mortensen, is this

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your verdict as read?
JUROR NO. 1: Yes.
THE CLERK: William Fisher, is this your verdict as read?
JUROR NO. 2: Yes.
THE CLERK: Kathryn Gegen, is this your verdict as read?
JUROR NO. 3: Yes.
THE CLERK: Gary Baier, is this your verdict as read?
JUROR NO. 5: Yes.
THE CLERK: Alesha Howell, is this your verdict as read?
JUROR NO. 6: Yes.
THE CLERK: Guadalupe Aguirre, is this your verdict as read?
JUROR NO. 7: Yes.
THE CLERK: Marvin Engels, is this your verdict as read?
JUROR NO. 8: Yes.
THE CLERK: John Junio, is this your verdict as read?
JUROR NO. 10: It is.
THE CLERK: Rebecca Sudberry, is this your verdict as read?

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JUROR NO. 11: Yes.
THE CLERK: Fatima Perry, is this your verdict as read?
JUROR NO. 12: Yes.
THE COURT: The jurors all answered in the affirmative. Very well. It will be recorded in the minutes of the Court.
Mr. Turner, do you have an amended Information to file?
MR. TURNER: I do, Your Honor. I'd ask leave of the Court to file a second amended Information.
THE COURT: Very good. No objection I take it.
MR. SCHIECK: Other than previously stated, Your Honor.
THE COURT: The Court will receive the amended Information. The clerk will read aloud the second amended Information.
Ladies and gentlemen, there's some additional business we have to conduct before we go into the penalty phase by way of explanation.
THE CLERK: Filed in open court February 4, 2009, Edward Friedland, Clerk of the Court by Linda Skinner, deputy district court

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clerk. Case No. C246709, Department No. XIV, second amended Information, County of Clark, David Roger, district attorney, within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada informs the Court:
That Dennis Marc Grigsby, the defendant above named, having committed the crime of murder with use of a deadly weapon (felony - NRS 200.010, 200?030, 193.165) on or about the 2nd day of April 2008 within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided and against the peace and dignity of the State of Nevada,
Count 1 - murder with use of a deadly weapon.
Did then and there wilfully, unlawfully, feloniously and without authority of law, and with malice aforethought kill Anthony Davis, a human being, by the said defendant shooting at and into the body and/or head of said Anthony Davis with a deadly weapon, to-wit: A firearm; said killing having been; (1) willful, deliberate, and premeditated, and/or (2) committed

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by defendant lying in wait to commit the killing.
Count 2 - possession of firearm by ex-felon.
Did then and there wilfully, unlawfully, and feloniously own or have in his possession or under his control a weapon, to-wit: a .25 caliber handgun, the said defendant being an ex-felon having in 2000 been convicted of possession of marijuana for the purpose of sale, a felony under the laws of the State of California, David Roger, district attorney, by Robert B. Turner, chief deputy district attorney, to which the defendant has entered a plea of not guilty.

THE COURT: Very well. Mr. Turner, do you have items to submit?
MR. TURNER: I do, Your Honor. The State would ask to approach the clerk and give my next piece of evidence marked next in order. Judge, at this time the State would admit to move State's proposed Exhibit 157 which is a certified copy of a felony conviction out of the State of California for Dennis Marc Grigsby for the felony count of possession of marijuana for the purpose of sale.

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THE COURT: Mr. Schieck, Mr. Patrick, other than the objection stated, is there any objection to the submission of this evidence?
MR. SCHIECK: None other than as previously stated, Your Honor, as to the voracity of the document as to the identity.
THE COURT: Very good then. The Court will receive the document.
MR. TURNER: Your Honor, the State has no further evidence to present.
THE COURT: All right. Defense counsel have any comments?
MR. SCHIECK: We have no evidence to present on that issue, Your Honor.
THE COURT: Very well then. Closing remarks?
MR. TURNER: Yes. Briefly, Your Honor, ladies and gentlemen, the State has filed with the Court an amended Information adding an additional count, ex-felon in possession of a firearm. You've already made a determination about the defendant's guilt.
The defendant was in possession of a .25 caliber handgun when he committed the murder of the victim in this case, Anthony Davis. We now ask

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you to return a verdict for possession of that firearm for the felony defense you will have with you possession of marijuana with the purpose of selling that marijuana.
THE COURT: Thank you, Mr. Turner. Any response?
MR. SCHIECK: We would wave any closing argument, Your Honor.
THE COURT: Mr. Schieck, the Court's intention would be to send an instruction in with the jury. Do you have any objections to the form of the instruction that you have been apprised of?
MR. SCHIECK: Not to the form of the instruction, Your Honor.
THE COURT: Okay. Ladies and gentlemen, I will read you the following instruction. A person who has been convicted of a felony in this or any other state or in any political subdivision thereof or of a felony in violation of the laws of the United States of America unless he has received a pardon and the pardon does not restrict his right to bear arms shall not own or have in his possession or under his control any firearm neither the concealment of the firearm or the carrying of the weapon are

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necessary elements of the offense.
So at this juncture the bailiff will escort you, ladies and gentlemen, to the jury room and resume your deliberations on this issue only. and resume your deliberations.
MR. TURNER: Your Honor, may we approach?
(Whereupon, counsel approached the bench, and after a discussion outside the hearing of the court reporter, the following proceedings took place:)
(Whereupon, the jury retired from the courtroom at 2:53 p.m. and entered again at 3:11 p.m. and the following proceedings took place:)
THE COURT: C246709, State of Nevada versus Dennis Marc Grigsby. Let the record reflect the presence of the defendant with his counsel, Mr. Schieck and Mr. Patrick; Mr. Turner for the State. Will counsel stipulate the jury is present?
MR. TURNER: Yes, Your Honor.

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MR. SCHIECK: Yes, Your Honor.
THE COURT: Mr. Mortensen, has the jury reached a verdict on this additional issue?
JUROR NO. 1: Yes, we have.
THE COURT: Please hand it to the bailiff.
Ms. Clerk, read aloud the verdict if you would and inquire of the jury if it's their verdict.
THE CLERK: State of Nevada versus Dennis Marc Grigsby, defendant, Case No. C246709, Department No. XIV, Verdict, We, the jury in the above entitled action find the defendant, Dennis Marc Grigsby, as follows: Count 2, possession of a firearm by ex-felon, guilty of possession of firearm by ex-felon dated this 4th day of February, 2009, Michael Mortensen, foreman.
Ladies and gentlemen, is this your verdict as read? So say you one, so say you all.
JURORS: Yes.
THE COURT: Does counsel wish to have the jurors polled?
MR. SCHIECK: No, Your Honor.
MR. TURNER: No, Your Honor.
THE COURT: The verdict will be

recorded in the minutes of the Court. Counsel, we just discussed previously the possibility of tomorrow afternoon as the time we begin the penalty phase of this proceeding. Is that going to be fine, 1:30?

MR. TURNER: Yes.

MR. SCHIECK: Anything else at this juncture?

MR. SCHIECK: No, Your Honor.

MR. TURNER: No, Your Honor.

THE COURT: Ladies and gentlemen, we will adjourn at this juncture and have you return at 1:30 tomorrow.

During this recess, it is your duty not to converse among yourselves or with anyone else on any subject connected with the trial or to read, watch or listen to any report of or commentary on the trial by any person connected with the trial or by any medium of information, including, without limitation, newspaper, television, radio, and the internet, and you are not to form or express an opinion on any subject connected with this case until it is finally submitted to you, under instructions by me.

Now, let me make something clear.

Part of this matter has been resolved yet you are not to discuss that or any other part until the final resolution of the matter so the same thing applies. Just don't speak to anybody. We'll see you back tomorrow at 1:30. Court's adjourned.

(Whereupon the proceedings adjourned at 3:14 p.m.)

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the proceeding transcript of trial filed in district court case No. C246709 does not contain the social security number of any person.

Dated this 14th day of August, 2012.

Cheryl Gardner

Cheryl Gardner, CCR 230, RPR, RMR

REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I, Cheryl Gardner, RMR-RPR, CCR 230, do hereby certify that I took down in Stenotype all of the proceedings had in the before-entitled matter at the time and place indicated and that thereafter said shorthand notes were transcribed into typewriting by me and that the foregoing transcript constitutes a full, true, and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal of office in the County of Clark, State of Nevada, this 14th day of August, 2012.

Cheryl Gardner

CHERYL GARDNER, RMR-RPR, CCR 230

EXHIBIT

B

Guilt Phase Verdict

February 4, 2009

VER

FILED IN OPEN COURT
FEB 04 2009 2:59 pm
EDWARD A. FRIEDLAND
CLERK OF THE COURT
BY Linda Skinner DEPUTY
LINDA SKINNER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
DENNIS MARC GRIGSBY,
Defendant.

CASE NO: ~~C246709~~ C244709
DEPT NO: XIV

VERDICT

We, the jury in the above entitled case, find the Defendant DENNIS MARC GRIGSBY, as follows:

COUNT 1 – MURDER WITH USE OF A DEADLY WEAPON

(please check the appropriate box, select only one)

- [X] Guilty of First Degree Murder With Use Of A Deadly Weapon
- [ ] Guilty of First Degree Murder
- [ ] Guilty of Second Degree Murder With Use Of A Deadly Weapon
- [ ] Guilty of Second Degree Murder
- [ ] Not Guilty

DATED this 4 day of February, 2009

Michael Mahan
FOREPERSON

CERTIFICATE OF SERVICE BY MAILING

I, Dennis Marc Grigsby, hereby certify, pursuant to NRCP 5(b), that on this 15 day of September, 2020, I mailed a true and correct copy of the foregoing, "Petition for Writ of Habeas Corpus"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

Nevada Attorney General
555 E. Washington Ave., #3900
Las Vegas, NV 89101
c/o Jaimie Stilz, D.A.G.

DOC 509, No.: 1729495

CC:FILE

DATED: this 15 day of September, 2020.

Dennis Grigsby
Dennis Marc Grigsby #1033640
Petitioner /In Propria Personam / Pro Se
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 2398.030

The undersigned does hereby affirm that the preceding _____

Petition for Writ of Habeas Corpus
(Title of Document)

filed in District Court Case number 08C246709

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-OR-

B. For the administration of a public program or for an application for a federal or state grant.

Dennis Grigsby
Signature

9/15/2020
Date

Dennis Marc Grigsby #1033690
Print Name

Petitioner Pro Se
Title

Dennis Grigsby #1033640
P.O. Box 650 [N.D.S.P.]
Indian Springs, NV 89070

$002.00

Clerk of Court
8th Judicial District Court
200 Lewis Ave.
Las Vegas, NV 89155

3762

Legal Mail

Doc 509, No.: 1729495

Inspected
9-15-2020
969 Manta
HDSP
07A/B

HIGH DESERT STATE PRISON
SEP 15 2020
UNIT 7 A/B

FILED
SEP 25 2020
CLERK OF COURT

Dennis Grigsby #1033640
P.O. Box 650 [H.D.S.P.]
Indian Springs, NV 89070

DISTRICT COURT
CLARK COUNTY, NEVADA

A-20-821932-W
Dept: XXV

Dennis Marc Grigsby,
Petitioner,
v.
Calvin Johnson, Warden, etal.,
Respondent.

Case No.: 08C246709
Dept. No.: XXV

Motion for Appointment of Habeas Corpus Counsel

Date of Hearing:
Time of Hearing:

COMES NOW, the Petitioner, Dennis Marc Grigsby, in pro se and hereby submits this Motion for Appointment of Habeas Corpus Counsel.

THIS Motion, is made and based upon all the prior papers and pleadings on file with the court clerk, and the points and authorities in support hereof.

DATED: this 15 day of September, 2020.

//

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Points and Authorities

This action is commenced by, Petitioner, Dennis Marc Grigsby, in state custody, and pursuant to NRS 34.750, in regard to his accompanying Petition for Writ of Habeas Corpus.

To support the Petitioners need for appointment of Habeas Corpus counsel, he states the following:

1. The merits of claim for relief within the Petition is of a constitutional dimension, and viable.
2. The issue presented within the Petition involves a complexity, the Petitioner is unable to argue orally as an attorney would or could.
3. Appointed counsel would be of service to the Court, Petitioner and the Respondents as well, by shaping the examination of potential witnesses and ultimately shortening the length of a potential Evidentiary Hearing.
4. Appointment of counsel would assit in the determination of a resolution should the need arise.

WHEREFORE, Petitioner prays the Court GRANTS this Motion.

DATED: this 15 day of September, 2020.

Respectfully submitted,
Dennis Grigsby #1033640

CERTFICATE OF SERVICE BY MAILING

I, Dennis Marc Grigsby, hereby certify, pursuant to NRCP 5(b), that on this 15 day of September, 2020, I mailed a true and correct copy of the foregoing, "Motion for Appointment of Habeas Corpus Counsel"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

Nevada Attorney General
555 E. Washington Ave., #3900
Las Vegas, NV 89101
c/o Jaime Stilz, D.A.G.

DOC 509, No.: 1729495

CC:FILE

DATED: this 15 day of September, 2020.

Dennis Grigsby
Dennis Marc Grigsby #1033640
Petitioner /In Propria Personam / Pro Se
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Motion for Appointment of Habeas Corpus Counsel
(Title of Document)

filed in District Court Case number 08C246709

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Dennis Grigsby
Signature

9/15/2020
Date

Dennis Marc Grigsby #1033640
Print Name

Petitioner Pro Se
Title

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DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Marc Grigsby,

Petitioner,

vs.

Calvin Johnson,

Respondent,

Case No: A-20-821932-W
Department 25

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on September 25, 2020. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 24th day of March, 20 21, at the hour of 3:00 p.m. ~~o'clock~~ for further proceedings.

Dated this 5th day of January, 2021

District Court Judge

FE9 78A 2037 497F
Kathleen E. Delaney
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Grigsby, Plaintiff(s)	CASE NO: A-20-821932-W
vs.	DEPT. NO. Department 25
Calvin Johnson, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case.

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 1/6/2021

Dennis Grigsby	#1033640 P.O. Box 650 Indian Springs, NV, 89070

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Dennis Grigsby #1033640
P.O. Box 650 [H.D.S.P.]
Indian Springs, NV 89070

DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Marc Grigsby,
Petitioner,
v.
Calvin Johnson, Warden, et al.,
Respondent.

Case No.: A-20-821932-W
Dept. No.: XXV

Judicial Notice
(Evidentiary Hearing Requested)

Supplement to Petition for Writ of Habeas Corpus

COMES NOW, the Petitioner, Dennis Marc Grigsby, in pro se and hereby submit the attached points and authorities in Supplement to the "Petition for Writ of Habeas Corpus". THIS Supplement, is based on all prior papers and pleadings on file with the clerk of the court, which are hereby incorporated by this reference and the attached points and authorities herein and such further facts as will come before the court at an evidentiary hearing.

DATED: this 24th day of March, 2021.

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I.

Points and Authorities

Argument

The petition before the court is submitted as a "traditional habeas petition", and not for postconviction relief. Clearly not titled "Post-Conviction", as must be pursuant to NRS 34.730 §2.

Specifically, the context of the instant petition set forth pursuant to NRS 34.360 is in substantially the form of "Application for Writ" in NRS 34.370 §3 and 4, under Habeas Corpus - General Provisions.

Moreover, a petition for habeas corpus may be filed in the district court having custody, or a request for relief may be brought in the court the conviction occurred, of which this court is both. Marshall v. Warden, NSP, 434 P.2d 437 (Nev. 1967); Pellegrini v. State, 34 P.3d 519 (Nev. 2001); Harris v. State, 329 P.3d 619 (Nev. 2014); Chauncey v. Warden, NSP, 505 P.2d 292 (Nev. 1973).

Here, the illegal verdict rendered upon the poll of only 10 of the 12 jurors is a "miscarriage of justice", where the extraordinary remedy of habeas corpus is appropriate to test the legality of a conviction which is challenged on constitutional grounds. Shum v. Foglian, 413 P.2d 495 (Nev. 1966); See NRS 175.481. See JOC, filed April 6, 2009 (Related Case No.: 08C246709, which violates the U.S. Constitution and the 5th, 6th, and 14th Amendments).

The Supreme Courts decision in Ramos v. Louisiana, 590 U.S. ___, 140 S.Ct. 1390 (2020), illustrates question of 'implicating the fundamental fairness and accuracy of the trial, regarding the "newly discovered" guilt phase verdict upon a non-unanimous jury poll.

Surely, the instant jury poll error violates Petitioner's "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons." Thompson v. Utah, 170 U.S. 343, 351 (1898). See also Maxwell v. Dow, 176 U.S. 581, 586 (1900).

Furthermore, the Supreme Court has, repeatedly and over many years recognized that the Sixth Amendment requires unanimity, and "that the verdict should be unanimous." Andres v. United States, 333 U.S. 740, 748 (1948).

Lastly, the petition before this court is submitted under General Provisions pursuant to NRS 34.360 and 34.370. A petition for habeas corpus and not for post-conviction relief pursuant to NRS 34.720 to 34.830 inclusive; it is not subject to the time requirement for filing set forth in NRS Post-Conviction Relief section. See Dromiack v. Warden, NSP, 607 P.2d 1145 (Nev. 1980).

DATED: this 24th day of March, 2021.

Respectfully submitted,
Dennis Quigley #1033640, Pro Se

CERTFICATE OF SERVICE BY MAILING

I, Dennis Marc Grigsby, hereby certify, pursuant to NRCP 5(b), that on this 24th day of March, 2021, I mailed a true and correct copy of the foregoing, "Supplement to Petition for Writ of Habeas Corpus"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clark County District Attorney
200 Lewis Ave.
LV, NV 89155

Nevada Attorney General
555 E. Washington Ave, #3900
LV, NV 89101

CC:FILE

DATED: this 24th day of March, 2021.

Dennis Grigsby
Dennis Marc Grigsby #1033680
/In Propria Personam / Pro Se
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding

Supplement to Petition for Writ of Habeas Corpus
(Title of Document)

filed in District Court Case number A-20-821932-W

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Dennis Grigsby
Signature

3/24/21
Date

Dennis Marc Grigsby
Print Name

Petitioner Pro Se
Title

Dennis Grigsby #1033640
P.O. Box 650
Indian Springs, NV 89070

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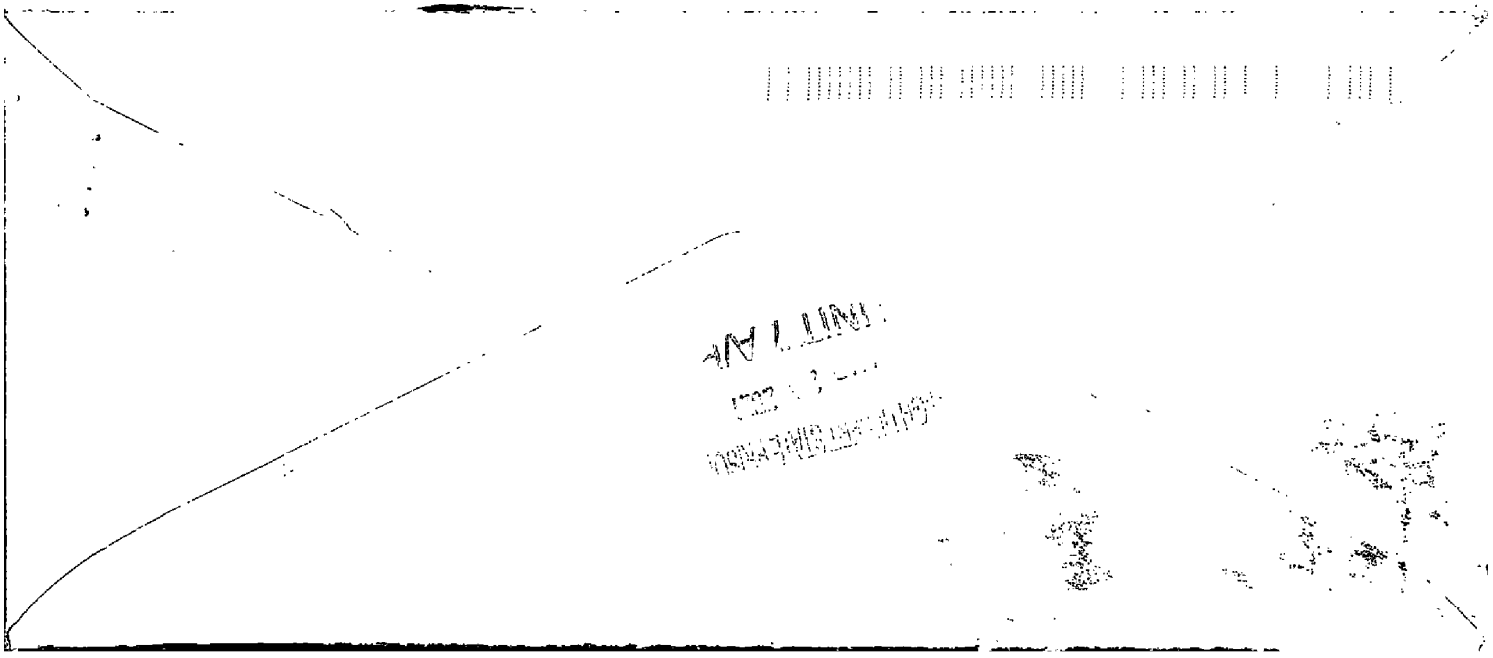

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS MARC GRIGSBY,
#1813660

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-821932-W
08C246709

DEPT NO: XXV

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), MOTION FOR APPOINTMENT OF COUNSEL, REQUEST FOR EVIDENTIARY HEARING AND STATE'S MOTION TO DISMISS PURSUANT TO LACHES

DATE OF HEARING: JUNE 16, 2021
TIME OF HEARING: 9:00AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On August 11, 2008, Dennis Marc Grigsby (hereinafter "Petitioner") was charged by way of Information with one count of Murder with Use of a Deadly Weapon and one count of Possession of a Firearm by Ex-Felon. On January 26, 2009, prior to the commencement of trial, the State filed an Amended Information wherein it removed the charge of Possession of a Firearm by a Felon. Petitioner's jury trial commenced on January 26, 2009. On February 4, 2009, the jury found Petitioner guilty of First Degree Murder with Use of a Deadly Weapon. Immediately following the jury's verdict, the State filed a Second Amended Information wherein it again charged Petitioner with Possession of a Firearm by Ex-Felon.[1] The jury reconvened and found Petitioner guilty of Possession of Firearm by Ex-Felon. At the penalty phase on February 5, 2009, the jury set Petitioner's penalty as Life in prison without the possibility of parole.

On March 19, 2009, the Court sentenced Petitioner as follows: pursuant to the jury verdict, to Life without the possibility of parole for the charge of First Degree Murder with A Deadly Weapon, with a consecutive term of sixty (60) to two-hundred forty (240) months in the Nevada Department of Corrections (hereinafter "NDC") for the deadly weapon enhancement. On the charge of Possession of Firearm by Ex-Felon, Petitioner was sentenced to sixteen (16) to seventy-two (72) months in the NDC, to run concurrent to his sentence on the murder charge. The Judgment of Conviction was filed on April 6, 2009.

On April 14, 2009, Petitioner filed a Notice of Appeal. On September 14, 2011, the Nevada Supreme Court affirmed the Judgment of Conviction, and Remittitur issued October 10, 2011.

On January 20, 2012, Petitioner filed three (3) documents: a Proper Person Petition for Writ of Habeas Corpus; a Motion for Leave to Proceed in Forma Pauperis; and a Motion for the Appointment of Counsel and Request for Evidentiary Hearing. On March 7, 2012, the State filed a Response to Petitioner's Petition. On March 12, 2012, the Court granted

[1] The Second Amended Information reflects both counts as follows: COUNT 1 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165) and COUNT 2 – Possession of a Firearm by Ex-Felon (Felony – NRS 202.360).

Petitioner's Motion to Appoint Counsel. Karen Connelly, Esq. confirmed as Petitioner's first counsel on March 21, 2012. Less than one month later, on April 18, 2012, Ms. Connelly withdrew as counsel and Terrence Jackson, Esq. confirmed as Petitioner's second counsel. On November 29, 2012, Petitioner, through Mr. Jackson, filed a Supplement to his Petition. The State filed a Response on February 6, 2013. Petitioner filed a Reply on March 5, 2013.

On January 2, 2013, Petitioner filed a Pro Per Motion to Dismiss Counsel. The State filed an Opposition on January 18, 2013. On January 28, 2013, Petitioner's Motion was denied. On March 8, 2013, Petitioner filed a second Motion to Dismiss Counsel. On March 11, 2013, Mr. Jackson joined in Petitioner's motion, citing irreconcilable differences. The State took no position on these motions. On April 1, 2013, the court granted the motion.

On April 2, 2013, Petitioner filed a First Amended Proper Person Petition for Writ of Habeas Corpus. On April 11, 2013, he filed a Supplemental Points and Authorities in Support of First Amended Pro Per Petition for Writ of Habeas Corpus. On April 24, 2013, he filed a Second Amended Pro Per Petition for Writ of Habeas Corpus. The State filed a Response on May 7, 2013. On May 15, 2013, the district court granted Petitioner' request for an Evidentiary Hearing regarding his Petition and set an Evidentiary Hearing for August 16, 2013.

On May 20, 2013, Petitioner filed a document entitled Motion to Appoint Counsel Upon Grant of an Evidentiary Hearing. On June 4, 2013, the State filed a Response. On June 10, 2013, the Court granted Petitioner's motion but noted that he previously had counsel and requested that his previous counsel withdraw. On June 17, 2013, Carmine Colucci, Esq. confirmed as counsel. However, due to a conflict between Petitioner and Mr. Colucci, Tom Ericsson, Esq. subsequently confirmed as Petitioner's third counsel on June 26, 2013. On June 26, 2013, the State requested that Petitioner file a superseding brief to encompass all of the issues due to the numerous supplemental briefs filed in the instant case. At a status check on August 7, 2013, the Evidentiary Hearing set for August 16, 2013 was vacated as defense counsel needed additional time.

On December 11, 2013, Brent Bryson, Esq. filed a Motion to Associate Counsel, seeking to allow Chandler Parker, Esq. to practice pro hac vice for purposes of assisting

Petitioner with his Petition. On February 6, 2014, a Stipulation to Continue Supplemental Briefing Schedule and Argument was filed delineating a new briefing schedule. The Evidentiary Hearing was subsequently reset for September 10, 2014. Despite having counsel, on February 13, 2014, Petitioner filed, in proper person, his Third Amended Petition for Writ of Habeas Corpus for Post-Conviction Relief and a separate document consisting of Exhibits in support of his Third Amended Pro Per Petition for Writ of Habeas Corpus for Post-Conviction Relief. On the same date, Petitioner filed a proper person Motion to Withdraw Counsel of Record, seeking the withdrawal of his third counsel, Mr. Ericsson. On March 5, 2014, Petitioner filed a document entitled Judicial Notice and Supplement to Supplemental Exhibits in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus.

On March 10, 2014, at the hearing on Petitioner's Motion to Withdraw Counsel of Record, Mr. Ericsson represented that he had previously been contacted by an attorney in California who had been hired to represent Petitioner. Accordingly, Petitioner's Motion to Withdraw Counsel of Record was granted and Mr. Bryson's Motion to Associate Counsel was set for March 24, 2014.[2] On March 24, 2014, the Motion to Associate Counsel was granted, and Petitioner received his fourth counsel.

Again, despite having counsel, on March 27, 2014, Petitioner filed a proper person document entitled Supplemental Points and Authorities in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus. On April 2, 2014, Mr. Bryson filed a Motion to Withdraw as Local Counsel of Record in which Mr. Bryson represented that Petitioner had terminated Mr. Chandler's representation. On April 7, 2013, Mr. Bryson's motion was granted and Dayvid Figler, Esq. confirmed as Petitioner's fifth counsel.

Though he had counsel, on April 17, 2014, Petitioner filed a document entitled Judicial Notice in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus for Post-Conviction.

On May 13, 2014, Petitioner filed a Motion to Withdraw Counsel of Record and Proceed in Proper Person. On May 30, 2014, the State filed its Response. The State took no

[2] On March 27, 2014, Defendant filed a Motion to Withdraw Counsel (Second Request) again seeking the withdrawal of Mr. Ericcson. This motion was later vacated as moot.

position as to Petitioner's motion but in the event the Court was inclined to grant his motion, the State requested that the Court conduct a Faretta[3] canvass. On June 4, 2014, a hearing was held on Petitioner's motion. Petitioner and his counsel Mr. Figler were present at the hearing. Following statements by counsel and a colloquy with Petitioner, his Motion to Withdraw Counsel of Record and Proceed in Proper Person was denied.

On July 11, 2014, Petitioner filed a Motion to Self-Represent with Stand-by Counsel. The State filed its Opposition on July 30, 2014. On August 6, 2014, Petitioner informed the Court that he wished to represent himself. He also informed the Court that he was prepared to continue with preparing a superseding petition to replace the numerous prior petitions, supplements, and amended petitions. The Court granted his motion in part, allowing Petitioner to represent himself, but declining to appoint a sixth counsel as stand-by counsel.

On December 3, 2014, Petitioner filed his Superseding Post-Conviction Proper Person Petition for Writ of Habeas Corpus and a document entitled "Judicial Notice of Reporter's Transcript's and Exhibit's in Support of Superseding Pro Per Petition for Writ of Habeas Corpus." On March 4, 2015, the State responded to the Petitioner's Proper Person Petition for Writ of Habeas Corpus. Petitioner then filed a Reply to the State's Response on April 6, 2015. On May 27, 2015, this Court denied both Petitioner's Proper Person Petition for Writ of Habeas Corpus and his Reply. The Findings of Fact, Conclusions of Law and Order was entered on July 30, 2015.

Petitioner filed a Notice of Appeal on September 8, 2015. On June 17, 2016, the Judgment of Conviction was affirmed and Remittitur issued on October 19, 2016.

On August 20, 2015, Petitioner filed a pro per Motion for Reconsideration. The State filed its Response on September 25, 2015. Petitioner filed a Reply to the State's Response on October 20, 2015. On February 10, 2016, this Court granted Petitioner's Motion and set the matter for Evidentiary Hearing on Grounds 1-4 of the Superseding Petition, despite this Court's previous Findings of Fact, Conclusions of Law and Order, and the pending appeal which divested the district court of jurisdiction.

[3] 422 U.S. 806, 95 S. Ct. 2525 (1975).

On February 22, 2016, Defendant filed a Motion for Appointment of Evidentiary Hearing Counsel. The State filed its Opposition on March 7, 2016. On March 14, 2016, the Court denied Petitioner's motion. The Order Denying Petitioner's Motion for Appointment of Evidentiary Hearing Counsel was filed on April 22, 2016.

On May 13, 2016, Jonathan MacArthur, Esq. made a special appearance on behalf of Petitioner, who indicated a desire to retain Mr. MacArthur. Mr. MacArthur advised he was not prepared to go forward on that date due to scheduling conflicts and requested the matter be continued. The Court granted his request to continue the Evidentiary Hearing. On July 21, 2016, the Court had received the June 17, 2016 Order of Affirmance from the Nevada Supreme Court affirming its July 30, 2015 Findings of Fact, Conclusions of Law and Order. The Court found that it did not have jurisdiction after the appeal was filed, the Nevada Supreme Court was never divested of its jurisdiction, and the Court was precluded from proceeding at this time. The Court took the matter off calendar as moot. On January 24, 2017, Petitioner filed a Motion to Withdraw Counsel Jonathan MacArthur, Esq. which was granted on February 27, 2017.

On September 25, 2020, Petitioner filed the instant second Petition for Writ of Habeas Corpus (hereinafter "Second Petition"), Motion for Appointment of Counsel and Request for Evidentiary Hearing. The State's response now follows.

ARGUMENT

I. THIS SECOND PETITION IS TIME-BARRED

Petitioner's instant Second Petition for Writ of Habeas Corpus was not filed within one year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to NRS 34.726(1):

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

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

In the instant case, Petitioner's filed a direct appeal, and Remittitur issued on October 10, 2011. Petitioner filed the instant Petition on September 25, 2020—almost nine (9) years after the Remittitur issued. Thus, the instant second Petition is time-barred. Absent a showing of good cause to excuse this delay, the instant Petition must be dismissed.

II. THIS SECOND PETITION IS BARRED AS SUCCESSIVE

NRS 34.810(2) reads:

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

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant

previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, as discussed supra, Section I., this is Petitioner's second Post-Conviction Petition. Petitioner did not raise this claim on direct appeal or in his first Petition. He only raises it for the first time now, nine (9) years later. Accordingly, this second Petition is an abuse of the writ, procedurally barred, and therefore, must be dismissed.

III. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court

has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, application of the procedural bars is mandatory.

IV. THE STATE AFFIRMATIVELY PLEADS LACHES

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final."

Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

The State affirmatively pleads laches in this case given that almost nine (9) years has elapsed between the issuing of Remittitur and the filing of the second Petition. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden.

As discussed supra, Section I., the one-year time bar began to run from the date the of the Remittitur on October 10, 2011. The second Petition was filed on September 25, 2020 – *almost nine (9) years* later. Because more than nine (9) years have elapsed between the Remittitur and the filing of the instant second Petition, NRS 34.800 directly applies in this case, and a presumption of prejudice to the State arises. Therefore, pursuant to NRS 34.800, this second Petition should be dismissed under the doctrine of laches.

V. PETITIONER CANNOT ESTABLISH GOOD CAUSE TO OVERCOME THE MANDATORY PROCEDURAL BARS

A showing of good cause and prejudice may overcome procedural bars. However, Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

In the instant case, Petitioner cannot demonstrate good cause to overcome the mandatory procedural bars because he cannot demonstrate that this claim was not reasonably available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner's one and only claim is that there was an illegal verdict because there was a "jury poll" error, and that the verdict was not unanimous because only ten of the twelve voted for guilt. Second Petition, at 4-6. While Petitioner alleges his claim was not available until the trial transcript was filed on August 15, 2012, he does not explain why he did not raise this claim in his first Petition. Petitioner was litigating his first Petition from January 20, 2012 when he first filed up until July 30, 2015 when the Findings of Fact, Conclusions of Law and Order was filed. Petitioner also fails to explain why, if he learned about this claim on August 15, 2012, he failed to raise it for over eight (8) years before filing the instant second Petition. Therefore, Petitioner cannot establish good cause to explain why his Petition was untimely, and the Petition must be denied as time barred.

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VI. PETITIONER'S CLAIMS ARE WAIVED FOR FAILING TO BE RAISED ON DIRECT APPEAL

Petitioner's only claim is that the jury verdict is illegal because it was not a unanimous verdict. Petition, at 8-10. Pursuant to NRS 34.810:

> 1. The court shall dismiss a petition if the court determines that:
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.
> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
> (b) Actual prejudice to the petitioner.
> The petitioner shall include in the petition all prior proceedings in which the petitioner challenged the same conviction or sentence.
> 4. The court may dismiss a petition that fails to include any prior proceedings of which the court has knowledge through the record of the court or through the pleadings submitted by the respondent.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the

claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Furthermore, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Here, as discussed supra, Section V., Petitioner cannot establish good cause to escape the procedural defaults of this claim. Even so, the claim itself is not just time-barred, but is a substantive claim that goes beyond the scope of a habeas petition. Petitioner claims this claim became available in 2012—but fails to explain why he is raising it now in 2021. Thus, this claim must be dismissed.

VII. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Whitley, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

Petitioner claims he needs counsel because the issues are complex, and he is unable to "argue orally." Motion for Appointment of Counsel, at 2. However, under NRS 34.750(1), the instant second Petition should be dismissed summarily without the appointment of counsel. Further, the NRS 34.750(1)(a)-(c) factors do not warrant Petitioner appointment of counsel because he does not specifically indicate what he needs counsel to investigate, or what exactly he needs counsel for in these post-conviction proceedings. Because no further investigation is required, Petitioner's request for counsel should be denied.

VIII. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.

1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994) (emphasis added).

Here, there is no reason to expand the record because Petitioner fails to present specific factual allegations that would entitle him to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605. There is nothing else for an evidentiary hearing to determine. Petitioner's one claim is time barred and outside the scope of a habeas petition. Supra, Section VI. There is no need to expand the record because Petitioner's claims are meritless and can be disposed of on the existing record. Therefore, Petitioner is not entitled to an evidentiary hearing.

CONCLUSION

Based on the foregoing, Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment of Counsel, and Request for Evidentiary Hearing should be DENIED and/or DISMISSED.

DATED this 30th day of April, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

BY */s/ TALEEN PANDUKHT*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 30th day of April, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DENNIS GRIGSBY, #1033640
HIGH DESERT STATE PRISON
PO BOX 650
INDIAN SPRINGS, NV 89070

BY */s/ E. DEL PADRE*
E. DEL PADRE
Secretary for the District Attorney's Office

TP/bs/ed/GCU

Electronically Filed
06/09/2021
CLERK OF THE COURT

Dennis Grigsby #1033640
P.O. Box 650 [H.D.S.P.]
Indian Springs, NV 89070

DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Marc Grigsby,
Petitioner,
v.
Calvin Johnson, Warden, et al.,
Respondent.

Case No.: A-20-821932-W
Dept. No.: XXV

Judicial Notice
(Evidentiary Hearing Requested)

Affidavit in Support of Petition for Writ of Habeas Corpus

COMES NOW, the Petitioner, Dennis Marc Grigsby, in pro se and hereby submits this Affidavit in Support of Petition for Writ of Habeas Corpus.

THIS Affidavit, is made and based upon all the prior papers and pleadings on file with the court clerk, and the affidavit in support hereof, as well as attached exhibit(s).

DATED: this 25th day of May, 2021.

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RECEIVED
MAY 27 2021
CLERK OF THE COURT

Affidavit of Cause and Prejudice

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

To Whom It May Concern:

I, Dennis Marc Grigsby, the undersigned, do hereby swear that all the following statements and the description of events, are true and correct of my own knowledge, information, and belief, and to those I believe to be true and correct. Signed under penalty of perjury pursuant to NRS 208.165.

(1) THAT, Petitioner, Dennis Marc Grigsby #1033640, is the affiant in this affidavit and is currently an illegally incarcerated prisoner at High Desert State Prison (H.D.S.P.).

(2) THAT, the default to advance the "fundamental constitutional error" of the 'jury poll error raised in Petition for Writ of Habeas Corpus, Case No. A-20-82 1932-W, at trial or in prior postconviction proceeding was beyond the Petitioners control due to ineffectiveness of appointed counsel (trial, direct appeal).

(3) THAT, appointed direct appeal counsel, Daniel M. Bunin, Esq., neglected to request of Reporter/Recorder: Cheryl Gardner, transcript of hearing held February 4, 2009.

(4) THAT, the Sixth Amendment guarantees the right to competent counsel at trial and on the first post-conviction appeal ("direct appeal").

(5) THAT, prior to Ramos v. Louisiana, 140 S. Ct. 1390 (2020), there was no clearly established federal authority that jury unanimity was required in a non capital criminal trial conducted in state court, pursuant to Berry v. Grigas, 171 Fed. Appx. 188 (9th Cir. 2006).

(6) THAT, state procedural default should be excused under the "cause and prejudice" exceptions presented in this affidavit due to ineffective assistance of appointed counsel and the recent change in federal precedent regarding the fundamental constitutional jury poll errors lack of a unanimous verdict, that was not reasonably available prior to the Ramos decision or default period implied.

(7) THAT, attached Nevada Supreme Court Docket Sheet, Docket No.: 53627, supports ineffective assistance of counsel and fundamental constitutional error claim that should be exceptions to state procedural default. Proof casefile and transcripts were not provided prior to default period.

Further, Affiant Sayeth Naught.

Executed at High Desert State Prison, this 25th day of May, 2021.

By: Dennis Quigley #1033640
Petitioner Pro Se

//

UNDER PENALTY OF PERJURY

I, the undersigned, certify, declare, or state that the foregoing is true and correct, to the best of my knowledge and belief, in accordance with NRS 208.165 and 28 USCA § 1746.

Excuted on the 25 day of May, 2021

Dennis Grigsby #1033640, Dennis Grigsby

Name and Prison BAC#, printed

EXHIBIT

Nevada Supreme Court

Docket: 53627

October 26, 2011

Nevada Supreme Court Docket Sheet

Docket: 53627 GRIGSBY (DENNIS) VS. STATE

DENNIS M. GRIGSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 53627
Consolidated with:

Counsel

Bunin & Bunin, Las Vegas, NV \ Daniel M. Bunin, Joseph D. Bunin, as counsel for Appellant, Dennis M. Grigsby

Attorney General/Carson City, Carson City, NV \ Catherine Cortez Masto, as counsel for Respondent, The State of Nevada

Clark County District Attorney, Las Vegas, NV \ Steven S. Owens, as counsel for Respondent, The State of Nevada

Case Information

Panel: SNP11D **Panel Members:** Douglas/Hardesty/Parraguirre
Disqualifications:
Case Status: Remittitur Issued/Case Closed
Category: Criminal Appeal **Type:** Life **Subtype:** Direct
Submitted: On Briefs **Date Submitted:** 07/11/11
Oral Argument:
Sett. Notice Issued: **Sett. Judge:** **Sett. Status:**
Related Supreme Court Cases:

District Court Case Information

Case Number: C246709
Case Title: STATE OF NEVADA VS. DENNIS GRIGSBY
Judicial District: Eighth **Division:** **County:** Clark Co.
Sitting Judge: Donald M. Mosley
Replaced By:
Notice of Appeal Filed: 04/14/09 Appeal **Judgment Appealed From Filed:** 04/06/09

Docket Entries

Date	Docket Entries	
04/17/09	Filed Certified Copy of Notice of Appeal. Appeal docketed in the Supreme Court this day. (Docketing statement mailed to counsel for appellant.)	09-09707
04/17/09	Filing Fee Waived.	
05/04/09	Filed Docketing Statement.	09-10979
05/04/09	Filed Request for Transcript of Proceedings. Transcripts requested: 1/09/09, 1/26/09, 1/27/09, 1/28/09, 1/29/09, 1/30/09, 2/02/09, 2/03/09, 2/04/09, and 2/05/09. To Court Reporter: Maureen Schorn.	09-11042
07/17/09	Filed Motion to Extend Time.	09-17613

Wednesday, October 26, 2011 11:44 AM

07/20/09	Filed Order Granting Motion. Appellant's opening brief and appendix due: October 16, 2009. No further extensions shall be permitted absent extreme and unforeseeable circumstances.	09-17743
10/14/09	Filed Motion to Extend Time. Second Motion.	09-25075
10/15/09	Filed Order. Regarding Transcripts and Granting Motion. Opening brief and appendix due 12/11/09. Ms. Schorn: 20 days. Fn1 [A copy of the transcript request form is attached to this order.]	09-25195
10/20/09	Filed Notice from Court Reporter. Maureen Schorn stating that the requested transcripts were delivered. Dates of transcripts: 1/09/09, 1/27/09, 1/28/09, 1/29/09.	09-25625
12/16/09	Filed Motion to Extend Time. Appellant's Third Motion to Extend Time to File Opening Brief	09-30611
12/21/09	Filed Order. Granting Motion. Opening Brief and Appendix due: January 29, 2010.	09-30812
12/29/09	Filed Letter. (copy) from appellant David Grigsby to his attorney Kirk Kennedy demanding a refund for undelivered transcripts.	09-31410
02/05/10	Filed Notice from Court Reporter. Maureen Schorn stating that the requested transcripts were delivered. Dates of transcripts: 1/30/09, 2/2/09.	10-03426
02/08/10	Filed Motion. Appellant's Fourth Motion to Extend Time to File Opening Brief and Motion of Counsel to Withdraw From Appeal.	10-03437
03/04/10	Filed Order Granting Motion. and Remanding for Counsel. The clerk of this court shall remove Mr. Kennedy as counsel of record for appellant. District Court Order: 35 days. Briefing suspended.	10-05744
03/25/10	Filed Notice from Court Reporter. Maureen Schorn stating that the requested transcripts were delivered. Dates of transcripts: 2/3/09, 2/5/09.	10-07893
03/31/10	Filed District Court Minutes. Re: Appointment of Counsel. Dan Bunin representing appellant.	10-08405
04/30/10	Filed Order/Briefing Reinstated. Appellant: 90 days to file the opening brief and appendix.	10-11108
08/09/10	Filed Order. Opening Brief and Appendix due: 15 days.	10-20482
09/10/10	Filed Order Conditionally Imposing Sanctions. Conditional sanction of $ 500 due: 15 days or Opening Brief and Appendix or Motion due: 10 days. (Faxed to counsel for appellant.)	10-23210
09/23/10	Filed Motion to Extension of Time to File Opening Brief and Appendix (First Request). (33) days.	10-24554
09/27/10	Filed Proof of Service. -Affidavit of Mailing- Motion for Extension of Time to File Opening Brief and Appendix.	10-24771
09/28/10	Filed Order Granting Motion. Opening Brief and Appendix due: November 1, 2010.	10-24932
11/05/10	Received Proper Person Letter (copy) from appellant David Grigsby to the law firm Bunin & Bunin.	10-28959
11/10/10	Filed Order. Opening Brief and Appendix due: 10 days.	10-29504
12/07/10	Filed Order Conditionally Imposing Sanctions. Conditional sanction of $500 due: 15 days or Opening Brief and Appendix or Motion due: 10 days.	10-31860
12/21/10	Received Proper Person Letter regarding counsels refusal to communicate.	10-33363
01/25/11	Filed Order Imposing Sanctions and Directing Counsel to Appear and Show Cause. Mr. Bunin: Failure to comply with NRAP and this court's orders warrants the imposition of additional sanctions in the amount of $1,000. Mr. Bunin: 15 day to pay the sum of $1,500 (the total sanctions imposed in this case) to the Supreme Court Law Library. We direct Mr. Bunin to personally appear before this court on February 16, 2011 at 2:00 p.m.	11-02510

Nevada Supreme Court Docket Sheet

Docket: 53627 GRIGSBY (DENNIS) VS. STATE

02/16/11	Received Opening Brief. (FILED PER ORDER 02/22/2011).	
02/16/11	Received Appendix to Opening Brief CD-ROM included. Vols. 1 thru 5. (FILED PER ORDER 02/22/2011).	
02/22/11	Filed Order. The clerk of this court shall file the opening brief and appendix. Answering Brief due: 30 days.	11-05427
02/22/11	Filed Opening Brief.	11-05430
02/22/11	Filed Appendix to Opening Brief CD-ROM included.	11-05432
03/11/11	Received Proper Person Document. Copy of Letter addressed to Daniel M. Bunin From Appellant Dennis Grigsby.	11-07603
03/24/11	Filed Motion for Extension of Time First Request.	11-09051
03/24/11	Issued Notice - Motion Approved. Answering Brief due: April 25, 2011.	11-09055
04/20/11	Filed Answering Brief.	11-11748
05/27/11	Received Proper Person Letter. Letter with regards to appellant's counsel. (FILED PER ORDER 06/24/2011).	11-15796
06/03/11	Briefing Completed/To Screening. No Reply Brief filed.	
06/24/11	Filed Order. Appellant has submitted a letter to this court in proper person asking the court to order counsel to provide appllant with copies of various documents. We treat the letter as a motion. We direct the clerk of this court to file the motion. The motion is granted in part. We direct attorney Daniel Bunin to provide appellant with a copy of the opening brief and other substantive documents filed in this appeal. To the extent that appellant asks this court to order counsel to provide him with his complete case file upon this court's issuance of its remittitur, we deny his request .	11-18867
06/24/11	Filed Proper Person Letter. Letter with regards to appellant's counsel.	11-15796
07/11/11	Filed Order Submitting for Decision without Oral Argument.	11-20557
07/11/11	Submitted for Decision.	
08/18/11	Received Proper Person Letter to Appellant's Attorney re: not following Court's order dated 6/24/11.	11-25161
09/06/11	Filed Affidavit of Mailing - appellant's opening brief and appendix served on appellant Dennis Grigsby.	11-27039
09/14/11	Filed Order of Affirmance. "ORDER the judgment of conviction AFFIRMED."	11-27952
10/06/11	Received Proper Person Notice of Change of Address.	11-30542
10/10/11	Issued Remittitur.	11-30866
10/10/11	Remittitur Issued/Case Closed.	
10/26/11	Filed Remittitur. Received by District Court Clerk on October 19, 2011.	11-30866

CERTIFICATE OF SERVICE BY MAILING

I, Dennis Marc Grigsby, hereby certify, pursuant to NRCP 5(b), that on this 25 day of May, 2021, I mailed a true and correct copy of the foregoing, "Affidavit in Support of Petition for Writ of Habeas Corpus" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

CC:FILE

DATED: this 25 day of May, 2021.

Dennis Grigsby #1033640
In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Affidavit in Support of Petition for Writ of Habeas Corpus
(Title of Document)

filed in District Court Case number A-20-821932-W

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

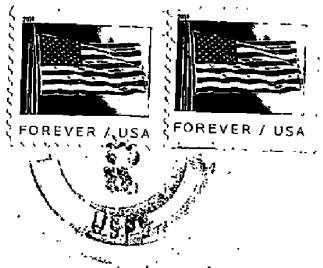
Dennis Grigsby
Signature

5/25/2021
Date

Dennis Grigsby #1033640
Print Name

Petitioner Pro Se
Title

Dennis Grigsby #1033640
P.O. Box 650
Indian Springs, NV 89070



District Court Clerk
200 Lewis Ave., 3rd Fl.
Las Vegas, NV 89155

LEGAL MAIL

89101$6300 C075

HIGH DESERT STATE PRISON
MAY 24 2021
UNIT 7 AB

27

Dennis Grigsby #1033640
P.O. Box 650 [H.D.S.P.]
Indian Springs, NV 89070

DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Marc Grigsby,
Petitioner,

Case No.: A-20-821932-W
Dept. No.: XXV

V.

Calvin Johnson, Warden, et al.,
Respondent.

Judicial Notice
(Evidentiary Hearing Requested)

Answer to Respondents Response and Motion to Dismiss Petition for Writ of Habeas Corpus

COMES NOW, the Petitioner, Dennis Marc Grigsby, in pro se and hereby submits the attached Points and Authorities in Answer to Respondents Response and Motion to Dismiss, pursuant to NRS 34.470.

THIS Answer, is based on all prior papers and pleadings on file with the clerk of the court, which are hereby incorporated by this reference and the attached points and authorities herein and such further facts as will come before the court at an evidentiary hearing.

DATED: this 20th day of May, 2021.

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Points and Authorities

Jurisdiction

The instant request is to prosecute a Writ of Habeas Corpus to inquire into the cause of illegal imprisonment. This Court reviewed the Petition/Application for Writ filed pursuant to NRS 34.360 and in accordance to NRS 34.370 subsections 3 and 4; having authority to issue writs of habeas corpus under Nevada Constitution Article 6, subsection 6. The Petitioner claims that his imprisonment is illegal and requests relief from a judgment of conviction in a criminal case.

The Respondents Response and Motion is misleading focusing on Post-Conviction Relief. Pursuant to NRS 34.390, Order for Petition for Writ of Habeas Corpus, was a request for assistance in determining whether the Petitioner is illegally imprisoned and restrained of his liberty. Legality, not validity pursuant to NRS 34.745.

A Return and Answer pursuant to NRS 34.430, is the appropriate provision to follow as the instant Writ requires only the production of the Petitioner to determine the legality of the custody or restraint. See NRS 34.390 subsection 2.

Here the extraordinary remedy of habeas corpus is appropriate to test the legality of a conviction which is challenged on constitutional grounds. See Shum v. Fogliani, 82 Nev. 156, 413 P.2d 495 (Nev. 1966).

Statement of the Case

The Supreme Court of Nevada affirmed Petitioner's Direct Appeal upon a incomplete trial record, guilt phase transcript of February 4, 2009, was omitted.

Petitioner filed a pro per state habes corpus writ (postconviction), January 20, 2012. Counsel was provided and a supplemental petition was submitted, along with 4 pro per amendend petitions. State Habeas Corpus Post-Conviction proceedings took place from January 20, 2012 until October 19, 2016.

Petitioner pursued Federal, 2254 Habeas Corpus from August 9, 2016 until October 19, 2020.

On September 25, 2020, Petitioner filed the instant Petition/Application for Writ of Habeas Corpus to inquire into the legality of his imprisonment and conviction, Motion for Appointment of Counsel and Request for Evidentiary Hearing.

Argument

The instant jury poll error is a "fundamental miscarriage of justice", that was not reasonably available at the time the one-year time bar began to run from the date the Remittitur issued on October 10, 2011. The fact that the trial proceeding of February 4, 2009, was not transcribed, certified and filed with the court is not the fault of the Petitioner; and dismissal of petition

as untimely, successive or due to doctrine of laches will unduly prejudice the Petitioner.

The principal claim in this case is whether the Petitioner is illegally comitted to the Nevada Department of Corrections as a result of being deprived of his right to a unanimous verdict due to jury poll error.

In Nevada, jury polling is governed by Nevada Revised Statutes §175.531, which provides that if the poll does not show unanimous concurrence in the verdict, the court may direct the jury to continue its deliberation or discharge the jury. Only two options for addressing a non-unanimous jury poll. See Saletta v. State, 127 Nev. 416, 254 P.3d 111 (Nev. 2011).

Clearly, the guilt phase jury poll was of only ten of the twelve jurors. Purpose of a jury poll is to test the uncoerced unanimity of the verdict by requiring each juror to answer for himself, creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman. See United States v. Shepherd, 576 F.2d 719 (7th Cir. 1978).

Such as the instant claim, plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Wherefore, Fed. R. Crim. P. 31 and NRS 175.531, which provide for polling a jury after its verdict has

been returned but before it is recorded, compels the conclusion that a verdict is not final when announced. Therefore, the count one verdict revealed by court record of February 4, 2009 should not be accepted as a valid verdict by this Court. The poll taken before the verdict was recorded indicates a poll of only ten jurors. Petitioner asserts he is illegally comitted as he has been deprived his right to demand that his liberty not be taken except by the joint action of the court and the unanimous verdict of a jury of twelve persons. See NRS 175.021; United States v. Lopez, 581 F.2d 1338 at n.2 (9th Cir. 1978); United States v. Love, 597 F.2d 81 (6th Cir. 1979).

Specifically, the jury poll error presented is a impeachment of the recorded verdict, and highly prejudicial affecting Petitioners substantial rights. Pursuant to NRS 34.500 §2,3,9, this Court has authority to reverse the judgment of conviction and discharge Petitioner. Such is necessary to correct the "miscarriage of justice", as well as preserve the integrity and reputation of the judicial process. See Exhibit, Judgment of Conviction, attached.

Unbecomingly, the Respondent misstates when the Petitioner learned of the instant jury poll error and recently established federal authority to

support his claim that jury unanimity is required in noncapital criminal trials conducted in state court. Petitioner asserts upon reading decision of the Supreme Court of the United States in Ramos v. Louisiana, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (April 20, 2020), in late July of 2020. A review of the February 4, 2009, trial transcript ironically labled "illegal to copy pursuant to statute" revealed that the jury did not collectively or individually provide as required by Sixth Amendment right to a jury trial, as incorporated against the States by way of the Fourteenth Amendment of the U.S. Constitution, a unanimous verdict to convict Petitioner as the attached Judgment of Conviction states.

According to statute, if it appears on the return of the writ of habeas corpus that the Petitioner is in custody by virtue of process from any court of this State, or judge or officer thereof, the Petitioner may be discharged in any one of the following cases:

2. When the imprisonment was at first lawful, yet by some act, omission or event, which has taken place afterwards, the Petitioner has become entitled to be discharged.

3. When the process is defective in some matter of substance required by law, rendering it void.

9. Where the Court finds that there has been a specific denial of the Petitioner's constitutional

rights with respect to the Petitioner's conviction or sentence in a criminal case. See NRS 34.500 (emphasis added).

The Petitioner pleads that on direct appeal and during state post-conviction proceedings the latent defect of the instant "newly discovered" jury poll error and illegal verdict could not be asserted prior to the newly recognized Supreme Court opinion of id. Ramos.

Moreover, because record of the instant claim was filed during post-conviction habeas and not direct appeal, the 5 year period should begin from the remittitur issued October 19, 2016, because Petitioner could not have had knowledge at the time of remittitur issued October 10, 2011.

Lastly, retroactivity under the standard in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989), should not be of issue the instant jury poll claim is "an old rule which applies both on direct and collateral review".

DATED: this 20th day of May, 2021.

Respectfully submitted,
Dennis Quigley #1033640
Pro Se

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Appendix of Attached Exhibits

1. Judgment of Conviction - Filed April 6, 2009 (2)

2. Order of Affirmance - Filed September 14, 2011 (4)

3. Remittitur - October 10, 2011 (1)

4. Order Denying Superseding Petition - Filed July 30, 2015 (13)

5. Order Denying Stay of Appeal - Filed December 21, 2015 (2)

6. Order of Affirmance - Filed June 17, 2016 (4)

7. Order Denying Rehearing - Filed September 22, 2016 (1)

8. Remittitur - October 19, 2016 (1)

9. Order for Petition for Writ of Habeas Corpus - Filed January 5, 2021 (1)

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ORIGINAL

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FILED

2009 APR -6 A 10:08

DISTRICT COURT

CLERK OF THE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DENNIS MARC GRIGSBY
#1813660

Defendant.

CASE NO. C246709

DEPT. NO. XIV

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – MURDER WITH THE USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 193.165, 200.010, 200.030, and COUNT 2 – POSSESSION OF FIREARM BY EX-FELON (Category B Felony), NRS 202.360; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 193.165, 200.010, 200.030, COUNT 2 – POSSESSION OF FIREARM BY EX-FELON (Category B Felony), NRS 202.360; thereafter, on the 19th day of

March, 2009, the Defendant was present in court for sentencing with his counsel, DAVID SCHIECK, Special Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - LIFE without the possibility of parole plus a CONSECUTIVE term of TWO HUNDRED FORTY (240) MONTHS MAXIMUM and SIXTY (60) MONTHS MINIMUM for the Use of a Deadly Weapon; AS TO COUNT 2 - TO A MAXIMUM of SEVENTY-TWO (72) MONTHS with a MINIMUM parole eligibility of SIXTEEN (16) MONTHS, COUNT 2 TO RUN CONCURRENT WITH COUNT 1, with THREE HUNDRED-THIRTY (330) DAYS credit for time served.

DATED this 2nd day of April, 2009

DONALD D. MOSLEY
DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS M. GRIGSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent,

No. 53627

FILED

SEP 14 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Dennis M. Grigsby raises five contentions on appeal.

First, Grigsby argues that the district court did not provide him an adequate hearing on his motion to dismiss counsel. This court reviews the district court's denial of a motion for substitution of counsel for an abuse of discretion. Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). There was no abuse of discretion based on the factors set forth in Young: (1) Grigsby did not demonstrate a complete breakdown of the attorney-client relationship; (2) in as much as Grigsby permitted, the district court made a sufficient inquiry into the substance of Grigsby's complaints; and (3) Grigsby did not inform the court that he wanted substitute counsel until his trial had begun, making the request untimely. Id. at 968-69, 102 P.3d at 576.

Second, Grigsby contends that the district court abused its discretion in admitting uncharged bad act evidence concerning the

burning of Grigsby's car without a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). We agree. Burning the car, which was owned by both Grigsby and his estranged wife, exposed Grigsby to criminal liability under Washington law. See Wash. Rev. Code § 9A.48.030 (defining second-degree arson as knowingly and maliciously causing fire that damages vehicle); Wash. Rev. Code § 9A.04.110(12) ("Malice may be inferred from an act done in willful disregard of the rights of another"); Wash. Rev. Code § 9A.72.150 (prohibiting destruction of evidence where person has reason to believe an official proceeding is about to be instituted and has intent to impair its appearance). However, the error is harmless because the evidence was relevant to show Grigsby's consciousness of guilt, the burning of the car was proven by clear and convincing evidence, and its probative value was not substantially outweighed by the danger of unfair prejudice. See Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005) (providing failure to hold Petrocelli hearing is harmless where record sufficient to determine the admissibility of the uncharged acts); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (providing that evidence of uncharged acts are admissible if relevant, proven by clear and convincing evidence, and probative value not outweighed by prejudicial effect); see also Bellon v. State, 121 Nev. 436, 443-44, 117 Nev. P.3d 176, 180 (2005) (providing that evidence of uncharged acts admissible to show consciousness of guilt).

Third, Grigsby contends that the prosecution improperly elicited testimony about his post-arrest silence. We disagree. Questions concerning what a defendant says after his arrest are generally improper. Morris v. State, 112 Nev. 260, 263-64, 913 P.2d 1264, 1267 (1996) (providing prosecution forbidden from commenting upon defendant's post-

arrest, pre-Miranda silence). However, Grigsby invited the line of questioning by examining the witness about Grigsby's reaction to his arrest. See Milligan v. State, 101 Nev. 627, 637, 708 P.2d 289, 295-96 (1985). Therefore, the district court did not err in overruling Grigsby's objection.

Fourth, Grigsby argues that the district court abused its discretion in admitting a photograph of a firearm into evidence when the police did not recover a firearm and did not include the picture in the requested discovery. We disagree. The record does not indicate that the State acted in bad faith or the failure to disclose the photograph in a timely manner caused substantial prejudice. See Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001). Therefore, we conclude that the district court did not abuse its discretion in overruling Grigsby's objection. See Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

Fifth, Grigsby contends that the district court erred in overruling his objection to the given lying in wait instruction based on the lack of evidence supporting it and rejecting his proposed lying in wait instruction. We disagree. The given instruction accurately defined lying in wait. See Moser v. State, 91 Nev. 809, 813, 544 P.2d 424, 426 (1975). Further, testimony that Grigsby and the victim had a heated confrontation outside the victim's apartment and that the victim was shot roughly ten minutes later upon his return from an errand was sufficient to support the instruction. See Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) (providing that instruction may be supported by "some evidence, no matter how weak or incredible"). Therefore, the district court did not abuse its discretion in overruling Grigsby's objection and

instructing the jury. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Having considered Grigsby's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
Bunin & Bunin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS M. GRIGSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 53627
District Court Case No. C246709

FILED
OCT 26 2011
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REMITTITUR

TO: Steven Grierson, District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order
Receipt for Remittitur.

DATE: October 10, 2011

Tracie Lindeman, Clerk of Court

By: Niki Wilcox
Deputy Clerk

cc (without enclosures):
Hon. Donald M. Mosley, District Judge
Bunin & Bunin
Attorney General/Carson City
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on OCT 19 2011

Deputy District Court Clerk

RECEIVED
OCT 17 2011
CLERK OF THE COURT

RECEIVED
OCT 24 2011
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

Electronically Filed
07/30/2015 04:20:57 PM

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DENNIS MARC GRIGSBY, #1813660 Defendant.	Case No.: 08C246709 Dept. No.: XXV

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DENYING SUPERSEDING PROPER PERSON PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

I.

PROCEDURAL HISTORY

On February 4, 2009, Petitioner was convicted of First Degree Murder with Use of a Deadly Weapon. Immediately following Petitioner's conviction, the State filed a Second Amended Information and again charged Petitioner with Possession of a Firearm by Ex-Felon. The jury reconvened and found Petitioner guilty of Possession of Firearm by Ex-Felon. On February 5, 2009, the jury set Petitioner's penalty as Life in prison without the possibility of parole.

On March 19, 2009, Petitioner was sentenced to a term of life in prison without possibility of parole for the charge of First Degree Murder with Use of a Deadly Weapon, with a consecutive term of 60 to 240 months for the deadly weapon enhancement. On the charge of Possession of a Firearm by Ex-Felon, Petitioner was sentenced to 16 to 72 months, to run concurrent to his sentence on the murder charge. On April 14, 2009, Petitioner filed an appeal.

KATHLEEN E. DELANEY
DISTRICT JUDGE
DEPARTMENT XXV

On September 14, 2011, the Nevada Supreme Court affirmed the Judgment of Conviction, and remittitur issued on October 10, 2011.

On January 20, 2012, Petitioner filed a *pro per* Petition for Writ of Habeas Corpus, a Motion for Leave to Proceed in *Forma Pauperis*, and a Motion for Appointment of Counsel and Request for Evidentiary Hearing. On March 7, 2012, the State filed a Response to Petitioner's Petition. On March 12, 2012, the Court granted Petitioner's Motion to Appoint Counsel. Thereafter, Karen Connelly, Esq. confirmed as Petitioner's first counsel on March 21, 2012. On April 18, 2012, Ms. Connelly withdrew as counsel and Terrence Jackson, Esq. confirmed as Petitioner's second counsel. Mr. Jackson filed a Supplement to Petitioner's Petition on November 29, 2012, to which the State filed a response on February 6, 2013. Petitioner filed a Reply on March 5, 2013.

On January 2, 2013, Petitioner filed a *pro per* Motion to Dismiss Counsel. On January 18, 2013, the State filed an Opposition. Petitioner's motion was denied on January 28, 2013. Mr. Jackson joined in Petitioner's motion on March 11, 2013, citing irreconcilable differences. The State took no position on these motions and on April 1, 2013, the court granted the motion.

On April 2, 2013, Petitioner filed a First Amended Pro Per Petition for Writ of Habeas Corpus. Petitioner filed a supplement on April 11, 2013. Petitioner then filed a Second Amended Pro Per Petition on April 24, 2013. The State filed a Response on May 7, 2013 and the district court granted Petitioner's request for an Evidentiary Hearing on May 15, 2013 and set the Evidentiary Hearing for the date of August 16, 2013.

On May 20, 2013, Petitioner filed a document entitled Motion to Appoint Counsel Upon Grant of Evidentiary Hearing. On June 4, 2013, State filed a Response. The Court granted Petitioner's motion on June 6, 2013 but the Court noted that Petitioner previously had counsel and requested his previous counsel withdraw. On June 17, 2013, Carmine Colucci, Esq.

confirmed as counsel; however, due to a conflict between Petitioner and Mr. Colucci, Tom Ericsson, Esq. subsequently confirmed as Petitioner's third counsel on June 26, 2013. On June 26, 2013, the State requested that Petitioner file a superseding brief to encompass all of the issues due to the numerous supplemental briefs filed in this case. At a status check on August 7, 2013, the Evidentiary Hearing set for August 16, 2013 was vacated as defense counsel requested additional time.

On December 11, 2013, Eric Bryson, Esq. filed a Motion to Associate Counsel to allow Chandler Parker, Esq. to assist with the Petition pro hac vice. The Evidentiary Hearing was reset for September 10, 2014 at 9:00 am. Despite having counsel, on February 13, 2014, Petitioner filed a Third Amended Pro Per Petition for Writ of Habeas Corpus for Post-Conviction Relief and a pro per Motion to Withdraw Counsel of Record, seeking the withdraw of Mr. Ericsson. On March 4, 2014, Petitioner filed a document entitled Judicial Notice and Supplement to Supplemental Exhibits in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus.

On March 10, 2014 during the hearing of Petitioner's Motion to Withdraw Counsel of Record, Mr. Ericsson represented he previously had been contacted by an attorney in California who had been hired to represent Petitioner. Petitioner's motion to Withdraw Counsel of Record was granted and on March 24, 2014, Mr. Bryson's Motion to Associate Counsel was granted and Petitioner received his fourth counsel.

Despite having counsel, on March 27, 2014 Petitioner again filed a pro per document entitled Supplemental Points and Authorities in Support of Third Amended Pro Per Petition of Writ of Habeas Corpus. On April 2, 2014, Brent Bryson, Esq. filed a Motion to Withdraw as Local Counsel of Record in which Mr. Bryson represented that Petitioner had terminated Mr.

Parker, Esq.'s representation. On April 7, 2014, Mr. Bryson's motion to Withdraw was granted and Dayvid Figler, Esq. confirmed as Petitioner's fifth counsel.

Though Petitioner had counsel, Petitioner filed another pro per document entitled Judicial Notice in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus for Post-Conviction on April 17, 2014. On May 13, 2014, Petitioner filed a Motion to Withdraw Counsel of Record and Proceed in Pro Per. On May 30, 2014, the State filed a Response. In the State's response, the State took no position as to Petitioner's motion but in the event the Court granted Petitioner's motion, the State requested the Court conduct a Faretta[1] canvass. On June 4, 2014, a hearing was held on Petitioner's motion for which Petitioner and Counsel Mr. Figler, Esq. were both present. At this hearing, Petitioner's Motion to Withdraw Counsel of Record and Proceed in Pro Per was denied.

On July 11, 2014, Petitioner filed a Motion to Self-Represent with Stand-by Counsel. The State filed its opposition on July 30, 2014. On August 6, 2014, Petitioner informed the court that he wished to represent himself and was prepared to continue with preparing a superseding petition to replace the numerous prior petitions, supplements, and amended petitions. This Court granted Petitioner's motion in part allowing Petitioner to represent himself but declining to appoint a sixth counsel as stand-by counsel. On December 3, 2014, Petitioner filed his Superseding Pro Per Petition for Writ of Habeas Corpus (Post-Conviction) and a document entitled "Judicial Notice of Reporter's Transcript's [sic] and Exhibit's [sic] in Support of Superseding Pro Per Petition for Writ of Habeas Corpus." This petition superseded all other prior petitions, supplements, and amended petitions and the State only responded to the arguments outlined in the Superseding Petition.

[1] 422 U.S. 806, 95 S. Ct. 2525 (1975)

KATHLEEN E. DELANEY
DISTRICT JUDGE
DEPARTMENT XXV

In Petitioner's Superseding Pro Per Petition for Writ of Habeas Corpus (Post-Conviction), Petitioner argues four grounds as to why an evidentiary hearing is necessary. These grounds are as follows: first, Petitioner's counsel was ineffective for failing to file a motion to suppress evidence based on a warrantless search and seizure; second, Petitioner's counsel was ineffective on appeal for failing to raise issues of prosecutorial misconduct based on the Prosecutor's closing argument; third, Petitioner's counsel was ineffective on appeal for failing to raise issues of judicial error for supplementing jury instructions after the jury had already retired for deliberation; and fourth, the cumulative effect of these errors combined prejudiced petitioner.

After further review of the briefings, the Court concludes that an evidentiary hearing is not necessary. Furthermore, the Court makes the following findings of fact and conclusions of law.

II.

FINDINGS OF FACT

A. **The Offense.**

On April 2, 2008, the Las Vegas Metropolitan Police Department were dispatched in response to shots being fired at the Lake Mead Estates Apartment complex. Upon the arrival of the officers, they located Anthony Davis, on the ground outside his apartment with a gunshot wound to the back of his head. Tina Grigsby exited the apartment and told the officers that Petitioner, her estranged husband, had shot Anthony Davis. Reporter's Transcript 1/28/2009, p. 73-74, 109. Upon being interviewed at the scene, Tina Grigsby revealed she was having an affair with the victim. Id. Tina Grigsby further stated that Petitioner lived at Apartment #140 of the Lake Mead Estates complex. Id. Dennis Grigsby was not at the scene. State's Exhibit A.

Police radio communication indicates that the officers were aware at 11:08 pm on April 2, 2008 that Petitioner lived in the *Lake Mead Estates* complex. Id. at 2. Afterwards, Officer Michael Kitchen's radio communication indicates the location of Apartment #140 within the apartment complex. Id. at 4. Further, at 11:51 pm, Officer Kitchen's radio communication indicated that he knocked on Petitioner's door and there was no answer and Apartment #140 was locked and secured. Id. at 5.

While officers continued to process the scene, Petitioner's mother, Mildred Grigsby, arrived on the scene and officers discovered that Petitioner's apartment was leased in Mildred Grigsby's name. Reporter's Transcript 1/28/2009, pp. 64-65. Officers then asked Petitioner's mother if they could enter the apartment and attempt to locate Petitioner to which Petitioner's mother agreed. State's Exhibit A. Officers then entered the apartment and did not find Petitioner inside. Id. After exiting and securing the apartment, officers awaited a search warrant. Reporter's Transcript 2/2/2009, pp. 32-33. During the search warrant application, officers did not provide any information containing items seen in Petitioner's apartment. State's Exhibit A.

While awaiting the search warrant, Petitioner's mother approached the officers while on the telephone and began relaying information to someone on the other end of the phone. Reporter's Transcript 2/2/2009, pp. 100-03. Petitioner's mother asked to retrieve something from Petitioner's apartment but refused to tell officers what the item she wished to retrieve was. Id. at 31-32. Officers informed Petitioner's mother that the apartment had been secured and no one could enter, at which time Petitioner's mother gave the officers a key to the apartment and left. Id. at 31-33. Subsequently, the search warrant arrived and officers then entered Petitioner's apartment. Id. at 33.

B. The Jury Trial.

At trial, during the State's closing argument, Chief Deputy District Attorney Robert Turner stated to the jury that a guilty verdict on the charge of first degree murder is allowed so long as the jury is unanimous on the issue of guilt, despite whether the jury is unanimous or not regarding the theories of guilt, specifically either the premeditation-and-deliberation or the lying-in-wait theories. Reporter's Transcript, 2/4/2009, p. 47-48. Petitioner's counsel asked if the two sides could approach the bench and, during this bench conference, Petitioner's counsel acknowledged that the aforementioned statement in the State's closing argument is an accurate statement of law. Id. at p. 1-2, internal pages 3-5.

During deliberation the District Court was handed a supplemental jury instruction regarding the comment on the different theories of first degree murder after the jury had already retired to deliberate and had been deliberating for six to eight hours. Id. at p. 1, internal pages 3-4. However, the Court decided to not send these supplemental jury instructions as the Court said giving this to the jury might be unfair and put undue emphasis on the State's comments. Id. The jury returned with a verdict finding Petitioner guilty of First Degree Murder with Use of a Deadly Weapon and then reconvened to find Petitioner guilty of Possession of Firearm by Ex-Felon.

III.

CONCLUSIONS OF LAW

The Sixth Amendment of the United States Constitution guarantees effective assistance of counsel at trial. To establish a claim of ineffective assistance of counsel, a petitioner must first show that counsel's performance fell beneath "an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). Once deficient performance is established, the petitioner must show that the deficient performance

prejudiced him; that but for counsel's deficiency, the result at trial would have been different. Id. at 694.

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

Even if a petitioner can demonstrate that his counsel's representations fell below an objective standard or reasonableness, petitioner still must demonstrate a reasonable probability of prejudice that would have changed the outcome of the trial. McNelton v. State, 115 Nev. 396, 403 (1999) (citing Strickland, 466 U.S. at 687). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89).

As stated and based on this case law, the court begins with the presumption of effectiveness and petitioner must overcome this presumption by a preponderance of the evidence. Means v. State, 120 Nev. at 1012.

A. Petitioner's Counsel was Not Ineffective for Choosing Not to File a Motion to Suppress Based on Warrantless Search and Seizure

In respect to an inquiry of ineffective assistance of counsel, a strategic decision, such as whether or not to file a motion, is "virtually unchallengeable." Howard v. State, 106 Nev. 713, 722 (1990) (citing Strickland, 466 U.S. at 691). In the present case, Petitioner's counsel was aware of "suppression issues" regarding the search of Petitioner's apartment and counsel consciously declined to pursue it. Reporter's Transcripts 8/4/2008, pp. 126-27. Due to the presumption of effectiveness of counsel and this strategic decision

is within the range of competence of counsel within criminal trials, the first prong of the Strickland test's requiring a showing of deficient performance is not satisfied.

Further, any suppression motion would have been without merit and therefore Petitioner cannot demonstrate prejudice as required under Strickland. The United States Supreme Court has made it clear that whenever a police officer desires to conduct a search, they may do so without obtaining a warrant if the owner of the area consents. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). A property interest in the place to be searched is a sufficient, though not necessary, source of actual authority to consent. State v. Taylor, 114 Nev. 1071, 1079 (1998). Similarly, where a person assumes the risk that a third party may consent to a search, it endows that third party with actual authority to consent. Id. Further, the leaseholder or owner of a property has actual authority to consent to a search, even if they are not occupying the premises at the time of consent. See id.; see also State v. Miller, 110 Nev. 690, 697 (1994).

In the present case, Petitioner does not dispute that his mother was the leaseholder of the apartment, only that she was not presently living at the apartment. However, Petitioner's mother had a property interest in the apartment, including the right to mutual use, and therefore had actual authority to consent to the search under Taylor. Further, Petitioner assumed the risk that Petitioner's mother could consent to a search as shown by giving her a spare key to the apartment and asking her to go to the apartment and wait upon his call. Because Petitioner assumed the risk of his mother consenting to a search and Petitioner's mother had actual authority to consent to a search under Nevada case law, there is not a reasonable probability that had Petitioner's counsel filed a motion to suppress that the result of the trial would have been different and therefore no prejudice exists.

Lastly, a search warrant was obtained properly based on Tina Grigsby's statements and the initial entry into the apartment was not a but-for cause of the discovery of

evidence. The initial entry into the apartment was simply to look for Petitioner himself. Because the initial entry did not lead to any evidence but rather the evidence was obtained after receiving a search warrant, a motion to suppress this evidence would have been moot.

B. Appellate Counsel was Not Ineffective for Choosing Not to Raise a Meritless Claim of Prosecutorial Misconduct as the Prosecution Accurately Stated the Law During Closing Arguments

Appellate counsel is not required to raise every issue to provide effective assistance and is entitled to make tactical decisions to limit the scope of issues raised to the stronger arguments rather than the weaker ones. Foster v. State, 121 Nev. 165 (2005). Further, in Jones v. Barnes, the United States Supreme Court recognized that part of professional competence and being an effective counsel requires "winnowing out weaker arguments on appeal" because a brief that raises every issue runs the risk of burying the stronger arguments. 463 U.S. 745, 751-53 (1983). To prevail on a challenge involving ineffective counsel failing to raise an issue on appeal, the petitioner must show the omitted issue would have had a reasonable probability of success on appeal. Nika v. State, 124 Nev. 1272, 1293 (2008).

In reviewing a claim of prosecutorial misconduct, the Court engages in a two-part analysis. Valdez v. State, 124 Nev. 1172, 1188 (2008). The first step requires that the prosecutorial statements were in fact improper. Id. Only if the statements were improper will the Court proceed to the next step which involves if the improper comments *prejudiced* the petitioner to affect the results of the proceeding. Id.

In the present case, Petitioner's counsel was not ineffective because the outcome of the appeal would not have changed if Petitioner's counsel raised the issue of prosecutorial misconduct and therefore Petitioner was not prejudiced. The State's comment during closing arguments regarding the jury being allowed to return a guilty verdict so long as the issue of guilt is unanimous, regardless of the theory underlying the issue of guilt, is an

accurate statement of law. See Walker v. State, 113 Nev. 853, 870 (1997); see also Mason v. State, 118 Nev. 554, 558 (2002). Because the prosecutor's comments accurately reflected the law, the first prong of the Valdez two-part test, requiring the prosecutorial statements to be improper, is not satisfied and therefore Petitioner cannot show that this issue on appeal would have had a reasonable probability of success and Petitioner was not prejudiced.

C. Appellate Counsel was Not Ineffective for Choosing Not to Raise a Meritless Claim of Judicial Error

Petitioner's third claim is similar to his second in that he claims appellate counsel was ineffective for failing to raise a claim on appeal of judicial error. Petitioner's assertion that the District Court improperly gave a jury instruction is belied by the record and therefore meritless. The record shows that the Court specifically said,

> I had indicated we would supplement the instructions. We didn't get a supplement to the instructions to the jury at the outset when they did adjourn to confer the matter, and we discussed it in chambers after a copy was deliver to my chambers, and I felt that the agreement was to send this in at this time after six or eight hours of deliberation. It might put a little undue emphasis. It might be unfair so I have it in my hand. It will be the next Court's exhibit, but we did not give this over to the jury.

Reporter's Transcript, 2/4/2009, p.1, internal pages 3-4 (emphasis added). The District Court did not, as Petitioner alleges, provide a late supplemental instruction to the jurors and therefore was not prejudiced by a failure to raise a meritless claim of judicial error.

Further, NRS 175.161(1) provides that the Court can give further instructions to the jury after the jury has retired to deliberate. This meant that had the Court given the instruction, the Court would have abided by Nevada law and as mentioned in Petitioner's second argument, the instruction would have been an accurate statement of Nevada law. Therefore, Petitioner's Counsel's strategic decision not to raise this claim upon appeal did not prejudice Petitioner.

D. There was No Cumulative Error and Reversal is Unwarranted

First, the Nevada Supreme Court has expressed doubt that a cumulative error analysis is applicable in the context of ineffective assistance of counsel. McConnell v. State, 125 Nev. 243, 259 & n. 17 (2009). Further, "relevant factors to consider in evaluating a claim of cumulative error are: 1) whether the issue of guilt is close, 2) the quantity and character of the errors, and 3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17 (2000).

In the present case, the issue of guilt was not close as Tina Grigsby identified Petitioner's clothing and voice which inculpated Petitioner. Also, Petitioner's actions after the murder further supported his conviction. Even though the crime charged had significant gravity, all of Petitioner's aforementioned arguments have not shown any ineffective assistance of counsel. Because there are no errors to cumulate, the Petitioner's argument of cumulative errors is meritless.

IV.

ORDER

For all of the foregoing reasons, it is hereby ORDERED that the Petitioner's Post-Conviction Petition for Writ of Habeas Corpus is DENIED.

DATED this 30th of July, 2015.

KATHLEEN E. DELANEY
DISTRICT COURT JUDGE

KATHLEEN E. DELANEY
DISTRICT JUDGE
DEPARTMENT XXV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING SUPERSEDING PROPER PERSON PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)** was E-Served, mailed, or placed in the attorney's folder in the Clerk's Office as follows:

Ryan MacDonald, Esq. – Deputy District Attorney

Dennis Marc Grigsby #1033640
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

Cindy Springberg
Judicial Executive Assistant

KATHLEEN E. DELANEY
DISTRICT JUDGE
DEPARTMENT XXV

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS MARC GRIGSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68783

FILED

DEC 21 2015

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

ORDER

This is a pro se appeal from an order dismissing a post-conviction petition for a writ of habeas corpus. Appellant has submitted a motion for a stay of this appeal pending the district court's resolution of a motion for reconsideration of its order denying appellant's petition. Although appellant has not been granted leave to file documents in pro se, *see* NRAP 46, we direct the clerk of this court to file the motion. It appears that appellant filed a timely motion for reconsideration in the district court prior to filing his notice of appeal; the district court ordered the state to file a response to the motion and directed appellant to file a reply. Those documents have been filed, but the district court subsequently took the matter off calendar on the ground that appellant had filed the notice of appeal and the district court concluded that it had lost jurisdiction.

A stay of this appeal is not appropriate. If the district court is inclined to grant reconsideration, the court shall so certify its intention to this court, and the matter may be remanded for the limited purpose of allowing the district court to enter an order. *See Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978); *see also Foster v. Dingwall*, 126 Nev. 228

SUPREME COURT
OF
NEVADA

(O) 1947A

15-20781

P.3d P.3d 453 (2010) (clarifying the remand procedure set forth in *Huneycutt*). We deny the motion for stay.

It is so ORDERED.

_____, C.J.

cc: Hon. Kathleen E. Delaney, District Judge
Dennis M. Grigsby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS MARC GRIGSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68783

FILED

JUN 17 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a pro se appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

In his pro se postconviction petition, appellant Dennis Marc Grigsby argued that trial and appellate counsel were ineffective on three grounds.[1] To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient because it fell below an objective standard of reasonableness and the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We give deference to the court's factual findings if supported by

[1]The district court appointed counsel to represent Grigsby in the postconviction proceeding. *See* NRS 34.750. Subsequently, Grigsby filed a motion to represent himself with standby counsel. The district court granted the motion in part, allowing Grigsby to represent himself without standby counsel.

substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Grigsby argued that trial counsel were ineffective for not seeking to suppress evidence collected during an unlawful search of his residence. In late March 2008, Grigsby kicked his wife, Tina Grigsby, out of their apartment because he believed that she was dating another man. Several days later, Tina moved in with her boyfriend, Anthony Davis, who lived in the same apartment complex as Grigsby. On the night of April 2, 2008, Grigsby got into an argument with Davis outside of Davis' apartment. Tina heard the exchange from inside Davis' apartment. The argument ceased after a few minutes; Tina heard gunshots about 10 to 15 minutes later. When the police arrived shortly thereafter, she relayed this information to police officers, who knocked on Grigsby's door. There was no answer. While police were still investigating the crime scene, Grigsby's mother, Mildred Grigsby, appeared, asking to gain entry into Grigsby's apartment to retrieve unidentified items. She was not allowed into the apartment but provided a key, which Grigsby had given her, to police officers so that they could determine if Grigsby was in the apartment; he was not in the residence. Subsequently, the police secured a search warrant, searched Grigsby's apartment, and seized several items.

Grigsby argued that the search of his apartment was improper because even though Mildred was the leaseholder of the apartment, she had no authority to allow police into his apartment as she did not reside there. The district court rejected his trial-counsel claim, determining that Mildred had actual authority to consent to a search of Grigsby's apartment

and therefore he assumed the risk of Mildred consenting to a search of the apartment. *See Taylor v. State*, 114 Nev. 1071, 1079, 968 P.2d 315, 321 (1998). Moreover, the district court concluded, the search warrant was properly issued based on Tina's statements to the police and the initial entry into the apartment was not the "but-for cause" of the discovery of the evidence in Grigsby's apartment. Rather, the initial entry into the apartment was simply to look for Grigsby and the seized evidence was obtained after a search warrant had issued. Therefore, trial counsel were not ineffective for not seeking to suppress the seized evidence. We conclude that the district court did not err by denying this claim.

Second, Grigsby argued that appellate counsel was ineffective for not challenging the prosecutor's comment to the jury that a guilty verdict is permissible so long as the determination of guilt is unanimous even if the jurors were not unanimous as to the theory of guilt, as the jury was not instructed on that legal principle before deliberations. Because the prosecutor's comment was a correct statement of the law, *see Schad v. Arizona*, 501 U.S. 624, 631 (1991); *Holmes v. State*, 114 Nev. 1357, 1364, n.4, 972 P.2d 337, 342 n.4 (1998), Grigsby failed to demonstrate that appellate counsel was ineffective for failing to challenge the comment on appeal. Accordingly, the district court properly denied this claim.

Third, Grigsby argued that appellate counsel was ineffective for not raising a claim that the district court erred by providing a supplemental instruction to the jury several hours after deliberations had begun. However, the record shows that the district court did not give the jury a supplemental instruction after deliberations began. Because

Grigsby failed to show that appellate counsel was ineffective for not raising this claim on appeal, the district court properly denied this claim.

Having considered Grigsby's claims and concluded that they lack merit, we

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

Douglas, J.

Cherry, J.

Gibbons, J.

cc: Hon. Kathleen E. Delaney, District Judge
Dennis M. Grigsby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[2]Because Grigsby did not demonstrate error, his contention that cumulative error requires reversal of his conviction and sentence lacks merit. Therefore, the district court properly denied this claim. We further conclude that the district court did not err by denying Grigsby's petition without conducting an evidentiary hearing. *See Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1239 (2002) (observing that a postconviction petitioner is entitled to evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief).

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS MARC GRIGSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68783

FILED

SEP 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Cherry, J.

Douglas, J.

Gibbons, J.

cc: Hon. Kathleen E. Delaney, District Judge
Dennis M. Grigsby
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS MARC GRIGSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 68783
District Court Case No. C246709

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 19, 2016

Elizabeth A. Brown, Clerk of Court

By: Joan Hendricks
Deputy Clerk

cc (without enclosures):
Hon. Kathleen E. Delaney, District Judge
Dennis M. Grigsby
Attorney General/Carson City
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on _____.

_____
District Court Clerk

Electronically Filed
01/05/2021 8:09 PM
CLERK OF THE COURT

PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Marc Grigsby,

Petitioner,

vs.

Calvin Johnson,

Respondent,

Case No: A-20-821932-W
Department 25

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on September 25, 2020. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 24th day of March, 20 21, at the hour of

3:00 p.m. ~~o'clock~~ for further proceedings.

Dated this 5th day of January, 2021

District Court Judge

FE9 78A 2037 497F
Kathleen E. Delaney
District Court Judge

CERTIFICATE OF SERVICE BY MAILING

I, Dennis Grigsby, hereby certify, pursuant to NRCP 5(b), that on this 20 day of May, 2021, I mailed a true and correct copy of the foregoing, "Answer to Respondents Response and Motion to Dismiss" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

CC:FILE

DATED: this 20 day of May, 2021.

Dennis Grigsby

Dennis Grigsby # 1033690
In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Answer to Respondents Response and Motion to Dismiss
(Title of Document)

filed in District Court Case number A-20-821932-W

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

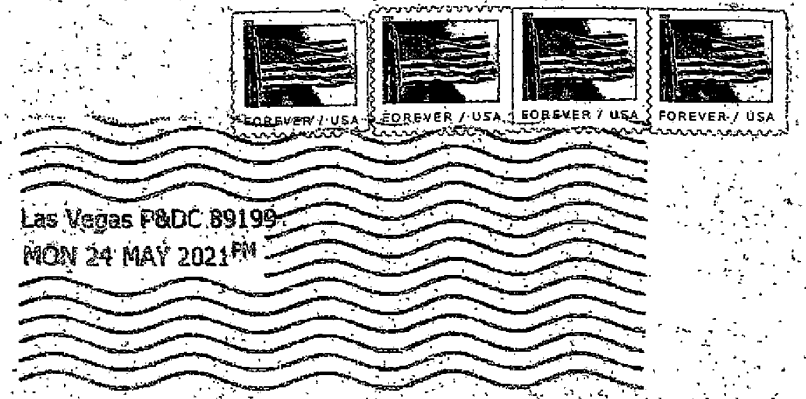
Dennis Grigsby
Signature

5/20/2021
Date

Dennis Grigsby #1033640
Print Name

Pro Se Petitioner
Title

Dennis Grigsby #1033642
P.O. Box 650
Indian Springs, NV 89070



District Court, Clerk
200 Lewis Ave., 3rd Fl.
Las Vegas, NV 89155-1160

Legal Mail
Confidential

27

Dennis Grigsby #1033640
P.O. Box 650 [H.D.S.P.]
Indian Springs, NV 89070

DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Marc Grigsby,
Petitioner,
v.
Calvin Johnson, Warden, etal.,
Respondent.

Case No.: A-20-821932-W
Dept. No.: XXV

Judicial Notice
(Evidentiary Hearing Requested)

Supplemental Cause and Prejudice Exhibits in Support of Petition for Writ of Habeas Corpus

COMES NOW, the Petitioner, Dennis Marc Grigsby, in pro se and hereby submit the attached Exhibits in Supplement to the "Petition for Writ of Habeas Corpus".

THIS Supplement, is based on all prior papers and pleadings on file with the clerk of the court, which are hereby incorporated by this reference and the attached points and authorities herein, as well as attached exhibits.

DATED: this 1st day of June, 2021.

//

Points and Authorities

The attached "Exhibits" are submitted in good faith to demonstrate to the Court, that the delay in asserting the jury poll/invalid verdict error within the one-year time period proscribed by NRS 34.726 is not the fault of the Petitioner; and dismissal of the petition as time-barred or as second/successive as per NRS 34.810 will unduly prejudice the Petitioner.

Review of the attached exhibits provide proof of relation back upon a common core of operative facts (ie. jury poll error, illegal verdict upon non-unanimous poll, omission of trial record, direct appeal upon incomplete record), issues all presented in original and prior post-conviction pleading of both Petitioner and the State.

A plain error review is proper pursuant to Saletta v. State, 127 Nev. 416, 254 P.3d 111 (Nev. 2011), where the instant claim before the Court worked to Petitioner's actual and substantial disadvantage, denying the right to a fair trial by error of constitutional dimensions. See United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed 2d 816 (1982); see also Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (Nev. 1993).

Lastly, good cause for failure/delay to present claim and actual prejudice should be demonstrated by the failure of direct appeal counsel, Daniel Bunin, Esq., to request and obtain record of February 4, 2009; and appointed appellate counsel, Terrence Jackson, Esq.,

making the decision "to raise the legal issues that counsel deems significant", clearly an impediment external to Petitioner's control where the petition he filed November 29, 2012, was (50) fifty days past the one-year period of remittitur issued on October 10, 2011. See attached Exhibit(s) - A and E.

Petitioner submits he has provided good cause to escape the procedural defaults pursuant to the doctrine of laches NRS 34.800 and waiver pursuant to NRS 34.810, by a clear rebuttal of presumption of prejudice to the State/Respondent.

Wherefore, the Petitioner, prays that this Honorable Court enter an order directing the County of Clark to issue a Writ of Habeas Corpus directed to, Calvin Johnson, Warden of State of Nevada's High Desert State Prison, commanding Warden Johnson to bring the Petitioner before your Honor, and return cause of his imprisonment.

DATED: this 1st day of June, 2021.

Respectfully submitted,
Dennis Grigsby
Dennis Grigsby, #1033640
Petitioner Pro Se

//

//

//

Index of Exhibits

A. Affidavit of Mailing, September 1, 2011.

B. Petition for Writ of Habeas Corpus, January 20, 2012.
See: D. Ground 4, #4 (pgs. 13-14).
E. Ground 5, #1 & #2 (pgs. 15-16).

C. State's Response to Petition for Writ of Habeas Corpus, March 7, 2012.
See: Claim #4, D (pgs. 25-26).
Claim #5, A & B (pgs. 26-28).

D. Ex Parte Orders, August 6, 2012.

E. Petition and Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief, November 29, 2012; Correspondence from Terrence Jackson, Esq., January 3, 2013; Reply to State's Response, March 5, 2013.

F. Motion for Discovery, August 28, 2013.

G. Correspondence from Dayvid Figler, Esq., October 15, 2014.

H. Superseding Proper Petition for Writ of Habeas Corpus, December 3, 2014.

(continued next page)

See: Ground #2 (pgs. 13-18).
Ground #3 (pgs. 19-23).

EXHIBIT

A.

Supreme Court of Nevada

Affidavit of Mailing

Docket: 53627; Sept. 1, 2011.

3 pages

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS M. GRIGSBY,
Appellant,
v. S.C. CASE NO.: 53627
THE STATE OF NEVADA,
Respondent.

AFFIDAVIT OF MAILING

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, Amanda Wells, being first duly sworn, deposes and says: That affiant is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 1st day of September, 2011, affiant deposited in the U.S. Mail at Las Vegas, Nevada, a copy of APPELLANT'S OPENING BRIEF AND APPENDIX enclosed in a sealed envelope upon which postage was fully prepaid, addressed to the following:

Dennis M. Grigsby
ID# 1033640
Ely State Prison
4569 N. State Route 490
Ely, Nevada 89301

That there is regular communication by mail between the place of mailing and the place so addressed.

SUBSCRIBED and SWORN TO before me this 1st day of Sept., 2011.

Patricia A. Lasker
NOTARY PUBLIC STATE OF NEVADA
My Appointment Expires 09/13/2011
Appointment No. 96-1185-1

NOTARY PUBLIC in and for said County and State

AMANDA WELLS
Employee of Bunin & Bunin, Ltd.

INDEX

EXHIBIT

B

Petition for Writ of Habeas Corpus

filed Jan. 20, 2012.

See: D. Ground 4, #4 (pgs. 13-14)

E. Ground 5, #1 & 2 (pgs. 15-16)

21 pages

Original

25

FILED

JAN 20 2012

CLERK OF COURT

Case No. C246709

Dept. No. 14

IN THE Eighth JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

C246709
Petit
Petition for Writ of Habeas Corpus
3268892

Dennis Marc Grigsby
Petitioner,

v.

Dwight Neven, Warden, H.D.S.P
Respondent

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

INSTRUCTIONS:

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

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

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

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

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

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

RECEIVED
JAN 20 2012
CLERK OF THE COURT

1

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

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison, Clark County, Nevada

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Nevada

3. Date of judgment of conviction: April 6, 2009

4. Case number: C246709

5. (a) Length of sentence: Life without the possibility of parole and a consecutive 60-240 months; Concurrent term of 16-72 months

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

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ___ No X
If "yes", list crime, case number and sentence being served at this time:

7. Nature of offense involved in conviction being challenged: First-degree murder with the use of a deadly weapon; Possession of firearm by ex-felon

8. What was your plea? (check one):
(a) Not guilty X (b) Guilty ___ (c) Nolo contendere ___

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury X (b) Judge without a jury ___

11. Did you testify at the trial? Yes ___ No X

12. Did you appeal from the judgment of conviction? Yes X No ___

13. If you did appeal, answer the following:
(a) Name of Court: Nevada Supreme Court
(b) Case number or citation: 53687
(c) Result: Affirmed

2

(d) Date of result: September 14, 2011
(Attach copy of order or decision, if available.) See Attached.

14. If you did not appeal, explain briefly why you did not: N/A

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

16. If your answer to No. 15 was "yes", give the following information:
(a)(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ___ No ___
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:
(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ___ No ___
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.
(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? ___
(1) First petition, application or motion? Yes ___ No ___
Citation or date of decision:
(2) Second petition, application or motion? Yes ___ No ___
Citation or date of decision:
(3) Third or subsequent petitions, applications or motions? Yes ___ No ___
Citation or date of decision:
(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

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17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:
(a) Which of the grounds is the same:
(b) The proceedings in which these grounds were raised:
(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) See Attached

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) No.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ___ No X
If yes, state what court and case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: James J. Russell, Scott L. Coffee, Lawrence J. Goldstein, David M. Schieck, Clark V. Patrick, Kirk T. Kennedy, Daniel M. Bunin

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ___ No X
If yes, specify where and when it is to be served, if you know:

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

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18.
A. Ground One: Ineffective Assistance of Pre-Trial and Trial Counsel

B. Ground Two: Ineffective Assistance of Pre-Trial Counsel

C. Ground Three: Ineffective Assistance of Trial Counsel

D. Ground Four: Ineffective Assistance of Trial and Appellate Counsel

E. Ground Five: Ineffective Assistance of Appellate Counsel

F. Ground Six: Ineffective Assistance of Pre-Trial, Trial, and Appellate Counsel

Ineffective grounds could not be raised on Direct Appeal

A. Ground One:
In violation of Petitioners right to Due Process, Fair Trial, Reasonable Search and Seizure, and Effective Assistance of Counsel, as guaranteed by the United States Constitution, and the Fourth, Fifth, Sixth, and Fourteenth Amendments, Due to Ineffective Assistance of Pre-Trial and Trial Counsel:

1. Pre-Trial and Trial counsel's failure to inform Petitioner of Husband and Wife privilege - NRS 49.295 or raise and preserve issue allowed Petitioner wife Tina Grigsby's pre-trial and trial identification and alternate theory testimony. Absent this prejudice and counsel error there is a reasonable probability that the jury would have had a reasonable doubt respecting guilt of every element of charged offense.

2. Pre-Trial and Trial counsel's failure to present Motion to Suppress Evidence of which counsel had knowledge of its questionable procurement being probable violation of Petitioner's Constitutional right to Reasonable Search and Seizure, where in light of Prosecutions circumstantial case had the evidence been suppressed there is probability

that no rational trier of fact could have found Petitioner guilty of the essential elements of the crime beyond a reasonable doubt.

3. Pre-Trial and Trial counsel's failure to raise and preserve issue of Prosecutor and Judge coercion of uninformed (noticed), unsubpoenaed witness Mildred Grigsby to testify after request for counsel through erroneous grant of immunity allowed Detective Laura Andersen's inaccurate and opinionated testimony of crime scene evidence and hearsay evidence. Had this prejudicial act not been committed there is great probability that a reasonable doubt of guilt of every element of charged offense would have existed with the jury.

B. Ground Two:
In violation of Petitioners right to Due Process, Fair Trial, and Effective Assistance of Counsel, as guaranteed by the United States Constitution, and the Fifth, Sixth and Fourteenth Amendments, Due to Ineffective Assistance of Pre-Trial Counsel:

1. Pre-Trial counsel's dereliction of Petitioners wish and assertion of right to trial in sixty days, through counsel's desire to present a defense that imply's inherent guilt which at outset of Mr. Scott-Coffee's appointment had been decided against by Petitioner and settled. Mr. Coffee's actions at calendar call October 21, 2008 prejudiced Petitioner vacating original trial date of October 27, 2008 providing ill prepared Prosecution an additional ninety days to prepare where Mr. Coffee could have proceeded in same fashion as Mr. Schieck and Mr. Patrick, relying on Prosecutions burden to prove every element of charged offense beyond a reasonable doubt, which may resulted in reasonable doubt in the jury in Petitioners favor.

C. Ground Three:
In violation of Petitioner's right to Due Process, Fair Trial, and Effective Assistance of Counsel, as guaranteed by the United States Constitution, and the Fifth, Sixth, and Fourteenth Amendments, Due to Ineffective Assistance of Trial Counsel:

1. Trial counsels failure to investigate and present video evidence which would have impeached the Prosecutions primary witness Tina Grigsby's identification of Petitioner and also undermined both first-degree murder theories of liability charged. Petitioner was prejudiced by not having Exculpatory Evidence presented to the jury that may have created a reasonable doubt in them changing the out come in favor of Petitioner.

2. Trial counsels failure to inform and disclose to Petitioner potential Expert Witnesses noticed and filed January 5, 2009 and failure to present experts in rebuttal of Prosecutions Experts prejudiced Petitioner of presenting mitigating evidence to the jury that may have created a reasonable doubt resulting in a different outcome.

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3. Trial counsels waiver of reading the charging document and failure to raise and preserve Prosecutions improper notice and substitution of witness Dr. Jacqueline Benjamin with Dr. Alane Olson violated Petitioners right to confrontation and cross-examination resulting in unanswerable questions of observations and actions not documented that may have presented a reasonable doubt regarding guilt of every element of charged offense.

4. Trial counsels excessive instruction of Court, Prosecution, and witnesses concerning evidence and eliciting testimony of witnesses exhibited gross negligence adversarial to Petitioner, raising cause to motion for substitution of counsel for an abuse of discretion where had Petitioner had loyal and vigorous counsel the outcome would have been different.

5. Trial counsels inadequate questioning of FBI Agent Dennis Serna allowed Prosecutions elicit of testimony of Petitioners post-arrest silence demonstrating prejudicial deficient performance where such questioning would generally be improper requiring reversal.

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D. Ground Four:
In violation of Petitioner's right to Due Process, Fair Trial, Reasonable Search and Seizure, and Effective Assistance of Counsel, as guaranteed by the United States Constitution, and the Fourth, Fifth, Sixth, and Fourteenth Amendments, Due to Ineffective Assistance of Trial and Appellate Counsel:

1. Trial and Direct Appeal counsels failure to raise and preserve Prosecutions Bad Faith Act of Failing as required to disclose evidence that would enable effective cross-examination and impeachment – "Brady" Exculpatory Evidence that was in the hands of investigating agencies, the Prosecution is charged with constructive knowledge and possession of evidence held by other state agents, including law enforcement. Video recovered by the Las Vegas Metropolitan Police Department if reproduced and viewed would have shown Petitioner dressed differently than witness Tina Grigsby discribed in her statements, preliminary hearing and trial testimony. The video would have also shown — undermining evidence of the two first-degree murder theories charged where had not been for this prejudice there is probability that a reasonable doubt would have existed of guilt of every element of offense.

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2. Trial and Direct Appeal counsels failure to adequately raise and preserve Court error of admitting evidence obtained by means violating Petitioners right to reasonable search and seizure, and admitting of uncharged bad act and untimely noticed demonstrative evidence. Prejudiced Petitioner by Prosecutions presentation of aforementioned evidence as consciousness of guilt to the jury. This showing without Petrocelli hearing was not harmless because requirements of admissibility were not properly proven. Evidence seized and bad acts of uncharged offenses were not one transaction as indicated by the Prosecution to be. The offenses were not proven by plain, clear and convincing evidence to have been committed by the Petitioner as required, allowing conviction on less than proof beyond a reasonable doubt of every element of charged offense.

3. Trial and Direct Appeal counsels failure to raise and preserve the amended charging document and instructions to jury creating a convoluted mandatory presumption of first-degree murder through use of pyrling

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and inconsistant language diluted the reasonable doubt standard and lighten the Prosecutions burden of proof to the jury, allowing a conviction on less than proof beyond a reasonable doubt of guilt of every element of charged crime rendering charge, conviction, and sentence fundamentally unfair.

4. Trial and Direct Appeal counsels failure to raise and preserve the jury on their verdict form being allowed not to indicate whether their verdict was unanimous based upon a single theory of the two first-degree murder theories charged. This prejudiced Petitioner in that murder of the first-degree is a Specific Intent crime and the jury must be unanimous in its verdict on the theory under which it is finding a criminal defendant guilty of the crime charged to comport with the mandates of the Due Process clause of the Fourteenth Amendment and to insure a Fair Trial under that Amendment. Had this been the case and not a general poll of first-degree murder with the use of a deadly weapon there is probability that a

reasonable doubt of guilt of every element of charged offense may have been present with the jury.

E. Ground Five:
In violation of Petitioner's right to Due Process, Fair Trial, and Effective Assistance of Counsel, as guaranteed by the United States Constitution, and the Fifth, Sixth, and Fourteenth Amendments, Due to Ineffective Assistance of Appellate Counsel:

1. Allowed withdrawl and re-appointment of Direct Appeal counsel without Petitioner's written consent by the Nevada Supreme Court through granting Order filed March 4, 2010 violated rule 46 (d)(3)(A) of the Nevada Rules of Appellate Procedure. Kirk Kennedy retained counsel was allowed to withdraw representation creating breach of duty, incomplete record, and present delay refunding retainer paid. Daniel Bunin accepted appointment March 22, 2010 and displayed dereliction of Petitioner from the outset resulting in the imposition of a $1,500 sanction, on January 25, 2011. Mr. Bunin's failure to communicate and keep Petitioner informed has extended to current failure to promptly provide entire casefile, papers, and property Petitioner is entitled upon denial of Direct Appeal and completion of representation upon request which was mailed November 4, 2011.

These actions prejudiced Petitioner by allowing review with incomplete and inadequate record of trial where jury instruction error was not raised or presented on Direct Appeal due to missing record of trial transcript of February 4, 2009 denying prosecution of a meritorious Direct Appeal where there is guaranty of Attorney representation.

2. Direct Appeal counsels failure to present opening brief legal arguments as constitutional violations, has prejudiced Petitioner. Appointed counsel Daniel Bunin has waived Petitioner's constitutional right to seek Federal review of the constitutional violations, and has placed the burden on the Petitioner to show cause and prejudice why the constitutional violations were not presented to the State Supreme Court on Direct review of conviction in State Court, where the State would have born the burden of proving that the errors were harmless.

F. Ground Six:
In violation of Petitioner's right to Due Process, Fair Trial, Reasonable Search and Seizure, and Effective Assistance of Counsel, as guaranteed by the United States Constitution, and the Fourth, Fifth, Sixth, and Fourteenth Amendments, Due to Ineffective Assistance of Pre-Trial, Trial, and Appellate Counsel:

1. The cumulative effect of Pre-Trial, Trial, and Direct Appeal counsels errors show deficient performance and even when no individual error is sufficiently prejudicial to warrant relief, that for errors the result of the proceedings would have been different and the cumulative effect as a whole may require reversal.

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

EXECUTED at H.D.S.P on the 12th day of the month of January of the year 2012.

Dennis Grigsby
Signature of petitioner

Dennis Marc Grigsby #1033640
High Desert State Prison
22010 Coldcreek Road
Indian Springs, NV 89070

N/A
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

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

Dennis Grigsby
Petitioner
Dennis Marc Grigsby #1033640

N/A
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Dennis Marc Grigsby, hereby certify pursuant to N.R.C.P. 5(b), that on this 12th day of the month of January of the year 2012, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Dwight Neven, Warden H.D.S.P
Respondent prison or jail official
22010 Coldcreek Road
Indian Springs, NV 89070
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

Clark County District Attorney
District Attorney of County of Conviction
200 Lewis Avenue
Las Vegas, NV 89155
Address

Dennis Grigsby
Signature of Petitioner
Dennis Marc Grigsby #1033640
High Desert State Prison
22010 Coldcreek Road
Indian Springs, NV 89070

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding

Petition For Writ OF Habeas Corpus
(Title of Document)

filed in District Court Case No. C246709

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or for an application for a federal or state grant.

Dennis Grigsby
(Signature)
Dennis Marc Grigsby #1033640

1/12/12
(Date)

Dennis Marc Grigsby #1033640
High Desert State Prison
22010 Calderock Road
Indian Springs NV 89070
3783
504.97
ZIP 89701
011D1260491

EXHIBIT

C

State's Response to Petition for Writ of Habeas Corpus, filed Mar. 7, 2012.

See: Claim #4, D (pgs. 25-26)

Claim #5, A & B (pgs. 26-28)

30 pages

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03/07/2012 10:32:40 AM

CLERK OF THE COURT

RSPN
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Clark County District Attorney
Nevada Bar #001565
NELL E. CHRISTENSEN
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
DENNIS ORIGSBY,
#1813660
Defendant.

CASE NO: C246709
DEPT NO: XIV

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: 03/12/12
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through NELL E. CHRISTENSEN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition For Writ Of Habeas Corpus.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On August 11, 2008, the State of Nevada, by way of Information, charged Dennis Grigsby (hereinafter "Defendant") with Count 1 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165) and Count 2 – Possession of a Firearm by Ex-Felon (Felony – NRS 202.360).

On February 4, 2009, a jury found Defendant guilty of Count 1 – First Degree Murder with Use of a Deadly Weapon and of Count 2 – Possession of a Firearm by Ex-Felon. On February 5, 2009, a jury sentenced Defendant to life in prison without possibility of parole. On March 19, 2009, the Court imposed the jury's sentence of Life without the possibility of parole on Count 1, plus a Consecutive term of Sixty (60) to Two Hundred Forty (240) for Use of a Deadly Weapon, and a term of Sixteen (16) to Seventy Two (72) Months on Count 2, to run concurrent to Count 1. On April 6, 2009, the Court entered a Judgment of Conviction. On September 14, 2011, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued October 10, 2011.

On January 20, 2012, Defendant filed a Petition for Writ of Habeas Corpus alleging the following ineffective assistance of counsel claims:

1) counsel failed to:
   a) inform Defendant of the privilege of husband and wife confidentiality;
   b) move to suppress questionably procured evidence;
   c) raise and/or preserve the issue of alleged improper testimony;
2) counsel waived Defendant's right to a speedy trial and proceeded with a theory of defense in consistent with Defendant's wishes;
3) counsel failed to:
   a) investigate and present video evidence;
   b) notice Defendant of State's expert witnesses or present rebuttal experts;
   c) require reading of the charging document and preserve the issue of the State's substitution of witnesses;
   d) "exhibited gross negligence adversarial to Petitioner";
   e) adequately cross examine FBI Agent Dennis Serna;
4) counsel failed to:
   a) preserve Brady issues or raise such on appeal;
   b) preserve, or raise on appeal, allegedly erroneous admission of prior bad acts and evidence obtained in violation of the Fourth Amendment;

   c) preserve, or raise on appeal, alleged confusing language in the changing document and jury instructions;
   d) preserve, or raise on appeal, alleged deficiencies in the verdict form;
5) counsel failed to:
   a) communicate or provide case files;
   b) raise constitutional issues on appeal;
6) cumulative error amounting to ineffective assistance.

The State responds below.

STATEMENT OF FACTS

As discussed more fully below, On April 2, 2008, at approximately 11:00 pm, Defendant waited in the dark between Buildings 9 and 10 at the Lake Mead Estates apartment complex to ambush Anthony Davis, who was having an affair with Defendant's wife, Tina Grigsby. Once Defendant saw Mr. Davis approaching, Defendant shot Mr. Davis several times. Although Davis ran for his life, Defendant eventually murdered Davis by piercing his skull with a bullet.

Events Leading Up to the April 2, 2008 Murder

Prior to this murder, Defendant and Tina were married in 2006. II TT 62[1]. The couple had a child together and lived in the Lake Mead Estates apartments. Id. at 63-64. However, as time progressed, there were problems in their marriage. Id. at 65-66. In fact, Defendant brought up the topic of separation to Tina and the couple discussed ending their marriage. Id. On March 29, 2008, the couple notified the apartment complex that the couple intended to vacate the premises in April 30, 2008. III TT 11-12.

On March 23, 2008, Easter Sunday, Defendant accessed Tina's voicemails after Tina fell asleep. II TT 70-30. Defendant overheard a voicemail from Mr. Davis. Id. at 73-74. Although Defendant did not know who the man was at the time, this message enraged him. Id. Defendant woke Tina and physically dragged her out of bed to accuse her of cheating on him. Id. at 73-74. Defendant kicked Tina and their children out of the apartment. Id. at 74-75. Tina went to a friend's home. Id. at 76. Once inside, Tina told the friend that Defendant

[1] Trial Transcripts: January 27, 2009 – "I TT"; January 28, 2009 – "II TT"; January 29, 2009 – "III TT"; January 30, 2009 – "IV TT"; February 2, 2009 – "V TT"; February 3, 2009 – "VI TT"

kicked Tina out of the home because he heard Mr. Davis' voicemail. Id. at 77, 123.

On March 27, 2008, Defendant, obsessed with this affair, printed out Tina's phone records in an effort to track down how many times she had spoken with Davis. V TT 37. On the print outs were handwritten notes indicating "Me" and "Tony" next to incoming and/or outgoing numbers. V TT 37. According to the records, it was clear that Tina had spoken with Davis multiple times before his murder. Id.

Several days after Easter Sunday, Defendant saw Tina walking their child to day care and offered to give them a ride. II TT 86-88. Tina accepted the invitation. Id. at 88. During the car ride, Defendant asked her why she was cheating on him and requested to see his child. Id. at 89. Tina also saw Defendant the day before Davis' murder at her friend Terry's home. Id. Defendant again expressed desire to see the baby more and Tina told Defendant to pursue custody through the judicial system. Id. at 91-94.

A few days prior to the murder, Defendant told neighbor, Richard Corbin, Tina "had been causing problems" so Defendant took off his wedding ring, threw away Tina's clothes and intended to return her car. Id. at 70-75, 82.

Defendant's Murder of Davis on April 2, 2008

On the evening of April 2, 2008, Davis picked up Tina from a friend's home. II.TT 94. The two were planning to stay at Davis' apartment, which like Defendant's, was also located within the Lake Mead Estates apartment complex. Id. at 95. Before arriving at Davis' home, Davis told Tina he was hungry and wanted to grab some food at the taco stand nearby the apartment complex. Id. at 95-96.

When the couple pulled into the parking lot, Tina saw Defendant standing in front of Coyote Corner, a nearby convenient store, wearing a red hooded sweatshirt, blue jeans and black Allen Iverson sneakers. Id. at 99-100. Tina, concerned about a potential altercation, told Davis to forget about the food and they drove to Davis' apartment. Id.

After about five minutes of being inside Davis' apartment, Davis said that he was leaving to grab some tacos. Id. at 101. Tina explained that, based on where Davis lived, it was easiest to walk to the taco stand rather than drive. Id. at 149. Tina asked Davis not to

leave, because she was afraid he would run into Defendant. Id. at 102. However, Davis left to go to the taco stand. Id. at 102-03.

As soon as Davis stepped out of his apartment, Tina saw someone standing outside in the same red sweatshirt as Defendant. Id. at 103. She heard Defendant holler "My baby better not be up there, my baby better not be up there." Id. Tina tried to pull Davis back, but he broke free and told Tina to lock the door. Id. Tina heard Davis and Defendant arguing for a few minutes. Id. at 104. About ten (10) or fifteen (15) minutes later, Tina heard three gunshots. Id. at 105. This testimony was corroborated by a couple of residents from the apartment complex. For example, resident Gilbert Arenas testified that as he sat in his nearby apartment, he heard an argument occur outside as well as two-to-four gunshots. II TT 33-36. Another resident, Luis Gomez, testified that at approximately 11:00pm, as he walked through the complex, he saw an African-American man dressed in a red hoody and blue jeans get into an argument with another man. II TT 49-50. As Gomez walked away, about ten to fifteen minutes later, he heard three-to-four gunshots coming from the apartment complex. II TT 53.

Tina refused to leave the apartment until she heard helicopters and the police outside. Id. at 107. When she stepped out of the apartment, she found Davis dead on the ground. Id.

At trial, Tina testified that Defendant owned a small black gun with little white handles. Id. at 105-06. Tina said the gun had a magazine clip that needed to be inserted into the handle to load it. Id.

Davis' body was found between buildings 9 and 10 in an area where two concrete walkways intersected. III TT 17; V TT 11. The walkways were bordered by a reddish colored gravel area. V TT 16-17. Detective Laura Anderson testified that based on the pathway in which Davis would have had to use to get to his apartment from the taco shop, he would have been blind to see whatever was back in the alcove area. Id. at 14-15. The detective also explained that the area was "dark, pitch black" and "very low lit." V TT 15. All along the sidewalk, where Davis' body was ultimately located, were several items of evidence, including a hands-free Bluetooth earpiece, a black baseball cap, a black jacket with

the sleeves turned partially inside-out with a cellular phone in a pocket as well as bag of discarded tacos. III TT 27-33; V TT 19. The detective testified that the wrapping on the tacos was consistent with the wrapping used at the taco stand that Davis told Tina he was going to before he was murdered. V TT 78-79.

The detective explained that based on the manner in which the food was strewn along the walkway, she believed that Davis was walking along the walkway from the taco shop to his apartment. Id. at 21. The detective noted that based on the location of the first two spent casings and the progressive dropping of Davis' personal property along the walkway, it indicated to the detective that Davis tried to flee his attacker. Id. at 22. Each of these items was found progressively along a sidewalk in the middle of the shooting scene. Id. at 21-22.

Additionally, the police discovered that the three separate spent cartridge cases, all bore the head-stamp "PMC .25 AUTO." III TT 38. The firearms expert, who examined the bullets, concluded that all three shell casings were fired from the same gun. IV TT 116. Police obtained and executed a search warrant at Defendant's apartment. III TT 43. The search yielded several items, including a firearm magazine containing six (6) PMC .25 AUTO cartridges and a red hoody sweatshirt. III TT 43-44; V TT 36-37. Police also found a handwritten note with the names of several local divorce and bankruptcy attorneys. V TT 40.

In Defendant's apartment was also a backpack that contained a sandwich bag that held an opened box of PMC .25 AUTO ammunition with thirteen (13) cartridges. Id. at 37. A fingerprint expert for the State was able to lift a fingerprint off of that sandwich bag containing the ammunition and conclude that it matched the right index fingerprint of Defendant. IV TT 87.

The firearms expert also concluded that it is likely the bullets were fired from a .25 auto caliber gun. Id. at 122, 138-39. Moreover, based on the types of magazines recovered from Defendant's home it is likely that a Raven Arms .25 auto gun was used, given how the magazines would fit in that type of weapon and based on the rifling characteristics of the bullets. Id. at 122-25, 138-39. At trial, to help illustrate why the firearms expert thought the Raven Arms .25 auto gun was the weapon most likely used, a picture of such a gun was

displayed to demonstrate how the magazine found in Defendant's home could fit inside that specific type of weapon. Id. at 126. However, the State noted at trial that this was not the actual weapon used in the murder and even indicated the firearm in the picture denoted that it was property of the Las Vegas Metropolitan police department. Id. Detectives also served a search warrant on the 1996 Buick located within the garage of Defendant's mother and found a pair of black size 11 "Reebok" Allen Iverson athletic shoes. III TT 100-08; V TT 35-36. The shoes had small pieces of reddish gravel in their soles similar to the reddish gravel found at the shooting scene. Id.

Defendant's Escape, Efforts to Conceal Identity and Eventual Capture

After the shooting, Defendant was nowhere to be found after the murder. Defendant's employer testified that the Defendant worked on April 2, 2008 the day of the murder, but failed to come to work the day after the shooting on April 3, 2008. III TT 123. Defendant had not notified the employer that he would be absent. Id. Defendant never went back to work and was officially terminated. III TT 125.

On April 10, 2008, the Seattle Police Department discovered Defendant's Chevy Cobalt found in a parking lot near Pritchard Beach in Seattle, Washington. III TT 155; IV TT 18, 26. The car was intentionally set ablaze and was totally destroyed in the fire. III TT 163-65. Additionally, someone changed the license plates and removed all of the Chevy logos, replacing them with Ford logos, seemingly in an effort to conceal the make and model of the vehicle. III TT 14-15. Near the vehicle was a matchbook that had an American flag on it with the words "Freedom lights the way." III TT 168; IV TT 19-21.

On April 23, 2008, Defendant was arrested south of Seattle in Sacramento, California. III TT 137-41; IV 30-31. Defendant was staying in Sacramento with a man named Kenneth Bunn and the woman who Bunn was seeing, Jacqueline Rachelle Vandyvall-Swepston ("Jackie") in early April 2008. III TT 130, 137-41. When Jackie first met Defendant, she was told his name was "Steve," not Dennis. Id. at 131-32. Bunn, who actually knew Defendant as Dennis, testified that Defendant was like his cousin. Id. at 148. At the time Bunn and Jackie met Defendant, he was driving a relatively new little white car. Id. at 133, 149. Defendant

only stayed with Bunn and Jackie for one night and then he left. Id. at 34-35. Two or three weeks later, after the Cobalt had been reported burned out, Defendant showed up again in Sacramento at Jackie's home. Id. at 133. However, this time, Defendant did not have his little white car. Id. at 136. Instead, Defendant had in his possession a "long" Greyhound bus ticket, which indicated to Jackie, who had used Greyhound before, that he must have made a number of bus transfers from his original destination. Id. at 136-37. During this second visit, Defendant told Jackie that he was going through domestic problems and his wife was cheating on him. Id. at 138-39. Defendant's second visit only lasted three to four days, because by that final day, April 23, 2008, the police arrested him. III TT 137-41; IV 30-31.

During the police search of Jackie's home, police found several pieces of baggage belonging to Defendant. IV TT 37; V TT 33. A search of these items uncovered a fictitious identification card bearing the Defendant's picture in the name of "Steven Cooper" with a "cheat sheet" containing all of Steven Cooper's information and identifiers, as well as a "to-do" list of how to obtain other false identifications. V TT 58, 70. Defendant also possessed a Sacramento County ID card under the name of Steven Burgess. Id. at 58. The police also found a Western Union receipt containing the names Stephen Cooper and Steven Burgess. Id. at 61.

Police also discovered in Defendant's possession, a receipt from a telephone store in Portland, Oregon, itemizing a telephone purchase in the name of Steven Cooper. V TT 60. Police found the telephone denoted on the receipt on Defendant's person. Id. at 60. The police testified that Portland is only a three hour drive from Seattle, the location of his abandoned burned out car. Id. at 60. The police also found in his possession an edition of the Portland Observer Newspaper that was dated April 9, 2008, one day before the police found his burned out Cobalt in Seattle. Id. at 68-69.

ARGUMENT

As outlined above, Defendant alleges various claims of ineffective assistance of counsel. However, Defendant fails to establish deficiency and/or prejudice for each claim. The State responds to each claim in turn.

Strickland v. Washington provides a two-prong test to determine whether counsel was ineffective:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995). Surmounting Strickland's high bar is never an easy task. Padilla v. Kentucky, 559 U.S. ---, ---, 130 S.Ct. 1473, 1485 (2010). Bare and conclusory claims are insufficient to warrant relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). A petitioner's claims must be supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Id.

With respect to the first prong, a defendant is not entitled to errorless counsel. Rather, "'Deficient' assistance of counsel is representation that falls below an objective standard of reasonableness." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997) citing to Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1286 (1993). A defendant must show counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. Harrington v. Richter, 131 S.Ct. 770, 787 (2011). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms', not whether it deviated from best practices or most common custom." Strickland, 466 U.S. at 690. There are countless ways to provide effective assistance in any given case and there is a *"strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689 (emphasis added). "Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach'. Harrington, 131 S.Ct. at 789. "Judicial review of a lawyer's representation is highly deferential." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998)

(quoting Strickland, 466 U.S. at 689).

In order to meet the second prong of the test, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different or an omitted issue on appeal possessed a reasonable probability of success. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996). For prejudice, it is not sufficient to show alleged errors had some conceivable effect on the proceedings, the error must render the result of the trial unreliable. McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009); Harrington v. Richter, 131 S.Ct. 770, 787-88 (2011). The court may consider both prongs in any order and need not consider them both when a defendant's showing on either prong is insufficient. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

I. DEFENDANT FAILS TO ESTABLISH INEFFECTIVE ASSISTANCE AS TO CLAIM 1.

Defendant's Claim 1 alleges he received ineffective assistance of counsel because A) counsel failed to inform Defendant of marital privilege; B) counsel failed to move to suppress evidence possibly obtained in violation of Defendant's Fourth Amendment rights; and C) counsel failed to object on the grounds that the State and/or Court coerced Mildred Grigsby's testimony; and allowed Detective Laura Andersen to present improper testimony. Petition, p. 6-7.

A. Marital Privilege

Defendant claims counsel failed to inform Defendant of marital privilege, or preserve and raise on appeal, "Tina Grigsby's pre-trial and trial identification and alternate theory testimony". Petition, p.6. The State interprets the second part of this claim as alleging counsel should have argued Tina should not have been permitted to testify in light of marital privilege. To the extent the second part is intended to relate to something else, Defendant fails to sufficiently allege the claim. Defendant claims but for these errors, reasonable doubt as to his convictions would exist.

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Pursuant to NRS 49.295(a), a spouse cannot testify against another spouse without the testifying spouse's consent. Regardless of the testifying spouse's consent, under NRS 49.295(b), a spouse may not testify as to specific communications during the marriage without the other spouse's consent. To fall within the scope of NRS 49.295(b) and therefore require the non testifying spouse's consent, the proffered testimony be: 1) "communication", which is an expression made with the intent to convey a meaning; and 2) "confidential" which is a statement made solely to the potential testifying spouse, in reliance on the marital confidence. Foss v. State, 92 Nev. 163, 547 P.2d 688 (1982), citing Guyette v. State, 84 Nev. 160, 438 P.2d 244 (1968); Franco v. State, 109 Nev. 1229, 866 P.2d 247 (1993); Conslancio v. State, 98 Nev. 22, 639 P.2d 547 (1982).

As noted above, pursuant to NRS 49.295(a), Defendant could not have precluded Tina from testifying entirely. Tina's testimony as a whole is therefore not objectionable. As to specific communications, Defendant does not point to specific points of Tina's testimony that amounted to confidential communications that should have required Defendant's consent. Defendant therefore fails to allege specific facts to support a claim. Hargrove, 100 Nev. 498.

Further, any specific conversations that Tina mentioned during testimony were not confidential and therefore were not subject to marital privilege. The only specific conversations Tina referred to were: Defendant initiating conversation regarding divorce; Defendant wanting to go out to dinner on Easter; the couple's argument when Defendant found Mr. Davis' voicemail; and Defendant's desire to go to counseling and see his child[2]. II TT 66-67, 70-71, 89, 91-94, 129. However, each of these conversations were either inconsequential or not confidential. Defendant's desire to go out to dinner on Easter or see his child are irrelevant to the verdict, therefore, even assuming such is included in NRS

[2] The State's position is that Tina's testimony was not privileged as the majority of this testimony discussed the general content of conversations, rather than specific statements made by Defendant. However, assuming arguendo the testimony falls within the scope of NRS 49.295(b), the testimony still is not subject to spousal privilege.

49.295(b), Defendant cannot show prejudice. Further, Defendant's comment discussing divorce and the conversations regarding the voicemail are not confidential. Defendant told a neighbor the couple was having problems and Defendant had taken off his wedding ring. I AA 75-76. He additionally told Ms. Swepston that he and Tina were having "domestic problems" and Tina was cheating on Defendant. II TT 138-39. As to Defendant's desire to go to counseling, such was elicited on cross thereby suggesting Defendant's consent to Tina's testimony. II TT 93. Even if Defendant did not consent, the fact that Defendant wanted to go to counseling did not have an effect on the verdict. An objection based on marital privilege would have been futile, therefore counsel is not deficient in failing to object or explain the privilege to Defendant. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

B. Alleged Fourth Amendment Violations

Defendant claims he received ineffective assistance of counsel because counsel failed to move to suppress evidence possibly obtained in violation of the Fourth Amendment. Petition, p.6-7. Defendant fails to present a claim for relief as he pleads no specific facts to explain what evidence should have been suppressed, why the State procured the evidence in violation of his constitutional rights, or how suppression of the evidence would have affected the verdict. Hargrove, 100 Nev. 498. Defendant's claim must therefore be denied as he fails to demonstrate deficiency or prejudice.

C. Testimony of Mildred Grigsby and Detective Andersen

Defendant claims he received ineffective assistance of counsel because counsel failed to "raise and preserve issue of Prosecutor and Judge coercion of uninformed (unnoticed), unsubpoenaed witness Mildred Grigsby, Defendant's mother, to testify after request for counsel through erroneous grant of immunity and allowed Detective Laura Andersen's inaccurate and opinionated testimony of crime scene and hearsay evidence." Petition, p.7.

As to Ms. Andersen, Defendant fails to plead sufficient facts to specify a claim for relief. Hargrove, 100 Nev. 498. Defendant does not explain exactly what Ms. Andersen testified to that was inappropriate. Further, counsel made an extensive record of objections as to what counsel believed was improper opinion and hearsay evidence from Ms. Andersen.

V TT 22-23, 110-20. Therefore, to the extent any possibly objectionable opinion and/or hearsay evidence may be deduced from the record, the record belies Defendant's claim that counsel "allowed" Ms. Andersen to testify improperly. Hargrove, 100 Nev. 498. The Court, not defense counsel, determines the bounds of evidence and here, defense counsel took every step to attempt to preclude what he believed was improper hearsay and opinion testimony. Defendant therefore cannot demonstrate deficiency or prejudice.

Over defense counsel's objection, Mildred Grigsby testified at the preliminary hearing. Preliminary Hearing Transcript (hereinafter "PHT"), p.110-14. The State called Ms. Grigsby to establish her contact with Defendant on the day of the murder. PHT p. 111. Prior to testifying, Ms. Grigsby asked for an attorney. Id. at 110-14. The State explained to Ms. Grigsby, on the record, that the State was granting her immunity and the State would not prosecute her for anything in her testimony. Id. Ms. Grigsby acknowledged immunity, but continued to ask for an attorney. Id. at 110-14, 129. The Court explained that, because she was granted immunity she was not entitled to an attorney and ordered her to testify. Id. Ms. Grigsby testified that on the day of the murder Defendant came to her home in Las Vegas, gave her a key to his apartment, and told her he would call her later. Id. at 116. Ms. Grigsby claimed she did not know why Defendant gave her a key and that Defendant did not tell her to retrieve something from his apartment. Id. at 119-20. According to Ms. Grigsby, later in the evening, she became concerned because she had not heard from Defendant and therefore went to his apartment to check on him and/or her granddaughter. Id. After the murder, Ms. Grigsby did not speak with Defendant for over three weeks, until he called her after being arrested. Id. at 124.

Mildred Grigsby refused to testify at trial. I TT 10. The State could not subpoena Ms. Grigsby as she was living in California. I TT 11. Defense counsel objected to the State's request to admit Ms. Grigsby's preliminary hearing testimony. I TT 10-13. The Court agreed to review Hernandez v. State, 124 Nev. 639, 188 P.3d 1126 (2008) and determine whether the State could admit Ms. Grigsby's preliminary hearing testimony. I TT 13-14. Thereafter, the Court did not admit Ms. Grigsby's preliminary hearing testimony.

The State contends Ms. Grigsby's testimony at the preliminary hearing was proper regardless of notice and/or presence of an attorney for Ms. Grigsby. However, the record belies Defendant's claim of deficiency as counsel objected to Ms. Grigsby's testimony both at the preliminary hearing and the trial. PHT 110-14; I TT 10-13; Hargrove, 100 Nev. 498. Further, even assuming the testimony was improper, the testimony did not prejudice Defendant. First, Ms. Grigsby's testimony did not include any substantive statements which were critical to a finding of probable cause to bind Defendant over to district court. See PHT, p.110-29. Second, as Ms. Grigsby's testimony was not admitted at trial, the testimony did not affect the jury's verdict. Defendant therefore fails to demonstrate prejudice.

II. DEFENDANT FAILS TO ESTABLISH INEFFECTIVE ASSISTANCE AS TO CLAIM 2.

Due to the facts explained below, the State understands Defendant's Claim 2 to allege Defendant received ineffective assistance because counsel's desire to present a "defense that implys (sic) inherent guilt" frustrated Defendant's statutory right to a speedy trial. Petition, p.8.

The following facts are compiled from district court minutes of dates between Defendant's arraignment and trial. Defendant was arraigned on August 27, 2008. Defendant invoked his statutory speedy trial rights and the Court set the trial for October 27, 2008. On September 29, 2008 Mr. Coffee represented Defendant, and Mr. Colucci filed a substitution of attorney. Mr. Colucci stated he would need time to determine whether any writ issues existed as the preliminary hearing transcript was not yet filed. Mr. Colucci noted even if there were no writ issues, he could not be ready for trial by October 27, 2008. On September 30, 2008, Mr. Coffee stepped back in as counsel and stated he would try to be ready for the scheduled trial. On October 21, 2008, Mr. Coffee stated he was not ready for trial and concerned about Defendant's mental state. Mr. Coffee explained Defendant had refused to speak with any doctors. Defendant claimed he was not incompetent, but that he and Mr. Coffee disagreed as to the defense theory. The Court vacated the trial date. On October 28, 2008, Mr. Coffee and Defendant still did not agree on a trial strategy. Defendant stated he

was not guilty and did not wish to pursue Mr. Coffee's desired theory of "inherent guilt". Mr. Coffee and Defendant still had not come to a resolution on November 4, 2008. Defendant stated he did not wish to pursue a defense of self defense. The Court permitted Mr. Coffee to withdraw. On November 26, 2008, the Special Public Defender confirmed and noted Defendant had not waived his statutory right to a trial within sixty (60) days. Trial commenced on January 26, 2008. Between August, 2008, and November, 2008, Defendant changed attorneys five times.

A defendant has a statutory right to a trial within sixty (60) days of the arraignment. NRS 1785.556. The Court may discretionarily dismiss an information based on NRS 178.556 where, through no fault of the defendant and without good cause, trial does not commence within sixty (60) days. NRS 178.556. However, a defendant may waive the statutory right and such waiver may be expressed by counsel. Furbay v. State, 116 Nev. 481, 998 P.2d 553 (2000).

Defendant cannot demonstrate deficiency. While Mr. Coffee desired to pursue a defense theory inconsistent with Defendant's choice of defense, such is presumed to be a reasonable strategy decision after reviewing the evidence. Rhyne, 118 Nev. 1, 38 P.3d 163 (2002); Harrington, 131 S.Ct. 770. Although this disagreement appears to have, in part, contributed to the delay in trial, it was reasonable for counsel and the Court to take some time to attempt to mend the differences between Defendant and counsel to avoid having to bring in a new attorney unfamiliar with the case. However, Defendant's disagreement with Mr. Coffee was not the sole reason for delay. Defendant's trial was additionally delayed because of his repeated attempts to change attorneys.

As to prejudice, Defendant's trial attorneys did in fact pursue Defendant's choice of defense, therefore Mr. Coffee's theory did not harm Appellant's defense. Defendant's sole allegation of prejudice is that Mr. Coffee's plan to pursue a self defense theory prevented his trial from commencing within the sixty (60) day statutory timeframe and gave the State more time to prepare. However, Defendant cannot show prejudice as he fails to establish the State actually gained an advantage in trying the case at a later date. To the contrary, the State

announced ready for trial four (4) months before trial actually commenced. Additionally, as noted above, Mr. Coffee's desire to pursue a self defense theory was not the sole reason for delay. Therefore even if the State did gain an advantage due to the delay in trial, such prejudice is not solely attributable to Mr. Coffee. Defendant therefore cannot show deficiency or prejudice.

III. DEFENDANT FAILS TO ESTABLISH INEFFECTIVE ASSISTANCE AS TO CLAIM 3.

Defendant's Claim 3 alleges he received ineffective assistance due to counsel's: A) failure to investigate and present video evidence; B) failure to inform Defendant of the State's expert witnesses and/or present rebuttal expert witnesses; C) failure to require the Court to read the charging document and preserve the issue of the State's improper notice of witnesses; D) "gross negligence adversarial to Petitioner"; E) failure to adequately cross examine FBI Agent Dennis Serna. Petition, p.9-10.

"The day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate – and ultimate – responsibility of deciding if and when to object, which witnesses, if any, to call, and what defense to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163 (2002) citing Wainwright v. Sykes, 433 U.S. 72, 93, 94 S.Ct. 2497 (1977). "A lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval." Id., citing Brookhart v. Janis, 384 U.S. 1, 8, 86 S.Ct. 1245 (1966). "Rare are the situations in which the wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." Harrington, 131 S.Ct. at 789. As to pretrial investigation, counsel may make "reasonable decision that makes particular investigations unnecessary". Id. at 788. The Nevada Supreme Court has similarly stated, "[w]here counsel and client clearly understand the evidence and permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). To show prejudice under Strickland, a defendant claiming inadequate investigation must show how the desired investigation would have affected the outcome of the case. Id.

A. Video Evidence

Defendant claims he received ineffective assistance of counsel because counsel failed to obtain video evidence which would have impeached Tina's identification of Defendant and undermined the State's case. Defendant fails to plead sufficient facts to warrant relief. Defendant does not explain where this video evidence is located, what it would have shown, and/or how and why the evidence would have impeached Tina's testimony or undermined the State's case. Petition, p.9. Defendant therefore fails to demonstrate that the evidence would have impacted the trial. Molina, 120 Nev. 185. Additionally, counsel's failure to obtain such evidence is presumed to be a reasonable strategy decision per Harrington, 131 S.Ct. at 788. Defendant therefore fails to show deficiency or prejudice.

B. Expert Witnesses

Defendant claims he received ineffective assistance due to trial counsel's failure to notify Defendant of "potential Expert Witnesses noticed and filed on January 5, 2009" and failure to obtain rebuttal expert's. Petition, p.9.

On January 5, 2009, defense counsel filed a Notice of Expert Witnesses notifying the State that the defense intended to call a firearms expert and a ballistics expert. Defendant claims counsel failed to notify him of these experts. First, trial counsel is not required to explain every trial tactic in advance to a defendant as strategies, including what witnesses to call are within the attorney's discretion. Rhyne, 118 Nev. 1. Defendant therefore cannot show deficiency. Second, assuming arguendo defense counsel did not tell Defendant about these experts, Defendant does not explain how notifying him of the potential experts would have likely altered the outcome of the case, therefore Defendant cannot show prejudice.

As to counsel's failure to obtain an expert for rebuttal, defense counsel and Defendant told the Court Defendant explicitly did not want to call any witnesses[3]. V TT 122.

[3] Defense counsel: ... "the Defense would also be resting without calling any witnesses, Your. Honor, as has been the direction of Mr. Grigsby to Mr. Patrick and myself not to call any witnesses." Court: Mr. Grigsby, would you stand please, sir. You've heard what Mr. Scheick said, is that a fact? Defendant: I would like to leave the burden of proof directly on the Prosecution, yes; no witnesses. Court: So you have asked your attorneys not to call any witnesses. Is that what you're saying?

Additionally, in Harrington, the Supreme Court spoke explicitly as to the plethora of expert witnesses available today and noted although experts may be useful, an attorney may properly decide to forego experts as "counsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accordance with effective trial tactics and strategies." 131 S.Ct. at 789. As such, even without Defendant's explicit direction to not call any experts, and assuming counsel chose to call off the noticed experts, such is presumed to be a reasonable trial decision. Additionally, Defendant does explain what testimony such experts would have provided to impact the case or establish that such experts were available, but purely speculates that the experts may have provided an opinion which may have created reasonable doubt. Such speculation is insufficient to warrant relief. *See* Molina, 120 Nev. 185; Hargrove, 100 Nev. 498. Defendant therefore fails to show deficiency or prejudice.

C. Charging Document/Improper Notice

Defendant claims counsel was ineffective in waiving the reading of the charging document and failing to object to the State's "improper notice and substitution of Dr. Jacqueline Benjamin with Dr. Alane Olson[4]". Petition, p.10.

As to the charging document, Defendant fails to explain how the Court not reading the Information prejudiced him. As to the State substituting experts, Defendant claims the substitution prejudiced him as the substitution "violated Petitioner's right to confrontation

Defendant: Yes. That's what I'm saying, correct."

Court: ... But I think Mr. Scheick has pretty much yielded to your desires if that, in fact, is your desire. All I want to do is make sure you understand what you're asking?
Defendant: I understand that it's my desire to leave the burden of proof on the Prosecution. Yes, and no witnesses called on behalf of the Defense."
Whereupon the Court explained the burden is on the State regardless of whether Defendant calls witnesses and Defendant confirmed he had no questions as to trial procedure and did not want to call witnesses. V TT 123-24.

[4] Dr. Benjamin performed the autopsy, but was unavailable at the time of trial. I TT 44. Therefore Dr. Olson, another medical examiner employed at the Clark County Coroner's Office, testified as to her expert opinion on the cause and manner of death based on a review of Dr. Benjamin's reports. I TT 39-57.

and cross examination resulting in unanswerable questions of observations and action not documented that may have presented a reasonable doubt". Petition, p.10. First, the record belies Defendant's claim as the only questions Dr. Olson could not answer due to her absence from the autopsy were those related to Metro's preservation of evidence[5]. I TT 58-66. Dr. Olson's inability to answer questions related to whether Metro preserved evidence at the autopsy is inconsequential as Defendant could obtain the same information while questioning Metro officers throughout the trial. Second, Defendant conceded someone shot and killed Mr. Davis. VI TT 59. As the medical examiner's testimony was uncontested, any error related to substitution was harmless. Defendant therefore fails to demonstrate deficiency. Further, Defendant's claim that, but for the substitution, a reasonable doubt "*may have*" existed is pure speculation insufficient to warrant relief. Harrove, 100 Nev. 498. Defendant therefore fails to demonstrate prejudice.

D. "Gross Negligence Adversarial to Petitioner"

Defendant claims he received ineffective assistance due to counsel's "excessive instruction of the Court, Prosecution, and witnesses concerning evidence and eliciting testimony of witnesses exhibited gross negligence adversarial to Petitioner". Petition, p.10. While the State does not fully comprehend this claim, the State believes Defendant is contending counsel improperly assisted the State to Defendant's detriment. However, as Defendant notes, he brought a motion to substitute counsel during trial due to this alleged betrayal by counsel. II TT 3-12. Defendant refused to discuss the specific facts of the motion on the record, but simply stated the attorney client relationship suffered a breakdown in communication and he did not trust counsel. Id. Lacking any specific facts to support the alleged controversy, the Court denied the motion and the Nevada Supreme Court upheld the denial on appeal. Id.; Grigsby v. State, Case No. 53627, Order of Affirmance, p.1. Here, Defendant once again does not divulge details of this alleged dispute and/or the actions of

[5] Dr. Olson was unsure whether a CSA was present at the autopsy, who Dr. Benjamin gave the bullet to, whether Metro tested Mr. Davis' hair, and whether Mr. Davis' hands were bagged to preserve evidence. I TT 62-65.

counsel that were "adversarial" to Defendant, therefore he fails to plead sufficient facts to show prejudice or deficiency. Hargrove, 100 Nev. 498.

E. Inadequate Cross Examination of Agent Serna

Defendant claims he received ineffective assistance because counsel's questioning of FBI Agent Dennis Serna permitted the State to elicit commentary on Defendant's post arrest silence. Petition, p.10.

As defense counsel cross examined Agent Serna, the following exchange occurred:
Defense: And your report indicates that the arrest was effected (sic) without incident?
Serna: Correct.
Defense: There were no problems during the arrest?
Serna: Correct.
Defense: If there had been something, you would have noted that in your report?
Serna: Yes.
IV TT 40-41. Thereafter, on redirect, Agent Serna testified to the following:
State: Defense counsel asked you some questions about whether or not the defendant was taken into custody without incident. Do you remember those questions?
Serna: Yes, I do.
State: If there had been some type of incident, like he had fought back or something like that, you would have put that in your report?
Serna: Absolutely.
State: Would you also have included in your report if he would have made statements at the time he was taken into custody?
Serna: If, for example, the arresting officer – because I was still at a distance still conducting surveillance when the actual officers put their hands on him. If he had made a statement to them, obviously, I wouldn't have heard it. And unless they voiced it to me to allow me to put it in my report, I never got any information like that.
State: Is there anything in your report, or do you recall anything about whether or not the defendant expressed surprise about being taken into custody?
Defense: I'm going to object, Your Honor. Can we approach?
Court: Yes.
(Whereupon counsel conferred with Court.)
Court: You may proceed.
State: Agent Serna, is it reflected in your report at the time the defendant was taken into custody if he expressed surprise at being arrested?
Serna: It's not reflected in my report.

State: Is it reflected in your report whether or not the defendant asked why he was being arrested?

Serna: It's not reflected in my report.

IV TT 46-47. The parties thereafter discussed the bench conference on record. Id. at 74-79. Defense counsel explained that he had objected and moved for a mistrial because the State commented on Defendant's right to remain silent. Id. at 76. The State explained that it had not asked Agent Serna to repeat anything Defendant may have or may not have said, but simply asked whether statements would be included in the report and whether statements were in the report. Id. at 77-78. The State further elaborated that the questions were intended to establish that Defendant was not surprised when he was arrested because he knew why he was being arrested. Id. The Court denied Defendant's motion. Id. at 79.

On appeal, the Supreme Court considered Defendant's claim that the State improperly commented on his right to remain silent. Grigsby v. State, Case No. 53627, Order of Affirmance, p.2-3. The Supreme Court found the State's comments were proper because Defendant opened the door to the questions by examining Agent Serna on Defendant's reaction to his arrest. Id.

The State's position is it did not comment on Defendant's right to remain silent. However, even if the comments may be construed as referring to Defendant's right to remain silent, defense counsel opening the door to the questions does not amount to ineffective assistance of counsel. First, cross examination is solely within counsel's discretion and is presumed to be a reasonable exercise of trial tactics. See Rhyne, 118 Nev. 1. Second, the jury could not have inferred anything improper as Agent Serna explicitly testified that he was beyond earshot when Defendant was arrested and would not have first hand knowledge of whether Defendant said anything. IV TT 46. Agent Serna's testimony that his report did not reflect any comments therefore only confirmed none of the officers relayed any of Defendant's comments to Agent Serna. Even if the testimony could be construed to imply Defendant exercised his right to remain silent, as discussed above, the State presented extensive evidence to prove Defendant killed Mr. Davis, therefore any effect of the allegedly improper comments did not affect the verdict.

IV. DEFENDANT FAILS TO DEMONSTRATE INEFFECTIVE ASSISTANCE AS TO CLAIM 4

Defendant's Claim 4 alleges he received ineffective assistance of counsel because counsel failed to preserve, or raise on appeal, the following issues: A) Brady violations; B) allegedly inadmissible evidence, including prior bad acts, and evidence obtained in violation of the Fourth Amendment; C) confusing language in charging document and jury instructions; D) defective verdict form. Petition, p.11-14.

"Appellate counsel is not required to raise every non-frivolous or meritless issue to provide effective assistance." Foster v. State, 121 Nev. 165, 111 P.3d 1083 (2005) (quoting Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532). "Appellate counsel is entitled to make tactical decisions to limit the scope of an appeal to issues that counsel feels have the highest probability of success." Id. Effective appellate advocacy is not coextensive with a litigation approach that raises every single colorable appellate issue. Ford v. State, 105 Nev. 850, 138 P.3d 500 (1989) (citing Jones v. Barnes, 463 U.S. 745, 752, 103 S.Ct. 3308, 3313 (1983)).

The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983), the Supreme Court recognized that part of professional diligence and competence involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751, 752, at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, at 3313. The Court also held that, "for judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, at 3314.

A. Brady Violations

Defendant claims counsel was ineffective in failing to object to, or raise on appeal, the State's failure to disclose evidence in violation of Brady. Specifically, Defendant claims

"video recovered by the Las Vegas Metropolitan Police Department [] reproduced and viewed would have shown Petitioner dressed differently than witness Tina Grigsby described in her statements...The video would have also shown undermining evidence of the two first degree murder theories charged[.]" Petition, p.11. Defendant does not plead sufficient facts to establish the relevance of this alleged video as he does not explain where the video came from and when it was recorded. Hargrove, 100 Nev. 498. Absent such facts, even assuming the alleged video exists, Defendant cannot establish the State was required to turn over the video or that the video would have affected the verdict. Therefore, based on the limited facts Defendant asserts, any objection would have been futile. Ennis, 122 Nev. 694. Further, objections and issues raised on appeal are within counsel's discretion and presumed reasonable. Rhyne, 118 Nev. 1; Jones, 463 U.S. 475. Defendant therefore fails to demonstrate deficiency or prejudice.

B. Inadmissible Evidence

Defendant claims he received ineffective assistance of counsel, due to counsel's failure to object to, or raise on appeal: 1) evidence obtained in violation of Defendant's Fourth Amendment rights; 2) improper admission of prior bad act evidence; and 3) untimely noticed demonstrative evidence. Petition, p.12. At the outset, the State notes that whether to object to an issue or raise such on appeal is a strategic decision presumed reasonable. Rhyne, 118 Nev. 1; Jones, 463 U.S. 475.

As to evidence allegedly obtained in violation of the Fourth Amendment, Defendant does not explain specifically what evidence he refers to, therefore he cannot demonstrate deficiency or prejudice. Hargrove, 100 Nev. 498. Similarly, Defendant fails to explain what prior bad act evidence was improper.

Prior to trial, the parties litigated whether the State would be permitted to admit drugs and drug paraphernalia found in Defendant's apartment; prior convictions; an incident of domestic violence, occurring on the night Defendant found Mr. Davis' voicemail on Tina's phone; the burned out car and Defendant's possession of false identification. See Defendant's Motion to Exclude Other Bad Acts; Character Evidence, and Prior Criminal

Activity; State's Opposition; January 9, 2009 Transcript. The Court excluded the drugs; permitted prior convictions for impeachment purposes; permitted the incidents occurring the night Defendant found the voicemail, but excluded the actual conviction; and permitted the evidence regarding the burned out car and false identification. See January 9, 2009 Transcript, I TT 4-9. On appeal, counsel argued the burned out car incident should have been excluded. Grigsby v. State, Case No. 53627, Order of Affirmance, p.2. The Nevada Supreme Court found that while the Court should have held a Petrocelli hearing as to the burned out car, the error was harmless as the record sufficiently established that the incident was admissible. Grigsby v. State, Case No. 53627, Order of Affirmance, p.2. In light of the foregoing, the record belies Defendant's claim as it relates to several alleged bad acts and Defendant's claim is barred by the law of the case to the extent it may relate to the burned out car. Hargrove, 100 Nev. 498; Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). As such, Defendant additionally cannot demonstrate prejudice.

As to the State's allegedly unnoticed demonstrative evidence, Defendant does not explain what evidence he refers to and therefore cannot demonstrate prejudice or deficiency. Additionally to the extent Defendant's claim may relate to the State's use of a picture of a gun, showing the model that could have been used in this crime, the record belies Defendant's claim of inefficiency. Trial counsel extensively objected to the State's use of the picture. I TT 66-75. Additionally, appellate counsel raised the issue before the Nevada Supreme Court, which denied Defendant's claim. Grigsby v. State, Case No. 53627, Order of Affirmance, p. 3. Therefore to the extent Defendant's claim may relate to the gun picture, such is barred by the law of the case. Hall, 91 Nev. 314.

C. Confusing Language Allegedly Reducing the State's Burden

Defendant claims counsel was ineffective for failing to object to, or raise on appeal, "the amended charging document and instructions to the jury, creating a 'convoluted' mandatory presumption of first degree murder through use of puzzling and inconsistent language diluted the reasonable doubt standard[.]" Petition, p.12-13. Defendant claims this language "lighten (sic) the Prosecution's burden of proof to the jury, allowing a conviction

on less than proof beyond a reasonable doubt of guilt of every element of the charged crime." Id. at 13.

Defendant fails to plead sufficient facts to warrant relief as he does not describe specifically what language was improper, why the language was an improper statement of law, or how the language allowed a conviction with less than proof beyond a reasonable doubt. Hargrove, 100 Nev. 498. Additionally, the record belies Defendant's claim that the instructions and/or charging document altered the State's burden. Id. Jury instruction #12 explained the jury must return a verdict of Second Degree Murder if some of the jury did not believe the State proved First Degree Murder beyond a reasonable doubt and all of the jury was convinced beyond a reasonable doubt that Defendant committed Second Degree Murder. Instruction #12 further explained that, if the jury was convinced beyond a reasonable doubt that Defendant committed a murder, but the jury was unsure whether the murder was first or second degree, they must return a verdict of Second Degree Murder. Further, instruction #18 explained the Defendant was presumed innocent and the State must prove every element beyond a reasonable doubt. Instruction #18 additionally provided the standard definition of beyond a reasonable doubt set forth in NRS 175.211, and instructed the jury to find Defendant not guilty if reasonable doubt existed. As the instructions did not dilute the State's burden of proof, any objection at trial or on appeal would have been futile. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006). Defendant therefore fails to show deficiency or prejudice.

D. Verdict Form

Defendant claims he received ineffective assistance because counsel failed to object to the verdict form. Petition, p.13-14. Defendant asserts the verdict form was defective because the jury did not indicate whether the verdict was unanimous "based upon a single theory of the first two first degree murder theories charged." Id.

The State argued Defendant was guilty of First Degree Murder because the murder was 1) willful, deliberate and premeditated, and/or 2) committed by Defendant lying in wait to commit the killing. Jury Instruction #3. The State understands Defendant's argument to

claim the jury must have been unanimous as to whether the First Degree Murder was committed as a deliberate premeditated act or committed after lying in wait. However, the jury need not be unanimous as to alternative theories amounting to first degree murder. Moore v. State, 116 Nev. 302, 304, 997 P.2d 793, 794 (2000); Crawford v. State, 121 Nev. 744, 121 P.3d 582 (2005). An objection therefore would have been futile. Ennis, 122 Nev. 694. Defendant fails to demonstrate deficiency or prejudice.

V. DEFENDANT FAILS TO ESTABLISH INEFFECTIVE ASSISTANCE AS TO CLAIM 5.

Defendant's Claim 5 alleges he received ineffective assistance of counsel because: A) counsel improperly withdrew and new counsel failed to adequately communicate with Defendant or provide case documents to Defendant; and B) failed to present constitutional issues on appeal. Petition, p.15-16.

A. Improper Withdrawal, Inadequate Communication, Inadequate Record

Defendant claims original appellate counsel, Kirk Kennedy, provided ineffective assistance because Mr. Kennedy withdrew without Defendant's written consent. Petition, p.15. Defendant claims Mr. Kennedy's withdrawal resulted in a breach of duty, incomplete record, and delay in refunding retainer. Id. Defendant additionally claims substituted appellate counsel, Daniel Bunin, failed to communicate or provide Defendant with case files. Id. Defendant claims "these actions" resulted in appellate review with an incomplete record, preventing Defendant from raising the issue of allegedly improper jury instructions. Id. at 16.

1. Mr. Kennedy

While acting as appellate counsel Mr. Kennedy was forced to request four extensions to file Defendant's opening brief due to the court reporter's failure to complete the trial transcripts. See Supreme Court Website, Grigsby v. State, Case No. 53627. Along with the fourth request for an extension, Mr. Kennedy filed a Motion to Withdraw. Id. Mr. Kennedy explained that Defendant blamed Mr. Kennedy for the delay in obtaining the transcripts, which thereby led to a complete breakdown in communication between Defendant and Mr. Kennedy. Id. The Supreme Court granted the Motion to Withdraw. Id.

Contrary to Defendant's claim, Mr. Kennedy is not required to obtain Defendant's permission before requesting withdrawal. See NEV. R. PROF. CONDUCT, R. 1.16. Further, Defendant does not explain what duty Mr. Kennedy breached or how such breach prejudiced Defendant. Additionally, whether Defendant received a timely refund of Mr. Kennedy's retainer is inconsequential to the lawfulness of Defendant's sentence and therefore is improper claim for a petition. NRS 34.724. Defendant therefore does not show deficiency or prejudice as to Mr. Kennedy.

2. Mr. Bunin

The adequacy of counsel's representation is not measured by quantity of communications with a defendant. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610 (1983). As such, Defendant's claim that counsel failed to communicate with him, without more, is insufficient to demonstrate deficiency. Further, counsel, not Defendant, determines which issues to raise on appeal. Jones v. Barnes, 463 U.S. 745. Defendant therefore cannot establish deficiency or prejudice. As to counsel's alleged failure to turn over case files, this claim is not proper for a petition as such is not relevant to whether Defendant's sentence is lawful. NRS 34.724. If Defendant still is not in possession of case files, his remedy is to file an appropriate motion with the Court.

3. Incomplete Record on Appeal

Defendant claims Mr. Kennedy's and/or Mr. Bunin's actions led to an incomplete appellate record which precluded review of jury instructions. The State does not understand whose and/or which alleged failure Defendant claims resulted in an inadequate record, but regardless of who caused the alleged error, Defendant's claim lacks merit. First, as Defendant does not claim what specifically is missing from the appellate record and/or how the absent records would have created a claim with a reasonable likelihood of success, Defendant fails to plead sufficient facts to state a claim. Hargrove, 100 Nev. 498. Further, while Defendant's appellate appendix is not currently accessible on the Supreme Court website, the trial transcripts were filed on Odyssey months and years prior to when counsel

filed Defendant's Opening Brief in the Supreme Court.[1] Additionally, counsel did in fact challenge the lying in wait instruction. Grigsby v. State, Case No. 53627, Order of Affirmance, p. 3-4. The Supreme Court considered and denied Defendant's claim without any mention of an insufficient record. Id. The foregoing therefore belies Defendant's claim that the record was insufficient to challenge jury instructions. Hargrove, 100 Nev. 498. As such, Defendant cannot show a different appellate counsel likely would have achieved a better result. Defendant fails to show deficiency or prejudice.

B. Failure to Raise Constitutional Issues

Defendant claims he received ineffective assistance of counsel due to raise constitutional arguments on appeal. Petition, p.16. Defendant claims the omission of constitutional issues resulted in a waiver of Defendant's ability to seek federal review. Id. Counsel, not a defendant, chooses the issues to pursue on appeal. Jones, 463 U.S. 475. Additionally, the Nevada Supreme Court has held counsel's failure to federalize issues on appeal is of no consequence to a petition. Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). Further, while Defendant claims this failure forced Defendant to have to show good cause and prejudice to seek federal review, Defendant does not allege he has been unable to show such cause and prejudice. Defendant fails to establish deficiency or prejudice.

VI. DEFENDANT FAILS TO ESTABLISH INEFFECTIVE ASSISTANCE AS TO CLAIM 6.

Defendant's Claim 6 alleges he received ineffective assistance due to cumulative error. The Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. See McConnell v. State, 212 P.3d 307, 318 (2009). Nevertheless, a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See,

[1] The trial transcripts were filed in Odyssey in May, 2009, February, 2010, and March, 2010. Counsel filed Defendant's Opening Brief in the Supreme Court on February 16, 2011.

e.g., Harris By and Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995); Dang v. Giurbino, 2010 WL 1332843 19-20 (C.D. Cal. 2010). There can be no cumulative error where the defendant fails to demonstrate any claims showing a violation of Strickland. See Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). Further, the errors must "'so infect[] the entire trial that the resulting conviction violates due process.'" Derden v. McNeel, 978 F.2d 1453, 1454 (5th Cir. 1992) (en banc) (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400 (1973)).

As argued throughout this response, Defendant fails to allege, much less demonstrate, any errors that, even if aggregated, would establish a reasonable likelihood of a better result at trial or on appeal. As the U.S. Supreme Court has recently observed: "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. ---, ---, 130 S.Ct. 1473, 1485 (2010). Even assuming the truth of all Defendant's allegations, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome at trial or on appeal. Additionally, considering the traditional cumulative error factors, while Defendant's conviction is grave, any alleged errors were minimal and evidence of guilt was overwhelming. Mulder v. State, 116 Nev. 1, 992 P.2d 845 (2000). Therefore to the extent cumulative error could possibly exist, such does not warrant reversal.

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CONCLUSION

In light of the foregoing, the State respectfully requests that this Honorable Court deny Defendant's Petition for Writ of Habeas Corpus.

DATED this 7th day of March, 2012.

Respectfully submitted,

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

BY /s//NELL E. CHRISTENSEN
NELL E. CHRISTENSEN
Chief Deputy District Attorney
Nevada Bar #008822

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 7th day of March, 2012, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DENNIS MARC GRIGSBY, #1033640
HDSP
P.O. BOX 650
INDIAN SPRINGS, NV 89070

BY Shellie Warner
Secretary for the District Attorney's Office

mmw/GCU

EXHIBIT
D

Ex Parte Order's

1. Transcript of Feb. 4, 2009, filed Aug. 6, 2012.

2. Transcripts of Oct. 8, 2008 and Mar. 19, 2009, filed Aug. 6, 2012.

2 pages

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FILED
AUG 6 11 25 AM '12
CLERK OF THE COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

COUNTY OF CLARK

STATE OF NEVADA,

Plaintiff,

v.

DENNIS M. GRIGSBY,
1033640,

Defendant.

CASE NO.: 08C 246709

DEPT NO.: XIV

EX PARTE ORDER

THIS MATTER HAVING COME BEFORE THE COURT and there appearing good cause therefore, it is hereby **ORDERED, ADJUDGED and DECREED** that payment be provided to court reporter Cheryl Gardner for the preparation of the transcript of February 4, 2009, in Eighth Judicial District Court (per Exhibit A, 'Register of Actions'). Defendant Grigsby is indigent and incarcerated, and counsel, Terrence M. Jackson, Esq., is appointed counsel as of April 18, 2012.

Dated this 2nd **day of** August**, 2012**

LEE A. GATES
Eighth Judicial District Court Judge

Order Prepared by:

Terrence M. Jackson, Esq.
This 2ND day of August, 2012

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FILED
Aug 6 11 16 AM '12
CLERK OF THE COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

COUNTY OF CLARK

STATE OF NEVADA,

Plaintiff,

v.

DENNIS M. GRIGSBY,
1033640,

Defendant.

CASE NO.: 08C 246709

DEPT NO.: XIV

EX PARTE ORDER

THIS MATTER HAVING COME BEFORE THE COURT and there appearing good cause therefore, it is hereby **ORDERED, ADJUDGED and DECREED** that payment be provided to court reporter Maureen Schorn for the preparation of transcripts of the October 8, 2008, calendar call and the March 19, 2009, sentencing in the above noted case as Defendant Grigsby is indigent and incarcerated, and counsel, Terrence M. Jackson, Esq., is appointed counsel as of April 18, 2012.

Dated this 2nd **day of** August, **2012**

LEE A. GATES

Eighth Judicial District Court Judge

Order Prepared by:

Terrence M. Jackson, Esq.

This 2ND day of August, 2012

EXHIBIT

E

Petition and Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief, filed Nov. 29, 2012; Correspondence from Terrence Jackson, Esq., January 3, 2013; Reply to State's Response, filed Mar. 5, 2013.

29 pages

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CLERK OF THE COURT

0014
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Counsel for Dennis M. Grigsby

THE STATE OF NEVADA,
Plaintiff/ Respondent,

v.

DENNIS M. GRIGSBY,
#1033640
Petitioner/ Defendant.

Case No.: 08C246709
Dept. No.: XIV

PETITION AND SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS FOR POST-CONVICTION RELIEF

COMES NOW the Petitioner/ Defendant, Dennis M. Grigsby, by and through his attorney, TERRENCE M. JACKSON, ESQ., and moves this honorable Court to enter an order granting his Petition for Post Conviction Relief on the grounds his attorney at the time,

WHEREFORE, Petitioner, hereinafter Defendant, prays that this Honorable Court enter an order directing the County of Clark to issue a Writ of Habeas Corpus directed to, Dwight Neven, Warden of State of Nevada's High Desert State Prison, commanding Warden Neven to bring the above named Defendant before your Honor, and return cause of his imprisonment.

DATED this 30th day of November, 2012.

Respectfully Submitted,

/s/ Terrence M. Jackson
Terrence M. Jackson, Esq.
Counsel for Defendant, Dennis M. Grigsby

FACTUAL STATEMENT

PROCEDURAL HISTORY

Dennis Grigsby was convicted by jury trial on February 4, 2009, of the crimes of first degree murder with use of a deadly weapon and possession of a firearm by an ex-felon.

On March 19, 2009, Defendant was sentenced to life without the possibility of parole on Count 1 murder, a consecutive term of 60 to 240 months for use of the deadly weapon, and 16 to 72 months on Count 2 to run concurrent to Count 1. Judgment of conviction was issued on April 6, 2009.

On September 14, 2011, the Nevada Supreme Court affirmed the conviction. Remittur was issued on September 14, 2011. On January 12, 2012, Defendant filed a timely Pro Per Writ of Habeas Corpus.

The State's theory of the case was that the Defendant killed Anthony Davis because he was having an affair with the Defendant's wife, Tina Grigsby. The State however merely proved through testimony of Tina Grigsby that Defendant and Tina Grigsby had a bad marriage. Tina told her girlfriend about her infidelities. Another witness established that the Defendant told a neighbor, Richard Corbin, that Tina had been "having problems." The State certainly showed Defendant Grigsby had ample reason to be very angry with his wife and her lover Anthony Davis, but it did not show the Defendant committed murder.

There were no eyewitnesses to the killing of Anthony Davis. An eyewitness, Luis Gomez, who could not identify anyone described as an African American male wearing a red hoody, in a verbal confrontation with a black man and a white female. The State relied upon this circumstantial evidence to link Dennis Grigsby to murder. Much of the other circumstantial evidence including the Defendant's flight was equivocal. Other circumstantial evidence adduced at trial should not have been admitted. Tina Grigsby, a not unbiased witness, testified that on the night of the

murder, April 2, 2008, she was with Davis just before the killing. They were planning on staying together at Davis' apartment, which was also located in the Lake Mead Estates complex.

Tina Grigsby testified she went with Anthony Davis to get food at a taco stand near Coyote Corner, where she was employed. While in the parking lot across from Coyote Corner, Tina testified she observed the Defendant standing in front of Coyote Corner wearing a red hooded sweat shirt, blue jeans and black tennis shoes. (AA 253-254).

She claimed that at her request that Davis left the area to avoid an altercation however soon thereafter she heard Davis and Grigsby arguing near the Lake Mead Estates apartments. (AA 258) She again reiterated that person Davis was arguing with was wearing a red sweatshirt. (AA 257) She could not actually see that individual. (AA 258)

Luis Gomez testified around 11:00 p.m. an African American man in a red hoody and blue jeans got into an argument with another man. As he walked away 10 minutes later, he heard 3 to 4 gun shots. Crime scene investigators discovered .25 caliber spent cartridge cases at the scene of the homicide. Eventually, police also obtained a search warrant and discovered similar ammunition and a red hoody at Defendant's mother's apartment. (AA 358) A later search warrant of Defendant's 1996 Buick yielded black *Allen Iverson* tennis shoes. (AA 415)

Clearly, the most important evidence linking Grigsby to the murder were the items found during the search of his mother's apartment and the detailed testimony by Tina Grigsby describing Dennis Grigsby as wearing a red hoody. This testimony intertwined with the testimony of the neutral witness, Luis Gomez, who could not identify the African American male he saw arguing with Davis as being the Defendant (AA 206, 207), but described the red hoody clothing. (AA 204)

Defense attorneys for Dennis Grigsby did not do the necessary pretrial preparation or investigation by obtaining video surveillance tapes at Coyote Corner

from the night of April 2, 2008, which may have exculpated Grigsby. A more thorough investigation of the circumstances of the search would have led to a Motion to Suppress based upon the totality of circumstances which led to the consent and subsequent telephonic warrant. Defense counsel did not effectively prepare nor did they zealously defend Dennis Grigsby with sufficient skill during trial.

I.

COUNSEL FOR DEFENDANT GRIGSBY WERE INEFFECTIVE BECAUSE THEY FAILED TO DO NECESSARY INVESTIGATION WHICH COULD HAVE EXCULPATED THE DEFENDANT.

The American Bar Association (ABA) Standards on the prosecutor and defense function emphasize the crucial importance of investigation by criminal defense attorneys for their clients. See ABA Standards 4.1:

4.1 Duty to Investigate.

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

The importance of this standard has been recognized and cited by the Nevada Supreme Court for over 30 years. *Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473 (1975). Counsel however, did not fulfill this elementary command to investigate and develop information that might assist his client. This failure requires reversal of the conviction.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme court established a two pronged test for reversal based upon ineffective assistance of counsel. First, the defendant must show counsel's *performance was deficient*. This requires a showing that counsel made

errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, counsel must show that the deficient performance *prejudiced* the defense. This requires showing that counsel errors are so serious as to deprive defendant of a fair trial, a trial where the result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted in a breakdown of the adversary process that renders the result unreliable. *Strickland* at 687.

Strickland noted that:

> ...[j]udicial scrutiny of counsel performance must be highly deferential however; counsel must at a minimum conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Strickland*, Id. 691, 104 S.Ct. at 2066.

Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

> To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, Sanborn must demonstrate that trial counsel's performance fell below an objective standard of reasonableness and that counsel's deficiencies were so severe that they rendered the jury's verdict unreliable. *See, Strickland v. Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden 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). Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and *Strickland*, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness. Trial counsel did not adequately perform pre-trial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the counsel' guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

Here, as in *Sanborn*, there existed ample evidence on the record that the Defendant had potential exculpatory evidence which could have cast doubt on the credibility of government eyewitnesses. An actual videotape existed which showed the Defendant at Coyote Corner. This videotape would have impeached the primary eyewitness for the state, Tina Grigsby, because it would have showed that his

appearance was dissimilar to her description of the Defendant that night in that he was not wearing clothing similar to the clothing the neutral witness Luis Gomez.

Counsel had a clear duty to discover and gather this potential exculpatory videotape before the trial and present it to the jury. The video was actually referred to by the prosecution witness, Detective Laura Anderson. (AA 549)

Such dereliction of duty by 'counsel' rendered the verdict unreliable.

> At a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case. *Crisp v. Duckworth*, 743 F.2d 580, 583 (9th Cir. 1984).
>
> Though there may be unusual cases where an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation. *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1984)

The failure to investigate or contact witnesses which would have led to exculpatory evidence cannot here be justified as a tactical decision. In *United States v. Gray*, 878 U.S. 702 (3rd Cir. 1989), the court found counsel ineffective for failure to adequately investigate, stating:

> Ineffective assistance is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such a decision could be made. *See Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2065-67; *See also Debongo*, 780 F.2d at 85 ("the failure to investigate potentially corroborating witnesses can hardly be considered a 'tactical decision'"); *Sullivan*, 819 F.2d at 1289; *Neal*, 764 F.2d at 1178; *Crisp*, 743 F.2d at 584.
>
> Such is the situation presented in this case. Counsel offered no strategic justification for his failure to make any effort to investigate the case, and indeed he could have offered no such rationale. As he admitted, he did not go to the scene of the incident to interview potential witnesses, even though, as the police officers testified, there were as many as 25 witnesses, including many persons who would have been easily located, such as the bartender and people who came out of their houses to observe the disturbance. Id. 711. *See also, United States v. Burrows*, 872 F.2d 915, 918 (9th Cir. 1989) and *Deutscher v. Whitney*, 884 F.2d 1152, 1160 (9th Cir. 1989).

Defense counsel in this case did not even acquire the simplest and most direct evidence. This video evidence could have impeached the star witness, Tina Grigsby.

It was ineffective assistance not to fully investigate this relevant evidence. *In re Cordero*, 756 P.2d 1370 (Cal. 1987).

The State had a duty under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny to disclose material, exculpatory evidence within its possession so acquiring this video tape should have been very easy for defense counsel. Detective Laura Anderson acknowledged possession of the video surveillance tape during her testimony (AA 549), yet defense counsel still did nothing.

Defendant submits the evidence of video surveillance in this case is similar, but more persuasive, than in the case of *State v. Huebler*, 128 Nev. Adv. Op. 19, 275 P.3d 91, (2012), where in a strong dissent, Justice Cherry noted the likely exculpatory value of the video surveillance evidence to the Defendant's case stating:

> The next consideration is whether the State withheld the evidence. The court suggests, again in the margin of its decision, that certain facts in the record would support a conclusion that the evidence could have been uncovered by the defense through diligent investigation. While defense counsel may have been able to contact law enforcement to obtain the videotapes (the police report included the name of the detective who could be contacted with questions related to the collection of the videotapes), the duty under *Brady* is the prosecutor's, and defense counsel had requested the videotapes and been told that the prosecutor would provide them to defense counsel (albeit at some later unspecified time) after they had been provided to the prosecutor). *Cf. Jimenez v. State*, 112 Nev. 610, 620, 918 P.2d. 687, 693 (1996). ("[E]ven if the detectives withheld their reports without the prosecutor's knowledge, the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers." (quoting *Gorham v. State*, 597 So.2d 782, 784 (Fla. 1992))); *see also, Allen v. State*, 854 So.2d 1255, 1259 (Fla. 2003) (stating that "[t]he defendant's duty to exercise due diligence in reviewing *Brady* material applies only after the State discloses it" and therefore "[o]nce the State obtained the results of the hair analysis, it was required to disclose them to the defendant").
>
> The final consideration is whether the evidence is material. On this point it is clear that the district court did not apply the correct test for materiality, focusing instead on the impact that the videotapes' absence had on defense counsel's 'ability to provide a sound defense.' Under the circumstances, I would remand for the district court to apply the correct test in the first instance. In my view, a remand is appropriate because many of the relevant factors involve factual and credibility determinations that should be made by the district court. Id. 102 (Emphasis added)

Defendant respectfully submits the video surveillance tape from Coyote Corner in this case would have been more persuasive than those in *Heubler* which involved underwater actions of the defendant and therefore because they were also easily obtained, counsel failed in not analyzing and then presenting these tapes before the trial jury.

Defendant submits a remand is appropriate to determine the exculpatory value of these tapes. It has long been recognized by the court that recorded evidence on tape can be extraordinarily persuasive. In an appellate case, *Ezell v. State*, 548 S.E.2d 852 (S.C. 2001), the Supreme Court of South Carolina reversed for ineffective assistance of counsel because appellate counsel failed to include in the record on appeal a video tape of a drug transaction that had been objected to at trial. The court, quoting *Southerland v. State*, 337 S.C. 60, 524 S.E.2d 833 (1999), stated:

> A defendant is constitutionally entitled to the effective assistance of appellate counsel .... First, the burden of proof is on petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Southerland*, 337 S.C. at 615-616, 524 S.E.2d at 836 (citations omitted) (emphasis in original). Here, we conclude the result of respondent's appeal would have been different had counsel submitted the audio tape to the Court of Appeals. Therefore, based on *Southerland*, the appropriate remedy for the ineffective assistance of appellate counsel on the particular facts of this case is to grant respondent a new trial. Id. 853, 854 (Emphasis added)

This court should reverse because trial counsel did not present the video tape to the jury. Alternatively, the court should enter an order granting an evidentiary hearing so that the defense can present evidence to show the exculpatory nature of the video recording.

II.

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEYS REFUSED TO FILE A MERITORIOUS MOTION TO SUPPRESS.

The Las Vegas Metropolitan Police unconstitutionally searched the Defendant's mother's apartment at Lake Mead Estates, unit #140, on April 3, 2008, in the early morning hours, without a warrant and without any valid exception to the Fourth Amendment warrant requirement. A later telephonic warrant which resulted, directed from the prior illegal seizures, led to additional evidence.

The chronology of events is of paramount importance in establishing the viability of the Defendant's Fourth Amendment claim which was ignored by his trial counsel who failed to file a Motion to Suppress. Police reports, which were available to counsel, establish that on April 2, 2008, at approximately 11:00 p.m., 911 received reports of gunshots fired at Lake Mead Estates. Police immediately attempted to contact the Defendant at apartment #140 of Lake Mead Estates. At approximately 11:07 p.m. police entered the residence of Mildred Grigsby, the Defendant's mother, and by means of subtle coercion, secured her "consent" to enter the residence at #140 Lake Mead Estates to check if Dennis was there.

The police had no lawful justification for the warrantless entry at night. There were no exigent circumstances to justify the later search. The timing of subsequent events shows the haste in which police reacted was not justified. Three hours after arriving at the scene, an application for telephonic warrant was sought at 2:25 a.m., to search for a pair of black shoes, a .25 caliber pistol and .25 ammunition or other firearm paraphernalia. Approximately 55 minutes later, at 3:20 a.m., the police entered the apartment again, having obtained the telephonic warrant from Judge Abbi

Silver at 3:37 a.m. Defendant himself was arrested when picked up on a warrant in Sacramento, California, April 23, 2008. He had never authorized or consented to any search after discovery of ammunition at his mother's house. (No gun was ever found).

The Defendant specifically requested that his appointed attorneys file a Motion to Suppress evidence found at the search of the residence but they ignored his request as they did many other requests of Defendant.

Failure to file a timely motion to suppress in this case was ineffective assistance of counsel that resulted in prejudicial error. As the Supreme Court noted in *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986):

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic consideration but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bed sheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pre-trial discovery. Id. 385 (Emphasis added)

Defendant submits counsel here was similarly negligent or incompetent. There was no valid strategic reason for not filing a motion to suppress highly prejudicial evidence.

In this case, Petitioner submits counsel apparently had not done the appropriate legal research to challenge the illegal seizure. If counsel had done appropriate research, they could have challenged police officer's violation of his constitutional rights with a timely motion and it is reasonably likely that it would have been successful and the damaging evidence discovered in the residence, the ammunition similar to the ammunition used in the death of Anthony Davis, would not have come before the jury.

Failure to file appropriate pretrial pleadings has been considered deficient performance under *Strickland*. In *Smith v. Dugger*, 911 F.2d 494 (11th Cir. 1990), failure to move to suppress a confession was found to be unreasonable attorney performance. Similarly, in *Wilcox v. McGhee*, 241 F.3d 1242, 1246 (9th Cir.2001),

failure to move to dismiss on double jeopardy grounds amounted to ineffective assistance of counsel. See also, *U.S. v. Palomba*, 31 F.3d 1456 (9th Cir. 1994) holding ineffective assistance for failing to move to dismiss. "No apparent tactical decision could explain counsel's failure to move to dismiss under the STA." Id. 1464 Analogously, in *Williams v. Washington*, 59 F.3d 673 (7th Cir. 1995), the Court found failure to seek a severance not objectively reasonable and ineffective assistance of counsel.

In *Ortiz-Sandoval v. Clarke*, 323 F.3d1165, 1172 (9th Cir. 2003), the Ninth Circuit found that when an ineffective assistance claim is rooted in defense counsel's failure to litigate a Fourth Amendment issue, the petitioner must show two things:

(1) the overlooked motion would have been meritorious, and;

(2) there is a reasonable probability the jury would have reached a different verdict absent introduction of the unlawful evidence.

Considering first the potential merit of a motion to suppress, Defendant believes an evidentiary hearing will show that police exceeded their authority in searching the residence of apartment #140 at Lake Mead Estates. The search was initially without a warrant and at night. Under the Fourth Amendment, a search absent a warrant is *per se* unreasonable, "subject only to a few specifically and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The third party consent which occurred here was mere acquiescence, not a knowing and voluntary consent. The government has the burden of establishing the validity of a third party consent. *Illinois v. Rodriguez*, 497 U.S. 177, 179, 110 S.Ct. 2793, 2797, 111 L.Ed.2d 148 (1990). They could not have done that on the facts that existed in this case.

Furthermore, there was no emergency or exigent factors that compelled a warrantless entry. A thorough and complete analysis of the facts and case law would have established solid grounds to suppress the very prejudicial evidence seized at the Defendant's residence. Mere submission to lawful authority does not equate with

consent, rather consent must be freely and voluntarily given. *U.S. v. Manuel*, 992 F.2d 272 (1993).

In *United States v. Soriano*, 346 F.3d 963 (9th Cir. 2003), the Ninth Circuit citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 212, 93 S.Ct. 2041, 3 L.Ed.2d 854 (1973) noted:

> Whether consent to search was voluntarily given is "to be determined from the totality of all the circumstances." Id. It is the government's burden to prove that the consent was freely and voluntarily given. *e.g. Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997). Id. 968 (Emphasis added)

The court noted five common factors to be considered in analyzing consent:

1. whether defendant was in custody;
2. whether arresting officers had their guns drawn;
3. whether Miranda warnings were given;
4. whether the defendant was notified she had a right not to consent;
5. whether defendant had been told a search warrant could be obtained.

The court in *Soriano* emphasized that these factors are not all inclusive, stating:

> It is not necessary to check off all five factors, but "many of this court's decisions upholding consent as voluntary are supported by at least several of the factors." *Chan-Jimenez*, 125 F.3d at 1327 n. 3. Nevertheless, these factors are only guideposts, not a mechanized formula to resolve the voluntariness inquiry. *Bustamonte*, 412 U.S. at 224, 93 S.Ct. 2041 (rejecting "talismanic definition of 'voluntariness' mechanically applicable" to all situations); *see also, United States v. Morning*, 64 F3d 531, 533 (9th Cir. 1995) ("although we have established these factors to aid in the decision making process, the full richness of every encounter must be considered. ... Every encounter has its own facts and its own dynamics. So does every consent.") Id. 966 (Emphasis added)

Similarly, in *United States v. Twomley*, 5 F.Supp 564 (1983), the court in finding defendant's consent to search involuntary stated:

> The test of whether a constitutional valid search of premises has been made without a warrant is whether the person in control

thereof has given his or her voluntary consent. *Schneckloth v. Bustamonte, supra*. Further, voluntariness is to be determined "from the totality of the circumstances," Id., and consent "must be proved by clear and positive testimony and must be 'unequivocal, specific and intelligently given, uncontaminated by any duress or coercion.'" *United States v. Hearn*, 496 F.2d 236 (6th Cir.), *cert. denied*, 419 U.S.1048, 95 S.Ct. 622, 42 L.Ed.2d 642 (1974). Finally, knowledge of the right to refuse is highly relevant to the determination that there has been consent. *United States v. Mendenhall*, 446 U.S. 544, 588, 100 S.Ct. 1870, 1879, 64 L.Ed.2d 497 (1980). Id. 565 (Emphasis added)

The consent of the Defendant's mother was not valid as she was intimidated and easily psychologically coerced by the threats of law enforcement personnel. The Defendant Grigsby had the right to challenge the third party consent by his mother. In *U.S. v. Cellitti*, 387 F.3d 618 (7th Cir. 2004), the court upheld a defendant's right to challenge the validity of third party consent when it is the product of duress or coercion. The court there stated:

> A third party may give consent to search a place in which both she and the defendant have legitimate expectations of privacy, and the defendant can challenge the validity of the consent given by the third party. *See, e.g., United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (defendant challenged roommate's consent to search bedroom); *United States v. Basinski*, 226 F.3d 829, 834-36 (7th Cir.2000) (defendant challenged friend's consent to search defendant's briefcase); *United States v. Jensen*, 169 F.3d 1044, 1048-49 (7th Cir.1999) (defendant challenged his stepfather's consent to search car he was driving but that his stepfather owned); *United States v. Ladell*, 127 F.3d 622, 624 (7th Cir. 1997) (defendant challenged his mother's consent to search their apartment); *United States v. Saadeh*, 61 F.3d 510, 517-19 (7th Cir.1995) (defendant challenged consent of the woman who owned garage where he worked to search the garage). That is the situation here. If, as Cellitti contends, Melissa's constitutional rights were violated in that she was coerced into consenting to a search of the Buick, then Cellitti's rights were likewise violated because he too had an expectation of privacy in the car. He can therefore challenge the voluntariness of her consent. Id. 622 (Emphasis added)

As in *Cellitti*, in this case the defendant had a right to challenge the consent to search given by his mother. The third party consent to search was invalid and the search could also not be justified as an emergency or exigent circumstance. The government here should have staked out the apartment until a warrant was obtained

rather than coercing a consent from Defendant's mother to allow an immediate unconstitutional search..

The Ninth Circuit in *U.S. v. Oaxaca*, 233 F.3d 1154 (9th Cir. 2000) noted:

> Oaxaca acknowledges that probable cause existed to arrest him, but he contends that the evidence the Government found in his home was the fruit of an illegal arrest and that the district court erred in denying his motion to suppress it. The Supreme Court and our court have made crystal clear that, in the absence of exigent circumstances, the police must obtain an arrest warrant before entering a person's home to arrest him. *See Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). As Judge Fernandez emphasized in *United States v. Albrekten*, 151 F.3d 951, 953 (9th Cir. 1998) (citation omitted):
>
> Nowhere is the protective force of the Fourth Amendment more powerful than it is when the sanctity of the home is involved. The sanctity of a person's home, perhaps our last real retreat in this technological age, lies at the very core of the rights which animate the amendment. Therefore, we have been adamant in our demand that absent exigent circumstances a warrant will be required before a person's home is invaded by the authorities. Id. 1156, 1157
>
> (Emphasis added)

Defendant was clearly prejudiced by his counsel's failure to file a possibly meritorious Motion to Suppress. The case was circumstantial. During closing argument counsel for Defendant argued the lack of a complete and thorough investigation by the state and the 'inadequacy' of the physical evidence presented in evidence.

The prosecutor countered this argument when the State's circumstantial case was argued vigorously by the prosecution during closing when they emphasized the only physical evidence linking Defendant to the homicide - the similar ammunition found during the illegal, warrantless search of his mother's' address at #140 Lake Mead Estates. (AA 593-595) The search yielding ammunition consistent with that found at the scene of the homicide was clearly highly prejudicial to Defendant.

An evidentiary hearing is necessary to resolve questions of fact concerning the alleged conduct of the police and any duress and/or coercion that occurred. *State v. Silvers*, 587 N.W.2d 325 (1998). In *Northropp v. Trippett*, 265 F.3d 372 (6th Cir.2001), the court stated:

> Having found Braverman's representation deficient, we next address whether Braverman's performance prejudiced Northrop. To establish prejudice, Northrop must show a reasonable probability that, "but for counsel's unprofessional conduct, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Specifically, "[w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Morrison*, 477 U.S. at 375, 106 S.Ct. 2574. Id. 384 (Emphasis added)

Similarly, in *Tice v. Johnson*, 647F.3d 87 (4th Cir. 2011), the court found there was ineffective assistance for failing to file a motion to suppress a confession, stating:

> [H]ad the confession been suppressed, there was a reasonable probability that the jury would have returned a different verdict, and we do not see how we could reasonably return otherwise. . . .
>
> Defense counsel, though generally able and competent, were constitutionally deficient in the discrete though crucial instance of failing to have Tice's confession suppressed. That rendered suspect the jury verdict. (Id. 111) (Emphasis added)

Defendant easily meets the reasonable probability standard there may have been a different verdict in this case. The jury verdict was rendered suspect by counsel's inaction in not filing a potentially meritorious motion.

III.

FAILURE TO OBJECT TO THE PROSECUTOR'S MISSTATEMENT OF THE LAW DURING CLOSING ARGUMENT AND MAKE A RECORD WAS PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL.

During closing argument, Deputy District Attorney Turner argued that:

> "The next instruction talks about theories of first degree murder. If you go back and deliberate and, say, six of you find beyond a reasonable doubt that I believe that he's guilty under the theory of lying in wait. And six of you say to yourselves: You know what, I think he's guilty, but I think it's premeditation and deliberation.

> As long as you all agree on a theory of first degree murder, then he can be guilty of first degree murder."
>
> Mr. Schieck: Your Honor, could we approach, please?
>
> The Court: Yes.
>
> (Whereupon, counsel conferred with the Court.)
>
> The Court: You may proceed.
>
> Mr. Turner: So you don't have to agree on the theory, as long as you believe beyond a reasonable doubt one of those two theories, either lying in wait, or murder that is deliberate and done with premeditation.
>
> (AA 605, 606) (Emphasis added)

The defense counsel, David Schieck, sensing that this statement by the prosecutor overstated the law and violated due process by allowing the jury to reach a non-unanimous verdict on alternative theories that may have been disputed by most members of the panel actually interrupted counsel and asked to approach the bench. It is unclear whether Schieck interposed an objection or asked for a correction of the prosecutor's statement of law.

Unfortunately, the bench conference was not recorded. This failure to request that bench conference be recorded makes review of counsel's actions during trial on appeal impossible. Counsel had a duty to protect the record, which he failed to do. It is clear, however that counsel proposed no corrective instruction or submitted any alternative verdict forms that could have mitigated the prejudicial argument of the prosecution. The vast majority of the jury may have been convinced there was insufficient evidence of premeditation or deliberation but nevertheless convicted the Defendant. The majority may also have been doubtful about the 'lying in wait' theory of the State, but based on the prosecutor's argument, felt they could convict.

...

In *United States v. Gillis*, 773 F.2d 54 (4th Cir. 1985), the court stated:

> "A criminal defendant has a right to a meaningful appeal based on a complete transcript. *See, Hardy v. United States*, 375 U.S. 277, 279, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964). When a transcript is less than complete, the court must determine whether the alleged omissions or deficiencies justify a new trial. In *United States v. Gillis*, it was held that whether an omission from a transcript warrants a new trial depends on whether the appellant has demonstrated that the omission "specifically prejudices his appeal ..." 773 F.2d 549, 554 (4th Cir. 1985). (Emphasis added)

In the case of *United States v. Nolan*, 910 F.2d 1553, 1560 (7th Cir. 1990), the court noted that "prejudice is found when a trial transcript is so deficient that it is impossible for the appellate court to determine if the district court has committed reversible error." Defendant submits the unrecorded bench conference may have established whether his counsel raised the appropriate due process or instruction issues.

The failure to preserve an adequate record of the entire trial was a structural error that mandates reversal. In *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1967), the United States Supreme Court held that: "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (Emphasis added)

Reversal is automatic if the defendant's absence constitutes a "structural error," that is an error that permeates the entire conduct of the trial from beginning to end or affects the framework within the trial proceeds." *See, Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). *See also, State v. Good*, 43 P.2d 948, 309 Mont. 113 (2002). Structural error exists when there is failure to substantially comply with procedural rules of a trial jury.

Defense counsel had a duty to object to misconduct by the prosecution. *Howard v. State*, 106 Nev. 713, 800 P.2d 175 (1991).

The United States Supreme Court first addressed the impact of a general verdict that may rest on a legally valid or a legally invalid alternative theory of liability in *Stromberg v. California*, in which the Court held that a general verdict delivered under these circumstances must be set aside unless it is possible to determine that the jury based the verdict on a legally valid ground. 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed.2d 1117 (1931). In *Keating v. Hood*, the Ninth Circuit Court of Appeals reasoned that reversal is required in such cases unless the court is 'absolutely certain' that the jury relied on a valid ground to reach its verdict." 191 F.3d 1053, 1063 (9th Cir. 1999) (Emphasis added)

Petitioner submits that the overly broad alternative theory instruction on the law argued by the prosecutor opened up the real possibility the jury could have reached a verdict on a ground that was legally insufficient. That issue was not adequately preserved or protected and this was ineffective assistance of counsel.

More recently, the United States Court considered this issue in a narrow 5-4 decision in the case of *Schad v. Arizona*, 501 U.S. 633, 111 S.Ct. 2491, 115 L.Ed.2d 1109(1991). The Supreme Court in *Schad* examined the constitutional issues surrounding the question of whether jurors need to be in agreement on the theoretical basis of a defendant's guilt. In that case the defendant was convicted of first degree murder defined by state law as murder that is willful, deliberate or premeditated or which is committed as the perpetration of, or attempt, to perpetrate a felony (robbery).

In reaching this narrow plurality decision, Justice Souter cautioned that it cannot be said that "either history or current practice is dispositive." Justice Souter emphasized the lack of a moral disparity between the two alternative mental states "whether or not everyone would agree the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense." Id. 644

Petitioner questions, is such lying in wait as allegedly occurred in this case the moral equivalence of premeditation and deliberation or felony murder? Would the Supreme Court so find? Even Justice Scalia, the fifth vote for affirmance in *Schad* relied solely on the fact that the ... "challenged practice was as old as the common law and still in existence in the vast majority of states." Id. 501 U.S. at 648 (Scalia concurring)

Scalia, critical of the plurality's "moral equivalence" test, noted that were it not for the weight of historical acceptance of general verdicts based upon multiple theories in first degree murder cases, he might well have been with the dissenters in this case. Id.651

Defendant submits his case would be appropriate for reexamining the holding of *Schad v. Arizona*, if an adequate record had been made. Defendant however lost that chance because of his counsel's ineffectiveness.

IV.

DEFENSE COUNSEL WAS INEFFECTIVE BY INVITING PREJUDICIAL ERROR WITH HIS UNCAREFUL CROSS EXAMINATION OF AGENT SERNA

The Nevada Supreme Court in its Order of Affirmance, stated:

> "Questions concerning what a defendant says after his arrest are generally improper. *Morris v. State*, 112 Nev. 260, 263-64, 913 P.2d 1264, 1267 (1996), (providing prosecution forbidden from commenting upon defendant's post-arrest, pre-*Miranda* silence). However, Grigsby invited the line of questioning by examining the witness about Grigsby's reaction to his arrest. *See, Milligan v. State*, 107 Nev. 627, 637, 708 P.2d 289, 295-96 (1985). Therefore, the district court did not err in overruling Grigsby's objection." (Emphasis added)

At trial, when defense counsel cross examined Agent Serna, the following exchange occurred:

Defense: And your report indicates that the arrest was effected (sic) without incident?

Serna: Correct.

Defense: There were no problems during the arrest?

Serna: Correct.

Defense: If there had been something, you would have noted that in your report?

Serna: Yes.

IV TT 40-41. Thereafter, on redirect, Agent Serna testified to the following:

State: Defense counsel asked you some questions about whether or not the defendant was taken into custody without incident. Do you remember those questions?

Serna: Yes, I do.

State: If there had been some type of incident, like he had fought back or something like that, you would have put that in your report?

Serna: Absolutely.

State: Would you also have included in your report if he would have made statements at the time he was taken into custody?

Serna: If, for example, the arresting officer - because I was still in a distance, still conducting surveillance when the actual officers put their hands on him. If he had made a statement to them, obviously, I wouldn't have heard it. And unless they voiced it to me to allow me to put it in my report, I never got any information like that.

State: Is there anything in your report, or do you recall anything about whether or not the defendant expressed surprise about being taken into custody?

Defense: I'm going to object, Your Honor. Can we approach?

Court: Yes." (Whereupon counsel conferred with Court.)

Court: You may proceed.

State: Agent Serna, is it reflected in your report at the time the defendant was taken into custody if he expressed surprise at being arrested?

Serna: It's not reflected in my report.

State: Is it reflected in your report whether the defendant asked why he was being arrested?

Serna: It's not reflected in my report.

(AA 497) (Emphasis added)

It was ineffective assistance of counsel to not be aware that Nevada law greatly favored a liberal right to respond to any "invited error." Defendant in this case lost his Fifth Amendment constitutional right to silence due to his attorney's inartful questioning which caused the "invited error." The Defendant's appeal was therefore affirmed by the Nevada Supreme Court consistent with prior decisions and case law defining invited error.

Although the response by the prosecution to defense counsel's questioning of Agent Serna was error that was invited, that does not remove the harm to the Defendant or remove its prejudice. Defense counsel was ineffective in his cross examination which allowed Agent Serna to comment on Defendant Grigsby's silence.

Nevada's concept of "opening the door" represents an effort by courts to prevent one party from gaining and maintaining an unfair advantage by selective presentation of the facts that without being elaborated or placed in context, create an incorrect or misleading impression. *People v. Miller*, 981 P.2d 654 (Colo. App. 1998).

In *Colon v. State*, 113 Nev. 484, 938 P.2d 714 (1997), the Nevada Supreme Court found the defense counsel had opened the door to evidence of a comment on

defendant's failure to cooperate with police following her arrest by raising the issue of the state's failure to prosecute the person who allegedly supplied defendant with methamphetamine. Similarly, in *Ford v. Warden of Nevada Women's Correctional Center*, 111 Nev. 872, 901 P.2d 123, defense counsel opened the door to evidence of defendant's belief and attitude during the guilt phase of trial by delving into defendant's insanity.

It was counsel's lack of skillful analysis and preparation here prior to cross examination which allowed the prosecutor to raise what would have been inadmissable evidence of the Defendant's post arrest silence. This prejudiced the Defendant and is the type of ineffective assistance which, although subtle, may have affected the jury's verdict in a close case.

V.

THE ACCUMULATION OF ERRORS IN THIS CASE REQUIRES REVERSAL

The numerous errors in this case require reversal of the conviction. Viewed separately, the errors in this case are clearly of such a magnitude that they each require reversal. But when viewed cumulatively, the case for reversal is overwhelming. *State v. Daniel*, 119 Nev. 498, *see also*, *Sipsas v. State*, 102 Nev. at 123, 216 P.2d at 235, stating: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial."

Prejudice may result from the cumulative impact of multiple deficiencies. *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (*En Banc*), cert. denied, 440 U.S. 970; *Harris by and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir. 1995).

The multiple errors of counsel in this case when accumulated together require reversal. A quantitative analysis makes that clear. *See, Van Cleave v. Rachel*, when is error ... not an error? Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

Because of defense counsel's unpreparedness and ineffective assistance both pretrial in the investigation and motion stage, the trial was fundamentally unfair. The defense was not properly prepared to present and effective case. The jury was unable to see the totality of evidence, both because of the Defendant's counsel's failure to seek out mitigating evidence and the prosecutor's failure to disclose what was potentially exculpatory evidence. The defense counsel not only failed in gathering exculpatory evidence but it also allowed the prosecution to submit evidence that could have been suppressed if the defense filed a motion to suppress challenging a warrantless unconstitutional search. The defense counsel also allowed the prosecution to argue multiple theories of homicide when the law and facts may not have supported such argument. The jury was also allowed to improperly infer guilt from the Defendant's post arrest silence because of his attorney's errors. The Defendant was grievously prejudiced by the ineffectiveness of his attorneys and but for their errors, there is a reasonable probability the result would have been different.

Judge David Bazelon articulated the importance of dealing rigorously and fairly with ineffective assistance of counsel claims in a seminal article stating:

> "... Defining 'effective representation' is not an easy task. If the task is accomplished, appellate courts will lose a valuable crutch: Every time a court finds that a substantial issue was not raised below, it will be required to determine, before it can refuse to decide the issue, whether trial counsel was ineffective in not raising it. Furthermore, there is good reason to fear that if the Sixth Amendment were given a real bite, we would have to swallow the bitter pill of reversing an uncomfortably large number of convictions, and releasing large numbers of defendants from their guilty pleas. And even if reversals and releases would not be that prevalent, the specter of a flood of frivolous ineffectiveness claims haunts every judge. These concerns are surely understandable. But they cannot excuse inaction.
>
> If the problem is so difficult or widespread, our responsibility to confront it is all the more urgent. Reversing convictions or undoing guilty pleas is never pleasant. I can tell you that. But, for every conviction or plea that we reverse now, we will save ourselves the need for a great many more reversals in the future. Perpetuating minimal requirements for defense counsel will not prevent frivolous claims from being filed. It will only preclude relief from being granted in meritorious cases. Indeed, clarifying the requirements for defense counsel might well reduce the number of ineffective claims by informing the bar as to what is expected of them. In any event, this clarification will make it easier for courts to separate frivolous from non-frivolous ineffectiveness

issues.

> Now, the final reason judges have ducked ineffectiveness issues, namely, their reluctance to 'soil the reputations' of counsel by labeling their work ineffective, is another equally unpersuasive argument as a justification for inaction. As one judge said, so vividly, in a recent opinion, 'ineffectiveness of counsel in the constitutional sense, is malpractice of law. It carries with it the most serious professional and economic consequences for the accused counsel ...' The bones of one lawyer are not for the picking by another except upon the clearest and most concrete reasons.' One might ask further whether this concern, even if it's valid, for reputations, justifies sacrificing defendants' rights and liberties. But the far more important response to this argument is that is wholly misconstrues the nature of an ineffectiveness finding. Ineffectiveness is not a judgment of the motives or abilities of lawyers, nor an inquiry into culpability. Concern is simply whether the adversary system has functioned properly. Thus, the question is not whether the defendant received the assistance of effective counsel, but whether he received the effective assistance of counsel. We should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal is too fallible to expect it to be otherwise." *Bazelon*, "The Realities of Gideon and Argersinger," Vol. XXXIII, N.D.A.D.A. (Emphasis added)

As Judge Bazelon so eloquently stated, the issue here is whether the adversary system functioned properly. Defendant respectfully submits it did not function properly in this case because of the accumulation of errors and misfeasances by counsel.

IV.

CONCLUSION

Wherefore, for the above stated reasons, Petitioner/ Defendant prays the Writ of Habeas Corpus for Post Conviction Relief be granted for all the reasons stated.

Petitioner/ Defendant was denied effective assistance of counsel guaranteed to him under the Sixth Amendment to the United States Constitution. His conviction should be reversed and the Court should grant whatever relief is just.

DATED this 30th day of November, 2012.

Respectfully Submitted,

/s/ Terrence M. Jackson
Terrence M. Jackson, Esq.
Counsel for Defendant, Dennis M. Grigsby

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Terrence M. Jackson, Esquire, and that I am competent to serve papers and pleadings, and not a party to the above-entitled action, and that on the 30th day of November, 2012, I served a true and correct copy of the foregoing: Petitioner/ Defendant, Dennis M. Grigsby's, Petition and Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief, District Court Case No.: 08C246709, as follows:

[X] Via e-filing to Clark County District Attorney & Nevada Attorney General:

STEVEN B. WOLFSON
Clark County District Attorney
200 E. Lewis Ave., Third Floor
Las Vegas, Nevada 89101

CATHERINE CORTEZ-MASTO
Attorney General - Appellate Division
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101

[X] Enclosed in a sealed envelope upon which first class postage was prepaid, and placed in an outgoing U.S. mail bin addressed to the following address:

Dennis M. Grigsby, #1033640
H.D.S.P. - Post Box 650
Indian Springs, NV 89070-0650

By: */s/ Ila C. Wills*
Ila C. Wills

-23-

Terrence M. Jackson, Esq.
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❖
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January 3, 2013

Confidential - Law Office Communication
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Confidential - Law Office Documents
Open Only in Presence of Inmate

Re: Your Motion to Dismiss Counsel

Dear Mr. Grigsby:

I believe that you misunderstand the duty of appellate counsel in a criminal case. The role of appellate counsel is to raise the legal issues that counsel deems significant, not every non-frivolous issue that could be raised.

It is a difficult calculation an attorney must make which is based upon the facts, the law, and experience from evaluating numerous prior cases that direct a lawyer in making the decision on what issues should be included in an appellate brief.

I carefully considered all the issues you wished me to raise and I filed Supplementary Points and Authorities on those issues that I could support with facts **and** case law with the strongest legal arguments I could make.

As the attorney, it is my decision what legal pleadings to file and as long as I am counsel of record, I will make those decision. The case law supports me. I have enclosed a copy of the United States Supreme Court decisions of *Jones v Barnes*, 103 S.Ct. 3308 (1983), and excerpts from *Sellan v. Kuhlman*, 261 F.3d 303 (2nd Cir.2001).

I take no position on your motion to dismiss counsel, but I advise you if I stay on your case as counsel, I will continue to vigorously represent you based upon my legal training.

Sincerely,

Terrence M. Jackson, Esquire

Enc.: Two Cases cited (13 pgs.)
cc: file

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Counsel for Dennis M. Grigsby

THE STATE OF NEVADA,
Plaintiff/ Respondent,
v.
DENNIS M. GRIGSBY,
#1033640,
Petitioner/ Defendant.

Case No.: 08C246709
Dept. No.: XXV

REPLY TO STATE'S RESPONSE TO SUPPLEMENTAL POINTS AND AUTHORITIES FOR WRIT OF HABEAS CORPUS PETITION FOR POST CONVICTION RELIEF

COMES NOW the Petitioner/ Defendant, Dennis M. Grigsby, by and through his attorney, TERRENCE M. JACKSON, ESQ., and replies to the State's Response to his Petition for Post Conviction Relief and Supplemental Points and Authorities.

This reply is based on all prior pleadings and such further facts as will come before the court at an evidentiary hearing.

I.

Defendant has demonstrated that there is reason to believe under *Strickland v. Washington* he did not receive effective assistance of counsel. The State cites boiler language from *Strickland* and cases construing it to the effect that counsel should not be second guessed and even that a court must presume counsel was ineffective.

The State always seeks to impose an impossible or near impossible burden on a defendant who seeks to set aside a conviction because his counsel was inadequate. The State even asks in this case that there be no evidentiary hearing, citing *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603, also *Mazey v. State*, 116 Nev. 351, 46 P.3d 1228, 1231 (2002). *See*, Response, page 23. Are they concerned an evidentiary hearing will develop some evidence that shows Defendant was prejudiced by ineffective counsel either at trial or pre-trial?

Petitioner submits it will of course be virtually impossible to show a lack of diligence or lack of reasonable effectiveness guaranteed by the Constitution if the Defendant is not allowed an evidentiary hearing. Defendant has raised Points in his pleadings that demand a hearing. At an evidentiary hearing, Defendant believes he can show that effective pre-trial investigation would have yielded exculpatory evidence, i.e., the *"Coyote Corner"* video which he believes contains exculpatory evidence.

At an evidentiary hearing, Defendant will establish through the testimony of the Defendant's Mother that she was intimidated and did not voluntarily consent to search. An evidentiary hearing will establish that effective counsel aware of all the facts pre-trial would have filed a winning suppression motion that kept prejudicial incriminating evidence from the jury.

An evidentiary hearing may be able to clarify these parts of the record that counsel did not preserve and also establish due process issues based on the missing record which reinforces the Sixth Amendment claims of Mr. Grigsby.

Wherefore, for all these reasons, Petitioner/Defendant believes he should prevail on his Petition for Post-conviction Writ of Habeas Corpus.

DATED this 5 th day of March, 2013.

Respectfully Submitted,
Terrence M. Jackson, Esq.
Counsel for Defendant, Dennis M. Grigsby

-2-

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Terrence M. Jackson, Esquire, and that I am competent to serve papers and pleadings, and not a party to the above-entitled action, and that on the 5th day of March, 2013, I served a true and correct copy of the foregoing: Petitioner/ Defendant, Dennis M. Grigsby's, Reply to State's Response to Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief, District Court Case No.: 08C246709, as follows:

[X] Via e-filing to Clark County District Attorney & U.S. mail to the office of the Nevada Attorney General:

STEVEN B. WOLFSON
Clark County District Attorney
200 E. Lewis Ave., Third Floor
Las Vegas, Nevada 89101
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CATHERINE CORTEZ-MASTO
Attorney General - Appellate Division
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101

[X] Enclosed in a sealed envelope upon which first class postage was prepaid, and placed in an outgoing U.S. mail bin addressed to the following address:

Dennis M. Grigsby, #1033640
H.D.S.P. - Post Box 650
Indian Springs, NV 89070-0650

By: Ila C. Wills

-3-

EXHIBIT

F

Motion for Discovery, filed Aug. 28, 2013.

7 pages

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
DENNIS GRIGSBY,
Defendant.

CASE NO.: 08C246709
DEPT. NO.: XXV

MOTION FOR DISCOVERY

COMES NOW, Defendant DENNIS GRIGSBY, by and through his counsel of record THOMAS A. ERICSSON, and hereby moves the Court to order the Clark County District Attorney's office to provide the Defendant with a complete copy of all discovery in this matter.

This Motion is made and based upon the attached Points and Authorities, the papers

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and pleadings on file herein, as well as any oral argument permitted by this court.

DATED this 28th day of August, 2013.

ORONOZ & ERICSSON, L.L.C.

/s/ Thomas A. Ericsson
THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982
700 South Third Street
Las Vegas, Nevada 89101
Tel: (702) 822-2772
Attorney for Defendant

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

TO: STEVE WOLFSON, District Attorney

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion on for hearing before the above-entitled Court on the 9 day of Sept., 2013, at the hour of 9:00am or as soon thereafter as counsel may be heard.

DATED this 28th day of August, 2013.

/s/ Thomas A. Ericsson
THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982
700 South Third Street
Las Vegas, Nevada 89101
Tel: (702) 822-2772
Attorney for Defendant

STATEMENT OF FACTS

On April 4, 2008, the State charged Dennis Grigsby (hereinafter "Grigsby" "Defendant" "Appellant") by way of a Criminal Complaint with Murder (Open) as well as Ex-Felon in Possession of a Firearm. After a preliminary hearing, Grigsby was bound over to the District Court where an Information charging the same was filed on August 11, 2008. A jury trial commenced on January 26, 2009. Following the jury trial, Mr. Grigsby was found guilty of first degree murder with use of a deadly weapon and was ultimately sentenced by the jury to Life in Prison Without the Possibility of Parole in the Nevada Department of Corrections with 330 days credit for time served.

Grigsby's Judgment of Conviction was filed on April 6, 2009. Notice of Appeal was timely filed on April 14, 2009. The Supreme Court subsequently affirmed the Judgment of Conviction on September 14, 2011, and a Remittitur was issued on October 26, 2011.

On June 26, 2013, the Court appointed defense counsel, Thomas A. Ericsson, Esq., to represent Grigsby in post-conviction relief proceedings. Mr. Ericsson contacted previous counsel, Terrence M. Jackson, Esq., about acquiring the discovery for the case. Mr. Jackson notified Mr. Ericsson that Mr. Jackson had sent the discovery he had to the client, Grigsby, when Mr. Jackson withdrew as counsel. On July 8, 2013, Mr. Ericsson visited Grigsby in High Desert State Prison, at which point Mr. Ericsson learned that Grigsby did not have the full discovery for this case. On August 5, 2013, Mr. Ericsson spoke with Robert B. Turner, Esq., of the Clark County District Attorney's Office in regards to acquiring the missing discovery. Mr. Turner informed Mr. Ericsson that it was the policy of the District Attorney's Office to not provide discovery in post-conviction relief proceedings without an order from the court. As such, counsel requests an order that the State produce a complete copy of the

discovery in this matter, which is necessary to aid the client, Grigsby, during post-conviction proceedings.

ARGUMENT

A. Grigsby Requests A Complete Copy of Discovery In Order To Investigate And Develop His Post-Conviction Claims.

The Defendant cannot investigate and develop the facts supporting his claims without a complete copy of discovery. NRS 34.780, which governs the granting of discovery in a state post-conviction proceeding, provides that a party may conduct discovery "to the extent that, the judge or justice for good cause shown grants leave to do so." There are no reported Nevada cases defining good cause or what circumstances constitute "good cause." Although NRS 34.780(2) allows a party to conduct discovery under the Nevada Rules of Civil Procedure, the statute presupposes that the defendant initially has enough information to file a post-conviction Petition for Writ of Habeas Corpus. At this point, counsel for Grigsby does not have the complete case file and therefore cannot properly develop and substantiate Grigsby's claims.

Grigsby is facing a term of Life Without the Possibility of Parole. Counsel has made good-faith efforts to obtain the information that is necessary to argue the merits of the Defendant's claims. However, obtaining a complete copy of the original file from the Defendant is impossible as the Defendant does not have the complete discovery file. Obtaining discovery from the State is the only viable option of ensuring counsel receives a complete set of materials used in Grigsby's prosecution. Accordingly, there is good cause for this Court to issue an Order directing the Clark County District Attorney's Office to provide the Defendant with a complete copy of discovery.

Lastly, counsel submits that under the Sixth Amendment of the United States Constitution and Article I § 8 of the Constitution of the State of Nevada, he will be ineffective in this matter unless he is given a complete copy of discovery in order to investigate and develop Grigsby's claims. Accordingly, Defendant's counsel must have access to a complete copy of the discovery in the State's possession.

CONCLUSION

For the above stated reasons, good cause exists for this Court to issue an Order directing the Clark County District Attorney's Office to provide the Defendant with a complete copy of discovery in its possession as the requested information will have a bearing on the claims in his forthcoming post-conviction Petition for Writ of Habeas Corpus.

DATED this 28th day of August, 2013.

/s/ Thomas A. Ericsson
THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982
700 SOUTH 3RD STREET
Las Vegas, Nevada 89101
Telephone: (702) 878-2889

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada State District Court in Clark County, Nevada on August ___, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

STEVEN WOLFSON
Clark County District Attorney
PDmotions@ccdanv.com

By: /s/ Jonathon Roberts
An employee of JAMES A. ORONOZ, ESQ.

EXHIBIT

G

Correspondence from Dayvid Figler, Esq.,
dated Oct. 15, 2014.

1 page

DAYVID FIGLER, ESQ.

615 S. 6th St. · Las Vegas, Nevada 89101
Phone (702) 222-0007 · Fax (702) 222-0001

October 15, 2014

Dennis Grigsby, ID # 1033640
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

Re: ***State of Nevada v. Dennis Grigsby,*** **Case No. C246709**

Dear Mr. Grigsby:

This will be my final correspondence with you. I have included with this letter and in separate envelopes every bit of materials related to your file that I could find. And while I am confident you already have much if not all of these materials, I am sending them anyway. This includes the following:

Reporter's Transcript of Preliminary Hearing date August 4, 2008
Reporter's Transcript of Bad Acts Motion date January 9, 2009
Reporter's Transcript of Jury Trial date January 27, 2009
Reporter's Transcript of Jury Trial date February 2, 2009
Reporter's Transcript of Jury Trial date February 3, 2009
Reporter's Transcript of Penalty Hearing date February 5, 2009
Numerous documents you filed in proper person on the following dates:
- January 28, 2013 (Motion to Dismiss Counsel)
- March 3, 2008 (Motion to Withdraw Counsel)
- April 2, 2013 (First Amended Petition for Writ)
- April 11, 2013 (Supplemental Points and Authorities)
- April 24, 2013 (Second Amended Petition for Writ)
- May 13, 2013 (Notice and Supplemental Exhibits)
- June 28, 2013 (Supp. Petition)
- March 5, 2014 (Judicial Notice and Supplement and Exhibits)

Various documents related to the Supreme Court including Order of Affirmance and Remittitur
Defendant's Witness Lists filed January, 2009
State's Witness lists filed October, 2008 & January, 2009
Terrance Jackson Reply Brief filed March 5, 2013
State's Response to First and Second Amended Petitions filed May 7, 2013
Defendant's Motion for Discovery and Opposition (2013)

Best wishes,

Dayvid Figler, Esq.

cc: Department 25
Attachment: State pleadings

EXHIBIT

H

Superseding Pro Per Petition for Writ of Habeas Corpus, filed Dec. 3, 2014.

See: Ground #2 (pgs. 13-18)

Ground #3 (pgs. 19-23)

29 pages

Case No. 08C246709
Dept. No. XXV

FILED
DEC 03 2014
CLERK OF COURT

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

Dennis Hart Grigsby
#1033410 Petitioner,

Superseding Proper Person

v.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

08C246709
RPHBC
Inmate Filed -- Petition for Writ of Habeas Corpus
4412021

Dwight Neven, Warden
Respondent,

INSTRUCTIONS:

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

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

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

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

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

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

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

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison, Clark County, Nevada

2. Name and location of court which entered the judgment of conviction under attack: The Eighth Judicial District Court, Clark County, Nevada

3. Date of judgment of conviction: April 6, 2009

4. Case number: 08C246709

5. (a) Length of sentence: Life without parole, consecutive to 60 to 240, concurrent 16 to 72 months.

RECEIVED
NOV 25 2014
CLERK OF THE COURT

-1-

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

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

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

7. Nature of offense involved in conviction being challenged: Open Murder with use of Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165), Ex-Felon Possession of Firearm (Felony - NRS 202.360).

8. What was your plea? (check one)
(a) Not guilty X
(b) Guilty .....
(c) Guilty but mentally ill .....
(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: No guilty pleas were entered.

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)
(a) Jury X
(b) Judge without a jury .....

11. Did you testify at the trial? Yes ..... No X

12. Did you appeal from the judgment of conviction? Yes X No .....

13. If you did appeal, answer the following:
(a) Name of court: Nevada Supreme Court
(b) Case number or citation: 53627
(c) Result: Affirmed
(d) Date of result: September 14, 2011
(Attach copy of order or decision, if available.)

-2-

14. If you did not appeal, explain briefly why you did not: N/A (Petitioner did appeal)

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

16. If your answer to No. 15 was "yes," give the following information:
(a) (1) Name of court: The Eighth Judicial District Court, Clark County, Nevada.
(2) Nature of proceeding: Motions to Withdraw Counsel, Amended Petitions, Supplements and Exhibits.
(3) Grounds raised: Ineffective Assistance of Counsel
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No X
(5) Result: N/A
(6) Date of result: N/A
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:
N/A

(b) As to any second petition, application or motion, give the same information:
(1) Name of court: N/A
(2) Nature of proceeding: N/A
(3) Grounds raised: N/A
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No X
(5) Result: N/A
(6) Date of result: N/A
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:
N/A

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

-3-

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?
(1) First petition, application or motion? Yes ..... No X
Citation or date of decision: N/A
(2) Second petition, application or motion? Yes ..... No X
Citation or date of decision: N/A
(3) Third or subsequent petitions, applications or motions? Yes ..... No X
Citation or date of decision: N/A

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) (Petitioner has yet to receive an evidentiary hearing)

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:
(a) Which of the grounds is the same: None, have been presented and ruled upon in any prior proceeding.
(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Ineffective Assistance of Counsel

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claims are not heard on Direct Appeal, the Nevada Supreme Court.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Superseding Petition Ordered, this Petition is timely filed.

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

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

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Michael Becker, James Buggeroli, Scott Coffee, Carey Landis, Carmine Colucci, David Schieck, Mark Patrick, Kirk Kennedy, Daniel Bunin.

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

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

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

Ground 1: Ineffective Assistance Of Counsel

In Violation Of Petitioner's Right To Effective Assistance Of Counsel And Reasonable Search And Seizure As Guaranteed By The U.S. Constitution In Amendments Four, Six And Fourteen, Pre-Trial And Trial Counsel Were Ineffective In Failing To Timely Move To Suppress Evidence Recovered Subsequent An Invalid Warrantless Search Of Petitioner's Domicile.

The Nevada Supreme Court reviews claims of ineffective assistance of counsel under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); McNelton v. State, 990 P.2d 1263 (Nev. 1999). In order to prevail on a Sixth Amendment ineffectiveness of counsel claim a petitioner must establish two things. First, he must establish that counsel's performance was deficient, that is, that it fell below an "objective standard of reasonableness" under prevailing professional norms. Id. at 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id; Wiggins v. Smith, 123 S.Ct. 2527 (2003).

In the instant case, pre-trial and trial counsel were ineffective in failing to file a pre-trial motion to suppress the evidence recovered subsequent prior illegal entry into the Petitioner's domicile, apartment #140, on the invalid consent of the Petitioner's mother, Mildred Grigsby. Here Mildred did not have dominion at the premises of #140, yet, provided consent to search for the Petitioner within apartment #140 at the officer's request, to conduct an warrantless search.

Here, the record reflects that an emergency call was placed at 11:01 PM on April 2, 2008, regarding a shooting at the Lake Mead Estates, 2068 North Nellis Blvd, Las Vegas, Nevada. Police officers respond to the scene within two to three minutes of the call. See Exhibit (EXH), "A".

The Petitioner's wife, Tina Grigsby, was interviewed as a witness at the scene immediately, implicating the Petitioner as the suspect. Police learn from Tina that she is estranged from her husband the Petitioner, whom with their children lived at apartment #140 of the Lake Mead Estates. See Prepsters Transcript (RT), 8/4/2008, pp. 9-74; 1/28/2009, pp. 63-65; EXH "B".

Wherefore, Police radio communication indicates officer awareness at 11:08 PM: "CHAN: CLR SUSP POSS LIVES IN COMPLEX.....2308." See EXH "A", p.2.

Afterwards, at 11:30 PM, Officer Michael Kitchen (1634), P# 6474, codes, "#140 IS IN BLDG 2 IN THE EXTREME S CORNER OF COMPLEX LIGHT ON NO MOVEMENT INSIDE SUSP HAS BEEN LIVING IN COMPLEX FOR LAST YEAR PER NBR..1634." See EXH "A", p.4. Here the Petitioner's apartment is targeted and under observation by the police.

Furthermore, at 11:51 PM, officer Kitchen, knocked on the Petitioner's door and there was "NO ANS @ UNIT #140 WAS LOCKED & SECURE....2351 HRS." See EXH "A", p.5. A couple of minutes later at 11:53 PM Sergeant Dennis O'Brien (740), P# 6192, requests "I NEED 2 UNITS THAT ARE ON, PERIM TO GO THRU PIOT & CHK FOR SUSP VEH...2353 HRS." See EXH "A", p.5.

Although, the record is in conflict regarding the time that the Petitioner's mother, Mildred Grigsby arrives at the location of the Petitioner's apartment. What is apparent is that officer's question, Mildred, who informed them that she lives in California, and has a residence at 6808 Needpaw Court where she was currently staying. Officers are aware that Mildred does not live at the location of apartment #140. See EXH "D" & "F". RT, 8/4/2008, pp. 114-128.

Regardless of being aware Mildred does not live at apartment #140, officers ask Mildred's consent to enter the Petitioner's domicile and

conduct a warrantless search for him within; Mildred agreed. See EXH, "B" & "C".

Here, without valid consent or probable cause and exigent circumstances, at 1:06 AM on April 3, 2008, Officer Andrew Krnjeu (1F2), P# 9336 indicates, "MAKING ENTRY @ APT # 140. NEG ON RED 0106 HRS." See EXH, "A", p.6.

Clearly, this violation of the Petitioner's Fourth Amendment U.S. Constitutional right prejudiced him by the States admission of the illegally seized evidence and accompanying testimony being utilized to convict him at his trial.

Here, the record provides indication that Officer Krnjeu, entered the Petitioner's domicile, well before the process of obtaining a warrant had begun. See EXH, "B". Additionally, this invalid entry and illegal search for the Petitioner permitted officers to observe items of evidentiary value as items admitted at trial are documented as being in "plain sight". Howe v. State, 916 P.2d 153 (Nev. 1996).

Specifically, digital images were published of the items admitted with testimony of the following: the interior of apartment # 140 showing condition, location of the evidence, and close-ups of the illegally seized items of evidence, where in the living room was located a magazine containing six (6) PMC 25 Auto cartridge cases (item # 11), near the east wall. Three (3) small baggies (items 20, #21, #22), containing a green leafy substance was located near the east wall, just south of the magazine. On the table in the dining room area was located a black and red back pack containing miscellaneous items of paperwork documenting dominion (item # 29) and a plastic bag (item # 18), containing an open box of PMC 25 Auto cartridges containing thirteen (13) cartridges (item # 16) and an additional magazine containing six (6) PMC 25 Auto cartridges (item # 17). Also inside was a black 'Realistic' fanny pack containing a small scale, along with sandwich bags and two (2) large bags of a green leafy substance (item # 23), were located in the larger compartment of the back pack. In the northwest bedroom closet within a blue storage bin was located a red hooded sweatshirt (item # 19), along with an envelope addressed to the Petitioner (item # 15), and on the bedroom floor was located a cell phone plugged in to a charger (item's # 12 & # 13). A check book (item # 14), containing the Petitioners name and address was located in a small blue cooler on the north side of the living room. See EXH, "E"; RT, 1/29/2009, pp. 41-66.

Furthermore, the record supports that trial counsel was aware "very early" before trial that the Petitioners mother, Mildred did not live at the premise of apartment # 140, and moreover trial counsel was conscious of "suppression issues" regarding the initial entry by Metro officers where she provided invalid consent to

enter apartment # 140, the Petitioner's domicile to search for him without a valid arrest/search warrant, nor exigent circumstance. In an effort to preserve for appeal this Fourth Amendment violation and counsel's failure to file a pre-trial motion to suppress the subsequently seized evidence, the Petitioner made an open-court record. See RT, 1/9/2009, pp. 1-4; 2/3/2009, pp. 14-15.

Here although the Petitioner's mother, Mildred was the lessee of apartment # 140, her testimony is that she did not live at the premises the night of the shooting when she provided officers consent to search within # 140. Clearly, as the Telephonic Search Warrant Application indicates the check book, utility bills and insurance policy (item's # 14, # 15 # 24) recovered from within the unit demonstrate the Petitioner's dominion of the premises where he had an expectation of privacy. See EXH, "B", "C", "E"; RT, 8/4/2008, pp. 110-128.

Wherefore, the Declaration of Warrant/Summons - Arrest, Officer's Report/Continuation and court record rebut any such position that officer's assumed, Mildred lived at apartment # 140 when she arrived at the Lake Mead Estate's and was questioned by officer's and provided the Key and consent to enter. Moreover, the flawed consent to search card, surely, highlights the initial entry into the Petitioner's apartment an unconstitutional search.

Whereas, the State may contend that the recovered evidence should not be suppressed the Petitioner submits he is due full exploration of the question of the initial illegal entry taint. U.S. v. Jensen, 169 F.3d 1044, 1048-49 (7th Cir. 1999).

Here, counsel's failure to file a timely suppression motion is the principal allegation of ineffectiveness under the Sixth Amendment, and counsel's neglect deprived the Petitioner review of his right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 18 of the Nevada Constitution. Counsel's error prejudiced the Petitioner, where there is a reasonable probability that but for counsel's failing to file a timely motion to suppress, the motion will have succeeded in excluding the illegally obtained evidence allowing for a different verdict. Grant of writ and a retrial without the evidence recovered subsequent the prior illegal entry is warranted. Howe v. State, 916 P.2d 153 (Nev. 1996); Kimmelman v. Morrison, 477 U.S. 365 (1986); U.S. v. Matlock, 415 U.S. 164 (1974).

Relief is warranted.

Ground (2): Ineffective Assistance Of Counsel

In Violation Of Petitioner's Right To Effective Assistance Of Appellate Counsel, Due Process And A Fair Trial, As Guaranteed By The U.S. Constitution In Amendments Five, Six And Fourteen, Direct Appeal Counsel Was Ineffective In Failing To Raise Preserved Issue Of Prosecutorial Misconduct.

The constitutional right to effective assistance of counsel extends to a Direct Appeal. Firestone v. State, 83 P.3d 279 (Nev. 2004); Kirksey v. State, 923 P.2d 1102 (Nev. 1996); Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830 (1985). A claim of ineffective assistance of appellant counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984).

To establish prejudice based upon the deficient performance and assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Firestone, 83 P.3d at 281. In making this determination, a court must review the omitted claim. Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

In the instant case, appellate counsel's error in not obtaining guilt phase transcript of

Trial proceedings held February 4, 2009 was a crucial element of appellate counsel's neglect to raise the preserved issue of prosecutorial misconduct. See EXH "G"; RT, 2/4/2009, pp. 2-6.

The following occurred during the closing argument of Chief Deputy District Attorney, Robert B. Turner:

"The next instruction talks about theories of first degree murder. If you go back and deliberate and, say, six of you find beyond a reasonable doubt that I believe that he's guilty under the theory of lying in wait. And six of you say to yourselves: You know what, I think he's guilty, but I think it's premeditation and deliberation. As long as you all agree on a theory of first degree murder, then he can be guilty of first degree murder."

Mr. Schieck: Your Honor, could we approach, please?

The Court: Yes.

(Whereupon, counsel conferred with the Court.)

The Court: You may proceed.

Mr. Turner: So you don't have to agree on the theory, as long as you believe beyond a reasonable doubt one of those two theories, either lying in wait, or murder that is deliberate and done with premeditation."

See RT, 2/3/2009, pp. 47-48.

In this case jury instructions were settled in open-court outside of the juries presence in accordance with NRS 175.161; on February 3, 2009, where the parties agreed to the District Court providing instructions #1-28 to the jury prior to closing argument. Where the improperly provided oral charge by Mr. Turner was not one of the instructions settled or given by the District Court. See RT, 2/3/2009, pp. 2-16; EXH "H".

Significantly, the transcript of the final day of the guilt phase of the Petitioner's trial, February 4, 2009, reported by Cheryl Gardner, RMR-RPR, CCR 230, was not filed with the district court until August 15, 2012. Well after the Nevada Supreme Court affirmed the Petitioner's conviction on September 14, 2011. See EXH "G"; RT, 2/4/2009 p.1. This transcript of February 4, 2009 is important because the District Court makes record of the misconduct of the prosecutor and the Court's allowance, over objection. Although, the record is vague as to whether Mr. Schieck moved for a strike, mistrial, assignment of misconduct or requested an instruction, it is clear the issue was preserved for appeal.

The record of February 4, 2009, further indicates that the District Court neglected to properly incorporate a supplement of the omitted instruction into the instructions at the outset when the

jury retired to deliberate their verdict. See RT, 2/4/2009, pp. 2-6; Stellings v. U.S., 536 F.3d 624, 627 (7th Cir. 2008).

The Petitioner submits that the prejudicial effects of Mr. Turner's recite and illustration of the unsettled instruction during his closing argument rendered the trial procedurally and fundamentally unfair, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment. Estelle v. Williams, 425 U.S. 501, 505-06 (1976).

Here, Defense counsel's argument could not perfect Mr. Turner's improper oral instruction of the jury, nor the District Court's neglect to properly instruct the jury. Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); U.S. v. Tory, 52 F.3d 207 (9th Cir. 1995).

Moreover, Mr. Schieck's objection as argued regarding that the jury be unanimous and pick and choose liability as to a single theory, when more than one theory is presented, is belied by the Nevada Supreme Court's ruling, where he raised the same argument in the case of Mason v. State, 51 P.3d 521 (Nev. 2002), and the court stated, "we have repeatedly approved this statement of law." Walker v. State, 944 P.2d 762, 773 (Nev. 1997); Schad v. Arizona, 501 U.S. 633 (1991). See RT, 2/4/2009, pp. 2-6.

The instant claim raises the question of, "whether the jury was properly instructed that unanimity was not required on whether the charge was established under a theory of lying in wait or under a theory of willful, deliberate, and premeditated murder?" See RT, 2/3/2009, pp. 2-16, 47-48; RT, 2/4/2009, pp. 2-6; EXH. "H".

Here, where appellate counsel's ineffectiveness is predicated upon a claim of prosecutorial misconduct, an appellate court engages in a two step analysis. First, the appellate court must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, the appellate court must determine whether the improper conduct warrants reversal. With respect to the second step of this analysis, the appellate court will not reverse a conviction based on prosecutorial misconduct if it was harmless-error. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension, then the appellate court will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. If the error is not of constitutional dimension, the appellate court will reverse only if the error substantially affects the jury's verdict. Valdez v. State, 196 P.3d 465 (Nev. 2008); U.S. v. Harlow, 444 F.3d 1255, 1269 (10th Cir. 2006).

Wherefore, appellate counsel's failure to obtain and utilize the February 4, 2009 transcript of guilt phase proceedings was negligent and prevented this preserved issue from being addressed at direct review, counsel's performance fell below an objective standard of reasonableness and was deficient, where but for counsel's unprofessional errors there is a reasonable probability this issue will have prevailed on appeal. See EXH. "G"; Stallings v. U.S., 536 F.3d 624, 627 (7th Cir. 2008).

Lastly, the Petitioner is prejudiced in that counsel's negligence denied judicial review of a meritorious claim. Mr. Turner's oral instruction of the jury with an unsettled instruction infected the trial with unfairness as to make the resulting verdict a denial of due process. Grant of writ and a new trial is warranted, where "the appropriate standard of review is the narrow one of due process and not the broad exercise of supervisory power." See RT, 2/4/2009, pp. 2-6; Robinson v. Maynard, 829 F.2d 1501 (10th Cir. 1987); Dugden v. Wainwright, 477 U.S. 168 (1986).

Relief is warranted.

Ground 3: Ineffective Assistance Of Counsel

In Violation Of Petitioner's Right To Effective Assistance Of Appellate Counsel; Due Process And A Fair Trial, As Guaranteed By The U.S. Constitution In Amendments Five, Six And Fourteen, Direct Appeal Counsel Was Ineffective In Failing To Raise Issue Of District Court's Error To Properly Instruct The Jury.

To establish ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. 668, 104 S.Ct. 2052 (1984). To establish prejudice based on the deficient assistance of appellate counsel, the petitioner must show that the omitted issue would be meritorious and have a reasonable probability of success on appeal. Firestone v. State, 83 P.3d 279, 281 (Nev. 2004). In making this determination, a court must review the merits of the omitted claim. Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Here, without belaboring the facts set forth in a previous ground, appellate counsel was ineffective in failing to raise the District Court's failure to properly instruct the jury, on an issue which was objected to, therefore being

properly preserved for appellate review.

During the guilt phase of the trial, the State inappropriately charged the jury with an instruction which was not settled on by the parties nor given by the District Court. The State argued:

"The next instruction talks about theories of first degree murder. If you go back and deliberate and say, six of you find beyond a reasonable doubt that I believe that he's guilty under the theory of lying in wait. And six of you say to yourselves: You know what I think he's guilty, but I think it's premeditation and deliberation. As long as you all agree on a theory of first degree murder, then he can be guilty of first degree murder."

Mr. Schieck: Your Honor, could we approach, please?

The Court: Yes.

(Whereupon, counsel conferred with the Court.)

The Court: You may proceed.

Mr. Turner: So you don't have to agree on the theory, as long as you believe beyond a reasonable doubt one of those two theories, either lying in wait or murder that is deliberate and done with premeditation."

See RT 2/3/2009, pp. 47-48.

When the parties approached the bench, Mr. Schieck lodged his objection, to which the District Court indicated they would supplement the instructions. See RT, 2/4/2009, pp. 2-6.

In this instance the District Court neglected to get in an instruction prior to the jury retiring to deliberate. In Taylor v. Kentucky, 436 U.S. 478, 489, 98 S. Ct. 1930 (1978), the U.S. Supreme Court held "[A]rguments of counsel cannot substitute for instructions by the court." Id. at 489.

While the jury was in deliberation, the District Court addressed Mr. Schieck's objection and it's error, stating:

> "... We didn't get a supplement to the instructions into the jury at the outset when they did adjourn to confer the matter, and we discussed it in chambers after a copy was delivered to my chambers, and I felt that the agreement was to send this in at this time after six or eight hours of deliberation. It might put a little undue emphasis. It might be unfair so I have it in my hand. It will be the next Court's exhibit, but we did not give this over to the jury."

See RT, 2/4/2009, pp. 3-4.

Here the Petitioner asserts that the District Court committed reversible error by submitting the unsettled additional instruction as an exhibit to be considered by the jury. Admitting the unsettled instruction six to eight hours after the jury was in deliberation, the District Court patently contravened Nevada law where, NRS 175.161(1) requires the District Court to instruct the jury at the close of argument with the written instructions. The same statute precludes the District Court from giving oral instructions to the jury unless the parties mutually agree to the oral instructions, clearly, in this instance the parties did not agree to oral instruction. See RT, 2/4/2009, pp. 2-6; Valdez v. State, 196 P.3d 465 (Nev. 2008).

Whether the matter was merely an oversight of the District Court is immaterial. Violation of the Petitioner's fundamental due process right commenced at the time Mr. Turner improperly orally charged the jury with an instruction of which there was no jury instruction to that effect affixed when jury instructions were settled. Continuing through-out the District Court admitting the additional unsettled jury instruction as an exhibit, allowing for a unreliable verdict. Crawford v. State, 121 P.3d 582 (Nev. 2005); U.S. v. Tory, 52 F.3d 207 (9th Cir. 1995).

Wherefore, appellate counsel's neglect to raise the obviously preserved issue of the District Courts failure to properly instruct the jury is deficient

conduct, prejudicing the Petitioner of judicial review of a meritorious claim. See RT, 2/4/2009, pp. 2-6; Stallings v. U.S., 536 F.3d 624, 627 (7th Cir. 2008).

Furthermore, had appellate counsel raised issue that the District Court admitted the unsettled additional instruction in violation of Nevada State law, where the proper inquiry is not whether the instruction "could have" been applied by the jury unconstitutionally, but whether there is a reasonable likelihood that the jury did so apply it, the issue would have been a dead bang winner on appeal. Schoels v. State, 966 P.2d 735, 738 (Nev. 1998); Hawkins v. Hannigan, 185 F.3d 1146, 1152 (10th Cir. 1999); Evitts v. Lucey, 469 U.S. 387 (1985); Ford v. Wainwright, 447 U.S. 399 (1983). Grant of writ and reversal of conviction for a new trial is warranted.

Relief is warranted.

Ground 4: Cumulative Error

The Cumulative Effect Of Trial And Direct Appeal Error's Violated Petitioner's Right's To Reasonable Search And Seizure, Due Process, Fair Trial And Effective Assistance of Counsel, As Guaranteed In Amendments Four, Five, Six And Fourteen Of The U.S. Constitution And Article 1, Section 18 of The Nevada Constitution.

Where the State's case relied upon pretense, and the evidence of guilt was not upon a foundation of proof. The cumulative effect of the error's set forth, supra, prejudiced Petitioner even when no individual error was sufficiently prejudicial to warrant relief, that for error's, the result of the court proceedings would have been different and the cumulative effect as a whole requires reversal of Petitioner's conviction and a new trial, Valdez v. State, 196 P.3d 465 (Nev. 2008); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

Relief is warranted.

Conclusion

For each of the reasons set forth herein, the Petitioner is entitled to an evidentiary hearing before this Court to determine whether the presented claims were committed and whether the Petitioner demonstrated both prongs of Strickland v. Washington, 466 U.S. 668 (1984).

Prayer For Relief

The Petitioner respectfully requests that this Court:

1. Issue writ of habeas corpus to have the Petitioner brought before the Court so that he may be discharged from his unconstitutional confinement.
2. That this Court conduct a hearing at which proof may be offered concerning the claims in this petition.
3. That this Court grant such other and further relief that the Court deems just and proper.

Wherefore, Petitioner prays that the Court grant the Petitioner relief to which he may be entitled in this proceeding.

EXECUTED at H.D.S.P. on the 20 day of the month of November, 2014.

Signed: Dennis Brigsby #1033640

(25)

Verification

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

Respectfully submitted,
By: Dennis Brigsby, ProPer
Dennis M. Grigsby #1033640
22010 Cold Creek Rd.
H.D.S.P. P.O. Box 650
Indian Springs, NV 89070

(26)

Certificate Of Service

I, Dennis M. Grigsby, hereby certify, pursuant to NRCP 5(b), that on this 20 day of November, 2014, I did serve a true and correct copy of the foregoing, Supersedeing ProPer Petition for Writ of Habeas Corpus by giving it to a prison guard at High Desert State Prison to deposit in the U.S. Mail, sealed in an envelope, postage pre-paid, addressed to the following:

Dwight Neven	Steven B. Wolfson	Attorney General
Warden, HDSP	District Attorney	Heros Memorial Bldg
22010 Cold Creek Rd.	200 Lewis Ave.	100 N. Carson St.
Indian Springs, NV 89070	Las Vegas, NV 89155	Carson City, NV 89710

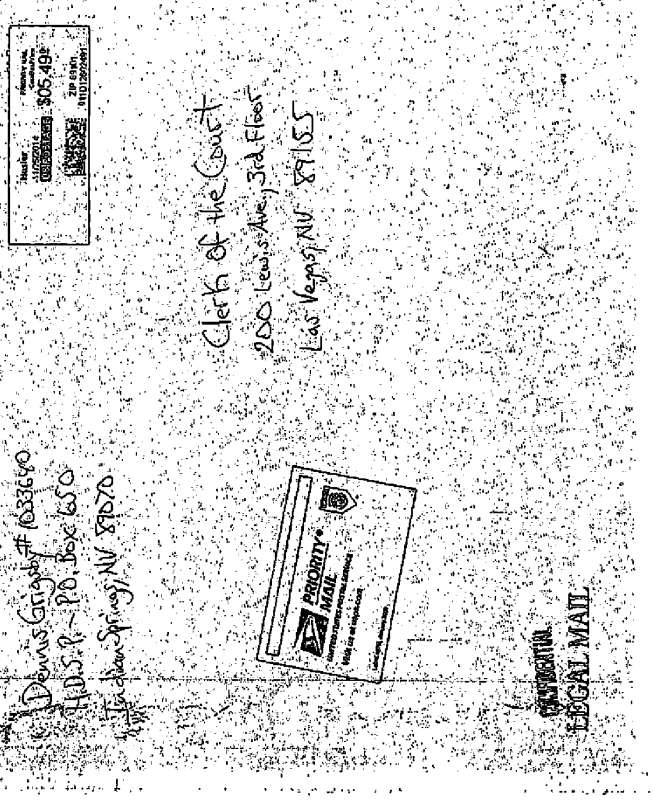
Affirmation

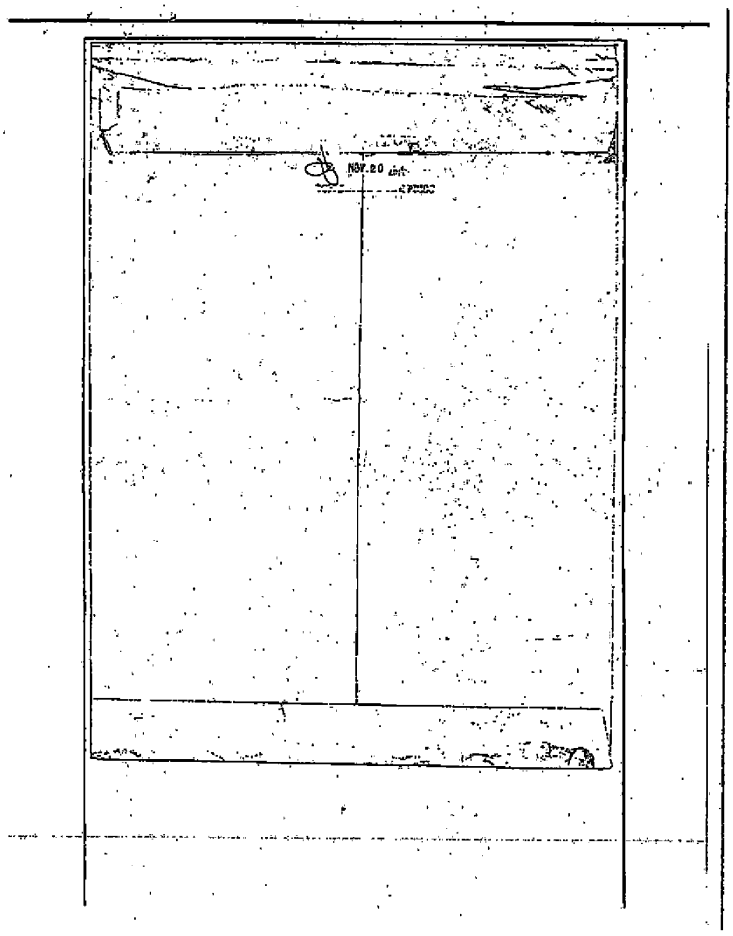
Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding above-mentioned submission filed in District Court Case No.: 08C246709, does not contain the social security number of any person.

DATED: this 20 day of November, 2014.

DOC 509 No.: 2086306 Signed: Dennis Brigsby, ProPer
cc: File Dennis M. Grigsby #1033640

(33)





CERTFICATE OF SERVICE BY MAILING

I, Dennis Marc Grigsby, hereby certify, pursuant to NRCP 5(b), that on this 1st day of June, 2021, I mailed a true and correct copy of the foregoing, "Supplemental Cause and Prejudice Exhibits in Support of Petition for Writ of Habeas Corpus"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

CC:FILE

DATED: this 1st day of June, 2021.

/Dennis Grigsby
Dennis Marc Grigsby #1033640
/In Propria Personam / Pro Se
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Supplemental Cause and Prejudice Exhibits in Support of Petition for Writ of Habeas Corpus

(Title of Document)

filed in District Court Case number A-20-821932-W

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

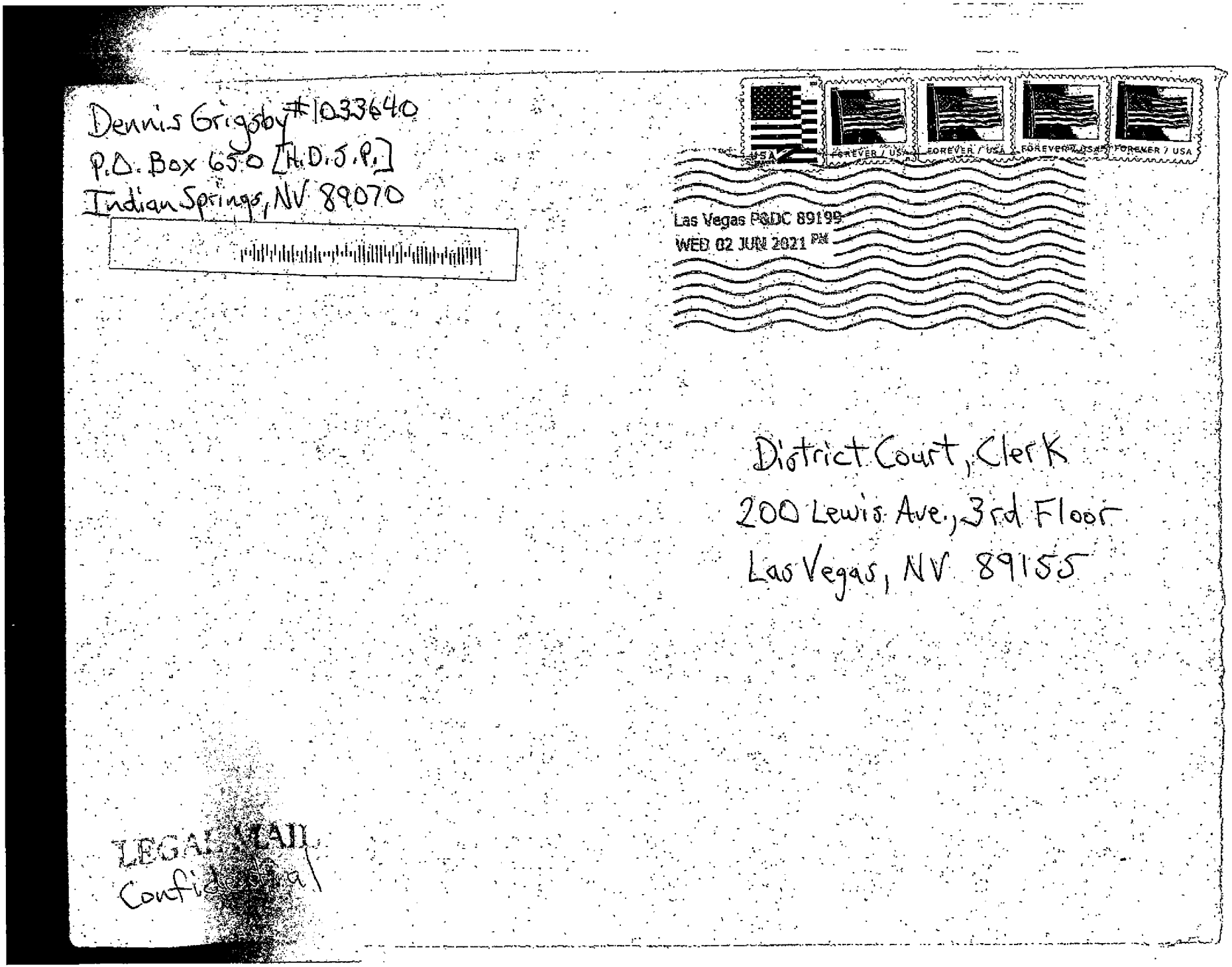
B. For the administration of a public program or for an application for a federal or state grant.

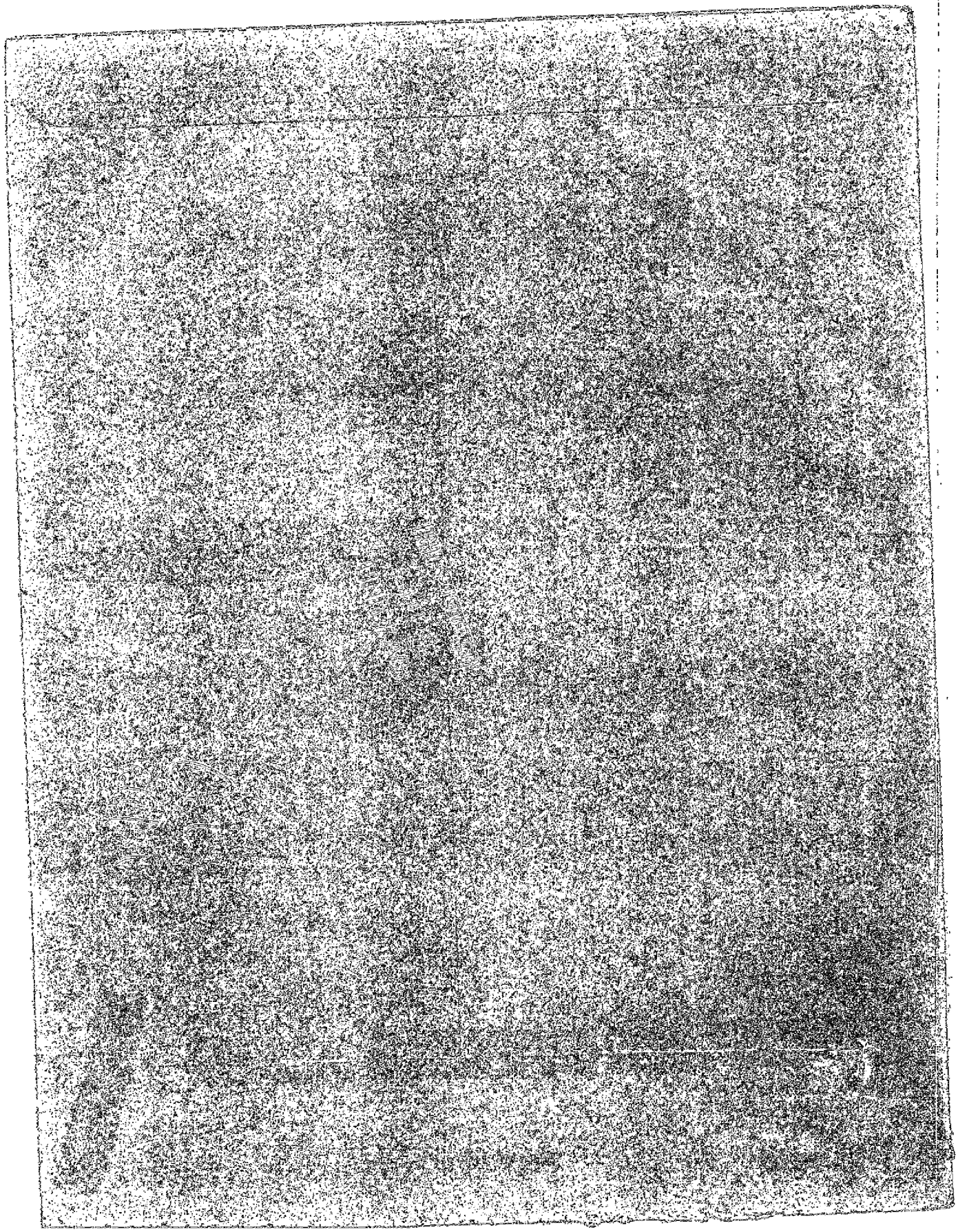
Dennis Grigsby
Signature

6/1/2021
Date

Dennis Grigsby #1033640
Print Name

Petitioner Pro Se
Title


Dennis Grigsby #1033640
P.O. Box 650 [H.D.S.P.]
Indian Springs, NV 89070
USA
FOREVER / USA
FOREVER / USA
FOREVER / USA
FOREVER 7 USA
Las Vegas P&DC 89199
WED 02 JUN 2021 PM
District Court, Clerk
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155
LEGAL MAIL
Confidential



Dennis Grigsby #1033640
Petitioner In Proper Person
P.O. Box 650 H.D.S.P.
Indian Springs, Nevada 89018

Eighth DISTRICT COURT
Clark COUNTY NEVADA

Dennis Marc Grigsby,
Petitioner,
-v-
Calvin Johnson, Warden, et al.,
Respondent,

Case No. A-20-821932-W
Dept.No. XXV
Docket

NOTICE OF APPEAL

Notice is hereby given that the Petitioner, Dennis Marc Grigsby, pro se, by and through himself in proper person, does now appeal to the Supreme Court of the State of Nevada, the decision of the District Court denying Petition for Writ of Habeas Corpus, filed pursuant to NRS 34.360 § 34.370.

Dated this date, June 23, 2021.

Respectfully Submitted,

Dennis Grigsby #1033640

In Proper Person

CERTIFICATE OF SERVICE BY MAILING

I, Dennis Marc Grigsby, hereby certify, pursuant to NRCP 5(b), that on this 23 day of June, 2021, I mailed a true and correct copy of the foregoing, "Notice of Appeal"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Nevada Supreme Court
Office of the Clerk
201 South Carson St., #201
Carson City, NV 89701-4702

DATED: this 23 day of June, 2021.

Dennis Grigsby
Dennis Grigsby, #1038640
Petitioner /In Propria Persona
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018

cc: File
DOC 589# 2412700

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Notice of Appeal
(Title of Document)

filed in District Court Case number A-20-821932-W

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Dennis Grigsby
Signature

6/23/2021
Date

Dennis Grigsby
Print Name

Petitioner Pro Se
Title

Dennis Grigsby #1033640
P.O. Box 650
Indian Springs, NV 89070

LAS VEGAS NV 890
24 JUN 2021 PM 5 L

8th Judicial District Court
Clerk of the Court
200 Lewis Ave., 3rd Fl.
Las Vegas, NV 89155

Legal Mail
Confidential 3762
Doc 509 # 2412700

89101-630000

ASTA

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

DENNIS MARC GRIGSBY,

Plaintiff(s),

vs.

CALVIN JOHNSON, WARDEN,

Defendant(s),

Case No: A-20-821932-W

Dept No: XXV

CASE APPEAL STATEMENT

1. Appellant(s): Dennis Grigsby

2. Judge: Kathleen E. Delaney

3. Appellant(s): Dennis Grigsby

Counsel:

Dennis Grigsby #1033640
P.O. Box 650
Indian Springs, NV 89070

4. Respondent (s): Calvin Johnson, Warden

Counsel:

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

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
**Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: Yes,
Date Application(s) filed: September 25, 2020

9. Date Commenced in District Court: September 25, 2020

10. Brief Description of the Nature of the Action: Civil Writ

Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 30 day of June 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Dennis Grigsby

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS MARC GRIGSBY,
#1813660

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-821932-W
08C246709

DEPT NO: XXV

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: JUNE 16, 2021
TIME OF HEARING: 3:00 P.M.

THIS CAUSE having come on for hearing before the Honorable CAROLYN ELLSWORTH, District Judge, on the 16th day of June, 2021, the Petitioner not being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through NICOLE CANNIZZARO, Chief Deputy District Attorney, and the Court, without hearing oral argument, having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

On August 11, 2008, Dennis Marc Grigsby (hereinafter "Petitioner") was charged by way of Information with one count of Murder with Use of a Deadly Weapon and one count of Possession of a Firearm by Ex-Felon. On January 26, 2009, prior to the commencement of trial, the State filed an Amended Information wherein it removed the charge of Possession of a Firearm by a Felon. Petitioner's jury trial commenced on January 26, 2009. On February 4, 2009, the jury found Petitioner guilty of First Degree Murder with Use of a Deadly Weapon. Immediately following the jury's verdict, the State filed a Second Amended Information wherein it again charged Petitioner with Possession of a Firearm by Ex-Felon.[1] The jury reconvened and found Petitioner guilty of Possession of Firearm by Ex-Felon. At the penalty phase on February 5, 2009, the jury set Petitioner's penalty as Life in prison without the possibility of parole.

On March 19, 2009, the Court sentenced Petitioner as follows: pursuant to the jury verdict, to Life without the possibility of parole for the charge of First Degree Murder with A Deadly Weapon, with a consecutive term of sixty (60) to two-hundred forty (240) months in the Nevada Department of Corrections (hereinafter "NDC") for the deadly weapon enhancement. On the charge of Possession of Firearm by Ex-Felon, Petitioner was sentenced to sixteen (16) to seventy-two (72) months in the NDC, to run concurrent to his sentence on the murder charge. The Judgment of Conviction was filed on April 6, 2009.

On April 14, 2009, Petitioner filed a Notice of Appeal. On September 14, 2011, the Nevada Supreme Court affirmed the Judgment of Conviction, and Remittitur issued October 10, 2011.

On January 20, 2012, Petitioner filed three (3) documents: a Proper Person Petition for Writ of Habeas Corpus; a Motion for Leave to Proceed in Forma Pauperis; and a Motion for the Appointment of Counsel and Request for Evidentiary Hearing. On March 7, 2012, the State filed a Response to Petitioner's Petition. On March 12, 2012, the Court granted Petitioner's Motion to Appoint Counsel. Karen Connelly, Esq. confirmed as Petitioner's

[1] The Second Amended Information reflects both counts as follows: COUNT 1 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165) and COUNT 2 – Possession of a Firearm by Ex-Felon (Felony – NRS 202.360).

first counsel on March 21, 2012. Less than one month later, on April 18, 2012, Ms. Connelly withdrew as counsel and Terrence Jackson, Esq. confirmed as Petitioner's second counsel. On November 29, 2012, Petitioner, through Mr. Jackson, filed a Supplement to his Petition. The State filed a Response on February 6, 2013. Petitioner filed a Reply on March 5, 2013.

On January 2, 2013, Petitioner filed a Pro Per Motion to Dismiss Counsel. The State filed an Opposition on January 18, 2013. On January 28, 2013, Petitioner's Motion was denied. On March 8, 2013, Petitioner filed a second Motion to Dismiss Counsel. On March 11, 2013, Mr. Jackson joined in Petitioner's motion, citing irreconcilable differences. The State took no position on these motions. On April 1, 2013, the court granted the motion.

On April 2, 2013, Petitioner filed a First Amended Proper Person Petition for Writ of Habeas Corpus. On April 11, 2013, he filed a Supplemental Points and Authorities in Support of First Amended Pro Per Petition for Writ of Habeas Corpus. On April 24, 2013, he filed a Second Amended Pro Per Petition for Writ of Habeas Corpus. The State filed a Response on May 7, 2013. On May 15, 2013, the district court granted Petitioner' request for an Evidentiary Hearing regarding his Petition and set an Evidentiary Hearing for August 16, 2013.

On May 20, 2013, Petitioner filed a document entitled Motion to Appoint Counsel Upon Grant of an Evidentiary Hearing. On June 4, 2013, the State filed a Response. On June 10, 2013, the Court granted Petitioner's motion but noted that he previously had counsel and requested that his previous counsel withdraw. On June 17, 2013, Carmine Colucci, Esq. confirmed as counsel. However, due to a conflict between Petitioner and Mr. Colucci, Tom Ericsson, Esq. subsequently confirmed as Petitioner's third counsel on June 26, 2013. On June 26, 2013, the State requested that Petitioner file a superseding brief to encompass all of the issues due to the numerous supplemental briefs filed in the instant case. At a status check on August 7, 2013, the Evidentiary Hearing set for August 16, 2013 was vacated as defense counsel needed additional time.

On December 11, 2013, Brent Bryson, Esq. filed a Motion to Associate Counsel, seeking to allow Chandler Parker, Esq. to practice pro hac vice for purposes of assisting Petitioner with his Petition. On February 6, 2014, a Stipulation to Continue Supplemental Briefing Schedule and Argument was filed delineating a new briefing schedule. The Evidentiary Hearing was subsequently reset for September 10, 2014. Despite having counsel, on February 13, 2014, Petitioner filed, in proper person, his Third Amended Petition for Writ of Habeas Corpus for Post-Conviction Relief and a separate document consisting of Exhibits in support of his Third Amended Pro Per Petition for Writ of Habeas Corpus for Post-Conviction Relief. On the same date, Petitioner filed a proper person Motion to Withdraw Counsel of Record, seeking the withdrawal of his third counsel, Mr. Ericsson. On March 5, 2014, Petitioner filed a document entitled Judicial Notice and Supplement to Supplemental Exhibits in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus.

On March 10, 2014, at the hearing on Petitioner's Motion to Withdraw Counsel of Record, Mr. Ericsson represented that he had previously been contacted by an attorney in California who had been hired to represent Petitioner. Accordingly, Petitioner's Motion to Withdraw Counsel of Record was granted and Mr. Bryson's Motion to Associate Counsel was set for March 24, 2014.[2] On March 24, 2014, the Motion to Associate Counsel was granted, and Petitioner received his fourth counsel.

Again, despite having counsel, on March 27, 2014, Petitioner filed a proper person document entitled Supplemental Points and Authorities in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus. On April 2, 2014, Mr. Bryson filed a Motion to Withdraw as Local Counsel of Record in which Mr. Bryson represented that Petitioner had terminated Mr. Chandler's representation. On April 7, 2013, Mr. Bryson's motion was granted and Dayvid Figler, Esq. confirmed as Petitioner's fifth counsel.

[2] On March 27, 2014, Defendant filed a Motion to Withdraw Counsel (Second Request) again seeking the withdrawal of Mr. Ericcson. This motion was later vacated as moot.

Though he had counsel, on April 17, 2014, Petitioner filed a document entitled Judicial Notice in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus for Post-Conviction.

On May 13, 2014, Petitioner filed a Motion to Withdraw Counsel of Record and Proceed in Proper Person. On May 30, 2014, the State filed its Response. The State took no position as to Petitioner's motion but in the event the Court was inclined to grant his motion, the State requested that the Court conduct a Faretta[3] canvass. On June 4, 2014, a hearing was held on Petitioner's motion. Petitioner and his counsel Mr. Figler were present at the hearing. Following statements by counsel and a colloquy with Petitioner, his Motion to Withdraw Counsel of Record and Proceed in Proper Person was denied.

On July 11, 2014, Petitioner filed a Motion to Self-Represent with Stand-by Counsel. The State filed its Opposition on July 30, 2014. On August 6, 2014, Petitioner informed the Court that he wished to represent himself. He also informed the Court that he was prepared to continue with preparing a superseding petition to replace the numerous prior petitions, supplements, and amended petitions. The Court granted his motion in part, allowing Petitioner to represent himself, but declining to appoint a sixth counsel as stand-by counsel.

On December 3, 2014, Petitioner filed his Superseding Post-Conviction Proper Person Petition for Writ of Habeas Corpus and a document entitled "Judicial Notice of Reporter's Transcript's and Exhibit's in Support of Superseding Pro Per Petition for Writ of Habeas Corpus." On March 4, 2015, the State responded to the Petitioner's Proper Person Petition for Writ of Habeas Corpus. Petitioner then filed a Reply to the State's Response on April 6, 2015. On May 27, 2015, this Court denied both Petitioner's Proper Person Petition for Writ of Habeas Corpus and his Reply. The Findings of Fact, Conclusions of Law and Order was entered on July 30, 2015.

Petitioner filed a Notice of Appeal on September 8, 2015. On June 17, 2016, the Judgment of Conviction was affirmed and Remittitur issued on October 19, 2016.

[3] 422 U.S. 806, 95 S. Ct. 2525 (1975).

On August 20, 2015, Petitioner filed a pro per Motion for Reconsideration. The State filed its Response on September 25, 2015. Petitioner filed a Reply to the State's Response on October 20, 2015. On February 10, 2016, this Court granted Petitioner's Motion and set the matter for Evidentiary Hearing on Grounds 1-4 of the Superseding Petition, despite this Court's previous Findings of Fact, Conclusions of Law and Order, and the pending appeal which divested the district court of jurisdiction.

On February 22, 2016, Defendant filed a Motion for Appointment of Evidentiary Hearing Counsel. The State filed its Opposition on March 7, 2016. On March 14, 2016, the Court denied Petitioner's motion. The Order Denying Petitioner's Motion for Appointment of Evidentiary Hearing Counsel was filed on April 22, 2016.

On May 13, 2016, Jonathan MacArthur, Esq. made a special appearance on behalf of Petitioner, who indicated a desire to retain Mr. MacArthur. Mr. MacArthur advised he was not prepared to go forward on that date due to scheduling conflicts and requested the matter be continued. The Court granted his request to continue the Evidentiary Hearing. On July 21, 2016, the Court had received the June 17, 2016 Order of Affirmance from the Nevada Supreme Court affirming its July 30, 2015 Findings of Fact, Conclusions of Law and Order. The Court found that it did not have jurisdiction after the appeal was filed, the Nevada Supreme Court was never divested of its jurisdiction, and the Court was precluded from proceeding at this time. The Court took the matter off calendar as moot. On January 24, 2017, Petitioner filed a Motion to Withdraw Counsel Jonathan MacArthur, Esq. which was granted on February 27, 2017.

On September 25, 2020, Petitioner filed the instant second Petition for Writ of Habeas Corpus (hereinafter "Second Petition"), Motion for Appointment of Counsel and Request for Evidentiary Hearing. The State filed its Response on April 30, 2021. Following a hearing on June 16, 2021, this Court finds and concludes as follows:

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CONCLUSIONS OF LAW

I. THIS SECOND PETITION IS TIME-BARRED

Petitioner's instant Second Petition for Writ of Habeas Corpus was not filed within one year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to NRS 34.726(1):

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

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

In the instant case, Petitioner filed a direct appeal, and Remittitur issued on October 10, 2011. Petitioner filed the instant Petition on September 25, 2020—almost nine (9) years after the Remittitur issued. Thus, the instant second Petition is time-barred. Absent a showing of good cause to excuse this delay, the instant Petition is dismissed.

II. THIS SECOND PETITION IS BARRED AS SUCCESSIVE

NRS 34.810(2) reads:

> A second or successive petition *must be dismissed* if the judge or justice determines that it fails to allege new or different grounds

> for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, as discussed supra, Section I., this is Petitioner's second Post-Conviction Petition. Petitioner did not raise this claim on direct appeal or in his first Petition. He only raises it for the first time now, nine (9) years later. Accordingly, this second Petition is an abuse of the writ, procedurally barred, and therefore, is dismissed.

III. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, application of the procedural bars is mandatory.

IV. THE STATE AFFIRMATIVELY PLEADS LACHES

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in

seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

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

The State affirmatively pleads laches in this case given that almost nine (9) years has elapsed between the issuing of Remittitur and the filing of the second Petition. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden.

As discussed supra, Section I., the one-year time bar began to run from the date the of the Remittitur on October 10, 2011. The second Petition was filed on September 25, 2020 – *almost nine (9) years* later. Because more than nine (9) years have elapsed between the Remittitur and the filing of the instant second Petition, NRS 34.800 directly applies in this case, and a presumption of prejudice to the State arises. Therefore, pursuant to NRS 34.800, this second Petition is dismissed under the doctrine of laches.

V. PETITIONER CANNOT ESTABLISH GOOD CAUSE TO OVERCOME THE MANDATORY PROCEDURAL BARS

A showing of good cause and prejudice may overcome procedural bars. However, Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

In the instant case, Petitioner cannot demonstrate good cause to overcome the mandatory procedural bars because he cannot demonstrate that this claim was not reasonably available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner's one and only claim is that there was an illegal verdict because there was a "jury poll" error, and that the verdict was not unanimous because only ten of the twelve voted for guilt. Second Petition, at 4-6. While Petitioner alleges his claim was not available until the trial transcript

was filed on August 15, 2012, he does not explain why he did not raise this claim in his first Petition. Petitioner was litigating his first Petition from January 20, 2012 when he first filed up until July 30, 2015 when the Findings of Fact, Conclusions of Law and Order was filed. Petitioner also fails to explain why, if he learned about this claim on August 15, 2012, he failed to raise it for over eight (8) years before filing the instant second Petition. Therefore, Petitioner cannot establish good cause to explain why his Petition was untimely, and the Petition is denied as time barred.

VI. PETITIONER'S CLAIMS ARE WAIVED FOR FAILING TO BE RAISED ON DIRECT APPEAL

Petitioner's only claim is that the jury verdict is illegal because it was not a unanimous verdict. Petition, at 8-10. Pursuant to NRS 34.810:

> 1. The court shall dismiss a petition if the court determines that:
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.
> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
> (b) Actual prejudice to the petitioner.
> The petitioner shall include in the petition all prior proceedings in which the petitioner challenged the same conviction or sentence.
> 4. The court may dismiss a petition that fails to include any prior proceedings of which the court has knowledge through the record of the court or through the pleadings submitted by the respondent.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Furthermore, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Here, as discussed supra, Section V., Petitioner cannot establish good cause to escape the procedural defaults of this claim. Even so, the claim itself is not just time-barred, but is a substantive claim that goes beyond the scope of a habeas petition. Petitioner claims this claim became available in 2012—but fails to explain why he is raising it now in 2021. Thus, this claim is dismissed.

VII. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Whitley, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not

guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

Petitioner claims he needs counsel because the issues are complex, and he is unable to "argue orally." Motion for Appointment of Counsel, at 2. However, under NRS 34.750(1), the instant second Petition should be dismissed summarily without the appointment of counsel. Further, the NRS 34.750(1)(a)-(c) factors do not warrant Petitioner appointment of counsel because he does not specifically indicate what he needs counsel to investigate, or what exactly he needs counsel for in these post-conviction proceedings. Because no further investigation is required, Petitioner's request for counsel is denied.

VIII. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine

> whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

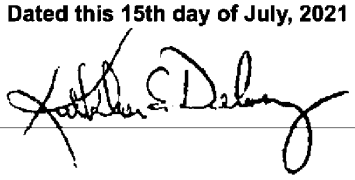
Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994) (emphasis added).

Here, there is no reason to expand the record because Petitioner fails to present specific factual allegations that would entitle him to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605. There is nothing else for an evidentiary hearing to determine. Petitioner's one claim is time barred and outside the scope of a habeas petition. Supra, Section VI. There is no need to expand the record because Petitioner's claims are meritless and can be disposed of on the existing record. Therefore, Petitioner is not entitled to an evidentiary hearing.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief, Motion for Appointment of Counsel and Request for Evidentiary Hearing shall be, and they are, hereby DENIED, and the State's Motion to Dismiss is GRANTED.

For Sr. Judge Carolyn Ellsworth,
Dated this 15th day of July, 2021



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Kathleen E. Delaney
District Court Judge

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

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 1st day of July, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DENNIS GRISBY, #1033640
HIGH DESERT STATE PRISON
PO BOX 650
INDIAN SPRINGS, NV 89018

BY ***/s/ E. Del Padre***
E. DEL PADRE
Secretary for the District Attorney's Office

TP/bs/GCU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Grigsby, Plaintiff(s)	CASE NO: A-20-821932-W
vs.	DEPT. NO. Department 25
Calvin Johnson, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/15/2021

Steven Wolfson	motions@clarkcountyda.com

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 7/16/2021

Dennis Grigsby	#1033640 P.O. Box 650 Indian Springs, NV, 89070

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS GRIGSBY,

Petitioner,

vs.

CALVIN JOHNSON,

Respondent,

Case No: A-20-821932-W

Dept No: XXV

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

PLEASE TAKE NOTICE that on July 15, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on July 19, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 19 day of July 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Dennis Grigsby # 1033640
P.O. Box 650
Indain Springs, NV 89070

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS MARC GRIGSBY,
#1813660

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-821932-W
08C246709

DEPT NO: XXV

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: JUNE 16, 2021
TIME OF HEARING: 3:00 P.M.

THIS CAUSE having come on for hearing before the Honorable CAROLYN ELLSWORTH, District Judge, on the 16th day of June, 2021, the Petitioner not being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through NICOLE CANNIZZARO, Chief Deputy District Attorney, and the Court, without hearing oral argument, having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

On August 11, 2008, Dennis Marc Grigsby (hereinafter "Petitioner") was charged by way of Information with one count of Murder with Use of a Deadly Weapon and one count of Possession of a Firearm by Ex-Felon. On January 26, 2009, prior to the commencement of trial, the State filed an Amended Information wherein it removed the charge of Possession of a Firearm by a Felon. Petitioner's jury trial commenced on January 26, 2009. On February 4, 2009, the jury found Petitioner guilty of First Degree Murder with Use of a Deadly Weapon. Immediately following the jury's verdict, the State filed a Second Amended Information wherein it again charged Petitioner with Possession of a Firearm by Ex-Felon.[1] The jury reconvened and found Petitioner guilty of Possession of Firearm by Ex-Felon. At the penalty phase on February 5, 2009, the jury set Petitioner's penalty as Life in prison without the possibility of parole.

On March 19, 2009, the Court sentenced Petitioner as follows: pursuant to the jury verdict, to Life without the possibility of parole for the charge of First Degree Murder with A Deadly Weapon, with a consecutive term of sixty (60) to two-hundred forty (240) months in the Nevada Department of Corrections (hereinafter "NDC") for the deadly weapon enhancement. On the charge of Possession of Firearm by Ex-Felon, Petitioner was sentenced to sixteen (16) to seventy-two (72) months in the NDC, to run concurrent to his sentence on the murder charge. The Judgment of Conviction was filed on April 6, 2009.

On April 14, 2009, Petitioner filed a Notice of Appeal. On September 14, 2011, the Nevada Supreme Court affirmed the Judgment of Conviction, and Remittitur issued October 10, 2011.

On January 20, 2012, Petitioner filed three (3) documents: a Proper Person Petition for Writ of Habeas Corpus; a Motion for Leave to Proceed in Forma Pauperis; and a Motion for the Appointment of Counsel and Request for Evidentiary Hearing. On March 7, 2012, the State filed a Response to Petitioner's Petition. On March 12, 2012, the Court granted Petitioner's Motion to Appoint Counsel. Karen Connelly, Esq. confirmed as Petitioner's

[1] The Second Amended Information reflects both counts as follows: COUNT 1 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165) and COUNT 2 – Possession of a Firearm by Ex-Felon (Felony – NRS 202.360).

first counsel on March 21, 2012. Less than one month later, on April 18, 2012, Ms. Connelly withdrew as counsel and Terrence Jackson, Esq. confirmed as Petitioner's second counsel. On November 29, 2012, Petitioner, through Mr. Jackson, filed a Supplement to his Petition. The State filed a Response on February 6, 2013. Petitioner filed a Reply on March 5, 2013.

On January 2, 2013, Petitioner filed a Pro Per Motion to Dismiss Counsel. The State filed an Opposition on January 18, 2013. On January 28, 2013, Petitioner's Motion was denied. On March 8, 2013, Petitioner filed a second Motion to Dismiss Counsel. On March 11, 2013, Mr. Jackson joined in Petitioner's motion, citing irreconcilable differences. The State took no position on these motions. On April 1, 2013, the court granted the motion.

On April 2, 2013, Petitioner filed a First Amended Proper Person Petition for Writ of Habeas Corpus. On April 11, 2013, he filed a Supplemental Points and Authorities in Support of First Amended Pro Per Petition for Writ of Habeas Corpus. On April 24, 2013, he filed a Second Amended Pro Per Petition for Writ of Habeas Corpus. The State filed a Response on May 7, 2013. On May 15, 2013, the district court granted Petitioner' request for an Evidentiary Hearing regarding his Petition and set an Evidentiary Hearing for August 16, 2013.

On May 20, 2013, Petitioner filed a document entitled Motion to Appoint Counsel Upon Grant of an Evidentiary Hearing. On June 4, 2013, the State filed a Response. On June 10, 2013, the Court granted Petitioner's motion but noted that he previously had counsel and requested that his previous counsel withdraw. On June 17, 2013, Carmine Colucci, Esq. confirmed as counsel. However, due to a conflict between Petitioner and Mr. Colucci, Tom Ericsson, Esq. subsequently confirmed as Petitioner's third counsel on June 26, 2013. On June 26, 2013, the State requested that Petitioner file a superseding brief to encompass all of the issues due to the numerous supplemental briefs filed in the instant case. At a status check on August 7, 2013, the Evidentiary Hearing set for August 16, 2013 was vacated as defense counsel needed additional time.

On December 11, 2013, Brent Bryson, Esq. filed a Motion to Associate Counsel, seeking to allow Chandler Parker, Esq. to practice pro hac vice for purposes of assisting Petitioner with his Petition. On February 6, 2014, a Stipulation to Continue Supplemental Briefing Schedule and Argument was filed delineating a new briefing schedule. The Evidentiary Hearing was subsequently reset for September 10, 2014. Despite having counsel, on February 13, 2014, Petitioner filed, in proper person, his Third Amended Petition for Writ of Habeas Corpus for Post-Conviction Relief and a separate document consisting of Exhibits in support of his Third Amended Pro Per Petition for Writ of Habeas Corpus for Post-Conviction Relief. On the same date, Petitioner filed a proper person Motion to Withdraw Counsel of Record, seeking the withdrawal of his third counsel, Mr. Ericsson. On March 5, 2014, Petitioner filed a document entitled Judicial Notice and Supplement to Supplemental Exhibits in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus.

On March 10, 2014, at the hearing on Petitioner's Motion to Withdraw Counsel of Record, Mr. Ericsson represented that he had previously been contacted by an attorney in California who had been hired to represent Petitioner. Accordingly, Petitioner's Motion to Withdraw Counsel of Record was granted and Mr. Bryson's Motion to Associate Counsel was set for March 24, 2014.[2] On March 24, 2014, the Motion to Associate Counsel was granted, and Petitioner received his fourth counsel.

Again, despite having counsel, on March 27, 2014, Petitioner filed a proper person document entitled Supplemental Points and Authorities in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus. On April 2, 2014, Mr. Bryson filed a Motion to Withdraw as Local Counsel of Record in which Mr. Bryson represented that Petitioner had terminated Mr. Chandler's representation. On April 7, 2013, Mr. Bryson's motion was granted and Dayvid Figler, Esq. confirmed as Petitioner's fifth counsel.

[2] On March 27, 2014, Defendant filed a Motion to Withdraw Counsel (Second Request) again seeking the withdrawal of Mr. Ericcson. This motion was later vacated as moot.

Though he had counsel, on April 17, 2014, Petitioner filed a document entitled Judicial Notice in Support of Third Amended Pro Per Petition for Writ of Habeas Corpus for Post-Conviction.

On May 13, 2014, Petitioner filed a Motion to Withdraw Counsel of Record and Proceed in Proper Person. On May 30, 2014, the State filed its Response. The State took no position as to Petitioner's motion but in the event the Court was inclined to grant his motion, the State requested that the Court conduct a Faretta[3] canvass. On June 4, 2014, a hearing was held on Petitioner's motion. Petitioner and his counsel Mr. Figler were present at the hearing. Following statements by counsel and a colloquy with Petitioner, his Motion to Withdraw Counsel of Record and Proceed in Proper Person was denied.

On July 11, 2014, Petitioner filed a Motion to Self-Represent with Stand-by Counsel. The State filed its Opposition on July 30, 2014. On August 6, 2014, Petitioner informed the Court that he wished to represent himself. He also informed the Court that he was prepared to continue with preparing a superseding petition to replace the numerous prior petitions, supplements, and amended petitions. The Court granted his motion in part, allowing Petitioner to represent himself, but declining to appoint a sixth counsel as stand-by counsel.

On December 3, 2014, Petitioner filed his Superseding Post-Conviction Proper Person Petition for Writ of Habeas Corpus and a document entitled "Judicial Notice of Reporter's Transcript's and Exhibit's in Support of Superseding Pro Per Petition for Writ of Habeas Corpus." On March 4, 2015, the State responded to the Petitioner's Proper Person Petition for Writ of Habeas Corpus. Petitioner then filed a Reply to the State's Response on April 6, 2015. On May 27, 2015, this Court denied both Petitioner's Proper Person Petition for Writ of Habeas Corpus and his Reply. The Findings of Fact, Conclusions of Law and Order was entered on July 30, 2015.

Petitioner filed a Notice of Appeal on September 8, 2015. On June 17, 2016, the Judgment of Conviction was affirmed and Remittitur issued on October 19, 2016.

[3] 422 U.S. 806, 95 S. Ct. 2525 (1975).

On August 20, 2015, Petitioner filed a pro per Motion for Reconsideration. The State filed its Response on September 25, 2015. Petitioner filed a Reply to the State's Response on October 20, 2015. On February 10, 2016, this Court granted Petitioner's Motion and set the matter for Evidentiary Hearing on Grounds 1-4 of the Superseding Petition, despite this Court's previous Findings of Fact, Conclusions of Law and Order, and the pending appeal which divested the district court of jurisdiction.

On February 22, 2016, Defendant filed a Motion for Appointment of Evidentiary Hearing Counsel. The State filed its Opposition on March 7, 2016. On March 14, 2016, the Court denied Petitioner's motion. The Order Denying Petitioner's Motion for Appointment of Evidentiary Hearing Counsel was filed on April 22, 2016.

On May 13, 2016, Jonathan MacArthur, Esq. made a special appearance on behalf of Petitioner, who indicated a desire to retain Mr. MacArthur. Mr. MacArthur advised he was not prepared to go forward on that date due to scheduling conflicts and requested the matter be continued. The Court granted his request to continue the Evidentiary Hearing. On July 21, 2016, the Court had received the June 17, 2016 Order of Affirmance from the Nevada Supreme Court affirming its July 30, 2015 Findings of Fact, Conclusions of Law and Order. The Court found that it did not have jurisdiction after the appeal was filed, the Nevada Supreme Court was never divested of its jurisdiction, and the Court was precluded from proceeding at this time. The Court took the matter off calendar as moot. On January 24, 2017, Petitioner filed a Motion to Withdraw Counsel Jonathan MacArthur, Esq. which was granted on February 27, 2017.

On September 25, 2020, Petitioner filed the instant second Petition for Writ of Habeas Corpus (hereinafter "Second Petition"), Motion for Appointment of Counsel and Request for Evidentiary Hearing. The State filed its Response on April 30, 2021. Following a hearing on June 16, 2021, this Court finds and concludes as follows:

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CONCLUSIONS OF LAW

I. THIS SECOND PETITION IS TIME-BARRED

Petitioner's instant Second Petition for Writ of Habeas Corpus was not filed within one year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to NRS 34.726(1):

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

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

In the instant case, Petitioner filed a direct appeal, and Remittitur issued on October 10, 2011. Petitioner filed the instant Petition on September 25, 2020—almost nine (9) years after the Remittitur issued. Thus, the instant second Petition is time-barred. Absent a showing of good cause to excuse this delay, the instant Petition is dismissed.

II. THIS SECOND PETITION IS BARRED AS SUCCESSIVE

NRS 34.810(2) reads:

> A second or successive petition *must be dismissed* if the judge or justice determines that it fails to allege new or different grounds

> for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, as discussed supra, Section I., this is Petitioner's second Post-Conviction Petition. Petitioner did not raise this claim on direct appeal or in his first Petition. He only raises it for the first time now, nine (9) years later. Accordingly, this second Petition is an abuse of the writ, procedurally barred, and therefore, is dismissed.

III. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, application of the procedural bars is mandatory.

IV. THE STATE AFFIRMATIVELY PLEADS LACHES

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in

seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

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

The State affirmatively pleads laches in this case given that almost nine (9) years has elapsed between the issuing of Remittitur and the filing of the second Petition. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden.

As discussed supra, Section I., the one-year time bar began to run from the date the of the Remittitur on October 10, 2011. The second Petition was filed on September 25, 2020 – *almost nine (9) years* later. Because more than nine (9) years have elapsed between the Remittitur and the filing of the instant second Petition, NRS 34.800 directly applies in this case, and a presumption of prejudice to the State arises. Therefore, pursuant to NRS 34.800, this second Petition is dismissed under the doctrine of laches.

V. PETITIONER CANNOT ESTABLISH GOOD CAUSE TO OVERCOME THE MANDATORY PROCEDURAL BARS

A showing of good cause and prejudice may overcome procedural bars. However, Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

In the instant case, Petitioner cannot demonstrate good cause to overcome the mandatory procedural bars because he cannot demonstrate that this claim was not reasonably available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner's one and only claim is that there was an illegal verdict because there was a "jury poll" error, and that the verdict was not unanimous because only ten of the twelve voted for guilt. Second Petition, at 4-6. While Petitioner alleges his claim was not available until the trial transcript

was filed on August 15, 2012, he does not explain why he did not raise this claim in his first Petition. Petitioner was litigating his first Petition from January 20, 2012 when he first filed up until July 30, 2015 when the Findings of Fact, Conclusions of Law and Order was filed. Petitioner also fails to explain why, if he learned about this claim on August 15, 2012, he failed to raise it for over eight (8) years before filing the instant second Petition. Therefore, Petitioner cannot establish good cause to explain why his Petition was untimely, and the Petition is denied as time barred.

VI. PETITIONER'S CLAIMS ARE WAIVED FOR FAILING TO BE RAISED ON DIRECT APPEAL

Petitioner's only claim is that the jury verdict is illegal because it was not a unanimous verdict. Petition, at 8-10. Pursuant to NRS 34.810:

> 1. The court shall dismiss a petition if the court determines that:
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.
> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
> (b) Actual prejudice to the petitioner.
> The petitioner shall include in the petition all prior proceedings in which the petitioner challenged the same conviction or sentence.
> 4. The court may dismiss a petition that fails to include any prior proceedings of which the court has knowledge through the record of the court or through the pleadings submitted by the respondent.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Furthermore, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Here, as discussed supra, Section V., Petitioner cannot establish good cause to escape the procedural defaults of this claim. Even so, the claim itself is not just time-barred, but is a substantive claim that goes beyond the scope of a habeas petition. Petitioner claims this claim became available in 2012—but fails to explain why he is raising it now in 2021. Thus, this claim is dismissed.

VII. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Whitley, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not

guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

Petitioner claims he needs counsel because the issues are complex, and he is unable to "argue orally." Motion for Appointment of Counsel, at 2. However, under NRS 34.750(1), the instant second Petition should be dismissed summarily without the appointment of counsel. Further, the NRS 34.750(1)(a)-(c) factors do not warrant Petitioner appointment of counsel because he does not specifically indicate what he needs counsel to investigate, or what exactly he needs counsel for in these post-conviction proceedings. Because no further investigation is required, Petitioner's request for counsel is denied.

VIII. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine

> whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

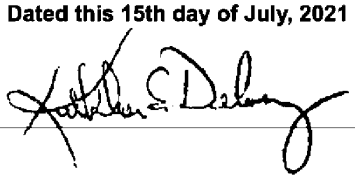
Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994) (emphasis added).

Here, there is no reason to expand the record because Petitioner fails to present specific factual allegations that would entitle him to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605. There is nothing else for an evidentiary hearing to determine. Petitioner's one claim is time barred and outside the scope of a habeas petition. Supra, Section VI. There is no need to expand the record because Petitioner's claims are meritless and can be disposed of on the existing record. Therefore, Petitioner is not entitled to an evidentiary hearing.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief, Motion for Appointment of Counsel and Request for Evidentiary Hearing shall be, and they are, hereby DENIED, and the State's Motion to Dismiss is GRANTED.

For Sr. Judge Carolyn Ellsworth,
Dated this 15th day of July, 2021



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Kathleen E. Delaney
District Court Judge

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

BY ***/s/ Taleen Pandukht***
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 1st day of July, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DENNIS GRISBY, #1033640
HIGH DESERT STATE PRISON
PO BOX 650
INDIAN SPRINGS, NV 89018

BY ***/s/ E. Del Padre***
E. DEL PADRE
Secretary for the District Attorney's Office

TP/bs/GCU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Dennis Grigsby, Plaintiff(s)	CASE NO: A-20-821932-W
vs.	DEPT. NO. Department 25
Calvin Johnson, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/15/2021

Steven Wolfson	motions@clarkcountyda.com

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 7/16/2021

Dennis Grigsby	#1033640 P.O. Box 650 Indian Springs, NV, 89070

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**March 18, 2021**

A-20-821932-W Dennis Grigsby, Plaintiff(s)
vs.
Calvin Johnson, Defendant(s)

March 18, 2021	**7:15 AM**	**Minute Order**	**Minute Order Re-Setting Hearings**

HEARD BY: Delaney, Kathleen E. **COURTROOM:** Chambers

COURT CLERK: April Watkins

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Pro Se Petitioner having filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Habeas Petition) and a Motion for Appointment of Habeas Corpus Counsel (Motion for Appointment of Counsel) on September 25, 2020; the Court having entered its Order for Petition for Writ of Habeas Corpus on January 5, 2021 and therein set the hearing on the Habeas Petition on March 24, 2021; it coming to the Court s attention thereafter that the State was not properly served with the Habeas Petition or the Court s Order as they were not yet registered for electronic filing in the case; and good cause appearing, COURT ORDERED the Habeas Petition re-set and the Motion for Appointment of Counsel set for Wednesday, June 16, 2021 at 9:00 a.m. (time subject to change).

COURT FURTHER ORDERED the following briefing schedule: State s Response to the Habeas Petition and Motion for Appointment of Counsel due Friday, April 30, 2021, and Petitioner s Reply to the State s Response, if any, due Friday, June 4, 2021.

CLERK'S NOTE: A copy of this minute order was emailed to Chief Deputy District Attorney, Taleen Pandukht (taleen.pandukht@clarkcountyda.com), attorney of record for the State, and mailed to Pro Se Petitioner, Dennis Grisgby (#1033640, HDSP, P.O. Box 650, Indian Springs, NV 89070).

DISTRICT COURT

CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**June 16, 2021**

A-20-821932-W Dennis Grigsby, Plaintiff(s)
vs.
Calvin Johnson, Defendant(s)

June 16, 2021 **3:00 PM** **All Pending Motions**

HEARD BY: Ellsworth, Carolyn **COURTROOM:** RJC Courtroom 15B

COURT CLERK: April Watkins

RECORDER:

REPORTER: Dana J. Tavaglione

PARTIES PRESENT: Cannizzaro, Nicole J. Attorney

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS...MOTION FOR APPOINTMENT OF HABEAS CORPUS COUNSEL

Court FINDS petition is time barred and barred because it exceeds the one year requirement as well as it is filed in excess of five years and State has affirmatively plead laches. It is also a successive petition which raises an issue that could of been raised previously but was not raised and amounts to abuse of the writ process. Therefore, COURT ORDERED, State's Motion to Dismiss GRANTED and petition DENIED. For that reason, the Motion for Appointment of Counsel is likewise DENIED. State to prepare findings of fact and conclusions of law.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Dennis Grigsby #1033640, H.D.S.P., P.O. Box 650, Indian Springs, NV 89070. aw

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated July 28, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 206.

DENNIS MARC GRIGSBY,

Plaintiff(s),

vs.

CALVIN JOHNSON, WARDEN,

Defendant(s),

Case No: A-20-821932-W

Dept. No: XXV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 9 day of August 2021.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk