IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 82798

TROY WHITE

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from the denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Ronald Israel, District Court Judge
District Court Case Nos. C-12-286357-1

APPELLANT'S OPENING BRIEF

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I. NRAP 26.1 DISCLOSURE

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

NONE

Attorney of Record for Troy White:

/s/ Christopher R. Oram

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IV. JURISDICTIONAL STATEMENT

On April 24, 2018, Appellant Mr. White filed a Petition for Writ of Habeas Corpus (Post-Conviction), and filed a corresponding Supplemental Brief on December 20, 2018. The parties briefed the issues, and the District Court held an evidentiary hearing. On April 13, 2021, the District Court filed its Findings of Fact, Conclusions of Law, and Order denying Mr. White's claims. Mr. White filed a timely Notice of Appeal on April 16, 2021.

This Court has jurisdiction over the District Court's denial of the post-conviction claims under NRS 34.575.

V. ROUTING STATEMENT

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

VI. STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion by not finding Trial Counsel ineffective for failing to conduct a proper forensic investigation and analysis on Mr. White's cellular phone.

2. Whether the District Court abused its discretion by not finding Trial Counsel and Appellate Counsel ineffective for failing to object to the State's insinuation of prior unknown acts of domestic violence.

3. Whether the District Court abused its discretion by not finding Trial Counsel ineffective for failing to ensure the police obtained a warrant to conduct forensic analysis on the phone attributed to Echo Lucas in violation of the Sixth, Fourth, and Fourteenth Amendments to the United States Constitution.

4. Whether the District Court abused its discretion by not finding that Mr. White received ineffective assistance of Trial and Appellate Counsel for failure to object and raise on appeal improper prosecutorial misconduct.

5. Whether the District Court abused its discretion by not finding that Mr. White received ineffective assistance of Trial and Appellate Counsel for failure to object and raise on appeal the District Court's giving of Instruction Numbers 18 and 28 in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

6. Whether the District Court erred by not reversing Mr. White's conviction based upon cumulative error.

7. Whether the District Court erred by not allowing Mr. White to address all of his issues during the evidentiary hearing.

VII. STATEMENT OF THE CASE

TRIAL PROCEEDINGS

On December 27, 2012, the State charged Mr. White with the following: Count 1- burglary while in possession of a firearm; Count 2- murder with use of a Deadly Weapon; Count 3- attempt murder with use of a deadly weapon; Count 4- carrying a concealed firearm or other deadly weapon; and Counts 5 through 9- child abuse, neglect, or endangerment. (A.A. Vol. 1, pg. 1-5). The State filed an Amended Information on March 24, 2015, removing the burglary count and charging an additional count of child abuse, neglect, or endangerment (A.A. Vol. 1, pg. 21-24). On April 6, 2015, the State filed a Second Amended Information that amended the text of the document, but not the substance. (A.A. Vol. 2, pg. 264-267).

Mr. White's jury trial began before the Honorable Elizabeth Gonzalez on April 6, 2015. The trial concluded on April 17, 2015. The jury found Mr. White guilty of all counts. (A.A. Vol. 1-2, pg. 29-263).

Mr. White was sentenced on July 20, 2015, as follows: Count 1: Life with parole after a minimum of ten (10) years, plus a consecutive term of one hundred ninety-two (192) months with minimum parole eligibility of seventy-six (76) months for the use of a deadly weapon; Count 2: a maximum of one hundred ninety-two (192) months with a minimum parole eligibility of seventy-six (76) months, plus a consecutive term of one hundred ninety-two (192) months with a minimum parole eligibility of seventy-six (76) months for the use of a deadly weapon; consecutive to Count 1; Count 3: a maximum of forty-eight (48) months with a minimum parole eligibility of nineteen (19) months, concurrent with counts 1 and 2; Count 4: a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, consecutive to counts 1 and 2; Count 5: a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; Count 6: a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; Count 7: a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; Count 8: a maximum of sixty (60) months with a minimum parole

eligibility of twenty-four (24) months, concurrent with all other counts. Mr. White received one thousand eighty-eight days (1,088) days credit for time served.

Mr. White received an aggregate total sentence of life with a minimum of thirty-four (34) years. The District Court filed the Judgment of Conviction on July 24, 2015(A.A. Vol. 10, pg. 1588-1590), and it later filed the Amended Judgment of Conviction on February 5, 2016, striking the aggregated sentence language from the Judgment. (A.A. Vol. 10, pg. 1597-1599).

Mr. White filed a timely Notice of Appeal on August 12, 2015. (A.A. Vol. 10, pg. 1591-1596). This Court affirmed Mr. White's conviction and sentence on April 26, 2017.

POST-CONVICTION PROCEEDINGS

On April 24, 2018, Mr. White filed a timely post-conviction Petition for Writ of Habeas Corpus. (A.A. Vol. 11, pg. 1600-1607). Mr. White filed a Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) on December 20, 2018. (A.A. Vol. 11, pg. 1608-1639). The State opposed Mr. White's Petition and Motion on March 26, 2019. (A.A. Vol. 11, pg. 1640-1665). The District Court held an evidentiary hearing on March 4, 2021, and denied Mr. White's claims. (A.A. Vol. 11, pg. 1770-1784).

The District Court filed the Findings of Fact, Conclusions of Law and Order on April 13, 2021. (A.A. Vol. 11, pg. 1765-1809). The District Court filed the

Notice of Entry of Findings of Fact, Conclusions of Law and Order on April 15, 2021. (A.A. Vol. 11, pg. 1810-1835). Mr. White filed a timely Notice of Appeal on April 16, 2021. (A.A. Vol. 11, pg. 1836-1837).

VIII. STATEMENT OF FACTS

On July 27, 2012, Officer Darren Martine was dispatched to 325 Altamira Road, Clark County, Nevada. (A.A. Vol. 5, pg. 781-782). As Officer Martine approached the residence, he observed some children outside of the residence acting in an extremely "excited manner." (A.A. Vol. 5, pg. 783).

Officers entered the residence and observed a male lying in the master bedroom in obvious physical distress. (A.A. Vol. 6, pg. 786-787). Across the hall, in another room, police located an adult female lying on her back suffering from an apparent gunshot wound. (A.A. Vol. 6, pg. 787). The injured male informed the police that he had been shot by a man named "Troy." (A.A. Vol. 6, pg. 789-791).

The female was identified as Echo Lucas. (A.A. Vol. 5, pg. 693). Dr. Lisa Gavin performed an autopsy on Ms. Lucas and determined the cause of death to be a gunshot wound. (A.A. Vol. 5, pg. 693,708).

At the time of trial, Jayce Gaines was ten years old. Jayce explained that he was at home with his four siblings[1], his mother, and her boyfriend when his father,

[1] Mr. White was the biological father to three of the children (A.A. Vol. 6, pg. 882).

Troy White, entered the residence. (A.A. Vol. 3, pg. 469). According to Jayce, Mr. White entered the residence and asked to speak with Ms. Lucas. Ms. Lucas agreed, and the two went into a craft room where a verbal argument ensued. (A.A. Vol. 3, pg. 470). Jayce testified that Mr. White shot his mother's boyfriend (later identified as Joseph "Joe" Averman) and then shot his mother. (A.A. Vol. 3, pg. 472-474). Jayce testified that his father placed the firearm in the back of his waistband area. (A.A. Vol. 3, pg. 478).

Jodey White, a sibling of Jayce, also testified. Jodey was eleven at the time of trial. (A.A. Vol. 4, pg. 532). Jodey claimed that he and his sibling, Jesse, were throwing objects at Mr. White and attempting to hit him to get him to stop the violence. (A.A. Vol. 4, pg. 554). Jayce testified that he did not throw anything at his father. (A.A. Vol. 4, pg. 515).

Jodey then fled the residence and went to a neighbor's house to get help. (A.A. Vol. 4, pg. 555). The neighbor called 911. (A.A. Vol. 4, pg. 555). Jodey testified that when Mr. White entered the residence, he seemed "mellow." (A.A. Vol. 4, pg. 574). Mr. White had previously stated that he hated Joe because he was cheating with Ms. Lucas. (A.A. Vol. 4, pg. 576). Jodey testified that his father often possessed a gun. (A.A. Vol. 4, pg. 583).

After the shooting, Mr. White left the residence and drove to Yavapai, Arizona, where he turned himself into authorities. (A.A. Vol. 4, pg. 651). Officer

James Jaeger, the first officer to encounter Mr. White, testified that Mr. White surrendered without incident and informed him that a gun and ammunition were located under the spare tire of the vehicle. (A.A. Vol. 5, pg. 724-729). Mr. White also told the officers that he had been involved in a shooting in Las Vegas. (A.A. Vol. 5, pg. 733).

Police also located a backpack with an empty gun holster near the driveway of the residence. (A.A. Vol. 6, pg. 816). Police also located a cell phone near Ms. Lucas that the Las Vegas Metropolitan Police Department digitally analyzed. (A.A. Vol. 6, pg. 820). Detectives learned that Mr. White did not have a permit to carry a concealed weapon. (A.A. Vol. 6, pg. 823-824). Police also learned that Mr. White worked at Yesco. (A.A. Vol. 6, pg. 833).

Weeks before the shooting, Mr. White allegedly posted a quote on his Facebook page that read:

> "Have you heard the quote, 'If you love someone set them free, if they come back their yours, if not they never were'? I like this version instead, 'If you love someone set them free, if they don't come back hunt them down and kill them! ha, ha, ha." (A.A. Vol. 6, pg. 843).

Another statement on the Facebook page read, "The adulterers leave to continue in their sins." (A.A. Vol. 6, pg. 845), as well as "God is really helping me as a testimony. The whore and whoremonger are still alive and I'm not in prison. No joke intended." (A.A. Vol. 6, pg. 845). Mr. White also allegedly wrote "I'm

humiliated that Echo would cheat on me with another backslider from The Potter's House." (A.A. Vol. 6, pg. 846).[2] Mr. White also wrote that he believed Ms. Lucas had been cheating on him for approximately five or six months. (A.A. Vol. 6, pg. 847). Police noted numerous family photographs depicting Mr. White and Ms. Lucas with the children. (A.A. Vol. 6, pg. 852-854). A week after Mr. White posted the statement about hunting down and killing someone, he posted, "My ex said to me, I want it all back, the family, the little things she missed about me and us." (A.A. Vol. 6, pg. 858).

Mr. Michael Montalto worked at Yesco Sign Company. (A.A. Vol. 6, pg. 926). Mr. White had worked at Yesco for approximately five or six years prior to the Incident. (A.A. Vol. 6, pg. 927). Mr. Montalto testified Mr. White worked the 5:00 a.m. to 1:30 p.m. shift. (A.A. Vol. 6, pg. 928). In the weeks leading up to the shooting, Mr. White complained that he could not sleep so he would arrive at work early. (A.A. Vol. 6, pg. 928). At approximately 4:30 a.m., on July 27, 2012, Mr. Montalto received a phone call from Mr. White indicating he wanted to arrive early at work so he could get off early. (A.A. Vol. 6, pg. 929). Mr. White allegedly appeared depressed and made a statement that he wanted to "kill them." (A.A. Vol. 6, pg. 932). Mr. Montalto testified that Mr. White lived with a friend after having

[2] The Potter's House is a church in Las Vegas where Mr. White and Ms. Lucas met and attended services.

left his marital home. (A.A. Vol. 6, pg. 933). The comment that he wanted to "kill them" was out of character for Mr. White. (A.A. Vol. 6, pg. 941-942).

DNA analysis established Mr. White's DNA on the firearm. (A.A. Vol. 7, pg. 984).

Joseph "Joe" Averman met Mr. White at The Potter's House Church in 2004. (A.A. Vol. 7, pg. 1024). The two became close friends. (A.A. Vol. 7, pg. 1026). After becoming friends, Mr. White met Ms. Lucas, and the two married. (A.A. Vol. 7, pg. 1026). Eventually, Mr. Averman and Ms. Lucas began to develop a close friendship. (A.A. Vol. 7, pg. 1028). Ms. Lucas began to confide in Mr. Averman that she was having marital problems. (A.A. Vol. 7, pg. 1029-1030).[3] In approximately March or April of 2012, Mr. Averman and Ms. Lucas began to have an affair. (A.A. Vol. 7, pg. 1032). Mr. Averman learned that Mr. White and Ms. Lucas had separated in June of 2012. (A.A. Vol. 7, pg. 1033). According to Mr. Averman, his affair with Ms. Lucas occurred after her marital separation. (A.A. Vol. 7, pg. 1033). Mr. Averman frequently stayed overnight at Ms. Lucas' residence. (A.A. Vol. 7, pg. 1034).

[3] Two of Ms. Lucas' five children (Jodey and Jayce) had a different father then Mr. White. Their father was named Travis. (A.A. Vol. 7, pg. 1030).

Monday through Friday, Ms. Lucas cared for the children. (A.A. Vol. 7, pg. 1034). Mr. White took care of the children on weekends at the residence, and Ms. Lucas left the residence. (A.A. Vol. 7, pg. 1034-1035).

According to Mr. Averman, Mr. White contacted him by phone or text expressing frustration about the affair. (A.A. Vol. 7, pg. 1037). On July 26, 2012, Mr. Averman spent the night at 325 Altamira with Ms. Lucas and the five children. (A.A. Vol. 7, pg. 1037-1038).

On the morning of July 27th, as the children watched television and Mr. Averman watched Netflix, Mr. Averman heard one of the children say "daddy's here." (A.A. Vol. 7, pg. 1040-1042). Mr. Averman believed this occurred shortly before noon. (A.A. Vol. 7, pg. 1042). Both Mr. Averman and Ms. Lucas walked out to the hallway. (A.A. Vol. 7, pg. 1042-1043). Mr. Averman saw Mr. White in the hallway. (A.A. Vol. 7, pg. 1043). Mr. Averman expected Mr. White to arrive in the afternoon, and it was unusual for him to arrive so early. (A.A. Vol. 7, pg. 1043-1044). Mr. White retained a key to the house. (A.A. Vol. 7, pg. 1044).

Mr. White deactivated the alarm and stated that he wanted to talk to Ms. Lucas for five minutes. (A.A. Vol. 7, pg. 1044). Ms. Lucas and Mr. White then went into the craft room to speak. (A.A. Vol. 7, pg. 1045). Mr. Averman heard Ms. Lucas state, "Troy, no, just stop." (A.A. Vol. 7, pg. 1047). As Mr. Averman opened the door to the craft room, Ms. Lucas attempted to leave. (A.A. Vol. 7, pg.

1048-1049). Mr. White then grabbed her arm and pulled her back. (A.A. Vol. 7, pg. 1049). Mr. White then pushed her against the wall and shot her. (A.A. Vol. 7, pg. 1049). Next, Mr. White shot Mr. Averman. (A.A. Vol. 7, pg. 1051).

Mr. Averman testified that Mr. White stated "...If he was going to go to prison he was going to kill me. And then he stood over me with a gun to my forehead." (A.A. Vol. 7, pg. 1054). At one point, Jayce grabbed a phone and gave it Mr. Averman to call for help. (A.A. Vol. 7, pg. 1055). Mr. White took the phone from Mr. Averman before he could call 911. (A.A. Vol. 7, pg. 1055). Mr. Averman acknowledged that the house was in Mr. White's name, and Mr. White paid the mortgage. (A.A. Vol. 7, pg. 1068-1069).

Mr. Averman recalled that he told police Mr. White had not sent threatening messages to him. (A.A. Vol. 7, pg. 1074-1075). Mr. Averman admitted Mr. White's behavior and demeanor became irrational. (A.A. Vol. 7, pg. 1089-1090). At one point, Mr. Averman heard Mr. White state that he tried to call 911 but could not get the phone to work. (A.A. Vol. 7, pg. 1090). Mr. Averman admitted that he was unemployed during the relevant time period and was not contributing to any of the bills. (A.A. Vol. 7, pg. 1097). Mr. Averman admitted that he may have, but was not sure, if he sent taunting text messages to Mr. White. (A.A. Vol. 7, pg. 1121).

Mr. White called 911 at 11:53 a.m., approximately three minutes after Jodey's 911 call. (A.A. Vol. 8, pg. 1193). In the call, Mr. White requested medical

assistance and stated that there were "shots fired." (A.A. Vol. 8, pg. 1195).

Mr. Timothy Henderson served as a Christian Minister with the Potter's House Church. (A.A. Vol. 8, pg. 1204). Approximately ten years prior, Minister Henderson became friends with Ms. Lucas and Mr. White. (A.A. Vol. 8, pg. 1205). When Minister Henderson became aware of Ms. Lucas' infidelity, he posted statements on Facebook concerning the affair. (A.A. Vol. 8, pg. 1209-1210). Essentially, Minister Henderson stated that he was so upset that if saw "this dude" (Joe Averman) he would "beat his..." (A.A. Vol. 8, pg. 1210). The Minister admitted that he was embarrassed he had made such angry statements that were viewed by Mr. White. (A.A. Vol. 8, pg. 1210).

Mr. Bradley Berghuis had been a detective assigned to the Computer Forensic Lab. (A.A. Vol. 8, pg. 1269-1270). Law enforcement analyzed a phone located at the scene. (A.A. Vol. 8, pg. 1270). Through Mr. Berghuis, the State elicited numerous text messages between Mr. White and Ms. Lucas. (A.A. Vol. 8, pg. 1280-1281). The text messages revealed the frustration and breakdown in the marriage.[4]

[4] Mr. Berghuis testified that he was asked to conduct an examination on a white Apple iPhone in this case. (A.A. Vol. 8, pg. 1281). Mr. Berghuis testified that an examination usually follows a "service request" and a "search warrant", unless a search warrant is not required. (A.A. Vol. 8, pg. 1272). At the conclusion of this testimony, the State rested.

The coroner's investigator testified that Ms. Lucas' mother informed him that the marriage was happy until she met her new boyfriend. (A.A. Vol. 8, pg. 1354). Ms. Lucas' mother also told the investigator that Ms. Lucas could live with her until the marriage reconciled. (A.A. Vol. 8, pg. 1354). Joe Averman's ex-wife testified that he was a compulsive liar. (A.A. Vol. 8, pg. 1365).

IX. SUMMARY OF THE ARGUMENT

Mr. White appeals several claims from the District Court's denial of his Petition for Writ of Habeas Corpus. The majority of the claims involve several instances of ineffective assistance of both Trial and Appellate Counsel. Next, Mr. White further appeals the District Court's decision not to find cumulative error with all of the instances of ineffective assistance of counsel. Finally, Mr. White appeals the District Court's decision not to grant an evidentiary hearing as it pertained to the cell phone evidence.

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X. ARGUMENT

A. Mr. White Received Ineffective Assistance of Counsel.

Standard of Review for Post-Conviction Claims

In reviewing findings of fact, this Court reviews the District Court's determinations for an abuse of discretion. *State v. Smith*, 131 Nev. 628, 356 P.3d 1092, 1094 (2015). This Court has held, "Generally, a district court's findings of fact with respect to claims of ineffective assistance of counsel are entitled to deference upon appellate review." *Hill v. State*, 114 Nev. 169, 175, 953 P.2d 1077 (1998).

Legal Authority for Ineffective Assistance of Counsel

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

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

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

Strickland v. Washington, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McConnell v. State*, 125 Nev. 243, 252, 212 P.3d 307 (2009); *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

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

Courts must judge counsel's performance against an objective standard for reasonableness. *State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006); *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). Counsel is entitled to make strategic decisions when defending a case, but strategic decisions must indeed be reasonable. *Strickland*, 466 U.S. at 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

After establishing the deficiency in counsel's performance, the defendant must demonstrate prejudice. *Strickland*, 466 U.S. at. 694, 104 S.Ct. 2068; *Davis v. State*, 107 Nev. 600, 601-602, 817 P. 2d 1169, 1170 (1991) overruled on other grounds by *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). Prejudice to the defendant occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). A "reasonable probability" means a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant may also demonstrate that the errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. *State v. Love*, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing *Lockhart v.*

Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Strickland*, 466 U.S. at 687.

This Court has further held that a defendant has a right to effective assistance of counsel on direct appeal. *Kirksey v. Nevada*, 112 Nev. 980, 923 P.2d 1102 (1996); *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See *Jones v. Barnes*, 463 U.S. 745, 751-54, 77 L.Ed.2d 987, 103 S.Ct. 3308 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. *Daniel v. Overton*, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994); *Leaks v. United States*, 841 F. Supp. 536, 541 (S.D.N.Y. 1994), aff'd, 47 F.3d 1157 (2d Cir.). To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. *Duhamel v. Collins*, 955 F.2d 962, 967 (5th Cir. 1992).

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

Mr. White raised several claims of ineffective assistance of counsel in his Supplemental Brief in Support of Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) filed on December 20, 2018. Mr. White submits that the District Court abused its discretion in denying the following claims.

1. **The District Court abused its discretion by not finding Trial Counsel ineffective for failing to conduct a proper forensic investigation and analysis on Mr. White's cellular phone.**

The District Court abused its discretion by finding Trial Counsel effective when he failed to conduct a proper investigation on Mr. White's cellular phone. (A.A. Vol. 11, pg. 1795). Specifically, the District Court found that Mr. White did not meet the burden of demonstrating the *Strickland* factors. As shown below, the District Court erred because Mr. White did, in fact, meet the burden of proving the *Strickland* factors by a preponderance of the evidence.

The District Court's Error

The District Court erred for several reasons. First, the District Court determined that forensic analysis would not have been necessary because Mr. White himself would have known the contents of his phone. (A.A. Vol. 11, pg. 1793). While it is true that Mr. White would have known the contents of his own phone, Mr. White had the categorial Fifth Amendment right not to testify. Mr. White's exercise of that right at trial did not preclude or prevent Trial Counsel from investigating this issue. Therefore, the District Court's analysis is misplaced.

Next, the District Court erroneously determined that Trial Counsel "made a strategic decision to not have the phone evaluated because it was more of a risk to Petitioner than a reward." (A.A. Vol. 11, pg. 1795).

Contrary to the District Court's finding, Trial Counsel's decision did not constitute a strategic decision. After Mr. White surrendered himself to authorities, police recovered Mr. White's cellular phone. During cross-examination of the homicide detective at trial, Trial Counsel established that police never conducted a forensic examination of the phone. (A.A. Vol. 6 pg. 877). Additionally, during the cross-examination of Joe Averman, Trial Counsel questioned Mr. Averman about receiving alleged threatening voice mails from Mr. White. (A.A. Vol. 7, pg. 1122). Trial Counsel also refreshed Mr. Averman's memory with his testimony from the preliminary hearing wherein he testified that he also received text messages. (A.A. Vol. 7, pg. 1122).

The State had accused Mr. White of sending threatening text messages and voice messages. Despite the accusation, Trial Counsel made no effort to have the phone forensically analyzed to disprove the State's and Mr. Averman's allegations. (A.A. Vol. 11, pg. 1773). During the evidentiary hearing on March 4, 2021, Trial Counsel admitted that he did not consider having a forensic analysis conducted on the cell phone to disprove the allegations of threat. (A.A. Vol. 11, pg. 1773). The District Court relied on pages 7 through 10 of the evidentiary

hearing transcript wherein Trial Counsel explained the risks associated with forensic analysis on a cell phone. (A.A. Vol. 11, pg. 1794-1795). Despite being asked narrow questions, Trial Counsel avoided answering the questions about this particular case, and instead, he gave generalizations. (A.A. Vol. 11, pg. 1794-1795).

Mr. White's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, due to Trial Counsel's failure to conduct an adequate investigation. U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

Failure to conduct a reasonable investigation constitutes deficient performance. *Strickland v. Washington*, 466 U.S. 668, 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also, *Warner v. State*, 102 Nev. 635, 638, 729 P.2d 1359, 1361 (1986) ("Counsel's failure to investigate and lack of preparation for trial left appellant without a defense at trial."). The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See *United States v. Gray*, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." *Id*. at 712. See also *Hoots v.*

Allsbrook, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); *Birt v. Montgomery*, 709 F.2d 690, 701 (11th Cir.1983) ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

In *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993), this Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses.

In *Love*, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. *Love*, 109 Nev. 1136, 1137.

This Court reviews claims of ineffective assistance of counsel under a reasonably effective assistance standard enunciated by the United States Supreme Court in *Strickland* and adopted by this Court in *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504, (1984); see *Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. *Strickland*, 466 U.S. at 687.

Under *Strickland*, defense counsel has a duty to make reasonable investigations or to make reasonable decisions that makes particular investigations unnecessary. *Id*. at 691. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id*. at 688. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id*. at 694.

"An error by trial counsel, even if professionally unreasonable, does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. *Strickland* also requires that the defendant be prejudiced by the unreasonable actions of counsel before his or her conviction will be reversed. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*. at 694. Additionally, the *Strickland* Court indicated that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

Here, Trial Counsel had to cross-examine the State's witnesses without knowing the exact contents of Mr. White's phone. The State's witnesses made uncorroborated claims that Mr. White had delivered threatening voice mails and text messages to Mr. Averman. Trial Counsel had the duty to obtain a forensic

analysis of the phone to determine whether the State's witnesses testified truthfully or whether they could easily have been impeached.[5] Trial Counsel would have easily defeated Mr. Averman's testimony had he prepared for these types of allegations.

Had Trial Counsel done the investigation and been prepared, there is a reasonable probability that the result of the trial would have been different because Mr. White would have been able to undermine the evidence of threat and established a stronger case for manslaughter instead of murder. Although Mr. White would have known the contents of his own cell phone, he exercised his right not to testify. Trial Counsel's performance did not constitute an objectively reasonable strategic decision. Trial Counsel's decision caused severe prejudice to Mr. White because the result of the case would have been manslaughter instead of murder. Trial Counsel needed to find another way to put the evidence in front of the jury and to demonstrate Mr. Averman's lies. Trial Counsel did not do this, and therefore Trial Counsel was ineffective.

Given the evidence presented at trial and during the evidentiary hearing, the District Court clearly abused its discretion by denying this claim. Mr. White

[5] For instance, Mr. Averman initially testified that he was employed during the relevant time period. This testimony was to dispel the notion that Mr. Averman was freeloading off Mr. White. Then, on cross-examination, he was forced to reveal that he was not employed at the time of the incident.

respectfully requests that this Court reverse the denial of his claim and grant him a new trial.

2. <u>The District Court abused its discretion by not finding Trial Counsel and Appellate Counsel ineffective for failing to object to the State's insinuation of prior unknown acts of domestic violence.</u>

The District Court erred by finding both Trial and Appellate Counsel effective despite failing to object to insinuations that Mr. White committed domestic violence. The District Court reasoned that "The questions are so facially vague that a reasonable juror would not have understood them as a reference to prior domestic violence." (A.A. Vol. 11, pg. 1798). Moreover, the District Court found that the result of the trial would not have been different had Trial Counsel challenged the questions. The District Court also found that Mr. White had no legal or factual basis to challenge the omission of this issue on appeal. (A.A. Vol. 11, pg. 1799). For the reasons set forth herein, the District Court abused its discretion in making these findings.

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Timothy Henderson, a minister, testified at trial. During the testimony, the State asked the following question, and he gave the following answer[6]:

> Q: You don't know what things the defendant might have done to her, or what she might have done to him?
> A: No, I'm not aware. (A.A. Vol. 8, pg. 1219).

The State asked a question that would have clearly sent a message to the jury that Mr. White had been violent with his wife.[7] Requesting that the minister speculate to what "things" Mr. White may have done to her, signaled to the jury that there were issues of domestic violence. In the District Court proceedings, the State argued that there was no actual evidence of the bad act. If this were the case, why did the State ask a question that would lead any reasonable listener to conclude that the prosecutor was aware of prior acts of domestic violence?

The insinuation was more powerful than an actual presentation of a bad act. The insinuation invited the jury to use their imaginations in determining what violent acts Mr. White had committed in the past.

This case presents an example of the complete erosion of the historical development of NRS 48.045(b). In 1997, this Court provided the lower courts with

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[6] The prosecution insinuated that there may have been bad acts to a lesser degree with the following question and answer.

> Q: At the beginning of 2012 did you learn that he may not be such a wonderful husband to Ms. Lucas?
> A: Absolutely, yes. (A.A. Vol. 8, pg. 1254).

[7] During sentencing, the State argued that Mr. White had committed domestic violence in the past.

a three-part test in determining the admissibility of prior bad acts. See *Tinch v. State*, 113 Nev. 1170, 946 P.2d 1061 (1997). In *Tinch*, this Court held that a trial court "...must determine, outside of the presence of the jury, that: 1) the incident is relevant to the crime charged; 2) the act is proven by clear and convincing evidence; and 3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." 113 Nev. at 1176, citing *Walker v. State*, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996).

Moreover, this Court noted in *Tinch* that "we acknowledge that some of our prior cases have misstated the third prong "the evidence is more probative than prejudicial." See *Cipriano v State*, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995) overruled on other grounds by *State v. Sixth Jud. Dist. Court*, 114 Nev. 739, 964 P.2d 49 (1998); *Berner v. State*, 104 Nev. 695, 697, 765 P.2d 1144, 1146 (1988).

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." See, *Taylor v. State*, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993); *Beck v. State*, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... *Cipriano v.*

State, 111 Nev. at 541; see also, *Crawford v. State*, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991). A trial court deciding whether to admit such acts must conduct a hearing on the matter outside the presence of the jury. See *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

> "The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly wrong." *Bonacci v. State*, 96 Nev. 894, 620 P.2d 1244 (1980), citing, *Brown v. State*, 81 Nev. 397, 400, 404 P.2d 428 (1965).

NRS 48.045(2)'s list of permissible nonpropensity uses for prior-bad-act evidence is not exhaustive. *Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244, 1249 (2012). Nonetheless, while "evidence of 'other crimes, wrongs or acts' may be admitted ... for a relevant nonpropensity purpose," *Id*., (quoting NRS 48.045(2)), "'[t]he use of uncharged bad act evidence to convict a defendant [remains] heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.'" *Id*. (quoting *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001)). Thus, "'[a] presumption of inadmissibility attaches to all prior bad act evidence.'" *Id*. (quoting *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)).

"[T]o overcome the presumption of inadmissibility, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Bigpond*, 270 P.3d at 1250. In addition, the district court "should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes." *Tavares*, 117 Nev. at 733.

The prosecutor's question provided an invitation for the jury to speculate as to the sinister acts Mr. White may have committed in the past. Trial Counsel did not object to this question, and Appellate Counsel did not raise the issue on appeal.[8] Accordingly, Trial and Appellate Counsel failed to preclude the

[8] When there is not an objection, all but plain error is waived. *Dermody v. City of Reno*, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997). Plain error asks: "To amount to plain error the 'error must be so unmistakable that it is apparent from casual inspection of the record." *Vega v. State*, 126 Nev. 332, 236 P.3d 632, 637 (2010). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights. *Martinorellan v. State*, 131 Nev. 43, 49, 343 P.3d 590, 593 (2015).

prosecution from insinuating extraordinarily prejudicial innuendo against Mr. White.

At a minimum, the District Court should have allowed Mr. White to confront Counsel about this issue at the evidentiary hearing. However, the District Court denied this claim prior to the evidentiary hearing. As Mr. White has demonstrated ineffective assistance, Mr. White respectfully requests that this Court reverse the denial of his claim and remand the case for a new trial. At a minimum, Mr. White requests that the Court remand this issue for an evidentiary hearing.

3. <u>The District Court abused its discretion by not finding Trial Counsel ineffective for failing to ensure the police obtained a warrant to conduct forensic analysis on the phone attributed to Echo Lucas in violation of the Sixth, Fourth, and Fourteenth Amendments to the United States Constitution.</u>

The District Court erred when it found Trial Counsel effective although Trial Counsel failed to ensure that police obtained a warrant to examine the phone attributed to Ms. Lucas. The District Court found that Mr. White had no standing to raise the issue. However, contrary to the District Court's finding, the State has provided no proof that the phone attributed to Ms. Lucas actually belonged to her.

Authorities seized an iPhone located at the scene and attributed the phone to Ms. Lucas. (A.A. Vol. 8, pg. 1330-1331). The State conducted a forensic analysis of this phone. Then, the State called Mr. Bradley Berghuis, a detective who was assigned to computer forensics to testify regarding the contents of the phone. (A.A.

Vol. 8, pg. 1269). The State then introduced numerous text messages in order to establish the State's theory of the case. [9]

In the discovery, Detective Berghuis drafted an examination report. On page two of this report, it provided:

> Authorization to search the electronic storage devices in reference to this case is granted by:
>
> Per Detective T. Sandborn P, #5450, the listed device (iPhone- 4S) belongs to the victim of a homicide and no one has standing to contest search and examination of the device. (A.A. Vol. 11, pg. 1637).

If in fact Ms. Lucas was the owner and sole individual who would have standing, this issue would admittedly be invalid. However, Post-Conviction Counsel for Mr. White has not been able to locate proof of this assertion.[10] During the argument hearing on September 2, 2020, Counsel informed the District Court that Counsel had not seen corroboration of Ms. Lucas' ownership. (A.A. Vol. 11, pg. 1755-1757).

In *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed 2d 430 (2014), the United States Supreme Court considered whether the police may, without a warrant, search digital information on a cell phone seized from an

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[9] There is almost no dispute that the State considered the text messages to be proof establishing Mr. White's state of mind at the time of the crime and shortly before hand.

[10] Post-Conviction Counsel for Mr. White has scoured the file attempting to locate phone records demonstrating the ownership of the cell phone to no avail.

individual who has been arrested. The United States Supreme Court unanimously held that in general, police officers could not search digital information on the cell phones seized from defendants without a warrant. *Id*.

The United States Supreme Court considered whether a suspect had a legitimate privacy interest in cell phone information held by a third party. *See Carpenter v. United States*, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018). In *Carpenter*, the United States Supreme Court determined that the government was required to have a warrant, supported by probable cause, to obtain cell site records from a third party to be utilized in a trial against a defendant. *Id*. at 2233.

During the District Court proceedings, Mr. White respectfully requested that the District Court order the State to produce evidence establishing that only Ms. Lucas had singular standing over the forensically analyzed cell phone. It should be noted that the text messages in question were between Mr. White and Ms. Lucas. There is a clear privacy interest in communication between two people operating cell phones. In this case, the detectives did not possess a warrant to forensically analyze the data on the cell phone.

The District Court erred by not ordering the State to produce evidence of Ms. Lucas' ownership. Without proof of her ownership, the detectives should not have conducted analysis on the contents without a warrant. Thus, Trial Counsel should have raised the issue and demanded that law enforcement obtain a warrant

to search the phone. At a minimum, the District Court should have granted an evidentiary hearing on this issue to determine the extent of Trial Counsel's ineffectiveness.

For these reasons, Mr. White respectfully requests that this Court reverse the District Court's denial and remand the case for an evidentiary hearing on this issue.

4. <u>The District Court abused its discretion by not finding that Mr. White received ineffective assistance of Trial and Appellate Counsel for failure to object and raise on appeal improper prosecutorial arguments.</u>

The District Court abused its discretion by not finding Trial and Appellate Counsel ineffective when they did not challenge improper prosecutorial arguments. The District Court's findings of fact mistakes Mr. White's argument before finding that Mr. White did not meet the *Strickland* standard for ineffective assistance of counsel.

Mr. White argued that Trial Counsel should have objected to the prosecutor's mischaracterization of the standard of proof for manslaughter. The Trial Court properly instructed the jury on manslaughter.

> A killing committed in the heat of passion, caused by a provocation sufficient to make the passion irresistible, is Voluntary Manslaughter even if there is an intent to kill, so long as the circumstances in which the killer was placed and the facts that confronted him were such as also would have aroused the irresistible passion of the ordinary reasonable man if likewise situated. (A.A. Vol. 10, pg. 1527).

The jury also received Instruction 13 as follows:

> Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible.
>
> In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. (A.A. Vol. 10, pg. 1525).

Manslaughter requires provocation upon a sudden heat of passion. If the jury finds that the evidence met this standard, the jury can find a defendant guilty of manslaughter. The provocation upon a sudden heat of passion allows the jury to reduce the conviction from murder to manslaughter. Despite having the Trial Court read the instructions, the prosecutor misstated the standard during closing arguments.

At no time is the jury ever instructed that the provocation must result in an irresistible desire to kill. The law does not *permit* an individual to kill based upon provocation. The law simply allows a jury to find a lower level of culpability based on the circumstances. The prosecutor in this case completely misunderstood this concept.

During closing arguments, the prosecutor argued:

> It is something more than that. It's something greater, significantly greater. I would submit to you that it's an emotion, it's an experience that no one in this court room has ever felt or will ever feel because it's so rare. It's an irresistible desire to take a human life. We've all been angry in situations, and we have broken bats, punched a wall. And your thinking to yourself, gosh, I can't believe I just did that, that was stupid. (A.A. Vol. 9, pg. 1429).
>
> There was a juror here, potential juror that drove a car through a wall at a restaurant because he was so angry about what his girlfriend or wife was doing. But what didn't he do? He didn't kill. He didn't have that irresistible desire to kill. So it's not just simply an irresistible desire to do harm, it's an irresistible desire to take human life. (A.A. Vol. 9, pg. 1429).

If the State then reiterated the improper argument:

> And finally, final limitation I want to talk to you about is that the defendant actually had to have killed in the heat of passion during that time that he had the irresistible desire to take human life and that he didn't have the time to cool off. (A.A. Vol. 9, pg. 1430-1431).

The prosecutor further stated, "but he wasn't in an irresistible desire to take human life." (A.A. Vol. 9, pg. 1431). Undoubtedly, the State will argue that Mr. White has taken these statements out of context. However, when reviewing the entirety of the prosecutor's closing argument, it is clear that the prosecutor misstated the intent element of voluntary manslaughter.

The prosecutor's misstatement essentially fabricated a new standard for justifiable killing by merging it with the standard of intent for voluntary manslaughter. This standard does not actually exist. A justifiable killing would

result in a verdict of not guilty because of self-defense. The law does not permit an individual to kill based on sufficient provocation. Rather, the law reduces the level of culpability from murder to manslaughter. Courts have repeatedly frowned upon prosecution mistaking the standard of proof. *See Holmes v. State*, 114. Nev 1357, 972 P.2d 337, 343 (1998) (holding that any misstatement by prosecutors of the standard is reversible error); *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (holding that misstating law and reasonable doubt is so egregious that it is never harmless); *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L.Ed.2d 339 (1990) (holding that any equation of reasonable doubt with substantial doubt or moral certainty as well as any other definition that would confuse jurors or lead them to believe that the State's burden is less significant than it is, is unconstitutional) (overruled on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

Here, the prosecutor repeatedly informed the jury that the State's burden of proof was much less than the law required. The prosecutor argued to the jury an impossible standard for Mr. White to achieve. Counsel for Mr. White did not object. This issue was not raised on appeal. Had the issue been objected to and raised on appeal, the result on appeal would have mandated reversal. Accordingly, Mr. White received ineffective assistance of both trial and appellate counsel

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

The District Court further erred by finding that Mr. White made "multiple arguments against his own claim" and that "Petitioner has not correctly cited to the record." (A.A. Vol. 11, pg. 1803). In fact, Mr. White has correctly cited to the record and showed that the prosecutor's rendition of the manslaughter instructions did not comport with Nevada law.

Therefore, the District Court abused its discretion in making these findings. Mr. White respectfully requests that this Court reverse the District Court's denial of his claim and reverse his conviction.

5. <u>The District Court abused its discretion by not finding that Mr. White received ineffective assistance of Trial and Appellate Counsel for failure to object and raise on appeal the District Court's giving of Instruction Numbers 18 and 28 in violation of the Fifth and Fourteenth Amendments to the United States Constitution.</u>[11]

The District Court abused its discretion by not finding Trial and Appellate Counsel ineffective for failing to challenge the "reasonable doubt" and "equal and exact justice instructions."

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

Although this Court has repeatedly denied this issue in other cases, Mr. White submits that these instructions are unconstitutional and require a challenge. Mr. White received ineffective assistance of Trial Counsel for failing to object to these jury instructions at trial. Mr. White also received ineffective assistance of Appellate Counsel for failing to raise the error concerning these instructions on appeal.

A. THE REASONABLE DOUBT INSTRUCTION

INSTRUCTION NO. 27

Jury Instruction No. 27 improperly minimized the State's burden of proof. The jury was given the following instruction on reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel and abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation. (A.A. Vol. 10, pg. 1541).

The instruction given to the jury minimized the State's burden of proof by including terms "It is not mere possible doubt, but is such a doubt *as would govern or control a person in the more weighty affairs of life*" and "Doubt to be reasonable must be actual, not mere possibility or speculation." This instruction inflated the constitutional standard of doubt necessary for acquittal, and it created a reasonable likelihood that the jury would convict and sentence based on a lesser

standard of proof than the constitution requires. See, *Victor v. Nebraska*, 511 U.S. 1, 24, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (Ginsburg, J., concurring in part); *Cage v. Louisiana*, 498 U.S. 39, 41, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Mr. White recognizes that this Court has found this instruction to be permissible. See e.g., *Elvik v. State*, 114 Nev. 883, 965 P.2d 281 (1998); *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998). However, Mr. White challenged the constitutionality of this instruction and now asserts that the District Court abused its discretion by not finding Trial and Appellate Counsel ineffective for failing to challenge this instruction.

B. EQUAL AND EXACT JUSTICE

Trial Counsel and Appellate Counsel failed to challenge the "equal and exact justice" instruction when it improperly minimized the State's burden of proof. The Trial Court provided the following instruction to the jury:

INSTRUCTION NO. 38

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada. (A.A. Vol. 10, pg. 1552).

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

The District Court should have found that Trial and Appellate Counsel erred in failing to challenge this instruction. The failures caused Mr. White prejudice because the result of the trial would have been different had Defense Counsel objected and proffered an instruction that comports with the correct presumption of innocence. Based on these principles, the District Court should have reversed Mr. White conviction and granted him a new trial. At a minimum, the District Court should have granted an evidentiary hearing. Therefore, Mr. White respectfully requests that this Court reverse the denial of his claim and remand the case for an evidentiary hearing on this issue. .

6. <u>The District Court erred by not reversing Mr. White's conviction based on cumulative error.</u>

In *DeChant v. State*, 116 Nev. 918, 10 P.3d 108 (2000), this Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In *Dechant*, this Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair

trial, this Court will reverse the conviction." *Id*. at 113, citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the errors, and 3) the gravity of the crime charged. *Id*.

Moreover, in *United States v. Necoechea*, the Ninth Circuit Court of Appeals found that although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal." *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993). Additionally, "The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Montana v. Egelhoff*, 518 U.S. 37, 53, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)).[12]

Additionally, the "cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually."

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

Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 420 (2007).[13] "Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *Alcala v. Woodford*, 334 F.3d 862, 883 (9th Cir. 2003). If an "[appellant]'s constitutional right to a fair trial was violated because of the cumulative effect of errors, [a] court will reverse the conviction." *Rose*, 123 Nev. at 212, 163 P.3d at 420.

The District Court should have reversed Mr. White's conviction based on cumulative error. The issue of guilt or innocence was close as evidence showed provocation, which would have led to manslaughter instead of murder. Additionally, the quantity of errors was large, as Mr. White alleged numerous errors in his post-conviction proceedings. Finally, Mr. White faced murder and attempt murder charges, which certainly are grave. Therefore, the District Court should have reversed Mr. White's conviction based on cumulative error.

Mr. White respectfully requests that this Court find cumulative error of Trial and Appellate Counsel and reverse his conviction.

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

7. <u>The District Court erred by not allowing Mr. White to address all of his issues during the evidentiary hearing.</u>

The District Court erred by not granting Mr. White an evidentiary hearing as to the cell phone issue.

A petitioner is entitled to an evidentiary hearing where the petitioner raises a colorable claim of ineffective assistance. *Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir.1990); *Hendricks v. Vasquez*, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992). See also *Morris v. California*, 966 F.2d 448, 454 (9th Cir.1991) (remanded for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance); *Harich v. Wainwright*, 813 F.2d 1082, 1090 (11th Cir.1987) ("[W]here a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing."); *Porter v. Wainwright*, 805 F.2d 930 (11th Cir. 1986) (without the aid of an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions concerning evidence were made for tactical reasons).

Mr. White was entitled to an evidentiary hearing on all of his issues. Although the District Court granted a hearing on the non-cell phone issues, the District Court should have allowed the evidentiary hearing to proceed regarding the cell phone. Mr. White's Trial and Appellate Counsel fell below a standard of

reasonableness. Based on Counsels' failures, Mr. White was severely prejudiced, pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, the District Court should have granted Mr. White an evidentiary hearing on all of his issues presented for post-conviction review.

Mr. White respectfully requests that this Court reverse the denial of his claims and remand the proceedings for an evidentiary hearing on the cell phone issues.

XI. CONCLUSION

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

Respectfully submitted this 2nd day of September, 2021.

By: /s/ Christopher R. Oram

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XII. CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14 point Times New Roman.*

*Certificate of Compliance containing word count continued to page 44.

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I further certify that this brief complies with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains 10,986 words. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of September, 2021.

Respectfully submitted,

By: /s/ Christopher R. Oram

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XIII. CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 2, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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