

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 82886

Electronically Filed
Sep 20 2021 04:07 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

JOSHUA BACHARACH

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from a Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Cristina D. Silva, District Court Judge
District Court Case No. C-14-299425-1

APPELLANT'S OPENING BRIEF

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NONE

/s/ James A. Oronoz

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1 **IV. JURISDICTIONAL STATEMENT**

2 On November 8, 2017, Appellant filed a Petition for Writ of Habeas Corpus
3 (“Petition”). On January 10, 2018, the Court granted Appellant’s Request to
4 Appoint Counsel.

5
6 On February 24, 2020, Appellant filed a Supplemental Post-Conviction
7 Petition for Writ of Habeas Corpus (“Supplemental Petition”). The State filed its
8 Response on March 27, 2020. On April 7, 2020, Appellant filed a Reply. On April
9 5, 2021, the Court denied the Petition. On May 5, 2021, the Court issued its
10 Findings of Fact, Conclusions of Law and Order.

11 This Court has jurisdiction over this appeal of the District Court’s denial of
12 the Appellant’s post-conviction claims pursuant to NRS 34.575.

13
14 **V. ROUTING STATEMENT**

15 Pursuant to the Nevada Rules of Appellate Procedure (hereinafter, “NRAP”)
16 17(b)(2), this case should not be presumptively assigned to the Court of Appeals
17 because it involves Category B felonies.

18
19 **VI. STATEMENT OF THE ISSUES**

- 20 1. Whether the District Court Erred By Not Finding That Trial Counsel
21 Provided Ineffective Assistance By Failing To Object To The Trial Court’s
22 Threat Toward A Critical State’s Witness.

2. Whether The District Court Erred By Not Finding That Trial Counsel Provided Ineffective Assistance By Failing To Object To Detective Jaeger's Improper Expert Testimony.
3. Whether The District Court Erred By Not Finding That Trial Counsel Provided Ineffective Assistance By Failing To Object To DDA Thomson's Improper Argument Regarding The Definition of Reasonable Doubt.
4. Issues Raised in Appellant's Pro Per Petition:
 - i) Whether the District Court Violated Mr. Bacharach's Sixth Amendment Right To A Fair Trial For Refusing To Grant Defense Counsel's Request For A Mistrial When Witness Eufrasia Nazaroff Testified Regarding The LVMPD Gang Unit.
 - ii) Whether the District Court Violated Mr. Bacharach's Sixth Amendment Right To A Fair Trial Because The Court Did Not Allow Defense Counsel to Cross-Examine the LVMPD Officer About The Body Camera Video.
 - iii) Whether Defense Counsel Was Ineffective For Failing to "Suppress Or Impeach" A Witness Who Presented Conflicting Statements At Trial.
 - iv) Whether District Court Violated Mr. Bacharach's Sixth Amendment Right To A Fair Trial By Admitting a "Tainted" And "Unreliable" In-Court Identification.

VII. STATEMENT OF THE CASE

This is an appeal from the District Court’s Findings of Fact, Conclusions of Law and Order denying Mr. Bacharach’s post-conviction claims issued on May 5, 2021.

On July 16, 2014, Mr. Bacharach was indicted on the following: Count 1: Attempt Murder With Use Of A Deadly Weapon; Count 2: Discharge Of Firearm From Or Within A Structure Or Vehicle; Count 3: Assault With A Deadly Weapon; Count 4: Discharge Of Firearm From Or Within A Structure Or Vehicle; Count 5: Assault With A Deadly Weapon; Count 6: Discharge Of Firearm From Or Within A Structure Or Vehicle; Count 7: Assault With A Deadly Weapon; Count 8: Discharge Of Firearm From Or Within A Structure Or Vehicle; Count 9: Assault With A Deadly Weapon; Count 10: Discharge Of Firearm From Or Within A Structure Or Vehicle; Count 11: Assault With A Deadly Weapon; Count 12: Stop Required On Signal Of Police Officer; Count 13: Resisting Public Officer With Use Of A Firearm; Count 14: Possession Firearm With Altered Or Obliterated Serial Number; Count 15: Possession Of Firearm By Ex-Felon; Count 16: Possession Of Firearm By Ex-Felon; And Count 17: Possession Of Firearm By Ex-Felon.

Mr. Bacharach proceeded to trial from November 2, 2015, through November 5, 2015. The trial proceeded forward, and on November 5, 2015, the

1 jury convicted Mr. Bacharach of Count 1: Attempted Murder With Use Of A
2 Deadly Weapon; Count 2: Discharge Of Firearm From Or Within A Structure Or
3 Vehicle; Count 3: Assault With A Deadly Weapon; Count 4: Discharge Of Firearm
4 From Or Within A Structure Or Vehicle; Count 5: Assault With A Deadly
5 Weapon; Count 6: Discharge Of Firearm From Or Within A Structure Or Vehicle;
6 Count 7: Assault With A Deadly Weapon; Count 8: Discharge Of Firearm From
7 Or Within A Structure Or Vehicle; Count 11 Assault With A Deadly Weapon;
8 Count 12: Stop Required On Signal Of Police Officer; Count 13: Resisting Public
9 Officer With Use Of A Firearm; Count 14: Possession Firearm With Altered Or
10 Obliterated Serial Number.
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12
13 On November 5, 2015, the Court also held a bifurcated trial to address
14 Counts 15 through 17, the jury convicted Mr. Bacharach on Counts 15-17, all for
15 Possession Of Firearm By Ex-Felon.

16 The Court sentenced Mr. Bacharach on December 30, 2015 and filed the
17 Judgment of Conviction on January 8, 2016. The Court sentenced Mr. Bacharach
18 to the Nevada Department of Corrections as follows: **Count 1** – ninety-six (96) to
19 two hundred and forty (240) months, plus a consecutive term of ninety-six (96) to
20 two hundred and forty (240) months for use of a deadly weapon; **Count 2**: seventy-
21 two (72) to one hundred and eighty (180) months; **Count 3**: twenty-eight (28) to
22 seventy-two (72) months; **Count 4**: seventy-two (72) to one hundred and eighty
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1 (180) months; **Count 5:** twenty-eight (28) to seventy-two (72) months; **Count 6:**
2 seventy-two (72) to one hundred and eighty (180) months; **Count 7:** twenty-eight
3 (28) to seventy-two (72) months; **Count 8:** seventy-two (72) to one hundred and
4 eighty (180) months; **Count 11:** twenty-eight (28) to seventy-two (72) months;
5 **Count 12:** twenty-eight (28) to seventy-two (72) months; **Count 13:** twenty-four
6 (24) to sixty (60) months; **Count 14:** Nineteen (19) to forty-eight (48); **Count 15:**
7 twenty-eight (28) to seventy-two (72) months; **Count 16:** twenty-eight (28) to
8 seventy-two (72) months; and **Count 17:** twenty-eight (28) to seventy-two (72)
9 months. The Court ordered all counts to run consecutive to each other. Mr.
10 Bacharach received zero (0) days credit for time served. The aggregate total
11 sentence was seven hundred forty-seven (747) months to one thousand eight
12 hundred eighty-four (1,884) months.
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15 Mr. Bacharach filed a timely Notice of Appeal on January 26, 2016. On
16 June 9, 2016, Mr. Bacharach filed a Fast Track Statement. Mr. Bacharach alleged
17 the following issues on appeal:
18

19 1. The District Court erred by instructing the jury on flight, because there
20 was no evidence to support the conclusion that Mr. Bacharach's going away was
21 not just a mere leaving.

22 2. The District Court erred by not granting a mistrial after State's witness
23 Eufrasia Nazaroff introduced testimony that she spoke with the gang unit.
24

1 The Court of Appeals affirmed Mr. Bacharach's conviction on October 19,
2 2016. The Nevada Supreme Court issued its Remittitur on November 15, 2016.

3 On November 8, 2017, Mr. Bacharach filed a timely Petition for Writ of
4 Habeas Corpus (Post Conviction). On February 24, 2020, Mr. Bacharach filed his
5 Supplemental Post-Conviction Petition for Writ of Habeas Corpus. On May 5,
6 2021, the District Court issued its Findings of Fact, Conclusions of Law and Order.
7

8 **IX. STATEMENT OF FACTS**

9 This case arises from an incident that occurred on June 26, 2014. A shooting
10 occurred between a Las Vegas Metropolitan Police Department ("LVMPD") patrol
11 officer and a suspect driving a maroon Dodge Intrepid. The following summary of
12 facts reflects the testimony elicited at trial in this case.
13

14 On June 26, 2014, at approximately 10:45 p.m., Maurine Palmer had just
15 arrived home from work to her residence at 2409 North Walnut, near the
16 intersection of N. Walnut and E. Carey Ave in Las Vegas and was in her garage
17 when she heard loud voices in Spanish arguing and then a loud pop which she at
18 first took to be fireworks. A few seconds later, she heard another pop on wherein
19 she decided it sounded more like a gunshot coming from the direction of E. Carey.
20 She then heard a car speeding away and looked out of her garage to see taillights
21 going east down Carey, then heard another loud pop. She closed her garage door
22 and entered her home, spoke with her uncle, and then heard sirens and saw police
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1 cordoning off the street. Appellant's Appendix (hereinafter "AA"), Volume II,
2 Bates Number 269.

3 Ms. Norayma Gonzalez testified that she lived in a ground floor apartment
4 located on Dolly, just southeast of the intersection of Dolly and El Tovar on the
5 night of June 26, 2014. She recalls calling her children in for the night and going
6 outside to have a cigarette when she heard a loud crash. AA II 279. She went
7 running towards the street over on Dolly. She saw a gentleman wearing what she
8 thought was a white shirt, running down Dolly towards and turning down El Tovar.
9 When he turned at El Tovar, she saw him pull out a gun and start shooting and she
10 heard two or three gunshots. AA II 280-281. He was right at the corner when he
11 pulled out the gun, aiming it down Dolly towards Carey. When she saw the gun
12 and heard the gunshots she ran back inside her apartment. AA II 282. She turned
13 around and saw that "the white shirt man" was getting down - - ducking down,
14 right in front of the white truck. She called 911. AA II 283. He was bending
15 down, kind of like hiding. AA II 284. "He went right up front of the truck. That's
16 when he did some more - - he fired again his gun towards - - at this time then I
17 could tell it was an officer that he was shooting at." AA II 285. "He ducked down
18 and took off the white shirt, which I thought was - - the white shirt and took off
19 running into El Tovar, towards the other houses. She saw the same gentleman later,
20 about 20-25 minutes later. They had the gentleman arrested." AA II 286.
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1 Ms. Gonzalez confirms that she was never able to see his face and the person
2 she identified wasn't wearing the white shirt. AA II 295. Prior to the arrest she
3 recalls he was pointing the gun with one arm and "he was ducking from the side of
4 the truck like this and point the gun and firing." AA II 297.

5
6 Mr. Chavez resides at 4595 El Tovar, the corner lot of Dolly and El Tovar.
7 On June 26, 2014, he was home that night with his two children, Ricardo, age 12
8 and Alanda, age 10. AA II 301. His children came into his bedroom as he was
9 watching television and told him they heard gunshots. He got out of bed and
10 opened the curtains around the window. AA II 303. He recalls seeing a person
11 shooting forward. AA II 304. He stopped by the engine of a white truck and it
12 looked like he was wearing a white shirt. He had long hair combed to the back.
13 He was shooting from the front of the truck back towards Dolly. AA II 306. Mr.
14 Chavez recalls hearing two or three shots. He saw an officer at the corner of Dolly
15 and El Tovar. He thought the officer got shot. He told his children to hit the floor
16 and get out of that room. AA II 307. Other officers arrived within two to three
17 minutes after this. He later saw the same individual at the intersection of Dolly
18 and Carey where the police had him. AA II 308. Mr. Chavez confirmed the
19 individual the police had was the same he saw in front of the white truck. He spoke
20 with police the next morning when they came around. AA II 309.

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1 Eufrasia Nazaroff, the owner of the Dodge Intrepid in question and mother
2 of Mr. Bacharach's children, testified at trial. AA II 323. Ms. Nazaroff testified
3 that she owned a maroon Dodge Intrepid in June of 2014. AA II 322. She explained
4 that Mr. Bacharach is the father of three of her children. AA II 323. She further
5 testified that Mr. Bacharach had come to stay with her "just a few days before June
6 26th of 2014." AA II 324.
7

8 Ms. Nazaroff testified that she did not own any firearms. AA II 324. On June
9 26, 2014, Mr. Bacharach went to Ms. Nazaroff's house. AA II 325. Ms. Nazaroff
10 testified that she allowed him to use her car. She also testified that he had been
11 wearing a yellow shirt when he left her house. AA II 326.
12

13 Ms. Nazaroff testified that she had seen Mr. Bacharach with guns "a long,
14 long, long time ago." AA II 326. Ms. Nazaroff further testified that the police from
15 the gang unit had shown her photographs of Mr. Bacharach from Facebook. AA II
16 326-327. The officers used their own phone to show Ms. Nazaroff the photographs.
17 AA II 329.
18

19 Ms. Nazaroff testified that she did not remember telling police that she saw
20 a bullet-proof vest on the night of June 26th. AA II 329. On cross-examination,
21 she testified that she had never seen Mr. Bacharach with a bullet proof vest. AA II
22 331.
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1 On cross-examination, Ms. Nazaroff testified that Mr. Bacharach had not
2 sent her any pictures of weapons and that she had not seen Mr. Bacharach with any
3 weapons. AA II 330. She also testified that Mr. Bacharach only had access to her
4 vehicle when she gave it to him. AA II 331.

5
6 Before opening statements on the first day of trial, the Court called Eufrosia
7 Nazaroff to the stand outside the presence of the jury. The Court admonished Ms.
8 Nazaroff about her testimony.

9 Court: They're going to lead you through along, you wouldn't come
10 in and pretrial with them and so they couldn't tell you all this
11 stuff. But I can tell you I've had people violate my order and if
12 you do, you'll go to jail today and I'll have somebody to come
get your child. AA II 251, November 2, 2015.

13 During the admonishment, the Court directed Ms. Nazaroff to answer the
14 State's questions. AA II 251. The Court also indicated:

15 Court: We're going to have them lead her through. But if she blurts it
16 out, I got no alternative but to put you in custody, you
understand? AA II 252.

17 Then, the Court admonished Ms. Nazaroff not to say anything exculpatory:

18 Court: **If you blurt out something about trying to get him off, say**
19 **something you're not supposed to say—** AA II 253
20 (emphasis added).

21 In essence, the Court admonished Ms. Nazaroff and prohibited her from
22 giving exculpatory testimony in front of the jury. The Court did this by threatening
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1 to put Ms. Nazaroff into custody and take her children if she did not comply with
2 the State's narrative. AA II 251-253.

3 Ms. Nguyen (defense counsel) objects and asks for a mistrial to the
4 testimony of Eufasia Nazaroff, wherein she indicated she had spoken with gang
5 detectives regarding Mr. Bacharach. The Court recalls that "she is an adverse
6 witness to the State and it was clear to me that she didn't want to answer some of
7 the questions or she was hesitant in answering some. In fact she even said she never
8 said anything about the bullet proof vest which - - at this point sounds untrue
9 because she has made statements to detectives about. And it was quick enough
10 said that no one went into it, no one highlighted it, no one talked about. And based
11 upon that I think it is - I think - the motion to - for a mistrial is denied. " AA II
12 383.

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14
15 Officer McNabb has been with Las Vegas Metro Police Dept., for about ten
16 years. He works as a patrol officer in the Northeast Area Command. AA II 384-
17 385. Officer McNabb carries a Glock 17, 9 mm, full-size, semi-automatic. Officer
18 McNabb confirms he was wearing a body camera at the time of the incident. AA
19 II 386. Officer McNabb states that he usually kept his car windows about halfway
20 down so that he could hear what was going on if something happened around him.
21 He worked the swing shift. It was 2:30 in the afternoon to midnight-thirty. AA II
22 388.
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1 As Officer McNabb was finishing up an investigation of a suspicious vehicle,
2 another vehicle caught his attention. "It was directly in front of me on Walnut, but
3 it was facing north where I was facing south and I noticed that - - and it was stopped
4 at the stoplight at Lake Mead, facing north on Walnut. And I noticed that its high
5 beams or brights were on." AA II 390. "I waited for the light to turn green and
6 then the car with its high beams on came across and there was another car behind
7 it. Then I signaled, then I did - - made a U-turn, and so now I'm going north on
8 Walnut following. I activated my lights - - my emergency lights. I wanted to get
9 that vehicle, the one in between us, to pull over, which they did about a half a block
10 or a block ahead, they pulled over." AA II 390. "Then I accelerated around the
11 vehicle that had pulled over and caught up to the Dodge Intrepid. I still had my
12 lights on and that's when I grabbed my radio to tell the dispatcher I was going to
13 do a vehicle stop." AA II 392. Officer McNabb described the protocol they are to
14 follow when doing a vehicle stop. "We tell her we're going to do a car stop and
15 then we give the license plate and our location in case there was an emergency that
16 would occur, everybody would know where we are...As I was about to read it out,
17 the driver reached out of the driver door and fired a gun up in the air." AA II 393.
18 Officer McNabb stated he couldn't read out the plate. Instead, he said he just fired
19 a shot out of the air and then I gave our location. AA II 393. Officer McNabb
20 stated he was shocked that a gun had just been fired. He was just trying to do a
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1 routine car stop. "It quickly upgraded the situation in my mind that this is a very
2 dangerous situation if a person's willing to fire a gun during this car stop." AA II
3 394. Officer McNabb activated his body camera right around this time. The
4 vehicle accelerated right after the shot and it went - - continued north on Walnut
5 and then it turned right on Carey, it ran through the stop sign right here, turned east
6 on Carey and I followed it." AA II 394. Officer McNabb testified "I continued to
7 follow and I turned right on Carey as well. As soon as I made the right turn and
8 my car was straightened out to face east, the driver fired two more shots and one
9 of them, I heard it, and one of them went right by my left ear like zing – I heard a
10 zing sound, just one time. I thought it hit my car or possibly the ground right
11 outside of my window." AA II 395. Officer McNabb informed dispatch that two
12 more shots were fired and that they were now going eastbound on Carey from
13 Walnut. He continued after the vehicle because the driver had just tried to kill him.
14 AA II 396. Officer McNabb testified that the situation had escalated from where
15 the individual was no longer firing in the air but firing at him. And was more of a
16 danger to Officer McNabb and the community. "We continued eastbound on
17 Carey. He accelerated; I estimate 70 to 80 miles an hour. I remember seeing my
18 speedometer as I very quickly went up above 60 and then I stopped looking at it as
19 we continued to accelerate...He passed through Lamb where there was a solid or
20 stale red light and I didn't see any brake lights, he just accelerated straight through
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1 Lamb on a red light. And I followed. I had to stop and clear my lanes so that I
2 didn't cause a traffic collision and then I - - there was a car that had to stop for me.
3 Then I continued through Lamb and as I passed through the intersection, I hear two
4 more shots being fired but he had gained a bunch of distance on me so I couldn't
5 tell if he was firing in the air or at me, but I heard two more shots." AA II 397.
6

7 "As I passed through Lamb and tried to catch up, I saw up ahead that the
8 vehicle crashed over something. It had turned to the right so it's facing south and
9 I saw it go over something. I didn't know what it was at first. I later saw that it
10 was a curb. But he went over and I saw dust fly up and then I continued to
11 approach." AA II 398. "I saw the vehicle was just south of Carey and it had
12 stopped facing south... I see the driver jump out of the driver door and run to the
13 - around the trunk. So, he runs north around the trunk and he turns towards me at
14 the trunk, I see that he has a handgun in his right hand and he walks past the trunk
15 out into the street towards me and he raises the gun at me like this but further up
16 in the air." AA II 399.
17

18 As Officer McNabb is pulling up to where the individual crashed the Dodge
19 Intrepid, he realized he needed to get his car stopped because he was still rolling.
20 "I put it in park, and I think I gave some radio traffic saying that he was pointing
21 the gun at me and I saw right after he fired, he started walking - he started walking
22 to my right. It would be in a southwest direction towards that corner where the
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1 streetlight is...and he's manipulating the gun as I'm throwing it into park. I can't
2 tell if he's reloading or clearing a malfunction, I just knew that he was doing
3 something with it. And then as I'm getting out, starts to point it out like this." AA
4 II 400. "He started to point it back out at me. He had already demonstrated a
5 willingness to fire in the air, to fire at my car, to fire at me on foot and while I'm
6 in my car, and now going to point at me again. I knew I need to stop that threat
7 and so I opened my door and jumped out and across my hood I fired approximately
8 five rounds at him to try to stop or incapacitate him." AA II 401. The individual
9 appeared to be a Hispanic male, heavyset, 20 to 40 years old, and he was wearing
10 a white shirt. AA II 401. Officer McNabb states that right as he fired at the
11 individual, his target fell backwards and little to the right, kind of made himself
12 smaller and then took off running, southbound on Dolly, around the corner. AA II
13 402. As Officer McNabb got to the corner, he saw a silhouette of the same person,
14 the same build, the same color shirt that he had just seen, and he knew he needed
15 to stop that threat and so he fired three more rounds. AA II 404. Right after he
16 fired the three rounds, he saw the silhouette go to the right, which would be El
17 Tovar. He turned the corner. Officer McNabb then gave radio traffic of what was
18 going on and a further description of the individual who had shot at him and where
19 they were. Officer McNabb stated that at El Tovar, it got very dark and he wasn't
20 sure if the street-light was working. AA II 404. A couple of houses down El Tovar,
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1 Officer McNabb saw a shadow go across the sidewalk to the right. At the
2 intersection of Dolly and El Tovar, Officer McNabb heard the sirens of back up
3 arriving and was very happy to hear that. He couldn't tell where the individual
4 was, if that was the shadow he saw or if this person was laying in wait for him. He
5 needed back up and decided to hop up there as his back was arriving. One patrol
6 car pulled up and Officer McNabb told the other officer that all he knew was the
7 suspect had gone in a direction towards the right. And then a K9 officer quickly
8 arrived and another patrol officer and he recalls them telling him to stay back. He
9 recalls hearing over the air that somebody had reported someone in their backyard
10 and then he thought some people had come out of their house saying someone was
11 in their backyard. Officer McNabb was taken back at that point and they put him
12 with someone else. He recalls hearing on the radio that the K9 officer and other
13 officer captured the suspect in the backyard of a house. AA II 407.

16 Officer McNabb confirmed that he has reviewed the footage from his body
17 cam for that night. AA II 409. Body cam footage is played for the jury.

18 When asked about his ammunition and if he felt the need to reload, he
19 testifies that he had put a full magazine of ammunition in his gun before he went
20 down to the corner of Dolly and El Tovar. He testified that he dropped the old
21 magazine on the ground. He felt like he had shot a lot more rounds than he did, so
22 he just wanted to get a full one in there. So, he left that one on the ground, and
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1 kept going. AA II 416. Officer McNabb confirms a large number of officers
2 responded to this call. AA II 420. All kinds of patrol, sergeants, lieutenants, and
3 undercover officers appeared on scene. When questioned about his statement at the
4 scene and the reason for his confusion, Officer McNabb responds "I'd just been in
5 one of the most traumatic experiences of my life. Having been in this shootout and
6 my life being threatened. And I had a big adrenaline dump and it was all slowing
7 down at that point and I couldn't really think straight and remember things as
8 accurately." AA II 421. Officer McNabb confirms that the individual arrested was
9 the same one he saw on the corner and saw get out of the maroon vehicle, the only
10 individual who he saw in the maroon vehicle. AA II 423.

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13 Officer McNabb identifies the Defendant as being the individual driving the
14 maroon Dodge Intrepid that night. AA 4II 25. Officer McNabb confirms that this
15 individual was driving at the time he fired the first shot up in the air. AA II 434.
16 Officer McNabb believed he turned the body camera on shortly after that first shot.
17 AA II 435. Officer McNabb testified that he heard two shots but felt one go by
18 him. AA II 436. There was only one shot in the air and that was on Walnut and
19 Judson. AA II 440.

20
21 When Officer McNabb is questioned by defense counsel regarding a
22 description of the subject, Officer McNabb confirms that he never gave a
23 description of the suspect's hair, facial hair, or general description of height. AA
24

1 II 445. Officer McNabb denies that there were any other suspects to look for. AA

2 II 446. When questioned as to his responsibility for preserving information on the
3 body camera, Officer McNabb testified that “At the end of the shift you take the
4 actual camera and the battery and you put them on the docking station that are at
5 each Area Command and it recharges the battery and it uploads all of the video to
6 *evidence.com*. But prior to doing that I flag things. Like if you make an arrest or
7 issue a citation, you flag it so it’s saved for a certain number of years.” AAII 449.

9 Under Redirect, Officer McNabb is questioned about the number of shots the
10 suspect took. He confirms there were five (5) shots fired from the maroon Dodge
11 and then one shot at the end of the car pursuit for total of six shots. AA II 455.
12 Officer McNabb confirmed that he turned over his body camera to another officer
13 at the scene and his handgun and magazines later to Detective Jaeger. AA II 456.

15 Sergeant Ferranti is in charge of the body-worn camera detail. He started
16 the program in early 2014. Initial deployment was 200 cameras. AA II 458-459.
17 “We only have one system and we only have one camera. Basically, it’s a three-
18 part system. It has the camera and DVR recorder and everything is in here. It
19 records the video and the audio on this device. This is connected by a cord through
20 to the battery controller. And then the controller also acts as a start/stop with this
21 round button that is lit up with the green. And then when they want to utilize it
22 and make recordings, they press on that round button to start and stop the camera
23
24

1 for making recordings. It has a nice, raised feature so you can feel it. So even
2 though its inside a piece of clothing, you can feel it and realize where it is and press
3 the button and turn it on. AA II 460.

4 Officer Ferranti testified as to the quality of the body cameras. “This is a
5 basic standard eight megapixel camera. It has a built-in microphone in it. It
6 doesn’t do anything better than the normal human eye. It doesn’t have any zoom
7 or infrared or anything specialized like that. We wanted to get a product that was
8 not any better than the officers’ eyes - - and our eyes are actually even better. But
9 we wanted a good quality and this is a good quality, eight megapixel basic camera.”

10 AA III 461. When questioned as if this was the first officer-involved shooting
11 where the officer wore a body camera, Officer Ferranti replies “It was our first, but
12 it was one of the first for body cameras all over the country, yes.” AA III 463. On
13 cross-examination, Officer Ferranti testifies that he was involved in the training of
14 the individuals receiving the body cameras. “In the beginning initial outlay of the
15 200 cameras we’re talking about, the training we got was basic operation of the
16 camera, our first policy and we’ve gone through a few revisions since then, and it
17 was approximately 45 minutes to an hour worth of training to get them the
18 functionality of the system and how it works, and how to plug it in at the end of
19 the shift and upload the videos to the cloud storage that we use. And just
20 instructions on how the basic operation would occur.” AA III 466. Officer Ferrante
21
22
23
24

1 states “That you’re supposed to activate the device when you can activate it and
2 it’s when you have interaction with citizens; when you’re going to be dealing with
3 citizens on a car stop, on a person stop, or a call for service are like the basic
4 reasons.” AA III 467. During Re-Direct, Officer Ferranti explains when you don’t
5 hear any gunshots coming at Officer McNabb during the audio portion. “You’re
6 inside the car and at some point, Officer McNabb rolls up the window. At some
7 point, he has his lights and sirens on, so you hear the siren. There’s radio traffic
8 coming into the car radio. There’s radio traffic going out from his voice. And the
9 system is designed to pick up those close sounds and try to record them on the
10 video as best they can within the limitations of the system. Something occurring
11 outside the car at any distance is not going to be picked up by the system, either
12 audio or video once it gets far enough away.” AA III 473.

15 Gloria Guillen was the resident who informed police about the man in her
16 backyard. AA III 520. Officer Morgan and other officers went through Ms.
17 Guillen’s house to the backyard where they located an individual. AA III 507-508.¹
18 The K9 bit the individual in the leg. AA III 489. The officers then took the man
19 into custody. AA III 490.

21 ///

23 ¹ Officer Anthony Garbutt testified that he was a patrol officer who assisted
24 with checking the backyard. AA III 521, November 3, 2015.

1 Detective Breck Hodson, firearms detective, met with Eufrasia Nazaroff in
2 June of 2014. AA III 687. Detective Hodson confirmed that she showed Ms.
3 Nazaroff still photographs taken from a Facebook page that she had determined
4 belonged to Joshua Bacharach. AA III 688. Ms. Nazaroff indicated to Detective
5 Hodson that she had recently seen Mr. Bacharach with three separate firearms. AA
6 III 689-690. Ms. Nazaroff also indicated that she had seen Mr. Bacharach with
7 the bullet-proof vest and that he was wearing it the evening of June 26, 2014, when
8 he left. AA IV 691, November 3, 2015. Detective Hodson then confirms the
9 pictures were shown to Ms. Nazaroff from the detective's phone. AA IV 692.

11 Ryan Jaeger is a FIT ("Force Investigation Team") Detective with Las
12 Vegas Metropolitan Police Department. AA IV 753, November 4, 2015. At the
13 time of the subject incident, he was assigned to the "force investigation team" or
14 the "FIT" unit. AA IV 753-754. Detective Jaeger was dispatched to the scene on
15 June 26, 2014. AA IV 754. Detective Jaeger's role was that of a "case agent" or
16 "project manager." AA IV 755. His job was "to manage the tasks that all need to
17 be done and then combined everything into one report." AA IV 755.

19 As part of his investigation, Detective Jaeger did a "walk-through" with
20 Officer McNabb. AA IV 755. Detective Jaeger also did a "walk-around" the crime
21 scene "just to make sure nothing gets missed." AA IV 756. Detective Jaeger and
22 the crime scene analyst searched around the patrol car for casings. AA IV 758.

1 They also searched the surrounding areas for “impacts from Officer McNabb.” AA
2 IV 758. Detective Jaeger testified that they located a “bullet-proof vest and a
3 handgun” underneath a white pickup truck. AA IV 759, 770. They also found
4 cartridge casings and unfired cartridges. AA IV 761.

5
6 During his testimony, Detective Jaeger identified aerial maps and diagrams
7 of the scene. AA IV 760. He also identified the yellow shirt allegedly worn by
8 the suspect on June 26, 2014. AA IV 762.

9 Detective Jaeger testified that there was no attempt to obtain gunshot residue
10 from Mr. Bacharach. AA IV 763. He explained that:

11 Gunshot residue just isn’t reliable. I’ve been a detective almost ten years
12 now. I don’t think I’ve ever collected gunshot residue because it’s just so
13 erratic. It can be transferred really easily and it’s just not reliable. AA IV
14 763.

15 He then went on to explain the “false positives” with gunshot residue:

16 The way police officers qualify with their weapons they normally stand
17 shoulder to shoulder at a firing range and a bunch of them shoot at the same
18 time and that gunshot residue spreads in the air. It can get on their equipment,
19 it can get on their hands, it can get on their clothes, and as soon as someone’s
20 touched that residue, it is passed. So, it’s just – it’s just not reliable and it’s
21 just not something that’s used. AA IV 763-764.

22 Detective Jaeger also testified that Mr. Bacharach had been sent to the
23 hospital for the dog bite. AA IV 765.

24 ///

///

1 Detective Jaeger testified about the locations of the cartridge casings. *Id.* at
2 107. The State then asked Detective Jaeger about his experience with firearms and
3 casings. AA IV 767. Detective Jaeger testified:

4 Casings are really unpredictable. Just picture the way most people hold a
5 handgun. If they're holding a handgun perfectly straight up and down, the
6 casing should go up and to the right. But as soon as you throw a motion in
7 there, if you [indiscernible] the gun this way they're going straight back. If
8 you're leaning this way, the casings are going over there. If you throw
movement in there, if you throw different surfaces that the casings hit. AA
IV 767.

9 After discussing the casings, Detective Jaeger discussed the type of bullet
10 proof vest recovered. AA IV 772. He explained:

11 Each vest is rated at different threat levels. The rating basically says what
12 kind of round that vest will stop. There's really no difference from this vest
13 to a vest that any of the officers working the street are wearing. Most of the
14 officers that are working the streets, their vests are also Threat Level II-A's.
AA IV 772.

15 Detective Jaeger then explained how the Dodge Intrepid was transported
16 back to the forensics lab for inspection. AA IV 773. Detective Jaeger then testified
17 about the damage to the vehicle. AA IV 774.

18 In describing the damage, Detective Jaeger opined regarding the angles of
19 the bullet impacts. AA IV 775. He testified:

20 If you picture throwing a tennis ball or the way a tennis ball bounces, the
21 greater the angle the higher the bounce that you will get from the ball. These
22 are coming at an angle where they're just touch the car and then continued
23 on. AA IV 775.
24

1 Detective Jaeger also testified regarding the paperwork found in the vehicle.
2 AA IV 776. He testified that they collected DNA from the vehicle. AA IV 777.
3 Finally, Detective Jaeger testified regarding Mr. Bacharach's jail calls. AA IV 779-
4 780. He explained how the calling procedures at Clark County Detention Center
5 work. AA IV 779.
6

7 Additionally, Detective Jaeger opined as to why shell casings could not be
8 found:

9 It's my theory that the casings that we couldn't find were stuck in the treads
10 on the tires of a patrol car or in someone's boots. They're kind of like rocks
11 and sometimes you get a rock stuck in the tread of your shoe. We sent out a
12 message to all the patrol guys that responded at Northeast Area Command
13 to check their tires to see if there was any casings in there and to check their
14 boots when they got back in to see if there was any shell casings stuck in
15 them and we didn't recover anymore. AA IV 781.

16 At the end of the trial after the parties rested, the State made closing
17 arguments. During closing, the State explained that it had "the burden to prove the
18 case beyond a reasonable doubt." AA IV 822, November 4, 2015. The State
19 explained that it had to prove "Every element of the offenses, not every fact that
20 could be brought up." AA IV 822. She further explained that "Reasonable doubt is
21 not beyond all doubt. It is reasonable doubt, not based on speculation, not based
22 on mere possibility." AA IV 823.

23 The State also argued, "If he's guilty of one, he's guilty of all in the sense
24 of proof that it is him in identity; not saying that we have necessarily met all of the

1 elements....But, if we've proven beyond a reasonable doubt that he committed one
2 of them then it must be his identity as to all of them." AA IV 824.

3 **X. SUMMARY OF THE ARGUMENT**

4 Mr. Bacharach appeals the denial of his Petition for Writ of Habeas Corpus
5 involving claims of ineffective assistance of counsel, namely: Trial Counsel's
6 failure to object to the Trial Court's threat toward a critical State's Witness,
7 namely Eufrasia Nazaroff; Trial Counsel's failure to object to Detective Jaeger's
8 improper expert testimony; Trial Counsel's failure to object to DDA Thomson's
9 improper argument regarding the definition of reasonable doubt; and Trial
10 Counsel's failure to suppress or impeach a witness who presented conflicting
11 statements at trial.
12

13
14 Mr. Bacharach additionally appeals the denial of his Petition for Writ of
15 Habeas Corpus involving the additional claims of ineffective assistance of counsel
16 as Mr. Bacharach's Sixth Amendment Right To A Fair Trial was violated by the
17 Court for refusing to grant defense counsel's request for a mistrial when witness
18 Eufrasia Nazaroff testified regarding the LVMPD gang unit; by not allowing
19 defense counsel to cross-examine the LVMPD officer about the body camera
20 video; and by admitting a "Tainted" and "Unreliable" in-court identification.
21

22 ///

23 ///

1 Mr. Bacharach also appeals the denial of his Petition for Writ of Habeas
2 Corpus involving claims of ineffective assistance of counsel for failing to
3 “suppress or impeach” a witness who presented conflicting statements at trial.
4

5 **XI. ARGUMENT**

6 **1. WHETHER THE DISTRICT COURT ERRED BY NOT FINDING** 7 **THAT TRIAL COUNSEL PROVIDED INEFFECTIVE** 8 **ASSISTANCE BY FAILING TO OBJECT TO THE TRIAL COURT’S** 9 **THREAT TOWARD A CRITICAL STATE’S WITNESS.**

10 The Sixth Amendment to the Constitution guarantees a criminal accused the
11 right to a fair trial. Likewise, the Fifth and Fourteenth Amendments guarantee a
12 defendant due process of law. It is well established that “Few right are more
13 fundamental than that of an accused to present witnesses in his own defense.”
14 *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297
15 (1973), citing *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972).

16 *Webb v. Texas* is the leading authority dealing with a trial court’s discretion
17 to admonish a witness. In *Webb*, the trial court admonished the defense witness
18 outside the presence of the jury and made explicit threats of prosecution if the
19 witness lied under oath. *Webb*, 409 U.S. at 95-96. Specifically, the trial court in
20 *Webb* made threats to “personally see that your case goes to the grand jury and
21 you will be indicted for perjury and the likelihood (sic) is that you would get
22 convicted of perjury and that it would be stacked onto what you have already
23 got...” *Id.* The United States Supreme Court reversed the conviction. The *Webb*
24

1 Court found that the trial court's threats deprived the defendant of due process of
2 law under the Fourteenth Amendment by exerting "Such duress on the witness'
3 mind as to preclude him from making a free and voluntary choice whether or not
4 to testify." *Webb*, 409 U.S. at 98 (emphasis added).

5
6 It is a violation of due process for a trial court to make a threat towards a
7 witness that is meant to discourage the witness' true testimony. *United States v.*
8 *Viera*, 819 F.2d 498, 502–503 (5th Cir. 1987), *on reh'g*, 839 F.2d 1113 (5th Cir.
9 1988). The *Viera* Court relied on *Webb* to point out that "But warnings of perjury
10 cannot be emphasized to the point where they threaten and intimidate the witness
11 into refusing to testify." *Viera*, 819 F.2d at 503. In *Viera*, the Court compared the
12 prosecutor's "good faith warning" to the *Webb* case wherein the United States
13 Supreme Court found that the "threatening remarks, directed only at the single
14 witness for the defense, effectively drove that witness off the stand." *Viera*, 819
15 F.2d at 503. In both *Viera* and *Webb*, the threat was to indict the witness for perjury.
16 The *Viera* Court found that the threat was egregious enough to dissuade the witness
17 from testifying. The *Viera* Court then relied on *Webb* and *United States v. Goodwin*,
18 625 F.2d 693, 703 (5th Cir. 1980) to reverse *Viera*'s conviction without a showing
19 of prejudice.
20
21

22 The Eleventh Circuit dealt with a similar issue in *United States v. Heller*,
23 830 F.2d 150 (11th Cir. 1987), where an IRS agent intimidated a defense witness.
24

1 In *Heller*, the IRS agent made threats to Heller’s accountant, which caused the
2 accountant to testify untruthfully against Heller. *Heller*, 830 F.2d at 153. The
3 *Heller* Court relied on the holdings from *Webb* and other appellate circuits to
4 determine that Heller had been “deprived of an important defense witness by
5 substantial interference on the part of the government.” *Id.* at 154. The Eleventh
6 Circuit reversed Heller’s conviction.
7

8 A structural error means that an error was “so intrinsically harmful [to the
9 concept of a fair trial] as to require automatic reversal...without regard to their
10 effect on the outcome [of the proceeding.]” *Knipes v. State*, 124 Nev. 927, 934,
11 192 P.3d 1178 (2008). When a structural error occurs, the “government is not
12 entitled to deprive the defendant of a new trial by showing that the error was
13 ‘harmless beyond a reasonable doubt.’” *Weaver v. Massachusetts*, 137 S. Ct. 1899,
14 1910, 198 L. Ed. 2d 420 (2017), *citing*, *Chapman v. California*, 386 U.S. 18, 24,
15 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Thus, in the case of a structural error, the
16 court must reverse the outcome of the proceeding “regardless of the error’s actual
17 ‘effect on the outcome.’” *Weaver*, 137 S. Ct. at 1910.
18

19
20 When raising a structural error for the first time under an ineffective-
21 assistance claim, the petitioner must show (1) the attorney’s deficient performance,
22 and (2) prejudice. *Weaver*, 137 S. Ct. at 1910. To establish deficient performance,
23 the defendant must demonstrate that counsel’s representation “fell below an
24

1 objective standard of reasonableness.” *Wiggins v. Smith*, 539 U.S. 510, 521, 123
2 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (*quoting Strickland v. Washington*, 466 U.S.
3 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show prejudice, “the
4 ultimate inquiry must concentrate on ‘the fundamental fairness of the proceeding.’”
5 *Weaver*, 137 S. Ct. at 1911, *citing*, *Strickland*, 466 U.S. at 694. The petitioner can
6 show prejudice by showing either that (1) there was a reasonable probability that
7 but for counsel’s errors, the result of the proceeding would have been different; or
8 (2) counsel’s errors rendered the trial fundamentally unfair. *Weaver*, 137 S. Ct. at
9 1911.
10

11 Here, both the Trial Court and Trial Counsel caused a structural error to
12 occur. First, the Trial Court caused a structural error by intimidating Eufrazia
13 Nazaroff—the mother of Mr. Bacharach’s children—and threatening to incarcerate
14 her and take away her children for not answering the State’s questions properly.
15 AA II 252. The Trial Court also instructed Ms. Nazaroff against “blurt[ing] out
16 something about trying to get him off...” AA II 253.
17

18 The Trial Court’s admonishment was intimidating and undermined the
19 integrity of the trial. The Trial Court used its power to compel Ms. Nazaroff to
20 answer according to the State’s narrative rather than answering honestly. The
21 threatening admonishment went beyond a mere admonishment against perjury.
22 The Trial Court threatened Ms. Nazaroff with incarceration and threatened to take
23
24

1 away her children if she testified to any exculpatory evidence or did not cooperate
2 with the State's narrative.

3 In essence, the Trial Court prohibited Ms. Nazaroff from exercising her "free
4 and voluntary choice whether or not to testify." See, *Webb*, 409 U.S. at 98. There
5 is no way to ascertain how Ms. Nazaroff would have testified if the Trial Court had
6 not threatened her or prohibited her from testifying to exculpatory evidence. Thus,
7 the Trial Court's threat violated Mr. Bacharach's rights to a fair trial and due
8 process. This Court must find that a structural error existed and reverse the
9 conviction.
10

11 Additionally, Trial Counsel caused a structural error by failing to object to
12 and challenge the Trial Court's threatening admonishment. Trial Counsel was
13 deficient for failing to object and protect Mr. Bacharach's right to due process.
14 Trial Counsel did not recognize that the Court was undermining Mr. Bacharach's
15 rights to due process and a fair trial by threatening a potentially exculpatory witness.
16 Therefore, Counsel's actions were deficient.
17

18 Mr. Bacharach suffered the prejudice of going to trial with a witness who
19 was threatened by the Trial Court. There is no way to know what Ms. Nazaroff
20 would have testified to without the Court's coercive threats. Thus, Counsel's
21 failure to object to the threatening admonishment rendered the trial fundamentally
22 unfair.
23
24

1 For these reasons, this Court should find that a structural error exists, reverse
2 Mr. Bacharach's conviction, and order a new trial.

3 **Legal Standard- Ineffective Assistance of Counsel**

4 A defendant is entitled to effective assistance of counsel during critical
5 stages of criminal proceedings. U.S. Const. amend. V, VI, & XIV; Nevada
6 Constitution Art. I. Ineffective assistance of counsel means that Counsel's
7 performance was (1) deficient, such that counsel made errors so serious he ceased
8 to function as the "counsel" guaranteed by the Sixth Amendment, and (2)
9 Counsel's deficiency prejudiced the defendant such that the result of the
10 proceeding was rendered unreliable. *Strickland*, 466 U.S. at 687–88. The question
11 of whether a defendant has received ineffective assistance of counsel is a mixed
12 question of law and fact that is subject to independent review. *State v. Love*, 109
13 Nev. 1136, 1136–1138, 865 P.2d 322, 323 (1993).

14 Counsel's performance will be judged against the objective standard for
15 reasonableness. *State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006);
16 *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). Where counsel might claim
17 that an action was a strategic one, the reviewing court must satisfy itself that the
18 decisions were, indeed, reasonable. *Strickland*, 466 U.S. at 691.

19 Prejudice to the defendant occurs when there is a reasonable probability that,
20 but for counsel's errors, the result of the proceeding would have been different.
21

1 *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). A “reasonable
2 probability” is one sufficient to undermine confidence in the outcome. *Id.*

3 Moreover, the right to counsel necessarily includes the right *to effective*
4 *assistance of counsel*. *Strickland*, 466 U.S. at 686, *citing*, *McMann v. Richardson*,
5 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). “The benchmark for
6 judging any claim of ineffectiveness must be whether counsel’s conduct so
7 undermined the proper functioning of the adversarial process that the trial cannot
8 be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

10 The Nevada Supreme Court reviews claims of ineffective assistance of
11 counsel under a reasonably effective assistance standard. *Warden v. Lyons*, 100
12 Nev. 430, 432, 683 P.2d 504 (1984); *see Dawson v. State*, 108 Nev. 112, 115, 825
13 P.2d 593, 595 (1992). In post-conviction habeas corpus proceedings, all factual
14 allegations in support of an ineffective assistance of counsel claim must only be
15 proven by a preponderance of the evidence. *Powell*, 122 Nev. at 759.

17 **2. WHETHER THE DISTRICT COURT ERRED BY NOT FINDING**
18 **THAT TRIAL COUNSEL PROVIDED INEFFECTIVE**
19 **ASSISTANCE BY FAILING TO OBJECT TO DETECTIVE**
20 **JAEGER’S IMPROPER EXPERT TESTIMONY.**

NRS 50.275 provides:

21 If scientific, technical, or other specialized knowledge will assist the trier of
22 fact to understand the evidence or to determine a fact in issue, a witness
23 qualified as an expert by special knowledge, skill, experience, training, or
24 education may testify to matters within the scope of such knowledge.

Moreover, NRS 50.285 governs opinions by expert witnesses:

- 1 1. The facts or data in the particular case upon which an expert bases an
2 opinion or inference may be those perceived by or made known to the
3 expert at or before the hearing.
- 4 2. If of a type reasonably relied upon by experts in forming opinions or
5 inferences upon the subject, the facts or data need not be admissible in
6 evidence.

7 The Nevada Supreme Court has held that trial courts have discretion to
8 decide “what factors are to be considered on a case-by-case basis. *Higgs v. State*,
9 125 Nev. 1043, 222 P.3d 648 (2010). The *Higgs* Court also provided:

10 In Nevada, the qualification, assistance, and limited scope requirements are
11 based on legal principles. The requirements ensure reliability and relevance,
12 while not imposing upon a judge a mandate to determine scientific
13 falsifiability and error rate for each case.

14 *Higgs*, 222 P.3d at 659.

15 Here, Trial Counsel was ineffective for failing to object to Detective Jaeger’s
16 improper expert testimony. The State did not notice Detective Jaeger as an expert.
17 Detective Jaeger was not qualified to be an expert. However, at several points
18 during his testimony, he offered opinions that were scientific, technical, and
19 specialized to assist the jury with understanding facts in issue.

20 For example, Detective Jaeger testified regarding the reliability of gunshot
21 residue. He explained the technical aspects of gunshot residue for the jury. There
22 was no gunshot residue testing done in this case.

23 Detective Jaeger testified:

24 Gunshot residue just isn’t reliable. I’ve been a detective almost ten years
now. I don’t think I’ve ever collected gunshot residue because it’s just so

1 erratic. It can be transferred really easily and it's just not reliable. AA IV
2 0763.

3 ...

4 The way police officers qualify with their weapons they normally stand
5 shoulder to shoulder at a firing range and a bunch of them shoot at the same
6 time and that gunshot residue spreads in the air. It can get on their equipment,
7 it can get on their hands, it can get on their clothes, and as soon as someone's
8 touched that residue, it is passed. So it's just – it's just not reliable and it's
9 just not something that's used. AA IV 763-764.

10 Next, Detective Jaeger testified about the characteristics and behaviors of
11 cartridge casings:

12 Casings are really unpredictable. Just picture the way most people hold a
13 handgun. If they're holding a handgun perfectly straight up and down, the
14 casing should go up and to the right. But as soon as you throw a motion in
15 there, if you [indiscernible] the gun this way they're going straight back. If
16 you're leaning this way, the casings are going over there. If you throw
17 movement in there, if you throw different surfaces that the casings hit. AA
18 IV 0767.

19 ...

20 It's my theory that the casings that we couldn't find were stuck in the treads
21 on the tires of a patrol car or in someone's boots. They're kind of like rocks
22 and sometimes you get a rock stuck in the tread of your shoe. We sent out a
23 message to all the patrol guys that responded at Northeast Area Command
24 to check their tires to see if there was any casings in there and to check their
boots when they got back in to see if there was any shell casings stuck in
them and we didn't recover anymore. AA IV 0781.

21 ///

22 ///

1 Detective Jaeger clearly explained the scientific aspects of how cartridge
2 casings are ejected and why the casings would not necessarily be found during the
3 investigation.

4 During closing arguments, the State relied on Detective Jaeger's
5 explanations to argue that "common sense" dictates that the roads are busy so there
6 were more shots fired than cartridge casings found at the scene. AA IV 0844. The
7 State also relied on Detective Jaeger's assessment to argue that the missing shell
8 casings could get into tire treads or boots, and therefore, they would not be found.
9 AA IV 0781.

10
11 Additionally, Detective Jaeger testified as an expert when he explained the
12 ratings of bullet proof vests.

13
14 Each vest is rated at different threat levels. The rating basically says what
15 kind of round that vest will stop. There's really no difference from this vest
16 to a vest that any of the officers working the street are wearing. Most of the
17 officers that are working the streets, their vests are also Threat Level II-A's.
18 AA IV 0772.

19 Finally, Detective Jaeger opined regarding the angles of bullet impacts:

20 If you picture throwing a tennis ball or the way a tennis ball bounces, the
21 greater the angle the higher the bounce that you will get from the ball. These
22 are coming at an angle where they're just touch the car and then continued
23 on. AA IV 0775.

24 Trial Counsel did not object to Detective Jaeger's scientific, technical, and
specialized testimony. Counsel continuously allowed Detective Jaeger to opine on

1 issues as an expert. See, NRS 50.285. Therefore, Trial Counsel was deficient for
2 failing to challenge Detective Jaeger's improper expert testimony.

3 Trial Counsel's deficiency caused prejudice to Mr. Bacharach. Had Counsel
4 objected, there is a reasonable probability that the result of the trial would have
5 been different. Detective Jaeger's improper expert testimony was essential to the
6 State's case against Mr. Bacharach. During closing arguments, the State argued
7 multiple times that the circumstantial evidence showed that Mr. Bacharach
8 committed the crimes. AA IV 0825, 0844, 0845. The State also argued that the
9 jurors should use "common sense" when evaluating the evidence. AA IV 0854.
10 Detective Jaeger's expert testimony and opinions provided the foundation for the
11 State's arguments to use "common sense" when evaluating the circumstantial
12 evidence against Mr. Bacharach.
13
14

15 For these reasons, Mr. Bacharach requests that the Court find that Trial
16 Counsel was ineffective and reverse Mr. Bacharach's conviction.

17 **3. WHETHER THE DISTRICT COURT ERRED BY NOT FINDING**
18 **THAT TRIAL COUNSEL PROVIDED INEFFECTIVE**
19 **ASSISTANCE BY FAILING TO OBJECT TO DDA THOMSON'S**
20 **IMPROPER ARGUMENT REGARDING THE DEFINITION OF**
REASONABLE DOUBT.

21 NRS 175.211 provides Nevada's definition of reasonable doubt:

- 22 1. A reasonable doubt is one based on reason. It is not mere possible doubt but
23 is such a doubt as would govern or control a person in the more weighty
24 affairs of life. If the minds of the jurors, after the entire comparison and
consideration of all the evidence, are in such a condition that they can say
they feel an abiding conviction of the truth of the charge, there is not a

1 reasonable doubt. Doubt to be reasonable must be actual, not mere
2 possibility or speculation.

- 3 2. No other definition of reasonable doubt may be given by the court to juries
4 in criminal actions in this State.

5 Nevada law expressly prohibits attorneys from attempting to “quantify,
6 supplement, or clarify the statutorily prescribed standard.” *Daniel v. State*, 119 Nev.
7 498, 521, 78 P.3d 890 (2003). Moreover, attorneys may not “explain, elaborate on,
8 or offer analogies or examples based on the statutory definition of reasonable doubt.
9 Counsel may argue that evidence and theories in the case before the jury either
10 amount to or fall short of that definition—nothing more.” *Id.* at 521–522.

11 Here, the Trial Court provided Jury Instruction No. 5 to the jury:

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

16 A reasonable doubt is one based on reason. It is not mere possible doubt but
17 is such a doubt as would govern or control a person in the more weighty
18 affairs of life. If the minds of the jurors, after the entire comparison and
19 consideration of all the evidence, are in such a condition that they can say
20 they feel an abiding conviction of the truth of the charge, there is not a
21 reasonable doubt. Doubt to be reasonable must be actual, not mere
22 possibility or speculation. AA IV 0872.

23 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled
24 to a verdict of not guilty.

Jury Instruction No. 5 gave Nevada’s statutory definition of reasonable
doubt. During closing arguments, however, the State argued:

1 If he's guilty of one, he's guilty of all in the sense of proof that it is him in
2 identity; not saying that we have necessarily met all of the elements....But,
3 if we've proven beyond a reasonable doubt that he committed one of them
then it must be his identity as to all of them. AA IV 0824.

4 Here, the State attempted to "explain, elaborate on" the statutory definition
5 of reasonable doubt. See, *Daniel*, 119 Nev. at 521–522. This explanation, in and
6 of itself, is impermissible under Nevada law. NRS 175.211. In other words, the
7 State's argument was not about the evidence or theories in the case. It was strictly
8 about the burden of proof, which the State completely misrepresented.
9

10 Trial Counsel for Mr. Bacharach was ineffective for failing to challenge the
11 State's argument regarding its burden of proof. Trial Counsel was deficient for
12 failing to object to the improper argument. Counsel's failure allowed the State to
13 misrepresent the statutory definition of reasonable doubt while arguing a blanket
14 presumption of guilt for all of the charged crimes.
15

16 Had Trial Counsel objected, the result of the trial would have been different.
17 There is a reasonable probability that Mr. Bacharach would not have been
18 convicted on all of the charged counts if Trial Counsel had challenged the State's
19 misrepresentation that finding guilt on one count applied to all other counts.

20 Thus, Trial Counsel was ineffective. For this reason, the Court should
21 reverse Mr. Bacharach's conviction and grant him a new trial.
22

23 ///

24 ///

1 **4. ISSUES RAISED IN APPELLANT’S PRO PER PETITION:**

2 **i) Whether the District Court Violated Mr. Bacharach’s Sixth**
3 **Amendment Right To A Fair Trial For Refusing To Grant**
4 **Defense Counsel’s Request For A Mistrial When Witness**
5 **Eufrasia Nazaroff Testified Regarding The LVMPD Gang Unit.**

6 In his pro per petition, Mr. Bacharach contended that his rights were violated
7 under the Fourth, Fifth, Sixth, Fourteenth, and Eighth Amendments to the United
8 States Constitution because the Trial Court refused to grant a mistrial when
9 Eufrasia Nazaroff commented that she was interviewed by the LVMPD Gang Unit.
10 Thus, Mr. Bacharach was prejudiced, and the Court must reverse his conviction.

11 **ii) Whether the District Court Violated Mr. Bacharach’s Sixth**
12 **Amendment Right To A Fair Trial Because The Court Did Not**
13 **Allow Defense Counsel to Cross-Examine the LVMPD Officer**
14 **About The Body Camera Video.**

15 In his pro per petition, Mr. Bacharach contended that his rights were violated
16 under the Fourth, Fifth, Sixth, Fourteenth, and Eighth Amendments to the United
17 States Constitution because Defense Counsel was not allowed to cross examine
18 the officer using the body camera. For this reason, Mr. Bacharach was prejudiced,
19 and the conviction must be reversed.

20 **iii) Whether Defense Counsel Was Ineffective For Failing to**
21 **“Suppress Or Impeach” A Witness Who Presented Conflicting**
22 **Statements At Trial.**

23 In his pro per petition, Mr. Bacharach contended that his rights were violated
24 under the Fourth, Fifth, Sixth, Fourteenth, and Eighth Amendments to the United

1 States Constitution because Trial Counsel was ineffective for failing to impeach
2 witnesses with available evidence of conflicting statements. Therefore, Mr.
3 Bacharach was prejudiced, and the conviction must be reversed.

4 **iv) Whether the District Court Violated Mr. Bacharach's Sixth**
5 **Amendment Right To A Fair Trial By Admitting a "Tainted"**
6 **And "Unreliable" In-Court Identification.**

7 In his pro per petition, Mr. Bacharach contended that his rights were violated
8 under the Fourth, Fifth, Sixth, Fourteenth, and Eighth Amendments to the United
9 States Constitution because the Trial Court allowed a witness to make an "in court
10 suggestive identification" at trial. For this reason, Mr. Bacharach contends that he
11 was prejudiced. Therefore, the conviction must be reversed.

12 **XII. CONCLUSION**

13
14 Appellant respectfully requests that this Court vacate his conviction and
15 order a new trial or, in the alternative, remand the matter back to District Court for
16 an evidentiary hearing on the issues presented by Appellant.

17 Respectfully submitted this 20th day of September 2021.

18
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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 10,847 words. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,

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4 **XIV. CERTIFICATE OF SERVICE**

5 I hereby certify and affirm that this document was filed electronically with
6 the Nevada Supreme Court on September 20, 2021. Electronic Service of the
7 foregoing document shall be made in accordance with the Master Service List as
8 follows:
9

10 AARON FORD
11 Nevada Attorney General

12 STEVEN B. WOLFSON
13 Clark County District Attorney

14 By /s/ Jan Ellison
Oronoz & Ericsson, LLC