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3 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

4  
5 THOMAS CASH

6 Appellant,

7  
8 vs.

9 THE STATE OF NEVADA,

10 Respondent.  
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Supreme Court Case No.: 82060

13 **APPELLANT'S OPENING BRIEF**

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13 **NRAP 26.1 DISCLOSURE**  
14

15 The undersigned counsel of record certifies that the following are persons  
16 and entities as described in NRAP 26.1 and must be disclosed.  
17

- 18 1. Attorney of Record: Jean J. Schwartzner  
19 2. Publicly-held Companies Associated: None  
20 3. Law Firm(s) Appearing in the Court(s) Below: Law Office of Jean J.  
21 Schwartzner, Ltd.

22 DATED this 6<sup>th</sup> day of September, 2021.

23 /s/ Jean J. Schwartzner  
24 Jean J. Schwartzner, Esq.  
25  
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3                   THOMAS CASH

4                                   Appellant,

5                                   vs.

6                   THE STATE OF NEVADA,

7                                   Respondent.

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Supreme Court Case No.: 82060

11                                   **STATEMENT OF JURISDICTION**

12                   This Court has appellate jurisdiction over the instant matter pursuant to Nev.

13

14                   Rev. Stat. § 177.015(3). Appellant THOMAS CASH (“Cash”) appeals from the denial

15                   of his Petition for Writ of Habeas Corpus (Post-Conviction), announced on October 7,

16                   2020. The Order Denying Petition was filed November 4, 2020. Notice of Entry of

17                   Decision and Order filed November 17, 2020. A timely Notice of Appeal was filed on

18                   November 2, 2020

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR APPOINTED COUNSEL FOR HIS POST-CONVICTION PROCEEDINGS

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS WITHOUT HOLDING AN EVIDENTIARY HEARING

III. CUMULATIVE ERROR

**ROUTING STATEMENT**

Cash is appealing the denial of a post-conviction Petition for Writ of Habeas Corpus that involves a challenge to a judgment of conviction for offenses that category A felonies. Therefore, pursuant to N.R.A.P. 17(b)(3), this appeal presumptively is routed to the Supreme Court of Nevada.

**STATEMENT OF THE CASE**

On April 19, 2018, the State filed an amended information charging Cash with MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 ) and BATTERY WITH INTENT TO KILL (Category B Felony - NRS 200.400.3). Appellant's Appendix (hereafter AA) 1342-1346.

Thereafter, Cash pleaded not guilty and went to trial. Cash's trial started on June 18, 2018. AA 001. The jury trial lasted eight days and concluded on June 28,

1 2018. AA1339. On that date, the jury found Cash guilty of Second Degree Murder  
2 with Use of a Deadly Weapon and not guilty of Battery with Intent to Kill. AA1339.  
3 On August 20, 2018, District Court sentenced Appellant to life without the possibility  
4 of parole under the large habitual criminal statute. AA 1349-1380.  
5

6 On, September 19, 2018, Cash filed a timely Notice of Appeal. On September  
7 12, 2019, this Court affirmed Petitioner's Judgment of Conviction but remanded for  
8 the district court to correct the habitual criminal citation. AA 1436-1442. On October  
9 31, 2019, the district court filed an Amended Judgment of Conviction correcting the  
10 habitual criminal statute.  
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13 On August 3, 2020, Cash filed a timely Petition for Writ of Habeas corpus  
14 (Post-Conviction) as well as a Request for Appointed Counsel and Evidentiary  
15 Hearing. AA 1443-1489; 1506-1509. The State filed a Response on September 18,  
16 2020. AA 1510-1549. On October 7, 2020, a hearing was held wherein the district  
17 court denied Cash's request for counsel and also denied appellant's Petition without  
18 Cash being present. AA 1550-1553. The district court ordered the State to prepare the  
19 Findings of Fact, Conclusions of Law and Order. Id. The district court filed the  
20 Findings and Order on November 4, 2020 and the Notice of Entry of Order on  
21 November 17, 2020. AA 1554-1596. On November 2, 2020, Cash filed a timely  
22 Notice of Appeal. AA 1597-1599.  
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27 The instant Opening Brief follows.  
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## **STATEMENT OF FACTS**

On December 11, 2017, Kyriell Davis went to pick up his daughter from his girlfriend, Brittney Turner. At the time Brittney was pregnant with Davis' second child, and was living at 3999 Pistachio Nut Drive with her Mother (Antoinette), stepfather (Cash), and sister (Angel Turner). AA 873-875, 954. Davis was driving a borrowed car, and asked a roommate, Ezekiel Devine, to come with him. AA879. Davis waited outside the house for Brittney to bring out their daughter, but she left him waiting 15-20 minutes while he called and texted her numerous times. AA884.

Davis testified that she was yelling at him from the time she came out of the house. AA 886. A neighbor, Isidra Carolina Araiza Flores, testified that the argument was very loud, and she looked out a window and saw "a man and a woman were fighting." AA 844-845. Brittney testified that as she and Davis were arguing, he threatened her, it "escalated" and he grabbed her by the arms. AA956. Davis testified that while Brittney was yelling at him he "got her off me" by "pushing her shoulders", which he claimed "wasn't a hard push because she was pregnant", but rather a "get out of my face type push". AA886-889.

Brittney testified she was scared, and noticed her sister Angel looking out the window at the fight. AA959-960. Angel testified she heard a commotion out front, and looking out the window she could see Davis battering her sister, holding her arms

1 and "banging her up against the car". AA1118-1119. Angel said she went to her step-  
2 father Cash and told him "come real quick, Kyriell is banging up Brittney against the  
3 car". AA1120. Tamisha Kinchron (Cash's niece) testified she heard Angel scream to  
4 Cash, saying "that boy" was jumping on her sister. AA1173. Cash told police that he  
5 was wrapping Christmas presents when Angel ran in and said Davis was attacking  
6 Brittney in front of the house, so he immediately ran outside. AA1239.

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9 Kinchron testified she saw Cash and Angel run down the stairs and out the front  
10 door. AA1175. Angel testified Cash ran outside, and Davis still had Brittney by the  
11 arms, so Cash got Davis off Brittney by putting him in a headlock. Angel said the two  
12 men then started "squaring up" to fight and circling each other. AA1121-1123.  
13 Kinchron testified Cash ran up to Brittney and Davis and tried to break them apart,  
14 and she saw Davis punch Cash. AA1178. Cash told police he immediately ran outside  
15 and saw Brittney breaking away, and Davis trying to grab her again, so he punched at  
16 and grabbed Davis. AA1239-1240. Davis testified that Thomas Cash ran outside and  
17 swung at him (Davis), but Cash missed and Davis grabbed Cash's face and they  
18 started to wrestle. AA891-895. Brittney testified that Cash came out of the house and  
19 sort of swung at Davis (but missed), and then they grabbed onto each other. AA961.

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24 Davis testified that Ezekiel then ran over and interjected himself into the fight,  
25 and pushed them apart. AA 895-896. Brittney testified Ezekiel got out of the car and  
26 started to fight Cash. AA965. She told the police that Ezekiel broke Davis and Cash  
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1 apart by punching Cash in the face (not by shoving them apart as Davis had testified).  
2 AA1009. Cash told police he was wrestling with Davis when he heard Davis say "get  
3 'em, get 'em", and a man he has never seen before (Ezekiel) got out of a car and  
4 punched Cash in the face. AA1240-1241. Brittney testified that Davis yelled that he  
5 was going to get a gun or shoot somebody, that he said he will shoot. AA986-987.  
6 Angel heard Davis tell Ezekiel "go get my thing out of the car" which she believed  
7 was in reference to a gun. AA1125-1126. Kinchron testified she saw Davis and Cash  
8 swinging at each other, with some punches landing, when she heard Davis say to  
9 someone "bring my shit". AA1180. Brittney said that Ezekiel punched Cash in the  
10 face with a closed fist, damaging Cash's nose and knocking Cash to the ground.  
11 AA989, 1006-1007. Angel also testified Ezekiel got out of the car and joined the  
12 fight, and Angel testified she saw both Davis and Ezekiel land punches on Cash.  
13 AA1125. Kinchron testified she saw Ezekiel get out of the car and join Davis in  
14 attacking Cash, two on one. AA1181-1182. Cash told police that when Ezekiel  
15 punched him in the face, the punch was so strong it took him by surprise, and he  
16 believed it was more than just a fist - like Ezekiel had a metal bar in his hand.  
17 AA1242, 1250. Cash was being held by Davis when Ezekiel punched him, and the  
18 blow was so powerful that it disoriented him. AA1248, 1250. Cash said Ezekiel was  
19 coming at him again and he was afraid of being hit like that again, so he pulled out the  
20 small pocket knife he used for work and stabbed Ezekiel once as Ezekiel came at him.  
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1 AA1242,1243,1252. Davis said he stumbled back and warned Ezekiel to "watch out"  
2 because he saw a glint in Cash's hand. AA896. Davis saw Ezekiel fall, but did not yet  
3 know Ezekiel was injured. AA896.  
4

5 Davis testified he is a football player in what he described as "perfect shape".  
6 AA939. Brittney said Cash was in his 50s, while both Davis and Ezekiel were football  
7 players in their early 20s. AA984. Cash told police he then heard Davis say he's  
8 going to get a gun and shoot him, so Cash ran into the house. AA1242. Davis said  
9 Cash ran to his house, and Davis said he ran after him and "tried to kick the door  
10 down" and only failed to kick the door in because Cash had his weight pressed against  
11 the other side of the door. AA896. Davis said he wanted to kick in the door so he  
12 could "fight" Cash some more, to "finish" the fight. AA910. At that point Davis heard  
13 Ezekiel calling his name and went back and found out Ezekiel was hurt. AA897.  
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17 The medical examiner testified that the cause of death was a single stab wound  
18 to the chest, a wound that traveled in an upward motion. AA707,711.  
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20 Detective Gillis testified when he came into contact with Cash, Cash had a nose  
21 injury and blood on his shirt and pants consistent with the injury to his face, however  
22 when they checked Cash's hands to see if he had any injuries consistent with punching  
23 someone there were no injuries to Cash's hands. AA1042, 1047. Cash also had  
24 injuries to one arm. AA1048.  
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## **SUMMARY OF THE ARGUMENT**

The district court erred in denying Cash's request for appointed counsel to litigate his Petition for Writ of Habeas Corpus (Post-conviction) given that Cash is indigent, his Petition cannot be summarily denied, he faced severe consequences of a life without parole sentence, the many issues he raised are complex and/or require him to conduct discovery and investigation into facts outside the record.

The district court also erred in denying Cash's Petition without an evidentiary hearing given that he has presented facts outside the record, which would have been more fully developed if he had been permitted to investigate, and if true, warrant relief. Additionally, the district court erred in finding only the State's facts accurate when this Court already ruled that conflicting testimony was presented regarding Cash's self-defense claim at trial.

These errors combined amount to cumulative error.

## **ARGUMENT**

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### **I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR APPOINTED COUNSEL**

1                   **A.     Standard of Review**

2           This Court reviews the denial of a request for appointed post-conviction  
3 counsel to litigate a Petition for Writ of Habeas Corpus (Post-Conviction) for an abuse  
4 of discretion. Renteria-Novoa v. state, 133 Nev. 75, 76, 391 P.3d 760,761 (2017).  
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7                   **B.     Pursuant to NRS 34.750, the District Should Have Appointed**  
8                   **Appellant Post-Conviction Counsel**

9           NRS 34.750 provides for the discretionary appointment of post-conviction  
10 counsel the allegation of indigency is true and the petition is not dismissed summarily  
11 and sets forth a non-exhaustive list of factors which the court may considered in  
12 exercising its discretion: the severity of the consequences of the petitioner, the  
13 difficulty of the issues presented, whether the petitioner is unable to comprehend the  
14 proceedings, and whether counsel is necessary to proceed with discovery. Nev. Rev.  
15 Stat. §34.750(1); Renteria-Novoa, 133 Nev. at 76, 391 P.3d at 760-61.  
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18           The district court relied heavily on Renteria-Novoa for its denial of Cash's  
19 request for appointed post-conviction counsel. AA1592-1593. Upon a full analysis of  
20 this Court's decision in Renteria-Novoa, Cash's case is clearly more analogous to  
21 Renteria-Novoa than it is distinguishable.  
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24           **First**, the district court established Renteria-Novoa's indigency whe it allowed  
25 him to proceed in forma pauperis. Renteria-Novoa, 133 Nev. at 76, 391 P.3d at 761.  
26 Here, the district court established Cash's indigency on June 26, 2020 when it filed an  
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1 Order to Proceed in Forma Pauperis.

2       **Second**, this Court held that Renteria-Novoa's petition was not subject to  
3 summary dismissal as it was his first petition challenging the validity of his judgment  
4 of conviction and sentence. Id.; See NRS 34.745(1), (4). Here, Cash's petition was  
5 not subject to summary dismissal as it was Cash's first petition challenging the  
6 validity of his judgment of conviction and sentence.  
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9       **Third**, this Court held that the consequences that Renteria-Novoa faced are  
10 severe given that he was convicted of 36 felonies and is serving 85 years before being  
11 eligible for parole, which amounts to a life-without-parole sentence. Renteria-Novoa,  
12 133 Nev. at 76-77, 391 P.3d at 761-62. Here, Cash was convicted at trial of Second  
13 Degree Murder with Use of a Deadly Weapon and Battery with Intent to Kill. He was  
14 subsequently sentenced to life without the possibility of parole, the most severe  
15 consequence short of death.  
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18       **Fourth**, this court held that Renteria-Novoa's Petition was his "only  
19 opportunity to assert ineffective-assistance and other claims that could not have been  
20 raised at trial or on direct appeal." Id. at 77, 391 P.3d at 762. "The pro se petition,  
21 although not well pleaded, raised several ineffective assistance of counsel claims,  
22 including the failure to investigate, which may require discovery and investigation of  
23 facts outside the record." Id. Likewise, this is Cash's only opportunity to assert his  
24 *many* ineffective assistance of trial and appellate counsel claims and he too has  
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1 asserted claims of failure to investigate, failure to consult an expert, and failure to  
2 interview and call certain witnesses, all of which require discovery and investigation  
3 of facts outside the record.  
4

5 Although the pro per petition was written in English, Renteria-Novoa was a  
6 native Spanish speaker and used an interpreter at trial. Renteria-Novoa, 133 Nev. at  
7 76, 391 P.3d at 761. This Court factored the language barrier into its decision along  
8 with the other four aforementioned factors in finding that the district court erred in  
9 failing to appoint him post-conviction counsel. Id. at 78, 391 P.3d at 762.  
10

11 This Court then took the opportunity to stress that “the decision whether to  
12 appoint counsel under NRS 34.750(1) is not necessarily dependent upon whether a  
13 pro se petitioner has raised claims that clearly have merit or would warrant an  
14 evidentiary hearing.” Id. at 77, 391 P.3d at 762. This Court pointed out that the  
15 decision to appoint counsel turns upon whether under the circumstances of a particular  
16 case, the assistance of counsel is essential to accomplish a fair and thorough  
17 presentation of defendant’s claims for collateral relief. Id., 133 Nev. at 77, 391 P.3d at  
18 762 *citing* Woodward v. State, 992 So. 2d 391, 392 (Fla. Dist. Ct. App. 2008).  
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23 In addition to a language barrier, this Court recognized many other inherent  
24 difficulties for prisoners in presenting claims of trial error without the assistance of  
25 counsel that could hinder their ability to accomplish a fair and thorough presentation  
26 of their claims. Renteria-Novoa, 133 Nev. at 77-78, 391 P.3d at 762 cf. Martinez v.  
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1 Ryan, 566 U.S. 1, 11-12, 132 S.Ct. 1309, 182 L.Ed. 2d 272 (2012).

2 In Martinez, the Supreme Court of the United States outlined some of these  
3 difficulties as follows:  
4

5 Without the help of an adequate attorney, a prisoner will  
6 have [ ] difficulties vindicating a substantial ineffective-  
7 assistance-of-trial-counsel claim. **Claims of ineffective**  
8 **assistance at trial often require investigative work and**  
9 **an understanding of trial strategy.** When the issue cannot  
10 be raised on direct review, moreover, a prisoner asserting an  
11 ineffective-assistance-of-trial-counsel claim in an initial-  
12 review collateral proceeding **cannot rely on a court**  
13 **opinion or the prior work of an attorney addressing that**  
14 **claim.** Halbert v. Michigan, 545 U.S. 605, 617, 125 S. Ct.  
15 2582, 162 L. Ed. 2d 552 (2005); To present a claim of  
16 ineffective assistance at trial in accordance with the State's  
17 procedures, then, a prisoner likely needs an effective  
18 attorney.

19 The prisoner, **unlearned in the law**, may not comply with  
20 the State's procedural rules or may misapprehend the  
21 substantive details of federal constitutional law. Cf., e.g., Id.,  
22 at 620-621, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (describing  
23 the **educational background of the prison population**).  
24 While confined to prison, the prisoner is in **no position to**  
25 **develop the evidentiary basis for a claim of ineffective**  
26 **assistance, which often turns on evidence outside the trial**  
27 **record.**

28 Martinez, 566 U.S. 1, 11-12, 132 S.Ct. 1309 (emphasis added) *as cited by*  
Renteria-Novoa, 133 Nev. at 77-78, 391 P.3d at 762.

Cash does not have a language barrier but he faces all the difficulties  
enunciated by the Supreme Court in Martinez. Cash does not understand trial strategy,  
cannot conduct investigation or hire experts while in prison, has no court opinion or

1 prior work done by his trial an/or appellate attorneys addressing the issues raised in  
2 his pro per petition, is not familiar with the law and is not educated. Most importantly,  
3 he is incarcerated and indigent and is no position to develop the evidentiary basis for  
4 his claims of ineffective assistance, which turns on evidence outside the trial record.  
5

6 With respect to the claims Cash raised in his pro per Petition, Cash raised eight  
7 issues and 19 sub issues.  
8

9 In his Petition, Cash raised the following issues:

10 **Ground One:** The State Used Petitioner's Post-Arrest Silence Against Him  
11 AA 1564-1568.

12 **Ground Two:** Petitioner's Sentence is Illegal AA 1568-1569.

13 **Ground Three:** Prosecutorial misconduct

- 14 • The State expressed its personal opinion that Davis punched Petitioner in  
15 the nose to get Devine away, which diluted Petitioner's theory of self-  
16 defense.
- 17 • The State improperly stated that Flores could see the altercation.
- 18 • The State improperly stated that Flores heard the impact.
- 19 • The State improperly stated that Flores saw Petitioner throw the first  
20 punch.
- 21 • The State improperly argued that Devine was stabbed twice.
- 22 • The State referenced Petitioner's post-arrest silence.
- 23 • The State improperly argued Petitioner's juvenile record at sentencing.
- 24 • The State failed to file a Notice of Habitual Criminal Treatment.  
25 AA 1569-1574.

26 **Ground Four:** Improper Jury Instructions Nos. 1, 17, 20, and 31 AA 1574-  
27 1579.

28 **Ground Five:** Improper Settling of Jury Instructions AA 1579-1580.

**Ground Six:** Ineffective Assistance of Trial Counsel

- Failure to investigate and prepare for trial.
  - Counsel did no investigation and only reviewed the State's open  
file.
  - Counsel failed to call a pathologist as an expert to discuss the  
positioning of the victim at time of death and the stabbing
  - Canvas neighbors to see what they saw

- Failed to interview Sandi Cash
  - Failure to establish Petitioner's theory of defense through jury instructions.
  - Failure to object to Davis' testimony
  - Failure to protect post-arrest silence
  - Failure to impeach Davis' testimony
- AA 1580-1585.

**Ground Seven:** Cumulative Error AA 1585-1586.

**Ground Eight:** Ineffective Assistance of Appellate Counsel for Failing to Consult with Petitioners Prior to Direct Appeal AA 1586

**Ground Nine:** Denial of Right to Speedy Trial Right AA 1587-1588.

In his Supplemental Memorandum Cash raised the following additional issues:

**Ground One:** Ineffective Assistance of Counsel

- Failure to consult and communicate
  - Failure to investigate and call witnesses Sandi Cash and Angel Turner
  - Failure to meet with Petitioner
- AA 1588-1591.

**Ground Two:** Ineffective Assistance of Appellate Counsel

- Appellate counsel failed to file an appeal
  - Appellate counsel failed to properly raise the issue of prosecutorial misconduct for arguing he had a duty to retreat because he failed to make a cogent argument and cite to relevant authority.
- AA 1591.

**Additional Ground:**

- Counsel failed to object when the State improperly argued that Appellant had a duty to retreat. (This ground was raised in the statement of facts section of Appellant's pro per Supplemental Memorandum.) AA 1475.

The issues related to jury instructions, prosecutorial misconduct, and presentation of a theory of self-defense are complex and require an understanding of case law, statutory law, and/or theories of liability. In its Order denying Cash's pro per petition, the district court repeatedly refers to Cash not citing proper portions of the transcript (AA 1570-1572) confusing witnesses with one another (AA 1571), that his assertions are

1 naked, not supported by case law and that he does not complete his argument  
2 regarding how an error prejudiced him (AA 1576-77; 1579) and that his claims are  
3 belied by the record because a claim is not worded correctly. AA 1569. All of these  
4 conclusions made by the district court indicate that Cash did not properly comprehend  
5 the proceedings and that the issues were too complex for him to properly litigate  
6 without counsel.  
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8  
9       Additionally, the issues related to failure to investigate and failure to call an  
10 expert require discovery and investigation of facts outside the record as well as the  
11 consultation with an expert, none of which Cash was permitted to do because he was  
12 not given an appointed attorney. The district court repeatedly referred to Cash not  
13 demonstrating how a better investigation or how expert testimony would have  
14 changed the outcome yet at the same denied him the opportunity to do so by denying  
15 him appointed counsel. AA 1581.  
16

17  
18       Finally, procedural issues regarding how to properly plead an ineffective  
19 assistance of trial counsel claim for failure to object to an error as well as how to  
20 properly plead an ineffective assistance of appellate counsel claim for failure to raise  
21 an issue on appeal are complex. As one example, Cash raised the issue of  
22 prosecutorial misconduct as a stand alone claim in his pro per petition whereas this  
23 should have been raised as either an ineffective assistance of counsel claim for failure  
24 to object to the prosecutorial misconduct or failure to raise the issue of prosecutorial  
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1 misconduct in his direct appeal. AA 1451-1452. The district court denied all  
2 prosecutorial misconduct claims, in part, as being waived due to Cash's failure to  
3 present then on direct appeal. AA 1569. Cash clearly did not understand how to  
4 properly plead the claim, discussed *supra*, because he does not understand the law or  
5 legal procedure. This is but one example of how Cash needed appointed counsel to  
6 properly plead his claims at a procedural level.  
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9 Cash's claims raised in his Petition were numerous, complex, required  
10 investigation of facts outside the record including witnesses and consultation with an  
11 expert, he faced severe consequences with a life without parole sentence. Thus,  
12 appointed counsel was necessary to accomplish a fair and thorough presentation of  
13 Cash's claims. Therefore, it was an abuse of discretion for the district court to deny  
14 Cash's request for appointed counsel to litigate his post-conviction Petition. Nev. Rev.  
15 Stat. §34.750(1); Renteria-Novoa, 133 Nev. at 76, 391 P.3d at 760-61.  
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## 18 **II. DISTRICT THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED** 19 **CASH'S PETITION WITHOUT AN EVIDENTIARY HEARING**

### 20 **A. Standard of Review**

21  
22 In Strickland v. Washington, the United States Supreme Court established the  
23 standards for a court to determine when counsel's assistance is so ineffective that it  
24 violates the Sixth Amendment of the U.S. Constitution. 466 U.S. 668, 104 S.Ct. 205  
25 (1984). Strickland laid out a two-pronged test to determine the merits of a  
26 defendant's claim of ineffective assistance of counsel. To state a claim of ineffective  
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1 assistance of counsel that is sufficient to invalidate a judgment of conviction, the  
2 petitioner must demonstrate that: (1) counsel's performance fell below an objective  
3 standard of reasonableness; and (2) counsel's errors were so severe that they rendered  
4 the verdict unreliable. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)  
5 citing Strickland 466 U.S. 668, 104 S.Ct. 205.

6  
7 Once the defendant establishes that counsel's performance was deficient, the  
8 defendant must next show that, but for counsel's errors the result of the trial would  
9 probably have been different. Strickland, 266 U.S. at 694, 104 S.Ct. 2068; Davis v.  
10 State, 107 Nev. 600, 601, 602, 817 P.2d 1169, 1170 (1991). The defendant must also  
11 demonstrate errors were so egregious as to render the result of the trial unreliable or  
12 the proceedings fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d  
13 322, 328 (1993) citing Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d  
14 180 (1993); Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. A habeas corpus petitioner  
15 must prove disputed factual allegations by a preponderance of the evidence. Means v.  
16 State, 120 Nev. 1001, 103 P.3d 25 (2004).

17  
18 "Strategy or decisions regarding the conduct of a defendant's case are virtually  
19 unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745,  
20 783 P.2d 430 (1989); Olausen v. State, 105 Nev. 110, 771 P.2d 583 (1989). **However,**  
21 **counsel's strategic decisions must still not fall below an objective standard of**  
22 **reasonableness.** Strickland, 466 U.S. 668. 104 S.Ct. 205.

1 A defendant who contends that his attorney was ineffective because he did not  
2 adequately investigate must show how a better investigation would have rendered a  
3 more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533  
4 (2004). Counsel cannot be ineffective for failing to make futile objections or  
5 arguments. See Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006). Trial counsel  
6 has the “immediate and ultimate responsibility of deciding if and when to object,  
7 which witnesses, if any, to call, and what defenses to develop. Rhyne v. State, 118  
8 Nev. 1, 8, 38 P.3d 163, 167 (2002). **However, counsel’s decisions regarding such**  
9 **matters must still not fall below an objective standard of reasonableness.**  
10 Strickland, 466 U.S. 668. 104 S.Ct. 205.

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14 This Court has held that all appeals must be “pursued in a manner meeting high  
15 standards of diligence, professionalism and competence.” Burke v. State, 110 Nev.  
16 1366, 1368, 887 P.2d 267, 268 (1994). There is a presumption that appellate counsel's  
17 performance was reasonable and fell within “the wide range of reasonable  
18 professional assistance.” See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir.  
19 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The federal courts have  
20 held that a claim of ineffective assistance of appellate counsel must satisfy the  
21 two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S. Ct. at 2065,  
22 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United  
23 States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130  
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1 (11th Cir. 1991). In order to satisfy Strickland's second prong, the defendant must  
2 show that the omitted issue would have had a reasonable probability of success on  
3 appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d  
4 at 1132.

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

11  
12 **B. The District Court Improperly Denied Cash's Petition Based Upon**  
13 **Pleadings, Affidavits and Assumptions Without Holding and**  
14 **Evidentiary Hearing**

15  
16 NRS 34.770 determines when a defendant is entitled to an evidentiary hearing.  
17 NRS 34.770 provides:

- 18  
19 1. The judge or justice, upon review of the return, answer  
20 and all supporting documents which are filed, shall  
21 determine whether an evidentiary hearing is required. A  
22 petitioner must not be discharged or committed to the  
23 custody of a person other than the respondent *unless an*  
24 *evidentiary hearing is held.*  
25 2. If the judge or justice determines that the petitioner is  
26 not entitled to relief and an evidentiary hearing is not  
27 required, he shall dismiss the petition without a hearing.  
28 3. If the judge or justice determines that an evidentiary  
hearing is required, he shall grant the writ and shall set a  
date for the hearing.

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



1 Nev. 1328, 885 P.2d 603 (1994). A defendant is entitled to an evidentiary hearing if  
2 his petition is supported by specific factual allegations, which, if true, would entitle  
3 him to relief unless the factual allegations are repelled by the record. Marshall, 110  
4 Nev. at 1331, 885 P.2d at 605; See also Hargrove, 100 Nev. at 503, 686 P.2d at 225  
5 (holding that “[a] defendant seeking post-conviction relief is not entitled to an  
6 evidentiary hearing on factual allegations belied or repelled by the record”). “A claim  
7 is ‘belied’ when it is contradicted or proven to be false by the record as it existed at  
8 the time the claim was made.” Mann v State, 118 Nev. 351, 354, 46 P.3d 1228, 1230  
9 (2002). The district court cannot rely on affidavits submitted with a response or  
10 answer in determining whether the factual allegations are belied by the record. Id. at  
11 354-56, 46 P.3d at 1230-31. Additionally, the district court cannot make credibility  
12 decisions without an evidentiary hearing. See Id. at 356, 46 P.3d at 1231 (rejecting  
13 suggestion that district court can resolve factual dispute within an evidentiary hearing  
14 and noting than “by observing the witnesses’ demeanors during an evidentiary  
15 hearing, the district court will be better able to judge credibility”).

21 In Ground Six of the Petition and Ground One of the Supplement, Cash raised  
22 numerous ineffective assistance of trial counsel issues, including the failure to  
23 investigate generally as well as the failure to specifically investigate named witnesses  
24 (Angel and Sandi), a genre of witnesses (neighbors) and the failure to use a  
25 pathologist as an expert. AA 1580-1584. With respect to the claim that defense  
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1 counsel failed to conduct any investigation whatsoever and that defense counsel failed  
2 to canvass the neighbors about what happened, the district court ruled pursuant to  
3 Molina v. State <sup>1</sup>, that Cash did not demonstrate what a better investigation would  
4 have shown. AA 1581.

6 With respect to the claim that defense counsel should have hired a pathologist  
7 as an expert to discuss the position of the victim at the time of his death, the district  
8 court ruled pursuant to Molina <sup>2</sup>, that Cash did not demonstrate what a better  
9 investigation would have shown and also that which witnesses to call is a strategic  
10 decision left to counsel pursuant to Rhyne v. State. <sup>3</sup> AA 1581. The district court  
11 cannot rely on affidavits submitted with a response or answer in determining whether  
12 the factual allegations are belied by the record. Mann, 118 Nev. at 354-56, 46 P.3d at  
13 1230-31. Id. at 354-56, 46 P.3d at 1230-31.

17 Presumably Cash was arguing that a pathologist could determine the angle at  
18 which the knife went in to demonstrate that Cash was in a vulnerable and defensive  
19 position when he stabbed Devine, as opposed to a powerful and aggressor position,  
20 the former supporting his theory of self-defense. The district court cannot determine if  
21 not consulting with a pathologist was, in fact, an effective or strategic decision by  
22 counsel without testimony from both counsel and a pathologist, which Cash was  
23 \_\_\_\_\_

26 <sup>1</sup> 120 Nev. 185, 87 P.3d 533 (2004).

27 <sup>2</sup> 120 Nev. 185, 87 P.3d 533 (2004).

28 <sup>3</sup> 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

1 unable to obtain due to the fact the district court denied his request for appointed  
2 counsel.

3 With respect to the claim that defense counsel should have interviewed Sandi  
4 Cash and was ineffective for failing to do so, the district court ruled pursuant to  
5 Molina <sup>4</sup>, that Cash did not demonstrate how this testimony would have changed the  
6 outcome of trial. FOFCL 28. The district court then goes on to state that even if Sandi  
7 Cash had testified, it would not have changed the outcome “because the jury was  
8 presented with evidence demonstrating Cash did not act in self-defense, including that  
9 Cash initiated the conflict, only he had a weapon he fled from the scene, and he  
10 disposed of the murder weapon.” AA 1582 citing AA 1437.

11 **First**, the district court only focused on the portion of Sandi’s affidavit that  
12 talks about the victim’s interaction with Cash and fails to address the interaction  
13 between Davis and Cash as well as Davis and Brittany. AA 1581. The district court  
14 also failed to address the fact that Cash asserted in his Petition that Sandi witnessed  
15 the incident and would have testified consistent with his theory of defense and  
16 corroborated the fact that he acted in self-defense. AA 1581; AA1475. Part of the  
17 State’s argument in response to the self-defense theory presented by defense at trial  
18 was that Cash allegedly had no reason to believe he needed to protect Brittany from  
19 Davis, which then dovetailed into the State’s argument that Cash had no reason to feel  
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28 <sup>4</sup> 120 Nev. 185, 87 P.3d 533 (2004).

1 personally threatened in any way by the altercation between he and both Davis and  
2 Devine. The incident described in Sandi's affidavit as well as the assertion he makes  
3 about what she saw supports Cash's self-defense theory as trial that he felt that  
4 Brittany was in danger and that he was in danger when up against Davis and Devine.  
5

6       **Second**, although Sandi states in her affidavit she never told Antoinette White  
7 or Cash about the incident, this does not mean that Cash and/or Antoinette were not  
8 aware of said incident. Had an evidentiary hearing been granted, Antoinette could  
9 have been questioned to determine if she and Cash had ever discussed what happened  
10 during this incident or other violent incidents that had occurred between Brittany and  
11 Davis.  
12

13       **Third**, the district court improperly uses the ruling of this Court regarding  
14 Cash's sufficiency of the evidence argument raised on direct appeal as dispositive of  
15 the prejudice prong. This Court was analyzing the evidence under the sufficiency of  
16 the evidence standard, which does not address credibility or weight of new evidence,  
17 views evidence in the light most favorable to the prosecution and looks at whether or  
18 not the jury could have found the elements of the crime met. Nolan v. State, 122 Nev.  
19 363, 377, 132 P.3d 564, 573 (2006) (emphasis omitted) quoting McNair v. State, 108  
20 Nev. 53, 56, 825 P.2d 571, 573 (1992). The sufficiency of the evidence standard is  
21 not what is used to analyze ineffective assistance of counsel claims in post-conviction  
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1 petitions where it is argued that new evidence would have changed the outcome of  
2 trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 205 (1984).

3         With respect to the claim that defense counsel should have interviewed and  
4 called Angel to testify, the district court ruled that this claim is belied by the record  
5 given the fact that Angel did testify at trial and that Cash failed to indicate how her  
6 testimony would have been different had counsel interviewed her. AA 1589. Although  
7 Angel's affidavit submitted by Cash was not artfully worded, a read of the preliminary  
8 hearing transcripts indicate that Angel heard Davis threatening Brittany saying you're  
9 never gonna see Londyn again." AA 1600. This information was not presented to the  
10 jury. AA 114-1171. This would have supported the defense argument that Cash's  
11 initial intention was to protect Brittany. While the pro per argument was worded  
12 "failure to interview," it appears that the crux of Cash's argument is that counsel  
13 should have elicited this information from Angel during examination at trial and that  
14 failing to do so fell below an objective standard of reasonableness and prejudiced  
15 Cash. Why counsel did not do so is unknown because counsel has not testified as to  
16 why he made this decision. The district court cannot rely on affidavits submitted with  
17 a response or answer in determining whether the factual allegations are belied by the  
18 record. Mann, 118 Nev. at 354-56, 46 P.3d at 1230-31. Id. at 354-56, 46 P.3d at 1230-  
19 31.

20         With respect to the claim that appellate counsel was ineffective for failing to  
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1 properly raise a prosecutorial misconduct claim, specifically, that appellate counsel  
2 failed to cite to any relevant authority when arguing that the State committed  
3 prosecutorial misconduct, the district court ruled that Cash failed to explain how such  
4 a complaint is relevant to a sufficiency of the evidence claim or how it would have  
5 made a difference on appeal. AA 1590. The district court also ruled that appellate  
6 counsel made a strategic decision in drafting the appellate brief the way he did. AA  
7 1591.

10 **First**, the district court incorrectly couches the argument made on appeal as  
11 being part of a sufficiency of the evidence argument. Appellate counsel raised a  
12 sufficiency of the evidence argument, which appears to morph into a prosecutorial  
13 misconduct claim at the end. AA 1393-1394. However, appellate counsel failed to cite  
14 to any legal authority for the prosecutorial misconduct claim and as such, this Court  
15 declined to address the issue. AA 1437.

18 **Second**, the district court cannot make the finding that counsel's failure to cite  
19 to legal authority is strategic in nature without hearing testimony from counsel  
20 regarding why he failed to raise a prosecutorial misconduct claim in a legal pleading  
21 submitted to this Court without citing the legal authority. Cash was never permitted to  
22 fully litigate his claim or prosecutorial misconduct at the direct appeal level because  
23 his attorney was ineffective for failing to cite to any legal authority regarding  
24 prosecutorial misconduct. The district court cannot rely on affidavits submitted with  
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1 a response or answer in determining whether the factual allegations are belied by the  
2 record. Mann, 118 Nev. at 354-56, 46 P.3d at 1230-31. Id. at 354-56, 46 P.3d at 1230-  
3 31.  
4

5 The district court also abused its discretion when it issued a order only finding  
6 that the State's asserted facts were correct. The Findings of Facgts issued bu the  
7 district court is literally a carbon copy of the statement of facts from the State's  
8 responding brief in post-conviction litigation as well as the State's answering brief on  
9 appeal. This is contrary to what this Court ruled in its Order of Affirmance wherein it  
10 stated, "The witnesses offered differing versions of the incident." AA 1438. "The law  
11 of a first appeal is law of the case on all subsequent appeals *in which the facts are*  
12 *substantially the same.*" Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975)  
13 (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969))(emphasis added).  
14  
15 Therefore, the district court abused its discretion when it made findings of facts  
16 consistent only with the State's version of events. This prejudiced Cash in that it  
17 contributed to the denial of his Petition  
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21 All of the above assertions claims as supported by specific factual assertions  
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23 The factual assertions are as specific as possible given the fact that Cash was not  
24 permitted to conduct any investigation with an appointed attorney. If true, and we are  
25 to assume they are true, would entitled him to relief. Marshall, 110 Nev. at 1331, 885  
26 P.2d at 605; See also Hargrove, 100 Nev. at 503, 686 P.2d at 225. Therefore it was  
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1 error for the district court to deny Cash and evidentiary hearing and this prejudiced  
2 Cash. Id., NRS 34.770.

3         Additionally, All of the aforementioned errors—failure to conduct any  
4 investigation, failure to interview important witnesses who corroborated a self defense  
5 theory, failure to elicit testimony from witnesses to support a self-defense theory,  
6 failure to consult with a pathologist to support a self defense theory and failure to cite  
7 to any relevant authority when making an argument on appeal--fall below an objective  
8 standard of reasonableness. Strickland, 466 U.S. 668, 104 S.Ct. 205.  
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11         Due to the fact that the district court denied Cash's request for an attorney,  
12 hindered Cash from investigating or presenting testimony at an evidentiary hearing, it  
13 is difficult to fully demonstrate to this Court that the outcome of Cash's trial would  
14 have been different had counsel met this standard. This being said, assuming he would  
15 have been able to obtain all the evidentiary support through proper investigation with  
16 an appointed attorney, the outcome of his trial would have been different had he  
17 received effective assistance of counsel. Strickland, 466 U.S. 668, 104 S.Ct. 205.  
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21         Therefore, the district court abused its discretion in denying Cash counsel,  
22 denying him the fair and thorough presentation of his claims, denying him an  
23 evidentiary hearing and denying his Petition and Cash was prejudiced by this abuse of  
24 discretion. Strickland, 466 U.S. 668, 104 S.Ct. 205.; Renteria-Novoa, 133 Nev. at  
25 77- 78, 391 P.3d at 762 cf. Martinez, 566 U.S. at 11-12, 132 S.Ct. at 1309; NRS  
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1 34.770; NRS 34.750.

### 2 3 **III. CUMULATIVE ERROR**

4 The relevant factors to consider in determining whether cumulative error is  
5 present include whether (1) the issue of innocence or guilt is close, (2) the quantity  
6 and character of the errors (3) and the gravity of the crime charged.” Mulder v. State,  
7 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). The issue of innocence or guilt was  
8 close given that Cash had a very valid claim of self-defense and as this Court stated in  
9 its Order of Affirmance, “the witnesses offered differing versions of the incident.” AA  
10 1438. As discussed *supra*, Cash raised numerous complex claims of ineffective  
11 assistance of counsel in this case at both the trial and appellate level. The arguments  
12 presented in his Petition, if successful, would have resulted in a better outcome.  
13 However, Cash was not permitted to fully present his issues because he was denied  
14 appointed counsel, the opportunity to investigate witnesses and consult with an expert  
15 and denied an opportunity to present facts outside the record at an evidentiary hearing.

16 Cash was convicted of the crimes of second degree murder with use of a deadly  
17 weapon and battery with intent to kill. These crimes are grave and  
18 Cash is serving a sentence of life without the possibility of parole.

19 Therefore, the Mulder factors weigh in favor of finding there is cumulative  
20 error warranting reversal of the denial of Cash’s Petition. The district court denied  
21 Cash’s request for counsel, hindered his ability to investigate and consult with an

1 expert, and then found no error on the part of counsel at a hearing Cash was not  
2 present for. Cumulatively this was an abuse of discretion and prejudiced Cash for the  
3 reasons discussed *supra* in the instant section as well as this entire instant Opening  
4 Brief.  
5

### 6 7 8 CONCLUSION

9 Based upon the arguments herein, *supra*, the denial of THOMAS CASH'S  
10 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) should be  
11 REVERSED and this matter should be remanded for appointment of counsel and an  
12 evidentiary hearing.  
13

14  
15 Dated this 6<sup>th</sup> day of September, 2021.  
16

17  
18 Respectfully submitted,  
19

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**CERTIFICATE OF COMPLIANCE**

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

6       **☒ This brief has been prepared in a proportionally spaced typeface using**  
7 **Microsoft Word 2010 Edition in Times New Roman 14 point font; or**  
8

9       **☐ This brief has been prepared in a monospaced typeface using [state name and**  
10 **version of word-processing program] with [state number of characters per inch and**  
11 **name of type style].**  
12

13       2. This brief exceeds the with the page- or type-volume limitations of NRAP  
14 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is  
15 either:  
16

17       **☐ Proportionately spaced, has a typeface of 14 points or more, and contains**  
18 **13,965 words; or**  
19

20       **☐ Monospaced, has \_\_\_\_\_ or fewer characters per inch, and contains \_\_\_\_\_**  
21 **words or \_\_\_\_\_ lines of text; or**  
22

23       **☒ Does not exceed 30 pages.**

24       3. Finally, I hereby certify that I have read this appellate brief, and to the best of  
25 my knowledge, information, and belief, it is not frivolous or interposed for any  
26 improper purpose. I further certify that this brief complies with all applicable Nevada  
27  
28

1 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every  
2 assertion in the brief regarding matters in the record to be supported by a reference to  
3 the page and volume number, if any, of the transcript or appendix where the matter  
4 relied on is to be found. I understand that I may be subject to sanctions in the event  
5 that the accompanying brief is not in conformity with the requirements of the Nevada  
6 Rules of Appellate Procedure.  
7

8  
9 DATED this 6<sup>th</sup> day of September, 2021.  
10

11  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on the 6<sup>th</sup> of September, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD, ESQ.  
Nevada Attorney General

ALEXANDER G. CHEN, ESQ.  
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Thomas Cash  
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