IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE MONAY-PINA, Appellant, v. STATE OF NEVADA, Respondent.	Docket No. 84321	Electronically Filed Jul 01 2022 12:15 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

Monique McNeill, Esq.
Nevada Bar No. 9862
P.O. Box 2451
Las Vegas, Nevada 89125
Phone: (702) 497-9734
Email: Monique.mcneill@yahoo.com
Attorney for Appellant Monay-Pina

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NRAP 26.1 DISCLOSURE

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

THOMAS BOLEY
Bar No. 11061
Trial Counsel

MONIQUE MCNEILL
Bar No. 9862
Post Conviction Counsel

MATT LAY
Bar No.12249
Appellate Counsel

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JURISDICTIONAL STATEMENT

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

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

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

C. Order Denying Petition Filed: 2/15/2022

D. Notice of Appeal Filed: 2/28/2022

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

This Appeal is from a denial of a post-conviction writ of habeas corpus, and thus this Court has jurisdiction.

ROUTING STATEMENT

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

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

STATEMENT OF THE CASE

On March 4, 2016, the State filed an Information charging Jose Monay-Pina ("Monay-Pina") as follows: Counts 1, 4 – Conspiracy to Commit Robbery (Felony – NRS 200.380, 199.480)); Count 2– Burglary While in Possession of a Firearm (Felony – NRS 205.060); Counts 3, 5 – Robbery with a Deadly Weapon (Felony – NRS 200.380, 193.165); Counts 6, 8, 9, 10 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony—NRS 200.481); Count 7—Attempt Murder with Use of a Deadly Weapon (Felony—NRS 200.010, 200.030); Count 11—Aiming a Firearm at a Human Being (Gross Misdemeanor—NRS 202.290); Count 12—Coercion with Use of a Deadly Weapon (Felony—NRS 207.190); Count 13—Battery with Intent to Commit a Crime (Felony—NRS 200.400.2). Appellant's Appendix ("AA")697.

Trial commenced on March 13, 2017. AA697. The jury rendered a verdict on March 15, 2017. AA697. The jury found Monay-Pina guilty on counts 1 through

8 and 11-13, as charged. AA97. The jury found Monay-Pina guilty as follows on count 9 – guilty of Battery with Use of a Deadly Weapon (no substantial bodily harm), and on count 10—guilty of battery with Use of a Deadly Weapon (no substantial bodily harm), AA697.

On June 8, 2017, the parties entered into a stipulation to continue the sentencing to a date after August 14, 2017. AA744. The court set sentencing for August 17, 2017, and the sentencing was continued again to September 7, 2017. AA744. The court sentenced Monay-Pina as follows: Count 1 – Twenty-Four (24) to Sixty (60) months, Count 2 –Twenty-four (24) to One hundred twenty (120) months, Count 2 to run concurrent to Count 1; Count 3 – twenty-four (24) to one hundred twenty (120) months, plus a consecutive twelve (12) to sixty (60) months for the use of the deadly weapon, to run concurrent with Count 2; Count 4 – twenty-four (24) to one hundred twenty (120) months, Count 4 to run concurrent with Counts 1, 2 and 3; Count 5 – twenty-four (24) to one hundred twenty (120) months, plus a consecutive twelve (24) to sixty (60) months for the use of the deadly weapon, Count 5 to run consecutive with 1, 2, and 3; Count 6 – twenty-four (24) to one hundred twenty (120) months, Count 6 to run concurrent with Counts 1 through 5; Count 7 – twenty-four (24) to one hundred twenty (120) months, plus a consecutive twelve (24) to sixty (60) months for the use of the deadly weapon, Count 7 to run consecutive to Counts 1 through 3; Count 8 – twenty-four (24) to one hundred

twenty(120) months, Count 8 to run concurrent with Counts 1 through 7; Count 9—twenty-four to sixty (60) months, Count 9 to run concurrent to Counts 1 through 8; Count 10—twenty-four (24) to sixty (60) months, Count 10 to run concurrent to Counts 1 through 9; Count 11—364 days in the Clark County Detention Center, concurrent with Counts 1 through 10; Count 12—twelve (12) to sixty (60) months, Count 12 to run consecutive to Counts 1, 2, 3, 5, and 7; Count 13—twenty-four (24) to sixty (60) months, Count 13 to run concurrent with Counts 1 through 12. AA744. The aggregate sentence was ninety-four (94) months to 420 (four hundred twenty) months. AA77. Monay-Pina had six hundred four (604) days credit for time served. AA745.

A Judgment of Conviction was filed on September 21, 2017. AA745. On October 3, 2017, Monay-Pina filed a Notice of Appeal. AA745. The following issues were presented:

1. District Court erred in failing to protect Mr. Monay-Pina's right to a fair trial by failing to *sua sponte* declare a mistrial because the State's comments during its closing arguments amounted to impermissible burden shifting and prevented him from receiving a fair trial. Appellant's Opening Brief ("AOB"), viii. AA745.

On March 28, 2019, the Supreme Court affirmed Monay-Pina's convictions. (Case No.74199). AA674. On April 23, 2019, Remittitur was issued. AA673.

On February 18, 2020, Monay-Pina filed a Pro Per Petition for Writ of Habeas Corpus. AA675. In his petition, Monay-Pina raised the following issues:

1. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process was violated when his counsel failed to ask if he was going to testify. Further, he alleges that his counsel failed to have him sign a waiver
2. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process was violated when trial counsel failed to hire an investigator, who would have had the video analyzed; a pre-trial lineup should have been done to exclude petitioner from prosecution.
3. His Sixth Amendment right to effective assistance of counsel and Fourteenth Amendment right to Due Process was violated when trial counsel failed to discuss his rights to testify and what he would testify to, and that counsel failed to have him sign the waiver in trial for not testifying.
4. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated by counsel failing to file a motion to sever his trial from that of his co-defendant, as it prejudiced him.
5. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when his attorney

failed to file a pretrial motion to have the deadly weapon enhancement dismissed, as the alleged weapon was a BB gun.

6. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated because his trial counsel failed to do any investigation, and because the witnesses could not identify him, counsel should have investigated. Further, counsel was not prepared to cross-examine the witnesses, and investigation would have helped him prepare.
7. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when trial counsel failed to have petitioner tested by a psychiatrist to see if he was mentally "fit" to understand the charges against him and the trial proceedings.
8. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when counsel failed to subject the State's case to an adversarial testing process, by failing to review the video, and by failing to make the State prove the case beyond a reasonable doubt.
9. His Sixth Amendment right to effective assistance of counsel and Fourteenth Amendment right to Due Process were violated when trial counsel failed to object to the State's argument which shifted the burden of proof, causing

prejudice to Monay-Pina.

10. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when trial counsel failed to visit him to develop his defense; trial counsel did the trial by himself; the errors were cumulative.

11. His Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to Due Process were violated when trial counsel admitted his guilt at trial. AA681-690.

On April 30, 2020, the district court entered a Decision and Order in which the court denied Grounds One, Three, Five, Nine, and part of Ground Ten of the petition. AA719. The court granted leave for Monay-Pina to present additional evidence regarding Grounds Two, Four, Six, Seven, Eight, and Eleven. AA720. The court further ordered that Monay-Pina can present additional evidence regarding Ground Ten regarding the cumulative error and the failure to visit Monay-Pina in jail, or to develop a defense prior to trial. AA720.

After briefing, and an evidentiary hearing, the court denied the petition. AA995.

STATEMENT OF FACTS

The following facts are as testified to at trial:

RICHARD DECAMP:

Richard DeCamp ("DeCamp") was working at 7-11 at 4950 West Charleston in January 2016. AA191. On January 12, 2016, around 3:00 a.m., two men came through the door. AA192. The men had their faces covered with masks, and only their eyes were showing. AA193. One of the men was tall, and one was short. AA193. The men asked for "all the money" and then took him over to the second register to get the money from that register. AA193. The tall man was giving instructions, but both men had weapons. AA193. After the register, the tall man asked DeCamp for the money in his wallet. AA197. DeCamp showed them that he had nothing in his wallet. AA197. The men told him to lie on the ground and then left. AA197. DeCamp called 911 and his boss, then the owner of the store. AA197. The police arrived within ten minutes. AA198.

The police asked DeCamp some questions, and then asked him to go and see if he could identify someone who was "down the street". AA198. The location was about eight or nine blocks from the store. AA199. The police asked him if he recognized the clothing, and he did. AA199. The police only asked him to identify one person. AA199. DeCamp told the police that he recognized the clothing, but not the face, as the men had their faces covered during the robbery. AA201. DeCamp testified that the police arrived at his store about ten minutes after the men left, and they took him to look at a suspect about ten to fifteen minutes after that. AA217-218.

ISAIAH SIMMONS:

Isaiah Simmons ("Simmons") was working for the Las Vegas Metropolitan Police Department ("LVMPD") on January 12, 2016. AA220. He responded to a call at a 7-11 at 5700 West Charleston, in Las Vegas. AA220. When he arrived, he spoke with Richard DeCamp, and then collected any information he could, including a witness statement. AA220. Simmons later learned that a potential suspect was in custody, and officers had DeCamp do a show up. AA222-223.

ABRAHAM AGUIRRE:

Abraham Aguirre ("Aguirre") was a sergeant with LVMPD in January 2016. AA237. He responded to the 7-11 first, and Simmons arrived shortly after. AA237. Aguirre tried to get as much information from DeCamp, and then worked on securing the scene. AA238-39. While Aguirre was securing the scene, he received another high priority call, a few blocks away from the 7-11. AA239. Aguirre made sure Simmons had the scene under control, and then responded to the call at 504 Brush Street. AA239. The Brush street location was about a mile away from the 7-11. AA241.

Other officers were already at the Brush Street scene, including officer Justin Spurling ("Spurling"). AA243. The Brush Street address had a carport that had been converted into a room. AA243. Aguirre remembered that there was blood

around the room, and he found an axe near the doorway. AA244. Aguirre, while in the makeshift room, heard a call from officer Spurling, and he immediately went around the north side of the house into the back yard. AA244-25. He saw Spurling looking over the wall of the backyard into the backyard of 510 Brush Street. AA245. Aguirre looked over the wall and saw Spurling illuminating the bushes. AA245. Aguirre could not see anyone, but he heard Spurling giving commands to someone. AA245. He then assisted Spurling by helping him get over the wall, and then he ran to 510 Brush and jumped the wall, along with officer Carter, who had just arrived. AA245.

When Aguirre landed in the yard of 510, he saw Spurling taking a suspect into custody with his pistol drawn. AA246. Spurling was giving verbal commands to another suspect who was hiding underneath a shed. AA246. Aguirre and Carter assisted Spurling in getting control of the potential suspects. AA247. Eventually, the man came out from under the shed and officers were able to search the property. AA248-49. They found a wallet and some money. AA250. Aguirre identified the men in the backyard as the two defendants. AA251. In the area of the bushes, Aguirre found a black ski mask, the wallet of resident of 504 Brush Street, two knives, a phone and a set of keys. AA251. Aguirre recognized Monay-Pina as the suspect from the bushes. AA232. From under the shed, officers found a few knives in sheaths, another ski mask and two handguns, or replica guns. AA255.

JAVIER COLON:

On January 12, 2016, Javier Colon ("Colon") was living with his sister in a house on Brush Street. AA278. Colon's room was the garage. AA233. Colon's sister and three children lived inside the house. AA279. The family had been living at the address for approximately three months. AA279. Colon was asleep when two men came into the garage and attacked him. AA281.

Colon was asleep in his bed, but was woken up when the first man opened the door. AA281. The man screamed, "Javier, get up, get up." AA281. There was another man present, but he said nothing. AA282. Colon knew one of the men, Casimiro Venegas ("Venegas"). AA281. Colon had seen the other man before, however, he did not know if it was him inside the house, as he had his face covered. AA283. Venegas did not have his face covered. AA284. After Venegas yelled at him to get up, Venegas began to hit Colon in the head with a gun. AA285. The other man pointed a gun at a window in the garage that looked into the house where the rest of the family was. AA285. Colon could see his family through the window. AA285. The man was not saying anything. AA286.

After Venegas hit Colon in the head with the gun, he picked up at axe and started hitting Colon with the axe. AA286. First, Venegas hit Colon in the leg, then the ribs, then the head. AA287. Colon put his hands up, so the axe cut his hands, not his head. AA287. When the police came, their lights were visible inside the

garage, and the men ran away. AA288-89. Officers arrived, and got Colon to the hospital. AA291. Doctors put stitches and staples in his head and his hand. AA291. Colon testified that he cannot move his fingers like he used to. AA291. Colon said that Venegas took his wallet, a camera, his MP3 player, and two collectors' knives. AA292. Venegas also screamed at Colon's sister inside the house "don't do anything, we're going to kill you, too." AA292. During the attack, Venegas was saying that Colon did something to Venegas's sister's car, possibly deflating her tires. AA299.

ADRIANA COLON:

Adriana Colon ("Adriana") was living at 504 Brush Street in January of 2016. AA324. She had been living there for about six months. AA324. Around 4:00 a.m., Adriana heard Colon scream that someone was threatening him, so she went to the window, and someone told her to shutup. AA326. There was two men in the room the with Colon, and both had guns pointing at the window. AA326. Adriana did not think the men could actually see her, because of the lighting, but she kept telling the men to leave, as her children were inside. AA327. Adriana said she could "hear" the hitting of Colon. AA328. Adriana's daughter, Lizbeth told Adriana that they needed to call the police. AA328. Lizbeth called the police, and they arrived within five minutes. AA330. Adriana could not see one man, because his face was covered, but she thought that the other man inside was Venegas. AA330-31.

LIZBETH AVINA:

Lizbeth Avina ("Avina") was living with her mother, uncle, and siblings at 504 Brush Street, on January 12, 2016. AA352. On that day, she woke up to her mom yelling. AA353. Her mom was yelling out the window, "Stop, stop" and "my kids are here." AA353. Lizbeth went to her mother's room and askes what was going on. AA354. Lizbeth told her mother they should call the police, but her mother said no because the men might shoot. AA356. Lizbeth told her siblings, who had come out of their rooms, to stay where they were, and she called the police. AA357. Lizbeth never looked out the window. AA357.

SAMANTHA AVINA:

Samantha Avina ("Samantha") was also living at 504 Brush Street with her family in January of 2016. AA364. On January 12, Samantha woke up to her mom screaming, and she noticed her brother was not in their room. AA66. Samantha went to her mother's room, and told her sister what was happening. AA366. Samantha heard her mother saying "stop" and heard her sister say "they have guns." AA366. Samantha and her brother went to their room, and Lizbeth called the police. AA371.

CESAR AVINA:

Cesar Avina ("Cesar") was living at 504 Brush Street in January 2016. AA378. Cesar woke up at some point because he heard his uncle knocking on the

window, calling his mother's name. AA378. His mother told him to go into the room with his sister. AA379. Cesar could hear his uncle yelling, and two men telling his uncle to be quiet. AA380. The police eventually came. AA380.

JUSTIN SPURLING:

Justin Spurling ("Spurling") was working for LVMPD in January of 2016, and was working in patrol. AA383.. Spurling responded to 504 Brush Street on January 12. AA384. A call came out that a man was being beaten by two men with guns. AA384. Spurling and his partner, Ivan Duron, responded. AA384. When the arrived, Spurling could hear screaming coming from the side of the house. AA384. Spurling followed the sound and entered a room where a man was on a bed, bleeding. AA386. Spurling then went outside and jumped a wall trying to find anyone who might be involved. AA387. As he was looking around, he saw a man standing in the middle of a backyard two houses down from 504 Brush. AA388. He man had a black stocking cap. AA388. Spurling made eye contact with the man, who then ducked down. AA388. Spurling got on his radio and notified other officers he had a potential suspect. AA389. Spurling them walked down and jumped into a yard that was just north of the potential suspect. AA389. He then jumped into the yard near the suspects. AA389. He drew his weapon and began to give commands. AA389. Spurling got back on his radio to alert other officers to set up a perimeter, and continued to give commands. AA390. The man ran and tried to hide behind a

very small tree. AA391. Spurling then jumped into the yard with the suspect, and eventually the man got down on the ground, as ordered. AA392. As Spurling took the man into custody, he noticed another man lying underneath the shed. AA393.

With his knee on the back of one man, Spurling began giving verbal commands to the man under the shed. AA394. The man did not appear to be complying, so Spurling pointed his gun at the man, and shined a flashlight on him. AA395. Two additional officers made their way into the yard, and Spurling told them there was a man under the shed. AA395. The men told the suspect to come out, and the man reached to his waist, making the officers nervous. AA396. Eventually the man came out from under the shed. AA396. Spurling then handcuffed the man under his knee. AA397. The man told Spurling that the police did not understand, and that he and the other man were victims of a tire slashing, and that the police would not listen to them. AA397. Spurling identified Monay-Pina as being the man he arrested. AA399. Spurling identified Venegas as the man who was under the shed. AA399. Spurling testified that the guns the police found were "replicas" or pneumatic guns. AA406.

ADAM FELABOM:

Adam Felabom ("Felabom") was a crime scene analyst with LVMPD. AA451. On January 12, 2016, Felabom responded to 510 Brush Street around 5:05 a.m. AA3452. When he arrived, he found two scenes, but he focused on 510 Brush

Street. AA452. Felabom photographed the scene first, then began taking notes of the layout, documenting any items he found. AA452. He then photographed items he found, and collected evidence. AA453. Inside the wallet he found in a bush he found a driver's license for Javier Colon. AA457. Felabom also collected $138 in various bills. AA458. Felabom also collected fingerprints from a magazine to one of the pneumatic guns. AA469. Felabom testified that the red gloves he found near the man in the shed had blood on them. AA480. The black gloves found in the bush did not. AA480.

TRACY SMITH:

Tracy Smith ("Smith") was a detective with LVMPD. AA428. A patrol officer called Smith on January 12, 2016, to assist with a robbery at 7-11, and learned that police thought it was related to an incident that had occurred about twenty minutes later. AA484-86. Initially Smith responded to the Brush Street address, where patrol officers briefed her. AA486. Smith also submitted fingerprints for processing, but the print recovered was not suitable for processing. AA491.

KIMBERLY DANNENBERGER:

Kimberly Dannenberger ("Dannenberger") was an employee of the LVMPD forensic laboratory in the DNA detail. AA498. Many items tested by Dannenberger either did not have enough DNA to process or were inconclusive.

AA511. However, DNA from the blood on the pneumatic gun contained belonged to Javier Colon. AA512. DNA from the inside of the black knit hat contained three contributors, one of which was Venegas. AA517-18. The blue ski mask contained a mixture of DNA, and Dannenberger was able to find one of the sources was Monay-Pina. AA540. A swab from the axe contained DNA from Colon. AA521.

SUMMARY OF ARGUMENT

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

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE PETITION FOR WRIT OF HABEAS CORPUS.

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

A. Trial counsel was ineffective for failing to hire an investigator and Monay-Pina's Sixth Amendment rights and his Fourteenth Amendment rights were violated because trial counsel failed to complete any investigation (Grounds Two and Six).

The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a "mixed question of law and fact and is thus subject to independent review." *Strickland v. Washington*, 466 U.S.

668, 104 S. Ct. 2052, at 2070, 80 L. Ed.2d 674 (1984). Under *Strickland,* defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* at 691, 104 S. Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id.* at 688, 104 S. Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. Id. at 694, 104 S. Ct. at 2068.

The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." *See U.S. v. Gray,* 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." *Id.* at 712. *See also Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir.1986)

("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); *Birt v. Montgomery.* 709 F.2d 690, 701 (7th Cir.1983) ... ("Essential to effective representation ... is the independent duty to investigate and prepare.").

In *State v. Love,* 865 P.2d 322, 109 Nev. 1136, (1993), the Nevada Supreme Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In *Love*, trial counsel failed to interview alibi witnesses in a case based largely on circumstantial evidence and a jailhouse informant. *Id.* That court upheld a District Court decision reversing a conviction on post-conviction because trial counsel did not call witnesses, and did not speak to all potential witnesses. *Id.*

Legal and factual judgments erroneously made because of inadequate investigation may be deemed ineffective assistance of counsel. *See Davis v. State*, 107 Nev. 600, 601-02, 817 P.2d 1169, 1170 (1991). Further, defense counsel failing to investigate facts, research legal issues, and prepare for trial leaves a defendant without any defense at trial. *See Buffalo v. State*, 111 Nev. 1139, 901 P.2d 647 (1995) and *Warner v. State*, 132 Nev. 635, 729 P.2d 1359 (1986). In *Warner,* trial counsel failed to investigate, and failed to adequately prepare for trial, leaving the defendant with no defense, and the *Warner* court felt that such performance was so deficient that the trial was rendered unreliable. *Warner*, at 636.

The district court found that trial counsel's performance was not deficient because Monay-Pina failed to show that hiring an investigator or investigating the "suggested witness statements" would have altered the outcome of the trial. AA992. The court further noted that while Monay-Pina alleged that investigation

would have revealed that Monay-Pina had no motive, there were not sufficient facts to show that the trial outcome would have been different. AA992.

Counsel admitted that he did not hire an investigator prior to trial. AA914. According to counsel, he "did not see any particular reason to" but he did admit that there was an issue where one of the victims may have had some involvement with Monay-Pina's girlfriend. AA914-15. Counsel testified that he felt investigating a defense other than the mistaken identification defense would "weaken" the identification defense. AA915. Counsel admitted that the identification defense was not all that viable, as the police photographed Monay-Pina wearing the same clothing as seen in the robbery. AA9150916. Counsel testified, however, that "unfortunately it was what we had." AA915.

Counsel testified that there were "no witnesses" to interview, but then admitted that he was unaware that the victim testified that a woman named Cynthia told him that she knew it was Monay-Pina who was involved. AA917. Counsel admitted that the victim, Colon, testified that he recognized Monay-Pina by his eyes, but he did not think it was important to impeach Colon based on investigating other witnesses. AA918. Counsel testified multiple times that any investigation he might do would "go against the identity defense." AA930. However, the facts of the case did not support and mistaken identity defense. Police arrested Monay-Pina very close in proximity to Colon's house, very close in time to the call to 911.

Police then were able to match the clothing worn by Monay-Pina and Venegas to the clothing the in 7-11 surveillance. Further, Monay-Pina's DNA was found on items taken during the Colon incident. A mistaken identification defense was not a viable defense. Counsel's testimony suggested that counsel was married to the identification defense and seemed unaware of other methods the State could use to prove identity. Counsel indicated that he did not investigate any other avenues because it may have "made the identification of Monay-Pina stronger." AA931. Counsel testified that while he was aware of that Monay-Pina's identity was fairly established through means other than eyewitness identification, despite knowing that Colon had potentially lied about how well he knew Monay-Pina, and that Colon had discussed the case with some unidentified woman, he did not think investigating the potential "beef" between Colon and the co-defendant, or even potentially Colon and Monay-Pina would have helped because it would have hurt the mistaken identification defense.

Counsel seemed to misapprehend how the State can prove identity, which would mean he did not explain to his client the issues with that defense. For example, this Court can look to this exchange:

> Q: Right, but what I'm asking you is if you realized that your identification defense was not viable you could have shifted to a different defense, perhaps making certain arguments about what may have happened in Colon's home, correct?
> A: I could have, yeah.
> Q: Okay, did you ever consider that?

A: I don't remember, honestly like to say we did consider other defenses, when I look at a file and hopefully consider everything but this seemed like the best strategy.
Q: Okay, what about this identification defense, knowing that the State had multiple other methods of proving your client's identification, what made you think this was the best defense?
A: Because they were wearing masks.
Q: Okay, but I guess my question is the masks are sort of meaningless if the State has other methods of proving identification, would you agree?
A: I don't think they are meaningless because if you can't say you saw somebody's face, like that's not a positive identification.
Q: But DNA is a positive identification, right?
A: Yeah.
Q: Okay, wearing the same clothing that you're photographed and seen in a video is a positive identification, right?
A: I don't think so by itself. But yeah it is evidence.
Q: Okay, and then those things sort of cumulate during the course of a trial and make an identification defense fairly difficult, right?
A: I guess that's what happened here.
Q: And did you ever explain to Mr. Monay-Pina, hey the way this evidence is coming together makes this identification defense difficult to sell to a jury?
A: I don't remember having that conversation. We talked signifcalntly so there was a lot of communication that occurred while the trial was going on because we were able to slip into a break out room. I don't remember exactly what I talked ot him about but, you know, if could have—that conversation could have happened.
Q: Well I'm talking about before trial. Because you going into trial you would have reviewed all of the State's evidence, right?
A: Yeah of course.
Q: And you have have been aware that they had DNA?
A: Yeah of course.
Q: An you would have been aware of the photographs and the video surveillance, right?
A: Yes.
. . .
Q: Okay,. And at no time did you say to Mr. Monay-Pina, we really have to discuss the fact this identity defense is sort of problematic?
A: I don't remember having that conversation, no. AA945-946.

Counsel married himself to a defense that was not viable and did not outside investigation. Counsel admitted that he could have investigated to show that the "beef" was actually between Colon and Venegas, and could have argued his client was merely present during the event, and that investigation could have bolstered that defense. Counsel also admitted that he did not put any thought into that line of defense because that would hurt the admittedly terrible mistaken identification defnse and because that is " not what was presented to him" even though he did no investigation. AA948-949.

The district court erred in finding that not having an investigator and not investigating would not have changed the outcome. In this case, counsel clearly did not understand the State's evidence, and admitted he did not explain to his client how the State's evidence would prove identity. He admitted he did not speak to anyone else who may have information about the "beef" between Colon and Venegas.

In his statement to police, Colon told the police that Venegas mentioned that Colon had "done something to his family." AA827. Colon even said, "I am his family's friend. . . and when he gets out from jail, his mom told me to find a job for him. And I did." AA827-28. On the day of the incident, Venegas said to Colon, "Give me your money" and then "hitted [sic] me with the pistol." AA829. Colon told the police in his statement that he "did not know the other guy" and it

was Venegas who hit him with the pistol and Venegas who hit him with the axe. AA830. The "other guy" did not do anything to Colon. AA831. Colon told the police Venegas mentioned that Colon had slashed a family member's tires. AA833. Colon's girlfriend introduced him to Venegas. AA839-840. Colon knew Venegas's mother's name, as well as Venegas's sister, Angelica. AA841.

Colon's sister, when asked by the police, if both men were pointing guns, she said that they were pointing them towards the windows, even though the men could not see her through the windows. AA856. Venegas's sister, Angelica, indicated that she knew Colon, and he had socialized with her and with Monay-Pina, who she dated briefly. AA888. Angelica told an investigator in 2021, that Colon had kicked in the door of her apartment in November 2015, and that Colon had slashed her tires at some point. AA889. She said that Colon was harassing her because he had been in an argument with Venegas. AA889.

Certainly, there was evidence that Venegas and Colon had some kind of negative history. There was evidence that Colon had lied to police about how well he knew Monay-Pina. None of that evidence was presented to the jury. This is important because the evidence showed that Colon had some reason for not telling the police or the jury that he in fact did know Monay-Pina, and Angelica provided evidence that Colon had a bias or motive against both defendants. While the State may argue that Colon's sister also provided testimony regarding what happened,

presenting evidence of Colon's bias, his mistruths about who he knew and, coupled with the fact that the evidence showed that Monay-Pina did not engage in the battery of Colon, he was not heard saying anything to Colon. While the evidence may have suggested he pointed a gun at a window, Colon's sister was clear that the men could not see her through the window. In a set of charges that encompasses the specific intent crimes of Burglary, Attempt Murder and Coercion, negating Monay-Pina's knowledge and intent was crucial. Showing the jury that it would seem strange that Colon would not tell the police he knew Monay-Pina, coupled with the minimization of Monay-Pina's acts during the Colon set of allegations, a better defense for Monay-Pina would be that he did not know what was going to happen when he entered the room (negating the burglary) and that he had no intent to harm Colon, as shown by his lack of participation in the beating, and his silence, (negating the attempt murder), and negating that he had no intent to keep Colon's family from coming to his aid or from leaving, it is likely that the jury could have come to a different conclusion regarding those counts.

First, counsel's preparation for trial was not effective. Counsel only visited his client one time in the entirety of his representation. AA869. Counsel admittedly did no investigation. Counsel admitted he did not explain to his client the problems with presenting a mistaken identity defense. Counsel admitted he did not actually show his client the video surveillance prior to trial. AA912. and

counsel admitted he did not explain to his client that he had the option of pleading to the charges instead of going to trial. AA921. The absolute bare basics of preparing for trial include explaining the discovery to your client, showing the discovery to your client, explaining issues in certain defenses to your client, gleaning information from people who have some information about the case to find anything that may provide an area of defense or mitigate punishment. To do nothing other than adopt a clearly unworkable defense and then never shift that defense, never seek to develop a defense, and never talk to a potential witness because that might hurt your unworkable defense cannot by any standard be deemed competent trial counsel performance.

Counsel's lack of preparation and lack of diligence left Monay-Pina in a felony jury trial with no defense. This Court, in *Buffalo v. State*, 901 P.2d 647 (1995), noted, in a trial where counsel's performance was similar to counsel's performance here that the defendant "was not provided with what could be fairly called a 'defense,' and this rendered his convictions unreliable." *Id.* at 648.

In that case, the court held that Buffalo was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and article 1, section 8 of the Nevada Constitution. Buffalo went to trial on what the court noted seemed an "uncomplicated" and "easy to dispose of"

case. *Id.* However, after a review of the post-conviction record, that court found that there was in fact a defense to the charges, but that defense was never presented to the jury. *Id.* The *Buffalo* court noted that counsel spent very little time with her client preparing prior to trial, did not investigate, and presented no defense to one set of charges, and the "wrong defense" to another allegation. *Id.* at 650. The State's argument in *Buffalo* was that there was "no bona fide defense" to the charges, but the Supreme Court found that indeed there were defenses to the crimes charged. *Id.* at 652. The court opined:

> Based upon the mentioned factors, we held in *Warner* that lack of preparation for trial left appellant without a defense at trial. Under the circumstances of the present case, we conclude that trial counsel's performance was so deficient as to render the trial result unreliable. Accordingly, we conclude that appellant was denied his Sixth Amendment right to the effective assistance of counsel. *Id.* at 653-54.

Based on the fact that there was a defense to the charges (with the court noting that it would/could not opine about the strength of the defense), and the fact that counsel had not prepared her case, or her client, the court reversed the convictions and remanded for a new trial. *Id.* at 654.

The convictions in this case, especially the Colon set of allegations, can hardly be said to be reliable when counsel's performance so deficient. As this Court noted in *Buffalo*, the court need not "opine about the strength" of the defense, instead the court should be concerned that there was a defense that

was not presented simply because counsel spent no time or energy developing a defense and instead seemed to misapprehend the basics of how the State can prove identity. The fact that, when confronted with all the ways the State provide Monay-Pina's identity, that counsel still insisted the identity defense was the best because "they were wearing masks" shows this Court that counsel's understanding of the evidence and its use against his client was severely lacking. The district court erred when it found that counsel's performance was not deficient and that the outcome would not have been affected. Monay-Pina asks this Court to follow it's findings in *Buffalo* that going to trial with an unprepared counsel cannot lead to a reliable verdict.

A. **Trial counsel was ineffective for failing to file a motion to sever defendants (Ground Four).**

The district court found that counsel was not ineffective for failing to file a motion to sever because trial counsel cannot be deemed ineffective for failing to file futile motions. AA993. The court also noted that it did not find that a motion to sever would have "necessarily been granted." AA993.

However, the court erred in that finding. Monay-Pina's best defense to these charges would require implicating Venegas solely and counsel should have moved to sever the defendants. A joint trial was prejudicial because it affected Monay-

Pina's right to effective assistance of counsel, his right to a fair trial, and his right to present a defense.

The decision to sever a trial is within the discretion of the court. NRS 174.165(1) provides that a trial judge may sever a joint trial if "it appears that a defendant is …prejudiced by a joinder of … defendants…for trial together." The Nevada Supreme Court has further clarified that a judge should grant a severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about the guilt or innocence." *Chartier v. State*, 191 P.3d 1182, 1185 (2008). If the defendants have conflicting defenses this may cause prejudice warranting severance. *Id.*

Here, the antagonistic defenses warranted severance. In the seminal case on severance in Nevada, one defendant claimed he was just helping another defendant, and not the mastermind of the offense, and that Nevada Supreme Court held it was not harmless for the court to not sever the cases. *See Chartier v. State*, 191 P.3d 1182, 1186, 124 Nev. 760, 765-766, 2008 Nev. LEXIS 73, 9-10, 124 Nev. Adv. Rep. 66 (Nev. 2008), where defendant Wilcox's defense was that he was merely assisting defendant Chartier.

Here, severance is required, because a failure to sever hindered Monay-Pina's ability to present and prove his theory of the case. *Chartier v. State*, 191

P.3d 1182, 1187, 124 Nev. 760, 767, 2008 Nev. LEXIS 73, 13, 124 Nev. Adv. Rep. 66 (Nev. 2008). In this case, Monay-Pina's defense to the ax incident was that he was had no idea what Venegas was going to do in the room. Further, the pistol whipping and ax attack was not a foreseeable consequence of the series of events that occurred that evening. The evidence showed that Monay-Pina, during the Colon allegations, had minimal involvement. The evidence showed that Venegas knew Colon, and that Venegas and Colon had intertwined lives, including Colon owing Venegas money, and that Colon had been harassing Venegas's sister.

Monay-Pina's defense would require him to implicate his co-defendant by telling the jury that it was Venegas who committed the crimes, and that there was no evidence that Monay-Pina helped plan what happened in the garage, or even that he knew going in what Venegas had planned. This would have required Mr. Venegas' right to a fair trial be infringed, however, and therefore the court may have to put restraints on what Monay-Pina could allege. This would then hamper Monay-Pina's right to present his defense. Limitation to one defendant's defense to preserve another defendant's rights affects the trial rights of both defendants. was not him who committed the crimes. This fact pattern is similar enough to *Chartier* that counsel should have filed a motion to sever defendants.

It would not have been futile for counsel to make such a motion. Counsel did not make such a motion because counsel had not adequately prepared for trial by

reading the discovery, investigating witnesses or talking to his client. When asked how counsel used the fact the two were tried together to Monay-Pina's benefit, his answer showed that he had no real idea. His response was that "you had two starkly different defendants in this case. You had Casimiro Venegas who had, you know a long criminal record, did these monstrous things. . .and my guy who was squeaky clean before his trial. . ." AA919. He further stated, "I thought it would be effective to have them standing next to each other." AA919. However, the criminal record of each defendant is not something that counsel was going to be able to tell the jury, and admitted that it would be something that would "come up later at sentencing." AA919. Not moving to sever to protect your clients' ability to present the best defense because of information to be used at sentencing makes no sense. The cases need not be tried together for counsel to have the ability to compare his client's record to that of the co-defendant.

Counsel's reasoning made no sense, and had counsel investigated and prepared his case for trial, counsel would have known that a motion to sever was not futile. Instead, counsel would have known that his client's best defense would require absolutely pointing the finger at his co-defendant. The district court erred when it found that trial counsel was not ineffective for failing to file a motion to sever. Monay-Pina was prejudiced by counsel's failure because his ability to present a defense was impaired.

B. **Monay-Pina's Sixth Amendment rights and Fourteenth Amendment rights were violated when trial counsel failed to review the video surveillance prior to trial (Ground Eight).**

The district court found that Monay-Pina failed to show how failing to show his client the video surveillance would have affected the outcome at trial. AA994. However, Monay-Pina has shown that had his counsel spent any time explaining the evidence the outcome would have been different in one of two ways. First, as argued above regarding the failure to investigate, had counsel showed the surveillance video and discussed how that video belied a mistaken identity defense later (by matching clothing), Monay-Pina could have made the decision to not go to trial, and perhaps gotten leniency from the court. Or two, Monay-Pina would have understood that he needed another defense and counsel should have investigated beyond this nonsensical mistaken identity defense.

The ground floor of competency as counsel is to go through discovery with your client, and explain how the evidence will be used, either to help you or to hurt you. Counsel admitted he did not show his client the surveillance. The district court erred when it found that there was no other outcome that could have occurred had counsel done this.

D. Monay-Pina's Sixth Amendment rights and Fourteenth Amendment rights were violated because the errors made by trial counsel were cumulative; trial counsel failed to visit Monay-Pina in jail, and failed to work with him to develop a defense (Ground Ten).

The district court found that the errors were not cumulative because the court did not find any errors, and the "issue of guilt here was not close due to the evidence presented against him." AA994. However, the very heart of the problem in this case is that the errors did cumulate. Counsel did not spend any time preparing, counsel did not investigate and counsel presented what amounted to no defense. Counsel did not file motions, counsel did not advise his client. Every single issue Monay-Pina faced in this case was made more severe because of counsel's ineffectiveness.

Counsel knew that there was an allegation his client had been drinking all day and using methamphetamine prior to the allegations occurred. Had counsel removed from his head the idea that mistaken identity was the only defense, and spent any time talking to client, visiting his client, going over the discovery with his client, he would have presented a viable defense such as: 1) Monay-Pina did not have the requisite intent, and 2) Monay-Pina did not directly commit the crimes at the axe scene, nor did he intentionally aid or abet or conspire with Venegas.

As is clear from the record, counsel did not conduct much, if any, cross-examination of the witnesses. Counsel did not retain an investigator, nor did counsel go through the discovery to glean the facts that he could use to present a defense.

Monay-Pina was left with no defense at trial and this was a result of errors that were cumulative to deprive Monay-Pina of his Constitutional rights to due

process, a fair trial, to present a defense and to effective assistance of counsel. Counsel not investigate any of the defendant's claims, did not spend time with client to develop his defense, did not find information to impeach the State's main witness, did not review discovery with Monay-Pina. The relevant factors to consider in determining whether error is harmless or prejudicial include whether (1) the issue of innocence or guilt is close, (2) the quantity and character of the error (3) and the gravity of the crime charged." *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). As discussed *supra*, several instances of ineffective assistance of counsel occurred in this case, and, as such, there is cumulative error worthy of reversal.

Monay-Pina was convicted of grave crimes such robbery with a deadly weapon and attempt murder. The errors on the part of trial counsel were harmful, discussed *supra*. Defense counsel presented no defense to the charges, and left Monay-Pina at trial in front of a jury with no defense. Therefore, the *Mulder* factors weigh in favor of finding there is cumulative error warranting reversal of Monay-Pina's conviction.

Monay-Pina asks that this Court reverse his convictions due to ineffective assistance of counsel.

CONCLUSION

The district court erred when it denied Monay-Pina's post conviction writ of habeas corpus.

Respectfully submitted,

By: /s/Monique McNeill
Monique McNeill
Nevada Bar # 9862

CERTIFICATE OF COMPLIANCE

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

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

2. This brief does not exceed the page or type limitations found in NRAP32(a)(7) because it contains 8788 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which

requires that every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of July, 2022.

By: /s/Monique McNeill
Monique McNeill
Nevada Bar # 9862

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 1st day of July of 2022, via Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

MONIQUE MCNEILL STEVEN WOLFSON

I further certify that I served a copy of this document, via United States Postal Service to Jose Monay-Pina.

Dated this 1st day of July, 2022.

By: /s/Monique McNeill
Monique McNeill