IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CRAIG MORTON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 83884

D. Ct. Case No. CR21-5708

APPEAL FROM JUDGMENT OF
THE HONORABLE RICHARD WAGNER

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S APPENDIX

VOLUME 4

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the prosecution gave me through discovery.

(BY MR. MOLEZZO:)

Q. In reference for preparation for today's appearance, did you also review photographs?

A. Yes, I did.

Q. Okay. At any time were you provided a .303 Enfield rifle to analyze?

A. Yes, I was.

MR. MOLEZZO: For the record, I'm walking to Exhibit No. 6, already submitted into evidence. Walking up to the witness box.

(BY MR. MOLEZZO:)

Q. Sir, is this the rifle you analyzed?

A. It certainly appears to be.

Q. What is this here?

A. That is the safety lever.

Q. This rifle -- does this rifle have a safety?

A. Yes, it does.

Q. Sir, did you take an opportunity through your analysis and investigation to take photographs of this rifle yourself?

A. Yes, I did.

MR. MOLEZZO: Mark these, please.

THE COURT: Miss Clerk, what are we to F?

THE COURT CLERK: We're to G.

THE COURT: To G. This series of photographs will be marked starting with G for identification.

MR. MOLEZZO: Thank you, Your Honor.

THE COURT: You want them marked as G and then with a dashed number, sir?

MR. MOLEZZO: Yes, sir, Your Honor.

THE COURT: Okay. How many photographs are there, sir?

MR. MOLEZZO: Thank you. Your Honor, there's 23. And the prosecution does have a full copy of these images.

(BY MR. MOLEZZO:)

Q. Sir, I'm providing you images. I would like you to take a look at these images, shuffle through them.

THE COURT: Wait a minute. We need to have them marked first. If he's going to talk about them, we need to identify them. They're G-1 through -26, did you say, sir?

MR. MOLEZZO: Twenty-three is my count.

THE COURT: Let's have the clerk mark them so for the record we know what particular photograph we're dealing with.

MR. MOLEZZO: Yes, sir.

THE COURT: It will take a minute, but why don't you give those to her. Can you give those to her and let her mark those while you proceed?

MR. MOLEZZO: I can. I can. Thank you.

THE COURT: Let's do that. Let's continue with the questioning and she will mark the exhibits, sir.

(BY MR. MOLEZZO:)

Q. Sir, who brought that rifle to you?

A. It was a Sergeant Garrett (verbatim) from, I believe, Winnemucca Police.

Q. Could it be Sergeant Garrison?

A. Yes. I'm sorry. It's in my notes. Sergeant Garrison.

Q. How long did you have that weapon, approximately?

A. I received the weapon on July 13th. And as of September 6th, the date of my report, it was still in my custody. I believe he picked it up.

MR. SMITH: Again, Your Honor, I'm going to object. Every question that's been asked, he's looking down to papers that are still in front of him. And he's reading off something to answer the question.

THE COURT: Okay, sir.

MR. SMITH: And, again, I don't know what he has in front of him now.

THE COURT: Okay. In order to answer questions, it's important that, if you need to refresh your recollection, you will need to make sure the attorney --

THE WITNESS: Yes, Your Honor.

THE COURT: -- acknowledges that you're going to

have to look at that to refresh your recollection. There's a way to do that appropriately.

Go ahead, sir.

MR. MOLEZZO: I apologize, Your Honor.

(BY MR. MOLEZZO:)

Q. So you had it for a few days or so?

A. I had it for --

Q. Approximately.

A. Approximately a month and a half.

Q. Okay.

A. I would have to refresh my memory to get the exact dates. I was looking at my report which has also been in discovery.

Q. Would your report allow you to revive your recollection?

A. Yes.

MR. MOLEZZO: Your Honor, may he look at his report?

THE COURT: Yes.

THE WITNESS: I was --

MR. MOLEZZO: Read that to yourself.

THE COURT: The way this works, sir, he will ask you if you need to refresh your recollection. If you need to do that, look at the document silently to yourselves -- to yourself. And then the appropriate question is, now do

you remember what that was? And then you can testify based upon that.

THE WITNESS: Thank you, Your Honor.

THE COURT: Okay.

MR. MOLEZZO: Thank you.

(BY MR. MOLEZZO:)

Q. Were you able to look at your report?

A. Uh, yes, I was.

Q. Does that revive your recollection of how long you've had this weapon?

A. Yes, it does.

Q. Sir, how long did you have this weapon for testing?

A. Just under two months.

Q. Okay. As you sit here today, sir, do you recall what types of testing you performed? And, if so, please share that with us without looking at your report.

A. The first testing that I performed was a field test of the rifle, which was basically taking a rifle to a range and firing it under various conditions.

Um, as part of defense theory was that rifle may have accidently discharged, I tried to create some realistic scenarios to determine whether the rifle would, in fact, accidently discharge under field conditions.

Um, did you want me to go into what my findings were on that

at this point?

Q. By all means, please continue.

A. Three out of four times we were able to get the rifle to fire if we simulated backing out of a doorway and allowing the rifle butt stock to strike the side of the doorway. I was not able to have it accidently discharge by striking the butt, um, on the ground or in any other fashion with my finger off of the trigger.

Q. In relation to this case, you indicate "defense theory." That was my communications to you?

A. Yes, it was.

Q. Was that in reference to what we were looking for in this case? Would that be fair?

A. Well, it was one of the areas that you were exploring.

Q. Okay. Did I tell you how to analyze this rifle?

A. Absolutely not.

Q. Did I tell you the findings that I needed to pursue a defense?

A. Absolutely not.

Q. You shared with us you did some range testing?

A. Correct.

Q. And what is that? Tell us.

A. Well, pointed out some of the deficiencies in the firearm, some of the modifications that had been made to it.

Q. Let me stop you there. Did you find modifications on this weapon?

A. It's been completely modified from its original military configuration.

Q. When you say "completely modified," without looking at your notes, what do you mean, "completely modified"?

A. Well, it's been sporterized. The sights have been changed, both front and rear. The rear sight blade was missing altogether. So there was no way to accurately sight without the sight blade.

The base was there. And that was an aftermarket -- um, I would have to look at my notes for the manufacturer, but I believe it was a Williams. It could have been a Millett receiver sight. The, um, rear tangent sight was removed altogether.

Q. What's a tangent sight, sir?

A. This would be a sight that you could elevate by -- basically, there would be a knob on either side of it with a sliding sight blade. So you would push it forward to raise the rear sight to give you greater, um, sighting capacity, greater distances. Generally they're from 100 yards out to 4- or 500 yards.

Q. Sir -- Mr. Venkus, in reference to your -- let me rephrase that.

Have you ever done gunshot residue in your professional life?

A. Yes, I have.

Q. What would you say -- what is gunshot residue? Can you share that with the jury.

MR. SMITH: I'd object, Your Honor. So far there's been no foundation that he has expertise to testify as to gunshot residue.

THE COURT: Sustained.

MR. MOLEZZO: Your Honor, I would submit gunshot residue is a dynamic of weapons operation. And he has shared with us that he has the knowledge in the operation of weapons. May I go further?

THE COURT: You don't have the foundation yet. I mean, that's your conclusion. I have yet to hear the foundation for that.

(BY MR. MOLEZZO:)

Q. In reference to your testing to the weapon, were you able to do any type of comparison tests?

A. Yes, I was.

Q. Can you explain to us or tell us what a comparison test is.

A. Well, it's basically just how it sounds. You're comparing it to a known stock weapon. I had the opportunity to obtain a Lee No. 1, Mark III, Enfield that was in stock

configuration.

Q. You found a similar weapon; is that your testimony?

A. Yes. It was two years' difference in production date. So it was a 1916 versus a 1918.

Q. And why would you do that?

A. As I have a federal firearms license, and it was fortuitous that a client had ordered one and I had it, um, in my, um, safe during his waiting period in California, um, and with his permission I took some measurements.

Q. As part of your testing process, did you do any trajectory-type testing?

A. No, I did not.

Q. In reference to the functionality of this weapon, would you say it was a dependable firearm?

A. On what scale? In my opinion, as it currently exists, it's a very dangerous weapon. It will fire, but perhaps at times you don't wish it too.

MR. MOLEZZO: Your Honor, may I approach the witness, please?

THE COURT: You may.

(BY MR. MOLEZZO:)

Q. I'm going to show you images marked G-1 through G-23. Would you take an opportunity and review these -- review these images and let me know when you completed that

review.

(Whereupon, the photographs were reviewed.)

(BY MR. MOLEZZO:)

Q. Do these look like the images you generated as your investigative process?

A. Yes, they are.

Q. Do they appear to be a true and accurate depiction of the photographs that you took?

A. Yes.

MR. MOLEZZO: I would move these into evidence at this time.

MR. SMITH: No objection.

MR. MOLEZZO: Thank you, Counsel.

THE COURT: Exhibits G-1 through G-23 consecutively numbered are hereby admitted into evidence.

(Whereupon, Exhibits G-1 through G-23 were admitted into evidence.)

(BY MR. MOLEZZO:)

Q. Hold on to those, Mr. Venkus. Now, in regards to functionality, what other type testing did you do with regard to this 1918 firearm?

A. Well, I did a visual inspection looking for broken or worn parts, which there were. Looking for modifications from the original. Um, I consulted with known historian on Enfield rifles concerning known problems with that

particular model. Um, I did trigger-pull testing.

Q. Let's talk about that. Explain to the jury and to me, because I'm not sure what trigger pull is. How do you trigger-pull test a weapon or a rifle?

A. Well, there's a number of means. The original method was basically placing a hook over the trigger when the rifle was in the cocked configuration.

Q. For the record, I'm retrieving these images back. Continue, please.

A. And you would continue to place greater quantities of weight until the searer surface is disengaged from the striker hook and the weapon fired, or it would dry fire in the case of a trigger-pull test. You wouldn't do it with a loaded weapon.

Q. What does dry firing mean? No shell?

A. Dry firing means no shell in the weapon, correct. I used a Lyman trigger-pull strain gauge, which is a little more accurate. It's a little newer technology than the old weight system.

Q. And in reference to this firearm, what did you find in reference to trigger pull?

A. Well, initially when I was field testing it it appeared to be light.

Q. Give me a number that you think was light.

A. It was in the three-pound, three-and-a-half-pound

range and for a battle weapon. That's light.

Q. Explain what a battle weapon is, please.

A. Any weapon that's been adopted for use in armed services. And in this particular case, that rifle entered service in World War I and was used by the British until 1954. So, uh, it underwent a number of modifications over the years.

But typically, um, weapons that were placed in the hands of soldiers with -- especially wartime considerations with little experience were designed to have fairly heavy trigger pulls so you wouldn't have accidental firings.

Q. And did you find a light trigger pull with this weapon?

A. Yes, I did.

Q. And you tell us you did that in field testing?

A. I first suspected it in the field testing. And then when I brought it back to, um, the area where I did the examination, I, um, tested it with the strain gauge.

Q. And what's a strain gauge? Please give us a visual of that, please.

A. It's a -- Lyman Precision makes it. It's a tool with a little handle and a little digital readout. And it has a hook basically, um, on the end of a rod that you would place over the trigger.

You would hold the gun in a static position and

slowly pull back on it until, in this case, the striker -- on other weapons it might be a hammer -- falls, and it gives you a reading of how many pounds that is.

Q. What was that reading?

A. Um, without referring to my notes, I would say --

Q. Without referring to your notes.

A. -- I would say right around three and a half pounds.

Q. Did you ever come -- through your testing, did you find a configuration or did you test where the trigger pull was lighter than that?

A. Um, I found a situation where the striker would fall with as little as an ounce and a quarter of weight placed on the trigger.

Q. And I'm not gun savvy. What is a striker, please, sir?

A. The striker basically is, if you look at the back of the weapon, there's a knob that you would pull rearward which contains the firing pin and some associated springs.

MR. MOLEZZO: For the record, I have Exhibit 6, already admitted into evidence. I'm pointing the gun down and approaching the witness.

May I continue, Your Honor?

THE COURT: You may.

MR. MOLEZZO: Thank you for that courtesy.

THE WITNESS: The striker is going to reside in the bolt that is not in the weapon.

(BY MR. MOLEZZO:)

Q. Okay. So the striker is in the bolt?

A. Correct.

Q. And explain to us again what the striker does, please.

A. Okay. The striker basically would operate the same way that a hammer would operate on a revolver or on a semiautomatic. In other words, it's held back under spring tension. When something releases that spring tension, it allows the firing pin to travel forward and strike the primer on the back of the cartridge causing the cartridge to fire.

Q. Also in my hand what appears -- what appears to be the bolt of the Exhibit 6 weapon.

MR. MOLEZZO: May I introduce this to the witness, Your Honor?

THE COURT: You may.

(BY MR. MOLEZZO:)

Q. Please take an opportunity to look at that and for the jury point out the striker, if you can.

A. This is the striker knob. And as you pull it out, you can see the striker retracting -- not retracting, but extending. If this were in the gun, it would extend to a

certain point where these notches on the back side or on the underside would engage the sear surface, which is the uppermost portion of the trigger.

Q. And does the striker fire the shell?

A. Correct.

Q. Do I have that correct?

A. Well, and the striker contains the firing pin. And the firing pin is the -- is the, um, actual object that contacts the head of the cartridge.

Q. And, I'm sorry, did you find functionality issues with the striker?

A. Not with the striker, but with the safety. The safety engages the striker. And the safety is very worn on this weapon.

Q. Okay. So through your -- you found a safety on this weapon?

A. Yes.

Q. Grabbing the weapon again, Exhibit 6, State's admission, can I see the safety here?

A. Yes, it's --

Q. Showing the weapon to the witness.

A. This portion right here (indicating) is the safety. It will rotate 180 degrees forward.

Q. And is it active and passive? What type of safety is it? I mean --

A. What the safety on this weapon does is it's twofold. The screw that holds it into the receiver also extends into the, um -- the area that would enclose -- that the bolt would be enclosed by.

So with the gun in the fire position, if I've already fired the weapon and I put the safety on it, it primarily locks the bolt so you're unable to throw the bolt to extract or chamber another round. That's in the full forward position.

Q. After -- after you've fired?

A. Right. Say, I was -- we finished the engagement and we were going on a march. I would save the weapon by putting the safety in the full forward position so that the bolt could not be accidently or unintentionally, um, retracted at that portion -- at that point.

Q. Okay. And, I'm sorry, before I interrupted you, did you find a different trigger pull pressure, you were saying?

A. Well --

Q. If I understand --

A. Well, if certain actions are taken -- that have taken place, if you reduce -- if you release the safety -- in other words, move it from the back position, which you have it now, into the forward position.

Q. That's releasing?

A. Correct.

Q. For the record, my thumb is on the safety, moving the safety up.

A. Okay, into the forward position. That would cause the safety to release. If you've done certain things prior to that, as little as an ounce and a quarter of weight on the trigger and the trigger will fire.

Q. When you say "certain things," what do you mean?

A. If the safety is in the on position, in other words, the firearm is in the back position. Okay. What it has done just now, it has cammed the striker away from the sear notch.

Q. What does cammed mean, please?

A. It moves it backwards.

Q. Okay.

A. So the sear notch, which is the very tip of the trigger, cannot contact the notch on the striker. So, in other words, you can pull the trigger and nothing's going to happen. It's -- it's interrupted the linkage between the trigger and the striker.

Q. Go on.

A. So the trigger pulls very freely.

Q. Go on.

A. This particular weapon, because of the wear, if you take your thumb off the safety, it automatically wants

to disengage. There's picture of that it in the exhibits. I'm holding it down with my finger. If I'm not holding it down with my finger, it pops up about a third of an inch. And it actually disengages the sear from the primary cocking notch on the striker, and it allows the sear to override -- excuse me, it allows the cocking notch to override the top of the sear.

Q. Go ahead, please.

A. If I have my finger on the trigger and I take the safety off, the gun will fire at that point, without any further motion on the trigger.

Q. So would you say the functionality of this safety is not very good? Or is it just simply a flawed tech? A flawed aspect of the weapon?

A. Well, it was a known problem with the weapon. According to Robert Riddervold, the historian and Enfield collector that I consulted, he stated that all of the armorers carried two and three spare safeties, because they just wore. The metallurgy was such in 1918, and the pressures were so extreme, that it caused wear fairly rapidly. So it was a known issue with the Mark I, No. 3.

Q. And if I understand correctly, through your test, there would come a time the safety would spring back on its own. Did I understand that?

A. Correct. If you took your finger off of the

safety.

Q. Right.

A. In other words, I throw the bolt, put a loaded round in it.

Q. Yes, sir.

A. Put the safety on.

Q. Yes.

A. As soon as I took my finger off of the safety with this one, not the one I compared it to.

Q. Yes, sir.

A. But with this one, the safety would advance about a third of an inch.

Q. Uh-huh.

A. And actually started to disengage from the striker at that point.

Q. With that dynamic in place, were you able to fire the gun?

A. Yes.

Q. What was the trigger pressure for that mode?

A. An ounce and a quarter, if I took the safety off. If my finger was not on the trigger and I took the safety off, it would drop to the half-cock notch and it would not fire at that point. You could continue to pull the trigger at that point and the gun would fire, which is not what it was designed to do either. So there's some major problems

there.

Q. Yes, sir. And thank you. So as I understand it, if you actively put the safety off, that's -- I do that, the trigger pull was at one and a half?

A. Ounce and a quarter at that point.

Q. And was it your testimony or -- what would you consider light?

A. Electronic triggers that the Olympic shooters are using, 14 ounces, maybe, and above. I don't have -- I've fired half a million rounds in my lifetime, and I don't have the fine muscle control to control anything about under a pound.

Q. In this firearm, what did you find when you got your finger close to the trigger?

A. I could not take the safety off without the gun firing if I was manually putting my finger on the trigger. My strain gauge wouldn't go low enough. So I had to construct a device to measure the weight that would actually cause the trigger to release.

Q. And what type of device was that, please?

A. Pretty simple. I use a paperclip.

Q. Okay. Uh-huh.

A. And put it over the trigger and I started hanging washers on it until I got to a weight where it would release. And then I weighed the entire apparatus, the

paperclip and the washers, and it came to 1.27 ounces.

Q. So were you able to fire the gun with the safety on?

A. No. You're removing the safety at this point.

Q. Yes, sir.

A. But if you got an ounce and a quarter on it, it will fire. With the safety on, if you pull the trigger, it will allow the striker to override the sear on the trigger. If I take the safety off, at that point, without my finger on the trigger, it will drop to the half-cock notch. I believe eventually it will fail all the way where it will fire that way as well. At this point, it's not.

Q. What is the purpose of a safety on a firearm, sir?

A. To keep it from firing inadvertently when you don't want it to.

Q. Did you perform any tests that compelled you or where you took the weapon and hit an object with the weapon? Did that make sense?

A. Yes. I tried to determine whether the weapon would discharge by striking the butt stock. If my finger was not on the trigger, it would not. If my finger was on the trigger and the safety was off intentionally, then the normal three-pound trigger pull, three-and-a-half-pound trigger pull came into play.

Q. And who requested that you check that out?

A. Um, that was my idea based on defense theory of the possibility of the rifle -- the butt stock being hit on a doorway as someone was exiting through a doorjamb. So I simulated a doorway at the firing range.

Q. Sure.

A. It's a practical range, so they have props. We put a prop doorway and intentionally struck the butt on it as we were walking backwards.

Q. With the capabilities of this weapon or functionality of this weapon, do you believe it's possible it could have discharged, uh, as two individuals struggled over the weapon?

A. I think very easily.

Q. Do you think it's possible it could have discharged if an individual tried to pull the weapon away from the original possessor of the weapon?

A. With any more than three pounds, yes. Three pounds of forward pressure on that trigger will cause that rifle to fire.

Q. Have you ever heard of the common expression "hair trigger"?

A. Yes, I have.

Q. What -- what -- would you say this weapon had a hair trigger?

A. Well, hair trigger's kind of a vernacular. It's

kind of a slang term. So there's a lot of different meanings. It usually refers to a very, very light trigger.

In the condition where the safety is taken off manually, in other words, not in the dangerous situation that I described, and the trigger pull is found to be about three-and-a-half pounds, I would say that's light for a battle weapon, but I wouldn't classify it as, you know, a hair trigger.

MR. MOLEZZO: For the record, I'm returning the exhibits I've got in reference to the images to the court clerk.

(BY MR. MOLEZZO:)

Q. So bringing it full circle, help us understand the functionality of this weapon. Would you rate the functionality of this weapon for its age at, say, a 10, being excellent, a 5, being okay, or a 1, being poor?

A. I haven't seen any rifles at that age that I would rate as a 10. In this case, I would rate that as a 1 being very poor.

MR. MOLEZZO: I have nothing further at this time. Thank you, Your Honor.

THE COURT: You may cross-examine.

MR. SMITH: Thank you, Your Honor.

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CROSS-EXAMINATION

(BY MR. SMITH:)

Q. Who are you working for today?

A. I've been hired by the defense.

Q. And when you went to the range and you set up the test, who helped you?

A. I was accompanied by Dustin Grate, the defense investigator.

Q. And is he present in the courtroom today?

A. Yes, he is.

Q. Can you please point to him and tell the Court what he's wearing.

A. He's standing, wearing a charcoal gray suit.

THE COURT: The record will so reflect, sir.

(BY MR. SMITH:)

Q. Did you send defense counsel the pages of questions that he were to ask you today as requested?

A. Excuse me?

Q. Did you send defense counsel questions that you wanted him to ask you today?

A. No, I did not.

Q. But that was a request that he had of you?

A. He requested that I discuss my opinions of the firearm.

MR. SMITH: Your Honor, may I approach with the

letter?

THE COURT: You may.

(Whereupon, a sidebar was had.)

MR. SMITH: Can I have this marked as State's exhibit next in line?

MR. MOLEZZO: I would object, Your Honor. That is work product --

THE COURT: It may be --

MR. MOLEZZO: -- generated by me.

THE COURT: I understand, but it was used for recollection purposes, and it is discoverable and admissible once you bring it out and he starts refreshing his memory from it in court.

It will be marked State's what?

THE COURT CLERK: Thirty-two.

THE COURT: State's 32 for identification.

(Whereupon, Exhibit 32 was marked for identification.)

MR. MOLEZZO: For the record, that was a cover letter accompanying the documents from reports I sent to him. I don't believe he used that letter to refresh his recollection, but I understand the Court's ruling.

THE COURT: Thank you, sir.

MR. MOLEZZO: Thank you, Judge.

(BY MR. SMITH:)

Q. Would you read that to yourself to refresh your

recollection?

MR. SMITH: Defense Counsel, that is page 1, paragraph 3.

THE WITNESS: Okay.

(BY MR. SMITH:)

Q. Did defense counsel ask you to give them a couple pages of questions to ask you in court today?

A. My interpretation of that, sir, was he was asking me questions to ask of the State's witness. That's how I interpreted that.

MR. MOLEZZO: My intent, Your Honor, if I may interject?

THE COURT: Counsel, you're not on the witness stand.

THE WITNESS: He wouldn't be cross-examining me.

THE COURT: Sir.

MR. SMITH: I haven't asked you a question.

THE COURT: Sir, just wait until the question is asked.

THE WITNESS: I'm sorry, sir.

(BY MR. SMITH:)

Q. Who helped you put up the door frame that you used at the firing range?

A. It was already assembled; we just moved it into the firing range. Mr. Grate and I both moved it.

Q. So Mr. Grate helped you do that?

A. Yes.

Q. Why were you using a door frame?

A. Again, defense counsel explained that one of the theories was that the defendant was moving out of one room into another room, and we were examining the possibility of an accidental discharge by the butt stock of the rifle hitting a door frame as you were moving from one room to another.

Q. Were you told that the defendant had gone into the bathroom?

A. I'm sorry?

Q. Were you told that the defendant had gone into the bathroom?

A. No. I was told that the incident happened in the bathroom.

Q. Were you told that the butt of the rifle or the stock had hit the door frame?

A. I was told that that was one of the theories that they were working off of.

Q. When you did the test on the door frame, what did you use to measure the pressure that it took between the butt of the gun striking the door frame to cause this discharge?

A. I didn't do a formal measurement. It was walking

backwards at a normal rate and allowing the butt stock to hit the door frame.

Q. So we have no idea how hard you hit that frame?

A. Well, we know it had to be more than three and a half pounds, because that was the trigger pull.

Q. All right.

A. It was holding the --

Q. That's good.

A. All right.

Q. Let me ask you a couple more questions. Now, you came up with a couple scenarios; is that correct?

A. Could you be more specific, sir?

Q. In your report, you came up with two scenarios on how the weapon could accidentally discharge; is that correct?

A. I would have to refresh my memory by reading my report.

Q. Okay. Well, instead of reading your whole report, um --

MR. SMITH: Your Honor, I'm going to introduce the defendant's report. Let me look real quick. I think I have one that's not marked, but I want to keep this one.

THE COURT: Sir, didn't you just have a copy of his report in your hands a minute ago?

MR. MOLEZZO: I can assist Mr. Smith. I have a

copy of the original report.

MR. SMITH: All right.

MR. MOLEZZO: Would that help?

MR. SMITH: Yes. Could we have that marked, then, as State's Exhibit --

THE COURT: Thirty-three?

MR. SMITH: Yes, Your Honor.

THE COURT: Miss Clerk, you can mark this Plaintiff's Exhibit 33 for identification purposes.

(Whereupon, Exhibit 33 was marked for identification.)

THE COURT: Do you have 32, sir?

MR. SMITH: I have it.

MR. MOLEZZO: I'm sorry, Your Honor. Absolutely. I'm sorry.

MR. SMITH: I will return it, Your Honor.

THE COURT: The clerk -- it belongs to the clerk once it's marked.

MR. SMITH: Counsel, I'm referring to a document that has been put together by the Forensics Study Group. I'm referring to page 4 of the four-page document. The record reflect I'm referring to page 3 of the three-page document (verbatim).

(BY MR. SMITH:)

Q. Would you read this to yourself.

A. All right.

Q. Okay. Does that refresh your recollection --

A. Yes. Thank you.

Q. -- of two accident discharge scenes that you created for the defense?

A. Right. Those were two that were readily apparent.

Q. In the first scenario, then, if the defendant has his finger on the trigger and the defendant is backing out of the doorway -- and let me see. Now, how did you put it exactly? I'm going to get this quoted just right -- and the defendant removed the first stage of the trigger. But what that really means is he's pulling the trigger and he's gone halfway back, right?

A. Correct.

Q. And then the butt of the gun strikes the frame of the door, then 75 percent of the time the gun went off?

A. It did in my testing.

Q. Okay. So as the defendant's pulling the trigger, he hits the door frame and it finishes going off?

A. Correct.

Q. Let's look at Scenario No. 2. Do you recall that?

A. Yes, I do.

Q. So if the defendant in Scenario No. 2 was manipulating the trigger -- in other words, the defendant was pulling the trigger; is that correct?

A. In that case it was pulling the trigger with the

safety on, not expecting it to fire.

Q. Okay. If you're pulling the trigger and you disengage the safety, then, in your expert opinion, it would fire a hundred percent of the time?

A. Certainly.

Q. Okay. So if you're pulling the trigger and you take the safety off at the same time, it's going to fire?

A. You wouldn't expect it to fire at an ounce and a quarter, sir.

Q. Okay. Do you teach hunter safety?

A. No, I do not.

Q. Do you teach range safety?

A. Yes, I do. I'm a range safety officer.

Q. Okay. Do you teach in your classes that you should walk around on the range with the trigger half cocked or half pulled back with a live round in the chamber?

A. Walking around, or during the course of a stage of fire?

Q. No, walking around.

A. You wouldn't be touching your weapon if you're walking around on a range.

Q. Wouldn't be safe, would it?

A. No, sir.

Q. But if you're engaging in firing the weapon, then you pull the trigger, right?

A. The first stage is what's called prepping the trigger, and that's taking out that slack or the first stage. That's normal preparation if you're shooting a match.

Q. Okay. And do you ever tell anybody to do that when they're just not ready to shoot something?

A. Under dry firing, you would do exactly that.

Q. Okay. On the range? Remember, you're an NRS or NRA instructor. In that course, do they teach you to tell people it is okay to half cock the trigger if they're not planning on shooting the weapon?

A. No. It's unsafe firearms handling.

Q. Absolutely.

A. I think that's pretty obvious.

Q. But in your expert opinion, in both of the scenarios that you set up for the defense counsel, the defendant was pulling the trigger when the scenarios made it possible for the gun to fire, right?

A. That's correct. It was bad firearms handling.

MR. SMITH: No further questions, Your Honor.

MR. MOLEZZO: Can I stay seated, Your Honor?

THE COURT: Yes. By the way, you may do redirect examination.

MR. MOLEZZO: Oh, I'm sorry, Judge.

THE COURT: It's okay.

REDIRECT EXAMINATION

(BY MR. MOLEZZO:)

Q. Is it possible, the first stage, in my mind, it clicks; is that right? Or it stops?

A. No. It's just there's a stop when it completes its travel. It's just basically, on some battle rifles, the trigger was constructed so there was about a half an inch of travel before the actual engagement of the fire control parts took place. It was just a spring, basically, that allowed for that.

Q. So, I'm sorry, could it stay -- could it stay -- your words -- the half pulled back stage, like for weeks or months, without discharging? Did that make sense?

A. Well, certainly, if you didn't pull it back past that.

Q. Okay.

MR. MOLEZZO: I have nothing further. Thank you.

THE COURT: For the record, 32 and 33 are not in evidence. Is that what you all --

MR. SMITH: I would like to move both of those into evidence, Your Honor. And I will provide 33 to the court clerk at this moment.

THE COURT: It's been marked for identification. Do you have any objection to 33?

MR. MOLEZZO: Absolutely not.

THE COURT: With regard to 32, that was simply for recollection purposes, and as I understand it --

MR. SMITH: Correct.

THE COURT: Is that correct?

MR. SMITH: That is correct, Your Honor. In fact, I would feel comfortable with it not going to the jury.

THE COURT: So do I.

MR. MOLEZZO: Yeah.

THE COURT: It's not going to the jury.

MR. MOLEZZO: May I approach, please, Judge?

THE COURT: So 32 is not in evidence. Thirty-three is, just so that you both know.

(Whereupon, Exhibit 33 was admitted into evidence.)

(Whereupon, a sidebar was had.)

MR. MOLEZZO: Thank you very much, Your Honor.

MR. SMITH: No further questions for the witness, Your Honor.

MR. MOLEZZO: Defense rests.

THE COURT: May this witness be excused?

MR. MOLEZZO: Absolutely.

MR. SMITH: Yes.

THE COURT: Sir, you get to go back to sunny California.

MR. MOLEZZO: Unless the jury has questions?

THE COURT: Sorry. Wait a minute. Any questions

of the jury? Now is the time. If you would please hand them to the bailiff, and we will be at ease.

If you will wait there, sir, and we will examine the question.

THE WITNESS: Thank you, Your Honor.

THE COURT: Counsel, if you will step out into the hallway with me, I will make a determination.

(Whereupon, a sidebar was had.)

THE COURT: Sir, I'm going to be asking you certain questions. I find that the jury questions are appropriate. We will take them one at a time.

Under the Scenario No. 2 that you described --

THE WITNESS: Yes, sir.

THE COURT: -- does it take both hands to cause a misfire, one hand on the trigger and the other hand operating the safety?

THE WITNESS: Yes.

THE COURT: How many times did you personally shoot this firearm for testing?

THE WITNESS: With live rounds at the range, I fired about 10 rounds. Uh, I did dry firing, uh, at my test site with one round, where the bullet and the powder had been removed, so it was just a primered case, just to ensure that it would, in fact, fire under that configuration, and it did.

THE COURT: Okay. And do you know how many shells the clip is capable of holding?

THE WITNESS: According to the Blue Book, the edition that I have, the Blue Book of Firearms Values that offers a description --

MR. SMITH: I'm going to object at this point, Your Honor, because if he didn't actually test this magazine, then we don't know. Because Blue Book -- he's already testified that this gun is highly modified. And if he didn't test this actual clip --

THE COURT: Let me ask this follow-up question. Did it appear that this would be the standard clip that went with the weapon, sir?

THE WITNESS: Yes, it is. It compared exactly to the unmodified one that I received from my client.

THE COURT: So how many shells is it capable of holding?

THE WITNESS: Ten.

THE COURT: Okay. Give those questions to the clerk as part of the record.

Anything further, gentlemen?

MR. MOLEZZO: Court's indulgence, please, Judge, before I rest.

THE COURT: Okay. I thought you did already, but --

MR. MOLEZZO: I may try to take it back.

THE COURT: Okay. Counselors, if you're contemplating any additional questions, it can only relate to the questions of the jurors.

MR. MOLEZZO: No further questions for this witness.

THE COURT: Okay.

MR. MOLEZZO: In reference to resting my case, I'm not certain. I need a few moments.

THE COURT: Okay. Well, let's deal with this witness.

MR. MOLEZZO: No further questions.

THE COURT: Sir?

MR. SMITH: No questions based on those, Your Honor.

THE COURT: Sir, you are excused and may return back to your duties.

THE WITNESS: Thank you, Your Honor.

MR. MOLEZZO: Your Honor, I would like to recall David Morton briefly.

THE COURT: Who?

MR. MOLEZZO: Just for some collateral measurement questions.

THE COURT: Any objection?

MR. SMITH: No, Your Honor.

MR. WILLIAMS: Your Honor, the calling and recalling witnesses is up to the Court.

THE COURT: Okay.

MR. MOLEZZO: Just real briefly.

THE COURT: All right.

Please take the witness stand. Please pull up to the microphone and state your name for the record.

THE DEFENDANT: David Craig Morton.

THE COURT: Mr. Morton, do you understand that you are still under oath, subject to perjury? Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. You may proceed.

MR. MOLEZZO: Thank you for that, Your Honor.

DIRECT EXAMINATION

(BY MR. MOLEZZO:)

Q. Mr. Morton, are you familiar with or do you have personal knowledge regarding the construction of your home?

A. Yes, I do.

Q. And how would you have this type of knowledge, sir?

A. Me and my father did a complete upstairs remodeling of that house in the course of a year.

(Whereupon, Exhibit H was marked for identification.)

(BY MR. MOLEZZO:)

Q. I'm handing you what has been marked as defense Exhibit H. I'm showing it to the prosecution.

Can you take a look at this diagram, if you will, and tell us what that shows you?

A. It shows the first bedroom, the hallway, and the bathroom, and the master bathroom connected to the master bedroom.

Q. Is it an accurate representation of your home's floor plan?

A. Yes, it is.

MR. MOLEZZO: I would like to move this in as Defense Exhibit H at this time.

MR. SMITH: Can we take another look at that, Your Honor?

MR. MOLEZZO: I'm sorry. Your Honor, for the record, I showed the prosecution a diagram that we've generated, and there is some information on that not in evidence. The prosecution was gracious and pointed that out.

(BY MR. MOLEZZO:)

Q. Sir, I'm going to show you what has been marked as defense Exhibit --

THE COURT: I.

MR. MOLEZZO: Huh?

THE COURT: I.

MR. MOLEZZO: I.

THE COURT: Is that correct, Miss Clerk?

THE COURT CLERK: Yep.

THE COURT: It will be marked as Exhibit I for identification.

(Whereupon, Exhibit I was marked for identification.)

MR. MOLEZZO: Thank you.

(BY MR. MOLEZZO:)

Q. Sir, will you look at this, um, and tell us what it is, please.

A. This is a diagram of the upstairs house at 1565 Harmony Road.

Q. And does it appear to be an accurate representation, though smaller than the original one, I showed you?

A. No.

Q. Does that not appear to be an accurate representation of your home, your floor plan?

A. It is a close approximation of the floor plan, but it's not exact. The bathroom doorway and the Bedroom No. 1 doorway do not line up at all. The Bedroom 1 doorway is further towards the living room.

If you walk straight out of the bathroom, you will not encounter that door. You actually have to step over to go into that doorway. The doorways do not line up at all.

Q. Okay. Does that one part represent the hallway of your house?

A. Yes, it does.

Q. Can you -- did you do work on the home?

A. Yes, we did.

Q. Do you know the width of that hallway?

A. Yes, I do. It's 36 inches.

Q. Could you -- could you mark --

THE COURT: Just a second.

MR. MOLEZZO: Sorry, Judge.

THE COURT: What did you say, sir?

THE WITNESS: I said the width of the hallway is 36 inches.

(BY MR. MOLEZZO:)

Q. Could you mark where you were, as best you can recall, on the night of the event?

A. (Witness complied.)

MR. MOLEZZO: I would move this in as defense Exhibit I.

MR. SMITH: No objection, Your Honor.

THE COURT: It will be admitted as I.

(Whereupon, Exhibit I was admitted into evidence.)

MR. MOLEZZO: Your Honor, may I publish this to the jury?

THE COURT: You may.

MR. MOLEZZO: Thank you for that.

(BY MR. MOLEZZO:)

Q. As indicated by a blue X. And in reference to that hallway, sir, again, what was the width of it?

A. Thirty-six inches.

MR. MOLEZZO: May I hand this to you? Thank you. For the record, I've handed --

THE COURT: Sir.

MR. MOLEZZO: What is that, Your Honor?

THE COURT: After you get it back, I suggest you have him write his name on it and the measurement.

MR. MOLEZZO: Thank you. I will.

(BY MR. MOLEZZO:)

Q. Sir --

MR. MOLEZZO: Your Honor, may I have the witness step down briefly from the witness stand, please?

THE COURT: Yes.

(BY MR. MOLEZZO:)

Q. Mr. Morton, would you please, um, assist me?

For the record, I have the Exhibit 6 already admitted into evidence.

Is this the gun on the night in question, sir?

A. Yes, it is.

Q. For the record, I'm handing Mr. Morton the end of the tape measure, fragments of one inch, one inch.

Sir, could you put that at the barrel of that weapon, please, uh, at the stock?

For the record, Mr. Morton is kneeling down, and I'm pulling it to the end of the muzzle.

Go ahead and leave it there. Mr. Morton, can you walk over to me, please, and share with the jury the length of this firearm?

A. Forty-four and one-half inches.

Q. Say that again, please.

A. Forty-four and one-half inches.

Q. Go ahead and take a seat. Thank you. No, Mr. Morton, over here, please.

A. Sorry.

THE COURT: Wrong seat.

(BY MR. MOLEZZO:)

Q. It's okay.

MR. MOLEZZO: For the record, I'm retrieving the document submitted to the jury under publication.

THE COURT: Would you have him write his name and --

MR. MOLEZZO: I will. Thank you, Your Honor.

(BY MR. MOLEZZO:)

Q. Sir, would you write your name on that document?

THE COURT: Here, do you want a red pen?

MR. MOLEZZO: Thank you. Thank you, District

Attorney.

(BY MR. MOLEZZO:)

Q. For the record, Mr. Morton is using red.

And write your name, please.

A. (Witness complied.)

THE COURT: Did you have him fill in the distance as well?

MR. MOLEZZO: I did.

THE COURT: Thank you, Counsel.

MR. MOLEZZO: For the record, I had Mr. Morton fill in the width and he's put in red "36 inches." I have really nothing further at this time. Thank you for the chance at recall, Your Honor.

THE COURT: Yes, sir.

You may proceed on cross-examination.

MR. WILLIAMS: Can I see the document, please? Just a couple questions.

CROSS-EXAMINATION

(BY MR. WILLIAMS:)

Q. So looking at the drawing, Mr. Morton, your testimony is you were standing in the doorway of the bathroom?

A. Yes, I was.

Q. And that you never entered the bathroom that night?

A. I didn't say that. I did enter the bathroom.

MR. MOLEZZO: Your Honor, it's kind of outside of the scope of direct, if you want to make a clean record. I was just asking in reference to the measurements, I believe. I'm just going to put it on the table.

THE COURT: I'm going to allow him a little bit of latitude, sir. I allowed you some latitude.

MR. MOLEZZO: Just making a record. Thank you, Your Honor.

MR. WILLIAMS: That's all the questions I have, Your Honor. Thank you.

MR. MOLEZZO: I have no further questions, Your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: Thank you.

MR. MOLEZZO: The defense will rest at this time.

THE COURT: Do you have any rebuttal witnesses?

MR. SMITH: Your Honor, may we confer on that issue for a moment?

THE COURT: Okay. What I intend to do at some point is, if there are no more witnesses, I'm going to be sending the jury home.

MR. SMITH: I just mean right here, real quick.

THE COURT: Okay.

MR. SMITH: No, Your Honor. The State will not be

putting on any rebuttal witnesses.

THE COURT: Oh, by the way, were there any jury questions of the last witness? I see no hands.

So you have --

MR. SMITH: No rebuttal.

THE COURT: So you have no rebuttal?

MR. SMITH: That's correct, Your Honor.

THE COURT: All right. That's the end of the evidence.

Ladies and gentlemen, what will happen now, I'm going to send you home and have you come back at 10:00 tomorrow. By then we will have completed all the jury instructions. I will read them to you. The attorneys will argue the case, and then you will begin deliberations tomorrow.

It is extremely important that you make sure that you do not become contaminated in any way with regard to any outside influences. This is a critical time of the trial. And so I'm going to ask that you listen very carefully to the admonitions and follow them.

I'm going to admonish you it is your duty not to discuss among yourselves or with anyone else any matter having to do with this case.

It is your further duty not to form or express any opinion regarding the guilt or innocence of the defendant

until the case has been finally submitted to you for your decision.

You are not to read any newspaper articles or listen to or view any radio or television broadcasts concerning this case.

Should any person attempt to discuss the case with you or in any manner attempt to influence you with respect to it, you are to advise the bailiff who will, in turn, advise the Court.

If you'd be here promptly at 10:00 a.m., we will begin. We will be doing some work as the attorneys and myself before that, but I expect to start right at 10:00. All rise, please.

Go ahead, ladies and gentlemen, you are excused.

(Whereupon, the following proceedings were had outside the presence of the jury and the alternates.)

THE COURT: Court will come back to order. Please be seated.

The record should reflect the absence of the jury and the alternates.

I wish to place on the record certain sidebar issues that came before the Court. Prior to the defense calling their expert witness in this case, Mr. Robert Venkus, the State objected to my allowing him to testify as a result of certain discovery issues.

At this time, counsel, you have the right to go on the record with regard to that.

MR. SMITH: Yes, Your Honor. The State made two motions. One that there was not a filed, stamped endorsement of the intent to call the expert witness filed in the Court's file, notifying the Court that the expert would be testifying.

The second issue that the State raised is that under rule NRS 174.234 (2), defense counsel is to provide the State with the report that their expert is going to be testifying on no later than 10 days prior to the date of trial. The State did not receive that. We received it four days prior to the beginning of trial.

THE COURT: Okay. Do you agree, Counsel, those were the objections?

MR. MOLEZZO: I agree those were the objections expressed by the DA.

THE COURT: Okay. And then I allowed the defense expert to testify. I do want to make a record of this, because of this problem previously in this jurisdiction in a similar serious case, the Supreme Court of the State of Nevada reversed a case in which, uh, the shoe was on the other foot.

The State had failed to endorse a witness and to -- excuse me -- had failed to notify defense counsel

within the 10 days of the trial with regard to testimony. And in that particular case, I allowed defense counsel time to examine the witness outside the presence of the jury, took a lot of steps to make sure they had that opportunity. And in spite of that, the Supreme Court reversed the case.

In all fairness, the rules should apply equally. And I just want to note for the record that I, because of the situation in this particular case, um -- it would have left the defense without an expert witness as to an important issue in this case, but I did allow your expert to testify.

Although, technically, this Court would have said I would not allow him to testify. I did do that, because I believe that it was critical that your client have the opportunity to have the expert there. But I would note for the future reference that those kinds of issues can create a situation in which a witness may not be allowed to testify.

MR. MOLEZZO: Thank you for the Court's courtesy. In no time in my long career, Your Honor, have I missed a witness endorsement deadline. I would submit Mr. Smith is an honorable man, but I'm certain he was endorsed -- I'm positive he was endorsed on time. In reference to the reports getting to him, I cannot say. And I'll have to review that in my case file.

THE COURT: Okay. I would advise you that I've

asked the clerk's office several times to find that endorsement. It has never appeared in the file.

MR. MOLEZZO: Okay.

THE COURT: I just want you to know that.

MR. MOLEZZO: Okay.

THE COURT: Although, I don't think the prosecution was surprised.

MR. SMITH: No. No, we weren't surprised.

MR. MOLEZZO: Thank you.

THE COURT: They knew of your witness, and they knew generally of his testimony and his reports. And so, for that reason, I've done that. But there are technical rules that I abide by, and I just want to point out that it's important that I do that fairly with regard to both sides.

MR. MOLEZZO: Yes, sir.

THE COURT: Anyway, that's behind us now. But with regard to jury instructions, I will meet with counsel. It's my understanding that your office is preparing what we worked on earlier today. And as soon as we get copies for counsel, then you can be excused to then go for the evening.

MR. MOLEZZO: Yes, sir.

THE COURT: And we'll meet back here with counsel to settle the final jury instructions at 9:00. It gives us an hour before the jury comes to make any last-minute

changes.

At that time, we will go on the record. We will number them and find any objections to the jury instructions. If you have additional instructions that you are proposing, please have those ready for me tomorrow.

MR. SMITH: Thank you, Your Honor.

MR. MOLEZZO: Yes, sir.

THE COURT: Counsel, anything else with regard to those?

MR. MOLEZZO: No, sir.

MR. SMITH: Not from the State, Your Honor.

THE COURT: Okay. We are adjourned until tomorrow morning at 10:00.

(Whereupon, the proceedings adjourned.)

STATE OF NEVADA)

) ss.

COUNTY OF HUMBOLDT)

We, ZOIE WILLIAMS and DENISE PHIPPS, court reporters of the State of Nevada, in and for the County of Humboldt, do hereby certify that we were present during all the proceedings had in the matter of the STATE OF NEVADA, plaintiff, vs. DAVID CRAIG MORTON, defendant, heard at Winnemucca, Nevada, on September 20, 2010, and took verbatim stenotype notes thereof; and that the foregoing pages contain a full, true and correct transcription to the best of our ability, by our stenotype notes so taken, and a full, true and correct copy of all proceedings had.

Zoie Williams, CCR 540
Official Court Reporter

Denise Phipps, CCR 284

CASE NO. CR 09-5709

Dept. NO. I

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DIST. COURT CLERK

Maria D Pecumbaugh

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

-oOo-

THE STATE OF NEVADA,

Plaintiff,

vs.

DAVID CRAIG MORTON,

Defendant. /

INSTRUCTIONS TO THE JURY

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

It is now my duty as Judge to instruct you in the law that applies in this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule or law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation

of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their importance.

INSTRUCTION NO. 3

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief, what facts are, or are not, established or what inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. 4

The Defendant, DAVID CRAIG MORTON, is being tried upon an Information which has been read to you, charging the Defendant with the crimes OPEN MURDER, WITH THE USE OF A DEADLY WEAPON and DISCHARGING A FIREARM FROM WITHIN OR FROM A STRUCTURE the charging parts of which read as follows:

COUNT I

That in Humboldt County, Nevada, on or about the 6th day of August 2009, at or near the location of 1565 Harmony Road, Winnemucca, County of Humboldt, State of Nevada, the crime of OPEN MURDER, WITH THE USE OF A DEADLY WEAPON, a Category A Felony, in violation of NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165, was committed by the above-named defendant who, at the time and place aforesaid, did willfully, unlawfully and feloniously with malice aforethought, and with deliberation and premeditation kill and murder another human being, with the use of a deadly weapon, in the following manner, to-wit: That on or about the 5th day of August, 2009, at or near the location of 1565 Harmony Road, Winnemucca, County of Humboldt, State of Nevada, the Defendant shot his wife, Cynthia Morton, in the abdomen with a rifle, causing the death of Cynthia Morton.

COUNT II

That in Humboldt County, Nevada, on or about the 6th day of August, 2009, at or near the location of 1565 Harmony Road, Winnemucca, County of Humboldt, State of Nevada, the crime of DISCHARGING A FIREARM FROM WITHIN OR FROM A STRUCTURE, a Category

B Felony, in violation of NRS 202.287(b), was committed by the above-named defendant who, at the time and place aforesaid, did maliciously or wantonly discharge or cause to be discharged a firearm from within a structure or vehicle, and that such conduct occurred within an area designated by city or county ordinance as a populated area for the purpose of prohibiting the discharge of weapons, in the following manner, to-wit: That on or about the 6th day of August, 2009, at or near the location of 1565 Harmony Road, Winnemucca, County of Humboldt, State of Nevada, the Defendant unlawfully shot a rifle in his house, located at 1565 Harmony Road, Winnemucca, Nevada.

To the above Information, the Defendant duly entered his pleas of NOT GUILTY.

INSTRUCTION NO. 5

You are instructed that the information itself is a mere charge or accusation against the defendant, and is not of itself any evidence of his guilt, and no juror in this case should permit himself or herself to be influenced by any extent against the defendant because of or on account of the information.

INSTRUCTION NO. 6

A defendant is presumed to be innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense.

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

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

INSTRUCTION NO. 7

In every crime or public offense, there must be union or joint operation of act and intention. Intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused.

When a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury as a matter of fact before the jury can find a verdict of guilty.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do there can be no eye witness account of state of mind with which the acts were done or omitted, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid determination of state of mind.

INSTRUCTION NO. 8

The Defendant was charged with two separate crimes as set forth under Counts I, and II of the Information. You are to decide the guilt or the innocence of the Defendant individually in each of these charges and in order to convict the Defendant of any of the charges the State must prove the elements of each offense beyond a reasonable doubt as defined in the instructions to follow.

INSTRUCTION NO. 9

In this case, the defendant, David Craig Morton, has been charged with "Open Murder" under Count I of the Information. This charge includes Murder of the First Degree and Murder of the Second Degree. This charge also includes the lesser included offenses of Voluntary Manslaughter and Involuntary Manslaughter.

The Jury must decide if the Defendant is guilty of any of the four offenses under Count I of the Information and, if so, of which offense.

Murder of the First Degree is murder which is perpetuated by means of any kind of willful, deliberate, and premeditated act with malice aforethought.

The law provides that you are to fully and carefully consider whether the Defendant is guilty of First Degree Murder. In the following instructions, the elements and definitions of First Degree Murder will be explained to you.

Any verdict of guilt for any crime you find has been proven beyond a reasonable doubt must be unanimous.

If after first fully and carefully considering the charge of First Degree Murder you find the Defendant not guilty or you are unable to unanimously agree whether to acquit or convict the Defendant on the charge of First Degree Murder, you may find the defendant guilty of Second Degree Murder. Second Degree

Murder is Murder with malice aforethought, but without the added mixture of premeditation and deliberation.

If you are convinced beyond a reasonable doubt that the crime of Murder has been committed by the defendant, but you have a reasonable doubt whether such Murder was of the First or Second Degree, you must give the defendant the benefit of that doubt and return a verdict of Murder of the Second Degree.

In the following instructions the elements and definitions of Second Degree Murder will be explained to you. You cannot find the defendant guilty of both First and Second Degree Murder.

The law provides that if after considering the charge of Second Degree Murder and you find either the defendant not guilty of that charge, or you are unable to agree unanimously whether to acquit or convict on the charge of Second Degree Murder, you may consider whether or not the defendant is guilty of the lesser-included offense of Voluntary Manslaughter. The definitions and elements of Voluntary Manslaughter will be explained to you in the instructions to follow.

The law further provides that if after considering the charge of Voluntary Manslaughter and you find either the Defendant not guilty of that charge, or you are unable to agree unanimously whether to acquit or convict on the charge of Voluntary Manslaughter, you may consider whether or not the Defendant is

guilty of the lesser included offense of Involuntary Manslaughter. The definitions and elements of Involuntary Manslaughter will be explained to you in the instructions to follow.

You cannot find the Defendant guilty of more than one of the four offenses which have been described to you in this instruction, however there is one other separate charge which you must independently decide which is charged under Count II of the Information. You are to decide the guilt or innocence of the defendant as to the charge of DISCHARGING A FIREARM FROM WITHIN OR FROM A STRUCTURE. The elements of that offense and the definitions that go with it are defined further in these instructions.

INSTRUCTION NO. 10

In order to find the Defendant, David Craig Morton, guilty of Premeditated First Degree Murder, With the Use of a Deadly Weapon, you must find that the State has proven each of the following elements beyond a reasonable doubt:

1. That the Defendant;
2. On or about the 6th day of August, 2009;
3. In Humboldt County, Nevada;
4. Did willfully;
5. With malice aforethought;
6. With deliberation; and
7. Premeditation;
8. Kill another human being;
9. With the use of a deadly weapon

INSTRUCTION NO. 16

The word "willful" when used in criminal statutes with respect to proscribed conduct relates to an act or omission which is done intentionally, deliberately or designedly, as distinguished from an act or omission done accidentally, inadvertently or innocently.

INSTRUCTION NO. 12

First Degree Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

INSTRUCTION NO. 13

Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements -- willfulness, deliberation, and premeditation -- must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.

Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.

Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the actions.

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the

act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

INSTRUCTION NO. 14

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

INSTRUCTION NO. 15

The intent to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

INSTRUCTION NO. 16

Express malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

INSTRUCTION NO. 17

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, from anger, hatred, revenge, or from particular ill will, spite or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 18

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

You are instructed that a firearm is a deadly weapon.

INSTRUCTION NO. 19

Where the original injury is a cause of death, the fact that the immediate cause of death was the medical or surgical treatment administered or that the treatment was a factor contributing to the cause of death will not relieve the person who inflicted the original injury from responsibility.

Where, however, the original injury is not a cause of the death and the death was caused by medical or surgical treatment or some other cause, then the Defendant is not guilty of an unlawful homicide.

INSTRUCTION NO. 20

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

INSTRUCTION NO. 21

Some crimes which are charged require the State to prove beyond a reasonable doubt that the Defendant had a specific intent at the time he committed such crime. These types of crimes are called "specific intent" crimes. When specific intent is an element of a crime with which the defendant is charged such Defendant may claim voluntary intoxication as a defense, including intoxication by alcohol or controlled substances.

While involuntary intoxication is not a defense to a crime, itself, if the offense charged is a "specific intent" crime the Jury may consider the fact of such intoxication as it goes to the element of intent of that crime. Voluntary intoxication of alcohol or controlled substance may negate specific intent.

If you find from the evidence that the State has failed to prove beyond a reasonable doubt that the Defendant had the "specific intent" to commit the specific crime charged because the Defendant was so intoxicated as to be incapable of forming such specific intent, the accused is entitled to an acquittal. In this case there are four separate crimes possible, only two of which are "specific intent" crimes. The two "specific intent" crimes which are possible in this case are First Degree Murder and Second Degree Murder.

Under Count II, Discharging a Firearm From Within or From a Structure, such crime is not a specific intent crime.

INSTRUCTION NO. 22

All murder which is not Murder of the First Degree is Murder of the Second Degree. Murder of the Second Degree is Murder with malice aforethought, but without the admixture of premeditation and deliberation.

INSTRUCTION NO. 23

In order to establish the crime of Second Degree Murder With the Use of a Deadly Weapon, the State must prove each of the following elements beyond a reasonable doubt:

1. That the Defendant;
2. On or about August 6, 2009;
3. In Humboldt County, Nevada;
4. Did willfully;
5. With implied malice aforethought;
6. Kill another human being;
7. With the use of a deadly weapon.

INSTRUCTION NO. 24

Manslaughter is the unlawful killing of a human being without malice express or implied and without any mixture of deliberation.

Voluntary Manslaughter is a voluntary killing upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible.

The provocation required for Voluntary Manslaughter must either consist of a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The serious and highly provoking injury which causes the sudden heat of passion can occur without direct physical contact. However, neither slight provocation nor an assault of a trivial nature will reduce a homicide from murder to manslaughter.

For the sudden, violent impulse of passion to be irresistible resulting in a killing, which is Voluntary Manslaughter, there must not have been an interval between the assault or provocation and the killing sufficient for the voice of reason and humanity to be heard; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and

humanity to be heard, then the killing shall be determined by you to be murder. The law assigns no fixed period of time for such an interval but leaves its determination to the jury under the facts and circumstances of the case.

INSTRUCTION NO. 25

The heat of passion which will reduce a homicide to Voluntary Manslaughter must be such an irresistible passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which he was placed and the facts that confronted him were such as also would have aroused the irresistible passion of the ordinarily reasonable man if likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from such passion rather than from judgment.

INSTRUCTION NO. 26

In order to find the Defendant, David Craig Morton, guilty of Voluntary Manslaughter With the Use of a Deadly Weapon, you must find that the State has proven each of the following elements beyond a reasonable doubt:

1. That the Defendant;

2. On or about the 6th day of August, 2009;

3. In Humboldt County, Nevada;

4. Did kill another person;

5. After having a serious and highly provoking injury inflicted upon himself sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing;

6. With the Use of a Deadly Weapon.

INSTRUCTION NO. 27

Involuntary Manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner.

INSTRUCTION NO. 28

In order to find the Defendant, David Craig Morton, guilty of Involuntary Manslaughter, you must find that the State has proven each of the following elements beyond a reasonable doubt:

1. That the Defendant;

2. On or about the 6th day of August, 2009;

3. In Humboldt County, Nevada;

4. Did willfully;

5. In the commission of an unlawful act;

6. Or a lawful act which probably might produce such a consequence in an unlawful manner;

7. Without the intent to do so;

8. Kill another human being;

INSTRUCTION NO. 29

You are instructed that if you find a defendant guilty of 1st or 2nd Degree Murder, or Voluntary Manslaughter you must also determine whether or not a deadly weapon was used in the commission of this crime.

If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon".

If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

INSTRUCTION NO. 30

In order to find the Defendant, David Morton, guilty of the crime of Discharging a Firearm Within or from a Structure you must find each of the following elements beyond a reasonable doubt:

1. The defendant, David Morton;
2. On or about August 6, 2009;
3. In Humboldt County, Nevada;
4. Did knowingly, willfully, and unlawfully discharge a firearm within his home;
5. Which is within a populated area.

INSTRUCTION NO. 31

If you find that in fact the Defendant accidently discharged a firearm you cannot find the Defendant guilty of Count II Discharging a Firearm From Within or From a Structure.

INSTRUCTION NO. 32

The deliberate attempt to avoid apprehension or prosecution by a person immediately after the commission of a crime, or after he is accused of a crime, is a circumstance in establishing his guilt, but is not sufficient in itself to establish guilt, but is a fact which, if proved, may be considered by the jury in light of all other proved facts in deciding the question of the Defendant's guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine.

INSTRUCTION NO. 33

A statement made by the Defendant other than at his trial may be an admission.

An admission is a statement by a Defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether an admission was made by the Defendant and if the statement is true in whole or part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

INSTRUCTION NO. 34

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the

court. Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 35

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

INSTRUCTION NO. 36

Every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness including, but not limited to, any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The conduct, attitude and manner of the witness while testifying;

Whether the witness had any bias, interest, or other motive not to tell the truth;

Evidence of the existence or non-existence of any fact testified to by the witness;

The attitude of the witness toward the action in which testimony has been given by the witness or toward the giving of testimony;

Whether any statement previously made by the witness was consistent with the witness' present testimony or, conversely, whether any statement previously made by the witness is inconsistent with the present testimony.

INSTRUCTION NO. 37

A witness who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his or her testimony in other particulars.

However, discrepancies in a witness' testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

INSTRUCTION NO. 38

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 29

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 40

In arriving at a verdict in this case as to whether the defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

If the Jury's verdict is Murder in the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

INSTRUCTION NO. 41

The Court instructs you as follows:

1. That, in order to return a verdict, each juror must agree thereto.

2. That jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.

3. That each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors.

That, in the course of deliberation, a juror should not hesitate to re-examine his own views and change his opinion, if convinced it is erroneous.

5. That no juror should surrender his honest conviction as to the weight of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 44

In this case there are two crimes charged. Under Count I "Open Murder" there are eight (8) possible verdicts. Under Count II, Discharging a Firearm From Within or From a Structure there are two (2) possible verdicts. These various possible verdicts are set forth in the forms of verdicts which you will receive. You may return only one of the possible verdicts for each of the two counts. If you all have agreed upon the verdict, the corresponding verdict form is to be signed. The other forms are to be left unsigned. The possible verdicts are as follows:

UNDER COUNT I OF THE INFORMATION

1. Guilty of **OPEN MURDER IN THE FIRST DEGREE, WITH THE USE OF A DEADLY WEAPON,**
2. Guilty of **OPEN MURDER IN THE FIRST DEGREE,**
3. Guilty of **OPEN MURDER IN THE SECOND DEGREE WITH THE USE OF A DEADLY WEAPON,**
4. Guilty of **OPEN MURDER IN THE SECOND DEGREE,**
5. Guilty of **VOLUNTARY MANSLAUGHTER WITH THE USE OF A DEADLY WEAPON,**
6. Guilty of **VOLUNTARY MANSLAUGHTER,**
7. Guilty of **INVOLUNTARY MANSLAUGHTER** or
8. **Not Guilty**

UNDER COUNT II OF THE INFORMATION

1. Guilty of DISCHARGING A FIREARM FROM WITHIN OR FROM A STRUCTURE, or

2. Not Guilty .

INSTRUCTION NO. 45

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

Instruction Number 1 through 45 given this 21st day of September, 2010.

Richard A. Wagner

RICHARD A. WAGNER
District Judge

Case No. CR-09-5709

Department I

FILED

DEC 20 2010

TAMI RAE SPERO
DIST. COURT CLERK

C. Smith

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT

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THE STATE OF NEVADA, Plaintiff, v. DAVID CRAIG MORTON, Defendant.	SENTENCING CONTINUANCE HEARING HELD IN CHAMBERS

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on December 17, 2010, before the HONORABLE RICHARD A. WAGNER, District Court Judge.

The State was present in chambers and represented by Russell Smith and Brian Williams, Humboldt County District Attorney, and Humboldt County Deputy District Attorney.

The Defendant was NOT present in chambers, but was represented by Richard A. Molezzo, Attorney at Law, who appeared telephonically.

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ORIGINAL

Winnemucca, Nevada, Friday, December 17, 2010

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P R O C E E D I N G S

THE COURT: This is case number CR-09-57 -- excuse me, 5709. It's entitled State of Nevada, plaintiff, vs. David C. Morton, defendant.

I am making a record, although the clerk of the court is not present.

The record should reflect that today is the date that was originally set for sentencing in this case to begin at 1:30.

The record should reflect that Mr. Russell Smith, district attorney of Humboldt County is here, present in my chambers with the court reporter, myself, and my law clerk.

And that Mr. Richard A. Molezzo, from Reno, who is the attorney on behalf of the defendant, is appearing telephonically.

Mr. Molezzo contacted me this morning and indicated that there was a pretty major issue with regard to the weather, particularly in the Reno area. Where we're at, the roads are clear, but it appears to be threatening out this direction. But apparently, the main storm is hitting over Reno.

I've also talked to another attorney who mentioned to me that out of the Reno area that apparently it's pretty bad weather. And so Mr. Molezzo has requested a continuance of the sentencing in this matter.

Is that correct, Mr. Molezzo?

MR. MOLEZZO: That is correct, Your Honor.

THE COURT: Okay. On behalf of the State, sir, have you been able to contact your witnesses to determine your position with regard to continuing this matter?

MR. SMITH: Yes, Your Honor. I've been able to contact our witnesses. And due to weather, those that were traveling from further away had chose not to travel and had submitted things in writing. And I was able to also talk with the local individuals, and, um, spoke to them about the need for the continuance because of the weather. And the State would not be objecting to a continuance at this time based on the weather conditions.

THE COURT: All right. With regard to that, then the Court finds that there is good reason. I don't want someone to put their life in danger simply in order to go forward with court today. And so I am going to find that there is good cause. And that there is, by stipulation of counsel, reason to continue this matter.

Mr. Molezzo, do you have the ability to reset this with calendar at this time?

MR. MOLEZZO: I do, Your Honor. I certainly do.

THE COURT: Okay. Um, I'm looking for a new date for the sentencing. Let's see, it appears I've got two open days. They both happen to be Fridays. In January I have the 14th or the 21st is the only two open days that I have in January on my calendar. What does it look like with regard to you gentlemen's calendars?

MR. SMITH: Brian, which one looks best for you?

THE COURT: Mr. Brian Williams has just come in.

MR. WILLIAMS: Hi Rich.

MR. MOLEZZO: Hello. Happy holidays.

MR. WILLIAMS: You too. Let me think. The 14th. I don't think we have any trials set that week at all. So the 14th would be --

THE COURT: Mr. Molezzo, is there one of these dates -- either of these dates that's appropriate for you?

MR. MOLEZZO: Yes, sir. Thank you, Your Honor. In reference to January 14th, that looks fine for me. I'll certainly make it happen. Weather conditions permitting, I'll definitely be there. If there's going to be dramatic weather, as we know in Nevada it can occur, if necessary, I'll come down the day before. So I'll make it happen. January 14th looks good.

THE COURT: What time do you want to set it for?

MR. MOLEZZO: Well, I would request a 1:30 setting

in case it's cold for things to melt.

THE COURT: Okay. I'm going to set it for 1:30. And I'll have my clerk get ahold of the clerk of the court and send out setting memos to everyone, resetting this matter.

While you're on the phone and we have a record going, Mr. Molezzo, you provided me with a sentencing memorandum.

MR. MOLEZZO: I did.

THE COURT: Within that there's a couple of things I do want to point out to you. That probably is better dealt with here than in open court. If you don't mind, I want to point out a couple of things that I think might be of some concern.

With regard to some of the issues of your client -- with regard to allocution, there is a case that controls the limits of allocution. And it is entitled Homick v. State. H-o-m-i-c-k. Let's see, I just have the advanced sheet, but it was filed January 27th, 1992.

Um, and specifically it deals with the issue of, I do not believe that you or your client can maintain his innocence during the sentencing, and I just wanted to bring that to your attention.

MR. MOLEZZO: Thank you, Your Honor. I will look up the case.

THE COURT: Okay. The cite here is at 108 Nevada 127. And it's 825 P.2d 600. It's a 1992 case.

MR. MOLEZZO: Yes, sir.

THE COURT: And that pretty much defines the limits within which you or your client, I think, can deal with the issue of arguing innocence as a result of the jury finding in this matter.

The other thing that I would point out is, is that the standard for evidence to be used at a sentencing is set forth in NRS 47.020.

MR. MOLEZZO: Thank you.

THE COURT: And that indicates that the general provisions of our evidence code do not apply at sentencing. Our supreme court has set forth a standard of sentencing in a case entitled Silks v. State. It's S-i-l-k-s, Silks v. State. That is -- and I notice it's quoted even today in most of the cases as to the standard of evidence.

And the cite on that particular case is 92 Nevada at page 91, 554 P.2d 1159. It's a 1976 case that still sets forth the standard. And the standard says, "So long as a record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed."

So the two standards that they set has to fall within that to be excluded, that it is impalpable or highly suspect evidence.

MR. MOLEZZO: Yes, sir.

THE COURT: Hearsay is available at sentencing.

MR. MOLEZZO: Yes, sir.

THE COURT: Provided it does not fall into that category.

For your edification, and the State as well, there is another case that sets forth, and I want to make sure the State understands the limits here, it's called Buschauer, B-u-s-c-h-a-e-r v. State at 106 Nevada 890, a 1990 case, that indicates that, even during a victim impact statement, or if the State were to try to produce evidence of other information about your client, they simply cannot come into court and bring up other matters without having giving you notice and the opportunity to receive information of matters that they would try to introduce into evidence. And this case kind of sets forth the standards with regard to that.

Even in allocution there are only certain matters that a victim or victim's family can indicate to the Court. And they cannot go beyond those things that are set forth for victim impact statements.

The way I will proceed in sentencing is, is that, when we go into court, I will ask if you have each received

a copy of the presentence investigation, and then I will request if there are any factual corrections.

This is important. Because, to me, it gives you an opportunity to correct anything that you find is in error in the report.

And if either side does not correct that, I assume that information then is true and correct. I believe that you will find that courts and parole boards and everyone else operate off the same idea if it was not corrected.

Part of the problem that we have with regard to that process that we learned last year, the judges in the state, was that if Parole and Probation has a report that has been corrected and they do not correct it in their copy on their computer, then if it ever gets to the parole board, the parole board never has the corrections.

And so I have recently been having to do a separate order, ordering that Parole and Probation make any corrections that we make in open court. Failure to do that is a little crazy, because the prison people do not talk, you know, and the parole board does not talk to Parole and Probation about those things.

And their -- the parole board is getting their information simply off of the computer record of the original report. And I just want to make you attorneys aware of that.

After I ask for that, I will then ask for any evidence on either side. And you'll have your exhibits premarked, I'm assuming, so that they can be identified.

Attached with your sentencing memorandum, Mr. Molezzo, there are letters and other things. We probably ought to have those individually marked as exhibits so they go into the record as exhibits. And the same thing with the State.

Allocution statement can be done either verbally or in writing according to the statute. And the same thing goes with the State, that you will have yours numbered on behalf of the State. And the defense will have theirs by letter, alphabetical letter.

Um, after all the exhibits are in then we go to argument. The State, of course, has the opening argument and final argument with regard to sentencing. Once that is done, then I ask the defendant and advise him of the right of allocution, and he will have the right to do that.

And after that is done, then the final thing is the victim impact statements. By law, the victim impact statements come after the allocution and all of the evidence. That's the statutory scheme of sentencing as I understand it to be.

If you gentlemen at any point believe that I'm incorrect in any of that, please feel free to bring it to my

attention. But that is my intention right now, so that you understand the procedure.

MR. SMITH: Thank you.

THE COURT: Mr. Molezzo, is there anything there that you have a concern about or anything that you, um, want to bring to my attention regarding what I've just relayed to you?

MR. MOLEZZO: Not really, Your Honor. In reference to all these dynamics, I'm very familiar with most of the cases cited. In regards to the victim impact statement as brought forth by the prosecution, I understand and I've practiced the following way, it is my call and I haven't been shut down too often, if I want them to take the stand and be sworn under oath, it's very rare, unless I have a really hostile victim and someone who I haven't been noticed of. Now, I know Mr. Smith is an honorable man, I don't anticipate that, and I don't anticipate calling them to be sworn. Some judges get nervous about that. I've had some arguments about that in court -- district court, I want this alleged victim sworn so I can cross-examine.

THE COURT: Okay.

MR. MOLEZZO: So I'm just sharing with you --

THE COURT: Well, I want you to understand is, is that during the phase where I say, if you have any evidence or witnesses, you can do that.

MR. MOLEZZO: Yes, sir. Yes, sir.

THE COURT: During allocution, you will not do that, and you will not be permitted to do that. And they will have the right to give an unsworn statement. That's what -- I'm sorry, not allocution, but victim impact statement. They have a right to give an unsworn statement, and that is not subject to cross-examination and would not be allowed at that phase. Just so that you understand.

MR. MOLEZZO: Okay.

THE COURT: So if you're going to do that, you're going to have to do that during the time of the -- of the evidentiary portion of any witnesses, including victims or other people. If you intend to do that, you will have to do it at that phase, not at the time that the victim impact statements come in which are unsworn statements.

MR. MOLEZZO: I respect that, Judge. But that's very difficult tactically for me to do, and I'll certainly comply, because I'm not sure what they're going to say. I understand your ruling and I have no issue with it.

THE COURT: Okay.

MR. MOLEZZO: In reference to the PSI, I will certainly try to correct any deficiencies. So I don't ask for another hearing and this thing gets continued. So I will try to speak with my client, again with Mr. Smith, in reference to any profound deficiencies which may hinge upon

or direct you in your final rulings.

THE COURT: Okay.

MR. MOLEZZO: So I will be prepared to go forward and complete the sentencing, I'm sure.

THE COURT: Very good. Okay. Is there any --

MR. WILLIAMS: Yes, Your Honor. Rich, did you receive the police reports we sent to you in the mail? I want to make sure you've gotten them.

MR. MOLEZZO: Oh, I did.

MR. WILLIAMS: Okay.

MR. MOLEZZO: And I shared a couple paragraphs in the defense sentencing memorandum in reference to that. And I think the Judge kind of hit on that in Silks v. State, the sentencing standard, the evidence standard.

THE COURT: You provided that memorandum to the other side as well, as I understand?

MR. MOLEZZO: Oh, absolutely.

MR. WILLIAMS: Uh-huh.

MR. SMITH: (Nods head.)

THE COURT: Okay. I just wanted to make sure that we're all on the same page.

MR. MOLEZZO: We are, Your Honor. We are, Your Honor. I am not asking in any part of the memorandum to strike anything. I was just sharing with the Court my view of how it should be looked at. It's entirely up to you.

THE COURT: Okay. Okay.

MR. MOLEZZO: So I'm ready to go forward.

THE COURT: All right. Well, if there's nothing further then, I am going to order the sentencing continued in this matter, and then we will be prepared, as I've indicated. Thank you for your courtesies here today, all of you.

Anything else? If not, I'm going to end this telephonic conference.

MR. MOLEZZO: No, sir. Nothing from the defense.

THE COURT: All right. And there will be a transcript of this provided, made and provided to counsel.

MR. MOLEZZO: Yes, sir. Thank you, Your Honor.

THE COURT: All right.

MR. SMITH: Have a good holiday, Rich.

MR. MOLEZZO: Everybody there have a great holiday. Thank you.

THE COURT: All right. Thanks again.

MR. MOLEZZO: Good-bye.

THE COURT: Good-bye.

(Whereupon, the proceedings concluded.)

STATE OF NEVADA)

) ss.

COUNTY OF HUMBOLDT)

I, ZOIE WILLIAMS, official court reporter of the State of Nevada, in and for the County of Humboldt, do hereby certify that I was present during all the proceedings had in the matter of the STATE OF NEVADA, plaintiff, vs. DAVID CRAIG MORTON, defendant, heard in chambers at Winnemucca, Nevada, on December 17, 2010, and took verbatim stenotype notes thereof; and that the foregoing pages contain a full, true and correct transcription to the best of my ability, by my stenotype notes so taken, and a full, true and correct copy of all proceedings had.

Zoie Williams

Zoie Williams, CCR #540
Official Court Reporter

Case No. CR-09-5709

Department I

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TAMI JAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT

ooOoo

THE STATE OF NEVADA, Plaintiff, v. DAVID CRAIG MORTON, Defendant.	SENTENCING HEARING

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on January 14, 2011, before the HONORABLE RICHARD A. WAGNER, District Court Judge.

The State was present in court and represented by Brian Williams, Humboldt County Deputy District Attorney.

The Defendant was present in court and represented by Richard A. Molezzo, Attorney at Law.

The Division of Parole and Probation was present in court and represented by Debbie Okuma.

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EXHIBITS

Winnemucca, Nevada, Friday, January 14, 2011

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P R O C E E D I N G S

THE COURT: Court will come to order. Please be seated. This is case number CR-09-5709. This is entitled State of Nevada, plaintiff, vs. David C. Morton, defendant.

The record should reflect the presence of the defendant, together with his attorney, Mr. Richard Molezzo.

Mr. Brian Williams is here on behalf of the State.

The record should reflect that this is the time and place set for sentencing in this matter.

Are the parties ready to proceed?

MR. MOLEZZO: Defense counsel ready.

MR. WILLIAMS: The State is ready, Your Honor.

THE COURT: Okay. The record should reflect that, as a result of a jury trial in this matter, that the defendant was found guilty by a jury of his peers with regard to the crime of open murder, second degree, with the use of a deadly weapon, and discharging a firearm from within or from a structure. As a result of that, this is the time to carry out the sentencing in this matter.

Before we begin, Mr. Morton, is Mr. Molezzo still

your attorney?

THE DEFENDANT: Yes, sir, he is, Your Honor.

THE COURT: And are you satisfied with his services in representing you?

THE DEFENDANT: Yes, I am, Your Honor.

THE COURT: I want to be sure that, in preparation for today's hearing, that you have had the ability to meet with your attorney. And have you had the opportunity to fully discuss with him what will take place today and to prepare for today's hearing?

THE DEFENDANT: I have, Your Honor.

THE COURT: With regard to the services that your attorney has rendered through the jury trial, is there anything with regard to his services that you believe that he has failed to do appropriately on your behalf or matters of law that he should have done differently with regard to representing you in this matter?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: Are you totally satisfied with his services?

THE DEFENDANT: Yes, I am, Your Honor.

THE COURT: Okay. Thank you. You may be seated.

In preparation for the sentencing today, I have received a presentence report prepared December 1st, 2010.

On behalf of the defendant, sir, have you received

a copy of that report?

MR. MOLEZZO: I have, Your Honor.

THE COURT: Are there any factual corrections to that report?

MR. MOLEZZO: Not at this time, no.

THE COURT: Okay. This is the only time.

MR. MOLEZZO: No.

THE COURT: Okay. And when I ask that question, I want to make sure both sides understand that I assume everything to be correct within this report, and that its factual issues as set forth therein, I intend to rely upon with regard to the sentencing.

On behalf of the State, sir, do you have any corrections to the report?

MR. WILLIAMS: Not in the form of corrections, Your Honor. There are a couple of additions that the State has marked as exhibits that I think would be prudent to point out right now.

First of all, there is another page that has been prepared by Debbie Okuma, who is the PSI writer, and it details some of the facts and circumstances of other crimes charged against the defendant. And we have marked that as an exhibit, provided that previously to defense counsel.

THE COURT: When was that supplied to defense counsel?

MR. WILLIAMS: It was supplied to defense counsel around the time of the last sentencing, Your Honor. We sent it along with the information on each of those previous crimes, which included all the police reports.

THE COURT: Did you receive that, counselor?

MR. MOLEZZO: I do have documents verifying prior acts by the client; yes, Your Honor.

THE COURT: Okay. And that's been marked as what, counsel?

MR. WILLIAMS: Exhibit 1, Your Honor.

THE COURT: Exhibit 1 for identification?

MR. WILLIAMS: Yes.

THE COURT: Do you have any objection to that, sir?

MR. MOLEZZO: I do not.

THE COURT: Okay. Exhibit 1 will be admitted into evidence for purposes of this hearing.

(Whereupon, Exhibit 1 was admitted into evidence.)

THE COURT: Did you have something else marked for identification, sir?

MR. WILLIAMS: I did, Your Honor. I will need to check which exhibit it is. It is marked as Exhibit 6, Your Honor.

In the interest of full disclosure, we have marked a printout of the disposition -- there was a domestic

battery charge pending against the defendant in Utah. And they arraigned him on that on December 6th of -- or is it the 8th of 2010? It was sometime in December, and they ended up dismissing the charge.

So in the interest of disclosure, we have included a copy of that so the Judge can be aware of that disposition. And that's been marked as Exhibit 6.

THE COURT: With regard to Exhibit 6, do you have any objection to that, sir?

MR. MOLEZZO: Not at all, Your Honor. Thank you.

THE COURT: Exhibit 6 is hereby admitted into evidence.

(Whereupon, Exhibit 6 was admitted into evidence.)

MR. WILLIAMS: Other than that, Your Honor, we have no corrections or additions.

THE COURT: I'm going to take a minute and review those documents.

(Whereupon, the documents were reviewed.)

THE COURT: For the record, it appears, with regard to Exhibit 1, the last paragraph of that was already included in the presentence violation report prepared December 1st, 2010.

MR. WILLIAMS: That is correct, Your Honor.

THE COURT: Okay.

MR. WILLIAMS: The only additions are the synopsis

of the two crimes which occurred in Utah.

THE COURT: All right. All right. With regard to evidence, on behalf of the State, do you have any evidence to present?

MR. WILLIAMS: Yes, Your Honor. The State has a few other exhibits.

THE COURT: So that everyone understands how we conduct a sentencing such as this, after the evidence is completed in this case, there will be an opportunity for the attorneys to argue recommendations to the Court. The defendant has the right of allocution.

And ultimately, under the law, any victim impact statements which are to be given orally to the Court will then be allowed at that time. That's the order by -- set forth in our statutes.

MR. WILLIAMS: Okay. Your Honor. Exhibits 2, 3, and 4 marked by the State are the police reports of a crime charged against the defendant in Utah. Exhibit 5 is police reports from a domestic battery that the defendant pled guilty to here in Winnemucca. And the State would move to have those admitted into evidence.

THE COURT: With regard to 2, 3, 4, and 5, are there any objections, sir?

MR. MOLEZZO: There are -- there are none.

THE COURT: Okay. Exhibits 2, 3, 4, and 5 are

hereby admitted into evidence for purposes of this hearing.

(Whereupon, Exhibits 2, 3, 4, and 5 were admitted into evidence.)

THE COURT: Do you have additional evidence to present?

MR. WILLIAMS: No additional evidence, Your Honor.

THE COURT: Okay. The Court will be taking judicial notice of all prior proceedings with regard to this case had before this Court. So that you understand, which includes the trial and portions of the transcripts and so forth.

Counselor, on behalf of the defendant, do you have additional evidence that you wish to present?

MR. MOLEZZO: You use a little different term than I'm used to, Your Honor. No. But I'm prepared to go forward with argument. I have no independent witnesses. I have no exhibits to put forth for evidence, but I'm prepared to argue now.

THE COURT: Okay.

MR. MOLEZZO: So I'm not sure --

THE COURT: What is it that you're unfamiliar with that I used?

MR. MOLEZZO: The terms in Reno, the Judge will say, are you ready, counsel? Go. And then I would talk about the PSI and the merits to that.

THE COURT: I see.

MR. MOLEZZO: And I just don't -- the "evidence," I don't hear at sentencing. I'm not used to it. So, no, I don't think I have any other evidence.

THE COURT: All right.

MR. WILLIAMS: Your Honor, may I be heard briefly on that?

THE COURT: Yes, sir.

MR. WILLIAMS: In the sentencing memorandum the defendant submitted, which is not part of the record right now, there are multiple letters in the back written by people on behalf of the defendant. We would have no objection to those being admitted into evidence here at the sentencing.

THE COURT: Is it your intention to have those submitted to the Court as evidence?

MR. MOLEZZO: That's evidence, yes. Yes.

THE COURT: Okay. All right, sir.

MR. MOLEZZO: That was filed in --

THE COURT: Yeah, that was a filed document. But as far as to be considered as evidence in the case, I take it that you are offering those, and that the State has no objection to them?

MR. MOLEZZO: Yes, sir.

THE COURT: All right. That document, for the

record, consists of a nine-page document, and attached to that, seven letters written on behalf of the defendant.

MR. MOLEZZO: Yes, Your Honor.

THE COURT: Okay. And they will be considered by the Court as evidence in this case.

(Whereupon, Exhibit A was admitted into evidence.)

MR. WILLIAMS: Your Honor, when you're done, there's been one change in the PSI I've just had pointed out to me by Miss Okuma that we need to correct. Just a typo that needs to be changed.

THE COURT: Tell me where that is, sir.

MR. WILLIAMS: On the bottom of page seven, Your Honor, she put in a synopsis of the findings by Dr. Clark. Under one, it says, "Clinically documented gunshot." And it says "would" and it should be "wound," I think that significantly changes the meaning. So we need to have that changed.

THE COURT: All right. Any objection to that, sir?

MR. MOLEZZO: No, there's no objection.

THE COURT: I've made that correction and placed my initials on that. Just give me a couple of minutes here so that I can review some of these documents.

(Whereupon, the documents were reviewed.)

THE COURT: Okay. I've reviewed all of those

documents.

Do you wish to proceed with argument, counsel?

MR. MOLEZZO: Counsel -- yes. Yes, I would, Your Honor.

THE COURT: Let's do so at this time, sir.

MR. MOLEZZO: Thank you. In reference to the outline for the defense, Your Honor, I would like to share with you the following. I'm going to pursue the PSI report and the merits therein, number one. Number two, briefly talk about the defense sentencing memorandum filed. And number three, the request for punishment by me. And number four, if the Court is inclined, a statement by my client's mother; brief, verbal statement from Beverly Upshaw. And number five, allocution. I should be able to do this all within about 20 minutes.

In reference to the PSI, as indicated earlier, there appears to be no objection to corrections necessary in the case. As expressed to the Court by my sentencing memorandum, and this is argument I make all too often, we can see from the PSI an opinion from the writer, superimposing her argument, which is not her purview or his purview to put forth. That is the DA's job. You are a learned, experienced jurist. The Court knows what I'm talking about. I just need to make a record on it.

In reference to page eight, the PSI writer tells

us that Mr. Morton's conduct was heartless and a demoralizing act of hate and rage. With respect, I object. That is the DA's purview and the DA should do that. And we talked about that in my PSI. I just wanted to bring it to your attention.

Again, if you were a junior or a freshman jurist, this could carry some weight. We're all human. And I don't believe that the probation officer should do that type of editorializing. And the case law suggests that I'm correct on that.

In reference to the PSI, there appears to be no additions or corrections --

MR. WILLIAMS: Your Honor, I'm going to object to that argument. I think that his argument there -- first of all, I don't think that is carried out -- borne out by the case law. But second of all, Your Honor, she's the one who decides whether or not -- what recommendations to make. And in making recommendations, you have to make a conclusion at some point, Your Honor.

THE COURT: Well, although I understand the legislature wants to put Parole and Probation under the judges, she does not work for me. She works for Parole and Probation and she gives a report, including her recommendations and the basis for that. She's entitled to that.

I am independent of that thinking. That's their opinion. And the law requires that Parole and Probation give me a report including the conclusion and opinions they have, which is not binding upon this Court. And I certainly will listen to counsel, as far as arguments, and I will consider all of that when I make my determinations.

Now, sir, you may proceed.

MR. MOLEZZO: Thank you. No further argument in reference to the PSI. Obviously, our posture is not to follow the recommendations from Parole and Probation in reference to sentencing.

And again, does the Court acknowledge that it has read the defense sentencing memorandum?

THE COURT: I have, sir.

MR. MOLEZZO: Thank you for that courtesy, Your Honor.

THE COURT: More than one time. Probably three times. So I'm very familiar with it.

MR. MOLEZZO: Thank you very much for that courtesy, Your Honor. In reference to the sentencing dynamic expressed in that memorandum by counsel, I would submit the following sentence is appropriate in this case and should be followed, respectfully.

In reference to murder, second degree, a sentence of 10 to 25 years. In regards -- that's one of the prongs.

The Court, obviously, is aware of that.

In regards to the enhancement of the weapon, respectfully request the sentence of 24 to 60 months consecutive. Statutory authority, binding authority on the Court tells us it must be consecutive. That would give an underlying sentence of 12 years before parole eligibility.

In reference to the other charge, Your Honor, respectfully submitted to you, again, thank you for reading my memorandum, in reference to discharging a firearm within a structure, first request, probation be granted and a fine of $2,000.

In the alternative, if the Court feels that it's important to impose a sentence, I strongly -- without trying to sound flippant -- I strongly believe that the Court would not run it consecutive, but would run it concurrent.

If the Court is inclined to put a sentence down, as indicated in my defense memorandum, 24 to 60 months, to run concurrent.

My pitch to the Court is as follows: In reference to criminal history, he has one prior conviction for domestic battery, misdemeanor.

And again, thank you to the prosecution. Their professionalism throughout this case has been outstanding. And they tell us earlier in the PSI that they were dismissed.

And in reference to the PSI -- a little back-stepping, I'm sorry, Your Honor. In reference to the PSI, page four, domestic violence, Salt Lake City, Utah, both of those violations were dismissed. So the only conviction he has is one prior domestic battery conviction.

Also, Your Honor, at this time, the Court knowing requests of defense counsel, in light of the case law, and again thank you for that -- those cases, the Homick v. State case. Again, that's a capital case. That's referencing allocution. Respectfully, I think it's a narrow scope, but I understand the Court's position. You can't come up here after a jury conviction and say, "I didn't do it." I'm not going to do that in this case.

THE COURT: That applies to your client in allocution.

MR. MOLEZZO: Right. Thank you.

THE COURT: He cannot maintain his innocence once a jury has determined his guilt in this case as to the second-degree murder. It just prevents him from doing that in allocution.

MR. MOLEZZO: Yes, sir. Thank you very much, Judge. I understood that.

And in reference to the victim impact statements, Buschauer v. State, we have that as well. I've read that. I see no objections coming through that case.

And in reference to the PSI report, what's permissible, Silks v. State; we've addressed that. I have no objections of the PSI report, other than my, uh, nonagreement with the toxic wording used by Parole and Probation.

In reference to -- would the Court please allow me at this time or grant me to have Bev Upshaw stand up, without taking the bench, and make a statement on behalf of her son?

THE COURT: Are we talking about evidence in the case or? She's not entitled to a victim impact statement, right?

MR. MOLEZZO: Again, you term it evidence. It's just a statement as to her feelings about her son. If you don't think it's appropriate --

THE COURT: Well, she can come up, but she needs to be sworn and put on the witness stand, because it's evidence and subject to cross-examination.

MR. MOLEZZO: Okay. Okay.

THE COURT: That certainly is allowable.

MR. MOLEZZO: Okay. Miss Upshaw, would you like to step forward, please?

THE COURT: Ma'am, would you come forward and raise your right hand and face the clerk, please?

BEVERLY UPSHAW,

Having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE WITNESS: I do.

THE COURT: Ma'am, please come and be seated here in the witness stand. After you're seated, pull up to the microphone, please. Would you speak right into the microphone and please state your name for the record?

THE WITNESS: My name is Beverly Upshaw. Your Honor, thank you for giving me this opportunity to speak on behalf of my son, David. We would like everyone to know how sad we are for the tragic loss of Cindy's life. It's a heartbreaking tragedy, not only for Cindy's family and us, but also for David.

Can I just have a minute?

THE COURT: Absolutely. Just take your time, ma'am. Do you need water or anything?

THE WITNESS: No.

THE COURT: Okay. Just take your time.

THE WITNESS: David is a kind, loving, gentle person. This is not something he would do on purpose. David is not a threat to society in any way, and I don't feel a long sentence would serve any purpose.

So I'm asking that you would please consider a

shorter sentence as opposed to long incarceration. I know David will never forgive himself for what happened. And at some point, when he's able to step back into society, I would like to be there to take his hand and help him find his way. I am 72, and I'm not sure that can happen.

I believe that with God's help, David will someday be able to reenter his life with his loving family. Thank you.

THE COURT: Thank you. Do you have any questions?

MR. WILLIAMS: No, Your Honor.

THE COURT: Thank you. You may step down, ma'am. Just take your time, ma'am.

THE WITNESS: Thank you.

THE COURT: Sir?

MR. MOLEZZO: Thank you, Your Honor. In reference to my client, he is 51 years of age. He is of fragile countenance. The Court has seen him throughout this process. For the last, over a year, he has been in custody.

The loss of a life is deserving of punishment, but I would submit to you that justice is served with defense counsel's request for that punishment; a minimum 12 years in custody. Counsel knows, can't verify it, but he -- as an officer of the Court, I do know some folks in the prison system, as the Court does, and these type of violations are so serious, where a human life is taken, it is extremely

unlikely they make their first parole. That is my learned opinion.

And in reference to the closure of my argument put forth to the Court, my client would like to make a statement. Thank you.

THE COURT: That will come at the appropriate time. Right now that will be at the allocation, sir.

MR. MOLEZZO: Okay.

THE COURT: I'm going to hear argument from the other side first.

MR. MOLEZZO: Thank you.

THE COURT: Sir?

MR. WILLIAMS: Thank you, Your Honor. Your Honor, the State is going to strongly urge you to follow the recommendations of Parole and Probation in this case.

Defense counsel, in his argument, made a statement about justice being served in this case. And I wrote that down, Your Honor, and asked myself the question, how can justice be served in this case?

I don't know if it's possible, Your Honor. Nothing we do is going to bring Cindy back. Nothing this Court does is going to bring her back. That's the fact you have when you have a murder, is that the defendant has taken away something that can never be brought back.

So all we're left to do here today is decide what

we think society can punish him for. And we feel that the PSI and the recommendations contained in the PSI do the best job of trying to get justice for what happened here.

And to argue that, Your Honor, what I've done is gone through, and I'm going to go through them with you, the factors under NRS 193.165 (1), which, as the Court I'm sure is aware, the supreme court ruled in the Mendoza-Lobos case, which is 125 Nevada advanced rep 49. That this Court is required to make specific findings as to each and every factor listed in the statute.

I believe going through those, I can frame for you the reasons why the State feels that the presentence report is appropriate here, and also explain to you why we think the defendant deserves the maximum enhancement contained under the deadly weapon statute.

THE COURT: Okay. I want to make clear on the record what we're arguing here, what you're arguing. With regard -- there are three different sentences here to be considered by the Court with regard to three matters.

Under the provision of additional penalty for the use of a deadly weapon, under NRS 193.165, as it applies to that penalty, the additional penalty. At one time the law, not too long ago, provided that the defendant was to be sentenced to a consecutive sentence equal to the underlying sentence. That was changed by our legislature.

And the law now provides that, under NRS 193.169 as follows, any person who uses a firearm or other deadly weapon in the commission of a crime, and I'm just reading the pertinent parts, shall, and that's mandatory, in addition to the term of imprisonment proscribed by statute for the crime, be punished by imprisonment in the State prison for a minimum term of not less than one year and a maximum term of not more than 20 years.

In determining the length of additional penalty imposed, the Court shall consider the following information; A, the facts and circumstances of the crime; B, the criminal history of the person; C, the impact of the crime on any victim; D, any mitigating factors presented by the person; and E, any other relevant information.

Then it goes on and makes a requirement of the Court, which says the Court shall, again mandatory, state on the record that it has considered the information described in paragraphs A through E, inclusive, in determining the length of the additional penalty imposed.

That's what we're doing with regard to the one issue with regard to the additional penalty of the deadly weapon. And that's what you're arguing. I want to make it clear on the record that it pertains to that particular matter.

You may proceed.

MR. WILLIAMS: It does, Your Honor. In addition, I feel that, as I go through that, it will frame our argument for the other charges as well. So that's why I've chosen to do that. The first thing under the statute is a discussion of the facts and circumstances of the crime.

Your Honor, this crime was done when this victim was defenseless, when she was sitting on the toilet. She was in a position of trust in her own home, where she expected to be safe. And instead of having that safe feeling, she had her husband approach her with a gun and shoot her in the chest.

In addition, Your Honor, this was done when their son Robert was present downstairs, and he had to go through and observe what happened here. He had to run up the stairs and see, to his horror, that his mother was lying on the floor in the bathroom, moaning, and his father was clutching a gun in his hands. I think that's important to note.

And this wound that went through her chest, Your Honor, was so painful that she was moaning and yelling in pain the entire time. She was forced to endure that all the way up until she got to the hospital.

And that -- the one thing that witnesses who testified at trial were all very uniform on was that she was yelling that it hurt the entire time.

And then she suffered for a month in the hospital

before she passed. Luckily, most of that time, she had the help of medicine and I'm sure she didn't feel very much pain, but she suffered and fought this injury for a month before finally her body couldn't do it -- couldn't take the injuries anymore and she succumbed to it.

In addition, Your Honor, I think this has been said before, but this is a murder. This is the most serious offense that you can possibly commit under our law. It's the one crime that there really is no rehabilitation from. There's no way Cindy can move on with her life after this. She will never have that opportunity.

The next thing under the statute the Court must consider is the criminal history of the defendant. Yes, he has no prior felonies. But as you can see from the reports that were submitted today, there is a prior history of violence by the defendant on this victim.

In particular, the two crimes that I wanted to talk about there are first, the one in Utah that ended up being dismissed. But as you review the police reports, the police were called to the scene in the area in Salt Lake, and they find our victim with a laceration to her head caused by the defendant, according to her statement to them. Now, we'll never have a trial on that, clearly.

But secondly, you have the offense that happened here. Where, once again, they're in their home. And the

defendant decided to use force or violence upon the victim -- upon our victim. So there's a prior history of this, Your Honor. This wasn't isolated. This was a pattern.

Unfortunately, as is sometimes the result in domestic violence cases, and that's what this is, this is a domestic violence case, the victim ended up dead.

The next thing that the Court has to consider is the impact of the crime on any victims. Well, first of all, we already talked about Cindy. She's never going to come back from what happened to her. She can't be here today to tell us about the impact on her.

But what's left today is there's people who came here for her, her family, to feel the loss of her, to know they're never going to be able to talk to her again, to know that she's never going to come home.

You also have the interesting way that her sons have had to deal with all of this. They have to deal with the fact that, on that day in question, they lost two parents. They lost both their mother and their father, and they're never going to be able to get that back.

Robert had to get on the stand at trial and talk about the day that he saw his mother on the floor. So did Chad. I think they're both dealing with this in their own way, but it's also something that they're never going to be

able to get over.

Mitigating factors, I think that's going to be up to the defense to talk about, Your Honor. And I think the Court is aware of the mitigators here.

Lastly, Your Honor, any other relevant information. Well, I think there's two things that need to be relevant here. Number one, as I stated, I really think the lasting image in this case is Robert running upstairs and finding his mother moaning in pain. I really think that that's the image that stuck with me as the prosecutor most from this case. And I think that that's what needs to come away from this, is a family that was broken by these events.

Secondly, Your Honor, I truly believe the defendant needs to be prevented from doing this to anybody else. Cindy has no more chance, but we can prevent this from happening to any other member of society.

I think for those reasons, Your Honor, the Court needs to follow the presentence report in this case. It's recommending maximum time on each of the offenses, and it is recommending that those run consecutive.

I think that's appropriate given the facts and circumstances as I've explained them to you, given the impact it's had upon the victim's family, given the impact this had on Cindy herself, the fact that she will never come back.

So we're going to ask that you adopt the recommendations of Parole and Probation, and that you sentence the defendant in accordance with the presentence report. Thank you.

THE COURT: Sir, you indicated they recommended maximum sentences. I don't think that's entirely correct.

MR. WILLIAMS: Okay.

THE COURT: I think the additional penalty is a 1 to 20. They're recommending -- oh, yes. I'm sorry. It is 96 to 240.

MR. WILLIAMS: That's my understanding is that's the highest they can go, Your Honor.

THE COURT: Okay. Okay.

MR. WILLIAMS: And Your Honor, just for your information, we will have a victim impact statement at the close, before the case is submitted to Your Honor, by Jesse Phillips, who is the victim's father.

THE COURT: All right, sir.

Sir, briefly, do you have anything further? This is the time for allocution of your client.

Mr. Morton, you have the right to address the Court personally before I impose sentence. Now is the time. If there's anything you wish to tell me as it relates to that sentence that you are able to tell me. I'm sure you've discussed that with your attorney, that there are limits

with regard to that, but you're free to address this Court with regard to this matter.

THE DEFENDANT: Thank you, Your Honor. What happened that terrible night -- I will never be able to forgive myself for what happened that night. The pain and suffering that I've caused our entire family. It's been something I can't even begin to deal with.

I'm sorry for losing my wife and for me being the cause of this. This is just beyond my comprehension. I'm so sorry for what happened. I will never be able to forgive myself.

THE COURT: Any victim impact statements that you have? They're unsworn statements.

MR. WILLIAMS: Yes, Your Honor. We would like to call Jesse Phillips to the stand. At the time of the incident, he is the mother -- excuse me, the father of the victim. I've explained to him the limits under the Buschauer case that he can state in his victim impact statement.

THE COURT: Sir, would you come forward and please be seated in the witness stand. You will not be sworn. You have the opportunity to come forward and give the Court the impact of this crime.

Would you please state your name for the record, sir?

THE WITNESS: Jesse James Phillips.

THE COURT: And your last name, how do you spell that, sir?

THE WITNESS: P-h-i-l-l-i-p-s.

THE COURT: Thank you. You may proceed.

VICTIM IMPACT STATEMENT

(BY MR. WILLIAMS:)

Q. Jesse, how do you feel about how this has impacted you?

A. It's been a great loss. I think about her every day. There's no closure to this. I don't think I'll ever have closure.

MR. MOLEZZO: Your Honor, I apologize. May we approach, please?

THE COURT: You may.

MR. MOLEZZO: And I'm sorry.

(Whereupon, a sidebar was had.)

MR. MOLEZZO: Thank you, Your Honor.

THE COURT: Okay. You may continue, sir.

(BY MR. WILLIAMS:)

Q. Is there anything else you want to tell the Judge about how this has impacted you, Jesse?

A. It's hard on me. Cindy was -- me and Cindy was the closest of the family -- of the other two children. And, uh, after they moved from Salt Lake back to Winnemucca,

we would talk on the phone almost once a week. I would either call her or she would call me. And it's hard on me, because I've missed my daughter.

Q. When she went in the hospital, did you visit her?

A. We did. Every week.

Q. And what was the plan if she recovered?

A. What?

Q. What was the plan? If Cindy was able to get out of the hospital, what was going to happen?

A. Well, she was going to leave David. She'd had enough.

Q. Was she going to go live with you?

A. She was going to move back to Salt Lake where Chad is.

Q. What do you think is an appropriate punishment here?

A. I think he should -- I think he should have to pay for his mistake. I think maximum sentence on the counts would be appropriate.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: You may step down.

Do you have any other victim impact statement, sir?

MR. WILLIAMS: No, Your Honor. That's all we have.

THE COURT: Counsel, for the record, you had an objection. You thought he needed to be sworn. It's my understanding that, if during the course of a victim impact statement, there is new or additional evidence of prior offense or other matters that are being brought in, then they are subject to be cross-examined. Put under oath and cross-examined is my understanding. Otherwise, the law provides that they're unsworn statements. That's my understanding.

MR. MOLEZZO: Yes, sir.

THE COURT: Okay. Now, is there anything further here, gentlemen? I take it we've concluded with your presentations?

MR. MOLEZZO: No, Your Honor, nothing from the defense. Thank you.

THE COURT: Sir?

MR. WILLIAMS: No, Your Honor, nothing from the State.

THE COURT: All right. It falls to me as the Judge in a case such as this to determine the sentence in the case. I take that very seriously. I have spent considerable time reviewing this case, reviewing transcripts of the case, reviewing those matters that have been a part of this case filed, the documents, statements from counsel, defense counsel and the various exhibits.

I have spent considerable time -- counsel, go ahead and sit down for right now -- I have spent considerable time in trying to determine what it is that I need to do in carrying out my job.

This is a court of law and a court of justice. I often ask people to tell me, who are before the Court in sentencing, what their definition of justice is. And I've heard all kinds of statements with regard to justice. Simply put, justice is getting what you deserve. It's a simple concept, but very complex when you deal with the kinds of cases that we deal with here.

This is a case that is characterized as a second-degree murder charge. And to make it clear what that is, murder of the second degree is the unlawful killing of a human being with malice aforethought, when the perpetrator intended unlawfully to kill a human being, but the evidence is insufficient to prove deliberation and premeditation.

That is what the defendant is before this Court on. And that is, after all the evidence was presented -- and I know that the defendant maintained that this was an accident; the jury found contrary to that. The jury found that this was the unlawful killing with malice aforethought.

Malice is generally thought of as a malignant or evil heart with regard to the actions toward another person. In our jurisprudence, people are punished for crimes which

include, not only an act, but the law requires a finding of what the intent of the person was at the time of the killing such as murder.

Intent, as was indicated to the jury in this case, is not something that we can open up someone's mind and say, what's your intent? Generally, it is shown by the behavior of the person before and after the events in question.

And in this case, the jury found that particular important element of malice aforethought. Although they found that it was not deliberation and premeditation.

This is consistent with the defendant's testimony as he testified of the events of that evening when he talked about sitting in the living room in the chair and he said, "I lost it"; that's pretty much what the jury found here. Is that he didn't deliberate, he didn't premeditate, but that he had malice aforethought.

This is a case that I believe to be, can only be termed as a murder and attempted suicide. The evidence points that out to me. All of the evidence in this case is about a relationship for many years that everyone apparently knew about, family members knew about it, the community knew about it, law enforcement knew about it, and it was destined to end in this fashion.

I read from a document that was put into evidence this day, Exhibit 5. This is an officer's statement. And

this has to do with the report from the Winnemucca Police Department on a prior occasion.

This is from the events of 2007, not quite two years prior to what occurred here. Here's what the police report says: "Potential for future injury. Events of this nature have apparently been occurring between this victim and suspect during the 30 years that they have been married. Most probably these events have resulted in injury of this nature or worse. The past events were simply never reported by the victim until her son reached the age of majority and was able to fight to protect his mother.

"It appears that, after these events, the suspect would go into an apologize mode, which most probably ended with a promise to never do this again, and an 'I'm sorry' tirade. This would be consistent in the victim not previously reporting domestic battery events unless they had become most severe."

That is the summary in nature of domestic violence. It is a pattern which we see in this country, day after day, and month after month, with people being killed, ultimately, as a result of relationships such as this where people and everyone around them knowing it's happening.

In fact, the defendant was sentenced, with regard to this instance, he was sentenced here in this community. And as a part of the sentence, as I read the presentence

report, that he was supposed to go for six months every week for anger management. That apparently did not work.

The events that took place on this particular occasion, as I view the events, and the reason I'm doing that is because, as part of the enhancement, it requires me to analyze these events and to determine how they play out in terms of what a sentence should be.

The story of this case I never heard argued by counsel during the course of this trial. Eyewitnesses were brought forth and they testified. There was physical evidence brought forth, but the story of this case has to do with two live cartridges and one spent cartridge. The story of this case centers around what occurred on that night with regard to those various cartridges.

The defendant's testimony was that he grabbed a firearm that he knew was loaded. His testimony was that he did not manipulate this lever to put a bullet into the chamber because he knew it was loaded. But the truth of the matter, and what I call circumstantial evidence, is more powerful than all of the testimony I heard here.

I once had a law professor, who is very well-known in this country, teaching me in law school about what is called circumstantial evidence. We come to court and we tell juries, you can use direct evidence, eyewitness testimony, as well as circumstantial evidence.

Very often people think circumstantial evidence is not very reliable. To the contrary, fingerprints, DNA, are all circumstantial evidence. When he asked -- this professor asked, if you had five people sitting in front of a building with a muddy road and there were fresh tracks from a dog, and they all swore that no dog had come there that day, what would you believe?

And the obvious answer is circumstantial evidence is what we rely upon more than eyewitness testimony. Because, in my opinion, when people are falsely convicted in this country, it's because of eyewitness testimony, because of the nature of that.

What can't be disputed in this case is there was a live round next to the chair in which the defendant sat. That didn't get there by magic. The story of that tells me he had to manipulate this in order to make sure there was a live chamber or a live round in the chamber.

The fact that there was two more, a live bullet, and a spent cartridge near the bathroom, can only tell me that he manipulated this three times. The action which has to do with intent of doing an act. That is the story of this case, and it is what the jury found. It's what the jury found.

And to bolster that, Mr. Morton, I understand your position, the jury didn't buy it and I don't buy it and that

has to do with this. You said you never put your finger on the trigger. That was your testimony. I've read your testimony several times and you said you never put your finger on the trigger.

Your expert testified it had to have been -- someone had to have their finger on the trigger for that gun to go off. This was not a situation where it simply went off by its own.

The tragedy part of that was that apparently you didn't know your son was there. He came to the rescue of his mother too late. And he found you with a gun, clearly describing what was your intention to commit a murder-suicide in this case. That is inescapable to me.

There is nothing in the evidence that could be other than that. Your testimony was that you were ejecting cartridges to make it safe. I can't imagine you trying to shoot yourself with an unloaded gun.

I know the attorneys do their jobs in these cases, but I, as a Judge, have a right to view the evidence because those are the facts as I see them.

The truth of this matter is, is defense counsel, from the very beginning, had a good word, which I have used over and over in my mind, this was indeed a toxic relationship. This was a relationship which was poisonous to not only the parties involved but to their families,

their children, and your children must live with that. They are victims. They're not here.

Nevertheless, in terms of being able to stand up and give any statements to me, they chose not to do that. And it's because I can imagine what it must be to try to square a mother and a father in this situation. How can you possibly do that? It's an awful thing that affects many, many people.

And you can see from the number of people in this courtroom today how many lives have been affected, and I suspect there are so many more. Murder is not a kind of crime that affects a few people. It affects -- and you too, sir.

And I want you to understand something. I believe that murder is probably the most serious of all the crimes that we have, because what it does is it shortens human life. Ultimately, each one of us are going to die. That's a given. When we're born, put on this earth, we're all going to go through that process we call death.

But time is the stuff of life. How much time we have varies from person to person, but no human being has the right to take the life of another person. It is the most important thing that we deal with. That includes your life as well, sir. Human life, including yours, is very valuable. I hold that to be valuable.

In all the cases I've dealt with, and I have sentenced and had people executed upon my order, even the human life of people who ultimately have to pay that price is very valuable, and I do not minimize that.

Even in sentencing, when I talk about time of people going to prison, that's your life. That's what your life is made of is time. And I hold that to be very valuable and very sacred to everyone that we deal with in this court system.

The law requires me to do a balancing. When you see the scales of justice -- I, as a Judge, and I can assure you, this is not an easy job. People are flippant on the street and they tell me, you should do this to everyone or this to everyone. That's nonsense. Every circumstance and every life must be judged appropriately. And I take seriously the balancing of what we call mitigating circumstances and aggravating circumstances.

In this case, the fact is the greatest aggravation of this case is that you have done an act for which you cannot do anything to restore it. When we talk about restitution in the court, sometimes people pay money back, and we have all these things that people do, human life can't be restored in that fashion.

And so the most serious part of this case is the fact is, after the fact you are sitting here with great

remorse, had only that occurred earlier. A set of tires, a signing of a document, any number of things could have prevented where this ended up. That was so predictable.

The domestic violence in this case, although the criminal record isn't extensive, in terms of convictions, the criminal history of this is an aggravating factor. And that is, the very nature of domestic violence, and we have much more of a handle on it today than we did years ago. It used to be that the rule of thumb was a man could beat his wife with a stick no bigger than his thumb. That's where the rule of thumb came from. We have long passed that.

We are living in a time and an age when people understand, no matter what your differences, you don't have the right to lay hands of anger and hurt upon another human being and particularly someone that's in a marriage situation.

That is progressive. It never goes backwards. What happens is it gets worse and worse. And the first thing that happens is this case is a textbook case of when the police first get involved in Salt Lake. And I look at the records, here's what happens, the police go out and investigate domestic violence. Your wife said, didn't happen. It did happen.

She started off protecting you, because she didn't want you to go to jail, for whatever reasons there are.

Typical in almost every case we see in domestic violence. That is, the violence starts, somebody comes, the police come, we're going to have to arrest your husband. Your wife says, no. No. I don't want that to happen. And that's where it begins, because the accountability is not there.

The next time you hit the court system, what happens? Charges are dropped. They're minimal. You were sentenced to maybe five days in jail. I think it said, as I recall, the sentence was like 20 days or something, and you were given credit for most of it.

The bottom line, the last time, a couple years before this, the sentence was you ended up doing like five days in jail and then go to anger management. It didn't work. Nothing was so predictable though from that time.

The presentence report, which was repeated again here, and I intend to put this in the record, because this -- you may think I'm talking too much here, but I intend to make a full record of what I'm doing and why.

And the whole point of this is this, October 21, 2007, "Winnemucca police officers were dispatched to the defendant's residence in regard to a domestic battery in progress. Upon arrival, the officer discovered Cynthia Morton on the floor, bleeding from the left side of her face and head and her left eye was black and blue. It was noted that, while in a highly-intoxicated state, Mr. Morton forced

his wife into a bedroom and physically assaulted her.

"During that time she called to her son for help. The son ran upstairs in time to see his father on top of his mother, holding her to the floor by the neck and administering at least one punch to the left side of her face. He subsequently got off his wife and began kicking her in the buttocks.

"When their son intervened, Ms. Morton crawled out of the bedroom, at which time her daughter-in-law observed her injuries and called 911. Mr. Morton fled the scene prior to the arrival of law enforcement, but was later arrested and sentenced for that."

The sentence was that you were sentenced to 20 days in jail, 16 days were stayed, $322 fee, 48 hours community service, one and a half hours anger management per week for six months, no alcohol.

That was a prelude. At which time, it was almost verbatim as to what occurred here. And then everyone wants to come in and say, this was unintended. It was -- it is not. This is -- this was destined to happen in this case.

I know I'm repeating that, but I want to make it clear that, at some point, someone has to say, this is enough of this. We can't continue to have people slaughtered over what are called domestic relations.

As I heard the testimony, it was about, I went to

911

get divorce papers; she tore them up. That night she said, pay for my tires, I'll leave. You weren't going to pay for her tires. And so what happens? Someone's murdered.

That is the nature of this case in its fullness, which has never been fully stated in this court, but that's what I find it to be.

With regard to alcohol involved in this case, it's been a toxic substance that you both were involved with over the period of both of your lives.

When we talk about, is that an aggravating circumstance or a mitigating circumstance? It's both. You walk into court and say, gee, I didn't know what I was doing. I was intoxicated. I was drunk. I wouldn't do this if I was sober. So at one point you're saying, gee, that should mitigate the case.

But after that many years, that's also an aggravating circumstance. You were given the opportunity not to drink. The opportunity for rehabilitation to deal with that. None of that worked.

Um, there are some mitigating factors. The fact is, it appears from your life that you did some things right. That is, you don't have the, other than these issues with regard to the domestic violence, you're not the kind of criminal I normally see here on murder kinds of charges.

The lack of major criminal history is a mitigating

circumstance. You were apparently able to be employed for a long-term period of time, and you had the respect of fellow employees and friends around you. You made friends. You apparently had the ability to be a good person when you were other than involved in this, counsel's toxic relationship. That's what it appears to me. You had the ability to be loving and kind with your sons and with other people. You had all of those characteristics at times.

Apparently you had some skills in remodeling your home, making a place for your family. That's no small thing. Apparently you took your sons out shooting, taught them how to deal with firearms. Those are important things in their life. I'm sure that they never will forget, which are positive things in your life.

You -- your attorney has indicated you're a fragile person. I'm not sure of that label. What it appears is that, um, whenever these matters came to a head, you were certainly sympathetic. You appear sympathetic here in court. I have no doubt that you intended that night to commit suicide.

In terms of a general threat to society, I don't think you pose a general threat to society. And that is, if you were to walk out these doors today, I don't believe that you -- as I have dealt with some people in the past, I wouldn't put a paperclip in some people's hands -- but I

don't think that you pose that kind of a general threat to society. Although, obviously, in this case you presented a specific threat because of this relationship.

At this time, sir, you may stand for sentencing. It is the order of this Court, Mr. David Craig Morton, that with regard to the charges by which you have been found guilty by a jury of your peers, the law requires that you pay a $25 administrative assessment fee.

With regard to Count I, open murder of the second degree with a use of a deadly weapon, a Category A felony, it is the order of this Court that you be imprisoned in the State prison for a definite term of 25 years with eligibility for parole beginning when a minimum of 10 years has been served.

With regard to the additional penalty, under NRS 193.165, the law requires that I consider certain provisions, as I have previously outlined them under NRS 193.165. The record should reflect and I put on the record that I have considered each of those factors as I have indicated in my recitation here.

The order of the Court is that I order a consecutive sentence as required by law. The term of that sentence is for the minimum term of 120 months and a maximum term of 300 months.

With regard to the discharging a firearm within or

from a structure, I find that with regard to that, it is predicated upon the same general facts as the open murder charge, and therefore, this will be a concurrent sentence. The order of the Court is that you are sentenced on a concurrent charge and concurrent sentence of a term of 72 months to a term of 180 months, concurrent.

So that I'm clear on that, with regard to Count I and Count II, my intention was that, with regard to each of those, there is a 10-year minimum term that you would have to serve before you become eligible for parole. Those are consecutive sentences. As to the third sentence, it is a concurrent sentence.

With regard to credit for time served, my calculations is 533 days. Counselor?

MR. MOLEZZO: No dispute from defense.

MR. WILLIAMS: I had 526, Your Honor; it's 498 plus 14 days in December beyond the 17th, and 14 days of this month, which will be 28 plus 498, which is 526, but we're willing to go with 533.

THE COURT: Well, the way I calculated it was 498, 21 days in December, right? Oh, it was from the 17th?

MR. WILLIAMS: It was from the 17th of December.

THE COURT: I'm sorry. I miscalculated. What is that number again?

MR. WILLIAMS: We have 526, Your Honor.

THE COURT: Okay. 526, that's more accurate. The defendant is given credit for 526 days on the first part of the sentence.

The defendant is remanded to the custody of the sheriff to carry out my sentence.

On behalf of the State, you will prepare the order, judgment of conviction in this case.

Is there anything else that needs to go on the record on behalf of the State, sir?

MR. WILLIAMS: The DNA fee, Your Honor, of $150.

THE COURT: That will be ordered as well, and that he submit to a DNA marker.

With regard to the defense, sir, do you have anything further to come before this Court as it relates to this matter?

MR. MOLEZZO: In brief, Your Honor, please educate counsel. In reference to the weapon, I have a consecutive of --

THE COURT: Of a minimum of 10 years.

MR. MOLEZZO: I'm sorry, Judge, 120 to 300?

THE COURT: Yes.

MR. MOLEZZO: But the maximum --

THE COURT: I could give him up to 20 years; is that your understanding?

MR. MOLEZZO: Yes, sir. What I understand with

the 40 percent rule, the maximum under that prong is 96 to 240, and you imposed 120 to 300. I don't understand.

THE COURT: Okay.

MR. WILLIAMS: I would agree, Your Honor, doing my math.

THE COURT: All right. That's under the 40 percent rule?

MR. MOLEZZO: Yes, sir.

THE COURT: Ninety-six to 240?

MR. MOLEZZO: That is correct.

THE COURT: That will be the order of the Court.

MR. WILLIAMS: Thank you, Your Honor.

MR. MOLEZZO: Thank you, Your Honor.

THE COURT: You do have the right to appeal your conviction and your sentences, sir.

Make sure that your client understands his right with regard to the appeal in this matter.

MR. MOLEZZO: Yes, sir, I will. Thank you, Your Honor.

THE COURT: Okay. Defendant's now remanded back to the custody of the sheriff. Thank you all.

MR. WILLIAMS: Thank you, Your Honor.

MR. MOLEZZO: Thank you, Your Honor.

(Whereupon, the proceedings concluded.)

STATE OF NEVADA)
) ss.
COUNTY OF HUMBOLDT)

I, ZOIE WILLIAMS, official court reporter of the State of Nevada, in and for the County of Humboldt, do hereby certify that I was present during all the proceedings had in the matter of the STATE OF NEVADA, plaintiff, vs. DAVID CRAIG MORTON, defendant, heard at Winnemucca, Nevada, on January 14, 2011, and took verbatim stenotype notes thereof; and that the foregoing pages contain a full, true and correct transcription to the best of my ability, by my stenotype notes so taken, and a full, true and correct copy of all proceedings had.

Zoie Williams, CCR #540
Official Court Reporter

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Case No. CR09-5709

Dept. No. 1

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

THE STATE OF NEVADA,

Plaintiff,

vs.

JUDGMENT OF CONVICTION

DAVID CRAIG MORTON
DOB: 10/12/1959,

Defendant. /

WHEREAS, on the 2nd day of November, 2009, the Defendant entered his plea of not guilty to the charges of OPEN MURDER, WITH THE USE OF A DEADLY WEAPON, a Category A Felony, in violation of NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165, and DISCHARGING A FIREARM FROM WITHIN OR FROM A STRUCTURE, a Category B Felony, in violation of NRS 202.287(b), and the matter having been tried before the Honorable Judge Richard A. Wagner.

At the time Defendant entered the plea of not guilty, this Court informed the Defendant of the privilege against compulsory self-incrimination, the right to a speedy trial, the right to a

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trial by jury, the right to compulsory process to compel witnesses to testify on behalf of the Defendant and the right to confront the accusers. That after being so advised, the Defendant stated that these rights were understood and still desired this Court to accept the plea of not guilty.

The Court having accepted Defendant's plea of not guilty, set the date of September 13-24, 2010, at the hour of 9:00 a.m. as the date and time for jury trial. On the 22nd day of September, 2010, Defendant was found guilty of Open Murder in the Second Degree With the Use of a Deadly Weapon and Discharging a Firearm From Within or From a Structure.

Furthermore, at the time Defendant entered the plea of not guilty and at the time of sentencing, Defendant was represented by attorney, RICHARD A. MOLEZZO, Esq.; also present in Court were TAMI RAE SPERO, Humboldt County Court Clerk or her designated agent; ED KILGORE, Sheriff of Humboldt County or his designated agent; DEBBIE OKUMA, representing the Division of Parole and Probation; and BRIAN WILLIAMS, Humboldt County Deputy District Attorney representing the State of Nevada.

Defendant appeared on January 14, 2011 represented by counsel, and Defendant having been given the opportunity to exercise the right of allocution and having shown no legal cause why judgment should not be pronounced at this time.

The above-entitled Court having accepted the jury's verdict of

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guilty on September 22, 2010, of OPEN MURDER IN THE SECOND DEGREE WITH THE USE OF A DEADLY WEAPON, a Category A Felony, in violation of NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033, and NRS 193.165, and DISCHARGING A FIREARM FROM WITHIN OR FROM A STRUCTURE, a Category B Felony, in violation of NRS 202.287(b), the Defendant was thereby ordered by the Court to pay an administrative assessment fee of $25 to the Clerk of the above entitled Court. In addition, the Defendant must, pursuant to NRS 176.0913, submit a biological specimen under the direction of the Nevada Department of Corrections to determine the Defendant's genetic markers. Further, pursuant to NRS 716.0915, in addition to any other penalty the Defendant must pay a $150 DNA fee, payable to the Humboldt County Clerk of the Court and may not be deducted from any other fines or fees imposed by the Court.

After making a specific findings of fact pursuant to NRS 193.165, the Court sentenced the Defendant, DAVID CRAIG MORTON, as follows:

Count I: Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony - imprisonment in the Nevada Department of Corrections for a minimum term of one hundred twenty (120) months and a maximum term of three hundred (300) months, with eligibility for parole beginning when a minimum of 10 years has been served, with credit for time of 526 days, in addition to time served from January 14, 2011 until transfer to the Nevada

Department of Corrections;

Additional penalty: In addition to the foregoing term of imprisonment, by imprisonment in the Nevada Department of Corrections for a minimum term of ninety-six (96) months and a maximum term of two hundred forty (240) months. Further, that the sentence run consecutive to the sentence imposed in Count I; and

Count II: Discharging a Firearm From Within or From a Structure - imprisonment in the Nevada Department of Corrections for a minimum term of seventy-two (72) months and a maximum term of one hundred eighty (180) months. Further, that the sentence in Count II run concurrent to the sentences imposed in Count I and the additional penalty.

Furthermore, bail, if any, is hereby exonerated.

RICHARD A. MOLEZZO, Esq., represented the Defendant during all stages of the proceedings.

BRIAN WILLIAMS, Deputy District Attorney, represented the State of Nevada during all stages of these proceedings.

DEBBIE OKUMA, represented the Division of Parole and Probation during all stages of these proceedings.

Therefore, the clerk of the above-entitled Court is hereby directed to enter this Judgment of Conviction as a part of the record in the above-entitled matter.

Furthermore, pursuant to NRS 239B.030., the undersigned hereby affirms this document does not contain the social security

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

number of any person.

DATED this 19th day of January, 2011, in the City of Winnemucca, County of Humboldt, State of Nevada.

Richard A. Wagner
DISTRICT JUDGE

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 20th day of January, 2011, I delivered at Winnemucca, Nevada, by the following means, a copy of the **JUDGMENT OF CONVICTION** to:

Richard A. Molezzo, Esq.
96 & 98 Winter Street
Reno, Nevada 89503

Division of Parole and Probation
3505 Construction Way
Winnemucca, Nevada 89445

(X) U.S. Mail
( ) Certified Mail
( ) Hand-delivered
( ) Placed in box at DCT
( ) Via Fax

Lotty Morrett

Original

FILED

2011 DEC 29 PM 12:06

TAMI RAE SPERO
DIST. COURT CLERK

David Craig Morton
Petitioner/In Propria Persona
Post Office Box 650 [HDSP]
Indian Springs, Nevada 89018

District Court
Humboldt County. Nevada

David Craig Morton,
Petitioner,

vs.

Dwight Neven, Warden
Respondent(s).

CV 18,803
Case No. ~~CR07-5709~~
Dept. No. 1
Docket

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

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

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

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

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

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Failure to raise all grounds I this petition may preclude you from filing future petitions challenging your conviction and sentence.

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

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claim must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

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

2. Name the location of court which entered the judgment of conviction under attack: Winnemucca, NV Humboldt County

3. Date of judgment of conviction: 01-20-2011 Guilty Jury Verdict on 9-22-10

4. Case number: CR09-5709

5. (a) Length of sentence: 10-25 years + adolitional Sentences, unsure of sent Structu

(b) If sentence is death, state any date upon which execution is scheduled: _____.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion:

Yes ____ No ✓ If "Yes", list crime, case number and sentence being served at this time: ____

7. Nature of offense involved in conviction being challenged: Second Degree Murder w/use of Deadly Weapon, Discharging Firearm Inside House

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8. What was your plea? (Check one)

(a) Not guilty ✓

(b) Guilty _____

(c) Nolo contendere ____

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

N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury ✓

(b) Judge without a jury ____

11. Did you testify at trial? Yes ✓ No ____

12. Did you appeal from the judgment of conviction?

Yes ____ No ✓

13. If you did appeal, answer the following:

(a) Name of court:

(b) Case number or citation:

(c) Result:

(d) Date of appeal:

(Attach copy of order or decision, if available).

14.) If you did not appeal, explain briefly why you did not: My counsel refused to file a direct appeal, I've been trying for months to get him to do so.

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

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16. If your answer to No 15 was "Yes", give the following information:

(a) (1) Name of court: N/A

(2) Nature of proceedings: _____

_____

(3) Grounds raised : _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: N/A

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: _____

(c) As to any third or subsequent additional application or motions, give the same information as above, list them on a separate sheet and attach. N/A

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(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? N/A

(1) First petition, application or motion?

Yes ____ No ____

Citation or date of decision: _____

(2) Second petition, application or motion?

Yes ____ No ____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You may relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify: NO

(a) Which of the grounds is the same: _____

(b) The proceedings in which these grounds were raised: _____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). None were presented, my attorney did not file my direct appeal after trial.

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). No

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ____ No ✓

If "Yes", state what court and the case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Richard Molezzo represented me in trial and SAID "I HAD NO GROUNDS FOR AN APPEAL"

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ____ No ✓ If "Yes", specify where and when it is to be served, if you know: _____

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Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: Ineffective assistance of counsel under the Sixth Amendment of the U.S. Constitution and Violations of petitioners Fourteenth Amendment rights to Due Process and equal protection under the law.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Petitioner has been denied his direct appeal by his trial counsel Richard Molezzo. When petitioner requested his attorney to file his direct appeal, counsel stated "it's not necessary, don't worry about it, you'll just receive more time then you already have". Clearly this shows unreasonable representation. Pursuant to NRAP 3(3) counsel is responsible for filing a timely fast track statement and that the Supreme Court of Nevada may Sanction an attorney for failing to file a timely fast track Statement, or failing to raise material issues or arguments in the fast track Statement, or failing to cooperate fully with appellate counsel during the course of an appeal. In the case at bar petitioners counsel refused to file a notice of appeal to the Nevada Supreme Court in turn denying petitioner his right to an appeal after trial by jury and guilty verdict.

Petitioner now asserts that this is a colorable claim and therefore requests an evidentary hearing on this particular ground.

23. (b) GROUND TWO: Ineffective assistance of Counsel under the Sixth Amendment of the U.S Constitution and Due Process violations under the Fourteenth Amendment of the U.S Constitution

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Counsel was ineffective for failing to properly investigate the circumstances of petitioners case at bar. Petitioner explained to counsel that petitioner was repeatedly physically and emotionally battered during this entire relationship. Had counsel investigated this issue to any extent, i.e. neighbors, friends, family etc. counsel could have brought to light the true issues of this case, and not used the ficticious defense petitioner begged his Counsel not to use, because it was not a correct and/or true depiction of the events which occurred in the case at bar.

This shows unreasonable representation! Counsels investigation is measured against "prevailing professional norms" or what ordinary attorneys would have done. Wiggins V. Smith 539 U.S. 510, 523 (2003). It also brings to light the ability to show prejudice. Defendant shows that, if his attorney had done a better job of investigating the criminal charges and evidence against him, the result might have been different. Williams v. Taylor 529 U.S 362, 363 (2000).

Petitioner now asserts that this is a colorable claim and therefore petitioner requests an evidentary hearing on this particular ground.

23. (c) **GROUND THREE**: Ineffective assistance of counsel under the Sixth Amendment of the U.S. Constitution, and violations of petitioners Fourteenth Amendment rights to Due Process and equal protection under the law.

23. (c) **SUPPORTING FACTS (Tell your story briefly without citing cases or law)**: Counsel's assistance was deficient for failing to investigate petitioners mental capacity and ability to stand trial.

Petitioner informed counsel, long before trial that he was mentally unstable and felt a mental evaluation was necessary due to the mental anguish and abuse petitioner was put through during the entire relationship in the case at bar.

Petitioners counsel refused to listen to anything petitioner had to say and in fact petitioner only seen counsel three times for two hours total through the entire trial process. Clearly two hours is not enough time to prepare an appropriate defense for such a complex case, especially since petitioner tried to explain to counsel the mental instability he was feeling due to the extreme abuse at the hands of the alleged victim. Defendant received ineffective assistance of counsel during his sentencing because his attorney never investigated the defendant's mental health problems." Weaver V. Warden, Nevada State Prison 107 Nev. 356, 858 (1991) The court said that the defense attorney's failure to investigate was ineffective assistance of counsel because the attorney 1) did not talk to other attorneys in the public defenders office about the case 2) did not use the office's full-time investigator 3) did not request any physical or psychological examinations of the defendant." The attorney's failure to investigate left the defendant without any defense to

to the criminal charges against him. Warner v. State, 102 Nev. 637-638 (1986) "If counsels failure to undertake careful investigations and inquiries with a view toward developing matters of defense results in omitting a crucial defense from the case, the defendant has been denied effective assistance of counsel". Nev. Jackson v. Warden.

In the case at bar, aside from not investigating any of the issues petitioner brought to counsel's attention, counsel never looked into petitioners mental problems stemming from long periods of physical and mental abuse throughout the entire relationship. Although petitioners attorney was well informed of petitioners mental issues, counsel never made an attempt to request a mental evaluation for petitioner. In this instance counsel breached the duty of loyalty, perhaps the most basic of counsels duties.

Petitioner now asserts that this is a colorable claim and therefore requests an evidentary hearing on this particular ground.

23. (d) GROUND FOUR: Ineffective assistance of counsel under the Sixth Amendment of the U.S. Constitution and Fourteenth Amendment violations of Due Process and equal protection under the law.

23. (d) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Counsels assistance at sentencing was deficient for failing to object when the Judge used dismissed criminal charges to increase petitioners sentences, stating "it doesn't matter if the charges were dismissed, he had discretion to use dismissed charges as justification for handing down harsher sentences," which is clearly beyond reason. The Judge also stated that "beings petitioners children weren't present in the Courtroom further justifies even more severe Sentences" once again counsel did not object Knowing full well petitioners children were in the courtroom and even if they weren't, this clearly is not a valid and/or legal reason to increase petitioners already harsh sentences. Counsels failure to object to the Judge increasing petitioners sentences due to dismissed criminal offenses, and petitioners children not being present in the court room even though they were is clearly below the standard expected of competent counsel. "The failure of counsel to prepare for and make an effective presentation on behalf of the accused at sentencing may often be of greater practical significance than the defense of the case in chief." U.S. v. Headley 923 F.2d 1079

Petitioner now asserts that this is a colorful claim and therefore requests an evidentary hearing on this particular ground.

(a) **Ground Five**: Ineffective assistance of counsel under the Sixth Amendment of the U.S. Constitution and violations of Petitioners Fourteenth Amendment rights to due process and equal protection under the law.

Supporting FACTS (Tell your story briefly without citing cases or law.): Petitioner contends counsel was deficient for failing to investigate the alleged victims domestic violence offenses against petitioner. The alleged victim abused petitioner on numerous occasions and has been arrested for and convicted of domestic violence against petitioner. An investigation into this issue was critical to petitioners defense, because it could be shown that petitioner was in fact abused by the alleged victim. Petitioner requests an evidentiary hearing, herein.

(b) **Ground Six**: Ineffective assistance of counsel under the Sixth Amend. of the U.S. Constitution and violations of Petitioners Fourteenth Amend rights to due process and equal protection under the law.

Supporting FACTS (Tell your story briefly without citing cases or law.): Counsel was deficient for failing to raise a meritorious issue on appeal concerning the alleged victims health conditions prior to entering the hospital, due to the fact that when counsel asked the coroner in trial if it was possible for the victim to have had sepsis before entering the hospital, the Judge halted the proceedings in turn denying petitioner his right to present evidence towards establishing his defense theory. Petitioner requested counsel to raise this issue and he did not. Lozada v State 110 Nev 349

(c) **Ground Seven**: Abuse of discretion by the District Court Judge at trial when the Judge denied petitioner his right to present evidence towards his defense.

Supporting FACTS (Tell your story briefly without citing cases or law.): The outcome at trial would have been different, had evidence of the alleged victims health conditions prior to entering the hospital been allowed to be heard by the jury, beings her pre existing medical conditions were extreme. The due process clause in our constitutions assure an accused the right to introduce into evidence any testimony or documentation which would tend to prove the defendants theory of the case. U.S. v Nixon 418 U.S. 683

(d) **Ground Eight**: Ineffective assistance of counsel under the Sixth Amend of the U.S Constitution and Fourteenth Amend. violations of due process and equal protection under the law.

Supporting FACTS (Tell your story briefly without citing cases or law.): Petitioner contends counsel was deficient for failing to object to the Judge increasing petitioners sentences because his children allegedly weren't present in the court when in fact they were present, and even if they weren't, this clearly is not a valid or legal reason to increase petitioners sentences and counsel should have objected to this unjust prejudice and unsubstantiated bias. Petitioner now asserts that this is a colorable claim and therefore requests an evidentiary hearing.

WHEREFORE, petitioner, prays that the court grant David Craig Morton relief ti which he may be entitled in this proceeding.

EXECUTED at High Desert State Prison on the 22nd day of DECEMBER 2011.

David Craig Morton
Signature of Petitioner

VERIFICATION

Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true and correct of his own personal knowledge, except as to those matters based on information and belief, and to those matters, he believes them to be true.

David Craig Morton
Signature of Petitioner

Atttorney for Petitioner

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition for Writ of Habeas Corpus (Post Conviction)
(Title of Document)

filed in District Court Case number CR09-5709

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

-OR-

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

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

(State specific law)

-or-

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

David Craig Morton
Signature

12-22-2011
Date

David Craig Morton
Print Name

Petitioner
Title

CERTFICATE OF SERVICE BY MAILING

I, David Craig Martin, hereby certify, pursuant to NRCP 5(b), that on this 22ND day of DECEMBER, 2011, I mailed a true and correct copy of the foregoing, "Petition for Writ of Habeas Corpus (Post-Conviction)" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Humboldt Co. Court Clerk
50 West 5th Street
Winnemucca, NV 89445

Humboldt Co. District Att.
50 West 5th Street
Winnemucca, NV 89445

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Dwight Neven, Warden
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

CC:FILE

DATED: this 22ND day of DECEMBER 2011.

David Craig Martin #1062758
Petitioner /In Propria Persona
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

FILED

2012 JAN 13 PM 4:35

TAMI RAELSPERO
DIST. COURT CLERK

Case Nos. CV 18,803 and CR 09-5709

Dept. No. 1

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

* * * *

DAVID CRAIG MORTON,

Petitioner,

vs.

DWIGHT NEVEN, Warden,

Respondent.

THE STATE OF NEVADA,

Plaintiff,

vs.

DAVID CRAIG MORTON,

Defendant.

ORDER APPOINTING COUNSEL
and
ORDER TO RESPOND

WHEREAS, the Petitioner, David Craig Morton, caused to be filed on December 29, 2011 a Petition for Writ of Habeas Corpus (Post-Conviction) as a result of convictions of various criminal offenses, including Second Degree Murder;

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AND WHEREAS, the said Petitioner has caused to be filed also a Motion to Appoint Counsel on December 29, 2011, and it appearing that the Petitioner is indigent and good cause therefor;

IT IS HEREBY ORDERED that the law firm of Hy Forgeron is hereby **APPOINTED** to represent the said Petitioner in filing a supplemental petition for writ of habeas corpus, if needed. The Court further notes that the said Petitioner has also filed in a separate action, Case No. CR 09-5709, a Motion to Modify or Correct Illegal Sentence which was filed in proper person by the said David Craig Morton.

NOW, THEREFORE, **IT IS HEREBY ORDERED** that the above-named counsel is **APPOINTED** to represent and assist said Petitioner/Defendant in both matters, and that counsel will have 90 days from the filing of this Order in which to proceed either on the original filings of the Petitioner/Defendant or to file amended and/or additional pleadings as it relates to both cases. After any additional filings by said counsel on behalf of the Petitioner/Defendant, the State shall have 60

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///

///

days in which to respond to such matters, which will thereafter be set for oral argument before the Court.

IT IS SO ORDERED.

DATED this 12th day of January, 2012.

RICHARD A. WAGNER
DISTRICT JUDGE

David Craig Morton, Petitioner, vs. Dwight Neven, Warden, Respondent.

Sixth Judicial District Court of Nevada, Case No. CV 18,803

DECLARATION OF SERVICE

I am a citizen of the Untied States, over the age of 18 years, and not a party to or interested in this action. I am an employee of the Humboldt County Clerk's Office, and my business address is 50 W 5th Street, Winnemucca, NV 89445. On this day I caused to be served the following document(s):

ORDER APPOINTING COUNSEL & ORDER TO RESPOND

__X__ By placing in a sealed envelope, with postage fully prepaid, in the United States Post Office, Winnemucca, Nevada, persons addressed as set forth below. I am familiar with this office's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in the designated area for pick up by the United States Postal Service.

__X__ By personal delivery of a true copy to the person(s) set forth below by placement in the designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative of said person(s) set forth below.

David C. Morton, #1062758
HDSP
PO Box 650
Indian Springs, NV 89018

Hy Forgeron
PO Box 784
Battle Mountain, NV 89820-0784

Michael Macdonald
Humboldt County District Attorney
501 S. Bridge Street
Winnemucca, NV 89445
(personal delivery)

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on January 13, 2012 at Winnemucca, Nevada.

County Clerk

Case No. CR-09-5709/CV18803

Dept. No. 1

The undersigned hereby affirms this document does not contain a social security number.

FILED

2015 MAR 30 PM 1:38

TAMI RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT

COUNTY OF HUMBOLDT, STATE OF NEVADA

DAVID MORTON,

Petitioner,

MOTION TO WITHDRAW AND FOR APPOINTMENT OF SUBSTITUTE COUNSEL

-vs-

THE STATE OF NEVADA,

Respondent.

_____/

COMES NOW, HY FORGERON, Esq., appointed counsel for the Petitioner above-named, and hereby moves this honorable Court for an Order allowing him to withdraw and for the appointment of substitute counsel. This motion is based on the Points and Authorities annexed hereto, the papers, pleadings and files herein and upon the evidence to be adduced at any hearing hereon.

Dated this 3rd day of March, 2015.

HY FORGERON, Esq., SBN 2355
Attorney at Law
PO Box 1179
Battle Mountain, NV 89820
775-635-8100
FAX: 775-635-3118
Attorney for Ramon Rivera, Jr.

POINTS AND AUTHORITIES

The undersigned attorney was appointed by the Court to represent Petitioner in his post-conviction proceeding.

As a result of the recent general election, Theodore C. Herrera, Esq. was elected as the new District Attorney of Lander County, Nevada. Mr. Herrera has appointed the undersigned attorney as his Chief Deputy District Attorney in charge of criminal prosecutions, effective January 5, 2015.

NRS 252.120 provides, in pertinent part:

NRS 252.120 District attorney or partner not to appear as or assist counsel against State or county; penalty.

1. No district attorney or partner thereof shall appear within his or her county as attorney in any criminal action, ***or directly or indirectly aid, counsel or assist in the defense in any criminal action***, begun or prosecuted during his or her term; nor in any civil action begun or prosecuted during his or her term, in behalf of any person suing or sued by the State or any county thereof. (emphasis added).

Nevada Rules of Professional Conduct, Rule 1.11 provides, in pertinent part:

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.

. . .

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) Is subject to Rules 1.7 and 1.9; and

(2) ***Shall not:***

(i) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing;

. . .

(e) As used in this Rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency. (emphasis added).

Having become employed as a Chief Deputy District Attorney in charge of criminal prosecutions in a neighboring county, the undersigned believes that it would constitute a conflict of interest and/or an ethical violation to continue to represent a private client in a criminal case in Humboldt County.

WHEREFORE, the undersigned respectfully requests that he be relieved from further representation of the Defendant herein and that substitute counsel be appointed in his place.

Dated this 3rd day of March, 2015.

HY FORGERON, Esq.
State Bar #2355
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2015, I faxed and mailed a copy of the foregoing Motion to the Humboldt County District Attorney's Office in Winnemucca, Nevada and mailed a copy addressed to Petitioner at:

David Morton #1062758
1200 Prison Road
Lovelock, NV 89414

Hy Forgeron, Esq.

Case No. CR-09-5709/CV 18,803

Dept. No. 1

The undersigned hereby affirms this document does not contain a social security number.

FILED

2015 MAR 30 PM 1:39

TAMI RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT

COUNTY OF HUMBOLDT, STATE OF NEVADA

DAVID MORTON,

Petitioner,

ORDER ALLOWING WITHDRAWAL AND APPOINTING SUBSTITUTE COUNSEL

-vs-

THE STATE OF NEVADA,

Respondent.

_____/

This matter came before the Court on March 3, 2015.

GOOD CAUSE APPEARING, Defense counsel's request to withdraw is granted and he is relieved from further representation of the Petitioner herein.

IT IS HEREBY ORDERED that Lockie & McFarlan, Esq. be and is hereby appointed as counsel for the Petitioner for all further proceedings herein.

Dated this 3rd day of March, 2015.

JIM C. SHIRLEY
District Judge

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David Morton vs. The State of Nevada

Sixth Judicial District Court of Nevada, Case No. CR 09-5709/CV 18,803

DECLARATION OF SERVICE

I am a citizen of the Untied States, over the age of 18 years, and not a party to or interested in this action. I am an employee of the Humboldt County Clerk's Office, and my business address is 50 W 5th Street, Winnemucca, NV 89445. On this day I caused to be served the following document(s):

ORDER ALLOWING WITHDRAWAL AND

APPOINTING SUBSTITUTE COUNSEL

__X__ By placing in a sealed envelope, with postage fully prepaid, in the United States Post Office, Winnemucca, Nevada, persons addressed as set forth below. I am familiar with this office's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in the designated area for pick up by the United States Postal Service.

__X__ By personal delivery of a true copy to the person(s) set forth below by placement in the designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative of said person(s) set forth below.

David Morton #1062758
1200 Prison Road
Lovelock, Nevada 89419

Michael Macdonald
Humboldt County District Attorney
PO Box 909
Winnemucca, Nevada 89446
(Placed in box in Clerk's Office)

Hy Forgeron
PO Box 784
Battle Mountain, Nevada 89820

Lockie & Macfarland
919 Idaho St.
Elko, Nevada 89801

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on April 1, 2015 at Winnemucca, Nevada.

Pamela Lecumberry
DEPUTY CLERK

KARLA K. BUTKO
P. O. BOX 1249
Verdi, NV 89439
(775) 786-7118
Attorney for Petitioner

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

DAVID CRAIG MORTON,

Petitioner,

vs. Case No. CV 18,803

THE STATE OF NEVADA, Dept. No. II

Respondent.

_____/

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

This Supplemental Petition is filed pursuant to Nevada Revised Statutes 34.735, et. seq.

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Petitioner is incarcerated at the Lovelock Correctional Center, Lovelock Nevada: Inmate 1062758.

2. Name and location of court which entered the judgment of conviction under attack: Sixth Judicial District Court of the State of Nevada, Reno, Washoe County, Nevada.

3. Date of judgment of conviction:

January 20, 2011.

4. Case Number: CR09-5709.

5. (a) Length of sentence:

The Court sentenced Petitioner as follows:
Count I: A maximum term of 25 years in prison with parole eligibility after service of 10 years plus a consecutive term for the deadly weapon enhancement of 240 months in prison with parole eligibility after service of 96 months; Count II: 180 months in prison with parole eligibility after service of 72 months . Credit time served of 526 days was granted.

950

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

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes____
No_X_

If "yes," list crime, case number and sentence being served at this time:

7. Nature of offense involved in conviction being challenged:

One count of Second Degree Murder with a Deadly Weapon, a Category A felony violation of NRS 200.010, NRS 200.020, NRS 200.030 and NRS 193.165 and one count of Discharging a Firearm from within or from a Structure, A Category B felony, in violation of NRS 202.287(b)..

8. What was your plea (check one)
(a) Not Guilty ___XX
(b) Guilty _
(c) Guilty but mentally ill
(d) Nolo contendere ____

9. If you entered a plea of guilty:

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

11. Did you testify at the trial? Yes __XX__ No ____

12. Did you appeal from the judgment of conviction?

Yes_____ No _XX__ Note: Mr. Morton attempted to appeal but the appeal notice was untimely.

13. If you did appeal, answer the following:
(a) Name of Court: Nevada Supreme Court
(b) Case number or citation: 60625
(c) Result: Order Dismissing Appeal
(d) Date of result: May 22, 2012
Remittitur date: June 18, 2012.
(Attach copy of order or decision, if available.)
(a) Name of Court: Nevada Supreme Court
(b) Case number or citation: 60624
(c) Result: Order Dismissing Appeal, no jurisdiction for appeal
(d) Date of result: April 17, 2012
Remittitur date:

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

Mr. Morton filed an in proper person notice of appeal on the civil case number for the postconviction case. The Nevada Supreme Court ruled that the postconviction case was still pending and dismissed his appeal. Mr. Morton was directly advised by trial counsel, Richard Molezzo, not to appeal because it could get worse for him rather than better if he appealed. Mr. Molezzo said there were no issues for appeal. This advice was flawed. There should have been a direct appeal.

See further argument herein.

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

16. If you answer to No. 15 was "yes," give the following information:

(a)(1) Name of court:

(2) Nature of proceeding:
(3) Grounds raised
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

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

(c)As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?
(1) First petition, application or motion? Yes____ No
Citation or date of decision:
(2) Second petition, application or motion? Yes____ No
Citation or date of decision:
(3) Third or subsequent petitions, applications or motions? Yes ____ No ____
Citation or date of decision:

(e) If you did not appeal from the adverse action of any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: N/A
(a) Which of the grounds is the same:
(b) The proceedings in which these grounds were raised:

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on page which is 8½ by 11 inches attached to the petition. Your response may not exceed give handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a), (b), © and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on page which is 8½ by 11 inches attached to the petition. Your response may not exceed give handwritten or typewritten pages in length.)

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly your reasons for delay. (You must relate specific facts in response to this question. Your response may be included on page which is 8½ by 11 inches attached to the petition. Your response may not exceed give handwritten or typewritten pages in length.)

Petitioner states said Petition is timely and filed within one year of the Judgment of Conviction. The Petition was filed December 29, 2011. The judgment of conviction entered January 20, 2011.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ____ No _X_

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

Richard Molezzo., Esq., and Del Hardy, Esq. , Court-Appointed counsel through Humboldt County represented Petitioner at all critical stages of the trial case and during the time period for the filing of the notice of appeal from the verdict of guilt and sentencing process.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?
Yes ____ No _X_

If yes, specify where and when it is to be served, if you know:

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

Every claim herein raised is also raised under the legal theory that the Petitioner was deprived of effective assistance of counsel, within the meaning of the 6th and 14th Amendments to the United States Constitution.

Ground One: Counsel failed to adequately discuss the plea offer made by the State to allow Petitioner to plead guilty to a second degree murder carrying 25 years in prison with parole eligibility after service of 10 years, causing Petitioner to reject the plea bargain which he would otherwise have accepted to conclude this matter. Prejudice is demonstrated by the conviction to Second Degree murder with the weapon enhancement and conviction of an additional felony count. Counsel was ineffective at the plea bargaining stage of the case under *Laffler v. Cooper* and *Missouri v. Frye*. See

argument herein.

Ground Two: Trial and appellate counsel were ineffective at the jury instruction stage of the criminal defense case for failing to insure that the jury was adequately instructed with the law. Jury Instructions provided were erroneous, given in violation of standing Nevada law in that the jury was not advised the State had the burden to prove the absence of provocation beyond a reasonable doubt; these instructions reduced the State's burden of proof. Petitioner was deprived of his rights under the 5th, 6th & 14th Amendments.

Ground Three: Trial Counsel were ineffective at the sentencing stage of the case when counsel: 1) failed to object to the presentence report prepared for this case and failed to move to have that report stricken from the Court's review. Trial counsel was ineffective for failing to appeal the contents of the presentence report.

Ground Four: Trial Counsel were ineffective at the sentencing stage of the case when counsel: 1) failed to object to the Court's reliance upon suspect evidence at the sentencing; 2) failed to advise the Court of the names and relationships of the persons in court on behalf of the Defendant; 3) by failing to advise the Court that Mr. Morton's Fifth Amendment rights to claim his innocence were indeed present at the date of sentencing; and 4) for failing to recommend an appeal of the sentencing proceeding

Ground Five: Trial counsel was ineffective when trial counsel failed to object to and indeed brought forth bad act evidence into this jury trial, without advising the jury at the time of the admission of the evidence of its proper use and by failure to advise the jury of application of NRS 48.045 evidence.

Ground Six: Trial counsel was ineffective when trial counsel failed to perfect an appeal on this case on the following grounds: 1) introduction of cumulative photographic evidence that was graphic; admission of improper bad act evidence; dimunition of defense counsel by the Court in front of the jury; trial counsel failed to object to an appeal the Court's ruling in front of the jury that Ellen Clark, M.D. was an expert; failure to appeal the District Court's improper instruction to the jury during trial on the definition of homicide

Ground Seven: Trial counsel was ineffective when counsel failed to file a motion to suppress the statements made by Mr. Morton at the Humboldt County Jail when Mr. Morton was intoxicated to the blood alcohol level of 0.276 and was too intoxicated to voluntarily waive his *Miranda* rights.

Ground Eight: Defense counsel was ineffective at the sentencing stage of the case when counsel failed to present expert witness testimony by arranging for a risk assessment by a psychological expert.

Ground Nine: Cumulative error resulted in the deprivation of the due process rights of Petitioner to a fair trial.

POINTS AND AUTHORITIES

Statement of Facts:

Petitioner, DAVID CRAIG MORTON, was charged by the State with one count of Open

Murder with a Deadly Weapon, a felony violation of NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165. He was also charged with a count of Discharging a Firearm from within or From a Structure in violation of NRS 202.287(b).

The basics of the case are that David Craig Morton ("David") shot his Wife, Cynthia Morton, "Cynthia" on August 6, 2009, at their family home in Winnemucca, Nevada. David's defense was that the gun accidentally discharged when he was intending to kill himself.

At the time of the shooting, Mr. Morton's blood alcohol level was in excess of 0.276. Mr. Morton's son, Robert Morton, was present in the home at the time of the shooting. Also in the basement of the home were Anastasia Barseness (girlfriend of Robert) and Jessica Morton (cousin of Robert), There were no actual witnesses that saw the gun discharged, save and except David and Cynthia. After the shooting, Cynthia was taken by ambulance to Humboldt General Hospital and then moved to Renown Medical Center in Reno, Nevada. She lived for about one month before she died from Sepsis and multiple organ failure.

Ample evidence was received by the jury of the physical condition of Cynthia while at Renown, to the effect that she was always in bed, could not speak, could nod her head to say yes or no but then remarkably there was testimony at the sentencing hearing that Cynthia had made plans to leave David and move to Utah and live with her father upon her release form the hospital.

Anastasia and Jessica heard David and Cynthia arguing loudly prior to the one and only gunshot. Robert testified clearly that David put the gun toward his face and he thought he was going to shoot himself. TT1: 67. At the time of the shooting, David was naked. TT1: 71. He put on pants before the ambulance arrived. David went to leave the house and he and Robert struggled over the gun. Robert and David were discovered in an area close to the family home by the police. David was arrested and taken to Humboldt County Jail.

Detective Garrison went to the hospital to interview Cynthia. The jury was allowed to hear Cynthia's hearsay statement that "He shot me with a shotgun", he, being David. TT2: 131. This testimony of the victim was admitted by the Court. It was highly prejudicial.

At the jail, David was suicidal. An alert went over the police radio that David tried to kill himself. Detective Garrison went to the jail to speak with David. Garrison believed that the jail recording system was in place and did not record the interview. During the interview, David was intoxicated. His blood alcohol at 0140 hours was 0.276, a very high blood alcohol level. TT2: 142. David, according to Garrison, was despondent, withdrawn, and tried to kill himself with a piece of formica counter top by slashing at his throat. TT 3: 64-77. The jury was provided the evidence. In spite of the intoxication of David, the jury was allowed to hear David's statements that night, "I can't believe I shot her. I'm going to prison for a very long time. I should have done it right the first time. TT2: 134-141. After the *Miranda* form was signed, David stated he was trying to scare Cynthia, he intended to kill himself, and that he just "lost it". David's signature of the Miranda waiver form says it all, he was too drunk to execute a waiver of his constitutional rights. See Exhibit 1 (signature on Miranda form and signature on petition for comparison). Defense counsel did not file a motion to suppress based upon the intoxication of David and his inability to knowingly and voluntarily execute a waiver. The interview took place at 0117. 27 minutes earlier, David's blood alcohol level was 0.276.

The first day of trial, David was told by Del Hardy to "sit there and be quiet, no emotion and let us do our job. Don't do a G##d## thing".

In the State's motion to admit the statements of David, the State admitted that David smelled of alcohol but the officer stated David seemed cognizant.

It was clear that this trial would have some type of bad act evidence to litigate. Defense counsel did litigate, pre-trial, some of the bad act evidence. In spite of this, Mr. Molezzo opened the door to bad act evidence of prior domestic battery charges and allegations against David by Cynthia. Robert Morton testified that Chad Morton called and said that Dad punched Mom in the face. Robert Morton testified that on another occasion when Cynthia stuck up for herself against David, the police were called by David and Cynthia was arrested. Robert testified that Cynthia wanted a divorce and that David stopped the process because the paperwork would go missing. During all of

this bad act testimony, the jury was not instructed per NRS 48.045. TTI 92-96.

Based upon Mr. Molezzo's questioning of Robert Morton, the State filed a motion during the trial to admit bad act evidence. Mr. Molezzo objected to admission of bad act evidence and argued that the State could not prove the instances by a clear and convincing standard and that the evidence was more prejudicial than probative. The Court advised the State how to admit the testimony it wanted through witness Chad Morton but limited the questioning to why he believed that David would do Cynthia harm. TT2: 1-10.

During this trial, the use of photographic evidence was cumulative and excessive. The jury received 244 pictures of the house, gun and scene from the State. Graphic photographs were admitted over defense objections. The jury was warned by the Court and by the State of the graphic nature of the photographs. The defense asked for black and white photographs. The court decided to admit the color photos. The following Exhibits 8-1; 8-2; 9-1 through 9-6 (even though only 9-3 and 9-5 were approved by the Court) were published to the jury.

During the witness testimony of Ellen Clark, M.D. , Judge Wagner told the jury that Ellen Clark was an expert. TT3. He did not return the favor to the defense expert witness, In fact, he criticized that expert. Judge Wagner allowed the jury to wonder whether the defense firearms expert was an expert. While Ellen Clark was testifying, the Court improperly advised the jury of the definition of homicide. Defense counsel Del Hardy objected to the Court and attempted to provide the correct definition of homicide to the jury. Judge Wagner shot him down, in front of the jury and admonished him. Ultimately, Del Hardy felt obliged to apologize to Judge Wagner but stood tall that the court provided the jury with the wrong definition of homicide. Judge Wagner ultimately conceded that he was wrong and that the word intentional is required in the definition of homicide. Judge Wagner said he would cure this in the actual jury instructions. Judge Wagner told the jury he was wrong but failed to provide the accurate definition until after the case was submitted to the jury. This issue should have been the subject of a motion for mistrial and should have been the subject of a direct appeal. TT3: 85-90.

Jury instructions in this case were the subject of various discussions. Eventually, the Court provided the jury with 45 instructions. Defense counsel did not object to any of the 45 instructions proposed by the court.

ADD ***** re jury instructions and bad act evidence

Prior to the trial, the State offered a plea offer of 10-25 years in prison to David. Mr. Molezzo advised David to reject that offer and take the case to trial. David will testify that he received the offer, wanted to take the offer but was talked out of doing so by Mr. Molezzo. On November 16, 2009, Mr. Molezzo told the Court, "and it's going to be a trial– no question". On August 23, 2010, Mr. Molezzo stated in open court that there would "absolutely" be a trial on the case. On May 20, 2010, Mr. Molezzo stated on the court record: "Do I think a straight acquittal will happen - no- Do I think a lesser included.. That I Will prevail, You Bet."

In front of Dustin Grate, a private investigator, Mr. Molezzo guaranteed David that he would get four years in prison. Mr. Molezzo told David, "let me do my thing." Mr. Molezzo told Terry Morton that he might even get David off of the charges.

David would have accepted the State's plea offer, had it been discussed intelligently and explained to him. He would accept the plea offer if this Court instructs the State to re-offer that plea bargain.

As for appellate counsel, there was no direct appeal. Mr. Molezzo told David that there were no issues for appeal. Mr. Molezzo told David to be happy, he got the 10 years in prison. David corrected Mr. Molezzo and reminded him that he got an extra 8 years (if all goes well). Mr. Molezzo told David that if he filed an appeal the case could get worse rather than better. Yet, jeopardy attached.

The case proceeded to sentencing. Just prior, the Department of Parole & Probation provided the Court with a presentence report. Mr. Molezzo noted the outrageous content of the presentence report but did not file any motion to strike the document. In the sentencing memo filed by Mr. Molezzo, he commented that responsible counsel would dispute and object to the portions of a

probation report which is unfair, unfounded, based upon hearsay or other raw material or tortured conclusions or slanting. Mr. Molezzo argued that the drafter of the presentence report should not become a prosecutor and should not superimpose their sentence upon the court by slanting a report.

The presentence report in this case was outrageous. Language such as this permeated the attitude and tone of the report: "It is horrific to imagine that a union where two people vowed to love, honor and cherish each other could end in such tragedy. It is impossible to understand the extreme psychological trauma a child would go through seeing his mother, who was just shot by his father, lying in the floor covered in blood. In fact, the way Mr. Morton shot his wife was a heartless and demoralizing act of hate and rage." The author went on to paint Cynthia as a beloved mother, grandmother, sister, daughter and friend. The author failed to note that Cynthia had been arrested for domestic abuse upon David and agreed to enter into treatment to get her charge dismissed. The author failed to note that Cynthia was an alcoholic and drug user. The author went forth to recommend maximum sentences running consecutively upon David. See PSI. Mr. Molezzo argued at the sentencing hearing that the presentence report was full of opinion of the author but did not seek to have the document corrected.

Interestingly enough, the history of the victim was hidden in this case. Cynthia had overdosed on four prior occasions. Her father, who gave a victim impact statement, went to get her out of the West Valley City Hospital. Cynthia actually overdosed in a car with the children in the car. An ambulance had to come and take her to the hospital. Cynthia had gone through Vitality Center in Elko for her methamphetamine addiction. Cynthia had committed prescription fraud to supply her pain pill addiction. In spite of repeated attempts at sobriety, Cynthia continued to use drugs. She pawned virtually anything of value to supply her habit. These records were available to defense counsel by way of a subpoena. David told Mr. Molezzo about Cynthia's addiction issues.

Prior to the sentencing hearing, Judge Wagner advised counsel that he did not believe that David had the right to maintain his innocence on the charges because the jury had found him guilty.

Judge Wagner refused to allow David to maintain that the discharge of the shotgun was accidental in nature. Judge Wagner refused to allow David's statement in allocution to include the fact that the shotgun discharged accidentally. Judge Wagner relied upon police reports from cases which did not result in conviction, surmised that Cynthia refused to testify without evidence of same, and stated that domestic abuse had been occurring for 30 years. Judge Wagner commented that the family members of David were not present in court to support him. That was untrue. David's family members were indeed in court. In fact, present in the courtroom were: David's Mother, Beverly Upshaw, Robert Morton (son), Chad Morton (son), Scott Upshaw (stepbrother), Terry Morton (stepbrother) and 10 friends of David. At the end of the day, Judge Wagner attempted to impose an illegally high sentence upon the deadly weapon enhancement and had to be advised that the law would not let him give 300 months to David on the enhancement as the maximum was 240 months. Judge Wagner had to reduce the weapon enhancement sentence to comport with the law.

Mr. Molezzo did not have any psychological evaluations completed on David prior to sentencing. There was no risk assessment provided to the Court.

After the sentencing hearing, David was upset with the sentence imposed by the court. Mr. Molezzo had no further contact with David. Mr. Molezzo told David not to appeal the case as it could get worse for him. David told Mr. Molezzo that he wanted to appeal the conviction. Mr. Molezzo told him he should be happy because he go the 10 years. David reminded Mr. Molezzo that he did not get 10 years as he got 25 + 20.

ARGUMENT

Ground One:

Counsel was ineffective when counsel advised Mr. Morton to reject the State's plea offer to a second degree murder charge and a sentence of 10-25 years in prison. Mr. Morton would have accepted the offer if counsel had adequately advised him on the plea offer or properly evaluated the case.

Defendants have a right to constitutional effective assistance of counsel that extends to the plea bargain stage. This is proper in a system in which 97% of federal criminal cases and 94% of state

criminal cases negotiate rather than proceed to trial. See Missouri v. Frye, 132 S. Ct. 1399, at 1386-1387 (2012).

In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Laffler v. Cooper, 132 S. Ct. 1376 (2012). Under Missouri v. Frye, supra, counsel must be effective at the plea bargain stage. In this context, the *Strickland* prejudice test requires a defendant to show a reasonable possibility that the outcome of the plea process would have been different with competent advice. See *Missouri* v. *Frye*, *ante,* at ___. Pp. 4–11.

Mr. Morton will testify that he did indeed receive the plea offer of a second degree murder charge with an agreement that both parties would seek a sentence of 10-25 years in prison. Mr. Morton will testify that Mr. Molezzo advised him to turn that offer down and that he would be guaranteed a sentence of four years. Mr. Molezzo told him to let him do his thing and he might win the case and get the charges dismissed. This is what was said to the client. The court record supports the fact that Mr. Molezzo wanted to take this case to trial. On three separate occasions, Mr. Molezzo advised the court that this case would definitely go to trial. Yet, when all was said and done, Mr. Morton received an extra 96-240 months in prison. This client was distraught, was in jail for 1 ½ years pending trial, depressed and only saw his attorney 4-5 times during that time frame. He would have accepted the plea offer, had it been properly delivered and evaluated.

In these circumstances, the proper remedy is to require the prosecution to reoffer the plea. The judge can then exercise discretion in deciding whether to vacate the prior conviction and accept the new plea. The court must weigh various factors. Here, it suffices to give two relevant considerations. First, a court may take account of a defendant's earlier expressed willingness, or

unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to disregard any information concerning the crime discovered after the plea offer was made. Mr. Morton will testify to the limited amount of time spent by counsel with him evaluating the offer, the failure to describe the defense case, the assurances he was made that he would get a better ending by going to trial. Justice prevails when this Court requires the plea offer to be re-made to Mr. Morton and he is sentenced to 10-25 years in prison.

Ground Two: : Trial and appellate counsel were ineffective at the jury instruction stage of the criminal defense case for failing to insure that the jury was adequately instructed with the law. Jury Instructions provided were erroneous, given in violation of standing Nevada law in that the jury was not advised the State had the burden to prove the absence of provocation beyond a reasonable doubt; these instructions reduced the State's burden of proof. Petitioner was deprived of his rights under the 5th, 6th & 14th Amendments.

The jury instructions that are provided in this case, 1-45, do not advise the jury that the State has the obligation to prove beyond a reasonable doubt the absence of provocation. Mr. Morton testified that Cynthia was striking at him and he "lost it". This is consistent with a manslaughter defense. The jury should have been properly instructed that the State had the burden to prove beyond a reasonable doubt that there was an absence of provocation. Voluntary manslaughter a lesser-included offense of murder. *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) NRS 200.040 (manslaughter is a voluntary killing "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible").

The United States Supreme Court held in *Multan v. Wilbur* that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. 684, 704 (1975). The Nevada Supreme Court has followed the *Multan* doctrine and has held, with respect to a theory of self-defense, that instructions imposing a burden of proof upon a defendant to negate an element of a charged offense are improper. See *St. Pierre v. State*, 96 Nev. 887, 890-91, 620 P.2d 1240, 1241-42 (1980); *Celso v. State*, 95 Nev. 37, 41, 588 P.2d 1035, 1038 (1979); see also *Runion*

v. State, 116 Nev. 1041, 1052, 13 P.3d 52, 59 (2000).

Failure to instruct this jury that the State had to prove the absence of provocation beyond a reasonable doubt violated the due process rights of Mr. Morton. Trial counsel should have proposed a proper instruction and did not do so. The Court should have properly instructed the jury. Trial counsel should have filed an appeal on this issue, as well as other issues.

Ground Three: Trial Counsel were ineffective at the sentencing stage of the case when counsel: failed to object to the presentence report prepared for this case and failed to move to have that report stricken from the Court's review. Trial counsel was ineffective for failing to appeal the contents of the presentence report.

The presentence report in this case is outrageous. Mr. Molezzo noted this to the Court. In fact, Mr. Molezzo stated that reasonable counsel would object and move to strike the biased and unsubstantiated argument portions of the document. Yet, he failed to do so.

Pursuant to NRS 176.135(1), the Division must "prepare a PSI to be used at sentencing for any defendant who pleads guilty to or is found guilty of a felony." Stockmeier v. State, Bd. of Parole Comm'rs, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011). "A PSI contains information about the defendant's prior criminal record, the circumstances affecting the defendant's behavior and the offense, and the impact of the offense on the victim." Id. at 248, 255 P.3d at 212-13. Additionally, a PSI must contain "[a] recommendation of a minimum term and a maximum term of imprisonment or other term of imprisonment authorized by statute, or a fine, or both." NRS 176.145(1)(g). The PSI may also include "any additional information that [the Division] believes may be helpful in imposing a sentence, in granting probation or in correctional treatment." NRS 176.145(2).

In *Goodson v. State*, the defendant objected to a "disputed portion" of the PSI used by the district court at sentencing. 98 Nev. 493, 495, 654 P.2d 1006, 1007 (1982). The Nevada Supreme court has concluded that an abuse of discretion will be found when the defendant's sentence is prejudiced from consideration of information or accusations founded on impalpable or highly suspect evidence. Id. at 495-96, 654 P.2d at 1007; see also *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159,

1161 (1976).

When considering whether to recommend probation or prison, NRS 213.10988(1) obligates the Chief Parole and Probation Officer to adopt "standards to assist him or her in formulating a recommendation . . . . The standards must be based upon objective criteria for determining the person's probability of success on parole or probation." Pursuant to NRS 213.10988(1)'s grant of regulatory authority, the Division adopted NAC 213.590, creating 27 objective factors that should be considered when preparing a PSP. None of these standards include the type of inflammatory rhetoric that is seen in this report.

NRS 213.10988(2) permits the Division Chief to "first consider all factors which are relevant in determining the probability that a convicted person will live and remain at liberty without violating the law." Furthermore, NRS 213.10988(3) requires the Division Chief to "adjust the standards to provide a recommendation of greater punishment for a convicted person who has a history of repetitive criminal conduct or who commits a serious crime."

Because the sentencing court will rely on a defendant's presentence investigation report (PSI), the PSI must not include information based on impalpable or highly suspect evidence. NRS 176.135(1), 176.145(1).

A simple review of this outrageous PSI will demonstrate to this Court that the author was biased and the report should have been corrected. Counsel was ineffective for failing to move to strike the PSI report and for failing to appeal issues regarding the nature of the PSI report.

Ground Four: Trial Counsel were ineffective at the sentencing stage of the case when counsel: 1) failed to object to the Court's reliance upon suspect evidence at the sentencing; 2) failed to advise the Court of the names and relationships of the persons in court on behalf of the Defendant; 3) failed to advise the Court that Mr. Morton's Fifth Amendment rights to claim his innocence were indeed in place at the date of sentencing; and 4) failed to recommend an appeal of the sentencing proceeding.

This sentencing hearing was fraught with prejudicial error. Firstly, the courtroom was filled with people who were concerned with the welfare of Mr. Morton and there to support him. Those folks were not even introduced to the court. Judge Wagner commented that Mr. Morton's children were not present in court, but they were there. Judge Wagner relied upon police reports on charges

that were dismissed. Judge Wagner then decided the charges were dismissed because Cynthia chose not to testify. There is nothing in the court record to support such a ruling. Judge Wagner determined that there was abuse in this relationship for 30 years. He had no evidence to support such a blatant view of the family dynamics. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

In *Brake v. State*, 113 Nev. 579, 584-85, 939 P.2d 1029, 1032-33 (1997); U.S. Const. amend. V, the Nevada Supreme Court held that the district court violated a defendant's Fifth Amendment right against self-incrimination by considering the defendant's lack of remorse in its sentencing decision. Mr. Morton maintained his innocence throughout this case and submitted that the gun discharged accidentally. Mr. Morton maintained that while he was suicidal, he did not intend to kill Cynthia. The jury held him criminally responsible but did not find deliberation or premeditation. The sentencing court added his own version of the case. Judge Wagner decided that this was to be a murder/ suicide by Mr. Morton. He is not the judge of the facts. The jury was.

Buschauer v. State, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990), holds that witnesses offering oral victim impact statements must be sworn. The victim impact evidence was not provided under oath. *Diudonne v. State*, reaffirmed *Buschauer*, 127 Nev. Adv. Op. 1 (2011). Appellate review when this issue is properly preserved, will cause the Court to analyze the erroneous admission of victim impact statements for harmless error. *Sherman v. State*, 114 Nev. 998, 1014, 965 P.2d 903, 914 (1998).

NRS 176.015(3) grants certain victims of crime an opportunity to "[reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." NRS 176.015(3)(b).

Judge Wagner attempted to impose an illegally high sentence upon the deadly weapon enhancement and had to be advised that the law would not let him give 300 months to David on the enhancement as the maximum was 240 months

The case of *Mitchell v. United States*, 526 U.S. 314 (1999), reminds us that the Petitioner's right to remain silent extends through the sentencing stage of the case. Defense counsel simply had

to object and remind the sentencing court that their client was relying upon his 5th Amendment rights and would not speak. If a sentencing judge relies upon prejudicial matters, such reliance constitutes abuse of discretion that necessitates re-sentencing hearing before different judge. This was not harmless error. This issue should have been raised on direct appeal, as it was meritorious and would have gained Mr. Morton a new sentencing hearing.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence but forbids only an extreme sentence that is grossly disproportionate to the crime. U.S. Const. amend. 8.

The Federal and Nevada Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(5). In the federal system, a substantively reasonable sentence is one that is "sufficient, but not greater than necessary" to accomplish § 3553(a)(2)'s sentencing goals. 18 U.S.C. § 3553(a); *see, e.g.,* United States v. Vasquez-Landaver, 527 F.3d 798, 804-05 (9th Cir. 2008).

This sentence was in excess of that needed for society's interests. The District Court's sentencing analysis was not 'reasoned' as the law requires (NRS 193.165) and relied upon suspect evidence. See United States v. Rita, 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007) and Gall v. United States, 128 S. Ct. 586 (2007).

Justice and this court record demand a re-sentencing occur. Trial counsel was ineffective. The decision to not appeal the sentencing hearing antics was flawed. The issues were ripe for appeal. The only reason an appeal did not happen is because trial counsel convinced David not to appeal. This deprived David of his right to appellate review of his sentence.

Ground Five: Trial counsel was ineffective when trial counsel failed to object to and indeed brought forth bad act evidence into this jury trial, without advising the jury at the time of the admission of the evidence of its proper use and by failure to advise the jury of application of NRS 48.045 evidence.

Defense counsel knew that there was bad act evidence in the wings on this case. On August 27, 2010, defense counsel filed a motion to preclude alleged other bad act evidence under NRS

48.045. Yet, during the cross examination of Robert Morton, defense counsel opened the very door to bad act evidence that he was trying to keep closed. Mr. Molezzo asked Robert who wanted the divorce. The answer was probably not what he wanted to hear, Cynthia. Mr. Molezzo opened the door to Robert testifying to hearsay statements by Chad Morton that dad punched mom in the face. The jury was not told to disregard this evidence. It was clearly not proven by clear and convincing evidence as it was not even witnessed by Robert. It did not stop there. Robert told the jury how his mother stood up for herself against David only to find that David called the cops on her. TT1: 92-95. At no time during this evidence was the jury instructed on the proper use of bad act evidence. In response to this questioning, the State was allowed to ask Chad Morton if he had any reason to believe that David Morton would actually harm Cynthia. TT2: 1-10.

Due to its highly prejudicial nature, if the district court's admission of the uncharged conduct was manifestly wrong, prejudice occurred and reversal is warranted. *Bellon v. State*, 121 Nev. 436, 117 P.3d 176 (2005) and *Sutton v. State*, 114 Nev. 1327, 972 P.2d 334 (1998). The use of prior act evidence pursuant to NRS 48.045(2) should always be approached with circumspection." *Ledbetter v. State,* 122 Nev. 264, 129 P.3d 671, 679-80 (2006). The district court failed to issue a limiting instruction as required under *Rhymes v. State*, 121 Nev. 17, 22, 24, 107 P.3d 1278, 1281-82 (2005).

The district court "should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes." *Thieveries*, 117 Nev. 725 at 733, 30 P.3d at 1133 (2001). The District Court did not give a jury instruction as required by *Thieveries or Big Pond*, either at the time of the admission of bad act evidence or in the final jury instructions.

NRS 48.045(2) prohibits the use of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). "To be deemed an

admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). In assessing "unfair prejudice," this court reviews the use to which the evidence was actually put—whether, having been admitted for a permissible limited purpose, the evidence was presented or argued at trial for its forbidden tendency to prove propensity. See *Rosky v. State*, 121 Nev. 184, 197-98, 111 P.3d 690, 699 (2005). Also key is "the nature and quantity of the evidence supporting the defendant's conviction beyond the prior act evidence itself." *Ledbetter,* 122 Nev. at 262 n.16, 129 P.3d at 678-79 n.16.

The admission of prior bad acts evidence requires a limiting instruction, unless waived by the defendant prior to admission. Both the State and the district court share blame for this error. See id. The district court failed to heed the Nevada Supreme Court's direction and "raise the issue sua sponte" after the State neglected its duty to do so. See id. In the face of imminent unfair prejudice, the district court should have taken appropriate steps to properly instruct the jury. Though this procedural safeguard would not have been adequate to ameliorate the unfair prejudice arising from admission of prior crimes and allegations of prior physical abuse into a jury trial for this murder case, at least the jury would have understood that it could not use that testimony to deem Mr. Morton had the propensity to commit a crime. See *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110-11 (2008).

At the time of this trial, the children of the Morton family were upset. They lost their mother, Their father was on trial for murder. There is no way they properly described the family dynamics. Chad Morton died of a heroin overdose. Chad Morton used to use controlled substances with his mother, Cynthia. Defense counsel knew this type of bad act evidence was available for the State to

use and still opened the door. This was ineffective assistance of counsel under *Strickland* and the 6th Amendment..

Ground Six: Trial counsel was ineffective when trial counsel failed to perfect an appeal on this case on the following grounds: introduction of cumulative photographic evidence that was graphic; admission of improper bad act evidence; dimunition of defense counsel by the Court in front of the jury; admission of the hearsay statements of the dead victim; trial counsel failed to object to an appeal the Court's ruling in front of the jury that Ellen Clark, M.D. was an expert; failure to appeal the District Court's improper instruction to the jury during trial on the definition of homicide.

The actions of counsel in failing to properly advise his client to appeal the jury verdict, the errors in the trial and the sentencing errors seen in this case cannot be justified. Petitioner was denied effective assistance of counsel on direct appeal and lost his appellate rights due to counsel's failure to perfect the notice of appeal. As such, Petitioner is entitled to raise all appellate issues herein under *Lozada and NRAP 4(c),* which provides for a belated appeal. NRS 34.810 cannot be used as a sword to deny the appellate claims when Petitioner lost his direct appeal due to counsel's advice.

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed un the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996).

Counsel must consult with the client about the procedures for and advantages and disadvantages of an appeal, and counsel's failure to do so is deficient performance for purposes of proving an ineffective assistance of counsel claim. U.S. Const. amend., VI; Roe v. Flores-Ortega, 528 U.S. 470, 477-81; Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); and Davis

v. State, 115 Nev. 17, 20, 974 P.2d 658, 659-60 (1999). Mr. Rodriguez was deprived of his right to a direct appeal due to ineffective assistance of counsel, see Toston v. State, 127 Nev. ___, 267 P.3d 795 (2011).

A claim of ineffective assistance of appellate counsel is reviewed under the *Strickland* test. In order to establish prejudice based on deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. Lara v. State, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004) (citing Kirksey, 112 Nev. at 998, 923 P.2d at 1114). Petitioner has met that burden of proof and is entitled to relief.

In circumstances where counsel believes that an appeal would benefit the client, even if the client does not express an interest in an appeal, that attorney has an obligation to further a direct appeal. This is just that setting. Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). An appeal would have resulted in a better sentencing position for this man.

There were ample issues with which to pursue a successful appeal on this case. A simple review of the sentencing transcripts demonstrates reliance upon suspect evidence, a direct violation of Mr. Morton's Fifth Amendment right to maintain his innocence, admission of bad act evidence without proper jury instruction at the time of the admission of the evidence and after, **, improper definition by the Court of the term homicide during the trial and failure to correct that improper definition by proper definition upon notice, the outrageous presentence report, graphic photographs that were cumulative in nature, dimunition of defense counsel in front of the jury by the trial judge, and vouching for the State's expert witness by defining Ellen Clark as an expert but refusing to acknowledge the defense expert witness in the same manner. Additionally, had trial counsel filed

the motion to suppress statements made by Mr. Morton at the Humboldt County Jail due to his intoxication and depression, that issue could have been raised on direct appeal. There is no way that this case should not have been the subject of direct appeal. Failure to file the direct appeal prejudiced the Petitioner. The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985).

A district court's conduct may influence jurors, prejudicing them against a party. See *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 417-18, 470 P.2d 135, 140 (1970). The words and utterances of a trial judge, sitting with a jury in attendance, is liable . . . to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby.' " (quoting *Peterson v. Pittsburgh Silver Peak Gold Mining Co.*, 37 Nev. 117, 122, 140 P. 519, 521 (1914))); see also *Oade v. State*, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998) (noting that a judge's repeated statements regarding decorum to the defendant's lawyer may have prejudiced the jury against the admonished party). The court may not hamper or embarrass counsel in the conduct of the case by remarks or rulings which prevent counsel from presenting his case effectively or from obtaining full and fair consideration from the jury.

Judge Wagner dressed down defense counsel Del Hardy in front of the jury. Not only was his attack unjustified, Judge Wagner was wrong on the law that he chastised Mr. Hardy for using. This occurred during critical cross examination of the State's expert witness, Ellen Clark. M.D. when the causation of the death of the victim was in question. It was admitted to be possible by the State's expert that Cynthia had sepsis or could have had sepsis prior to the shooting.

Judge Wagner criticized the qualifications of defense counsel's expert witness. Judge Wagner unfairly treated Del Hardy, Esq, poorly, in front of the jury and actually complained that Mr. Hardy should have been the one to seek removal of the jury if there was to be an issue. It is Judge Wagner's job to maintain impartiality, order and decorum in trial proceedings, as explained by the Nevada Supreme court in *Azucena v. State*, 135 Nev. Adv. Op 36 decided September 5, 2019. NCJC Canon 2, Rule 2.8()B) requires the judge to be patient, dignified and courteous. Judge Wagner was to promote public confidence in the independence, integrity and impartiality of the judiciary. NCJC Canon 1, Rule 1.2. Mr. Morton's side of this case was prejudiced by the actions of Judge Wagner. See *Parodi*, 111 Nev. 367-68, 892 P.2d 589-90. Mr. Hardy should have insisted that his client appeal this conviction. Mr. Molezzo watched the antagonistic attack upon co-counsel. Mr. Molezzo should have demanded his client appeal.

This was a relatively short trial. While it was many days, several of the days were short trial days with only a few witnesses. The attack on defense counsel was unwarranted. After the attack, the Court admitted it was wrong but did not advise the jury of the proper definition of homicide, thereby reducing the State's burden of proof during the trial, as the word intentional was deleted from the definition of homicide. The record was made by trial counsel. This matter should have been the subject of direct appellate review. Judge Wagner promised that he would clear up the definition of homicide in jury instructions at the final stage. That did not happen. There is no definition of homicide. Criminal homicide requires criminal intent, an accidental shooting does not count.

The continued graphic nature of the photographic evidence was admitted by the trial court as well as the State. There were 244 photographs admitted in one setting. TT3: 104. There were photographs 8-1 to 8-57 admitted. Defense counsel objected to the graphic nature of photos. TT2: 96-107. Yet, after objection, and the court ruled that 9-3 and 9-5 would be admitted, not all of the series 9 photos, they were all brought into the trial. TT2: 1331-134. Admissibility of gruesome photographs showing wounds on the victim's body lies within the sound discretion of the trial court and, absent an abuse of that discretion, the decision will not be overturned. *Flores v. State*, 121 Nev. 706, 722, 120 P.3d 1170, 1180 (2005) (quoting *Turpen v. State*, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978)). In this case, the trial court determined that in spite of the cumulative nature of the gruesome photographs, it would admit them. This was prejudicial error. Appellate counsel should have litigated this issue.

The jury was allowed to hear Cynthia's hearsay statement that "He shot me with a shotgun", he, being David. TT2: 131. Witnesses were allowed to testify that Cynthia was in the hospital and able to communicate by nodding her head. This hearsay testimony of the victim was admitted by the Court. It was highly prejudicial. he hearsay in this case was extremely prejudicial, both because of its content and because it was, in effect, testimony from the dead victim. See *Downey v. State*, 103 Nev. 4, 7, 731 P.2d 350, 352 (1987); see also *Summers v. State*, 102 Nev. 195, 202, 718 P.2d 676, 681 (1986). There was no limiting instruction provided to the jury on the use of such evidence in deliberation. In addition, the district court "should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a

general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes." Thieveries, 117 Nev. at 733, 30 P.3d at 1133. This did not happen.

All issues that could and should have been raised on direct appeal should be heard by this court at an evidentiary hearing.

Ground Seven: Trial counsel was ineffective when counsel failed to file a motion to suppress the statements made by Mr. Morton at the Humboldt County Jail when Mr. Morton was intoxicated to the blood alcohol level of 0.276 and was too intoxicated to voluntarily waive his *Miranda* rights.

There is no debate available on this question. Trial counsel should have moved to suppress the statements made by David Morton at the Humboldt County Jail. The statements were not recorded. There is no good reason the statements were not recorded. The jail itself has recording of every location within the walls. Yet, mysteriously, this man who is a 0.276 blood alcohol level 30 minutes after signing a Miranda wavier and speaking with Detective Garrison was not recorded when giving a police interview. We all know why that happened that way. David Morton was drunk. He was unable to knowingly and voluntarily waive his right. He was distraught, depressed and drunk. A simple review of the handwritten signature of David Morton on this Miranda waiver form will prove up how drunk he was. A review of his signature on other court documents does not show that erratic signature he had at 0117 a.m. on the night of this shooting. David Morton was suicidal. In response to that, Detective Garrison stopped what he was doing at the hospital to get a quick interview in with this drunk man. The statement should have been the subject of a suppression motion. It was not voluntary. Once that statement is deemed involuntary, it cannot be used for any purpose against Mr. Morton, not even impeachment.

The Fifth Amendment privilege against self-incrimination requires that a suspect's statements made during custodial interrogation not be admitted at trial if the police failed to first provide a *Miranda* warning. *See Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Taylor*, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998); *Koger v. State*, 17 P.3d 428 (Nev. 2001).

As this Court noted in *Stewart v. State*, 133 Nev. Adv. Op 20 (May 4, 2017);

> *Miranda* establishes procedural safeguards "to secure and protect the Fifth Amendment privilege against compulsory self-incrimination during the inherently coercive atmosphere of an in-custody interrogation." *Dewey v. State*, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007). *Miranda* prescribed the four now-familiar warnings:
>
> [A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Florida v. Powell, 559 U.S. 50, 59-60 (2010) (alterations in original) (quoting *Miranda,* 384 U.S. at 479)."

In order to admit statements made during custodial interrogation, the defendant must knowingly and voluntarily waive the *Miranda* rights. *See Miranda*, 384 U.S. at 479, 86 S.Ct. 1602; *Echavarria v. State*, 108 Nev. 734, 742, 839 P.2d 589, 595 (1992).

Waiver of the right to counsel must be voluntary, knowing and intelligent. *Miranda v. Arizona*, 384 U.S. 426, 475-77 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1932). Review of the district court's determination that a defendant's *Miranda* waiver was knowing and intelligent is reviewed for clear error. *Collazo v. Estelle*, 940 F.2d at 416.

A determination of waiver depends on the totality of circumstances, including the background, experience and conduct of the accused. *United States v. Rodriquez-Gastelum*, 569 F.2d 482, 488 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978).

An inculpatory statement is voluntary only when it is the product of a rational intellect and a free will. *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960); *United States v. Crespo de Llano*, 830 F.2d 1532, 1541-2 (9th Cir. 1987).

The test is whether, considering the totality of circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne. *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963); *United States v. Pinion*, 800 F.2d 976, 980 (9th Cir.1986), *cert. denied*, 107 S.Ct. 1580 (1987). *See also United States v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981).

To establish waiver, the government must meet the following requirements:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness, both of the nature of the right to be abandoned and consequences of the decision to abandon it.
>
> *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Most importantly, any purported waiver must be judged on a case-by-case basis in light of the accused's background, experience and circumstances. *Edwards v. Arizona*, 451 U.S. 477, at 482 (1981); *North Carolina v. Butler*, 441 U.S. 369, 374-5 (1979) at 374-5. In this case, there was no intelligent or voluntary waiver to the right to counsel because Mr. Morton was drunk and unable to voluntarily and intelligently do this. The factors seen in this custodial interview demonstrate clearly that there could be no waiver by this suicidal drunk man. Trial counsel should have filed a motion to suppress the statements of David Morton at the Humboldt County Jail that night.

It is required that each element of a crime be proven beyond a reasonable doubt. *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). When reviewing a criminal conviction for sufficiency of the evidence, this court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. Id.

"The district court has broad discretion to settle jury instructions." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A district court's denial of proposed jury instructions may constitute an abuse of discretion or judicial error. Id. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."

Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). However, an instruction must be reviewed to see if it was an accurate statement of law and is reviewed de novo. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009).

The jury was improperly instructed on the lesser included offense of voluntary manslaughter but was not instructed that the State has the obligation to prove beyond a reasonable doubt that there was an absence of provocation. Said failure reduced the burden of proof for the State and forced Mr. Morton to incur a burden of proof to negate an element of a charged offense. This was *Multan* error and should have been raised on direct appeal.

Deliberation was an element of the offense of first degree murder. The fact that Mr. Morton acted or did not act with adequate provocation without a cooling off period had to be proven by the State beyond a reasonable doubt. See *United States v. Wallen*, 874 F.3d 620 (9th Cir. 2017). JI 21 was constitutionally flawed. It is not a harmless error standard of review. This jury instruction error mandates relief.

Trial and Appellate Counsel for the defense were ineffective for allowing the jury to receive jury instructions **, rather than abiding by *Byford*, supra.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). An instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution. *Francis v. Franklin*, 471 U.S. 307, 316 (1985). Although deference is given to appellate counsel's decisions of which issues to raise on appeal, nonetheless, appellate counsel can be held ineffective if it fails to select proper claims for appeal. *Jones v. Barnes*, 463 U.S. 745 (1983).

Appellate counsel should have raised these flawed jury instructions on direct appeal.

Ground Eight: Defense counsel was ineffective at the sentencing stage of the case when counsel failed to present expert witness testimony by arranging for a risk assessment by a psychological expert.

The State was legally obligated to pay for reasonable defense services. Widdis v. State, 114 Nev. 1224, 968 P.2d 1165 (1998). 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).

In *Ake,* the Supreme Court held that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake v. Oklahoma*, 470 U. S. 68 at 76 (1985).

Cases have held that the denial of a Defendant's rights to retain an expert to assist in explaining the defense and present his defense may violate Due Process and the Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment right to counsel and the Fifth, Sixth and Fourteenth Amendment right to present a defense. An indigent defendant is entitled to the basic tools of an adequate defense. *Britt v. North Carolina*, 404 U.S. 226 (1971).

The standard for associated expert is "necessary for adequate representation." Pursuant to *United States v. Durant*, 545 F.2d 823, 827 (2nd Cir. 1976) necessary should at least me "reasonably necessary" and an adequate defense must include both preparation for cross-examination of a government expert as well as representation of an expert defense witness. Experts are allowed and should be provided for at all stages of the defense. *United States v. Sims*, 617 F.2d 1371, 1375 (9th Cir. 1990).

There really is no standard cited but counsel who fail to obtain expert testimony when it was necessary are certainly being held ineffective across America. *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012).

Counsel should have presented an expert witness on risk assessment issues. Judge Wagner attempted to impose a sentence in excess of that legally available on the weapons enhancement in this case. Had Judge Wagner had the opportunity to hear from a psychological expert that Mr. Morton was not a high risk to reoffend and had the ability to see that expert's work product, he would not have imposed the maximum possible weapon enhancement sentence.

Judge Wagner's reliance upon the "three casing" evidence as circumstantial evidence, was flawed. He relied upon his own version of what the evidence said. Clearly, the jury understood that there was no way to tell where the casings (spent or not) were actually located after the discharge of the firearm. Between the police, the medical personnel, the paramedics and the family members, the casing evidence was unsecured. There was no way for Judge Wagner to rely upon that evidence to impose a maximum consecutive sentence on the weapon enhancement.

Counsel should have brought forth evidence of a risk assessment by a qualified psychological expert. It is the intention of Mr. Morton to provide same to this Court at an evidentiary hearing on this matter.

The use of methamphetamine by a mentally ill person and the reaction of violence on Cynthia's part due to her consumption of methamphetamine. Cynthia's failure to take her prescribed mental health drugs also caused her erratic behavior. Cynthia's prior domestic battery arrest should have played a factor in the sentence imposed herein. Counsel should have presented an expert so the jury could properly establish the degree of guilt, if any, of Mr. Morton in this setting. Counsel has discussed this with two separate experts and the report will be forthcoming.

Ground Nine: Cumulative errors deprived Mr. Morton of his constitutional right to due process, the effective assistance of counsel and right to a fair trial, in violation of the 5th, 6th, & 14th Amendments.

Further, if these issues had been raised, the Nevada Supreme Court would have reviewed the question of whether cumulative errors deprived Mr. Morton of a fair trial. When evaluating a claim of cumulative error, the Court considers the following factors: '(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.' " Id. (quoting *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

Notably, although the State told the jury the evidence was overwhelming, the decision by the Supreme Court was that the evidence was sufficient to sustain a conviction.

Remedy Sought:

Petitioner seeks alternative relief, depending upon this Court's determinations:

1) A new trial; or

2) Re-offer of the plea offer that counsel advised him to decline, Second Degree Murder with a sentence of 10-25 recommended by the Parties; or

3) A new sentencing proceeding.

4) A belated appeal under NRAP 4 (c) and *Lozada.*

Ineffective Assistance of Counsel authority:

In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether or not a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law in fact and is subject to independent review. The Supreme Court reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984). The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland. The Nevada Supreme Court revisited this issue in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) and Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). The Nevada Supreme Court has provided a two-prong test in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency.

The Court will uphold a presumption that counsel was effective. Petitioner must, therefore, show that his attorney's performance was unreasonable under prevailing professional norms and that he was prejudiced as a result of the deficient performance.

In Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970), the Nevada Supreme Court held that it will presume that an attorney has fully discharged their duties and that such presumption

can only be overcome by strong and convincing proof to the contrary. The court went on in Warden v. Lischko, 90 Nev. 220, (1974), to hold that the standard of review of counsel's performance was whether the representation of counsel was of such low caliber as to reduce the trial to a sham, a farce or a pretense. Thus, Petitioner is properly before the court on issues of ineffective assistance of counsel and would request this court grant him an evidentiary hearing on these issues. To state a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below the objective standard of reasonableness. Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Prejudice is demonstrated where counsel's errors were so severe that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different, is a probability sufficient to undermine confidence in the outcome of the trial. Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994).

CONCLUSION

WHEREFORE, Petitioner prays that the Court grant Petitioner an evidentiary hearing on the issues raised herein and grant him the relief to which he may be entitled in this proceeding.

Dated this 10th day of September, 2019.

By: _____

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State Bar No. 3307

EXHIBIT 1

EXHIBIT 1

Certificate of

Miranda Warning and Waiver

I hereby declare: That I am an officer of the WINNEMUCCA POLICE DEPT and that on 08-06- 2009 at 01:16 (a.m.) / p.m. I interviewed DAVID MORTON at HCDC and that prior to that interview, and before any questioning, I advised the person named above the following:

1. *"You have the right to remain silent.*
2. *Anything you say can and will be used against you in a court of law.*
3. *You have the right to talk to a lawyer and have him present with you while you are being questioned.*
4. *If you cannot afford to hire a lawyer, one will be appointed to represent you, before any questioning, if you wish one.*
5. *You can decide at any time to exercise these rights and not answer any questions or make any statements."*

That after informing the person named above of the foregoing, I asked him if he understood the rights that I had stated, to which he replied: "YES I DO"

That I then asked him if, having in mind and understanding his rights, he was willing to talk to me, to which he replied: "YA, I'LL TALK TO YOU"

That the above answers were given freely and voluntarily, without the making of any threats or promises, and not under duress, pressure or coercion of any kind.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at 01:17HRS.AM. on 08.06. 2009.

Signature of Officer

100.001 Revised 9/02/97 DMR

EXHIBIT 2

6236542

DEFENDANTS STATEMENT

Honorable Judge Wagner 09-CR-00802

My name is David Craig Morton. I was convicted of second degree murder in the death of my wife Cynthia Ann. My being responsible for Her death is eating away at me and leaving me in such pain and sorrow that there are no words to describe it

the pain and suffering that I have caused our Family is over-whelming. My remorse and shame for causing these great people to hurt so bad, feels like the Universe is sitting on my chest and crushing my heart

After years of almost daily fighting and arguing, our marriage of 32 years was over. That horrible night in August was a long time in the making and I would do anything to do it over. Cindy and I loved each other for a long time, but in the end, us being together was pure poison. I love and miss her more than anyone will ever know. I have cried every day since.

It should have been me.

My heart, spirit and soul are totally broken.

Every minute of every day - it is all I think about and re-live it every night in my dreams - I would do anything to take it back. I will be devistated the rest of my life.

Our Children - Chad & Robert - have told me again and again that She forgave me - that they forgive me - I will never be able to forgive myself

May God please comfort our Family

Respectfully
David Morton

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STATE OF NEVADA
DEPARTMENT OF PUBLIC SAFETY
INTOXILYZER 5000EN CHECKLIST

INSTRUMENT SERIAL # 68-013409

AGENCY: WINNEMUCCA Police Dept CASE #: 09-0778

SUBJECT: MORTON David Craig DATE: 08-06-09

OPERATOR: Hinton, Mitchell CERTIFICATION #: N01917

If the instrument is in STANDBY (red power light is on, display is blank), press the green START TEST button.

1. If subject has removable dental work, (dentures, partial), have subject remove dental work, rinse mouth with water.

2. Check subject's mouth for foreign objects (i.e., chewing tobacco, breath mints, candy, gum, coins). If any are found, have subject remove object and rinse mouth with water.

3. TIME OBSERVATION PERIOD STARTED: 0140 HOURS Observe subject minimum 15 minutes with close visual contact. If the subject eats; drinks; smokes; burps; regurgitates; vomits; or puts any foreign object in his/her mouth, you must wait an additional 15 minutes.

4. Observation period was completed satisfactorily. Comments:

5. Ensure that the simulator solution is 34 +/- 0.5 degrees centigrade. TRANSFER INFORMATION FROM LABEL ATTACHED TO SIMULATOR TO THE BLANKS BELOW:

   CERTIFIED VALUE OF SIMULATOR SOLUTION 0.103

   LOT NUMBER OF SIMULATOR SOLUTION N-0609

6. In display window, observe READY TO START message scrolling across screen. To start the test, push the GREEN START TEST button at any time.

7. When requested, insert an evidence card into the card slot located on the front of the instrument. Make sure to insert the card face up with the sealed edge in first.

   Display will request, "ENTER START OF OBSERVATION TIME - OBSR. START=". Enter the time that observation began followed by ENTER.

9. The instrument will automatically run an air blank and a simulator test. A test cannot be administered if the simulator solution tests out of range. If this occurs, determine reason why or replace simulator solution.

10. When prompt displays "PLEASE BLOW / R INTO MOUTHPIECE UNTIL TONE STOPS" attach a clean mouthpiece and request subject blow with a long, continuous breath into the breath tube until the tone stops. If subject is not willing to provide a sample, press "R" key followed by ENTER. The instrument will not accept this command until after the beep is heard and "PLEASE BLOW / R" is flashing on the display.

11. When prompt again displays "PLEASE BLOW / R INTO MOUTHPIECE UNTIL TONE STOPS" attach a clean mouthpiece and request subject blow into the mouthpiece until the tone stops. If subject is not willing to provide a sample, press "R" key followed by ENTER. The instrument will not accept this command until after the beep is heard and "PLEASE BLOW / R" is flashing on the display.

12. If the two samples do not agree within 0.020, the instrument will automatically request another sample be given. When requested, have subject deliver a third sample.

13. Display will request "SUB LAST NAME". Enter subject's last name followed by ENTER. Answer subsequent test data entry questions.

14. Instrument will automatically print out the test results. REMOVE TEST PRINTOUT and SIGN. CORRECT THE TIME / DATE ON EVIDENCE CARD IF NECESSARY. INITIAL THE CHANGES. Record necessary information below and in the D.U.I. LOGBOOK

RESULTS: REF. STD. (SIMULATOR TEST) 0.107

TEST #1 .276 TEST #2 .266 TEST #3 N/A

ATTACH TEST/RECORD

I HAVE FOLLOWED THE PROCEDURES OUTLINED ABOVE.

OPERATOR'S SIGNATURE

D-202
(Rev. 06/06)

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Karla K. Butko, 1030 Holcomb Avenue, Reno, NV 89502, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

_____ Reno/Carson Messenger Service

addressed as follows:

MICHAEL MACDONALD, ESQ.
ANTHONY GORDON, ESQ.
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

DATED this 10th day of September, 2019.

KARLA K. BUTKO

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED this 10th day of September, 2019.

KARLA K. BUTKO, ESQ.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Case No. CV 18,803

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

DAVID CRAIG MORTON,

Petitioner,

vs.

Dwight Nevin, Warden
High Desert State Prison,

THE STATE OF NEVADA

Respondents.
_____/

RESPONDENT'S RESPONSE TO PETITIONER'S PETITION FOR MOTION TO MODIFY AND/OR CORRECT ILLEGAL SENTENCE; PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION); AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

COMES NOW, the County of Humboldt, Plaintiff, by and through Anthony R. Gordon, Humboldt County Deputy District Attorney, and hereby files this response to Petitioner's Petition for Motion to Modify and/or Correct an Illegal Sentence; Petition for Writ of Habeas Corpus (Post-Conviction); and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). This Response is based upon the attached Points and Authorities and all the pleadings and papers on file herein.

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

DATED this 1st day of October, 2021.

ANTHONY R. GORDON
Deputy District Attorney

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POINTS AND AUTHORITIES

I.
FACTS

On September 22, 2010, Petitioner was found guilty after a jury trial for one count of Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165,* and one count of Discharging a Firearm from Within or From a Structure, a Category B Felony, in violation of *NRS 202.287*(b).[1] The facts of this case arose on or about August 6, 2006, at 1565 Harmony Road, in Winnemucca, Humboldt County, Nevada, where the Petitioner shot his wife, Cynthia Morton, in the abdomen with a rifle, causing her death.[2]

As a matter of procedural history, the Judgment of Conviction in the present case was filed on July 20, 2011. There was no direct appeal taken in this case. On December 29, 2011, Petitioner filed in pro-per, a Petition for Motion to Modify and/or Correct an Illegal Sentence, as well as a Writ of Habeas Corpus (Post-Conviction). Subsequently, on January 13, 2012, Hy Forgeron, Esq. of Battle Mountain, Nevada was appointed as counsel for Petitioner and ordered to respond by filing a Supplemental Petition for a Writ of Habeas Corpus, if needed. The Court record indicates that Hy Forgeron had failed to file any documents in this case, on behalf of Petitioner, but that on April 6, 2012, Petitioner filed in pro-per, while still represented by Hy Forgeron, Esq., a Notice of Intent to Appeal Verdict in the present case, which the Nevada Supreme Court subsequently ordered dismissed for lack of jurisdiction in May 23, 2012, with a Remitter later being filed by the Nevada Supreme Court on May 22, 2012. Between the time of the Remitter in this case by the Nevada Supreme Court on May 23, 2012, and until March 30,

[1] See Information filed in this matter on October 22, 2009.

[2] *Id.*

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2015, when Hy Forgeron, Esq, filed a Motion to Withdraw and for Appointment of Substitute Counsel, there does not appear for unknown reasons, to be any supplemental responsive Petition for a Writ of Habeas Corpus filed by Petitioner's appointed attorney Hy Forgeron, Esq., or later by the law firm of Lockie and MacFarlan in Elko, Nevada, who were then appointed to represent the Petitioner by Judge Jim C. Shirley on March 30, 2015. As a result, it was not until September 19, 2019, after Petitioner's present counsel was appointed on June 11, 2019, that a Supplemental Petition for a Writ of Habeas Corpus (Post-Conviction) was filed on September 10, 2019 long after the Respondent's original trial attorneys Richard Molezzo, Esq., and Del Hardy, Esq.[3] had left the case, and the subsequently assigned deputy district attorney was no longer employed by the Humboldt County (NV) District Attorney's Office.[4]

Thereafter, both sides attempted in good faith to reach an amicable resolution of the issues in this case over the past year during the COVID-19 epidemic, but have been unable to do so, and talks have since broken down in this regard as to the issues raised in *Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed on filed on September 10, 2019*. As a result, the Respondent now files its response to *Petitioner's Pro-Per Petition for Motion to Modify and/or Correct an Illegal Sentence filed on December 29, 2011*; *Petitioner's Pro-Per Petition for Writ of Habeas Corpus (Post-Conviction), filed on December 29, 2011*; and

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[3] In Respondent's response here for ease of reference, the word trial counsel shall refer to both Richard Molezzo, Esq., and Del Hardy, Esq., together and individually, as to their actions or inactions in this case.

[4] In the present case, Respondent State's response is directed to the issues contained in *Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed on September 10, 2019*, and essentially overlap some of the inartful issues raised in Petitioner's Pro-Per *Petition for Motion to Modify and/or Correct an Illegal Sentence, filed on December 29, 2011*, as well his initial *Writ of Habeas Corpus (Post-Conviction, filed on December 29, 2011*. To the extent that Petitioner's allegations and issues previously raised his *Petition for Motion to Modify and/or Correct an Illegal Sentence, filed on December 29, 2011*, and his initial *Writ of Habeas Corpus (Post-Conviction, filed on December 29, 2011*, do not overlap and are contained in *Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed on September 10, 2019*, they are denied in their entirety by Respondent as lacking legal merit.

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Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed on September 10, 2019, in order to allow this matter to proceed to resolution. Since Petitioner's Pro-Per initial *Petition for Writ of Habeas Corpus (Post-Conviction) was filed on December 29, 2011*, his Petition is timely within the one-year statutory limitation of *NRS 34.726*.

II.
LEGAL ARGUMENT

As grounds for the Petitioner's *Supplemental Writ of Habeas Corpus (Post-Conviction) filed on September 10, 2019*, he pleads nine separate grounds of ineffective assistance of counsel in violation of the 6th and 14th Amendments to the United States Constitution. Moreover, the Nevada Supreme Court has held in *McConnell v. State*, 125 Nev. 243,212 P.3d 307 (2009), that a post-conviction habeas petitioner is entitled to a post-conviction evidentiary hearing when they assert claims supported by specific factual allegations not belied by the record that, if true, would entitle them to relief. *See Mann v. State*, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002); *see Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). This is not the case here because a review of Petitioner's claims in his *Supplemental Writ of Habeas Corpus (Post-Conviction) filed on September 10, 2019*, are groundless and are not supported factually by the record in this case or legally under relevant Nevada Statutory and Federal and State Constitutional law. As a result, the Petitioner's *Supplemental Writ Petitions for a Writ of Habeas Corpus (Post-Conviction), filed on September 10, 2019,* should be denied in its entirety after the evidentiary hearing herein. For ease of reference, each substantive allegation will be dealt with individually as noted below.

III.
ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL (GROUNDS 1-9)

Petitioner alleges nine main allegations of ineffective assistance of counsel in violation of his 6th and 14th Amendments to the U.S. Constitution. While the Sixth Amendment to the United

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States Constitution guarantees effective assistance of counsel at trial, in order to establish a claim of ineffective assistance of counsel, the Petitioner must first show that counsel's performance fell beneath "an objective standard of reasonableness" as stated in *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Only when the Petitioner has shown that counsel's performance fell beneath "an objective standard of reasonableness" and a deficiency therefore exists, the Petitioner must then show, but for his counsel's deficiency, a different result would have been had at trial. *Id* at 694; *Rubio v. State,* 124 Nev 1032, 1040, 194 P.3d 1224, 1229 (2008).

In order to establish an objective standard of reasonableness, the Court must look to the "prevailing professional norms" of legal practice, *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Additionally, effectiveness does not mean errorless and courts have noted that effectiveness means performance "within the range of competence demanded of attorneys in criminal cases." *Jackson v. Warden, Nev. State Prison*, 91 Nev. 430, 43[2], 537 P,2d 473, 474 (1975) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)). Courts have noted that effectiveness encompasses making "sufficient inquiry into the information that is pertinent" to the case in order to make "a reasonable strategy decision on how to proceed with a client's case." *See Doleman v, State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (*citing Strickland*, 466 U.S. at 690-91). Furthermore, courts have held that strategic decisions made by trial counsel are assumed to be intentional and are "virtually unchallengeable." *Doleman,* 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), strategic decisions based on an incomplete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91).

Secondarily, even if a Petitioner can establish deficient performance of his trial counsel, he must then establish "prejudice" by a showing that counsel's errors were so serious as to

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deprive the defendant of a fair trial, a trial whose result is reliable. (*Id.* at 687.) Proving prejudice requires the defendant to "show that there is a reasonable probability that, "but" for counsel's unprofessional errors, the result of the proceeding would have been different. In these situations, reasonable probability is defined as "a probability sufficient to undermine the confidence of the outcome" with a court hearing claims of ineffective assistance of counsel considering the totality of the evidence in determining prejudice. *Id.*

Third, as to claims of ineffective assistance of trial counsel at the sentencing proceeding. according to the Nevada Supreme Court in *Oliver,* to state a claim of ineffective assistance of counsel sufficient to warrant a new sentencing hearing, a petitioner must demonstrate that that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Oliver, supra* 281 P.3d at 1206, citing *Strickland v. Washington,* 466 U.S. at 694; and *Weaver v. Warden,* 107 Nev. 856, 858–59, 822 P.2d 112).

Finally, in *Morales v. State* (Nev., 2018) the Court held that to prove ineffective assistance of appellate counsel a petitioner "must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal," *citing Kirksey v. State,* 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996), *Morales, supra* at page 8. The *Morales* court further noted that "Appellate counsel is not required to raise every non-frivolous issue on appeal," *citing Jones v. Barnes,* 463 U.S. 745, 751 (1983), and that "[r]ather, appellate counsel will be most effective when every conceivable issue is not raised on appeal," *citing Ford v. State,* 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), *Morales, supra* at page 8. Thirdly, the *Morales* court also noted that "[b]oth components of the inquiry must be shown," citing

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Strickland v. Washington, 466 U.S. 668, 697 (1984), and that they will "give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo," *citing Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), *Morales, supra* at page 9.

In the present situation, the Petitioner has not shown and the record does not reflect, a "deficient" level of performance of his trial counsel needed to overturn his convictions under the standard laid down by the U.S. Supreme Court in *Strickland, supra,* nor has he shown that for such trial's counsel's deficiency, he has been prejudiced to the extent that a different result would have occurred, *Strickland, supra* at 694; *Rubio v. State,* 124 Nev 1032, 1040, 194 P.3d 1224, 1229 (2008).

A: Ineffective Assistance of Counsel Allegations - Purported Plea Offer Prior to Trial-Ground 1:

The Petitioner's first allegation for ineffective assistance of counsel is that his trial counsel was ineffective when he advised the Petitioner to reject the Respondent State's plea offer to Second Degree Murder with a sentence of ten to twenty-five years in prison, and that he would have accepted the offer if his trial counsel had adequately advised him of the plea offer or properly evaluated the case. (*See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed September 10, 2019, page 11*). The record however, is devoid of any evidence to support this claim and no affidavit of Petitioner's Trial Counsel, or even Petitioner himself, has been submitted to support it, especially as to the fact of his trial counsel's alleged statement, that "he would be guaranteed a sentence of four years." (*See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed September 10, 2019, page 12*). Furthermore, statements attributed to his trial counsel that he said on three separate occasions that "this case would definitely go to trial," says absolutely nothing about any failure to disclose any plea offers to the Petitioner.

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In *Lee v. US*, 582 U.S.,137 S. Ct. 1958, (2017), the U.S. Supreme Court in holding that the defendant there was prejudiced by his counsel's erroneous advice, noted:

> "A claim of ineffective assistance of counsel will often involve a claim of attorney error "during the course of a legal proceeding" — for example, that counsel failed to raise an objection at trial or to present an argument on appeal. *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). A defendant raising such a claim can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 482, 120 S.Ct. 1029 (quoting *Strickland,* 466 U.S., at 694, 104 S.Ct. 2052; internal quotation marks omitted). But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Flores-Ortega,* 528 U.S., at 483, 120 S.Ct. 1029. When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place." *Id.,* at 482-483, 120 S.Ct. 1029 (internal quotation marks omitted). We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding ... to which he had a right." *Id.,* at 483, 120 S.Ct. 1029. As we held in *Hill v. Lockhart,* when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S., at 59, 106 S.Ct. 366. *(See Lee v. US,* 137 S. Ct. at 1964-1965).

In the present case, the key fact here is that Petitioner exercised his right to have a jury trial, and as the U.S. Supreme Court noted in *Lee, supra*, there is "a strong presumption of reliability to judicial proceedings," and also compared to *Lee, supra,* Petitioner here was not prejudiced by the "denial of the entire judicial proceeding ... to which he had a right." (*Emphasis original*). *See Lee v. US*, 137 S. Ct. at 1965. Furthermore, similar to the case in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839, (2008), Petitioner never indicated to the Court, before his trial in September of 2010, that he desired to plead guilty or that his trial counsel prevented him from doing so, nor does Petitioner contend that his trial counsel failed to approach the State with a specific plea offer or that a specific offer was ever made by the State. *See Nika v. State*, 198 P.3d

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supra at 852. As a result, in the present case, the record does not reflect, a "deficient" level of performance of his trial counsel, nor has he shown that for such trial's counsel's deficiency, he has been prejudiced to the extent that a different result would have occurred, and having failed to meet either of his burdens under the two prong *Strickland standard, supra*, Petitioner's first allegation in ineffective assistance of counsel must fail.[5]

B: Ineffective Assistance of Counsel Allegations - Improper Jury Instructions-Ground 2:

Petitioner next assets that both his trial counsel and appellate counsel were ineffective for failing to ensure that the jury was adequately instructed, in that they were not advised that the State had the burden to prove the absence of provocation beyond a reasonable doubt, thus reducing the States burden of proof and this depriving the Petitioner of his rights under the 5th, 6th and 14tth Amendments to the United States Constitution. (*See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed September 10, 2019, page 13*).

Under *Higgs v. State*, 126 Nev. 1, 222 P.3d 648, (2010) the Nevada Supreme Court noted that district courts have "broad discretion to settle jury instructions" *citing Cortinas v. State,* 124 Nev., 195 P.3d 315, 319 (2008), and that the Court is limited to inquiring whether there was an abuse of discretion or judicial error, *Higgs v. State, supra* at 661. In the present case, the Petitioner has not shown why the entire set of instructions given by the Court in this case does not show that the State was not required to meet its burden on all the elements of all the crimes that he was charged with, especially that of Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165* and its lesser included offenses of Voluntary Manslaughter and

[5] Since there is no evidence that any plea offers of second degree murder with a sentence of ten to twenty-five years in prison were offered in this case prior to the trial in this matter in September of 2010, despite a diligent search of the State's case file, as well as what was available from Respondent's trial counsel's file, and the State does not offer any such purported plea offer in this case in this matter.

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Involuntary Manslaughter. (*See Jury Instructions 9,24-28 in Morton v. State*, CR09-5709 (2010). Furthermore, the record here reveals that the jury was instructed on the definition of Voluntary Manslaughter, the definition of heat of passion, along with the specific elements of Voluntary Manslaughter, with the fact that the State had to prove that the Petitioner, "after having a serious and highly provoking injury inflicted upon himself sufficient to excite an irresistible passion in a reasonable person, or an attempt on the person killed to commit a serious personal injury on the person killing." (*See Jury Instructions 24-26 in Morton v. State*, CR09-5709 (2010) (See also Order of Affirmance in *Brown v. State,* 281 P.3d 1157 (Nev. 2009)(The district court found that there was "virtually no chance that a jury could have found manslaughter based on the evidence adduced at trial," c*iting* to *Doyle v. State,* 116 Nev. 148, 156, 995 P.2d 465, 470 (2000)).

In the present case, Petitioner has failed to show why the Court's failure to give an individualized jury instruction that the State had to prove the abuse of provocation beyond reasonable doubt, was an abuse of the trial court's discretion, especially since it was not sought by his trial counsel, and all the elements of Voluntary and Involuntary Manslaughter were sufficiently covered in other jury instructions that were in fact give in this case. (*See Jury Instructions 26,28 in Morton v. State*, CR09-5709 (2010)., As a result, therefore this allegation must fail under *Higgs, supra.*

Additionally, Petitioner has failed to show that the decision of his trial counsel to not pursue a jury instruction that the State had to prove the abuse of provocation beyond reasonable doubt, was not a normal strategic decision made by his trial counsel, which are assumed to be intentional and are "virtually unchallengeable," under *Doleman, supra. See also Johnson v. State*, 133 Nev. Adv. Op. 73, 133 Nev. 571, 402 P.3d 1266 (2017). Moreover, in *Morales v. State* (Nev., 2018), the Court held that to prove ineffective assistance of appellate counsel, a petitioner "must demonstrate that counsel's performance was deficient in that it fell below an

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objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal," *citing Kirksey v. State,* 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996), *Morales, supra* at page 8. Petitioner here has not shown that his appellee counsel's ultimate decision not to pursue an appeal in this case reflected a "deficient" level of performance of his appellate counsel, nor has he shown that for such trial's counsel's deficiency, he has been prejudiced to the extent that a different result would have occurred on appeal, and that this specific issue, as well as the others he now asserts should have been raised on appeal, would have had any reasonable probability of success on appeal. *See Kirksey, supra.*

As a result, having failed to meet either of his burdens under the two prong *Strickland standard, supra,* Petitioner's second allegation in ineffective assistance of counsel must fail as well.

C: Ineffective Assistance of Counsel Allegations – Presentence Report-Ground 3:

Petitioner next alleges in general terms that the Presentence Report in this case was outrageous, but trial counsel failed to object on the record at the time of sentencing to what is now alleged to be unsubstantiated claims, and the *Supplemental Petition for Writ of Habeas Corpus (Post Conviction) filed on September 10, 2019*, simply fails to do much more. *See Supplemental Petition for Writ of Habeas Corpus (Post Conviction) filed on September 10, 2019, pages 14-15.* The law is clear in this area, as stated by the Nevada Supreme Court in *Denson v. State,* 112 Nev. 68, 915 P.2d 284,286 (1996), that the Nevada Supreme Court will only reverse a sentence if is *supported solely* by improbable and highly suspect evidence. (*Emphasis added*). *See Denson v. State, supra* 915 P.2d at 286. As the Nevada Supreme Court in *Denson vs. State, supra* noted:

> "Few limitations are imposed on a judge's right to consider evidence in imposing a sentence, and courts are generally free to consider information extraneous to the presentencing report. *See United States v. Tragg,* 392 F.2d 860, 864 (7th Cir.1968); *United States v. Schipani,* 315 F.Supp. 253, 257-60 (E.D.N.Y.1970). Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of

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> determining the type and extent of punishment. *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949). Further, a sentencing proceeding is not a second trial, and the court is privileged to consider facts and circumstances that would not be admissible at trial. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). A district court is vested with wide discretion regarding sentencing, but this court will reverse a sentence if it is supported *solely* by impalpable and highly suspect evidence. *Renard v. State*, 94 Nev. 368, 369, 580 P.2d 470, 471 (1978); *Silks*, 92 Nev. at 94, 545 P.2d at 1161."
>
> *See Denson v. State, supra* 915 P.2d at 286.

In the present case, Petitioner has failed to show that Petitioner's trial counsel fell below an objective standard of reasonableness under the "prevailing professional norms" of legal practice, yet alone establishing "prejudice" by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). *See also Strickland, supra* 466 U.S. at 687. Additionally, effectiveness does not mean errorless and courts have noted that effectiveness means performance "within the range of competence demanded of attorneys in criminal cases." *Jackson v. Warden, Nev. State Prison*, 91 Nev. 430, 43[2], 537 P,2d 473, 474 (1975) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Moreover, which parts of a Presentence Report to highlight at sentencing falls into strategic decisions that are made by trial counsel and are assumed to be intentional and are "virtually unchallengeable." *See Doleman*, 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), strategic decisions based on an incomplete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91). As a result, Petitioner has failed again to meet either of his burdens under the two prong *Strickland standard, supra*, and Petitioner's third allegation in ineffective assistance of counsel must fail as well.

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D: Ineffective Assistance of Counsel Allegations – Sentencing-Ground 4:

Petitioner next alleges a series of perceived mistakes by his trial counsel at his sentencing, but all four of them, individually or taken together cumulatively, fail to show that Petitioner's trial counsel's performance was not "within the range of competence demanded of attorneys in criminal cases." *See Jackson v. Warden, Nev. State Prison*, 91 Nev. 430, 432, 537 P,2d 473, 474 (1975) (*quoting McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Moreover, Petitioner has not established "prejudice" by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *See Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (*quoting Strickland*, 466 U.S. at 688). In the same situation as Petitioner's Ineffective Assistance of Counsel allegations, as noted in ground 3 above, Petitioner's trial counsel's decisions here fall into strategic decisions that made by trial counsel that are assumed to be intentional and are "virtually unchallengeable." *See Doleman,* 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

The Nevada Supreme Court has previously ruled that the sentencing judge has wide discretion in imposing a sentence, and that this determination will not be overruled absent a showing of abuse of discretion, *Norwood v. State*, 112 Nev. 438, 915 P.2d 177 (1996), citing *Houk v. State,* 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Additionally, a sentencing court is often privileged to consider facts and circumstances which would clearly not be admissible at trial, even uncharged or past misconduct which happens in most sentencing proceedings. *Silks v. State,* 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). Furthermore, while a district court has wide discretion to consider prior uncharged crimes during sentencing, the sentencing court must refrain from punishing a defendant for prior uncharged crimes. *See Sheriff v. Morfin,* 107 Nev. 557, 561, 816 P.2d 453, 455 (1991); *see also Riker v. State,* 111 Nev. 1316, 1326-27, 905 P.2d 706, 712-13 (1995). "Consideration of those crimes is solely for the purpose of gaining a fuller

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assessment of the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Denson v. State,* 112 Nev. 489, 494, 915 P.2d 284, 287 (1996) (*quoting Williams v. New York,* 337 U.S. 241, 245 (1949)).

In the present case, there is no indication, that the Petitioner was punished solely for any prior uncharged crimes, including that of domestic violence; the sentencing court acted within its discretion to receive an unsworn victim impact statement; and nor was his sentence in violation of the Eight Amendment to the U.S. Constitution. (*See Blume v. State*, 112 Nev. 472, 915 P.2d 282 (1996)(A sentence within the statutory limits is not "cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience," *quoting Culverson v. State,* 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979);(*Harmelin v. Michigan*, 501 U.S. 575, 1000-1001 (1991) (plurality opinion), explaining that the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime). (*See also Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998,1000 (2001)("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.").

Furthermore, all Petitioner can point to for support of his ground 4 in his *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) filed on September 10, 2019,* are basically assertions that Judge Wagner, as the sentencing judge, did not agree with his version of the facts, which certainly does not arise to the level of improbable and highly suspect evidence, which is required under *Denson v. State, supra,* where a reversal of a sentence would then be required. Moreover, while the Petitioner certainly has the right to an allocation before the sentencing judge, the present case is clearly distinguishable from *Brake v. State*, 113 Nev. 579, 939 P.2d 1029 (1997), since in *Brake, supra,* the district court relied primarily on the defendant's lack of

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X E-Flex Delivery System of the Nevada Supreme Court

____ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

addressed as follows:

MICHAEL McDONALD DISTRICT ATTORNEY
ANTHONY GORDON, DEPUTY DISTRICT ATTORNEY
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

DATED this 25th day of March, 2022.

Karla K. Butko

KARLA K. BUTKO, ESQ.