

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

2
3 **No. 85782**

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Elizabeth A. Brown
Clerk of Supreme Court

4 **JUSTIN D. PORTER**

5 Appellant,

6 v.

7 **THE STATE OF NEVADA**

8 Respondent.

9
10
11 Appeal from a Judgment of Conviction
12 Eighth Judicial District Court, Clark County
13 The Honorable Jacqueline Bluth, District Court Judge
14 District Court Case No. 01C174954

15 **APPELLANT'S APPENDIX**
16 **VOLUME I**

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● ORIGINAL ●

24

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DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
APR 26 2 00 PM '01
Shirley L. Langston
CLERK

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 JUSTIN D. PORTER, aka Jug Capri Porter,
16 #1682627

17 Defendant.

Case No. C 174954
Dept. No. XVI
Docket U

INFORMATION

18 STATE OF NEVADA }
19)ss:
20 COUNTY OF CLARK }

21 STEWART L. BELL, District Attorney within and for the County of Clark, State of
22 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

23 That JUSTIN D. PORTER, aka Jug Capri Porter, the Defendant(s) above named, having
24 committed the crimes of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON
25 (Felony - NRS 205.060, 193.165), FIRST DEGREE KIDNAPPING WITH USE OF A
26 DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165), SEXUAL ASSAULT WITH
27 USE OF A DEADLY WEAPON (Felony - NRS 200.364, 200.366, 193.165), ROBBERY WITH
28 USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165), FIRST DEGREE
29 KIDNAPPING WITH USE OF A DEADLY WEAPON WITH SUBSTANTIAL BODILY
30 HARM (Felony - NRS 200.310, 200.320, 193.165), SEXUAL ASSAULT WITH USE OF A
31 DEADLY WEAPON WITH SUBSTANTIAL BODILY HARM (Felony - NRS 200.364,
32 200.366, 193.165), ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony -

COUNTY CLERK

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AA 0001

1 NRS 200.010, 200.030, 193.330, 193.165), FIRST DEGREE ARSON WITH USE OF A
2 DEADLY WEAPON (Felony - NRS 205.010, 193.165), FIRST DEGREE KIDNAPPING
3 WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Felony -
4 NRS 200.310, 200.320, 193.165, 193.167), SEXUAL ASSAULT WITH USE OF A DEADLY
5 WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Felony - NRS 200.364, 200.366,
6 193.165, 193.167), ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS
7 OF AGE OR OLDER (Felony - NRS 200.380, 193.165, 193.167), BATTERY WITH INTENT
8 TO COMMIT A CRIME, VICTIM 65 YEARS OF AGE OR OLDER (Felony - NRS 200.400,
9 193.167), ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS
10 200.380, 193.165, 193.330), MURDER WITH USE OF A DEADLY WEAPON (OPEN
11 MURDER), (Felony - NRS 200.010, 200.030, 193.165) and BATTERY WITH USE OF A
12 DEADLY WEAPON (Felony - NRS 200.481), on or between February 1, 2000 and June 9,
13 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of
14 statutes in such cases made and provided, and against the peace and dignity of the State of
15 Nevada,

16 COUNT I -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

17 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
18 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
19 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
20 building occupied by TERESA TYLER, located at 2895 East Charleston Boulevard, Apartment
21 No. 1016 therein, Las Vegas, Clark County, Nevada.

22 COUNT II - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

23 did, on or about February 1, 2000, wilfully, unlawfully, feloniously, and without authority
24 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away TERESA
25 TYLER, a human being, with the intent to hold or detain the said TERESA TYLER, against her
26 will, and without her consent, for the purpose of committing robbery and/or sexual assault, said
27 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

28 ///

1 COUNT III - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

2 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
3 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
4 sexual intercourse, by inserting his penis into the vagina of the said TERESA TYLER, against
5 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
6 crime.

7 COUNT IV - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

8 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
9 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
10 sexual intercourse, by inserting his penis into the vagina of the said TERESA TYLER, against
11 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
12 crime.

13 COUNT V - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

14 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
15 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
16 fellatio, by placing his penis in or on the mouth of the said TERESA TYLER, against her will,
17 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

18 COUNT VI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

19 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
20 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
21 fellatio, by placing his penis in or on the mouth of the said TERESA TYLER, against her will,
22 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

23 COUNT VII - ROBBERY WITH USE OF A DEADLY WEAPON

24 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
25 take personal property, to wit: lawful money of the United States, from the person of TERESA
26 TYLER, or in her presence, by means of force or violence or fear of injury to, and without the
27 consent and against the will of the said TERESA TYLER, said Defendant using a deadly
28 weapon, to wit: a knife, during the commission of said crime.

1 COUNT VIII -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

2 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously
3 enter, while in possession of a deadly weapon, to wit: scissors and/or a knife, with intent to
4 commit larceny, and/or a felony, to wit: sexual assault and/or robbery and/or any other felony,
5 that certain building occupied by LEONA CASE, located at 2900 East Charleston Boulevard,
6 Apartment No. 50 therein, Las Vegas, Clark County, Nevada.

7 COUNT IX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH
8 SUBSTANTIAL BODILY HARM

9 did, on or about March 7, 2000, wilfully, unlawfully, feloniously, and without authority
10 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away LEONA
11 CASE, a human being, with the intent to hold or detain the said LEONA CASE, against her
12 will, and without her consent, for the purpose of committing robbery and/or sexual assault, said
13 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime, resulting
14 in substantial bodily harm to the said LEONA CASE.

15 COUNT X - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH
16 SUBSTANTIAL BODILY HARM

17 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously
18 sexually assault and subject LEONA CASE, a female person, to sexual penetration, to-wit:
19 sexual intercourse, by inserting his penis into the vagina of the said LEONA CASE, against her
20 will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime,
21 resulting in substantial bodily harm to the said LEONA CASE.

22 COUNT XI- ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

23 did, on or about March 7, 2000, then and there, without authority of law, and with
24 premeditation and deliberation, and with malice aforethought, wilfully and feloniously attempt
25 to kill LEONA CASE, a human being, by stabbing at or into the body of the said LEONA CASE
26 with a deadly weapon, to wit: a knife, and by choking the said LEONA CASE around the neck
27 with a phone cord, and/or by the Defendant thereafter locking LEONA CASE in her bathroom
28 and setting her apartment on fire, said Defendant using a deadly weapon, to wit: knife, during
the commission of said crime.

1 COUNT XII - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH
2 SUBSTANTIAL BODILY HARM

3 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously
4 sexually assault and subject LEONA CASE, a female person, to sexual penetration, to-wit:
5 sexual intercourse, by inserting his penis into the vagina of the said LEONA CASE, against her
6 will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
7 crime, resulting in substantial bodily harm to the said LEONA CASE.

8 COUNT XIII - ROBBERY WITH USE OF A DEADLY WEAPON

9 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously take
10 personal property, to wit: lawful money of the United States and/or jewelry and/or food stamps,
11 from the person of LEONA CASE, or in her presence, by means of force or violence or fear of
12 injury to, and without the consent and against the will of the said LEONA CASE, said Defendant
13 using a deadly weapon, to wit: a knife, during the commission of said crime.

14 COUNT XIV- FIRST DEGREE ARSON WITH USE OF A DEADLY WEAPON

15 did, on or about March 7, 2000, then and there willfully, unlawfully, maliciously and
16 feloniously set fire to, and thereby cause to be burned, a certain apartment, located at 2900 East
17 Charleston Boulevard, Apartment No. 50 therein, Las Vegas, Clark County, Nevada, said
18 property being then and there the property of LEONA CASE, by use of open flame and
19 flammable and/or combustible materials, and/or by manner or means unknown, said Defendant
20 using a deadly weapon, to wit: a knife, during the commission of said crime.

21 COUNT XV -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

22 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously
23 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
24 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
25 building occupied by RAMONA LEYVA, located at 600 East Bonanza Avenue, Apartment No.
26 114 therein, Las Vegas, Clark County, Nevada.

27 COUNT XVI - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

28 did, on or about March 25, 2000, wilfully, unlawfully, feloniously, and without authority

1 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away RAMONA
2 LEYVA, a human being, with the intent to hold or detain the said RAMONA LEYVA, against
3 her will, and without her consent, for the purpose of committing robbery and/or sexual assault,
4 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

5 COUNT XVII - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

6 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously
7 sexually assault and subject RAMONA LEYVA, a female person, to sexual penetration, to-wit:
8 sexual intercourse, by inserting his penis into the vagina of the said RAMONA LEYVA, against
9 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
10 crime.

11 COUNT XVIII - ROBBERY WITH USE OF A DEADLY WEAPON

12 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously take
13 personal property, to wit: car keys and/or a 1980 Buick, bearing Nevada license no. 657 KMC,
14 from the person of RAMONA LEYVA, or in her presence, by means of force or violence or fear
15 of injury to, and without the consent and against the will of the said RAMONA LEYVA, said
16 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

17 COUNT XIX - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

18 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously enter,
19 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
20 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
21 occupied by MARLENE LIVINGSTON, located at 2301 Clifford, Las Vegas, Clark County,
22 Nevada.

23 COUNT XX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON,
24 VICTIM 65 YEARS OF AGE OR OLDER

25 did, on or about April 4, 2000, wilfully, unlawfully, feloniously, and without authority
26 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away
27 MARLENE LIVINGSTON, a human being 65 years of age or older, with the intent to hold or
28 detain the said MARLENE LIVINGSTON, against her will, and without her consent, for the

1 purpose of committing robbery and/or sexual assault, said Defendant using a deadly weapon, to
2 wit: a knife, during the commission of said crime.

3 COUNT XXI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, VICTIM 65
4 YEARS OF AGE OR OLDER

5 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously
6 sexually assault and subject MARLENE LIVINGSTON, a female person being 65 years of age
7 or older, to sexual penetration, to-wit: fellatio, by placing his penis in or on the mouth of the
8 said MARLENE LIVINGSTON, against her will, said Defendant using a deadly weapon, to wit:
9 a knife, during the commission of said crime.

10 COUNT XXII - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF
11 AGE OR OLDER

12 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously take
13 personal property, to wit: lawful money of the United States and/or jewelry and/or car keys
14 and/or a 1991 Dodge, bearing Nevada license no. 728 ENB, from the person of MARLENE
15 LIVINGSTON, a person 65 years of age or older, or in her presence, by means of force or
16 violence or fear of injury to, and without the consent and against the will of the said MARLENE
17 LIVINGSTON, said Defendant using a deadly weapon, to wit: a knife, during the commission
18 of said crime.

19 COUNT XXIII - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

20 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously
21 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
22 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
23 building occupied by CLARENCE AND FRANCIS RUMBAUGH, located at 436 North 12th
24 Street, Apartment No. B therein, Las Vegas, Clark County, Nevada.

25 COUNT XXIV - BATTERY WITH INTENT TO COMMIT A CRIME, VICTIM 65 YEARS
26 OF AGE OR OLDER

27 did, on or about April 12, 2000, did then and there wilfully, unlawfully, and feloniously
28 use force or violence upon the person of another, to-wit: CLARENCE RUMBAUGH, a human

1 being 65 years of age or older, with intent to commit robbery and/or sexual assault, by grabbing
2 and/or pushing and/or throwing the said CLARENCE RUMBAUGH.

3 COUNT XXV - BATTERY WITH INTENT TO COMMIT A CRIME, VICTIM 65 YEARS
4 OF AGE OR OLDER

5 did, on or about April 12, 2000, did then and there wilfully, unlawfully, and feloniously
6 use force or violence upon the person of another, to-wit: FRANCIS RUMBAUGH, a human
7 being 65 years of age or older, with intent to commit robbery and/or sexual assault, by grabbing
8 and/or pushing and/or throwing the said FRANCIS RUMBAUGH.

9 COUNT XXVI - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF
10 AGE OR OLDER

11 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously take
12 personal property, to wit: lawful money of the United States, from the person of CLARENCE
13 RUMBAUGH, a person 65 years of age or older, or in his presence, by means of force or
14 violence or fear of injury to, and without the consent and against the will of the said
15 CLARENCE RUMBAUGH, said Defendant using a deadly weapon, to wit: a knife, during the
16 commission of said crime.

17 COUNT XXVII - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS
18 OF AGE OR OLDER

19 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously take
20 personal property, to wit: lawful money of the United States, from the person of FRANCIS
21 RUMBAUGH, a person 65 years of age or older, or in her presence, by means of force or
22 violence or fear of injury to, and without the consent and against the will of the said FRANCIS
23 RUMBAUGH, said Defendant using a deadly weapon, to wit: a knife, during the commission
24 of said crime.

25 COUNT XXVIII -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

26 did, on or about June 6, 2000, then and there wilfully, unlawfully, and feloniously enter,
27 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
28 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building

1 occupied by LEROY FOWLER, located at 1121 East Ogden, Apartment No. 9 therein, Las
2 Vegas, Clark County, Nevada.

3 COUNT XIX -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

4 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously enter,
5 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
6 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
7 occupied by JONI HALL, located at 624 North 13th Street, Apartment No. B therein, Las
8 Vegas, Clark County, Nevada.

9 COUNT XXX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

10 did, on or about June 7, 2000, wilfully, unlawfully, feloniously, and without authority of
11 law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away JONI HALL,
12 a human being, with the intent to hold or detain the said JONI HALL, against her will, and
13 without her consent, for the purpose of committing robbery and/or sexual assault, said Defendant
14 using a deadly weapon, to wit: a knife, during the commission of said crime.

15 COUNT XXXI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

16 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously
17 sexually assault and subject JONI HALL, a female person, to sexual penetration, to-wit: sexual
18 intercourse, by inserting his penis into the vagina of the said JONI HALL, against her will, said
19 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

20 COUNT XXXII - ROBBERY WITH USE OF A DEADLY WEAPON

21 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously take
22 personal property, to wit: a Westinghouse color television and/or a Lenox portable CD player
23 and/or a baby stroller, from the person of JONI HALL, or in her presence, by means of force or
24 violence or fear of injury to, and without the consent and against the will of the said JONI
25 HALL, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
26 crime.

27 COUNT XXXIII - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

28 did, on or about June 8, 2000, then and there wilfully, unlawfully, and feloniously enter,

1 while in possession of a deadly weapon, to wit: a gun, with intent to commit larceny, and/or a
2 felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
3 occupied by GYALTSO LUNGTOK, located at 415 South 10th Street, Apartment No. H
4 therein, Las Vegas, Clark County, Nevada.

5 COUNT XXXIV - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

6 did, on or about June 8, 2000, then and there wilfully, unlawfully, and feloniously attempt
7 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
8 other property of GYALTSO LUNGTOK, from the person of GYALTSO LUNGTOK, or in his
9 presence, by means of force or violence or fear of injury to, and without the consent and against
10 the will of the said GYALTSO LUNGTOK, said Defendant using a deadly weapon, to wit: a
11 gun, during the commission of said crime.

12 COUNT XXXV - MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

13 did, on or about June 8, 2000, then and there wilfully, feloniously, without authority of
14 law, and with premeditation and deliberation and malice aforethought, kill GYALTSO
15 LUNGTOK, a human being, by shooting at and into the body of the said GYALTSO
16 LUNGTOK with use of a deadly weapon, to-wit: a gun, the Defendant being responsible under
17 one or more of the following theories of criminal liability, to-wit: 1)Premeditation and
18 deliberation: by the Defendant directly committing said felony offense as the perpetrator, and/or
19 2) Felony murder: by the Defendant committing said felony offense during the perpetration or
20 attempted perpetration of the crime(s) of burglary and/or robbery.

21 COUNT XXXVI -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

22 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously enter,
23 while in possession of a deadly weapon, to wit: a gun, with intent to commit larceny, and/or a
24 felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
25 occupied by LAURA ZAZUETA, GUADALUPE LOPEZ and BEATRIZ ZAZUETA, located
26 at 2830 East Cedar, Apartment No. 229 therein, Las Vegas, Clark County, Nevada.

27 COUNT XXXVII - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

28 did, on or about June 9, 2000, wilfully, unlawfully, feloniously, and without authority of

1 law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away LAURA
2 ZAZUETA, a human being, with the intent to hold or detain the said LAURA ZAZUETA,
3 against her will, and without her consent, for the purpose of committing robbery and/or sexual
4 assault, said Defendant using a deadly weapon, to wit: a gun, during the commission of said
5 crime.

6 COUNT XXXVIII - ROBBERY WITH USE OF A DEADLY WEAPON

7 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously take
8 personal property, to wit: lawful money of the United States, from the person of LAURA
9 ZAZUETA, or in her presence, by means of force or violence or fear of injury to, and without
10 the consent and against the will of the said LAURA ZAZUETA, said Defendant using a deadly
11 weapon, to wit: a gun, during the commission of said crime.

12 COUNT XXXIX - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

13 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously attempt
14 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
15 other property of LAURA ZAZUETA, GUADALUPE LOPEZ and/or BEATRIZ ZAZUETA,
16 from the person of GUADALUPE LOPEZ, or in his presence, by means of force or violence or
17 fear of injury to, and without the consent and against the will of the said GUADALUPE LOPEZ,
18 said Defendant using a deadly weapon, to wit: a gun, during the commission of said crime.

19 COUNT XL - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

20 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously attempt
21 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
22 other property of LAURA ZAZUETA, GUADALUPE LOPEZ and/or BEATRIZ ZAZUETA,
23 from the person of BEATRIZ ZAZUETA, or in her presence, by means of force or violence or
24 fear of injury to, and without the consent and against the will of the said BEATRIZ ZAZUETA,
25 said Defendant using a deadly weapon, to wit: a gun, during the commission of said crime.

26 COUNT XLI- ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

27 did, on or about June 9, 2000, then and there, without authority of law, and with
28 premeditation and deliberation, and with malice aforethought, wilfully and feloniously attempt

1 to kill GUADALUPE LOPEZ, a human being, by pointing a gun at the body of the said
2 GUADALUPE LOPEZ, the Defendant thereafter putting the gun to the forehead of the said
3 GUADALUPE LOPEZ and threatening to "start blasting" if he did not receive money, the
4 Defendant thereafter firing approximately three shots at the said GUADALUPE LOPEZ, striking
5 him once in the leg, the defendant using a deadly weapon, to wit: a gun, during the commission
6 of said crime.

7 COUNT XLII - BATTERY WITH USE OF A DEADLY WEAPON

8 did, on or about June 9, 2000, then and there, wilfully, unlawfully, and feloniously use
9 force and violence upon the person of another, to wit: GUADALUPE LOPEZ, with use of a
10 deadly weapon, to wit: a gun, by the Defendant shooting a gun at the said GUADALUPE
11 LOPEZ, striking him in the leg.

12 STEWART L. BELL
13 DISTRICT ATTORNEY
Nevada Bar #000477

14
15 BY 
16 DOUGLAS HERNDON
17 Chief Deputy District Attorney
Nevada Bar #004286

18 Names of witnesses known to the District Attorney's Office at the time of filing this
19 Information are as follows:

20 <u>NAME</u>	<u>ADDRESS</u>
21 ADAMS, Marian	UMC - S.A.N.E. 1800 W. Charleston Blvd. 22 Las Vegas, NV 89102
23 ANDERSON, L.	LVMPD #2780
24 ATKIN, M.	LVMPD #5409
25 AWALOM, Alemayehu	415 S. 10th Street Las Vegas, NV
26 BARNETT, Jean	624 N. 13th Street 27 Las Vegas, NV
28 BEAS, A.	LVMPD #5208

1	BERNSTEIN, Flossie	221 S. Bruce #110 Las Vegas, NV 89101
2	BOYD, F.	LVMPD #5216
3	BREWSTER, Kent	Las Vegas Fire & Rescue 500 N. Casino Center Blvd. Las Vegas, NV 89101
4		
5	BRISCOE, G.	LVMPD #3202
6	BROTHERSON, D.	LVMPD #4931
7	BUTLER, D.	LVMPD #6264
8	CALARCO, M.	LVMPD #6473
9	CARR, J.	LVMPD #4792
10	CARSON, Maurice	Bonanza Spring Apartments 600 E. Bonanza Road Las Vegas, NV
11		
12	CASE, Leona	2900 E. Charleston Blvd. Las Vegas, NV
13		
14	CASTANEDA, M.	LVMPD #4394
15	CAVALIERI, D.	LVMPD #3876
16	CLEVELAND, Jay	60 N. Pecos Las Vegas, NV
17	CRICKET, L.	LVMPD #3631
18	CUSTODIAN OF REOCORDS or DESIGNEE	UMC 1800 W. Charleston Blvd. Las Vegas, NV 89102
19		
20	D'ANGELO, V.	LVMPD #5787
21	DAO, Hue	6201 Don Zarembo Las Vegas, NV
22		
23	DELUCCHI, D.	LVMPD
24	DIAZ, FNU	Address Unknown
25	DILLON, Regina	417 S. 10th Street Las Vegas, NV
26	EMBRY, C.	LVMPD #6223
27	FOOTE, Stacie	624 N. 13th Street Las Vegas, NV
28		

1	FOWLER, Leroy	112 E. Ogden Las Vegas, NV
2	FLYNN, P.	LVMPD #6463
3	FORD, D.P.	LVMPD #4244
4	GELLER, J.	LVMPD #5892
5	GIBSON, James	518 E. Mesquite Las Vegas, NV
6	GOMEZ, FNU	AMR 1130 S. Martin Luther King Blvd. Las Vegas, NV 89102
7	GOOD, R.	LVMPD #806
10	GREEN, Dr.	CORONER/MEDICAL EXAMINER 1704 Pinto Lane Las Vegas, NV 89106
11		
12	GUNTHER, K.	LVMPD #6109
13	HALL, Joni	624 N. 13th Street Las Vegas, NV
14	HANSEL, R.	LVMPD #5054
15	HEFNER, K.	LVMPD #2185
16	HEVEL, Robert	Las Vegas Fire & Rescue 500 N. Casino Center Blvd. Las Vegas, NV
17		
18	JACKSON, George	512 E. Mesquite Las Vegas, NV
19		
20	JENSEN, B.	LVMPD #3662
21	KIRBY, Susan	UMC - S.A.N.E. 1800 W. Charleston Blvd. Las Vegas, NV 89102
22		
23	KISNER, J.	LVMPD #4656
24	KUZMAK, J.	LVMPD #5967
25	KYGER, T.	LVMPD #4191
26	LAROCHELLE, J.	LVMPD #4353
27	LEMASTER, D.	LVMPD #4243
28	///	

1	LEYVA, Ramona	600 E. Bonanza Road Las Vegas, NV
2		
3	LIVINGSTON, Marlene	2301 Clifford Avenue Las Vegas, NV
4	LOPEZ, Guadalupe	2850 Cedar Las Vegas, NV
5		
6	LOVE, D.	LVMPD #3748
7	MAHON, Gerald Sgt.	CHICAGO POLICE DEPT. Chicago, IL
8	MAIN, T.	LVMPD #5062
9	MARTIN, T.	LVMPD #5946
10	MATTHEWS, Chanel	209 N. 18th Street #B Las Vegas, NV
11	MINOLETTI, G.	LVMPD #6199
12	MISSIG, H.	CORONER'S OFFICE 1704 Pinto Lane Las Vegas, NV 89106
13		
14	MISURACA, M.	LVMPD #5825
15	MITCHELL, J.	LVMPD #5299
16	MONAHAN, T.	LVMPD #2936
17	MONIOT, T.	LVMPD #4664
18	O'CONNELL, D.	LVMPD #3434
19	O'DONNELL, J.	LVMPD #5709
20	PARENT/GUARDIAN OF KURTIS RICHARDS	Address Unknown
21		
22	PARTIN, Dorothy	50 N. 21st Street Las Vegas, NV
23	PETERSEN, W.	LVMPD #1913
24	PORTER, Angela	208 N. 13th Street Las Vegas, NV
25		
26	PORTER, George	1251 Kildare Ave. Chicago, IL
27	PORTER, Beverly	1251 Kildare Ave. Chicago, IL
28		

1	PROVOST, Sergo	208 N. 13th Street Las Vegas, NV
2	PULLIAM, F.R.	LVMPD #5412
3	REED, G.	LVMPD #3731
4	REGALADO-GONZALEZ, Rebecca	415 S. 10th Street Las Vegas, NV
5	REGALADO-ORDONEZ, Dina	415 S.10th Street Las Vegas, NV
6	REYES, Laury	600 E. Bonanza Road Las Vegas, NV
7	REYES, R.	LVMPD #4346
8	RHODES, FNU	Las Vegas Fire & Rescue 500 N. Casino Center Blvd. Las Vegas, NV
9	RICH, Lillie	2300 Olive Street Las Vegas, NV
10	RICHARDS, Kurtis	Clark County Juvenile Hall Las Vegas, NV
11	ROBERTS, V.	LVMPD #5714
12	ROSENBERG, T.	LVMPD #3816
13	RUMBAUGH, Clarence	436 N. 12th Street Las Vegas, NV
14	RUMBAUGH, Francis	436 N. 12th Street Las Vegas, NV
15	SAMS, J.	LVMPD #4793
16	SCARBOROUGH, S.	LVMPD #2160
17	SCHELLBERG, P.	LVMPD #5413
18	SCHWARTZ, D.	LVMPD #6434
19	SMINK, J.	LVMPD #6556
20	STELK, J.	LVMPD #2550
21	STERLING, Derrick	406 S. 11th Street Las Vegas, NV
22	SULLIVAN, K.	LVMPD #3400
23	SUTTON, Habibala	4850 S. Boulder Hwy. Las Vegas, NV
24		
25		
26		
27		
28		

1	SUTTON, A.	LVMPD #5973
2	SZUKIEWICZ, J.	LVMPD #5411
3	THOMAS, M.	LVMPD #4032
4	THOMPSON, M.	LVMPD #1988
5	THOWSEN, T.	LVMPD #1467
6	TYLER, Teresa	2895 E. Charleston Blvd.
7		Las Vegas, NV
8	TYLER, Samantha	2895 E. Charleston Blvd.
		Las Vegas, NV
9	WELCH, D.	LVMPD #1418
10	WILLIAMS, R.	LVMPD #5646
11	WILSON, Antwoyne	2601 Tuskegee
12		Las Vegas, NV
13	WINTERS, Nan	415 S. 10th Street
		Las Vegas, NV
14	WORKMAN, R.	LVMPD #4597
15	ZAZUETA, Beatrice	2850 Cedar #229
16		Las Vegas, NV
17	ZAZUETA, Laura	2850 Cedar #229
		Las Vegas, NV
18		
19		
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24	DA#00F13901X/gmr	
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	0005090185/0006050305/0006-60165/0006070313	
26	0006090140/0006101143/0007120766	
	BURGWDW; FIRST KID. WDW, SAWDW, ROBBWDW, ATT. MURDER WDW,	
27	FIRST ARSON WDW, FIRST KID. WDW WSBH, SAWDWWSBH,	
	FIRST KID. WDWVO65, SAWDWVO65, ROBBWDWVO65, MURDERWDW, BWDW	
28	(TK6)	

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BARBARA J. KARP, DEPUTY

1 INFO
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

9 I.A. 5/2/01
10 8:45 A.M.
11 P.D.

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 JUSTIN D. PORTER, aka Jug Capri Porter,
16 #1682627

17 Defendant.

Case No. C174954
Dept. No. XVI
Docket U

AMENDED
INFORMATION

18 STATE OF NEVADA)
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20)
21)
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STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JUSTIN D. PORTER, aka Jug Capri Porter, the Defendant(s) above named, having committed the crimes of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165), SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony - NRS 200.364, 200.366, 193.165), ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH SUBSTANTIAL BODILY HARM (Felony - NRS 200.310, 200.320, 193.165), SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH SUBSTANTIAL BODILY HARM (Felony - NRS 200.364, 200.366, 193.165), ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony -

1 NRS 200.010, 200.030, 193.330, 193.165), FIRST DEGREE ARSON WITH USE OF A
2 DEADLY WEAPON (Felony - NRS 205.010, 193.165), FIRST DEGREE KIDNAPPING
3 WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Felony -
4 NRS 200.310, 200.320, 193.165, 193.167), SEXUAL ASSAULT WITH USE OF A DEADLY
5 WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Felony - NRS 200.364, 200.366,
6 193.165, 193.167), ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS
7 OF AGE OR OLDER (Felony - NRS 200.380, 193.165, 193.167), BATTERY WITH INTENT
8 TO COMMIT A CRIME, VICTIM 65 YEARS OF AGE OR OLDER (Felony - NRS 200.400,
9 193.167), ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS
10 200.380, 193.165, 193.330), MURDER WITH USE OF A DEADLY WEAPON (OPEN
11 MURDER), (Felony - NRS 200.010, 200.030, 193.165) and BATTERY WITH USE OF A
12 DEADLY WEAPON (Felony - NRS 200.481), on or between February 1, 2000 and June 9,
13 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of
14 statutes in such cases made and provided, and against the peace and dignity of the State of
15 Nevada,

16 COUNT I -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

17 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
18 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
19 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
20 building occupied by TERESA TYLER, located at 2895 East Charleston Boulevard, Apartment
21 No. 1016 therein, Las Vegas, Clark County, Nevada.

22 COUNT II - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

23 did, on or about February 1, 2000, wilfully, unlawfully, feloniously, and without authority
24 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away TERESA
25 TYLER, a human being, with the intent to hold or detain the said TERESA TYLER, against her
26 will, and without her consent, for the purpose of committing robbery and/or sexual assault, said
27 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

28 ///

1 COUNT III - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

2 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
3 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
4 sexual intercourse, by inserting his penis into the vagina of the said TERESA TYLER, against
5 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
6 crime.

7 COUNT IV - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

8 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
9 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
10 sexual intercourse, by inserting his penis into the vagina of the said TERESA TYLER, against
11 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
12 crime.

13 COUNT V - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

14 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
15 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
16 fellatio, by placing his penis in or on the mouth of the said TERESA TYLER, against her will,
17 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

18 COUNT VI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

19 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
20 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
21 fellatio, by placing his penis in or on the mouth of the said TERESA TYLER, against her will,
22 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

23 COUNT VII - ROBBERY WITH USE OF A DEADLY WEAPON

24 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
25 take personal property, to wit: lawful money of the United States, from the person of TERESA
26 TYLER, or in her presence, by means of force or violence or fear of injury to, and without the
27 consent and against the will of the said TERESA TYLER, said Defendant using a deadly
28 weapon, to wit: a knife, during the commission of said crime.

1 COUNT VIII -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

2 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously
3 enter, while in possession of a deadly weapon, to wit: scissors and/or a knife, with intent to
4 commit larceny, and/or a felony, to wit: sexual assault and/or robbery and/or any other felony,
5 that certain building occupied by LEONA CASE, located at 2900 East Charleston Boulevard,
6 Apartment No. 50 therein, Las Vegas, Clark County, Nevada.

7 COUNT IX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH
8 SUBSTANTIAL BODILY HARM

9 did, on or about March 7, 2000, wilfully, unlawfully, feloniously, and without authority
10 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away LEONA
11 CASE, a human being, with the intent to hold or detain the said LEONA CASE, against her
12 will, and without her consent, for the purpose of committing robbery and/or sexual assault, said
13 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime, resulting
14 in substantial bodily harm to the said LEONA CASE.

15 COUNT X - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH
16 SUBSTANTIAL BODILY HARM

17 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously
18 sexually assault and subject LEONA CASE, a female person, to sexual penetration, to-wit:
19 sexual intercourse, by inserting his penis into the vagina of the said LEONA CASE, against her
20 will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime,
21 resulting in substantial bodily harm to the said LEONA CASE.

22 COUNT XI- ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

23 did, on or about March 7, 2000, then and there, without authority of law, and with
24 premeditation and deliberation, and with malice aforethought, wilfully and feloniously attempt
25 to kill LEONA CASE, a human being, by stabbing at or into the body of the said LEONA CASE
26 with a deadly weapon, to wit: a knife, and by choking the said LEONA CASE around the neck
27 with a phone cord, and/or by the Defendant thereafter locking LEONA CASE in her bathroom
28 and setting her apartment on fire, said Defendant using a deadly weapon, to wit: knife, during
the commission of said crime.

1 COUNT XII - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH
2 SUBSTANTIAL BODILY HARM

3 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously
4 sexually assault and subject LEONA CASE, a female person, to sexual penetration, to-wit:
5 sexual intercourse, by inserting his penis into the vagina of the said LEONA CASE, against her
6 will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
7 crime, resulting in substantial bodily harm to the said LEONA CASE.

8 COUNT XIII - ROBBERY WITH USE OF A DEADLY WEAPON

9 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously take
10 personal property, to wit: lawful money of the United States and/or jewelry and/or food stamps,
11 from the person of LEONA CASE, or in her presence, by means of force or violence or fear of
12 injury to, and without the consent and against the will of the said LEONA CASE, said Defendant
13 using a deadly weapon, to wit: a knife, during the commission of said crime.

14 COUNT XIV - FIRST DEGREE ARSON WITH USE OF A DEADLY WEAPON

15 did, on or about March 7, 2000, then and there willfully, unlawfully, maliciously and
16 feloniously set fire to, and thereby cause to be burned, a certain apartment, located at 2900 East
17 Charleston Boulevard, Apartment No. 50 therein, Las Vegas, Clark County, Nevada, said
18 property being then and there the property of LEONA CASE, by use of open flame and
19 flammable and/or combustible materials, and/or by manner or means unknown, said Defendant
20 using a deadly weapon, to wit: a knife, during the commission of said crime.

21 COUNT XV - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

22 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously
23 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
24 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
25 building occupied by RAMONA LEYVA, located at 600 East Bonanza Avenue, Apartment No.
26 114 therein, Las Vegas, Clark County, Nevada.

27 COUNT XVI - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

28 did, on or about March 25, 2000, wilfully, unlawfully, feloniously, and without authority

1 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away RAMONA
2 LEYVA, a human being, with the intent to hold or detain the said RAMONA LEYVA, against
3 her will, and without her consent, for the purpose of committing robbery and/or sexual assault,
4 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

5 COUNT XVII - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

6 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously
7 sexually assault and subject RAMONA LEYVA, a female person, to sexual penetration, to-wit:
8 sexual intercourse, by inserting his penis into the vagina of the said RAMONA LEYVA, against
9 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
10 crime.

11 COUNT XVIII - ROBBERY WITH USE OF A DEADLY WEAPON

12 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously take
13 personal property, to wit: car keys and/or a 1980 Buick, bearing Nevada license no. 657 KMC,
14 from the person of RAMONA LEYVA, or in her presence, by means of force or violence or fear
15 of injury to, and without the consent and against the will of the said RAMONA LEYVA, said
16 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

17 COUNT XIX - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

18 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously enter,
19 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
20 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
21 occupied by MARLENE LIVINGSTON, located at 2301 Clifford, Las Vegas, Clark County,
22 Nevada.

23 COUNT XX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON,
24 VICTIM 65 YEARS OF AGE OR OLDER

25 did, on or about April 4, 2000, wilfully, unlawfully, feloniously, and without authority
26 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away
27 MARLENE LIVINGSTON, a human being 65 years of age or older, with the intent to hold or
28 detain the said MARLENE LIVINGSTON, against her will, and without her consent, for the

1 purpose of committing robbery and/or sexual assault, said Defendant using a deadly weapon, to
2 wit: a knife, during the commission of said crime.

3 COUNT XXI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, VICTIM 65
4 YEARS OF AGE OR OLDER

5 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously
6 sexually assault and subject MARLENE LIVINGSTON, a female person being 65 years of age
7 or older, to sexual penetration, to-wit: fellatio, by placing his penis in or on the mouth of the
8 said MARLENE LIVINGSTON, against her will, said Defendant using a deadly weapon, to wit:
9 a knife, during the commission of said crime.

10 COUNT XXII - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF
11 AGE OR OLDER

12 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously take
13 personal property, to wit: lawful money of the United States and/or jewelry and/or car keys
14 and/or a 1991 Dodge, bearing Nevada license no. 728 ENB, from the person of MARLENE
15 LIVINGSTON, a person 65 years of age or older, or in her presence, by means of force or
16 violence or fear of injury to, and without the consent and against the will of the said MARLENE
17 LIVINGSTON, said Defendant using a deadly weapon, to wit: a knife, during the commission
18 of said crime.

19 COUNT XXIII -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

20 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously
21 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
22 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
23 building occupied by CLARENCE AND FRANCIS RUMBAUGH, located at 436 North 12th
24 Street, Apartment No. B therein, Las Vegas, Clark County, Nevada.

25 COUNT XXIV - BATTERY WITH INTENT TO COMMIT A CRIME, VICTIM 65 YEARS
26 OF AGE OR OLDER

27 did, on or about April 12, 2000, did then and there wilfully, unlawfully, and feloniously
28 use force or violence upon the person of another, to-wit: CLARENCE RUMBAUGH, a human

1 being 65 years of age or older, with intent to commit robbery and/or sexual assault, by grabbing
2 and/or pushing and/or throwing the said CLARENCE RUMBAUGH.

3 COUNT XXV - BATTERY WITH INTENT TO COMMIT A CRIME, VICTIM 65 YEARS
4 OF AGE OR OLDER

5 did, on or about April 12, 2000, did then and there wilfully, unlawfully, and feloniously
6 use force or violence upon the person of another, to-wit: FRANCIS RUMBAUGH, a human
7 being 65 years of age or older, with intent to commit robbery and/or sexual assault, by grabbing
8 and/or pushing and/or throwing the said FRANCIS RUMBAUGH.

9 COUNT XXVI - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF
10 AGE OR OLDER

11 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously take
12 personal property, to wit: lawful money of the United States, from the person of CLARENCE
13 RUMBAUGH, a person 65 years of age or older, or in his presence, by means of force or
14 violence or fear of injury to, and without the consent and against the will of the said
15 CLARENCE RUMBAUGH, said Defendant using a deadly weapon, to wit: a knife, during the
16 commission of said crime.

17 COUNT XXVII - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS
18 OF AGE OR OLDER

19 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously take
20 personal property, to wit: lawful money of the United States, from the person of FRANCIS
21 RUMBAUGH, a person 65 years of age or older, or in her presence, by means of force or
22 violence or fear of injury to, and without the consent and against the will of the said FRANCIS
23 RUMBAUGH, said Defendant using a deadly weapon, to wit: a knife, during the commission
24 of said crime.

25 COUNT XXVIII - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

26 did, on or about June 6, 2000, then and there wilfully, unlawfully, and feloniously enter,
27 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
28 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building

1 occupied by LEROY FOWLER, located at 1121 East Ogden, Apartment No. 9 therein, Las
2 Vegas, Clark County, Nevada.

3 COUNT XXIX - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

4 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously enter,
5 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
6 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
7 occupied by JONI HALL, located at 624 North 13th Street, Apartment No. B therein, Las
8 Vegas, Clark County, Nevada.

9 COUNT XXX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

10 did, on or about June 7, 2000, wilfully, unlawfully, feloniously, and without authority of
11 law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away JONI HALL,
12 a human being, with the intent to hold or detain the said JONI HALL, against her will, and
13 without her consent, for the purpose of committing robbery and/or sexual assault, said Defendant
14 using a deadly weapon, to wit: a knife, during the commission of said crime.

15 COUNT XXXI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

16 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously
17 sexually assault and subject JONI HALL, a female person, to sexual penetration, to-wit: sexual
18 intercourse, by inserting his penis into the vagina of the said JONI HALL, against her will, said
19 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

20 COUNT XXXII - ROBBERY WITH USE OF A DEADLY WEAPON

21 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously take
22 personal property, to wit: a Westinghouse color television and/or a Lenox portable CD player
23 and/or a baby stroller, from the person of JONI HALL, or in her presence, by means of force or
24 violence or fear of injury to, and without the consent and against the will of the said JONI
25 HALL, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
26 crime.

27 COUNT XXXIII - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

28 did, on or about June 8, 2000, then and there wilfully, unlawfully, and feloniously enter,

1 while in possession of a deadly weapon, to wit: a gun, with intent to commit larceny, and/or a
2 felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
3 occupied by GYALTSO LUNGTOK, located at 415 South 10th Street, Apartment No. H
4 therein, Las Vegas, Clark County, Nevada.

5 COUNT XXXIV - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

6 did, on or about June 8, 2000, then and there wilfully, unlawfully, and feloniously attempt
7 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
8 other property of GYALTSO LUNGTOK, from the person of GYALTSO LUNGTOK, or in his
9 presence, by means of force or violence or fear of injury to, and without the consent and against
10 the will of the said GYALTSO LUNGTOK, said Defendant using a deadly weapon, to wit: a
11 gun, during the commission of said crime.

12 COUNT XXXV - MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

13 did, on or about June 8, 2000, then and there wilfully, feloniously, without authority of
14 law, and with premeditation and deliberation and malice aforethought, kill GYALTSO
15 LUNGTOK, a human being, by shooting at and into the body of the said GYALTSO
16 LUNGTOK with use of a deadly weapon, to-wit: a gun, the Defendant being responsible under
17 one or more of the following theories of criminal liability, to-wit: 1)Premeditation and
18 deliberation: by the Defendant directly committing said felony offense as the perpetrator, and/or
19 2) Felony murder: by the Defendant committing said felony offense during the perpetration or
20 attempted perpetration of the crime(s) of burglary and/or robbery.

21 COUNT XXXVI -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

22 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously enter,
23 while in possession of a deadly weapon, to wit: a gun, with intent to commit larceny, and/or a
24 felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
25 occupied by LAURA ZAZUETA, GUADALUPE LOPEZ and BEATRIZ ZAZUETA, located
26 at 2830 East Cedar, Apartment No. 229 therein, Las Vegas, Clark County, Nevada.

27 COUNT XXXVII - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

28 did, on or about June 9, 2000, wilfully, unlawfully, feloniously, and without authority of

1 law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away LAURA
2 ZAZUETA, a human being, with the intent to hold or detain the said LAURA ZAZUETA,
3 against her will, and without her consent, for the purpose of committing robbery and/or sexual
4 assault, said Defendant using a deadly weapon, to wit: a gun, during the commission of said
5 crime.

6 COUNT XXXVIII - ROBBERY WITH USE OF A DEADLY WEAPON

7 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously take
8 personal property, to wit: lawful money of the United States, from the person of LAURA
9 ZAZUETA, or in her presence, by means of force or violence or fear of injury to, and without
10 the consent and against the will of the said LAURA ZAZUETA, said Defendant using a deadly
11 weapon, to wit: a gun, during the commission of said crime.

12 COUNT XXXIX - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

13 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously attempt
14 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
15 other property of LAURA ZAZUETA, GUADALUPE LOPEZ and/or BEATRIZ ZAZUETA,
16 from the person of GUADALUPE LOPEZ, or in his presence, by means of force or violence or
17 fear of injury to, and without the consent and against the will of the said GUADALUPE LOPEZ,
18 said Defendant using a deadly weapon, to wit: a gun, during the commission of said crime.

19 COUNT XL - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

20 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously attempt
21 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
22 other property of LAURA ZAZUETA, GUADALUPE LOPEZ and/or BEATRIZ ZAZUETA,
23 from the person of BEATRIZ ZAZUETA, or in her presence, by means of force or violence or
24 fear of injury to, and without the consent and against the will of the said BEATRIZ ZAZUETA,
25 said Defendant using a deadly weapon, to wit: a gun, during the commission of said crime.

26 COUNT XLI- ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

27 did, on or about June 9, 2000, then and there, without authority of law, and with
28 premeditation and deliberation, and with malice aforethought, wilfully and feloniously attempt

1 to kill GUADALUPE LOPEZ, a human being, by pointing a gun at the body of the said
2 GUADALUPE LOPEZ, the Defendant thereafter putting the gun to the forehead of the said
3 GUADALUPE LOPEZ and threatening to "start blasting" if he did not receive money, the
4 Defendant thereafter firing approximately three shots at the said GUADALUPE LOPEZ, striking
5 him once in the leg, the defendant using a deadly weapon, to wit: a gun, during the commission
6 of said crime.

7 COUNT XLII - BATTERY WITH USE OF A DEADLY WEAPON

8 did, on or about June 9, 2000, then and there, wilfully, unlawfully, and feloniously use
9 force and violence upon the person of another, to wit: GUADALUPE LOPEZ, with use of a
10 deadly weapon, to wit: a gun, by the Defendant shooting a gun at the said GUADALUPE
11 LOPEZ, striking him in the leg.

12 STEWART L. BELL
13 DISTRICT ATTORNEY
14 Nevada Bar #000477

15 BY

16 
DOUGLAS HERNDON
17 Chief Deputy District Attorney
Nevada Bar #004286

18 Names of witnesses known to the District Attorney's Office at the time of filing this
19 Information are as follows:

20	<u>NAME</u>	<u>ADDRESS</u>
21	ADAMS, Marian	UMC - S.A.N.E. 1800 W. Charleston Blvd. 22 Las Vegas, NV 89102
23	ANDERSON, L.	LVMPD #2780
24	ATKIN, M.	LVMPD #5409
25	AWALOM, Alemayehu	415 S. 10th Street 26 Las Vegas, NV
27	BARNETT, Jean	624 N. 13th Street Las Vegas, NV
28	BEAS, A.	LVMPD #5208

1	BERNSTEIN, Flossie	221 S. Bruce #110 Las Vegas, NV 89101
2	BOYD, F.	LVMPD #5216
3	BREWSTER, Kent	Las Vegas Fire & Rescue 500 N. Casino Center Blvd. Las Vegas, NV 89101
4		
5	BRISCOE, G.	LVMPD #3202
6	BROTHERSON, D.	LVMPD #4931
7	BUTLER, D.	LVMPD #6264
8	CALARCO, M.	LVMPD #6473
9	CARR, J.	LVMPD #4792
10	CARSON, Maurice	Bonanza Spring Apartments 600 E. Bonanza Road Las Vegas, NV
11		
12	CASE, Leona	2900 E. Charleston Blvd. Las Vegas, NV
13		
14	CASTANEDA, M.	LVMPD #4394
15	CAVALIERI, D.	LVMPD #3876
16	CLEVELAND, Jay	60 N. Pecos Las Vegas, NV
17		
18	CRICKET, L.	LVMPD #3631
19	CUSTODIAN OF REOCORDS or DESIGNEE	UMC 1800 W. Charleston Blvd. Las Vegas, NV 89102
20		
21	D'ANGELO, V.	LVMPD #5787
22	DAO, Hue	6201 Don Zarembo Las Vegas, NV
23	DELUCCHI, D.	LVMPD
24	DIAZ, FNU	Address Unknown
25	DILLON, Regina	417 S. 10th Street Las Vegas, NV
26		
27	EMBRY, C.	LVMPD #6223
28	FOOTE, Stacie	624 N. 13th Street Las Vegas, NV

1	FOWLER, Leroy	112 E. Ogden Las Vegas, NV
2	FLYNN, P.	LVMPD #6463
3	FORD, D.P.	LVMPD #4244
4	GELLER, J.	LVMPD #5892
5	GIBSON, James	518 E. Mesquite Las Vegas, NV
6	GOMEZ, FNU	AMR 1130 S. Martin Luther King Blvd. Las Vegas, NV 89102
7	GOOD, R.	LVMPD #806
10	GREEN, Dr.	CORONER/MEDICAL EXAMINER 1704 Pinto Lane Las Vegas, NV 89106
11		
12	GUNTHER, K.	LVMPD #6109
13	HALL, Joni	624 N. 13th Street Las Vegas, NV
14	HANSEL, R.	LVMPD #5054
15	HEFNER, K.	LVMPD #2185
16	HEVEL, Robert	Las Vegas Fire & Rescue 500 N. Casino Center Blvd. Las Vegas, NV
17		
18	JACKSON, George	512 E. Mesquite Las Vegas, NV
19		
20	JENSEN, B.	LVMPD #3662
21	KIRBY, Susan	UMC - S.A.N.E. 1800 W. Charleston Blvd. Las Vegas, NV 89102
22		
23	KISNER, J.	LVMPD #4656
24	KUZMAK, J.	LVMPD #5967
25	KYGER, T.	LVMPD #4191
26	LAROCHELLE, J.	LVMPD #4353
27	LEMASTER, D.	LVMPD #4243
28	///	

1	LEYVA, Ramona	600 E. Bonanza Road Las Vegas, NV
2	LIVINGSTON, Marlene	2301 Clifford Avenue
3		Las Vegas, NV
4	LOPEZ, Guadalupe	2850 Cedar
5		Las Vegas, NV
6	LOVE, D.	LVMPD #3748
7	MAHON, Gerald Sgt.	CHICAGO POLICE DEPT.
8	MAIN, T.	Chicago, IL
9	MARTIN, T.	LVMPD #5062
10	MATTHEWS, Chanel	209 N. 18th Street #B
11		Las Vegas, NV
12	MINOLETTI, G.	LVMPD #6199
13	MISSIG, H.	CORONER'S OFFICE
14		1704 Pinto Lane
15	MISURACA, M.	Las Vegas, NV 89106
16	MITCHELL, J.	LVMPD #5825
17	MONAHAN, T.	LVMPD #5299
18	MONIOT, T.	LVMPD #2936
19	O'CONNELL, D.	LVMPD #4664
20	O'DONNELL, J.	LVMPD #3434
21	PARENT/GUARDIAN OF KURTIS RICHARDS	LVMPD #5709
22	PARTIN, Dorothy	Address Unknown
23	PETERSEN, W.	50 N. 21st Street
24	PORTER, Angela	Las Vegas, NV
25	PORTER, George	LVMPD #1913
26	PORTER, Beverly	208 N. 13th Street
27		Las Vegas, NV
28		1251 Kildare Ave.
		Chicago, IL

1	PROVOST, Sergo	208 N. 13th Street Las Vegas, NV
2	PULLIAM, F.R.	LVMPD #5412
3	REED, G.	LVMPD #3731
4	REGALADO-GONZALEZ, Rebecca	415 S. 10th Street Las Vegas, NV
5	REGALADO-ORDONEZ, Dina	415 S.10th Street Las Vegas, NV
6	REYES, Laury	600 E. Bonanza Road Las Vegas, NV
7	REYES, R.	LVMPD #4346
8	RHODES, FNU	Las Vegas Fire & Rescue 500 N. Casino Center Blvd. Las Vegas, NV
9	RICH, Lillie	2300 Olive Street Las Vegas, NV
10	RICHARDS, Kurtis	Clark County Juvenile Hall Las Vegas, NV
11	ROBERTS, V.	LVMPD #5714
12	ROSENBERG, T.	LVMPD #3816
13	RUMBAUGH, Clarence	436 N. 12th Street Las Vegas, NV
14	RUMBAUGH, Francis	436 N. 12th Street Las Vegas, NV
15	SAMS, J.	LVMPD #4793
16	SCARBOROUGH, S.	LVMPD #2160
17	SCHELLBERG, P.	LVMPD #5413
18	SCHWARTZ, D.	LVMPD #6434
19	SMINK, J.	LVMPD #6556
20	STELK, J.	LVMPD #2550
21	STERLING, Derrick	406 S. 11th Street Las Vegas, NV
22	SULLIVAN, K.	LVMPD #3400
23	SUTTON, Habibala	4850 S. Boulder Hwy. Las Vegas, NV

1	SUTTON, A.	LVMPD #5973
2	SZUKIEWICZ, J.	LVMPD #5411
3	THOMAS, M.	LVMPD #4032
4	THOMPSON, M.	LVMPD #1988
5	THOWSEN, T.	LVMPD #1467
6	TYLER, Teresa	2895 E. Charleston Blvd.
7		Las Vegas, NV
8	TYLER, Samantha	2895 E. Charleston Blvd.
		Las Vegas, NV
9	WELCH, D.	LVMPD #1418
10	WILLIAMS, R.	LVMPD #5646
11	WILSON, Antwoyne	2601 Tuskegee
12		Las Vegas, NV
13	WINTERS, Nan	415 S. 10th Street
		Las Vegas, NV
14	WORKMAN, R.	LVMPD #4597
15	ZAZUETA, Beatrice	2850 Cedar #229
16		Las Vegas, NV
17	ZAZUETA, Laura	2850 Cedar #229
		Las Vegas, NV
18		
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24	DA#00F13901X/gmr	
	LVMPD EV#0002012429/0003070141	
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	0005090185/0006050305/0006-60165/0006070313	
26	0006090140/0006101143/0007120766	
	BURGWDW; FIRST KID. WDW, SAWDW, ROBBWDW, ATT. MURDER WDW,	
27	FIRST ARSON WDW, FIRST KID. WDW WSBH, SAWDWWSBH,	
	FIRST KID. WDWVO65, SAWDWVO65, ROBBWDWVO65, MURDERWDW, BWDW	
28	(TK6)	

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Shirley B. Rungius
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STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN D. PORTER, aka Judg Capri Porter,
#1682627

Defendant.

Case No. C174954
Dept. No. XVI

SECOND
AMENDED
INFORMATION

STATE OF NEVADA }
COUNTY OF CLARK }ss:

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JUSTIN D. PORTER, aka Judg Capri Porter, the Defendant(s) above named, having committed the crimes of BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165), SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony - NRS 200.364, 200.366, 193.165), ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH SUBSTANTIAL BODILY HARM (Felony - NRS 200.310, 200.320, 193.165), SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH SUBSTANTIAL BODILY HARM (Felony - NRS 200.364,

COUNTY CLERK

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RECEIVED

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1 200.366, 193.165), ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony -
2 NRS 200.010, 200.030, 193.330, 193.165), FIRST DEGREE ARSON (Felony - NRS 205.010),
3 SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE
4 OR OLDER (Felony - NRS 200.364, 200.366, 193.165, 193.167), ROBBERY WITH USE OF
5 A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Felony - NRS 200.380,
6 193.165, 193.167), ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Felony -
7 NRS 200.380, 193.165, 193.330), MURDER WITH USE OF A DEADLY WEAPON (OPEN
8 MURDER), (Felony - NRS 200.010, 200.030, 193.165) and BATTERY WITH USE OF A
9 DEADLY WEAPON (Felony - NRS 200.481), on or between February 1, 2000 and June 9,
10 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of
11 statutes in such cases made and provided, and against the peace and dignity of the State of
12 Nevada,

13 COUNT I - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

14 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
15 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
16 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
17 building occupied by TERESA TYLER, located at 2895 East Charleston Boulevard, Apartment
18 No. 1016 therein, Las Vegas, Clark County, Nevada.

19 COUNT II - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

20 did, on or about February 1, 2000, wilfully, unlawfully, feloniously, and without authority
21 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away TERESA
22 TYLER, a human being, with the intent to hold or detain the said TERESA TYLER, against her
23 will, and without her consent, for the purpose of committing robbery and/or sexual assault, said
24 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

25 COUNT III - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

26 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
27 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
28 sexual intercourse, by inserting his penis into the vagina of the said TERESA TYLER, against

1 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
2 crime.

3 COUNT IV - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

4 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
5 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
6 sexual intercourse, by inserting his penis into the vagina of the said TERESA TYLER, against
7 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
8 crime.

9 COUNT V - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

10 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
11 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
12 fellatio, by placing his penis in or on the mouth of the said TERESA TYLER, against her will,
13 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

14 COUNT VI - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

15 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
16 sexually assault and subject TERESA TYLER, a female person, to sexual penetration, to-wit:
17 fellatio, by placing his penis in or on the mouth of the said TERESA TYLER, against her will,
18 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

19 COUNT VII - ROBBERY WITH USE OF A DEADLY WEAPON

20 did, on or about February 1, 2000, then and there wilfully, unlawfully, and feloniously
21 take personal property, to wit: lawful money of the United States, from the person of TERESA
22 TYLER, or in her presence, by means of force or violence or fear of injury to, and without the
23 consent and against the will of the said TERESA TYLER, said Defendant using a deadly
24 weapon, to wit: a knife, during the commission of said crime.

25 COUNT VIII -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

26 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously
27 enter, while in possession of a deadly weapon, to wit: scissors and/or a knife, with intent to
28 commit larceny, and/or a felony, to wit: sexual assault and/or robbery and/or any other felony,

1 that certain building occupied by LEONA CASE, located at 2900 East Charleston Boulevard,
2 Apartment No. 50 therein, Las Vegas, Clark County, Nevada.

3 COUNT IX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH
4 SUBSTANTIAL BODILY HARM

5 did, on or about March 7, 2000, wilfully, unlawfully, feloniously, and without authority
6 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away LEONA
7 CASE, a human being, with the intent to hold or detain the said LEONA CASE, against her
8 will, and without her consent, for the purpose of committing robbery and/or sexual assault, said
9 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime, resulting
10 in substantial bodily harm to the said LEONA CASE.

11 COUNT X - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH
12 SUBSTANTIAL BODILY HARM

13 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously
14 sexually assault and subject LEONA CASE, a female person, to sexual penetration, to-wit:
15 sexual intercourse, by inserting his penis into the vagina of the said LEONA CASE, against her
16 will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime,
17 resulting in substantial bodily harm to the said LEONA CASE.

18 COUNT XI- ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

19 did, on or about March 7, 2000, then and there, without authority of law, and with
20 premeditation and deliberation, and with malice aforethought, wilfully and feloniously attempt
21 to kill LEONA CASE, a human being, by stabbing at or into the body of the said LEONA CASE
22 with a deadly weapon, to wit: a knife, and by choking the said LEONA CASE around the neck
23 with a phone cord, and/or by the Defendant thereafter locking LEONA CASE in her bathroom
24 and setting her apartment on fire, said Defendant using a deadly weapon, to wit: knife, during
25 the commission of said crime.

26 COUNT XII - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON WITH
27 SUBSTANTIAL BODILY HARM

28 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously

1 sexually assault and subject LEONA CASE, a female person, to sexual penetration, to-wit:
2 sexual intercourse, by inserting his penis into the vagina of the said LEONA CASE, against her
3 will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
4 crime, resulting in substantial bodily harm to the said LEONA CASE.

5 COUNT XIII - ROBBERY WITH USE OF A DEADLY WEAPON

6 did, on or about March 7, 2000, then and there wilfully, unlawfully, and feloniously take
7 personal property, to wit: lawful money of the United States and/or jewelry and/or food stamps,
8 from the person of LEONA CASE, or in her presence, by means of force or violence or fear of
9 injury to, and without the consent and against the will of the said LEONA CASE, said Defendant
10 using a deadly weapon, to wit: a knife, during the commission of said crime.

11 COUNT XIV- FIRST DEGREE ARSON

12 did, on or about March 7, 2000, then and there willfully, unlawfully, maliciously and
13 feloniously set fire to, and thereby cause to be burned, a certain apartment, located at 2900 East
14 Charleston Boulevard, Apartment No. 50 therein, Las Vegas, Clark County, Nevada, said
15 property being then and there the property of LEONA CASE, by use of open flame and
16 flammable and/or combustible materials, and/or by manner or means unknown.

17 COUNT XV -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

18 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously
19 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
20 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
21 building occupied by RAMONA LEYVA, located at 600 East Bonanza Avenue, Apartment No.
22 114 therein, Las Vegas, Clark County, Nevada.

23 COUNT XVI - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

24 did, on or about March 25, 2000, wilfully, unlawfully, feloniously, and without authority
25 of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away RAMONA
26 LEYVA, a human being, with the intent to hold or detain the said RAMONA LEYVA, against
27 her will, and without her consent, for the purpose of committing robbery and/or sexual assault,
28 said Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

1 COUNT XVII - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

2 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously
3 sexually assault and subject RAMONA LEYVA, a female person, to sexual penetration, to-wit:
4 sexual intercourse, by inserting his penis into the vagina of the said RAMONA LEYVA, against
5 her will, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
6 crime.

7 COUNT XVIII - ROBBERY WITH USE OF A DEADLY WEAPON

8 did, on or about March 25, 2000, then and there wilfully, unlawfully, and feloniously take
9 personal property, to wit: car keys and/or a 1980 Buick, bearing Nevada license no. 657 KMC,
10 from the person of RAMONA LEYVA, or in her presence, by means of force or violence or fear
11 of injury to, and without the consent and against the will of the said RAMONA LEYVA, said
12 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

13 COUNT XIX -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

14 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously enter,
15 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
16 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
17 occupied by MARLENE LIVINGSTON, located at 2301 Clifford, Las Vegas, Clark County,
18 Nevada.

19 COUNT XX - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, VICTIM 65
20 YEARS OF AGE OR OLDER

21 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously
22 sexually assault and subject MARLENE LIVINGSTON, a female person being 65 years of age
23 or older, to sexual penetration, to-wit: fellatio, by placing his penis in or on the mouth of the
24 said MARLENE LIVINGSTON, against her will, said Defendant using a deadly weapon, to wit:
25 a knife, during the commission of said crime.

26 COUNT XXI - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF
27 AGE OR OLDER

28 did, on or about April 4, 2000, then and there wilfully, unlawfully, and feloniously take

1 personal property, to wit: lawful money of the United States and/or jewelry and/or car keys
2 and/or a 1991 Dodge, bearing Nevada license no. 728 ENB, from the person of MARLENE
3 LIVINGSTON, a person 65 years of age or older, or in her presence, by means of force or
4 violence or fear of injury to, and without the consent and against the will of the said MARLENE
5 LIVINGSTON, said Defendant using a deadly weapon, to wit: a knife, during the commission
6 of said crime.

7 COUNT XXII -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

8 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously
9 enter, while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny,
10 and/or a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain
11 building occupied by CLARENCE AND FRANCIS RUMBAUGH, located at 436 North 12th
12 Street, Apartment No. B therein, Las Vegas, Clark County, Nevada.

13 COUNT XXIII - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF
14 AGE OR OLDER

15 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously take
16 personal property, to wit: lawful money of the United States, from the person of CLARENCE
17 RUMBAUGH, a person 65 years of age or older, or in his presence, by means of force or
18 violence or fear of injury to, and without the consent and against the will of the said
19 CLARENCE RUMBAUGH, said Defendant using a deadly weapon, to wit: a knife, during the
20 commission of said crime.

21 COUNT XXIV - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS
22 OF AGE OR OLDER

23 did, on or about April 12, 2000, then and there wilfully, unlawfully, and feloniously take
24 personal property, to wit: lawful money of the United States, from the person of FRANCIS
25 RUMBAUGH, a person 65 years of age or older, or in her presence, by means of force or
26 violence or fear of injury to, and without the consent and against the will of the said FRANCIS
27 RUMBAUGH, said Defendant using a deadly weapon, to wit: a knife, during the commission
28 of said crime.

1 COUNT XXV -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

2 did, on or about June 6, 2000, then and there wilfully, unlawfully, and feloniously enter,
3 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
4 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
5 occupied by LEROY FOWLER, located at 1121 East Ogden, Apartment No. 9 therein, Las
6 Vegas, Clark County, Nevada.

7 COUNT XXVI -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

8 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously enter,
9 while in possession of a deadly weapon, to wit: a knife, with intent to commit larceny, and/or
10 a felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
11 occupied by JONI HALL, located at 624 North 13th Street, Apartment No. B therein, Las
12 Vegas, Clark County, Nevada.

13 COUNT XXVII - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

14 did, on or about June 7, 2000, wilfully, unlawfully, feloniously, and without authority of
15 law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away JONI HALL,
16 a human being, with the intent to hold or detain the said JONI HALL, against her will, and
17 without her consent, for the purpose of committing robbery and/or sexual assault, said Defendant
18 using a deadly weapon, to wit: a knife, during the commission of said crime.

19 COUNT XXVIII - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

20 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously
21 sexually assault and subject JONI HALL, a female person, to sexual penetration, to-wit: sexual
22 intercourse, by inserting his penis into the vagina of the said JONI HALL, against her will, said
23 Defendant using a deadly weapon, to wit: a knife, during the commission of said crime.

24 COUNT XXIX - ROBBERY WITH USE OF A DEADLY WEAPON

25 did, on or about June 7, 2000, then and there wilfully, unlawfully, and feloniously take
26 personal property, to wit: a Westinghouse color television and/or a Lenox portable CD player
27 and/or a baby stroller, from the person of JONI HALL, or in her presence, by means of force or
28 violence or fear of injury to, and without the consent and against the will of the said JONI

1 HALL, said Defendant using a deadly weapon, to wit: a knife, during the commission of said
2 crime.

3 COUNT XXX - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

4 did, on or about June 8, 2000, then and there wilfully, unlawfully, and feloniously enter,
5 while in possession of a deadly weapon, to wit: a gun, with intent to commit larceny, and/or a
6 felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building
7 occupied by GYALTSO LUNGTOK, located at 415 South 10th Street, Apartment No. H
8 therein, Las Vegas, Clark County, Nevada.

9 COUNT XXXI - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

10 did, on or about June 8, 2000, then and there wilfully, unlawfully, and feloniously attempt
11 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
12 other property of GYALTSO LUNGTOK, from the person of GYALTSO LUNGTOK, or in his
13 presence, by means of force or violence or fear of injury to, and without the consent and against
14 the will of the said GYALTSO LUNGTOK, said Defendant using a deadly weapon, to wit: a
15 gun, during the commission of said crime.

16 COUNT XXXII - MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

17 did, on or about June 8, 2000, then and there wilfully, feloniously, without authority of
18 law, and with premeditation and deliberation and malice aforethought, kill GYALTSO
19 LUNGTOK, a human being, by shooting at and into the body of the said GYALTSO
20 LUNGTOK with use of a deadly weapon, to-wit: a gun, the Defendant being responsible under
21 one or more of the following theories of criminal liability, to-wit: 1)Premeditation and
22 deliberation: by the Defendant directly committing said felony offense as the perpetrator, and/or
23 2) Felony murder: by the Defendant committing said felony offense during the perpetration or
24 attempted perpetration of the crime(s) of burglary and/or robbery.

25 COUNT XXXIII -BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

26 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously enter,
27 while in possession of a deadly weapon, to wit: a gun, with intent to commit larceny, and/or a
28 felony, to wit: sexual assault and/or robbery and/or any other felony, that certain building

1 occupied by LAURA ZAZUETA, GUADALUPE LOPEZ and BEATRIZ ZAZUETA, located
2 at 2830 East Cedar, Apartment No. 229 therein, Las Vegas, Clark County, Nevada.

3 COUNT XXXIV - ROBBERY WITH USE OF A DEADLY WEAPON

4 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously take
5 personal property, to wit: lawful money of the United States, from the person of LAURA
6 ZAZUETA, or in her presence, by means of force or violence or fear of injury to, and without
7 the consent and against the will of the said LAURA ZAZUETA, said Defendant using a deadly
8 weapon, to wit: a gun, during the commission of said crime.

9 COUNT XXXV - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

10 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously attempt
11 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
12 other property of LAURA ZAZUETA, GUADALUPE LOPEZ and/or BEATRIZ ZAZUETA,
13 from the person of GUADALUPE LOPEZ, or in his presence, by means of force or violence or
14 fear of injury to, and without the consent and against the will of the said GUADALUPE LOPEZ,
15 said Defendant using a deadly weapon, to wit: a gun, during the commission of said crime.

16 COUNT XXXVI - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

17 did, on or about June 9, 2000, then and there wilfully, unlawfully, and feloniously attempt
18 to take personal property, to wit: lawful money of the United States and/or jewelry and/or any
19 other property of LAURA ZAZUETA, GUADALUPE LOPEZ and/or BEATRIZ ZAZUETA,
20 from the person of BEATRIZ ZAZUETA, or in her presence, by means of force or violence or
21 fear of injury to, and without the consent and against the will of the said BEATRIZ ZAZUETA,
22 said Defendant using a deadly weapon, to wit: a gun, during the commission of said crime.

23 COUNT XXXVII- ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

24 did, on or about June 9, 2000, then and there, without authority of law, and with
25 premeditation and deliberation, and with malice aforethought, wilfully and feloniously attempt
26 to kill GUADALUPE LOPEZ, a human being, by pointing a gun at the body of the said
27 GUADALUPE LOPEZ, the Defendant thereafter putting the gun to the forehead of the said
28 GUADALUPE LOPEZ and threatening to "start blasting" if he did not receive money, the

1 Defendant thereafter firing approximately three shots at the said GUADALUPE LOPEZ, striking
2 him once in the leg, the defendant using a deadly weapon, to wit: a gun, during the commission
3 of said crime.

4 COUNT XXXVIII - BATTERY WITH USE OF A DEADLY WEAPON

5 did, on or about June 9, 2000, then and there, wilfully, unlawfully, and feloniously use
6 force and violence upon the person of another, to wit: GUADALUPE LOPEZ, with use of a
7 deadly weapon, to wit: a gun, by the Defendant shooting a gun at the said GUADALUPE
8 LOPEZ, striking him in the leg.

9 STEWART L. BELL
10 DISTRICT ATTORNEY
Nevada Bar #000477

11
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13 BY 
14

DOUGLAS HERNDON
Chief Deputy District Attorney
Nevada Bar #004286

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26 0006090140/0006101143/0007120766
BURGWDW; FIRST KID. WDW, SAWDW, ROBBWDW, ATT. MURDER WDW,
27 FIRST ARSON WDW, FIRST KID. WDW WSBH, SAWDWWSBH,
FIRST KID. WDWVO65, SAWDWVO65, ROBBWDWVO65, MURDERWDW, BWDW
28 (TK6)

ORIGINAL

FILED

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Lisa E. Higgins
CLERK

1 **ORDR**

2 STEWART L. BELL
3 Clark County District Attorney
4 Nevada Bar #000477
5 DOUGLAS HERNDON
6 Chief Deputy District Attorney
7 Nevada Bar #004286
8 200 South Third Street
9 Las Vegas, NV 89155-2211
10 (702) 455-4711
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 JUSTIN D. PORTER,
14 #1682627

15 Defendant.

Case No. C174954
Dept No. XVI

17 ORDER DENYING DEFENDANT'S MOTION TO DISMISS NOTICE OF INTENT TO
18 SEEK DEATH PENALTY FOR VIOLATION OF INTERNATIONAL TREATY AND
19 CUSTOMARY LAW

20 DATE OF HEARING: 12-17-02
21 TIME OF HEARING: 9:00 A.M.

22 / THIS MATTER having come on for hearing before the above entitled Court on the
23 17th day of December, 2002, the Defendant being present, represented by JOSEPH
24 ABOOD, Deputy Public Defender, and CURTIS BROWN, Deputy Public Defender, the
25 Plaintiff being represented by STEWART L. BELL, District Attorney, through LISA
26 LUZAICH, Chief Deputy District Attorney, and the Court having heard the arguments of
27 counsel and good cause appearing therefor,
28 ///

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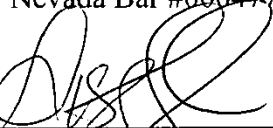
1 IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss Notice of Intent
2 to Seek Death Penalty for Violation of International Treaty and Customary Law, shall be,
3 and it is denied.

4 DATED this 30th day of December, 2002.

5
6 
7 DISTRICT JUDGE

AD

8
9 STEWART L. BELL
10 DISTRICT ATTORNEY
11 Nevada Bar #000477

12 
13 LISA LUZACH
14 Chief Deputy District Attorney
15 Nevada Bar #005056
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CASE NO. 174954

ORIGINAL

FILED IN OPEN COURT¹
FEB 09 2005

DEPT. NO. 16

DOCKET U

SHIRLEY B. PARRAGUIRRE, CLERK
BY *Jennifer Kimmel*
JENNIFER KIMMEL DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,)
)
 PLAINTIFF,)
)
 VS.)
)
 JUSTIN D. PORTER, AKA JUG CAPRI PORTER,)
)
 DEFENDANT,)
 -----)

REPORTER'S TRANSCRIPT
OF
EVIDENTIARY HEARING

BEFORE THE HONORABLE JUDGE JOHN MCGROARTY
DISTRICT COURT JUDGE

DATED TUESDAY, FEBRUARY 8, 2005

FOR THE PLAINTIFF: LISA LUSAICH -AND- BILL BERRETT
FOR THE DEFENDANT: CURTIS BROWN -AND- JOSEPH ABOOD

REPORTED BY: PEGGY ISOM, RMR, CCR NUMBER 541

1 CASE NO. 174954

2 DEPT. NO. 16

3 DOCKET U

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 *****

8 THE STATE OF NEVADA,

9 PLAINTIFF,

10 VS.

11 JUSTIN D. PORTER, AKA JUG CAPRI PORTER,
12 DEFENDANT,

14 REPORTER'S TRANSCRIPT

15 OF

16 EVIDENTIARY HEARING

18 BEFORE THE HONORABLE JUDGE JOHN McGROARTY
19 DISTRICT COURT JUDGE

20 DATED TUESDAY, FEBRUARY 8, 2005

21 FOR THE PLAINTIFF: LISA LUSAICH -AND- BILL BERRETT

22 FOR THE DEFENDANT: CURTIS BROWN -AND- JOSEPH ABOOD

24 REPORTED BY: PEGGY ISOM, RMR, CCR NUMBER 541

1 APPEARANCES:

2 FOR THE STATE: LISA LUSAICH, ESQUIRE
3 -AND-
4 BILL BERRETT, ESQUIRE
5 DEPUTY DISTRICT ATTORNEY
6 200 SOUTH THIRD STREET
7 LAS VEGAS, NEVADA 89101

8 FOR THE DEFENDANT: CURTIS BROWN, ESQUIRE
9 -AND-
10 JOSEPH ABOOD, ESQUIRE
11 PUBLIC DEFENDERS OFFICE
12 309 SOUTH THIRD STREET #226
13 LAS VEGAS, NEVADA 89155

14 *****

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MAR / ADM

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1 LAS VEGAS, NEVADA; TUESDAY, FEBRUARY 8, 2005

2 1:34 P.M.

3 PROCEEDINGS

4 *****

5 THE COURT: All right. Let the record reflect
6 this is the time set for hearing in the matter of State
7 versus Justin Porter. Let the record reflect the
8 presence of the defendant, his counsel, the state's
9 attorneys.

10 Are you prepared?

11 MS. LUSAICH: State is ready.

12 MR. BROWN: Defense is ready, your Honor.

13 THE COURT: All right. Go ahead.

14 MR. BROWN: Your Honor, this is a preliminary,
15 matter.

16 THE COURT: Yes.

17 MR. BROWN: Could we have the wrist restraints
18 removed from Mr. Porter?

19 THE COURT: He still has leg, leg irons?

20 MR. BROWN: Yes, he does.

21 THE COURT: Okay. Fine.

22 THE BAILIFF: Which hand do you write with?

23 MR. BROWN: He writes with his right.

24 THE BAILIFF: You want the right one removed.

5

1 MR. BROWN: If you won't do both, at least the
2 right.

3 THE BAILIFF: It's up to the C.O.

4 THE CORRECTIONS OFFICER: Okay.

5 THE COURT: Are we ready?

6 All right. Let the record reflect this is the
7 time for the defendant's motion to remand to Juvenile
8 Court.

9 MS. LUSAICH: No.

10 THE COURT: Also the motion to suppress
11 defendant's confessions.

12 MS. LUSAICH: My understanding it's only the
13 motion to suppress.

14 MR. ABOOD: It's the continuation of that motion.

15 THE COURT: Let the record reflect that the
16 calendar is wrong.

17 MS. LUSAICH: Oh

18 MR. BROWN: The calendar is probably not wrong
19 nearly as much as we are. But this is a continuation of
20 the suppression motion.

21 THE COURT: All right. Fine. Thank you.
22 You may proceed.

23 MR. BROWN: We start by calling Dr. Paglini.

24 THE COURT: Dr. Paglini.

6

1 MR. BROWN: And just to give your Honor a little
2 procedural catch up, the motion that Mr. Abood and myself
3 filed in challenging the statement given by Mr. Porter
4 in, I believe it was --

5 MS. LUSAICH: August of --

6 MR. BROWN: -- August of Two Thousand, listed as
7 a number of complaints that the statement was coerced,
8 and in addition, that Mr. Porter did not understand the
9 waiver per Miranda of his rights to remain silent and
10 have an attorney present with him at the time. And
11 that's basically the body of the motion.

12 As you recall, your Honor, I believe it was last
13 April -- no, it wasn't that long ago.

14 MS. LUSAICH: -- ish.

15 MR. BROWN: Where we started this hearing, where
16 we had the detectives from Chicago testify referencing
17 the coercive aspects as well as the detectives from Las
18 Vegas discussing all aspects of both issues.

19 Now we're continuing with the use of
20 Dr. Paglini, initially, with respect to part two of that
21 motion.

22 THE COURT: Let the record reflect that those
23 transcripts are in the file.

24 MR. BROWN: Thank you, your Honor.

7

1 THE COURT: Thank you.

2

3 DR. JOHN ANTHONY PAGLINI

4 Having been first duly sworn to tell the
5 truth, the whole truth and nothing but the truth,
6 testified as follows:

7 THE COURT CLERK: Would you state your full name
8 and spell your last name for the record, please.

9 THE WITNESS: John Anthony Paglini,
10 P-a-g-l-i-n-i.

11

12 DIRECT EXAMINATION

13 BY MR. BROWN:

14 Q. Good afternoon, Doctor.

15 A. Hello.

16 Q. Could you explain to the judge what it is that
17 you are specialized in?

18 A. I'm a clinical psychologist. I have a doctorate
19 in clinical psychology. I went to college at Catholic
20 University in Washington, D.C. Graduate school was
21 Illinois School of Professional Psychology. Internship
22 was United States Air Force in Washington D.C. And
23 received my doctorate from Illinois School of
24 Professional Psychology in Nineteen Ninety.

8

1 Q. Are there any other education or seminar
2 programs that you've attended reference your specialty?

3 A. Well, to lead up to that from that point on I
4 worked on an inpatient unit at various mental hospitals
5 for adolescents and adults. And in the mid Nineties, I
6 started to work in the forensic area for family courts as
7 well as criminal. I attended seminars at the American
8 Board of Professional Forensic Psychology on a consistent
9 basis in adolescent and adult matters.

10 Death penalty, sexual offender assessments,
11 ethics, just covered a whole gambit of responsibility
12 evaluations.

13 So the primary focus of all my C.E.U.s, likely,
14 since Nineteen Ninety-Eight to Nineteen Ninety-Nine has
15 been forensic psychology.

16 Q. Have you been certified as an expert in the
17 Eighth Judicial District in the past?

18 A. I'm sorry. What?

19 Q. Have you been certified as an expert in the area
20 of forensic psychology in the Eighth Judicial District?

21 A. Yes. I've testified at murder trials.

22 Q. Have you testified before this court before?

23 A. Yes. In competency-related issues.

24 Q. As an expert?

9

1 A. Yes.

2 Q. Okay. Have you ever testified or been retained

3 as an expert on behalf of the State of Nevada.

4 A. The D.A. has retained me in several cases. The

5 last was on a criminal responsibility case, I think,

6 sometime in mid Two Thousand and Four. I testified on

7 their behalf.

8 Q. Okay? And that was a murder case?

9 A. That's a murder case, correct.

10 MR. BROWN: Your Honor, I would offer

11 Dr. Paglini to this court as an expert in the area of

12 forensic psychology.

13 MR. BERRETT: No objection.

14 THE COURT: Okay. We'll so accept.

15 BY MR. BROWN:

16 Q. Now, Doctor, did there come a time on -- in or

17 around Two Thousand, Two Thousand and One, Two Thousand

18 and Two, I know that's a wide range, where I asked you to

19 consult on the State of Nevada versus Justin Porter?

20 A. Yes.

21 Q. Okay. If you have in your records the time of

22 that consult and initially what you were asked to consult

23 for?

24 A. Initially consulted to do a death penalty

10

1 evaluation, mitigation evaluation. So the cognitive

2 testing that was performed here actually was under the

3 guise of the death penalty evaluation. I met with -- I'm

4 just trying to find the report here.

5 THE COURT: Thank you.

6 THE WITNESS: I met with Mr. Porter extensively

7 one time eight-hour interview on January Eighteenth, Two

8 Thousand and Two -- actually, seven hours.

9 I met with him at Clark County Detention Center

10 on February Thirteenth, April Thirteenth, April

11 Twenty-Second, and June Seventh, Two Thousand and Two.

12 In addition, I conducted approximately eleven to

13 twelve collateral interviews which includes when I was in

14 Chicago I interviewed his tutor and other individuals,

15 his family members.

16 I also administered numerous testings.

17 Q. Okay. So as a response to my request, you were

18 initially retained, as this was going to be a death

19 penalty case?

20 A. Correct.

21 Q. And you were retained for purposes of

22 establishing some mitigation for the potential penalty

23 phase of that case?

24 A. That's correct.

11

1 Q. And along those lines, you were asked to do

2 certain tests and examinations of Mr. Porter?

3 A. Correct.

4 Q. And one of those was an I.Q. test?

5 A. Correct.

6 Q. Now I believe you additionally indicated that

7 you did some historical or some collateral background

8 interviews and research on behalf of Mr. Porter as well?

9 A. That's correct. I've talked to family members

10 as well as Mr. Wilson -- Winston, who was a tutor to

11 Mr. Porter during his eighth grade year.

12 Q. Now there was a time where you actually traveled

13 to Chicago to interview and meet with these people?

14 A. Yes. I met with the family members and

15 Mr. Winston, and also went to his schools.

16 Q. You went to a number of the elementary and high

17 schools that Mr. Porter attended?

18 A. I think the only two I attended was Esmond and

19 Grisham which were his grammar schools.

20 Q. Okay. And you obtained -- did you obtain any

21 records or documents from these schools?

22 A. Yes, I did.

23 Q. Okay. What was it that you were able to obtain

24 from that visit?

12

1 A. Academic records, in regards to his academic

2 history while in Chicago from roughly kindergarten to

3 approximately ninth grade.

4 Q. Okay. And we have those as well?

5 A. Yes, we do.

6 Q. Okay. Now in response to the request to --

7 well, why don't you explain to the court exactly the

8 nature of the tests that you did give Mr. Porter?

9 A. Okay. I gave him an I.Q. test. Actually, I

10 gave him an I.Q. test which called the W.A.I.S. Three.

11 And I give additional tests, which is two achievement

12 tests and memory tests, and Trails A and B which is a

13 brief neurological screener test.

14 Q. Let's go through them one a time.

15 A. Okay.

16 Q. Now, when we talk about an I.Q. test, is that

17 how we always understood it, just basic intelligence?

18 A. Yes. I.Q. test comprises of approximately

19 eleven to twelve sub scales. Half of them are verbal and

20 the other half are perceptual organizational, so you're

21 going to have a verbal I.Q. Perceptual organizational

22 I.Q., and then with the combination of those two, you're

23 going to have a full scale I.Q.

24 Q. What is --

13

1 A. I'm sorry.

2 Q. What is that second phase? What is that

3 perceptual I.Q.? What does that take in effect?

4 A. That deals with what we call non-verbal

5 abilities. Such as his ability to copy symbols within a

6 two minute period or put blocks together.

7 Q. Okay.

8 A. Or put pictures in a correct order in a time

9 measurement.

10 Q. Okay. So they take the verbal. They take the

11 perceptual?

12 A. The non-verbal, perceptual organizational, and

13 then that equals the full scale I.Q.

14 Q. Okay.

15 A. And I was fortunate because I had earlier I.Q.s

16 from high school to compare his, you know, his I.Q. from,

17 which is wonderful.

18 Q. And we'll touch on that in just a moment. Now

19 with respect to these tests, can you explain exactly how

20 the test is given?

21 A. Yes. I give it in person and roughly the

22 W.A.I.S Three takes usually anywhere from sixty to ninety

23 minutes. And there's approximately eleven sub tests.

24 And I have a booklet and a standardized, meaning, I have

14

1 to read the instructions and I have to follow the

2 instructions clearly. And if he doesn't give a full

3 credit response, on occasions I have to prompt him.

4 Q. Okay. And did you do that in this case?

5 A. Yes.

6 Q. Okay. Now, what were the results of the various

7 factors in that test? You indicated there were the two

8 sub categories and the final score. If you would just

9 give the Judge the results.

10 A. Okay. Mr. Porter's chronological age at the

11 time was nineteen years and I assume it's one month,

12 roughly. And his verbal I.Q. was 78 which places him in

13 borderline classification percentile seven. Let me

14 explain what a 78 means.

15 Q. Please.

16 A. An average I.Q. is one hundred. And a standard

17 deviation which is a variance is -- one standard

18 deviation is a fifteen so if you have an eighty-five

19 score that roughly is a below average score at the

20 sixteenth percentile.

21 If you take away another fifteen points from

22 eighty-five, you'll have seventy which will bring you

23 down to the second percentile which is classified as

24 mentally retarded and just in terms of I.Q. level.

15

1 And so if you have a score of sixty-nine or

2 below, that -- that score is severely impaired and would

3 possibly indicate an individual who is mentally retarded.

4 So a score of seventy-eight is considered a

5 borderline classification at the seventh percentile which

6 basically means if I compare Mr. Border to his reference

7 group was seventeen years old zero months to nineteen

8 years old eleven months, he -- ninety-three out of a

9 hundred individuals in that range scored better than he

10 does when it comes to verbal abilities.

11 Q. Okay. Just to clarify. Okay. Go on and give

12 us the results of the perceptual.

13 A. Okay. The perceptual organizational I.Q. was

14 eighty which basically indicates that ninety-one out of a

15 hundred individuals in that reference group, seventeen to

16 almost twenty years old, score better than him. He's at

17 the ninth percentile. His full scale I.Q. when you

18 combine the two, is a seventy-seven which places him at

19 the sixth percentile.

20 So, basically, his scores are severely

21 impaired.

22 Q. Okay. Now, just to get this out of the way. Is

23 Mr. Porter considered mentally retarded?

24 A. No, he's not.

16

1 Q. Okay.

2 A. For two reasons: One, his I.Q. does not fall

3 below seventy;

4 Two, he doesn't have impaired adaptive

5 functioning. Meaning, that you can have an individual

6 with a sixty-eight I.Q. but their functioning is, let's

7 just say, sub par, but not totally impaired. And they

8 wouldn't be mentally retarded.

9 In his case, he has -- he's a border -- I would

10 classify him as borderline intelligence. That was the

11 best way to classify him.

12 Q. Okay. Now you indicated that you were fortunate

13 in this case because you had other tests from Mr. Porter

14 when he was in the Chicago School District. Which tests

15 are you referring to?

16 A. Well, if I can, for a second if I can talk about

17 his achievement scores I gave him because the achievement

18 scores also were given several years ago.

19 Q. Okay.

20 A. So I kind of like -- this way it's going to be

21 kind of easier for everybody to understand everything.

22 Q. All right. Let's do that. Let's go through the

23 rest of the tests that you gave Mr. Porter, and then

24 we'll relate it back to the historical report.

17

1 A. Okay.

2 Q. So go ahead and explain to the court exactly

3 what the achievement test is.

4 A. Okay. I also administered the W.R.A.T. Three

5 which is called the Wide Range Achievement Test Revision

6 Third Edition, and Wechslers Individual Achievement

7 Test.

8 I administered the W.R.A.T. Three on January

9 Eighth, Two Thousand and Two. And, basically, what I

10 came up with, there was three sub tests to this.

11 The reading, he had a standard score of

12 sixty-three which indicates he's a grade equivalent score

13 of second grader. Percentile was one.

14 Spelling, he had a standard score of

15 fifty-four, grade equivalent of a first grader with a

16 percentile of one fifth of one percent. So he's very

17 severely impaired spelling. To give you an example of

18 his spelling abilities:

19 Enter is spelled I-N-T-E-R-E.

20 Circle is spelled C-U-O-K-L.

21 Correct is spelled C-K-O-R-E-K.

22 And material is spelled M-O-T-E-R-E-O.

23 And that was his spelling abilities.

24 Now, his reading abilities basically what this

18

1 is more or less a pronunciation. And he -- I can tell he

2 tried because he self corrected on numerous times, but he

3 just couldn't pronounce certain words, like, lame,

4 stretch, bulk, collapse, triumph.

5 he could not pronounce those words. He also

6 couldn't pronounce split or spell. He had difficulties

7 with that. He did pronounce accurately: In, cat, book,

8 tree and other words like that. So he was pretty

9 severely impaired.

10 Then what I did, I decided, approximately ten

11 days later when I had seen him for a full day's

12 assessment, to give him a different achievement score to

13 see how he would come up and see if these results would

14 carry over.

15 His basic reading score was sixty-three which is

16 exactly what I had in the first score.

17 His spelling score was a fifty, so which he had

18 a fifty-four. So basically he's below the first

19 percentile in spelling in both tests given approximately

20 ten days apart.

21 His mathematical reasoning score was a

22 sixty-three which is the same as I gave earlier, ten days

23 earlier. So once again, they were -- this is consistent

24 scores.

19

1 What I also did is with the -- this test,

2 there's additional sub tests which I gave which was

3 reading comprehension. He had a standard score of

4 seventy-one, which is at the third percentile with the

5 3.6 grade equivalent.

6 Listening comprehension was a seventy-two.

7 Just a little over, you know, let's just say, border,

8 very borderline intelligence at the third percentile.

9 Once again 3.5 equivalent.

10 And oral expression which is expressing his

11 ideas when he's seeing a stimulus, was in the average of

12 minus range at approximately the fifth grade 5.5 grade

13 level. So here we have an individual who -- which we'll

14 get into probably in a second -- who is diagnosed very

15 early on in the Chicago Board of Education as being

16 severely learning disabled.

17 And as a nineteen year old, nineteen years

18 approximately one month, he attained scores

19 approximately, I would say, his reading pronunciation

20 level, his reading comprehension level, and his listening

21 comprehension level consistently scored approximately 3.5

22 to 3.8 grade level. So it's severely impaired.

23 And that was consistent with about ten days

24 apart.

20

1 I also gave him a memory test. And this is

2 called the Wechsler Memory Scale, Third Edition.

3 Q. Before we go to the memory test, if we could

4 backup to the Wide Range Achievement Test?

5 A. Yes, sir.

6 Q. That's the first -- that's the first test you

7 indicated that you gave that was a type of a reading

8 comprehension test.

9 A. It's -- it's more. The W.R.A.T. Three, it's

10 more of a pronunciation test. And the rational for that

11 is because they want to see if individuals can pronounce

12 the words. They want to know is it a comprehension

13 problem or is it just a word attack problem that they

14 don't even know basic, you know, the first step, the

15 reading comprehension. First have you to read.

16 Q. Right.

17 A. You have to be able to look at words and

18 pronounce them correctly. And even on this he scored

19 very poorly, approximately the second grade level. And

20 his reading comprehension seemed to be over the third --

21 under the third grade level.

22 Q. So breaking that down, this nineteen year old's

23 reading level was essentially that of a second grade?

24 A. No. Well, I would say, if we're looking -- if

1 we're really kind of going across the board, I would say
2 it would be safer to say that he's probably about the end
3 of third grade.

4 Q. End of third grade?

5 A. I would say that would probably be safer.

6 Q. Okay. Now did you give this wide range
7 achievement test in response to the I.Q. test? Or is
8 this something you do as a normal course of the cognitive
9 testing you do?

10 A. Well, when you're doing a death penalty case,
11 you're looking for any aspects of mitigation. And if I'm
12 going to possibly give him paper and pencil test, I have
13 to understand what his reading level is going to be
14 like. Because when you're talking to him, initially,
15 although you're seeing a deficit, he acquiescence.
16 Meaning, that he'll kind of nod, yeah, yeah, I
17 understand, but he doesn't as well as I'm thinking he's
18 understanding.

19 So when I gave him this test, I recognized, even
20 if I wanted to give him a personality test, I couldn't
21 because he's not going to understand the vocabulary which
22 is normally an eighth grade level.

23 So the reason to -- why to give him an I.Q. and
24 achievement test is, does he have a mental retardation?

1 And the answer was, no.

2 Does he have a, perhaps, a learning disability
3 and how does that factor into, you know, any mitigation
4 that we're looking at? So that's the reason why I gave
5 the test.

6 Q. Now, once you gave the wide range achievement
7 test, did you do -- you decided to support that with a
8 similar test, but not the same test?

9 A. Yeah. Actually they're correlated. My goal
10 was, is that, the Wechsler Individual Achievement Test
11 had roughly a more scales to assess him on. It had a
12 reading comprehension component and a listening
13 comprehension component, and the W.R.A.T. Three didn't.

14 So I was looking for two things:

15 One is, would I get consistency with the
16 scores? Well, and that would fall into line, is he
17 malingering?

18 And two, you know, I wanted to kind of look at
19 his comprehension, his ability to understand what is
20 being said to him.

21 Q. Okay. Now you mentioned malingering, and it's
22 something we're going to talk about a little bit more
23 when we get into his historical education patterns. But
24 while you've mentioned that, malingering essentially

1 means --

2 A. Well --

3 Q. -- tricking or faking --

4 A. -- in this case that, perhaps, for secondary
5 gain, the defendant would fake bad.

6 Q. Okay.

7 A. You know, perhaps he could fake -- he would want
8 to look mentally retarded to avoid the death penalty.
9 That would be one aspect of, perhaps, malingering.

10 Q. Are those always -- is malingering always an
11 aspect that you are looking for in evaluating when
12 conducting these types of test?

13 A. Yes, it is.

14 Q. Okay. And what assurances do you have, through
15 at least the first three tests that we talked about, that
16 he was not malingering?

17 A. We have a few things which I guess, one is that
18 I, fortunately, have older records which indicate that
19 his scores are consistent from when he was in high
20 school, in ninth grade. So that helps out a lot.

21 I think, when I did my initial assessment, I
22 didn't have those records, so I got them at a later date
23 and said, oh, look, there's some comparison here which is
24 wonderful.

1 But if you look at W.A.I.S. Three, there's
2 approximately eleven different sub scales. And what
3 we're looking here is if somebody is trying to malingering,
4 we're going to look for how he's responding to the
5 questions.

6 Meaning that, if you're trying to malingering,
7 maybe in this case you're going to want to look really
8 bad. And in some cases when I'm working with guys, you
9 know, they can't tell me the simplest things.

10 With Mr. Porter's case what I -- the general
11 consensus was, is that, he was doing well at the
12 beginning of the test and then would start fading as the
13 test became much more difficult, which is something that
14 I would expect.

15 Also he was self correcting. And what that
16 means is that if he gave me a response, he then, all of a
17 sudden, was thinking about it more, and says, no, it's
18 not this; it's this. And he would give me a correct
19 response.

20 And he did that numerous times throughout the
21 testing where he would, you know, on one occasion on the
22 achievement test, he got one question wrong, and then the
23 next question he got that wrong.

24 And I said, what's going on? He said, I'm

1 still thinking about the first question. And then he got
2 that one right. And so, you know, there was an
3 investment that was seen with him. Also with that
4 investment, what I noticed was, he had word finding
5 problems. He couldn't express himself appropriately.

6 He might have had an idea in his head, but he
7 couldn't come across with it because he didn't have the
8 vocabulary level. So his expressive vocabulary is
9 especially poor when we compare him to other kids his
10 age. Roughly, you know, I would say kind of like on
11 third grade level, maybe fourth grade level. Yeah.

12 Q. So with respect, at least, to the adult
13 intelligence test, the wide range achievement test, and
14 the individual achievement test, the Wechsler Individual
15 Achievement Test, you're satisfied there's no indications
16 of malingering with respect to those tests?

17 A. Correct. Also when I gave him the Trails A and
18 B which is a brief neurological screener, he scored in
19 the normal range. Indicating that he was trying. And
20 then I gave him at T.O.N.I. Three which is a test of
21 non-verbal learning.

22 And, and this is more of where he's looking at
23 pictures and he doesn't talk, but he points to what the
24 correct item is. And he scored kind of in the average

1 minus range. All indicating to me that, you know, there
2 was an effort there. That he was trying. And even on
3 T.O.N.I. he was self correcting, meaning, that he's
4 trying to get the right answer.

5 Q. He's trying to succeed?

6 A. He's trying to succeed, yeah.

7 Q. In your experience malingerers are trying to
8 fail?

9 A. Their trying, yes. Correct.

10 Q. Now you mentioned those two other tests, the
11 T.O.N.I. and the Trails Making A and B. What is it
12 exactly that the T.O.N.I. test, the test of non-verbal
13 intelligence, is attempting to discover?

14 A. As stated just briefly. Sometimes when I have
15 someone who's doing so poorly on an I.Q. test and
16 Achievement scores I want to understand, geez, what is
17 their non-verbal abilities like? Can they score a little
18 better?

19 And this is a test where they're going to see
20 maybe a pattern of five response choices. They have to
21 pick the right response choice and complete the pattern.

22 And in this case he had an average -- actually,
23 I misquoted. I said average minus. It was an average
24 score.

1 So he did that fairly well on that. So I was
2 confident that, okay, here he is. He's attempting to do
3 as well as he can on this.

4 Q. And those, you indicated that is a non-verbal
5 intelligence?

6 A. Yes.

7 Q. Those kinds of picture associations?

8 A. Right.

9 Q. That doesn't reflect, necessarily, such as the
10 other tests do his reading comprehension and his reading
11 abilities?

12 A. The T.O.N.I. was designed to be language and
13 culture free. So it has nothing to do with language at
14 all.

15 Q. Okay. And you also made mention of Trails
16 Making A and B Test?

17 A. Just a brief neurological screener, where if he
18 would have bombed on that, then I probably would have
19 consulted and, you know, maybe have him see a neurologist
20 or something, if he would have done very poorly. It's a
21 very easy test to be successful in.

22 And once again, if he would have failed that
23 test or had a markedly impaired score I'd have to either
24 say, is he malingering? Or does he have some kind of

1 neurological impairment? And he passed that. He's fine.

2 Q. But he's -- okay. Now, is that a full
3 indication of the various tests that you actually
4 performed with Mr. Porter?

5 A. That covers it with the exception of the memory
6 tests. The Wechsler Memory Scale Third Edition.

7 Q. And what is that?

8 A. The reason why I administered this test --

9 THE COURT: Excuse me, Doctor. Can I just
10 interrupt you, for just a brief second? When you said he
11 had no neurological impairment, that means no organic
12 defect?

13 THE WITNESS: Well, my -- my assessment was very
14 brief, but based on what I have here, I think I have a
15 person who has a severe learning disability as opposed to
16 someone who has a head injury.

17 THE COURT: That's why I asked.

18 THE WITNESS: Yeah. Right.

19 THE COURT: Okay. Fine. Thank you.

20 Go ahead.

21 MR. BROWN: Thank you, your Honor.

22 BY MR. BROWN:

23 Q. We were discussing the --

24 A. The Wechsler Memory Scale, Third Edition.

1 THE COURT: Right.

2 THE WITNESS: This is divided into different
3 sections, which is short term memory and long term memory
4 and attention concentration.

5 And short term memory is divided in two aspects
6 which is verbal and also visual.

7 So we have a verbal memory, short term memory,
8 and a visual short term memory.

9 And more or less across the board on everything
10 he scored, auditory short term memory is seventy-four,
11 visual short term memory is seventy-eight. Overall short
12 term memory is a seventy-one at the third percentile.

13 Long term memory is seventy-four for verbal.
14 Visual is seventy-eight.

15 General was a seventy-three.

16 His auditory recognition delay was a little
17 higher.

18 Q. What is that?

19 A. Well, that's basically -- it's easier. What it
20 is is that if I -- if I give you a story and I say, did
21 it happen at seven o'clock or nine o'clock? You have,
22 you know, kind of two choices and something is there.
23 The answer is there for you. And it's easier for you to
24 do that, recognition than recall. Recall is much more

1 difficult.

2 It's kind of like if I give you an essay format
3 in a question, that's going to be much more difficult
4 than if I give you a multiple choice and the answer is
5 there.

6 Q. I see.

7 A. So normally with people with recognition are
8 going to score higher than recall and he did because he
9 had an eighty which puts him at the ninth percentile.

10 So overall, what we have is, these scores, his
11 memory scores are consistent with his I.Q. He's an
12 individual with a borderline intelligence and his
13 achievement scores which we've kind of gotten into, are
14 even lower, so to speak, than his I.Q. which is kind of
15 consistent.

16 Q. Now on this memory test, you indicated that he
17 improved in the areas that you would have anticipated
18 someone to improve -- or scored better in the areas on
19 the test you would anticipate somebody to score better
20 on?

21 A. Correct. Person is usually going to score
22 higher recognition than recall.

23 Q. And he did that?

24 A. He did that.

1 Q. Is that one of the areas you look at when you're
2 trying to decide if somebody is malingering or
3 intentionally faking this particular test?

4 A. I'm looking for everything. Because I mean, to
5 be really honest with you, is that I'm not going to be
6 coming up on the stand if I think the guy is malingering
7 because they're going to be hiring me. Then they will be
8 bringing me in because he's malingering.

9 So I don't want to come up and say the guy is
10 doing well when all the evidence indicates he's
11 malingering. And in this case, you know, there's no
12 evidence of malingering.

13 Q. Okay. Now, just to backup a little. On that
14 test you were throwing out a lot of numbers. Seventy,
15 seventy-eight, et cetera.

16 If you could backup to this, to this latest
17 test and put those numbers in context for the Court as
18 to, on some of them you were saying which percentile
19 Mr. Porter fell into. But if you could go through one at
20 a time, and you could give me the score and the context
21 in which that score was reviewed?

22 A. Sure.

23 Q. And the percentile that that compares him to the
24 population.

1 A. I'll do a little better than that. I'll start
2 at the top.

3 Q. Okay.

4 A. Which if you score a hundred and thirty, you're
5 in a very superior range in the upper second percentile.
6 You're two standard deviations above the mean. If you
7 score a one twenty to one twenty-nine, you're in the
8 superior range. Roughly about ninety to ninety-eight
9 percent, roughly.

10 If you score a one ten to one nineteen, you're
11 in above-average range. And you're going to be roughly,
12 I think, in the seventieth percentile, maybe the
13 ninetieth percentile, roughly. I'm a little off on the
14 numbers, a few.

15 If you score a hundred, that's considered
16 average. That is the -- right in the middle. And that
17 is our benchmark when we do the standardized deviations.
18 So anything from, like, a ninety-two to, like, a one zero
19 eight, I would consider a ninety-two to be average minus
20 and one zero eight to be kind of average plus.

21 The person has, like, a ninety-six to one zero
22 four, I'd say that's average.

23 If I see a score that's eighty to eighty-nine,
24 I would say that is below average score. An eighty-nine

1 would be kind of a below average plus, and, you know, an
2 eighty, obviously, kind of a below average minus.

3 If I have a guy who has an I.Q. of seventy to
4 seventy-nine, that is borderline intelligence because
5 it's right over mental retardation. And the person is
6 severely impaired. With a seventy-nine, I think you
7 might be at the, about the seventh percentile. And if
8 you have a seventy, you're at the second percentile.

9 So in order to be qualified as mentally
10 retarded, we're looking at the bottom two percent in our
11 country who have impaired adaptive abilities, and that's
12 sixty-nine or below.

13 If you have a fifty or a forty-five, you know,
14 you're really impaired.

15 So in his case, he has an overall I.Q., once
16 again, to kind of get back to it, with a verbal I.Q. of a
17 seventy-eight at the seventh percentile which means that
18 ninety-three out of a hundred people do better than him
19 in his group, his age group, which is seventeen years
20 zero months to nineteen years eleven months.

21 Q. Now does that scale apply in the same way, for
22 example, to the Wechsler Memory Scale?

23 A. Yes.

24 Q. Okay. So when you're talking he scored seventy

1 or seventy-three --

2 A. We're talking the same range.

3 Q. It's the same range as with the adult
4 intelligence scale?

5 A. Correct.

6 Q. Okay. Now you had indicated that in addition to
7 conducting these tests yourself, you had access to school
8 records, interviews with family members, a tutor, and
9 other individuals to help give you collateral background
10 information on Mr. Porter; is that correct?

11 A. That's correct.

12 Q. Okay. Throughout these interviews and these
13 document reviews, were your findings consistent or
14 inconsistent with the tests you gave?

15 A. They were consistent. May I explain his
16 educational history?

17 Q. I would appreciate that.

18 A. Okay.

19 Q. I think what I'd like to do is, actually, maybe
20 give some of this to the court as well, so we'll have the
21 Court have some of the school records, and we can go
22 through them.

23 THE COURT: Anything that you give me, you have
24 to give the state.

1 MR. BROWN: The state -- you should have a copy?

2 MR. BERRETT: We do.

3 MR. BROWN: Yeah. They have the school records,
4 Judge. And the Court's pleasure whether we could take --

5 You want to take all the records and maybe mark
6 them as one stack or do you want me to break them down as
7 to different --

8 MR. BERRETT: Oh, no. Do one stack. That's
9 easier.

10 THE COURT: Fine.

11 MR. BROWN: So let's just put a big clip on
12 this, and then have it marked.

13 THE COURT CLERK: Defendant's A.

14 MR. BROWN: Defendant's A.

15 BY MR. BROWN:

16 Q. Do you have a copy of the school records?

17 A. Of Chicago's?

18 Q. Yes. Chicago's. Just so that we can -- if I
19 can ask to you review the ones that I've marked as
20 Exhibit A, real briefly, to see if these are the same or
21 copies of a document that you obtained from the Chicago
22 School District, and the ones that you'll be testifying
23 about this morning -- afternoon.

24 A. They seem very similar.

1 Q. Okay.

2 MR. BROWN: Judge, I'd move for the admission of
3 these.

4 MR. BERRETT: No objection.

5 THE COURT: It will be admitted.

6 MR. BROWN: Okay. I'll give this to you now,
7 your Honor.

8 THE COURT: Thank you.

9 MR. BROWN: If you want to peruse through them.

10 BY MR. BROWN:

11 Q. Okay. Dr. Paglini, now with respect to the
12 records -- let me catch up.

13 Okay. You have, I believe, elementary school
14 progress records?

15 A. Yes.

16 Q. And elementary school standard test data?

17 MR. BROWN: It's another sheet that looks
18 similar.

19 THE COURT: It's at the top of the first sheet.

20 THE WITNESS: Yeah, I have this one. Oh, that
21 one.

22 BY MR. BROWN:

23 Q. That's the test data sheet.

24 A. Let me borrow yours. I've seen it.

1 Q. I'm going to ask you to explain.

2 A. I might have it. This is it here. I just have
3 it stapled.

4 Q. Yeah. And you have, if I may --

5 A. I see.

6 Q. -- the same copies as I do. If you could just
7 explain to the court as best as you understand what these
8 records are indicating on these reports?

9 A. Okay. Let's go with the -- his history, Chicago
10 Board of Education.

11 Q. Okay.

12 A. He was enrolled at Esmond in Nineteen
13 Eighty-Seven and Eighty-Eight. And he missed forty-three
14 days of Headstart. And then he attended Esmond for
15 kindergarten.

16 Q. If I could just stop you right there. When you
17 say the Headstart Program, is that a program that's
18 actually designed to take place before kindergarten?

19 A. Correct.

20 Q. And he missed the first forty-three days of that
21 program?

22 A. All right.

23 Q. Which is a school year?

24 A. Yeah. He missed probably about twenty-five

1 percent of the school year.

2 Q. Okay. Then he attended kindergarten at Esmond,
3 in which case he missed about twenty-three days out of
4 about sixty some days. And then he was transferred to
5 Fuller for some reason.

6 And he passed kindergarten. However, in first
7 grade he -- he was identified as special education, I
8 think, in kindergarten.

9 Q. Okay.

10 A. And he repeated first grade. And he was
11 eventually sent to Grisham which has better facilities in
12 the public school system to treat individuals with
13 learning disabilities.

14 Basically, I guess, if you kind of want to go
15 through some of these records here.

16 Q. Yes.

17 A. In second grade he was assessed with word
18 analysis at a first percentile. When he compares himself
19 to second graders vocabulary at the thirteenth
20 percentile, slightly below.

21 And reading was at a 1.8 level, so he was -- I
22 don't know when this -- this is in the Spring, so he
23 should have probably been at 2.7 grade level.

24 And his reading level was 1.8, so he's already

1 about a year behind when he's starting things off.

2 Q. Okay.

3 A. In the fourth grade, it appears, if we're
4 looking at the same standardized achievement score, his
5 word analysis is at the first percentile with a 1.8 grade
6 level. So he's gone up about two grades. And he's gone
7 up maybe about one and a half grades. He's still behind
8 by two years, so this is Spring of Ninety-Four.

9 Vocabulary ability at the first percentile 1.5

10 Now in sixth grade, now this is interesting
11 because it has a Spring Ninety-Five and a Spring
12 Ninety-Six, both grade six.

13 And I am not sure here if he repeated the sixth
14 grade, because I don't think he did. But I have
15 different scores here. But anyways, it seems that his
16 reading went up in the Spring of Ninety-Six to a
17 percentile of thirty-six which is pretty interesting
18 because when you move it to the side here and you go
19 Spring of Ninety-Seven, his reading then goes down to the
20 fifth grade level and vocabulary is 6.1.

21 But that is during the time he had a lot of
22 tutoring. Mr. Winston worked with him, I think, twice a
23 week for almost a whole school year. So it's kind of
24 interesting how he kind of peaks up there. And the

1 reason why this is significant is -- and I'm getting
2 ahead of ourselves -- but if on the district two zero six
3 high school, Bloom High School -- bloom Trails High
4 School, if you look at his testing, they have an I.Q.
5 test and an achievement test.

6 Q. Now are those similar to what the tests you
7 administered to Mr. Porter?

8 A. This is what I administered. These scores here,
9 I would not have -- this is a standardized scores. So
10 that's different.

11 Q. Okay.

12 A. So now this score here, the W.R.A.T. Three is
13 similar to what I administered.

14 Q. And that's a test that was given to Justin
15 Porter in Nineteen Ninety-Seven?

16 A. September Eleventh, Nineteen Ninety-Seven?

17 THE COURT: I have that, yes.

18 BY MR. BROWN:

19 Q. Okay.

20 A. And his age at that time would have been
21 fourteen years eight months.

22 Q. Okay.

23 A. And why this is significant is because his I.Q.,
24 his verbal I.Q., is seventy-six. When I gave -- let's

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1 see here. No, I'm sorry, a seventy -- yeah, a
 2 seventy-six. When I gave it five years later, he got a
 3 seventy-eight, so that's pretty consistent.
 4 When I gave the performance scale I.Q., he had
 5 an eighty-seven on that test and I got an eighty. And
 6 that's within normal kind of scoring.
 7 And I had a full school I.Q. of seventy-seven.
 8 They didn't present the full scale I.Q.
 9 Now the difference was, they administered the
 10 W.I.S.K. Three, and I administered the W.A.I.S. Three.
 11 What's the difference? Well, you can administer the
 12 W.I.S.K. Three to kids up until the age of sixteen. And
 13 when I tested Justin, he was nineteen, so I had to give
 14 the adult test.
 15 But then again, once again, that adult test
 16 went down to seventeen, seventeen years zero months and
 17 nineteen eleven months. Now let's look at the
 18 achievement scores that he got in high school compared to
 19 now.
 20 I gave the W.R.A.T. Three. They gave the
 21 W.R.A.T. Three. When he was nineteen years old, he had a
 22 standard score in reading of fifty-one. I got a
 23 sixty-three. I received a better score from him.
 24 Spelling, they got a fifty-nine. I got a

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1 fifty-four. That's within normal limits.
 2 Math, they received a seventy. I received a
 3 sixty-three, still within normal limits because you're
 4 going to get some variance.
 5 So here you have an individual that's about
 6 four years five months older, and for most part, we're
 7 having consistent scores, very consistent scores.
 8 There's not a lot of variances, which is a good thing.
 9 And so the most important thing, I think, to
 10 recognize when he was in the Chicago Public School System
 11 is, that in eighth grade they socially promoted him.
 12 And what, basically, that means he was too old
 13 to remain in eighth grade. They just elevated him. And
 14 if you look at all his grades here on the elementary
 15 school progress record, in eighth grade he actually
 16 missed thirty-three days of school out of a hundred and
 17 seventy-seven.
 18 And he primarily received in:
 19 Oral expression, written expression, and
 20 spelling, Ds.
 21 Handwriting C.
 22 And then easy classes -- well, I mean, I
 23 wouldn't say easy, but let's just say:
 24 Art, music A, B;

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1 Health and Safety, Physical Ed, Library Science,
 2 like, you know, B's and A's. So he did a little better.
 3 But once again, the core classes, he's really
 4 struggling. And in those classes he's, you know,
 5 sometimes, you know, well I can't say how they graded
 6 him, so --
 7 THE COURT: Excuse me. I'd just like to comment
 8 that you said social promotion. I mean, that's a term of
 9 art. I find it interesting that the written
 10 documentation on the school psychology report actually
 11 puts that in writing.
 12 THE WITNESS: Yes.
 13 THE COURT: Quote, social promotion, unquote.
 14 THE WITNESS: That's where I got it from, sir.
 15 THE COURT: To get from eighth grade to high
 16 school, quote, sent onto high school based on a, quote,
 17 social promotion, unquote.
 18 THE WITNESS: And part of that is his age.
 19 Let's see here, in December Thirteenth, Nineteen
 20 Eighty-Two, and he would have graduated, I think, in
 21 eighth grade in Nineteen Ninety-Eight. So this, he was
 22 about what sixteen or fifteen and a half. And so,
 23 technically, when you're fifteen, you're going to be, you
 24 know, probably in the sophomore in high school or maybe

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1 for him a freshman, you know. He's a year or two behind
 2 because of his date of birth.
 3 THE COURT: On page three of that record it
 4 indicates he's reading comprehension scales were only
 5 slightly better, second grade level, and with arithmetic
 6 computational skills, third grade. So he's only second
 7 or third grade level --
 8 THE WITNESS: Right.
 9 THE COURT: -- when he entered high school?
 10 THE WITNESS: Right.
 11 THE COURT: Thank you.
 12 BY MR. BROWN:
 13 Q. And are those findings consistent with the
 14 findings that you made in Two Thousand and Two when you
 15 tested Justin?
 16 A. Yes.
 17 Q. Now with respect to the Nineteen Ninety-Seven, I
 18 think there's two in Ninety-Seven, so I'll refer to
 19 September Twenty-Fifth, Nineteen Ninety-Seven. There
 20 seems to be -- it's an I.E.P. program; is that correct?
 21 A. Yes.
 22 Q. Individualized Education Program for Justin?
 23 A. I assume it's September Twenty-Fifth, Nineteen
 24 Ninety-Seven.

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1 Q. Correct.

2 A. Okay.

3 Q. And these individualized education programs are

4 a recognition of the school program that an individual

5 needs specialized care in their education?

6 A. Yes. Any time you have an individual who's

7 recognized as learning disabled, every year you have to

8 have an individual education plan where you assess their

9 needs and make sure that you're addressing their

10 deficiencies, so they can go from grade to grade.

11 THE COURT: I believe -- excuse me for

12 interrupting, but I believe that's a federal requirement.

13 THE WITNESS: Yes, it is.

14 THE COURT: Yeah.

15 MR. BROWN: Thank you, Judge.

16 BY MR. BROWN:

17 Q. Now the whole document and the entire body is in

18 the court's record for review. But I would direct your

19 attention to Page 4.

20 THE COURT: Page 4 of the M.D.C.?

21 MR. BROWN: Correct.

22 THE COURT: I have that.

23 BY MR. BROWN:

24 Q. Under disabilities for category D, specific

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1 learning disability, they recognize --

2 A. Wait a minute. Make sure I'm on the right page.

3 MR. BROWN: If I can approach.

4 THE COURT: This one here.

5 THE WITNESS: Okay. Right here. Got it, sir.

6 THE COURT: All right.

7 THE WITNESS: Thank you.

8 BY MR. BROWN:

9 Q. Under, do you see where it says disabilities?

10 THE COURT: At the top?

11 THE WITNESS: Yes, sir.

12 BY MR. BROWN:

13 Q. At the top and it lists A through H on the

14 left-hand side?

15 A. Yes.

16 Q. The primary concern there seems to be specific

17 learning disability?

18 A. Correct.

19 Q. And over on the right under disability under

20 heading I speech language impairment seems to be a

21 secondary concern?

22 A. Correct.

23 Q. And I believe there's actually listing under the

24 adverse effects that in Nineteen Ninety-Seven Justin has

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1 poor memory skills, his reading, spelling, and writing

2 skills significantly interfere with his education

3 performance. He has a severe reading disability and poor

4 development?

5 A. Correct.

6 Q. And that's consistent with the findings that you

7 had even in Two Thousand and Two?

8 A. Correct.

9 Q. Is there any reason to believe that in the

10 middle period there, say, the year Two Thousand, that he

11 would have had a significant improvement and then

12 reverted back to impaired to Two Thousand and Two?

13 A. Probably not. Because eventually he moved to

14 Las Vegas where it seems like there was even less

15 supervision of him.

16 Q. Okay.

17 A. And he was transferred to different high schools

18 frequently. So I don't think that his educational issues

19 were addressed. The only time they probably were

20 addressed, and Mr. Winston, who I did a collateral

21 interview with, provided tutoring for Justin during the

22 eighth grade year.

23 And he was very helpful because he knew -- he

24 knew the family fairly well. And he more or less said,

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1 look, the family was kind of overwhelmed. And although

2 they were nice people, they just -- you know, they didn't

3 support Justin, academically.

4 And so he probably stabilized. The best year he

5 probably had in his life was eighth grade because his

6 family moved, like, twenty-seven times from birth to

7 seventeen years of age, twenty-six or twenty-seven times.

8 A lot of domestic violence in the home. And,

9 you know, single mother, and a lot of instability.

10 So, and then, if you even look at his report

11 card here, look how many days this young man misses.

12 It's unbelievable. I mean, thirty-three days out of a

13 hundred and seventy-seven in seventh grade. Thirty-two

14 days out of a hundred and seventy-nine in sixth grade.

15 So if you think about that in of itself, you

16 have a kid who is coming from, obviously, not an enriched

17 environment with, although okay parents, no parental

18 support. A lot of stressors, moving all the time. So

19 there's no stability for him to launch from. And then

20 when he moves to Vegas, it's even worse.

21 Q. Now Mr. Winston, you indicated was a -- did you

22 recall what his education was or what Mr. Winston's role

23 was in the community?

24 A. Mr. Winston, now, is a principal of the Chicago

1 Public School System.

2 Q. Okay.

3 A. I found him to be a very credible individual who
4 really cared tremendously for Justin and the family. I
5 think he has -- I don't have it written here, but I say
6 he has a masters degree.

7 Q. Did he give you some specific recollections of
8 Justin and either the difficulties or the achievements
9 that he had while trying to tutor Justin?

10 A. Can I read what I wrote in my report? Would
11 that be easier? Or just briefly? Or --

12 MR. BROWN: Well, your Honor, I plan on marking
13 and having the report admitted, your Honor, for review.
14 So if it's okay with the Court for him to go ahead and
15 read instead of trying to memorize.

16 THE COURT: If it's okay with you.

17 MS. LUSAICH: No objection.

18 THE COURT: Go ahead.

19 THE WITNESS: Okay. Mr. Winston is a principal
20 at Fulton Elementary School located in Chicago.
21 Mr. Winston was evaluated on April Twenty-Five, Zero Two
22 at Fulton Elementary School.

23 Mr. Winston stated he tutored and mentored
24 Justin from Nineteen Ninety-Six through Nineteen

1 Ninety-Seven.

2 Mr. Winston tutored Justin for approximately
3 seven months two times a week. In addition, his wife
4 also helped out.

5 When Mr. Winston reported he and his wife
6 attended the same church as the Porter family. The
7 church provided the family with support.

8 Mr. Winston also tutored Justin's sister.
9 Mr. Winston reported Ms. Porter is a very caring parent
10 who did a lot for her children; however, quotation marks
11 she is not as structured with them end of quotation
12 marks.

13 Mr. Winston believed Mrs. Porter did the best
14 she could as a single parent, yet, was unable to provide
15 boundaries for her children.

16 Mr. Winston recalled Justin's father, Mr. Porter
17 would stop by when he was called, but for the most part
18 he was not actively involved in Justin's life.

19 Mr. Winston tutored Justin through the eighth
20 grade year. During this time Justin was approximately
21 thirteen years of age.

22 Mr. Winston's impression was that Justin has a
23 mental age of nine or ten. Described Justin as being
24 playful, but could not retain information.

1 Mr. Winston stated that Justin was very caring
2 of little children and he played with children
3 exceptionally well.

4 When his mother stepped out of the home, he
5 watched the children and was trustworthy. Mr. Winston
6 reported that Justin has a reading level of fourth or
7 fifth grade, and he had very poor spelling skills.

8 Mr. Winston reported quotation marks, Justin
9 made some progress but nothing to brag about, quotation
10 marks.

11 Mr. Winston reported that although Ms. Porter
12 was very giving, she never had any time to do the
13 homework with Justin or provide any form of structure.

14 Mrs. Porter was informed by the school of
15 Justin's learning problems but she never followed through
16 with any form of structure in regarding his studying.

17 Mr. Winston reported that Justin was very
18 respectful towards him or others, never was disrespectful
19 was very caring with little children and exhibited a lot
20 of love for his family.

21 In regards to Justin's weaknesses, Mr. Winston
22 reported, quotation marks, I just didn't see that, end of
23 quotation marks.

24 He acknowledged the family needed family

1 therapy, and Mrs.. Porter needed to be a mother to Justin
2 and not a friend.

3 Mr. Winston denied that Justin had anger
4 problems, antisocial behavior, gang involvement, or a
5 criminal record. Reported Justin was simply a sweet
6 child.

7 Mr. Winston reported in regard to what went
8 wrong, he believed that the mother was not strong enough
9 for the boys and Justin got away from her.

10 Mr. Winston is a Godparent to Justin's
11 stepchildren -- sister's children, I apologize.

12 BY MR. BROWN:

13 Q. Now you indicated at one point in there that
14 Mr. Winston actually described Justin as playful and
15 somewhat juvenile?

16 A. Yeah. Justin's emotional I.Q. is
17 underdeveloped.

18 Q. Is it --

19 A. And he's just a -- he was in a church, and they
20 would just kind of like lead him to do things, and he
21 never was aggressive in the church. Of course, that's a
22 different setting. And what they knew of the family, he
23 was just a very playful young man that really probably
24 had an absent father, and a very difficult life. So he's

1 likely seeking a lot of attention.

2 Q. Could that be characterized as childlike?

3 A. Yeah.

4 Q. Is that consistent with your experiences and
5 your history with Justin?

6 A. Yes. Yes.

7 Q. And how much time would you say, total, in
8 reviewing Justin's records, and how much time would you
9 say you put in, total, in reviewing Justin's records and
10 meeting with and discussing with Justin Porter?

11 A. Oh, I probably had minimally twelve to fourteen
12 contact hours. And I was in Chicago interviewing
13 family. That might have been seven or eight hours. Then
14 I did some collaterals on the phone. That could have
15 been several more hours.

16 Then reviewing discovery and add on numerous
17 hours for that.

18 Q. In your meetings and discussions with the family
19 members and other figures such as Mr. Winston, would you
20 say that their characterization of Justin and his
21 learning deficits were consistent?

22 A. Yes, they were.

23 Q. Okay. I'm going to show you what's been marked
24 as Defense B. See if you recognize that as a copy of

1 your cognitive analysis report --

2 A. Correct.

3 Q. -- that you prepared for this particular
4 hearing?

5 A. Yes.

6 Q. Okay. Does this appear to be a true and
7 accurate copy of your report?

8 A. I would think so.

9 MR. BROWN: Your Honor, I move to admit this as
10 well.

11 MR. BERRETT: Is that the report we're talking
12 about?

13 MR. BROWN: Yeah.

14 MR. BERRETT: Twelve pages?

15 MR. BROWN: Yeah.

16 MS. LUSAICH: All right. No objection.

17 THE COURT: It will be admitted.

18 MR. BROWN: Provide this to the Court for
19 further review.

20 THE COURT: Thank you.

21 BY MR. BROWN:

22 Q. Thank you, Dr. Paglini.

23 I pass the witness, your Honor.

24 MR. BERRETT: Thank you, Judge.

CROSS EXAMINATION

2 BY MR. BERRETT:

3 Q. Counsel just asked you, Doctor, how much time
4 you had spent with the defendant, and you answered a lot
5 of time with collateral stuff. And I never really heard
6 the answer. How much time actually did you spend with
7 Mr. Porter himself?

8 A. I would tend to believe anywhere from maybe
9 about eleven to fourteen hours on January Eighteenth,
10 Zero Two, if I'm not mistaken, he came to my office and I
11 assessed him for approximately --

12 Q. That's all right. Eleven to fourteen hours,
13 roughly. Now, your purpose in talking to Mr. Porter was
14 to evaluate him for a death penalty evaluation?

15 A. Correct.

16 Q. What is a death penalty evaluation?

17 A. Well, when the state seeks the death penalty at
18 sentencing, there's what we call mitigating factors which
19 would be that if -- can you -- can the defense provide
20 factors which would help mitigate the sentence from a
21 death to, perhaps, life in prison.

22 Q. So you're looking for any factor in the
23 defendant's history that would help mitigate the
24 punishment; is that correct?

1 A. Correct.

2 Q. So you're talking about maybe lower I.Q., family
3 issues, social issues, some other explanations for his
4 behavior?

5 A. Correct.

6 Q. And that was your purpose when you evaluated him
7 and did all this collateral stuff for the defense; is
8 that correct?

9 A. Correct.

10 Q. All right. Now you also did the testing which
11 you've explained. Does one's I.Q. change over the years?

12 A. It can. But normally it depends on what the
13 stimulus is. Meaning, that there is some research to
14 indicate that over the course of, maybe, like, a decade
15 an I.Q. can go up, you know, even one standard deviation
16 from the mean. Yeah. But you're going to have a lot of
17 training that's going on.

18 Q. It would go up with education, perhaps?

19 A. Yeah, education enriched environment.

20 Q. All right. Now, you indicate in your report
21 that when the defendant was tested in the Chicago Public
22 Schools, his I.Q. basically verbal I.Q. is seventy-six
23 and the performance I.Q. is eighty-seven; is that
24 correct?

1 A. Correct.

2 Q. Now you indicated that an I.Q. test between

3 eighty to eighty-nine is below average, but it's in that

4 average range, correct?

5 A. That's -- there's also -- I mean, there's a big

6 difference where below average -- an eighty is below

7 average minus is probably at about the ninth percentile

8 which means about ninety-one -- roughly ninety-one out of

9 a hundred people would exceed that score.

10 Q. All right. But let's talk about eighty-seven

11 which is what the defendant tested at. Eighty-seven is

12 in that below average range; is that correct?

13 A. Correct.

14 Q. And what percentile is eighty-seven?

15 A. I would say approximately, don't hold me to

16 this, but I'm looking at probably the twentieth

17 percentile, approximately. Your standard, even one

18 standard deviation from the mean would be an eighty --

19 was it an eighty-five. And so an eighty-five score would

20 be roughly the sixteenth percentile.

21 Q. All right. Now you talked about another test.

22 And by the way, when you say the average, say, the

23 eighty-seven, that is not mentally retarded. You

24 clarified that. Because mentally retarded, as I

1 understand it, is below sixty-nine?

2 A. Seventy -- sixty-nine or below.

3 Q. Sixty-nine or below. There's another test that

4 you talked about, a couple of them. The one is the

5 T.O.N.I. which is a non-verbal test. And I take it from

6 what you were indicating is that that test is more for

7 street smarts. It's not reading. It's not math. It's

8 not writing.

9 But it does give an indication of how someone

10 learns through pictures and that sort of thing like

11 street smarts; is that correct?

12 A. Street smarts may be a different word. I

13 wouldn't use that. It's more visual reasoning. I don't

14 know if that would be street smarts. I understand what

15 your reference is but --

16 Q. That's what I'm trying to get at.

17 A. Say visual reasoning would be the accurate --

18 Q. That's called the T.O.N.I test?

19 A. Its T.O.N.I. Three, correct, sir.

20 Q. And your cognitive evaluation report, which test

21 is that? You got some numbers here --

22 A. The --

23 Q. -- under procedures evaluation?

24 A. -- number seven, sir.

1 Q. That's number seven?

2 And you call that the T.O.N.I., T-O-N-Y?

3 MS. LUSAICH: I.

4 BY MR. BERRETT:

5 Q. T-O-N-I test? All right. So that's the test

6 that will test non-verbal intelligence?

7 A. Correct.

8 Q. And you said he had an average score?

9 A. Correct.

10 Q. So I gathered from that that in non-verbal

11 intelligence he would do quite well?

12 A. Well, you see, when you're doing any kind of

13 assessment, sometimes you're going to have -- you're

14 going to be -- when you're looking at non verbal, I mean,

15 his verbal -- let's see what is his I.Q. here? It was

16 much lower than that.

17 His overall non-verbal or visual spatial I.Q.

18 was an eighty, at the ninth percentile. And it didn't

19 depend on one test. It depended on two, four, five

20 different sub tests, which is not the T.O.N.I. So it

21 hits different aspects.

22 Q. I'm just trying to figure out if you're kind of

23 gauging how a person can -- can, you know, succeed in

24 society in terms of stuff besides just reading and

1 writing. It looked to me like this might be a good

2 indicator; is that true?

3 A. It's nice that he scored in the average range

4 finally on something. Yeah, I mean, that was good. I

5 mean, that's productive.

6 Q. All right.

7 A. But I wouldn't -- if I'm looking at him, and no

8 offense to Mr. Porter, but, you know -- he, you know --

9 he in terms of performing in society, he's not going to

10 do a good job at all. If he's working in some kind of

11 job, it's going to be very difficult for him to follow

12 anything. But you can train him, but you probably have

13 to -- has to be very low level.

14 Q. Now, you indicated also the Trails A and B Test,

15 and, I think, that's number eight on your procedures of

16 evaluation?

17 A. Yes, sir.

18 Q. Is that correct? And you indicated he also was

19 fine in that test, correct?

20 A. Correct.

21 Q. Again, what did that test test?

22 A. Well it's a very, very simple test. Basically,

23 it's connecting the dots, like, one, two, three, four,

24 five. That's Trails A, and what we're looking for is

1 people who are neurologically impaired, have a difficult
2 time doing that, going from one to two, two to three,
3 three to four. Trails B is going from number letter,
4 number letter, one A two B three C four D. And people,
5 once again, with neurological impairment have
6 difficulties with such a simple test.

7 And it depends on possibly where neurological
8 impairment is, though, but anyways on both -- on that
9 test he did well.

10 Q. Would that kind of test, like, common sense?

11 A. You know, when you're testing intelligence, it's
12 multi faceted. And so it's not unusual for an individual
13 to have very low scores in some areas and then, maybe,
14 like, an average score somewhere else. I mean, like,
15 look at idiot savants. They could be mentally retarded,
16 but then they're like brilliant in one small area. But
17 we don't have that here.

18 But okay. But, you know, so it's not uncommon
19 that a person can have kind of an average or average
20 minus score somewhere, but mostly predominantly their
21 abilities could be kind of in the borderline range and
22 sometimes below average range.

23 Q. Is there a test -- I mean, say you do an I.Q.
24 test, and it tests reading and writing, and --

1 A. Um-hum.

2 Q. -- and maybe some of those things, but you got
3 out on the street, and, say, a guy is selling dope. And
4 that takes some perception. It takes a little savvy. It
5 takes some intelligence.

6 Which of these kinds of tests would test that
7 type of ability to adapt in society and get by and maybe
8 show some cunning and some street sense?

9 A. It's an excellent question. Of course, you're
10 going to have a lot of different levels of dope dealers
11 so to speak.

12 Some are going to be highly refined and
13 sophisticated. And others are going to be really low
14 level.

15 And so in terms of the I.Q. tests, obviously, I
16 mean, you know, if a person has poor vocabulary
17 abilities, they're not going to be able to communicate
18 well. They're not going to be able to rational -- the
19 comprehension sub test may say, you know, he's not going
20 to be able to size up social situations.

21 The information sub test may indicate that he
22 can't recall information in his environment too well,
23 but, yes, can you sell drugs and have an I.Q. like this?
24 The answer would be, yes, of course.

1 Q. Okay. And, in fact, part of what I, I heard you
2 say, I think, is that some of this is environment; is
3 that correct? Because you didn't really identify what
4 the defendant's learning disability is. Does he have an
5 identifiable learning disability?

6 A. Oh, sure.

7 Q. What is it?

8 A. Yeah. I would say he probably has a learning
9 disability with reading, with writing, spelling, and
10 mathematics.

11 Q. Don't you have to define it more than that,
12 though? Isn't it a processing problem between different
13 sides of the brain? Or --

14 A. Yeah. You can -- you can in -- if you look at
15 the academic part, they normally don't do that. When you
16 have a person in the educational component, they're not
17 going to say, you know, if it's visual perceptual, you're
18 probably going to say right hemispheric. If it's
19 language based, you may say, you know, left hemispheric.
20 I don't think you really have to put that in the report.

21 If you look at any educational reports, you
22 know, they're not going to say something like, you know,
23 the occipital lobe is malfunctioning. They're going to
24 just say something like, you know, this individual has a

1 visual perceptual disorder.

2 Q. Your --

3 A. Of course its organicity is different.

4 Q. You're familiar with his I.E.P., correct?

5 A. Correct.

6 Q. Does that I.E.P. done in Chicago identify
7 specifically what his learning disability is, more than
8 just saying he has a hard time reading?

9 A. I would say in some -- yes, it does. They --
10 they look at certain areas that they want to improve,
11 which would be, like, reading comprehension or whatever,
12 mathematical reasoning.

13 Q. But they don't put in there the cause of that?
14 He doesn't have a brain problem, right?

15 A. Well, it didn't seem like it was identified that
16 he had a head trauma if you look at the social
17 developmental records.

18 And plus my interviewing with him, it didn't
19 seem like there was any form of trauma or organicity. We
20 have a lot of people who, when they enter the school
21 system, that it could be a result of, you know, nature
22 versus nurturer, you know. What is their hard wiring
23 like? You know, some people come into kindergarten very
24 intelligent, and others are very, very slow. And I'm

65

1 sorry, go on.

2 Q. Well, that's my question. Because, obviously,

3 you have ear marked an attendance problem in Chicago.

4 And, I guess, it's true that you develop talents where

5 you spend your time. And if you're not spending your

6 time at school, you're on the street. You're on the

7 playground. Or you're playing ball or you're running

8 around the streets doing stuff you shouldn't be doing.

9 That's where you're going to develop the skills; isn't

10 it?

11 A. You're going to develop academic skills at

12 home. You know, he grew up in a -- well, his environment

13 was not enriching at all. There was a lot of parental

14 strife and a lot of instability. So did that have an

15 impact on his educational development? I would say, yes.

16 Q. All right. But that's -- really my question

17 is: There's nothing identifiable in terms of

18 shortcomings in his mental process other than maybe not

19 putting any effort, maybe not putting in the time?

20 A. It's much deeper than that, sir. It's not -- if

21 you read his reports, if you read the reports, I.E.P.s,

22 they say Justin is working very hard. Justin is very

23 frustrated. He doesn't have any comprehension. He

24 doesn't comprehend.

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1 It's kind of repeated throughout that. This is

2 a young man who is trying, and doesn't have the

3 intellectual resource. I know what you're trying to

4 say: This guy is just not putting forth the effort.

5 And what I'm telling you is, is that, you know,

6 he probably could have had a more enriching environment,

7 but his hard wiring started out pretty poor.

8 Q. Well --

9 A. And I think he has other relatives too that have

10 learning disabilities. I think he has a sister also who

11 has -- one or two, maybe, family members have academic

12 difficulties.

13 Q. Does the majority of society have some sort of

14 learning disability?

15 A. Majority? No. If you're talking about --

16 Q. Well --

17 A. If you're talking about people having strengths

18 and weaknesses cognitively just like they do

19 interpersonally? Yes. But what I would also tell you is

20 that when we compare the average seventeen year old,

21 okay, or let's just say nineteen year old to him, okay,

22 he would score below maybe the seventh percentile or the

23 eighth percentile. When we add up all the nineteen year

24 olds in the country, he's going to score very poorly.

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1 Q. Well, no. We've heard that. We know that. My

2 question really is, why? And you're telling me he

3 doesn't have dyslexia? He doesn't --

4 A. Oh, hang on. Actually, I mean, if you're

5 looking at --

6 Q. Does he have dyslexia?

7 A. If you're looking at word reversal, he did

8 exhibits it in one of the tests here. Was I trying to

9 specify things at this point? Probably not. But, I

10 mean --

11 Q. Let me ask this more specifically. Was that in

12 his I.E.P. in Chicago?

13 A. I'd have to review it again. He had severe

14 reading comprehension problems, severe spelling disorder.

15 I mean, this kid can't even come close to some

16 words, spelling them.

17 Q. All right.

18 A. It's -- he's just total phonetic.

19 Q. All right. Doctor, you had indicated at one

20 point Mr. Winston tutored the defendant and his scores

21 went up substantially; isn't that true?

22 A. Yeah. I was impressed with that. I -- in terms

23 of that achievement score, it was interesting that all of

24 a sudden, I think it was -- it went up a little while

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1 which was good. It was excellent.

2 Q. Isn't that really saying if you took some time

3 and worked with that kid, that he's as bright as the next

4 guy?

5 A. No. I wouldn't say he's as bright as the next

6 guy. No.

7 Q. But he can improve substantially?

8 A. That might have been the peak of his

9 improvement, meaning, that you go from, like, a

10 borderline kid to maybe a below average kid. Which isn't

11 a bad thing.

12 Q. But the tutoring didn't hurt?

13 A. Tutoring was helpful.

14 Q. You had -- at one point in your testimony on

15 direct examination you used the term, or I think

16 Mr. Brown used the term, childlike?

17 A. Um-hum.

18 Q. How would you define childlike?

19 A. I would say that Mr. Porter is emotionally

20 immature. His responses are not sophisticated. Even on

21 occasions when I was interacting with him and I was

22 trying to elicit information from him, I found myself, at

23 times, getting frustrated because I wasn't getting, like,

24 really great information.

1 But then it was kind of interesting because when
2 I was talking to his mom, there was a lot of similarities
3 that, you know, she was just so scattered I couldn't get
4 good dates. But I could understand it with him because
5 of his I.Q. But initially when I was assisting him, I
6 was struggling with it, with his responses.

7 Q. Part of your evaluation which, of course, was
8 for death penalty evaluation, did you tell the defendant
9 why you were talking to him?

10 A. Yes.

11 Q. And so at the time when he took these tests, he
12 knew that, you know, appearing to be a genius was
13 probably not going to be in his benefit; is that true?

14 A. Well, I hear what you're saying. So, I guess,
15 the way you're phrasing the question is -- I think
16 Mr. Porter was who he is.

17 I don't think he could be a genius. I think I
18 got an accurate appraisal of his I.Q. level because I'm
19 able to compare it with what had occurred several years
20 ago, and it falls well within normal limits.

21 Q. I understand because you did talk about the
22 malingering. But short of full scale malingering, I
23 mean, if I was being tested and wanted to spell something
24 kind of goofy, I could do that, could I not, and there

1 would be no way that you could tell that?

2 A. Well, you're an attorney. So my thinking would
3 be that you're going to be of above average to superior
4 intelligence.

5 Now, it is possible if you're an attorney you
6 might have a spelling disorder, and you use the computer
7 spell check to kind of aid you with things. So if you're
8 blowing an occasional word, I'll find it interesting. My
9 thinking would be your verbal abstraction skills should
10 be excellent, and you should have an excellent vocabulary
11 ability.

12 So if you're an attorney with, maybe, a
13 borderline reading ability and borderline vocabulary
14 ability, I would really start saying to myself, what's
15 going on with this man? Does he have some severe
16 cognitive deficit? Or is he malingering?

17 Q. You understand what I'm saying, though?

18 A. Sure.

19 Q. It would be difficult to catch; wouldn't it?

20 A. I'm not going to tell you that I'm going to
21 catch everything, but I do look for it.

22 Q. Now, let me ask about some standardized tests.
23 And you had indicated numerous tests that you gave the
24 defendant. Those are all standardized tests; are they

1 not?

2 A. Correct.

3 Q. What does it mean to be a standardized test?

4 A. It's when you compare an individual's score with
5 a group score, and that you have a format of reliability
6 and validity.

7 Q. Are you familiar with a test called the
8 Assessing, Understanding, and Appreciation of Miranda
9 Rights Test?

10 A. Yes.

11 Q. And is that a test by Thomas Grisso?

12 A. Correct.

13 Q. All right. What can you tell us about that
14 test?

15 A. Not as much as I'd like to tell you. Because I
16 did take Grisso's Juvenile Assessment Class or seminar
17 I should say. I do have the test. Have I administered
18 the test? The answer would be no.

19 Q. Why not?

20 A. Well, because I haven't been asked to. And so I
21 bought the test more for informational purposes. And
22 when it does arise, then I'll review everything and then
23 administer the test.

24 Q. Doctor, were you asked to administer each of

1 these tests specifically?

2 A. No. I chose those on my own.

3 Q. All right. But you haven't had an opportunity
4 to chose administering the Assessing, Understanding, and
5 Appreciation of Miranda Rights Test?

6 A. I would not have administered that because --

7 Q. I'm not talking about specifically here but in
8 any case?

9 A. Have I -- have I administered that test in any
10 other case? The answer is no.

11 Q. All right.

12 MR. ABOOD: If you don't mind, Judge I just want
13 to point out that Mr. Berrett was looking at
14 Dr. Paglini's report when he referred to, you
15 administered these tests here.

16 MR. BERRETT: Yeah. For the record.

17 THE COURT: The record will so reflect.

18 MR. BERRETT: I was referring to the report
19 which spelled out the numerous tests he has presented
20 testimony about.

21 THE COURT: That's Proposed Defense Exhibit B.
22 I assume. First page. I read it, yes.

23 BY MR. BERRETT:

24 Q. Doctor, is it your understanding that the

1 Assessing, Understanding, and Appreciation of Miranda
2 Rights Test is not a standardized test?

3 A. I can't address that issue.

4 Q. Can you indicate that it is not widely used?

5 A. Well, I can't address that issue either because
6 I think it is widely used, and it's an instrument likely
7 used for juvenile and Miranda Warning.

8 Q. You have been a psychologist for how many years?

9 A. I received my degree in Nineteen Ninety, but
10 before that I was still practicing as a psychologist in
11 training for a few years before that.

12 Q. All right. But you've indicated you have never
13 used this test?

14 A. I have never used that test.

15 Q. All right. Are you familiar with the correct
16 use of the test?

17 I have reviewed the test. Okay. I can not
18 speak intelligently on the test at this time. I've
19 reviewed what it's asking. Yes. But I cannot speak
20 intelligently on it.

21 Q. Okay.

22 A. I think you might want to defer that question to
23 Dr. Brown. Okay.

24 Q. Well, I also would like your --

1 A. Okay.

2 Q. -- opinion if you could give one, but it sounds
3 like you can't.

4 A. I cannot.

5 Q. Now, Doctor, in preparation for your testimony
6 in this case, you had occasion to review several police
7 reports, several witness statements; is that correct?

8 A. I did review that information in Two Thousand
9 and Two. I reviewed part of Mr. Porter's testimony of
10 thirty pages of it within the last several days. But no,
11 I did not -- I reviewed all that material in Two Thousand
12 and Two I should say.

13 Q. But you did review it in Two Thousand and Two?

14 A. Correct.

15 Q. A couple of the things you did review I'd like
16 to ask you some questions about. Those would be the
17 voluntary statements by the defendant. And just to
18 refresh your recollection, these are statements taken by
19 various police officers in Chicago following the Miranda
20 Rights being given.

21 And I want to get some insight from you in
22 those statements about the mental process of the
23 defendant.

24 And as that statement was given, of counsel's

1 benefit, the first statement would be the one referred
2 to, and I guess we will call it statement number one,
3 taken on August Twelfth of Two Thousand at nineteen
4 thirty hours.

5 MR. BROWN: Okay.

6 MS. LUSAICH: On the front it says --

7 MR. BROWN: And, Judge, I have -- I don't
8 particularly have an objection yet because the question
9 hasn't been posed, but I'm -- he says mental status which
10 I don't think was an issue necessarily placed in issue
11 here at this hearing. However, general intelligence is
12 what we're talking about.

13 If there's a question directed at that,
14 naturally, I wouldn't object. But if he's talking about
15 intent or mental status or something, a mental status
16 issue relevant to criminal responsibility, then I would
17 object to that.

18 MR. BERRETT: Well, let me go through it. If we
19 have an objection, we can discuss that at the time.

20 THE COURT: Now what document are you referring,
21 so I get on the same page?

22 MR. BERRETT: This is in reference to -- in
23 fact, let me get these marked.

24 THE COURT: They're not in the file. They

1 haven't been received yet?

2 THE COURT CLERK: Um-hum.

3 MS. LUSAICH: Judge, when the police officer --
4 I'm sorry to interrupt. When the police officers
5 testified way back when, did we enter the defendant's
6 actual statements into evidence?

7 THE COURT: That's what I'm wondering.

8 MS. LUSAICH: The hearing was March Eighth of
9 Two Thousand and Four.

10 MR. BROWN: We can do it again.

11 THE COURT: We have at least three detectives:
12 Kato, Sarone, and Jensen all testified.

13 MR. ABOOD: I don't have a specific
14 recollection, Judge, as to whether or not the actual
15 complete statements went in, so, perhaps, Mr. Berrett
16 will just go ahead and do that.

17 MR. BERRETT: Let me go ahead and get that
18 marked.

19 THE COURT CLERK: One?

20 MR. BERRETT: Yeah.

21 I only have one extra copy, so let me refer to
22 it with the witness.

23 THE WITNESS: Okay.

24 MR. BERRETT: And then I'll let you look at it,

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1 Judge.

2 THE COURT: I don't have -- I have my notes from

3 the previous hearing, and I don't see anything being

4 proffered.

5 MR. ABOOD: I recall, Judge, that we introduced

6 a number of articles and things along that line.

7 Frankly, I don't remember the statements being introduced

8 either.

9 BY MR. BARRETTE:

10 Q. Doctor, I'm referring to what's been marked as

11 Exhibit Number One for the purpose of this hearing.

12 That's a statement which I believe you previously had an

13 opportunity to review; is that correct?

14 A. A very long time ago.

15 Q. All right.

16 A. I may have reviewed -- I think I may have

17 reviewed maybe thirty or forty pages the other night.

18 Q. All right.

19 And for defense counsel, you got the right one?

20 MR. BROWN: I got it.

21 BY MR. BERRETT:

22 Q. On page two of that statement --

23 THE COURT: Now. Wait a minute. First of all

24 it's not in evidence. Is it in evidence?

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1 THE COURT CLERK: It's proposed exhibit.

2 MR. BERRETT: Well, I could move to admit it --

3 THE COURT: Move to admit.

4 MR. BERRETT: -- in evidence.

5 THE COURT: Then we can talk about it.

6 MR. BROWN: That's fine, Judge.

7 THE COURT: Okay. It will be admitted. Thank

8 you.

9 BY MR. BARRETTE:

10 Q. In the middle of that statement, there's a

11 question asked, and it's by the officer. It says:

12 Okay. Apartment --

13 THE COURT: Excuse me, Counsel. Who's statement

14 is that?

15 MR. BERRETT: This is --

16 THE COURT: Kato's?

17 MR. BERRETT: -- the statement by the defendant.

18 THE COURT: Oh, by the defendant.

19 MR. BERRETT: Yes. Who was talking to the

20 police officer. It's Detective B. Jensen.

21 THE COURT: Okay. He's the one of the three

22 that testified. Right?

23 MR. BERRETT: Right.

24 ///

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1 BY MR. BERRETT:

2 Q. The question is halfway down the page. Okay.

3 Apartment number three. Uh, Justin, do you know this is

4 being recorded?

5 "A. Yes, sir."

6 Now, from what you understand of your contact

7 with the defendant, he would understand that English

8 used; is that correct?

9 He had a sufficient intelligence to understand

10 that that statement was being recorded; is that true?

11 A. I guess appears so, yes.

12 Q. All right. And then the next question:

13 "Is that okay with you?"

14 And the answer is: Fine.

15 Is that correct? Actually, "Fine by me."

16 Indicating that he understands that he's taking part in

17 an interview process and that it's actually being

18 recorded?

19 THE COURT: What page was that?

20 MR. BERRETT: That would be page two.

21 THE COURT: Thank you.

22 THE COURT CLERK: Do you have another copy,

23 Counsel?

24 MR. BERRETT: Judge, would you like to see a

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1 copy while we go through this? I apologize I brought one

2 extra copy, but I didn't bring two.

3 MR. BROWN: Your Honor, again, I -- I don't have

4 an objection going over some of the questions, but I

5 think that the document speaks for itself, and I don't

6 know if Dr. Paglini is in a position to answer

7 specifically on any one given answer what somebody does

8 or does not understand.

9 That's the very nature of why we're here.

10 THE COURT: I understand that. But as a

11 practicing psychologist, can he not opine on what he

12 envisions as the answer, the significance of a particular

13 answer?

14 MR. BROWN: I would leave that to Dr. Paglini's

15 comfort level, of course.

16 THE COURT: Exactly.

17 MR. BROWN: But what I would say is that any

18 particular question in its context may not give rise to

19 the understanding in total.

20 THE COURT: I agree.

21 MR. BROWN: And one other thing I would -- well,

22 I would point out --

23 THE COURT: This isn't a jury, so we --

24 MR. BROWN: Right. And the other thing I would

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1 point out to your Honor -- or, you know, it might be
 2 inappropriate at this time, so go ahead. I just with
 3 redirect.

4 THE WITNESS: Your Honor, may I say something?

5 THE COURT: We have a -- Mr. Brown.

6 MS. LUSAICH: Curtis.

7 MR. BROWN: I'm sorry, Judge.

8 THE COURT: We have the doctor proffering or
 9 offering to make a statement.

10 MR. BROWN: Yes.

11 THE WITNESS: Okay. I'd like, basically, I'm
 12 deferring the Miranda Warning to Dr. Brown.

13 THE COURT: Okay.

14 THE WITNESS: That's what it comes down to. My
 15 evaluation was to give an I.Q. test, and my talk here
 16 today was to give an I.Q., you know, to discuss the I.Q.
 17 results, his educational history, his achievement scores.
 18 If I -- you know, like just with that
 19 statement, fine by me, my response is going to be:
 20 What's the context? What happened before everything?
 21 Was this, did they just turn the tape on? Was there any
 22 contact beforehand? If there was, what was going on?
 23 There's a lot of questions I would. We could be here for
 24 about six hours answering these questions.

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1 MR. BROWN: And, essentially, Judge, that's what
 2 I was saying I was going to reserve my comment for
 3 redirect. As your Honor recalls, this entire transcript
 4 is the result of after over two hours of sitting with
 5 Justin and having the conversation first, then deciding,
 6 now, we know what everybody is going to say. Let's turn
 7 on the tape recorder.

8 I think the reliability of answering those
 9 questions in the context of, they had a dress rehearsal,
 10 does not necessarily give any credibility to what the
 11 state is trying to elicit from Mr. Paglini who doesn't
 12 have the total context --

13 THE COURT: Maybe --

14 MR. BROWN: -- information.

15 THE COURT: -- we should defer it to Dr. Brown.

16 MR. BERRETT: Well, Judge, of course, we would
 17 like to ask him questions about the same thing. As I
 18 understand it, one of the purposes of this hearing is to
 19 elicit whether or not the defendant understood the words
 20 and the concepts in his Miranda rights.

21 And number two, whether or not the defendant had
 22 a voluntary confession. We've had a doctor here who
 23 spent a lot of time testing the defendant to understand
 24 his comprehension.

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1 In that context of that comprehension, I want
 2 to go through the statement the defendant told to the
 3 police officers to get his evaluation of that
 4 understanding.

5 Of course, we will do this with Dr. Brown also.

6 THE COURT: Well --

7 MR. BERRETT: But --

8 THE COURT: To the extent that Dr. Paglini is
 9 comfortable with answering the question, he can answer.
 10 But if he's not comfortable, he doesn't have to answer.

11 MR. BERRETT: All right.

12 THE COURT: Okay.

13 MR. BROWN: And as far as you were talking about
 14 the understanding. Are we talking about the
 15 voluntariness issue?

16 MR. BERRETT: Yes.

17 MR. BROWN: He was never -- I don't know if he
 18 knows anything about that, even that that issue is in
 19 front of the court. But I'll just -- I'll let
 20 Mr. Berrett ask his questions.

21 THE COURT: Sure. Go ahead.

22 BY MR. BERRETT:

23 Q. Well, let me ask just, for example, if you would
 24 turn, sir, to page twenty of that statement?

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1 A. Page twenty?

2 Q. Yeah.

3 Judge, if I could, I'm going to give you a copy
 4 to refer to because I do have --

5 THE COURT: All right. Fine. Thank you.

6 MR. BERRETT: I always feel bad if I'm referring
 7 to something the judge can't see. I know it's kind of
 8 unfair.

9 Page twenty of that statement. And I'm -- I'm
 10 just going to ask you a question here. The second
 11 question down that page is the question:

12 Why did you pick that apartment?

13 And then my question really goes with the answer
 14 which begins with:

15 Why did I pick it?

16 That's one, two, three, four, five, six, seven,
 17 eight lines of response. Now, Doctor, from what you are
 18 familiar with, with the defendant, his language
 19 abilities, his mental abilities and his I.Q., those words
 20 that he responds in that question appear to be a
 21 voluntary statement of his understanding about what he
 22 wants to tell the officer; is that correct?

23 A. I don't know because I wasn't --

24 Q. Well --

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1 A. Well, I mean, I don't know what the context was
 2 beforehand. Let me just, once again, restate that.
 3 Q. Let me do this. Let me do this.
 4 THE COURT: Wait a minute. First rule. Wait
 5 for my court reporter to get down your question and
 6 answer.
 7 Go ahead.
 8 BY MR. BERRETT:
 9 Q. Why don't you read it first of all.
 10 A. Yes, sir. Why did I pick it?
 11 Q. You don't have to read it out loud.
 12 THE COURT: Just to yourself.
 13 MR. BERRETT: Yeah.
 14 THE WITNESS: Okay. Yes, sir. I've completed
 15 it.
 16 BY MR. BERRETT:
 17 Q. All right. Now do you remember what my question
 18 was?
 19 A. Could you repeat it, please?
 20 Q. I don't think I can, but I will attempt to.
 21 The question was in essence: After all you
 22 know about the defendant from your testing, does this
 23 statement appear to be language he's familiar with?
 24 Language he used or could use? And does this language

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1 express his understanding of the situation where he's
 2 telling the officer what happened?
 3 A. That's a very good question. And as I stated
 4 earlier with respect to the Court, I am not here to
 5 testify on analysis of Miranda Warning because I wasn't
 6 hired to do that. I was hired to do the death penalty
 7 segment of evaluation.
 8 My job today was to educate the judge on his
 9 educational history and his I.Q. and achievement
 10 assessment.
 11 I have not reviewed this report entirely
 12 recently, and I did not look at it from a Miranda
 13 perspective, so I cannot answer the question
 14 intelligently. And if I did answer these questions, I
 15 would be misleading the Court, and I don't want to do
 16 that.
 17 Q. Well, I'm not going to talk about Miranda, so
 18 don't worry about that.
 19 THE COURT: If that's an objection, I'll sustain
 20 it.
 21 MR. BROWN: Also he is talking Miranda because
 22 Mr. Berrett asked the question, did he voluntarily say
 23 the words.
 24 THE COURT: That's what I said.

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1 MR. BERRETT: I'm not specifically asking a
 2 question about Miranda.
 3 THE COURT: Okay.
 4 MR. BERRETT: But my question is to the
 5 voluntariness of the speech and the patterns and the
 6 intelligence expressed in this statement.
 7 THE COURT: But isn't that the heart of the
 8 issue?
 9 MR. BERRETT: Well, it's part of the issue.
 10 That's for sure.
 11 THE COURT: It's right lynch pin quality.
 12 MR. BERRETT: So let me see if I understand.
 13 Although he's done all this testing --
 14 THE COURT: Right.
 15 MR. BERRETT: -- on the defendant, the Court
 16 doesn't feel he's in a position to express an opinion
 17 whether or not this is voluntary language?
 18 THE COURT: Well, because he wasn't there,
 19 number one.
 20 Number two, he did not prepare himself as an
 21 expert witness to testify on this issue. And whether or
 22 not he can give an opinion if he had the time to study
 23 the context, that can't be answered because he says he
 24 hasn't.

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1 Now I'm not saying that you couldn't opine on
 2 the voluntariness of this defendant's statements, but the
 3 doctor has stated to the Court, and I have to accept him
 4 at his word, that he's not prepared to answer that issue
 5 of voluntariness.
 6 Is that correct?
 7 THE WITNESS: That's correct, sir.
 8 THE COURT: All right.
 9 MR. BERRETT: Okay. The Court's indulgence.
 10 BY MR. BERRETT:
 11 Q. Doctor, you know, forget about the voluntariness
 12 aspect. You did read these statements, correct? Because
 13 it says you did in your report.
 14 A. Correct. In Two Thousand and Two.
 15 Q. Do these statements appear to be language which
 16 comes from the defendant based upon what you know about
 17 the defendant, his I.Q., and his abilities?
 18 A. Well, once again, I read it in Two Thousand and
 19 Two, so it's very, very difficult for me to ascertain
 20 that. I mean, just reading this one paragraph, yeah, it
 21 sounds like language he would use. But I can't go into
 22 definitive detail because I read this material, like, two
 23 and-a-half almost three years ago.
 24 Q. Well, okay. Thank you.

1 A. Thank you, sir.

2 MR. BERRETT: I don't have anything else.

3 MR. BROWN: Redirect examination.

4
5 DIRECT EXAMINATION

6 BY MR. BROWN:

7 Q. What you are saying then, it's too broad of a
8 brush that you're painting with to try and incorporate
9 whether that's his language in the entire statement when
10 you don't have a recollection of the specifics?

11 A. Correct.

12 Q. Also, with respect to context, is it important?
13 Is there a difference between whether these statements
14 made by an individual are the first time they've been
15 made or whether they had been rehearsed and gone through
16 earlier, just, maybe, just hours before?

17 A. Yes, because --

18 Q. Could that --

19 A. -- because that's a prompt.

20 Q. -- could there have been, again, it's fairly
21 speculative, but with the context, someone else's
22 language the first time it went through and then Justin's
23 language this time through?

24 MS. LUSAICH: I'm sorry.

1 THE WITNESS: It's possible. It's hard to
2 speculation.

3 MS. LUSAICH: Objection. I mean, he's totally
4 putting words in his mouth.

5 THE COURT: Well, if the objection is
6 speculation, I sustain it.

7 MR. BROWN: He agreed it was speculative, and it
8 is.

9 BY MR. BROWN:

10 Q. I just have a couple of questions back to the
11 tests, the actual tests?

12 A. Okay.

13 Q. And specifically when Mr. Berrett was going
14 through your report, and I believe it's page six of your
15 report, when he was talking about Justin's I.Q. in
16 Nineteen Ninety-Seven from the W.I.S.K. Three?

17 A. Okay.

18 Q. And he was discussing an I.Q. of eighty-seven.
19 That was just the performance aspect of that I.Q. test?

20 A. Correct perceptual organizational skills.
21 Right.

22 Q. Do you recall or can you remind the Court what
23 his verbal I.Q. was at that point?

24 A. Verbal I.Q. in Nineteen Ninety-Seven was

1 seventy-six.

2 Q. Okay. And they didn't provide an overall I.Q.
3 score?

4 A. No. It didn't appear as if they did.

5 Q. Okay. And I believe you had indicated at one
6 point and the inference was going that -- that Justin's
7 really just a bright guy who never applied himself. Is
8 that an accurate portrayal of Mr. Porter?

9 A. That Justin is a bright guy who just never
10 applied himself?

11 Q. Yes.

12 A. That would not be an accurate portrayal of him.

13 Q. Are his educational records and your testing and
14 your contacts with him consistent with an individual who
15 is learning disabled

16 A. He's learning disabled. He's a borderline I.Q.

17 Q. Without specifically identifying what the
18 disability may be?

19 A. Right.

20 Q. There are a number of possibilities for what the
21 disability could be?

22 A. Sure. The first stroke that you would have is
23 that he's a borderline I.Q. And that would indicate that
24 when you compare him to his age group, that he likely is

1 somewhere at about the seventh and ninth percentile. So
2 cognitively, he's severely impaired. When we break it
3 down a little further, he has a spelling disorder.

4 He likely also has a severe reading disorder.
5 and he obviously had mathematical impairment
6 also.

7 Q. But the borderline I.Q. is in and of itself the
8 disability?

9 A. That's -- well, that's a diagnosis. And, yeah,
10 it would be considered, I mean, not that you can collect
11 on it through social security. Okay.

12 Q. Right.

13 A. But it -- it does signify his functioning.

14 Q. And many learning disabled or otherwise disabled
15 people are capable of learning skills?

16 A. I'm sorry. Say that again.

17 Q. Many learning disabled or otherwise --

18 A. Yeah.

19 Q. -- mentally impaired individuals are capable of
20 learning skills?

21 A. Yeah.

22 Q. Okay. And you have no evidence that he
23 actually -- that his disability is related to a head
24 injury or an actual organic brain injury?

1 A. He -- you know, as I stated earlier, he's hard
2 wired likely different than other people. And it's very
3 common in society that some people are going to be very
4 intelligent and other people are not going to have the
5 raw ability.

6 And that's just where he's at. Yeah.

7 Q. With the cards Justin was dealt, he wasn't going
8 to be a prosecutor or defense attorney, likely?

9 A. Probably not.

10 MR. BROWN: I have nothing further, Judge.

11 MR. BERRETT: We agree he's not going to be a
12 prosecutor, probably.

13 No questions.

14 THE COURT: Thank you, Doctor. You can step
15 down.

16 THE WITNESS: Thank you.

17 THE COURT: Doctor, do you want to or can you
18 give this to the doctor?

19 Want to take a break.

20 MR. ABOOD: Thanks, Judge.

21 THE COURT: Okay. Take a break.

22 (RECESS)

23 THE COURT: All right. You may continue.
24

1 MR. ABOOD: Thank you, Judge. We have Dr. Greg
2 Brown.

3 THE COURT: All right.

4 DR. GREGORY PENINGER BROWN

5 Having been first duly sworn to tell the
6 truth, the whole truth and nothing but the
7 truth, testified as follows:

8 THE COURT CLERK: Would you state your name and
9 spell your last name for the record, please.

10 THE WITNESS: Gregory Peninger Brown.
11 P-e-n-i-n-g-e-r.

12 MR. ABOOD: Thank you, Judge.

13 DIRECT EXAMINATION

14 BY MR. BROWN:

15 Q. Dr. Brown, can you please tell the Court what
16 type of professional you are?

17 A. I'm a psychiatrist. I obtained a B.A. in
18 psychology from Oberlin College. I then went to medical
19 school at University of Arkansas followed immediately by
20 a psychiatric residency at Albert Einstein Medical Center
21 in Philadelphia. That was from Nineteen Ninety-One
22 through nineteen Ninety-Five I then went to the
23
24

1 University of the Rochester in Rochester, New York, for a
2 one year fellowship in forensic psychiatry. And I'm
3 board certified in both adult psychiatry and forensic
4 psychiatry.

5 Q. And briefly, can you tell the judge what
6 forensic psychiatry is?

7 A. Forensic psychiatry is simply a sub specialty of
8 the field that relates to any question relating to the
9 law and how the interface with mental health and the law
10 may have questions that need to be resolved.

11 Q. Kind of like what we're doing here; is that
12 correct?

13 A. Kind of like what we're doing here.

14 Q. All right. Now you've obviously held various
15 positions since you became a licensed psychiatrist. Can
16 you tell the judge about that?

17 A. Well, I worked at the Southern Nevada Adult
18 Mental Health Services for a brief period of time in
19 Nineteen Ninety-Six and then I went into private practice
20 immediately thereafter.

21 I have been an assistant clinical professor at
22 University of Nevada School of Medicine through Nineteen
23 Ninety-Eight through, actually, July of Two Thousand and
24 Four. Which when I became an assistant professor. I'm

1 currently the residency training program director of the
2 psychiatry residency in Las Vegas. And I provide
3 lectures and materials to both psychiatry residents here
4 and psychiatry residents in Reno. The internal medicine
5 residents and the family practice residents here. In
6 addition to supervising medical students who are rotating
7 through the service.

8 Q. And other than being a training director, is it
9 fair say that you yourself regularly attend seminars in
10 your field?

11 A. Certainly. Excuse me.

12 THE COURT: Are you all right?

13 That's why we have the Kleenex right there.

14 THE WITNESS: I had no idea the top was so
15 loose.

16 MR. BERRETT: We've all done that a number of
17 times.

18 THE WITNESS: Can you repeat the question?

19 BY MR. ABOOD:

20 Q. Yes. I'm sorry, Doctor. My question to you was
21 other than being the training director my guess is you
22 regularly attended seminars yourself in your field of
23 expertise; is that correct?

24 A. Yes, I keep up with the Nevada requirements for

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1 category one C.M.E.s each year. And that's in both
 2 general psychiatry and forensic psychiatry.
 3 Q. And my understanding is that you've testified as
 4 an expert numerous times here in Clark County, State of
 5 Nevada; is that right?
 6 A. Yes. That is correct.
 7 Q. In fact, have you testified for the State of
 8 Nevada numerous times in the Eighth Judicial District
 9 Court?
 10 A. Not numerous, but I have testified for the
 11 D.A.'s office. Yes.
 12 Q. A number of times?
 13 A. I think once.
 14 Q. Okay. And you're involved in mental health
 15 court or something along the lines?
 16 A. Yes. That's true. I do mental health court
 17 hearings each Friday to determine whether people meet the
 18 commitment criteria to be held against their will in
 19 psychiatric hospitals.
 20 THE COURT: Competency hearings?
 21 THE WITNESS: Yes, exactly.
 22 THE COURT: That's with Judge Voy?
 23 THE WITNESS: Yes. Exactly.
 24 THE COURT: All right. Fine. Family court.

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1 BY MR. ABOOD:
 2 Q. Have you testified as an expert?
 3 A. Yes.
 4 Q. Okay.
 5 MR. ABOOD: Judge, I'd like to submit him to
 6 your Honor --
 7 MR. BERRETT: No objection.
 8 THE COURT: He will be admitted.
 9 MR. ABOOD: In forensic and adult psychiatry.
 10 THE COURT: Yes. Exactly accepted.
 11 MR. BERRETT: Just for this hearing?
 12 MR. ABOOD: Thank you.
 13 THE COURT: Yes.
 14 BY MR. ABOOD:
 15 Q. In August of Two Thousand and Two, Doctor, did
 16 you --
 17 Thank you, Judge.
 18 In August of Two Thousand and Two did my office
 19 retain you to help us determine whether or not Justin
 20 Porter was able to understand the words and the concepts
 21 behind what we typically refer to as the Miranda
 22 Warnings?
 23 A. Yes.
 24 Q. And to aid you in that request, did we provide

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1 with you a number of documents to review?
 2 A. Yes, you did.
 3 Q. And you heard Dr. Paglini testify earlier; is
 4 that right?
 5 A. Yes, I did.
 6 Q. And he made reference to some of these documents
 7 himself; is that correct?
 8 A. Yes, he did.
 9 Q. In fact, did we provide you a transcript of a
 10 recorded statement given by Justin Porter on August
 11 Twelfth of Two Thousand?
 12 A. Yes, you did.
 13 Q. A transcript of a recorded statement given by
 14 Justin Porter on August Thirteenth of Two Thousand?
 15 A. Yes, you did.
 16 Q. A transcript of a recorded statement given by
 17 Justin on August Fifteenth of Two Thousand?
 18 A. Yes.
 19 Q. And were you able to familiarize yourself with
 20 the charges and the allegations that he was facing, by
 21 looking at police reports and things along those lines?
 22 A. Yes.
 23 Q. And did you review a motion that we filed to
 24 suppress his statement to become familiar with the

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1 factual background of the interrogations in this case?
 2 A. Yes.
 3 Q. Finally, did you review a psychological report
 4 that was prepared by John Paglini, Dr. Paglini, on July
 5 Tenth of Two Thousand and Two?
 6 A. Yes, I did.
 7 Q. And, in fact, you heard Dr. Paglini testify
 8 about that report; is that right?
 9 A. Yes, I did.
 10 Q. Now is that something that forensic
 11 psychiatrists normally do, review the reports of
 12 psychologists?
 13 A. Yes. Absolutely. Psychologists, for example,
 14 perform I.Q. tests and have specialized training to do
 15 that. Psychiatrists don't have the training to give an
 16 I.Q. test.
 17 Q. So Dr. Paglini administered a number of tests,
 18 and you were able to review the results of those tests by
 19 reviewing his report; is that right?
 20 A. Yes. That's correct.
 21 Q. Okay. Now you made reference, just now, that an
 22 I.Q. test that Dr. Paglini administered -- is it your
 23 understanding that at the time that Dr. Paglini
 24 administered this I.Q. test on Justin Porter that there

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1 was a verbal score of between seventy-six to
 2 seventy-eight?
 3 A. Yes.
 4 Q. Does that sound familiar?
 5 A. That sounds familiar.
 6 Q. And did you become aware of a full score of
 7 about Seventy-Seven?
 8 A. Yes. That sounds familiar both from the report
 9 and from the testimony today.
 10 Q. And, in fact, Dr. Paglini testified that he
 11 referred to this as borderline intellectual functioning
 12 range. Does that make sense to you?
 13 A. Yes, borderline intellectual functioning is
 14 defined by the diagnostic and statistical manual volume
 15 four, which is basically a manual which lists all the
 16 psychological and psychiatric diagnoses that we typically
 17 use. And borderline intellectual function is designed as
 18 basically an I.Q. between about seventy and eighty-five.
 19 It would be a little bit below low normal and it
 20 would be a little bit above mentally retarded.
 21 Q. So basically, this is somewhat above, and I
 22 guess your word, a little bit above the level of what we
 23 call mild mental retardation?
 24 A. Yes.

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1 Q. And I also heard words along the lines of
 2 borderline mental retardation. Does that apply to this
 3 case?
 4 A. I suppose that would be a less rigorous way of
 5 describing it. The diagnostic term would be borderline
 6 intellectual functioning. It describes this range of
 7 people who are functioning below average, but are not
 8 functioning in the mentally retarded range.
 9 Q. And I heard several learning disabilities. Do
 10 you agree with that?
 11 A. I don't have any reason to doubt that. It
 12 certainly is substantiated by both Dr. Paglini's
 13 analysis, his testing, and school records.
 14 Q. Which you, yourself reviewed; is that correct?
 15 A. Yes. That's correct.
 16 Q. Okay. Now Dr. Paglini also testified that he
 17 assessed Justin's current spelling and reading abilities;
 18 is that right?
 19 A. Yes, that's correct.
 20 Q. And my understanding was that his spelling
 21 abilities were impaired at the first percentile and at a
 22 third grade level; do you agree with that?
 23 MR. BERRETT: Judge, I know we've heard all
 24 this. Is there a reason we have to review it?

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1 MR. ABOOD: Well if you agree that Dr. Paglini's
 2 assessments are all correct, then I can move on to --
 3 would you like to do that?
 4 MR. BERRETT: Well, we got the reports.
 5 MR. ABOOD: I'd be happy, Judge, if the state
 6 wants to stipulate that Dr. Paglini's assessments are
 7 correct. Then I can move on to another topic with
 8 Dr. Brown.
 9 THE COURT: What I understand you're trying to
 10 do is take the reports done by Dr. Paglini, build upon
 11 that, use that as a premise?
 12 MR. ABOOD: That's correct.
 13 THE COURT: And then let him opine on the
 14 meaning of those --
 15 MR. ABOOD: That's where we're going.
 16 THE COURT: -- numbers that he got?
 17 MR. ABOOD: That's where we're going.
 18 THE COURT: Can you agree to that?
 19 MR. BERRETT: Well, we understand that he has
 20 reviewed Paglini's reports. I don't know that we have to
 21 go through it A, B, C, D.
 22 THE COURT: What I'm suggesting, we assume for
 23 the sake of argument that Dr. Paglini made certain tests
 24 and came up with certain numbers. What does that mean

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1 now? Is what I think we're saying?
 2 MR. ABOOD: And to satisfy the state, Judge,
 3 I've only got a few more questions along these, lines if
 4 they're not comfortable stipulating that Dr. Paglini --
 5 everything he said is correct. Then just give me a few
 6 more questions, and I think I can establish that Greg
 7 Brown agrees with Dr. Paglini.
 8 THE COURT: All right. Few more questions.
 9 MR. ABOOD: Thank you.
 10 BY MR. ABOOD:
 11 Q. Dr. Brown, Dr. Paglini found that his spelling
 12 abilities were impaired at about the first percentile and
 13 a third grade level. In your review of those -- of those
 14 reports; do you agree?
 15 A. I have no reason to disagree with that. That
 16 would be a formal testing procedure that Dr. Paglini
 17 would excel at.
 18 Q. And the basic reading skills being at a second
 19 grade level, is there any information you reviewed that
 20 would cause you to disagree with that?
 21 A. No.
 22 Q. Okay. Now is it fair to say that Justin's
 23 reading and spelling abilities are substantially below
 24 what one might expect from someone his age?

1 A. Well, yes. You would expect someone his age to
2 read, at least, at the grade level where they left school
3 if not at a high school level.
4 Q. So —
5 A. And yes, this would be substantially lower than
6 that.
7 Q. Okay. Now, you reviewed the same school records
8 that Dr. Paglini did; is that right?
9 A. Yes, I did.
10 Q. Now, Dr. Paglini already testified as to the
11 importance of these records. What was your overall
12 impression of Justin's school performance based on those
13 records?
14 A. Well, it was poor in that he got largely Ds in
15 his major subjects that would be involved with reading,
16 and spelling, and writing.
17 And his standardized test scores were typically
18 low as we've already heard. What this became important
19 to me in the context of looking at the serial evaluations
20 that occurred over time, such that, for example, the I.Q.
21 scores being low were present when Justin was in school
22 and then they were also low when Dr. Paglini performed
23 the test.
24 And that level of congruence over the course of

1 time gives additional validity, from my perspective, to
2 the low scores.
3 Q. And so is it your testimony that the fact that
4 we were able to uncover, for example, prior I.Q. tests
5 given when he was younger together with these school
6 records and things along those lines, this tends to lend
7 validity to the last I.Q. test that was given to Justin?
8 A. Certainly.
9 Q. Okay.
10 A. Yes.
11 Q. Is there anything in these — in these school
12 reports that you were given in any of the reports that
13 you reviewed in this case that would refute Dr. Paglini's
14 conclusion that Justin is between the second and third
15 grade level in his basic reading skills?
16 A. No. Not that I'm aware of.
17 Q. Now armed with all this background that you were
18 able to gather, did we ask you to go to the Clark County
19 Detention Center about August Twelfth, Two Thousand and
20 Two, to personally interview Justin Porter?
21 A. Yes.
22 Q. And during that interview of Justin Porter, did
23 you administer something called an Assessing,
24 Understanding, and Appreciation of Miranda Rights Test?

1 A. Yes, I did.
2 Q. And this test was devised by, I guess, was it a
3 psychiatrist or psychologist named Thomas Grisso?
4 A. Thomas Grisso is a psychologist who has written
5 and has been involved with assessing competence to stand
6 trial and various aspects of competence in the trial
7 process.
8 Q. You've heard of this man?
9 A. Yes.
10 MR. ABOOD: Judge, if you don't mind, I'd like
11 to provide you what I've marked for identification as
12 Proposed Exhibit D?
13 THE COURT: All right.
14 BY MR. ABOOD:
15 Q. Look — do you have a copy of that, Dr. Brown?
16 A. I do.
17 Q. Okay. Is this the test that I'm asking you
18 about: Assessing, Understanding, and Appreciation of
19 Miranda Rights?
20 A. Yes, it is.
21 Q. Is this the actual test that you gave to Justin
22 Porter on, was it August Twelfth of Two Thousand and Two?
23 A. Yes.
24 Q. And, in fact, is that your handwriting on this

1 test?
2 A. That is my handwriting throughout the test, yes.
3 MR. ABOOD: I'm going to move for its admission,
4 Judge.
5 MR. BERRETT: We don't have a problem for this
6 hearing.
7 MR. ABOOD: Thank you.
8 THE COURT: This will be next in order. What is
9 that?
10 THE COURT CLERK: Is that D?
11 MR. ABOOD: Is it D?
12 THE COURT CLERK: Is that what we're talking —
13 MR. ABOOD: What I gave him is C. I believe. I
14 beg your pardon. I gave him D. And I apologize, Judge.
15 I have another document that's already been marked C.
16 And so I'll go ahead and admit this.
17 THE COURT: This will be D.
18 MR. ABOOD: Thank you.
19 BY MR. ABOOD:
20 Q. Now, I asked you whether or not this was your
21 handwriting on this — on this document. First of all is
22 that unusual that you would be the one to fill this in?
23 A. No. This test is actually administered in
24 basically a verbal format to a large degree. And you, as

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1 the evaluator, read certain questions. Some of which are
 2 actually printed on this form. Others of which are in
 3 the test booklet.

4 And you then record the responses that the
 5 evaluatee states as he states them.

6 And that's what I did.

7 Q. Okay. Now, briefly describe for the judge what
 8 is this test designed to do?

9 A. Well, this test is the result of work done from
 10 a national institute of health grant which was used to
 11 look at assessing individual's capacity to understand the
 12 comprehension and the vocabulary and the process of the
 13 Miranda Warning.

14 Q. And do you have any insight for the judge as to
 15 how this test was developed?

16 A. Well, it was -- Dr. Grisso began the process and
 17 worked with other professionals in the field, to hone the
 18 questions and make them more specific.

19 And then the test was given to somewhere
 20 between eight and nine hundred individuals. And the
 21 scores were then standardized from that individual group.

22 Q. Now, you've never -- is this the first time
 23 you've given this test?

24 A. Yes, it is.

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1 Q. And you did this based on my office's request?

2 A. Yes.

3 Q. Now --

4 A. And I think it's important to realize this is a
 5 pretty --

6 MR. BERRETT: Objection. There's no question.

7 THE COURT: No question. Sustained.

8 BY MR. ABOOD:

9 Q. What is it important to realize concerning this
 10 test?

11 A. This is a relatively straight forward test in
 12 which you're basically reading sentences to people and
 13 asking them what those sentences mean or words.

14 And the interater reliability even amongst
 15 inexperienced or untrained individuals giving this test
 16 is quite high.

17 It's in the .88 to 1.0 range with individuals
 18 who have given it many times. So that would suggest it
 19 does not require great skill to administer the test.

20 Q. Okay. Well, let's explain to the judge how this
 21 test is actually administered.

22 A. Certainly.

23 Q. This test, the testing protocol is divided into
 24 several sections; is that correct?

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1 A. Yes, that's correct.

2 Q. One section is called comprehension of Miranda
 3 Rights; is that correct?

4 A. Yes, it is.

5 Q. Another section is called direct comprehension
 6 of statements in the rights; is that correct?

7 A. Yes, that's correct.

8 Q. And my understanding is that a third section is
 9 called, it's the final portion, it assesses three
 10 separate areas. And are you -- you're prepared to tell
 11 the judge about that; is that right?

12 A. There is one other section, but, yes.

13 Q. Well, let's start with the first one.

14 Comprehension of Miranda Rights. I'm looking at page
 15 one.

16 A. Okay.

17 Q. Is this the first part of that -- of this test?

18 A. Yes, it is.

19 Q. Okay. If you don't mind, explain to the judge
 20 how it is that you asked these various questions and you
 21 get these various scores?

22 A. Basically I speak to Mr. Porter. And I say,
 23 what does the following sentence mean to you:
 24 You do not have to make a statement. And have

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1 the right to remain silent.

2 I then wait and I record the exact words that
 3 Mr. Porter states in response to that question.

4 Q. So when you asked him that question, what
 5 answers did he give you?

6 A. He first stated quote, no good, close quote.
 7 Which was not relevant.

8 And I waited for a moment, and then he stated
 9 quote, silence is the last part, close quote.

10 Q. Okay.

11 A. Referring, I believe, to the last word of the
 12 sentence.

13 Q. All right. So that was his response to what
 14 that sentence meant; is that right?

15 A. Yes. That's correct.

16 Q. Now explain to the judge how you came with a
 17 score of zero? In other words, was this subjective on
 18 your part? Or does that book give you guidance on how to
 19 score this thing?

20 A. The scoring book gives examples of answers which
 21 would score as a two which would be perfect. A one which
 22 would be so so. And a zero which would be bad.

23 And you match the answers which were given to
 24 the examples within the test protocol book.

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1 Q. And just for purposes of reference, give the
 2 judge some examples of what would be a good answer as to
 3 what that means: You do not have to make a statement,
 4 and have the right to remain silent.
 5 In other words what would they give a score of
 6 two for the answer that you provide?
 7 A. With regards to the first question that we're
 8 talking about a two --
 9 THE COURT: Excuse me. For the record, read in
 10 the record.
 11 THE WITNESS: I'm sorry.
 12 THE COURT: What you're referencing.
 13 THE WITNESS: Oh, certainly. This is called
 14 Instruments For Assessing, Understanding, and
 15 Appreciation of Miranda Rights by Thomas Grisso,
 16 G-r-i-s-s-o. Copyright Nineteen Ninety-Eight.
 17 THE COURT: Okay.
 18 THE WITNESS: On page twenty-three is the
 19 particular scoring guide for question number one on part
 20 one. And they're a series of two point answers which
 21 would include such things as:
 22 You do not have to say a word to police or
 23 anyone;
 24 You don't have to say anything;

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1 And if you don't, it won't be held against you
 2 in court.
 3 A one point answer -- and there are several
 4 others.
 5 A one point answer example would be:
 6 I think I should keep quiet;
 7 It means don't talk to the police;
 8 I would say it's best to say nothing.
 9 It means you better keep your mouth shut.
 10 Those are examples of one point answers
 11 according to scoring protocol.
 12 A zero point answer would be:
 13 You got to be quiet.
 14 It means you can't say anything;
 15 You must speak quietly;
 16 It means you don't talk;
 17 Or don't have to talk unless you're guilty.
 18 Those are the kinds of examples that would be a
 19 zero point.
 20 BY MR. ABOOD:
 21 Q. And I don't want to go through the examples for
 22 each and every one of these questions: Is it fair to say
 23 that in this first part: Comprehension of Miranda
 24 Rights, they give you model two point, one point, and

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1 zero point answers for every question asked; is that
 2 correct?
 3 A. Yes, that's correct.
 4 Q. So when you asked the question -- and the second
 5 question that you asked him pursuant to the instructions
 6 in that manual:
 7 Anything you say can be and will be used against
 8 you in a court of law; is that correct?
 9 A. Yes, that's correct.
 10 Q. Now can you please tell the judge what Justin
 11 thought that meant?
 12 A. Well, his first response was the word, if. And
 13 then he made three other responses later. Which
 14 included: I can be in a courtroom;
 15 It's no good for me;
 16 Don't want to be there.
 17 Q. And it was -- and in your referring to the scale
 18 again, you gave him zero points?
 19 A. That's correct.
 20 Q. In terms of coming close to answering what that
 21 meant?
 22 A. That's correct.
 23 Q. Is that right?
 24 A. Based upon the rules and the examples given in

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1 the scoring guide.
 2 Q. All right. Now the third question you
 3 specifically asked him is:
 4 You are entitled to consult with an attorney
 5 before interrogation and to have an attorney present at
 6 the time of the interrogation, correct?
 7 A. Yes, that's correct.
 8 Q. Please tell the judge what Justin thought that
 9 meant.
 10 A. He said: Have an attorney with me when you get
 11 there.
 12 Q. Okay. And according to the book, you were able
 13 to give him some credit for that answer; is that correct?
 14 A. That is a one point answer.
 15 Q. That's a one point answer. And, finally:
 16 If you can not afford an attorney, one will be
 17 appointed for you?
 18 A. Yes.
 19 Q. What does he say that means?
 20 A. He says: I get an attorney.
 21 Q. And according to the book, does he have an
 22 understanding of what that means?
 23 A. No.
 24 Q. You gave him zero points?

- 1 A. That's correct.
- 2 Q. Now, on the comprehension of Miranda Rights,
- 3 Justin scored, my understanding is, one out of a possible
- 4 eight?
- 5 A. Yes, that's correct.
- 6 Q. And you indicated that that puts him at the
- 7 lowest one percent. What does that mean?
- 8 A. Well, that it's not one percent. It is one
- 9 percentile.
- 10 Q. One percentile?
- 11 A. Which is the same kind of answer that
- 12 Dr. Paglini was giving that means that ninety-nine people
- 13 out of a hundred would score better than that on this
- 14 particular portion of the test.
- 15 Q. Okay. Let me move you to the second section. I
- 16 guess, it's called direct comprehension of statements in
- 17 the rights; is that right?
- 18 A. There's -- there are actually two sections to
- 19 this. One is comprehension of Miranda Rights,
- 20 recognition, and the second is comprehension of Miranda
- 21 vocabulary.
- 22 Q. Okay. So the top part is comprehension of
- 23 Miranda Rights recognition; is that right?
- 24 A. Yes, that's correct.

- 1 Q. Explain to the judge what this section is
- 2 designed to measure?
- 3 A. This section is designed to look at whether
- 4 someone is understanding the concept of a particular
- 5 sentence. And in the context of doing that, you read two
- 6 sentences to the individual. And I'll give you an
- 7 example for number one. The first sentence you read is:
- 8 You do not have to make a statement, and have
- 9 the right to remain silent.
- 10 Then you read a second statement. And in this
- 11 case it is: It is not right to tell lies.
- 12 And the task of the individual is to tell you
- 13 whether those two statements mean the same thing or
- 14 whether they mean different things.
- 15 Q. Okay. And from what I'm looking at here, there
- 16 were twelve of those; is that right?
- 17 A. That is correct, yes.
- 18 Q. And are each one of those types of questions
- 19 that were asked directly relating to Miranda rights?
- 20 A. Yes.
- 21 Q. And the S means, I guess, same. And the D means
- 22 different on this form?
- 23 A. Yes. S means that Mr. Porter answered saying
- 24 that the two sentences meant the same thing.

- 1 Q. Right.
- 2 A. The -- on number one, the fact that D is
- 3 underlined, suggests D was actually the correct answer.
- 4 Q. Okay.
- 5 A. But, again, Mr. Porter can not see this answer
- 6 sheet during, or can not see this sheet during --
- 7 Q. Right. Because you're filling it in?
- 8 A. Because I'm filling it in, so he would not know
- 9 that.
- 10 Q. Okay. Now, again, without going through each
- 11 and every one of those questions and how they're
- 12 different or how they're similar, the state can do that
- 13 if they wish. You scored him two out of twelve; is that
- 14 right?
- 15 A. Right. That's basically the total number of
- 16 answers he gave which also had an underline under the
- 17 answer suggesting it was correct.
- 18 Q. Now you also wrote something in your own hand in
- 19 this section here. Can you tell the judge what that
- 20 says?
- 21 A. I simply noted that it appeared very hard for
- 22 him to understand this task. And that I often had to
- 23 repeat these two sentence pairs two or three times before
- 24 he was able to answer.

- 1 Q. Okay. Now, I'm now looking at a section
- 2 entitled comprehension of Miranda vocabulary; is that
- 3 right?
- 4 A. Yes. That's correct.
- 5 Q. Explain to the judge what this section is
- 6 designed to measure?
- 7 A. This section is designed to look at specific
- 8 vocabulary used which are used in the Miranda wording.
- 9 And in this particular case the words are: Consult,
- 10 attorney, interrogation, appoint, entitled, and right.
- 11 And you ask the person what the word means, and
- 12 then you read the sentence which is printed in the
- 13 manual. So that the person will have a context for the
- 14 word. Because some of these, like, consult would be
- 15 either be a verb or a noun. But you have a specific
- 16 purpose. So you say what does the word consult mean to
- 17 you when used in a sentence like: I want to consult with
- 18 him? And then you record his exact response.
- 19 Q. Okay. Well, let's look at that one. In fact,
- 20 the first word is consult, correct?
- 21 A. Correct.
- 22 Q. And the context you used it in was: I want to
- 23 consult with him, correct?
- 24 A. Yes. That's correct.

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1 Q. Did Justin know what that meant?

2 A. He did not.

3 Q. Okay. The second word was attorney; is that

4 right?

5 A. Yes.

6 Q. And the context you used it in was the attorney

7 left the building, correct?

8 A. Correct.

9 Q. What did Justin say that meant?

10 A. He said quote, someone to help a lawyer, close

11 quote.

12 Q. Okay. Okay. And you gave him full credit for

13 that?

14 A. That is two point answer.

15 Q. Okay.

16 A. Yes.

17 Q. The word interrogation, the context you used it

18 in was: The interrogation lasted quite a while, correct?

19 A. Correct.

20 Q. Did Justin have any idea what the word

21 interrogation meant?

22 A. He did not know what that word meant, no.

23 Q. Appoint, the context you used it in was: We

24 will appoint her to be your social worker, correct?

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1 A. Yes, correct.

2 Q. Please tell the judge what Justin thought that

3 meant?

4 A. He thought it meant a point, like you were going

5 to make a point when you were talking.

6 Q. Or like the point on the end of pencil?

7 A. Yes.

8 Q. Okay. The fifth word I see is, entitled. And

9 the context it's used in is: He is entitled to money,

10 correct?

11 A. Correct.

12 Q. Tell the judge what Justin thought you were

13 talking about.

14 A. His response was quote, no car title, close

15 quote.

16 Q. No car title?

17 A. Yes.

18 Q. And again, you gave him no point for that?

19 A. That is a zero point answer, yes.

20 Q. And, finally, the sixth word is the word,

21 right. And you used it in the context: You have the

22 right to vote, correct?

23 A. Yes. That's correct.

24 Q. And what did Justin think that that meant?

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1 A. He, initially his first statement was, turn

2 right, as in the direction right. And then indicated,

3 right to go.

4 Q. So these words that all appear in the standard

5 Miranda Warnings, you scored him based on the

6 instructions in that book with a two out of twelve; is

7 that right?

8 A. Yes. That's correct.

9 Q. What does that mean?

10 A. It means that he doesn't understand those words.

11 Q. What's this 1.2 percentile?

12 A. A two out of twelve when measured against the

13 standardized group is a 1.2 percentile meaning about

14 ninety-eight or ninety-nine people out of one hundred

15 would score better than Mr. Porter did on this portion of

16 the test.

17 Q. Okay. I'm turning the page. I'm looking at

18 page, I guess it's Page four, function of rights in

19 interrogation; is that right?

20 A. Yes. That's correct.

21 Q. Now it's difficult for us to figure out what

22 that means by simply looking at that page. But can you

23 please explain to the judge what this page is designed to

24 measure and how you administered this page to Justin?

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1 A. Certainly. This page measures three different

2 things. And rather than looking purely at vocabulary or

3 at word meaning, this is giving a situation and then

4 asking questions about what might happen in a situation.

5 So, for example, in the interrogation portion,

6 after you let them know that the -- that he's in a police

7 station and he's going to be questioned by police, the

8 first question for -- in one is: What is it the

9 policemen will want Joe to do? Close quote.

10 And then --

11 THE COURT: Excuse me. Does he -- is he given a

12 written statement to read a facts scenario before this is

13 asked?

14 THE WITNESS: No. This is just a very -- it's

15 not even a full vignette. It's Joe is in the police

16 station. The police want to ask him a question.

17 THE COURT: I'm just wondering if there's --

18 THE WITNESS: No. There's nothing that he had

19 to read.

20 THE COURT: Nothing in writing?

21 THE WITNESS: No.

22 THE COURT: Tell him verbally this is a standard

23 set of facts that you read.

24 THE WITNESS: It's not even a set of facts.

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1 There's no crime listed. There's no, Joe did X Y or Z.
 2 It's only Joe is present in a police station.
 3 THE COURT: See my problem is that I don't have
 4 a reference for these answers.
 5 MR. ABOOD: Let me go ahead. If you don't mind,
 6 I'd like to have this marked. My office will buy you a
 7 new one, both of you gentlemen.
 8 THE COURT: Either that or you can have copies
 9 made.
 10 MR. ABOOD: Let's go ahead. I don't know if we
 11 can have copies made, Judge. I think it's copyrighted.
 12 But if you don't mind, I'd like to mark it. I want to
 13 admit this. We're going to give it the judge.
 14 THE COURT: You don't have to give it to me. I
 15 just want to make sure that we have --
 16 MS. LUSAICH: I would love for it to be marked
 17 and admitted.
 18 MR. ABOOD: If the state doesn't mind, then I'll
 19 allow your Honor --
 20 THE COURT: You know, you're all talking. So
 21 the state just said they didn't have any objection to the
 22 admitting. I think that's fine.
 23 THE COURT CLERK: E.
 24 MR. ABOOD: Thank you.

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1 You know, it's up to the -- it's up to the
 2 Court, frankly, Judge, if you want to look at this while
 3 Greg Brown is talking about it.
 4 THE COURT: No. I just wanted to make sure we
 5 have this, that source book for the record.
 6 MR. ABOOD: Okay.
 7 THE COURT: The appellate court frowns on
 8 anything we don't include in the record.
 9 MR. ABOOD: Thank you.
 10 BY MR. ABOOD:
 11 Q. Now the judge wants a better understanding of
 12 what questions it is or what vignettes you are offering,
 13 that cause Justin to provide various answers. Because if
 14 you recall, the judge is just looking at the answers form
 15 like we are.
 16 A. Right.
 17 Q. So is there a way you can provide him with a
 18 better explanation?
 19 A. Basically, you indicate that the police have
 20 brought Joe into the detention or the police station.
 21 There has been a crime. The policemen want to talk to
 22 Joe. Remember that Joe is in detention or at a police
 23 station and the policemen want to talk to him.
 24 Q. Okay.

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1 A. And that's the limit of what he knows.
 2 Q. All right. And so that part goes to Joe's
 3 interrogation on the top of Page four?
 4 A. Yes. That's correct.
 5 Q. Correct. Now what's the first question that you
 6 provided that you gave him two points for? In other
 7 words, how do you get all these two point answers?
 8 A. Right. Well, then you have to read questions.
 9 And his responses are, again, verbal. The first question
 10 is: What is it that the policemen will want Joe to do?
 11 Q. Okay. And what answer did Justin give you?
 12 A. His first answer was: Talk. And then he
 13 stated: About what he was arrested for.
 14 Q. And you gave him two points for that?
 15 A. Yeah. That's a perfect answer.
 16 Q. He gave a perfect answer?
 17 A. Yes.
 18 Q. Now what is the second question?
 19 A. The second question is, finish this sentence:
 20 The police think that Joe blank.
 21 Q. And what answer did Justin give you?
 22 A. Justin gave the answer, quote: Joe knows, close
 23 quote.
 24 Q. And what did the manual view that kind of answer

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1 as worth?
 2 A. That's worth two points.
 3 Q. So he got that one right?
 4 A. Yes. He got that right.
 5 Q. And the third question was?
 6 A. What is the most important thing the police
 7 might want Joe to tell them?
 8 Q. And what did Justin say?
 9 A. He said, quote, what's going down, close quote.
 10 Q. And, again, he scored perfectly?
 11 A. That's a perfect score, yes.
 12 Q. What was the next question?
 13 A. How are the policemen probably feeling?
 14 Q. And Justin's answer?
 15 A. Quote, want to bash his head in, close quote.
 16 Q. And was that worth two points?
 17 A. That was worth two points, yes.
 18 Q. And finally, the last question?
 19 A. Was, how is Joe probably feeling?
 20 Q. And what did Justin say?
 21 A. Quote, wants to get the hell out of there, close
 22 quote.
 23 Q. Okay. So in terms of the word interrogation, it
 24 was your judgment, based on the guidance of that book,

1 that he gave perfect answers, ten out of ten; is that
2 right?
3 A. Yes. He got a perfect score regarding sort of
4 the functional aspects of the interrogation process.
5 Q. Okay. So one thing you can conclude for sure,
6 he didn't mangle concerning the meaning of
7 interrogation; is that right?
8 A. He did not mangle, or he did it poorly.
9 Q. Okay. Or he did it poorly?
10 All right. Now, there are other sections here
11 under function of rights of interrogation?
12 A. That's correct.
13 Q. And what I really want to do was give the judge
14 examples of the kind of questions that are asked.
15 A. Okay.
16 Q. Is it fair to say that the second part deals
17 with Tim and his lawyer?
18 A. Yes.
19 Q. And, again, it's designed for you to read a
20 small vignette and ask a series of questions, correct?
21 A. That's correct.
22 Q. And in that section, it looks like Justin got
23 six points. That was -- what is that, six out of ten?
24 A. That's -- actually this combines two different

1 vignettes, but his score regarding the right to an
2 attorney, he scored an eight out of ten.
3 Q. Eight of ten concerning his right to an
4 attorney; is that right?
5 A. Yes, that's correct.
6 THE COURT: Excuse me. It also includes his
7 court hearing as well, down at the bottom because you're
8 adding up -- you're adding six and two, correct?
9 THE WITNESS: Right. That one question on the
10 Court hearing related to the attorney, and that's why it
11 went up to that area.
12 THE COURT: Okay. By --
13 THE WITNESS: Yes, your Honor.
14 THE COURT: You added them up?
15 THE WITNESS: Yes.
16 MR. ABOOD: That would be Greg's court hearing;
17 is that right?
18 THE COURT: Exactly.
19 BY MR. ABOOD:
20 Q. All right. Now, understanding the concept of
21 his right to remain silent, is that covered somewhere in
22 this test?
23 A. Yeah that is the R.S. score.
24 Q. The R.S. score. Explain to the judge what that

1 means.
2 A. Well the R.S. score assesses questions which
3 assess his knowledge or understanding that he is not
4 obligated to speak to the police at the time of the
5 questioning.
6 Q. Is there a specific section here that we can
7 look at?
8 A. Well, you have the questions that go into that
9 score are R.S.1, R.S.2, R.S.3, R.S.4, and R.S.5.
10 Q. Okay. And, again, is there a small vignette
11 there?
12 A. Yes, there is. One moment.
13 Q. All right. Now, my understanding concerning his
14 understanding of the concept of the right to remain
15 silent, he scored a one out of ten; is that right?
16 A. Yes, that's correct.
17 Q. That was exceptionally poor; wasn't it?
18 A. That was exceptionally poor.
19 Q. I think it's important enough for you to read
20 the judge the vignette and the questions you asked and
21 the answers he provided.
22 A. Well, with regards to the interrogation piece,
23 there's one brief vignette and with regards to the court
24 hearing piece there's another vignette.

1 Q. Okay.
2 A. Because those two are asked separately, and the
3 scores are added together.
4 Q. Why don't you go ahead and do that for the
5 judge?
6 A. Okay. This is Greg. The police have taken him
7 to detention or to the police station because they want
8 to talk to him. Greg stole money from a store, but the
9 police are not sure he did it because no one saw Greg do
10 it. They are getting ready to ask him questions. Greg
11 knows he doesn't have to talk if he doesn't want to and
12 is trying to decide whether or not to talk. That's --
13 that is the vignette.
14 Q. Okay.
15 A. The second vignette is that: This is Greg three
16 weeks later. He's at a court hearing. The judge is
17 here, and the policemen who arrested and questioned Greg
18 are here. Greg's lawyer and his parents are sitting near
19 him.
20 Q. Okay?
21 A. Very brief vignette. The questions which follow
22 are, finish this sentence: If Greg decides to tell the
23 police about what he did, then the things that Greg says,
24 blank.

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1 Q. What did Justin say?

2 A. Justin's response to that question was: Quote,

3 bamboozled them, close quote.

4 Q. Give the judge an example of a proper answer to

5 that question.

6 A. A proper answer is:

7 Can be used against him in court;

8 Will get him into trouble at court time;

9 Can turn against him later in court;

10 Will be told to the judge later on;

11 Will go into his record.

12 Those would be examples of perfect answers.

13 Q. Any one of those would be perfect?

14 A. That's correct.

15 Q. Okay. What was the second question?

16 A. The second question was: If Greg decides not to

17 talk, what is the most important thing the police are

18 supposed to do?

19 Q. And what did Justin say?

20 A. Justin's answer was, quote: I don't know, close

21 quote.

22 Q. And give the judge an example of the right

23 answer.

24 A. Examples would be:

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1 Leave him be;

2 Don't question him;

3 Get him a lawyer.

4 Q. Okay. And what was the next question?

5 A. Next question is: If Greg says he doesn't want

6 to talk but the police tell him he has to talk, what

7 should happen then?

8 Q. What did Justin say?

9 A. Quote, he got to talk, close quote.

10 Q. Okay. And what was the proper answer?

11 A. A proper answer would be something like, they

12 would be lying because he doesn't have to;

13 They would be going against his right;

14 It still doesn't mean that he has to talk;

15 Greg can tell them he doesn't have to talk;

16 They are wrong;

17 He'll know that he doesn't have to really.

18 Q. Okay.

19 A. Things like that.

20 Q. Well, Justin says, he got to talk. Why did you

21 give him a point for that?

22 A. Because one point answers include:

23 He'll have to talk.

24 Q. Okay. Was there any other questions?

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1 A. Yes.

2 Q. Okay.

3 A. The next questions jump down to R.S.4 and

4 R.S.5.

5 Q. Okay.

6 A. R.S.4 is if the judge finds out that Greg

7 wouldn't talk to the police, then what should happen?

8 Q. And Justin said?

9 A. I don't know.

10 Q. And what's the right answer?

11 A. Nothing bad will happen;

12 Go on with the hearing;

13 The judge will listen to what everybody has to

14 say.

15 Answers like that.

16 Q. Okay. And what was the next question?

17 A. Greg did not tell the police anything about what

18 he did. Here in court, if he is told to talk about what

19 he did that was wrong, will he have to talk about it?

20 Q. And what did Justin say?

21 A. He answered that he did not know.

22 Q. He didn't know. Okay. What score did you give

23 him when you took into account that whole section?

24 A. Well, the score -- the scoring was a one.

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1 Q. Okay.

2 A. Out of ten possible.

3 Q. A one out of ten?

4 A. Yes. That's correct.

5 Q. Is there a final score for the whole test? Is

6 that how the test works?

7 A. Well for these last three portions relating,

8 understanding the interrogation process, having the

9 understanding that you have a right to counsel, and

10 having the understanding that you have a right to remain

11 silent, there is a total score for that section.

12 The first three sections stand on their own.

13 Q. So the last section that you're talking about,

14 what page is that on?

15 A. That's the last page.

16 Q. Is that the page that we haven't looked at?

17 A. No.

18 Q. Because I see notes.

19 A. No. I'm sorry. That's the third page. The one

20 that we just talked about.

21 Q. We just talked about?

22 I'm sorry, ma'am.

23 All right. Overall, are these scores low? Or

24 are they high?

1 A. Overall the scores are low.
 2 Q. What does this indicate to you?
 3 A. It indicates to me that he had difficulty with
 4 the vocabulary present in the language of the Miranda
 5 Warning, and that he had difficulty understanding what
 6 the actual phrases meant in addition to the individual
 7 words.
 8 Q. Now I want to talk about -- talk to you about
 9 that very briefly. But before I do that, there's a last
 10 page on here that says notes; is that right?
 11 A. Yes, that's correct.
 12 Q. Tell the judge what that -- what that note
 13 section is about.
 14 A. The next portion of the test is, you are
 15 required to ask the examinee what their description of
 16 events, thoughts, and feelings were during the time that
 17 surrounded their arrest, custody, and interrogation.
 18 Q. So Justin apparently told you that, and you
 19 wrote it down on that last page; is that right?
 20 A. Yes. That's correct.
 21 Q. Okay. Now --
 22 THE COURT: Doctor, could you translate those
 23 notes for me?
 24 THE WITNESS: Certainly, your Honor.

1 Came in with guns out;
 2 Take me;
 3 Quote, don't play fucking stupid to me, close
 4 quote;
 5 To station means taken to station;
 6 Quote, a lot, close quote;
 7 They was mean;
 8 Beatings;
 9 Wrapped with books;
 10 Talking and talking for hours and hours, day
 11 after day;
 12 Threatened to beat me;
 13 Someone else has been killed at that same
 14 station;
 15 Sleeping on table;
 16 Felt scared;
 17 No real meal;
 18 No sense of time for days;
 19 Worstest torture in the world.
 20 THE COURT: Thank you.
 21 BY MR. ABOOD:
 22 Q. You provided a report to my office on August
 23 Seventeenth, Two Thousand and Two, wherein you rendered a
 24 professional opinion as to whether Justin understood his

1 Miranda rights; is that correct?
 2 A. That is correct.
 3 MR. ABOOD: Your Honor, if you don't mind, I've
 4 had this marked as Defense Proposed Exhibit C. I'd like
 5 to have it admitted.
 6 THE COURT: Wait a minute.
 7 MR. BERRETT: Sorry.
 8 THE COURT: Don't we already have a C?
 9 MR. ABOOD: That's Greg Brown's report. I don't
 10 think Greg Brown's report is in.
 11 MR. BERRETT: Is that this one?
 12 MS. LUSAICH: The raw data is in.
 13 THE COURT: Do we have a C? All right.
 14 MR. ABOOD: Yeah, it is. It's in as state's --
 15 MR. BERRETT: We didn't put it in.
 16 MR. ABOOD: Oh, you didn't put it in?
 17 THE COURT: So just for the record, let me
 18 figure out. Do we have a C yet?
 19 THE COURT CLERK: No, sir. He gave me this
 20 prior.
 21 THE COURT: So it's already been marked?
 22 MR. ABOOD: Thank you, Judge.
 23 THE COURT CLERK: And I marked it Proposed C.
 24 MR. ABOOD: I'm going to provide it to the

1 judge.
 2 THE COURT: Thank you.
 3 BY MR. ABOOD:
 4 Q. Dr. Brown?
 5 MR. BERRETT: Is it in?
 6 MR. ABOOD: Yeah, it's in.
 7 THE COURT CLERK: Thank you.
 8 MR. BERRETT: No objection.
 9 MR. ABOOD: Okay.
 10 BY MR. ABOOD:
 11 Q. The results you got on this test, that we've
 12 been talking about, based on your review of all the
 13 testing that Dr. Paglini did, all the tests that he
 14 testified to earlier --
 15 A. Yes.
 16 Q. -- do the results that you got on the test you
 17 administered pretty much comport with the kinds of
 18 results that Dr. Paglini got in the tests he
 19 administered?
 20 A. It is my opinion that they are congruent with
 21 one another and consistent in that he has significant
 22 difficulties with vocabulary, reading, verbal processing.
 23 Q. The tests that you gave and the results that you
 24 derived from the testing you did on Justin, do the scores

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1 also comport with what we know about Justin in terms of

2 the I.Q. testing that he was given when he was in grade

3 school and high school?

4 A. Yes. And with regard to his functioning in

5 school and his gradings in school.

6 Q. And his grades in school. So is it fair to say

7 that the results you got are completely consistent with

8 the results that we have on every test that's been given

9 to Justin that we're aware of?

10 MR. BERRETT: That's a leading question.

11 Objection.

12 THE COURT: It is. Ask it a different way.

13 BY MR. ABOOD:

14 Q. Is there anything -- based on the testimony you

15 heard from John Paglini, is there anything unusual about

16 the scores you got in relation to the scores John Paglini

17 got in all the testing that he gave Justin Porter?

18 A. No.

19 Q. Okay. Now, you provided a report dated August

20 Seventeenth, Two Thousand and Two, and I provided a copy

21 to the judge. It's been admitted as evidence. Do you

22 recall that report?

23 A. Yes.

24 Q. Now, you rendered a professional opinion in that

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1 report; is that correct?

2 A. I did.

3 Q. And your opinion is based on the I.Q. test

4 administered by Dr. Paglini; is that right?

5 A. Partially, yes.

6 Q. The educational history and records you reviewed

7 that we gathered on Justin Porter, correct?

8 A. Yes, partially.

9 Q. The testing that you did that we just went over

10 with the judge: Assessing, and Understanding, and

11 Appreciation of Miranda Rights; is that right?

12 A. Yes.

13 Q. And what is your -- do you have a copy of your

14 report with you?

15 A. I do.

16 Q. What is your professional opinion as to whether

17 or not Justin would have had significant difficulty

18 understanding his Miranda Rights?

19 A. To a reasonable degree of psychiatric certainty

20 it's my professional opinion that he would have had

21 significant difficulty understanding the Miranda Rights,

22 both with regards to the vocabulary and the

23 comprehension.

24 MR. ABOOD: Thank you very much, Dr. Brown.

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1 Thanks, Judge.

2 THE WITNESS: You're welcome. Thank you.

3 MR. BERRETT: Thank you, Judge.

4

5 CROSS EXAMINATION

6 BY MR. BERRETT:

7 Q. Let's, if we could, go through this test. Now,

8 this is a test that you had never given before; is that

9 correct?

10 A. That's correct. This was the first time I've

11 used this particular measure.

12 Q. Never had any opportunity in the world in your

13 practice to use this test until you were contacted by the

14 defense attorneys; is that correct?

15 A. Yeah. That's correct.

16 Q. All right. And you got the instruction book, I

17 assume, because you had to follow the instruction book to

18 figure out how to do it; is that right?

19 A. That is correct.

20 THE COURT CLERK: The book?

21 MR. BROWN: I think he has it.

22 BY MR. BERRETT:

23 Q. When are you supposed to use this test?

24 A. Excuse me?

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1 Q. When are you supposed to use this test?

2 MR. ABOOD: Ask for clarification, Judge. I

3 don't understand what that question means.

4 THE WITNESS: I don't know what the word "when"

5 means in your question.

6 BY MR. BERRETT:

7 Q. Well, if I'm a police officer on the street, and

8 I'm arresting a defendant, am I supposed to do it at that

9 point? Or years later when I'm second guessing what

10 someone's understanding was a couple of years previous?

11 Is that when the test is to be applied?

12 A. I think the test is to be applied when the

13 question arises as to whether or not someone had a

14 capacity to understand the information they were given.

15 Q. Does the book tell when is the appropriate time

16 to use the test? Says here purpose of instruments, page

17 three. Let's see if it says anything.

18 I suppose the fact that I'm reading this in here

19 indicates that you don't know what the answer is to that

20 question?

21 A. My answer is the same to the previous question.

22 You administer a test when there is a question to be

23 answered.

24 Q. All right. Are you familiar with what Miranda

145

1 Rights were given to the defendant in this case?

2 A. My understanding is that he was to read the card

3 aloud.

4 Q. Do you have a copy of that card?

5 A. I do not have a copy of that card.

6 Q. Did you have a copy of the card prior to

7 administering the test?

8 A. No.

9 Q. So you don't know the language on the card which

10 you were comparing language on a test without knowing

11 what language was used; is that correct?

12 A. Yes. That's correct.

13 MR. BERRETT: Judge, I think this is our only

14 copy. If we can get the bailiff.

15 Bill, I think the defense would probably like a

16 copy and the judge.

17 THE BAILIFF: I'll make copies.

18 THE COURT: Is it the Miranda Warning?

19 MR. BERRETT: Yes.

20 THE COURT: I don't think I need a copy.

21 MR. BERRETT: All right.

22 MR. BROWN: I think that particular one is

23 already marked and admitted.

24 MR. BERRETT: It should be. I just wanted it

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1 for convenience.

2 THE COURT: It's all right. Go ahead.

3 BY MR. BERRETT:

4 Q. While he's making that, I want to go through

5 some of these, the questions here. I'm talking about the

6 first page where it talks about: You have to make a

7 statement.

8 A. Okay.

9 Q. Is the word statement in that Miranda Warning

10 card?

11 A. I have no idea. The test has to be given as it

12 is given in this protocol in order to use the test as a

13 standardized measure from the test subject. So if you

14 change the test, it really would not be terribly

15 meaningful.

16 MR. BERRETT: Wait for that copy.

17 BY MR. BERRETT:

18 Q. What I think — I think what you're saying is:

19 If I ask a question about the word magnificent and the

20 word magnificent is not on the Miranda Warnings card, it

21 may have no meaning. Would you concede that?

22 A. Well, that actually wasn't what I said. What I

23 said was, that when you are administering a test of this

24 type, the test has been standardized on a group of

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1 individuals. And that group of individuals is what

2 provides the scores in order to compare people who did

3 well versus not well on a statistical measure like we

4 talked about.

5 And if you begin making changes to the

6 standardized test protocol as it sits here, then the

7 ability to compare with those standardized scores that

8 exist is lost.

9 Q. Well, I'm not suggesting you changing the test.

10 But what I'm asking is: If certain words exist —

11 THE COURT: Thank you.

12 MR. BERRETT: We're short.

13 MR. BROWN: That's okay. Give the doctor a

14 copy.

15 MR. BERRETT: Okay.

16 MR. BROWN: If you're going to reference it, I

17 think.

18 BY MR. BERRETT:

19 Q. Doctor, let me just do this. First of all, is

20 this a standardized test?

21 A. Yes. It has a standardized test group which is

22 in the back of the manual which assesses the store — the

23 scores of an individual versus the standardized scores in

24 the back.

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1 Q. All right. Let's go to the comprehension

2 Miranda vocabulary. One of the words there is consult.

3 A. Yes.

4 Q. Would you look on the Miranda Rights which were

5 given to the defendant and see if you see that word,

6 consult.

7 A. Yes. This version does not contain the word

8 consult.

9 Q. And why did you test the defendant about the

10 meaning of the word that he was not given in the Miranda

11 Warnings?

12 A. I think I already answered that in that this is

13 a standardized test, and it has to be administered in the

14 same way each time it's administered.

15 And you have to use it as it stands, otherwise,

16 you can not reasonably or meaningfully use the

17 standardized scores at the end.

18 Q. You, as I understand it, are saying the

19 defendant was questioned as to his comprehension of

20 Miranda based on these words, and that he didn't

21 comprehend Miranda because he failed this test; isn't

22 that what you said?

23 A. That's correct.

24 Q. All right. Another word down here is

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1 interrogation. Can you look on that rights of person
 2 arrested card and find that word interrogation?
 3 A. That word is not present either.
 4 Q. And what does that mean in regard to the test?
 5 A. Same answer as with regards to the word consult.
 6 Q. Does it mean that you tested him about something
 7 that was irrelevant to his understanding of what he was
 8 told on Miranda?
 9 A. No. It means that I tested him regarding a
 10 standardized test version of the Miranda Warnings and how
 11 this particular test assesses the different aspects of
 12 understanding the Miranda Warnings.
 13 Q. All right. Let's go to the next word then.
 14 Appoint. Can you see that word appoint on the Miranda
 15 Warnings card?
 16 A. Yes, I do.
 17 Q. By itself without appointed. Is there appoint
 18 there, somewhere?
 19 A. No. The version on this test is appointed.
 20 Q. All right. That's a different word from
 21 appoint; isn't it?
 22 A. It's a different verb tense.
 23 Q. All right.
 24 A. Has the same general meaning.

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1 Q. Let's go to the next word, entitled. Do you see
 2 the word entitled on the Miranda card that was given to
 3 the defendant?
 4 A. That is not on this, yes.
 5 Q. All right. So far four out of the six words you
 6 tested his comprehension of were not even on the rights
 7 card that the police advised him of; isn't that correct?
 8 A. Yes.
 9 Q. Now, Miranda is not some sort of magic voodoo
 10 word, is it? People see Miranda Rights all the time on
 11 T.V.; don't they?
 12 A. You can if you watch the right television shows,
 13 yes.
 14 Q. Do you think it's a strange concept to a young
 15 kid, that when he's arrested, that he has a right to
 16 remain silent?
 17 MR. BROWN: Now, we've gone a little far into
 18 the speculation, Judge. I would object.
 19 MR. BERRETT: Well, he's --
 20 THE COURT: You are arguing.
 21 MR. BERRETT: Taking a position the defendant
 22 didn't understand his Miranda Right.
 23 THE COURT: Well --
 24 MR. ABOOD: Based on these tests, Judge.

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1 THE COURT: Speculation.
 2 MR. ABOOD: I beg your pardon, your Honor.
 3 THE COURT: Speculation.
 4 BY MR. BERRETT:
 5 Q. You go through the rest of this, and there's
 6 also use of some words that were not used in that Miranda
 7 Rights. Again, I think the use of the word interrogation
 8 occurred, and entitled, and consult, in fact, in one
 9 sentence in the comprehension of Miranda Rights; is that
 10 correct?
 11 A. I didn't follow that last question. I'm sorry.
 12 Q. All right. What I'm talking about is: On one
 13 of the test areas which is Comprehension of Miranda
 14 Rights, it would be question number three. In that --
 15 A. Yes.
 16 Q. -- question --
 17 A. Yes.
 18 Q. -- it says you are entitled to consult with an
 19 attorney before interrogation.
 20 Those are three words that do not appear on the
 21 Miranda Rights card that were in your comprehension list;
 22 aren't they?
 23 A. Yes.
 24 Q. Isn't that true?

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1 A. That's correct.
 2 Q. All right. Now, did the defendant understand he
 3 was confessing to a crime?
 4 A. I don't -- I don't believe that's addressed in
 5 the particular test protocol.
 6 Q. Well you have read the statements; have you not?
 7 A. Yes, I did.
 8 Q. And you become familiar with the police
 9 reports. And you have, in fact, evaluated the defendant
 10 specifically as to this area. So can you tell us whether
 11 or not the defendant understood he was confessing to a
 12 crime?
 13 A. Well, I -- I -- I would believe -- I believe he
 14 knew he was talking about a crime. Excuse me.
 15 Q. Did he know he was waiving a right?
 16 A. Well, that's -- that's sort of the ultimate
 17 question of today.
 18 Q. And by the way, I'm not one to nit pick, but on
 19 your Comprehension of Miranda Vocabulary --
 20 Counsel, I'm talking about right here.
 21 MR. BROWN: Okay.
 22 BY MR. BERRETT:
 23 Q. Sir, on the Comprehension of Miranda Vocabulary,
 24 on this portion here, when it's defining right, and one

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1 of his answers is: Turned right, which, of course, is
2 correct. But not in the sense you're referring to it
3 here?
4 A. Right.
5 Q. But he says, he has a right to go, and you
6 scored him a zero?
7 A. Yes.
8 Q. You maintain that a guy saying I have a right to
9 go gets no credit when he's defining what a right is?
10 A. I believe so. We can check it against the
11 answers if you would like.
12 Q. Well, that's all right. Doctor, if I could, I'm
13 going to go through some of the statements briefly, and,
14 again, if I could, you don't have copies, do you?
15 A. I --
16 Q. Or do you?
17 A. -- do have a copy. Yes.
18 THE COURT: Thank you.
19 MR. BERRETT: Counsel, I'm going to refer to the
20 first statement which is dated August Twelve, the one of
21 nineteen thirty hours.
22 THE COURT: For the record, that's State's
23 Exhibit One. What page, twelve?
24 BY MR. BERRETT:

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1 Q. Well, let's start out with page two. And,
2 Doctor, I'm going to refer to about halfway down the
3 page.
4 "Q. Okay. Apartment number three. Uh, Justin,
5 do you know this is being recorded?
6 "A. Yes, sir.
7 "Q. Is that okay with you?
8 "A. Fine by me."
9 Now, in terms of his understanding that he was
10 giving a statement to the police that was being recorded,
11 would you indicate that he had that knowledge based on
12 that language.
13 A. It would appear that he understands he's being
14 tape recorded, yes.
15 Q. All right. Now, if you were to consider whether
16 a statement was voluntarily given or coerced, would one
17 of the factors be that, say, you asked a short question
18 and you get, say, a two paragraph response.
19 Would that indicate to you that the person
20 giving that response was freely and voluntarily giving
21 that answer?
22 A. There -- I mean, there would be some variables.
23 It would depend on where in the interview it fell, for
24 example, and what it was in response to.

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1 Q. All right. Well, let's go through a couple of
2 examples. Just to get a feel for whether or not the
3 defendant understood that he was giving information to
4 the police. Page six. That would be the second question
5 up from the bottom of the page?
6 "Q. Okay. And before you left, what did you do
7 to the gal?" Sir, could you read that answer?
8 A. Out loud or silently?
9 Q. Go ahead and read it out loud.
10 A. When she got the -- when she was, like -- you
11 know, she act like she was scared. I mean, cuz she said,
12 well, I'm supposed to blank out on her. I mean, I was
13 scared. I didn't know what to do. I didn't know, well,
14 she might -- well, rape.
15 Then, again, she might say, you know, he was
16 going to kill me. I don't really know. And I was
17 scared. So, and during that time -- the time that I was
18 scared, I didn't know what to think.
19 But at the time before we even got to the point
20 where she got scared.
21 We was having a nice time, close quote.
22 Q. All right. Now that's a fairly lengthy response
23 to that question; isn't it?
24 A. That's a reasonably long answer, especially in

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1 compared to many of the others, yes.
2 Q. Let me give you another example on page eleven.
3 MR. BROWN: Judge, is there a follow-up question
4 to other than just having the doctor read it.
5 MR. ABOOD: I don't understand what the
6 relevance is.
7 MR. BERRETT: Well --
8 MR. ABOOD: The question is not whether or not
9 he knew he was giving information. The question is
10 whether or not he knew he had a right not to give
11 information. And that's what we're trying to
12 investigation.
13 MR. BERRETT: Well --
14 THE COURT: That's the issue.
15 MR. BERRETT: The issue is with the totality of
16 the circumstance. Was the defendant freely and
17 voluntarily giving information to the police officers?
18 MR. ABOOD: We will never --
19 MR. BERRETT: So --
20 MR. ABOOD: Beg your pardon. I'm sorry. Go
21 ahead.
22 MR. BERRETT: In terms --
23 THE COURT: It's his question. Go ahead.
24 MR. BERRETT: All right. Thank you, Judge.

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1 BY MR. BERRETT:

2 Q. And I'm not going to have them all read. I just

3 want to point out several places in the transcript where

4 he continues to give very lengthy answers. Page eleven,

5 for example, if you could see that last question on the

6 page, and the answer. Doctor, can you count how many

7 lines the answer takes, following over in page twelve?

8 A. That would be a little over thirteen and-a-half

9 lines, almost fourteen lines.

10 Q. Would you say that's a pretty good or pretty

11 long answer for any question?

12 A. I would say that's a relatively long answer.

13 Q. Again on page twenty-one, the top of the page,

14 there's a question, or a beginning of an answer of a

15 question. Can you indicate how lengthy that answer is?

16 A. It looks like four lines, three and-a-half, four

17 lines.

18 Q. Page twenty-one?

19 A. Yes.

20 MS. LUSAICH: The top.

21 THE WITNESS: I see a four line answer.

22 MR. BROWN: We all have the same?

23 THE WITNESS: Are we at the same page?

24 MR. BERRETT: Ten. Let's check.

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1 THE WITNESS: Maybe we're on different pages.

2 This says twenty-one.

3 BY MR. BERRETT:

4 Q. There's two twenty-ones?

5 MR. ABOOD: I don't think he has a corrected

6 copy.

7 THE WITNESS: This is my page twenty-one.

8 BY MR. BERRETT:

9 Q. Let me look at that. For the record his page

10 twenty-one is different. That's an uncorrected copy.

11 THE COURT: All right. For the record.

12 THE WITNESS: Okay.

13 BY MR. BERRETT:

14 Q. Let me just have you refer to that page

15 twenty-one. How many lines? For the record, the copy

16 the doctor was using had an uncorrected on the top right

17 page, which is probably before it was edited. Maybe

18 something was changed.

19 A. Oh, okay. Nine and a word.

20 Q. All right. Page forty-nine. The middle of the

21 page, there's a question and the answer. Can you just

22 give an idea how many lines that answer goes through?

23 A. Nine lines.

24 Q. All right.

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1 Now, I'm going to refer to page seventy-six,

2 counsel.

3 One of the questions really is -- is -- let's

4 see if you can find that in your copy. I'll refer to

5 it. But at the top of the page it's really the

6 defendant's answer. And this is a answer. Can you read

7 that?

8 A. Do you -- do you think I'm sorry for what I did?

9 Q. And then the question by the officer: Do you

10 want me to ask you that? Do you think -- are you sorry

11 for what you did? What's his answer?

12 A. Yes, I am, you know. And if I could turn back

13 the hands of time, like I'm saying I wish I could, God

14 knows I wish I could. Sometime, you know, like me, when

15 they told me when the officers first came and got me,

16 they told me, you know, when he looked at me, he looked

17 to say, you ain't no gang banger.

18 Q. And the question is, okay. And then what's the

19 answer?

20 A. He looked me straight in the eye and said you

21 ain't no gang banger. They must got you confused with

22 something else. And I ain't -- I ain't no bad child,

23 blank. My momma said, you know, momma's will do what

24 they got to do for their kids, you know. And, um, I

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1 don't want to be called no, no, no rapist or nothing like

2 that. You know. But that -- that would be the first

3 thing that would come out of people mouths.

4 Q. And then the next request is: Okay. Can you

5 see what his answer is to the question, okay?

6 A. You're a rapist. You know that. It's like you

7 all don't even know what goes on. You know, it's like

8 you hear one side of the story, but you got to hear both

9 of the sides.

10 Q. All right. I think that's enough to kind of

11 show -- would you call that interrogation, Doctor? I

12 mean, here -- the two questions in a row are, by the

13 officer, okay. And then it's the defendant who's

14 continuing to say what he wants to say. And at the top

15 of page, the question that started it out was by the

16 defendant's answer: Do you think I'm sorry for what I

17 did?

18 Now, some people like to get things off their

19 chest, don't they, Doctor?

20 A. Occasionally, yes.

21 Q. And did you see anything in the defendant's

22 statements that were expressions of remorse or sorrow for

23 what he had done where he wanted to free his mind or free

24 his thought process from the burden of the secrecy that

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1 he'd been carrying around?

2 A. I don't -- I don't recall.

3 Q. If we could, we'll refer to the second

4 interview.

5 MR. BROWN: Judge, I would object. I don't

6 understand the relevance of whether he answered that. We

7 probably could mark it and admit a copy of that one if we

8 have it too.

9 MR. BERRETT: Yes.

10 MR. BROWN: And then, of course, the statements

11 can speak for themselves. And counsel can argue, but I

12 don't know how we can expect the doctor to make an

13 informed decision on whether he understood the waiver

14 rights by feeling sorry later. So that's my objection.

15 I don't think it's relevant.

16 MR. BERRETT: If I could get, the next

17 statement. We will call it statement number two. It's a

18 statement dated August Twelfth at nineteen thirteen

19 hours.

20 MS. LUSAICH: Interestingly in the top right

21 hand corner it says number two.

22 MR. BERRETT: Yeah. And it says number two on

23 the top right hand corner.

24 THE COURT: All right. Fine.

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1 MR. BERRETT: Again, can I get a copy for the

2 judge?

3 THE COURT CLERK: It will be Proposed Two also.

4 MR. BERRETT: I move to admit Two.

5 BY MR. BERRETT:

6 Q. Are you familiar with that statement, Doctor?

7 A. No, actually I --

8 THE COURT: Is it admitted over the objection of

9 Mr. Brown?

10 MR. BROWN: No, Judge. We have no objection.

11 THE WITNESS: You said another one on October.

12 MR. BROWN: I object to the frame of the

13 question. I don't object to the statement being in.

14 THE COURT: All right. Fine.

15 MR. BROWN: And my argument is simply that the

16 statement speaks for itself. And we're going to litigate

17 this later. I don't know.

18 MR. BERRETT: Yeah.

19 MR. BROWN: I object to the relevancy of

20 Dr. Brown being able to address the question posed by the

21 state in the statement.

22 MR. BERRETT: I'm just going to ask him a couple

23 of questions --

24 THE COURT: Okay.

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1 MR. BERRETT: -- Judge. I'm not going to

2 belabor it because I know you'll have the statements.

3 THE COURT: All right.

4 THE WITNESS: I don't have a second

5 interrogation dated the Twelfth of August, which I

6 believe is what you said. I have one dated the

7 Thirteenth. But I don't have a second one dated the

8 Twelfth.

9 MS. LUSAICH: Well, interestingly you have one

10 dated the fifteenth, and there is not one dated the

11 Fifteenth.

12 THE WITNESS: Oh.

13 BY MR. BERRETT:

14 Q. Did I give you the original?

15 THE WITNESS: Well, here's the one dated the

16 Fifteenth.

17 MS. LUSAICH: Statement?

18 MR. ABOOD: Maybe we can provide the state with

19 a copy of their police reports, Judge.

20 MR. BERRETT: That should be something else.

21 THE WITNESS: But I don't have a second one from

22 the Twelfth.

23 THE COURT: This is the one on the Twelfth.

24 Counsel, this is the one on the Twelfth.

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1 MR. BERRETT: All right. It's number two.

2 BY MR. BERRETT:

3 Q. Let me just go through this. Refer to what we

4 call Exhibit Number Two -- I'm sorry, interview number

5 two, page fourteen.

6 When, again, we're talking about

7 voluntariness. And my suggestion or question is: Isn't

8 it possible that he wanted to lighten his burden, his

9 hurt, by expressions of what he had done? And if I could

10 get you to read the answer which is --

11 MR. BROWN: Your Honor that's -- that's got to

12 be speculation on motives or reasons behind why one would

13 give a statement. Particularly in context of an

14 after-the-fact statement by the client does not

15 necessarily address what he was thinking at the time the

16 Miranda Rights were read which was the direct testimony.

17 THE COURT: Any response?

18 MR. BERRETT: Well I'm not really trying to read

19 what's in his mind other than he's voluntarily or he has

20 some reason to make these statements.

21 THE COURT: For purposes of this hearing, I'll

22 let it in. I would not let it in with the jury.

23 BY MR. BERRETT:

24 Q. All right. Doctor, could you read that answer?

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1 A. It's like I -- I never (sniffing), did
 2 something wrong, you know, I -- that -- it -- it -- it
 3 was just, like, something that was out of control where
 4 you -- so out of control, like, it's, man, sometimes I go
 5 to sleep and I see -- I see the same thing happen again
 6 (sniffing).
 7 I'm so scared. I don't know what to do. But I
 8 just can't run to my momma. And tell her that I need
 9 some help because such and such happened.
 10 Q. And then the next question again is, okay, and
 11 then what's his answer?
 12 A. And that's the only thing that I hurt so bad is
 13 that right there.
 14 Q. All right. Doctor, do you recall approximately
 15 three or four places in his various statements where he
 16 talked about himself hurting as being a motivating factor
 17 in making this statement.
 18 MR. BROWN: Well, your Honor, I would object to
 19 the characterization.
 20 THE COURT: Sustained. Sustained.
 21 BY MR. BERRETT:
 22 Q. Well let me go ahead. Turn to page eighteen, if
 23 you would, in the middle of the page.
 24 A. Okay.

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1 Q. All right. I'm talking about, answer that
 2 beginning with okay.
 3 A. Here?
 4 Q. Yes. If you could read that.
 5 A. Okay. I probably, maybe, said a little
 6 something to him but, hmm, it's like to me it's hurting
 7 this side. But at the same time I got to be strong about
 8 it.
 9 Q. Question: Right. If you would read the next
 10 answer?
 11 A. I don't even really know the context of it:
 12 But I can't be strong about it because I know my
 13 momma won't want me to lead no life like this.
 14 Q. Okay. If you would turn to page twenty-three
 15 and read the first two lines on that page.
 16 A. I'm up here, you know, when I'm up here, it kind
 17 of calm. But at the same time it done calm me. But, you
 18 know, it hurts so bad it hurts so bad that I did that.
 19 Q. Sir, if you would turn to the last page, page
 20 twenty-six. And read the answer on the very top of the
 21 page.
 22 A. Blank, it's like I hear, but at the same time
 23 when I hear, it's like I'm scared. And it's like it
 24 ain't nobody I can tell about it. It's like, it's eating

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1 me up inside and ain't nobody -- and ain't nobody I can
 2 go to about it.
 3 I go to my cousin. How that look? He can't --
 4 he wouldn't know what to tell me.
 5 Q. And the question by the officer, the third line
 6 up from the bottom, or the third question up.
 7 "Q. Does -- well, does it feel better that you
 8 told me about this?
 9 What's his answer?
 10 A. As it's coming out, it feel good. I mean, but,
 11 it's, like, I don't think I'm going to get over, blank.
 12 Cuz I ain't never did nothing like that. It
 13 wasn't intentionally for that to happen.
 14 Q. So his expression that to get this off his chest
 15 feels good. Would you -- in your experience with the
 16 defendant, would you concede that that may be a
 17 motivating factor, where he would want to talk about what
 18 had happened?
 19 MR. BROWN: Judge.
 20 BY MR. BERRETT:
 21 Q. And he wasn't being coerced?
 22 MR. BROWN: I have to frame the objection the
 23 form of we don't know the context or the foundation of
 24 all these questions. They've been taken one at a time

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1 out of a body of close to a hundred and fifty pages.
 2 And we don't know the pre interviews or post
 3 interviews none of that foundation or context has been
 4 laid and to ask him a question about a motivating factor
 5 for this defendant or any other defendant without
 6 specific knowledge, I think is speculation.
 7 I object on the grounds of speculation.
 8 THE COURT: I'll allow the answer in this
 9 proceeding, but I would not allow the answer before the
 10 jurors.
 11 MR. BERRETT: Thank you.
 12 THE WITNESS: Well, I -- I do understand that
 13 there have been some interrogations that occurred before
 14 anything was taped. And given that that's not available
 15 for review, I don't know what, kind of, set a lot of this
 16 part up.
 17 And in the statements that I just read in this
 18 last section, this was a document that I did not have
 19 previously. So I don't know the context for these
 20 particular statements at the present time.
 21 THE COURT: Then I don't want to hear your
 22 answer.
 23 THE WITNESS: Okay.
 24 THE COURT: Thank you.

1 BY MR. BERRETT:

2 Q. Let me go on to the next statement which I have
3 marked that would be statement number three. Do you have
4 a copy of that, Doctor?

5 A. It's labeled number three. I have one dated
6 Eight Thirteen, Two Thousand, at fifteen hundred hours.

7 MR. BERRETT: August Thirteenth, Two Thousand,
8 fifteen hundred hours.

9 THE WITNESS: Yes.

10 THE COURT: Yes.

11 BY MR. BERRETT:

12 Q. All right. On page fifteen of that statement,
13 the officer talks to the defendant, Mr. Porter, and
14 says: The statements you've been giving us today and
15 yesterday, have you been telling us the truth? And his
16 answer is:

17 "A. Yes, I have.

18 "Q. Okay.

19 "A. I would have no reason to lie.

20 "Q. All right.

21 "A. And I would say what I told you in the
22 courtroom.

23 Now, Doctor, that statement from a defendant
24 who's accused of some very serious crimes that he would

1 be willing to say the same stuff in Court, would you say
2 that that has an atmosphere of coercion? Or is that
3 freely and voluntarily given?

4 MR. BROWN: Same objection, Judge. Speculation
5 in context or form.

6 THE COURT: Well, ask. If he can answer the
7 question. Fine. If he can't, he can also tell us that.

8 THE WITNESS: Well, it depends upon the
9 circumstances. And that is if you believe his
10 information that he had been, for example, threatened
11 with phone books and threatened with other things prior
12 to these statements being taken, then it would be pretty
13 hard for me to see any of it as being voluntary.

14 THE COURT: All right. Thank you.

15 BY MR. BERRETT:

16 Q. Doctor, you had read these statements in
17 preparation for your testimony here today; is that
18 correct?

19 A. I've reviewed them with the exception --

20 Q. Can you show me --

21 A. -- of number two.

22 Q. -- anywhere in any statement he's ever made to
23 the police where he claims to be threatened with phone
24 books or in any other fashion?

1 A. Those are not in the statements.

2 Q. You're right.

3 A. And how could they be?

4 Q. Well, if a person was just threatened and being
5 interviewed by the police, you don't think that he would
6 make some sort of statement about that?

7 A. Of course not.

8 Q. He didn't make any mention of any police agency
9 anywhere in any statement; is that correct, that's
10 transcribed?

11 A. Yes. I already said, yes.

12 Q. Do you recall in his statement, and this is on
13 page twenty-three, the question by the officer: Did you
14 sleep better last night after you talked to us? What was
15 his answer?

16 A. Yes, I did.

17 Q. Doctor, you're familiar with the allegations in
18 these statements about the defendant hurting, feeling
19 some sort of remorse, wanting to talk about what had
20 happened, looking for solutions to his problems. Are you
21 still maintaining that he did not freely and voluntarily
22 give these statements?

23 A. I'm maintaining that based upon the information
24 on the test protocol that he did not reasonably

1 understand the right to remain silent, number one.

2 And number two, if he were, in fact, threatened
3 then they would be involuntary irrespective of whether he
4 subjectively felt better after having made some of them.

5 MR. BERRETT: I have no further questions.

6 MR. BROWN: The Court's indulgence

7 MR. BERRETT: Just for the record, I think we
8 moved to admit those three statements exhibit --

9 MR. BROWN: No objection.

10 MR. BERRETT: State's One, Two, and Three. I
11 don't remember what they were marked.

12 THE COURT: All right. It will be admitted.

13 THE COURT CLERK: Three?

14 THE COURT: You may redirect.

15 MR. ABOOD: Yeah, Judge. I have a few
16 questions. Thank you.

17 REDIRECT EXAMINATION

19 BY MR. ABOOD:

20 Q. Mr. Berrett asked you, Dr. Brown, initially, at
21 what point in time should that test that we've been
22 talking about be administered; do you recall that?

23 A. Yes, I do.

24 Q. And I think you'll agree that if you give a test

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1 like this almost immediately after someone is arrested,
 2 you're probably likely to get a more accurate result than
 3 if you wait a couple of years later; is that right?
 4 A. That's probably true.
 5 Q. And the reason that's true is because after a
 6 couple of years, a person can learn the right answers to
 7 these questions, correct?
 8 A. Yes, they could.
 9 Q. And a couple of years after Justin was arrested,
 10 in fact, he didn't learn the right answers to these
 11 questions; did he?
 12 A. Not very well.
 13 Q. And, again, he failed this test in your view,
 14 correct?
 15 A. Yes.
 16 Q. Okay. Mr. Berrett also brought out the fact
 17 that this concept, this test that's designed to test the
 18 concepts of Miranda, doesn't use the exact same wording
 19 as the Miranda Rights card he provided you, correct?
 20 A. That's correct.
 21 Q. Question number one: Does your Miranda card say
 22 something along the lines of: Having the right to remain
 23 silent?
 24 A. Let me get it. Yes, it does. It's the first

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1 statement.
 2 Q. Okay. And, in fact, this test in question
 3 number one says, you do not have to make a statement and
 4 have the right to remain silent, correct?
 5 A. Yes, it does.
 6 Q. So, in fact, this question actually gives you
 7 more information than that Miranda card, correct?
 8 A. Yes, it does, in that.
 9 Q. This questionnaire makes it easier to get the
 10 answer right than that Miranda card, correct?
 11 A. Correct.
 12 Q. Thank you. Whether or not Mr. Porter felt
 13 better after answering some of these questions, does that
 14 go to whether or not he knew that he didn't have to
 15 answer these questions?
 16 A. Those are -- in my mind, those are totally
 17 unrelated concepts.
 18 Q. You were asked of the conditions of the
 19 interrogation of Justin Porter. First of all, you
 20 weren't there when Justin Porter was interrogated; is
 21 that right?
 22 A. Of course not.
 23 Q. You weren't there when the -- when the
 24 detectives did a two and-a-half hour preinterview with

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1 him before they turned the tape recorder on; were you?
 2 A. No. I was not there.
 3 Q. So you don't have any personal knowledge of
 4 whether or not the detectives threatened him physically
 5 with beatings with a phone book; do you?
 6 A. Of course not.
 7 Q. You don't have any personal knowledge as to
 8 whether or not these detectives threatened to take him
 9 down to the docks --
 10 MR. BERRETT: Judge, this is all leading
 11 questions.
 12 BY MR. ABOOD:
 13 Q. -- and whoop his ass, do you?
 14 A. No.
 15 Q. So in other words --
 16 THE COURT: Just a minute.
 17 MR. BERRETT: Objection, leading questions.
 18 THE COURT: Correct.
 19 MR. ABOOD: May I proceed?
 20 THE COURT: Yes.
 21 MR. ABOOD: Thank you.
 22 THE COURT: But don't lead.
 23 MR. ABOOD: Thank you.
 24 ///

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1 BY MR. ABOOD:
 2 Q. So your opinion --
 3 Thank you, Judge. I won't lead.
 4 BY MR. ABOOD:
 5 Q. Is it fair -- is it your opinion that he did not
 6 understand his Miranda Rights? Does that opinion have
 7 anything to do with whether or not his -- his statement
 8 was given voluntarily?
 9 A. No, it does not. That's a separate matter.
 10 Q. Okay. So let's discuss whether or not his
 11 statement was given voluntarily. You simply concluded in
 12 your report that, if what Justin says is true about being
 13 threatened with a phone book and being threatened with
 14 getting his ass whooped down on the docks in Chicago, if
 15 those things were true, than your feeling was that this
 16 statement would not have been voluntary; is that correct?
 17 A. Exactly.
 18 Q. Okay.
 19 A. I think I mentioned that in cross as well, but
 20 exactly.
 21 Q. Thank you. Thank you. Thank you very much,
 22 Doctor.
 23 THE COURT: Any recross?
 24 MR. BERRETT: Nothing else, Judge.


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1 THE COURT: You may step down. Thank you.
2 THE WITNESS: Thank you, your Honor.
3 THE COURT: I'm not going to stay any longer.
4 MS. LUSAICH: Thank you.
5 MR. ABOOD: We'll see you tomorrow.
6 MR. BROWN: See you later, Judge.
7 THE COURT: One-thirty, tomorrow.
8 MR. BROWN: Just for the record, your Honor, at
9 the request of the state we provided first pages three
10 through thirteen.
11 MS. LUSAICH: Three through sixteen.
12 MR. BROWN: Three through sixteen of the manual
13 that we've been referencing for Dr. Bicker's review this
14 evening.
15 THE COURT: Okay.
16 MR. BROWN: And we'll see you tomorrow
17 afternoon.
18 THE COURT: Thank you.
19 MR. ABOOD: Thank you very much, your Honor.
20 THE COURT: And for the record who is going to
21 pay for that manual?
22 MS. LUSAICH: Mr. Abood says he's the one who
23 ever so kindly snatched it and volunteered.
24 MR. ABOOD: My office will take care of that,

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1 Judge.
2 THE COURT: All right. Thank you.
3 MR. BROWN: Do you have it?
4 THE COURT: See you tomorrow at one-thirty.
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6
7 (WHEREUPON, THE PROCEEDINGS WERE
8 CONCLUDED)
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1 REPORTER'S CERTIFICATE
2
3 STATE OF NEVADA)
4 :SS
4 COUNTY OF CLARK)
5
6 I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER,
7 DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF
8 THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT
9 THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
10 STENOGRAPHY NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
11 AND UNDER MY DIRECTION AND SUPERVISION AND THE
12 FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
13 ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
14 PROCEEDINGS HAD.
15 IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
16 MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
17 NEVADA.
18
19
20 
21 PEGGY ISOM, RMR, CCR 541
22
23
24

State of Nevada v. Justin D. Porter
September 19, 2007

C174954
S.C. 54866

DISTRICT COURT

CLARK COUNTY, NEVADA

ORIGINAL

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CLERK OF THE COURT

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Ann L. Blum
CLERK OF COURT

THE STATE OF NEVADA,)

PLAINTIFF,)

VS.)

CASE NO: C174954

JUSTIN D. PORTER)

aka JUDG CAPRI PORTER,)

DEFENDANT.)

REPORTER'S TRANSCRIPT

OF

STATUS CHECK: NEGOTIATIONS

BEFORE THE HONORABLE JUDGE LEE A. GATES
DISTRICT COURT JUDGE
DEPARTMENT VIII

DATED WEDNESDAY, SEPTEMBER 19, 2007

FOR THE PLAINTIFF: ELISSA LUZAICH, ESQ.

FOR THE DEFENDANT: JOSEPH K. ABOOD, ESQ.
CURTIS S. BROWN, ESQ.

REPORTED BY: SONIA L. RILEY, CCR NO. 727

SONIA L. RILEY, INC. (702) 526-1298

1 APPEARANCES:

2 FOR THE PLAINTIFF:

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6
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PUBLIC DEFENDER'S OFFICE
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Suite 226
10 Las Vegas, Nevada 89155
(702) 455-4685

11
12 DEFENDANT PRESENT

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SONIA L. RILEY, INC. (702) 526-1298

1 LAS VEGAS, NEVADA; WEDNESDAY, SEPTEMBER 19, 2007

2 P R O C E E D I N G S

3 * * * * *

4 **THE COURT:** What are we doing on Justin
5 Porter?

6 **MS. LUZAICH:** Good morning, Judge.

7 **MR. BROWN:** Good morning, Judge. Curtis
8 Brown and Joe Abood on Mr. Porter. This was a
9 continued status check for the resetting of the
10 trial date. We're asking for -- actually, if we
11 could have maybe two weeks or slightly over two
12 weeks to finish our discussions about the
13 negotiations, we can set a trial.

14 **THE COURT:** Mr. Brown, I get the feeling
15 you're always jerking me around.

16 **MR. BROWN:** No; I'm requesting, your
17 Honor. This is a complicated negotiation,
18 obviously, and Mr. Porter's reluctance -- we've had
19 many discussions with him.

20 **THE COURT:** I can't keep discussing this
21 all along --

22 **MR. BROWN:** The discussions really are
23 pretty new. For as old as this case is, we've
24 actually been discussing these negotiations for
25 about a month.

1 **THE COURT:** It's easier for me to try the
2 darn thing and be done with it.

3 **MR. BROWN:** Frankly, it's probably easier
4 for everybody to try it, except the consequences are
5 so significant to Mr. Porter, and we talked a lot
6 about that.

7 **THE COURT:** You guys are going to have
8 to -- what is it?

9 **MS. LUZAICH:** Part of the problem is mine,
10 I have to admit. All these years I have never made
11 an offer; it has always been trial only.

12 **THE COURT:** It's always your problem every
13 time you're involved in a case, I can tell you that.

14 **MS. LUZAICH:** Thank you, Judge, but I did,
15 for the first time, make an offer last month, so
16 they never had the opportunity to talk to him about
17 it.

18 **THE COURT:** Two weeks.

19 **MR. BROWN:** Thank you, Judge.

20 **MR. ABOOD:** Whoa, whoa, whoa, your Honor.

21 **THE DEFENDANT:** I don't want the deal.
22 You can keep the deal. Excuse me, your Honor. I'm
23 ready to proceed with this.

24 **THE COURT:** The man wants a trial.

25 **MR. BROWN:** Set a trial, Judge.

1 **THE DEFENDANT:** Excuse me, your Honor. I
2 want these cases severed, if I can, through my
3 attorneys, to file motions, whatever they got to do.
4 That's all I'm asking.

5 **THE COURT:** What do you mean "severed"?

6 **THE DEFENDANT:** I got --

7 **MS. LUZAICH:** He murdered one person; he
8 raped seven.

9 **THE DEFENDANT:** Okay. Well, you're just
10 saying --

11 **THE COURT:** Wait a minute. Wait. You're
12 in court.

13 **THE DEFENDANT:** Sorry. I apologize, your
14 Honor. All I'm saying is I would just like the
15 cases to be severed. I'm tired. I'm ready to get
16 this over with. What's going to happen gon' happen.
17 I put my faith in the Lord, and whatever she want to
18 say, I don't care; I'm just ready to proceed. I'm
19 tired of being here.

20 **THE COURT:** Counsel, what do you want to
21 do?

22 **MR. BROWN:** Well, your Honor, we would --

23 **THE DEFENDANT:** I'm ready to proceed.

24 **MR. BROWN:** He's ready to proceed. We've
25 had discussions. This is the first time he's really

1 expressed it that severely that he's ready to go.
2 That's fine; we can set a trial date. The problem
3 we have with my calendar and Mr. Abood's calendar is
4 we're not going to be available with the Court's
5 until June. I have two death penalty cases set now.

6 **THE COURT:** I can't continue this case to
7 June.

8 **MR. BROWN:** The problem is if we set it
9 before then and the other cases continue forward,
10 we're going to be asking to continue this case.

11 **THE COURT:** How old is this case?

12 **MR. BROWN:** This is the first trial
13 setting.

14 **THE COURT:** How long has he been in jail?

15 **THE DEFENDANT:** Seven years, your Honor,
16 and some.

17 **THE COURT:** You haven't been in jail on
18 this case for seven years.

19 **MR. BROWN:** Yes, your Honor. You remember
20 this case, this was McGroarty's. We had two years'
21 worth of suppression hearings that were ruled on
22 once he became a senior judge and was retired from
23 the bench with some of the scheduling issues, but
24 ironically, this was the first trial setting that
25 was vacated last month, so you are setting the

1 second trial setting.

2 **THE COURT:** He's never been convicted of
3 this stuff?

4 **MR. BROWN:** No. He's never been
5 convicted; he hasn't had an appeal; he's never been
6 back.

7 **THE COURT:** This has been going around for
8 seven years?

9 **MR. BROWN:** Yes.

10 **THE COURT:** That's terrible. It looks
11 like, to me, you would put other stuff aside and try
12 to get this man's case tried.

13 **MR. BROWN:** That's conceivable, but as you
14 know, there's 50 different counts that are going to
15 require intensive preparation.

16 **THE COURT:** You had seven years to
17 prepare.

18 **MR. BROWN:** Your Honor, it's been working
19 towards other things during that period. For
20 instance, this was originally a death penalty case.
21 Through the process, we've had over 20 counts
22 dismissed through litigation as well as the death
23 penalty dismissed throughout the process of the
24 litigation, so we've been progressing forward with
25 tremendous benefits, but now it's time to set the

1 trial date. The first offer that was ever offered
2 that gives Mr. Porter an opportunity to save his
3 life through a negotiation, he's evaluated it. He's
4 talked about it, and he's decided he doesn't want
5 that, and he wants to go to trial, and we can do
6 that, but from this point forward to be prepared for
7 trial and to clear other schedules, June is the
8 earliest I can realistically do it. I don't think
9 Mr. Porter has a problem waiting that long as long
10 as we do the trial.

11 **THE COURT:** Is that firm date okay with
12 you?

13 **THE DEFENDANT:** You know, right now, your
14 Honor, I can't really say. I don't know right now.
15 I got a lot of things on my mind and I'm going
16 through, and I really can't say myself.

17 **THE COURT:** I'm going to give you this
18 date, but you're going to have to go to trial on
19 this. State, both of you are going to have to go to
20 trial. This is ridiculous.

21 **MR. BROWN:** Judge, if that's the way it
22 has to go, we're going to have to be ready to go to
23 trial.

24 **THE COURT:** Give them a firm date in June.
25 I don't want to hear any ifs, ands and excuses about

1 this.

2 **MS. LUZAICH:** When does your criminal
3 stack start?

4 **THE CLERK:** It starts June 30th.

5 **MS. LUZAICH:** That's correct. I have a
6 criminal trial on May 27th.

7 **THE CLERK:** Jury trial will be July 1st at
8 10:00 a.m. with a calendar call June 23rd --
9 June 30th -- I'm sorry, June 30th at 9:00 a.m. --
10 no -- it's the 23rd, thank you, your Honor.
11 June 23rd is the calendar call at 9:00 a.m. with a
12 jury trial July 1st at 10:00 a.m.

13 **THE COURT:** That's a firm date.

14 **THE DEFENDANT:** I would like to apologize
15 by hollering, your Honor.

16 **THE COURT:** That's fine. No problem.

17 **THE DEFENDANT:** I was a little upset.

18 (WHEREUPON, THE PROCEEDINGS WERE
19 CONCLUDED.)

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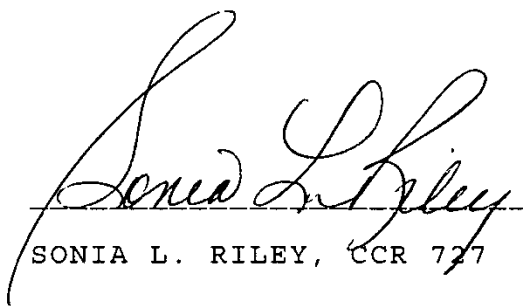
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REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, SONIA L. RILEY, CERTIFIED COURT
REPORTER, DO HEREBY CERTIFY THAT I TOOK DOWN IN
STENOGRAPH ALL OF THE PROCEEDINGS HAD IN THE
BEFORE-ENTITLED MATTER AT THE TIME AND PLACE
INDICATED, AND THAT THEREAFTER SAID STENOGRAPH NOTES
WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY
DIRECTION AND SUPERVISION AND THE FOREGOING
TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE
RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS
HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO
SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF
CLARK, STATE OF NEVADA.


SONIA L. RILEY, CCR 727

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

JUSTIN JUG CAPRI PORTER,

Defendant.

CASE NO. C174954X
DEPT. NO. VIII
DATE: May 28, 2008
TIME: 9:00 a.m.

MOTION TO SEVER COUNTS XXX, XXXI, XXXII CHARGING MURDER AND
RELATED CRIMES AGAINST GYALTSO LUNGTOK, FROM THE REMAINING
COUNTS IN THE SECOND AMENDED INFORMATION

COMES NOW, the Defendant, JUSTIN JUG CAPRI PORTER, by and through CURTIS
S. BROWN and JOSEPH K. ABOOD, Deputy Public Defenders and files this Motion to Sever
Counts XXX, XXI, XXXII Charging Murder and Related Crimes Against Gyaltsu Lungtok, from
the Remaining Counts in the Second Amended Information.

This Motion is made and based upon all the papers and pleadings on file herein, the
Memorandum of Points and Authorities, and oral argument at the time of hearing on this matter.

DATED this 14 day of May, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By
CURTIS S. BROWN, #4546
Deputy Public Defender

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By
JOSEPH K. ABOOD, #4546
Deputy Public Defender

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MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Defendant JUSTIN D. PORTER (date of birth: December 13, 1982) is charged by way of a Second Amended Information, filed October 11, 2001, with a number of crimes involving a number of different victims.

On February 1, 2000, Teresa Tyler became the victim of a series of crimes which make up the basis of Counts I through VII of the Second Amended Information. A crime report was taken for this incident under Event Number 000201-2429. Investigation revealed that a black male known to Ms. Tyler as Chris "came to the apartment produced a small black knife directed her into the bedroom and ordered her to remove her clothes." This suspect then allegedly forced Ms. Tyler to engage in various sexual acts with him and stole some of her money.

The Second Amended Information charges MR. PORTER with the following crimes based on the above allegations:

- I. Burglary While in Possession of a Deadly Weapon.
- II. First Degree Kidnapping With Use of a Deadly Weapon.
- III. Sexual Assault With Use of a Deadly Weapon.
- IV. Sexual Assault With Use of a Deadly Weapon.
- V. Sexual Assault With Use of a Deadly Weapon.
- VI. Sexual Assault With Use of a Deadly Weapon.
- VII. Sexual Assault With Use of a Deadly Weapon.

On March 7, 2000, Leona Case reported that she had been that victim of a series of crimes. A crime report was taken under Event Number 000307-0141. Investigation revealed that a black male knocked on her door and asked her to use the telephone. She refused. A few minutes later the suspect allegedly kicked in her front door, entered her apartment and began striking her in the

1 face demanding cash and valuables. He took Forty-four Dollars (\$44.00) and a ring belonging to
2 Ms. Case. He then allegedly forced her to undress by threatening her with a pair of scissors.
3 Sexually assaulted her and then attempted to strangle her with an electrical cord. Ms. Case was
4 then stabbed with a kitchen knife. She was then barricaded inside of her bathroom and her
5 apartment was set on fire.

6 The Second Amended Information charges Mr. Porter with the following crimes based on
7 the above allegations:
8

9 VIII. Burglary While in Possession of a Deadly Weapon.

10 IX. First Degree Kidnapping With Use of a Deadly Weapon With Substantial Bodily
11 Harm.

12 X. Sexual Assault With Use of a Deadly Weapon With Substantial Bodily Harm.

13 XI. Attempt Murder With Use of a Deadly Weapon.

14 XII. Sexual Assault With Use of a Deadly With Substantial Bodily Harm

15 XIII. Robbery With Use of a Deadly Weapon.

16 XIV. First Degree Arson.

17
18 On March 25, 2000, Ms. Ramona Leyva reported a series of crimes under Event Number
19 000325-2971. Investigation revealed that a black male kicked in her door while she was in the
20 bathroom. He grabbed Ms. Leyva by the back of the hair and dragged her into the main living
21 area. He then retrieved a kitchen knife from her kitchen and threatened to kill her. Placed her on
22 her bed and sexually assaulted her. He then took her vehicle keys and departed in her vehicle.
23

24 The Second Amended Information charges Mr. Porter with the following crimes based on
25 the above allegations:

26 XV. Burglary While in Possession of a Deadly Weapon.

27 XVI. First Degree Kidnapping With Use of a Deadly Weapon.
28

1 XVII. Sexual Assault With Use of a Deadly Weapon.

2 XVIII. Robbery With Use of a Deadly Weapon.

3 On April 4, 2000, Ms. Marlene Livingston reported a series of crimes under Event Number
4 000404-0324. Investigation revealed that a black male kicked in her apartment door and entered
5 with a knife in his hand. He took money and other valuables from Ms. Livingston and forced her
6 to perform fellatio on him. He then filed in Ms. Livingston's vehicle.

7
8 Counts XIX through XXI charge crimes against Marlene Livingston:

9 XIX. Burglary While in Possession of a Deadly Weapon.

10 XX. Sexual Assault With Use of a Deadly Weapon Victim 65 Year of Age or Older.

11 XXI. Robbery With Use of a Deadly Weapon Victim 65 Years of Age or Older.

12 On April 12, 2000, Francis and Clarence Rumbaugh reported crimes under Event Number
13 000412-2745. Investigation revealed that a black male entered the Rumbaugh's apartment through
14 an unlocked screen door pushing Mr. Rumbaugh to the ground. He then cut the telephone cord in
15 the kitchen area with a knife he retrieved from the Rumbaugh's kitchen. The suspect then
16 allegedly searched through the apartment and took Eighty Dollars (\$80.00) from Mr. Rumbaugh.

17
18 Counts XXII through XIV charge crimes against Clarence and/or Francis Rumbaugh:

19 XXII. Burglary While in Possession of a Deadly Weapon.

20 XXIII. Robbery With Use of a Deadly Weapon Victim 65 Years of Age or Older.

21 XXIV. Robbery With Use of a Deadly Weapon Victim 65 Years of Age or Older.

22
23 On June 6, 2000, Mr. Leroy Fowler became the victim of a home invasion. A crime report
24 for this incident was taken under Event Number 000606-0165. Investigation revealed that a black
25 male kicked in Mr. Fowler's apartment door holding a knife. Mr. Fowler began screaming at the
26 suspect causing him to run out of the apartment.
27
28

Count XXV charges a crime against Leroy Fowler:

XXV. Burglary While in Possession of a Deadly Weapon.

On June 7, 2000, Ms. Joannie Hall reported a series of crimes under Event Number 000607-0313. Investigation revealed that a black male kicked in her apartment door and confronted Ms. Hall in her bedroom. He was holding a knife in his right hand and directed her around the apartment. He then performed various sex acts with her and stole a number of items from her apartment.

These crimes make up the basis of Counts XXVI through XXIX of the Second Amended Information.

Counts XXVI through XXIX charge crimes against Joannie Hall:

XXVI. Burglary While in Possession of a Deadly Weapon.

XXVII. First Degree Kidnapping With Use of a Deadly Weapon.

XXVIII. Sexual Assault With Use of a Deadly Weapon.

XXIX. Robbery With Use of a Deadly Weapon.

Detective M. Castaneda prepared an Application and Affidavit for a Search Warrant on August 11, 2000, wherein he states that "through the numerous similarities between the aforementioned incidents it was apparent that a crime series had developed with one lone suspect as the perpetrator of the listed crimes." This series of crimes was even given a moniker of "Downtown Area Command Series" and a number of different detectives from within Metro were assigned to it. These detectives were from both the Robbery and Sexual Assault Details. They noticed similarities between all these crimes in the "series" including time of attacks, geography, residence types targeted, and escalating confrontation with any males the perpetrator encountered. These facts were noted prior to any mention of crimes against Gyaltsu Lungtok or Laura or Beatriz

1 Zazueta, or Guadalupe Lopez appeared in that application even though those crimes had already
2 occurred.

3 On June 13, 2000, Detective Love was in the area of 209 North 18th Street conducting a
4 surveillance program designed to spot any black males who fit the description given by the above
5 mentioned victims. She spotted Defendant JUSTIN PORTER loitering in the area at about 0330
6 hours. She believed he matched the description given. He later submitted to a buccal swab. On
7 August 10, 2000, she was informed by Criminalist Dave Welch that the DNA profile of PORTER
8 matched the DNA evidence collected from victims, Tyler and Leyva. Detective Castaneda states
9 in his application that "based upon the circumstances and similarities of the other listed incidents,
10 this shows PORTER to be responsible for those crimes as well.
11

12 **That assessment did not include the following crimes, which were not referenced at all**
13 **in his application.**

14 On June 9, 2000, Guadalupe Lopez, Laura Zazueta and Beatriz Zazueta were the victims of
15 a series of crimes charged in Counts XXXIII through XXXVIII of the Second Amended
16 Information. These crimes were reported under Event Number 000609-0140. They allege that a
17 black male entered their residence through an unlocked front door in the middle of the night and
18 demanded money from Laura Zazueta. She directed the suspect to her sister's room, Beatriz and
19 her boyfriend Guadalupe Lopez. Guadalupe Lopez grabbed at the suspect's gun and a struggle
20 ensued. The suspect fired three shots and Lopez was slightly injured. The suspect then broke free
21 and jumped out the front window.
22

23 Counts XXXIII and XXXVIII charge crimes against Laura Zazueta, Guadalupe Lopez
24 and/or Beatriz Zazueta:
25

26 XXXIII. Burglary While in Possession of a Deadly Weapon.

27 XXXIV. Robbery With Use of a Deadly Weapon.
28

1 XXXV. Attempt Robbery With Use of a Deadly Weapon.

2 XXXVI. Attempt Robbery With Use of a Deadly Weapon.

3 XXXVII. Attempt Robbery With Use of a Deadly Weapon.

4 XXXVIII. Battery With Use of a Deadly Weapon.

5 On June 10, 2000, Metro responded to a homicide at 415 South Tenth Street. The victim,
6 Gyaltsso Lungtok was found dead in his apartment having been shot numerous times. The front
7 door of the apartment had been kicked in and a footwear impression revealed that the shoe brand
8 name was Saucony. Forensic Laboratory Manager Richard Goode determined that the firearm
9 used on June 9, 2000, against Guadalupe Lopez was the same as that used against Gyaltsso
10 Lungtok.
11

12 Counts XXX through XXXII charge crimes against Gyaltsso Lungtok:

13 XXX. Burglary While in Possession of a Deadly Weapon.

14 XXXI. Attempt Robbery With Use of a Deadly Weapon.

15 XXXII. Murder With Use of a Deadly Weapon. (Open Murder).
16

17 Detective James La Rochelle completed an Application and Affidavit for Search Warrant
18 on the 11th day of August, 2000. In that Affidavit and Application on page 5 he states, "the sexual
19 assault crime series in which Justin Porter was developed as a suspect had a numerous factors in
20 common with the robbery investigation and the homicide investigation. The physical description
21 in the robbery matches the crime series and Justin Porter. The location of the robbery and
22 homicide occur within the downtown area command and their time of occurrence both correspond
23 with the crime series. The modus operandi of the crimes have strong similarities such as forced
24 entry specifically door kicks, use of weapon, propensity of violence, dress of suspect and the
25 choice of targets."
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ARGUMENT

NRS 173.115 Joinder of Offenses reads:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:

1. Based on the same act or transaction; or
2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

NRS 174.165 Relief From Prejudicial Joinder, reads:

1. If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
2. In ruling on a motion by a defendant for **severance** the court may order the district attorney to deliver to the court for inspection in chambers any statements or confessions made by the defendants whom the state intends to introduce in evidence at the trial.

The defense respectfully requests that this Honorable Court sever Counts XXX through XXXII which charge Defendant with crimes, including murder, against Gyaltsso Lungtok. Although these charges are properly joined with all the other charges against Mr. Porter in the Second Amended Information, we move that they be severed for trial because Mr. Porter will be prejudiced by trying them together. There is strong DNA evidence which links Mr. Porter to a number of the other charges in the Information, as well as eyewitness identification. In contrast, little evidence exists which implicates Mr. Porter to the murder and related crimes against Gyaltsso Lungtok, absent his own admissions. As this Court undoubtedly knows, the more a Defendant is charged with, the worse he looks. Jurors tend to operate on the principle that where there is smoke, there is fire. The concern of the defense is that the DNA, fingerprint, eyewitness evidence of the other counts in this case is not applicable to the murder case. However, the jury will naturally believe that if they think Mr. Porter is guilty of those crimes, he must be guilty of the

1 homicide as well, since it occurred in the same area and in the same time span as the other crimes.
2 In addition, the State is relying on their belief that as these offenses in the "Downtown Area
3 Command Series" continued, the perpetrator became increasingly more violent and
4 confrontational, particularly with males he encountered. Therefore, it's logical to assume that
5 what began as mere home invasions (burglaries, robberies and sexual assaults) escalated to
6 attempted murder of Guadalupe Lopez, and culminated in the actual murder of Gyaltsso Lungtok.

7 In Rodriguez v. State, 1217 Nev. Adv. Op. No. 66; 32P.3d 773 (2001), the Court ruled that
8 severance should be granted when there is a serious risk that ... the jury may not make a reliable
9 judgment about guilt or innocence. In Floyd v. State, 118 Nev. Adv. Op. No. 17; 92 P.3d 249
10 (2002), the Court stated that even if joinder is permissible under NRS 173.115, a trial court should
11 sever the offenses if the joinder is "unfairly prejudicial." NRS 174.165(1) provides that if a
12 defendant is prejudiced by joinder of offenses, the district court may order separate trials of counts.
13 In that case, the defense moved to sever the counts relating to crimes which occurred at his
14 apartment from those relating to the multiple killings at the Albertsons supermarket fifteen minutes
15 later. The Supreme Court agreed with the district court that severance was not warranted because
16 ".... The acts charged were at the very least connected together. The crimes at the supermarket
17 began only about fifteen minutes after the crimes at the apartment ended, and Floyd used the same
18 shotgun in committing both sets of crimes. Moreover, his actions and statements in committing
19 the crimes at this apartment were particularly relevant to the question of premeditation and
20 deliberation regarding the murders at the supermarket. Likewise, Floyd's actions and demeanor
21 and possession of the shotgun at the supermarket corroborated the testimony of the sexual assault
22 victim and would have been relevant, at a separate trial, to prove more than just Floyd's character.
23 Thus the evidence of the two sets of crimes was- cross admissible." The Floyd court also
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1 considered a Montana Supreme Court case, State v. Campbell, 189 Mont. 107, 615 P.2d 190
2 (Mont. 1980) regarding the types of prejudice that can result from joinder of charges:

3 The first kind of prejudice results when the jury considers a person facing
4 multiple **charges** to be a bad man and tends to accumulate evidence
5 against him until it finds him guilty of something. The second type of
6 prejudice manifests itself when proof of guilt on the first count in an
7 Information is used to convict the defendant of a second count even
8 though the proof would be inadmissible at a separate trial on the second
9 count. The third kind of prejudice occurs when the defendant wishes to
10 testify on his own behalf on one **charge** but not on another.

11 The Nevada Supreme Court ruled in Floyd that the defense failed to show that he was
12 unfairly prejudiced by the joinder of charges. "The evidence of the burglary, murders, and
13 attempted murder was overwhelming. The evidence of the kidnapping and sexual assaults was
14 substantial and uncontradicted. He has not shown that the jury improperly accumulated evidence
15 against him, that it used the proof of one count improperly to convict him of another count, or that
16 the **joinder** prevented him from testifying on any **charges**. Thus, the district court did not err in
17 denying Floyd's motion to sever the **charges**".

18 In contrast, in the case before your Honor, the evidence of murder and related crimes
19 involving Gyaltsso Lungtok is far from overwhelming, substantial or uncontradicted. That case is
20 supported by little more than Defendant's admissions. In contrast, the evidence of the other counts
21 in the Information is substantial. There is no question that the jury's resolve that Mr. Porter did
22 commit those crimes, and is therefore a bad person, will taint his defense to the most serious crime
23 of all, murder.

24 Mitchell v. Nevada, 105 Nev. 735; 782 P.2d 1340 1989), involved two separate victims
25 charged in the same Information. The defendant was charged with grand larceny and sexual
26 assault of Mary Beth Petz, and sexual assault and murder of Jacqueline Brown. The two incidents
27 were not connected except for the fact that the defendant took both victims dancing and drinking at
28 the same bar, and is alleged to have sexually assaulted both women. The Court ruled that the

1 defenses contention that it was error for the District Court to deny the defense's motion to sever
2 the counts had merit. The Court stated:

3 NRS 173.115 permits **joinder** of criminal counts only if the counts are
4 based on the same transaction or constitute part of a common scheme or
5 plan. Being 45 days apart, these separate incidents cannot be considered
6 part of the same transaction. Nor can taking two different women dancing
7 and alter attempting intercourse be considered part of a common plan just
8 because the women are taken in part to the same bar. See, Nester v. State
9 of Nevada, 75 Nev. 41; 334 P.2d 523 (1959). If, however, evidence of one
10 **charge** would be cross-admissible in evidence at a separate trial on
11 another **charge**, then both **charges** may be tried together and need not be
12 severed. Robinson v. United States, 459 F.2d 847, 855 (D.C. Cir. 1972).
13 Here, the District Court denied the motion for severance on the basis that
14 evidence of the Petz counts would have been cross-admissible at a
15 separate trial on the counts of murder and sexual assault of Brown.

16 Evidence of prior bad acts such as Mitchell's acts involving Petz is
17 admissible only if: (1) the prior acts are relevant to the crime charged
18 because they show motive, intent or another material element listed in
19 NRS 48.045(2); (2) the prior acts are proved by clear and convincing
20 evidence; and (3) the prior acts are more probative than prejudicial.
21 Berner v. State, 104 Nev. 695; 765 P.2d 1144 (1988); NRS 48.045(2).
22 Here, evidence of the prior alleged sexual assault if Petz was marginal.
23 Because she was drunk or tired, Petz did not even remember having sex
24 with Mitchell. Even assuming that prior incident was relevant under NRS
25 48-.045(2), under these circumstances the trial judge erred in concluding
26 that the alleged sexual assault of Petz was proved by clear and convincing
27 evidence. In deed, the district court advised the jury against a guilty
28 verdict on this count due to the paucity of evidence of lack of consent.
Under Berner, then, evidence of the sexual assault of Petz was not cross-
admissible as to the counts involving Brown, and the district court erred
by denying the motion to sever the counts.

21 The United States Court of Appeals for the Ninth Circuit in Bean v. Calderon, 163 F.3d
22 1073 (1998) had occasion to review facts similar to those presented in Mr. Porter's case. In that
23 case, the defendant was convicted of first degree murder, robbery and burglary. The charges
24 stemmed from two different incidents/victims that were consolidated for trial. The facts of those
25 tow separate crimes are as follows:

26 On June 26, 1980, George Schatz awoke to two young black males in his
27 mobile home. One of the men ordered him to lie back down on the bed.
28 He realized his wife was not in the bed with him. He eventually lost

consciousness. When he regained consciousness, he found his wife lying on the floor naked, and dead. He called police and realized for the first time he had been seriously injured. A number of items were missing from his home. After examining the crime scene, police found "strong indicators" that shoes owned by the defendant had made shoe prints in the flower bed. In addition, a fingerprint and palm print linked the defendant to the crimes.

On June 29, 1980, Eileen Fox was found dead in her residence. Police found a pair of her eyeglasses lying next to her body. She had been beaten to death. At trial, the State of California presented evidence of fingerprints recovered from Fox's sunglasses. Prosecution experts identified the print as matching the third finger of Bean's left hand. The defense experts refuted that opinion, and all experts agreed that the print was a composite of several overlaid prints.

The Court of Appeals for the Ninth Circuit stated:

After careful examination of the record, we conclude that joinder of the Schatz and Fox indictments deprived Bean of a fundamentally fair trial on the Fox charges. Consolidation of the relatively weak Fox cast with the compelling Schatz charges in a single trial violated Bean's right to due process by leading the jury to infer criminal propensity. This impermissible inference, in turn, allowed the jury to rely upon the Schatz evidence to strengthen the otherwise weak case against him for the Fox offenses. Because the joinder was constitutionally impermissible, we reverse Bean's conviction of the Fox charges.

CONCLUSION

The evidence against Mr. Porter concerning Counts XXX, XXI and XXII is substantially weaker than the evidence supporting the remaining counts in the Second Amended Information. That fact will deny Mr. Porter a fair trial concerning the murder and related allegations. Consolidating the relatively weak murder case with the remaining charges in this case which are supported by compelling evidence will violate Mr. Porter's right to due process by leading the jury to conclude that if they believe Mr. Porter is guilty of the crime series of burglary, robbery and

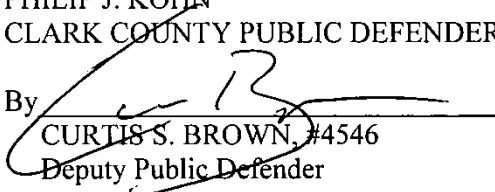
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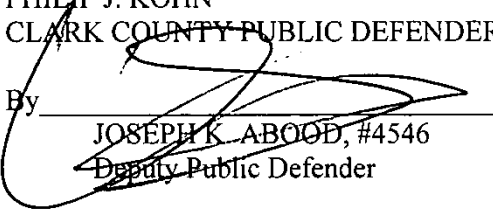
1 sexual assault, he must be guilty of the murder and related crimes against Gyaltsso Lungtok. The
2 defense strongly asserts that this joinder is constitutionally impermissible.

3 DATED this 14 day of May, 2008.

4
5 PHILIP J. KOHN
6 CLARK COUNTY PUBLIC DEFENDER

7 By 
8 CURTIS S. BROWN, #4546
Deputy Public Defender

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By 
JOSEPH K. ABOOD, #4546
Deputy Public Defender

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 28th day of May, 2008, at 9:00 a.m..

DATED this 14 day of May, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By [Signature]
CURTIS S. BROWN, #4546
Deputy Public Defender

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By [Signature]
JOSEPH K. ABOOD, #4546
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion to Sever Counts XXX, XXXI, XXXII Charging Murder and Related Crimes Against Gyaltsso Lungtok, from the Remaining Counts in the Second Amended Information is hereby acknowledged this 15 day of May, 2008.

CLARK COUNTY DISTRICT ATTORNEY

By [Signature]

ORIGINAL

32

ORDR

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED

JUL 3 9 33 AM '08

Cheryl
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JUSTIN JUG CAPRI PORTER,
#1682627

Defendant.

Case No. C174954
Dept No. VIII

ORDER GRANTING DEFENDANT'S MOTION TO SEVER COUNTS XXX, XXXI,
XXXII CHARGING MURDER AND RELATED CRIMES AGAINST GYALTSO
LUNGTOK, FROM THE REMAINING COUNTS IN THE SECOND AMENDED
INFORMATION

DATE OF HEARING: 06/18/08

TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the
18th day of June, 2008, the Defendant being present, represented by CURTIS BROWN and
JOSEPH ABOOD, Deputy Public Defenders, the Plaintiff being represented by DAVID
ROGER, District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and
the Court having heard the arguments of counsel and good cause appearing therefor,

CLERK OF THE COURT

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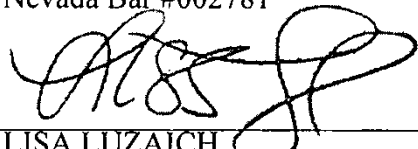
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IT IS HEREBY ORDERED that the Defendant's above-entitled motion, shall be, and
it is granted.

DATED this 2 day of ~~June~~^{July}, 2008.


DISTRICT JUDGE KSB
PC

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781


LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

mmw/SVU

ORIGINAL

FILED

Nov 6 5 21 PM '08

CLERK OF THE COURT

1 **ORDR**

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 LISA LUZAICH
6 Chief Deputy District Attorney
7 Nevada Bar #005056
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 JUSTIN D. PORTER,
14 #1682627

15 Defendant.

Case No. C174954
Dept No. VIII

17 ORDER DENYING DEFENDANT'S MOTION TO REMAND TO JUVENILE COURT

18 DATE OF HEARING: 10/13/08
19 TIME OF HEARING: 9:00 A.M.

20 THIS MATTER having come on for hearing before the above entitled Court on the
21 13th day of October, 2008, the Defendant not being present, REPRESENTED BY JOSEPH
22 ABOOD, Deputy Public Defender, the Plaintiff being represented by DAVID ROGER,
23 District Attorney, through LISA LUZAICH, Chief Deputy District Attorney, and the Court
24 having heard the arguments of counsel and having been under advisement and the Court
25 make a decision on the 15th day of October, 2008, and good cause appearing therefore,

26 //

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CLERK OF THE COURT

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IT IS HEREBY ORDERED that the Defendant's Motion to Remand to Juvenile Court, shall be, and it is denied.

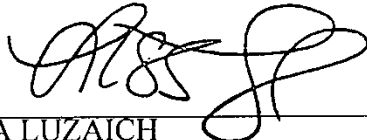
DATED this 5 day of ^{Nov} October, 2008.



DISTRICT JUDGE₇₁

for Hon. Lee Gates

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781



LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

mmw/SVU


CLERK OF THE COURT

AINF
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

JUSTIN D. PORTER, aka Jug Capri
Porter,
#1682627

Defendant.

Case No. C174954
Dept No. VI

THIRD AMENDED
INFORMATION

STATE OF NEVADA }
COUNTY OF CLARK } ss:

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JUSTIN D. PORTER, aka Jug Capri Porter, the Defendant(s) above named, having committed the crimes of **BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060, 193.165); ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 193.330, 200.380, 193.165) and MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Felony - NRS 200.010, 200.030, 193.165)**, on or about the 8th day of June, 2000, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

//

1 COUNT 1 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

2 did then and there wilfully, unlawfully, and feloniously enter, while in possession of a
3 deadly weapon, to-wit: a gun, with intent to commit larceny, and/or robbery and/or any
4 other felony, that certain building occupied by GYALTSO LUNGTOK, located at 415 South
5 10th Street, Apartment No. H therein, Las Vegas, Nevada, Clark County, Nevada.

6 COUNT 2 – ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

7 did then and there wilfully, unlawfully, and feloniously attempt to take personal
8 property, to-wit: lawful money of the United States and/or jewelry and/or any other property
9 of GYALTSO LUNGTOK, from the person of GYALTSO LUNGTOK, or in his presence,
10 by means of force or violence or fear of injury to, and without the consent and against the
11 will of the said GYALTSO LUNGTOK, said defendant using a deadly weapon, to-wit: a
12 gun, during the commission of said crime.

13 COUNT 3 – MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

14 did then and there wilfully, feloniously, without authority of law, and with
15 premeditation and deliberation and malice aforethought, kill GYALTSO LUNGTOK, a
16 human being, by shooting at and into the body of the said GYALTSO LUNGTOK with use
17 of a deadly weapon, to-wit: a gun, the defendant being responsible under one or more of the
18 following theories of criminal liability, to-wit: 1) Premeditation and deliberation: by the
19 defendant directly committing said felony offense as the perpetrator, and/or 2) Felony
20 murder: by the defendant committing said felony offense during the perpetration or
21 attempted perpetration of the crime(s) of burglary and/or robbery.

22 DAVID ROGER
23 DISTRICT ATTORNEY
24 Nevada Bar #002781

25 BY /s//LISA LUZAICH
26 LISA LUZAICH
27 Chief Deputy District Attorney
28 Nevada Bar #005056

27 DA#00F13901X/mmw/SVU
28 LVMPD EV#0006101143
(TK6)

1 **VER**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

FILED IN OPEN COURT
MAY - 8 2009 4:00 PM
EDWARD A. FRIEDLAND
CLERK OF THE COURT
BY *Keith Reed* DEPUTY
KEITH REED

5 THE STATE OF NEVADA,)

6 Plaintiff,)

7 -vs-)

8 JUSTIN D. PORTER,)

9 Defendant.)

Case No. C174954

Dept No. VI

10 VERDICT

11 We, the jury in the above entitled case, find the Defendant JUSTIN D. PORTER, as follows:

12 COUNT 1 - BURGLARY WHILE IN POSSESSION OF A FIREARM

13 (please check the appropriate box, select only one)

14 ☐ Guilty of Burglary while in Possession of a Firearm

15 ☒ Not Guilty

16 COUNT 2 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON

17 (please check the appropriate box, select only one)

18 ☐ Attempt Robbery With Use of a Deadly Weapon

19 ☐ Attempt Robbery

20 ☒ Not Guilty

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1 **COUNT 3** – MURDER WITH USE OF A DEADLY WEAPON

2 *(please check the appropriate box, select only one)*

- 3 ☐ Guilty of First Degree Murder With Use of a Deadly Weapon
- 4 ☐ Guilty of First Degree Murder
- 5 ☒ Guilty of Second Degree Murder With Use of a Deadly Weapon
- 6 ☐ Guilty of Second Degree Murder
- 7 ☐ Not Guilty

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11 DATED this 8th day of May, 2009

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14 FOREPERSON

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DEC 29 2009
Ann L. ...
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JUSTIN D. PORTER,

Defendant.

CASE NO. C174954

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE
WEDNESDAY, SEPTEMBER 30, 2009

TRANSCRIPT OF PROCEEDINGS
SENTENCING

APPEARANCES:

For the State:

ELISSA LUZAICH, ESQ.
Chief Deputy District Attorney

For the Defendant:

CURTIS S. BROWN, ESQ.
JOSEPH K. ABOOD, ESQ.
Deputy Public Defenders

RECORDED BY: JESSICA RAMIREZ, COURT RECORDER

RECEIVED
DEC 29 2009
CLERK OF THE COURT

1 Wednesday, September 30, 2009 at 9:40 a.m.

2
3 THE MARSHAL: Top of page 6, State of Nevada v. Porter, Justin D.

4 MR. ABOOD: Good morning, Your Honor.

5 MR. BROWN: Good morning, Judge.

6 THE COURT: Good morning.

7 MR. BROWN: Curtis Brown and Joseph Abood on behalf of Mr. Porter.

8 MS. LUZAICH: And for the record, Lisa Luzaich for the State.

9 THE COURT: Okay. All right. We finally got a PSI.

10 MR. ABOOD: Yes.

11 THE COURT: All right. This is the time set for entry of judgment and
12 imposition of sentence. Is there any legal cause or reason why judgment
13 should not be entered at this time?

14 MR. ABOOD: No, Your Honor.

15 THE COURT: All right. So, by virtue of the jury's verdict in this case, I
16 hereby adjudicate you guilty of second degree murder with use of a deadly
17 weapon, a felony.

18 State.

19 MS. LUZAICH: Judge, the Court heard the trial, so I'm not gonna
20 reiterate the facts. The Court has a decision between 10 to life and 10 to 25
21 with an equal and consecutive for the weapon. I would ask the Court to
22 sentence him to the 10 to life with an equal and consecutive 10 to life.

23 I would submit to the Court that when the legislature gave the
24 option of an alternative sentence at 10 to 25 they were considering more the
25 kind of person who commits one offense, and doesn't have anything else in the

1 system, and is somebody who is potentially redeemable, or -- as opposed to
2 somebody who goes in and intentionally shoots a monk -- or retired, sorry,
3 monk, -- over money.

4 So, the Court obviously hasn't heard the rest of the facts situation.
5 But, the Court's aware that there are still basically ten other doors that he
6 kicked in and either sexually assaulted or robbed somebody therein. There's
7 DNA, and prints, and this, that, and the other thing connecting him to lots of
8 them. So, I'd submit that the 10 to life is the appropriate sentence, and that's
9 what I would ask the Court to do, with an equal and consecutive for the gun.

10 THE COURT: Okay. Mr. Porter is there anything you'd like to tell me
11 today?

12 THE DEFENDANT: Upon the advice of my attorney, I have no statements
13 concerning this matter. But, I do have something to say concerning what the
14 DA is saying.

15 MR. BROWN: No, you -- no.

16 THE DEFENDANT: No, yes, I do.

17 MR. BROWN: Okay.

18 THE DEFENDANT: When it comes to sentencing me today. On all the
19 things she says you'll see when the next trial comes about how it really plays
20 out. So, when she comes about saying what she's saying, just leave that for
21 the next jury.

22 And all I have to say, Your Honor, when you sentence me today,
23 don't sentence me because of what she wants you to give me or what my
24 attorney don't want you to give me, but what you feel I should have.

25 And you already know I did nine years in here. You know, what

1 furthermore do I have to say is nothing. But, just take into consideration I did
2 do nine years. I was 17 at the time that I got into whatever they say I got into,
3 coming and being incarceration. Now, I'm 26 years old. So, regardless of the
4 fact of whatever, sitting in this County jail is stressful. So, I ask you to
5 sentence me to what you want, not what they want, but what you feel I
6 should have.

7 My family's not here. They didn't know I was supposed to get
8 sentenced today. And I wish they would have been here. And that's all I have
9 to say.

10 THE COURT: Thank you.

11 Counsel.

12 MR. BROWN: Thank you, Your Honor. And you recall that Mr. Porter's
13 family was here throughout the trial. And they are, and do continue to be,
14 supportive but when the matter got continued the communication break down
15 occurred.

16 And just kind of finishing out what Mr. Porter was saying. There's
17 not a long lengthy argument to be made here. You sat through the whole trial.
18 You heard everything that happened. I would submit that what Ms. Luzaich
19 represented to Your Honor as to what Mr. Porter did in that apartment is not
20 what the jury concluded. They did not conclude he went in there to get
21 money, otherwise they would have clearly convicted him of first degree murder
22 under a felony murder theory. They did not come to that conclusion.

23 You do have only two choices. And the two choices are the 20
24 basically with the weapon. It's either a life tail or it's a term of years tail. And
25 let's not forget that the term of years we're talking about is pretty significant.

1 It's 50 years. So, it's a 10 to 25 and an equal and consecutive 10 to 25.

2 And I'm asking Your Honor to, similar to what Mr. Porter said, to
3 evaluate it based on this case. He does have other pending matters and they
4 are before Your Honor. So, at the conclusion of those trials, which you would
5 handle the sentencing upon a conviction if there is any, you can do what you
6 want. I mean, if it's a life sentence you want, you're going to have that
7 discretion at that time. If it's longer than a life sentence, if it's two, three, or
8 four lives, you're going to have the discretion again at that time. And so I
9 would just ask you today to consider the term of years so that there is a back
10 end time that Mr. Porter can look forward to if the trial doesn't play out the
11 way that the State's alleging that it will.

12 I only have one other comment, Judge, and that's on the credit for
13 time served. Miraculously they came pretty close. The only problem that we
14 have is that P&P did not account for the time that Mr. Porter was actually
15 arrested in Chicago. So there were I think 8 additional days for that, plus the 2
16 days that we've continued for now -- from Monday rather, from what the PSI
17 says. So, I have the total days 3,338 total days. He was arrested on August
18 11th of 2000 in Chicago, and they only count the time once he got brought
19 back here and booked into CCDC.

20 MS. LUZAICH: I don't have any objection to that.

21 MR. BROWN: And I'd submit it on that, Judge, unless Your Honor has
22 any specific questions.

23 THE COURT: I will impose an Administrative Assessment Fee of \$25,
24 DNA Analysis Fee of \$150, Extradition Fees of \$2,421.50. I will sentence the
25 Defendant to life with the possibility of parole after 120 months, plus an equal

1 and consecutive term of life with the possibility of parole after 120 months,
2 with 3,338 days credit for time served, and order restitution of \$425.

3 Do you want to talk about a trial date or --

4 MR. BROWN: We've been working on that, Your Honor. And one would
5 think considering the time we've had we'd actually be able to come to some
6 easy resolution, but we haven't. The problem we've come up with is the date
7 that works best for all of us, the four attorneys; I'm not sure works for the
8 Court, and that would be June of next year. As I understand that might be
9 actually your civil stack.

10 THE COURT: My civil, yeah, until June 28th is when my criminal starts up
11 again.

12 MR. BROWN: If -- you know, and I hate to ask for this, but maybe a
13 week or two weeks so that we could see if maybe there's a possibility of
14 moving other cases. Because that's where we're at, short of moving into, you
15 know, October or so of next year, is perhaps trying to -- and we may not be
16 able to do that. But, I understand that we both have cases we might be able to
17 look into and maybe shuffle something around.

18 THE COURT: Okay. All right. So, let's set it a couple weeks out for trial
19 setting.

20 THE CLERK: Yes, Your Honor. October 14th, 8:30.

21 MS. LUZAICH: Thank you.

22 MR. BROWN: And just again, Judge, and we'll check with your Clerk or
23 your JEA on available times. We anticipate safely about 4 weeks for this. I
24 mean, it --

25 THE COURT: Yeah.

1 MR. BROWN: -- it theoretically could be a little longer. But, I think we
2 probably would be able to trim it down to about 4 weeks. But, I don't think it
3 would be wise to set for anything -- counting on anything less than that.

4 MS. LUZAICH: I do agree that I don't think it would be a day less than 4
5 weeks.


6 THE COURT: Okay. So, I will work on my end and see what -- I mean
7 obviously I've got -- I don't have a lot set in that timeframe on my calendar.
8 But, if that's really going to be when we go, I'll have to work on what I'm
9 going to do with the other cases that otherwise get set there.

10 MR. BROWN: Thank you very much, Your Honor.

11 MS. LUZAICH: Thank you.

12 [Proceeding concluded at 9:48 a.m.]
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video
22 proceedings in the above-entitled case to the best of my ability.

23 
24 Jessica Ramirez
25 Court Recorder/Transcriber

JOC

FILED

OCT 13 2009

Alma L. Williams
CLERK OF COURT

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

CASE NO. C174954

-vs-

DEPT. NO. VI

JUSTIN D. PORTER
aka Jug Capri Porter
#1682627

Defendant.

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony) in violation of NRS 205.060, 193.165, COUNT 2 – ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 193.330, 200.380, 193.165, COUNT 3 – MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Category A Felony) in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crime of COUNT 3 – SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030, 193.165;

1 thereafter, on the 30TH day of September, 2009, the Defendant was present in court for
2 sentencing with his counsel JOSEPH A. ABOOD, Deputy Special Public Defender and
3 CURTIS BROWN, Deputy Special Public Defender, and good cause appearing,
4

5 THE DEFENDANT IS HEREBY ADJUDGED guilty of said crime as set forth in
6 the jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee,
7 \$150.00 DNA Analysis Fee including testing to determine genetic markers, \$425.00
8 Resstitution and \$2,421.50 Extradition Costs, the Defendant is SENTENCED as follows:
9 TO LIFE with a MINIMUM parole eligibility after ONE HUNDRED TWENTY (120)
10 MONTHS plus a CONSECUTIVE term of LIFE with a MINIMUM parole eligibility after
11 ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections
12 (NDC), with THREE THOUSAND THREE HUNDRED THIRTY-EIGHT (3,338) DAYS
13 credit for time served. COUNTS 1 & 2 – NOT GUILTY
14
15

16
17 DATED this 12 day of October, 2009.

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ELISSA CADISH
DISTRICT JUDGE

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NOAS
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR No. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED
OCT 29 2009
John + [unclear]
CLERK OF COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C174954X
)	
v.)	DEPT. NO. VI
)	
JUSTIN JUG CAPRI PORTER,)	
)	
Defendant.)	

NOTICE OF APPEAL

TO: THE STATE OF NEVADA
DAVID ROGER, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and
DEPARTMENT NO. VI OF THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that Defendant, Justin Jug Capri Porter, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the judgment entered against said Defendant on the 13th day of October, 2009, whereby he was convicted of Ct. 3 - Second Degree Murder With Use of a Deadly Weapon and sentenced to \$25 Admin. fee; \$150 DNA analysis fee; genetic testing; \$425 restitution; \$2,421.50 extradition costs; 120 months to Life in prison plus a consecutive term of 120 months to Life in prison; 3,338 days CTS; Counts 1 & 2 Not Guilty.

DATED this 28th day of October, 2009.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER
By: *Howard S. Brooks*
HOWARD S. BROOKS, #3374
Deputy Public Defender

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OCT 29 2009
CLERK OF THE COURT

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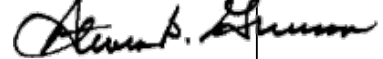
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DISTRICT COURT

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CLARK COUNTY, NEVADA

7

THE STATE OF NEVADA,

CASE#: 01C174954

8

Plaintiff,

DEPT. VI

9

vs.

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JUSTIN D. PORTER, aka JUG
CAPRI PORTER,

11

Defendant.

12

13

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

14

MONDAY, NOVEMBER 22, 2010

15

**RECORDER'S TRANSCRIPT OF HEARING: STATUS CHECK:
TRIAL SETTING ACHNOWLEGMENT**

16

17

APPEARANCES:

18

For the State:

LISA LUZAICH, ESQ.

19

Chief Deputy District Attorney

20

21

For the Defendant:

JOSEPH K. ABOOD

22

Public Defender's Office

23

24

25

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

1 Las Vegas, Nevada, Monday, November 22, 2010

2 [Hearing began at 9:51 a.m.]

3 MR. ABOOD: Good morning, Judge --

4 THE COURT: Good morning.

5 MR. ABOOD: -- he's present, in custody.

6 THE COURT: All right. So at the last hearing we worked on a

7 -- trial date -- a continued trial date and came up with April 18th trial date

8 with calendar call on April 11th. Unfortunately we didn't have Mr. Porter

9 present at that time.

10 Mr. Porter, are you aware that the trials been continued to that

11 particular date?

12 THE DEFENDANT: Yes, ma'am, I'm informed.

13 THE COURT: Pardon me?

14 THE DEFENDANT: Yes, ma'am, I was informed.

15 THE COURT: Okay. All right. And, I have to say, I no longer

16 remember what the reasons were, but I believe -- counsel had conflict

17 with other trial scheduling.

18 MR. ABOOD: Had a death penalty case scheduled at exactly

19 the same time.

20 THE COURT: Right, right. Okay. All right. So, Mr. Porter,

21 we needed to have you acknowledge the new sentencing -- the new trial

22 date, I apologize. The new trial date that was necessitated by these

23 conflicts with another death penalty case. You're aware of all that?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: And you've discussed with counsel the new

1 trial date?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Okay. And you're not objecting to it?

4 THE DEFENDANT: I am -- objecting to it.

5 THE COURT: Okay. Go ahead.

6 THE DEFENDANT: I would like a [indiscernible] --

7 THE RECORDER: Sir could you -- can I have a microphone
8 closer? Thank you.

9 THE DEFENDANT: -- right now, I'm currently in High Desert.
10 And this back and forth thing ain't for me. And I'm just trying to get this
11 all out the way now.

12 THE COURT: Right.

13 THE DEFENDANT: It suppose been up on the 8th, but they
14 didn't bring me here.

15 THE COURT: Right.

16 THE DEFENDANT: And I'm not trying to push it off no farther
17 then what -- it -- was suppose to be. I'm ready to go. I'm not wasting
18 time.

19 THE COURT: No, I understand. And the continuance, as I
20 mentioned, was a result of some conflicts that, I think, that your
21 attorneys had with a death penalty case --

22 THE DEFENDANT: Yes.

23 THE COURT: -- that was going to go --

24 THE DEFENDANT: That has nothing to do with me.

25 THE COURT: I understand that.

1 THE DEFENDANT: That's somebody else totally different.

2 THE COURT: I understand that. All right. I certainly
3 understand that you want to get this done and over with. Believe me, I
4 appreciate that. And I'm sure that your counsel are well aware of that as
5 well, and certainly want to get this resolved just as soon as they can for
6 you, but certainly they can't be in two different places at once. And
7 certainly would not be appropriate to have different counsel come in and
8 try to get up to speed and represent you --

9 THE DEFENDANT: Right.

10 THE COURT: -- at this time. So as a result of those
11 unavoidable conflict issues, and -- the trial was continued to April 18th. I
12 appreciate the concerns you've raised, but frankly it's unavoidable --

13 THE DEFENDANT: See you already had your mind set
14 whatcha you was gonna to do, basically.

15 THE COURT: Well --

16 THE DEFENDANT: Could've left me where I was.

17 THE COURT: I suppose we could have. But there is no
18 choice in the circumstance. And so given that it had to be continued we
19 put it on in April, which was the soonest we could get everybody
20 necessary to be here on the calendar at that time. So it's not -- it's not
21 that I don't hear your concerns, and understand them, I think everybody
22 involved wanted to get the trial done, but --

23 THE DEFENDANT: What was done is going to be done. So I
24 can just sit down --

25 THE COURT: All right, thank you, sir, --

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THE DEFENDANT: -- take it with stride.

THE COURT: -- I do appreciate your concerns, and they are
noted for the record. And it certainly will be the courts intention to
complete the trial in April as scheduled.

THE DEFENDANT: All right.

THE COURT: Thank you very much.

MS. LUZAICH: Thank you, Judge.

MR. ABOOD: Thank you, Your Honor.

[Hearing concluded at 9:55 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio/video proceedings in the above-entitled case to the best of my
ability.


De'Awna Takas
Court Recorder/Transcriber

FILE WITH
MASTER CALENDAR

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

DEPARTMENT VI
NOTICE OF HEARING
DATE 4/16/12 TIME 8:30
APPROVED BY JS

JUSTIN D. PORTER,
Petitioner,

vs.

STATE OF NEVADA,
Respondent,

[Signature]
CLERK OF THE COURT

Case No: C174954
Dept No: 6

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on February 10, 2012. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 16th day of April, ~~2002~~ 2012 at the hour of 8:30 A o'clock for further proceedings.

01C174954
OPWH
Order for Petition for Writ of Habeas Corpus
1770064



[Signature]

District Court Judge *JS*

RECEIVED

FEB 14 2012

CLERK OF THE COURT

ORIGINAL

FILED

JUN 11 2012

Alfonso J. Salazar
CLERK OF COURT

1 **ORDR**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 LISA LUZAICH
6 Chief Deputy District Attorney
7 Nevada Bar #005056
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

01C174954
FFCO
Findings of Fact, Conclusions of Law and C
1870891



9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 JUSTIN PORTER,
13 #1682627

14 Defendant.

CASE NO: C-01-174954-1

DEPT NO: VI

15 **FINDINGS OF FACT, CONCLUSIONS OF**

16 **LAW AND ORDER**

17 DATE OF HEARING: APRIL 23, 2012

18 TIME OF HEARING: 8:30 A.M.

19 THIS CAUSE having come on for hearing before the Honorable ELISSA CADISH,
20 District Judge, on the 23rd day of April, 2012, the Petitioner being present, PROCEEDING
21 IN FORMA PAUPERIS, the Respondent being represented by STEVEN B. WOLFSON,
22 Clark County District Attorney, by and through LISA LUZAICH, Chief Deputy District
23 Attorney, and the Court having considered the matter, including briefs, transcripts,
24 arguments of counsel, and documents on file herein, now therefore, the Court makes the
25 following findings of fact and conclusions of law:

26 //

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15-18-12 P 03919 -FM

CLERK OF THE COURT

JUN 11 2012

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FINDINGS OF FACT

1. On April 26, 2001, the State of Nevada, by way of Information, charged Justin Porter (hereinafter "Defendant") with over forty (40) felony counts, related to nine (9) events over a four month period involving twelve (12) victims.
2. On June 18, 2008, the Court granted Defendant's Motion to Sever and ordered the murder event be tried separately. The State subsequently filed an Amended Information in the instant case on April 30, 2009, charging Defendant with one (1) count Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165), one (1) count Attempt Robbery With Use of a Deadly Weapon (Felony – NRS 193.330, 200.380, 193.165), and one (1) count Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165).
3. On May 8, 2009, a jury found Defendant guilty of Second Degree Murder With Use of a Deadly Weapon (Count 3) and not guilty of Burglary While in Possession of a Deadly Weapon (Count 1) and Attempt Robbery With Use of a Deadly Weapon (Count 2).
4. On September 30, 2009, the Court sentenced Defendant to the Nevada Department of Corrections for One Hundred Twenty (120) Months to Life, plus a consecutive term of One Hundred Twenty (120) Months to Life for the Use of a Deadly Weapon enhancement. The Court entered a Judgment of Conviction on ^{October} ~~October~~ 13, 2009.
5. On November 8, 2010, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued December 3, 2010.
6. On February ¹⁰ ~~14~~, 2012, Defendant filed a Petition for Writ of Habeas Corpus, asserting the following claims:
 - Claim 1: the State presented insufficient evidence at trial to convict Defendant;
 - Claim 2: the Court improperly admitted Defendant's confessions, allegedly obtained in violation of Miranda; and
 - Claim 3: the Court improperly sentenced Defendant to One Hundred Twenty (120) Months to Life for the Deadly Weapon enhancement.

- 1 7. The State filed a Response to Defendant's Petition on March 21, 2012.
- 2 8. The parties appeared before the Court on April 23, 2012. The Court ruled on
- 3 Defendant's Petition without hearing argument.
- 4 9. Defendant's Petition is untimely.
- 5 10. While Defendant claims he was unaware the Nevada Supreme Court affirmed his
- 6 conviction until recently, he fails to allege sufficient facts to establish he filed the
- 7 instant petition within a reasonable amount of time of ^{learning} ~~hearing~~ of the affirmance. As
- 8 such, Defendant fails to demonstrate good cause to overcome the procedural time bar.
- 9 11. Even if Defendant filed the instant petition within a reasonable time of discovering
- 10 the Nevada Supreme Court affirmed his conviction and therefore established good
- 11 cause to overcome the time bar, his claims lack merit.
- 12 12. Claim 1, insufficient evidence, and Claim 2, based on alleged Miranda violations,
- 13 were both considered and rejected by the Nevada Supreme Court on appeal. Porter v.
- 14 State, Case No. 54866, Order of Affirmance, p.1-2. As such, both are precluded by
- 15 the law of the case and are therefore denied.
- 16 13. Claim 3 also lacks merit. In 2000, when Defendant murdered the instant victim, NRS
- 17 193.165 required a sentence equal and consecutive to the underlying offense for a
- 18 Deadly Weapon enhancement. As Defendant's crime predated the change in the law,
- 19 the Court properly sentenced Defendant as contemplated by the statute. Claim 3 is
- 20 therefore denied.

21 CONCLUSIONS OF LAW

- 22 1. Pursuant to NRS 34.726:

23 Unless there is good cause shown for delay, a petition that

24 challenges the validity of a judgment or sentence must be filed

25 within 1 year after entry of the judgment of conviction or, if an

26 appeal has been taken from the judgment, within 1 year after the

supreme court issues its remittitur. For the purposes of this

subsection, good cause for delay exists if the petitioner

demonstrates to the satisfaction of the court:

- 27 (a) That the delay is not the fault of the petitioner; and
- 28 (b) That dismissal of the petition as untimely will unduly
- prejudice the petitioner.

- 1 2. The one year time-bar must be strictly construed. Gonzales v. State, 118 Nev. 61, 590
2 P.3d 901 (2002). The district court has a duty to consider whether the procedural bars
3 apply to a post-conviction petition and not arbitrarily disregard them. State v. Eighth
4 Judicial District Court, 121 Nev. 225, 112 P.3d 1070 (2005).
- 5 3. "In order to demonstrate good cause, a petitioner must show that an impediment
6 external to the defense prevented him or her from complying with the state
7 procedural default rules." Hathaway v. State, 119 Nev. 30, 71 P.3d 503, 506 (2003);
8 citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v.
9 State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev.
10 63, 769 P.2d 72 (1989); See also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d
11 247, 252 (1997); Phelps v. Director, Nevada Department of Prisons, 104 Nev. 656,
12 764 P.2d 1303 (1988). Such an external impediment could be "that the factual or
13 legal basis for a claim was not reasonably available to counsel, or that 'some
14 interference by officials' made compliance impracticable." Hathaway, 71 P.3d at
15 506; quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); See
16 also Gonzales, 118 Nev. 590, 595, 53 P.3d 901, 904; citing Harris v. Warden, 114
17 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998). Clearly, any delay in filing of the
18 petition must not be the fault of the petitioner. NRS 34.726(1)(a). To find good cause
19 there must be a "substantial reason; one that affords a legal excuse." Hathaway, 71
20 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989),
21 quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw. 1981).
- 22 4. A defendant's low intelligence is insufficient to amount to good cause to overcome
23 the procedural time bar. Phelps, 104 Nev. at 659-60.
- 24 5. A defendant's mistaken belief that the Nevada Supreme Court has not yet issued
25 remittitur may provide good cause to overcome the time bar, but only where the
26 defendant files a petition within a reasonable amount of time after learning of the
27 affirmance. See Hathaway v. State, 119 Nev. at 254-55.

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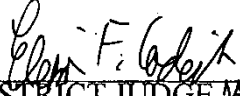
- 1 6. Claims asserted in petition must be supported with specific factual allegations, which
2 if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502,
3 686 P.2d 222, 225 (1984). Bare and naked allegations are insufficient. Id.
4 7. Defendant's conviction is supported by sufficient evidence. Porter v. State, Case No.
5 54866, Order of Affirmance p.1.
6 8. Defendant voluntarily, knowingly, and intelligently waived his Miranda rights,
7 therefore the district court did not err in admitting Defendant's statements at trial.
8 Porter v. State, Case No. 54866, Order of Affirmance p.1-2.
9 9. The law of a first appeal is the law of the case on all subsequent appeals in which the
10 facts are substantially the same. Hall v. State, 91, Nev. 314, 315, 535 P.2d 797, 798
11 (1975). The doctrine of the law of the case cannot be avoided by a more detailed and
12 precisely focused argument. Id. at 316.
13 10. In 2000, NRS 193.165 read as follows:
14 "Except as otherwise provided in NRS 193.169, any person who
15 uses a firearm or other deadly weapon or a weapon containing
16 or capable of emitting tear gas, whether or not its possession is
17 permitted by NRS 202.375, in the commission of a crime shall
18 be punished by imprisonment in the state prison for a term equal
19 to and in addition to the term of imprisonment prescribed by
20 statute for the crime. The sentence prescribed by this section
21 runs consecutively with the sentence prescribed by statute for
22 the crime." 1995 Statutes of Nevada, p.1431.
23 11. A defendant is sentenced in accordance with the sentencing statutes in place at the
24 time of the crime, rather than at the time of sentencing. See Tellis v. State, 84 Nev.
25 587, 445 P.2d 938 (1968); NRS 193.130.
26 //
27 //
28 //

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and is, denied.

DATED this ~~18th~~ day of ~~April~~ 2012.

8 June


DISTRICT JUDGE

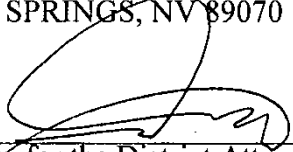
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY 
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

NOTICE OF SERVICE

I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the ~~18th~~ day of MAY, 2012, to:

JUSTIN PORTER, BAC#1042449
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89070


Secretary for the District Attorney's Office

hjc/SVU

22

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OPWH

FILED

2013 SEP 10 A 10:17

DISTRICT COURT
CLARK COUNTY, NEVADA

[Signature]
CLERK OF THE COURT

JUSTIN PORTER,

Petitioner,

vs.

STATE OF NEVADA,
Respondent,

Case No: 01C174954
Dept No: VI

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on August 26, 2013. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 8th day of January, 2014, at the hour of 8:30^{am} o'clock for further proceedings.

IT IS SO ORDERED THIS 6 day of September, 2013.

[Signature]
District Court Judge

DEPARTMENT VI
NOTICE OF HEARING
DATE 1/8/14 TIME 8:30am
APPROVED BY Habelas

FILE WITH
MASTER CALENDAR

01C174954
OPWH
Order for Petition for Writ of Habeas Corpus
2919726



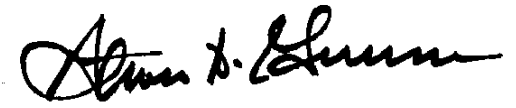
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CLERK OF THE COURT

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CLERK OF THE COURT

ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

JUSTIN PORTER,
#1682627
Defendant.

CASE NO: 01C174954

DEPT NO: VI

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: JANUARY 13, 2014
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable ELISSA CADISH,
District Judge, on the 13th day of January, 2014, the Petitioner not being present, proceeding
IN FORMA PAUPERIS, the Respondent being represented by STEVEN B. WOLFSON,
Clark County District Attorney, by and through DENA RINETTI, Deputy District Attorney,
and the Court having considered the matter, including briefs, transcripts, no arguments of
counsel, and documents on file herein, now therefore, the Court makes the following
findings of fact and conclusions of law:

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FINDINGS OF FACT

1. On April 26, 2001, the State of Nevada, by way of Information, charged Justin Porter (hereinafter "Petitioner") with over forty (40) felony counts, including sexual assault, kidnapping, murder, burglary, and robbery, related to nine events over a four month period, involving twelve victims. On May 2, 2001, an Amended Information was filed in open court to correct a typographical error. On October 11, 2001, a Second Amended Information was filed reducing the total charges to 38 counts. Counts 30, 31 and 32 alleged Burglary while in Possession of a Deadly Weapon; Attempt Robbery with Use of a Deadly Weapon; and Murder with Use of a Deadly Weapon (Open Murder), respectively. These three counts involved a single victim.

2. On May 15, 2008, Petitioner filed a Motion to Sever Counts 30-32 from the remainder of the charges. On June 12, 2008, the State filed its Opposition. On June 18, 2008, the Court granted Petitioner's Motion to Sever and ordered the murder event be tried separately. The State subsequently filed a Third Amended Information in the instant case on April 30, 2009, charging Petitioner with: Count 1 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165); Count 2 – Attempt Robbery With Use of a Deadly Weapon (Felony – NRS 193.330, 200.380, 193.165), and Count 3 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165).

3. On May 8, 2009, a jury found Petitioner guilty on Count 3 of Second Degree Murder with Use of a Deadly Weapon. Petitioner was found not guilty of Counts 1 and 2.

4. On September 30, 2009, the Court sentenced Petitioner to the Nevada Department of Corrections for One Hundred Twenty (120) Months to Life, plus a consecutive term of One Hundred Twenty (120) Months to Life for the use of a deadly weapon. The Judgment of Conviction was filed on October 13, 2009. On October 29, 2009, Petitioner filed a Notice of Appeal. On November 8, 2010, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued December 3, 2010.

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1 5. On February 10, 2012, Petitioner filed a pro per Petition for Writ of Habeas Corpus
2 (Post-Conviction). The State filed its Response and Motion to Dismiss on March 21, 2013.
3 On April 23, 2012, the Court denied Petitioner's Petition as untimely. The Findings of Fact,
4 Conclusions of Law, and Order were filed on June 11, 2012. The Notice of Entry of Order
5 was filed on June 15, 2012. Petitioner appealed the denial of his Petition on May 8, 2012
6 and on February 13, 2013, the Nevada Supreme Court affirmed the denial. The Remittitur
7 issued on March 11, 2013.

8 6. On August 26, 2013, Petitioner filed a second Petition for Writ of Habeas Corpus and
9 a separate Motion to Appoint Counsel. On January 3, 2013, the State filed a Response and
10 Motion to Dismiss the Petition and an Opposition to motion to appoint counsel. On January
11 13, 2014, this Court held a hearing on the Petition and found as follows.

12 7. The Petition for Writ of Habeas Corpus is procedurally time barred per NRS
13 34.726(1). Following the direct appeal, the Remittitur issued on December 3, 2010. Thus, the
14 August 26, 2013 Petition was nearly two years beyond the time permitted. Therefore, this
15 Court must dismiss the Petition absent a showing of good cause.

16 8. Petitioner failed to show good cause to overcome the procedural bar. Petitioner
17 offered no facts upon which good cause might be based.

18 9. Petitioner is not entitled to post conviction counsel because Petitioner cannot show
19 that any petition at this time or in the future would not be frivolous and summarily
20 dismissed.

21 CONCLUSIONS OF LAW

22 1. The mandatory provision of NRS 34.726(1) states:

23 Unless there is good cause shown for delay, a petition that
24 challenges the validity of a judgment or sentence must be filed
25 within 1 year after entry of the judgment of conviction or, if an
26 appeal has been taken from the judgment, *within 1 year after the
Supreme Court issues its remittitur*. For the purposes of this
subsection, good cause for delay exists if the petitioner
demonstrates to the satisfaction of the court:

- 27 (a) That the delay is not the fault of the petitioner; and
28 (b) That dismissal of the petition as untimely will unduly
prejudice the petitioner.

1 (Emphasis added). “[T]he statutory rules regarding procedural default are mandatory
2 and cannot be ignored when properly raised by the State.” State v. Eighth Judicial Dist.
3 Court, 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

4 2. The one-year time bar prescribed by NRS 34.726 begins to run from the date
5 the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
6 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.
7 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be
8 construed by its plain meaning).

9 3. In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada
10 Supreme Court rejected a habeas petition that was filed two (2) days late, pursuant to the
11 “clear and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the
12 importance of filing the petition with the District Court within the one-year mandate, absent
13 a showing of “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-year
14 time bar is therefore strictly construed. In contrast with the short amount of time to file a
15 notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition,
16 so there is no injustice in a strict application of NRS 34.726(1), despite any alleged
17 difficulties with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

18 4. To avoid procedural default under NRS 34.726, a defendant has the burden of
19 pleading and proving specific facts that demonstrate good cause for his failure to present his
20 claim in earlier proceedings or comply with the statutory requirements. See Hogan v.
21 Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Nevada Dep’t of
22 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

23 5. “To establish good cause, appellants *must* show that an impediment external to
24 the defense prevented their compliance with the applicable procedural rule.” Clem v. State,
25 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119
26 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519,
27 537 (2001). Such an external impediment could be “that the factual or legal basis for a claim
28 was not reasonably available to counsel, or that ‘some interference by officials’ made

1 compliance impracticable.” Hathaway, 74 P.3d at 506 (quoting Murray v. Carrier, 477 U.S.
2 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904
3 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in
4 filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

5 6. The Nevada Supreme Court has clarified that, “appellants cannot attempt to
6 manufacture good cause[.]” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause
7 there must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at
8 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230
9 (1989)). Excuses such as the lack of assistance of counsel when preparing a petition, as well
10 as the failure of trial counsel to forward a copy of the file to a petitioner have been found not
11 to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by
12 statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140,
13 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

14 7. In State v. Eighth Judicial District Court, 121 Nev. 225, 234, 112 P.3d 1070
15 (2005), the Nevada Supreme Court held as follows:

16 Given the untimely and successive nature of [defendant’s]
17 petition, the district court **had a duty imposed by law** to
18 consider whether any or all of [defendant’s] claims were barred
19 under NRS 34.726, NRS 34.810, NRS 34.800, or by the law of
the case . . . [and] the court’s failure to make this determination
here constituted an arbitrary and unreasonable exercise of
discretion.

20 (Emphasis added), see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82
21 (2003) (wherein the Nevada Supreme Court held that parties cannot stipulate to waive,
22 ignore or disregard the mandatory procedural default rules nor can they empower a court to
23 disregard them), State v. Greene, 129 Nev. Ad. Op. 58, 307 P.3d 322, 326 (2013) (The
24 district court abused its discretion by considering the merits of the defendant’s post-
25 conviction writ of habeas corpus where the defendant failed to demonstrate that an
26 impediment external to the defense prevented him from complying with the procedural-
27 default rules).

28 //

1 8. NRS 34.750 provides, in pertinent part:

2 A petition may allege that the Defendant is unable to pay the costs
3 of the proceedings or employ counsel. If the court is satisfied that
4 the allegation of indigency is true and the petition *is not dismissed*
5 *summarily*, the court may appoint counsel at the time the court
 orders the filing of an answer and a return. In making its
 determination, the court may consider whether:

6 (a) The issues are difficult;

7 (b) The Defendant is unable to comprehend the
 proceedings; or

8 (c) Counsel is necessary to proceed with discovery.

9 (Emphasis added). Under NRS 34.750, it is clear that the court has discretion in
10 determining whether to appoint counsel.

11 9. Further, in Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566
12 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right
13 to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 163, 912
14 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that “[t]he Nevada
15 Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we
16 interpret the Nevada Constitution’s right to counsel provision as being coextensive with the
17 Sixth Amendment to the United States Constitution.” In McKague, the Nevada Supreme
18 Court specifically held that with the exception of cases in which appointment of counsel is
19 mandated by statute, one does not have “[a]ny constitutional or statutory right to counsel at
20 all” in post-conviction proceedings. Id. at 164. The Nevada Supreme Court has observed
21 that a petitioner “must show that the requested review [for post-conviction relief] is not
22 frivolous before he may have an attorney appointed.” Peterson v. Warden, Nevada State
23 Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

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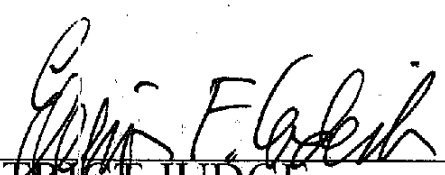
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ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and it is, hereby dismissed, and the Motion to Appoint Counsel shall be, and is, denied.

DATED this 12 day of ^{February} January, 2014.


DISTRICT JUDGE *WSH*

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

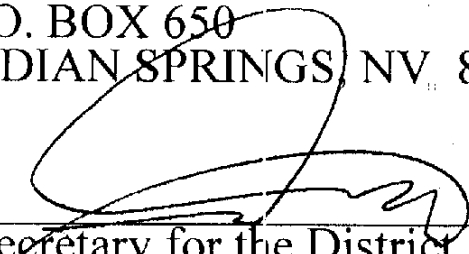
BY 
DENA RINETTI
Deputy District Attorney
Nevada Bar #009897

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NOTICE OF SERVICE

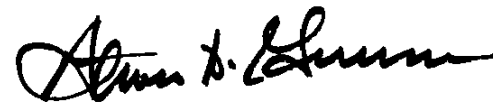
I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the 30th day of JANUARY, 2014, to:

JUSTIN PORTER #1042449
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV, 89018.



Secretary for the District Attorney's Office

hjc/SVU



CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEO

JUSTIN D. PORTER,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 01C174954

Dept No: VI

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

PLEASE TAKE NOTICE that on February 14, 2014, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on February 24, 2014.

STEVEN D. GRIERSON, CLERK OF THE COURT



Teodora Jones, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 24 day of February 2014, I placed a copy of this Notice of Entry in:

The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:

Justin D. Porter # 1042449
P.O. Box 650
Indian Springs, NV 89070

Philip J. Kohn, Public Defender
309 S. Third St., #226
Las Vegas, NV 89101



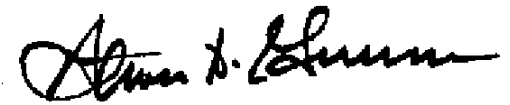
Teodora Jones, Deputy Clerk

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1 **ORDR**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JAMES R. SWEETIN
6 Deputy District Attorney
7 Nevada Bar #005144
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff



CLERK OF THE COURT

7 **DISTRICT COURT**
8
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,
11 Plaintiff,

12 -vs-

13 JUSTIN PORTER,
14 #1682627 Defendant.

CASE NO: 01C174954

DEPT NO: VI

15
16 **FINDINGS OF FACT, CONCLUSIONS OF**

17 **LAW AND ORDER**

18 DATE OF HEARING: JANUARY 13, 2014
19 TIME OF HEARING: 8:30 A.M.

20 THIS CAUSE having come on for hearing before the Honorable ELISSA CADISH,
21 District Judge, on the 13th day of January, 2014, the Petitioner not being present, proceeding
22 IN FORMA PAUPERIS, the Respondent being represented by STEVEN B. WOLFSON,
23 Clark County District Attorney, by and through DENA RINETTI, Deputy District Attorney,
24 and the Court having considered the matter, including briefs, transcripts, no arguments of
25 counsel, and documents on file herein, now therefore, the Court makes the following
26 findings of fact and conclusions of law:

27 //

28 //

//

FINDINGS OF FACT

1. On April 26, 2001, the State of Nevada, by way of Information, charged Justin Porter (hereinafter "Petitioner") with over forty (40) felony counts, including sexual assault, kidnapping, murder, burglary, and robbery, related to nine events over a four month period, involving twelve victims. On May 2, 2001, an Amended Information was filed in open court to correct a typographical error. On October 11, 2001, a Second Amended Information was filed reducing the total charges to 38 counts. Counts 30, 31 and 32 alleged Burglary while in Possession of a Deadly Weapon; Attempt Robbery with Use of a Deadly Weapon; and Murder with Use of a Deadly Weapon (Open Murder), respectively. These three counts involved a single victim.

2. On May 15, 2008, Petitioner filed a Motion to Sever Counts 30-32 from the remainder of the charges. On June 12, 2008, the State filed its Opposition. On June 18, 2008, the Court granted Petitioner's Motion to Sever and ordered the murder event be tried separately. The State subsequently filed a Third Amended Information in the instant case on April 30, 2009, charging Petitioner with: Count 1 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165); Count 2 – Attempt Robbery With Use of a Deadly Weapon (Felony – NRS 193.330, 200.380, 193.165), and Count 3 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165).

3. On May 8, 2009, a jury found Petitioner guilty on Count 3 of Second Degree Murder with Use of a Deadly Weapon. Petitioner was found not guilty of Counts 1 and 2.

4. On September 30, 2009, the Court sentenced Petitioner to the Nevada Department of Corrections for One Hundred Twenty (120) Months to Life, plus a consecutive term of One Hundred Twenty (120) Months to Life for the use of a deadly weapon. The Judgment of Conviction was filed on October 13, 2009. On October 29, 2009, Petitioner filed a Notice of Appeal. On November 8, 2010, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued December 3, 2010.

//

//

1 5. On February 10, 2012, Petitioner filed a pro per Petition for Writ of Habeas Corpus
2 (Post-Conviction). The State filed its Response and Motion to Dismiss on March 21, 2013.
3 On April 23, 2012, the Court denied Petitioner's Petition as untimely. The Findings of Fact,
4 Conclusions of Law, and Order were filed on June 11, 2012. The Notice of Entry of Order
5 was filed on June 15, 2012. Petitioner appealed the denial of his Petition on May 8, 2012
6 and on February 13, 2013, the Nevada Supreme Court affirmed the denial. The Remittitur
7 issued on March 11, 2013.

8 6. On August 26, 2013, Petitioner filed a second Petition for Writ of Habeas Corpus and
9 a separate Motion to Appoint Counsel. On January 3, 2013, the State filed a Response and
10 Motion to Dismiss the Petition and an Opposition to motion to appoint counsel. On January
11 13, 2014, this Court held a hearing on the Petition and found as follows.

12 7. The Petition for Writ of Habeas Corpus is procedurally time barred per NRS
13 34.726(1). Following the direct appeal, the Remittitur issued on December 3, 2010. Thus, the
14 August 26, 2013 Petition was nearly two years beyond the time permitted. Therefore, this
15 Court must dismiss the Petition absent a showing of good cause.

16 8. Petitioner failed to show good cause to overcome the procedural bar. Petitioner
17 offered no facts upon which good cause might be based.

18 9. Petitioner is not entitled to post conviction counsel because Petitioner cannot show
19 that any petition at this time or in the future would not be frivolous and summarily
20 dismissed.

21 CONCLUSIONS OF LAW

22 1. The mandatory provision of NRS 34.726(1) states:

23 Unless there is good cause shown for delay, a petition that
24 challenges the validity of a judgment or sentence must be filed
25 within 1 year after entry of the judgment of conviction or, if an
26 appeal has been taken from the judgment, *within 1 year after the
Supreme Court issues its remittitur*. For the purposes of this
subsection, good cause for delay exists if the petitioner
demonstrates to the satisfaction of the court:

- 27 (a) That the delay is not the fault of the petitioner; and
28 (b) That dismissal of the petition as untimely will unduly
prejudice the petitioner.

1 (Emphasis added). “[T]he statutory rules regarding procedural default are mandatory
2 and cannot be ignored when properly raised by the State.” State v. Eighth Judicial Dist.
3 Court, 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

4 2. The one-year time bar prescribed by NRS 34.726 begins to run from the date
5 the judgment of conviction is filed or a remittitur from a timely direct appeal is filed.
6 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v.
7 State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be
8 construed by its plain meaning).

9 3. In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada
10 Supreme Court rejected a habeas petition that was filed two (2) days late, pursuant to the
11 “clear and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the
12 importance of filing the petition with the District Court within the one-year mandate, absent
13 a showing of “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-year
14 time bar is therefore strictly construed. In contrast with the short amount of time to file a
15 notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition,
16 so there is no injustice in a strict application of NRS 34.726(1), despite any alleged
17 difficulties with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

18 4. To avoid procedural default under NRS 34.726, a defendant has the burden of
19 pleading and proving specific facts that demonstrate good cause for his failure to present his
20 claim in earlier proceedings or comply with the statutory requirements. See Hogan v.
21 Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Nevada Dep’t of
22 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

23 5. “To establish good cause, appellants *must* show that an impediment external to
24 the defense prevented their compliance with the applicable procedural rule.” Clem v. State,
25 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119
26 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519,
27 537 (2001). Such an external impediment could be “that the factual or legal basis for a claim
28 was not reasonably available to counsel, or that ‘some interference by officials’ made

1 compliance impracticable.” Hathaway, 74 P.3d at 506 (quoting Murray v. Carrier, 477 U.S.
2 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904
3 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in
4 filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

5 6. The Nevada Supreme Court has clarified that, “appellants cannot attempt to
6 manufacture good cause[.]” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause
7 there must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at
8 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230
9 (1989)). Excuses such as the lack of assistance of counsel when preparing a petition, as well
10 as the failure of trial counsel to forward a copy of the file to a petitioner have been found not
11 to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by
12 statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140,
13 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

14 7. In State v. Eighth Judicial District Court, 121 Nev. 225, 234, 112 P.3d 1070
15 (2005), the Nevada Supreme Court held as follows:

16 Given the untimely and successive nature of [defendant’s]
17 petition, the district court **had a duty imposed by law** to
18 consider whether any or all of [defendant’s] claims were barred
19 under NRS 34.726, NRS 34.810, NRS 34.800, or by the law of
the case . . . [and] the court’s failure to make this determination
here constituted an arbitrary and unreasonable exercise of
discretion.

20 (Emphasis added), see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82
21 (2003) (wherein the Nevada Supreme Court held that parties cannot stipulate to waive,
22 ignore or disregard the mandatory procedural default rules nor can they empower a court to
23 disregard them), State v. Greene, 129 Nev. Ad. Op. 58, 307 P.3d 322, 326 (2013) (The
24 district court abused its discretion by considering the merits of the defendant’s post-
25 conviction writ of habeas corpus where the defendant failed to demonstrate that an
26 impediment external to the defense prevented him from complying with the procedural-
27 default rules).

28 //

1 8. NRS 34.750 provides, in pertinent part:

2 A petition may allege that the Defendant is unable to pay the costs
3 of the proceedings or employ counsel. If the court is satisfied that
4 the allegation of indigency is true and the petition *is not dismissed*
5 *summarily*, the court may appoint counsel at the time the court
 orders the filing of an answer and a return. In making its
 determination, the court may consider whether:

6 (a) The issues are difficult;

7 (b) The Defendant is unable to comprehend the
 proceedings; or

8 (c) Counsel is necessary to proceed with discovery.

9 (Emphasis added). Under NRS 34.750, it is clear that the court has discretion in
10 determining whether to appoint counsel.

11 9. Further, in Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566
12 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right
13 to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 163, 912
14 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that “[t]he Nevada
15 Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we
16 interpret the Nevada Constitution’s right to counsel provision as being coextensive with the
17 Sixth Amendment to the United States Constitution.” In McKague, the Nevada Supreme
18 Court specifically held that with the exception of cases in which appointment of counsel is
19 mandated by statute, one does not have “[a]ny constitutional or statutory right to counsel at
20 all” in post-conviction proceedings. Id. at 164. The Nevada Supreme Court has observed
21 that a petitioner “must show that the requested review [for post-conviction relief] is not
22 frivolous before he may have an attorney appointed.” Peterson v. Warden, Nevada State
23 Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

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ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and it is, hereby dismissed, and the Motion to Appoint Counsel shall be, and is, denied.

DATED this 12 day of ^{February} ~~January~~, 2014.


DISTRICT JUDGE

WSH

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

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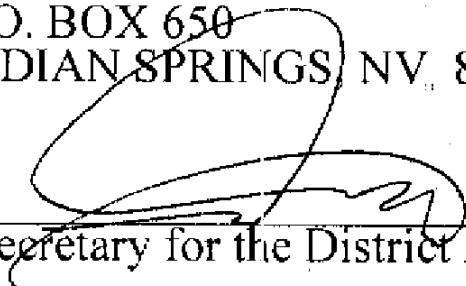

DENA RINETTI
Deputy District Attorney
Nevada Bar #009897

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NOTICE OF SERVICE

I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the 30th day of JANUARY, 2014, to:

JUSTIN PORTER #1042449
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV, 89018.



Secretary for the District Attorney's Office

hjc/SVU

OK

[Handwritten signature]

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DISTRICT COURT
CLARK COUNTY, NEVADA

2015 NOV -4 P 2: 12

JUSTIN D PORTER,
Petitioner,
vs.
STATE OF NEVADA,
Respondent,

[Signature]
Case No: 01C174954
Department 6
CLERK OF THE COURT

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on October 26, 2015. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 1st day of FEBRUARY, 2016, at the hour of

8:30 AM
o'clock for further proceedings.

DEPARTMENT VI
NOTICE OF HEARING
2/1/16 TIME 8:30AM
APPROVED BY KEC

[Signature]

District Court Judge

[Handwritten initials]

FILE WITH
MASTER CALENDAR

RECEIVED

NOV 04 2015

CLERK OF THE COURT

01C174954
OPWH
Order for Petition for Writ of Habeas Corpus
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FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff


CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

JUSTIN PORTER,
#1682627

Defendant.

CASE NO: **01C174954**

DEPT NO: **VI**

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

DATE OF HEARING: FEBRUARY 1, 2016
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable JUDGE ELISSA CADISH, District Judge, on the 1st Day of February, 2016, the Petitioner not being present, proceeding IN FORMA PAUPERIS, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through LISA LUZAICH, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, no arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT
CONCLUSIONS OF LAW

On April 26, 2001, the State of Nevada, by way of Information, charged Justin Porter (hereinafter "Defendant") with over 40 felony counts, including sexual assault, kidnapping, murder, burglary, and robbery, related to 9 events over a 4-month period, involving 12 victims. On May 2, 2001, an Amended Information was filed in open court to correct a typographical error. On October 11, 2001, a Second Amended Information was filed reducing the total charges to 38 counts. Counts 30, 31 and 32 alleged Burglary while in Possession of a Deadly Weapon; Attempt Robbery with Use of a Deadly Weapon; and Murder with Use of a Deadly Weapon (Open Murder), respectively. These three counts involved a single victim.

On May 15, 2008, Defendant filed a Motion to Sever Counts 30-32 from the remainder of the charges. On June 12, 2008, the State filed its Opposition. On June 18, 2008, the Court granted Defendant's Motion to Sever, and ordered the murder event be tried separately. The State subsequently filed a Third Amended Information in the instant case on April 30, 2009, charging Defendant with: Count 1 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165); Count 2 – Attempt Robbery With Use of a Deadly Weapon (Felony – NRS 193.330, 200.380, 193.165), and Count 3 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165).

On May 8, 2009, a jury found Defendant guilty on Count 3 of Second Degree Murder with Use of a Deadly Weapon. Defendant was found not guilty of Counts 1 and 2.

On September 30, 2009, the Court sentenced Defendant to the Nevada Department of Corrections for 120 months to Life, plus a consecutive term of 120 months to Life for the use of a deadly weapon, with 3,338 days credit for time served. The Judgment of Conviction was filed on October 13, 2009. On October 29, 2009, Defendant filed a Notice of Appeal. On November 8, 2010, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued December 3, 2010.

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1 On February 10, 2012, Defendant filed his first pro per Post-Conviction Petition for
2 Writ of Habeas Corpus. The State filed its Response and Motion to Dismiss on March 21,
3 2012. On April 23, 2012, the Court denied Defendant's Petition as untimely. The Findings of
4 Fact, Conclusions of Law, and Order were filed on June 11, 2012. Defendant appealed the
5 denial of his first Petition on May 8, 2012, and on March 11, 2013, the Nevada Supreme Court
6 affirmed the denial. Remittitur issued on March 19, 2013.

7 On August 26, 2013, Defendant filed his second pro per Post-Conviction Petition for
8 Writ of Habeas Corpus, and a separate Motion to Appoint Counsel. The State filed its
9 Response and Motion to Dismiss on January 3, 2014. On January 13, 2014, the Court denied
10 Defendant's second Petition as time-barred. Defendant filed a Notice of Appeal from the
11 denial of his second Petition on February 7, 2014, and on June 11, 2014, the Nevada Supreme
12 Court affirmed the denial. Remittitur issued on July 15, 2014.

13 On October 26, 2015, Defendant filed the instant (his third) pro per Post-Conviction
14 Petition for Writ of Habeas Corpus. The State filed its Response on January 26, 2016.

15 NRS 34.726(1) provides in relevant part that a petition that challenges the validity of a
16 judgment or sentence must be filed within one year after entry of the judgment of conviction
17 or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues
18 its remittitur. The Nevada Supreme Court has specifically found that the district court has a
19 duty to consider whether the procedural bars apply to a post-conviction petition and not
20 arbitrarily disregard them. Here, this Court finds that Defendant's Post-Conviction Petition is
21 beyond the one-year time bar. Defendant filed an appeal from his Judgment of Conviction.
22 The Nevada Supreme Court affirmed on November 8, 2010, and Remittitur issued on
23 December 3, 2010. Therefore, Defendant had until December 3, 2011 to file his Post-
24 Conviction Petition. The instant Petition was filed on October 26, 2015, almost four years too
25 late. Therefore, because it is procedurally barred by NRS 34.726(1) and Defendant, as
26 discussed below, failed to show good cause and prejudice, this Court finds that Defendant's
27 Petition is dismissed.

28 //

1 Furthermore, NRS 34.810(2) provides in relevant part:

2 [a] second or successive petition must be dismissed if the judge or
3 justice determines that it fails to allege new or different grounds
4 for relief and that the prior determination was on the merits or, if
5 new and different grounds are alleged, the judge or justice finds
6 that the failure of the petitioner to assert those grounds in a prior
7 petition constituted an abuse of the writ.

8 In addition, meritless, successive, and untimely petitions clog the court system and
9 undermine the finality of convictions.” Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950
10 (1994).

11 On February 10, 2012, Defendant filed his first pro per Post-Conviction Petition for
12 Writ of Habeas Corpus where he alleged as good cause for his untimely Petition that he had a
13 low IQ, and that he was only recently informed that the Nevada Supreme Court affirmed his
14 conviction. On April 23, 2012, this Court denied Defendant’s Petition as untimely because he
15 did not demonstrate sufficient good cause to overcome the time bar. On August 26, 2013,
16 Defendant filed his second pro per Post-Conviction Petition for Writ of Habeas Corpus where
17 he failed to state any sufficient facts upon which good cause might be found. On January 13,
18 2014, this Court denied Defendant’s second Petition as time-barred with no good cause
19 alleged. Defendant appealed both of these denials, and the Nevada Supreme Court affirmed
20 each of them, but did not address the merits of any claims as both Petitions were untimely.
21 Defendant had the opportunity to allege the new and different grounds in the instant 3rd
22 Petition in these previous petitions. Therefore, this Court finds that the present Petition is
23 successive and constitutes an abuse of the writ, and is hereby dismissed.

24 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the
25 following: (1) “[t]hat the delay is not the fault of the petitioner,” and (2) that the petitioner will
26 be “unduly prejudice[d]” if the petition is dismissed as untimely. Under the first requirement,
27 “a petitioner must show that an impediment external to the defense prevented him or her from
28 complying with the state procedural default rules.” Hathaway v. State, 119 Nev. 248, 252, 71
P.3d 503, 506 (2003) (citing Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537; Lozada v. State,
110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, Dep’t Prisons, 105 Nev.

1 63, 66, 769 P.2d 72, 74 (1989). “An impediment external to the defense may be demonstrated
2 by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel,
3 or that some interference by officials, made compliance impracticable.’” Id. (quoting Murray
4 v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986) (citations and quotations
5 omitted)). Clearly, any delay in filing of the petition must not be the fault of the
6 petitioner. NRS 34.726(1)(a). Once a petitioner has established cause, he must show actual
7 prejudice resulting from the errors of which he complains, i.e., “a petitioner must show that
8 errors in the proceedings underlying the judgment worked to the petitioner’s actual and
9 substantial disadvantage.” State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 94-95 (Nev.
10 2012) (citing Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993)).

11 Here, this Court finds that Defendant has failed to demonstrate good cause or prejudice
12 to overcome the procedural bar. In the event that Defendant is alleging as good cause
13 ineffective assistance of counsel, this claim is without merit. Defendant claims that counsel
14 was ineffective for requesting confusing and improper jury instructions. However, Defendant
15 only offers a single conclusory sentence in support of his claim, and makes no showing of how
16 this was connected to his failure to file a post-conviction Petition within the one year deadline.

17 Defendant also contends that his appellate counsel failed to raise this issue on direct
18 appeal. The Nevada Supreme Court in Hathaway found that “a petitioner’s reliance upon his
19 counsel to file a direct appeal is sufficient cause to excuse a procedural default if the petitioner
20 demonstrates: ‘(1) he actually believed his counsel was pursuing his direct appeal, (2) his belief
21 was objectively reasonable, and (3) he filed his state post-conviction relief petition within a
22 reasonable time after he should have known that his counsel was not pursuing his direct
23 appeal.’” Hathaway, 119 Nev. at 254, 71 P.3d at 507-08. Once again, Defendant only offers a
24 single conclusory sentence in support of this claim, and makes no showing of how this was
25 connected to his failure to file a post-conviction Petition within one year. Because Defendant
26 has failed to show good cause, this Court finds his Petition is dismissed.

27 //

28 //

1 The court may also excuse a failure to show cause where prejudice from a failure to
2 consider the claim amounts to a “fundamental miscarriage of justice.” Mazzan v. Warden, 112
3 Nev. 838, 842, 921 P.2d 920, 922 (1996); Hogan, 109 Nev. at 959, 860 P.2d at 715–16. The
4 miscarriage of justice exception is narrow in scope and employed only in extraordinary
5 circumstances. Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 1502-03
6 (1998). This standard can only be met where the petitioner makes a colorable showing that he
7 is actually innocent of the crime committed. Pellegrini, 117 Nev. at 887, 34 P.3d at 537; see
8 also Mazzan, 112 Nev. at 842, 921 P.2d at 922; Hogan, 109 Nev. at 954–55, 959, 860 P.2d at
9 712, 715–16. “To avoid application of the procedural bar to claims attacking the validity of
10 the conviction, a petitioner claiming actual innocence must show that it is more likely than not
11 that no reasonable juror would have convicted him absent a constitutional violation.”
12 Pellegrini, 117 Nev. at 887, 34 P.3d at 537. “To be credible,” a claim of actual innocence must
13 be based on reliable evidence not presented at trial. Schlup v. Delo, 513 U.S. 298, 324, 115 S.
14 Ct. 851, 865 (1995). Given the rarity of such evidence, “in virtually every case, the allegation
15 of actual innocence has been summarily rejected.” Id. (internal quotation marks omitted).

16 Here, the Defendant does not argue actual innocence, nor is there any indication that he
17 is innocent. Defendant believes that because he was accused of felony murder, but was
18 acquitted of the underlying felonies, he was wrongfully convicted of second-degree murder.
19 In order to demonstrate a fundamental miscarriage of justice, a defendant must make a
20 colorable showing of actual innocence —factual innocence, not *legal* innocence. Pellegrini,
21 117 Nev. at 887, 34 P.3d at 537; see Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct.
22 1489, 140 L. Ed. 2d 728 (1998). Any claim Defendant is attempting to construct here is a legal
23 claim, as it does not have to do with him being innocent based on the facts. Accordingly, this
24 Court finds that Defendant cannot overcome the procedural bars on his actual innocence claim,
25 nor is there any newly discovered evidence for an actual innocence claim, thus his Petition is
26 dismissed.

27 This Court also denied Defendant’s request for counsel and an evidentiary hearing.

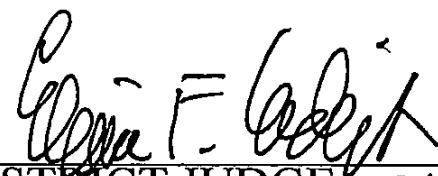
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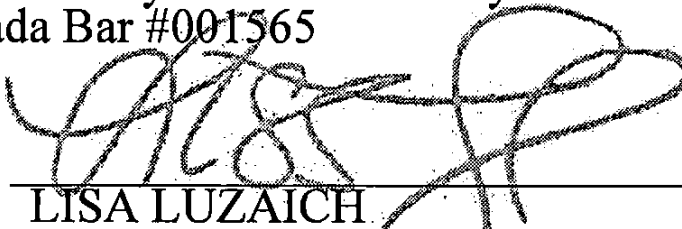
ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Post-Conviction Relief shall be, and is, denied.

DATED this 10 day of February, 2016.


DISTRICT JUDGE *BLL*

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY 
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

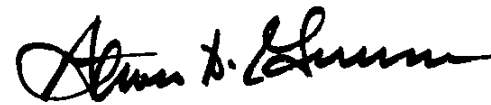
CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 22nd day of FEBRUARY, 2016 by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JUSTIN PORTER, BAC#1042442
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89018

/s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU



CLERK OF THE COURT

1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**
4

5 JUSTIN D. PORTER,

6 Petitioner,

Case No: 01C174954

Dept No: VI

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,
10

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

11 **PLEASE TAKE NOTICE** that on March 14, 2016, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on March 22, 2016.

16 STEVEN D. GRIERSON, CLERK OF THE COURT



17
18 Heather Ungermann, Deputy Clerk

19 CERTIFICATE OF MAILING
20

21 I hereby certify that on this 22 day of March 2016, I placed a copy of this Notice of Entry in:

22 ☒ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
23 Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:
Justin D. Porter # 1042449 Philip J. Kohn, Public Defender
25 P.O. Box 650 309 S. Third St., #226
Indian Springs, NV 89070 Las Vegas, NV 89155
26



27
28 Heather Ungermann, Deputy Clerk

ORIGINAL

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CLERK OF THE COURT

1 **FCL**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **LISA LUZAICH**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #005056**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**
10 **Plaintiff,**

11 **-VS-**

12 **JUSTIN PORTER,**
13 **#1682627**

14 **Defendant.**

CASE NO: 01C174954

DEPT NO: VI

15 **FINDINGS OF FACT, CONCLUSIONS OF**
16 **LAW AND ORDER**

17 **DATE OF HEARING: FEBRUARY 1, 2016**
18 **TIME OF HEARING: 8:30 AM**

19 **THIS CAUSE** having come on for hearing before the Honorable JUDGE ELISSA
20 **CADISH**, District Judge, on the 1st Day of February, 2016, the Petitioner not being present,
21 proceeding **IN FORMA PAUPERIS**, the Respondent being represented by **STEVEN B.**
22 **WOLFSON**, Clark County District Attorney, by and through **LISA LUZAICH**, Chief Deputy
23 District Attorney, and the Court having considered the matter, including briefs, transcripts, no
24 arguments of counsel, and documents on file herein, now therefore, the Court makes the
25 following findings of fact and conclusions of law:

26 //

27 //

28 //

FINDINGS OF FACT
CONCLUSIONS OF LAW

On April 26, 2001, the State of Nevada, by way of Information, charged Justin Porter (hereinafter "Defendant") with over 40 felony counts, including sexual assault, kidnapping, murder, burglary, and robbery, related to 9 events over a 4-month period, involving 12 victims. On May 2, 2001, an Amended Information was filed in open court to correct a typographical error. On October 11, 2001, a Second Amended Information was filed reducing the total charges to 38 counts. Counts 30, 31 and 32 alleged Burglary while in Possession of a Deadly Weapon; Attempt Robbery with Use of a Deadly Weapon; and Murder with Use of a Deadly Weapon (Open Murder), respectively. These three counts involved a single victim.

On May 15, 2008, Defendant filed a Motion to Sever Counts 30-32 from the remainder of the charges. On June 12, 2008, the State filed its Opposition. On June 18, 2008, the Court granted Defendant's Motion to Sever, and ordered the murder event be tried separately. The State subsequently filed a Third Amended Information in the instant case on April 30, 2009, charging Defendant with: Count 1 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165); Count 2 – Attempt Robbery With Use of a Deadly Weapon (Felony – NRS 193.330, 200.380, 193.165), and Count 3 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165).

On May 8, 2009, a jury found Defendant guilty on Count 3 of Second Degree Murder with Use of a Deadly Weapon. Defendant was found not guilty of Counts 1 and 2.

On September 30, 2009, the Court sentenced Defendant to the Nevada Department of Corrections for 120 months to Life, plus a consecutive term of 120 months to Life for the use of a deadly weapon, with 3,338 days credit for time served. The Judgment of Conviction was filed on October 13, 2009. On October 29, 2009, Defendant filed a Notice of Appeal. On November 8, 2010, the Nevada Supreme Court affirmed the Judgment of Conviction. Remittitur issued December 3, 2010.

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1 On February 10, 2012, Defendant filed his first pro per Post-Conviction Petition for
2 Writ of Habeas Corpus. The State filed its Response and Motion to Dismiss on March 21,
3 2012. On April 23, 2012, the Court denied Defendant's Petition as untimely. The Findings of
4 Fact, Conclusions of Law, and Order were filed on June 11, 2012. Defendant appealed the
5 denial of his first Petition on May 8, 2012, and on March 11, 2013, the Nevada Supreme Court
6 affirmed the denial. Remittitur issued on March 19, 2013.

7 On August 26, 2013, Defendant filed his second pro per Post-Conviction Petition for
8 Writ of Habeas Corpus, and a separate Motion to Appoint Counsel. The State filed its
9 Response and Motion to Dismiss on January 3, 2014. On January 13, 2014, the Court denied
10 Defendant's second Petition as time-barred. Defendant filed a Notice of Appeal from the
11 denial of his second Petition on February 7, 2014, and on June 11, 2014, the Nevada Supreme
12 Court affirmed the denial. Remittitur issued on July 15, 2014.

13 On October 26, 2015, Defendant filed the instant (his third) pro per Post-Conviction
14 Petition for Writ of Habeas Corpus. The State filed its Response on January 26, 2016.

15 NRS 34.726(1) provides in relevant part that a petition that challenges the validity of a
16 judgment or sentence must be filed within one year after entry of the judgment of conviction
17 or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues
18 its remittitur. The Nevada Supreme Court has specifically found that the district court has a
19 duty to consider whether the procedural bars apply to a post-conviction petition and not
20 arbitrarily disregard them. Here, this Court finds that Defendant's Post-Conviction Petition is
21 beyond the one-year time bar. Defendant filed an appeal from his Judgment of Conviction.
22 The Nevada Supreme Court affirmed on November 8, 2010, and Remittitur issued on
23 December 3, 2010. Therefore, Defendant had until December 3, 2011 to file his Post-
24 Conviction Petition. The instant Petition was filed on October 26, 2015, almost four years too
25 late. Therefore, because it is procedurally barred by NRS 34.726(1) and Defendant, as
26 discussed below, failed to show good cause and prejudice, this Court finds that Defendant's
27 Petition is dismissed.

28 //

1 Furthermore, NRS 34.810(2) provides in relevant part:

2 [a] second or successive petition must be dismissed if the judge or
3 justice determines that it fails to allege new or different grounds
4 for relief and that the prior determination was on the merits or, if
5 new and different grounds are alleged, the judge or justice finds
6 that the failure of the petitioner to assert those grounds in a prior
7 petition constituted an abuse of the writ.

8 In addition, meritless, successive, and untimely petitions clog the court system and
9 undermine the finality of convictions.” Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950
10 (1994).

11 On February 10, 2012, Defendant filed his first pro per Post-Conviction Petition for
12 Writ of Habeas Corpus where he alleged as good cause for his untimely Petition that he had a
13 low IQ, and that he was only recently informed that the Nevada Supreme Court affirmed his
14 conviction. On April 23, 2012, this Court denied Defendant’s Petition as untimely because he
15 did not demonstrate sufficient good cause to overcome the time bar. On August 26, 2013,
16 Defendant filed his second pro per Post-Conviction Petition for Writ of Habeas Corpus where
17 he failed to state any sufficient facts upon which good cause might be found. On January 13,
18 2014, this Court denied Defendant’s second Petition as time-barred with no good cause
19 alleged. Defendant appealed both of these denials, and the Nevada Supreme Court affirmed
20 each of them, but did not address the merits of any claims as both Petitions were untimely.
21 Defendant had the opportunity to allege the new and different grounds in the instant 3rd
22 Petition in these previous petitions. Therefore, this Court finds that the present Petition is
23 successive and constitutes an abuse of the writ, and is hereby dismissed.

24 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the
25 following: (1) “[t]hat the delay is not the fault of the petitioner,” and (2) that the petitioner will
26 be “unduly prejudice[d]” if the petition is dismissed as untimely. Under the first requirement,
27 “a petitioner must show that an impediment external to the defense prevented him or her from
28 complying with the state procedural default rules.” Hathaway v. State, 119 Nev. 248, 252, 71
P.3d 503, 506 (2003) (citing Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537; Lozada v. State,
110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, Dep’t Prisons, 105 Nev.

1 63, 66, 769 P.2d 72, 74 (1989). “An impediment external to the defense may be demonstrated
2 by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel,
3 or that some interference by officials, made compliance impracticable.’” Id. (quoting Murray
4 v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986) (citations and quotations
5 omitted)). Clearly, any delay in filing of the petition must not be the fault of the
6 petitioner. NRS 34.726(1)(a). Once a petitioner has established cause, he must show actual
7 prejudice resulting from the errors of which he complains, i.e., “a petitioner must show that
8 errors in the proceedings underlying the judgment worked to the petitioner’s actual and
9 substantial disadvantage.” State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 94-95 (Nev.
10 2012) (citing Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993)).

11 Here, this Court finds that Defendant has failed to demonstrate good cause or prejudice
12 to overcome the procedural bar. In the event that Defendant is alleging as good cause
13 ineffective assistance of counsel, this claim is without merit. Defendant claims that counsel
14 was ineffective for requesting confusing and improper jury instructions. However, Defendant
15 only offers a single conclusory sentence in support of his claim, and makes no showing of how
16 this was connected to his failure to file a post-conviction Petition within the one year deadline.

17 Defendant also contends that his appellate counsel failed to raise this issue on direct
18 appeal. The Nevada Supreme Court in Hathaway found that “a petitioner’s reliance upon his
19 counsel to file a direct appeal is sufficient cause to excuse a procedural default if the petitioner
20 demonstrates: ‘(1) he actually believed his counsel was pursuing his direct appeal, (2) his belief
21 was objectively reasonable, and (3) he filed his state post-conviction relief petition within a
22 reasonable time after he should have known that his counsel was not pursuing his direct
23 appeal.’” Hathaway, 119 Nev. at 254, 71 P.3d at 507-08. Once again, Defendant only offers a
24 single conclusory sentence in support of this claim, and makes no showing of how this was
25 connected to his failure to file a post-conviction Petition within one year. Because Defendant
26 has failed to show good cause, this Court finds his Petition is dismissed.

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1 The court may also excuse a failure to show cause where prejudice from a failure to
2 consider the claim amounts to a “fundamental miscarriage of justice.” Mazzan v. Warden, 112
3 Nev. 838, 842, 921 P.2d 920, 922 (1996); Hogan, 109 Nev. at 959, 860 P.2d at 715–16. The
4 miscarriage of justice exception is narrow in scope and employed only in extraordinary
5 circumstances. Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 1502–03
6 (1998). This standard can only be met where the petitioner makes a colorable showing that he
7 is actually innocent of the crime committed. Pellegrini, 117 Nev. at 887, 34 P.3d at 537; see
8 also Mazzan, 112 Nev. at 842, 921 P.2d at 922; Hogan, 109 Nev. at 954–55, 959, 860 P.2d at
9 712, 715–16. “To avoid application of the procedural bar to claims attacking the validity of
10 the conviction, a petitioner claiming actual innocence must show that it is more likely than not
11 that no reasonable juror would have convicted him absent a constitutional violation.”
12 Pellegrini, 117 Nev. at 887, 34 P.3d at 537. “To be credible,” a claim of actual innocence must
13 be based on reliable evidence not presented at trial. Schlup v. Delo, 513 U.S. 298, 324, 115 S.
14 Ct. 851, 865 (1995). Given the rarity of such evidence, “in virtually every case, the allegation
15 of actual innocence has been summarily rejected.” Id. (internal quotation marks omitted).

16 Here, the Defendant does not argue actual innocence, nor is there any indication that he
17 is innocent. Defendant believes that because he was accused of felony murder, but was
18 acquitted of the underlying felonies, he was wrongfully convicted of second-degree murder.
19 In order to demonstrate a fundamental miscarriage of justice, a defendant must make a
20 colorable showing of actual innocence —factual innocence, not *legal* innocence. Pellegrini,
21 117 Nev. at 887, 34 P.3d at 537; see Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct.
22 1489, 140 L. Ed. 2d 728 (1998). Any claim Defendant is attempting to construct here is a legal
23 claim, as it does not have to do with him being innocent based on the facts. Accordingly, this
24 Court finds that Defendant cannot overcome the procedural bars on his actual innocence claim,
25 nor is there any newly discovered evidence for an actual innocence claim, thus his Petition is
26 dismissed.

27 This Court also denied Defendant’s request for counsel and an evidentiary hearing.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and is, denied.

DATED this 10 day of February, 2016.


DISTRICT JUDGE *BLL*

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY 
LISA LUZAICH
Chief Deputy District Attorney
Nevada Bar #005056

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 22nd day of FEBRUARY, 2016 by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JUSTIN PORTER, BAC#1042442
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89018

/s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

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5/31/2017 11:02 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

1 JUSTIN PORTER ID NO. 1042449
2 HIGH DESERT STATE PRISON
3 22010 COLD CREEK ROAD
4 POST OFFICE BOX 650
5 INDIAN SPRINGS, NEVADA 89070

6 Defendant In Proper Person

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 STATE OF NEVADA
10 PLAINTIFF

CASE NO.: 01C-174954

DEPT NO.: 6

11 vs.

12 Justin Porter
13 Defendant

DATE OF HEARING: 6-21-17

TIME OF HEARING: 8:30A

"MOTION TO DISMISS / SUBSTITUTE COUNSEL / MOTION TO DISMISS"

14 COMES NOW, Justin Porter, Defendant, In Proper Person and

15 moves this Honorable Court, to grant his motion
16 to dismiss / substitute counsel / motion to dismiss.
17 MADE PURSUANT TO EIGHTH JUDICIAL DISTRICT COURT
18 RULE(S) 740 b 2 II

19 THIS MOTION, is made and based upon the attached Memorandum of Points

20 and Authorities, all of the pleadings and other documents on file in this case, as well as
21 AFFIDAVIT OF JUSTIN PORTER.

22 DATED This 18 day of May, 2017.

23 Respectfully submitted,

24 Justin Porter #1042449
25 Justin Porter ID NO. 1042449
26 Defendant In Proper Person

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MAY 31 2017

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MAY 23 2017

11
1 "POINTS AND AUTHORITIES"

2 Procedural Background.

8 (IN PERTINENT PARTS)

4 ON APRIL 26, 2001, the State of Nevada, by
5 WAY OF INFORMATION, charged Justin Porter
6 (hereinafter "Defendant") with over 40 felony
7 counts, including sexual assault, kidnapping
8 murder, burglary, and robbery, related to
9 9 events over a 4-month period, involving
10 12 victims. ON MAY 2, 2001, an Amended
11 INFORMATION was filed reducing the total
12 charges to 38 counts, counts 30, 31 and 32
13 alleged BURGLARY while in possession of a
14 DEADLY WEAPON; Attempt Robbery with use
15 OF A DEADLY WEAPON; and Murder with use
16 OF A DEADLY WEAPON (OPEN MURDER), respectively.
17 These three counts involved a single victim.

18 ON OR ABOUT MAY 3rd, 2001, Defendant was
19 MANIPULATED AND COERCED INTO UNKNOWINGLY
20 WAIVING HIS SPEEDY TRIAL RIGHTS.

21 ON OCTOBER 11, 2001 A second Amended
22 INFORMATION was filed in open court to correct
23 A TYPOGRAPHICAL error.

24 ON OR ABOUT SEPT. 19, 2007 Defendant
25 APPEARED before the Honorable Judge LEE A.
26 GATES, AND DID RE-INVOKE HIS RIGHT(S)
27 TO A FAST AND SPEEDY TRIAL.

1 ON MAY 15, 2008, Defendant filed a motion to
2 SEVER COUNTS 30-32 FROM THE REMAINDER
3 OF THE CHARGES. ON JUNE 12, 2008, THE STATE
4 FILED ITS OPPOSITION. ON JUNE 18, 2008, THE
5 COURT GRANTED DEFENDANT'S MOTION TO
6 SEVER, AND ORDERED THE MURDER EVENT
7 BE TRIED SEPARATELY. THE STATE SUBSEQUENTLY
8 FILED A THIRD AMENDED INFORMATION ON
9 APRIL 30, 2009, CHARGING DEFENDANT
10 WITH: COUNT 1-BURGLARY WHILE IN POSSESSION
11 OF A DEADLY WEAPON; COUNT 2- ATTEMPT ROBBERY
12 WITH USE OF A DEADLY WEAPON, AND COUNT 3 -
13 MURDER WITH USE OF A DEADLY WEAPON.

14 ON MAY 8, 2009 A JURY FOUND DEFENDANT
15 ON COUNT 3 OF SECOND DEGREE MURDER WITH
16 USE OF A DEADLY WEAPON. DEFENDANT WAS
17 FOUND NOT GUILTY OF COUNTS 1 AND 2.

18 ON SEPT. 30, 2009 THE COURT SENTENCED
19 DEFENDANT TO THE NEVADA DEPT. OF CORRECTIONS
20 FOR 120 MONTHS TO LIFE, PLUS A CONSECUTIVE TERM
21 OF 120 MONTHS TO LIFE FOR THE USE OF A
22 DEADLY WEAPON, WITH 3,338 DAYS CREDIT FOR
23 TIME SERVED.

24 DEFENDANT'S REMAINING CHARGES
25 WENT ON, UNPROSECUTED.

26 ON NOV. 22, 2010 DEFENDANT
27 APPEARED BEFORE THE HONORABLE JUDGE

1 ELISSA CADISH AND DID [AGAIN] INVOKE
2 HIS RIGHTS TO A FAST AND SPEEDY
3 TRIAL.

4 THAT THERE AFTER, DEFENDANT DID
5 MAKE SEVERAL ORAL AND WRITTEN
6 REQUESTS UPON HIS ATTORNEY OF
7 RECORD MR. PHILIP J. KOHN, HIS
8 DEPUTY(IES).

9 DEFENDANT REQUESTED APPOINTMENT OF INVESTIGATOR
10 DEFENDANT REQUESTED INFORMATION AND MATERIALS.
11 DEFENDANT REQUESTED COMPLETE COPY OF ALL DISCOVERED
12 EVIDENCE. DEFENDANT REQUESTED A COPY OF THE
13 STATE'S WITNESS LIST. DEFENDANT REQUESTED
14 THE APPOINTMENT OF EXPERT FINGERPRINT ANALYZER
15 DEFENDANT REQUESTED THE APPOINTMENT OF EXPERT
16 D.N.A., ANALYZER. DEFENDANT REQUEST THAT
17 SEVERAL PRE-TRIAL MOTION(S) BE FILED ON
18 HIS BEHALF. AND DEFENDANT DID ALSO
19 REQUEST THAT WITNESSES BE SUBPOENA
20 TO TESTIFY AT HIS TRIAL.

21 THAT DEFENDANT'S ATTORNEY
22 OF RECORD, MR. PHILIP J. KOHN, HIS
23 DEPUTY(IES) HAVE REFUSED AND/OR FAILED
24 TO ACCOMMODATE THE AFORE-CITED REQUESTS
25 TO THE DATE OF THIS WRITING.

1 "POINTS AND AUTHORITIES"
2 LEGAL ARGUMENT(S).

3 Defendant Justin Porter. Hereinafter
4 defendant, asserts that he is being
5 denied his right to effective assistance
6 of counsel, due to the wholly inadequate
7 actions of his court-appointed counsel,
8 Mr. Philip J. KOHN, the Clark
9 County Public Defender. Further,
10 counsel's action(s) comport to
11 nothing more than a violation of
12 defendant's due process rights, see
13 the due process of law clause(s) of
14 the UNITED STATES CONSTITUTION,
15 AND SEE ARTICLE 1 & 8, OF THE NEVADA
16 STATE CONSTITUTION. ALSO see AFFIDAVIT
17 OF JUSTIN PORTER, ALL ATTACHED Hereto,
18 BY Reference.

19 Defendant has written numerous requests
20 to counsel and counsel has refused and/or
21 failed to accommodate the same,
22 although said requests are lawful
23 and timely made. Please see attached
24 exhibits marked NO. 1, 2, 3, 4, 5, 6,
25 7, and 8.

26 That counsel has never discussed a
27 trial strategy with defendant, although

1 defendant Has Always maintained
2 A Desire to go to TRIAL AND Prove
3 His Factual INNOCENCE. This
4 Fact Has been the case over the
5 Past 17 yrs. Since Counsel was
6 Appointed.
7 Defendant has an UNQUALIFIED Right to
8 legal Assistance that expresses
9 loyalty to defendant. "The Right
10 to Counsel is the Right [also] to
11 effective Assistance of Counsel".
12 see CUYLER V. SULLIVAN, 100 S.Ct. 1708
13 (1980); AND FRAZIER V. U.S., 18 F.3d.
14 778 (9th Cir. 1994). Thus... The
15 adversarial Process Protected by the Sixth
16 Amendment to the UNITED STATES CONSTITUTION
17 Requires that the ACCUSED have "counsel
18 Acting in the Role of AN ADVOCATE". see
19 ANDERS V. CALIFORNIA, 87 S.Ct. 1396 and
20 1480 (1967).
21 A PARTY whose Counsel is unable to provide
22 effective OR adequate Assistance is NO
23 better than one who has NO Counsel AT ALL;
24 AND ANY APPEAL(S) would be futile in it's
25 gesture. see EVITTS V. LUCEY, 105 S.Ct.
26 830 (1985); AND see DOUGLAS V. CALIFORNIA,
27 83 S.Ct. 814 (1963).

1 APPOINTED COUNSEL FOR THIS DEFENDANT
2 HAS DONE NOTHING TO FAIRLY, PROPERLY
3 REPRESENT DEFENDANT SINCE HIS
4 APPOINTMENT, OVER (16 1/2) - "SIXTEEN
5 AND ONE HALF YEARS AGO". THIS ALONE
6 IS A VIABLE CLAIM AS TO INEFFECTIVE
7 ASSISTANCE OF COUNSEL. SEE STRICKLAND
8 V. WASHINGTON, 466 U.S. 668, 687 (1984).

9 Therefore, defendant contends
10 that although counsel has been appointed
11 in the instant case, the actions of
12 counsel, or... lack thereof, have
13 created UNFAIR PREJUDICE AND
14 obstacles which do not comport the
15 FAIR PROCEDURES OWED TO THE DEFENDANT
16 AND HAVE CREATED IREPAIRABLE
17 HARM TO DEFENDANT'S DEFENSE.
18 I.E. A "17yr. delay in his trial."

19 The PLURALITY OPINION IN EVITT
20 AND DOUGLAS, INFERA, MADE IT VERY
21 CLEAR THAT;

22 "There is lacking that equality demanded
23 by the Fourteenth Amendment, where the "rich man"
24 ENJOYS the benefit of the law being RIGHTEOUSLY
25 PRACTICED; IN THAT, COUNSEL'S EXAMINATION STEP-
26 BY-STEP (INTO THE RECORD OF THE CASE), AND
27 RESEARCH OF THE LAW, AND A MARSHALLING OF THE

1 facts and arguments on his behalf is done,
2 as should befit an advocate of defense;
3 while the indigent, so burdened by a
4 preliminary determination that his
5 case is without merit, is forced to
6 shift for himself," 105 S.Ct. At
7 842; 83 S.Ct. At 816-17.

8 NOTWITHSTANDING the strong
9 policy favoring autonomy, "ethical,
10 professional AND constitutional principals"
11 establish counsel's standards owed
12 to his client. See: American BAR
13 Association (ABA), AND Professional
14 Responsibility Code (CPR).

15 SO... CLEARLY, A conflict of
16 interest now exist between counsel,
17 MR. Philip J. KOHN, AND defendant,
18 AS ALL faith AND trust has been
19 diminished AS A result of counsel's
20 actions OR lack thereof, AND A
21 "showing" of conflict of interest
22 requires NO showing of prejudice.
23 See CUYLER V. SULLIVAN, 100 S.Ct. At 1717.

24 The law addresses itself to
25 actualities.

26 Ad Judication is NOT A mere
27 mechanical process, NOR does it compel

1 ANY either OR determination. see
2 GRIFFIN V. ILLINOIS, 76 S. CT. 585
3 592-594 (1956).

4 Therefore, fundamental fairness
5 requires the abolition of [Prejudice]
6 which defendant is presently suffering.
7 This is an ACTUALITY that the law
8 must address. Anything short of
9 abdication would further a manifest
10 of injustice. The "effectiveness
11 (in assistance) of counsel" is an
12 individual's most fundamental right,
13 for without it, every other right
14 defendant has to assert becomes
15 affected. I. E., DEFENDANT'S
16 RIGHT TO A FAST AND SPEEDY TRIAL
17 DENIED TO HIM FOR 17 yrs.

18
19 DATED THIS 18 DAY OF May, 2017
20

21
22 BY: *Justin Porter*
23 JUSTIN PORTER-DEFENDANT
24

25 I, Justin Porter, do herein solemnly
26 swear, under the penalty and pains
27 of perjury, pursuant to N.R.S. 171.102

28

1 AND N.R.S. 208.165
2 That I Did MAKE, OR Did CAUSE
3 to have made, the Above, AFORE:
4 - DRAFTED, MOTION TO DISMISS AND
5 SUBSTITUTE COUNSEL / MOTION
6 TO DISMISS. That the Same is
7 Accurate and is Correct to the best of my
8 Knowledge, memory and belief, except those
9 matters which I have had to Rely upon
10 Information, and AS to those matters I
11 believe them to be true Also.

12
13 DATED THIS 18 DAY OF MAY, 2017

14
15 BY: Justin Porter

16 JUSTIN PORTER - DEFENDANT - Pro. Per.
17
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22
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27

"MOTION TO DISMISS"

AS CAUSE FOR SAID MOTION
TO DISMISS, defendant asserts as
follows;

The 6th Amend. to the U.S. Const., sets
forth the following mandate upon the state's
through the Fourteenth Amend.,

"In All Criminal Prosecutions, the
Accused Shall Enjoy the Right to a Speedy
and Public TRIAL..."

This Constitutional Mandate has been
codified in the state of Nevada, in the
N.R.S., under Section 178.556 (2);

That Herein, I At the Instant
case, Defendant has made several
futile attempts to exercise his Constitutionally
Protected Liberties, to a Speedy and Public
TRIAL.

That over the course of the Past (17 yrs.) Seven-
teen Years, defendant has Begged, and...
Pleaded, to have his Case Brought to
trial, wherein He can Prove his Factual
INNOCENCE. See TRANSCRIPT(S) OF HEARING
DATES, "Sept. 19, 2007 AND NOV. 22, 2010, AND ALSO
see defendant's "MOTION FOR DISMISSAL FOR LACK
OF SPEEDY AND TIMELY PROSECUTION", Received by

1 this Honorable Court, ON OR ABOUT the 16 day
2 OF JUNE, 2016.

3
4 The HIGH COURT OF OUR GREAT
5 COUNTRY HAS LONG AGO SETTLED ALL DIFFERENCES
6 CONCERNING DEFENDANTS [CONSTITUTIONAL
7 GUARANTY] TO A SPEEDY TRIAL, see
8 BARKER V. WINGO, 407 US 514, 33 L.Ed.
9 2d 101, 92 S.Ct. 2182

10 FURTHER...

11 IN BARKER V. WINGO, SUPRA.
12 THE HIGH COURT HELD THAT,
13 "While a defendant's Assertion of, or
14 Failure to Assert, his Right to a speedy trial
15 is one of the factors to be considered in
16 an inquiry into the deprivation of such a
17 Right. The PRIMARY burden REMAINS on the
18 courts and the Prosecutors to ASSURE
19 that cases are speedily brought to TRIAL

20
21 The Instant Case AT BAR is 17 YRS. old.
22 For 17 YRS. the Court and the
23 District Attorney HAS FAILED AND Refused to
24 BRING the Instant Case to trial.

25
26 The Same OVERT, deliberate, PLAIN ON IT'S
27 FACE, CONSTITUTIONAL INFRCTIONS HAVE

1 made it impossible for defendant to
2 Have A FAIR TRIAL, which also violates
3 the 6th amend. to the U.S.C.

4
5 FINALLY, because defendant, after
6 17 yrs. of unduly, delay, on the part
7 of the prosecutor(s) and ineffective
8 Assistance of Defense Counsel, Defendant
9 cannot possibly be given a FAIR TRIAL,
10 could not possibly gather evidence,
11 nor contact his witnesses or otherwise
12 prepare a defense.

13 Defendant Prays this
14 Honorable Court, DISMISS THE INSTANT
15 CASE, for lack of Prosecution and
16 for irreparable violations of defendant's
17 Speedy TRIAL Rights.

18
19
20 DATED THIS 18 DAY OF May, 2017

21
22 BY: Justin Porter
23 JUSTIN PORTER-DEFENDANT-PROPER

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION

TO DISMISS AND SUBSTITUTE COUNSEL
(Title of Document)

filed in District Court Case number DIC-174954

☒ 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.

Justin Porter
Signature

5-18-17
Date

JUSTIN PORTER
Print Name

Title

CERTIFICATE OF SERVICE BY MAILING

I, Justin Porter, hereby certify, pursuant to NRCP 5(b), that on this 18
day of MAY, 2017, I mailed a true and correct copy of the foregoing, "MOTION
TO DISMISS AND SUBSTITUTE COUNSEL"
by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
addressed as follows:

BRIAN Williams
WARDEN - H.D.S.P.
P.O. BOX 650
INDIAN SPRINGS, NV. 89070

STEVEN WOLFSON
DISTRICT ATTORNEY
200 Lewis Ave.
LAS VEGAS, NV. 89155-2212

STEVEN GRIERSON
CLERK OF THE COURT
200 Lewis Ave.
LAS VEGAS, NV. 89155-1160

CC: FILE

DATED: this 18 day of MAY, 2017.

Justin Porter #1042449
JUSTIN PORTER #1042449
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

JUSTIN PORTER # 1042449
P.O. BOX 650 (H.O.S.A.)
INDIAN SPRINGS, NV. 89070

EXHIBIT # 1

APRIL 10, 2017

Jeffrey S. MANINGO, ESQ.
309 S. Third Street
P.O. Box 552610
Las Vegas, NV. 89055

RE: CASE NO. OLC-174954 / "REQUEST FOR
APPOINTMENT OF INVESTIGATOR".

DEAR MR. MANINGO, I am requesting that You, Your
good Office, Please Provide me with AN Investigator,
within (10) TEN WORKING DAYS OF Receipt of
this missive, so that I can Assist with my
defense and Prove my Factual Innocence.

In Advance, THANK You Sincerely
for Your Prompt Compliance.

Justin Porter
Justin Porter

RECEIVED

MAY 22 2017

CLERK OF THE COURT

JUSTIN PORTER #1042449
P.O. Box 650 (H.D.S.P.)
INDIAN SPRINGS, NV. 89070

APRIL , 12 , 2017

Jeffrey S. MANINGO, ESQ.
309 S. Third Street
P.O. Box 552610
LAS Vegas, NV. 89155

RE: CASE NO. OLC174954 / "REQUEST FOR
INFORMATION AND MATERIALS".

DEAR MR. MANINGO, I AM requesting that You,
Your good office, Please Provide me with
the below listed Information and
materials within 30 days from receipt of
this missive, so that I can Assist with
my Defense and Prove my Factual
INNOCENCE.

COPIES OF CRIMINAL AND CIVIL COMPLAINTS FILED
AGAINST ANY PERSONS WHO WORKED DIRECTLY
OR INDIRECTLY ON THE INSTANT CASE,
COPY OF MILITARY RECORDS OF THE SAME PERSONS
LISTED ABOVE.

COPIES OF ANY AND ALL STATEMENTS, DEPOSITIONS
AND/OR REPORTS MADE BY OFFICERS, INFORMANTS,
CONFIDENTIAL INFORMANTS, NURSES, DOCTORS,
EXPERTS, DETECTIVES, INVESTIGATORS, ETC.,
WHO WORKED DIRECTLY AND OR INDIRECTLY.

ON the INSTANT CASE.

COPIES OF PICTURES, VIDEO TAPES, AUDIO TAPES RECORDINGS, IN THE CUSTODY OF THE STATE OF NEVADA, U.S. GOVERNMENT, DISTRICT ATTORNEY, ect., THAT ARE RELATED DIRECTLY AND/OR INDIRECTLY TO THE INSTANT CASE, AND/OR DEFENDANT.

COPIES OF THE NAMES OF ANY PERSONS WHO WORKED DIRECTLY AND/OR INDIRECTLY ON THE INSTANT CASE, AND/OR RELATED TO DEFENDANT. THIS MUST INCLUDE, BUT IS NOT LIMITED TO THE FOLLOWING;

OFFICERS, AGENTS, INFORMANTS, CONFIDENTIAL INFORMANTS, DOCTORS, NURSES, DETECTIVES, INVESTIGATORS, PROSECUTORS, ect.,

FINALLY,

DEFENDANT REQUESTS COPIES OF ANY AND ALL EXCULPATORY INFORMATION AND OR MATERIALS IN THE CUSTODY OF METRO POLICE OFFICERS (LAS VEGAS), LAW ENFORCEMENT AGENTS, CHICAGO POLICE OFFICERS, INFORMANTS, CONFIDENTIAL INFORMANTS, DOCTORS, NURSES, DETECTIVES, INVESTIGATORS, PROSECUTORS, BOTH STATE AND FEDERAL.

IN ADVANCE THANK YOU FOR YOUR PROMPT COMPLIANCE

Justin Porter

JUSTIN PORTER-DEFENDANT

2 of 2

JUSTIN PORTER # 1042449
P.O. Box 650 (H.D.S.A.)
Indian Springs, NV. 89070

APRIL 17, 2017

JEFFREY S. MANINGO, ESQ.
309 S. Third Street
P.O. Box 552610
Las Vegas, NV. 89155

RE: CASE NO. OIC174954 / REQUEST FOR COMPLETE
COPY OF ALL DISCOVERED EVIDENCE.

DEAR MR. MANINGO, I am requesting that you, your
good office, please provide me with a copy of all
discovered evidence in the instant case within
(10), TEN WORKING DAYS OF RECEIPT OF THIS
MISSIVE, SO THAT I CAN ASSIST WITH MY
DEFENSE AND PROVE MY FACTUAL INNOCENCE.

In Advance, Thank You, Justin Porter
Justin Porter

EXHIBIT #4

JUSTIN PORTER #1042449
P.O. Box 650 (H.D.S.P.)
INDIAN SPRINGS, NV. 89070

APRIL 18, 2017

Jeffrey S. MANINGO, ESQ.
309 S. Third Street
P.O. Box 552610
LAS VEGAS, NV. 89155

RE: CASE NO. 01C174954 / REQUEST FOR
COPY OF STATE'S WITNESS LIST.

DEAR MR. MANINGO, Herein I am requesting
that you, your good office, please forward
to me a copy of the state's witness
list, so that I can assist with my
defense.

In advance, thank you
for your prompt compliance and professional
assistance.

Justin Porter
JUSTIN PORTER

JUSTIN PORTER #1042449
P.O. Box 650 (H.D.S.A.)
INDIAN SPRINGS, NV. 89070

EXHIBIT #5

APRIL 20, 2017

Jeffrey S. MANINGO, ESQ.
309 S. Third Street
P.O. Box 552610
LAS VEGAS, NV. 89155

RE: CASE NO. 01C-174954 / "REQUEST FOR
THE APPOINTMENT OF EXPERT FINGER-
- PRINT ANALYZER"

DEAR MR. MANINGO, I am requesting that you,
your good office, APPOINT A EXPERT FINGER -
- PRINT ANALYZER, to my case.

IN ADVANCE, THANK YOU SINCERLY
FOR YOUR TIME AND PROFESSIONALISM.

Justin Porter
JUSTIN PORTER - DEFENDANT

JUSTIN PORTER # 1042449
P.O. Box 650 (H.D.S.P.)
INDIAN SPRINGS, NV, 89070

EXHIBIT #6

APRIL 23, 2017

Jeffrey S. MANINGO, ESQ.
309 S. Third Street
P.O. Box 552610
Las Vegas, NV, 89155

RE: CASE NO. OIC-174954 / REQUEST FOR
THE APPOINTMENT OF EXPERT D.N.A. ANALYZER

DEAR MR. MANINGO, I AM requesting that you,
your good office, please, appoint a expert
D.N.A. ANALYZER to my case.

In Advancer thank You Sincerely
for Your time and Professionalism.

Justin Porter
Justin Porter - Defendant

EXHIBIT #7

JUSTIN PORTER # 1042449
P.O. Box 650 (H.D.S.P.)
INDIAN SPRINGS, NV. 89070

MARCH 31, 2017

Jeffrey S. MANINGO, ESQ.
309 S. Third Street
P.O. Box 552610
Las Vegas, NV. 89155

RE: CASE NO. 01C174954 / Pre Trial MOTIONS
Which MUST BE filed on behalf of Defendant

1. Formal Written MOTION FOR COPY OF ALL DISCOVERED EVIDENCE
2. MOTION TO DISMISS - All charges.
3. MOTION TO SUPPRESS IN-VOLUNTARY STATEMENTS BY
DEFENDANT / OR EXCLUSIONARY HEARING.
4. MOTION FOR INDEPENDANT, PRIVATE INVESTIGATOR,
NOT UNDER CONTRACT WITH STATE OF NEVADA OR
COUNTY OF CLARK.
5. MOTION FOR EVIDENTIARY HEARING
6. MOTION FOR INDEPENDANT D.N.A. EXPERT, to
be APPOINTED.
7. MOTION FOR INDEPENDANT Ballistics Expert,
to be APPOINTED.

DEAR MR. MANINGO, I am requesting that You, Your good office,
Please file the Afore-listed motions on my behalf.

In Advance, Thank You.

Justin Porter
Justin PORTER

JUSTIN PORTER #1042449
P.O. Box 650 (H.D.S.P.)
INDIAN SPRINGS, NV. 89070

APRIL 27, 2017

Jeffrey S. MANINGO, ESQ.
309 S. Third Street
P.O. Box 552610
Las Vegas, NV. 89155

RE: CASE NO. OLC-174954 / "WITNESSES WHO
MUST BE SUBPOENA, TO TESTIFY AT TRIAL."

DEAR MR. MANINGO, the following is a list of
Persons/Witnesses who MUST BE SUBPOENA TO TESTIFY AT
MY TRIAL, so that I can Prove my Factual Innocence.

1. KRISTOPHER Deloney
2. DOROTHY Deloney
3. Beverly Porter
4. Pookie RAY
5. Bill

Justin Porter
Justin PORTER

CERTIFICATE OF SERVICE BY MAILING

I, Justin D. Porter, hereby certify, pursuant to NRCP 5(b), that on this 3
day of MAY, 2017, I mailed a true and correct copy of the foregoing, "MEMORANDUM / NOTICE TO THE COURT EX-PARTE"
by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
addressed as follows:

Steven D. GRIERSON, C.C.
200 Lewis Ave. 3RD Floor
Las Vegas, NV 89155-1160

Steven B. Wolfson
200 Lewis Ave.
Las Vegas, NV 89155-2212

Jeffrey S. Maningo
309 S. Third Street
P.O. Box 552610
Las Vegas, NV 89155

CC: FILE

DATED: this 3 day of MAY, 2017.

Justin D. Porter 1042449
Justin D. Porter #1042449
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Justin Porter #1042449 3762
P.O. Box 650
Indian Springs, NV 89070

Hasler 2-83 FIRST CLASS MAIL
05/19/2017
US POSTAGE \$001.82-
011E12550757

Confidential

STEVEN D. GRIERSON, CLERK OF THE COURT
200 Lewis Ave., 3RD FLOOR
LAS Vegas, NV 89155-1160

(CONFIDENTIAL)

CONFIDENTIAL

LEGAL MAIL

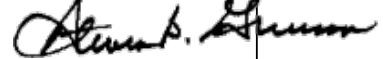
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LAW LIBRARY



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DISTRICT COURT

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CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,

CASE#: 01C174954

8

Plaintiff,

DEPT. VI

9

vs.

10

JUSTIN D. PORTER, aka JUG
CAPRI PORTER,

11

Defendant.

12

13

BEFORE THE HONORABLE JACQUELINE M. BLUTH,
DISTRICT COURT JUDGE

14

WEDNESDAY, JUNE 26, 2019

15

**RECORDER'S TRANSCRIPT OF HEARING: SEVERE COUNTS -
PER ORDER FILED ON JULY 3, 2008**

16

17

APPEARANCES:

18

19

For the State:

LISA LUZAICH, ESQ.
Chief Deputy District Attorney

20

21

22

For the Defendant:

ADAM L. GILL, ESQ.

23

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RECORDED BY: De'AWNA TAKAS, COURT RECORDER

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Las Vegas, Nevada, Wednesday, June 26, 2019

[Hearing began at 10:16 a.m.]

THE COURT: Okay. 01C17494 -- 54 State of Nevada versus Justin Porter. Who's present in custody with Mr. Gill. Ms. Luzaich on behalf of the State. So --

MR. GILL: Could we approach, Your Honor?

THE COURT: Yeah. Somebody help me understand what's happening here.

[Bench conference - not transcribed]

THE COURT: Okay. So, Mr. Porter, so here's the issue, is -- why this is on today --

THE DEFENDANT: Excuse me, Your Honor, with all due respect, I never -- that a -- speak with my lawyer. And I know that I have a right to speak with my lawyer when it comes to matter of my defense.

THE COURT: Okay.

THE DEFENDANT: And --

MR. GILL: Like, right now?

THE DEFENDANT: Yeah, like, right now. Anytime that court realizes -- recognize that I could speak to you at any time.

[Colloquy between Mr. Gill and Defendant]

MR. GILL: Thank you, Your Honor.

THE COURT: Okay. Mr. Gill --

MR. GILL: Yes, Your Honor.

THE COURT: -- does Andrea Simmons work for you?

MR. GILL: Yes, Your Honor, she's present in the courtroom in

1 the back row.

2 THE COURT: Okay. All right. So, Mr. Porter, --

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: -- the reason why this is on is just so -- for
5 clarification -- obviously this case has been going on a long time, which
6 I'm sure you're well aware; right?

7 THE DEFENDANT: Very much aware.

8 THE COURT: So there's been a couple -- Judge Cadish was
9 the judge for a long time, and then when she left for the Supreme Court
10 there were two senior judges sitting before I took the bench.

11 THE DEFENDANT: Well, ma'am --

12 THE COURT: Wait, no, my turn. So at that point in time --
13 now this is my case. So I'm going to oversee it. I just needed to
14 understand what counts had been already been tried --

15 THE DEFENDANT: Right.

16 THE COURT: -- and what counts are still out there.

17 THE DEFENDANT: Well, personally, Judge McGroarty was
18 the first judge.

19 THE COURT: Oh, okay.

20 THE DEFENDANT: Then Lee Gates, and then --

21 THE COURT: Judge Cadish.

22 THE DEFENDANT: -- Cadish.

23 THE COURT: Got it.

24 THE DEFENDANT: As far as I explained to my lawyer -- he's
25 my lawyer. He's to aid me in my defense. And what I wanted to do was

1 different from what he wanted to do. And, I think, right now what he's
2 trying to do is not for the best of my interest, because if he's my counsel
3 then what I ask him to do for me for my defense then, I think, he must
4 assist me with it.

5 THE COURT: Well that's actually not the law. So there's a lot
6 of --

7 THE DEFENDANT: Well it -- according to the --

8 THE COURT: Oh, okay --

9 THE DEFENDANT: -- system of --

10 THE COURT: -- Mr. Porter let --

11 THE DEFENDANT: -- of --

12 THE COURT: -- me tell you how this going roll --

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: -- between you and I. When I'm talking, you're
15 going to listen. And you're not going to keep interpreting me, because
16 that's not how I do it.

17 THE DEFENDANT: I want to speak to the Judge.

18 THE COURT: And he's my Marshall, and when --

19 THE DEFENDANT: I understand.

20 THE COURT: -- you get out of line. He's going to get close to
21 you. So --

22 THE DEFENDANT: I'm not --

23 THE COURT: -- listen up.

24 THE DEFENDANT: -- out of line, ma'am.

25 THE COURT: If you --

1 THE MARSHAL: Stop interrupting.

2 THE COURT: -- want to represent yourself, that is your
3 choice, and you can do so. But Mr. Gill isn't just your errand boy who
4 does whatever you want. There are many, many decisions that are
5 completely up to him.

6 MR. PORTER: But this --

7 THE COURT: And you keep acting like he's going to aid you.
8 That's not how this goes. There are --

9 THE MARSHAL: Stop talking.

10 THE COURT: -- decisions that --

11 THE DEFENDANT: I have a --

12 THE COURT: -- as an attorney --

13 THE DEFENDANT: -- right to talk too.

14 THE COURT: There are decisions as an attorney -- strategic
15 decision that he's going to make. There are definite rights that you
16 have, like, right to testify, those are things that are up to you.

17 THE DEFENDANT: Right.

18 THE COURT: So if you wish to represent yourself, that's fine.

19 THE DEFENDANT: Right. Yes, ma'am, it's my defense I'm
20 the -- life blood of the law when it comes to -- my defense it's -- not my
21 attorney that suffers the consequences. But the court should recognize,
22 that I am the defendant, will be the one that suffer the consequences.
23 Not the court.

24 THE COURT: I am aware of that.

25 THE DEFENDANT: Oh, okay.

1 THE COURT: And I just need you to know --
2 THE DEFENDANT: And --
3 THE COURT: -- what the law is.
4 THE DEFENDANT: -- I understand, ma'am. Anytime there's
5 a conflict between what's lawful for me and what my counsel feel is
6 lawful for him, then there's a conflict of interest.
7 THE COURT: You're not getting another attorney, because --
8 THE DEFENDANT: I didn't --
9 THE COURT: -- you've already --
10 THE DEFENDANT: -- ask for another attorney, ma'am.
11 THE MARSHAL: Stop interpreting the Judge.
12 THE COURT: Okay.
13 THE DEFENDANT: I'm just --
14 THE COURT: So --
15 THE DEFENDANT: -- explaining that --
16 THE COURT: -- here the deal --
17 THE DEFENDANT: -- she asked me a question. I have a
18 right to answer it.
19 THE COURT: Mr. Porter.
20 THE DEFENDANT: Yes, ma'am.
21 THE COURT: Would you like to represent yourself?
22 THE DEFENDANT: Yes, ma'am.
23 THE COURT: Okay. So you're going to sit down and at the
24 end of this calendar we'll do what's referred to as a *Faretta* canvas --
25 THE DEFENDANT: Yes, ma'am --

1 THE COURT: -- so we can --
2 THE DEFENDANT: -- I'm fully --
3 THE COURT: -- go forward.
4 THE DEFENDANT: -- aware.
5 THE COURT: Great. So have a seat.
6 Okay, Mr. Gill --
7 MR. GILL: Do you need me --
8 THE COURT: -- anything else?
9 MR. GILL: No, Your Honor. Do you need me back for that
10 *Faretta* canvas?
11 THE COURT: Yes, please.
12 MR. GILL: I just have to run to JC 7, and Herndon starts at
13 11, but I will be back -- I'll communicate with your department then.
14 THE COURT: Okay.
15 MS. LUZAICH: Could you give us just a guestimate as when?
16 Just a guestimate, --
17 THE COURT: Yeah.
18 MS. LUZAICH: -- please.
19 MR. GILL 11?
20 MS. LUZAICH: Well Judge Herndon starts at 11, so maybe a
21 few minutes after?
22 MR. GILL: Yeah, but he --
23 THE COURT: No, like 11:15.
24 MR. GILL: Okay.
25 MS. LUZAICH: Okay.

1 THE COURT: All right, thank you.

2 MS. LUZAICH: Thank you.

3 MR. GILL: Thank you, Your Honor.

4 [Hearing concluded at 10:26 a.m.]

5 [Hearing began at 11:04 a.m.]

6 THE COURT: Okay, we're back on in State of Nevada versus
7 Justin Porter, 01C174954, page 4. Mr. Porter is present in custody, Mr.
8 Gill on his behalf. Ms. Luzaich on behalf of the State.

9 Mr. Porter, earlier you referenced that you wanted to represent
10 yourself. And per the law I have to do what is referred to as *Faretta*
11 canvas in order to do so. Are you ready to proceed with the *Faretta*
12 canvas?

13 THE DEFENDANT: Ma'am, pardon me for a second, don't
14 mean to be rude --

15 THE COURT: Okay.

16 THE DEFENDANT: -- but -- yes. But also at the same time I
17 would like to also put on the record according to *Faretta versus*
18 *California* that once I assert that I would like to defend myself and this
19 knowingly and intelligently waive that I don't need counsel that the courts
20 recognize that is a right under the 6th amendment to be able to represent
21 myself as long as it's knowingly and intelligently.

22 THE COURT: Yep.

23 THE DEFENDANT: So as far as the *Faretta* canvas goin,
24 continue.

25 THE COURT: Okay. That sounds great.

1 So you have made a request to proceed without a lawyer
2 representing your interests?
3 THE DEFENDANT: Yeah.
4 THE COURT: Do you understand that you have the right to
5 have a lawyer represent you and that the court has appointed a lawyer
6 for you, at no cost, if you cannot afford a lawyer?
7 THE DEFENDANT: Yes, ma'am.
8 THE COURT: Have you thought this matter through and are
9 you certain that you wish to proceed without a lawyer?
10 THE DEFENDANT: Accurately, all the way through.
11 THE COURT: Are you currently under the influence of any
12 medications, alcohol or drugs at this time?
13 THE DEFENDANT: Of course not, ma'am.
14 THE COURT: Do any of these things affect your
15 understanding of the proceedings that are happening today?
16 THE DEFENDANT: No, ma'am.
17 THE COURT: Have you ever experienced any mental health
18 issues?
19 THE DEFENDANT: No, ma'am.
20 THE COURT: Have you ever had any competency issues?
21 THE DEFENDANT: Not so far.
22 THE COURT: Do you have any physical health issues that
23 would prevent you from understanding the proceedings that are
24 happening here today?
25 THE DEFENDANT: No, ma'am.

1 THE COURT: Are you a United States citizen?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Do you understand that your current lawyer,
4 Mr. Gill, has experience in handling criminal matters, and, in particular,
5 handing criminal jury trials?

6 THE DEFENDANT: With all do, yes, respect to Mr. Adam, yes
7 ma'am.

8 THE COURT: Okay. Do you understand that you have a --
9 constitutional right to an attorney to advise and represent you at all
10 times?

11 THE DEFENDANT: That's under the 6th amendment.

12 THE COURT: Yep. An attorney is required to do everything
13 that an attorney can honestly do to help you. The attorney will
14 investigate your case, talk to witnesses, study the law, and defend you
15 at trial. No one can take that right away from you. And I understand that
16 you understand; right?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Do you understand that a defendant who
19 represents himself may impart to the jury a negative feeling since a
20 lawyer is not present to handle your case with you?

21 THE DEFENDANT: Absolutely.

22 THE COURT: Have you ever represented yourself before in a
23 criminal action?

24 THE DEFENDANT: No, ma'am.

25 THE COURT: Okay. Do you have any educational

1 background in legal matters?

2 THE DEFENDANT: No, I'm layman.

3 THE COURT: Okay. And just give me an idea of your
4 educational background?

5 THE DEFENDANT: As far as *Faretta* right now, the accused -
6 -

7 THE COURT: Oh, no, I'm sorry. I don't mean about that. I
8 mean, like, how far did you go in high school?

9 THE DEFENDANT: I went to the 10th grade, but I took the
10 GED test in prison.

11 THE COURT: And passed it?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Okay. Do you have a general understanding of
14 the -- English language?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: Do you have any legal training other than
17 what've taught yourself within the system?

18 THE DEFENDANT: No, ma'am.

19 THE DEFENDANT: Are you familiar with the Eighth Judicial
20 District Court Rules?

21 THE DEFENDANT: So far, yes ma'am.

22 THE COURT: Okay. Do you understand that there are rules
23 controlling the way a criminal case proceeds through the system and the
24 way that the criminal trial, in fact, does proceed?

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: Okay. Do you understand that you will be
2 bound by the same rules as anyone else who would be involved in a
3 similar matter as your attorney?
4 THE DEFENDANT: Yes, ma'am.
5 THE COURT: Do you understand that you will be held to the
6 same standard as any lawyer who might appear in a similar matter
7 representing a client?
8 THE DEFENDANT: Yes, ma'am.
9 THE COURT: Are you -- familiar with the Rules of Evidence
10 that are used in the State of Nevada?
11 THE DEFENDANT: Yes, ma'am. Every --
12 THE COURT: Do you -- do you understand that these rules
13 control what evidence may be introduced at any trial?
14 THE DEFENDANT: Yes, ma'am.
15 THE COURT: And that you will be required to follow these
16 rules in the same way as any other person, or attorney, who would
17 appear in court?
18 THE DEFENDANT: Yes, ma'am.
19 THE COURT: Okay. So explain to me what that means to
20 you that you --
21 THE DEFENDANT: But if --
22 THE COURT: -- you're gonna -- go ahead.
23 THE DEFENDANT: First of all evidence is something that's
24 obtained by the government through forensic, whatever, -- way -- that
25 the officers deemed -- need to be necessary to receive, or if through the

1 courts, possible, that the courts recognize that it's --

2 THE COURT: Admissible?

3 THE DEFENDANT: Admissible, yes ma'am. Thank you,
4 correct words for me.

5 THE COURT: Okay. Do you understand that the rules we
6 follow may make it difficult for you to ask questions in a way that you
7 might wish to ask a question? So --

8 THE DEFENDANT: Of course, ma'am.

9 THE COURT: -- let me --

10 THE DEFENDANT: Of course.

11 THE COURT: -- give you an example. So in law school we
12 learn the rules of evidence, for instance, hearsay. So, you know, let's
13 say Witness A is on the stand and you want to ask Witness A what
14 Witness B said because it's important. Do you understand that there are
15 rules --

16 THE DEFENDANT: Yeah.

17 THE COURT: -- like the hearsay rules that would prevent you
18 from doing that?

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Okay.

21 THE DEFENDANT: Some hearsay is also not -- is in
22 admissible in some, is not dependent on if it's wrote, or a statement.

23 THE COURT: Yep. Okay. Since you are not --

24 MS. LUZAICH: Well --

25 THE DEFENDANT: Reading?

1 MS. LUZAICH: -- reading versus statement doesn't make --
2 THE DEFENDANT: Well --
3 MS. LUZAICH: -- a difference.
4 THE DEFENDANT: -- and if it's on paper -- if it's already been
5 deemed to be evidence that's -- of in importance that someone has
6 spoken on the record. And for instance, if there is no witness and
7 somebody may have had [indiscernible] them not being able to show up
8 to court then the court can use that. Then don't become hearsay.
9 MS. LUZAICH: Okay.
10 THE COURT: So there are certain -- yeah. So there are
11 certain exemptions to the hearsay rule, which are found under the
12 Nevada Revised Status, under the hearsay rule. Which say -- I think
13 rule 51 --
14 THE DEFENDANT: And also in the federal rule, as well.
15 THE COURT: Okay.
16 MS. LUZAICH: The federal rule, just so he's clear. The
17 federal rules do not apply here.
18 THE DEFENDANT: Well federal rules --
19 MS. LUZAICH: We are not in federal court.
20 THE DEFENDANT: -- always apply to every 50 states.
21 MS. LUZAICH: No, they don't.
22 THE COURT: So in Eighth Judicial District Court the federal
23 rules of evidence do not apply.
24 THE DEFENDANT: In this --
25 THE COURT: The Nevada Revises Status under NRS

1 Chapter 51 will have the hearsay rules. They're very --

2 THE DEFENDANT: Okay.

3 THE COURT: They're very similar to the federal rules, but
4 you would definitely want to study those; okay?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: So like I was explaining, since there are rules
7 of Rules of Evidence, you may not know the appropriate way to frame a
8 question, like an attorney would, but you understand --

9 THE DEFENDANT: I will learn.

10 THE COURT: -- that? Okay, you're going to learn; all right.
11 Do you understand that the court cannot and will not function as your
12 lawyer?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: And that I cannot give you any legal advice or
15 help?

16 THE DEFENDANT: Of course.

17 THE COURT: I have to treat you just like I would treat a
18 prosecutor or a defense attorney.

19 THE DEFENDANT: Yes, ma'am.

20 THE COURT: Do you understand that the fact that you may
21 lack personal knowledge of the Court Rules, Procedure, and the Rules
22 of Evidence will not be a reason for me to ignore these rules that I'm still
23 have to make sure you're bound by those?

24 THE DEFENDANT: And the Supreme Court, as well, too
25 ma'am.

1 THE COURT: Yes. And you're -- you understand that?
2 THE DEFENDANT: Yes, ma'am.
3 THE COURT: Okay. Do you understand that you may lose --
4 sorry go back. Do you understand that if you represent yourself, you will
5 give up the right to later claim that you did not have effective and proper
6 legal counsel?
7 THE DEFENDANT: Yes, ma'am.
8 THE COURT: Do you understand that you may lose an
9 appeal on evidence issues or any part of the trial because you do not
10 know how to make the proper --
11 THE DEFENDANT: Objections.
12 THE COURT: -- objection? And you're okay with that?
13 THE DEFENDANT: Yes, ma'am.
14 THE COURT: All right. Now I need to pull up -- do either one
15 of you, at this time, have a copy of the current, either -- indictment or
16 information?
17 THE DEFENDANT: Oh, I'm fully I'm aware of them -- the
18 information --
19 MR. GILL: He might, Judge. I --
20 THE DEFENDANT: -- information.
21 MR. GILL: -- don't on me.
22 THE COURT: Okay.
23 MS. LUZAICH: I didn't bring with me, Judge. I apologize.
24 THE COURT: That's all right.
25 THE COURT: Is --

1 THE DEFENDANT: I --

2 THE COURT: -- it --

3 THE DEFENDANT: -- actually -- have one in my -- in my legal
4 materials in my room.

5 THE COURT: Okay. That's --

6 MS. LUZAICH: That's gonna be -- and I apologize. There's
7 gonna need to be a next in order amended filed, because the murder
8 incident has already been tried and I have not generate an amended
9 since then.

10 THE COURT: Okay. So in the information it looks to me like
11 you're charged with multiple counts. I need to put them on the record.

12 THE DEFENDANT: Right.

13 THE COURT: Burglary while in possession of a deadly
14 weapon; first degree kidnapping with use of a deadly weapon; sexual
15 assault with use of a deadly weapon; robbery with use of a deadly
16 weapon; first degree kidnapping with use of deadly weapon with
17 substantial bodily harm; --

18 THE DEFENDANT: Uh-huh.

19 THE COURT: --sexual assault with use of deadly weapon
20 with substantial bodily harm; an attempt murder with use of a deadly
21 weapon; first degree arson with use of deadly weapon; first degree
22 kidnapping with use of a deadly weapon, victim 65 years of age or older;
23 sexual assault with use of a deadly weapon, victim 65 years of age or
24 older; robbery with use of a deadly weapon, victim 65 years of age or
25 older; battery with intent to commit a crime, victim 65 years of age or

1 older; attempt robbery with use of a deadly weapon. And then, I believe,
2 the murder with use of a deadly weapon, and battery with use of a
3 deadly weapon were for the previous case.

4 MS. LUZAICH: Correct.

5 THE DEFENDANT: Yep.

6 MS. LUZAICH: Well same case but the severed out --

7 THE COURT: Sorry. Severed --

8 MS. LUZAICH: -- parts.

9 THE COURT: -- our counts.

10 MS. LUZAICH: Correct.

11 THE COURT: And you understand that those are the charges
12 against you?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: So do you understand the elements of each of
15 those crimes?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: Okay. So talk to me about the elements of
18 burglary while in possession of a deadly weapon.

19 THE DEFENDANT: Well burglary -- while in possession of a
20 deadly weapon is staten that I burglarized a dwelling with -- not saying
21 committin, I mean, a sayin that I'm guilty but --

22 THE COURT: I know.

23 THE DEFENDANT: -- while in commission of -- havin a
24 weapon. While havin a -- firearm, or any type of deadly weapon. A
25 weapon that could be used to harm, hurt.

1 THE COURT: Sure. And so, burglary, when you say
2 burglarized it means?
3 THE DEFENDANT: I didn't say I burglarized.
4 THE COURT: No, so -- just so you know. These aren't an
5 admission in anyway.
6 THE DEFENDANT: Right.
7 THE COURT: We're just talking about, hypothetically, to
8 charges; --
9 THE DEFENDANT: Okay.
10 THE COURT: -- okay?
11 THE DEFENDANT: Just clearing it up.
12 THE COURT: That's all right. So stating that you, allegedly, -
13 -
14 THE DEFENDANT: I got it.
15 THE COURT: -- entered a dwelling with the intent --
16 THE DEFENDANT: Intent.
17 THE COURT: -- to commit a crime, or a felony, or a --
18 THE DEFENDANT: Yes, ma'am.
19 THE COURT: -- larceny. That -- those are the elements.
20 And, obviously, like you said with deadly weapon. That you had a
21 deadly weapon in your hands or that you came --
22 THE DEFENDANT: Let's not say we -- me.
23 THE COURT: But -- that's what we're going to have to this,
24 because --
25 THE DEFENDANT: All right.

1 THE COURT: -- we're just talking about the elements of the
2 charges you're charged with.

3 THE DEFENDANT: Right.

4 THE COURT: But I want the record to clearly reflect at no
5 time is Mr. Porter making any --

6 THE DEFENDANT: Admission.

7 THE COURT: -- admission; okay?

8 THE DEFENDANT: Yes.

9 THE COURT: Let's talk about first degree kidnapping with
10 use of a deadly weapon. Talk to me about the elements of that.

11 THE DEFENDANT: Well elements of kidnapping with use of a
12 deadly weapon is, taking by force to either harm, in any type of way,
13 murder, kill, sexual assault, and all the beyond --

14 THE COURT: Okay.

15 THE DEFENDANT: -- and [indiscernible] above.

16 THE COURT: So -- but yes, you basically have a -- it doesn't
17 always have to be a force --

18 THE DEFENDANT: Pull'em.

19 THE COURT: -- you can either seize that person --

20 THE DEFENDANT: Yep.

21 THE COURT: -- confine them, inveigle, entice. But you're
22 general understanding of taking that individual, moving them with the
23 intent to rob them, commit sexual assault, that is kidnapping.

24 THE DEFENDANT: Right.

25 THE COURT: All right. So the next charge would be sexual

1 assault with use of a deadly weapon. Talk to me about you're
2 understanding in regards to the --
3 THE DEFENDANT: Taking --
4 THE COURT: --element.
5 THE DEFENDANT: -- advantage of, in a sexual manner
6 without the consent of the individual.
7 THE COURT: That's right. And that includes -- or the actual
8 definition would be penetration.
9 THE DEFENDANT: Yeah.
10 THE COURT: All right. So let's talk about your understanding
11 of the elements of robbery.
12 THE DEFENDANT: Taken from an individual, victim,
13 belonging of theirs with --
14 THE COURT: No, you're right.
15 THE DEFENDANT: I'm just throwed off from all the other
16 stuff.
17 THE COURT: But with force.
18 THE DEFENDANT: With force, yes.
19 THE COURT: Or attempted force.
20 THE DEFENDANT: Attempted force, yes.
21 THE COURT: Talk to me about your understating -- what is
22 substantial bodily harm?
23 THE DEFENDANT: The harming of someone by either force -
24 - brutal force, you know, hitting, beaten, --
25 THE COURT: And so when you have substantial bodily harm

1 you have what's referred to as either, like, a permanent scar --
2 THE DEFENDANT: Scar, yeah permanent --
3 THE COURT: -- prolonged --
4 THE DEFENDANT: -- scar.
5 THE COURT: -- physical pain, things like --
6 THE DEFENDANT: Yes, ma'am.
7 THE COURT: -- that; all right?
8 THE DEFENDANT: Injury.
9 THE COURT: Talk to me about your understanding of what
10 attempt murder is.
11 THE DEFENDANT: Attempt murder is to attempt to kill
12 someone.
13 THE COURT: But failing to do --
14 THE DEFENDANT: Failing --
15 THE COURT: -- so.
16 THE DEFENDANT: -- to do so. Yeah.
17 THE COURT: What about first degree arson?
18 THE DEFENDANT: First degree arson -- I don't -- burning a
19 dwelling with the malice -- thought of doing it before doing it, while doing
20 it.
21 THE COURT: Okay. I think that, you know, victims 65 years
22 of age or older, is probably pretty self --
23 THE DEFENDANT: Yeah.
24 THE COURT: -- explanatory; right? The victim --
25 THE DEFENDANT: It's an --

1 THE COURT: -- has to be --
2 THE DEFENDANT: -- enhancement.
3 THE COURT: That's right.
4 THE DEFENDANT: It's an enhancement.
5 THE COURT: What about battery with intent to commit a
6 crime? Talk to me about your understanding of that.
7 THE DEFENDANT: As you say, injuring someone -- with
8 intent to take something from them.
9 THE COURT: Yeah, or to commit a crime.
10 THE DEFENDANT: Or to commit a crime.
11 THE COURT: All right. Just making sure we get all of the
12 charges. All right. And I -- you know I think -- did we already do -- nope
13 never mind, sorry.
14 All right. So -- now do you understand the sentencing
15 parameters for each of those?
16 THE DEFENDANT: Yeah, a lot of time.
17 THE COURT: So, in regards to --
18 THE DEFENDANT: Robbery is a 2 to -- no burglary is a 2 to
19 a, I think it's, correct 2 to 5?
20 THE COURT: Burglary, I believe, a 1 to 10 --
21 THE DEFENDANT: 1 to 10?
22 THE COURT: -- or a 2 to 10.
23 THE DEFENDANT: 1 to 10, 2 to 10.
24 THE COURT: And then when that's done with a possession
25 of deadly --

1 THE DEFENDANT: Weapon --
2 THE COURT: -- weapon --
3 THE DEFENDANT: It's an enhancement.
4 MR. GILL: I'm sorry; it's a 2 to 10 1 to 10, on the deadly --
5 THE DEFENDANT: 2 to 10 1 to 10.
6 THE COURT: Okay.
7 MR. GILL: Is that correct?
8 MS. LUZAICH: Well back in 1999 --
9 MR. GILL: That's also --
10 MS. LUZAICH: -- burglary was a 1 to 5.
11 MR. GILL: That's fair.
12 MS. LUZAICH: And burglary in possession of a weapon was
13 a little more than 1 to 5, I just don't remember how much.
14 THE COURT: Okay.
15 MR. GILL: That's also true.
16 THE COURT: What about first degree kidnapping with use of
17 a deadly weapon. Do you understand --
18 THE DEFENDANT: It's a life -- life in prison sentence.
19 THE COURT: What about the sexual assaults?
20 THE DEFENDANT: That could be depending on, I think it
21 was, matters involved, it could be life imprisonment.
22 THE COURT: So in the regards to the sex assault -- there
23 doesn't have to be malice involved.
24 THE DEFENDANT: Right.
25 THE COURT: But in the 90s, Ms. Luzaich, with the sex

1 assault with the deadly weapon --

2 MS. LUZAICH: 10 to life, plus 10 to life.

3 THE DEFENDANT: 10 to life. That's 10 to life.

4 THE COURT: Okay. What's your understanding -- you talked

5 about robbery, I think, you talked about robbery first before you talked

6 about the burglary. But what's your understanding of robbery?

7 THE DEFENDANT: My understanding of robbery -- of time

8 sentencing frame?

9 THE COURT: Time.

10 THE DEFENDANT: Robbery is basically 2 to -- no, no, no 4 to

11 10 -- could be 4 to 10 the sentencing --

12 MS. LUZAICH: 2 to --

13 THE DEFENDANT: -- structure --

14 MS. LUZAICH: -- 15.

15 THE COURT: 2 to 15.

16 THE DEFENDANT: 2 to --

17 MS. LUZAICH: 2 to --

18 THE DEFENDANT: -- 15 --

19 MS. LUZAICH: -- 15.

20 THE DEFENDANT: -- okay.

21 MS. LUZAICH: With deadly weapon --

22 THE DEFENDANT: 2 to 15 with --

23 MS. LUZAICH: -- equal and consecutive --

24 THE DEFENDANT: -- the deadly weapon?

25 MS. LUZAICH: -- 2 to 15.

1 THE DEFENDANT: But it could also, well most people I
2 know, take deals for 4 to 10 so.
3 THE COURT: Oh, I see what you're saying.
4 THE DEFENDANT: Yeah.
5 THE COURT: On the men with the deadly weapon
6 enhancement you always have to add that --
7 THE DEFENDANT: Enhancement. Yeah with the deadly
8 weapon it's anywhere from 1 to 20 years now.
9 MS. LUZAICH: No, it's an equal and consecutive, --
10 THE DEFENDANT: Equal and consecutive.
11 MS. LUZAICH: -- because the law applies back then.
12 THE DEFENDANT: Oh. Back then --
13 THE COURT: Okay?
14 THE DEFENDANT: -- among the 2000 law.
15 THE COURT: That's okay. So attempt murder with use of
16 deadly weapon, do you know the sentencing range in regards to that?
17 THE DEFENDANT: Yeah. Yeah.
18 THE COURT: Attempt murder -- tell me about it.
19 THE DEFENDANT: Is it, if I'm correct, it's a 2 to 5. No, no,
20 no, no, no, no, no, no, no, no, no, it's -- ranges from different --
21 THE COURT: 2 to 20.
22 THE DEFENDANT: 2 to 20 in a different number.
23 THE COURT: With the deadly weapon of --
24 THE DEFENDANT: With the deadly weapon enhancement --
25 THE COURT: -- equal and consecutive.

1 THE DEFENDANT: -- another 22 -- 2 to 20 consecutive
2 because I fall under the old law enhancement.

3 THE COURT: And you also understand that any time where
4 you a have victim 65 years of age or older like you've --

5 THE DEFENDANT: That enhancement --

6 THE COURT: -- been saying --

7 THE DEFENDANT: -- is added.

8 THE COURT: -- it's an enhancement; --

9 THE DEFENDANT: It's an enhancement.

10 THE COURT: -- right?

11 THE DEFENDANT: Uh-huh.

12 THE COURT: We've done all the -- battery with intent to
13 commit a crime, are you understanding -- do you know the charge --
14 sorry, the sentencing structure for that one?

15 THE DEFENDANT: Sentencing structure -- I'm not familiar
16 with it completely. But --

17 THE COURT: Ms. Luzaich on a battery with intent victim 65
18 or older?

19 MS. LUZAICH: 1 to 5, plus 1 to 5 --

20 THE DEFENDANT: 1 to 5 plus.

21 MS. LUZAICH: -- in 99.

22 THE COURT: All right. An attempt robbery with use of a
23 deadly weapon, are you familiar with that structure?

24 THE DEFENDANT: If I'm correct, it is a 1 -- to 5 too as well,
25 no, no, no 1 to -- 3 -- 1 to 4.

1 MS. LUZAICH: 1 to 10.
2 THE DEFENDANT: 1 to 10?
3 THE COURT: It did.
4 THE DEFENDANT: That's that same as a manslaughter.
5 THE COURT: Yeah.
6 MS. LUZAICH: Same as a voluntary, yep.
7 THE DEFENDANT: Voluntary manslaughter.
8 THE COURT: With deadly weapon enhancement.
9 THE DEFENDANT: Enhancement.
10 THE COURT: So -- the point in, you know, in going over all
11 this is that, you understand if you're found guilty of one or more of those
12 crimes, the court can sentence to those guidelines and can even do it
13 concurrently or consecutively, one after --
14 THE DEFENDANT: Yes.
15 THE COURT: -- the other.
16 THE DEFENDANT: Yes, ma'am. And, but, I'm also aware
17 that -- in the *Anderson -- versus Boston*, being that a juvenile -- commit a
18 crime at -- under the age of 18, that they'll eligible for parole when
19 there's one -- murder there's 20 years, and there's two or more murders
20 -- I mean, when there's one murders 20 years -- when there's more than
21 one murder -- two or more murders it doesn't apply in any offense that
22 didn't resolve in a homicide is 15 years.
23 THE COURT: Okay. And so do you understand the total
24 amount at sentences that would available to the court --
25 THE DEFENDANT: Well -- also in the statute is says,

1 regardless of what the courts deem the sentence to be it must be.

2 THE COURT: Okay. Do you know the defenses that you can
3 present to each of those crimes we've talked about?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: And do you understand that there may be
6 certain affirmative defenses or mitigating evidence and that -- your lack
7 of knowledge of their existence or your lack of knowledge of the
8 appropriate procedure for introducing evidence on these issues will not
9 be grounds for an appeal, if you do not address the appropriate issues?

10 THE DEFENDANT: Yes, ma'am, and I plan on addressin'em.

11 THE COURT: Do you understand that an attorney may be
12 aware of ways of defending these particular charges that may not occur
13 to you since you are not a lawyer?

14 THE DEFENDANT: I understood that from the beginning
15 when I choose to dismiss counsel.

16 THE COURT: Okay. Do you know what lesser included
17 offenses are?

18 THE DEFENDANT: Yes, ma'am. When I can get a -- found
19 guilty of, for instance, instead a -- higher then offense that I could've had
20 received.

21 THE COURT: Okay. So are, like, there any lesser included
22 offenses to the crimes that you could think of?

23 THE DEFENDANT: As of right now, I can I think of one that I
24 was found guilty of that I didn't get to proffer my jury instruction on.

25 THE COURT: Okay. So, like, if we think of a, maybe a

1 kidnapping, could you think of a lesser included?

2 THE DEFENDANT: A lesser included restraining -- yeah, I will

3 find that out, because when we did that I didn't realize I was --

4 THE COURT: So, like, let's think of --

5 THE DEFENDANT: A detained for battery instead of a

6 kidnapping it could be just battery.

7 THE COURT: Or, like, in a battery with intent to commit --

8 THE DEFENDANT: Yeah, battery.

9 THE COURT: -- a crime.

10 THE DEFENDANT: Yeah.

11 THE COURT: It could just be battery; --

12 THE DEFENDANT: Yeah.

13 THE COURT: -- all right? And -- but you understand that I

14 can't give you advice, and you're okay with that?

15 THE DEFENDANT: Of course, ma'am. I'm fine with it.

16 THE COURT: Do you know what mitigation is?

17 THE DEFENDANT: Mitigation? No, ma'am. I'm --

18 THE COURT: So --

19 THE DEFENDANT: -- litigat'en?

20 THE COURT: -- mitigation is is --

21 THE DEFENDANT: Nothing.

22 THE COURT: -- if you could present your -- any factors -- let's

23 say we go to sentencing; right?

24 THE DEFENDANT: Right.

25 THE COURT: And the State presents a bunch of factors of

1 why you should get this.

2 THE DEFENDANT: Awe.

3 THE COURT: You have the right to present mitigation, so --

4 THE DEFENDANT: Right, --

5 THE COURT: -- things --

6 THE DEFENDANT: -- right, right.

7 THE COURT: -- that would make your sentence less; --

8 THE DEFENDANT: Right, right, right.

9 THE COURT: -- all right?

10 THE DEFENDANT: I have a couple of those that I need to

11 ask -- add to the situation right now.

12 THE COURT: Okay. Do you understand that, if you represent

13 yourself, you are on your own?

14 THE DEFENDANT: Yes, ma'am. I understand.

15 THE COURT: And I can't tell you or advise you as to how you

16 should try your particular case?

17 THE DEFENDANT: Fully.

18 THE COURT: Do you know what a jury voir dire is? When we

19 pull it -- select the jury?

20 THE DEFENDANT: That's when you choose -- chose a jury --

21 THE COURT: Okay.

22 THE DEFENDANT: -- that conducive to my, you know, trial or

23 -- I shouldn't use that word, let's just say, that'd be a pulled for the

24 purpose of a trial.

25 THE COURT: All right. And do you know how to go about the

1 process of selecting a jury?

2 THE DEFENDANT: I'm familiar with it ma'am.

3 THE COURT: All right. And do you know the difference

4 between opening and closing arguments and statements?

5 THE DEFENDANT: Yes, ma'am. The --

6 THE COURT: Do --

7 THE DEFENDANT: -- defense gets one opening statement

8 and the DA has opening and closing. But she gets the two shots at it.

9 THE COURT: At the -- during closing arguments.

10 THE DEFENDANT: During closing arguments.

11 THE COURT: Okay. Do you know how to admit evidence?

12 THE DEFENDANT: Exhibit.

13 THE COURT: And do you know how to object to evidence?

14 THE DEFENDANT: Yes, when -- when they say it is --

15 inadmissible.

16 THE COURT: All right.

17 THE COURT: Do you know the State's burden of proof?

18 THE DEFENDANT: Beyond a reasonable doubt.

19 THE COURT: Do you know what the -- presumption of

20 innocence means?

21 THE DEFENDANT: To believe someone is -- well, I'm a let

22 you explain that one to me.

23 THE COURT: Innocent until proven guilty.

24 THE DEFENDANT: Yeah, just innocent until proven guilty. I

25 don't want to say the wrong words.

1 THE COURT: That's all right. Do you know how to submit
2 mitigation evidence at sentencing, if you are convicted?

3 THE DEFENDANT: I believe so, ma'am.

4 THE COURT: All right. Do you understand that you must
5 proceed by asking questions of the witnesses that will appear before the
6 court?

7 THE DEFENDANT: Of course, yes.

8 THE COURT: Do you understand that you can't make
9 statements to the witnesses but you could only ask them questions
10 concerning the facts in this case?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: You cannot make statements that are not
13 questions and you will not be permitted to simply argue with the
14 witnesses. Unless --

15 THE DEFENDANT: Yes.

16 THE COURT: -- you decide to testify on your own behalf, you
17 will not be permitted to tell the jury matters that you wish them to
18 consider as evidence other than through the making of an opening
19 statement and a closing argument. Do you understand this?

20 THE DEFENDANT: Yes, ma'am. Yes, ma'am, fully.

21 THE COURT: Do you understand that if you decide to testify
22 you will be giving up your right to remain silent and you would be giving
23 up your right not to incriminate yourself?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: If you decide to testify on your own behalf, you