Post- Conviction Relief Standards

MOTION TO WITHDRAW GUILTY PLEA – Knowing and Voluntary

Pursuant to NRS 176.165, after sentencing, a defendant's guilty plea can only be withdrawn to correct "manifest injustice." See also Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). The law in Nevada clearly establishes that a plea of guilty is presumptively valid and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)). Manifest injustice does not exist if defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394.

To determine whether a guilty plea was voluntarily, entered the Court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. A proper plea canvass should reflect that:

> "(1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; (2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; (3) the defendant understood the consequences of his plea and the range of punishments; and (4) the defendant understood the nature of the charge, i.e., the elements of the crime." Wilson v. State, 99 Nev. at 367, 664 P.2d at 331 (citing Higby v. Sheriff, 86 Nev. 774, 476 P.2d 950 (1970)).

The Nevada Supreme Court suggests in Patton v. Warden that the presence and advice of counsel is a significant factor in determining the voluntariness of a plea of guilty. 91 Nev. 1, 2, 530 P.2d 107, 107 (1975).

This standard requires the court to personally address the defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 367. A court may not rely simply on a written plea agreement without some verbal interaction with a defendant. Id. Thus, a "colloquy" is constitutionally mandated, and a "colloquy" is but a conversation in a formal setting, such as that occurring between an official sitting in judgment of an accused at plea. See id. However, the court also need not conduct a ritualistic oral canvass. State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000). The guidelines for voluntariness of pleas of guilty "do not require the articulation of talismanic phrases. It required only 'that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.'" Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973); Brady v. United States, 397 U.S. 742, 747-748, 90 S. Ct. 1463, 1470 (1970).

Alford Plea

The standard described above also applies to Alford pleas. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970). A plea of guilty pursuant to Alford dictates that courts may constitutionally accept guilty pleas from defendants who simultaneously protest their innocence when the defendant "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." Id. at 37, 91 S. Ct. at 167. A guilty plea pursuant to Alford is still, by definition, a plea of guilty and has been deemed constitutionally valid when entered into to avoid, for example, a harsher penalty. Tiger v. State, 98 Nev. 555, 654 P.2d 1031 (1982); Gomes v. State, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

EQUITABLE LACHES – Post-conviction

Certain limitations exist on how long a defendant may wait to assert a post-conviction motion to withdraw one's guilty plea. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit withdrawal of a plea after sentencing. Hart v. State, 116 Nev. 558, 563-64, 1 P.3d 969, 972 (2000). In Hart, the Nevada Supreme Court stated:

> Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673-74 (1978). Additionally, where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion. Id. at 563-64, at 972.

HARGROVE "BELIED BY THE RECORD" and "BARE AND NAKED"

In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

NRS 34.735

A proper petition for post-conviction relief must set forth specific factual allegations. N.R.S. 34.735(6) states, in pertinent part:

> [Petitioner] must allege specific facts supporting the claims in the petition [he] file[s] seeking relief from any conviction or sentence. Failure to raise specific facts rather than just conclusions may cause [the] petition to be dismissed.

See also Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that bare or naked allegations are insufficient to entitle a defendant to post-conviction relief).

Conclusory Claims

"A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations." Colwell v. State, 118 Nev. Adv. Op. 80, 59 P.3d 463, 467 (2002) (citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

APPOINTMENT OF AN ATTORNEY – Post-conviction

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991). In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court similarly

observed that "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> "[a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed 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:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery." (Emphasis added).

Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. To have an attorney appointed the defendant "must show that the requested review is not frivolous." Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)).

BRUTON – Admission of co-defendant that implicates defendant

Generally, out of court statements offered for their truth are not allowed. However, NRS 51.035 provides an exception to that rule. NRS 51.035 states:

> "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:
>
> . . .
>
> 3. The statement is offered against a party and is:
>
> . . .
>
> (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

NRS 51.035(e) "does not require that the witness be a coconspirator, only that the statement in question be by a coconspirator." Fish v. State, 92 Nev. 272, 275, 549 P.2d 338, 340 (1976).

"Under the common law exception to the hearsay rule covering the extra-judicial statements of co-conspirators, any act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator..." Goldsmith v. Sheriff, 85 Nev. 295, 305, 454 P.2d 86, 93 (1969) (citations omitted). The Goldsmith Court also explained that "in all conspiracy cases great latitude in the introduction of evidence is allowed. It is enough that the evidence offered tends to elucidate the inquiry or assist in determining the truth." Id. at 304, at 92.

However, before a co-conspirator's statements will be admissible, the State must present independent evidence of the existence of a conspiracy must be found before the admission of extrajudicial statements by co-conspirators may be admitted. Id. at 305, at 92. "The preliminary question of the existence of a conspiracy for purposes of NRS 51.035(3)(e) need only be

established . . . by 'slight evidence.'" McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987); see also Fish v. State, 92 Nev. 272, 549 P.2d 338 (1976).

"The duration of a conspiracy is not limited to the commission of the principal crime, but can continue during the period when conspirators perform affirmative acts of concealment." Foss v. State, 92 Nev. 163, 167, 547 P.2d 688, 691 (1976) (citations omitted). In addition, the Nevada Supreme Court has explained that "[e]ven though a crime has been committed, the conspiracy does not necessarily end, but it continues until its aim has been achieved. . . . [A] robbery continued until the fruits of the crime had been disposed of." Goldsmith, 85 Nev. at 306, 454 P.2d at 93 (citing Murray v. United States, 10 F.2d 409 (7th Cir.1925)).

The main concern surrounding the admission of a co-conspirator's statement centers around the Confrontation Clause. In Bourjaily v. United States, the United States Supreme Court analyzed the Confrontation Clause and the co-conspirator exception to the hearsay rule and recognized that "a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable" and rejected that view as "unintended and too extreme." 483 U.S. 171, 183, 107 S. Ct. 2775, 2783 (1987) (citing Ohio v. Roberts, 448 U.S. 56, 63, 100 S. Ct. 2531, 2537 (1980)).

Bruton v. United States, involved a joint trial, in which Bruton and his codefendant were being tried jointly. 391 U.S. 123, 126, 88 S. Ct. 1620, 1622 (1968). A postal inspector testified that Bruton's codefendant confessed that he and Bruton had committed the robbery. Id. The United States Supreme Court subsequently held that admission of the codefendant's confession in the joint trial violated Bruton's right of cross-examination secured by the Confrontation Clause, despite limiting instructions to the contrary. Id. at 126, at 1622-23. Bruton involved the admission of a non-testifying codefendant's *facially incriminating confession* and did *not* involve charges of conspiracy and never addressed the co-conspirator exception to the hearsay rule. See id. 124-26, 1621-22.

Cases subsequent to Bruton confirm that this rule is confined to limited circumstances. In Richardson v. Marsh, 481 U.S. 200, 207-208, 107 S.Ct. 1702, 1707 (1987), the United States Supreme Court recognized the narrow limitations articulated in Bruton by upholding the admissibility of a redacted confession of a codefendant. The Richardson Court stated:

> There is an important distinction between this case and Bruton, which causes it to fall outside the narrow exception we have created. In Bruton, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. Bruton v. United States, 391 U.S. 123, 124, n. 1, 88 S. Ct. 1620, 1621, n.1 (1968). Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." Id. at 135, 88 S. Ct., at 1627. By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial[.] 481 U.S. at 208, 107 S. Ct. at 1707.

The Nevada Supreme Court distinguished Bruton holding that "a non-testifying defendant's admission which *expressly incriminates another defendant* cannot be used at a joint trial." Byford v. State, 116 Nev. 215, 229, 994 P.2d 700, 710 (2000).

However, when a co-conspirator is making statements in furtherance of the conspiracy, rather than an admission of guilt, the statement will be admissible. United States v. McCown, 711 F.2d 1441, 1448-1449 (9th Cir.1983). In McCown, the Ninth Circuit Court of Appeals, in denying defendant's Bruton claim, found that co-conspirator statements were admissible under the co-conspirator exception to the hearsay rule and that their admission did not jeopardize the

defendant's right of confrontation because they were not statements made in a confession but were statements made in furtherance of a conspiracy. Id. See also United States v. Nunez, 483 F.2d 453, 462 (1973) (noting that "the statement in Bruton was not one in furtherance of a conspiracy or a common scheme within the recognized exception to the hearsay rule"). It is well settled law that "any act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator." Goldsmith, 85 Nev. at 305, 454 P.2d at 93. "It was not the intent of Bruton to nullify the co-conspirator exceptions to the hearsay rule." United States v. Projansky, 465 F.2d 123, 137-138 (2nd Cir. 1972).

INEFFECTIVE ASSISTANCE COUNSEL - Strickland

The Sixth Amendment to the United State Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland. 466 U.S. at 686-87, 104 S. Ct. at 2063-64; see also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis means the court should neither "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." U.S. v. Cronic, 466 US 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton, 115 Nev. at 403, 990 P.2d at 1268 (citing Strickland, 466 U.S. at 687-89 & 694, 104 S. Ct. at 2064-65 & 2068).

When ineffective assistance of counsel claims are asserted in a petition for post-conviction relief, the claims must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (Emphasis added).

Failure to Investigate

A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004).

Failure to Communicate – Morris v. Slappy

A defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 1610 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See Id.

Appellate Counsel

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The federal courts have held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S. Ct. at 2065, 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983), the Supreme Court recognized that part of professional diligence and competence involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 -752, at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, at 3314.

TRANSCRIPTS OR COURT RECORDS – Peterson v. Warden

The State is not required to furnish transcripts at its expense upon the unsupported request of a Defendant claiming inability to pay for them. Peterson v. Warden, 87 Nev. 134, 135-36, 483 P.2d 204, 205 (1971). The United States Supreme Court has held "We do not hold that a State

must furnish a transcript in every case involving an indigent defendant." Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 216, 78 S. Ct. 1061, 1062 (1958) (citing Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585 (1956).

In Nevada, an indigent defendant must satisfy the court that the points raised have merit, which will tend to be supported by a review of the record before he may have records supplied at the state's expense. Peterson, 87 Nev. at 135-36, 483 P.2d at 205. To be entitled to transcripts at the state's expense, a defendant must demonstrate that: (1) the points raised have merit; and (2) such merit will tend to be supported by a review of the record. Id. Transcripts will not be furnished at the State's expense based upon "the mere unsupported request of a Defendant who is unable to pay for them." Id. In Peterson, the Court stated:

> NRS 177.325, 177.335, and 177.345 do not contemplate that records will be furnished at state expense upon the mere unsupported request of a petitioner who is unable to pay for them. Just as the petitioner must show that the requested review is not frivolous before he may have an attorney appointed (NRS 177.345(2)), so must he satisfy the court that the points raised have merit and such merit will tend to be supported by a review of the record before he may have trial records supplied at state expense. He must specifically set forth grounds upon which the petition is based. Id.

Appeal

An indigent appellant's right to have access to needed transcripts was established in Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585 (1956). The protection of indigents from preclusive monetary requirements has been extended to other post-conviction proceedings. *See* Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895 (1961); Douglas v. Green, 363 U.S. 192, 80 S. Ct. 1048 (1960)(docket fees in habeas corpus proceedings). However, the United States Supreme Court reiterated in Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 216, 78 S. Ct. 1061, 1062 (1958), what it said in Griffin: "We do not hold that a State must furnish a transcript in every case involving an indigent defendant." Although the Nevada Supreme Court recently ruled that an indigent defendant is entitled to free transcripts for his *direct appeal*, it also stated that Peterson v. Warden remains good law as to post-conviction proceedings beyond the direct appeal. George v. State, 122 Nev. 1, 127 P.3d 1055 (2006).

MOTION TO PRODUCE OR TRANSPORT PRISONER.

A defendant must be present at those hearings in which the Court deems it necessary to expand the record. See Gebers v. State, 118 Nev. 500 (2002).

LAW OF THE CASE - Hall

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

SUFFICIENCY OF THE EVIDENCE

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); See also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380. (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (Court held it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (In all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court), cert. denied, 429 U.S. 895, 97 S.Ct. 257 (1976). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S.Ct. 483, 486 (1966)). This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S.Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976).

MOOT MOTIONS - NCAA

The Supreme Court of Nevada holds that the "duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." NCAA v. University of Nevada, Reno, 97 Nev. 56, 57, 624 P.2d 10 (1981). Furthermore, "[c]ases presenting real controversies at the time of their institution may become moot by the happening of subsequent events." Id. at 58, at 11.

DEFENDANT HAS FAILED TO MAKE AN ADEQUATE SHOWING OF "ACTUAL INNOCENCE"

Defendant's claims of "actual innocence" are without merit. In Calderon v. Thompson, 523 U.S. 538, 560, 118 S.Ct. 1489, 1503 (1998), the U.S. Supreme Court held that in order for a

defendant to obtain a reversal of his conviction based on a claim of actual innocence, he must prove that "'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in habeas proceedings." (Quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995)). Defendant's bare claim of actual innocence is insufficient to meet the Calderon test.

NRS 34.738 – CREDIT FOR TIME SERVED

NRS 34.738(3) provides:

> A petition must not challenge both the validity of a judgment of conviction or sentence and the computation of time that the petitioner has served pursuant to that judgment. If a petition improperly challenges both the validity of a judgment of conviction or sentence and the computation of time that the petitioner has served pursuant to that judgment, the district court for the appropriate county shall resolve that portion of the petition that challenges the validity of the judgment of conviction or sentence and dismiss the remainder of the petition without prejudice.

Since Defendant is challenging both his judgment of conviction and the computation of his credit for good time, NRS 34.738(3) requires the court to resolve only that portion of Defendant's petition which challenges the validity of the judgment of conviction or sentence, and dismiss the remainder of the petition without prejudice. As such, the portion of Defendant's petition which questions whether his credit for good time is correct must be dismissed at this time.

NRS 34.770 – REQUEST FOR AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

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

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; See also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

APPOINTMENT OF COUNSEL – NRS 34.750

There is no federal constitutional right under the Sixth Amendment and no state constitutional right to counsel in post-conviction relief proceedings. Coleman v. Thompson, 501 U.S. 722, 725, 111 S. Ct. 2546, 2552 (1991); McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996). However, a district court judge has the discretion to appoint counsel under the following conditions pursuant to NRS 34.750:

> A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed 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:
>
> (a) the issues are difficult;
> (b) the petitioner is unable to comprehend the proceedings; or
> (c) counsel is necessary to proceed with discovery.

As set forth in NRS 34.750, in order to be eligible for appointment of counsel, Defendant must first file a Post-Conviction Petition for Writ of Habeas Corpus and show that his petition will not be summarily dismissed along with the other listed statutory requirements. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

DEFENDANT IS NOT ENTITLED TO SENTENCE MODIFICATION - Passanisi

In general, a district court lacks jurisdiction to modify a sentence once the defendant has started serving it. Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1373 (1992). However, a district court has inherent authority to correct, vacate, or modify a sentence that violates due process where the defendant can demonstrate the sentence is based on a materially untrue assumption or mistake of fact that has worked to the *extreme detriment* of the defendant. (Emphasis added) Edwards v. State, 112 Nev. 704,707, 918 P.2d 321, 324 (1996); see also Passanisi, 108 Nev. at 322, 831 P.2d at 1373.

Not every mistake or error during sentencing gives rise to a due process violation. State v. Eighth Judicial District Court, 100 Nev. 90, 97, 677 P.2d 1044, 1048 (1984). A district court has jurisdiction to modify a defendant's sentence "only if (1) the district court actually sentenced appellant based on a materially false assumption of fact that worked to appellant's extreme detriment, and (2) the particular mistake at issue was of the type that would rise to the level of a violation of due process." Passanisi, 108 Nev. at 322-323, 831 P.2d at 1373-74.

DEFENDANT'S MOTION TO CORRECT AN ILLEGAL SENTENCE

NRS 176.555 states that "[t]he court may correct an illegal sentence at anytime." See also Passanisi v. State, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992). However, the grounds to correct an illegal sentence are interpreted narrowly under a limited scope. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996); see also Haney v. State, 124 Nev. Adv. Op. 40, 185 P.3d 350, 352 (2008). "A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing." Edwards, 112 Nev. at 708, 918 P.2d at 324.

"Motions to correct illegal sentences address only the facial legality of a sentence." Edwards, 112 Nev. at 708, 918 P.2d at 324. Motions to correct illegal sentences evaluate whether the sentence imposed on the defendant is "'at variance with the controlling statute, or "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided.'" Id. (citing Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)). Other claims attacking the conviction or sentence must be raised by a timely filed direct appeal or a timely filed Petition for a Post-Conviction Writ of Habeas Corpus per NRS 34.720-34.830, or other appropriate motion. See Edwards, 112 Nev. at 708, 918 P.2d at 324.

Lifetime Supervision

NRS 176.0931(1) provides that "If a defendant is convicted of a sexual offense, the court shall include in sentencing, in addition to any other penalties provided by law, a special sentence of lifetime supervision." The defendant was convicted of attempt to commit a sexual offense as defined by NRS 176.0931(5)(c)(1). Therefore, the sentence was not facially illegal at the time of sentencing and the defendant should be denied relief.

NRS 34.726 – 1-YEAR TIME BAR

NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence *must* be filed within one (1) year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one (1) year after the Supreme Court issues its remittitur." (Emphasis added).

The Nevada Supreme Court interprets this statute very strictly. The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001). In Gonzales v. State, 118 Nev. 590, 53 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition, pursuant to the mandatory provisions of NRS 34.726(1), that was filed a mere two days late. Gonzales reiterated the importance of filing the petition within the mandatory deadline, absent a showing of "good cause" for the delay in filing. 118 Nev. at 590, 53 P.3d at 902.

NRS 34.810

Successive Petition

NRS 34.810(2) reads:

> "A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." (Emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be

decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

In Lozada, the Nevada Supreme Court stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. 110 Nev. at 358, 871 P.2d at 950. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Id. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).

Waiver if Not Raised on Appeal – Franklin v. State

NRS 34.810(1)(b)(2) reads:

> The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). The Court noted in Evans v. State, "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

DEFAULT RULES

The Federal Public Defender's Office has once again burdened this Court with its oft-repeated argument that Nevada's procedural default rules are inconsistently applied. The Nevada Supreme Court has gone to great lengths to refute claims that it arbitrarily and inconsistently applies the procedural default rules. See State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). Similar to the defendant in Riker, Defendant argues that procedural default rules cannot be applied to his case because the Court has disregarded the bars or has applied them inconsistently in other cases. In Riker, the Court stated:

> ***We accept neither Riker's premise that we regularly disregard the bars nor his conclusion that disregard or inconsistency on our part would excuse his own procedural default.*** First, any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore the rules, which are mandatory, as we explained in Pellegrini v. State. Second, ***we flatly reject the claim that this court at its discretion ignores procedural default rules.*** Riker offers a number of flawed, misleading, and irrelevant arguments to back his position that this court 'has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in [NRS] 34.726, 34.800, and 34.810. (Emphasis added) Id. at 236, at 1077.

The Court's stern and unequivocal rejection of claims that courts inconsistently apply procedural default rules speaks directly to Defendant's case as well.

The United States District Court for the District of Nevada issued a recent order on January 9, 2008, concluding that Nevada regularly and consistently applies its procedural bars. See Howard v. McDaniel, Slip Copy, 2008 WL 115380 (D. Nev.). In Howard, the appellant made the same claim as Defendant in that he claimed the Nevada Supreme Court exercises "unfettered discretion" which has led to inadequate holdings in its application of the procedural default rules, primarily NRS 34.726. Id. at 2. The Court analyzed over 200 Nevada Supreme Court opinions presented by the appellant and the respondents and concluded "the Nevada Supreme Court has continued …. to consistently apply NRS 34.726 to untimely petitions." Id. at 7.

The reasoning from the Riker opinion was incorporated into the opinion written by the District Court:

> A court need not discuss or decide every potential basis for its decision as long as one ground sufficient for the decision exists. This proposition is fundamental to legal analysis and judicial economy, as well as simple logic. Thus, our conclusion in a case that one procedural bar precludes relief carries no implication regarding the potential applicability of other procedural bars. Id. at 6 (quoting Riker, 121 Nev. at 239, 112 P.3d at 1079).

This recent decision and the extensive analysis conducted by the federal court in reviewing more than 200 previous opinions from the Nevada Supreme Court negates any argument by Defendant that the Supreme Court exercises unfettered discretion in its application of the procedural default rules to reach arbitrary and inconsistent results. The State adopts the federal court's holding which completely rebuts Defendant's claim of arbitrary and inconsistent application of the procedural default rules.

The Federal Public Defender's Office repeatedly confuses the Court's discretion to entertain issues on appeal with the Court's requirement to apply procedural bars. The general judicial practice to decline considering issues not first raised below is a policy designed to help an appellate court orderly manage its caseload. Just because a court may depart from this judicial principle in an appropriate case does not equate with ignoring procedural bars. Such issues may be considered within the framework of good cause and prejudice, a fundamental miscarriage of justice, or actual innocence consistent with application of the procedural bars.

In this case, Defendant's erroneous and unfounded accusations that Nevada's procedural default rules are not consistently applied do not constitute good cause for excusing Defendant's twenty-three (23) year delay in filing the instant petition.

GOOD CAUSE AND PREJUDICE

A showing of good cause and prejudice may overcome the procedural bars. "To establish good cause, appellants *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." (Emphasis added) Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Nevada Supreme Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, at 526. The Court explained that in order to establish prejudice, the defendant must show "not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Mental Problems

The Nevada Supreme Court has held that mental problems do not constitute an impediment external to the defense and therefore does not constitute good cause to overcome the procedural bars. Phelps v. Director, Nevada Department of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

NRS 34.800 - LACHES

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court observed in Groesbeck v. Warden, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches in its motion to dismiss the petition. NRS 34.800(2). The State affirmatively pleads laches in the instant case.

RIGHT TO APPEAL UPON ENTERING A GUILTY PLEA

Generally, counsel is not constitutionally required to advise a defendant who has pled guilty of his right to appeal. Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999). Even so, Defendant was, in fact, advised of his limited right to appeal in the Guilty Plea Agreement. By signing the Guilty Plea Agreement, Defendant acknowledged that he was aware of the following facts:

> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:
>
> The *right to appeal* the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of N.R.S. 174.035.
>
> All of the foregoing elements, consequences, and *waiver of rights* have been thoroughly explained to me by my attorney.

(emphasis added). Thus, Defendant was informed of his limited right to appeal even though counsel generally had no affirmative duty to do so.

CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120

Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

NO JURISDICTION PENDING APPEAL

"Jurisdiction in an appeal is vested *solely* in the supreme court until the remittitur issues to the district court." (Emphasis added) Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994). While an appeal is pending district courts do not have jurisdiction over the case until remittitur has issued. Id.

Exception – Petitions for Writ of Habeas Corpus

Further, Halverson cites Buffington v. State, 110 Nev. 124, 868 P.2d 643 (1994) alleging that the district court did not have jurisdiction to decide the merits of his First Petition because his direct appeal was still pending before the Nevada Supreme Court. However, Halverson fails to note that the Nevada Supreme Court has recognized concurrent jurisdiction when the defendant files a Petition for Writ of Habeas Corpus (Post-conviction). See Varwig v. State, 104 Nev. 40, 42, 752 P.2d 760, 761 (1988); see also Daniels v. State, 100 Nev. 579, 580, 688 P.2d 315, 316 (1984).

REQUESTS FOR LIMITED EVIDENTIARY HEARING – DEPRIVATION OF DIRECT APPEAL.

A habeas corpus petitioner must prove disputed factual allegations by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). The United States Supreme Court requires courts to review three factors when determining whether a defendant was deprived of his right to an appeal: Whether the defendant asked counsel to file an appeal; Whether the conviction was the result of a trial or a guilty plea; and Whether the defendant had any non-frivolous issues to raise on appeal. Roe v. Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). The Nevada Supreme Court has held that the court can assess the credibility of witnesses when conducting an evidentiary hearing to determine whether a defendant was deprived of an appeal. Barnhart v. State, 122 Nev. 301, 130 P.3d 650, 652 (2006).

Defendant has a right to a Limited Evidentiary Hearing

Consequently, the court should hold an evidentiary hearing strictly limited to the appeal deprivation claim per Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003), Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994), and Roe v. Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000).

EXHAUSTING REMEDIES IN STATE COURT DOES NOT OVERCOME PROCEDURAL BARS - Shumway

A return to State court to exhaust remedies for federal habeas is not good cause to overcome state procedural bars. Shumway v. Payne, 223 F.3d 982 (9th Cir. 2000).

DEFENDANT'S MOTION IS NOT PROPERLY BEFORE THE COURT PURSUANT TO EDCR 2.24

Eighth Judicial District Court Rule (EJDCR) 2.24 reads in relevant part:

> (a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefore, after notice of such motion to the adverse parties.
> (b) A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to NRCP 50(b), 52(b), 59, or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the 30-day period for filing a notice of appeal from a final order or judgment.

A defendant must obtain leave of the court before filing a motion to reconsider. EJDCR 2.24(a). A defendant also must file such motion within 10 days of service of the Order or Judgment. EJDCR 2.24(b).

DEFENDANT HAS NOT DEMONSTRATED THAT THE COURT MISAPPREHENDED ANY ISSUE OF FACT OR LAW

Defendant has not shown that the court overlooked or misapprehended any issue of fact or law with respect to the original motion. See NRAP 40(a).

The facts of this case are inapposite to Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2001), on which defendant relied. In Hathaway, the defendant believed that his counsel had filed a *direct appeal* and therefore did not file a timely habeas petition in reliance on that fact. The Court in Hathaway held: "A petitioner's *mistaken but reasonable belief* that his or her attorney was pursuing a *direct appeal* is good cause if the petitioner raises the claim *within a reasonable time* after learning that his or her attorney was not in fact pursuing a direct appeal on the petitioner's behalf." (Emphasis added) Hathaway, 119 Nev. at 251, 71 P.3d at 505.

PETITION DOES NOT SUBSTANTIALLY COMPLY WITH NRS 34.735

To the extent Defendant's "Motion" can be construed as a Petition for Writ, NRS 34.735 requires that a defendant filing a Petition for Writ of Habeas Corpus (Post-Conviction) follow a specific format outlined within the statute. In the present case, Defendant has not met the relevant statutory requirement to file his petition in the proper form. Section 34.735 sets forth twenty-three questions which a petitioner must answer when filing a Petition for Writ of Habeas Corpus. See Pangallo v. State, 112 Nev. 1533, 1535, 930 P.2d 100, 102 (1996). Defendant has failed answer all of those questions in the proper format. Therefore, his petition should be dismissed.

PETITION IS NOT VERIFIED PURSUANT TO NRS 34.730

If Defendant's document is a petition, NRS 34.730 requires that a "petition must be verified by the petitioner . . . " Defendant's instant document is not so verified. In addition to being time barred and in improper form, Defendant's failure to verify the petition may, in the court's discretion, preclude consideration of Defendant's petition as well. See Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004)(holding that "[o]nce the district court *acquires jurisdiction by the timely filing of the petition for the writ*, any defects in the petition may be cured by amendment, even after the statutory time limit for filing the petition has elapsed ....") (emphasis added). Defendant's petition is defective in a number of respects; therefore, the court may choose to dismiss Defendant's petition based on the failure to verify it pursuant to NRS 34.730.

FUGITIVE DOCUMENT – EJDCR 7.40(a)

On October 29, 2008, Jeannie N. Hua was appointed as Defendant's counsel. The Defendant filed the instant motions himself on November 10, 2008. As such, these motions are fugitive documents per EJDCR 7.40(a), which states:

> When a party has appeared by counsel, the party cannot thereafter appear on the party's own behalf in the case without the consent of the court. Counsel who has appeared for any party must represent that party in the case and shall be recognized by the court and by all parties as having control of the case. The court in its discretion may hear a party in open court although the party is represented by counsel.

DEFENDANT IS NOT ENTITLED TO DISCOVERY AT THIS JUNCTURE – NRS 34.780

Brown requests a copy of the transcripts of an interview the North Las Vegas Police Department conducted with Brown on February 15, 2008. However, Brown's request cites improper authority by relying on NRS 174.235, a pre-trial discovery statute. Rules regarding post-conviction discovery are found in NRS 34.780(2). NRS 34.780(2) reads:

> *After the writ has been granted* and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice *for good cause* shown grants leave to do so. (Emphasis added).

Post-conviction discovery is not available until "after the writ has been granted." Id. Brown has failed to show good cause and his Petition for Writ of Habeas Corpus (Post-conviction) has not been granted. Therefore, Brown's Motion for Production of Documents is premature and must be denied.

FIRST AMENDMENT PETITION – NRS 34.185

Varnado captioned his instant petition as a "First Amendment Petition" in attempt to circumvent the procedural bars under NRS 34.185. NRS 34.185 reads:

> (1) If the applicant is alleging an unconstitutional prior restraint of his rights pursuant to the First Amendment to the Constitution of the United States or Section 9 of Article 1 of the Constitution of the State of Nevada, the applicant shall insert the words "First Amendment Petition" in the caption of the application for the writ in at least 10-point type.
> (2) The court shall render judgment on an application for a writ described in subsection 1 not later than 30 days after the date on which the application for the writ is filed.

However, to benefit from this statute, the defendant must allege an unconstitutional prior retraint of his First Amendment rights. NRS 34.185. Varnado has not alleged any unconstitutional prior restraint in his instant petition. In fact, he makes no First Amendment allegations. Varnado's personal decision to caption his petition as a First Amendment Petition does not afford it the benefits of NRS 34.185.

MOTION TO TRANSPORT – NO NEED TO PRODUCE THE PRISONER

A defendant must be present at those hearings in which the Court deems it necessary to expand the record. See Gebers v. State, 118 Nev. 500 (2002) (a defendant is only required to be present at evidentiary hearings). In the instant matter, Defendant has not shown, nor is there is any need, for the court to receive evidence or take testimony from any party before ruling on Defendant's petition. In addition, there is no need for Defendant to testify and present evidence, because all of Defendant's factual and legal allegations are contained in his instant petition(s).

> Nevada Law is as follows:
> **Judicial determination of need for evidentiary hearing: Dismissal of petition or granting of writ.**
> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.
> NRS 34.770.

Defendant's request for his production, as well as his request for subpoenas, is premature because there is no present need to expand the record, nor has the court determined whether there is a need for a record expanding evidentiary hearing at any time. Gebers, supra; NRS 34.770.

PREJUDICE OR BIAS OF COURT – RECUSAL OF COURT – Sonner v. State

In Nevada, a judge is presumed to be not biased. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988) (overturned on other grounds, see Halverson v. Hardcastle, 123 Nev. 29, 163 P.3d 428 (2007)). The burden is on the party asserting bias "to establish sufficient factual grounds warranting disqualification." Goldman, 104 Nev. at 644, 764 P.2d at 1296. A motion to disqualify will be insufficient where there are no facts that support a reasonable inference that a judge entertained bias against the defendant. Id. at 650, at 1300. Therefore, a defendant's bare allegation of bias is not sufficient to overcome the presumption that the court is not biased. Id. at 644, at 1296; Sonner v. State, 112 Nev. 1328, 1335, 930 P.2d 707, 712 (1996).

In Cameron v. State, the defendant licked the vagina of a three year old. 114 Nev. 1281, 1282, 968 P.2d 1169, 1170 (1998). The sentencing court expressed disgust, dismay, and outrage that a person would commit such atrocious acts. Id. The Nevada Supreme Court found that the sentencing court was not expressing personal prejudice or bias towards Cameron, rather the court was offended by the facts of the crime. Id. at 1283, at 1170-71. "[R]emarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice

unless they show that the judge has closed his or her mind to the presentation of all the evidence." Id. at 1283, at 1171.

BENEFIT OF BARGAIN

Defendant claims that the Guilty Plea Agreement (GPA) entitles him to withdraw his guilty plea to Discharging Firearm Out of Motor Vehicle and enter a guilty plea to the misdemeanor of Disorderly Conduct. His argument focuses on what it means to "successfully complete probation." Under a theory of contract law, he claims the primary purpose of probation is to avoid the imposition of the suspended sentence and thus it does not matter whether the defendant is honorably or dishonorably discharged, so long as the suspended sentence is not imposed the defendant successfully completes probation.

Defendant suggests that plea agreements are "contractual in nature and are measured by contract principles" (Keller v. State, 902 F.2d 1391, 1393 (9th Cir. 1990)). Even applying contract principles, Defendant's claims lack legal merit for several reasons.

A. Conditions Precedent

First, under a theory of contract, Defendant did not fulfill the conditions precedent to entitle him to relief. Conditions precedent are requirements that one party must fulfill, before the other party must fulfill his terms of the bargain. See Clark County School Dist. v. Richardson Const., Inc. 168 P.3d 87, 95 (Nev. 2007). If the first party does not fulfill the conditions precedent, the second party has no obligation to perform under the terms of the contract. Id.

Probation is governed by Chapter 176A of the Nevada Revised Statutes. NRS 176A.210(2)(a) requires all defendants who receive probation to sign a document stating that they will "comply with the conditions imposed by the court." In Clark County we use a "Probation Agreement and Rules (PAR)." This document lists the conditions of probation and provides a signature line, which every probationer must sign.

Here, Defendant signed the PAR. By so doing, Defendant verified: "I have read, or have had read to me, the foregoing conditions of my probation, and fully understand them and I agree to abide by and *strictly* follow them and I fully understand the penalties involved should I *in any manner violate* the foregoing conditions." (Emphasis added). The plain meaning of the contract must prevail. Thus, Defendant only fulfills his obligations under the contract if he "strictly" abides by the conditions of probation. A violation in any manner would subject him to penalties. Other jurisdictions have similarly adopted standards which require the defendant to strictly abide by the conditions of probation to be entitled to certain benefits. See Planas v. State, 296 Ga.App. 51, 52, 673 S.E.2d 566, 567 (Ga.App. 2009); see also State v. Griffith, 140 Idaho 616, 617, 97 P.3d 483, 484 (2004).

Defendant did not strictly follow the conditions of probation. During the first probation revocation proceeding Defendant stipulated that he was not reporting properly. He also stipulated that he was not paying his supervision fee and that he had not paid any amount of his $1,000 fine.

During the second probation revocation hearing Defendant again stipulated to the violations which included: possession of a knife; using drugs and alcohol; failing appear upon order of the Division of Parole and Probation; unemployment; in arrears with paying his supervision fees; and not obtaining permission to visit people while on house arrest.

Defendant did not and does not now deny that he violated these conditions of his probation. Strict compliance with the conditions of probation are conditions precedent to being permitted to withdraw his guilty plea to Discharging Firearm Out of a Motor Vehicle and pleading guilty to the misdemeanor offense of Disorderly Conduct.

The GPA reads, "*If* the defendant successfully completes probation." (Emphasis added). The structure of the sentence identifies successful completion as a condition precedent. By failing to strictly comply with the conditions of probation, Defendant has not fulfilled the conditions precedent and thus he is not entitled to the benefits of his bargain as described in the GPA; withdraw his felony guilty plea to enter a misdemeanor guilty plea.

B. Plain Language of the Guilty Plea Agreement

Second, under contract theory, generally the plain language of the terms will be given meaning. Sheehan & Sheehan v. Nelson Malley and Co., 121 Nev. 481, 487-88, 117 P.3d 219, 224 (2005). The actual syntax and grammar of a contract are relevant in determining the meaning of a contract. Id.

In the present case, each word in the phrase "Successful completion of probation" must have purpose and meaning. "Successful" modifies "completion." Had the parties simply intended that Defendant complete probation, whether honorable or dishonorable, they would have written "If defendant completes probation." However, the parties modified completion by placing "successful" before "completion." By its plain meaning the parties intended that Defendant successfully complete probation. This implies that more than mere completion of probation was required. Defendant's multiple violations of the probation conditions do not constitute a successful completion, especially considering the fact that Defendant spent two different stints in jail, totaling eight months, for violating the conditions of his probation.

C. Defendants are Entitled to Different Privileges Depending upon whether They Receive an Honorable or Dishonorable Discharge

Third, NRS 176A distinguishes honorable discharge from dishonorable discharge. The primary difference is what benefits and privileges the defendant is entitled to upon being discharged from probation. NRS 176A.850; NRS 176A.870. "A dishonorable discharge releases the probationer from any further obligation, except a civil liability arising on the date of discharge for any unpaid restitution, but does not entitle the probationer to *any privilege* conferred by NRS 176A.850." (Emphasis added) NRS 176A.870. A dishonorable discharge is not a successful completion of probation, as a defendant is not entitled any of the numerous benefits obtainable if the defendant received an honorable discharge.

Here, Defendant should not be entitled to any privilege because he did not obtain an honorable discharge. If he is not entitled to the privileges of an honorable discharge, he should also not receive a benefit requiring "successful completion of probation."

NRS 34.724 – ONLY FELONS SERVING PRISON TIME MAY FILE PETITIONS.

Pursuant to NRS 34.724, "(a)ny person convicted of a crime and under sentence of death or imprisonment" may file a post conviction petition for habeas corpus. Defendant's serving jail terms for misdemeanors or gross-misdemeanors are not entitled to file post-conviction petitions. See Ferreira v. City of Las Vegas, 106 Nev. 386, 387, 793 P.2d 1328-1329 (1990).

OPPOSE WRIT OF MANDAMUS

As per NRS 34.160, a district court judge does not have jurisdiction to issue a writ of mandamus to himself. The statute reads as follows:

> The writ may be issued by the supreme court, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

Even if the District Court wished to entertain Defendant's petition, it could not do so for lack of jurisdiction. In addition, Defendant has filed this instant motion with the District Court and yet his motion clearly reads "In the Supreme Court of Nevada." Therefore, it appears that Defendant filed his motion in the wrong court.

As the district court judge lacks jurisdiction, the Defendant's Writ of Mandamus must be denied.

DEFENDANT'S REQUEST FOR A DEFAULT JUDGMENT IS IMPROPER AGAINST THE STATE IN A HABEAS ACTION

Notwithstanding that the State did in fact prepare and file its Opposition to Defendant's motion, Defendant's request for a default judgment against the State in post conviction proceedings is improper. Warden v. O'Brien, 93 Nev. 211, 562 P.2d 484 (1977) (holding that a court should not "blindly and arbitrarily release a prisoner" because of a defective return or absence of a return or answer by the State). Defendant's motion should therefore be denied.

DEFENDANT NOT ENTITLED TO DISMISS COUNSEL AND APPOINT NEW COUNSEL

In Young v. State, 102 P.3d 572 (2004), the Nevada Supreme Court adopted a three-part inquiry as enunciated in the 9th Circuit's decision in U.S. v. Moore, 159 F.3d 1154 (9th Cir. 1998), to determine whether or not a defendant's motion for substitution of counsel is appropriate. Quoting Moore, the Court held that the three factors upon which such a determination is to be based were: "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." Young, 102 P.3d at 576, quoting U.S. v. Moore, 159 F.3d at 1158-59.

APPRENDI

First, citing to its earlier decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219 (1998), the US Supreme Court held generally in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), that any fact which increases the penalty beyond that prescribed by the primary offense must be found by a jury, not a judge. However, the Court in Apprendi also held that certain sentence enhancements do NOT fall under this general holding and, therefore, are not subject to an Apprendi analysis. Specifically, the Court held that Apprendi has no application to a defendant who waives his right to a jury trial and pleads guilty. Id. at 490, 120 S.Ct. at 2362-63. In the present case, Defendant admitted that he committed the crime of Attempt Grand Larceny on January 18, 2005, the date he pled guilty. When the underlying aggravating facts are *admitted*, no Apprendi violation exists.

Second, as evidenced by Defendant's executed Guilty Plea Agreement, Defendant waived his right to a trial and, consequently, to a jury determination of guilt by proof beyond a reasonable doubt when he pled guilty:

> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges: . . . (2) The constitutional right to a speedy and public trial by an impartial jury, . . . At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense charged. (3) The constitutional right to confront and cross-examine any witnesses who would testify against me. . . . (5) The constitutional right to testify in my own defense.

Guilty Plea Agreement, p. 3-4. By pleading guilty Defendant effectively waived a jury trial. When considered in conjunction with the US Supreme Court's holding in Apprendi it is clear that Defendant is NOT, as he concludes, entitled to have the amount of restitution he owes determined by a jury.

CREDIT FOR TIME SERVED

Nevada law with respect to credit for time served provides as follows:

> **Credit against sentence of imprisonment.**
>
> 1. Except as otherwise provided in subsection 2, whenever a sentence of imprisonment in the county jail or state prison is imposed, the court may order that credit be allowed against the duration of the sentence, including any minimum term thereof prescribed by law, for the amount of time which the defendant has actually spent in confinement before conviction, *unless his confinement was pursuant to a judgment of conviction for another offense.* Credit allowed pursuant to this subsection does not alter the date from which the term of imprisonment is computed.
>
> 2. A defendant who is convicted of a subsequent offense which was committed while he was:
>
> (a) In custody on a prior charge is not eligible for any credit on the sentence for the subsequent offense for time he has spent in confinement on the prior charge, unless the charge was dismissed or he was acquitted.
>
> (b) Imprisoned in a county jail or state prison or on probation or parole from a Nevada conviction is not eligible for any credit on the sentence for the subsequent offense for the time he has spent in confinement which is within the period of the prior sentence, regardless of whether any probation or parole has been formally revoked.

NRS 177.055 (emphasis added).

The purpose of NRS 177.055 is to ensure that defendants get credit for presentence time served against their ultimate sentence. Johnson v. State, 120 Nev. 296, 89 P.3d 669 (2004). NRS 177.055(1) prohibits credit for any time served towards subsequently sentenced cases if the time served up to that point is served "pursuant to a judgment of conviction for another offense." Subsection (2) of that statute is inapplicable to the facts of Defendant's case as he was not "in custody" when any of the offenses were committed, although he was out on bail on one or more of the three cases.

CHANGE OF VENUE/RECUSAL OF JUDGE MOSLEY IS NOT WARRANTED

Defendant moves this court for a change of venue. Pursuant to NRS 174.455, however, such a request is not appropriate because Defendant's case has already been adjudicated. NRS 174.455 specifically reads that this motion is only appropriate "on the ground that a fair and impartial trial cannot be had in the county where the indictment, information or complaint is pending." NRS 174.455(1). Indeed, every section of this statute deals with the change of venue only in the case of a trial. Therefore, to the extent that Defendant is requesting a change of venue his motion should be dismissed.

Notwithstanding that Defendant's motion for a change of venue is inappropriate, it seems that Defendant is, in reality, seeking the recusal of Judge Mosley. However, Defendant has failed to show anything to overcome the presumption that Judge Mosley is not biased. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988). Therefore, Defendant's motion should be denied.

DOUBLE JEOPARDY

The prohibition against double jeopardy "protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." Peck v. State, 116 Nev. 840, 847, 7 P.3d 470, 475 (2000); citing State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998); see also Gordon v. District Court, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996). The facts of Defendant's case do not fit within any of those three categories.

THE TRIAL COURT CORRECTLY SUSTAINED THE STATE'S BATSON CHALLENGE TO THE JURY SELECTION

A. Standard of Review

The United States Supreme Court has held that the racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The Supreme Court subsequently extended Batson to hold that its prohibition also applies to discrimination based on gender (J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994)) and ethnic origin (Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859 (1991)). Batson also applies to criminal defendants and forbids their exercise of peremptory challenges to remove potential jurors on the basis of race, gender or ethnic origin. United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000) and Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348 (1992). Furthermore, there is no requirement that the defendant and the excluded juror be of the same race. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991); Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990).

In Purkett v. Elem, 514 U.S.765, 766-67, 115 S.Ct. 1769, 1770-71 (1995), the United States Supreme Court pronounced a three part test for determining whether a prospective juror has been impermissibly excluded under the principles enunciated in Batson. Specifically, the Court ruled:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible.

Purkett, 514 U.S.at 766-767, 115 S.Ct. at 1770-1771.

The Nevada Supreme Court adopted the Purkett three step analysis of a Batson claim in Doyle v. State, 112 Nev. 879, 921 P.2d 901, 907-908 (1996); and Washington v. State, 112 Nev. 1067, 1071, 922 P.2d 547, 549 (1996). Accordingly, the opposing party's exercise of its peremptory challenge is governed by a Purkett analysis.

In deciding whether or not the requisite showing of a prima facie case of racial discrimination has been made, the court may consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire examination. Batson, 476 U.S. at 96-97, 106 S.Ct. at 1723, Libby v. State, 113 Nev. 251, 255, 934 P.2d 220, 222 (1997), Doyle, 112 Nev. at 887-888, 921 P.2d at 907.

In step two, assuming the opposing party makes the above described prima facie showing, the burden of production then shifts to the proponent of the strike to come forward with a race-neutral explanation. Purkett, 514 U.S. at 767, 115 U.S. at 1770. "The second step of this process does not demand an explanation that is persuasive or even plausible." Purkett, 514 U.S. at 768, 115 U.S. at 1771. "Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral." Id; Doyle, 112 Nev. at 888, 921 P.2d at 908.

In step three, "the district court must determine whether the explanation was a mere pretext and whether the opponent successfully proved racial discrimination." King v. State, 116 Nev. 349, 353, 998 P.2d 1172, 1175 (2000). At this stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. Purkett, 514 U.S. at 768, 115 U.S. at 1771. What is meant by a legitimate race-neutral reason "is not a reason that makes sense, but a reason that does not deny equal protection." Purkett, 514 U.S. at 769, 115 U.S. at 1771, Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1999).). "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 123 S.Ct. 1029 (2003). Nevertheless, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768, 115 U.S. at 1771, Doyle, 112 Nev. at 889, 921 P.2d at 908.

Lastly, in reviewing the denial of a Batson challenge, the reviewing court should give great deference to the determining court. Hernandez, 500 U.S. at 364, 111 S.Ct. at 1868-1869, Doyle, 112 Nev. at 889-890, 921 P.2d at 908, Thomas v. State, 114 Nev. at 1137, 967 P.2d at 1118, Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997). The reasoning for such a standard is the trial court is in the position to best assess whether from the "totality of the circumstances" that racial discrimination is occurring. "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." Hernandez, 500 U.S. at 367, 111 S.Ct. at 1870. In conclusion it should be noted that although much of the case law cited to from which the aforementioned principles are drawn refer to the defendant, generally, as the party opposing the peremptory challenge, McCollum ensures that Batson applies to all parties including criminal defendants. Georgia v. McCollum, 505 U.S. 42, 112 S.Ct, 2348 (1992).

THERE WAS SUFFICIEINT EVIDENCE TO SUPPORT THE DISTRICT COURT'S WEAPON ENHANCEMENT OF DEFENDANT'S SENTENCE

Defendant's contention that there was insufficient evidence to support the application of the deadly weapon enhancement pursuant to NRS 193.165(1) is belied by the record. The Nevada Supreme Court has found that in reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); see also Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). In State v. Walker, 109 Nev. 683, 685 857 P.2d 1, 2 (1993), this Court delineated the proper standard of review to be utilized when analyzing a claim of insufficiency of evidence:

> Insufficiency of the evidence occurs where the prosecutor has not produced a minimum threshold of evidence upon which a conviction may be based. Therefore, even if the evidence presented at trial were believed by the jury, it would be insufficient to sustain a conviction, as it could not convince a reasonable and fairminded jury of guilt beyond a reasonable doubt. Id.

Furthermore, the Nevada Supreme Court has ruled it will not reverse a verdict even if the verdict is contrary to the evidence where there is substantial evidence to support it. State v. Varga, 66 Nev. 102, 117, 205 P.2d 803, 810 (1949).

Moreover, this Court has specifically stated that "[c]ircumstantial evidence alone may sustain a conviction." McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992); see also Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). The rationale behind this rule is that the trier of fact "may reasonably rely upon circumstantial evidence; to conclude otherwise would mean that a criminal could commit a secret murder, destroy the body of the victim, and escape punishment despite convincing circumstantial evidence against him or her." Williams v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) citing People v. Scott, 176 Cal. App. 2nd 458, 1 Cal. Rptr. 600 (1959). In the present case, the District Court found sufficient evidence to enhance Defendant's sentence based on a deadly weapon enhancement.

Claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 17 P.3d 397, 415 (2001); See Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997). Should the court disagree, then it is the State's position that Defendant's argument is without merit.

The standard of review for prosecutorial misconduct rests upon Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

ENTRAPMENT

In Foster v. State, 116 Nev. 1088, 1091, 13 P.3d 61 (2000), the Nevada Supreme Court held that raising an entrapment defense places a defendant's character directly in issue for purposes of NRS 48.055. Under NRS 48.055, specific instances of a defendant's prior conduct may be used when character is an element of the defense. *See also* Foster, 116 Nev. at 1095, 13 P.3d at 65. The Foster Court outlined a three-part analysis to be used by courts in determining whether evidence of a prior conviction should be admitted to show predisposition to rebut an entrapment defense:

> (1) the other crime is of a similar character to the offense on which the defendant is being tried; (2) the other crime is not too remote in time from the offense charged; and (3) the probative value of the other crime is not substantially outweighed by the danger of unfair prejudice.

NRS 50.095 does not limit impeachment to only evidence of felonies relevant to truthfulness or veracity.

The entrapment defense requires proof of two elements: (1) the State presented the opportunity to commit a crime, and (2) the defendant was not otherwise predisposed to commit the crime. Daniels v. State, 121 Nev. Adv. Op. 11, 110 P.3d 477 (2005); Miller v. State, 121 Nev. Adv. Op. 10, 110 P.3d 53 (2005); Where the State uses undercover officers as decoys, the Nevada Supreme Court has "drawn a clear line between a realistic decoy who poses as an alternative victim of potential crime and the helpless, intoxicated, and unconscious decoy with money hanging out of a pocket. Id. The former is permissible undercover police work, whereas the latter is entrapment. Id.

CERTIFICATION TO ADULT STATUS

The crimes committed by Defendant are within the scope of NRS 62B.390(2)(b). The relevant part of NRS 62B.390 provides:

2. Except as otherwise provided in subsection 3, upon a motion by the district attorney and after a full investigation, the juvenile court **shall certify** a child for proper criminal proceedings as an adult to any court that would have jurisdiction to try the offense if committed by an adult, if the child:
   (a) Is charged with:

      (1) A sexual assault involving the use or threatened use of force or violence against the victim; or
      (2) **An offense** or attempted offense **involving the use** or threatened use **of a firearm**; and
   (b) Was 14 years of age or older at the time the child allegedly committed the offense.
3. The juvenile court shall not certify a child for criminal proceedings as an adult pursuant to subsection 2 if the juvenile court specifically finds by **clear and convincing evidence** that:
   (a) The child is developmentally or mentally incompetent to understand his situation and the proceedings of the court or to aid his attorney in those proceedings; or
   (b) The actions of the child were **substantially the result** of the substance abuse or emotional or behavioral problems of the child and the substance abuse or emotional or behavioral problems may be appropriately treated through the jurisdiction of the juvenile court.

NRS 62B.390 (emphasis added).

NRS 62B.390 was added in 2003 and replaced the former statute NRS 62.080.[1] The history of the statute is relevant to this case. Prior to 1995, all persons under the age of eighteen were "'presumed to come under the jurisdiction of the juvenile court,'" and there could be no certification to the adult court unless it was 'made to appear clearly and convincingly that the public safety and welfare require[d] transfer.'" Anthony Lee R. v. State, 113 Nev. 1406, 951 P.2d 1 (1197) quoting In the Matter of Seven Minors v. Juvenile Division, 99 Nev. 427, 664 P.2d 947 (1983). In 1995, the legislature declared that public safety and welfare require certification to adult court in juvenile cases involving the use or threatened use of a deadly weapon. Anthony Lee R., 113 Nev. at 1409, 951 P.2d at 3. In these types of cases, absent clear and convincing proof by the juvenile that he was not the principal actor or that special circumstances exist, juveniles were no longer presumed to be within the jurisdiction of the juvenile court. Id. In 1997, the legislature again amended the statute to make certification presumptive only in forcible sex

[1] Repealed by Laws 2003, c. 206, § 383, eff. Jan. 1, 2004.

crimes or those involving the use or threatened use of a firearm. NRS 62.080 (repealed). In 2003, the legislature reorganized the juvenile justice system in Nevada by repealing and reenacting statutes. The former NRS 62.080 became the current NRS 62B.380.

The statute, as it exists now, is narrowly drawn to provide for presumptive certification only in the most serious crimes. Certainly, an armed robbery with a gun falls within the scope of the statute. Therefore, Defendant bears the burden to demonstrate clear and convincing evidence that he falls within one of the statutory exceptions to presumptive certification.

THE DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE DISTRICT COURT ALLOWED WITNESSES TO IDENTIFY THE DEFENDANT AT TRIAL AFTER EACH HAD IDENTIFIED HIM DURING PHOTOGRAPHIC AND/OR PHYSICAL LINE-UPS

Defendant's claims that his due process rights were violated by the admission of witness testimony identifying him as the shooter is without merit. It is well settled that a trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992)." Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978 (1995).

A. The photographic line-ups were not unnecessarily suggestive.

Defendant's assertion that the identifications were unnecessarily suggestive and therefore in violation of his due process rights is without merit. The test to determine if an identification is in violation of the due process clause is "whether the confrontation conducted…was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was deprived due process of law." Banks v. State, 95 Nev. 90, 94 590 P.2d 1152 (1978)(citing Stovall v. Denno, 388 U.S. at 301-302 ((1972)). The determination of whether an identification is unnecessarily suggestive requires a review of the totality of the circumstances. Id. See also, Gehrke v. State, 96 Nev. 581, 613 P.2d 1028 (1980); Jones v. State, 95 Nev. 613, 600 P.2d 247 (1979).

B. Harmless Error

Even if this Honorable Court were to find that the line-ups were suggestive, any error in admitting the evidence would be harmless because it is clear, beyond a reasonable doubt that the admission of the evidence did not contribute to the verdict. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824 (1967)

THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN THE POLICE CONDUCTED A LAWFUL PAT-DOWN FOLLOWING A TRAFFIC STOP

Defendant's argument that the stop conducted by Officer Theobald was unlawful, thereby requiring suppression of the subsequent evidence found on defendant's person, is without merit. It is well-settled that a police officer may, in appropriate circumstances, and in an appropriate manner, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause for arrest. Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880 (1968). The Court in Terry held that police could stop a person based on "articulable and reasonable suspicion" that the person "is committing, has committed or is about to commit a crime," even where there is no probable cause to effect an arrest. Id.

In Terry, a police officer observed two individuals walking by, slowing down and looking in a store several times. Based on these observations, the officer thought that the men might be casing the store contemplating daylight robbery.

Nevada has codified the Terry decision. NRS 171.123 states that "Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime." Once the officer believes the person in question has committed, is committing or is about to commit a crime, the officer may then detain the person "to ascertain his identity and the suspicious circumstances surrounding his presence abroad." NRS 171.123(3).

The Supreme Court of Nevada recently discussed the constitutionality of NRS 171.123(3) in the 2002 case State v. Hiibel. 118 Nev. 868, 59 P.3d 1201 (2002). In Hiibel the Supreme Court stated that "any intrusions on privacy caused by NRS 171.123(3) is outweighed by the benefits to officers and community safety." Id. It is specifically stated within Hiibel that officers must have "an articulable suspicion that a person is engaged in criminal behavior." Id. "The 'reasonable articulable suspicion' necessary for a Terry stop is more than an inchoate and unparticularized suspicion or 'hunch.'" State v. Lisenbee, 116 Nev. 1124, 1128, 13 P.3d 947, 949 (2000); citing Terry v. Ohio, 392 U.S. at 27, 88 S.Ct. at 1883. Reasonableness is determined with an objective eye in light of the totality of the circumstances. *See* Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412 (1990).

Investigative Detentions Involving Automobiles are Inherently Dangerous.

It is well settled that investigative detentions involving suspects in automobiles are fraught with danger to police officers. *See* Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977). The Fourth Circuit as well as a number of state and federal courts have noted, *guns often accompany drugs*. *See* United States v. Perrin, 45 F.3d 869, 873 (4th Cir. 1995). (noting that "it is certainly reasonable for an officer to believe that a person engaged in selling of crack cocaine may be carrying a weapon for protection"). (emphasis added).

MIRANDA

It is well-settled that Miranda v. Arizona established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966). Pursuant to Miranda, a suspect may not be subjected to an interrogation in official custody unless that person has previously been advised of, and has knowingly and intelligently waived, the following: the right to silence, the right to the presence of an attorney, and the right to appointed counsel if that person is indigent. Miranda, at 444, 1612. Failure by law enforcement to make such an admonishment violates the subject's Fifth Amendment guarantee against compelled self-incrimination. Id

THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF ATTEMPTED MURDER

In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence. Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002). Where conflicting testimony is presented, the jury determines what weight and credibility to give it. Id. The Court asks, Whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id.

Attempted murder is a specific intent crime, meaning that the State had to prove beyond a reasonable doubt the defendant unlawfully intended to kill another person, and that the act tended to, but failed, to kill that person. Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). However, it is not necessary that the State prove that the defendant intended to kill a particular person if the defendant fired a weapon with the intent to kill a member of a group. See Ewell v. State, 105 Nev. 897, 785 P.2d 1028 (1989).

THE STATE PROVED THE ELEMENTS OF THE GANG ENHANCEMENT BEYOND A REASONABLE DOUBT

NRS 193.168 allows enhancement of any felony that is "committed knowingly for the benefit of, at the direct of, or in affiliation with, a criminal gang." A criminal gang is defined as:

> …any combination of persons, organized formally or informally, so constructed that the organization will continue its operation even if the individual members enter or leave the organization which:
> (a) has a common name or identifying symbol;
> (b) has particular conduct, status, and customs indicative of it;
> (c) has as one of its common activities engaging in criminal activity punishable as a felony, other than the conduct which constitutes the primary offense.

MOTION FOR A MISTRIAL

PRIOR BAD ACTS

SPONTANEOUS REFERENCE TO INADMISSIBLE MATERIAL

"A witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." Rose v. State, 123 Nev. 194, 207, 163 P.3d 408, 417 (2007) quoting Ledbetter v. State, 122 Nev. 252, 264-65, 129 P.3d 671, 680 (2006) quoting Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

THE DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE STATE PROVIDED ADEQUATE DISCOVERY

It is well-settled that Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. *See* Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." Mazzan 116 Nev. at 67. "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable *possibility* that the omitted evidence would have affected the outcome. Id.

(original emphasis), *citing* Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996); Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-400 (1976). Favorable evidence is material, and constitutional error results, "if there is a reasonable probability that the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 (1995), *citing* United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985). A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial. Kyles at 434, 115 S.Ct. 1565.

Due Process does not require simply the disclosure of "exculpatory" evidence. Evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses. *See* Kyles 514 U.S. at 442, 445-51, 1115 S. Ct. 1555 n. 13. Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

"While the [United States] Supreme Court in Brady held that the [g]overnment may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). When defendants miss the exculpatory nature of documents in their possession or to which they have access, they cannot miraculously resuscitate their defense after conviction by invoking Brady. White 970 F.2d at 337.

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made. This Court held that the defendant certainly had knowledge of the calls that he made and through diligent investigation the defendant's counsel could have obtained the phone records independently. Id. Based on that finding, this Court found that there was no Brady violation when the State did not provide the phone records to the defense. Id.

State v. Second Judicial District Court, 188 P.3d 1079 (2008) = sentencing scheme in place at the time the criminal offense is committed governs the defendant's sentence. Not the statute which governs at the time defendant is sentenced.

RESEARCH ON ISSUING ORDERS

SCR 16(3), through EDCR 1.30(b)(5), requires the chief judge to assign cases to each judge, in accordance with the other local rules.[FN86] Under the EDCR, the chief judge may "[r]eassign cases from a department to another department as convenience or necessity requires." [FN87] EDCR 1.60(a) reiterates that the chief

judge has *448 authority to assign and reassign all pending cases but also indicates that, "[u]nless otherwise provided in these rules, all cases must be distributed on a random basis." With respect to the types of cases assigned to each department, the chief judge must assign judges to blended and specialized divisions, which includes a civil-only division, on a rotating two-year basis, "as needed." FN88

Halverson v. Hardcastle 163 P.3d 428, 447 -448 (Nev.,2007)

1. When any district judge shall have entered upon the trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about such cause, proceeding or motion, unless upon the written request of the judge who shall have first entered upon the trial or hearing of such cause, proceeding or motion.

   District Court Rules, Rule 18

(a) The chief judge shall have the authority to assign or reassign all cases pending in the district. Unless otherwise provided in these rules, all cases must be distributed on a random basis. However, when a case is remanded to a lower court or tribunal for further proceedings, it must be returned to the original judge at the conclusion of these proceedings.

EDCR RULE 1.60

Ordinarily, one district court lacks jurisdiction to review the acts of other district courts. [FN13] However, in the unique situation of forfeitures, when the same district attorney's office is proceeding on both the criminal case and the forfeiture proceeding, the court can exercise its jurisdiction by exercising its inherent authority over those who are the officers of the court. The federal courts have called this anomalous jurisdiction. [FN14]

FN13. *Rohlfing v. District Court, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990*).

Maiola v. State 120 Nev. 671, 676, 99 P.3d 227, 230 (Nev.,2004)