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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RONALD LAWRENCE MORTENSEN, Petitioner, v. ROBERT LEGRAND, et al., Respondents.	2:11-CV-00266-KJD-(GWF) **Second Amended Petition For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 By A Person In State Custody** (*Not* Sentenced To Death)

Petitioner Ronald Lawrence Mortensen, through counsel, hereby files this Second Amended Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. Mr. Mortensen alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America, and the rights afforded him under international law enforced under the Supremacy Clause of the United States Constitution. U.S. Const., Art. VI.

Procedural Allegations

1. Mortensen is currently in the custody of the State of Nevada at Lovelock Correctional Center in Lovelock, Nevada. Respondent Robert LeGrand is the warden of the Lovelock Correctional Center, and Adam Paul Laxalt is the Attorney General of the State of Nevada. The Respondents are sued in their official capacities.

2. On January 17, 1997, the State charged Mortensen with one count of murder with use of a deadly weapon (Open Murder), a violation of NRS 200.010, 200.030, 193.165. (Doc. 19 at 5-6). The case number was C140608, in the Eighth Judicial District Court, Clark County, Nevada. *Id.* at 5. The case was in Department III before Judge Joseph S. Pavlikowski. *Ibid.* On February 6, 1997, Mortensen pleaded not guilty to the charge(s) in the indictment. (Doc. 23 at 245-46).

3. On April 24, 1997, the date set for calendar call, the State asked for leave of court to file an Amended Indictment alleging a second, alternative theory of murder, pursuant to NRS 200.070. (Doc. 35-2 at 2627-30). According to the State, under that particular theory of culpability (NRS 200.070), Mortensen would be guilty of second-degree murder, not first degree murder. (Doc. 35-2 at 2628-29). The court granted the State's request. (Doc. 35-2 at 30). The Amended Indictment charged Mortensen with one count of murder with use of a deadly weapon (Open Murder), a violation of NRS 200.010, 200.030, 200.070 and 193.165, committed on or about December 28, 1996. (Doc. 21 at 384). According to the Amended Indictment, Mortensen was liable under the following "theories of criminal liability, to wit: (1) having premeditation and deliberation in its commission, and (2) by committing the unlawful act or acts, which, in its or their consequences, naturally tends or tend to destroy the life of a human being, to wit: Defendant aiming and shooting a firearm from a motor vehicle into a group of persons." (Doc. 21 at 384-85). That same day (April 24, 1997), Mortensen pleaded not guilty to the Amended Indictment. (Doc. 35-2 at 2630). Mortensen's trial counsel then informed the court he knew of "no reason" why the filing of the Amended Indictment would prevent the defense from proceeding with trial as calendared. *Ibid.*

4. The trial started on Monday, April 28, 1997 with jury selection. (Doc. 23-1 at 750). The parties made their opening statements on April 30, 1997. (Doc. 26 at 1232-68 (prosecution's opening statement); Doc. 26 at 1269 — Doc. 26-1 at 1286 (defense opening statement)). On May 14, 1997, the jury found Mortensen guilty of murder in the first degree with the use of a deadly weapon. (Doc. 22 at 630). That same jury then deliberated in the penalty phase of the trial. The

following day, May 13, 1997, the jury determined Mortensen should be sentenced to life without the possibility of parole for murder in the first degree, plus life without the possibility of parole for the use of a deadly weapon. (Doc. 22-2 at 653; Doc. 23 at 726-27; Doc. 35-1 at 2598). The verdict was entered on May 15, 1997. (Doc. 22-1 at 653).

5. On June 16, 1997, Mortensen filed a motion for new trial. (Doc. 22-2 at 668-78). The motion was based on newly discovered evidence regarding a woman named Carye Morris, who alleged Officer Christopher Brady forced her to perform fellatio upon him while transporting her to the jail. *Ibid.* When she asked him why he would do such a thing, he responded "(Officer Brady laughing) Some people call me evil – (Officer Brady still laughing) – Hell, sometimes I call myself evil – (still laughing) – Man, I am evil." (Doc. 22-2 at 674). During the trial, Mortensen had testified it was Brady, not him, who fired multiple shots into the alley of McKellar Circle, and that after firing the shots, Brady told Mortensen, "Just chill out . . . I told you I was an evil man. I am evil." (Doc. 22-2 at 675-77). Although the State had mentioned something about Morris midway through the trial, it was not until after the trial that Mortensen discovered the full and accurate facts about Morris's experience with Brady. (Doc. 22-2 at 668-72).

6. On July 25, 1997, the judge sentenced Mortensen pursuant to the jury's verdict, and determined the sentences should be consecutive. (Doc. 23 at 726-27; *see also* Doc. 36 at 2649-55). The written judgment of conviction was entered on July 28, 1997. *Ibid.* That same day, the judge also entered an order denying Mortensen's motion for new trial. (Doc. 23 at 731-32; *see also* Doc. 36 at 2649-50).

7. Mortensen appealed from the judgment of conviction and the order denying his motion for new trial on August 4, 1997. (Doc. 23 at 733-35). The appeal was assigned case number 30855. (Doc. 35-2 at 2602). Mortensen raised four issues in that appeal:

- By ruling that MORTENSEN could not cross-examine Brady concerning his numerous incidents of excessive force, the trial court denied MORTENSEN a meaningful

opportunity to establish Brady's guilt and, in doing so, denied him his Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process.

- The opinion testimony of Torrey Johnson to the effect that the vehicle from which shots were fired was, in all probability, moving was without foundation, constitutionally prejudicial, and otherwise inadmissible.

- By having refused multiple defense efforts to obtain and examine Brady's truck and clothing and by having specifically disregarded a Justice Court directive to preserve these items, the State did deny MORTENSEN his due process rights under the Fourteenth Amendment and an opportunity to establish his innocence.

- The court erred in failing to order a new trial on the basis of newly discovered evidence. After the trial, Carve Morris, a young girl who alleges that Christopher Brady forced her to commit a sex act upon him when he arrested her, stated that Brady told her he was "evil."

(Doc. 70 at 4:681–82).

8. While that appeal was pending, Mortensen filed another motion for new trial. (Doc. 36 at 2656 — Doc. 36-1 at 2698). His second motion for new trial was filed on August 10, 1998. *Ibid.* Once again, Mortensen requested a new trial based on newly discovered evidence. *Ibid.* The newly discovered evidence consisted of officer Mark Barry's testimony before a federal grand jury that, on no fewer than six occasions before the murder in this case, Brady told him he wanted to do a "drive-by"; that officer Bill Butler, while serving with Brady on LVMPD's Las Vegas Strip Bike Squad, heard Brady refer to himself as "evil"; and a memorandum by Torrey Johnson, the State's firearms examiner, demonstrating the "haphazard, last-minute, patchwork quality of the supposed scientific testing" Johnson did. *Ibid.*

9. On August 25, 1998, the court granted an evidentiary hearing on Mortensen's second motion for new trial. (Doc. 36-1 at 2722; Doc. 36-2 at 2731). The evidentiary hearing was held on October 9, 1998. (Doc. 36-3 at 2760 — Doc. 37 at 2850). On October 15, 1998, after the evidentiary hearing, the district court denied Mortensen's motion for new trial. (Doc. 36-2 at 2739-42).

10. On November 3, 1998, Mortensen appealed the district court order denying his second motion for new trial. (Doc. 36-2 at 2746-49). That appeal was assigned case number 33293 (Doc. 37 at 2851). In that appeal, Mortensen raised two issues:

- That Christopher Brady, the man whom MORTENSEN has always alleged shot Daniel Mendoza, did, prior to the shooting, describe himself as "evil" to other officers, the same word MORTENSEN testified Brady used to describe himself immediately after Brady shot Daniel Mendoza; and that Chris Brady told Marc Barry, another police officer, on as many as six occasions before the Mendoza shooting, that Brady wanted to do a "drive-by" shooting.
- That an expert witness prepared relevant notes of his impressions, which notes were provided to the State but were withheld from MORTENSEN, that the impressions reflected on the withheld notes were exculpatory; and that the expert witness, with complete disregard for the scientific method, allowed the conclusions which he intended to offer to dictate what the relevant facts were?

(Doc. 37 at 2863).

11. On March 4, 1999, Mortensen moved to consolidate appeals 30855 and 33293. (Doc. 37-2 at 2913-16). The motion was initially denied. (Doc. 37-2 at 2917). After oral argument in appeal No. 30855 and complete briefing in the two appeals, however, the Nevada Supreme Court changed its mind and ruled the appeals would be consolidated "for the purpose of disposition only." (Doc. 38-1 at 3019, n.1).

12. While these two appeals were pending, Mortensen filed a third motion for new trial on May 6, 1999. (Doc. 37-2 at 2924-36). This motion, like the others, was based on newly discovered evidence. *Id.* at 2925. The newly discovered evidence related to one of the State's eyewitnesses, Ruben Ramirez. *Ibid.* Ramirez, like Mendoza (the victim), was a member of the 18th Street gang. *Ibid.* Apparently, of all the State's eyewitnesses, Ramirez was the only one who was able to identify Mortensen (from a physical lineup) as the shooter. *Ibid.* During his trial testimony, however, Ramirez claimed he was just outside having a smoke at the time of the shooting. *Id.* at 2926. He denied that "he ever drinks and denied doing drugs." *Ibid.* He also "denied that either he

or any of his associates had a gun that night." *Ibid.* The newly discovered evidence, however, showed that Ramirez had been arrested several times before trial for robbery, possession of a dangerous weapon, possession of an unregistered firearm, domestic violence, and for selling methamphetamine. *Id.* at 2926-27. Ramirez therefore may have received favorable treatment or other benefits from the State in exchange for his testimony. Moreover, this evidence could have been used to impeach his testimony about not carrying a gun, and about how he was just outside having a smoke on the night of the shooting. Mendoza's autopsy showed the presence of meth in his system (the very drug Ramirez was arrested for selling), and Rosa Zarita said she announced the "mares are here" when she saw Brady's truck drive up to McKellar Circle. *Ibid.*

13. On September 27, 1999, the Nevada Supreme court decided the consolidated appeals numbers 30835 and 33293. (Doc. 38-1 at 3018-38). The court in its Opinion affirmed Mortensen's conviction and sentence, and affirmed the district court's denial of Mortensen's first motion for new trial. *Ibid.* The opinion was amended on October 14, 1999, but the Nevada Supreme Court's decision to affirm did not change. (Doc. 38-1 at 3039-40).

14. On October 14, 1999, Mortensen filed a petition for rehearing in appeals numbers 30835 and 33293. (Doc. 38-1 at 3041-49).

15. While the petition for rehearing was pending, the district court entered written findings of Fact and Conclusions of Law regarding Mortensen's third motion for new trial. (Doc. 38-2 at 3052-54). Those were entered on December 3, 1999. *Ibid.* The district court denied Mortensen's third motion for new trial. *Id.* at 3051.

16. On December 14, 1999, Mortensen filed a notice of appeal, appealing the district court's order denying his third motion for new trial. (Doc. 38-2 at 3057). The appeal was assigned case number 35316. (Doc. 38-2 at 3077). In that appeal, Mortensen raised one issue for review.

- Whether newly discovered evidence that Ramon [should be "Ruben"] Ramirez, the principal eyewitness to testify against Mortensen at trial, was actively involved in a methamphetamine distribution ring at the time of the shooting and at the time of the

> trial, and may have been armed at the time of the shooting, was so significant as to warrant a new trial.

(Doc. 38-2 at 3081).

17. On December 27, 1999, the Nevada Supreme Court denied Mortensen's petition for rehearing in appeals numbers 30855 and 33293. (Doc. 38-2 at 3063). Remittitur was filed on January 28, 2000. (Doc. 38-2 at 3070, 3071).

18. On December 13, 2000, while Mortensen's appeal from the denial of his third motion for new trial was pending, Mortensen filed a petition for writ of habeas corpus in state court. (Doc. 40 at 3173-80). In his petition, Mortensen alleged the following grounds for relief:

- Denied rights under Sixth and Fourteenth Amendments as I did not receive due process of law or effective assistance of counsel at trial. (Supporting facts will be presented in the supplemental points and authorities filed after a briefing schedule is established.)
- Denied rights under Sixth and Fourteenth Amendments as I did not receive due process of law or effective assistance of counsel on appeal. (Supporting facts will be presented in the supplemental points and authorities filed after a briefing schedule is established.)

Id. at 3178-79.

19. On October 5, 2001, the Nevada Supreme Court entered an Order of Affirmance in appeal number 35316. (Doc. 40 at 3206-10). They affirmed the district court's denial of Mortensen's third motion for new trial. *Ibid.* Remittitur was filed on November 9, 2001. (Doc. 40 at 3212).

20. On February 11, 2004, Mortensen filed his supplemental petition for writ of habeas corpus (post conviction) points and authorities in state court. (Doc. 41 at 3256 — Doc. 41-3 at 3403). In his supplemental petition, Mortensen raised the following grounds for relief:

- Mortensen received ineffective assistance of counsel (trial level) in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and in violation of his rights under Nevada's Constitution Article 1, Sections 3, 6 and 8, and Article IV, Section 21.

- Mortensen received ineffective assistance of counsel (appellate level) in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and also in violation of his rights under Nevada's Constitution Article 1, Sections 3, 6, and 8, and Article IV, Section 21.

- Mortensen's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, and his right to a fundamentally fair trial were violated because various law enforcement agencies failed to provide discovery of impeachment and exculpatory evidence.

- Mortensen was denied due process of law and a fundamentally fair trial by the concealment and destruction of evidence, and the failure of the State to investigate the case, but rather to proceed with the goal of shielding Brady and blaming Mortensen.

- The conduct of the prosecutors and State witnesses denied Mortensen of due process of law and of a fundamentally fair trial in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

- The pre-trial identification procedures denied Mortensen of his right to due process and a fundamentally fair trial.

- Mortensen's conviction and sentence are invalid under the State and Federal Constitutional guarantee of due process, equal protection of the laws, effective assistance of counsel, and reliable sentence because a number of jury instructions given at trial were faulty and were not the subject of contemporaneous objection by trial counsel, and not raised on direct appeal by appellate counsel. *See*, United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article 1, Sections 3, 6 and 8; Article IV, Section 21.

- Improper argument and prosecutorial misconduct deprived Mortensen of a fair trial and due process of law, and trial counsel failed to make contemporaneous objections [to] valid issues, thereby precluding meaningful appellate review of the case, in violation of Mortensen's rights under the Sixth Amendment to effective counsel, and under the Fifth and Fourteenth Amendments to due process and a fundamentally fair trial.

- The prosecution of Mortensen was disparate treatment of identically or similarly situated persons in violation of the equal protection clause of the Fourteenth Amendment.

- The stock jury instruction given in this case defining premeditation and deliberation necessary for first degree murder as "instantaneous as successive thoughts of the mind" violated the Constitutional guarantees of due process and equal protection, was vague and relieved the State of its burden of proof on every element of the crime. *See*, United

States Constitution Amendments 5, 6, 8, and 14, Nevada Constitution Article 1, Sections 3, 6 and 8; Article IV, Section 21.

- Cumulative errors throughout the course of the proceedings have acted to deny Mortensen of due process of law and a fundamentally fair trial under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under the Constitution of the State of Nevada.

- Mortensen's right to a fair and impartial jury, free from prejudicial publicity, was violated by the failure of counsel to move for a change of venue, and further by the failure of the court to order such a change of venue even in the absence of a motion by counsel.

Ibid.

21. Mortensen requested an evidentiary hearing, which the court granted but limited to the testimony of defense counsel (Frank Cremen) and Mortensen. (Doc. 43 at 3603). Cremen testified at the evidentiary hearing on June 19, 2007. (Doc. 43-2 at 3691 — Doc. 43-5 at 3800) Mortensen testified at the evidentiary hearing on July 19, 2007. (Doc. 43-2 at 3659-89). On April 23, 2008, the district court denied Mortensen's petition for a writ of habeas corpus. (Doc. 11 at 3801-26). Judge Pavlikowski was no longer on the case by this time. The case was still in Department III of the Eighth Judicial District Court, Clark County, Nevada, but the judge who ruled on Mortensen's petition for a writ of habeas corpus was Douglas W. Herndon. *Ibid.*

22. Mortensen filed a notice of appeal on May 13, 2008, appealing the district court's denial of his petition for a writ of habeas corpus. (Doc. 11 at 3828-29). The appeal was assigned case number 51648. (Doc. 11-1 at 3857). Mortensen raised the following issues in that appeal:

- Whether the district court abused its discretion in limiting the evidentiary hearing on Mortensen's claims of ineffective assistance of counsel thereby depriving him of due process under the Fourteenth Amendment and of the ability to conclusively establish a violation of the Sixth Amendment right to effective assistance of counsel.

- Whether Mortensen's conviction and sentence are valid under the State and Federal guarantee of effective assistance of counsel, due process of law, equal protection of the laws, cross-examination and confrontation, and a reliable sentence due to the failure of trial counsel to provide reasonably effective assistance of counsel. United States

Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

- Whether Mortensen's conviction and sentence are valid under the State and Federal constitutional guarantee of due process, equal protection of the laws, effective assistance of counsel, and reliable sentence because Mortensen was not afforded effective assistance of counsel on direct appeal. United States Constitution Amendments 5, 6, 8, and 14; Nevada Constitution Article I, Sections 3, 6 and 8; Article IV, Section 21.

- Whether the jury instruction given in this case defining premeditation and deliberation necessary for first degree murder as "instantaneous as successive thoughts of the mind" violated the constitutional guarantees of due process and equal protection, was vague and relieved the State of its burden of proof on every element of the crime and mandates reversal of the conviction.

- Whether the failure to provide discovery of impeachment and exculpatory evidence by various law enforcement agencies violated Mortensen's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and right to a fundamentally fair trial.

- Whether cumulative errors throughout the course of the proceedings have acted to deny Mortensen of due process of law and a fundamentally fair trial under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Nevada.

(Doc. 44-1 at 3867-68).

23. On July 15, 2010, the Nevada Supreme Court entered an Order of Affirmance, affirming the district court's denial of Mortensen's petition for a writ of habeas corpus. (Doc. 44-6 at 4043-53). On August 2, 2010, Mortensen filed a petition for rehearing. (Doc. 44-6 at 4054-57). On October 4, 2010, the Nevada Supreme Court denied rehearing. (Doc. 44-6 at 4058-62). On October 5, 2010, Mortensen filed a petition for *en banc* reconsideration. (Doc. 44-6 at 4063-66). On November 17, 2010, the Nevada Supreme Court denied Mortensen's petition for *en banc* reconsideration. (Doc. 44-6 at 4067-70). Remittitur was filed on December 28, 2010. (Doc. 44-6 at 4071).

24. On February 17, 2011, Mortensen filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in State custody (NOT sentenced to death). (Doc. 1). On March 4, 2011, the court appointed undersigned counsel to represent Mortensen in this case. (Doc. 6). On March 9, 2011, the court entered an order directing counsel for Mortensen to file an amended petition that includes "all known grounds for relief (both exhausted and unexhausted)." (Doc. 7).

25. On October 21, 2011, an amended petition was submitted. (Doc. 15).

26. On March 9, 2012, Respondents moved to dismiss Mortensen's amended petition, arguing it contained a mix of exhausted and unexhausted claims. (Doc. 50). On January 9, 2013, this Court determined that some of the claims in Mortensen's amended petition were unexhausted. (Doc. 57).

27. On March 13, 2013, pursuant to a stipulation from all parties, this Court stayed proceedings in this case so that Mortensen could return to Nevada state court to present there his unexhausted claims. (Doc. 61).

28. On May 2, 2013, Mortensen filed a petition for writ of habeas corpus in Nevada state court, presenting all the claims that he had raised in his amended petition in this Court. (Doc. 70-1 at 4185). He also filed a motion, on two separate occasions, asking the state district court to appoint him counsel. (Doc. 70-1 at 4352).[1] No counsel was ever appointed. The Nevada state district court denied Mortensen relief in a written order entered April 29, 2014. (Doc. 70-3 at 4611). Notice of entry of the district court's findings of fact, conclusions of law and order, denying Mortensen's petition was entered and served on May 5, 2014. (Doc. 70-3 at 4620).

[1] So far, counsel has only received a copy of the second motion to appoint counsel, and it is the one cited above. However, the state court docket indicates that, on May 3, 2013, Mortensen filed his first motion to appoint counsel with the petition for writ of habeas corpus. (Doc. 70-2 at 4508).

2%. Mortensen appealed the state district court's decision.[2] While the district court, Mortensen moved the Nevada Supreme Court to appoint appellate counsel to aid him, though again, no counsel was appointed. The Nevada Supreme Court considered Mortensen's appeal without briefing or oral argument, and it affirmed the district court's decision in an order entered on September 16, 2014. (Doc. 70-3 at 1489). The remittitur was filed on October 24, 2014. (Doc. 70-3 at 1515).

3%. December 16, 2014, after Mortensen updated this Court on the status of his state proceedings, it ordered him to file a second amended petition within 60 days from the entry of the order. (Doc. 67).

Statement of Facts

Context. To put the claims raised in this petition into some context, the following statement of facts is incorporated from the Nevada Supreme Court decision resolving Mortensen's first direct appeal. *See Mortensen v. State*, 115 Nev. 273, 986 P.2d 1105 (1999). It is offered solely to provide a general factual context of the crime that was presented at trial. It is not a complete and accurate representation of all of the events that transpired before and after the crime.

On Friday, December 27, 1996, Ronald Mortensen, an officer with the Las Vegas Metropolitan Police Department (LVMPD), celebrated his 31st birthday at a Las Vegas drinking establishment. Christopher Brady, another LVMPD officer, was among the revelers.

At around midnight, the celebration ended. Mortensen's wife went home while Mortensen and Brady got in Brady's blue 1977 LVMPD police pickup truck. Brady and Mortensen then drove away

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[2] Mortensen filed two notices of appeal. One after the state district court's decision was pronounced, and another after he was given notice that the written order was entered. (Doc. 70-2 at 1469; Doc. 70-3 at 1621).

Brady drove and Mortensen occupied the passenger seat. Prior to their departure, Mortensen gave his wife his fanny pack, but removed from it his off-duty weapon, a .380 Sig Sauer pistol.

Brady and Mortensen ultimately drove into an alley abutting 537 McKellar Circle, an area known for gang activity, where a group of people had gathered. It is undisputed that the passenger side of Brady's truck faced the group. Witnesses saw a handgun appear in the passenger's window, after which six shots were fired. One man, Daniel Mendoza, was fatally wounded. The truck then pulled away and left the area.

Following the incident, Mortensen and Brady went to PT's Lounge in Las Vegas, a bar frequented by off-duty police officers. Later Brady drove Mortensen home.

Brady claims that the next morning, Saturday, he discovered Mortensen's Sig Sauer in the pickup. Brady removed the bullets from the magazine and the chamber, placed the gun in his bathroom cabinet and went fishing. On Sunday morning, Brady contacted his father, who was also a police officer. Brady, accompanied by his father, then drove to the police station, where Brady gave a statement identifying Mortensen as the shooter. Brady also turned over Mortensen's Sig Sauer. That evening, Mortensen was arrested. The State treated Brady as a witness rather than as an accessory. Thus, he was never arrested or charged in connection with his role in the affair.

During the investigation, the police went to Brady's apartment to retrieve the truck and Brady's gun, a .38 Taurus revolver. The truck was towed to a crime lab where the passenger side was examined by a criminalist. The truck was returned to Brady a day or two later. Two identifiable prints left by Mortensen were recovered from the side of the weapon.

On January 15, 1997, Mortensen appeared at a bail hearing before a justice of the peace. Mortensen's counsel made an oral request for Brady's truck and clothing. Although noting that it had no jurisdiction over Brady's property, the court requested that the State ask Brady not to destroy any evidence.

On January 23, 1997, Mortensen was arraigned in the District Court. At that hearing, Mortensen made another oral request for Brady's truck and clothing. The court told Mortensen that he would have to obtain those items through his own resources. Sometime within the next few weeks, Mortensen was able to obtain both the truck and the clothing. The clothing had been laundered. The custom seat that had been in the truck on the night of the shooting had been removed and sold. The truck had been repainted, the tint had been removed from the side windows, and the clutch and carburetor had been adjusted.

At a pre-trial hearing, on April 24, 1997, the State claimed that no additional discovery was forthcoming.

On April 28, 1997, the first day of trial, Mortensen received copies of two reports from Torrey Johnson, the State's firearms expert. The first report, dated April 25, 1997, indicated that, on February 18, 1997, Johnson examined Brady's truck and concluded that a dent in the floorboard was not made by a bullet strike. The report also indicated that on April 23, 1997, Johnson examined two bullet strikes at the murder scene, one on an electrical box and another on a laundry room doorway, and concluded that the laundry room bullet had been traveling slightly upwards. Johnson also concluded that both bullets came from Mortensen's gun. The second report, dated April 28, 1997, indicated that on April 25, 1997, Johnson examined a piece of sheet metal from the murder scene and concluded it had been struck by a bullet from Mortensen's gun which was traveling perpendicular to the surface of the sheet metal.

The State called several eyewitnesses at trial. Five witnesses gave similar descriptions of the shooter, describing him as a large, white male who wore glasses and was the passenger in the truck. Two of those witnesses specifically identified Mortensen as the shooter, and one of those witnesses stated that the truck moved during the shooting.

It was established that Mortensen was six feet, two inches tall and weighed 220 pounds, while Brady was five feet, nine inches tall and weighed 165 pounds. It was also established that Mortensen wore glasses on the night of the shooting.

No witnesses identified Brady or anyone else as the shooter.

Brady was called as a State's witness. He testified that the center console of the custom truck seat was lowered at the time of the shooting, and therefore it would have been impossible for him to reach across the truck cab in order to fire a gun out of the passenger window. However, Brady did admit that he drew his weapon, a Taurus revolver, immediately after Mortensen drew his gun. Brady claimed he pointed the Taurus out the passenger window, but did not fire. Brady testified that he pressed down on the truck's accelerator, after shooting commenced.

At this point in the trial, Mortensen sought to question Brady about two prior incidents, which had resulted in internal affairs investigations of Brady. The incidents resulted in, at most, minor internal corrective action. The court sustained the State's objection to this line of inquiry.

The State called Johnson as an expert witness. Johnson identified Mortensen's Sig Sauer as the murder weapon. He testified that the Sig Sauer must have been fired from outside the truck cab, due to the ejection characteristics of the gun, and the fact that all of the shells were found on the ground at the crime scene. Johnson also gave an opinion with regard to the trajectories of the bullets fired at the crime scene. Specifically, Johnson analyzed three bullet strikes: one located on a piece of sheet metal; another on a metal electrical box; and a third through a glass window and into a laundry room door. Johnson testified that in his opinion, based on location of the bullet strikes, the gun moved at least six feet during the shooting. Shortly thereafter, Mortensen moved for a mistrial, claiming that the State failed to provide notice that Johnson would testify that the truck moved while the shots were fired. The motion was denied.

Mortensen testified in his own defense. He admitted he was in the passenger seat on the night of the shooting, but claimed that Brady was the shooter. Mortensen testified that Brady

suddenly retrieved the Sig Sauer from underneath Morton's buttocks, reached across the cab of the truck and fired at the group of people outside. Then, according to Mortensen, Brady indicated he would dispose of the gun, and that Brady placed it in a secret compartment in the center section of the custom truck seat. Mortensen also testified that he asked Brady why he had fired the shots and that Brady then called himself "evil."

Brady's truck was introduced into evidence. Although Brady had removed the custom seat after the shooting, the defense was able to reacquire the same seat and place it in the truck for demonstration purposes at trial. Members of the jury observed the truck with the custom seat in place and were able to sit inside the truck.

On May 14, 1997, the jury found Mortensen guilty of first degree murder with the use of a deadly weapon. He was sentenced to two consecutive terms of life imprisonment without the possibility of parole.

Statement on Exhaustion

All of the claims presented in this petition have been exhausted, either through submission to the Nevada Supreme Court on direct appeal from his conviction or motions for new trial, through submission to the Nevada Supreme Court on appeal from his first state post conviction petition, or through submission to the Nevada Supreme Court on appeal from the second state post conviction petition accomplished during the stay and abeyance of proceedings in this case.

Prior Counsel

The attorneys who represented Mr. Mortensen in previous proceedings were:

1. Pretrial/Trial Proceedings: Frank J. Cremen, Esq. (retained)
2. First Direct Appeal: Frank J. Cremen, Esq. (retained)
3. Post-Trial Proceedings (3 motions for new trial): Frank J. Cremen, Esq. (retained)
4. Appeals from Denials of Motions for New Trial: Frank J. Cremen, Esq. (retained)

5. State Habeas Corpus Proceedings (Post Conviction): David M. Schieck, Esq., Special Public Defender (appointed)

6. Appeal from Denial of State Petition for Writ of Habeas Corpus: David M. Schieck, Esq., Special Public Defender (appointed)

Grounds for Relief

I. Ground One – Ineffective Assistance of Counsel at Pretrial

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because his trial attorney failed to provide effective assistance of counsel.

Under *Strickland v. Washington*, Mortensen was entitled to "reasonable effective assistance" from his trial counsel. 466 U.S. 668, 687 (1984). Reasonable effective assistance, or assistance that meets "an objective standard of reasonableness," *id.* at 688, includes the requirement that counsel "make reasonable investigations" and other preparations for the trial. *See id.* at 690–91. As detailed below, Mortensen's trial counsel failed to make reasonable preparations for trial. This prejudiced Mortensen, as "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Supporting Facts

Trial counsel failed to perform adequate pretrial investigation, failed to prepare to present a cogent theory of defense, and further failed to confer with Mortensen concerning the defense of the case and evidence to be presented. Some of counsel's pretrial errors and omissions include:

A. *Failure to obtain or seek appointment of experts*

Trial counsel failed to retain or seek appointment for his client of experts necessary to defend the case—to assist in preparation for and to testify at trial, to support the theory of defense,

and to rebut the evidence presented by the State. The necessary experts should have included the following:

1. *Eyewitness expert*

A *competent* eyewitness testimony expert should have been utilized by trial counsel in order to establish that the identification of Mortensen was incorrect or could not be certain beyond a reasonable doubt. Research has shown that flawed police procedures and the vagaries of memory often lead witnesses to identify the wrong person, and the credulous jurors too easily accept their testimony. The expert called by trial counsel, Richard Shomer, was inadequately prepared and failed to present any testimony based on an examination of the crime scene, vehicle, or interviews with alleged witnesses.

2. *Police procedure expert*

Trial counsel should have engaged an expert on police procedures, interviews, interrogations and homicide scene investigations. A key aspect of the defense theory was to establish that the LVMPD made Mortensen a scapegoat and protected Brady based on his father's connection with law enforcement. An expert in police procedures could have testified as to the following errors, omissions, irregularities, and cover ups:

the presence of Chris Brady's father during Brady's statement;

taking only an 18 minute statement from an accomplice/eyewitness to an officer involved homicide;

- releasing Brady's truck without full forensic processing;
- failing to interview other persons present during the evening leading up to the shooting;
- failing to record or document alleged follow up interviews with Chris Brady wherein he allegedly clarified inconsistencies in his original statement;
- failing to have a command level officer present at the initial interview of Brady;

- the workings of the "Blue Wall of Silence" and how it impacted on the disparate treatment of Brady and Mortensen;
- the immediate release of Mortensen's photograph to the media, while waiting several weeks before any photograph of Brady was released to insure that Mortensen was identified as the shooter while Brady was allowed to remain virtually anonymous.

Even without any significant expenditure or effort, trial counsel could have presented testimony on the above issues. Trial counsel had already employed Don Dibble as a defense investigator. Dibble had been a homicide detective for the LVMPD for a number of years. If nothing else, trial counsel could have called Dibble to testify that LVMPD had violated a number of standard procedures and practices in the handling of the case and the prosecution of Mortensen while Brady was allowed a free pass.

Also available to trial counsel was Robert Piccarello, another person qualified to testify on standard police procedures and the deviations that occurred in the case. Piccarello was present during the early stages of the trial and could have been used to clarify and bolster the defense position.

3. Lighting expert

Trial counsel should have engaged an expert on lighting. Such an expert could have been used to reconstruct the lighting conditions at the time of the shooting, and, in turn, establish that the eyewitnesses could not have made a valid identification. A lighting expert could have also testified that the conditions at the time of the shooting were drastically different than those observed by the jury. Further, key testimony could have been provided as to the effect tinted windows had on the alleged ability of the witnesses to identify Mortensen as the shooter as opposed to Brady.

4. Ballistics and trajectory expert

Trial counsel was also deficient for failing to engage a ballistics expert. Testing completed after the trial established that a substantial issue existed whether the fatal shot was fired from

Mortensen's gun. After Mortensen had been convicted and sentenced, an expert was contacted that would have been available to testify if requested, and after performing tests determined that there existed a reasonable doubt that the fatal shot was fired from Mortensen's gun. The same expert could have been utilized to conduct election pattern analysis and to discredit the testimony of Torrey Johnson at trial. Although trial counsel was sandbagged by the State on Torrey Johnson's testimony, as argued below, he nevertheless should have had an expert ready and available to testify.

5. *Gang expert*

Trial counsel was ineffective for failing to engage an expert on gangs, particularly one who could describe gang members' proclivity for carrying guns, the methodology for drug sales at that location, and standard response to unknown individuals or vehicles in the area.

The deceased in this case was an admitted member of the 18th Street gang, a street gang emanating out of southern California. Evidence existed to show that the 18th Street gang had been the victims of police shootings in Los Angeles and those shootings would have put the entire gang on alert to the presence of unknown individuals that looked like police officers. Under the circumstances that existed in December 1996 with respect to the 18th Street gang, there is no way that gang members would not have been armed and on alert to two white males that looked like police officers entering McKellar Circle after dark.

18th Street gang member Javier Ocando had been shot by members of LAPD Rampart Division on October 12, 1996, and that shooting would have been relayed to the Las Vegas branch of the gang. An expert familiar with the workings of the 18th Street gang would have been able to unequivocally testify that the members on McKellar Circle would have reacted in a hostile fashion to the presence of the Brady vehicle containing two white individuals that looked like "males." The jury was deprived of this crucial testimony because of trial counsel's failure to obtain and present such an expert.

6. Forensic pathologist

Trial counsel was ineffective for failing to engage a forensic pathologist. A forensic pathologist could testify that the victim's gunshot wound was not caused by a hydro shock .380 caliber projectile, meaning Mortensen's Sig Sauer .380 weapon did not cause his death. This testimony would have established that Mendoza was possibly killed by gunfire from the other members of the 18th Street gang, or, at the very least, created a reasonable doubt as to how Mendoza was killed.

B. Video and independent witnesses near crime scene

Trial counsel failed to obtain copies of video tapes from the T-Bird Lounge, Terrible Herbst gas station, and an ATM machine, or interview witnesses to establish from independent sources a number of crucial facts. Any of these video tapes or witnesses could have established whether Brady was wearing his glasses on the night in question and would have been able to substantially impeach Brady's version of the events of the evening.

C. Improper pretrial identification

Trial counsel failed to challenge the pretrial identification of Mortensen as being so impermissibly suggestive as to deprive him of due process and taint the in-court identification relied upon by the State.

The identification of Mortensen as the shooter was a key component of the State's case and ultimately led to Mortensen's conviction for first degree murder. Trial counsel did not challenge the procedures utilized by LVMPD, despite a number of irregularities. Trial counsel should have sought an evidentiary hearing to expose the suggestive nature of the line-up, emphasizing that LVMPD had released Mortensen's photograph to the press prior to the line up.

Due process clause of the Fifth and Fourteenth Amendment forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. In addition to being

denied effective assistance of counsel under the Sixth Amendment, Mortensen was denied due process and a fundamentally fair trial through the use of the tainted identification.

The evidence shows Mortensen's identification was impermissibly tainted by his photograph being disseminated in the media prior to any photo or live lineups being shown to alleged witnesses. Trial counsel should have contemporaneously challenged the admissibility and demanded an evidentiary hearing before allowing any in court identification to occur. At the hearing, it should also have been determined why Brady was not placed into the physical lineup also. Ian Ritchie, who looked very similar to Brady, was picked by two alleged witnesses as the shooter. This raises the suspicion that Brady was not in the line-up because of fear that he would be identified as the shooter.

D. Exculpatory and impeachment evidence from federal investigations

Trial counsel failed to subpoena FBI investigative documents and conduct other discovery to seek exculpatory evidence or impeachment evidence against key state witnesses.

It was well known that the Department of Justice and the FBI were involved in the investigation of the shooting of Daniel Mendoza and possible related civil rights violations by members of the LVMPD. Further, civil litigation was in progress wherein exculpatory evidence was available.

For example, on March 10, 1997, just six weeks before testifying against Mortensen, State witness Ruben Ramirez sold drugs to a State Division of Investigation undercover agent. That agent was working on a joint federal task force. Had trial counsel filed a motion for discovery and subpoenaed records, he would have uncovered significant information to impeach the Ramirez's testimony. Instead, at trial, Ramirez's testimony that he did not take drugs went unchallenged. His testimony could have been substantially impeached by this evidence of his drug dealing conduct along with his other criminal activity, which is described below in the following section. The motive

for Ramirez to identify Mortensen thus became crystal clear after the trial was over. He had to say what was expected or face prosecution on a number of felonies and time in prison.

E. Investigation and impeachment of state witnesses

Trial counsel failed to conduct a thorough background investigation of any of the alleged eyewitnesses in order to impeach their purported crucial trial testimony.

With no witness was this failure more glaring than with Ruben Ramirez. In May 1999, trial counsel moved for a new trial based on newly discovered evidence concerning Ramirez. In the motion, counsel described the importance of Ramirez's testimony:

> The Court will clearly recall that the State has placed its heaviest reliance upon the testimony of the alleged "eyewitnesses" in order to justify its conviction of Mr. Mortensen. Of those alleged eyewitnesses, only one, Ruben Ramirez, was able to identify Mr. Mortensen as the alleged shooter. It was only he who was able to pick Mr. Mortensen from a physical lineup, but that was only after he was unable to identify him in a photo line up the day before. (Trial Transcript, pp. 713-715) [Doc. 27 at 1467-69]

(Doc. 37-2 at 2925).

The newly discovered evidence concerning Ramirez consisted of the following:

- his selling methamphetamine to undercover agents on March 10, 1997;
- a citation for possession of a dangerous weapon on April 25, 1997;
- an arrest for domestic violence on April 17, 1997;
- an arrest for robbery on March 31, 1997, which consisted of stealing several cases of beer from a local convenience store which was reduced to a gross misdemeanor;
- an arrest for possession of an unregistered firearm on September 26, 1996

(Doc. 37-2 at 2924-36).

All of these incidents occurred prior to Ramirez's trial testimony in this case. But he was not the only witness trial counsel failed to investigate fully.

Others that should have been fully investigated prior to trial included:

Louie Raman Martinez (aka Baby L) - He testified that he was visiting friends and arrived with girlfriend Andrea Lujan. He was an admitted member of the 18th Street gang, yet no investigation was done into the extent of his involvement with the gang. He testified that he was starting to leave in his car when the truck drove into the alley. He did not talk to the police on the "night" of the shooting [early morning hours of December 28, 1996], and he did not give a statement until December 30, 1996. At the physical lineup, he picked Ian Ritchie in position #1 as the shooter, but indicated that he thought he also looked like #6 (Mortensen). This information should have led counsel and the investigator to discover that Ian Ritchie was a friend of Brady's and may have participated in "fishing expeditions" at McKeller Circle on previous occasions and possibly earlier the same day. Martinez could have picked Ritchie because he recognized him from prior incidents involving Brady and Ritchie.

Andrea Lujan - She was Martinez's girlfriend and was unable to identify the shooter, but assumed [and testified at trial] that the passenger was the shooter.

Eduardo Rodriguez – He stated that he arrived in the morning, and stayed all day at McKellar Circle, yet incredibly claimed to only have had half of a 40 oz. beer to drink. He was leaning against his car when the truck pulled up, when he heard Ruben [Ramirez] state "they look like narcs." He described the passenger as having slicked back hair and that there was a big light on the driver's side. He further claimed he was only five feet away when the passenger pulled out a gun and stated, "Hey, where are you guys going?" and started shooting the gun from his left hand. Despite all of the inconsistencies in his recollection (for instance Ruben Ramirez told the police that the passenger did not say anything), he identified Mortensen in court as the passenger and shooter. This identification was tainted by the fact that he was unable to identify Mortensen until he saw his picture in the paper. Even more doubt falls onto the testimony of Rodriguez' identification as he allegedly was unable to attend the live lineup because he had to work. In a case such as this, if the authorities believed that he had any credible testimony, they would have picked him up and brought him to the

lineup whether he was at work or not. This delay allowed him to view the newspaper photograph and coordinate his testimony with other members of the gang.

Rose Zurita – She said she was inside an apartment downstairs when the truck pulled in, and she described the passenger as clean-cut with black hair and glasses. She said she could not see the driver. She told people in the house the nares had pulled up, and then the passenger leaned out the window and fired the gun. She ducked after the first shot. In her written statement, she said the passenger had long hair, but that changed in her taped statement to short hair on top, long in the back. She could not pick Mortensen out of the photo lineup and at a physical lineup picked Ian Ritchie in position #1. This comports with Louie Martinez and the reasons for his identification of Ritchie. An initial effort was made by investigator Jim Thomas to speak with Zurita but she refused to do so unless the civil attorney for the Mendoza family could be present. Proper investigation would have established that she was Daniel Mendoza's sister-in-law and she and her father-in-law stood to gain if the civil suit was successful. She clearly could and should have been impeached concerning her bias in the case by the possibility of financial gain as a result of Mortensen's conviction.

It is clear that little or no investigation was conducted concerning the State's lay witnesses and their motives and biases toward Mortensen. If proper investigation and cross-examination had been done, a substantial doubt would have existed as to the identification of Mortensen as the shooter.

F. Failure to file necessary pretrial motions

1. Motion for discovery

Trial counsel was ineffective for failing to file a motion for discovery. That motion should have sought information about all of the State's witnesses, including their criminal records and other history. The motion also should have sought Torrey Johnson's notes to the effect that he had questions whether the fatal shot was fired from Mortensen's gun.

The motion for discovery also should have included a request for a subpoena directed to the federal authorities to disclose all exculpatory evidence to Mortensen. The failure to demand and the failure of the federal prosecution to turn over evidence, violated Mortensen's rights under the Sixth Amendment to compulsory process, under the Fifth Amendment to Due Process, and under the Eighth Amendment to be able to present mitigating evidence at the sentencing hearing.

2. *Motion for change of venue*

Trial counsel was ineffective for failing to seek a change of venue because of the excessive and prejudicial publicity about the case.

Mortensen had a right to a fair trial, not one conducted in a carnival type atmosphere, overwhelmed by press coverage, and dominated by a wave of public passion. Instead, Mortensen's trial was conducted under an umbrella of pervasive media coverage that was full of misinformation and innuendo. The prosecution fueled this hysteria and played upon it in front of the jury, severely prejudicing Mortensen. Every effort should have been made to quell the media frenzy, including but not limited to seeking a change of venue.

The publicity that surrounded this case was pervasive from the date of the shooting through the end of the trial, to the extent that prejudice should have been presumed. The factors that dictated that it was necessary and prudent to file a motion for change of venue included the following:

- LVMPD Swat Captain had dinner with the Mendoza family and contributed to the burial fund;

  LVMPD had organized a clean up of McKellar Circle which garnered considerable publicity;
- Within two hours of Mortensen's arrest, Sheriff Keller held a press conference where he named Mortensen as the guilty individual based on nothing more than Brady's story;

– Every morning during the trial the jury had to cross a line of picketers handing out flyers proclaiming that Mortensen was guilty of first degree murder.

i. Sequester motion

Trial counsel was ineffective for failing to move to sequester the jury to prevent them from being exposed to the pervasive publicity surrounding the trial as well as the other outside influences that would affect the jury's ability to be fair and impartial.

Known prejudicial influences that *did* infect the jury include the following:

– Juror Roberto Terrazo read about the case after being admonished not to do so.

– Juror Eldred received a visit at home during the trial from Metro Detective Andy Hafen on Sunday, May 11, 1997.

– Jury members having to cross through lines of picketers handing out flyers stating that Mortensen should be convicted of first degree murder.

In addition to constituting ineffective counsel, the failure to have the jury sequestered was prejudicial to Mortensen and denied him of due process and a fundamentally fair trial.

l. Motion to dismiss because of lost or destroyed exculpatory evidence

Trial counsel was ineffective for failing to seek dismissal based on the loss, destruction, and failure to preserve exculpatory evidence. In addition to being raised as a violation of the Sixth Amendment right to counsel, Mortensen has asserted this issue as a separate substantive constitutional violation. The arguments and authorities contained therein are incorporated herein with respect to the Sixth Amendment violation by this reference.

It is a well settled principle that the intentional suppression of material evidence by the prosecution constitutes a violation of due process, irrespective of the good or bad faith of the prosecution.

G. Evidence of McKellar Circle criminal activity

Trial counsel failed to subpoena LVMPD records for criminal activity in the McKellar Circle area to show that without a doubt the 18th Street gang was armed and willing to shoot as of December 27, 1996. The information sought should have included copies of all field information cards (FI cards) from the gang intelligence unit of LVMPD. This information would have gone toward the due diligence that was found lacking by the courts on the motion for new trial.

H. Conflicted investigator

Trial counsel negligently recommended the hiring of an investigative firm, Groover and Associates, because the firm had a conflict of interest—they regularly worked for the civil defense of litigation against LVMPD officers in other cases. In the middle of trial preparation, the civil litigation law firm defending LVMPD pressured Groover to abandon Mortensen's defense, resulting in a change of investigators at one of the most crucial times of the case, and a loss of valuable preparation time and resources.

The efforts of investigator Jim Thomas (who worked for Groover and Associates), at times, were actually detrimental to Mortensen. e.g., Groover had taken photographs of Mortensen in the Clark County Detention Center and then Thomas showed them to Ruben Ramirez thereby bolstering Ramirez's ability to identify Mortensen. Ramirez had already been shown photographs of Mortensen and attended a lineup, and thus there was nothing to be gained in Mortensen's defense by showing Ramirez the defense photographs. These photographs had been taken under the guise of showing that Mortensen did not have long hair, but were curiously used for a different purpose by the investigators.

The change of investigator was prejudicial because it was Thomas who (on February 13, 1997) had completed the testing on the timing of Brady's ride [i.e., the ride Beede and Mortensen took late at night on December 27, 1996 and very early in the morning on December 28, 1996] and who determined the trip would have taken over 25 minutes. Trial counsel failed to have Thomas

testify to this testing at trial. Instead, he had Don Dibble, the investigator who replaced Thomas, testify on May 7, 1997, right in the middle of trial and under different conditions. Dibble took over as the defense investigator on March 25, 1997, just one month before the trial started. Under these circumstances, trial counsel should have moved to continue the trial. A continuance would have allowed time for a proper investigation into the State's witnesses and for the motions described above to be filed and expert witnesses obtained.

1. Failure to investigate Brady's time on bike team

Trial counsel was ineffective for failing to investigate Christopher Brady's activity while a member of the LVMPD bike team. By interviewing his fellow officers, trial counsel could have established that Brady previously worked in the McKellar Palos Verde area and had gone on "poaching" or "fishing" trips in the area, and had specific knowledge of the alley where the shooting and subsequent escape took place. This information was ultimately revealed in conjunction with the federal civil rights investigation; however, trial counsel should have investigated this information prior to trial as a result of anonymous phone calls received by counsel and his office staff. Witnesses that were available to testify on these matters and to impeach Brady include, but are not limited to, the following LVMPD officers:

Brian "Opie" Morris;

- Les Lane;
- Marc Barry,
- John Sheehan;
- Tom Fisher,

William Butler;

Sgt. Ronald Fox;

- Kim Thomas,
- Paul Ehlers;

Mark Fowler;

- Pete Boffelli;
- Steve Tafova;

Brian DeBecker;

- Jim Mitchell (sister bike squad);

Jim Binganman (sister bike squad);

- Joe Maviglia;
- Steve Naegle, who indicated that the bike team, including Brady, did initiate directed patrol activities in the 18th Street/Mary Nora area. This testimony would have directly contradicted Brady's testimonie that he did not know the area;
- Michael Ramirez who said he was in the area of McKellar Circle on several occasions with Brady. Ramirez was a client of Frank Cremen on unrelated matters and had given Cremen information about the bike team individuals that should have led to the investigation referenced herein;

Devin Mohr who along with Officers Bob Whitley and Troy Barrett was taken on a "ride" by Brady after they left a bar just a few months prior to the McKellar shooting. Mohr had provided this information to trial counsel prior to trial, but the information was not elicited during his trial testimony.

It is unknown exactly when this information became known to trial counsel, however, it appears that an anonymous informant was supplying sufficient information to trial counsel that should have led to the appropriate investigation. After trial, when the federal government was looking into the activities of LVMPD, this evidence began to come to the attention of the media. In response to the publicity and resultant public pressure, the homicide detectives conducted interviews with the bike squad and uncovered the tip of the iceberg and began a campaign to insulate itself from the damage that the truth would reveal. These interviews prompted a new trial motion, but

counsel was left with the same problem, i.e., that the lack of investigation and due diligence doomed any success of the motion.

This testimony would have impeached Brady's trial testimony that it was Mortensen's idea to turn into the alley next to McKellar Circle and that Brady was not familiar with the area. Establishing that Brady had been untruthful about significant issues in the case would have destroyed his credibility before the jury. Additionally, use of such false testimony to gain a conviction is a separate substantive basis for relief as a denial of due process. Whether or not the prosecution knew at the time of trial that evidence used against Mortensen was false, allowing a conviction to stand despite present knowledge that material evidence was false violates due process.

J. Investigation of Brady

Trial counsel failed to investigate Brady's background and discover substantial evidence to impeach his testimony at trial and establish that his character was such that it was highly probable that he was the shooter and not Mortensen. Available witnesses included the following witnesses.

Brian Inman – He knew Brady before he joined the force and of his violent propensities.

Marc Barry – Pleadings filed by trial counsel after Mortensen had been convicted revealed that during the course of the trial "counsel received an anonymous telephone call in which the caller stated that only several weeks prior to the shooting in question, Christopher Brady was in a bar and told Officer Mark Barry that he would like to do a drive by shooting." (Doc. 30 at 2657). According to the Motion, "Barry informed the defense investigator that the story was 'B.S.'" and one of the prosecutors informed the Court during an in chambers discussion that the office of the District Attorney had been told by Officer Barry that the story was "nonsense." *Id.* at 2657-58. The exact representation of the prosecutor was:

> MR. SCOTT: We have talked to Mark Berry. I had an investigator talk to Mark Berry. He said it is nonsense but I wanted to make that part of the record.

(Doc. 33 at 2350).

Nothing more was made of the information. Yet, after Mortensen was convicted, counsel filed a motion for new trial based on the evidence that Berry admitted was true (i.e., Brady had previously stated that he wanted to do a drive by shooting). The culpability of the State for its representation as to the exculpatory testimony of a member of law enforcement is a matter addressed elsewhere herein. What is even more disturbing and difficult to believe is that the investigator for the District Attorney's Office would call a member of the LVMPD and not identify himself sufficiently for the Officer to feel comfortable enough to answer questions, and would deny the statements because he did not know who he was speaking with. (*See e.g.*, Doc. 36-1 at 2687-88).

K. Intimidation of McKellar Circle residents

Trial counsel failed to investigate and establish at trial that LVMPD actively maintained a coercive presence in McKellar Circle up through trial and intimidated the residents of the area in order to pressure them into testifying against Mortensen and identifying him as the shooter in order to protect Brady and spawning mass hysteria among the residents. Witnesses to such intimidation included:

Jackie Bunge – She took photographs of Swat Raids.

Rosa Zurita – Daniel Mendoza's sister in law, who was present, and observed these raids by LVMPD and had given a statement to the civil attorneys who would have shared the information. This information would have been available to trial counsel had a request been made to the civil firm. Contact had been made with Zurita who requested that attorney Joe Dempsey be present for the interview, but no follow-up was made in order to arrange the interview and obtain the information.

L. Lack of witness preparation

Trial counsel failed to prepare character witnesses to testify, resulting in the ultimately detrimental testimony from Jose Calbeiro. This, in turn, prompted trial counsel to abandon any attempt to call additional character witnesses. Jose was only interviewed for a few minutes by trial

counsel on the morning he was scheduled to testify, resulting in prejudicial testimony coming before the jury.

After the trial, counsel indicated in a letter to Robert Pecarreto's employer that "for tactical reasons, after the first of my character witnesses in the case was abused by the prosecutor on cross examination, I decided not to call any further character witnesses."

M. Rush to trial

Trial counsel was ineffective for allowing the case to proceed to trial just four months after the shooting when there had been inadequate trial preparation and investigation, and while the publicity surrounding the case was still high. A delay in the trial date would have resulted in the information regarding Brady described herein being released prior to Mortensen being tried and would have resulted in an acquittal.

The prejudicial impact of the failure to investigate and prepare the case for trial is demonstrated by the opinion formulated by attorney Kenneth Roberts who was handling the wrongful death litigation filed by the Mendoza family. In a letter written to Frank Cremen on September 11, 1997, Roberts made the following observation:

> This offer is being extended to Mr. Mortensen and his family as a token of good faith that they will cooperate with our investigators. It is apparent to this firm that Christopher Brady may very well have been the individual who shot Daniel Mendoza and that he has arrested Mr. Mortensen of the crime in an attempt to protect himself. From where I observe things, Mr. Mortensen had nothing to lose by cooperating with our investigation and everything to gain. I am agreeing to share information with you and Mr. Mortensen which may be helpful in his appeal. I have stated before and state again, neither this firm nor the Mendoza family have any desire to see an innocent man spend the rest of his life in prison.

The error of proceeding to trial so quickly is itself demonstrated by the three separate motions for new trial filed shortly after the conviction.

N. Lack of witness preparation for Zoe Mortensen

Trial counsel failed to prepare Zoe Mortensen to testify such that she contradicted Mortensen's testimony concerning whether he wore his fanny pack and where he placed the gun when he removed it from the fanny pack.

O. Last-moment simulated test firing

Trial counsel did not conduct a simulated test firing from Brady's truck until the Tuesday of the last week of trial, just one day before putting Dibble, the defense investigator, on the stand to testify as to his findings. The jury apparently had already been allowed access to the truck and to conduct any simulations without the benefit of having heard Mortensen's testimony on the reenactment from the defense standpoint. As such, the jury most likely had already made up its mind as to whether Brady could have fired out of the passenger window before Dibble was called to testify.

P. No preparation to rebut alleged prior bad acts by Mortensen

Trial counsel failed to investigate Mortensen's alleged prior bad acts at Dillards, in order to adequately repel the misrepresentations made by the prosecutor about the facts and about Mortensen in arguing against the motion for mistrial. Mortensen had already been cleared by a Nevada Highway Patrol investigation conducted by Trooper Edwards into the alleged incident. The incident also had been investigated by LVMPD. Mortensen also passed a polygraph with LVMPD prior to his hiring as a police officer.

II. Ground Two – Ineffective Assistance of Counsel during Trial

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because his trial attorney failed to provide effective assistance of counsel.

Under *Strickland v. Washington*, Mortensen was also entitled to "reasonable effective assistance" from his trial counsel during trial. 466 U.S. 668, 687 (1984). His counsel had "a duty to bring to bear such skill and knowledge" that would "render the trial a reliable adversarial testing." *Id.* at 688. As shown below, trial counsel failed in that duty. This prejudiced Mortensen, as "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Supporting Facts

During trial the following errors occurred because of the deficient performance of trial counsel

A. Attacking Brady's credibility

Trial counsel failed to establish during Brady's cross-examination that he lied about the alleged thirty minutes of driving around harassing people after going to the ATM. Use of the ATM slip and the time of the 911 call would have conclusively established the time frames in question and that it would have been impossible to have arrived at McKellar Circle as claimed by Brady.

B. Inadequate cross-examination

Trial counsel failed to adequately cross examine the purported eyewitnesses to establish that there was no possibility they could make a valid identification of Mortensen. He also failed to impeach them on their bias against the police in general and Mortensen specifically. Trial counsel should have utilized a reconstruction of the conditions and an expert on eyewitness identification to show that the identifications were obviously tainted. Examples of the failures include the following:

1. Lujan and Martinez

Trial counsel failed to establish that Lujan and Martinez, the couple parked in the compact car 60 to 80 feet away, would have been looking directly into the headlights and through a tinted window into the dark interior of the cab of the truck. Under such circumstances it would have been impossible to identify either occupant of Brady's truck.

2. *Rosa Zurita*

Rosa Zurita testified she was looking through the blinds when the truck pulled into the alley. No effort was made to determine the type of blinds and whether she pulled them up or separated the slats and looked through. Photographs should have been taken from her vantage point inside the apartment and with a reconstruction of the conditions to show that she, too, could not have made a valid identification of the occupants of Brady's truck.

3. *Gang affiliations*

All of the lay witnesses from McKellar Circle were linked to the 18th Street gang and evidence should have been presented to show that the gang was motivated to do anything necessary to get the police, even commit perjury, by identifying Mortensen as the shooter when no such identification was possible under the circumstances existing at the time of the shooting.

C. Changes to McKellar Circle

Trial counsel allowed the jury to view the crime scene after it had been drastically cleaned up by the police department and under conditions that were dramatically different than that which existed on the night of the shooting. No record was made of the conditions of the viewing or what transpired at the crime scene. This failure additionally denied Mortensen of his Constitutional right to be present at all critical stages of the proceedings. The jury was allowed to use the information they observed at McKellar Circle, yet Mortensen was not present when the viewing occurred. Additionally the jury was not taken to the alley where Brady drove after the shooting, which would have established for the jury that Brady had to be familiar with the area in order to drive down what appeared to be a dead end alley to the casual observer. During trial, witnesses Martinez and Rodriguez testified that only a person familiar with the area would have known that one could exit by way of the back alley.

The prejudice from failing to insure that the jury only viewed the crime scene under proper circumstances is shown by the request on May 7, 1997 of Juror Patricia Ernst:

> THE BAILIFF: I got a note from the jury, Patricia McLeod Ernst, the tall, red haired girl, "[can] we go out there at night with the truck to look at the lighting, also to see the color of the tint and what it looked like at night."
>
> THE COURT: Can't send them out there at night. That would be the biggest security problem that I have. My answer is going to be no based on security.
>
> MR. CREMEN: Well, I think it's probably the best answer anyhow.
>
> THE COURT: I don't want to send them out there. I don't need to send them out there. The answer is no at this time.

(Doc. 31-4 at 2203).

Trial counsel clearly should have insisted that if the jury was allowed to view the crime scene that it be done under conditions as close as possible to the night in question. To allow the jury to view the altered scene during the daytime gave the jury a distorted view of the incident.

D. Brady's familiarity with McKellar Circle

Trial counsel failed to present evidence and testimony to establish that Brady had to be familiar with McKellar Circle and the surrounding area in order to accomplish his escape through the narrow alley that would appear to be a dead end to someone not intimately familiar with the area.

E. No premeditation or deliberation

Trial counsel failed to argue to the jury that, even if Mortensen was the shooter, it was not first degree murder, as there was no premeditation and deliberation as defined in *Byford v. State*, 116 Nev. 215, 235-37, 994 P.2d 700, 713-15 (2000); and failed to offer a jury instruction properly defining all of the elements of first degree murder.

F. Different shoulder holsters

Trial counsel failed to establish during the trial that the shoulder holster Brady demonstrated in court was not the one that he would typically wear when off duty. The shoulder holster that Brady brought to court was a Tanker holster for a .45 semiautomatic military weapon. It was huge

and made it appear impossible that no one saw him carrying a gun on December 27, 1997. The holster that Brady typically wore was a Bianchi shoulder rig for a .38 snub nose pistol. He would typically wear this small, tight fitting holster under his shirt. When the wrong holster was admitted, Mortensen brought this to the attention of trial counsel but it was never corrected.

Officer Devin Mohr was also aware that the wrong shoulder holster was admitted into evidence and tried to tell the jury during his testimony but was not allowed to do so. Trial counsel failed to elicit this testimony from Mohr, even though Mortensen had informed him of the potential testimony during the trial.

G. Witnesses feared cooperating with the defense

Trial counsel failed to elicit or present testimony that witnesses were afraid that they would get in trouble if they spoke with defense investigators. Specifically, before Ruben Ramirez would speak with Jim Thomas (defense investigator), he had to make a phone call to speak with someone. Ramirez did speak with Thomas after the phone call, but the testimony would have shown the coercive grip that law enforcement was maintaining on the McKellar Circle witnesses. If Rose Zarcia had been interviewed on this issue, she could have described the pressure maintained by the police in the days and weeks following the shootings.

H. Mismatched description of glasses

Trial counsel failed to elicit or present testimony that Ruben Ramirez told investigator Jim Thomas the shooter was wearing "little round glasses" and that Mortensen's glasses did not fit that description, but Brady had glasses that matched that description.

I. No objections to prosecutorial misconduct

Trial counsel failed to object to numerous instances of prosecutorial misconduct during the trial, including:

1. Pointing and dry firing a gun at jurors

During closing argument, prosecutor Gary Guymon pointed a Sig Sauer .380 semi automatic handgun (Mortensen's off duty weapon admitted into evidence at trial) directly at the jury, causing a number of them to react and duck away as it was dry fired at them. One of the jurors actually jumped when this improper demonstration took place. This was highly prejudicial and should have been the subject of a contemporaneous objection.

2. Gruesome photos

During closing argument, prosecutor Guymon turned toward the audience, which included many members of the Mendoza family, and displayed gruesome photographs of the deceased. His sole intention was to elicit a reaction from the audience and influence the jury with their reaction, and to insure that the press would be able to display such photographs on the news and in the newspapers.

The failure of trial counsel to prevent this conduct was not only a Sixth Amendment violation, but also a denial of due process and a fundamentally fair trial. At the very least to avoid the due process violation, the court should have intervened to prevent such conduct.

J. Swastikas on demonstration gun

Trial counsel failed to object to the admission of a demonstration gun that contained Nazi swastikas on the handles.

During the testimony of Torrey Johnson and his demonstration of gun angles or locations, Johnson used a gun out of the crime lab that was admitted into evidence as part of the prop he utilized in demonstrating for the jury. The gun used by Johnson was an old German police pistol that had swastikas on the pistol grips. This gun was admitted into evidence and the jury was allowed to see the gun during deliberations.

Trial counsel should have objected and prevented the admission of the gun to prevent the subtle prejudicial impact on the jury, portraying Mortensen as a racist or white supremacist racist

K. Evidence on Mortensen's glasses

Trial counsel failed to present testimony to establish that Mortensen did not always wear his glasses and that the style of glasses he wore were not small and round as described by Ruben Ramirez.

L. Missing or faulty jury instructions

Trial counsel failed to offer jury instructions to properly and constitutionally instruct the jury:

1. No mere presence instruction

It was obvious during the trial, especially after Mortensen's testimony, that the theory of defense being presented was that Mortensen was present in the truck with Brady but had no prior knowledge that Brady was going to suddenly turn into the 18th Street gang territory or fire the weapon out of the passenger window. "In every criminal case, a defendant is entitled to have the jury instructed on any theory of defense as disclosed by the evidence, no matter how weak or incredible that evidence may appear to be." *Allen v. State*, 95 Nev. 339, 343-46, 594 P.2d 725, 730 (1979)

The Nevada Supreme Court has long approved of the following instruction in cases where a defendant claims that he was merely present at the scene of a crime:

> Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant is a participant and not merely a knowing spectator.

Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 894-95 (1987). The jury was not instructed on the concept of mere presence and very well could have believed that because Mortensen was present in the truck when Brady fired the shots he should be held equally liable.

Counsel was ineffective in failing to insure that the jury was properly instructed. Additionally the failure to instruct on Mortensen's theory of defense violated his Sixth and

Fourteenth Amendment rights to adequate instruction, right to a jury trial and due process of law and a fundamentally fair trial.

2. Improper definition of premeditated and deliberate

A proper definition of the elements of first degree murder would have required the jury to find (if they believed he was the shooter) that Mortensen acted after there had been time for passion to subside and deliberation to occur because a mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill. Pursuant to *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), in order for the jury in this case to return a verdict of first degree murder, they should have been required to first find that the shooting was not an "unconsidered and rash impulse" and that the decision was the "result of thought, weighing the reasons for and against the action and considering the consequences of the actions." 116 Nev. at 236, 994 P.2d at 714.

Even if the State's version of the evidence is accepted, there was no evidence to support a finding that Mortensen acted with premeditation and deliberation. If trial counsel had insured that the jury was properly instructed, a different verdict would have been the result. In addition to being deprived of his right to effective counsel, the erroneous instruction defining the elements of first degree murder deprived Mortensen of his rights under the due process Clause.

3. An instruction on eyewitness identification

Trial counsel was ineffective for failing to request an instruction on eyewitness identification, such as the following:

> In evaluating the identification testimony of a witness you should consider all of the factors already mentioned concerning your assessment of the credibility of any witness in general, and should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time or times about which the witness testified. You may consider, in that regard, such matters as the length of time the witness had known or observed the person at earlier times.

> If, after examining all of the testimony and evidence in the case you have a reasonable doubt as to the identity of the Defendant as the perpetrator of the offense charged, you must find the Defendant not guilty

Fifth Circuit Pattern Instruction, No. 6.

Such an instruction should have been offered in combination with the use of a fully prepared eyewitness identification expert. The failure to do so not only denied Mortensen of his rights under the Sixth Amendment to effective assistance of counsel, but also denied him Due Process of Law and a fundamentally fair trial.

A. Instruction on credibility of drug users or addicts

More than sufficient testimony and records were available to show that witness Ramirez was a drug dealer and there was more than enough to imply that the remainder of the State's purported eyewitnesses were involved in drug use and sales. A standard instruction on the testimony of a witness using or addicted to drugs provides:

> There has been evidence introduced at the trial that the government called as a witness a person who was using or addicted to drugs when the events he observed took place or who is now using drugs. I instruct you that there is nothing improper about calling such a witness to testify concerning events within his personal knowledge.
>
> On the other hand, his testimony must be examined with greater scrutiny than the testimony of any other witness. The testimony of a witness who was using drugs at the time of the events he is testifying about, or who is using drugs at the time of his testimony may be less believable because of the effect the drugs may have on his ability to perceive or relate the events in question.
>
> If you decide to accept his testimony, after considering it in light of all the evidence in this case, then you may give it whatever weight, if any, you find it deserves.

Modern Federal Jury Instructions, 7.01 (1990).

Trial counsel should have requested an instruction similar to the one cited above and presented testimony and evidence that impeached the testimony of the State's purported eyewitnesses.

5. No instruction on intoxication negating elements of a crime

Nevada Statutes and case law have long authorized the following jury instruction where there is evidence of intoxication and the crime charged is one of specific intent:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of that person's condition. However, whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of one's intoxication may be taken into consideration in determining such purpose, motive or intent.
>
> Intoxication may be considered in determining specific intent and the jury has been informed as to the possible effect of intoxication upon the formation of criminal intent.

See e.g., Imbrade v. State, 87 Nev. 144, 145, 483 P.2d 208 (1971); *Finger v. State*, 97 Nev. 169, 170-71, 625 P.2d 1173, 1173-75 (1981).

Trial counsel failed to offer the above instruction, which again would have mitigated against the jury finding first degree murder as opposed to a lesser offense. Even though counsel argued that Mortensen was not guilty as Brady was the shooter, the jury should have been properly instructed so that conviction of a lesser offense was possible. The failure to so instruct was prejudicial to Mortensen as the jury convicted him of first degree murder without being told that his intoxication could negate the specific intent necessary for first degree premeditated and deliberate murder.

M. Failure to call character witnesses

Trial counsel failed to call character witnesses on behalf of Mortensen even though the same were ready to testify. After the trial, counsel indicated in a letter to Robert Piccarello's employer that "for tactical reasons, after the first of my character witnesses in the case was abused by the

prosecutor on cross examination. I decided not to call any further character witnesses." The witnesses that should have been interviewed and called at trial included the following:

- Denise Lacassen-Ackerson;
- Koko Carmona;
- Raul Carmona, Sr.;
- Raul Carmona, Jr.;
- Benvenido Perez;
- Gloria Caliberiro;
- Victor Garcia;
- Anthony Galvan;
- Julio Caliberiro, Jr.;
- Ruben Lujan;
- Diego Benitez;
- Gregorio Garcia;
- Paul Zamora;
- Yolanda Zamora;
- Lawrence Benitez.

Each of these witnesses would have testified concerning Mortensen's long history of positive relationships with the Hispanic community. He had associated with all of these individuals from anywhere between three and twenty years and each of them would have been willing to testify on his behalf at trial. Trial counsel was aware of the individuals willing to testify on Mortensen's behalf and was ineffective in violation of the Sixth Amendment in not interviewing, preparing, and calling these witnesses to testify on Mortensen's behalf.

N. Policy violation for release of truck

Trial counsel failed to present testimony and evidence that the release of Brady's truck in less than 48 hours was a violation of the LVMPD policy manual with respect to release of evidence. This testimony was readily available and would have been invaluable to show that LVMPD violated its own policies in order to insulate Brady from culpability.

O. No motion to disqualify jurors

Trial counsel failed to move to disqualify jurors that had been prejudicially influenced by outside factors, which would not have even arisen had counsel insisted that the jury be sequestered during the course of the trial. The impacted jurors were:

Juror Roberta Tiernan: This juror read about the case after being admonished not to do so. Trial counsel should have moved to disqualify a juror that obviously could not and would not follow the admonition of the Court. This is especially true give the pervasive publicity that surrounded the trial.

Juror Gayle Ulrich: This juror received a visit from Metro Detective Andy Hafen on Sunday, May 11, 1997. There were four alternate jurors seated and no legitimate reason existed to retain a juror that had such close ties to the police department, which was clearly determined to see to it that Mortensen was convicted. The fact that Ulrich should have been excluded is further established by the fact that on May 7, 1997, just before the defense was scheduled to put on its case, her husband was undergoing a heart procedure, and rather than be at the hospital the entire time with her husband she wanted to remain on the jury.

Juror Scott Beck: This juror, who became the foreman of the jury, received calls at home from a Hispanic woman. This frightened his wife and himself to the point that he attempted to report the incident to the police.

P. Testimony about Mortensen line-up

Trial counsel failed to present testimony from the individuals that were present at Mortensen's physical lineup that commented that the individual in position #1, Ian Ritchie, looked remarkably similar to Chris Brady. Among the witnesses that so stated was Homicide Sgt. Manning, who made the comments to Richard Wright, an attorney representing Mortensen at the lineup.

Q. Cross-examination about window tinting

Trial counsel failed to cross examine Daniel Ford about the change in the window tinting on the truck and to establish the amount of tinting on the front window that would have obstructed the view of a number of witnesses. Additionally, there were no questions asked by trial counsel that would have established that LVMPD failed to take any photographs from the front of the truck to show the effects of the tinting on the windows. Trial counsel also allowed Brady to testify as to the changes to the truck without mentioning the removal of the tinting from the front windshield. Brady testified that he removed the tint from the side windows and windowing but testified there was no tinting on the front windshield. The window tinting also would have prevented Mortensen from being able to observe any individuals standing on McKellar Circle, and thus he would not have been able to direct Brady to turn down the alley, as Brady alleged when he testified.

Instead of hiring an expert, trial counsel used investigator Don Dibble to show photographs taken in daylight to show what could be seen from the location of the various witnesses, using Brady's truck that had already had the tint removed. Obviously, from the request of Juror Ernst, described above, the jury wanted to see the scene at night with some allowance for the tinting that was on the window of the truck on December 27, 1996 (early morning hours of December 28, 1996). Further, trial counsel should have located the person who stripped and re-painted the truck after it was released to Brady to describe the amount and location of the window tinting on the truck before it was released to suspect Brady and altered

B. Improper closing penalty-phase argument

Trial counsel failed to object to improper prejudicial closing argument at the penalty hearing and additionally thereby failed to preserve the issues for appellate review. The improper argument at the penalty hearing falls into several categories:

1. Misstatement of the law

At the penalty hearing the prosecutor misstated the law and thus committed prosecutorial misconduct by making the following argument to the jury:

> And it is ironic, is it not, that with the roles reversed, the death penalty is available for someone who knowingly kills a police officer but not available by law in this case.
>
> The harshest punishment that you can impose is life without parole.
>
> The law has already provided Mr. Mortensen with a break which may not have been available to young Daniel Mendoza had the roles have been reversed.

(Doc. 35-1 at 2580).

This argument is both legally and factually incorrect in that the decision not to seek the death penalty was made by the District Attorney and not "by law" as there were a number of aggravating circumstances that could have been alleged and most likely proven, such as great risk of harm to more than one person, and murder without apparent motive. *See* NRS 200.033. By making this argument, Prosecutor William "Bill" Knot sought to inflame the jury on the apparent injustice of the law in not allowing the death penalty to be considered for the alleged shooting of a Hispanic citizen by a white police officer. Not only should trial counsel have objected, he should have demanded an instruction from the Court and informed the jury that it was the District Attorney that made the decision not to seek the death penalty for the alleged murder of a Hispanic citizen by a white police officer.

The prosecutor's argument, which appealed to racial and ethnic stereotypes, violated Mortensen's right to due process and equal protection of the law. Further the comments by the

prosecutor concerning the death penalty improperly invoked the authority of the State to urge that the sentence must be life without parole in order to do justice.

This improper argument, without doubt, compelled the jury to return the harshest sentence in order to overcome the perceived injustice in the law when in fact it was the decision of the office of the District Attorney as to what sentence to seek. If there is any bias or discriminatory use of the death penalty it is the fault of the prosecutors and not the law, and the jury should have been so informed. Not only should trial counsel have objected to the argument, the Court should have been required to inform the jury of the true state of the law to overcome the prejudicial impact of the purposely incorrect statements by prosecutor Koot.

7. Penalty argument on community standards and other extraneous factors

The prosecutor urged the jury to return the most severe penalty possible because of the "residual impact of that type of conduct on the community," a "community that already has no confidence in its law enforcement officers. And how much rebuilding does it take to correct that wrong?" (Doc. 35-1 at 2581, 2582). The prosecutor added:

> And I honestly believe that with your verdict of guilty you went a long ways in correcting or in restoring the confidence and the trust that the citizenry has in its police force, not just the Las Vegas Metropolitan Police Department but the entire criminal justice system.
>
> And all I am asking you to do is to finish that job, to finish the rebuilding.
>
> And if Ron Mortensen has to be an object lesson, then so be it. If he has to be an object lesson, so be it.

(Doc. 35-1 at 2582-83).

During the final closing argument, the prosecutor echoed the same theme set during the previous argument and implored the jury to "[p]lease, I ask you to be conscientious of the message that your punishment sends." (Doc. 35-1 at 2595). This request brought an objection from defense counsel which was sustained by the Court. (Doc. 35-1 at 2595-96). However, there was no

objection to the comment "And what message do we send? Commission to serve and protect. What is due that oath?" (Doc. 35-1 at 2593).

A prosecutor may not pressure jurors by telling them to do their "job," to fulfill its civic duty, to act as the conscience of the community, to cure society's ills, or to send out a message by finding the defendant guilty. Such comments may also constitute an impermissible assertion of a personal opinion and a reference to facts outside the record.

The prosecutors' arguments clearly violated this mandate in many respects, including the following statements:

> I would ask that you consider the residual damage done by Ron Mortensen in his conduct, and by that I am talking about his actions as a police officer that has been woven throughout this case. It has what's made this case perhaps one of the dynamic or importance that this community has experienced certainly in the many, many years that I have lived here.
>
> To even think of a drive by shooting committed by a police officer is to think of the unthinkable.
>
> And I would ask that you consider the residual impact of that type of conduct not on just the community at large but on the community in which Mr. Mendoza lives, the community in which the less fortunate that live have to live because of economic circumstances.

(Doc. 35-1 at 2561)

Not only was there no objection to this improper and prejudicial argument, the improper arguments were not raised on direct appeal. These numerous instances of prosecutorial misconduct and the failure of trial counsel to object and prevent the same cumulatively deny and that Mortensen's sentence be set aside.

S. Improper comment in the opening statement

Trial counsel failed to object to improper comments by the prosecutor during his opening statement to the jury

During his opening statement to the jury, the prosecutor repeatedly violated known standards for an opening statement, yet this did not draw a single objection from defense counsel. The effect of the improper opening statement was prejudicial to Mortensen by tainting the jury's view of Mortensen. The conduct of the prosecutor deprived Mortensen of a fundamentally fair trial and due process of law. It was further a violation of his right to effective counsel under the Sixth Amendment when his attorney failed to object or otherwise prevent the misconduct and violated the confrontation clause of the Sixth amendment.

The prosecutor in this case continually stated his personal opinion and vouched for the credibility of witnesses by stating such things as:

> However, I believe I am telling you the gospel when I go through their anticipated testimony.
>
> . . .
>
> And again he insists that the shooter was a cop. No one looks more like a cop than Ron Mortensen. He looks like a cop.
>
> Quite frankly, Brady would not be an individual that you would look at and say "he's a cop." There are images that we have of police officers and fireman and people in that line of work. Ron Mortensen fits that bill as well."
>
> Now, I would be a little more satisfied if he picked Number 6, but he picked number 1. And we'll have another witness make the same mistake.
>
> But you can see and you judge for yourself whether or not there is a similarity, a striking similarity between number 1 and number 6.
>
> And, trust me when I say this because you will see Chris Brady in this courtroom. He comes up to about here
>
> He's a slight, skinny guy. Doesn't look like any of these fellows.
>
> . . .
>
> All I am saying is we did what we could in this case. And whatever the defense wanted we did what we could.
>
> He was in a panic. I am sure Mr. Mortensen was in a panic.

(Doc. 26 at 1251, 1256, 1257-58, 1263, 1261-65).

Statements of personal opinion by a prosecutor have long been condemned by state and federal courts.

The prosecutor also misstated the evidence without objection from trial counsel:

> And when these people talk about glasses, they are talking about glasses, not shades. Talking about the kind of things that I am wearing, the kind that Mortensen always wears.

(Doc. 26 at 1255).

The initial broadcast over the LVMPD communications was that the two individuals in the truck were wearing sunglasses. This fact was never brought out during the trial, but showed the consciousness of the prosecution, who knew of the information, and the lengths they were willing to go to change the facts of the case in order to gain the conviction.

> Ramon thought that the driver looked Hispanic. You will see Chris Brady. Chris Brady looks Hispanic.
>
> Chris Brady is a small, slight fellow. If he weighs 155 pounds he is cheating.
>
> He is no more than about 5'8", 5'9". He is a very small human being and he is dark complected.

(Doc. 26 at 1254).

In fact, Brady does not look Hispanic nor does he have a dark complexion, but the prosecutor nonetheless made the representation to the jury in his opening statement to vouch for the credibility of Ramon. Trial counsel should have interjected an objection to prevent such distortion of the evidence. As described above, witnesses also should have been called to testify that Brady had dramatically altered his appearance at the time of his trial testimony.

Finally during his opening statement the prosecutor improperly inflamed the jury with prejudicial comments:

> At that point we now have a rogue cop with a gun out on the street who is coming on duty that very night.

(Doc. 26 at 1265).

The evidence in the case that was hidden from Mortensen prior to his trial, and only came to light as a result of the federal investigation into the multiple civil rights violations by LVMPD, actually supports that Brady along with his fellow members of the bike squad were the "rogue cops." This name calling and prejudicial rhetoric was designed to inflame the jury against Mortensen, and the unfair impact of such statements was heightened by the district court's refusal to allow Mortensen to present testimony concerning Brady's previous acts. It was also an incorrect statement of the facts as Mortensen did not have a gun, Brady had possession of the Sig Sauer, and Mortensen's duty firearm was still in his locker at the Southwest Area Command substation.

Such misstatement of evidence also warrants reversal of the conviction as a violation of due process and a fundamentally fair trial.

T. Improper guilt-phase closing argument

Trial counsel failed to object to numerous instances of improper argument and prosecutorial misconduct during the closing arguments during the guilt phase of the trial. In addition to asserting that he was denied effective assistance of counsel under the Sixth Amendment, Mortensen submits that the actions of the prosecutor denied him a fundamentally fair trial and due process of law.

The improper arguments which were not the subject of objection by trial counsel included the following.

1. Improper victim-impact argument

It is well established that victim impact testimony is highly prejudicial and not relevant during the trial portion of a criminal proceeding. Nevertheless, trial counsel failed to object to argument from the State that was blatantly victim impact and highly prejudicial. An emotional appeal to consider the victim's family is patently improper and prejudicial.

It must be remembered that the above argument was during the trial portion of the case [i.e., the guilt phase of the trial] where victim impact is not admissible, even under the decision in *Payne v.*

Tennessee, 501 U.S. 808 (1991), which dealt exclusively with the admissibility of such evidence during the penalty or sentencing phase of a criminal proceeding. Likewise, the ruling of the Nevada Supreme Court in *Hamnck v. State*, 108 Nev. 127, 135-37, 825 P.2d 600, 605-07 (1992) dealt with error claimed to have occurred during the penalty hearing.

The improper argument in the instant case was as follows:

> MR. GUYMON: May it please the Court, counsel, good morning.
>
> I begin with the life of Daniel Mendoza. The very reason we start in this courtroom is the loss of his life.
>
> Daniel Mendoza was a human being. He was twenty one years of age.
>
> He was a son. He was a brother, and he was a friend.

(Doc. 31 at 242S).

When the prosecutor made the victim impact reference he turned and gestured toward the Mendoza family. This display was extremely orchestrated and prejudicial to Mortensen's defense of the charges due to the impact on the jury and sympathy for the Mendoza family that had nothing to do with the evidence in the case.

2. Expression of personal opinion

Just as with the opening statement, the prosecutor could not refrain from giving his own personal opinion to the jury during his closing argument. As set forth above, such argument is patently improper and should have been the subject of numerous objections by trial counsel. The expressions of personal opinion included the following:

> He lifts up that club. I don't see the significance.
>
> He talks about a seventeen minute interview. I don't see the significance.
>
> He talks with Mr. Torrey Johnson not taking a measurement. I don't see any significance.
>
> Quite frankly, Mr. Cremen I believe took some liberties with the evidence that was produced, but that is why you are here. Your job is to decide what the facts are, what the facts were as they were presented to you.

> . . .
>
> More importantly I think the police have an absolute obligation to remove a rogue cop from the streets. I think time is of the essence.
>
> I don't think you can put that man back out on the street with his uniform and his gun after he did what he did.
>
> . . .
>
> And it just seems to me if a man is going to carry a weapon on his person, a relatively small semi automatic that doesn't have any knobs on it, doesn't have rough edges on it, it is pretty easy to carry that in your pants. And that's where you are going to keep it . . . .
>
> I think that baby is going to stay put whether it is playing pool or sitting in the cab of a truck. And I am sure he being right handed it would have been there on his right side.

(Doc. 34-2 at 2520, 2522, 2523).

There should have been an objection to the repeated improper expression of personal opinion and Mortensen was prejudiced by the failure of his attorney to object and prevent the misconduct and there is failure to raise the matter on direct appeal.

3. Reference to facts not in evidence

The prosecutor told the jury that it was through his heroic efforts that the seat was removed and placed into the altered Brady truck. There was nothing in the record to substantiate such an argument, and trial counsel should have corrected the prosecutor and asked that the jury be admonished:

> One of the parts is the physics of it all. That's why when we talk about getting the seat, if you knew what I had to go through to get that seat, put it back in this truck, I would probably get some extra pay. I mean, we put that truck back together so that you would be able to do what you do so we would be able to take it to that crime scene.

(Doc. 34-2 at 2529)

Mortensen has raised the loss of the original truck as a separate substantive claim below, which details what really transpired with regard to Brady's truck. The factual contents and argument therein contained are incorporated into the instant argument by this reference.

1. Reference to obsession with firearms and to the incident being "a recreational thrill kill"

There was absolutely no evidence before the jury that Mortensen had an "obsession" with firearms and the court had already found such questioning to be improper during the testimony of Jose Caliberto. The prosecutor could not resist the chance to commit further misconduct with continued statements of prejudicial rhetoric:

> This was a recreational thrill kill by a man who has this obsession with firearms and a great opportunity on this particular evening to do somebody who was worth one hell of a lot less than he is.

(Doc. 31-2 at 2530).

The prosecutor's obligation to "desist from the use of pejorative language and inflammatory rhetoric is every bit as solemn as his obligation to attempt to bring the guilty to account." *See, e.g. United States v. Rodriguez Estrada*, 877 F.2d 153, 159 (1st Cir. 1989). Such comments not only violate the right to due process of law, but also violate the rule forbidding prosecutors from asserting a personal opinion and from alluding to facts which are not in the record.

Additionally the questioning of Caliberto about the legal ownership of guns and the argument about owning guns violated Mortensen's rights under the Second Amendment to bear arms. Mortensen hereby asserts said violation as a separate, substantive constitutional ground for reversal of his conviction, along with the failure of trial counsel to object as being a violation of the Sixth Amendment right to effective assistance of counsel.

3. Disparaging defense witness

A prosecutor may not disparage or ridicule a defense expert witness. The prosecutor nevertheless made the following improper argument:

> And these people before there were any statements said they were nazes, they were cops. Does that actually mean that they weren't looking at anything other than the gun? This [defense expert] Shomer is full of baloney. He is living in some ivory tower world that has absolutely no reality to this case.

(Doc. 34-2 at 2528).

Trial counsel was ineffective in failing to object to this argument and subsequently by failing to raise the prosecutorial misconduct as an issue on direct appeal.

6. Improper comment on right to remain silent

During closing argument, the prosecutor also referenced Mortensen's decision not to talk about the incident before he was arrested. These comments clearly violated his Fifth and Sixth Amendment right to remain silent and consult with counsel. The prosecutor commented:

> Now, the defendant wants you to believe that somehow he has insight that none of us have, that he knows it is a big setup, he knows he's going to prison and yet he doesn't tell his wife a thing about it, he doesn't tell his child goodbye. He simply stews and ponders for three hours.
>
> And he walks by homicide detectives when he arrives at work. He walked right by Detective Becker.
>
> And remember, this is a man that somehow wanted to go in and tell, he needed to tell somebody he was being set up, yet he told nobody.
>
> And he enters into the locker room where there was a whole bunch of other police officers and he says nothing. And he sees Sergeant Anderson and he says nothing.

(Doc. 34-1 at 2482).

The prosecutors' comments were meant to imply to the jury that Mortensen's silence should be used against him in violation of the Fifth Amendment and were further comments on his decision not to talk until he consulted with an attorney. Trial counsel was ineffective in not objecting and appellate counsel should have raised the issue as plain, constitutional error.

U. No cross-examination on head-lights

During Lonus Martinez's cross examination, trial counsel failed to ask any question to establish that the headlights of Brady's truck were on and would have prevented him from being able to see the passenger. Likewise, neither Ruben Ramirez, Eduardo Rodriguez, nor Andrea Lopez were asked if the headlights were on. Rosa Zarate testified that the headlights were on in the car and that is what caused her to look out of her window, but her angle of sight was significantly different from those individuals that were outside.

V. Poor cross-examination of pathologist

Trial counsel failed to cross-examine the pathologist who performed the autopsy concerning stippling, tattooing or gunshot residue on or about Mendoza's clothing, or about the size of the bullet wound to establish that the fatal shot was not fired from Mortensen's gun.

W. Brady's supervisory status

Trial counsel failed to establish that Chris Brady was Mortensen's acting sergeant on December 27, 1996 [and early morning hours of December 28, 1996], and that the chain of command would have required Mortensen to report the incident to Brady. Southwest Area Command patrol logs would have shown that Brady was using the sergeant's call sign of "6417(A)" and could have been used to further impeach Brady's story. Instead, during Brady's direct testimony he was able to state:

> Q. Were you ever, sir, in a supervisory capacity over Ron Mortensen?
> A. No, sir.
> Q. You were two patrolmen, you had a little seniority on him but nevertheless you are two patrolmen working for the Las Vegas Metropolitan Police Department?
> A. Yes, sir.

(Doc. 30 at 1859-60).

X. No testimony on Brady's familiarity with the 18th Street gang

Trial counsel also was not prepared or able to present testimony that would show Brady was familiar with the 18th Street gang, a fact that he denied during cross-examination at trial.

Y. Failure to support Mortensen's testimony

Trial counsel failed to ask any question on re-direct examination of Mortensen to rebut issues raised on cross-examination or call any witnesses to corroborate Mortensen's testimony.

Z. No motion for mistrial after prosecutor violated evidence order

Trial counsel failed to move for a mistrial after prosecutor Koot improperly again brought up issues regarding Mortensen's employment at Dillard's in the presence of the jury after the Court had ruled that the evidence was not admissible.

AA. No record of in-chambers discussions

Trial counsel waived Mortensen's presence for the in chambers discussion of the jury view of the shooting scene and failed to make a record as to what the conditions were for the viewing. He also failed to insist that arrangements be made so that Mortensen could be present without prejudicial impact on the jury members.

There was an in-chambers meeting on Monday, May 5, 1997, where discussions took place about making the truck available to the defense and about arrangements for the jury to view the crime scene. Mortensen was not present for these discussions. There was no discussion on the record concerning the conditions for the viewing or what areas would be the subject of the jury's inspection.

Counsel again waived Mortensen's presence for an in chambers argument concerning the admissability of other bad act evidence against Brady after the conclusion of direct examination by the State.

These actions denied Mortensen his right to be present at all critical stages of the proceedings and to confront the evidence against him in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments.

BB. No objection to improper cross-examination

Trial counsel failed to object to improper cross-examination that commented on Mortensen's Fifth Amendment right to remain silent.

During cross-examination, without objection, the prosecutor was allowed to ask the following questions:

> Q. You mean you never did tell anybody there as you had planned to do?
> A. I never had to, sir.
> THE COURT: Did you tell anybody?
> THE WITNESS: No, sir, I never told anybody anything, except what I said to the detectives.
>
> . . .
>
> Q. You didn't even tell your wife?
> A. That's correct.
> Q. You were going to give her a welcome call from the jail?
> A. I didn't want to upset my wife.
> Q. Would she be less upset if you called her from the jail?
> THE COURT: Mr. Koot, he answered.

[Doc. 68-2 at 2335].

CC. No testimony of Brady's altered appearance

Trial counsel failed to present testimony that Brady had altered his appearance for his trial testimony by either tanning or application of tanning products to make it appear that he had a dark complexion. Any number of witnesses could have testified that Brady was very light skinned and not dark-complected as urged by the prosecutor in his opening statement to the jury.

This testimony would have impeached the identification of Mortensen by witnesses and at the same time shown Brady's deceitful efforts to avoid culpability and demonstrated his consciousness of guilt.

III Ground Three - Ineffective Assistance of Appellate Counsel

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because he was not afforded effective assistance of counsel on direct appeal.

Under *Evitts v. Lucey*, Mortensen has a right to effective assistance of appellate counsel. 469 U.S. 387, 393–97 (1985). *Evitts* extended the application of *Strickland* standard to the assistance appellate counsel provides a defendant. Thus, when appellate counsel unreasonably fails to raise meritorious issues in an appeal, as Mortensen's counsel failed to do, that is ineffective assistance. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). And that ineffective assistance prejudiced Mortensen because, but for appellate counsel's ineffective assistance, there is a reasonable probability that Mortensen would have prevailed on his direct appeal. *Id.* 285–86.

Supporting Facts

Appellate counsel failed to provide reasonably effective assistance to Mortensen by failing to raise on appeal, or completely assert, all the available arguments supporting constitutional issues. These issues include the following:

A. Challenge to jury instructions

1. Failure to challenge instructions on premeditation and deliberation

Appellate counsel rendered ineffective assistance in failing to challenge the premeditation and deliberation instructions on direct appeal, even if only as plain error. Mortensen has therefore been prejudiced by the failure of appellate counsel in violation of his Sixth Amendment right to effective assistance of counsel on direct appeal. This failure is raised elsewhere as a separate ground for relief (*see* Ground Two, part I.(2); Ground Eight, part A; Ground Eleven), and the arguments and authorities are incorporated by reference.

2. Failure to challenge no instruction on express and implied malice

Appellate counsel also rendered ineffective assistance by failing to raise the absence of an instruction on express and implied malice. The failure is raised as a separate ground for relief below (*see* Ground Eight, part B), and the arguments and authorities are incorporated by reference.

B. Other errors by appellate counsel

1. No challenge to failure to investigate Ramirez

Appellate counsel failed to raise any issue regarding trial counsel's failure to determine prior to Mortensen's trial (as opposed to after the trial) whether Ruben Ramirez's attorney to determine if there had been any discussion or knowledge that Ramirez was a witness for the State either when Ramirez pleaded or was sentenced in connection with the meth distribution charge.

2. No motion to disqualify Justice Becker

Appellate counsel failed to file a motion to disqualify Supreme Court Justice Nancy Becker from participating in the decision on the direct appeal and appeal(s) from the motion(s) for new trial based on her conflict of interest as she was the District Court Judge that issued the search warrant to search Mortensen's home in December 1996. Justice Becker ultimately heard both of the appeals despite the conflict of interest.

3. Broad admissibility of Brady's other bad acts

Appellate counsel failed to argue that evidence of Brady's other bad acts was admissible on a number of theories other than just identity. The decision of the Nevada Supreme Court only addressed the admissibility of the evidence under NRS 48.045(2) to show identity and noted in a footnote that at oral argument appellant argues that the evidence was also admissible to show modus operandi. (Doc. 38-1 at 3024-25).

The State at trial had opened the door for the other bad act testimony by eliciting testimony from Brady that:

Q. Why did you decide to come forward?

> A. Because, sir, what happened was wrong. And even though the guy was a gang banger he didn't deserve to get shot.
> And it was just the right thing to do to come forward.

(Doc. 30 at 1877).

This testimony implied that Brady had never done anything else like this before and would always do the right thing and not harass "gang bangers" and "dopers" regularly while off duty. As discussed above, there was ample evidence available to show that Brady was far different than portrayed at trial and appellate counsel should have stressed this point at oral argument.

4. Letter of theory of defense not included in appellate record

Appellate counsel failed to include in the appendix on the direct appeal a copy of the letter sent to the prosecution in January 1997, putting the State on notice of the theory of defense. This failure allowed the State to argue and the Supreme Court to decide that the State was not on notice of the theory of defense until the end of March 1997, and thus did not act in bad faith in failing to preserve the evidence for defense examination. (*See* Doc. 19 at 2-3; Doc. 38-1 at 3029).

5. No challenge to failure to obtain expert witness

Appellate counsel failed to argue that, prior to filing the motion for new trial, trial counsel failed to obtain an expert witness to testify to contradict the "surprise" testimony of Torrey Johnson in order to establish the prejudicial impact of such testimony at trial and that the testimony was not only inaccurate but incredible.

Expert Darrell Powell was available and in trial counsel's office, but not utilized in support of the motion for new trial to show that there was reasonable doubt whether the fatal shot was fired from Mortensen's gun. The same expert could have been utilized to conduct ejection pattern analysis and to discredit the testimony of Torrey Johnson at trial, as indicated above in the argument concerning failure to utilize experts at trial.

6. Issue of prosecutorial misconduct not raised

There were a number of instances of prosecutorial misconduct that should have been raised on direct appeal, even though there had been no contemporaneous objection. For example:

Opening Statement:

- Statement of personal opinion and vouching for the credibility of prosecution witnesses.

  Misstatement of the evidence.

- Improperly inflaming the jury with prejudicial comments.

Closing Argument:

- Improperly put victim impact argument before the jury.
- Expression of personal opinion during closing argument.

  Reference to facts not in evidence.

  Reference to obsession with firearms and to the incident being "a recreational thrill kill."

- Disparaging defenses witnesses.

  Improper comment on right to remain silent.

- Inflammatory conduct in pointing and dry firing the gun at the jury.

Penalty Hearing:

- Misstatement of the law.

  Urging the jury to sentence based on community standards or extraneous factors

7. No challenge to court's limits on attacking gang member credibility

The Court improperly limited trial counsel from exploring the relationship within the 18th Street gang to show that gang loyalty would be much stronger than the oath administered to witnesses to tell the truth. During the testimony of Ruben Ramirez, when counsel asked about loyalty within the gang, the court, without a renewed objection from the State, ruled that it was

immaterial and irrelevant. Appellate counsel should have challenged this ruling as such testimony was both material and relevant as it went to the credibility of Ramirez and other gang-affiliated witnesses.

8. No challenge to denial of mistrial based on improper cross of Cabrera

Appellate counsel failed to raise on direct appeal the denial for mistrial based on the cross examination of Jose Cabreiro. There were two instances of improper questioning that were not raised on direct appeal. During cross-examination, the following sequence of questions occurred:

> Q. Are you aware, sir, that Mr. Mortensen had about—has about 14 handguns registered to him at the present time? Are you aware of that, sir?
>
> THE COURT: I don't know whether that's in the evidence or not.
>
> MR. CREMEN: Your Honor, I am going to object to that.
>
> THE COURT: Just a second, please. Let's hear the objection.
>
> MR. CREMEN: Your Honor, that has nothing to do with the circumstances and the facts that my client has related or that witness has related, that has nothing to do with the issue at trial. I mean
>
> MR. KOOT: I think what's relevant here –
>
> THE COURT: Overruled. I will let him answer. If he is aware of it.
>
> Q. (By Mr. Koot) You are not aware of Mr. Mortensen's fascination for firearms?
>
> MR. CREMEN: Object to "fascination."
>
> THE COURT: Sustained. Rephrase it.
>
> Q. (By Mr. Koot) Are you aware of the fact Mr. Mortensen has, over the numerous years, owned numerous firearms?
>
> MR. CREMEN: These aren't facts in evidence.
>
> THE COURT: Sustained.
>
> Q. (By Mr. Koot) Do you, sir, join Mr. Mortensen in his hobby of shooting firearms?
>
> MR. CREMEN: There is no testimony about that, either.
>
> Q. (By Mr. Koot) So you are
>
> THE COURT: Just a moment, Mr. Koot. I sustained the objection. There is no evidence.
>
> MR. KOOT: I am testing his knowledge of the real Mr. Mortensen.

THE COURT: Then rephrase the question. There is no evidence that Mr. Mortensen enjoys shooting firearms. Nothing in evidence to show that. Sustained.

Q. Does Mr. Mortensen enjoy shooting firearms?

A. Yes.

Q. And does he enjoy owning and possessing firearms?

MR. CREMEN: I object to the relevance. What does this have to do with the issue at hand?

MR. KOOT: Well, he's the one who chose to call character witnesses. You know, I am going to attack Mr. Mortensen's character through your witness.

MR. CREMEN: Your Honor, may we approach the bench?

THE COURT: Yes.

(An off-record discussion was held between the Court and counsel at the bench out of the hearing of the jury.)

THE COURT: Only that issue, Mr. Koot.

(Doc. 81-4 at 2494-96).

. . .

MR. CREMEN: Again, I have to make a motion for a mistrial. And I want to do it for these reasons.

Mr. Koot brought up about this witness and he was allowed to go into it for awhile, my client's ownership of handguns.

And somehow the ownership of handguns is given by Mr. Koot and the tone of his questions is there some sort of sinister twist. And he then abandoned and started to talk to the witness about my client's once having been employed at Dillard's.

Now, the Court may or may not remember, that was the subject of a newspaper story sometime ago. My client's employment at Dillard's has nothing to do with anything.

THE COURT: I sustained your objection and struck it from the record and told the jury to disregard it.

MR. CREMEN: You may have admonished them to disregard it but that, and the suggestion that something sinister by my client of owning and having registered to him handguns over the years or engaged in target shooting with this witness is fraught with suggestion that he is a bad man and the suggestion that he once worked at Dillard's, that jury now

knows even though you told them to strike it from the record. That, in conjunction with the statements concerning the firearms, they suspected something sinister happened at Dillard's.

There is a case called *Rambert versus State* were a sexual assault conviction was specifically reversed by the Nevada Supreme Court when a prosecutor went into a witness, a defendant, about the reason for his leaving a particular job, that the Supreme Court felt was wrong and reversed the conviction.

THE COURT: I don't know how many questions the prosecutor asked that defendant at that time. I struck it from the record. There was one question asked. And I struck it from the record. I sustained your objection. I admonished Mr. Koot not to ask that question again.

MR. KOOT: Well, if I might. Where I was going, first of all, I don't think this guy knew the real Ron Mortensen. I was testing him because this guy, Ron Mortensen, wanted I think his signature – actually, if you knew Ron Mortensen you would know that he is an absolute gun fanatic and a gun nut. And I was testing his recollection or his knowledge of that to see if he knew that side of Ron Mortensen.

In addition to that, Ron Mortensen had been – at Dillard's, in addition to a lot of other problems, he had carried a weapon concealed when it was he should not be carrying a weapon.

It was either unarmed security – violation of policy, did not have a concealed weapons permit. More fascination.

If this guy was a close friend to Ron Mortensen, he probably knows that Ron Mortensen carried concealed weapons all the time. He just has this tremendous fascination

THE COURT: I don't know that. That's not in evidence.

MR. CREMEN: What does that have to do with the issue?

MR. GUYMON: Because he's a level-headed guy, doesn't carry a gun on the job

MR. KOOT: We are just making the record where I was going, because in this case the character trait – the character traits that you are trying to dispel is that this guy loves Hispanics, that he's a mild guy, that he loves people, he wouldn't fire a gun, and in this particular case he killed a man, our theory, is with a concealable weapon – with a concealable handgun.

MR. CREMEN: So what?

> MR. KOOT: So what? It is murder. It is guns, man. Guns
> MR. CREMEN: There is nothing wrong with carrying a concealed weapon.
> THE COURT: He's a peace officer. Nothing wrong with that.
> MR. CREMEN: How do you jump from that, that he carries a concealed weapon or that he had registered or that he was employed with Dillard's and that he was
> THE COURT: He didn't say that, that testimony. That is not in the record, Frank
> MR. CREMEN: But all of his testimony about guns and the sinister connotations Mr. Koot put on it, I have to ask for a mistrial.
> THE COURT: Your motion for a mistrial is denied. I don't think that would prejudice – that was prejudicial to you. You asked for an admonishment of the jury and I told them it would be stricken from the record

(Doc. 31-4 at 2199-2203).

The prosecutor engaged in intentional misconduct by referring to Mortensen's employment at Dillard's after the Court had previously ruled that the evidence was inadmissible. According to ABA Standards section 3-5.6 (b), it is considered unprofessional conduct for a prosecutor to ask objectionable questions or to make other impermissible comments in the jury's presence "knowing and for the purpose of bringing inadmissible matters to the attention of the judge or the jury." In this case, during the cross-examination of defense witness Jose Cabezuto, the following took place:

> Q. Were you aware, sir, that Mr. Mortensen was employed at Dillard's department store?
> MR. CREMEN: Your Honor, may we approach the bench?
> THE COURT: Just a moment, please. Sustain the objection, Mr. Koot. I think I made my ruling on this earlier.
> MR. KOOT: All right.
> THE COURT: Sustain the objection. That will be stricken from the record and the jury is admonished to disregard that last statement.

(Doc. 31-4 at 2197).

These issues were preserved for appeal and should have been raised by effective appellate counsel as a basis to set aside Mortensen's conviction. The failure to do so not only denied him of effective assistance of counsel, but also denied him of due process of law under the Fourteenth Amendment.

9. No appellate challenge to improper comment on Mortensen's silence

Appellate counsel failed to raise any issues regarding the improper cross examination that commented on Mortensen's Fifth Amendment right to remain silent.

10. No claim of cumulative error

Appellate counsel failed to raise the issue of cumulative error. In addition to those issues that were raised on direct appeal and those that should have been raised, appellate counsel should have challenged the conviction under the theory of cumulative error. Cumulative error has been raised as an independent substantive claim herein, and the authorities and arguments therein are incorporated into this Claim by this reference.

IV. Ground Four – Prosecution's Failure to Provide Impeachment and Exculpatory Evidence

Mortensen alleges his conviction and sentence are unconstitutional in violation of his Fifth and Fourteenth Amendment rights to due process and a fundamentally fair trial because various law enforcement agencies failed to provide him with discovery of impeachment and exculpatory evidence.

Under *Brady v. Maryland*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963).

Supporting Facts

Mortensen's prosecution was the result of a joint investigative effort by the Nevada authorities as well as the FBI and U.S. Department of Justice. The investigation by the federal

authorities led to a grand jury investigation into the activities of Christopher Brady and his eventual plea to civil rights violations before an indictment could be returned.

In such a joint investigation, the knowledge and information gathered by one agency is chargeable to the other. It is no defense to a *Brady* claim that one branch of the prosecution withheld information from the other branch. *See, e.g., United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979).

Defense counsel made a specific request for the materials under the control of the prosecution team.

The Due Process Clause mandates that the conviction be overturned based on the failure to reveal the following evidence to Mortensen. To the extent respondent argues that this information was available to the defense through due diligence, Mortensen repeats and realleges the claims from Ground One above that he received ineffective assistance of counsel.

A. Impeachment evidence for Ruben Ramirez

The State was in possession of critical information that impeached the credibility of the testimony of Ruben Ramirez, consisting of his criminal activity prior to his trial testimony. This information should have been provided to the defense prior to the testimony of Ramirez.

The knowing use of perjured or false testimony is a denial of due process. When considering the knowing use of perjured testimony, courts may decline to draw a distinction between the police agents and prosecutors and focus instead upon the "prosecutorial team," which includes both the investigative and prosecutorial arms. Due process prohibits prosecutors from presenting testimony that any member of the prosecution team, including investigative and prosecutorial personnel, knows to be false.

B. Failure to photography Brady

LVMPD detectives failed to photograph Brady's appearance at the time of his interview, and instead allowed him to go and have a new driver's license issued on December 31, 1996, and appear

as he chose to appear and then use that photograph at trial by admitting his newly created driver's license into evidence. (Doc. 30 at 1878).

C. Brady's expressed desire to do a drive-by

Prosecutor Koot affirmatively represented to the Court at the hearing on the request to admit other bad acts against Brady on cross examination that "[t]here is no conduct that I am aware of that Mr. Brady has ever committed which is even closely associated with this particular case" and "[i]n this case it is so unique where . . . these two fellows go out and they shoot somebody and fire their guns. Mr. Brady has never even come close to doing this." (Doc. 30 at 1885).

Koot claimed in chambers that he had an investigator talk to officer Mike Barry, and that Barry said that it was nonsense that Brady had stated to him a couple of weeks earlier that he wanted to do a drive-by shooting. (Doc. 33 at 1550). Barry's statement to FBI Special Agent Sheehan, and testimony before the federal grand jury, was quite different and included statements that whoever had called him and asked him questions did not identify himself/herself as being a District Attorney Investigator. (*See* e.g., Doc. 36-1 at 2087-88). Either a LVMPD Officer intentionally concealed evidence and lied to the District Attorney or the District Attorney concealed the evidence from the Court and from the defense. It makes little difference under prevailing case law; [illegible] conduct was a denial of due process and of a fundamentally fair trial. It would have been clear that there were previous marauding trips by Brady that were known by members of the LVMPD, and therefore must be imputed to the prosecuting attorneys.

The Court, in denying Mortensen's request concerning the Barry information, relied upon these representations by the prosecutor:

> THE COURT: I agree with Mr. Koot. I don't think there is anything closely resembling anything in his background. I want you to know I reviewed those reports with my law clerk and there is nothing in those reports that come close to the facts of the incident in the present case in mind so I am going to sustain the objection.

(Doc. 30 at 1886).

Had the district court been told of the actual evidence that existed, it would have allowed it to be introduced by the defense at trial. Instead, operating in a vacuum of concealment and deceit, the court denied Mortensen the ability to pursue the line of defense that likely would have resulted in his acquittal.

At trial Brady denied having ever done this sort of thing before, which was known to be false by members of law enforcement, who, for whatever reason, declined to reveal the information until the federal government started asking questions. During cross-examination, trial counsel asked Brady about prior incidents and received false answers:

> Q. And I take it you had done this kind of thing before, hadn't you?
> A. No, sir.
> Q. You mean to tell me this very first episode occurred on December 27, 1996?
> A. Yes, sir.
> Q. Brand new idea that just popped into your head when you got to Twain and Maryland Parkway?
> A. Yes, sir.
> Q. Just you — it just dawned on you, you know, there would be a lot of fun; I think I am going to drive down Twain recklessly and turn hard right on Cambridge? And start harassing people?
> A. Yes, sir.
> Q. Now, the genius for this idea was yours?
> A. Yes, sir.
> Q. You hadn't discussed doing this kind of thing with other officers, had you?
> A. Not the harassing part.

(Doc. 30-1 at 1919).

It is apparent from this line of questioning that defense counsel believed Brady had gone on his "fishing" expeditions before and may perhaps admit to having done this kind of thing before the

consent incident. The key question is what other LVMPD officers knew about the prior incidents when Brady took the stand and committed perjury?

Incredibly, after Mortensen was convicted, the stakes of the deception became even greater. When it became common knowledge that the FBI was investigating the Mortensen case along with other possible civil rights violations by LVMPD, the union for the police officers put out a letter telling officers not to say anything to the FBI. As such obstruction was openly practiced in general, it is not hard to believe that in the specific case of Mortensen, he was set up to take the fall to cover the actions of other officers with seniority and political connections.

D. Failure to produce ballistic expert's notes

After Mortensen was convicted, trial counsel obtained copies of Dorsey Johnson's notes that showed he had doubts that the fatal shot was fired from Mortensen's gun. Although this was raised by way of a motion for new trial after conviction and denied, the failure to produce the notes prior to trial also constituted a violation of the State's responsibility to turn over all potentially exculpatory evidence. Doc. No. 2661-62; Doc. No. 1 at 24-25.

V. Ground Five: Destruction and Concealment of Evidence

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because of the concealment and destruction of evidence and the failure of the State to investigate the case, but rather to protect and seek the goal of shielding Brady and blaming Mortensen.

The claims under this ground turn on *Brady v. Maryland* insomuch as "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). However, there is currently no *Brady* violation where the

Court recognized that the "failure to preserve potentially useful evidence" violate the Due Process Clause when the failure is rooted in bad faith. 488 U.S. 51, 57–58 (1988).

Supporting Facts

It is a well settled principle that the intentional suppression of material evidence by the prosecution constitutes a violation of due process, irrespective of the good or bad faith of the prosecution.

The loss of evidence and failure to preserve evidence included the following:

A. Gunpowder residue on Mendoza

The LVMPD failed to test Mendoza's hands for gunpowder residue or to collect and preserve the clothing he was wearing and test same for gun powder. If these steps had been taken, Mortensen may have been able to establish that the fatal shot was not fired from his gun and provided a host of additional defenses to the charge of first degree murder.

B. No forensic investigation of the driver's side of Brady's truck

Testimony at trial from Senior Crime Scene Analyst Daniel Ford was that he only processed the passenger side of the vehicle because he had been instructed by a homicide detective to only process the passenger side of Brady's truck. (Doc. 26-2 at 1347-48). The failure to process the entire truck was compounded by the failure of the crime scene analyst to prepare an impound report or inventory report on the contents of the truck. (Doc. 26-2 at 1352-53). The processing of the truck was so poor that Ford failed to even discover that there was a secret compartment in the armrest of the bench seat in the truck. (Doc. 26-2 at 1354-55).

C. Alterations permitted to Brady's truck

Deputy District Attorney John Lukens gave Brady permission to make the alterations to the truck according to Brady's trial testimony. (Doc. 30 at 1874). This is absolutely contrary to representations made by prosecutor Lukens to the Justice of the Peace on January 15, 1997, when

Cremen asked that the truck and clothing and any other evidence be preserved. Lukens' statements to the Court included the following:

> Your Honor, there is nothing to be preserved. The State has nothing, doesn't have any of these items, doesn't have anything in its custody. So I don't know what remedy Mr. Cremen asks.
>
> . . .
>
> We have no control over what our witnesses do or don't do.
>
> . . .
>
> I have no control over it. I cannot I can't be held accountable for something I've no control.

(Transcript, January 15, 1997, pages 5, 6, & 7).[5]

Curiously, the prosecutor failed to inform the Court or defense counsel that Brady had already asked and received permission from Lukens to alter the truck. Lukens did have the ability to control the truck as Brady called him and asked his permission to repaint it. Lukens's actions violated the requirement of candor to the tribunal and establish a pattern of conduct and cover-up from the inception of Mortensen's prosecution. The complicity of Lukens in the destruction of evidence is further established by Brady's testimony that he had the truck repainted on January 24, 1997, a week after Lukens dead panned to the Court that he had no control over the vehicle. (Doc 31 at 19758).

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[5] At the time this amended petition was submitted to this Court, the referenced transcript could not be located in the records Mortensen's present counsel had in his possession. Counsel will attempt to locate a copy of the transcript, and intends to contact the state court to see if still has this record in its possession. However, given the time that has passed, there is the possibility that it will not.

If Respondents have a copy, Mortensen respectfully asks, consistent with Rule 5(c) of the Rules Governing § 2254 Petitions, that the Respondents submit it to this Court.

D. Brady never photographed

LVMPD detectives failed to even photograph or document Brady's appearance at the time of the interview, instead allowing him to go and have a new driver's license issued on December 31, 1996, and appear as he chose to appear and then use that photograph at trial by admitting his driver's license. (Doc. 30 at 1878). Brady was thus able to change his appearance by cutting his hair and not wearing glasses in order to deceive the jury about the description of the person in the truck that was firing the gun.

E. Objections to testimony about the truck alterations

The State's conduct, in allowing the truck to be drastically altered, then objecting to any testimony about the truck during Dobbie's examination at trial:

> Q. (By Mr. Cremen) Now, Don, you drove that 1974 Dodge pickup, did you not?
> A. Yes, I did.
> Q. And did you attempt to, that afternoon, to determine what would happen if the car were in gear and the foot – your foot was removed from the brake?
> A. Yes, I did.
> Q. What happened?
> A. It begins to move forward.
> Q. Were you able to determine how quickly?
> A. In terms of there was no measurement of time distance, but it is a noticeable and near-immediate acceleration
> MR. KOOT: I believe there has been testimony – there has been testimony that the carburetor has been rebuilt and –
> THE COURT: Sustained. Sustained.
> MR. CREMEN: Well, Your Honor, all right, thank you.
> THE COURT: The carburetor has been rebuilt. Not the same as it was on December 28. Let me make my record. Sustain the objection.

(Doc. 32 at 2219-20).

Thus the record establishes that not only did the authorities allow the destruction of evidence, the prosecutors at trial took advantage of the conduct to prevent any testimony about the

acceleration of the truck, and thus Mortensen was prejudiced by the loss or destruction of the evidence. On cross-examination, the prosecutor made the point even stronger by asking a series of questions to show that defense investigator Dibble could not testify as to the characteristics of the truck at the time of the incident. (Doc. 32 at 2221-22).

F. False representations of fact by the prosecutor

Prosecutor Koot affirmatively represented to the Court at the hearing on the request to admit other bad acts against Brady on cross-examination that "[t]here is no conduct that I am aware of that Mr. Brady has ever committed which is even closely associated with this particular case" and "[i]n this case it is so unique where – these two fellows go out and they shoot somebody and fire their gun, Mr. Brady has never even come close to doing this." (Doc. 30 at 1885).

It would later turn out Brady had engaged in previous marauding trips, and that members of the LVMPD knew this information, and therefore that knowledge must be imputed to the prosecuting attorneys. The facts and authorities pertaining to this issue are discussed above with respect to failure to investigate, and the same are incorporated herein by this reference.

The Court in denying Mortensen's request relied upon these representations by the prosecutor:

> I agree with Mr. Koot. I don't think there is anything closely resembling anything [like that] in his background. I want you to know I reviewed those reports with my law clerk and there is nothing in those reports that come [s] close to the facts of the incident in the present case [to my] mind, so I am going to sustain the objection.

(Doc. 30 at 1886)

Koot, while cross examining Mortensen, stated that the streets of the area "were quite familiar to Mr. Brady, I believe, right." (Doc. 68-2 at 2316-17). Also "I mean, he was driving through the area so we can assume from that, that he seemed to know where he was going, right?" (Doc. 68-2 at 2317). Koot obviously knew that Brady had worked the area or been in the area on

other occasions contrary to Brady's testimony. The prosecution thus knowingly presented perjured testimony from Brady and failed to provide exculpatory impeachment material to Mortensen for cross examination of the perjured testimony.

G. Inconsistent testimony by Becker

The cover-up by detective Becker to exonerate Brady continued up through the trial. Becker initially testified that Brady never told him that he stuck his gun out the window, and never mentioned that he had conversations after the recorded statement wherein he was concerned with that portion of Brady's story. Then suddenly, after having testified and not remembering anything about the gun out the window, he was recalled by the State to testify that he was so concerned with Brady's statement on the tape about the gun out the window that he had gone back into the interview room and had Brady clarify and even demonstrate how he had handled the gun. It strains the imagination to believe that Becker forgot and then remembered something that was so important that he sought clarification after he completed his "thorough" 18 minute interview of Brady. His epiphany was a pure figment of his imagination to cover the huge hole in the State's malicious prosecution of Mortensen.

H. No interview of Lorraine Mohr

The homicide detectives assigned to the case never even bothered to interview Lorraine Mohr to determine her observations and whether she could offer any information to either impeach or corroborate the story that had been told by Brady. (Doc. 32 at 2236).

VI. Ground Six – Prosecutorial Misconduct

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights because the prosecutors' and State's witnesses' conduct denied him of his rights to due process and a fundamentally fair trial.

Under *Donnelly v. DeChristoforo*, when prosecutors make remarks that infect the trial with unfairness, the resulting conviction is a denial of due process. 416 U.S. 637, 643 (1974).

Supporting Facts

Mortensen has alleged that he received ineffective assistance of counsel because his trial counsel failed to object to the misconduct that occurred at the trial level, and then his appellate counsel failed to raise the misconduct as an issue on direct appeal. He now raises the conduct of the prosecution as a separate, independent, and substantive constitutional violation irrespective of the failures of his attorney to challenge the conduct contemporaneously.

The prosecutorial misconduct that denied Mortensen of Due Process and a fundamentally fair trial includes the following:

A. Swastika demonstration gun

During Torrey Johnson's testimony and his demonstration of gun angles or location, Johnson used a gun out of the crime lab that was admitted into evidence as part of the prop he utilized in demonstrating for the jury. The gun was a .380 semi-automatic, just as was Mortensen's gun. However, the gun used by Johnson was an old German police pistol that had swastikas on the pistol grips. This gun was admitted into evidence and the jury was allowed to see the gun during deliberations. The subtle prejudicial impact on the jury, portraying Mortensen as a racist or white supremacist racist, is impossible to gauge, but demonstrates the pervasive misconduct that occurred during the trial in the instant case.

B. Impugning defense counsel

Through questions to witnesses, the prosecution improperly impugned the motives and intentions of defense counsel:

> Q. (By Mr. Guymon) How does it affect you when counsel wants to try to infer this about the 18th Street gang?
>
> MR. CRIMINI: I object. That is not what I am doing. Now these two fellows injected the gang questions.

THE COURT: Just a moment, please. He objected. I sustained.
MR. GUYMON: Thank you, your Honor.
THE COURT: Let me run this courtroom or we'll be in big trouble.
Okay. Thank you.

(Doc. 26-4 at 1426-27).

Comments suggesting that defense counsel in general, or the defendant's attorney in particular are cunning or deceptive violate the Sixth Amendment right to counsel and the Fourteenth Amendment's due process clause.

C. Demeaning statements about Mortensen

During Brady's re-direct examination, the prosecutor asked the following:

Q. Did you help him unzip his pants?
A. No, sir.
Q. You didn't hold his hand, did you?
A. No, sir.
MR. CREMEN: That question is entirely improper, crass, impudent.
MR. KOOT: What is impudent about it?
THE COURT: It is improper. He said he didn't do it.
MR. KOOT: I will abide by the Court's ruling.

(Doc. 31 at 1994-95).

D. Raising matters prohibit by the court

The prosecutor also engaged in intentional misconduct by referring to Mortensen's employment at Dillards after the court had ruled that the evidence was inadmissible. During the cross-examination of defense witness Jose Cabezuto, the following took place:

Q. Were you aware, sir, that Mr. Mortensen was employed at Dillard's department store?
MR. CREMEN: Your Honor, may we approach the bench?
THE COURT: Just a moment, please. Sustain the objection, Mr. Koot. I think I made my ruling on this earlier.
MR. KOOT: All right.
THE COURT: Sustain the objection. That will be stricken from the record and the jury is admonished to disregard that last statement.

(Doc. 31-4 at 219.).

The prosecutor also misrepresented the testimony concerning Mortensen's employment history at Dillards in arguing against the motion for mistrial. This conduct is also addressed above as a failure of defense counsel to investigate and object, and the argument and authorities on the same are incorporated herein by this reference.

E. Disparaging defense counsel

> Q. [KOOT] Right. And one of your strengths, I believe you listed on your application to Metro was leadership?
> A. Yes, sir.
> Q. In fact, you have done a good job here in the courtroom leading Mr. Cremen around?
> MR. CREMEN: Your Honor
> THE COURT: Mr. Koot, just ask the questions, please. Ask the questions, Mr. Koot.
> MR. KOOT: All right.
> Q. (By Mr. Koot) Your leadership ability, sir, would you say that here in the courtroom you did a pretty good job of leading the examination of yourself?
> MR. CREMEN: This is an inappropriate question, Your Honor.
> THE COURT: Sustain the objection.

(Doc. 32-1 at 2293-94).

> . . .
> Q. You're suing on your own gun?
> A. Yes, sir.
> Q. So it is under your control?
> A. Not necessarily, sir.
> MR. CREMEN: I don't understand the point of this cross examination, Your Honor. Is he suggesting he should have taken it --
> MR. KOOT: Your Honor
> THE COURT: Just a moment. Just a moment, please. Mr. Koot, he is making an objection.
> MR. KOOT: Let him verbalize his objection without making an argument.

THE COURT: Mr. Koot, let me say this now, gentlemen, let's restrain ourselves from getting too excited, all right? We'll get rid of this case. Everybody stay calm, including myself. Now, Mr. Cremen?

MR. CREMEN: I thought Mr. Koot was suggesting that Mr. Mortenson should have grabbed his gun and shot Mr. Brady because of his erratic driving.

THE COURT: No, no, no, no. This is proper cross-examination. He said he was intimidated because of the weapon.

Now, go on.

MR. KOOT: I object to that objection.

THE COURT: Proceed, Mr. Koot.

MR. KOOT: Yes, I will.

THE COURT: Stay calm. Now we are all right.

(Doc. 68-2 at 2299-2300)

. . .

Q. Wait a second. You wanted to go home from the time you left – from almost the time you left before you lit the cigar

MR. CREMEN: That is not his testimony.

THE COURT: Just a moment, please.

MR. KOOT: I object to counsel –

THE COURT: Mr. Koot. Mr. Koot, please

MR. CREMEN: Your Honor, that was not the testimony. He is misstating the evidence.

MR. KOOT: This is cross-examination.

MR. CREMEN: You are not allowed to misstate the evidence.

MR. KOOT: I am trying to cross-examine him.

THE COURT: You can't misstate the evidence, Mr. Koot, ask him

MR. KOOT: Yes, Your Honor, I will.

(Doc. 68-2 at 2303-04).

. . .

Q. You were going to be a popular fellow in that jail in that uniform, weren't you?

THE COURT: Mr. Koot, that's improper.

(Doc. 68-2 at 2309).

. . .

Q. You didn't just qualify. You got, what a 93 and 94? I looked up the score. 93 and 94.

A. Yes, sir.

(Doc. 68-2 at 2327).

. . .

Q. About 90 – I looked it up. Is this incorrect, 90 percent?

MR. CREMEN: I object to Mr. Koot testifying.

THE COURT: You can't testify, Mr. Koot. You may ask questions, though, until you take the witness stand and raise your right hand, okay?

(Doc. 68-2 at 2329).

. . .

Q. You are young, you are 31 years old, you bounce, you have been hung over before, haven't you?

THE COURT: Mr. Koot, please.

MR. CREMEN: This is argumentative.

THE COURT: Sustained.

Q. (By Mr. Koot) Did you, sir, tell me that you worked at Dillards?

A. No sir, I didn't tell you that.

Q. You didn't tell me that?

A. No.

Q. You told me you worked security –

MR. CREMEN: Your Honor, I object.

THE COURT: Sustained. I made my ruling earlier, Mr. Koot.

MR. KOOT: I do need – I do need, if the Court would keep an open mind, I need to make an argument.

THE COURT: You may do so.

MR. CREMEN: I think we have already covered this, Your Honor.

THE COURT: Just a moment. I will let you renew this later on down the road, but I already made my ruling on this. We had an argument earlier.

(Doc. 68-2 at 2332).

When the prosecutor was offered the chance to continue cross examination, he declined but made sure to inform the jury that it was because the judge would not let him get into the area stating, "In light of your ruling, no, Your Honor, we do not [have any further questions]." (Doc. 33 at 2354). Again, in front of the jury when asked if he had any rebuttal witnesses, Koot stated "In light of the Court's ruling, one witness." (Doc. 33-1 at 2412)

Furthermore, during the direct examination of Zoe Mortensen, the prosecutor made an objection simply for the purpose of poisoning the jury and not on any legal basis:

> Q. And how were you awakened?
> A. A (short pause)
> MR. KOOT: Your Honor, this is histrionics. Not relevant in this case. We are getting to a point of him being arrested. Now we are going to have the witness cry. This is histrionics. It has no place in the courtroom.
> THE COURT: Overruled.
> MR. CREMEN: This is totally uncalled for by Mr. Koot.
> THE COURT: Mr. Koot, please.

(Doc. 33 at 2362).

This exchange shows the double standard that the prosecution wanted to use in this case. It was more than fine for them to make reference to the family of the victim, and point them out to the jury as they cried, or to turn toward them and display photos of the deceased, but when the defense simply sought to introduce evidence of the events on the morning following the shooting, the prosecutor jumped up and claimed that it was "histrionics."

VII. Ground Seven – Improper Pretrial Identification

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fourth, Fifth and Fourteenth Amendment rights because the pretrial identification procedures denied Mortensen of his rights to due process and a fundamentally fair trial.

"[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois*, 434 U.S. 220, 227 (1977).

Supporting Facts

The pretrial identification procedures utilized by the State were so impermissibly suggestive as to deprive Mortensen of due process of law and a fundamentally fair trial under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The failure of trial and appellate counsel to litigate this issue has been raised herein as ineffective assistance of counsel. Mortensen hereby raises such procedures as separate, independent and substantive violations of his constitutional rights delineated above.

Mortensen was falsely identified as the individual firing the gun on McKellar Circle. This false identification was the result of the procedures, intentions and incompetence of the investigating officers who handled this case. Without doubt Mortensen was prejudiced by the false identification in violation of his constitutional right to due process and a fundamentally fair trial and he is entitled to a new trial.

VIII. Ground Eight – Faulty Jury Instructions

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights because a number of jury instructions were faulty, his trial counsel was ineffective for not objecting to them, and his appellate counsel was ineffective for not raising the issue on direct appeal.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A "challenged jury instruction had the effect of relieving the

State of the burden of proof enunciated in *Winship*" violates a defendant's right to due process. *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

Supporting Facts

It is hereby urged that each of the following erroneous instructions or failure to properly instruct deprived Mortensen of due process of law and a fundamentally fair trial.

A. Bad instructions on premeditation and deliberation

The jury instruction on premeditation and deliberation. The legal arguments, showing why the instruction was faulty, are articulated in this petition (under Ground Eleven), those arguments and explanation are incorporated herein by this reference.

B. Vague instructions on malice

The instruction given to the jury on implied malice was vague, ambiguous and relieved the State of its requirement to prove every element of the charge beyond a reasonable doubt.

At the settling of jury instructions, trial counsel failed to object to Instruction Number 10, which defined express and implied malice as follows:

> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

(Doc. 22 at 604).

The instruction in no uncertain terms defines what express malice is without issuing a directive as to when express malice may be found. The distinction is obvious, express malice is merely defined, whereas the jury is virtually directed to find implied malice "when no considerable provocation appears." This interpretation of Instruction No. 10 is consistent with the finding of the court in *Thomas v. State*, 88 Nev. 382, 498 P.2d 1314 (1972) that "[g]enerally, the word 'may' is

construed as permissive and the word 'shall' is construed as mandatory." 88 Nev. at 384, 498 P.2d at 1315.

The State of California, having recognized the problem, has altered its instruction to read "Malice is express when . . . and malice is implied when . . ." California Jury Instructions, Criminal, Section 8.11.

The Eleventh Circuit Court of Appeals, in reviewing a Georgia case that incorporated the same statutory language as used in Instruction No. 10 ("shall be implied"), found that the statutory language is constitutionally infirm as it is a directive instruction and shifts the burden of proof by giving the prosecution a presumption of malice. *New Yorko v. Aiken*, 484 U.S. 211, 212-14, 216-17 (1988); *Hill v. Mahoney*, 927 F.2d 646, 651 (1st Cir. 1990)

Although the Nevada Supreme Court has upheld the validity of the instruction as correctly informing the jury of the distinction between express and implied malice under NRS 200.020, *see Guy v. State*, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992), Mortensen still urges that the presumption language is improper. It is therefore urged that the Court reconsider the finding in *Guy* and reverse Mortensen's conviction, under both State and Federal Constitutional law.

IX Ground Nine – Improper Argument by the Prosecution

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fifth, Sixth, and Fourteenth Amendment rights because the prosecutor's improper argument and misconduct deprived him of a fair trial and due process, and his trial counsel's failure to object to these valid issues precluded meaningful appellate review, he therefore was also denied effective assistance of counsel.

Supporting Facts

Mortensen has alleged that trial counsel was ineffective for failing to object to this misconduct, and that his appellate attorney was ineffective for failing to raise the misconduct as an

issue on direct appeal. Mortensen incorporates each and every one of those allegations of prosecutorial misconduct previously alleged as a violation of his due process rights and right to a fundamentally fair trial into this count.

V Ground Ten – Disparate Treatment

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fourteenth Amendment rights because his prosecution was disparate treatment of identically or similarly situated persons thereby violating his right to equal protection

While prosecutors retain broad discretion in determining whom to prosecute, the discretion is not unfettered. *Wayte v. United States*, 470 U.S. 598, 607–08 (1985). Nevertheless, "[s]electivity in the enforcement of criminal laws is . . . subject to constitutional constraints." *Id.* at 608 (quoting *United States v. Batchelder*, 442 U. S. 114, 125 (1979)). "[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." *Id.* (quotations and citations omitted)

Supporting Facts

The treatment of Mortensen by law enforcement and the District Attorney's Office demonstrates that he was treated differently from other law enforcement officers who are charged with, or implicated in criminal activity. One must look no further than the treatment accorded Chris Brady, the son of a long time LVMPD detective with many friends in the upper chain of command of LVMPD.

Also, not long after Mortensen's conviction, the disparate treatment continued with one long-time officer committing a drive-by shooting; yet, he was not criminally prosecuted even though LVMPD internal affairs substantiated the offense and the individual was terminated. If the court grants Mortensen an evidentiary hearing, Mortensen will present a barrage of officer criminal

conduct that was not (or is not) prosecuted and/or is handled differently than his case. Such disparate treatment deprived Mortensen of his right to Equal Protection under the Fourteenth Amendment.

XI. Ground Eleven – Bad Jury Instructions

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights because the stock jury instructions given in this case defining premeditation and deliberation necessary for first-degree murder, as "instantaneous as successive thoughts of the mind," violated constitutional guarantees of due process and equal protection, the instructions were vague, and relieved the State of its burden of proof on every element of the crime.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A "challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship*" violates a defendant's right to due process. *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

Supporting Facts

The instructions given to the jury failed to provide the jury with any rational or meaningful guidance as to the concept of premeditation and deliberation and thereby eliminated any rational distinction between first and second degree murder. The instruction given does not require any deliberation at all and thus violates the constitutional guarantee of due process of law, because it is so bereft of meaning as to the definition of two elements of the statutory offense of first degree murder.

Mortensen's trial attorney did not object to Instruction 14. The instruction informed the jury that:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing was preceded by and is the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

(Doc. 22 at 608).

Jury instruction number 11 must be read in conjunction with jury instruction number 13, which stated, in relevant part:

> Murder of the First Degree is murder which is perpetrated by any kind of willful, deliberate and premeditated killing.

(Doc. 22 at 607).

The remainder of the instructions do not define, explain or clarify for the jury the phrases "premeditated," "willful," and "deliberate." (*See* Doc. 22 at 595-627).

The instructions correctly inform the jury that there are three necessary and distinct elements to the crime of first degree murder. NRS 200.030(1)(a). The use of the conjunctive "and" crystallizes that the elements are separate, and each one is required to support a verdict of murder in the first degree. The jury, however, was only given an instruction defining premeditation with no guidance whatsoever as to the meaning of "deliberate."

The challenged instruction was modified by the court in *Byford v. State*, 116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000). In *Byford*, the court rejected the argument as a basis for relief for Byford, but recognized that the erroneous instruction raised "a legitimate concern" that the court should address. 116 Nev. at 233, 994 P.2d at 712. The court went on to find that the evidence in the case was clearly sufficient to establish premeditation and deliberation. *Ibid.*

Subsequent to the decision in *Byford* further challenges have been made to the instruction with no success. In *Garner v. State*, 116 Nev. 770, 6 P.3d 1013 (2000) *overruled on other grounds by*

Vienna v. State, 118 Nev. 648, 654-55, 56 P.3d 868, 871-72 (2002), the Nevada Supreme Court discussed at length the future treatment of challenges to what has been deemed the "Kazalyn" instruction. In *Garner*, the issue was raised on direct appeal but had not been preserved at the trial court level. Mortensen is now raising the issue without the issue being preserved at trial or raised on direct appeal because of the ineffective assistance of trial and appellate counsel, as a separate substantive claim as a violation of due process and a fundamentally fair trial. The court stated in *Garner*:

> To the extent that our criticism of the *Kazalyn* instruction in *Byford* means that the instruction was in effect to some degree erroneous, the error was not plain.
>
> Therefore, under *Byford*, no plain or constitutional error occurred here. Independently of *Byford*, however, Garner argues that the *Kazalyn* instruction caused constitutional error. We are unpersuaded by his arguments and conclude that giving the *Kazalyn* instruction was not constitutional error . . .
>
> Therefore, the required use of the *Byford* instruction applies only prospectively. Thus, with convictions predating *Byford*, neither the use of the *Kazalyn* instruction nor the failure to give instructions equivalent to those set forth in *Byford* provides grounds for relief.

Garner, 116 Nev. at 788, 6 P.3d at 1025.

The prejudicial impact of the improper instruction was heightened by closing argument that highlighted the "successive thoughts of the mind" aspect of the erroneous instruction:

> Many of you may have entered this courtroom and you may in your mind have thought, gee, a premeditated murder means that it is someone that sat down at a desk and they wrote out exactly what they were going to do step by step and they established a blueprint for the crime and they thought about it and they pondered over it and they talked to people about it and they planned it for days and days and days.
>
> But, we learn in the instruction, and each of you indicated you would follow the law, in 14 it tells us premeditation is a design. It need not be for a day, it need not be for an hour or even a minute, but as successive thoughts of the mind.

(Doc. 34 at 2441).

It is respectfully urged that, not only were trial and appellate counsel ineffective in failing to object at trial and challenge on appeal the premeditation and deliberation instruction, but also that the failure to properly instruct the jury on this issue was a denial of due process and equal protection.

XII. Ground Twelve – Cumulative Error

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights because cumulative errors throughout the course of the state court proceedings denied Mortensen of due process and a fundamentally fair trial.

To the extent that any of the errors may be found not to have prejudiced the outcome of the trial on their own, "prejudice may result from the cumulative impact of multiple deficiencies." *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978).

Supporting Facts

Cumulative error has been recognized as a viable basis for reversal of convictions. In *Sipsas v. State*, the Nevada Supreme Court was confronted with a situation where neither one of two specified instances of error was sufficient to justify reversal yet the Court reversed the conviction stating:

> The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial. Moreover, we note that the evidence against Sipsas was less than overwhelming on the question of whether Sipsas harbored the requisite intent to be convicted of first degree murder . . . In reviewing the record it is apparent that because of cumulative error, Sipsas was denied his constitutional right to a fair trial.

102 Nev. 119, 125, 716 P.2d 231, 235 (1986).

The errors that occurred during the course of the entire proceedings against Mortensen, fall into a number of categories that overlap in some substantial aspects but some of which stand as distinct due process or constitutional violations that were raised by trial and appellate counsel in a disjointed, haphazard fashion. This is demonstrated in part by the filing of three separate motions for new trial, each of which were considered and appealed on their limited specific issues instead of being considered as a package for their combined prejudicial impact on the fairness of the trial Mortensen received. When these matters are then combined with the issues and allegations raised herein, it becomes obvious that Mortensen did not receive a fair trial.

The Court should consider the cumulative impact of all of the errors, including but not limited to:

The jury was not informed of a great body of evidence that existed and should have been presented at trial. The evidence was either not presented due to ineffective assistance of counsel or because it was not discovered until after trial and such formed the basis for the motions for new trial. This evidence included the following which were considered as part of the three motions for new trial:

After arresting Carye Morris and forcing her to perform fellatio on the way to jail, Brady, when asked why he had done this to her responded that some people call him evil and that he sometimes calls himself evil, and that he was evil. (Doc. 22-2 at 768-78);

A letter and two notes written by Torrey Johnson were withheld from Mortensen;

The testimony of Officer Mark Berry that Brady on six different occasions had spoken of doing a "drive by";

Eyewitness Ruben Ramirez had been charged with selling drugs after the trial and had been arrested for domestic violence, and possession of an unregistered firearm and

possession of a dangerous weapon and received favorable negotiations from the State several weeks before the murder.

Additionally, there was evidence that was available that the court precluded Mortensen from presenting to the jury, which included the following:

- In July 1995, Brady pulled a weapon and held it to Nogali's head when he stopped him for an illegal lane change.
- In November 1995, he held a gun to Escobar's head when he stopped him for a DUI, and injured him when he pulled him from the vehicle and beat him with a baton.

These two incidents vividly demonstrated Brady's hot temper and impulsive personality.

There was also evidence that the court improperly allowed to be presented to the jury, e.g., the "expert" testimony of Torrey Johnson on the trajectory tests that he performed when such information had been withheld from Mortensen until the very last minute, in violation of Mortensen's discovery motion and order of the court granting same.

Mortensen has raised a number of claims herein on the basis of ineffective counsel, and on separate, independent and substantive constitutional grounds. There is no doubt that with respect to ineffective counsel claims "prejudice may result from the cumulative impact of multiple deficiencies." Mortensen incorporates all claims and issues raised herein as a basis for relief based on cumulative error.

This Court, when reviewing the entire record of these proceedings, and the errors and failures of counsel, and the other Constitutional violations, should find that Mortensen was denied due process and a fundamentally fair trial, and reverse the conviction and the sentence imposed.

XIII Ground Thirteen – No Change of Venue

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights because trial counsel failed to move

for a change of venue, and because the district court failed to order such a change of venue even in the absence of a motion for such relief, thereby depriving Mortensen of his right to a fair and impartial jury, free from prejudicial publicity.

Supporting Facts

Mortensen has set forth the authorities and facts concerning this issue under the ineffective assistance of counsel claims. He incorporates the same by this reference and hereby raises the denial of a fair and impartial jury, free of prejudicial publicity, as a separate, independent, and substantive constitutional violation.

Even in the face of trial counsel's failures, Mortensen should be afforded relief. It is true that failure to object generally precludes appellate review, however, such issues may be addressed when they are plain error or constitutional error. The errors in the instant case were of a constitutional magnitude and therefore should be addressed by the Court and found to be reversible error, irrespective of the failures of counsel.

XIV. Ground Fourteen – No evidentiary hearing on ineffective assistance claims

Mortensen alleges his state court conviction and sentence are unconstitutional, in violation of his Sixth and Fourteenth Amendment rights because the district court abused its discretion in limiting the evidentiary hearing on Mortensen's claims of ineffective assistance of counsel thereby depriving him of due process and the ability to conclusively establish a violation of his Sixth Amendment right to effective assistance of counsel.

Supporting Facts

The purpose of an evidentiary hearing on a claim of ineffective assistance of counsel is to establish what trial counsel should have done at trial. If a petition for post conviction relief contains

allegations of facts outside the record, which, if true, would entitle the petitioner to relief, an evidentiary hearing is required. *Baldon v. State*, 99 Nev. 181, 183, 659 P.2d 886, 887 (1983).

During oral argument on Mortensen's state court petition for a writ of habeas corpus, Mortensen requested a full evidentiary hearing:

> It would be a practical impossibility for me to stand before the Court and orally argue each of the issues in this petition, because there are so many
>
> . . .
>
> I would, however, like to orally compel the Court to grant us an evidentiary hearing so that we can fully develop the record in this case on behalf of Mr. Mortensen."

(Doc. 42-2 at 3513).

The district court decided to allow Mortensen an evidentiary hearing only on the issue of whether trial counsel had a strategic reason for the failures alleged in the supplemental petition as ineffective counsel. The claims concerning other constitutional violations, not involving Sixth Amendment claims for ineffective assistance of counsel, were thus considered and denied by the district court based on the pleadings in the case. (Doc. 44 at 3804-26).

The allegations of the supplemental petition and accompanying affidavit of Mortensen were sufficient to mandate a full evidentiary hearing. (Doc. 41 at 3256 — Doc. 41-3 at 3403). In his affidavit, Mortensen set forth the names of witnesses that should have been contacted and called to testify, as well as the need for expert testimony and detailed investigation of the State's witnesses. (Doc. 41-3 at 3393-3402). The multiple motions for new trial filed by defense counsel after the trial and conviction are prima facie evidence that necessary additional facts were not presented to the jury. In his affidavit, Mortensen reiterated and adopted all of the factual statements in the supplemental petition. *Ibid.*

Among the factual matters asserted by Mortensen, which if true would entitle him to relief were:

The shoulder holster that Brady brought to court and put into evidence was a Tanker holster for a .45 semiautomatic military weapon which was the wrong holster. When the wrong holster was admitted, Mortensen brought it to trial counsel's attention, but he did nothing to correct the mistake. Police officer Devin Mohr could have testified to the same thing.

- A ballistic expert to refute Torrey Johnson's testimony. Both at trial and at the motion for new trial, an expert should have been utilized. A full evidentiary hearing would have allowed Mortensen to develop the prejudice from the failure of trial counsel to present this testimony.

Brady changed his appearance when he testified at trial. Mortensen told trial counsel about this change in his appearance but no witnesses were called to show that Brady had changed his appearance from the time of the shooting until trial. This evidence could have been presented at a full evidentiary hearing.

Brady had supervisory capacity over Mortensen. Brady was able to testify that he had no supervisory capacity over Mortensen on the date of the shooting. Brady could have been impeached with this information to establish his effort to conceal evidence and point the finger at Mortensen.

A number of character witnesses should have been called at trial. Other witnesses that should have been called include the following: Denise Lacassen-Ackerson, Kiko Carmona, Raul Carmona, Sr., Raul Carmona, Jr., Benvenuido Perez, Gloria Cabertas, Victor Garcia, Anthony Galvan, Julio Cabrera, Jr., Ruben Lujan, Diego Benitez, Gregorio Garcia, Paul Zamora, Yolanda Zamora, and Lawrence Benitez. These witnesses could have cemented at the evidentiary hearing that trial counsel's performance impacted Mortensen.

> A review of the time line of the proceedings shows that the defense case was presented without the presentation of evidence to refute the credibility of the State's witnesses. Neither was there any use of available witnesses that could have corroborated Mortensen's testimony of his lack of culpability for the shooting. An evidentiary hearing would have allowed presentation of this evidence.

Each of Mortensen's allegations, when accumulated, required that a full evidentiary hearing be granted. Such a hearing would have allowed Mortensen to show that Brady was more likely the shooter, and that Mortensen should never have been convicted of first degree murder. It was error for the district court to limit the evidentiary hearing. Challenging what happened at trial would have resulted in reversal of the conviction.

Prayer for Relief

Mr. Mortensen has demonstrated he is entitled to relief. For the reasons stated above, Mr. Mortensen prays this Court:

- issue a Writ of Habeas Corpus;
- grant an evidentiary hearing;
- vacate Mr. Mortensen's convictions and sentence;
- enter an order granting Mr. Mortensen a new trial on all issues, or, in the alternative, a new penalty phase hearing.

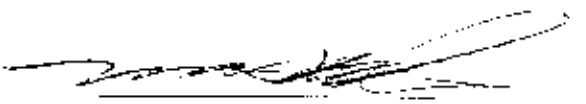
DATED: February 14, 2015

Respectfully Submitted,

/s/ Mario D. Valencia
MARIO D. VALENCIA
Counsel for Ronald Mortensen

Verification

Under penalty of perjury, the undersigned declares that he knows the content of the petition, that the pleading is true of his knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true.



Ronald Mortenson

Certificate of Service

The undersigned hereby certifies that on this date, February 14, 2015, he served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressees:

Adam Paul Laxalt,
Nevada Attorney General

Victor-Hugo Schulze, II
Senior Deputy Attorney General

The undersigned further certifies that on this date, February 14, 2015, he served a true and accurate copy of the foregoing by U.S. Mail, postage fully prepaid, on the following:

Ronald Lawrence Mortensen # 54506
Lovelock Correctional Center
1200 Prison Rd.
Lovelock, Nevada 89419
Petitioner

/s/ Mario D. Valencia
MARIO D. VALENCIA