No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ABARA, Petitioner,

v.

JACK PALMER, WARDEN; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Petitioner David Abara asks for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in the federal district court for the District of Nevada and in the United States Court of Appeals for the Ninth Circuit. Counsel for Abara was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3599(a)(2). Granting leave to proceed in forma pauperis is authorized by Supreme Court Rule 39.1.

Dated this 10th Day of December 2019.

Respectfully submitted,

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/s/ ***Jason F. Carr***

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QUESTION PRESENTED

SHOULD THIS COURT ADDRESS, IN QUESTION OF FIRST-IMPRESSION, WHETHER IT VIOLATES THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR A TRIAL COURT TO FORCE A DEFENDANT INTO SELF-REPRESENTATION WHEN THE DEFENDANT AND HIS APPOINTED ATTORNEY HAVE DEVELOPED AN IRRECONCILABLE CONFLICT?

LIST OF PARTIES

There are no parties to the proceeding other than those listed in the caption.

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OPINIONS BELOW

This Petition concerns a United States Court of Appeals decision for the Ninth Circuit unpublished opinion denying Abara's Sixth Amendment deprivation federal habeas claim. *See Abara v. Palmer*, CA No. 17-177103, 776 Fed. Appx. 961 (Sept. 11, 2019) (attached as Appendix (App.) A). Abara's federal petition challenged Nevada convictions involving the use of a false identification to pay for $223.84 worth of merchandise at a Target store. (*See* App. D (Nevada criminal judgment).)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its unpublished consolidated memorandum decision on September 11, 2019. (*See* App. A.) Abara mails and electronically files this petition within ninety days of the entry of that order. *See* Sup. Ct. R. 13(1); *see also* Sup. Ct. R. 30(1) (excluding the last day of the period if it falls on a federal holiday). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition implicates Title 28 U.S.C. § 2254, which states in pertinent part:

> The Supreme Court . . . shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The standards and requirements for acquiring relief from a state court conviction in federal court is set forth in 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Sixth Amendment to the United States Constitution reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner David Abara ("Abara") has a criminal record and likely will not leave Nevada prisons in his lifetime due to that state's imposition of multiple life terms of imprisonment in an unrelated case. Mr. Abara also suffers from a host of psychological ailments including Depressive Disorder, Cyclical Bipolar Disorder, and Seizure Disorder. (*See* Exhibit (Ex.) 52 (sentencing memorandum summarizing psychological and competency exam findings); *see also* Ex. 8 (Psychiatric Evaluation).)[1]

The state court charges are relatively minor and uncomplicated. The Washoe County, Nevada, District Attorney (DA) alleged Abara acquired a temporary credit card from Target under a false assumed name using someone else's passport. Abara then charged approximately $223.84 in Target merchandise to that fraudulently

[1] "Exhibit" refers to the state court record documents and transcripts that Abara submitted to the federal district court.

acquired credit card. The entire trial, after jury selection, lasted a bit less than two hours. (*See* Ex. 6 (minutes of jury trial).)

The nature of the trial and the evidence presented therein is not the focus of Abara's federal post-conviction petition. The issue Abara raises regards the fact that Abara represented himself at trial. But not, Abara avers, by choice. Abara maintains the trial court forced him into self-representation due to its failure to rectify Abara's internal and external conflicts with his appointed counsel. The state district court did not afford Abara the option of appointment of non-conflicted counsel, hence Abara alleges he was forced into self-representation.[2] Further, Abara suffered from mental health problems that rendered self-representation problematic. (*See* ER 309-12.)

Abara, therefore, did not knowingly and voluntarily waive his right to counsel.

Before exploring the constitutional violation at issue, however, it is necessary to examine the procedural and factual history of the case.

A. The Criminal Charges

This case involves a criminal judgment of conviction entered in the state of Nevada. The Second Judicial District Court in and for the County of Washoe, City of Reno, Nevada, entered the judgment at issue in this litigation on November 8, 2006, pursuant to jury verdict. (*See* Ex. 54.) The state court case is entitled *State of Nevada v. David Edward Eugeno Abara*, Case No. CR05-2224. (*See, e.g.,* Ex. 6 (state district court case history log).)

The case formally began on July 5, 2005, when the Washoe County District Attorney charged Abara in a complaint with Obtaining and/or Using the Personal

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[2] The facts of this case are similar to those in *United States v. Williams*, 594 F.2d 1258 (9th Cir. 1979). In this case, the trial court forced Mr. Williams to elect to represent himself or stay with appointed counsel. Like the instant matter, the record established a *prima facie* showing of irreconcilable conflict. The *Williams* court held that, under these circumstances, the trial court deprived Mr. Williams of the constitutionally guaranteed right to counsel. *Id.*

Identification of Another, a twenty-year maximum sentence felony, pursuant to Nevada Revised Statute § 205.463; and burglary, a ten-year maximum sentence felony, pursuant to Nevada Revised Statute § 205.060.[3] (*See* Ex. 2 (criminal complaint).) The DA alleged Abara committed the offenses on or about May 27, 2005. (*Cf.* Ex. 19 (later filed Information).)

At Abara's initial appearance, the justice court delayed the preliminary hearing proceeding in order to conduct a competency exam at Abara's appointed counsel's request. (*See* Ex. 5(Order for Competency Evaluation).)

The court sent Abara to Nevada's prison treatment facility, Lake's Crossing, for a competency evaluation. The mental health staff found Abara to be competent.[4] On December 13, 2005, the presiding justice of the peace received the competency findings and proceeded to conduct Abara's preliminary hearing. (*See* Exs. 11-12 (transcripts of proceedings).)

B. The Results of the Competency Exam and Both Faretta Canvasses

Before the hearing could commence, appointed counsel for Abara, Kevin Van Ry, informed the court that Mr. Abara wished to represent himself. The justice court conducted a somewhat folksy, yet thorough and meaningful, canvass of Abara pursuant to *Faretta v. California*, 422 U.S. 806 (1975).

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[3] The burglary charge and conduct of conviction is a product of Nevada's quite expansive view of burglary where the Nevada Supreme Court has interpreted the state's burglary statute to apply whenever someone enters any building, legally or not, to commit a crime. Recently, however, Nevada does appear to be backing away from its unusual formulation of the concept burglary. *See State v. White*, 330 P.3d 482, 484-85 (Nev. 2014) (determining, for the first time in the state, that a person cannot be convicted of burglary for crimes committed within that person's own home).

[4] While meeting the narrow requirements for competency, the Lake's Crossing exam report and other medical records submitted to the lower court raises the question of whether Abara, while competent to proceed to trial, was not competent to represent himself at trial. *See Indiana v. Edwards*, 554 U.S 164 (2008) (allowing for a higher level of requisite competency for self-representation).

During that canvass Abara expressed that he did not want to represent himself but he felt that his relationship with appointed counsel, Mr. Van Ry, was riven with conflict and untenable. (*See, e.g.,* Ex. 12, Hearing Transcript (HT), at 4 ("I feel I have no other option").) The bases for the conflict was lack of communication, defense counsel's advocacy for acceptance of a plea offer, counsel agreeing to continuances of the case without informing or seeking Abara's position, and Abara's irritation at being forced to undergo a competency exam against his will. (*See id.* at 4-7.) Abara felt coerced by appointed counsel and had lost all confidence in him.

The prosecutor correctly noted that Abara was not unequivocally stating he wanted to represent himself. (*See id.* at 13-15.) Abara voiced a complaint of conflict with counsel. A different issue that the court should inquiry upon on to clarify Abara's actual request and position. The justice court agreed.

Upon further questioning, and realizing the issue was one of potential conflict with counsel, the justice court declined Abara's request for self-representation and urged Abara and trial counsel to work together to reach some form of understanding. (*See id.* at 17-18.)

The justice court then conducted the preliminary hearing and found the State presented sufficient probable cause to bind Abara over for trial. (*See id.* at 280-83.)

The justice court's admirable efforts at identifying the true nature of the problem with Abara and trial counsel, and urging the parties to mend that rift, did not end the conflict. During Abara's next appearance, now at the district court level, he raised the same conflict complaints presented to the justice court. (*See* Ex. 16 (hearing transcript).) Abara and counsel had not worked out their internal conflict. Indeed, Abara had taken the additional step of joining a class action lawsuit against the appointed conflict counsel group upon which Van Ry was a part. (*See id.* at 22-24.) Further, Abara had learned that Van Ry used to be a prosecutor on the same frequent offender team that had targeted Abara. (*See id.* at 18-19.)

The district court did not perceive the Abara's complaints in the same light as the justice court. Rather than attempt to ameliorate the conflict, or appoint another attorney, the district court forced Abara to represent himself. (*See id.* at 22-24.)

This set of occurrences, culminating in Abara representing himself at trial, forms the core of Abara's primary issue in federal post-conviction—Whether Abara was deprived of his Sixth Amendment right to counsel when the district court forced Abara to choose between self-representation or proceeding to trial with counsel with which Abara had developed an irreconcilable conflict?

C. Jury Verdict and Sentencing

Now acting pro se, Abara voiced an intention to go to trial. The trial, which lasted less than one day, culminated in jury findings of guilt on both counts. (*See* Ex. 32 (Verdict).)

Abara recognized he needed assistance at sentencing due to the voluminous medical records and his general recognition that self-representation was not wise. The district court appointed a conflict-free appointed attorney, Mary Lou Wilson, to represent Abara. Ms. Wilson submitted a sentencing memorandum providing documentation of Abara's mental health issues and otherwise advocating for a lower sentence. (*See* Ex. 52 (with medical and psychiatric reports).)

The district court followed the prosecutor's request to impose the maximum sentences possible for both counts and to run both counts consecutive to each other and the unrelated case for which Abara remained in custody. (*See* App. D (state court criminal judgment); *see also* Ex. 53 (transcript of sentencing).)

D. Abara's Appeal to the Nevada Supreme Court

After sentencing and entry of judgment, Abara took a direct appeal of the convictions and sentence to the Nevada Supreme Court. In his appeal, Abara challenged, inter alia, whether the trial court erred in allowing Abara to represent himself including the question of whether Abara's decision to represent himself was knowing and voluntary. (*See* App. C (Nevada Supreme Court Order of Affirmance).) The Nevada Supreme Court denied Abara's direct appeal finding that: "Based on all of the above, we conclude that the record as a whole demonstrates that Abara knowingly, voluntarily, and intelligently waived his right to counsel." (Ex. 700.))

E. The Federal District Court's Ruling

On October 27, 2010, Abara mailed his federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to a district court in the District of Nevada. (*See* App. B (district court order detailing Abara's federal filings).)

The lower court dismissed Abara's petition on procedural grounds. (*See* CR 46.) The Ninth Circuit reversed reviving four of Abara's claims and remanding the matter back to the lower court. *See Abara v. Baker*, CA No. 13-16712, 618 Fed. Appx. 347 (Oct. 14, 2015).

The district court directed the State to answer Abara's remaining claims, including his claim of deprivation of counsel. The State filed its Answer to which Abara replied. (*See* CR 59, 67.)

The district court ruled against Abara on the merits. (*See* App. B.) The court examined the history of Abara's conflict with counsel. (*See id.* at 4-9.) The court's legal ruling takes up two pages. (See id. at 8-9.) Abara is not contesting the validity of the *Farretta* canvass. Instead Abara claims he was forced into self-representation which rendered his choice involuntary. (*See id.* at 8.) The state justice court conducted a reasonable inquiry into the conflict and found that Abara's complaints

were based on "legitimate reasons." (*Id.* at 9.) While there was a "slight hiccup" in communications between counsel and client early in the proceedings, there was not a "serious breakdown." (*Id.* (citing *Daniels v. Woodford*, 428 F.3d 1181, 1199 (9th Cir. 2005)).) Most important, the courts successfully reconciled the conflict. Abara did not object to trial counsel acting as standby counsel and trial counsel stated that the two could communicate. (*See id.*)

Abara's conflict with counsel was not severe enough to trigger a Sixth Amendment violation. (*See id.*)

F. The Ninth Circuit's Decision

The focus of this Petition is the Ninth Circuit's unpublished order which affirmed the lower court's denial. (*See* App. A.)

The Ninth Circuit's decision was preordained by another en banc decision from that court—*Plumlee v. Masto*, 512 F.3d 1204, 1210 (9th Cir. 2008) (en banc). In *Plumlee*, the Ninth Circuit determined that, even though circuit law is clear that a defendant cannot be forced to go to trial a lawyer with which he has developed an "irreconcilable conflict," this Court has never addressed the issue. Hence, a federal habeas petition, even one forced into self-representation, cannot prevail on this issue because there is no "clearly established federal constitutional law as articulated by the U.S. Supreme Court" that is on-point. *See Plumlee*, 512 F.3d at 1210-12.

Now is the time for this Court to rectify that gap in the law. Mr. Abara's case posture and underlying facts, moreover, make this a favorable vehicle upon which to address that issue. Unless and until this Court takes up the issue, all defendants in Abara's position will be unable to acquire federal habeas relief regardless of the underlying merits of their claim of deprivation of the Sixth Amendment's right to counsel.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO CLARIFY THAT IT VIOLATES THE SIXTH AMENDMENT TO FORCE A CRIMINAL DEFENDANT TO GO TO TRAIL WITH A LAWYER THAT, THROUGH NO FAULT OF THE DEFENDANT, HE IS UNABLE TO COMMUNICATE WITH OR OTHERWISE DEVELOP A MEANINGFUL ATTORNEY-CLIENT RELATIONSHIP.

A. Summary of Argument

Abara pleaded Grounds One and Seven as separate claims in his Amended Petition. The claims, however, are inextricably interrelated and were considered together by the lower court. (*See* App. B.)

Ground One states a comprehensive claim arguing that Abara's request for self-representation was not voluntary. Abara did not wish to represent himself, but rather felt as though he had no choice due to an irreconcilable conflict with trial counsel. This, in conjunction with Abara's mental health condition—schizoaffective disorder—renders the trial court's decision to allow Abara to represent himself violative of Abara's Sixth Amendment right to counsel.[5]

Ground Seven articulates the other side of the coin. In this Ground, Abara notes that he would not have been forced into self-representation had the lower court granted Abara's request for substitute counsel. Abara was forced to choose between self-representation and the prospect of proceeding to trial with a lawyer that Abara did not trust and with which he could not communicate.

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[5] Schizoaffective disorder is a condition in which a person experiences a combination of schizophrenia symptoms — such as hallucinations or delusions — and mood disorder symptoms, such as mania or depression.

Schizoaffective disorder is not as well understood or well defined as other mental health conditions. This is largely because schizoaffective disorder is a mix of mental health conditions, including schizophrenic and mood disorder features that may run a unique course in each affected person.

See Schizoaffective Disorder, Mayo Clinic (June 13, 2016), http://www.mayoclinic.org/diseases-conditions/schizoaffective-disorder/basics/

If the relationship between defendant and defense counsel collapses, the refusal to substitute counsel constitutes a violation of the Sixth Amendment right to adequate representation. In the instant matter, Abara made his initial request to relieve retained counsel at the justice court level. (*See* Ex. 12 (transcript of proceeding).) Abara made specific factual allegations detailing the breakdown of the attorney/client relationship. (*See, e.g.,* id. at 12 (Abara expressing his "total loss of confidence" in his attorney).) The justice court correctly perceived that Abara's request to represent himself was based on his conflict with counsel and, therefore, involuntary. That court denied Abara's request. (*See id.* at 17.)

Abara again asked to represent himself at the district court level once more detailing a conflict between him and appointed counsel—Kevin Van Ry. The district court granted that request. (*See* Ex. 16 (transcript of *Faretta* canvass).) Abara then proceeded to trial without the benefit of counsel; the jury's subsequent guilty verdicts preordained.

The conflict between trial counsel and Abara was not the product of contumacious behavior. Abara's distrust was grounded in objective factors. The breakdown in communication began when trial counsel forced Abara into a competency evaluation against Abara's will. Abara felt this was vindictive. When Abara asked Van Ry why has was being sent away for a competency evaluation, Van Ry replied: "Because you didn't listen to me."

The conflicts escalated from there.

Precedent provides three factors to consider when a defendant requests new counsel based on the existence of a conflict. These are: 1) the extent of the conflict; 2) the adequacy of the inquiry; and 3) the timeliness of the motion. *See United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990). Application of these factors demonstrates the Nevada trial court abused its discretion in not allowing Abara

substitute counsel. After this erroneous decision, Abara felt he had no choice but to request to represent himself.

Respondent Warden, represented by the Nevada Attorney General's office [hereinafter State], focused its objections below on the requirements of a *Faretta* canvass. (*See* CR 59 (Answer).) The state lower courts, justice and district, conducted two canvasses that met the requirements of *Faretta v. California*, 422 U.S. 806 (1975).

Because both canvasses met the requirements of *Faretta*, a point Abara does not dispute, Abara is not entitled to relief.

The State misses the point. Abara's claim is that he did not voluntarily waive his right to counsel because he was forced into self-representation. By denying Abara's objectively reasonable request for substitute counsel, particularly after Abara had joined a lawsuit naming Van Ry as a party, the trial court left Abara with a Hobson's choice—proceed with a lawyer with which you have no relationship and do not trust or represent yourself. The fact that Abara elected to pick the later of the two untenable options does not render his choice voluntary.

Because the State of Nevada forced Abara to proceed to trial without an attorney, this Court should issue a writ of habeas corpus directing Nevada to appoint Abara conflict-free counsel and retry the case.

B. This Court Should Decide Whether a Defendant May Request New Counsel in the Face of an Irreconcilable Conflict

It is a universal truth that a criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963)*; accord Menefield v. Borg*, 881 F.2d 696, 698 (9th Cir. 1989) (declaring that the Sixth Amendment guarantees the right to the effective assistance of counsel at all critical stages of a criminal proceeding). It is also black letter law that an individual's constitutional rights are violated whenever an actual or constructive denial of counsel occurs.

In *Riggins v. Nevada*, 504 U.S. 127, 144 (1992), this Court explained:

> We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf.

Accord United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was . . . prevented from assisting the accused during a critical stage of the proceeding."); *cf. Geders v. United States*, 425 U.S. 80, 91 (1976) (holding that an order preventing overnight communication between counsel and defendant violated the Sixth Amendment); *see also Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (finding that "it is well established and clear" that an extreme conflict with counsel can violate a defendant's Sixth Amendment rights). *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, 149-52 (2006) (holding the erroneous deprivation of the right to counsel of choice constitutes structural error).

To "compel one charged with a grievous crime to undergo a trial with the assistance of an attorney with whom [the defendant] has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of counsel whatsoever." *Brown v. Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970); *see also Hudson*

v. Rushen, 686 F.2d 826, 831 (9th Cir. 1982) (explaining the greater the hostility and length of conflict between defendant and counsel, the more likely the case will be analyzed in terms of a total deprivation of counsel thereby invoking the rule articulated in *Gideon v. Wainwright,* 372 U.S. 335 (1963)). "Given the commands of Sixth Amendment jurisprudence, a state trial court has no discretion to ignore an indigent defendant's timely motion to relieve an appointed attorney." *Schell*, 218 F.3d at 1025.

Abara also submits that such a breakdown in communication prevents trial counsel from presenting a defense. Forcing a defendant to trial with counsel with which he cannot communicate imperils sundry Sixth Amendment rights including the right to trial by jury, the benefit of competent counsel, and the protections afforded by the Compulsory Process and Confrontation Clauses.[6] It also implicates the Fifth Amendment's Due Process Clause.[7]

In 1948, Justice Black declared that a defendant's "right to his day in court" is "basic in our system of jurisprudence" and includes the right "to be represented by counsel." *In re Oliver*, 333 U.S. 257, 273 (1948). Since then, this Court has reiterated the "fundamental" or "essential" character of a defendant's right to counsel and the concomitant right to present a defense. *See, e.g., Crane v. Kentucky,* 476 U.S. 683, 687, 690 (1986).

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[6] *See Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (providing that the right of a defendant to present evidence "stands on no less footing than other Sixth Amendment rights"); *see also Washington v. Texas*, 388 U.S. 14, 15, 19, 23 (1967) (stating that the right to compel the testimony of witnesses "is in plain terms the right to a defense").

[7] *Webb v. Texas*, 409 U.S. 95, 98 (1972) (explaining the right of a defendant to present evidence is predicated on due process grounds); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984))).

The rule of law is clear. When faced with an irreconcilable conflict between appointed counsel and a defendant, the denial of a motion for change of counsel results in the deprivation of the constitutionally guaranteed right to effective assistance of counsel. *See, e.g., United States v. Williams*, 594 F.2d 1258, 1261 (9th Cir. 1979).[8]

The application of this principle is fact dependent. To aid trial courts in evaluating a request for substitution of counsel, precedent has established a three-factor inquiry: 1) the adequacy of the court's inquiry; 2) the extent of the conflict; and 3) the timeliness of the motion. *See United States v. Gonzalez*, 113 F.3d 1026, 1028 (9th Cir. 1997); *cf. Schell v. Witek*, 218 F.3d 1017, 1024-25 (9th Cir. 2000) (describing these factors).

Abara contends that his waiver of the right to self-representation was involuntary and predicated on an antecedent unconstitutional ruling—the trial court's refusal to appoint substitute counsel despite Abara's actual, potential, and irreconcilable conflict with trial counsel Van Ry.

The facts of this case mirror those set forth in *United States v. Williams*, 594 F.2d 1258 (9th Cir. 1979). In that case, the trial court forced Mr. Williams to elect to represent himself or stay with appointed counsel. Like the instant matter, the record established definitive showing of irreconcilable conflict. Also like the instant matter, the trial judge denied the request for substitute counsel. *See id.* at 1260. *Williams* held that, under these circumstances, the trial court deprived Mr. Williams of the constitutionally guaranteed right to counsel. *Id.*

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[8] The Ninth Circuit's irreconcilable conflict rule is followed, in substantial part, by the other federal courts of appeals. *See, e.g., United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973*); United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972); accord United States v. Hart, 557 F.2d 162, 163 (8th Cir. 1977) ("In order to warrant substitution of counsel, the defendant must show justifiable dissatisfaction with his appointed counsel.").

Abara recognizes that *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983), holds that a defendant is not entitled to a "meaningful relationship" with counsel. Precedent notes, however, that if the relationship between lawyer and client completely collapses, the refusal to appoint new counsel violates the Sixth Amendment. *See United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998). Abara had objective reasons for perceiving a conflict with appointed counsel. The record establishes that Abara asserted specific complaints detailing a pervasive conflict that impacted all aspects of counsel's ability to put on a defense. The thrust and gravamen of these objections indicate a lack of communication to the point it eroded retained counsel's ability to assist Abara during trial. *Cf. United States v. Garcia*, 924 F.2d 925, 926 (9th Cir. 1991).

One of the primary reasons for this Court granting this Petition is found in *Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) (en banc). That case, while recognizing that Mr. Plumlee's conflict with counsel was based on reasonable, objective factors, held that there is no firmly established precedent from the Supreme Court of the United States concerning irreconcilable conflicts with counsel. Had the case been on direct appeal there is no question Mr. Plumlee would have prevailed.

CONCLUSION

Prisoners Plumlee and Abara, and all the others similar situated, remain in prison for little reason other than the fact this Court has not yet cogitated on this issue. The issue is important is it directly implicates the Sixth Amendment's right to counsel. The social harm caused by this gap in the law is severe as it forces defendants to proceed to trial without the assistance of counsel. Without that assistance, as evidenced by Abara's case, guilt is almost preordained.

For the aforementioned reasons, and in the interests of justice and fair play and the preservation of the right to counsel enshrined in the Sixth Amendment to the U.S. Constitution, the Petitioner Abara respectfully requests that the Court grant this Petition for a Writ of Certiorari and take up the question of when the development of an irreconcilable conflict between counsel and client requires substitution of counsel.

DATED this 10th Day of December 2019.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s/ Jason F. Carr

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,124 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 10th day of December 2019.

Respectfully submitted,

/s/ Jason F. Carr

JASON F. CARR
ASST. FED. P. DEFENDER

CERTIFICATE OF SERVICE

I hereby declare that on the 10th day of December 2019, I served this Petition for Writ of Certiorari, including the appendix, on the State of Nevada by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

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NOT FOR PUBLICATION

FILED

SEP 11 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ABARA, Petitioner-Appellant, v. JACK PALMER; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 17-17103 D.C. No. 3:10-cv-00688-HDM-VPC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted September 9, 2019**
San Francisco, California

Before: GOULD, BEA, and FRIEDLAND, Circuit Judges.

David Abara appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition challenging the Nevada Supreme Court's determination that his waiver of right to counsel was valid under *Faretta v. California*, 422 U.S. 806,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

835 (1975). We affirm.

We review de novo the district court's decision to grant or deny a petition for habeas corpus. *Dows v. Wood*, 211 F.3d 480, 484 (9th Cir. 2000). We may grant habeas relief to a state prisoner "on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). Federal habeas relief is unavailable so long as "'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Abara argues that the Nevada Supreme Court unreasonably applied *Faretta* to conclude that he had voluntarily chosen to represent himself because Abara's only other option besides self-representation was representation by counsel with whom he had an irreconcilable conflict. We disagree.

Abara's contention turns on whether he had an irreconcilable conflict with his counsel. To prove an actual conflict, Abara must show that there was "an incompatibility between . . . the lawyer's own private interest and those of the client." *Plumlee v. Masto*, 512 F.3d 1204, 1210 (9th Cir. 2008) (en banc). "[T]here is no Sixth Amendment right to 'a meaningful relationship between an

accused and his counsel," *id.* at 1210-11 (quoting *Morris v. Slappy*, 461 U.S. 1, 14 (1983)), so a showing that the conflict was based in the defendant's having "refuse[d] to cooperate because of dislike or distrust" without any evidence of other actual conflicts of interest is insufficient to prove a Sixth Amendment violation. *Id.* at 1211.

Here, the state trial court conducted a lengthy inquiry into the alleged conflicts before trial. Abara's complaint that his lawyer had failed to communicate with him was undercut when he did not dispute his lawyer's statements that they were in communication, and his complaint generally appeared to be based primarily on frustration with case delays and a competency evaluation conducted against his will, neither of which demonstrate an irreconcilable conflict. Abara's other assertions that his lawyer had previously worked as a prosecutor and worked as an independent contractor with a large law group that Abara had sued as part of a class action similarly failed to identify a specific "incompatibility." As a result, the Nevada Supreme Court did not unreasonably apply clearly established law to conclude that Abara's decision to represent himself was voluntary.

Abara separately contends that the Nevada Supreme Court unreasonably erred in concluding that Abara had voluntarily, knowingly, and intelligently waived his right to counsel to represent himself because Abara was not competent to do so under *Indiana v. Edwards*, 554 U.S. 164 (2008). Even if *Edwards* applied

retroactively to cases like Abara's whose direct appeal had concluded by the time it was decided (which the Supreme Court has not held it does), Abara misstates *Edwards*'s holding. The Court held in *Edwards* that "the Constitution *permits* States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." 554 U.S. at 178 (emphasis added). *Edwards* did not take away a state's ability to allow self-representation so long as the defendant is competent to stand trial. The Supreme Court's decision in *Edwards* therefore does not render erroneous the Nevada Supreme Court's determination that Abara could lawfully represent himself.

AFFIRMED.

APP. 005

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DAVID EDWARD EUGENO ABARA,

Petitioner,

v.

JACK PALMER, *et al.*,

Respondents

3:10-cv-00688-HDM-VPC

ORDER

Petitioner David Edward Eugeno Abara, a prisoner in the custody of the State of Nevada, brings this habeas action under 28 U.S.C. § 2254 to challenge his 2006 Nevada state sentence for obtaining and/or using another's personal identification information and burglary. After evaluating his claims on the merits, this Court denies Abara's petition for a writ of habeas corpus, dismisses this action with prejudice, and denies a certificate of appealability.

I. BACKGROUND

As summarized by this Court's previous order of August 16, 2013:

> On February 2, 2006, the State of Nevada filed a second amended information in the Second Judicial District Court for the State of the Nevada charging petitioner, with one count of obtaining and/or using the personal identification information of another, one count of burglary, and being a habitual criminal. (Exhibit 26). After a one-day jury trial, in which petitioner represented himself, with the assistance of stand-by counsel, the jury found petitioner guilty of obtaining and/or using the personal identification information of another and burglary. (Exhibits 30 & 32). The state district court entered its judgment of conviction on November 8, 2006, and sentenced petitioner to 96 to 240 months in prison for obtaining and/or using the personal identification information of another and 48 to 120 months in prison for burglary, with the burglary sentence to be served consecutively to the first sentence and any other sentence being served by petitioner. (Exhibit 54). The District Court ordered petitioner to pay restitution of $323.84. (*Id.*). Petitioner appealed. (Exhibit 55). On April 4, 2007, the Nevada Supreme Court affirmed petitioner's convictions. (Exhibit 70).

> On February 15, 2008, petitioner, appearing *pro se*, filed a post-conviction petition in the state district court. (Exhibit 74). On June 27, 2008, the court appointed counsel to assist petitioner. (Exhibit 77). Subsequently, petitioner, through counsel, filed a supplemental petition for relief. (Exhibit 79). Without holding an evidentiary hearing, the District Court denied post-conviction relief on May 8, 2009. (Exhibit 83). Petitioner appealed the denial to the Nevada Supreme Court. (Exhibit 88). On June 9, 2010, the Nevada Supreme Court affirmed the District Court's decision. (Exhibit 95).
>
> Petitioner dispatched his original federal petition for writ of habeas corpus to this Court on October 27, 2010. (ECF No. 12). Respondents moved to dismiss the petition. (ECF No. 15). By order filed August 22, 2012, this Court found the petition to be conclusory and granted petitioner leave to file an amended petition. (ECF No. 34). In the same order, the Court granted respondents an opportunity to file an answer or other response. (*Id.*). Respondents filed a motion to dismiss the first amended petition. (ECF No. 36). Petitioner filed an opposition. (ECF No. 42). Respondents filed a reply. (ECF No. 43).

(ECF No. 46 at 1–2).[1] This Court then granted the motion to dismiss, dismissing all counts.

Abara appealed, and the Ninth Circuit reversed the dismissals of grounds 1, 2, 7, and 9. (ECF No. 55). Respondents then filed an Answer to these grounds. (ECF No. 59). Abara filed his Reply. (ECF No. 67).

II. FEDERAL HABEAS REVIEW STANDARDS

When a state court has adjudicated a claim on the merits, the Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly deferential" standard for evaluating the state court ruling that is "difficult to meet" and "which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170 (2011). Under this highly deferential standard of review, a federal court may not grant habeas relief merely because it might conclude that the state court decision was incorrect. *Id.* at 202. Instead, under 28 U.S.C. § 2254(d), the court may grant relief only if the state court decision: (1) was either contrary to or involved an unreasonable application of clearly established law as determined by the United States Supreme Court or (2) was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. *Id.* at 181–88. The petitioner bears the burden of proof. *Id.* at 181.

A state court decision is "contrary to" law clearly established by the Supreme Court only if it

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[1] The exhibits referenced in this order are found in the Court's record at ECF Nos. 17–23 (Exhibits 1–18, 20–109), ECF No. 60 (Exhibit 19), and ECF No. 68 (Exhibit 97). All page citations are to the page numbers of the documents themselves, rather than the ECF-generated page numbers.

applies a rule that contradicts the governing law set forth in Supreme Court case law or if the decision confronts a set of facts that are materially indistinguishable from a Supreme Court decision and nevertheless arrives at a different result. *See, e.g.*, *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003). A state court decision is not contrary to established federal law merely because it does not cite the Supreme Court's opinions. *Id.* The Supreme Court has held that a state court need not even be aware of its precedents, so long as neither the reasoning nor the result of its decision contradicts them. *Id.* And "a federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." *Id.* at 16. A decision that does not conflict with the reasoning or holdings of Supreme Court precedent is not contrary to clearly established federal law.

A state court decision constitutes an "unreasonable application" of clearly established federal law only if it is demonstrated that the state court's application of Supreme Court precedent to the facts of the case was not only incorrect but "objectively unreasonable." *See, e.g.*, *id.* at 18; *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004). When a state court's factual findings based on the record before it are challenged, the "unreasonable determination of fact" clause of 28 U.S.C. § 2254(d)(2) controls, which requires federal courts to be "particularly deferential" to state court factual determinations. *See, e.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This standard is not satisfied by a mere showing that the state court finding was "clearly erroneous." *Id.* at 973. Rather, AEDPA requires substantially more deference:

> [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court's factual findings are presumed to be correct and the petitioner must rebut that presumption by "clear and convincing evidence." In this inquiry, federal courts may not look to any factual basis not developed before the state court unless the petitioner both shows that the claim relies on either (a) "a new rule of constitutional law, made

retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (b) "a factual predicate that could not have been previously discovered through the exercise of due diligence" and shows that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2).

When a state court summarily rejects a claim, it is the petitioner's burden to show that "there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

III. ANALYSIS

A. Grounds 1 and 7

In Ground 1, Abara argues that the state district court denied him his Fifth, Sixth, and Fourteenth Amendment rights to due process and the effective assistance of counsel when it "erred in permitting [Abara] to represent himself during [the] jury trial, when [the court and his counsel] were aware that [Abara] had a mental health and controlled substance history." (ECF No. 35 at 3). The Supreme Court of Nevada rejected his claim on the merits, finding that he was competent to choose self-representation and that he knowingly, voluntarily, and intelligently waived his right to counsel. (Exhibit 70 at 1–3).

In his Reply, Abara effectively combined Grounds 1 and 7, and deemed them "inextricably interrelated." In fact, Abara's reply addresses *only* Grounds 1 and 7, leaving the State's responses to his claims in Grounds 2 and 9 unanswered. Ground 7 of the petition \argues that Abara was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel "when his request for substitute counsel was denied by the district court." (ECF No. 35 at 29). In Abara's Reply, he captions Grounds 1 and 7 as so:

> The trial court forced Abara into self-representation by failing to provide substitute counsel in the face of an actual conflict between Abara and counsel, where the relationship between Abara and counsel was irreconcilable, and where the court had notice that Abara failed to meet the heightened competency standard applicable to requests for self-representation.

(ECF No. 67 at 5 (capitalization altered); *see also id.* at 14 ("Combining Grounds One and Seven,

Abara contends that his waiver of the right to self-representation was involuntary and predicated on an antecedent unconstitutional ruling—the trial court's refusal to appoint substitute counsel despite Abara's actual, potential, and irreconcilable conflict with trial counsel Van Ry.")). Therefore, his arguments are that his "request for self-representation was not voluntary" because he "felt as though he had no choice due to an irreconcilable conflict with trial counsel"—which, "in conjunction with Abara's mental health condition . . . renders the trial court's decision to allow Abara to represent himself violative of Abara's Sixth Amendment right to counsel." (*Id.* at 5). And even if Abara's decision to proceed pro se was constitutionally sound, he was nonetheless denied his Sixth Amendment right to counsel because he "was forced to choose between self-representation and the prospect of proceeding to trial with [an ineffective] lawyer." (*Id.*). This Court does not agree.

Abara's preliminary hearing was on December 8, 2005; he was represented by Kevin Van Ry. (Exhibit 12 at 1). At the start of the hearing, his counsel informed the court that "Abara has indicated for quite some time now that he wishes to represent himself. He does not want me as his counsel, and, frankly, he thinks he can do a better job on his own." (*Id.* at 3). Therefore, counsel asked the court to consider that and do a *Faretta* canvass; it did. (*See id.* at 3–4). When asked if he wanted to represented himself, Abara explained, "I feel I have no other option. I've asked him to remove himself due to other conflicts that had gotten nowhere. I was—a competency hearing was called against my will, adding further length of time to this hearing. . . . It's been my intent to go forward. So I feel at this point in time my only other option, seeing there is conflict, is to represent myself." (*Id.* at 4). When the judge explained the perils of self-representation, including the inability to raise ineffectiveness of counsel on appeal, Abara wanted to make sure that he was still able to claim ineffective assistance of counsel for what had happened up until that point. (*See id.* at 5–6).

Abara explained that he has a bachelors degree from Cal State Hayward and "limited experience" in legal matters, which included his previous criminal charges and time he'd spent in the prison law library. (*Id.* at 7). He said that his health was "[e]xcellent" and that he was not taking any medications, but that there was a "competence hearing that states that he" had schizo-effective

disorder. (*Id.* at 7–8). When asked if he was being threatened or coerced into waiving his right to an attorney, Abara responded, "I feel that I am being coerced [by] Mr. Van Ry himself [by] his actions to the conflicts, and whatnots, I feel I have no other choice but to represent myself in order to get this to go forward." (*Id.* at 8). When asked if he "want[ed] to elaborate," Abara responded that he had been "requesting . . . a preliminary hearing for six months now." (*Id.*). But, he claimed that his counsel told him that he had to have the competency hearing, "he said, 'Because you would not listen to me'" because Abara "refused to listen to a [plea] deal offer." (*Id.* at 9).

The trial court asked the State if it wanted to weigh in before it made its ruling, and the State explained that it did not think that Abara was "necessarily freely and voluntarily waiving his right to counsel" because he kept "qualifying it with 'I've lost faith. I feel like I have to.'" (*Id.* at 13). The court took that advice and inquired further with Abara into why he felt that he had no choice. (*See id.* at 13–15). The court found that Abara was not capable of representing himself, and therefore denied his request to proceed pro se. The court explained that Abara could appeal this decision. Abara acknowledged that, but he never asked for different counsel. In fact, he had already been assigned different counsel when the public defender's office conflicted out. But he did not request to do so—he requested only to proceed pro se, and that request was denied.

At his arraignment two weeks later, Abara repeated his request to not "have a lawyer representing [him]." (Exhibit 16 at 2). He explained, "At this stage I feel that I'm capable of representing myself." (*Id.* at 2–3). When asked in the *Faretta* canvass, in light of the fact that the costs would be so minimal to him, if he "really want[ed] to forego all the benefits that a lawyer might be able to bring to [his] case," he responded that he did. (*Id.* at 3). The court further asked him about his education, his health, substance abuse, and whether there "would be any impediment in [his] ability to represent [himself]," he said no—and he hadn't used any drugs for the past six months. (*Id.* at 3–4). He said that he understood all of the elements of the three charges against him, when asked whether he was aware of and generally understood a litany of possible defenses, Abara said that he was. (*See id.* at 4–7). When the court discussed the advantages of a lawyer, and Abara's limitations being incarcerated, Abara explained that he thought that "there should be an ability to at

least have somebody do research [for him]." (*Id.* at 8). When asked if "anyone threatened or coerced [him] in any way to waive [his] right to have representation by an attorney," he responded, "No, sir." (*Id.* at 9).

At the end of the canvass, the court asked him if it could ask why he was waiving his right to an attorney. (*See id.* at 12). Abara replied that there "are conflicts that have not been resolved and are not going to be resolved" with his "specific lawyer." (*Id.*). The trial court explained that it did not think that representing himself was wise, and asked him to reconsider his position in the future, but authorized him to represent himself at trial. (*See id.* at 15). Then, the court said, Abara's current counsel would become his stand-by counsel. (*See id.*). Abara did not seem to mind, and responded instead to another part of the comment. (*See id.* at 16).

Just as in the preliminary hearing, the State raised the issue of Abara qualifying his desire to represent himself on "conflicts" with his counsel. (*See id.*). Therefore, the State asked that the record "be clear as to exactly what conflicts [Abara] believes exist and why he's making that decision. I just don't want to see a problem arise at the appellate level whereby he claims he is being forced to do this." (*Id.* at 17). Abara explained that "the biggest conflict" was that Abara joined a class action suit "that is direct at Jack Alian group in general"—and that his counsel was an independent contractor of the Jack Alian group (which, coincidentally, was the main source of public lawyers other than the public defender's office, with which Abara had a conflict that precluded them from representing him). (*Id.* at 18). He then explained that, "[s]econdarily is his prior jobs. He is an ex-prosecutor." (*Id.*). He then explained that he "had requested that a preliminary hearing go forward, and instead, [counsel] requested a competency hearing . . . when there was no need or any prior indication that a competency hearing should even be asked for." (*Id.* at 19). He explained his view that, "unless [he's] sitting there drooling and in restraints, then there is no reason" for a competency hearing unless he wants one himself. (*Id.* at 22). Indeed, he contends that he hasn't "exhibited any mental health issues." (*Id.*). Abara further rejected the notion that his counsel could have "the final say in anything that pertains to [him]." (*Id.* at 21). The court explained that it didn't "think that there is really a particular problem here with" Abara's counsel and therefore let Abara

represent himself. (*Id.* at 22).

"This set of occurrences, culminating in Abara representing himself at trial, forms the core of Abara's primary issue in federal post-conviction—Whether Abara was deprived of his Sixth Amendment right to counsel when the district court forced Abara to choose between self-representation and proceeding to trial with counsel with which Abara had developed an irreconcilable conflict." (ECF No. 67 at 10). What this set of occurrences shows, though, is not an irreconcilable conflict of constitutional proportions—it shows a defendant who did not like his counsel because he wanted his counsel to do exactly what he said. Choosing between that and self-representation is the same choice every defendant makes, and it does not form the basis for federal habeas relief.

Turning to the constitutional law, Abara does not contest the adequacy of the *Faretta* canvass. Instead, his claims are limited to whether his choice was voluntary based on the claim of an irreconcilable conflict with his counsel, thus rending the counsel constitutionally inadequate. (*See* ECF No. 67 at 11 ("The core of Abara's contention does not lie in the quality of either the justice of district court's *Faretta* canvass or even that Abara's waiver of his right to counsel wasn't knowing and intelligent. Abara contends his choice was involuntary. Abara would not have sought to represent himself had not he been saddled with a lawyer with whom Abara was embroiled in an irreconcilable conflict.")).

"Indigent defendants have a constitutional right to effective counsel, but not to have a specific lawyer appointed by the court and paid for by the public." *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010); *see also Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989). When a trial court refuses to substitute in new counsel in the face of an irreconcilable conflict that effectively deprives a defendant of the effective assistance of counsel, the reviewing court must consider: "(1) the extent of the [irreconcilable] conflict; (2) whether the trial judge made an appropriate inquiry into the extent of the conflict; and (3) the timeliness of the motion to substitute counsel." *Daniels v. Woodford*, 428 F.3d 1181, 1197–98 (9th Cir. 2005). This question is reviewed de novo: the issue is whether the state trial court "violated [Abara's] constitutional rights in

that the conflict between [Abara] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." *Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000).

As described above, the state trial court, through an in-depth inquiry, established that the conflict that Abara had with counsel was not for a "legitimate reason." *Daniels*, 428 F.3d at 1198; (*see* Exhibit 16 at 22). And while there might have been a slight hiccup in communications early on in the proceedings, it could not be characterized as a "serious breakdown." *Daniels*, 428 F.3d at 1198; *see also United States v. Richardson*, 894 F.2d 492, 496–97 (1st Cir. 1990) (upholding the district court's refusal to allow the defendant to replace court-appointed counsel with privately paid counsel on the morning of trial because "expressed his general dissatisfaction with Ward without expressing any specific breakdowns in communication or refusals to cooperate"). Most importantly, of course, the conflict was not "irreconcilable" because it was reconciled. Not only did Abara have no problem with his counsel representing him as standby counsel, but his counsel testified—without contradiction from Abara—that the two had several discussion about both the case and about general principles of constitutional law, and about the case at issue *as well as* the other cases that were pending against Abara at the time. (*See* Exhibit 16 at 17–18). These conflicts, even as perceived by Abara did not create a "significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." *Schell*, 218 F.3d at 1026.

The Supreme Court of Nevada's holding that Abara's decision to proceed pro se was constitutionally free from error did not involve an unreasonable determination of fact, nor was it contrary to, or an unreasonable application of, federal law as clearly established by the U.S. Supreme Court.

Grounds 1 and 7 provide no basis for habeas relief.

B. Ground 2

In Ground 2, Abara argues that his sentence violated his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment right to due process. (ECF No.

35 at 10). The Supreme Court of Nevada rejected his claim on the merits. (Exhibit 70 at 3–4).

His rights were violated, he contends, because the trial court thought, based on the pre-sentence report, that Abara had committed fifteen prior convictions, of which nine were felonies and six were misdemeanors. (*Id.*). He argues that he actually only had one felony, as the rest had been reduced to misdemeanors or were never felonies in the first place. (*Id.*). Indeed, a sentence based on erroneous information violates due process. *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Abara did not object to this information when it was presented by the State during sentencing, nor when it was included in the pre-sentence report or the sentencing recommendation. (*See* Exhibit 53 at 6; *see also* Exhibit 35 (pre-sentence report); Exhibit 52 (sentencing recommendation)). Therefore, any objection is subject to plain error review. *See United States v. Lindsey*, 634 F.3d 541, 554–55 (9th Cir. 2011); *accord Lamb v. State*, 251 P.3d 700, 703 (Nev. 2011). To reverse under plain error, there must be "(1) an error (2) that is plain and (3) that affects substantial rights." *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1146 (9th Cir. 2012); *accord Green v. State*, 80 P.3d 93, 95 (Nev. 2003). Abara has not carried his burden of showing that there was any error here, let alone clear error. There is no evidence in the record that the characterizations of his criminal record were incorrect. *See Lechner v. Frank*, 341 F.3d 635 (7th Cir. 2003); *Villafuerte v. Stewart*, 111 F.3d 616, 628 (9th Cir. 1997). Thus, he has failed to meet his burden.

Abara also argues that the trial court "did not reason its sentencing analysis as required by law." (ECF No. 35 at 11). But federal due process rights are not violated simply because a state trial court failed to follow the proper state procedure. *See Engle v. Issac*, 456 U.S. 107, 119 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). And while the Due Process Clause protects against the deprivation of liberty interests, the alleged statutory requirement does not create a liberty interest under the Fourteenth Amendment because the fact that the state court must "reason its sentencing analysis" does not place "substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983); *see also Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462 (1989) (requiring that, for a procedural state law to create a liberty interest, the state law contain "specific directives to the decision-maker that if the regulations' substantive predicates are present, a particular outcome

must follow"). Otherwise, "the record shows that he has had a full and fair opportunity to have his case heard." *McQueary v. Blodgett*, 924 F.2d 829, 833 (9th Cir. 1991).

Therefore, the only other federal constitutional issue which Abara appears to raise is the Eighth Amendment's prohibition on cruel and unusual punishment. "[O]nly extreme sentences that are 'grossly disproportionate' to the crime" violate the Eighth Amendment. *United States v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992) (citation omitted). Abara was sentenced to prison terms of 96 to 240 months for felony obtaining/using someone else's personal information and 48 to 120 months for felony burglary, with the latter being consecutive to the former, which in turn is consecutive to any other sentence he was then serving. (Exhibit 54). The sentences here, while substantial, were not "grossly disproportionate" to the crimes of using another's personal documentation and obtaining it by manipulation—especially given Abara's significant criminal history, including three relatively recent offenses and other pending charges, many of which bore similar hallmarks of manipulation. As the State said at sentencing, "it's taking advantage of people over and over and over again." (Exhibit 53 at 7). Moreover, because the Nevada Supreme Court denied this claim on the merits, relief is available only if its decision was contrary to or an unreasonable application of clearly established U.S. Supreme Court case law. *See Ramirez v. Castro*, 655 F.3d 755, 773 (9th Cir. 2004). But the "precise contours" of the gross disproportionality principle are "unclear" and warrant federal habeas relief only in "exceedingly rare cases." *Lockyer v. Andrade*, 538 U.S. 63, 72–23 (2003). This is not one of those cases.

The Supreme Court of Nevada's holding that Abara's sentence was constitutionally free from error did not involve an unreasonable determination of fact, nor was it contrary to, or an unreasonable application of, federal law as clearly established by the U.S. Supreme Court.

Ground 2 provides no basis for habeas relief.

C. Ground 9

In Ground 9, Abara argues that he was deprived of his Sixth and Fourteenth Amendment right to effective assistance of appellate counsel for failing to raise the claim that the state trial court erred in two of its jury instructions. (ECF No. 35 at 39). He contends that Instructions 15 and 22

were "incorrect statement[s] of law which reduced the State's burden of proof." (*Id.*). The Supreme Court of Nevada rejected these claims on their merits because one "was a correct statement of the law" and the other, while "clumsily worded," nonetheless "defines the necessary elements of the crime." (Exhibit 95 at 2). Therefore, he "failed to establish . . . a reasonable probability of success on appeal." (*Id.*).

To establish a claim of ineffective assistance of appellate counsel, a petitioner must show: (1) that his appellate counsel was objectively unreasonable; and (2) there "is a reasonable probability that, but for counsel's [unprofessional errors], he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000); *cf. Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983); *see also Davila v. Davis*, 137 S. Ct. 2058, 2067 ("Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court."). Courts evaluate a counsel's performance from counsel's perspective at the time and begin with a strong presumption that counsel's conduct well within the wide range of reasonable conduct. *See, e.g.*, *Beardslee v. Woodford*, 358 F.3d 560, 569 (9th Cir. 2004). When a state court has reviewed the claim, a federal court's habeas review is "doubly deferential"—the reviewing court must take a "highly deferential" look at counsel's performance through the also "highly deferential" lens of § 2254(d). *Pinholster*, 563 U.S. at 190, 202.

Abara first objects to Instruction 15 because it "makes no sense. A read of the instruction causes one to question why it was given and the goal of the actual instruction." (ECF No. 35 at 39). The instruction read:

> No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial.
>
> The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. Such identity or degree of the crime may be established by an admission or confession.

(Exhibit 31 at 17). Under Nevada state law, that is correct. *See* Nev. Rev. Stat. §§ 205.060,

205.463; *State v. Fouquette*, 221 P.2d 404, 418 (1950) (holding that the identity of the perpetrator is not an element of the *corpus delicti*); *cf. Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) (per curiam) ("[F]ederal courts must look to state law for 'the substantive elements of the criminal offense' . . . ." (citation omitted)).

Abara next objects to Instruction 22 because it "is a sentence which stops in the middle. . . . The jury was instructed that identify was not in issue in the case. The case involved a question of identity theft. Identity is a key issue to the charge." (Exhibit 35 at 39–40). The instruction read:

> Every person who knowingly obtains any personal identifying information of another person and uses the personal identifying information to harm that other person or for any unlawful purpose, including, without limitation, to obtain credit, a good, a service or anything of value in the name of that person.

(Exhibit 31 at 24). Abara is correct that this stops mid-sentence, but it nonetheless properly defines the elements of the crime. *See* Nev. Rev. Stat. § 205.463. Moreover, as explained above, "identity" is not an element of the crime under Nevada law.

On doubly deferential review, Abara's appellate counsel was not ineffective for failing to raise this claim. Therefore, the Supreme Court of Nevada's holding that Abara's appellate counsel was not ineffective did not involve an unreasonable determination of fact, nor was it contrary to, or an unreasonable application of, federal law as clearly established by the U.S. Supreme Court.

"[T]he fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71–72 (1991). Instead, "the only question" is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The review is done in conjunction with the trial record as a whole, and when reviewing an ambiguous instruction, the question is whether "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Id.* (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). A jury instruction that reduces "the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence." *Gibson v. Ortiz*, 387 F.3d 812, 820 (9th Cir. 2004) (quoting *Cool v. United States*, 409 U.S. 100, 104 (1972)), *overruled on other grounds by Byrd v. Lewis*, 566 F.3d

855, 866 (9th Cir. 2009). In light of all the instructions the court cannot conclude that the questioned instructions infected the trial as to violate due process. Even if there were constitutional error, Abara is entitled to relief only if "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see Dixon v. Williams*, 750 F.3d 1027, 1034 (9th Cir. 2014). If a court believes, "with fair assurance, . . . that the judgment was not substantially swayed by the error," then habeas relief is not warranted. *Dixon*, 750 F.3d at 1034 (citation omitted). Importantly, though, the question is not "merely whether there was enough [evidence] to support the result . . . . It is rather, even so, whether the error itself had substantial influence." *Id.* (citation omitted). If a court is left in "virtual equipoise," then it must grant relief. *Id.* (citation omitted).

The Nevada Supreme Court found that any error would have been harmless, in its view, in light of the overwhelming evidence of guilt. Without according any deference to this determination, this Court agrees with that assessment. *See Dixon*, 750 F.3d at 1035 ("[C]ourts apply the *Brecht* test without regard for the state court's harmlessness determination." (citation omitted)).

Ground 9 provides no basis for habeas relief.

IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that **Abara's petition for a writ of habeas corpus is DENIED** on the merits, and this action is **DISMISSED with prejudice**.

Because reasonable jurists would not find this decision to be debatable or incorrect, IT IS FURTHER ORDERED that a **certificate of appealability is DENIED**. The Clerk of Court is directed to **enter judgment, in favor of respondents and against Abara, dismissing this action with prejudice**.

DATED: September 18th, 2017.

Howard D. McKibben
Senior United States District Judge

APP. 019

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID EDWARD EUGENO ABARA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48395

FILED

APR 04 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of obtaining and/or using the personal identification information of another and burglary. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant David Abara to serve consecutive prison terms of 96-240 months and 48-120 months and ordered him to pay $323.84 in restitution.

First, Abara contends that the district court erred by allowing him to represent himself at trial. Specifically, Abara claims that he was not competent to waive counsel because he was unmedicated for a "schizoaffective disorder," and he believed that he had no choice but to represent himself because the district court did not inform him "that he could be represented by counsel outside the conflict group of lawyers." We disagree with Abara's contention.

In this case, the district court thoroughly canvassed Abara, ensuring that his waiver of the right to counsel was voluntary, knowing

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and intelligent.[1] Among other things, Abara stated that he understood the nature of the charges against him. The district court discussed the various defenses Abara might present, and advised him about the dangers and disadvantages of self-representation. The district court also informed Abara that he could employ a private attorney or have a court-appointed attorney, including standby counsel. In fact, Abara agreed to have standby counsel present during the trial. The district court noted that Abara was educated and articulate, stating, "you could do as well as I suppose most anybody could in representing themselves, even though, frankly, I think it's not the way to go." Previously, after a psychiatric evaluation and hearing in the district court, Abara was found competent to stand trial. During the Faretta canvass, Abara stated that he opposed the competency evaluation because he did not have, and had not exhibited, any mental health issues. Throughout the canvass, Abara was unequivocal in his desire to represent himself.

Based on all of the above, we conclude that the record as a whole demonstrates that Abara knowingly, voluntarily, and intelligently waived his right to counsel and was competent to choose self-

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[1]See Faretta v. California, 422 U.S. 806, 835 (1975) (the record as a whole must show that an accused wishing to represent himself truly understood the dangers and disadvantages of self-representation so that the choice is made "with eyes open"); Vanisi v. State, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001) ("[t]he district court should inquire of a defendant about the complexity of the case to ensure that the defendant understands his or her decision and, in particular, the difficulties he or she will face proceeding in proper person"); see also SCR 253.

representation. Therefore, we conclude that the district court did not err in allowing Abara to represent himself.

Second, Abara contends that the district court abused its discretion by imposing a harsh sentence. In support of his contention, Abara points out that he was already serving two life sentences for an unrelated case, his mental health problems were untreated at the time he committed the instant offense, and the victims' total monetary loss was only $323.84.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[2] This court has consistently afforded the district court wide discretion in its sentencing decision.[3] The district court's discretion, however, is not limitless.[4] Nevertheless, we will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[5] Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is

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[2]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

[3]Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[4]Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

[5]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

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constitutional, or the sentence is not so unreasonably disproportionate to the crime as to shock the conscience.[6]

Abara does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statutes.[7] Additionally, we note that Abara has an extensive criminal history and was eligible for habitual criminal adjudication. Also, it is within the district court's discretion to impose consecutive sentences.[8] Therefore, we conclude that the district court did not abuse its discretion at sentencing.

Third, Abara contends that the evidence against him "was the result of an improper inventory, waiver of Miranda, and search and seizure." Abara, however, does not provide any argument whatsoever suggesting error. In fact, Abara concedes that he waived his rights pursuant to Miranda prior to being interrogated.[9] Abara does not provide any argument assigning error to the inventory search in which incriminating evidence was seized. Additionally, Abara concedes that he consented to the search of his motel room which also resulted in the seizure of incriminating evidence. This court has repeatedly stated that

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[6]Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

[7]See NRS 205.463(1); NRS 205.060(2).

[8]See NRS 176.035(1); see generally Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967).

[9]Miranda v. Arizona, 384 U.S. 436 (1966).

"[i]t is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."[10] Therefore, Abara has not demonstrated error.

Fourth, Abara purportedly claims that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Abara's brief on appeal, however, does not note any insufficiency in the State's case, and instead, provides a summary of the overwhelming incriminating evidence against him. Nevertheless, we have reviewed the record on appeal and confirm that there was sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[11]

In particular, we note that Abara admitted to having possession of a passport without the owner's consent and using the passport to apply for a Target Department Store credit card. The credit card was then used to purchase items at Target. Abara concedes that a receipt for the items purchased at Target was found in his motel room, along with other documents in the victim's name. Additionally, a security surveillance videotape showed Abara committing the crimes. And finally, Abara confessed to the investigating police officer.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Abara committed the

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[10]Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

[11]See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

crimes beyond a reasonable doubt.[12] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.[13] Therefore, we conclude that the State presented sufficient evidence to support the jury's verdict.

Fifth, Abara contends that the district court erred by allowing the admission of prior bad acts without conducting a hearing and providing the jury with a limiting instruction. Specifically, Detective Joseph Lever of the Reno Police Department testified that while working undercover, he assisted with a traffic stop, and based on "[p]robable cause from an unrelated case for two different felony charges," took Abara into custody. Abara concedes that he did not object to the detective's testimony, but argues that admission of the other bad act evidence constitutes plain error requiring the reversal of his conviction. We disagree.

In this case, the district court did not conduct a hearing to consider the admissibility of the prior bad act evidence and did not provide the jury with a limiting instruction prior to its admission.[14] As noted above, Abara did not contemporaneously object. Nevertheless, prior to the jury's deliberations, the district court did give a limiting instruction.

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[12]See NRS 205.463(1); NRS 205.060(1).

[13]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[14]See Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998); see also Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

We conclude that although Detective Lever's testimony was admitted in error, it was harmless beyond a reasonable doubt.[15] The State presented overwhelming evidence of Abara's guilt, and Abara has not demonstrated that the failure of the district court to conduct a hearing and give a limiting instruction prior to the admission of the evidence had an injurious effect on the jury's verdict. Therefore, the district court's error does not require the reversal of Abara's conviction.

Having considered Abara's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Cherry

[15]See NRS 178.598; Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) ("Although a hearing is required, the failure to hold a proper hearing below and make the necessary findings will not mandate reversal on appeal if . . . 'the result would have been the same if the trial court had not admitted the evidence.'") (quoting Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005)).

APP. 026

cc: Hon. Steven R. Kosach, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

APP. 027

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID EDWARD EUGENO ABARA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 48395

District Court Case No. CR052224

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 4th day of April, 2007.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 1st day of May, 2007.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

APP. 028

ORIGINAL

FILED

NOV 08 2006

RONALD A. LONGTIN, JR., CLERK

By: DEPUTY CLERK

CODE 1850

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

DAVID EDWARD EUGENO ABARA,

Defendant.

Case No. CR05-2224

Dept. No. 8

JUDGMENT

The Defendant, having been found Guilty by Jury, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court the Court rendered judgment as follows:

That David Edward Eugeno Abara is guilty of the crime of Obtaining and/or Using the Personal Identification Information of Another, a violation of NRS 205.463, a felony, as charged in Count I; and, Burglary, a violation of NRS 205.060, a felony, as charged in Count II of the Second Amended Second Information, and that he be punished by imprisonment in the Nevada State Prison for a minimum term of ninety-six (96) months to a maximum term of two hundred forty (240) months on Count I; a minimum term of forty-eight (48) months to a maximum term of one hundred twenty (120) months on Count II, to run consecutively to the sentence imposed in Count I and consecutively to any other sentence presently being served. The Defendant is given credit for five hundred three (503) days time served. It is further ordered that the Defendant shall pay the statutory

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Twenty Five Dollar ($25.00) administrative assessment fee, pay the One Hundred Fifty Dollar ($150.00) DNA testing fee, reimburse the County of Washoe the sum of One Thousand Dollars ($1,000.00) for legal representation and effect restitution in the amount of Three Hundred Twenty-Three Dollars and Eighty-Four Cents ($323.84).

Dated this 8th day of November, 2006.

DISTRICT JUDGE