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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMAAR JEROME WILLIAMS, Petitioner-Appellant, v. JO GENTRY, Warden; ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents-Appellees.	No. 17-17442 D.C. No. 2:05-cv-00879-APG-CWH MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Submitted October 2, 2019[**]
San Francisco, California

Before: FERNANDEZ and PAEZ, Circuit Judges, and CHOE-GROVES,[***] Judge.

Jamaar Jerome Williams appeals the district court's dismissal of his habeas

[*]This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**]The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

[***]The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

corpus claim[1] that trial counsel was ineffective because he failed to present an alibi defense at Williams' trial in the Clark County, Nevada district court. We affirm.

Williams asserts that his procedural default in the Nevada state court proceedings should be excused on the basis of cause and prejudice. *See Martinez v. Ryan*, 566 U.S. 1, 17, 132 S. Ct. 1309, 1320, 182 L. Ed. 2d 272 (2012). We disagree. In order to establish cause and prejudice, Williams had to "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim . . . [had] some merit." *Id.* at 14, 132 S. Ct. at 1318; *see also Trevino v. Thaler*, 569 U.S. 413, 423, 133 S. Ct. 1911, 1918, 185 L. Ed. 2d 1044 (2013); *Rodney v. Filson*, 916 F.3d 1254, 1260 & n.2 (9th Cir. 2019). That he has not done. *See Strickland v. Washington*, 466 U.S. 668, 687–91, 104 S. Ct. 2052, 2064–66, 80 L. Ed. 2d 674 (1984). He has submitted no evidence that prior to Williams' testimony at trial his counsel had reason to suspect or believe that Williams had an alibi or alibi witnesses. On the contrary, the record indicates the opposite. That is far from showing some merit to his current claim of ineffective assistance of counsel. *See id.* at 690–91, 104 S. Ct. at 2066; *Eckert v. Tansy*, 936 F.2d 444, 447 (9th Cir. 1991); *see also* Nev. Rev. Stat. § 174.233; *Eckert v. State*, 605 P.2d 617, 618–19 (Nev. 1980). The district court did not err.

[1] *See* 28 U.S.C. § 2254.

Williams also argues that the district court should have held an evidentiary hearing. While evidentiary hearings are often necessary,[2] they are not required where the record before the district court provides a sufficient basis for decision.[3] Here, even fully crediting the declarations before the district court,[4] nothing in the declarations indicates that trial counsel was ineffective.

AFFIRMED.

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[2] *See, e.g.*, *Rodney*, 916 F.3d at 1261; *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc).

[3] *Runningeagle v. Ryan*, 825 F.3d 970, 990–91 (9th Cir. 2016); *see also Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 1940, 167 L. Ed. 2d 836 (2007).

[4] *See Earp v. Ornoski*, 431 F.3d 1158, 1170 (9th Cir. 2005); *see also Stewart v. Cate*, 757 F.3d 929, 942 (9th Cir. 2014).

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMAAR JEROME WILLIAMS, Petitioner, vs. JO GENTRY,[1] *et al.*, Respondents.	)	2:05-cv-00879-APG-CWH **ORDER**

On October 19, 2016, the United States Court of Appeals for the Ninth Circuit entered a judgment vacating this court's order dismissing petitioner's ineffective assistance of counsel claims under Grounds Two and Three(a-c) and remanding the case so that this court can reconsider the procedural default of those claims in light of *Martinez v. Ryan*, 566 U.S. 1 (2012). ECF No. 100. Specifically, the court of appeals directed this court to "evaluate whether further factual development is needed and determine whether [the underlying ineffective assistance of counsel] claims are substantial under the appropriate standard." *Id*. at 4. In furtherance of the Ninth Circuit's mandate (ECF No. 101), this court allowed petitioner Williams to submit points and authorities and

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Jo Gentry, the Warden of Southern Desert State Prison, has been substituted for previous respondent, Jackie Crawford, the former Warden of High Desert State Prison.

to proffer any evidence in support his claims under *Martinez*. ECF No. 103. For the reasons that follow, this court concludes that none of the ineffective assistance of counsel claims are "substantial" for the purposes of *Martinez*.

As an initial matter, a Supreme Court decision issued subsequent to the Ninth Circuit's remand in this case holds that *Martinez* is confined to defaulted claims of ineffective assistance of trial counsel and does not extend to defaulted claims of ineffective assistance of appellate counsel. *See Davila v. David*, 137 S. Ct. 2058, 2070 (2017). Because Grounds Three(a), (b), and (c) are all ineffective assistance of appellate counsel claims, petitioner cannot utilize *Martinez* to excuse the default of those claims. Thus, this court need not determine whether those claims are "substantial" for the purposes of *Martinez*. *See Insurance Group Committee v. Denver & R. G. W. R. Co.*, 329 U.S. 607, 612 (1947) ("When matters are decided by an appellate court, its rulings, *unless reversed by it or a superior court*, bind the lower court." (Emphasis added.)).

As to whether his ineffective assistance of trial counsel claims are "substantial," Williams must demonstrate that they have "some merit." *See Martinez*, 566 U.S. at 14 (citing to *Miller–El v. Cockrell*, 537 U.S. 322 (2003), which describes the standards for certificates of appealability to issue). The standard for issuing a certificate of appealability involves a threshold inquiry into whether the petitioner has shown "'that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (quoting *Miller–El*, 537 U.S. at 326) (internal quotation marks and alterations omitted)). "Stated otherwise, a claim is 'insubstantial' if 'it does not have any merit or . . . is wholly without factual support.'" *Id*. (quoting *Martinez*, 566 U.S. at 15-16).

Ineffective assistance of counsel (IAC) claims are analyzed under the two-prong test propounded in *Strickland v. Washington*, 466 U.S. 668 (1984). That is, a petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell

below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

Ground Two(a)

In Ground Two(a), Williams claims that his trial counsel provided ineffective assistance by not moving to sever the charges in his case. The charges arose out of events that occurred in a Las Vegas mobile home park over a two-day period. On November 7, 2000, an assailant shot and killed Reggie Ezell and shot at, but missed, Darin Archie. On November 8, 2000, an assailant shot James Polito and Ricky Policastro, both of whom survived. In relation to those events, Williams was convicted of one count of murder with the use of a deadly weapon, three counts of attempted murder with the use of a deadly weapon, and one count of conspiracy to commit murder. According to Williams, reasonably competent counsel would have moved to the sever the charges arising from the November 8 incident and that severance of the charges would have resulted in a more favorable outcome.

Under Nevada law, multiple offenses "may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are "[b]ased on the same act or transaction; or [b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Nev. Rev. Stat. § 173.115. Charges are "connected together if evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the other charge." *Rimer v. State*, 351 P.3d 697, 703 (Nev. 2015). "Even if charges could otherwise be properly joined, severance may still be mandated where joinder would result in unfair prejudice to the defendant." *Weber v. State*, 119 P.3d 107, 121 (Nev. 2005). However, "[t]o establish that joinder was [unfairly] prejudicial 'requires more than a mere showing that severance might have made acquittal more likely.'" *Id*. (citations omitted).

Here, there is ample evidence that all the charges were based on acts or transactions connected together or constituting parts of a common scheme or plan. According to his own testimony at trial, Williams had a verbal altercation with Archie on the afternoon November 7, 2000, the cause of which was Williams attempting to confront Polito while Polito was working on the door to Archie's mobile home. Additional evidence established the following. Upon leaving that afternoon, Williams stated that he would be coming back. Later that evening, Williams knocked on the door of Polito's mobile home then walked in the direction of Archie's mobile home, with the shooting at Archie's home occurring shortly thereafter. Witnesses, including Archie, identified Williams as the shooter. The following night, Jules, an acquaintance of Williams's, went to Polito and Policastro's mobile home and questioned them about who talked to police about the prior night's shooting. While in the home, Jules communicated with someone via mobile phone, indicating how many people were currently present. Just as Jules exited the trailer, Williams entered the trailer and shot Polito and Policastro.

Even if the foregoing is not sufficient to establish that all the charges constituted part of a common scheme or plan, the charges were "connected together" because evidence of any of the charges would have been admissible for a relevant, non-propensity purpose in a separate trial for any of the other charges. Moreover, Williams fails to demonstrate that he was *unfairly* prejudiced by the joinder. Accordingly, he has not shown that a motion to sever would have had any chance for success. Thus, his IAC claim premised on his trial counsel failing to file such a motion is not "substantial" for the purposes of *Martinez*.

Ground Two(b)

In Ground Two(b), Williams claims that his trial counsel provided ineffective assistance by not moving to suppress Williams's statement to the police or to argue to the jury that it was involuntary. Though he did not include such allegations in his habeas petition, Williams argues in his *Martinez* brief on remand that the circumstances surrounding his arrest support a finding that his

confession was coerced. However, the only evidence he proffers to substantiate this claim is a declaration from a woman named Dorothy Howell, who states that she was present when Williams was arrested. ECF No. 106-3. Williams also alleges that he believed he was going to get some benefit from telling the police what they wanted to hear and that he was represented by counsel at the time of the confession, but the police failed to contact his attorney.

Howell's declaration provides little support for Williams's IAC claim. The circumstances surrounding his capture are not necessarily pertinent to whether his subsequent confession was the product of undue coercion. *See Greenawalt v. Ricketts*, 943 F.2d 1020, 1027 (9th Cir. 1991). Moreover, the declaration provides details as to how Howell and her daughter were treated by the police, but does not describe how Williams was treated.

Similarly, Williams's belief that he would benefit from confessing to the police adds nothing to his claim of coercion given the absence of any evidence that police made any false promises or offered any improper inducements. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause."). Also, Williams has not established that the attorney referred to in Ground Two(b), Steve Altig, represented Williams in relation to the matter at hand. Accordingly, the police were under no obligation to contact Altig before interrogating Williams about the events giving rise to the charges in this case. *See Texas v. Cobb*, 532 U.S. 162 (2001).

For the foregoing reasons, Ground Two(b) has no merit.

Ground Two(c)

In Ground Two(c), Williams claims that his trial counsel provided ineffective assistance by not moving for a mistrial when one of the victim's family members "made a scene" during opening arguments. The transcript of the trial indicates that, as part of his opening argument, the prosecutor displayed a photograph of Reggie Ezell and, as the prosecutor began to describe the manner in

which Ezell was killed, an audience member left the courtroom crying. ECF No. 38, p. 15-16. The transcript also indicates that, just prior to the conclusion of proceedings that same day, Williams's counsel sought to clarify the event for the record. ECF No 38-4, p. 45. In doing so, he noted that "one of the family members began screaming and the [sic] yelling and left the courtroom." *Id*. Counsel did not, however, move for a mistrial.

The foregoing constitutes the entirety of the evidence in the record regarding the incident. There is no indication that the outburst was directed at Williams or the jury or that the State had any control over it. Although the audience member was apparently related to the victim, he or she was also a member of the public who had a right to observe the courtroom proceedings. He or she was not called as a witness, and no further incidents occurred. Given these circumstances, there was virtually no chance that the trial court would have granted a mistrial. *See Johnson v. State*, 148 P.3d 767, 777 (Nev. 2006).

Thus, Williams cannot show prejudice sufficient for this court to determine that Ground Two(c) has "some merit."

Ground Two(d)

In Ground Two(d), Williams claims that his trial counsel provided ineffective assistance by failing to call an eyewitness identification expert at trial. According to Williams, such an expert could have "dramatically assisted" in his defense because of the "varying nature of the eyewitness testimony." ECF No. 36, p. 9. He also alleges that such an expert could have testified "about the effects of stress, gun focus, suggestibility, and other issues with identification." *Id*.

While Williams makes broad claims about the potential benefit of presenting the testimony of an eyewitness identification expert, he does not demonstrate how such an expert would have effectively challenged the particular positive identifications in his case. That is, Williams does not identify an expert who would have been willing to testify in his case, much less proffer any evidence (such as a report or a declaration) showing how he or she could have undermined the reliability of

the witnesses who identified Williams as the shooter. *See Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) (noting that speculation that an expert would have testified on the defendant's behalf is not enough to establish prejudice). While recognizing that the "some merit" standard is not high, this court cannot find Ground Two(d) substantial in the absence of any evidence that Williams was prejudiced due to counsel's failure to call an eyewitness identification expert at trial.

Ground Two(e)

In Ground Two(e), Williams claims that his trial counsel provided ineffective assistance by not calling alibi witnesses at trial. In support of this claim, Williams identifies two of his cousins, Blanche Williams and Dorrell Porter, as potential witnesses who could have testified that he was not at the mobile home park on the evening of November 8, 2000. And, with his *Martinez* brief on remand, Williams proffers a declaration from each that states Williams was with them at home at the relevant time. ECF No. 106-1/106-2.

Both declarations were executed in February 2017, more than sixteen years after the night in question and almost ten years after Williams filed his second amended habeas petition in this proceeding. That alone is reason to doubt their reliability, but the declarations also conflict with the state court record. In her declaration, Blanche Williams recounts her efforts to contact Williams's attorney, "Mr. Denue," however, Denue served as Williams's counsel on appeal and was not his trial counsel.[2] ECF No. 40-6. In his declaration, Dorrell Porter states that Williams arrived home at 10:00 pm on November 7, 2000, where he remained for the rest of the night, however, Williams testified at trial that he was making "a couple rounds through the trailer parks" at that time, which, according to his further testimony, was prior to him then meeting a friend, who smoked marijuana with him and got into the altercation that resulted in Ezell getting shot. ECF No. 39-5, p. 26-37.

[2] The court notes that Blanche Williams also provided a declaration in Williams's state court post-conviction proceedings that includes very similar allegations regarding her efforts to contact Mr. Denue to obtain Williams's case file after his direct appeal. ECF No. 68-21.

Conspicuously absent from Williams's habeas petition and his *Martinez* brief are any allegations that he notified counsel prior to trial about the existence of either of these purported alibi witnesses or that counsel otherwise had reason to know of their existence. Certainly, if Williams spent the evening of November 8, 2000, with two witnesses who could have vouched for his whereabouts at the time of the shooting, he would have informed counsel of such. Yet, he makes no allegation to that effect. Moreover, it strains to credulity to accept that trial counsel, who otherwise mounted a vigorous defense on Williams's behalf, would wholly disregard readily-available exculpatory evidence. In sum, Claim Two(e) lacks credible factual support and, therefore, has no merit.

For the foregoing reasons, this court concludes that Williams has not shown that any of his IAC claims are "substantial" for purpose of excusing his procedural default under *Martinez*. Williams asks for an evidentiary hearing to support his claims. However, he does not identify with any specificity the evidence he would present beyond that which he has already submitted for consideration. Accordingly, the court denies his request of a hearing. *See Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016) (holding that an evidentiary hearing was not required because the "documentary evidence submitted fully presented the relevant facts," and, therefore, "oral testimony and cross-examination [were] not necessary").

IT IS THEREFORE ORDERED that Grounds Two and Three (a-c) of the second amended petition (ECF No. 36) are DISMISSED with prejudice as procedurally defaulted.

IT IS FURTHER ORDERED that the Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

Dated: November 20, 2017.

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMAAR JEROME WILLIAMS,

Petitioner,

v.

JO GENTRY, ET AL.,[1]

Respondents.

Case No. 2:05-cv-00879-APG-CWH

REPLY TO RESPONDENTS' OPPOSITION TO WILLIAMS' POINTS AND AUTHORITIES IN SUPPORT OF HIS ARGUMENTS PURSUANT TO *MARTINEZ V. RYAN*

Petitioner, Jamaar Jerome Williams, through his attorney of record, files this Reply to Respondents' Opposition to his Points and Authorities in support of his arguments pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). This pleading is based upon the points and authorities, *infra*, as well as all other pleadings filed in this matter.

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[1] Pursuant to Federal Rule of Civil Procedure 25(d), Mr. Williams substitutes Jo Gentry, the Warden of Southern Desert State Prison for the previous Respondent, Jackie Crawford, the former Warden of High Desert State Prison.

POINTS AND AUTHORITIES

I. Introduction

This Court ordered Williams to "submit points and authorities and to proffer any evidence in support [of] his claims under *Martinez*." ECF No. 103. Williams complied (ECF No. 105), and Respondents filed their opposition focusing solely on the fourth prong under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), namely whether Williams can demonstrate his claims of ineffective assistance of trial and appellate counsel are "substantial." ECF No. 109. Williams files this Reply.

II. Grounds Two, Three (a), (b), and (c) are not procedurally defaulted because Williams can show they have "some merit" or are "substantial."

Respondents concede that Williams has met the other prongs of Martinez and that he need only show that his ineffective assistance of trial and appellate counsel claims are "substantial" or have "some merit." ECF No. 109, p. 3. *See also Martinez*, 132 S.Ct. at 1318. They argue, however, that Williams cannot meet this very modest standard. Respondents are incorrect and Williams submits he can demonstrate that each of the claims are "substantial" or have "some merit."

A. Ineffective Assistance of Trial Counsel

1. Ground Two (a)

Based upon the factual allegations set forth in Ground Two (a) of the amended petition, trial counsel was ineffective for failing to move to sever the charges in this case. ECF No. 36.[2] Respondents allege Williams "provides no basis for severance" and that he conceded a basis for the joinder. ECF No. 109, p. 4. Both statements are incorrect.

[2] The counseled amended petition filed on September 24, 2007 is incorrectly titled "First Amended Petition", but it is in fact a second amended petition. Compare ECF Nos. 5, 11, 36.

Williams submits the joinder violated his constitutional rights to due process and a fair trial, as well as his right to remain silent. He submitted counsel never attempted to sever the charges, despite the availability of legal bases for doing so: the fact the offenses on November 7 and November 8 were not based upon the same act or transaction nor did they constitute part of a common scheme or plan. *See* Nev. Rev. Stat. § 173.115. Furthermore, counsel had no strategic reason for failing to move to sever the charges.

Moreover, the uncharged co-conspirator, Jules, was not involved in the November 7 shooting but was the primary player on November 8. The state had none and therefore produced no evidence that Jules called Williams or that Williams knew Jules was at the trailer park on November 8. Such evidence did not provide a "relevant, non-propensity purpose for joinder of the charges" as alleged by Respondents. ECF No. 109, p. 4. Rather, the charges were joined merely to ensure a conviction against Williams where there was no evidence linking Williams and Jules to the November 8 incident.

Williams has demonstrated the claim has "some merit." He has therefore proved cause and prejudice based on all the briefing in this matter. He respectfully submits this Court should address the merits of Ground Two (a).

2. Ground Two (b)

Based upon the factual allegations set forth in Ground Two (b) of the amended petition, trial counsel was ineffective for failing to move to suppress Williams's statement to police and failing to argue to the jury that the statement was involuntary. ECF No. 36. Respondents allege Williams's claim is "conclusory" and not supported by the caselaw. ECF No. 109, p. 5. Respondents's allegations are without merit.

Respondents ignore Williams's arguments that his statement was obtained in violation of *Miranda* because of significant use of force and coercion by police officers. Williams provided a declaration of Dorothy Howell with his Points and Authorities. Ms. Howell, a former corrections officer, was with Williams when he was apprehended by police. Ms. Howell noted there were 10-15 officers who "came out of nowhere" and her belief that some of the officers were "with a SWAT team." Ex. 92. She described in detail the extreme measures taken to arrest Williams, including throwing her and her daughter to the ground and handcuffing them behind their backs, with a "high-powered rifle pointed to her head." Ex. 92. Williams's companions were threatened with arrest themselves. *Id.* His statement was obtained by police shortly thereafter as a result of the police coercive and forceful tactics, in violation of *Miranda* and its line of cases.

Furthermore, Respondents's allegation that Williams cannot prevail on his argument that police failed to contact his attorney is belied by the record, where there is evidence in the record that trial counsel did intend to call Williams's attorney at the time, Steven Altig, as a fact witness, because trial counsel believed "Mr. Altig has information that the police may have coerced a confession out of Deft." Ex. 1, 1/31/02; ex. 18, p. 2-3. The state indicated its intention to file a motion in limine to preclude such testimony and trial counsel did not call Altig as a witness as a result. *Id.* This evidence tends to prove Williams's allegations that Williams consulted with Altig as his attorney on the charged murder case. *Texas v. Cobb*, 532 U.S. 162 (2001) is therefore distinguishable from the situation here.

Williams has demonstrated the claim has "some merit." He has therefore proved cause and prejudice, and this Court should address the merits of Ground Two (b).

3. Ground Two (c)

Based upon the factual allegations set forth in Ground Two (c) of the amended petition, trial counsel was ineffective for failing to move for a mistrial when one of the decedent's family members made a scene during opening statements. ECF No. 36. Respondents allege Williams has provided "no legal basis for counsel moving for a mistrial" and makes only a "conclusory statement regarding prejudice." ECF No. 109, p. 5. Respondents's arguments are not supported by the record.

Respondents argue "Williams points to no United States Supreme Court decision supporting the substantive claim" warranting a mistrial. ECF No. 109, p. 6. But this is not the standard. The question here is whether—under the very modest standard of "some merit"—Williams can show counsel's performance was deficient and whether the error prejudiced him under the *Strickland v. Washington*, 466 U.S. 668 (1984) standard. In other words, Williams need only show there is "some merit" to his claim that counsel was ineffective and that there is a reasonable probability this error had an effect on the outcome of the proceedings. Williams cited legal authority demonstrating that courts have concluded that when the admission of evidence so infects a trial as to render it unfair, it is a denial of a defendant's rights to due process. Such is the case here, where the emotional outburst from a victim's family member surely had a negative impact on the jury and was prejudicial.

Because Williams has demonstrated the claim is "substantial" or has "some merit", he has shown cause and prejudice, this Court should address the merits of Ground Two (c).

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a. Ground Two (d)

Based upon the factual allegations set forth in Ground Two(d), trial counsel was ineffective for failing to call an eyewitness identification expert at trial. Respondents argue Williams only speculates about what an expert would offer and presents "no facts supporting this claim." ECF No. 109, p. 6-7. The arguments are without merit.

Williams notes at the outset that the standard to prove cause and prejudice under *Martinez* is not the same as proving prejudice under *Strickland*. Rather, Williams need only prove that the underlying claim has "some merit." The case cited by Respondents, *Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001) is a *Strickland* merits case. In that case, the Ninth Circuit concluded the petitioner could not prevail on the merits of his claim because he could not prove prejudice. At this stage of the litigation, however, Williams is not held to that burden. Instead, Williams must prove that the claim has "some merit" or is substantial. And he has done so by demonstrating that eyewitness identification experts have and could have testified about the eyewitnesses's inconsistencies in Williams's trial. *See* Points & Authorities, ECF No. 105. In any event, Williams is entitled to an evidentiary hearing on this claim.

Williams's ineffective assistance of trial counsel claim is substantial or has "some merit." He can therefore show cause and prejudice under *Martinez* and this Court should address the merits of Ground Two (d).

4. Ground Two (e)

Based upon the factual allegations set forth in Ground Two (e) of the amended petition, trial counsel was ineffective for failing to present alibi witnesses at trial. ECF No. 36. Respondents utilize extensive adjectives to object to the declarations

submitted by Williams in support of this claim. ECF No. 109, p. 8. Yet Respondents's allegations are untrue and they offer no additional real challenge to the evidence.

First, Respondents allege the declarations are "unsworn, unverified, and unwitnessed." ECF No. 109, p. 8. It appears Respondents would only accept a notarized affidavit, which is not required by the Nevada state courts nor by the federal courts. At the outset, Williams notes that both Blanche Williams's and Darrell Porter's declarations "declare under penalty of perjury that the foregoing statement is true." Exs. 90 & 91. Furthermore, the Nevada Supreme Court recently accepted "declarations under penalty of perjury" as evidence for an actual innocence claim that warranted remand for an evidentiary hearing and discovery. *Berry v. State*, 363 P.3d 1148 (Nev. 2015); *see also* Nev. Rev. Stat. § 53.045 (2001) ("Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated …") The Ninth Circuit has reached a similar conclusion. *See generally Earp v. Ornoski*, 431 F.3d 1158, 1168-70 (9th Cir. 2005) (concluding petitioner "adequately proffered to the state court" the factual basis of his claim, when he included—among other pieces of evidence—"a series of declarations" outlining his prosecutorial misconduct claim and determining a hearing was warranted to determine "credibility.")

Respondents make no other challenge to the declarations except to assert without detail that one of the declarations contradicts Williams's trial testimony. ECF No. 109, p. 8. It is unclear from their citation to the record (ECF 39-4 at 27, which is Ex. 24, p. 85) what is inconsistent with the declarations. Page 85 of Exhibit 24 is Williams's testimony about what he did on the night of November 7. Exhibit 90, however, discusses Williams's whereabouts on the evening of November 8. Furthermore, Exhibit 91 is not inconsistent with Williams's testimony. Williams

testified he left the trailer park with a friend on the night of November 7. Ex. 24, p. 85. He later testified he ultimately stayed with family the night of November 7 and remained with them for "awhile", meaning more than a day or two. Ex. 24, p. 99. This is consistent with Porter's declaration. In any event, Williams is entitled to an evidentiary hearing on this claim. *Earp*, 431 F.3d at 1169.

Williams's ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause and prejudice for the procedural default under *Martinez*. He respectfully submits this Court should address the merits of Ground Two (e) or order an evidentiary hearing.

B. Ineffective Assistance of Appellate Counsel

1. Ground Three (a)

Based upon the factual allegations set forth in Ground Three(a) of the Second Amended Petition, appellate counsel was ineffective for failing to challenge the elicitation of improper testimony by the prosecutor. ECF No. 36. Respondents's claim that Williams's answer was non-responsive contradicts the prosecutor's own statements that he intentionally asked the question knowing it would elicit an incriminating response.

During Williams's trial testimony, the prosecutor asked him why he went to the trailer park daily. This question knowingly elicited the testimony from Williams that he went to the trailer park to sell drugs. Ex. 24, p. 102. Defense counsel made a contemporaneous objection, stating the prosecutor intentionally elicited the information, that the information constituted a prior bad act, and the information should not have been admitted. Ex. 24, p. 102-3. The prosecutor agreed he intentionally elicited the statement, noting he did so because he believed "I should be able to be allowed to inquire as to any contradictions or reasons that would put him in that mobile home park." Ex. 24, p. 102. The judge overruled the objection,

concluding defense counsel had opened the door to the evidence during his direct examination. Ex. 24, p. 102-3.

However, the judge did not explain how Williams's counsel opened that door in his questioning. Indeed, trial counsel admitted in his objection that he would not have had a problem with the prosecutor establishing that Williams went to the trailer park every day. *Id.* Establishing why Williams was in the trailer park every day was not relevant to the question of whether Williams committed a murder on November 7 or was otherwise involved in the events of November 8. Williams did not make "evidence of his character or a trait of his character" an issue in his direct examination, and the evidence was not properly admitted under that exception. Ex. 24, p. 81-101; NRS 48.045(1)(a). Really, admission of the evidence served no other purpose than to prejudice the jury against Williams, a fact the prosecutor admitted when he told the court he wanted the jury to hear "reasons that would put him in that mobile home park."

Williams's ineffective assistance of appellate counsel claim is substantial or has "some merit." Thus, Williams can show cause and prejudice for the procedural default under *Martinez*. He respectfully submits this Court should address the merits Ground Three (a).

a. Ground Three (b)

Based upon the factual allegations set forth in Ground Three (b) of the amended petition, appellate counsel was ineffective for failing to challenge prosecutorial misconduct during trial. ECF No. 36.

Respondents hinge their entire argument on this claim upon a falsity. Respondents argue appellate counsel's failure to raise this issue was not deficient performance, because the Nevada Supreme Court did not address whether it was misconduct until November 3, 2003, "after Williams's conviction was final." ECF No.

109, p. 10 (*citing Daniel v. State*, 78 P.3d 890 (Nev. 2003)). Respondents are incorrect. In fact, Williams's conviction was not final until remittitur issued on November 12, 2003. Ex. 41; *Glauner v. State*, 813 P.2d 1001 (Nev. 1991) ("the decision in any appeal is not final until the date the remittitur is filed.")[3]

In any event, the fact that the Nevada Supreme Court had not squarely "adopt[ed] a rule prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying", *Daniels*, 78 P.3d at 519, is beside the point. The Nevada Supreme Court had, in 2000, ruled that a "lay witness's opinion concerning the veracity of the statement of another is inadmissible." *DeChant v. State*, 10 P.3d 108, 112 (Nev. 2000) (reversing conviction following prosecutor's use of evidence that defendant's statement to the police was not believable) (*citing Sterling v. State*, 834 P.2d 400, 404 (1992)). Furthermore, federal precedent has long held that the credibility of the witness is a matter to be determined by the jury, and vouching of witnesses by the state is constitutionally impermissible. *Berger v. U.S.*, 295 U.S. 78, 87-8 (1935). Other federal courts had also concluded it is improper to question a witness about the credibility (or lack thereof) of other witnesses. *U.S. v. Sanchez*, 176 F.3d 1214, 1219 (9th Cir. 1999) (citation omitted) (holding the prosecutor committed misconduct when he "force[d] a defendant to call [a testifying witness] a liar"); *U.S. v. Sullivan*, 85 F.3d 743, 749 (1st Cir. 1996) (cross-examination "which compels a defendant to state that law enforcement officers lied in their testimony is improper.") *U.S. v. Richter*, 826 F.2d 206, 208 (2d Cir. 1987) (prosecutor committed misconduct when he forced defendant to state government witness was mistaken or lying).

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[3] The Nevada Supreme Court filed its order of affirmance in Williams's case on October 16, 2003. Ex. 40. *Daniels v. State* issued on November 3, 2003. Williams had 18 days, or until November 3, 2003, to file a petition for rehearing (although motions for extensions of time are permitted). Remittitur did not issue in Williams's case until November 12, 2003. Ex. 41.

Williams's ineffective assistance of appellate counsel claim is substantial or has "some merit." Thus, Williams can show cause and prejudice for the procedural default under *Martinez*. He respectfully submits this Court should address the merits of Ground Three (b).

b. Ground Three (c)

Based upon the factual allegations set forth in Ground Three(c) of the amended petition, appellate counsel was ineffective for failing to challenge the flight instruction. ECF No. 36. Respondents do not challenge Williams's argument that the flight instruction is only proper in Nevada when there is a "chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." *Jackson v. State*, 17 P.3d 998, 1001 (Nev. 2001). Here, Williams fled Nevada more than a week after the crime occurred. Ex. 24, p. 126-7. That does not suggest a "chain of unbroken inferences" from his behavior to his guilt of the crime. In addition, the state offered no evidence—nor do Respondents now—challenging Williams's statement that he left Las Vegas out of fear for his life and the safety of his family rather than to flee from law enforcement. Ex. 59, p. 21.

Williams's ineffective assistance of appellate counsel claim is substantial or has "some merit." Thus, Williams can show cause and prejudice for the procedural default under *Martinez*. He respectfully submits this Court should address the merits of Ground Three (c).

III. Conclusion

Williams submits he has demonstrated cause and prejudice to overcome the procedural defaults on all of Ground Two and Ground Three (a)-(c) on the record before the Court. As such, this Court should deny the motion to dismiss and direct the Respondents to answer the claims on their merits.

Should the court require additional evidence before finding in Williams's favor, however, he has demonstrated he is entitled to an evidentiary hearing where this Court can consider evidence supporting Williams's allegations that his claims have "some merit" or are "substantial."

Dated this 23rd day of June, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Megan C. Hoffman
MEGAN C. HOFFMAN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: Michael Bongard

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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/s/ Dayron Rodriguez
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App.0025

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMAAR JEROME WILLIAMS, Petitioner(s), vs. JACKIE CRAWFORD and ATTORNEY GENERAL OF THE STATE OF NEVADA, et al,	Case No. 2:05-cv-00879-APG-CWH

OPPOSITION TO POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S ARGUMENT PURSUANT TO *MARTINEZ V. RYAN* (ECF 105)

Respondents, by and through counsel, ADAM PAUL LAXALT, Attorney General of The State of Nevada, and MICHAEL J. BONGARD, Deputy Attorney General, hereby respond to Petitioner Jamaar Jerome Williams' (WILLIAMS) points and authorities in support of his Petition For Writ Of Habeas Corpus. This pleading is based upon the following points and authorities, the exhibits filed in this matter, and all the documents and pleadings on file in this case.

RELEVANT PROCEDURAL HISTORY

On July 20, 2005, the clerk received WILLIAMS' federal habeas corpus petition initiating this action. ECF 5. WILLIAMS' filed a counseled second-amended petition on September 21, 2007. ECF 36. The Court stayed the matter while WILLIAMS returned to state court to exhaust claims. ECF 66.

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Upon return the federal court, respondents filed a motion to dismiss the petition. ECF 72. The Court dismissed Grounds 2, 3(a), 3(b), and 3(c), finding the claims procedurally barred, and finding that petitioner presented no prejudice to overcome the procedural default. ECF 88. The Court denied the remaining claims on the merits. ECF 94. WILLIAMS filed a notice of appeal. ECF 96.

On appeal, the Ninth Circuit remanded for reconsideration of the Court's order concerning the procedural default of Grounds 2, 3(a), 3(b), and 3(c). ECF 100.

This Court entered a briefing schedule on November 17, 2016. ECF 103.

On March 3, 2017, WILLIAMS filed his points and authorities. ECF 105. Respondents now submit their opposition.

ARGUMENT AND LAW

The Antiterrorism and Effective Death Penalty Act (AEDPA) governs these proceedings. 28 U.S.C. § 2254. Federal habeas relief is available only if the relevant state court decision is: (1) contrary to clearly established federal law, as determined by the Supreme Court; or (2) involved an unreasonable application of clearly established federal law as determined by the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 399 (2000); 28 U.S.C. § 2254(d)(1).

I. Applicable Law

A. *Martinez v. Ryan*

In 2012, the United States Supreme Court held a federal habeas petitioner may demonstrate cause to overcome state court procedural default of ineffective assistance of trial counsel claims in an initial-review collateral proceeding, if a petitioner demonstrates "in initial review collateral proceedings, there was no counsel or counsel in that proceeding was ineffective," and that the claim of ineffective assistance of trial counsel was substantial. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012).

The Ninth Circuit expanded the holding in *Martinez* to claims of ineffective assistance of appellate counsel. *Nguyen v. Curry*, 736 F.3d 1287, 1293-96 (9th Cir. 2013).

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B. Ninth Circuit's Conditions For Excusing Default

The Ninth Circuit held:

> Under *Martinez*, a procedural default may be excused when the following four conditions are met:
>
> > (1)the underlying ineffective assistance of … counsel claim is "substantial"; (2) the petitioner was not represented or had ineffective counsel during the [post-conviction relief (PCR)] proceeding; (3) the state PCR proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding.

ECF 100 at 2 (citations omitted).

However, this language appears to conflict with the holding in *Martinez*. The United States Supreme Court's holding in *Martinez* only addressed cause to excuse the procedural default. 566 U.S. at 17. The Court never addressed prejudice, remanding the case to determine, among other things, prejudice to excuse the default. *Id*., at 18. *Martinez* in no way affected or modified the fact a petitioner must still demonstrate prejudice in order to excuse procedure default. Murray v. Carrier, 477 U.S. 478, 485 (1986).

C. What Makes A Claim "Substantial"

In *Martinez*, the Court addressed whether a claim is substantial by stating an insubstantial claim is one that "does not have any merit or that it is wholly without factual support." 566 U.S. at 16.

The Ninth Circuit, citing *Martinez*, defines a "substantial" claim as "one that has some merit." *Lopez .v Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012), citing *Martinez v. Ryan*, 566 U.S. at 16.

II. Ground 2(a)

A. The Claim

In Ground 2(A), WILLIAMS alleges trial counsel was ineffective because he failed to file a motion to sever charges. ECF 36 at 7.

In support of the claim in his second amended petition, WILLIAMS argued: "The trial of these charges together prejudiced [WILLIAMS] by making it appear that he had been on some sort of shooting rampage." ECF 36 at 7-8.

In the supplemental briefing, WILLIAMS now alleges the failure to sever "forced [WILLIAMS] to surrender his constitutional rights to due process and a fair trial, as well as his right to remain silent."

B. The Claim Is Not Substantial

In the second amended petition, WILLIAMS provides no basis for severance. The petition merely presents a conclusory claim that "Reasonably competent counsel would have moved the court to sever the two cases."

In Nevada, joinder of charges is permissible when charges are "[b]ased on the same act or transaction; or…[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." *Rimer v. State*, 351 P.3d 697, 708 (Nev. 2015), citing, NRS 173.115. When deciding joinder of charges, a district court should consider "whether the evidence of either charge would be admissible for a relevant, non-propensity purpose in a separate trial for the other charge." *Id*.

WILLIAMS concedes a relevant, non-propensity purpose existed for the joinder of the charges. ECF 105 at 11. Evidence introduced at trial reflected that Jules, a friend of the defendant, questioned the victims of the second shooting about who talked to police about the prior night's shooting. ECF 39 at 23-24; ECF 39 at 59. Eyewitnesses placed WILLIAMS at the scene of both crimes. ECF 38 at 44 (November 7th); ECF 39 at 21 (November 7th); ECF 39 at 27-28 (November 8th); ECF 39 at 61-62 (November 8th).

WILLIAMS Ground 2(a) claim is not substantial. The claim alleges no basis for trial counsel to argue for severance of the charges.

C. The Claim Has No Merit Because Counsel Is Not Ineffective For Failing To Raise Frivolous Motions

WILLIAMS cannot demonstrate Ground 2(a) has "some merit." WILLIAMS concedes the evidence of the November 7th murder is relevant to show motive for the November 8th attempted murders. WILLIAMS offers no legal theory for severance. Nevada law, like federal law "does not require severance even if prejudice is shown." *Rimer v. State*, 351 P.3d 697, 709 (Nev. 2015), citing *Zafiro v. United States,* 506 U.S. 534, 538 (1993). Severance is required only when the denial of severance results in a denial of due process. Even spillover does not mandate severance when limiting instructions and judicial convenience are considered. *Spencer v. Texas*, 385 U.S. 554, 562 (1967).

WILLIAMS cannot demonstrate Ground 2(a) is substantial, or that it possesses some merit.

. . .

III. Ground 2(b)

A. The Claim

In Ground 2(b), WILLIAMS alleges trial counsel was ineffective because he failed to file a motion to suppress statements and failed to argue WILLIAMS' statements were involuntary. ECF 36 at 8.

In the petition, WILLIAMS alleges he "was already represented by attorney Steve Altig when he was interviewed, yet police failed to contact Mr. Altig." ECF 36 at 8.

B. The Claim Is Not Substantial

WILLIAMS' claim of coercion in the petition is conclusory, as is the claim in the supplemental briefing alleging WILLIAMS "was apprehended by police in a sting operation." ECF 36 at 8; ECF 105 at 13.

WILLIAMS alleges counsel should have argued the "coercive nature" of the statement (ECF 105, at 15), but provides no facts supporting the claim. The petition alleges WILLIAMS had counsel, but ignores the fact that the attorney was representing WILLIAMS in another matter. ECF 39-4 at 42. The fact counsel represented WILLIAMS in another matter triggers no Miranda violation for new charges. *Texas v. Cobb*, 532 U.S. 162 (2001).

C. The Claim Has No Merit

WILLIAMS faults counsel for conceding the statement was voluntary, but provides no factual or legal ammunition for contesting a Miranda violation, or for arguing the statement was involuntary. WILLIAMS' claims trial counsel was deficient and counsel's actions prejudiced the outcome of the proceedings are at best conclusory and without merit.

IV. Ground 2(c)

A. The Claim

In Ground 2(c), WILLIAMS alleges trial counsel was ineffective because he failed to move for a mistrial during opening statements. ECF 36 at 8.

B. The Claim Is Not Substantial

In his pleadings, WILLIAMS provides no legal basis for counsel moving for a mistrial.

Contrary to WILLIAMS' claim a victim's family members "made a scene" (ECF 105 at 15), the trial transcript reflects, "Whereupon a crying member of the audience leaves the room". ECF was 38 at 16.

C. At Best, The Substantive Claim Is An Open Question In United States Supreme Court Jurisprudence

Addressing the claim as a Strickland violation, Williams' amended federal petition describes no basis for a motion for mistrial. EOR 41. Addressing the prejudice prong of *Strickland*, WILLIAMS merely makes a conclusory statement regarding prejudice. *Id.* ("That type of emotional outburst before the jury surely had a negative impact.").

WILLIAMS points to no United States Supreme Court decision supporting a claim the substantive claim the spectator's conduct amounted to a federal constitutional violation. That Court held "[A]lthough the Court articulated the test for inherent prejudice that applies to state conduct in *Williams* and *Flynn*, we have never applied that test to spectator's conduct." *Carey v. Musladin*, 549 U.S. 70, 76 (2006).[1]

WILLIAMS' petition presents no facts or argument supporting his claim that counsel was ineffective because he did not ask the trial court for a mistrial, or that a more favorable outcome would have resulted had counsel moved for mistrial. The Ground 2(c) claim in the amended petition is not substantial and WILLIAMS failed to demonstrate the claim has "some merit."

V. Ground 2(d)

A. The Claim

In Ground 2(D), WILLIAMS alleges trial counsel was ineffective because he failed to call an eyewitness identification expert at trial. ECF 36 at 9. The petition alleges, "The eyewitness expert could have testified about the effects of stress, gun focus, suggestibility and other issues with identification. Reasonably competent counsel would have hired an eyewitness identification expert to testify as a witness at trial to rebut the eyewitness testimony." *Id.*

In the supplemental briefing, WILLIAMS presents speculation about possible subjects an eyewitness identification expert could have addressed. ECF 105, at 18-19.

[1] Citing *Estelle v. Williams*, 425 U.S. 501, 503-506 (1976), and *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986).

B. The Claim Is Not Substantial

In support of the claim, WILLIAMS provides no facts regarding the substance of an experts' testimony, only that an "expert could have testified about the effects of stress, gun focus, suggestibility and other issues with identification." WILLIAMS offers no facts supporting this claim. In short, WILLIAMS' petition and supplemental briefing offer nothing of substance for this Court to address regarding the merits of the claim that trial counsel was ineffective for failing to hire an expert on eyewitness identification.

C. The Claim Has No Merit

The Ninth Circuit previously held that mere speculation about what an expert would have said is insufficient to establish prejudice. *Wideman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001), citing *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997).

Even if somehow, the Court found trial counsel's conduct was deficient, he cannot demonstrate prejudice. The Nevada Supreme Court found the evidence of guilt "substantial" including "the testimony of several witnesses who were acquainted with appellant prior to the shooting." ECF 40-15 at 3.

WILLIAMS at best speculates prejudice resulted from trial counsel's failure to hire an expert in eyewitness identification. That is not enough for this Court to find the Ground 2(d) Strickland claim has some merit. WILLIAMS fails to satisfy his burden under *Martinez*.

VI. Ground 2(e)

A. The Claim

In Ground 2(e), WILLIAMS alleges trial counsel was ineffective because he failed to call alibi witnesses at trial. ECF 36 at 9. This claim only applies to an alibi for the November 8th crimes.

B. The Claim Is Not Substantial

In the second amended petition, WILLIAMS provided no factual support for the claim that trial counsel was ineffective for failing to call alibi witnesses. ECF 36 at 9. In the supplemental briefing, WILLIAMS provides what appears to be two declarations. ECF 106-2. The declarations, allegedly executed in February of 2017 purport to be from the alleged alibi witnesses in the second amended petition. *Id.*

WILLIAMS' pleading fails to explain how evidence appearing for the first time ten years after filing of the second amended petition would have been available to trial counsel at the time of trial over seventeen years ago.

Additionally, at least one of the affidavits contradicts WILLIAM's trial testimony. ECF 39-4 at 27; ECF 106-2.

C. The Claim Does Not Have "Some Merit"

The addition of two unsworn, unverified, and unwitnessed declarations fail to make Ground 2(e) anything but conclusory and meritless. This claim fails to meet the threshold requirements for further consideration under *Martinez*.

VII. Ground 3(a)

A. The Claim

In Ground 3(a), WILLIAMS alleges appellate counsel was ineffective because the appeal raised no challenge to the State's eliciting testimony from WILLIAMS about selling drugs at the trailer park. ECF 36 at 10. In the supplemental briefing, WILLIAMS labels the claim as "prosecutorial misconduct." ECF 105 at 22.

WILLIAMS' briefing neglects the fact WILLIAMS' statement he sold drugs was non-responsive to the prosecutor's question. The trial record reveals the following testimony:

> Q (Prosecutor): Now, I'm going to go back to the very first part that you said when you took the stand. And you said it was your daily routine to go there to the mobile home park.
>
> A (Williams): Yes.
>
> Q: What do you mean by that, daily routine?
>
> A: Sell drugs. That's why I go over there, you know. I go to school in the morning - -
>
> DEFENSE COUNSEL: Your Honor, I'm going to object to the question. I think the District Attorney knew where this was going. I don't know the reason why he had to bring that out if he was establishing he'd gone there on a daily basis. I don't think he had any reason why he was there.
>
> PROSECUTOR: Judge, he brings it up. In his own statement he takes the stand in his own defense. I should be able to be allowed to inquire as to any contradictions or reasons that would put him in that mobile home park.

> DEFENSE COUNSEL: Well, Your Honor, this is a prior bad act then, which has never been mitigated as to whether or not any of this is admissible.
>
> . . .
>
> (Whereupon a bench conference was held)
>
> THE COURT: The objection is overruled. I don't think that the question necessarily called for any type of prior bad act. It's – the door was open to that question by the questioning by defense counsel on direct examination. For those reasons, the objection is overruled.

ECF 39-4 at 44-45.

The defendant testified part of his daily routine consisted of going to the trailer park. ECF 39-4 at 23-24. The Nevada Supreme Court held questioning by the prosecution is permissible if defense counsel opened the door. *Taylor v. State*, 858 P.2d 843, 858 (Nev. 1993).

Additionally, the question asked by the prosecution did not require a response admitting WILLIAMS sold drugs or admitting any other prior bad act.

B. The Claim Is Not Substantial

The claim is not substantial. The petition presented no theory or legal basis for appellate counsel raising the claim. WILLIAMS points to no legal authority in the petition supporting the conclusory claim WILLIAMS' admission was inadmissible. The petition points to no legal authority supporting an argument the Nevada Supreme Court would have granted relief had appellate counsel raised the claim on direct appeal. The claim presented is conclusory without any factual or legal support. The State did not focus on WILLIAMS' admission, or make further inquiry into WILLIAMS' admission.

C. The Claim Does Not Meet The "Some Merit" Standard

In the supplemental briefing, WILLIAMS states the applicable standard is contained in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). WILLIAMS presents no evidence in the record supporting the standard that the question by the prosecutor (and WILLIAMS' answer) "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ECF 105 at 22, citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1973).

WILLIAMS points to no case law supporting a claim that a single, unsolicited admission of a bad act by a defendant infected a trial with unfairness. WILLIAMS points to no case suggesting that an appellate claim objecting to an unsolicited admission by a defendant resulted in relief. WILLIAMS' Ground 3(a) claim does not possess "some merit," warranting further review or relief.

VIII. Ground 3(b)

A. The Claim

In Ground 3(b), WILLIAMS alleges appellate counsel was ineffective because the appeal raised no challenge to prosecutorial misconduct at trial. ECF 36 at 10.

B. The Claim Is Not Substantial

In the petition, WILLIAMS ignores the fact the Nevada Supreme Court never addressed this specific claim in any case until after WILLIAMS' conviction became final. Appellate counsel was not required to raise anticipate a change in law. The Ninth Circuit held appellate counsel was not ineffective where appellate counsel failed to raise a "developing claim." *Deutscher v. Whitley*, 884 F.2d 1152, 1158 (9th Cir. 1989), vacated and remanded on other grounds, *Angelone v. Deutscher*, 500 U.S. 901 (1991).

C. The Claim Does Not Have "Some Merit"

WILLIAMS cannot claim Ground 3(b) has "some merit." At the time of WILLIAMS' appeal, the Nevada Supreme Court had not addressed this issue. That court first addressed the issue in *Daniel v. State*, 78 P.3d 890 (Nev. 2003), after WILLIAMS' appeal was affirmed by the Nevada Supreme Court. ECF 40-15. In that case, the Nevada Supreme Court noted a violation is subject to harmless error review, which WILLIAMS cannot demonstrate. 78 P.3d at 904.

United States Supreme Court case law directly on point forecloses WILLIAMS' Ground 3(b) claim. A court reviews challenges to appellate counsel in light of the law existing at the time counsel was required to file the brief on appeal. *Smith v. Murray*, 477 U.S. 527, 536 (1986), citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Strickland places no burden on appellate counsel to anticipate changes in the law when briefing an appeal. Ground 3(b) has no merit under the case law at the time of WILLIAMS' appeal.

. . .

IX. Ground 3(c)

A. The Claim

In Ground 3(c), WILLIAMS alleges appellate counsel was ineffective because the appeal raised no challenge to the flight instruction given during trial. ECF 36 at 10. WILLIAMS concedes in the petition that he "left Las Vegas after a week following being accused of the crime. ECF 36 at 10.

B. The Claim Is Not Substantial

Ground 3(c) of WILLIAMS' petition alleges *in its entirety*:

> When jury instructions were settled, trial counsel objected to instruction number 42 (Ex. 26), which instructed that the flight of a person immediately after the commission of a crime shows consciousness of guilt. (Ex. 25, p. 126.) Counsel pointed out that Mr. Williams left Las Vegas after a week following being accused of the crime. (Id.) Despite the improper giving of this instruction, appellate counsel failed to raise this issue on appeal. Had this issue been raised, Mr. Williams likely would have had a better outcome at trial.

ECF 36 at 10.

This claim is conclusory. In Ground 3(c) of the amended petition, WILLIAMS presented no legal theory for appellate counsel to frame the issue.

C. The Claim Does Not Have "Some Merit"

The State presented evidence of flight. WILLIAMS himself admitted at trial that he returned in part because it was too difficult to live under an alias. While the supplemental brief alleges that WILLIAMS' statement to law enforcement supports a claim WILLIAMS "fled" because of fear (ECF 105 at 25), WILLIAMS supplement also notes that WILLIAMS' statement to police was not necessarily the truth but "telling the police what they wanted to hear. ECF 105 at 14.

At trial, WILLIAMS testified that he left Las Vegas because "Knowing if I have no money there wasn't going to be a way that I can beat this case when I with (sic) a public defender." ECF 39-4 at 41.

In Nevada, "[A] district court may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest." *Rosky v. State*, 111 P.3d 690, 699-700 (Nev. 2005).

WILLIAMS cannot demonstrate a claim that counsel's ineffectiveness for failure to contest the flight instruction has "some merit."

D. Williams Demonstrated No Prejudice For The Default

At the conclusion of *Martinez*, the Court stated:

> In this case *Martinez*'s attorney in the initial-review collateral proceeding filed a notice akin to an Anders brief, in effect conceding that *Martinez* lacked any meritorious claim, including his claim of ineffective assistance at trial. See *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *Martinez* argued before the federal habeas court that filing the Anders brief constituted ineffective assistance. The Court of Appeals did not decide whether that was so. Rather, it held that because *Martinez* did not have a right to an attorney in the initial-review collateral proceeding, the attorney's errors in the initial-review collateral proceeding could not establish cause for the failure to comply with the State's rules. Thus, the Court of Appeals did not determine whether *Martinez*'s attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice. These issues remain open for a decision on remand.

566 U.S. at 18.

Even if WILLIAMS demonstrates cause for his default under Martinez, this Court must still decide prejudice before excusing the default. "Prejudice" and "substantiality" are not the same determination. If they were, the remand in Martinez would not have directed the appellate court to address both issues.

Respondents argue that this Court already addressed prejudice, and WILLIAMS' failure to demonstrate prejudice, in the order granting the motion to dismiss. ECF 59 at 5. WILLIAMS still fails to demonstrate the default infected his trial "with error of constitutional dimensions." *Id*., citing *Murray v. Carrier*, 477 U.S. at 494.

X. WILLIAMS Has Not Met The Burden For An Evidentiary Hearing.

Because WILLIAMS has not demonstrated either cause or prejudice excusing his procedural default, WILLIAMS is not entitled to an evidentiary hearing. The claims presented do not meet the "some merit" standard for receiving an evidentiary hearing.

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CONCLUSION

Respondents request the Court reject the arguments in support of finding the default of Grounds 2, 3(a), 3(b), and 3(c) excused under *Martinez*.

DATED this 24th day of April, 2017.

ADAM PAUL LAXALT
Attorney General

By: /s/ Michael J. Bongard
MICHAEL J. BONGARD
Nevada Bar No. 007997
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court by using CM/ECF system on April 24th, 2017. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMAAR JEROME WILLIAMS,

Petitioner,

v.

JO GENTRY, ET AL.,[1]

Respondents.

Case No. 2:05-cv-00879-APG-CWH

POINTS AND AUTHORITIES IN SUPPORT OF HIS ARGUMENTS PURSUANT TO *MARTINEZ V. RYAN*

Petitioner, Jamaar Jerome Williams, through his attorney of record, files these Points and Authorities in support of his arguments pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). This pleading is based upon the points and authorities, *infra*, as well as all other pleadings filed in this matter.

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/ / /

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Mr. Williams substitutes Jo Gentry, the Warden of Southern Desert State Prison for the previous Respondent, Jackie Crawford, the former Warden of High Desert State Prison.

POINTS AND AUTHORITIES

I. Introduction

Williams filed a counseled amended petition on September 21, 2007. ECF No. 36. The Respondents moved, in part, to dismiss Grounds Two and Three (a), (b), and (c) of the amended petition as procedurally defaulted. ECF No. 72. Williams opposed the motion, alleging multiple bases for good cause and prejudice. ECF Nos. 74-5.

While the motion to dismiss was pending before the district court, the United States Supreme Court issued opinions in *Maples v. Thomas*, 565 U.S. 266 (2012) and *Martinez v. Ryan*, 566 U.S. 1 (2012). Williams filed notices of supplemental authority on the new cases, and he requested supplemental briefing as well as an evidentiary hearing. ECF Nos. 83-87.

The district court issued an order on the motion to dismiss without requesting supplemental briefing or holding a hearing. The court concluded Williams demonstrated "cause for the procedural default because he was unable to obtain his case file from his attorney." ECF No. 76. However, the court concluded Williams did not demonstrate prejudice. *Id.* The court did not address Williams's other arguments for cause and prejudice, including his arguments under *Martinez* or *Maples*, and it granted the motion to dismiss as to Grounds Two and its subsections, and Three (a), (b), and (c).

Following merits briefing on the remaining grounds in the petition, the court dismissed Williams's petition on August 11, 2014. ECF No. 94. The court denied Williams's request for a Certificate of Appealability (COA) on the merits issues and failed to address Williams's request for a COA on the procedural default ruling. ECF No. 94.

Williams appealed to the Ninth Circuit Court of Appeals, and his request for a COA was granted on the procedural issues. ECF No. 96; Ninth Cir. Docket 5.

Following briefing, the Ninth Circuit vacated the district court's dismissal of Grounds Two and Three (a), (b), and (c) on procedural grounds. ECF No. 100. The Ninth Circuit concluded the district court "applied the wrong standard in determining that Williams procedurally defaulted these claims" because it failed to consider the applicability of *Martinez v. Ryan*, *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), and *Nguyen v. Curry*, 736 F.3d 1287, 1293-96 (9th Cir. 2013) (*Nguyen* extends *Martinez* to underlying claims of ineffective assistance of appellate counsel.) *Id.* at 2-3.

The court specifically noted "the last three prongs of *Martinez* are clearly satisfied in this case." *Id.* at 3. The court remanded the case to this Court to determine in the first instance whether Williams's ineffective assistance of trial and appellate counsel claims are "'substantial' under *Martinez*, and thus whether his procedural default should be excused." *Id.* The order directed this Court to "evaluate whether further factual development is needed and determine whether Williams's claims are substantial under the appropriate standard." *Id.* at 104.

After mandate issued, this Court issued an Order directing Williams to "submit points and authorities and to proffer any evidence in support [of] his claims under *Martinez*." ECF No. 103. These points and authorities, and supporting documentation, follow.

II. Williams can demonstrate Grounds Two and Three (a), (b), and (c) have "some merit" or are "substantial." He can therefore overcome the procedural bars with respect to those grounds for relief.

To establish cause and prejudice under *Martinez/Trevino/Nguyen*, a petitioner must show: (1) he was not represented or had ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) during the post-conviction review proceeding; (2) the state post-conviction review proceeding was the initial review proceeding; (3) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding; and (4) the underlying ineffective

assistance of trial or appellate counsel claim is "substantial" or has "some merit." *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc) (citing *Trevino*, 133 S.Ct. at 1921).

Williams clearly meets the first, second, and third requirements. First, Williams was not represented in his first state habeas proceedings, despite his request for the appointment of counsel. Ex. 46.[2] Second, the first state petition was the relevant initial review proceeding. Third, that initial review proceeding was the appropriate proceeding under state law for Williams to have raised a challenge to the effectiveness of his trial and appellate counsel. *See, e.g., Rippo v. State*, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006) ("Claims of ineffective assistance of trial or appellate counsel are properly raised for the first time in a timely first post-conviction petition."). Furthermore, the Ninth Circuit Court of Appeals has already concluded Williams meets the first three prongs of the *Martinez* inquiry. ECF No. 100.

Therefore, the only inquiry before this Court is whether Williams can demonstrate that his underlying ineffective assistance of trial and appellate counsel claims are "substantial" or have "some merit." *Dickens*, 740 F.3d at 1319. If this Court answers the question in the affirmative, the claims are not defaulted and Williams is entitled to proceed on the merits.

A. Grounds Two, Three (a), (b), and (c) are not procedurally defaulted because Williams can show they have "some merit" or are "substantial."

Williams can demonstrate his ineffective assistance of trial and appellate counsel claims are "substantial" or have "some merit." *Martinez*, 132 S.Ct. at 1318; see also *Buck v. Davis*, __ S.Ct. __, 2017 WL 685534, *9 (Feb. 22, 2017). *See also*

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[2] Exhibits 1-89 cited herein reference exhibits to the First Amended Petition and Opposition to the Motion to Dismiss. ECF Nos. 37-41, 68, 75. Exhibits 90-92 are being filed contemporaneously with these Points and Authorities.

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Clabourne, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 789, 818 (9th Cir. 2015) (en banc). (To successfully demonstrate prejudice under the *Martinez* standard, a petitioner must demonstrate only that the underlying "ineffective assistance of counsel claim was 'substantial.'")

A petitioner can easily demonstrate the underlying grounds are "substantial", meaning they have "some merit," as the standard is the same as those for a certificate of appealability (COA) to issue. *Martinez*, 132 S.Ct. at 1318 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). The COA standard is satisfied if the petitioner can "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (quotations omitted, emphasis added). This standard was reaffirmed in *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *see also Miller-El*, 537 U.S. at 337-8 ("Indeed, a claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that Petitioner will not prevail.")

"What the requirement of a certificate of appealability does, and all it does, is screen out of the federal appellate court claims that are not even debatable among reasonable judges, which is to say, frivolous claims." *Hayward v. Marshall*, 603 F.3d 546, 554 (9th Cir. 2010), *overruled on other grounds by Swarthout v. Cooke*, 131 S.Ct. 859 (2011) (per curiam); *see also Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) ("[T]he COA requirement constitutes a gatekeeping mechanism that prevents us from devoting judicial resources on frivolous issues while at the same time affording habeas petitioners an opportunity to persuade us through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit.")

Williams can demonstrate that each of the claims below are "substantial" or have "some merit."

1. Relevant facts

The instant litigation arises out of two separate incidents occurring on November 7, 2000 and November 8, 2000. Darin Archie ("Archie") testified that on the night of November 7, 2000, Williams fired a gun in Archie's direction and Archie ran into his trailer. Ex. 22, p. 37. After additional gunfire, Reggie Ezell ("Ezell") was found dead outside the trailer. Ex. 22, p. 40-1.

On the following evening, November 8, 2000, a man by the name of "Jules" visited Jimmy Polito ("Polito") and Ricky Policastro's ("Policastro") trailer asking who the witnesses were to the shooting the day before. Ex. 23, p. 17, 53. After about fifteen minutes, Polito walked Jules to the door and an individual appeared and fired a handgun at Polito, striking him in the neck. Ex. 23, p. 21. Policastro was on the sofa and was shot as well. Ex. 23, p. 57. Neither Polito nor Policatstro were killed.

At trial, the state presented no conclusive evidence linking Williams to the November 7 shooting of Ezell. Williams testified he was not the shooter during the November 7 incident, and he did not fire a gun. Ex. 24, p. 95-6. Williams further testified that his prior taped statement given to police, in which he admitted being present and shooting during the November 7 incident, did not accurately present the facts of the shooting. Ex. 24, p. 100, 109; Ex. 59. At no time - either in his statement to the police or in his testimony - did Williams indicate he shot Ezell. Ex. 24, p. 81-123; Ex. 59.

The facts presented at trial demonstrated neither Darin Archie nor witness Olivia McBride witnessed Williams shoot at Ezell. Archie testified the first shot was fired at him, and he did not see any other shots fired. Ex. 22, p. 37, 71, 74, 78-80. McBride testified to witnessing shots fired at Archie - not the victim - and only heard

Ezell fall. Ex. 22, p. 185-6, 188. McBride had not previously met Williams. Ex. 22, p. 182, 198-9. In identifying Williams as the shooter, she relied solely on Archie's earlier identification of the person who stuck his head inside the trailer door as Williams. Ex. 22, p. 182; cf. p. 35 (Archie testified the person who opened the door as a person named Dominique). McBride stated the person holding the gun and the person looking in the door was the same person. Ex. 22, p. 199. McBride could not conclusively identify Williams in the photographic line-up. Ex. 22, p. 193.

Further, at least one other person was present at the shooting but was never arrested. Ex. 24, p. 63. Archie's testimony affirmed Ezell talked with Williams and a third person before the shooting. Ex. 22, p. 36-8. Most significantly, ballistics expert James Krylo testified the bullets recovered from the scene on November 7 did not conclusively come from one gun. Ex. 23, p. 184. The state's experts could also not discount that at least one of the bullet fragments was the product of a ricochet bullet. Ex. 22, p. 124.

The critical issue for the jury regarding the November 8 incident was the eyewitness testimony of several witnesses. No other evidence linked Williams to the crime. None of the witnesses gave an accurate description of Williams at the time of the offense. Polito testified he only recognized Williams from a "quick flash" just before he was shot. Ex. 23, p. 46; see also p. 84 (Policastro affirmed Polito was shot "immediately" after walking to the door). Polito looked to identify Williams in the photographic line-up because "[Williams] was the only one [Polito] recognized" and he had been informed of Williams's involvement in the November 7, 2000 incident. Ex. 23, p. 44-6.

Likewise, Policastro had been informed that Williams had been in a shooting the previous night and looked specifically for Williams in the photographic line-up. Ex. 23, p. 77-8. Additionally, Policastro observed a second person outside the trailer

who had about the same build as Williams. Ex. 23, p. 60. However, only Williams was pointed out.

Witness Cerra, located at the time about four or five trailers away from the shooting on November 8 (Ex. 23, p. 113, 124-5), testified she did not actually see Williams's face; she only saw his back. Ex. 23, p. 124, 163. She observed the person for a very short period of time, about 10-20 seconds. Ex. 23, p. 124. The witnesses expected the shooter to be Williams and assumed it was Williams.

Furthermore, at trial, the state presented no conclusive physical evidence linking Williams to the November 8 incident. The state called multiple expert and police witnesses. Homicide Sergeant Ken Hefner linked alternate suspect Jules Lindsey's phone calls immediately prior to the November 8 incident to a person named Alexis Sims – not Williams. Ex. 23, p. 129-32; Ex. 24, p. 19 (Homicide Detective James LaRochelle agreed that an investigation as to Jules is still ongoing).

Criminalistic technologist David Welch could not conclusively link the black stocking hood worn by the shooter on November 8, 2000 to Williams, as the hood yielded no DNA. Ex. 23, p. 148-9; Ex. 24, p. 15.

Joe Geller, an expert in fingerprint analysis, acknowledged he did not recover any latent prints from the submitted cartridge cases. Ex. 23, p. 165. Geller further testified footprint evidence recovered at the scene did not match Williams, nor did the latent print recovered from a motion detector sensor. Ex. 23, p. 170, 172. The testimony of Detective James LaRochelle further reinforced the lack of physical evidence connecting Williams to the crime. LaRochelle testified fingerprints taken off the motion sensor did not match Williams, the footprint analysis did not match Williams, and no DNA was recovered sufficient to determine any generic markers on the mask. Ex. 24, p. 39-40.

Most significantly, ballistics expert James Krylo testified the bullets from the November 8, 2000 incident were neither the same type, nor fired from the same gun as those found from the November 7, 2000 incident. Ex. 23, p. 183.

Williams was ultimately convicted of one count of first degree murder with use of a deadly weapon, three counts of attempt murder with use of a deadly weapon, and one count of conspiracy to commit murder.

2. Ineffective Assistance of Trial Counsel

a. Two (a)

Based upon the factual allegations set forth in Ground Two (a) of the amended petition, trial counsel was ineffective for failing to move to sever the charges in this case. ECF No. 36.[3]

Williams set forth the facts of the crimes charged against him in greater detail above. He was charged in two separate and distinct incidents that occurred on two separate dates. On November 7, the prosecution alleged murder, attempt murder, and conspiracy to commit murder with regard to the death of Reggie Ezell and shooting toward Darin Archie. On November 8, the prosecution alleged two counts of attempt murder and firing into a structure for the non-fatal shootings of James Polito and Ricky Policastro. Ex. 20. Williams adamantly denied any involvement in the November 8 incident, and he denied shooting Ezell in the November 7 incident. Ex. 24, p. 54, 95-6, 99-109.

The joinder in this case forced Williams to surrender his constitutional rights to due process and a fair trial, as well as his right to remain silent. The November 7

[3] The counseled amended petition filed on September 24, 2007 is incorrectly titled "First Amended Petition", but it is in fact a second amended petition. Compare ECF Nos. 5, 11, 36.

and November 8 offenses occurred on different days, involved different victims, and the evidence in one would not be admissible in the other.

A multiple count information or indictment presents a grave danger to prejudice the jury against a defendant. The Supreme Court has held that the Fifth Amendment right to a fair trial is violated if "an error involving misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *U.S. v. Lane*, 106 S.Ct. 725, 732 (1986) (*quoting Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946)). As the Ninth Circuit has stated, the danger of "undue prejudice is particularly great when joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible" because "it is difficult for a jury to compartmentalize the damaging information." *Sandoval v. Calderon*, 241 F.3d 765, 772 (9th Cir. 2000).

Also, the Ninth Circuit recognized joinder of counts may unduly affect a defendant's rights under the Fifth, Sixth and Fourteenth Amendments, including his decision whether to testify in his own defense. *See Comer v. Schriro*, 463 F.3d 934, 959 (9th Cir. 2006). A severance is warranted in such circumstances when a defendant can show "he has important testimony to give on some counts and a strong need to refrain from testifying on those he wants severed." *United States v. Nolan*, 700 F.2d 479, 483 (9th Cir. 1983).

Counsel for Williams never attempted to sever the charges, despite the fact the offenses were not based upon the same act or transaction nor did they constitute part of a common scheme or plan. *See* Nev. Rev. Stat. § 173.115. Furthermore, counsel had no strategic reason for failing to move to sever the charges.

In Williams's case, had the counts been severed, most of the evidence would not have been cross-admissible. The incidents took place on separate days, involved

different victims and different sets of facts, and involved different co-conspirators. As described in more detail below, pp. 17-19 infra, a number of the witnesses for November 7 and November 8 were unable to identify Williams with any certainty. The evidence from November 7 would not have been admissible in the trial for the November 8 charges.

While it is true that such evidence can be offered for proof of motive, opportunity, intent, preparation, plan, identity, or absence of mistake or accident, admission still must be balanced against the threat of undue prejudice. Nev. Rev. Stat. § 48.045. There was little evidence to support the state's theory was that November 8 shooting was in response to the November 7 shooting. Williams denied shooting Ezell and denied having any involvement in the November 8 shooting. Ex. 24, p. 54, 95-6, 99-109. Indeed, as outlined below in detail, *infra*, Williams was not the shooter on November 8 and has several alibi witnesses to confirm he was not at the trailer park on the night of the shooting. Exs. 90-1.

Moreover, the uncharged co-conspirator, Jules, was not involved in the November 7 shooting but was the primary player on November 8. In this case the marginal relevance of the evidence regarding the November 7 incident is greatly outweighed by the extreme prejudice of admitting such evidence. Williams's defense was that he did not shoot anyone on either night. Joining the offenses allowed the state to bolster the weak evidence for each alleged offense in a way that would make it extremely difficult for the jury to compartmentalize the evidence.

Counsel's ineffectiveness prejudiced Williams. The joinder of the charges served only to make it appear to the jury that Williams had been on a shooting rampage. Additionally, as Williams had made statements to the police regarding the November 7 incident, but not the November 8 incident, the trial of these cases together significantly increased the likelihood of conviction on the November 8

charges. The jury was unable to separate Williams's inculpatory statements as to his involvement with the November 7 shooting from his alleged guilt on November 8. Williams has alibi witnesses for the shooting on November 8. Moreover, Williams's Fifth Amendment rights were violated as a result of the joinder, because he could not testify as to his proclaimed innocence on the attempt murder charges while also maintaining his right to remain silent on the murder charge at the joint trial. But for counsel's failure to move to sever the charges, Williams would have had a more favorable outcome at trial. *Strickland*, 466 U.S. at 687-93.

Accordingly, the ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause for the procedural default under *Martinez*. Further, Williams can show prejudice. The failure to raise Ground Two (a) in the first petition worked to his actual and substantial disadvantage. As shown above, the ineffectiveness claim was meritorious. Thus, if the claim had been raised in the post-conviction proceeding, Williams would have been entitled to relief.

Because Williams has shown cause and prejudice, this Court should address the merits of Ground Two (a).

b. Ground Two (b)

Based upon the factual allegations set forth in Ground Two (b) of the amended petition, trial counsel was ineffective for failing to move to suppress Williams's statement to police and failing to argue to the jury that the statement was involuntary. ECF No. 36.

During a criminal trial, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966.) These procedural safeguards include the right to an attorney for any custodial

interrogation, and if a defendant "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." *Id.* at 444-5.

In determining whether a defendant voluntarily and knowingly waived his rights under *Miranda*, a court must look to the totality of the circumstances. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Factors to consider may include the defendant's age, intelligence and education level, time between the reading of *Miranda* rights and the questioning, etc. *Doody v. Schiro*, 548 F.3d 847 (9th Cir. 2008) (citations omitted). A statement is involuntary if a "defendant's will was over-borne" by the police, including a review of the "characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

Williams's statement was not knowingly and voluntarily obtained, and it should have been suppressed. Williams was apprehended by police in a sting operation. Williams was staying with Aja Howell, a family acquaintance. Ex. 92. A man came to the door, claiming to be a maintenance worker there to change the air filters. *Id.* Sometime later, Ms. Howell's mother, Dorothy Howell, arrived to help Aja move out of her home. All three adults—Aja, Dorothy, and Williams—carried items out of the house to load into Dorothy's car. Aja's five-year old son also followed the adults outside. *Id.*

Once outside, 10-15 police officers "came out of nowhere" with their guns drawn. Ex. 92. Some of the officers were with a SWAT team. They began screaming and ordered all the adults to get down on the ground. Exs. 92. Aja and Dorothy were handcuffed on the ground, while the officers screamed and swore at them. Officers held high-powered rifles to both Dorothy's and Aja's heads. *Id.* The officers refused to check pockets for identification and instead threatened the women with criminal

charges, both related and unrelated to Williams. *Id.* Aja's son was crying. The women were only uncuffed when Dorothy was finally able to convince an officer to review her badge, proving she was a retired corrections Sergeant. *Id.*

Williams was separated from the women. Although they could not hear him, he appeared to be cooperating with police. *Id.*

At the police station, Williams was questioned by police about the shootings. He gave a video statement to the police indicating he had been involved in the November 7 incident. He made the statement more than an hour after he signed a waiver card and after he had already spoken with the officers. Ex. 56. He also gave the statement after being taken in by extreme force, with use of a SWAT team. Exs. 92. His statement was given after the women who had helped him—Aja and Dorothy—were threatened with criminal charges and while a five-year old boy was left on the curb crying. Exs. 92.

Williams testified at trial he believed he was going to get some benefit from telling the police what they wanted to hear. Ex. 24, p. 655. Furthermore, Williams was already represented by attorney Steve Altig when he was interviewed, yet police failed to contact Altig before eliciting statements from Williams.

Despite the real possibility of coercion through the advanced methods of interrogation employed by the police and the failure of the police to contact Williams's attorney before interviewing him, trial counsel never moved to suppress the statement or requested a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), to determine the voluntariness of the statement. In fact, although not required to do so (*see Wilkins v. State*, 609 P.2d 309 (Nev. 1980)), the trial court reminded defense counsel that he was entitled to a *Jackson* hearing, and counsel declined to request one, and failed to object at all to the admission of the video interview. Ex. 24, p. 31.

During trial, counsel also failed to argue to the jury the coercive nature of the statement.

The statement by Williams placing him at the scene and shooting was certainly the most damaging evidence against him. Reasonably competent counsel would have challenged the statement to the police. Successful suppression of the statement or education of the jurors on the involuntary nature of the statement would have resulted in a more favorable outcome to Williams at trial. *Strickland*, 466 U.S. at 687-93.

Accordingly, the ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause for the procedural default under *Martinez*. Further, Williams can show prejudice. The failure to raise Ground Two (b) in the first petition worked to his actual and substantial disadvantage. As shown above, the ineffectiveness claim was meritorious. Thus, if the claim had been raised in the post-conviction proceeding, Williams would have been entitled to relief.

Because Williams has shown cause and prejudice, this Court should address the merits of Ground Two (b).

c. Ground Two (c)

Based upon the factual allegations set forth in Ground Two (c) of the amended petition, trial counsel was ineffective for failing to move for a mistrial when one of the decedent's family members made a scene during opening statements. ECF No. 36.

During the prosecutor's opening argument, a picture of the victim, Reggie Ezell was shown, resulting in one of his family members screaming and yelling in the courtroom. Ex. 22, p. 9, 243. Defense counsel made a record of the incident at the end of the day, but he did not contemporaneously object to the outburst and he failed to move for a mistrial. Ex. 22, p. 243. There was no limiting or curative instruction by the judge after the outburst. Ex. 22, p. 9-10.

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This type of emotional outburst before the jury – particularly given that the outburst obviously came from a friend or family member of the victim—surely had a negative impact and was prejudicial. The judge offered no limiting or curative instruction at any point during the trial, and so the jury was left with the screaming and crying victim's family member as one of their first memories and visceral experiences of the trial. Evidence such as the outburst in this case is improperly introduced to a jury as it may result in the conviction of a defendant on something other than the evidence presented at trial. Indeed, it is "well-settled [that] evidence developed against a defendant must come from the witness stand." *Fields v. Brown*, 503 F.3d 755, 779 (9th Cir. 2007). When the admission of evidence infects a trial as to render the proceedings unfair, the defendant is denied due process. *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994); *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999) (examining whether the admission of a photograph rendered a trial "fundamentally unfair"). Reasonable trial counsel would have moved for a mistrial. Failure to do so resulted in prejudice to Williams. *Strickland*, 466 U.S. at 687-93.

Accordingly, the ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause for the procedural default under *Martinez*. Further, Williams can show prejudice. The failure to raise Ground Two (c) in the first petition worked to his actual and substantial disadvantage. As shown above, the ineffectiveness claim was meritorious. Thus, if the claim had been raised in the post-conviction proceeding, Williams would have been entitled to relief.

Because Williams has shown cause and prejudice, this Court should address the merits of Ground Two (c).

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d. Ground Two (d)

Based upon the factual allegations set forth in Ground Two(d) of the amended petition and as set forth in greater detail above, supra pp. 6-9, trial counsel was ineffective for failing to call an eyewitness identification expert at trial.

During Williams's trial, a number of the witnesses were unable to identify him or identify him with certainty. For example, witness Richard Mantie failed to identify Williams. Ex 22, p. 104. Olivia McBride testified she was told to pick the person who closely resembled the shooter and then wrote that she was not 100% certain. Ex. 22, p. 192. Lee Saladiner testified Williams was not either of the men he saw on November 8. Ex. 22, p. 214. Although both Jimmy Polito and Ricky Policastro identified Williams as the shooter based on their previous familiarity with him, the men also testified that Williams's friend, Will, looks like Williams in shape and build. Ex. 23, p. 41, 65. Also, both men confirmed there was no outside lighting on November 8, because the motion sensor light was out. Ex. 23, p. 42, 74. Furthermore, both men had been told by others that Williams was responsible for the shooting on November 7. Ex. 23, p. 45, 78. Given the varying nature of the eyewitness testimony, an eyewitness identification expert would have dramatically assisted in Williams's defense. An eyewitness identification expert could have testified about the effects of stress, gun focus, suggestibility, and other issues with identification.

The prosecution of Williams rested heavily upon eyewitness identification, which has been repeatedly found to be of questionable reliability. Jennifer Devenport, et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 Psychol. Pub. Pol'y & L. 338, 338 (1997). Juries are often unaware of the limitations of eyewitness identifications and therefore give great weight to such identifications. *See State v. Clopten*, 223 P.3d 1103, 1109 (2009), citing Elizabeth Loftus, *Eyewitness Testimony*, 9, 19 (1979); Roger B. Handberg, *Expert Testimony on Eyewitness*

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Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013, 1014 (1995); *c.f. Perry v. New Hampshire*, 565 U.S. 228 (2012) (noting with approval "eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising eyewitness identification evidence.")

An expert witness could have testified to several factors which greatly decreased the reliability of the eyewitness identification testimony in Williams's case. First, suggestive identification procedures may violate due process and greatly "increase the likelihood of misidentification." *Neil v. Biggers*, 409 U.S. 188, 198 (1972). Second, studies by social scientists have demonstrated that "violence or other stressful situations greatly decrease the ability of a witness to make accurate identifications." Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 Ind. L. Rev. 271, 281 (2007) (citation omitted). Third, "[i]f there is one thing that the research is virtually unanimous on, it is this: there is no correlation between eyewitness certainty and accuracy." *Id.* at 282-3 (citation omitted).

Trial counsel has a duty to make reasonable investigations. *Strickland*, 466 U.S. at 690; *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). "Although there is a strong presumption an attorney's conduct meets the standard for effectiveness, 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Wiggins*, 241 F.3d at 1198. Reasonably effective counsel would have hired an eyewitness identification expert to testify as a witness at trial to rebut the eyewitness testimony. Failure to call such a witness resulted in a less favorable outcome to Williams. *Strickland*, 466 U.S. at 687-93.

Accordingly, the ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause for the procedural default under

Martinez. Further, Williams can show prejudice. The failure to raise Ground Two (d) in the first petition worked to his actual and substantial disadvantage. As shown above, the ineffectiveness claim was meritorious. Thus, if the claim had been raised in the post-conviction proceeding, Williams would have been entitled to relief.

Because Williams has shown cause and prejudice, this Court should address the merits of Ground Two (d).

e. Ground Two (e)

Based upon the factual allegations set forth in Ground Two (e) of the amended petition, trial counsel was ineffective for failing to present alibi witnesses at trial. ECF No. 36.

Two witnesses, Dorrell Porter and Blanche Williams, would have testified that Williams was not at the trailer park on November 8. Exs. 90-1.

Dorrell Porter has stated in a Declaration filed at Exhibit 91 that he is Jamaar Williams's cousin. Ex. 91. In November 2000, Porter was employed at the University of Nevada, Las Vegas, as a Management Assistant for the English Department. During the week of November 5-12, 2000, Porter's brother and his friend were visiting Las Vegas and staying with Porter. Williams, who often stayed with Porter, arrived at Porter's home on the night of November 7, 2000, at around 10:00 p.m. Williams fell asleep at Porter's house that evening and did not leave the house the entire day, November 8, which Porter can confirm because he hung out with Porter, his brother, and the brother's friend the entire day. Ex. 91.

Likewise, Blanche Williams also confirms Williams's alibi for November 8, 2000. In November 2000, Blanche was living with her brother, Dorrell Porter. Ex. 90. At the time, she worked for the MGM Grand. Like most days, she arrived home between 5:30-6:00 p.m. on the evening of November 8, 2000. Williams was at the home as well. On the evening of November 8, 2000, Williams stayed at the home of

Dorrell Porter all evening and night. They all hung out together, ate dinner, and watched television. Blanche was shocked to learn Williams had been accused of a shooting on November 8, 2000, as he had been with his family the entire night. Ex. 90.

Defense counsel failed to call either witness to testify at trial. In fact, trial counsel never communicated with either Porter or Blanche before trial, although Williams asserted he had nothing to do with the November 8 shooting. Ex. 90-1; ex. 59, p. 17-9. A "lawyer who fails adequately to investigate, and to introduce evidence, evidence that demonstrates his client's factual innocence, or that raises doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002). Where the testimony of alibi witnesses at trial would have "create[d] a reasonable probability that the fact-finder would have entertained a reasonable doubt concerning guilt," trial counsel was therefore ineffective for failing to call them. *Brown v. Meyers*, 137 F.3d 1154, 1158 (9th Cir. 1998) (quotation omitted). *See c.f. Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) (trial counsel's failure to interview defendant's brother, who confessed he was the murderer, was ineffective assistance as counsel had a duty to investigate).

It would be reasonable to presume that in a shooting case where there may be eyewitnesses available, the attorney would attempt to speak to the witnesses before trial. It is doubtful any "reasonable professional judgment" could have supported trial counsel's failure to interview the witnesses. Indeed, Williams's trial counsel utterly failed in this regard when he failed to call the alibi witnesses at trial. Failure to call these witnesses, who would have testified that Williams was with them on the night of November 8, was consistent with Williams's own version of events. It was consistent with his defense. Trial counsel's failure to call the witnesses resulted in a

less favorable outcome to Mr. Williams and fell below the standard for reasonably effective assistance of counsel. *Strickland*, 466 U.S. at 687-93.

Accordingly, the ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause for the procedural default under *Martinez*. Further, Williams can show prejudice. The failure to raise Ground Two (e) in the first petition worked to his actual and substantial disadvantage. As shown above, the ineffectiveness claim was meritorious. Thus, if the claim had been raised in the post-conviction proceeding, Williams would have been entitled to relief.

Because Williams has shown cause and prejudice, this Court should address the merits of Ground Two (e).

3. Ineffective Assistance of Appellate Counsel

a. Ground Three (a)

Based upon the factual allegations set forth in Ground Three(a) of the Second Amended Petition, appellate counsel was ineffective for failing to challenge the elicitation of improper testimony by the prosecutor. ECF No. 36.

Under Nevada law the state can only offer evidence of prior bad acts after a hearing. See Nev. Rev. Stat. § 48.045 (regarding evidence of prior bad acts, with exceptions); *Petrocelli v. State*, 692 P.2d 503, 507 (Nev. 1985) (holding that evidence of prior bad acts can only be admitted if state first proves them by "by plain, clear and convincing evidence"), holding modified on other grounds, *Sonner v. State*, 930 P.2d 707 (Nev. 1996).

Nevertheless, during the course of Williams's trial testimony, the prosecutor asked Williams why he went to the trailer park daily. This question elicited the testimony from Williams that he went to the trailer park to sell drugs. Ex. 24, p. 102. Defense counsel made a contemporaneous objection, stating that the prosecutor intentionally elicited that information, that the information constituted a prior bad

act, and the information should not have been admitted. Ex. 24, p. 102-3. Despite the serious prejudice to Williams in this inadmissible evidence being presented to the jury, appellate counsel failed to raise this issue on appeal.

A long-established rule of constitutional law provides that prosecutorial misconduct can result in a violation of a defendant's right to due process. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986). This is the case when improper conduct by the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1973).

Federal law not only prohibits prosecutors from committing misconduct, but also requires prosecutors to assist in protecting the constitutional rights of those facing trial. The Supreme Court has explained that the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done." *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds* by *Stirone v. United States*, 361 U.S. 212 (1960). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* at 88. This Court explained that "[i]t is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial." *Commonwealth of the Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 486 (9th Cir. 1993), *overruled on other grounds* by *George v.* Camacho, 119 F.3d 1393 (9th Cir. 1997); *see also Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) ("The proper role of the criminal prosecutor is not to simply obtain a

conviction, but to obtain a fair conviction. It was to insure that defendants are not subjected to unfair trials that the limits on prosecutorial conduct evolved.")

The prosecutor's intentional elicitation of Williams's background as a person who sold drugs in the trailer park served no other purpose than to prejudice the jury against Williams. Williams was not charged with trafficking in the instant case. Furthermore, the fact that Williams had previously sold drugs in the trailer park did not have any bearing on the events on November 7 or 8. The error was not harmless. *See generally U.S. v. Moorehead*, 57 F.3d 875 (9th Cir. 1995) (finding harmful error when a trial court elicited information through questioning that suggested the defendant "was a nasty man who sold drugs in the park").

Appellate counsel had no strategic reason for failing to raise this issue on appeal. Had this issue been raised, Williams likely would have had a better outcome on appeal. *Strickland*, 466 U.S. 668; *Evitts v. Lucey*, 469 U.S. 387 (1985).

Accordingly, the ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause for the procedural default under *Martinez*. Further, Williams can show prejudice. The failure to raise Ground Three (a) in the first petition worked to his actual and substantial disadvantage. As shown above, the ineffectiveness claim was meritorious. Thus, if the claim had been raised in the post-conviction proceeding, Williams would have been entitled to relief.

Because Williams has shown cause and prejudice, this Court should address the merits of Ground Three (a).

b. Ground Three (b)

Based upon the factual allegations set forth in Ground Three (b) of the amended petition, appellate counsel was ineffective for failing to challenge prosecutorial misconduct during trial. ECF No. 36.

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In Williams's case, the prosecutor committed misconduct when he repeatedly asked Williams during cross-examination if other witnesses were lying when they testified to different facts. Ex. 24, p. 111-2. Defense counsel made a contemporaneous and continuing objection to the questions. *Id.*

The credibility of the witness is a matter to be determined by the jury, and vouching of witnesses by the state is constitutionally impermissible. *Berger v. U.S.*, 295 U.S. 78, 87-8 (1935). Improper comments by a prosecutor can "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Prosecutors are advised to avoid statements and argument "to the effect that, if the defendant is innocent, government agents must be lying." *U.S. v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999) (citation omitted) (holding the prosecutor committed misconduct in vouching for his witnesses); *U.S. v. Sanchez-Lima*, 161 F.3d 545 (9th Cir. 1998) (improper vouching as to truthfulness over objection is reversible error); *U.S. v. Geston*, 299 F.3d 1130, 1136-7 (9th Cir. 2002) (prosecutor's improper questioning as to the veracity of a government witness was plain error).

Despite the clear impropriety of the prosecutor's questions during Williams's cross-examination and despite trial counsel's objections to the improper questioning, appellate counsel failed to raise this meritorious issue on appeal. Had this issue been raised, Williams likely would have had a better outcome on appeal. *Strickland*, 466 U.S. 668; *Evitts*, 469 U.S. 387.

Accordingly, the ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause for the procedural default under *Martinez*. Further, Williams can show prejudice. The failure to raise Ground Three (b) in the first petition worked to his actual and substantial disadvantage. As shown

above, the ineffectiveness claim was meritorious. Thus, if the claim had been raised in the post-conviction proceeding, Williams would have been entitled to relief.

Because Williams has shown cause and prejudice, this Court should address the merits of Ground Three (b).

c. Ground Three (c)

Based upon the factual allegations set forth in Ground Three(c) of the amended petition, appellate counsel was ineffective for failing to challenge the flight instruction. ECF No. 36.

When jury instructions were settled, trial counsel objected to instruction number 42 (Ex. 26), which instructed that the flight of a person immediately after the commission of a crime shows consciousness of guilt. Ex. 24, p. 126-7. Counsel pointed out that Williams left Las Vegas after a week following being accused of the crime. *Id.* Williams's statement to police was more suggestive that he left Las Vegas out of fear for his life and the safety of his family than to flee from law enforcement. Ex. 59, p. 21.

In Nevada, a flight instruction is only appropriate if the state presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest. *Rosky v. State*, 111 P.3d 690 (Nev. 2005). Flight instructions are valid "only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." *Jackson v. State*, 17 P.3d 998, 1001 (Nev. 2001). The flight instruction here was inappropriate because the evidence at trial showed that McMahon did not flee from police after he was accused of a crime.

Despite the improper giving of this instruction and trial counsel's timely objection, appellate counsel failed to raise this issue on appeal. Appellate counsel's failure to challenge the improper flight instruction prejudiced Williams. The

instruction implied Williams knew he was guilty and tried to flee Nevada to avoid prosecution. It also invited the jury to consider whether the supposed flight showed "a consciousness of guilt." It wrongly forced Williams to prove that his flight was not consciousness of guilt. Had this issue been raised, Williams likely would have had a better outcome on appeal. *Strickland*, 466 U.S. 668; *Evitts*, 469 U.S. 387.

Accordingly, the ineffective assistance of trial counsel claim is substantial or has "some merit." Thus, Williams can show cause for the procedural default under *Martinez*. Further, Williams can show prejudice. The failure to raise Ground Three (c) in the first petition worked to his actual and substantial disadvantage. As shown above, the ineffectiveness claim was meritorious. Thus, if the claim had been raised in the post-conviction proceeding, Williams would have been entitled to relief.

Because Williams has shown cause and prejudice, this Court should address the merits of Ground Three (c).

III. Williams has demonstrated prejudice because each of the grounds listed above have "some merit." At the very least, Williams is entitled to an evidentiary hearing.

Williams submits he has demonstrated cause and prejudice to overcome the procedural defaults on Grounds Two and Three (a), (b), and (c). However, if this Court determines additional evidence is necessary before it can rule on the *Martinez* issue, Williams requests an evidentiary hearing.

As an alternative, Williams seeks an evidentiary hearing related to whether he can demonstrate cause and prejudice and thus avoid the defenses the Respondents previously raised in its motion to dismiss (ECF No. 72), 28 U.S.C. § 2254(e)(2) does not govern this motion. The language in section (e)(2) is limited to the factual development of substantive claims. Id. ("If the applicant has failed to develop the factual bases of a claim in State court proceedings . . . ."); *see House v. Bell*, 547 U.S. 518, 539 (2006) (section 2254(e)(2) does not address the federal court's consideration

of defaulted claims based upon a showing of actual innocence); *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) ("Evidentiary hearings to develop the factual basis of a 'claim' are ordinarily governed by 28 U.S.C. § 2254(e)(2). But as we have already noted, a prisoner making a *Martinez* motion is not asserting a 'claim' for relief but instead is seeking, on an equitable basis, to excuse a procedural default."); *see also Quezada v. Scribner*, 611 F.3d 1165, 1168 (9th Cir. 2010) ("We therefore remand to the district court with instructions to conduct an evidentiary hearing to determine the admissibility, credibility, veracity and materiality of the newly discovered evidence. . . . If [petitioner's] . . . claim is procedurally barred, the district court should proceed to determine whether [petitioner] can show cause and prejudice or manifest injustice to permit federal review of the claim."); *Williams v. Crawford*, ECF No. 100 (remanding the instant matter for possible additional factual development, including at an evidentiary hearing, particularly in light of *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc) and *Nguyen*, 736 F.3d at 1289).

Williams requests a hearing where he can put on evidence of post-conviction's deficient performance and the prejudice it caused. *See Detrich*, 740 F.3d at 1246 ("For procedurally defaulted claims, to which *Martinez* is applicable, the district court should allow discovery and hold an evidentiary hearing where appropriate to determine whether there was 'cause' under *Martinez* for the state-court procedural default and to determine, if the default is excused, whether there has been trial-counsel IAC."). While Williams has already described some of this evidence herein, there is additional evidence this Court should hear at an evidentiary hearing. The evidence presented at an evidentiary hearing would include:

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- Evidence on the merits of Ground Two (a) (that trial counsel was ineffective for failing to move to sever the charges). This evidence would including testimony from trial counsel. This testimony would go to whether Williams can overcome any default under *Martinez.*

- Evidence on the merits of Ground Two (b) (that trial counsel was ineffective for failing to move to suppress Williams's statement to police). This evidence would including testimony from trial counsel, and from Aja and Dorothy Howell. This testimony would go to whether Williams can overcome any default under *Martinez.*

- Evidence on the merits of Ground Two (d) (that trial counsel was ineffective for failing to call an eyewitness identification expert). This evidence would including testimony from trial counsel. It would also include the testimony of an eyewitness identification expert. This testimony would go to whether Williams can overcome any default under *Martinez.*

- Evidence on the merits of Ground Two (e) (that trial counsel was ineffective for failing to present evidence of Williams's alibi at trial). This evidence would including testimony from trial counsel. It would also include testimony from Blanche Williams and Dorrell Porter. This testimony would go to whether Williams can overcome any default under *Martinez.*

IV. Conclusion

Williams submits he has demonstrated cause and prejudice to overcome the procedural defaults on all of Ground Two and Ground Three (a)-(c) on the record before the Court. As such, this Court should deny the motion to dismiss and direct the Respondents to answer the claims on their merits.

Should the court require additional evidence before finding in Williams's favor, however, he is entitled to an evidentiary hearing where this Court can consider evidence supporting Williams's allegations that his claims have "some merit" or are "substantial."

Dated this 3rd day of March, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Megan C. Hoffman

MEGAN C. HOFFMAN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: Michael Bongard

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

Jamaar Williams, #72808
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070

/s/ Dayron Rodriguez
An Employee of the
Federal Public Defender

FILED

OCT 19 2016

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMAAR JEROME WILLIAMS, Petitioner-Appellant, v. JACKIE CRAWFORD; ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents-Appellees.	No. 14-16723 D.C. No. 2:05-cv-00879-PMP-CWH MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted September 15, 2016
San Francisco, California

Before: GOULD and BERZON, Circuit Judges, and TUNHEIM,** Chief District Judge.

Petitioner Jamaar Jerome Williams appeals from the district court's order dismissing with prejudice several grounds for relief included in his second

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

** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

amended federal habeas petition.[1] The claims at issue concern ineffective assistance of trial and appellate counsel. Because the district court applied the wrong standard in determining that Williams procedurally defaulted these claims, we vacate and remand for further proceedings.

1. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), governs whether we may excuse Williams's procedural default and reach the merits of his claims. Under *Martinez*, a procedural default may be excused when the following four conditions are met:

> (1) the underlying ineffective assistance of . . . counsel claim is "substantial"; (2) the petitioner was not represented or had ineffective counsel during the [post-conviction relief (PCR)] proceeding; (3) the state PCR proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding.

Dickens v. Ryan, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc) (citing *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013)); *see also Nguyen v. Curry*, 736 F.3d 1287,

[1]At issue in this appeal are the claims Williams raised for the first time in his second amended petition, Grounds for Relief Two and Three(a), (b), and (c). These grounds encompass all but one of Williams's claims of ineffective assistance of trial and appellate counsel. The remaining claim (Three(d)), that Williams's appellate counsel was ineffective for failing to communicate with Williams or provide him with his file, was adjudicated on the merits by the district court, along with his claim that insufficient evidence supported his conviction. We do not address the claims adjudicated on the merits here.

1293–96 (9th Cir. 2013) (extending *Martinez* to cases in which the underlying ineffective assistance of counsel claim concerns appellate counsel).

The last three prongs of *Martinez* are clearly satisfied in this case. Williams was unrepresented during his first state habeas proceeding.[2] He therefore meets the second requirement. Williams also satisfies the third and fourth prongs, as state habeas proceedings are the "initial review proceedings" for claims of ineffective assistance of trial and appellate counsel in Nevada, and Williams effectively was required to bring his claims in those proceedings. *See Rippo v. State*, 122 Nev. 1086, 1095 (2006) ("Claims of ineffective assistance of trial or appellate counsel are properly raised for the first time in a timely first post-conviction petition." (citing *Pellegrini v. State*, 117 Nev. 860, 882 (2001))).

2. Rather than decide in the first instance whether any of Williams's claims of ineffective assistance of trial and appellate counsel are "substantial" under *Martinez*, and thus whether his procedural default should be excused, we remand Williams's case to the district court.

Remand is appropriate because Williams did not have the opportunity in the district court fully to brief and develop a record supporting his claims under *Martinez*. He alerted the district court that the Supreme Court had decided

[2]Williams requested that counsel be appointed, but the court did not grant his request.

Martinez while his case was pending and offered to provide additional briefing. The State's response to Williams's notice of supplemental authority and Williams's subsequent reply further advised the district court that *Martinez* was relevant to the issue raised in this case. Yet the district court did not request supplemental briefing, hold an evidentiary hearing, or apply *Martinez* in determining that Williams had procedurally defaulted Grounds Two and Three(a), (b), and (c). We remand so that the district court can evaluate whether further factual development is needed and determine whether Williams's claims are substantial under the appropriate standard. *See Woods v. Sinclair*, 764 F.3d 1109, 1137–38 (9th Cir. 2014), *cert. denied sub nom. Holbrook v. Woods*, 135 S. Ct. 2311 (2015).

Further counseling in favor of remand is intervening authority, which has clarified the scope of *Martinez* as it applies here. *See Dickens*, 740 F.3d at 1321 (addressing the availability of an evidentiary hearing to show that a claim is "substantial" under *Martinez*); *Nguyen*, 736 F.3d at 1289.

We therefore **VACATE** the district court's order dismissing Williams's claims as procedurally defaulted and **REMAND** for further proceedings.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMAAR JEROME WILLIAMS, Petitioner, vs. JACKIE CRAWFORD, et al., Respondents.	2:05-CV-0879-PMP-GWF **FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254**

Petitioner, Jamaar Jerome Williams, through his attorney of record, Linda Marie Bell, Assistant Federal Public Defender, files this First Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254.[1]

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[1] The Exhibits referenced in this First Amended Petition are identified as "Ex."

I.

PROCEDURAL BACKGROUND

1. On April 30, 2002, the Clerk of the Eighth Judicial District Court, Clark County, Nevada, entered a Judgment of Conviction in the case entitled State of Nevada v. Jamaar J. Williams, Case No. C174590. (Ex. 30.)

2. Following a four-day jury trial, the jury convicted Mr. Williams of Murder With Use of a Deadly Weapon (Open Murder) (Count I), Attempt Murder With Use of a Deadly Weapon (Counts II, IV and V), and Conspiracy to Commit Murder (Count III). The judge sentenced Mr. Williams as follows: Count I - to a maximum life term with a minimum parole eligibility of 20 years plus an equal and consecutive term of life with a minimum parole eligibility of 20 years for the use of a deadly weapon; Count II - to a maximum of 240 months with a minimum parole eligibility of 53 months plus an equal and consecutive term of a maximum of 240 months with a minimum parole eligibility of 53 months for the use of a deadly weapon consecutive to Count I; Count III - to a maximum of 120 months with a minimum parole eligibility of 26 months concurrent with Count I; Count IV - to a maximum of 240 months with a minimum parole eligibility of 53 months plus an equal and consecutive term of a maximum of 240 months with a minimum parole eligibility of 53 months for the use of a deadly weapon consecutive to Count II; Count V - to a maximum of 240 months with a minimum parole eligibility of 53 months plus an equal and consecutive term of a maximum of 240 months with a minimum parole eligibility of 53 months for the use of a deadly weapon consecutive to Count IV. The Nevada Department of Corrections houses Mr. Williams at the High Desert State Prison. (Id.)

3. The preliminary hearing was held on April 11, 2001. (Ex. 2.) Mr. Williams was present throughout with Deputy Special Public Defender, Joseph Sciscento.

4. The Information was filed on April 12, 2001, charging Mr. Williams with the crimes of Murder With Use of a Deadly Weapon, a violation of NRS 200.101, 200.030, 193.165 (Count I); Attempt Murder With Use of a Deadly Weapon, a violation of NRS 193.330, 200.010, 200.030, 193.165 (Counts II, IV, and V); Conspiracy to Commit Murder, a violation of NRS 199.480, 200.010, 200.030 (Count III); and Discharging a Firearm At or Into Structure, a violation of NRS 202.285 (Count VI). (Ex. 3.)

5. Just prior to trial, on February 5, 2002, Mr. Williams signed a Stipulation and Order agreeing that should the jury return a guilty verdict on any offense, he would waive the penalty hearing before the jury as normally required under Nev. Rev. Stat. 175.552(1)(a). (Ex. 19.)

6. The case proceeded to trial on February 6, 2002 and continued through February 11, 2002. The Honorable Dan L. Papez (Visiting Judge) presided. (Ex. 22 - 25.) Mr. Sciscento represented Mr. Williams throughout the trial.

7. The sentencing hearing took place on April 22, 2002. (Ex. 29.) The sentence the trial court imposed is set forth above in paragraph two. The judgment of conviction followed on April 30, 2002. (Ex. 30.)

DIRECT APPEAL

8. A timely Notice of Appeal was filed by attorney Gregory L. Denue on May 10, 2002. (Ex. 31.) The Nevada Supreme Court docketed this appeal as Case No. 39651.

9. The Opening Brief was to be filed on September 16, 2002. Mr. Denue failed to meet this filing deadline, and on October 14, 2002, the Nevada Supreme Court ordered Mr. Denue to file the Opening Brief and appendix within fifteen days from the date of its order. (Ex. 33.)

10. Mr. Denue failed to comply with the Nevada Supreme Court's order directing him to file the Opening Brief by October 29, 2002. On December 1, 2002, Mr. Denue signed an affidavit which was attached to his Motion for Extension of Time to File Opening Brief explaining that "the Opening Brief was not filed due to a calendaring error for which I ultimately am responsible." (Ex. 36.)

11. On December 6, 2002, the Nevada Supreme Court, in the interest of judicial economy, directed the clerk to file the late opening brief and appendix. The Court further admonished Mr. Denue for failing to comply with the Court's October 14, 2002 Order, or otherwise communicating with the court, and cautioned him that "future procedural derelictions may result in the imposition of sanctions." (Ex. 34.)

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12. Appellant's Opening Brief was filed on December 6, 2002. (Ex. 35.) Mr. Denue raised the following assignment of error in the brief:

> I. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUSTAIN WILLIAMS' CONVICTION.

13. On October 16, 2003, the Nevada Supreme Court filed an Order of Affirmance, denying Mr. Williams relief on appeal. (Ex. 40.) Remittitur issued on November 12, 2003. (Ex. 41.)

POST-CONVICTION LITIGATION

14. On September 27, 2004, Mr. Williams, in proper person, filed a Motion to Withdraw Counsel and Motion for Production of Documents, Papers, Pleadings and Tangible Property of Defendant. (Exs. 42, 43.) In these motions, Mr. Williams requested that Mr. Denue provide him with a copy of his entire file. (Id.)

15. A hearing took place on Mr. Williams motions before the Honorable Michael Cherry on October 12, 2004. (Ex. 44.) Mr. Williams was not present nor represented by counsel at this hearing. The trial court granted Mr. Williams motion and directed the State to call Mr. Denue and tell him to send Mr. Williams his file. (Id.)

16. On November 10, 2004, Mr. Williams filed a proper person motion seeking additional time in which to file his Petition for Writ of Habeas Corpus because "former counsel has not produced any documents to defendant, leaving the defendant unable to file a timely petition for writ of habeas corpus." (Ex. 45.)

17. Without having any of his court record available to him, on November 19, 2004, Mr. Williams filed his proper person Petition for Writ of Habeas Corpus. (Ex. 46.) Mr. Williams claim for relief is that his due process rights had been violated under 6th and 14th amendments of the United States Constitution. Mr. Williams supporting facts are:

> The petitioner is unable to continue litigation due to the attorney of record not releasing "any" of my records or files. The court or my attorney did not notify me that my direct appeal was affirmed. The petitioner contends that the purpose for him filing this petition is to alert the court of my situation whereby I will not be time barred under the one year statute of limitation.

18. A hearing on Williams' motion for enlargement of time took place on November 23, 2004 before the Honorable Michael Cherry. (Ex. 47.) Mr. Williams was not present nor was he represented

by counsel at this hearing. The trial court found good cause for the delay in that Mr. Williams alleges some ineffective assistance of counsel and the failure to inform him of his right to appeal and granted Mr. Williams motion, giving him an additional thirty days to file his petition for writ of habeas corpus. (Id.) An Order Granting Defendant's Motion for Enlargement of Time was filed on December 7, 2004 (Ex. 48); however, it does not appear to have been served on Mr. Williams as there is no accompanying Certificate of Service or Notice of Entry of Order.

19. The district court filed a written order dismissing the Petition for Writ of Habeas Corpus on March 4, 2005. (Ex. 54.)

20. Mr. Williams filed the timely Notice of Appeal on February 24, 2005. (Ex. 53.) The Nevada Supreme Court docketed this appeal as Case No. 44779.

21. On June 1, 2005, the Nevada Supreme Court denied the appeal and filed an Order of Affirmance. (Ex. 56.) Remittitur issued on June 28, 2005. (Ex. 57.)

22. Mr. Williams mailed his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody in the instant action on July 18, 2005.

II.

STATEMENT OF EXHAUSTION

Mr. Williams raised the basis for Ground One of his Amended Petition in his direct appeal to the Nevada Supreme Court. Consequently, that ground is exhausted. The remaining grounds in this petition were not raised in Mr. Williams's state court proceedings, but should be considered exhausted as he has no state court remedy available to him at this time.

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III.

GROUNDS FOR RELIEF

GROUND ONE

EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A FINDING OF FIRST DEGREE MURDER, DEPRIVING MR. WILLIAMS OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

The admissible evidence in this case failed to support the jury's verdict. Absent sufficient evidence a criminal judgment entered on a jury verdict denies due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. Jackson v. Virginia, 443 U.S. 307 (1979). Mr. Williams testified that he was not the shooter during the November 7, 2000 incident, and he did not fire a gun. This did somewhat contradict a prior statement to police that Mr. Williams fired two shots; however Mr. Williams testified that he did not accurately present the facts of the shooting when talking to the police. (Ex. 25, p. 95-97, 109.) At no time, either in his statement to the police, or in his testimony, did Mr. Williams indicate that he shot Reggie Ezell. (Ex. 25; Ex. 59.) Mr. Williams also steadfastly denied any involvement in the incident on November 8, 2000. (Ex. 25, p. 54, 99.)

The forensic evidence bore out Mr. Williams's testimony. The prosecution's ballistics expert, James Krylo, testified that the bullets recovered from the scene on November 7, 2000 did not conclusively come from one gun. (Ex. 23, p. 184.) Additionally, Mr. Krylo testified that the bullets from the November 8, 2000 incident were neither the same type, nor fired from the same gun as those found from the November 7, 2000 incident. (Ex. 23, p. 183.)

The hood worn by the gun man during the November 8, 2000 incident yielded no DNA. (Ex. 23, p. 149.) Footprint evidence at the scene did not match Mr. Williams's shoes. (Ex. 25, p. 40.) Fingerprints taken off a motion sensor out side of the trailer did not match Mr. Williams. (Ex. 25, p. 39.)

Eyewitness testimony regarding the November 8, 2000 incident consisted of the testimony of Janice Cerra that she did not actually see Mr. Williams's face (Ex. 23, p. 163); the testimony of Jimmy Polito that he recognized Mr. Williams from a "quick flash" just before he was shot, and he was not wearing any sort of hat (Ex. 23, p. 46); and the testimony of Ricky Polcastro that Mr. Williams was wearing some sort of cap, which he notice just before he was shot (Ex. 23, p. 66, 69). Police reports

taken at the time indicated that Mr. Polito and Mr. Polcastro both told police that the shooter had his face covered, but they believed it was Mr. Williams from his voice. (Ex. 25, p. 37.)

Because there was insufficient evidence to prove the charges, Mr. Williams's convictions do not meet the federal due process test for sufficiency of evidence to prove guilt set forth in Jackson v. Virginia, 443 U.S. at 307. Consequently, the writ should be granted and Mr. Williams's convictions vacated.

GROUND TWO

COUNSEL FAILED TO ADEQUATELY DEFEND MR. WILLIAMS DURING THE TRIAL PROCESS. ACCORDINGLY, MR. WILLIAMS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A defendant in a criminal case is entitled to the effective assistance of counsel during all phases of a criminal proceeding. Strickland v. Washington, 466 U.S. 668 (1984). Because of counsel's errors, as more particularly set forth below, Mr. Williams did not receive reasonably competent representation and was, therefore, prejudiced because had his lawyer performed competently he would not have been convicted. Accordingly, this court cannot conclude that the outcome was reliable.

a. Trial counsel failed to move to sever the charges in this case.

Mr. Williams was charged in two separate and distinct incidents which occurred on two separate dates. On November 7, 2000, the prosecution alleged charges of murder, attempt murder and conspiracy to commit murder with regard to the death of Reggie Ezell and shooting toward Darin Archie. On November 8, 2000, the prosecution charged two counts of attempt murder and firing into a structure for the non-fatal shootings of James Polito and Ricky Policastro. (Ex. 3.) Mr. Williams adamantly denied involvement in the November 8, 2000 incident. (Ex. 24, p. 54, 99.) Counsel for Mr. Williams never attempted to sever the charges. (Ex. 1.) The trial of these charges together prejudiced Mr. Williams by making it appear that he had been on some sort of shooting rampage. Additionally, as Mr. Williams had made statements to the police regarding the November 7, 2000 incident, but not the November 8, 2000 incident, the trial of these cases together significantly increased the likelihood of conviction on the November 8, 2000 charges. Reasonably competent counsel would have moved the

court to sever the two cases. Severance of the charges would have resulted in a more favorable outcome at trial.

b. Trial counsel failed to move to suppress the statement in this case and failed to argue to the jury that Mr. Williams's statement was involuntary.

Mr. Williams gave a video statement to the police indicating that he had been one of the people shooting on November 7, 2000. He gave transcribed portion of the statement more than an hour after he signed a waiver card, and after he had spoken with the officers. (Ex. 56, p. 2 and final page.) Mr. Williams testified at trial that he believed he was going to get some benefit from telling the police what they wanted to hear. (Ex. 25, p. 109.) Furthermore, Mr. Williams was already represented by attorney Steve Altig when he was interviewed, yet police failed to contact Mr. Altig. Despite the real possibility of coercion through the advanced methods of interrogation employed by the Las Vegas Metropolitan Police Department, and the failure of the police to contact Mr. Williams attorney before interviewing him, trial counsel never moved to suppress the statement, and never requested a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964). I

n fact, the court reminded defense counsel that he was entitled to a Jackson v. Denno hearing, and counsel declines - failing to object at all to the admission of the video interview. (Ex. 24, p. 31.) During trial, counsel failed to argue to the jury the coercive nature of the statement. The statement by Mr. Williams placing him at the scene and shooting was certainly the most damaging evidence against him. Reasonably competent counsel would have challenged the statement to the police. Successful suppression of the statement, or education of the jurors on the involuntary nature of the statement, would have resulted in a more favorable outcome to Mr. Williams at trial.

c. Trial counsel failed to move for a mistrial when one of the decedent's family members made a scene during opening arguments.

During the prosecutor's opening argument, a picture of Reggie Ezell was shown, resulting in one of his family members screaming and yelling prior to leaving the courtroom. (Ex. 22, p.10.) Defense counsel made a record of the incident at the end of the day (Ex. 22, p.243), but failed to move for a mistrial. That type of emotional outburst before the jury surely had a negative impact. Reasonable trial counsel would have moved for a mistrial. Failure to do so resulted in prejudice to Mr. Williams.

d. Trial counsel failed to call an eyewitness identification expert at trial.

The prosecution of Mr. Williams rested heavily upon eyewitness identification, which has been repeatedly found to be of questionable reliability. During the trial, a number of the witnesses were unable to identify Mr. Williams, or unable to identify him with certainty. For example, witness Richard Mantie failed to identify Mr. Williams. (Ex. 22, p. 104.) Olvia McBride testified that told her to pick the person who closely resembled the shooter, and then put that she was not 100% certain. (Ex. 22, p. 192.) Lee Saladiner testified that Mr. Williams was not either of the men he saw on November 8, 2000. (Ex. 22, p. 214.) James Polito testified he did not see who did the shooting on November 7, 2000. (Ex. 23, p. 16.) Yet, in spite of being shot in the neck right when he opened the door on November 8, 2000, Mr. Polito identified Mr. Williams. Given the varying nature of the eyewitness testimony, an eyewitness identification expert would have dramatically assisted in Mr. Williams's defense. The eyewitness identification expert could have testified about the effects of stress, gun focus, suggestibility and other issues with identification. Reasonably competent counsel would have hired an eyewitness identification expert to testify as a witness at trial to rebut the eyewitness testimony. Failure to call such a witness resulted in a less favorable outcome to Mr. Williams.

e. Trial counsel failed to call alibi witnesses at trial

Two witnesses, Blanche Williams (a cousin of Mr. Williams) and Donell Porte, would have testified that Mr. Williams was not at the trailer park on November 8, 2000. Defense counsel failed to call either witness to testify at trial. Failure to call these witnesses resulted in a less favorable outcome to Mr. Williams and fell below the standard for reasonably effective assistance of counsel.

GROUND THREE

THE FAILURE OF MR. WILLIAMS'S APPELLATE COUNSEL TO RAISE CERTAIN ISSUES ON APPEAL DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A defendant in a criminal case is entitled to the effective assistance of counsel during all phases of a criminal proceeding, including direct appeal. Smith v. Robbins, 528 U.S. 259, 285 (2002); Strickland v. Washington, 466 U.S. 668 (1984); Douglas v. California, 372 U.S. 353 (1963). Because of counsel's errors, as more particularly set forth below, Mr. Williams did not receive reasonably

competent representation. Had his appellate lawyer performed competently, there is more than a reasonable probability that the outcome of his appeal would have been different. The failures of appellate counsel undermine confidence in the outcome of the decision on appeal.

a. Appellate counsel failed to challenge the prosecutor eliciting testimony from Mr. Williams that he went to the trailer park to sell drugs.

During the course of Mr. Williams's testimony, the prosecutor asked Mr. Williams why he went to the trailer park daily. This question elicited the testimony from Mr. Williams that he went to the trailer park to sell drugs. Defense counsel made a contemporaneous object, stating that the prosecutor intentionally elicited that information, that the information constituted a prior bad act, and the information should not have been admitted. (Ex. 25, p. 102.) Despite the serious prejudice to Mr. Williams in this inadmissible evidence being presented to the jury, appellate counsel failed to raise this issue on appeal. Had this issue been raised, Mr. Williams likely would have had a better outcome at trial.

b. Appellate counsel failed to challenge prosecutorial misconduct during trial.

During the cross examination of Mr. Williams, the prosecutor repeatedly asked Mr. Williams if other witnesses were lying when they testified to different facts. (Ex. 25, p. 111.) Defense counsel made a contemporaneous and continuing objection to the questions. (Id.) Despite the clear impropriety of the prosecutor's questions, appellate counsel failed to raise this issue on appeal. Had this issue been raised, Mr. Williams likely would have had a better outcome at trial.

c. Appellate counsel failed to challenge the flight instruction given during trial.

When jury instructions were settled, trial counsel objected to instruction number 42 (Ex. 26), which instructed that the flight of a person immediately after the commission of a crime shows consciousness of guilt. (Ex. 25, p. 126.) Counsel pointed out that Mr. Williams left Las Vegas after a week following being accused of the crime. (Id.) Despite the improper giving of this instruction, appellate counsel failed to raise this issue on appeal. Had this issue been raised, Mr. Williams likely would have had a better outcome at trial.

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d. Appellate counsel failed to communicate with Mr. Williams or to provide Mr. Williams with his file.

Despite repeated requests and attempts to obtain his file in order to pursue post-conviction relief, appellate counsel refused to provide his file to Mr. Williams. (See Ex. 42, 43, 44, 45, 46.) Mr. Williams was forced to contact the Nevada Supreme Court himself to discover the fate of his appeal. (Ex. 58.) Notably, even efforts by current counsel to obtain the file from appellate counsel netted no documents beyond trial counsel's file. (Id.) Appellate counsel's dereliction in failing to communicate with Mr. Williams and failing to provide Mr. Williams with his file severely prejudiced Mr. Williams in his pursuit of post-conviction relief.

IV.

PRAYER FOR RELIEF

Petitioner Jamaar J. Williams respectfully prays this honorable Court to enter an order granting and directing the following:

1. That a writ of habeas corpus issue to have Mr. Williams brought before it, so that he may be discharged from the restraints attendant to his unconstitutional convictions;

2. That a hearing be held, at which proof may be offered concerning the allegations in this petition and any affirmative defenses raised by Respondents;

3. That Mr. Williams be granted the authority to obtain subpoenas for witnesses and documents, conduct depositions, and conduct any other discovery reasonably necessary to prove the facts alleged in this Petition; and

4. That this Court order such other and further relief as may be appropriate in the interests of justice.

DATED this 21st day of September, 2007.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: /s/ Linda Marie Bell
LINDA MARIE BELL
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on September 21, 2007, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Joseph W. Long
Deputy Attorney General
Special Prosecutions
1539 Avenue F, Suite 2
Ely, NV 89301

/s/ Susan Kline
An Employee of the Federal Public Defender's Office

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAMAAR J. WILLIAMS,
#1520438

Defendant.

Case No. C174590
Dept. No. XVII

4/24

JUDGMENT OF CONVICTION (JURY TRIAL)

The Defendant previously entered plea(s) of not guilty to the crime(s) of **MURDER WITH USE OF A DEADLY WEAPON; ATTEMPT MURDER WITH USE OF A DEADLY WEAPON; CONSPIRACY TO COMMIT MURDER and DISCHARGING FIREARM AT OR INTO STRUCTURE**, in violation of NRS 200.010, 200.030, 193.165, 193.330, 199.480, 202.285, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crime(s) of **COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON (Open Murder) (Category A Felony); COUNTS 2, 4 and 5 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony) and COUNT 3 - CONSPIRACY TO COMMIT MURDER (Category B Felony)**; and thereafter on the 22nd day of April, 2002, the Defendant was present in Court for sentencing with his counsel, JOSEPH SCISCENTO, Esq.; and good cause appearing therefor,

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THE DEFENDANT HEREBY ADJUDGED. guilty of the crime(s) as set forth in the jury's verdict and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee and $30,677.25 restitution, the Defendant is sentenced as follows:

Count 1 - to a MAXIMUM term of LIFE with a MINIMUM parole eligibility of TWENTY (20) YEARS in the Nevada Department of Corrections (NDC) plus an equal and CONSECUTIVE term of LIFE with a MINIMUM parole eligibility of TWENTY (20) YEARS for use of a deadly weapon ;

Count 2 - to a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a minimum parole eligibility of FIFTY-THREE (53) MONTHS in NDC plus an equal and CONSECUTIVE term of MAXIMUM TWO HUNDRED FORTY (240) MONTHS with the minimum parole eligibility of FIFTY-THREE (53) MONTHS for use of a deadly weapon CONSECUTIVE to COUNT I;

Count 3 - to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a minimum parole eligibility of TWENTY-SIX (26) MONTHS in NDC CONCURRENT with Count I;

Count 4 - to a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a minimum parole eligibility of FIFTY-THREE (53) MONTHS in NDC plus an equal and CONSECUTIVE term of MAXIMUM TWO HUNDRED FORTY (240) MONTHS with a minimum parole eligibility of FIFTY-THREE (53) MONTHS for use of a deadly weapon CONSECUTIVE to Count II;

Count 5 - to a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a minimum parole eligibility of FIFTY-THREE (53) MONTHS in NDC plus an equal and CONSECUTIVE term of MAXIMUM TWO HUNDRED FORTY (240) MONTHS with a minimum parole eligibility of FIFTY-THREE (53) MONTHS for use of a deadly weapon CONSECUTIVE to Count IV. Deft. to receive credit for time served on these charges.

DATED this 29th day of April, 2002.

DISTRICT JUDGE