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APPENDIX A

APPENDIX A

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 11 2020

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

LEMAR GANT,

Petitioner-Appellant,

v.

BRIAN WILLIAMS, SR.; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 19-15265

D.C. No.
2:16-cv-00528-JAD-NJK

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Submitted April 17, 2020**
San Francisco, California

Before: HAWKINS and PAEZ, Circuit Judges, and RESTANI,*** Judge.

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

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

*** The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

Lemar Gant appeals the district court’s denial of his 28 U.S.C. § 2254 petition challenging his conviction in Nevada state court for being an ex-felon in possession of a firearm. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Defense counsel’s failure to run a criminal background check on a witness whose incarceration impeached his exculpatory testimony was not constitutionally deficient. The adequacy of counsel’s witness investigation depends on whether it was “reasonable considering all the circumstances,” *see Strickland v. Washington*, 466 U.S. 668, 688 (1984), and the state court had reason to conclude that it was, *see Harrington v. Richter*, 562 U.S. 86, 105 (2011). After learning about the witness through Gant’s girlfriend, counsel sent an investigator to interview the witness, reviewed the investigator’s report, and shared the testimony with Gant himself. It was conceivable, if not entirely reasonable, then, for the state court to conclude that Gant’s nonchalant response to the expected testimony gave counsel no reason to doubt its veracity. *See Strickland*, 466 U.S. at 691 (“[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.”). And although the devastating impact of the witness’s previously unknown incarceration on Gant’s defense understandably has caused counsel to reconsider his vetting process, “the harsh light of hindsight” cannot alter our analysis. *See Bell v. Cone*, 535 U.S. 685, 702 (2002); *see also Richter*, 562 U.S.

at 105 (“The question is whether an attorney’s representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.” (quotation marks and citation omitted)).

We reach the same conclusion concerning defense counsel’s failure to ensure receipt of (or check the electronic docket for) the prosecution’s supplemental witness list. Although that filing likely would have alerted counsel to his own witness’s incarceration, the state court reasonably concluded that this omission did not render counsel’s performance constitutionally deficient. Gant offers no evidence that counsel had either seen the supplemental witness list, noticed an issue with receiving previous filings that he could have corrected, or otherwise learned about the prosecution’s additional witness. That the state court made no express finding on this point is of no moment. Already having failed to advance a more plausible explanation, Gant cannot litigate the issue anew. *See Richter*, 562 U.S. at 98–99. We must, and do, presume that the state court’s denial of relief included a rejection of this argument. *See id.* at 99–100.

AFFIRMED.

FILED

Gant v. Williams, 19-15265

MAY 11 2020

PAEZ, Circuit Judge, concurring:

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

I agree with my colleagues that the Nevada Court of Appeals' decision rejecting Gant's ineffective assistance of counsel claim was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). I arrive at this conclusion through a different path, however. I seriously question whether the state court's determination that trial counsel's defense strategy of calling a single witness without conducting any independent investigation of that witness's background or the story he offered was constitutionally reasonable. Despite my reservations, even assuming that counsel's performance was deficient, Gant's claim fails on *Strickland*'s prejudice prong, as the state court reasonably concluded. Gant argues that, but for trial counsel's error, he would have called one or more witnesses to testify that the officer planted the gun. But the evidence at trial was that it was "highly unlikely" that Gant's DNA could have been found on the gun without him having handled the gun himself. Thus, Gant has not shown it was "necessarily unreasonable" for the Nevada Court of Appeals to conclude that "he had failed to undermine confidence in the jury's" verdict. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011).

Accordingly, I concur in the judgment.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LeMar A. Gant,

Case No.: 2:16-cv-00528-JAD-NJK

Petitioner

Order Denying Petition

V.

[ECF No. 5]

Brian Williams, et al.,

Respondents

8 Petitioner LeMar Gant petitions under 28 U.S.C. § 2254 to challenge his 2012 state-court
9 judgment of conviction for being an ex-felon in possession of a firearm.¹ Several of Gant's
10 claims have been dismissed, and the others have been consolidated. I now deny the surviving
11 claims on their merits.

Background

13 On October 25, 2011, Gant was pulled over by Las Vegas Metropolitan Police Officer
14 David Denton for failing to use a turn signal. When the officer asked if there was anything
15 illegal in the car, Gant said there might be a smoking pipe but gave him permission to search
16 anyway. The officer searched the car and found a handgun in a black holster wrapped in a
17 bandana under the hood. Gant, an ex-felon, was charged with being an ex-felon in possession of
18 a firearm.²

1 ECF No. 5.

² Ex. 2; Ex. 25 (Tr. 7–17). The exhibits cited in this order, comprising the relevant state court record, are located at ECF Nos. 10–14.

1 Two weeks before trial, Gant's defense attorney disclosed four witnesses, including
 2 Matthew Merry.³ Two days later, the State filed a supplemental notice of witnesses that
 3 identified the Henderson Detention Center's custodian of records.⁴

4 At trial, counsel stipulated to Gant's status as an ex-felon.⁵ A forensic expert for the
 5 State testified that the major DNA profile pulled from the gun was consistent with Gant's DNA.⁶
 6 Gant called Merry as his only witness. He claimed responsibility for the gun being in the hood
 7 of the car on the day Gant was arrested, testifying that on the day of Gant's arrest, Gant gave
 8 Merry a ride and that Merry hid a gun, which he wrapped in Gant's bandana, in the hood of the
 9 car without Gant's knowledge.⁷ On cross-examination, the State asked Merry whether he'd be
 10 surprised to learn he had been in custody on the day in question and Merry responded that he
 11 would.⁸

12 Gant elected not to testify, and the defense rested.⁹ The State then called the custodian of
 13 records for Henderson Detention Center, who testified that Merry had been in custody on—and
 14 for several days around—the date he claimed to have placed the gun in the car.¹⁰ In closing
 15 arguments, defense counsel ignored Merry's testimony and asserted that “this is simply a DNA

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 19 ³ Ex. 19.

20 ⁴ Ex. 20.

21 ⁵ Ex. 21 (Tr. 3).

22 ⁶ Ex. 25 (Tr. 50–69).

23 ⁷ *Id.* (Tr. 82–90).

⁸ *Id.* at 98–99.

⁹ *Id.* at 104–06.

¹⁰ *Id.* at 107–09.

1 case,” and argued that the only thing tying Gant to the gun was DNA and that Gant’s DNA could
2 be explained by transfer from the bandana.¹¹ The jury found Gant guilty.¹²

3 Gant was sentenced, judgment was entered, and Gant appealed.¹³ The Nevada Supreme
4 Court affirmed.¹⁴ Gant filed a postconviction habeas petition in state court, which resulted in an
5 evidentiary hearing at which both Gant and his trial counsel testified.¹⁵ Following the hearing,
6 the trial court denied relief, and the Nevada Court of Appeals affirmed.¹⁶

7 Gant then initiated this federal habeas corpus petition. Three claims remain: (1) that
8 counsel improperly denied or influenced Gant to give up his right to testify by calling Merry; (2)
9 that counsel was ineffective for failing to investigate Merry before calling him to the stand; and
10 (3) that counsel was ineffective for failing to investigate the DNA evidence or to obtain and call
11 a DNA expert.¹⁷ I consider each in turn.

12 **Legal Standard**

13 28 U.S.C. § 2254(d) provides the legal standards for consideration of the merits of the
14 petition in this case:

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

18 (1) resulted in a decision that was contrary to, or involved an unreasonable
application of, clearly established Federal law, as determined by the
Supreme Court of the United States; or

20 ¹¹ *Id.* at 121.

21 ¹² *Id.* at 127; Ex. 27.

22 ¹³ Exs. 30, 31 & 33.

23 ¹⁴ Ex. 55.

¹⁵ Exs. 60, 66 & 71.

¹⁶ Exs. 81 & 91.

¹⁷ Gant’s seven remaining claims have been consolidated into these three claims.

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Antiterrorism and Effective Death Penalty Act (AEDPA) “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.”¹⁸ A federal court’s ability to grant a writ is limited to cases where “there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [United States Supreme Court] precedents.”¹⁹ The Supreme Court has emphasized “that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.”²⁰

A state-court decision is contrary to clearly established Supreme Court precedent within the meaning of 28 U.S.C. § 2254 “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.”²¹

A state-court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.”²² The “unreasonable application” clause

¹⁸ *Bell v. Cone*, 535 U.S. 685, 693–694 (2002).

¹⁹ *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

²¹ ²⁰ *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt”) (internal quotation marks and citations omitted.)

²³ ²¹ *Andrade*, 538 U.S. at 63 (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

²² *Andrade*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413).

1 requires the state court decision to be more than incorrect or erroneous; the state court's
2 application of clearly established law must be objectively unreasonable.²³

3 To the extent that the state court's factual findings are challenged, the "unreasonable
4 determination of fact" clause of § 2254(d)(2) controls on federal habeas review.²⁴ This clause
5 requires that the federal courts "must be particularly deferential" to state court factual
6 determinations.²⁵ The governing standard is not satisfied by a showing merely that the state
7 court finding was "clearly erroneous."²⁶ Rather, AEDPA requires substantially more deference:

8 [I]n concluding that a state-court finding is unsupported by
9 substantial evidence in the state-court record, it is not enough that
10 we would reverse in similar circumstances if this were an appeal
11 from a district court decision. Rather, we must be convinced that
12 an appellate panel, applying the normal standards of appellate
13 review, could not reasonably conclude that the finding is supported
14 by the record.²⁷

15 Under 28 U.S.C. § 2254(e)(1), state-court factual findings are presumed correct unless
16 rebutted by clear and convincing evidence. The petitioner bears the burden of proving by a
17 preponderance of the evidence that he is entitled to habeas relief.²⁸ State courts' decisions on the
18 merits are entitled to deference under AEDPA and may not be disturbed unless they were ones
19 "with which no fairminded jurist could agree."²⁹

20 ²³ *Id.* (quoting *Williams*, 529 U.S. at 409).

21 ²⁴ *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004).

22 ²⁵ *Id.*

23 ²⁶ *Id.* at 973.

24 ²⁷ *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

25 ²⁸ *Cullen*, 563 U.S. at 181.

26 ²⁹ *Davis v. Ayala*, ____ U.S. ___, 135 S. Ct. 2187, 2208 (2015).

Analysis of Gant's Claims

A. Grounds 2 and 9

3 In Ground 2, Gant alleges that his trial counsel was ineffective because he denied Gant
4 his right to testify in “exchange for” Merry’s perjured testimony.³⁰ In Ground 9, Gant asserts
5 that trial counsel unduly influenced him to give up his right to testify by promising that Merry’s
6 testimony would win the case.³¹ The Nevada Court of Appeals rejected these claims, holding
7 that Gant failed to “demonstrate counsel’s performance was deficient or resulting prejudice.”³²
8 It found that the trial court informed Gant he had the right to testify and that the decision whether
9 to testify was his alone, and that Gant acknowledged he had discussed the decision with counsel
10 and understood that he had to decide whether to testify.³³ The Court of Appeals also noted that
11 Gant’s lengthy criminal history would have been probed on cross-examination if he had testified.
12 This fact, combined with his statements to the trial court, led the Court of Appeals to conclude
13 that Gant failed to demonstrate that counsel improperly influenced him not to testify or that there
14 was a reasonable probability of a different outcome had counsel acted differently with respect to
15 Gant’s potential testimony.³⁴

Ineffective assistance of counsel claims are governed by *Strickland v. Washington*, which requires a petitioner to satisfy two elements to obtain habeas relief: (1) deficient performance by counsel and (2) prejudice.³⁵ Under the deficient-performance element, a petitioner must

30 ECF No. 5 at 8.

21 | ³¹ *Id.* at 47.

22 | ³² Ex. 91 at 4.

22

23 | 34 *Id*

³⁵ *Strickland v. Washington*, 466 U.S. 669, 687 (1984).

1 demonstrate that his counsel's performance was so deficient that it fell below an "objective
2 standard of reasonableness."³⁶ In reviewing counsel's conduct, a court "must be highly
3 deferential" and "indulge a strong presumption that counsel's conduct falls within the wide
4 range of reasonable professional assistance."³⁷ For the prejudice element, the court "must ask if
5 the defendant has met the burden of showing that the decision reached would reasonably likely
6 have been different absent [counsel's] errors."³⁸ Because of the deference owed to state-court
7 decisions on the merits and the deference owed to counsel's performance, the United States
8 Supreme Court has described federal judicial review of state court decisions about ineffective
9 assistance of counsel as "doubly deferential."³⁹

10 The state court's decision was not contrary to, or an unreasonable application of, clearly
11 established federal law, nor was it an unreasonable determination of the facts. The state courts
12 applied the correct standard and came to an objectively reasonable conclusion. To the extent
13 Gant alleges counsel "discouraged" him from testifying, it was not unreasonable for counsel to
14 have done so. Gant had several prior felonies, the nature and number of which could have been
15 discussed during cross-examination had he testified, so it was reasonable for counsel to avoid the
16 risk of prejudice from discussion of Gant's prior felonies.⁴⁰ To the extent Gant asserts counsel
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20 ³⁶ *Id.* at 688.

21 ³⁷ *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (citation and quotation marks omitted).

22 ³⁸ *Strickland*, 466 at 696.

23 ³⁹ *Knowles*, 556 U.S. at 123.

⁴⁰ Gant's position that counsel admitted that Gant was guilty of the crime charged is without merit because counsel did not admit that Gant was guilty of being an ex-felon in possession of a firearm. Counsel admitted only that Gant was an ex-felon, which was a fact that would have been easily proven—potentially by more prejudicial means—absent counsel's stipulation.

1 “prohibited” him from testifying, Gant acknowledged that he knew the decision to testify was his
 2 alone, and he did not at any point tell the trial court that he wanted to testify.⁴¹

3 Gant’s main argument is that he didn’t have a meaningful choice whether to testify
 4 because Merry’s testimony conflicted with Gant’s story that Officer Denton had planted the gun,
 5 and, even absent this conflict, Merry’s testimony destroyed the credibility of Gant’s version of
 6 events. While I am not certain that the state courts correctly concluded that Gant suffered no
 7 prejudice from counsel’s decision to have Merry testify, this claim need not be resolved on those
 8 grounds. Gant has not shown that counsel was deficient in calling Merry to testify, regardless of
 9 whether Gant would have testified absent Merry’s testimony or whether the outcome of the
 10 proceedings had a reasonable probability of being different if he had done so. Counsel testified
 11 at the evidentiary hearing that Merry had a reasonable story and that he thought it was an easier
 12 sell than Gant’s.⁴² Further, the state courts found counsel credible when he testified that he told
 13 Gant about Merry’s testimony and Gant expressed no confusion or hesitation about having
 14 Merry testify, nor did he give counsel reason to second guess the decision to call Merry.⁴³
 15 Contrary to Gant’s contention, the state courts were correct that Gant’s own conduct was a
 16 relevant part of the totality of the circumstances under which his counsel’s choices must be
 17 evaluated.

18 Given Gant’s failure to raise any concerns about Merry’s testimony and the strategic
 19 benefits counsel saw in calling Merry over Gant, counsel’s decision to call Merry did not fall
 20 below the wide range of reasonable representation.⁴⁴ The state courts were therefore not

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 23⁴¹ Ex. 25 (Tr. 105).

⁴² Ex. 71 (Tr. 46).

⁴³ *Id.* at 66–67; Ex. 91 at 3.

⁴⁴ Counsel testified that had Merry not testified, he would have called Gant and the other two witnesses who were in the car with Gant, who would have testified they saw the officer take the

1 objectively unreasonable in rejecting this claim, and Gant is not entitled to relief on Grounds 2
2 and 9.

3 **B. Grounds 3, 5, and 10**

4 In Ground 3, Gant asserts that his trial counsel was ineffective for knowingly introducing
5 Merry's perjured testimony, which Gant claims his trial counsel fabricated.⁴⁵ In Ground 5, Gant
6 asserts that counsel failed to conduct a basic investigation before trial, specifically about
7 Merry.⁴⁶ And in Ground 10, Gant asserts that counsel and the investigator failed to conduct a
8 criminal-records check of Merry or investigate why the custodian of records for Henderson
9 Detention Center was listed as a witness by the State.⁴⁷

10 The Nevada Court of Appeals rejected these claims, holding that Gant failed to
11 "demonstrate the district court misapplied the standard for ineffective assistance of counsel for
12 this claim."⁴⁸ It found that Gant's trial counsel told Gant of Merry's potential testimony and that
13 Gant never told counsel that Merry's version of events wasn't truthful. The Court of Appeals
14 noted that it wasn't until trial that defense counsel found out that Merry had actually been in the
15 Henderson Detention Center on the day Gant was arrested. Defense counsel testified that he
16 could have looked into the truthfulness of Merry's potential testimony, but Gant had given him
17 no reason to believe Merry's testimony would be untruthful. The Court of Appeals held that,
18 given Gant's knowledge about the truthfulness of Merry's potential testimony, Gant didn't meet
19 his burden to demonstrate that his counsel acted unreasonably.

20
21 bandana out of the back of the car, walk to the hood, and then return with the gun wrapped in the
22 bandana. Ex. 71 (Tr. 30–33).

23⁴⁵ ECF No. 5 at 14–18.

⁴⁶ *Id.* at 28–29.

⁴⁷ *Id.* at 52–53.

⁴⁸ Ex. 91 at 2–3.

1 As to Gant's argument that the district court misapplied the *Strickland* standard by
 2 considering Gant's conduct while evaluating counsel's performance, the Court of Appeals held
 3 that the district court properly considered all the circumstances of counsel's decision not to
 4 investigate.⁴⁹ This conclusion was not objectively unreasonable. First, there is no evidence that
 5 counsel fabricated Merry's testimony, coached him on what to say, or knew his testimony was
 6 going to be perjured. Additionally, except with respect to Merry, Gant's failure-to-investigate
 7 claim is conclusory. And Gant's argument that his conviction was obtained through the knowing
 8 use of perjured testimony is wholly meritless because there is no evidence that anyone lied about
 9 the evidence underlying Gant's guilt, and the only person who did lie—Merry—did so in an
 10 attempt to exonerate Gant. These claims therefore lack merit, and the state courts were
 11 reasonable in rejecting them.

12 As to the claim that counsel was ineffective for failing to investigate Merry, Gant has not
 13 identified any reason that counsel should have been aware of a reason to investigate Merry, other
 14 than the supplemental notice of witnesses. Gant, who admits that he knew Merry had not been
 15 around the car that day, could—and should—have given counsel reason to doubt Merry's
 16 testimony but failed to do so.⁵⁰ As to the supplemental notice, counsel testified that he did not
 17 receive or see the supplemental notice of witnesses before trial. The state courts did not make
 18 any explicit finding whether counsel was credible in this regard, but it is the petitioner's burden
 19 to show “there was no reasonable basis for the state court to deny relief.”⁵¹ The state courts were
 20 not objectively unreasonable in rejecting this claim because (1) it would have been reasonable to

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 23⁴⁹ *Id.* at n.1.

⁵⁰ *Id.* at 54–64.

⁵¹ See *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

1 deny relief if the state courts concluded that counsel never received the supplemental notice of
2 witnesses and (2) Gant points to nothing else in the case that could have alerted counsel to
3 Merry's impending perjury. Gant is thus not entitled to relief on Grounds 3, 5, and 10.
4 However, because the question is close, I will grant Gant a certificate of appealability with
5 respect to this claim.

6 **C. Grounds 4 and 8**

7 In Ground 4, Gant alleges that counsel failed to conduct an independent DNA test of the
8 evidence or call an expert witness to testify that the DNA on the firearm came from someone
9 using Gant's bandana to wipe down the firearm.⁵² In Ground 8, Gant asserts that a DNA expert
10 would have been useful at trial, that he was prejudiced because counsel argued that this was a
11 DNA case in closing arguments, and that if counsel had hired a DNA expert, he would have had
12 at least some defense after the Merry debacle.⁵³ The Nevada Court of Appeals rejected this
13 claim, holding that Gant failed to demonstrate that his counsel's decision not to retain a defense
14 DNA expert was deficient or resulted in prejudice.⁵⁴

15 Defense counsel testified at the evidentiary hearing that he didn't retain an expert because
16 he believed he could demonstrate that Gant's DNA was on the gun because of a transfer from the
17 bandana. The Court of Appeals noted that “[t]actical decisions such as this one ‘are virtually
18 unchallengeable absent extraordinary circumstances,’”⁵⁵ and that Gant failed to meet that
19 standard. It also held that Gant failed to demonstrate a reasonable probability of a different
20 outcome at trial had his counsel retained a DNA expert because Gant didn't show that further

21 _____
22 ⁵² ECF No. 5 at 21–25.

23 ⁵³ ECF No. 5 at 43–45.

24 ⁵⁴ Ex. 81 at 2.

25 ⁵⁵ *Id.* (quoting *Ford v. State*, 784 P.2d 951, 953 (1989)).

1 expert testimony would have been favorable to his defense.⁵⁶ This conclusion was not
2 objectively unreasonable.

3 At trial, the State's expert testified that the holster returned a mixture of DNA from at
4 least three persons, but, given the variety of DNA present, almost no one could be excluded as a
5 contributor—Gant included. But while the gun also had a mixture of DNA, a major DNA profile
6 could be pulled from it and that profile was consistent with Gant's DNA. The expert did not test
7 the bandana for DNA.⁵⁷ On cross-examination by defense counsel, the following exchange took
8 place:

9 Q: And it's also possible that the DNA could have come off of
10 the handkerchief and onto the weapon if there was a sufficient
11 amount of DNA on that handkerchief and that handkerchief was
12 used to – as being wrapped around the gun, it could be possible the
13 that DNA could have transferred that way, isn't that correct?

14 A: It's possible. But as I mentioned before, it's highly
15 unlikely because we are talking about touch DNA. And so we're
16 already starting out with a small amount of DNA, so for it to get
17 transferred it's unlikely that I would get a major DNA profile from
18 a person.

19 Q: But again, if that DNA – there was a sufficient or a high
20 amount of source of DNA on that handkerchief and that
21 handkerchief was wrapped around the weapon, that increases the
22 odds of seeing how much DNA would be transferred on the
23 weapon, isn't that correct?

24 A: Yes, it's possible. Yes.⁵⁸

25⁵⁶ *Id.*

26⁵⁷ Ex. 25 (Tr. 50–69).

27⁵⁸ *Id.* at 73.

1 On re-direct, the expert testified that if the DNA on the gun came from the bandana, she would
2 expect to find a stronger DNA profile on the holster, as well.⁵⁹ At the evidentiary hearing on
3 Gant's state habeas petition, counsel testified that he did not ask an expert to test the gun and
4 holster for the DNA of the other individuals in the car because he thought that Gant's DNA on
5 the gun could be explained by transfer from the bandana and he thought the other DNA on the
6 gun and holster were irrelevant.⁶⁰

7 Gant has shown neither prejudice nor deficient performance. He has not shown that an
8 independent DNA test or expert testimony would have resulted in evidence in his favor. The
9 State's expert testified that it was extremely unlikely that DNA could transfer in the manner
10 asserted by counsel, and Gant has not shown that another DNA expert would have disagreed.
11 Speculation that another expert would have testified in petitioner's favor is insufficient to
12 establish prejudice.⁶¹ Gant therefore cannot show that he was prejudiced by the lack of a DNA
13 expert.

14 It was also a reasonable strategic decision for counsel to focus on creating doubt through
15 cross-examination rather than expert testimony that might have been easily debunked, especially
16 where, as here, the theory was not very strong. "In many instances cross-examination will be
17 sufficient to expose defects in an expert's presentation. When defense counsel does not have a
18 solid case, the best strategy can be to say that there is too much doubt about the State's theory for
19 a jury to convict."⁶² Gant's counsel got the expert to admit that DNA *could* be transferred from
20 the bandana to the gun, though it was unlikely. This may be the most Gant could have hoped for,

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⁵⁹ *Id.* at 79.

⁶⁰ Ex. 71 (Tr. 8).

⁶¹ *Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001).

⁶² *Harrington v. Richter*, 562 U.S. 86, 111 (2011).

1 and he has not established here or before the state courts that alternative testimony that would
2 have been favorable to his defense was available. The state courts were thus not objectively
3 unreasonable in rejecting Gant's ineffective-assistance-of-counsel claim based on the failure to
4 obtain a DNA expert. Accordingly, Gant is not entitled to relief on Ground 4 or 8.

5 **Certificate of Appealability**

6 To proceed with an appeal, Gant must receive a certificate of appealability.⁶³ Generally,
7 a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
8 certificate of appealability.⁶⁴ "The petitioner must demonstrate that reasonable jurists would find
9 the district court's assessment of the constitutional claims debatable or wrong."⁶⁵ To meet this
10 threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable
11 among jurists of reason, that a court could resolve the issues differently, or that the questions are
12 adequate to deserve encouragement to proceed further.⁶⁶

13 I have considered the issues raised by Gant and whether they satisfy the standard for
14 issuance of a certificate of appealability, and I conclude that only one meets this standard. I
15 therefore grant a certificate of appealability only for Gant's claim that counsel was ineffective for
16 failing to investigate Merry prior to calling him as a witness at trial.

17 **Conclusion**

18 IT IS THEREFORE ORDERED that the petition (ECF No. 5) is DENIED, and this
19 action is DISMISSED WITH PREJUDICE.

20

21⁶³ 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950–951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551–52 (9th Cir. 2001).

22⁶⁴ *Allen*, 435 F.3d at 951; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

23⁶⁵ *Allen*, 435 F.3d at 951 (quoting *Slack*, 529 U.S. at 484).

⁶⁶ *Id.*

1 IT IS FURTHER ORDERED that a certificate of appealability is GRANTED with
2 respect to Gant's claim that counsel was ineffective for failing to investigate Merry prior to
3 calling him at trial and is DENIED in all other respects.

4 The Clerk of the Court is directed to ENTER JUDGMENT accordingly and CLOSE
5 THIS CASE.

6 Dated: January 14, 2019

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8 U.S. District Judge Jennifer A. Dorsey

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APPENDIX C

APPENDIX C

Original

LeMar Giant
 Name 49097
 Prison Number S.D.C.C.
 Place of Confinement

FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
MAR - 9 2016	
CLERK US DISTRICT COURT	
DISTRICT OF NEVADA	
BY:	DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LeMar A. Giant, Petitioner,)
 (Full Name))
 vs.)
Brian Williams, Sr., Respondent,)
 (Name of Warden, Superintendent, jailor or
 authorized person having custody of petitioner))
 and)
The Attorney General of the State of Nevada,)
 (NOT SENTENCED TO DEATH)

2:16-cv-00528-JAD-NJK

PETITION FOR A
 WRIT OF HABEAS CORPUS
 PURSUANT TO 28 U.S.C. § 2254
 BY A PERSON IN STATE CUSTODY

1. Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: 8th Jud. Dist Ct, Clark County, Nevada.
2. Full date judgment of conviction was entered: 10 / 12 / 2012 (month/day/year)
3. Did you appeal the conviction? Yes No. Date appeal decided: 9 / 19 / 2013.
Remittitur: October 17, 2013
4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state court?
 Yes No. If yes, name the court and date the petition was filed: 8th Jud. Dist Ct, Clark Co, NV. 3 / 21 / 2014. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? Yes No. Date the appeal was decided: 11 / 19 / 2015. Have all of the grounds stated in this petition been presented to the state supreme court? Yes No. If no, which grounds have not? N/A
5. Date you are mailing (or handing to correctional officer) this petition to this court: 03 / 04 / 2016.
 Attach to this petition a copy of all state court written decisions regarding this conviction.

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? Yes
 _____ No. If no, what was the prior case number? N/A. And in what court was
 the prior action filed? N/A.

Was the prior action _____ denied on the merits or _____ dismissed for procedural reasons (check one). Date of decision: /N/A. Are any of the issues in this petition raised in the prior petition? _____ Yes No. If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this successive petition? _____ Yes _____ No.

7. Do you have any petition, application, motion or appeal (or by any other means) now pending in any court regarding the conviction that you are challenging in this action? _____ Yes No.

If yes, state the name of the court and the nature of the proceedings: _____

N/A

8. Case number of the judgment of conviction being challenged: C-11-278233.

9. Length and terms of sentence(s): 96 months to 240 months.

10. Start date and projected release date: _____.

11. What was (were) the offense(s) for which you were convicted: Ex-Felon in Possession of Firearm - Habitual Treatment.

12. What was your plea? _____ Guilty Not Guilty _____ Nolo Contendere. If you pleaded guilty or nolo contendere pursuant to a plea bargain, state the terms and conditions of the agreement: _____

N/A

13. Who was the attorney that represented you in the proceedings in state court? Identify whether the attorney was appointed, retained, or whether you represented yourself *pro se* (without counsel).

	Name of Attorney	Appointed	Retained	<i>Pro se</i>
arraignment and plea	<u>Benjamin Durham</u>	<input checked="" type="checkbox"/>	_____	_____
trial/guilty plea	<u>Carl Arnold</u>	_____	<input checked="" type="checkbox"/>	_____
sentencing	" "	_____	<input checked="" type="checkbox"/>	_____
direct appeal	" "	_____	<input checked="" type="checkbox"/>	_____
1st post-conviction petition	<u>Gregory Couper</u>	<input checked="" type="checkbox"/>	_____	_____
appeal from post conviction	" "	<input checked="" type="checkbox"/>	_____	_____
2nd post-conviction petition	<u>N/A</u>	_____	_____	_____
appeal from 2nd post-conviction	<u>N/A</u>	_____	_____	_____

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Sixth and Fourteenth Amendment right to U.S. Constitution, based on these facts:

Trial Counsel Was Ineffective In
Failing To Conduct A Thorough And
Proper Investigation In Preparing
For Trial, IN Violation Of The
Sixth And Fourteenth Amendment
To The United States Constitution

Giant asserts trial counsel was ineffective in failing to conduct a proper and thorough investigation in preparation for trial.

A. Failure To Investigate:

According to officer Denton's arrest report, Denton states:

"I have had numerous previous
dealings with Giant reference
firearms related charges..."

////
////

Exhaustion of state court remedies regarding Ground 1:

1 From the onset of Grant's arrest, Grant had
2 informed counsel of the numerous previous
3 dealings/arrest and convictions initiated by
4 officer Denton. These prior dealings extend
5 over a ten (10) year period. Despite counsel's
6 knowledge of the history between Grant and
7 officer Denton, counsel failed to secure the
8 information regarding these encounters.

9 In 2002 and 2003, officer Denton conducted
10 vehicle stops on Grant for the purpose of
11 harassment. In 2004, Grant was arrested
12 and eventually sentenced to county jail
13 time. Officer Denton was a participating officer
14 in the case. In 2006, officer Denton was
15 an officer involved with Grant in Case No.
16 #06FO0185X. Furthermore, between 2001 and
17 2011, Grant was arrested or cited by officer
18 Denton for numerous charges which were
19 not prosecuted.

20 Trial counsel's failure to secure this vital
21 information for impeaching the officer clearly
22 demonstrates deficient performance in the
23 preparation for trial, as the entire case
24 hinged on officer Denton's credibility.

25 ////

26 ////

27 ////

ADDIT^{ED}

1 The arrest report of officer Denton
2 provides:

3 "I have received information from numerous
4 sources that Giant always carries a gun with
5 him. One source stated Giant always hides his gun
6 under the hood of the vehicle because he says
7 the cops never look under the hood. "

8 Giant made several request of counsel to
9 seek out and discover exactly whom these
10 "numerous sources" are, however, counsel did
11 not file a motion for discovery demanding the
12 State to disclose the names of the source of
13 information under Brady.

14 During trial, officer Denton testified
15 to the information:

16 Q. Officer Denton, as Mr. Arnold just
17 asked you, you had information that
18 night that Mr. Giant was carrying a
19 firearm?

20
21 A. Yes I did.

22
23 The introduction of evidence regarding
24 these individuals whom told Denton that
25 Giant always carries a gun was also
26 vital to Denton's credibility.

1 Counsel's actions, or lack thereof, have
2 created unfair prejudice upon Gant. Counsel's
3 failure to obtain the vital facts, information
4 and evidence that was vital to the impeachment
5 of the State's leading witness, ultimately
6 allowed his testimony to be deemed reliable
7 to the jury because it was not properly
8 subjected to adversarial scrutiny, thus,
9 preventing counsel from conducting a proper
10 cross-examination of Denton.

11 The irreparable prejudice undermines
12 the confidence in the jury's verdict and
13 violates the Sixth and Fourteenth Amend-
14 ment to the U.S. Constitution.

15 Relief is warranted

16 ||||

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► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Raised on post-conviction

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: _____

If yes, name of court: 8th Jud. Dist. Ct. date petition filed 3/21/14.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A

If yes, name of court: N/A date petition filed / /.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A

State concisely every ground for which you claim that the state court conviction and/or sentence is

unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 6th and 14th Amendment right to U.S. Constitution, based on these facts:

Trial Counsel has Ineffective In Denying Defendant His Right To Testify In Exchange for The Introduction Of Perjured Testimony, In Violation Of The Fifth, Sixth And Fourteenth Amendment

Grant asserts he was denied his fifth, sixth and fourteenth amendment rights when counsel prohibited him from testifying on his own behalf in exchange for introducing known perjured testimony.

During the Preliminary Hearing, Officer Denton testified that Grant had consented to the search of the vehicle. However, at the suppression hearing, Grant testified he only gave Officer Denton consent to search his personal property because the vehicle did not belong to him.

Counsel, was aware the entire case hinged on the credibility of Officer Denton.

Exhaustion of state court remedies regarding Ground 2:

- Direct Appeal:

1 versus Gant, on the issue of the scope
2 of the consent to search of the vehicle.

3 Gant, charged with ex-felon in possession
4 of a firearm, advised counsel that he wanted
5 to testify at trial because he had nothing
6 to lose as the jury would already know
7 he was an ex-felon.

8 The State, outside the presence of the
9 jury, made representations to the court
10 that Gant was stipulating at trial to his
11 felony status. Counsel agreed to these
12 representations as opposed to listing the
13 specific felonies. The stipulation was
14 not for the sole purpose of not having to
15 list his prior felonies, but also for Gant
16 to testify as to the scope of his consent
17 for Officer Denton's search.

18 During trial, Denton testified that Gant
19 gave him consent to search the vehicle
20 without limitations. When the State
21 rested its case, the court was in recess.
22 During recess, Gant advised counsel he
23 wanted to testify to the fact that he
24 did tell Denton he could only search his
25 own personal belongings because the
26 vehicle was not his. Gant wanted
27 to testify that any DNA matching him

1 him came from the bandana which was
2 his that he left in the vehicle before it was
3 stolen from the original owner. Therefore,
4 any DNA on the gun was transferred
5 from the bandana when the person who
6 stole the vehicle, used the bandana to
7 wrap the gun and hide it under the
8 hood.

9 Counsel told Gant he wouldn't be testifying
10 because he [counsel] had a witness
11 that could destroy Denton's testimony.
12 When Gant asked who the witness was,
13 counsel stated: "Don't worry. Just trust
14 me on this." Gant continued to
15 argue with counsel about testifying on
16 his own behalf because he wanted the
17 jury to know officer Denton had been arrest-
18 ing him for over 10 years.

19 Counsel replied by advising Gant he
20 would not call him to the stand to
21 testify and to "trust him", ... "we got
22 this case beat."

23 Counsel called Matthew Merry as the
24 sole defense witness. Mr. Merry testified
25 he placed the firearm under the hood of
26 the car on October 25th, 2011.

1 Prior to the defense resting its case, the
2 district court canvassed Gant on his right to
3 testify. As a result of counsel's demand not
4 to testify based on Matthew Merry's testi-
5 mony, Gant reluctantly elected not to
6 testify.

7 Unknown to Gant, Mr. Merry's testimony
8 was perjured because the State called
9 a rebuttal witness, Sgt. Herrera, whom
10 testified that Mr. Merry was in the
11 custody of Henderson jail on October 25th,
12 2011.

13 Gant was the most important witness
14 to the proceedings. His testimony would
15 have put testimony in dispute and
16 questioned the credibility of the States
17 witnesses and evidence. Without
18 question, Gant's right to testify should
19 not have been exchanged or substituted
20 for the perjured testimony of Matthew
21 Merry.

22 Counsel did not "advise" Gant not to
23 testify, counsel blatantly told Gant he
24 was not testifying. However, Gant ~~also~~
25 was unaware he was being prohibited
26 from testifying so counsel could know-
27 ingly present the perjured testimony of
28

1 Mr. Merry, as Giant was left with
2 counsel's words of; "Don't worry"...
3 "we got this case beat."

4 When considering Giant stipulating to
5 his ex-felon status, Giant testifying would
6 not have been a "suicidal trial strategy",
7 but yet, was extremely vital to the scope
8 of consent and Denton's credibility.

9 In then counsel prohibited Giant from
10 testifying in exchange for presenting
11 known perjured testimony, counsel's
12 actions, or lack thereof, created unfair
13 prejudice as the perjured testimony
14 destroyed all sense of credibility that
15 Giant could have offered and bolstered
16 the State's evidence and witness
17 testimony.

18 Counsel's performance fell below an objective
19 standard of reasonableness amounting to the
20 clearest form of deficient performance and
21 creating extreme prejudice, in violation of the
22 Sixth and Fourteenth Amendment, by denying
23 Giant his Fifth Amendment right to testify.

24 Relief is warranted

25 1111

26 1111

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Raised on post conviction

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: N/A

If yes, name of court: 8th Jud. Dist. Ct. date petition filed 3/21/14.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A

If yes, name of court: N/A date petition filed / /.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

N/A

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two

extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th and 14th Amendment right to U.S. Const., based on these facts:

Trial Counsel Was Ineffective
In Knowingly Introducing The
False And Perjured Testimony Of
Matthew Mervy, In Violation Of
The Sixth And Fourteenth
Amendment To The U.S. Const.

Gant asserts trial counsel created a conflict of interest by introducing perjured testimony to advance his own ~~self~~ self-interest.

A. Perjured Testimony:

When the trial commenced, counsel introduced himself and gave the names of the potential witnesses that may be called by the defense to include: Matthew Mervy, Jeamar Jones, Don Thurlow and Annie Galante. Gant was unaware of why Mr. Mervy would be called as a witness because Gant knew

Exhaustion of state court remedies regarding Ground 3:

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

1 Mr. Merry was not present during the
2 traffic stop, arrest and had absolutely no
3 connection to the case.

4 Grant, unaware of what testimony Mr.
5 Merry could offer, counsel opened its case
6 by calling Mr. Merry to the stand. Mr. Merry
7 testified he was with Grant on October 25, 2011
8 and he had a pistol he was trying to sell.
9 He grabbed the pistol with a bandana out
10 of the clothing in the back seat and
11 wrapped it up and put it under the driver's
12 seat, but found another place and put it
13 under the hood of the car.

14 Mr. Merry testified he discovered Grant
15 had been arrested after talking with Grant's
16 girlfriend. He testified he told officer Denton
17 at a later date, that he put the gun under
18 the hood of the car and that Grant knew
19 nothing about it.

20 On cross-examination, the State went
21 on to question Mr. Merry's credibility of his
22 whereabouts.

23 Q. Okay, Mr. Merry, would you agree
24 with me it's impossible to be
25 two places at one time?

26 A. It's impossible to be two places?

1 Q. Yeah. Would you agree with me?

2 A. Yes

3 Q. Now, isn't it true you were
4 actually arrested on October 22nd
5 of 2011?

6 A. No.

7 Q. It's not true?

8 A. No

9 Q. Would it surprise you to hear that
10 you were actually in custody in the
11 Henderson Detention Center from
12 October 22nd --

13 A. No, I wasn't.

14 Q. -- until November 18th of last year?

15
16 The State called a rebuttal witness,
17 Sgt. Herrera, of the Henderson jail, who
18 testified that Mr. Merry was booked into
19 the Henderson jail October 22nd, 2011
20 until November 18th of 2011, for a period
21 of twenty-five uninterrupted days.

22 During closing arguments, counsel
23 made a futile argument to the jury to
24 not hold Mr. Merry's perjured testimony
25 against Gant because Mr. Merry told lies
26 to the jury, the Court and counsel --
27 "he was found out, disregard his testimony."

1 During the State's cross-examination of
2 Mr. Merry, it was revealed that Mr. Merry met
3 with counsel and the investigator;

4 Q. Okay. Do you recall giving a state-
5 ment just about a week or two ago
6 to Mr. Arnold and Mr. Giant's
7 investigator?

8 A. Yes.

9
10 Giant asserts it was at this meeting
11 when Mr. Merry, counsel and investigator
12 agreed to coach Mr. Merry with the facts
13 surrounding the case to ensure his
14 testimony would be consistent and
15 credible to the jury.

16 Mr. Merry's entire testimony was a
17 fabrication by counsel because counsel
18 knew that Mr. Merry was not present
19 during the stop and had no connection to
20 the case. Furthermore, it would appear
21 very inconceivable for the State to know
22 Mr. Merry was in custody on the day of the
23 incident and to have a rebuttal witness on
24 stand-by to refute Mr. Merry's entire testi-
25 mony, and yet, counsel not know the same
facts about his star witness. Thus, either
counsel knowingly introduced false and

1 perjured testimony, or counsel was grossly
2 ineffective in failing to investigate the
3 validity of Mr. Merry's story. Either way,
4 counsel's actions, or lack thereof, demonstrate
5 deficient performance that ultimately violated
6 Grant's constitutional rights under the
7 Sixth and Fourteenth Amendment to a
8 right to effective assistance of counsel, the
9 right to a fair trial and equal due process
10 of the law.

11 The perjury was apparent to the jury
12 and it destroyed counsel's credibility. Most
13 detrimental was the fact that such perjury
14 inclined the jury against leniency for
15 Grant. Thus, under the circumstances,
16 Grant did not receive a fair trial.
17 Furthermore, at sentencing, the court
18 accused Grant of arranging the perjured
19 testimony. However, counsel advised the
20 court that Grant had no knowledge Mr.
21 Merry would be called to give such testi-
22 mony. Also, the State advised the court
23 that after conducting an investigation, there
24 was no evidence that Grant had knowledge
25 of the perjured testimony.

26 As Grant vehemently deny having
27 knowledge of the perjured testimony and

1 there being no evidence to prove.
2 otherwise, the introduction of this perjured
3 testimony ~~and~~ rest squarely on
4 counsel.

5 The prejudicial effect is obvious as such
6 perjured testimony created unfair prejudice
7 to Giant and destroyed counsel's credibility.
8 Counsel advised the jury of other potential
9 witnesses to be called. However, once the
10 jury heard the perjured testimony of Mr.
11 Memy, any other defense witness would be
12 viewed as a liar, thus, Giant was denied
13 the chance to present credible witnesses.

14 Counsel's actions "corrupted the truth
15 seeking function" and cannot be deemed
16 a sound tactical decision in accordance
17 with the Sixth and Fourteenth Amendment.
18 Counsel violated the law and got caught.

19
20 Relief is warranted

21 ||||

22 ||||

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26 ||||

Yes No. If no, explain why not:

Raised on post-conviction

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: _____

If yes, name of court: 8th Jud. Dist. Ct. date petition filed 3/21/14

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A _____

If yes, name of court: N/A date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

N/A _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A _____

WHEREFORE, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 4

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th and 14th Amendment right to U.S. Const., based on these facts:

Trial Counsel has Ineffective In Failing To Conduct An Independent DNA Testing Of The Evidence And Failing To Present Expert Witnesses, In Violation Of The Sixth And Fourteenth Amendment, U.S. Const.

A. Independent DNA Testing:

In the instant case, Officer Denton discovered the firearm wrapped in a bandana under the hood of the vehicle driven by Giant.

During an hearing held February 6, 2012, the State made representations of the DNA testing being completed. At the suppression hearing on June 15, 2012, the State made representations to the DNA evidence from the firearm being a match for Giant.

Prior to trial, Giant advised counsel he had borrowed the same vehicle prior to the

1 instant case and left his bandana and a
2 few items in the car when he returned it
3 to the owner. Shortly there-after, the
4 vehicle was stolen and recovered. He then
5 borrowed the vehicle to move his belongings
6 and was stopped by officer Denton.

7 Giant did not dispute the bandana
8 belonging to him, however, denied touching
9 or having personal knowledge of the firearm
10 being under the hood of the car. Giant's
11 theory is that whomever stole the vehicle
12 used his bandana to wipe the firearm
13 down and then wrapped the gun and
14 holster in the bandana before hiding it
15 under the hood. This would explain the
16 mixture of DNA profiles and Giant's DNA
17 being a dominate contributor.

18 Giant specifically requested of counsel
19 to conduct an independent DNA test on
20 the firearm, bandana and holster to
21 demonstrate his DNA was present on
22 the firearm by way of being transferred
23 from the bandana and not a direct
24 touch.

1111

1111

1111

B. Expert Witness:

Gant, in requesting of counsel to conduct an independent DNA testing of the evidence, he also requested counsel to secure and present expert witnesses on DNA evidence. Both of these request went ignored by counsel.

Counsel was well aware of the State's intentions to present an expert witness on the DNA evidence tested and alleged to have matched Gant's. The State called expert witness, Beata Vida, Forensic Scientist II, to testify to the DNA evidence collected in the case. She testified she obtained a mixture of profiles of DNA from the holster that at least three individuals, and Gant could not be excluded as a contributor to the mixture.

Ms. Vida testified she tested the magazine and got an inconclusive DNA profile. However, she did not conduct a DNA testing on the bandana and she did not get a buccal swab from anyone else to eliminate as potential contributors to the DNA profiles from the firearm.

1 Had counsel conducted an independent
2 DNA test of the evidence, an expert
3 could have tested the bandana for DNA
4 to support the theory of "transfer"
5 evidence. The conclusion would have
6 been used to refute the State's expert
7 witness on her lack of testing the
8 bandana and supported the fact that
9 Giant's DNA only came from the
10 bandana used to wipe the gun down
11 and wrap the holster before hiding

12 An independent test of the firearm
13 would have revealed exactly where
14 Giant's DNA was located as Ms. Vida
15 testified she did not know whether
16 Giant's DNA was found on the trigger,
17 slide or grip.

18 Finally, had counsel conducted an
19 independent DNA testing on the gun
20 and holster, counsel would have been
21 able to run a DNA comparison on the
22 mixture of DNA profiles which contained
23 at least three different individuals.
24 These three other individuals were
25 potential witnesses or suspects to the
26 theft of the gun or whom actually was
27 in possession of the gun. Most importantly,

1 One of these individuals could have
2 testified that Giant did not possess the
3 weapon, thus, bolstering his "transfer" of
4 DNA from the bandana theory.

5 Without question, counsel was at least
6 obligated to conduct independent testing of
7 the evidence and then consult with an
8 expert to prepare a theory of defense
9 surrounding the results.

10 The prejudicial effect of counsel's overall
11 deficient performance is obvious and
12 irreparable as Giant was denied his right
13 to present an adequate theory to his defense
14 and put the State DNA evidence through a
15 proper adversarial testing, especially, as
16 it could not be disputed that Giant's DNA
17 could have been a product of "transfer"
18 evidence.

19 Furthermore, as Ms. Vida did not attempt
20 to run the mixture of profiles through a
21 State and nationwide data base to
22 determine who the other contributor's of
23 DNA could have belonged too, counsel's
24 failure to conduct this independent
25 procedure prejudiced Giant to the highest
26 degree because counsel's actions, or lack
27 thereof, eliminated the opportunity at

1 discovering potential witnesses and
2 suspects.

3 The actions of counsel violates the
4 Sixth and Fourteenth Amendment to the
5 U.S. Constitution.

6

7 Relief is warranted

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Exhaustion of state court remedies regarding Ground 4

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: _____

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: N/A

If yes, name of court: 8th Jud. Dist. Ct.

date petition filed 3/21/14

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A

If yes, name of court: N/A

date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 5

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th and 14th Amendment right to U.S. Constitution, based on these facts:

Trial Counsel Was Ineffective For Failing To Conduct A Thorough And Proper Investigation In Preparing For Trial

Trial counsel was ineffective for failing to conduct basic investigations which would have prevented the debacle that was Matthew Memy's testimony. Trial counsel's failure to investigate the veracity of Memy's testimony resulted in his being revealed as a liar in front of the jury and thereby destroying the credibility of Grant's entire defense.

On June 26, 2012, counsel for Grant filed a defense notice of witnesses listing Matthew Memy as a witness. Counsel also provided the State with a copy of a recorded statement from Memy. Two days later, the State supplemented its witness list with the Custodian of Records for Henderson Detention Center.

ADDITIONAL FACTS OF THE CASE:

1 Gant's case had no connections to the
2 City of Henderson whatsoever until the
3 State amended its witness list. This fact,
4 combined with the timing of the State
5 amending its witness list in conjunction
6 with the disclosure of Merry's statement
7 should have caused any reasonable
8 attorney to investigate why the State
9 would call a witness from the Henderson
10 Detention Center. The implication is obvious,
11 Merry could not be telling the truth about
12 being with Gant on October 24th or 25th.

13 Had this simple inquiry been conducted,
14 trial counsel would have been obligated
15 not to call Merry as a witness and
16 thereby would have prevented the entire
17 destruction of the defense's credibility
18 in front of the jury.

19 The prejudice to Gant is unmistakable.
20 Merry was the only defense witness;
21 he was literally the entire defense case.
22 Merry lied, and the jury knew it. The
23 only impression that the jury could
24 possibly have been left with was that
25 Gant's defense had no credibility.
26 The jury went into deliberations believing
27 that Gant's defense was a farce.

1 Clearly, the credibility of Giant's defense
2 was obliterated by the calling of Memy
3 as a witness. Any alternative defense
4 Giant could have put forward, however,
5 credible, would have been better for him
6 provided the alternative defense was not
7 proven to be an obvious lie.

8 The failure of trial counsel to properly
9 vet Memy and to investigate why the
10 State was calling someone from Henderson
11 Detention Center was deficient performance.
12 There can be no dispute that had counsel
13 undertaken this investigation, Memy would
14 never have been allowed to testify.

15 Memy's testimony destroyed the
16 credibility of Giant's entire defense - a
17 devastating prejudice from which Giant
18 could not possibly recover sufficient to
19 receive a fair trial.

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Exhaustion of state court remedies regarding Ground 5

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Raised on post-conviction

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: N/A

If yes, name of court: St. Jud. Dist. Ct. date petition filed 3/21/14.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A

If yes, name of court: N/A date petition filed / /.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 6

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fourth Amendment right to U.S. Constitution, based on these facts:

The Stop Performed By Officer Dentoni Was Pretextual And Illegal

In the instant case, Officer Dentoni asserted four (4) total reasons that he made the traffic stop. Officer Dentoni reported and testified that the vehicle was stopped because: (a) it failed to use a blinker while turning, (b) did not have a front license plate, (c) did not have a front license plate light and (d) was seen in front of a known drug house.

a. Based On Officer Dentoni's Testimony, It Would Have Been Impossible For Him To See Whether The Impala Signaled The Turn Or Not

The officer testified he was traveling southbound on Mountain Vista, passing

ADDITIONAL FACTS OF THE CASE:

1 through the light at Harmon, where he
2 allegedly saw the vehicle fail to signal
3 a turn. The officer alleged the vehicle
4 was heading westbound on Mountain Vista,
5 in the right hand lane, and turned south-
6 bound onto Harmon. However, this is
7 factually impossible because the place
8 where Mr. Gant was eventually pulled
9 over is north of the intersection at
10 Mountain Vista and Harmon. The vehicle
11 made a right turn and headed north, not
12 south. This is impossible for the officer
13 to have seen whether or not the vehicle
14 used a right turn signal as he was pass-
15 ing through the light at Harmon.

16 The vehicle was behind and to the
17 left of the officer, thus, he could not have
18 seen the blinker on the right side of
19 Gant's vehicle. Therefore, he could not
20 have legally pulled Gant over for that
21 reason.

22 b. It Is Legal For A 2007 Chevrolet
23 Impala To Not Have A Front License
24 Plate Mounted On The Bumper And
25 The Front License Plate Was Displayed
26 On The Front Dashboard.

1 If a vehicle is not manufactured to
2 display a front license plate, then it is
3 optional for the owner of the vehicle
4 to display a front license plate. NRS 482.
5 274(2). The 2007 Impala is not man-
6 ufactured with a front license bracket
7 on the front bumper.

8 Furthermore, a front license plate was
9 displayed on the front dashboard of the
10 vehicle. As there was no violation of
11 law, the officer could not have legally
12 pulled Grant over for a failure to display
13 a front license plate.

14 C. There Is No Law Regarding
15 Front License Plate Lights

16 NRS 484D.115(4) requires all cars must
17 have a white light illuminating the rear
18 registration or license plate.

19 The officer could not have legally
20 pulled Grant over for a failure to
21 have a front license plate light because
22 it is legal to not have a front license
23 plate light.

24 ||||

25 ||||

1 d. It Is Not Illegal To Be Parked
2 In Front Of A "Known Drug
3 House" And Making A Stop Of
4 That Is Pretextual

5 Officer Dentoni's arrest report asserts
6 that part of the reason he pulled the
7 vehicle over was because he saw it
8 parked in front of a "known drug house"
9 earlier in the night.

10 Pulling a car over because it was
11 parked in front of an alleged drug house
12 is a pretextual stop. There is nothing
13 illegal about being parked on the street
14 in front of an alleged drug house and
15 the officer could not have legally pulled
16 the vehicle over for that reason.

Exhaustion of state court remedies regarding Ground 6

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: _____

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: _____

Raised on Direct Appeal

If yes, name of court: N/A date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

N/A

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: _____

N/A

If yes, name of court: _____ date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

N/A

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: _____

N/A

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 7

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my Fourth Amendment right to U.S. Constitution, based on these facts:

The District Court Erred In
Denying Mr. Giant's Motion
To Suppress

Mr. Giant's Motion to Suppress challenged the sufficiency of the alleged consent Officer Denton received to search the vehicle. Here, the district court reasoned that there was no probable cause for a search warrant but, based on the credibility of the officer and the later acquired DNA evidence, determined that Giant consented to a search of the entire vehicle.

Given the totality of the circumstances, the district court erred in determining Mr. Giant consented to the search of the entire vehicle because: (a) based on the officer's testimony, he is not credible and (b) the district court should not have taken the later acquired DNA evidence into account

ADDITIONAL FACTS OF THE CASE:

1 when making a determination on
2 whether consent was given.

3
4 a. Officer Denton Is Not Credible

5
6 Officer Denton is not credible because
7 there are inconsistencies in his explana-
8 tion of the events on the night in question.

9 First, it was shown the officer's expla-
10 nation of how he observed the vehicle
11 fail to signal is factually impossible.
12 He alleged multiple times that he saw the
13 vehicle turn southbound onto Mountain
14 Vista but somehow made the traffic stop
15 a few blocks north of Mountain Vista
16 and Harmon.

17 Additionally, the officer's testimony
18 changes in regards to how the stop was
19 conducted. In the arrest report and at
20 the preliminary hearing, he states that
21 Mr. Grant was in the driver's seat.
22 However, during the evidentiary hearing
23 he testified that Mr. Grant got out of the
24 car and walked to the back of the vehicle
25 before he could approach.

26 The officer changed his testimony
27 because in the second scenario no one

1 else is around to hear the conversation
2 that transpired when Mr. Gant allegedly
3 consented to the search of the entire
4 vehicle. It is illogical that Officer Denton
5 would allow Mr. Gant to get out of the
6 car and approach him when he allegedly
7 had information that Mr. Gant was
8 carrying a firearm. This portion of
9 Officer Denton's testimony is a fabrica-
10 tion!.

11 Furthermore, Denton states that he
12 spoke to the registered owner of the car,
13 Anni Galante, in his report. However, later
14 testified that he did not speak with Ms.
15 Galante until later on, when she was
16 picking up her car. Denton reported he
17 observed and recovered the firearm from
18 under the hood and that later on another
19 officer took photographs. Somehow, the
20 pictures depict the handgun wrapped in
21 a bandana hidden in the engine block,
22 the alleged original hiding place, after
23 Denton said he recovered it.

24 Denton testified that he was given
25 consent without parameters but both
26 Mr. Gant and Mr. Jones were adamant
27 that Mr. Gant only consented to a

1 Search of his personal items in the
2 back seat of the car. Denton was told
3 by Mr. Gant multiple times that he did
4 not consent to the search of the entire
5 vehicle, only a search of his personal
6 items, and that he would need to contact
7 Ms. Galante to get consent to search
8 the vehicle, but Denton did not do so.

9 Denton failed to record Mr. Gant's
10 consent to search the entire vehicle,
11 although he had the ability to do so and
12 did record the passenger's statements,
13 because Mr. Gant never gave Denton
14 consent to search the entire vehicle.

15 Lastly, Denton testified that he had
16 only dealt with Mr. Gant on one previous
17 traffic stop during trial. However, the
18 arrest report alleges that Denton has had
19 numerous dealings with Mr. Gant, which
20 is the truth. Denton has been involved
21 in numerous other cases with Mr. Gant
22 and fabricated his sworn testimony so
23 that he would not appear biased against
24 Mr. Gant. Denton has arrested both
25 Mr. Gant and his wife on numerous
26 occasions. Denton has a personal
27 vendetta against Mr. Gant because of a

1 federal criminal case where charges
2 against Mr. Gant were dropped because
3 it was shown that Denton had lied
4 about circumstances of Mr. Gant's
5 arrest. These acts of contrivance are
6 just efforts of revenge on the part of
7 Denton. Based on the totality of
8 Denton's report and testimony, he is
9 not credible and the district court
10 erred by considering him credible.

11
12 b. The District Court Should Not Have
13 Considered The Recently Acquired
14 DNA Evidence When Determining
15 The Extent Of The Consent
16 Given To Officer Denton

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18 The district court determined that
19 because DNA had come back to Mr. Gant,
20 his version of the night in question was
21 not credible. Taking the new DNA
22 evidence into account when determining
23 whether Mr. Gant's Fourth Amendment
24 rights were violated is a violation of his
25 due process. The court should not have
26 considered the DNA evidence in coming to
27 its conclusion and erred by doing so.

Exhaustion of state court remedies regarding Ground 7

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: _____

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: _____

Raised on Direct Appeal

If yes, name of court: N/A date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A

If yes, name of court: N/A date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 8

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 4th Amendment right to U.S. Constitution, based on these facts:

The District Court Erred In Denying Gant's Post-Conviction Petition Because Gant Received Ineffective Assistance Of Counsel Due To Trial Counsel's Failure To Consult And Utilize A Defense DNA Expert

In the instant case a defense DNA expert would have been particularly useful and should have been employed by trial counsel. The failure to do so fell below an objective standard of reasonableness and should be considered ineffective.

The State's DNA expert Beata Vida, testified that the type of DNA at issue was 'touch' or 'transfer' DNA - meaning skin cell or sweat - which is generally found in far smaller usable quantities than rich sources of DNA like blood and saliva. Ms. Vida explained that she identified a

ADDITIONAL FACTS OF THE CASE:

1 mixture of DNA from at least three
2 contributors, and that Giant could not be
3 excluded as a contributor to the DNA
4 mixture.

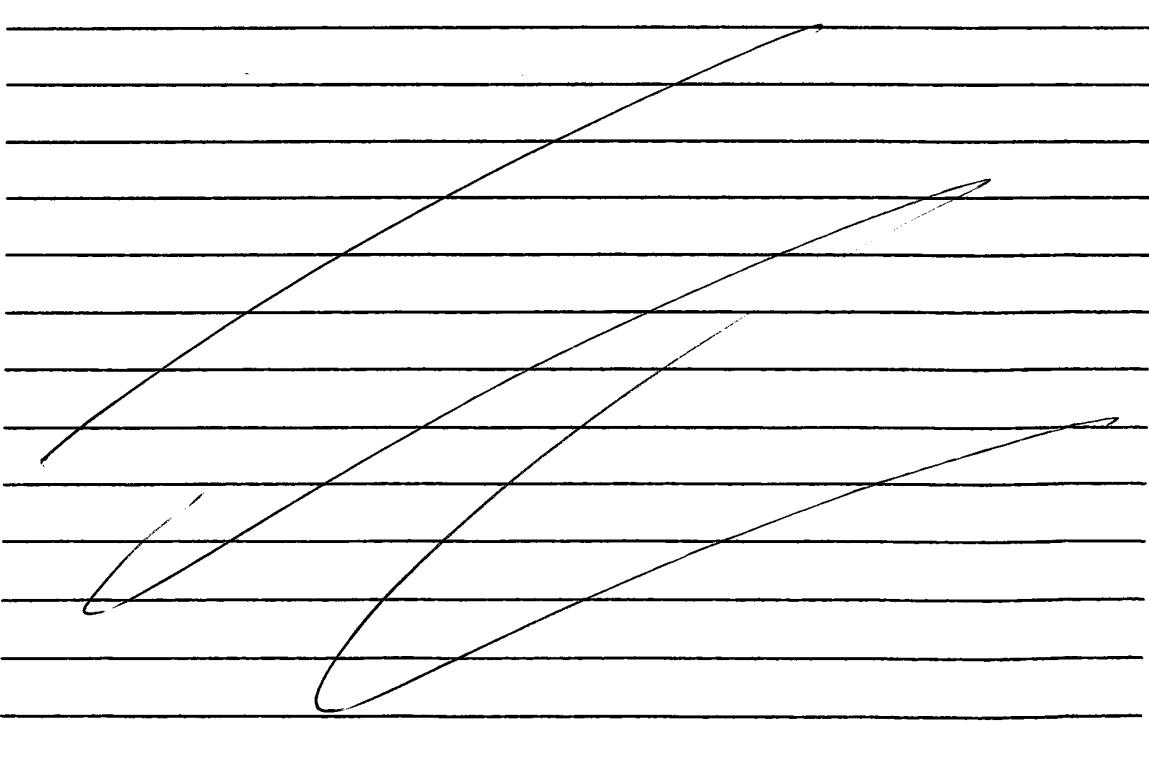
5 Trial counsel determined that a defense
6 DNA expert was not necessary because
7 they had an explanation (Matthew Meny's
8 testimony regarding his use of the
9 bandana from Giant's pile of clothing)
10 for how Giant's DNA came to be on the
11 firearm that was located. However, trial
12 counsel admitted that a defense expert
13 would have been useful to help explain
14 the DNA issues in the case and could
15 have made Giant's case stronger by
16 analyzing the DNA of the other
17 convicted felon that was present in the
18 vehicle with Giant.

19 The prejudice caused by the absence
20 of a defense DNA expert was apparent
21 when trial counsel began his closing
22 argument by saying "This case is a DNA
23 case." Trial counsel's decision to argue
24 the DNA evidence in closing was due
25 to the plan to rely on Matthew Meny's
26 testimony was shot down in flames, as
27 discussed, infra.

1 Had trial counsel employed a defense
2 DNA expert, Gant would have had at least
3 some portion of a defense that was not
4 utterly tainted by the decimation of
5 Matthew Memy. When viewed in context
6 of the entirety of Gant's defense, the
7 prejudice of not having a DNA expert is
8 magnified substantially.

9 A defense expert (DNA) would have,
10 shifted the focus of Gant's defense
11 away from the Memy mess to the
12 forensic science and produced a far
13 better result

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Exhaustion of state court remedies regarding Ground 8

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Raised in post conviction

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: _____

If yes, name of court: 8th Jud. Dist. Ct. date petition filed 3 / 21 / 14

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 9

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my
6th Amendment right to U.S. Constitution,
based on these facts:

The District Court Erred In Denying
Grant's Post-Conviction Petition Because
Grant Received Ineffective Assistance Of
Counsel When Trial Counsel Unjustly
Influenced Grant To Give Up His
Right To Testify

In this case, Grant never had a meaningful choice whether to testify or not. By the time he was canvassed on his choice, the testimony of Matthew Memy had already been elicited. Prior to trial, Grant's trial counsel had given him confident assurance that Memy's testimony would win the case. Since the defense theory Grant wished to put forward conflicted with the expert testimony of Memy, Grant's "choice" boiled down to this: either testify (and put forth conflicting defense theories to the jury) or don't testify (and hope that Memy's testimony

1 would carry the day per the advice of
2 counsel). As things turned out, both
3 "choices" ultimately left Gant with a
4 defense posture that utterly lacked
5 credibility.

6 In this case, we know exactly what
7 defense Gant wished to present to
8 the jury because of the fact that he
9 testified at a pretrial hearing. On June
10 5, 2012, Gant testified at an evidentiary
11 hearing on a motion to suppress evidence.
12 Gant testified the vehicle was not his.
13 It belonged to a friend and had recently
14 been stolen. Gant had just retrieved
15 the car from the person who owned it
16 and used it to transport some of his
17 belongings.

18 Trial counsel had heard Gant's version
19 of the facts at the motion to suppress
20 hearing and had also heard Merry's
21 pretrial interview. Therefore, trial
22 counsel was aware that the two stories
23 did not match up. Gant has told his
24 trial counsel that he wished to testify
25 on his own behalf. However, counsel
26 told him not to testify because Merry
27 would destroy the State's evidence and

1 win the case.

2 Such overly confident assurance from
3 a retained attorney would unduly
4 influence any criminal defendant, and
5 in fact unduly influenced Giant. Trial
6 counsel's performance in this regard
7 was deficient for failing to honor the
8 defendant's desire to testify, providing
9 overly confidence and assurance of
10 success, and then knowingly eliciting
11 testimony that conflicted with the
12 testimony trial counsel knew the
13 defendant wanted to give.

14 The prejudice is obvious and sub-
15 stantial. Meny's testimony conflicted
16 with what Giant wanted to say and
17 Meny's testimony was proven false.
18 Giant was therefore left with a com-
19 pletely worthless "choice" having been
20 deprived of the ability to put forth
21 any defense having a shred of
22 credibility. As Giant put it, whether
23 he testified or not, he was "damned if
24 I do, damned if I don't." This is not
25 a meaningful choice.

26 The issue ~~is~~ of prejudice is not
27 whether the jury would have believed
28

1 Gant's version over Memi's version.
2 Rather, the issue is whether the
3 destruction of the defense's credibility
4 due to Memi's testimony undermined
5 confidence in the outcome at trial.

6 It seems self-evident that putting forth
7 a perjury-free defense is far more
8 conducive to the defendant's entitlement
9 to a fair trial. It simply cannot be said
10 that Gant received a fair trial and a
11 meaningful choice of whether to testify
12 on his own behalf due to the over-
13 confident influence and ill-prepared
14 strategy of his trial counsel which
15 resulted in such a poor showing.

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Exhaustion of state court remedies regarding Ground 9

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Raised on post conviction

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: _____

If yes, name of court: 8th Jud. Dist. Ct. date petition filed 3/21/14

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 10

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th Amendment right to U.S. Const., based on these facts:

The District Court Erred by Misapplying The Strickland Standard In Rendering Its Decision That Giant Failed To Establish Ineffective Assistance Of Counsel Based On Trial Counsel's Failure To Adequately Investigate Matthew Merry And Discover That He Was Lying

Giant was denied the effective assistance of counsel because trial counsel failed to conduct an adequate investigation into the sole defense witness, Matthew Merry. Trial counsel's investigation undeniably fell below an objective standard of reasonableness under the first prong of Strickland.

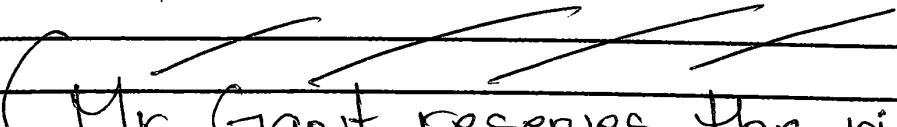
First, trial counsel and/or his investigator failed to conduct the most basic vetting of Matthew Merry by failing to conduct a

ADDITIONAL FACTS OF THE CASE:

1 criminal records check.

2 Second, trial counsel apparently failed
3 to learn the identity and relevance of
4 a key State's witness - the representa-
5 tive from Henderson Detention Center -
6 despite the State having disclosed this
7 witness on a properly filed Supplemental
8 witness list.

9 Third, the district court misapplied
10 the Strickland standard when it found
11 counsel was not deficient. The court
12 failed to employ an objective standard
13 of review in its assessment of counsel's
14 performance.

15 
16 (Mr. Gant reserves the right
17 to extend and provide complete facts
18 on this claim when he receives all
19 available documents. The lack of
20 a "Word-by-word" recitation of the
21 facts should not be construed as a
22 waiver to any claim, facts or arguments
23 and a deviation or change of the original
24 arguments. All documents have not
25 been made available to Mr. Gant)

Exhaustion of state court remedies regarding Ground 10

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Raised on post conviction

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: _____

If yes, name of court: 8th Jud. Dist. Ct. date petition filed 3/21/14.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: N/A

If yes, name of court: _____ date petition filed / /.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: N/A

If yes, did you raise this issue? Yes No. If no, explain why not: _____

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: N/A

Eric Douglas #50824

(Name of person who wrote this
complaint if not Plaintiff)

LeMar Giant

(Signature of Plaintiff)

LeMar Giant #49091

3-1-16

(Date)

NA

(Signature of attorney, if any)

(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.**
See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at B.D.C.C. on 3-1-16.
(Location) (Date)

LeMar Giant
(Signature)

49091
(Inmate prison number)

“LEGAL MAIL”



3763

35-2170809

\$5.00

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1001

U.S. District Court
STATE OF NEVADA
333 LAS VEGAS Blvd South
Las Vegas NV 89101

Priority Mail	03/08/2016	\$0.00
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App.0078

APPENDIX D

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEMAR ANTONIO GANT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67885

FILED

NOV 19 2015

TRACIE L. LINDENAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Appellant Lemar Antonio Gant argues the district court erred in denying the claims of ineffective assistance of counsel he raised in his March 21, 2014, petition. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but

Court of Appeals
of
Nevada
00-19478

15-901436

review the court's application of the law to those facts *de novo*. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Gant argues his trial counsel was ineffective for failing to retain a DNA expert witness. Gant fails to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he decided not to retain a defense DNA expert because he believed the defense could demonstrate Gant's DNA was on the firearm due to transfer from Gant's bandana. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Gant does not demonstrate. Gant fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought a defense DNA expert because he does not demonstrate that further expert testimony regarding DNA would have been favorable to his defense. Therefore, the district court did not err in denying this claim.

Second, Gant argues his trial counsel was ineffective for failing to properly investigate a defense witness, who was revealed during trial to have testified untruthfully. Gant fails to demonstrate his counsel's performance was deficient or resulting prejudice. "[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *State v. Lowe*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting *Strickland*, 466 U.S. at 691). A petitioner may not properly "accuse his counsel of ineffectiveness when it is clear that [the petitioner] himself was responsible for any prejudice which resulted." See *Leonard v. State*, 114 Nev. 639, 657, 968 P.2d 1220, 1233 (1998), modified on other grounds by *Collman v. State*, 116 Nev. 687, 7 P.3d 426 (2000).

At the evidentiary hearing, counsel testified Gant's girlfriend informed him of a potential defense witness, Matthew Merry. Merry then informed counsel he had accepted a ride from Gant on the day in question, that unknown to Gant he had placed the firearm in the vehicle, and had used Gant's bandana when concealing the firearm. Counsel testified he informed Gant of the substance of Merry's potential testimony and Gant had never informed him Merry's version of events was untruthful. During trial, it was revealed Merry had actually been in the Henderson Detention Center during the incident, and therefore, could not have been in Gant's vehicle on that day. Counsel acknowledged at the evidentiary hearing he could have performed further actions to ascertain the truthfulness of Merry's potential testimony, but Gant had given him no reason to believe Merry would testify untruthfully. The district court concluded Gant knew Merry's testimony was false, but did not disclose this fact to counsel. Given Gant's own knowledge of whether Merry's potential testimony was truthful, we conclude Gant did not meet his burden to demonstrate counsel acted unreasonably.¹ See *id.*

¹Gant also asserts the district court misapplied the *Strickland* standard for this claim because the court considered Gant's conduct when evaluating the performance of Gant's trial counsel. However, defense counsel's "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." *Strickland*, 466 U.S. at 691. As the district court determined Gant knew Merry's testimony was false and failed to inform his counsel of that knowledge, the district court properly considered Gant's conduct when evaluating Gant's trial counsel's performance. Accordingly, Gant fails to demonstrate the district court misapplied the standard for ineffective assistance of counsel for this claim.

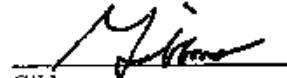
In addition, Gant fails to demonstrate a reasonable probability of a different outcome had counsel performed further investigation regarding Merry because there was strong evidence of his guilt presented at trial, given DNA consistent with Gant's was discovered on the firearm and the firearm was hidden in the vehicle driven by Gant. Therefore, the district court did not err in denying this claim.

Third, Gant argues his trial counsel was ineffective for improperly influencing Gant to decline to testify in his own defense. Gant asserts he wished to testify that a police officer had planted the firearm in the vehicle, but he was forced to decline to testify because his testimony would have conflicted with Merry's testimony. Gant fails to demonstrate counsel's performance was deficient or resulting prejudice. The trial court informed Gant he had the right to testify and the decision whether to testify was his alone. Gant acknowledged he had discussed testifying with counsel and he understood he had to decide whether to testify. In addition, Gant had a lengthy criminal history and he would have been subject to questioning regarding those convictions. See NRS 60.095. Given Gant's statements to the trial court and his criminal history, he fails to demonstrate counsel improperly influenced him to decline to testify or there was a reasonable probability of a different outcome had counsel performed different actions with respect to Gant's potential testimony. Therefore, the district court did not err in denying this claim.

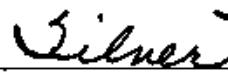
Fourth, Gant argues the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. Gant fails to demonstrate any errors, even if considered cumulatively, amount to ineffective assistance of counsel sufficient to warrant vacating the

judgment of conviction. Therefore, Gant fails to demonstrate the district court erred in denying this claim.

Having concluded Gant is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.


Gibbons C.J.


Tao J.


Silver J.

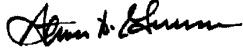
cc: Hon. Carolyn Ellsworth, District Judge
Coyer Law Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX E

APPENDIX E

1 JOC

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CLERK OF THE COURT

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -VS-

10 LEMAR ANTONIO GANT
11 #0858905

12 Defendant.

13 CASE NO. C278233-1

14 DEPT. NO. V

15 JUDGMENT OF CONVICTION

16 (JURY TRIAL)

17
18 The Defendant previously entered a plea of not guilty to the crime of
19 POSSESSION OF FIREARM BY EX-FELON (Category B Felony) in violation of NRS
20 202.360; and the matter having been tried before a jury and the Defendant having been
21 found guilty of said crime, thereafter on the 8th day of October, 2012, the Defendant was
22 present in court for sentencing with his counsel CARL ARNOLD, ESQ., and good cause
23 appearing,

24
25 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense as set forth in
26 the jury's verdict under the SMALL HABITUAL Criminal Statute and, in addition to the

27 //

1 \$25.00 Administrative Assessment Fee the Defendant is SENTENCED as follows: TO
2 A MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM
3 parole eligibility of NINETY-SIX (96) MONTHS in the Nevada Department of Corrections
4 (NDC), with THREE HUNDRED FIFTY-NINE (359) DAYS credit for time served. DNA
5 Fee WAIVED.

6
7
8 DATED this 11/14 day of October, 2012.
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CAROLYN ELLSWORTH
DISTRICT JUDGE