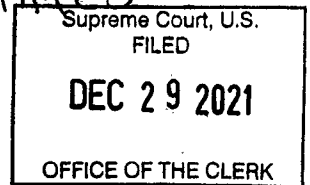


No. 21-7898 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Emilio Evalio Arenas, ID 1051999
Petitioner



vs.
THE STATE OF NEVADA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO
THE SUPREME COURT OF NEVADA

PETITION FOR WRIT OF CERTIORARI

Emilio Evalio Arenas, ID 1051999
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89070

QUESTIONS PRESENTED FOR REVIEW

- (1) After the Supreme Court of Nevada reversed the petitioner's conviction on Count 4 in C-B-293029-1, did the Court's Order remanding the petitioner to be "resentenced" to the count as it originally appeared in the indictment - without a new trial - violate the petitioner's rights under Amendments Five, Six, and Fourteen?
- (2) Did the Supreme Court of Nevada conclude erroneously that the Eighth Judicial District Court did not err in finding that the petitioner abandoned his vehicle, and that the "abandoned property [was] not subject to Fourth Amendment protections" as a result.
- (3) Did the Supreme Court of Nevada err when it concluded that the petitioner was not prejudiced by cumulative prosecutorial misconduct?

PARTIES TO THE PROCEEDINGS

Emilio EVALIO ARENAS, ID 1051999, Petitioner
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070

Pro Se representation for Petitioner

Attorney General Aaron D. Ford
Attorney for the State of Nevada
100 North Carson Street
Carson City, Nevada 89701

TABLE OF CONTENTS

<u>CONTENTS</u>	<u>PAGE(S)</u>
QUESTIONS PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDINGS	iii
INDEX OF AUTHORITIES	vi-x
CITATION OF OPINIONS AND ORDER IN CASE	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	3,4
STATEMENT OF THE CASE	5
EXISTENCE OF JURISDICTION BELOW	6-8
REASONS FOR GRANTING THE WRIT	9-12
A. THE SUPREME COURT OF NEVADA HAS DECIDED MULTIPLE FEDERAL QUESTIONS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT	
ARGUMENTS AMPLIFYING REASONS FOR WRIT	13
I. THE SUPREME COURT OF NEVADA ERRED WHEN IT REMANDED THE PETITIONER TO BE "RESEN- TENCED," WITHOUT A NEW TRIAL, TO A COURT THAT WAS REVERSED BECAUSE OF AN ABUSE OF THE DISTRICT COURT'S DISCRETION	13-18
II. THE SUPREME COURT OF NEVADA'S CONCLUSION THAT THE EIGHTH JUDICIAL DISTRICT COURT DID NOT ERR IN FINDING THAT THE PETITIONER VOLUNTARILY ABANDONED HIS 1997 LAND RO- VER WAS BASED ON AN UNREASONABLE DETER- MINATION OF FACTS...	18-33

TABLE OF CONTENTS, cont.

CONTENTS

PAGE(S)

III THE SUPREME COURT OF NEVADA'S CON- CLUSION THAT THE PETITIONER WAS NOT PREJUDICED BY CUMULATIVE PROSECUTOR- IAL MISCONDUCT IS ERRONEOUS	33-37
CONCLUSION	37-39
PROOF OF SERVICE	39-40
APPENDIX TO PETITION	AA1-15

INDEX of AUTHORITIES

<u>JURISPRUDENCE</u>	<u>PAGE(S)</u>
<u>Alleyne v United States</u> , 570 US 99, 104 S.Ct. 2151, 186 L.Ed 2d 314 (2013)	10, 13
<u>Apprendi v New Jersey</u> , 530 US 466, 120 S.Ct. 2346, 147 L.Ed 2d 438 (2000)	10, 15, 37
<u>Arizona v Gant</u> , 556 US 332, 339 (2009)	11, 26
<u>Barron v State</u> , 105 Nev. 767, 780, 783 P.2d 444, 452 (1989)	33
<u>Big Pond v State</u> , 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)	17
<u>Caldwell v Mississippi</u> , 472 US 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed 2d 231, 239 (1985)	12, 36
<u>Carroll v United States</u> , 267 US 132, 48 S.Ct. 1280, 69 L.Ed. 543, TD 3686 (1929)	11, 31
<u>Chambers v Mississippi</u> , 410 US 284 (1973)	38
<u>Chimel v California</u> , 395 US 752, 762-63, 89 S.Ct. 2034, 2039-40, 23 L.Ed 2d 685 (1969)	26
<u>Davis v Ayala</u> , 135 S.Ct. 2187, 2198, 192 L.Ed. 2d 323 (2015)	12, 18, 20 33
<u>Elkins v United States</u> , 364 US 206, 80 S.Ct. 1437 (1960)	11, 25, 32
<u>Ex parte Jackson</u> , 96 US 727, 733, 24 L.ed 877, 878	29
<u>Ford v Wainwright</u> , 477 US 399, 106 S.Ct. 2895, 91 L.Ed. 2d 335 (1986)	12, 38
<u>Giordanoello v United States</u> , 387 US 480, 486	11, 31, 32
<u>Haines v Kerner</u> , 404 US 519, 92 S.Ct. 594, 30 L. Ed. 2d 652	2
<u>Harris v Reed</u> , 489 US 255, 260, 109 S.Ct. 1038, 1042, 103 L.Ed 2d 308, 315 (1989)	17.

INDEX OF AUTHORITIES, cont.

<u>JURISPRUDENCE</u>	<u>PAGE(S)</u>
<u>Illinois v Gates</u>	11
<u>Katz v United States</u> , 389 US 347, 19 L. Ed 2d 576, 80 S. Ct. 507	11, 29
<u>Lee v Kemna</u> , 534 US 362, 122 S. Ct. 877, 151 L. Ed 2d 820 (2002)	17
<u>Lewis v United States</u> , 385 US 206, 210, 17 L. ed 2d 312, 315, 87 S. Ct. 424	29
<u>Lockyer v Andrade</u> , 538 US 63, 73, 123 S. Ct. 1166, 1173, 155 L. Ed 2d 144, 156 (2003)	16
<u>Miller-El v Dretke</u> , 545 US 231, 240-65, 125 S. Ct. 2317, 2325-40, 162 L. Ed 2d 196, 214-30 (2005)	32
<u>NRB v Pittsburgh S.S. Co.</u> , 340 US 498, 71 S. Ct. 483, 95 L. Ed 479, 27 L. RRM (BNA) 2382, 19 Lab Cas. (CCH) ¶166192 (1951)	18
<u>Nevada v Lloyd</u> , 129 Nev. Adv. Rep. 79 @ 750, 312 P. 3d 467, 474 (2013)	31
<u>O'Neal v McAninch</u> , 513 US 432, 436, 115 S. Ct. 992, 994 130 L. Ed. 2d 947, 952 (1995)	15
<u>Parle v Runnels</u> , 505 F. 3d 922, 927 (9th Cir. 2007)	38
<u>People v Tully</u> , 54 Cal. 4th 952, 1026 to 1027, 282 P. 3d 173, 242 (2012)	35
<u>Preston v United States</u> , 376 US 364, 367, 11 L. Ed. 2d. 777, 784, 84 S. Ct. 881 (1964)	11, 26
<u>Rios v United States</u> , 364 US 253, L. ed 2d 1688, 80 S. Ct.	

INDEX OF AUTHORITIES, cont.

JURISPRUDENCE

	<u>PAGE(S)</u>
(from <u>Rios</u>) 1431,	11, 28, 30, 32
<u>Skinner v Railway Executives Ass'n</u> , 489 US 602, 614, 109 S.Ct. 1402, L.Ed. 2d 639 (1989)	11, 25, 32
<u>State v Lianbre</u> , 116 Nev. 1124, 1130, 13 P.3d 947, 951 (2000)	27
<u>Stewart v Smith</u> , 536 US 856, 860 122 S.Ct. 2578, 2581, 153 L.Ed. 2d 762, 767 (2002)	17,
<u>Stirone v United States</u> , 361 US 22, 4 L.Ed. 2d 252, 80 S.Ct. 270	10, 14, 38
<u>Stone v Powell</u> , 428 US 465, 494, 96 S.Ct. 3067, 3052, 49 L.Ed. 2d, 1067, 1058 (1976)	11, 38
<u>Taylor v Alabama</u> , 457 US 687, 691 (1982)	29, 32
<u>Townsend v Sain</u> , 372 US 293 (1963)	12, 38
<u>United States v Jacobsen</u> , 466 US 109, 113, 104 S.Ct. 1652, 80 L.Ed. 2d 85 (1984)	25
<u>United States v Karim Hussain Al Nasser</u> , 550 F.3d 722, 725 (9th Cir. 2009)	25
<u>United States v Lee</u> , 274 US 559, 563, 71 L.Ed. 1202, 1204, 47 S.Ct. 746	29
<u>United States v Leon</u> , 468 US 897, 920, n. 21 (1984)	25
<u>United States v Miller</u> , 471 US 130, 138, 85 L.Ed. 2d 99, 105 S.Ct. 1811 (1985)	10
<u>United States v Milstein</u> , 401 F.3d 53 (2005)	10, 16, 37
<u>United States v Ramirez</u> , 145 F.3d 845, 853 (5th Cir. 1998)	26, 27 28, 30, 32
<u>United States v Wadley</u> , 80 F.3d 129, 132 (5th Cir.)	

INDEX of AUTHORITIES, cont.

<u>JUAS PRUDENCE</u>	<u>PAGE(S)</u>
cert. denied 117 S.Ct. 83, 136 L.Ed 2d 40 (1996)	31
<u>Utah v Strieff</u> , 579 US — (2016)	25
<u>Walther</u> , 652 F.2d	25
<u>Warden v Hayden</u> , 387 US 294, 298-99, 18 L. Ed 2d	
782, 787, 87 S. Ct. 1642	26
<u>Wiggins v Smith</u> , 539 US 510 (2003)	11
<u>Williams v Taylor</u> , 529 US 362, 410, 120 S.Ct. 1495,	
1522, 146 L. Ed 2d 389, 428 (2000)	11, 32, 37

NEVADA RULES

Nevada Revised Statute 173.095(1)	9, 13
Nevada Supreme Court Rule 250	14

FEDERAL RULES

Federal Rules of Criminal Procedure Rule 52(b)	17
--	----

UNITED STATES CODES

18 § 3006 A	8
28 § 1257(a)	2
28 § 1654	8
28 § 2403(b)	2, 10, 17
42 § 1981	7
42 § 1981(A)	7, 17

INDEX OF AUTHORITIES, cont.

<u>UNITED STATES SUPREME COURT RULES</u>	<u>PAGE(S)</u>
Rule 10 (b) and (c)	2, 6, 7
Rule 12 (b)	8
Rule 14	8
Rule 13.3	2
Rule 33.2	8
Rule 39	8

UNITED STATES TREATIES

Treaty on Cooperation Between the United Mexican States and the United States of America for Mutual Legal Assistance, Article 12, Sections 1 and 2	23
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The Petitioner, Emilio EVALIO ARENAS, ID 1051999, prays that this Honorable Court will issue a writ of certiorari to review the judgment of the Supreme Court of Nevada in Case No. 78673. The Order in the above proceeding was entered on September 15, 2021. Remittitur was issued on October 11, 2021.

★
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I.

CITATIONS OF OPINIONS AND ORDERS IN THE CASE

THE ORIGINAL judgment of conviction of the petitioner in the Eighth Judicial District Court, Clark County, Nevada (District Court Case 13-213029-1) is attached hereto as Appendix "1".

The original judgment of conviction was appealed to the Supreme Court of Nevada. The Court Affirmed the Conviction, in part; Reversed, in part; and Remanded in Case No. 78673. See Appendix "2".

Petitioner's pro se Petition for Rehearing was returned unfiled on October 19, 2021. The Petition and Nevada Supreme Court's response are attached hereto as Appendix "3".

Petitioner's pro se Petition for Enlargement of Time was returned unfiled on November 30, 2021. The Petition and the Court's response are attached hereto, Appendix "4".

II.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Nevada was entered on September 15, 2021. Remittitur was issued on October 11, 2021.

THE JURISDICTION of this Court is invoked under 28 USC § 1257(a), 28 USC § 2403(b); and United States Supreme Court Rules 10(b) and (c), and 13(3).

Pursuant to the Court's decision in Haines v Kerner, 404 US 519, 92 S Ct 594, 30 L Ed 2d 652, this petition was drafted by a pro se litigant who has had no formal legal training. As such this brief should be held to a less strict standard than to that applied to a licensed attorney.

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1). The Fourth Amendment of the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2). The Fifth Amendment of the United States Constitution provides:

"No person shall be ... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

(3). The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to... be informed of

the nature and cause of the accusation;
... and to have the the assistance of counsel for his defense."

(4). The Eighth Amendment of the United States Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

(5) Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



IV.

STATEMENT OF THE CASE

On October 2, 2013, a Clark County, Nevada grand jury returned a True Bill, charging EMILIO EVALIO ARENAS, ID 1051999, and two co-defendants with Kidnapping, robbery, and murder with use of a deadly weapon; and, with conspiracy to commit all the above.

On January 8, 2019, jury trial commenced against Arenas in C-13-293029-1. Arenas's trial was joined to that of PEYTON HEMINGWAY (C-13-293029-2).

On January 15, 2019, State of Nevada, through District Attorney STEVEN B. WOLFSON, and Chief Deputy District Attorney CLANCARLO PESCI, Moved the Court to Amend Count 4 in the indictment to FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON, RESULTING IN SUBSTANTIAL BODILY HARM.

The Hon. Judge MICHELLE LEAVITT granted State's Motion over defense objection. See Appendix "5".

ON FEBRUARY 1, 2019, a Clark County jury found the petitioner guilty on five of the six counts in the indictment: Conspiracy to Commit Robbery, Kidnapping and Murder; and, First Degree Kidnapping with Use of a Deadly Weapon, Resulting in Substantial Bodily Harm, and First Degree Murder With Use of a Deadly Weapon.

On April 2, 2019, Judgment of Conviction was entered. See Appendix "1".

On April 23, 2019, Notice of Appeal was filed in the Supreme Court of Nevada by Clark County Special Public Defender JOE L. TIMMIS, and Deputy Special Public Defender NAVID AFSHAR. See Appendix "6".

On September 15, 2021, Petitioner's conviction was Affirmed, in part, Reversed in part, and Remanded, by Supreme Court of Nevada, Case No. T8673. See Appendix "2".

On March 18, 2022, the petitioner was resentenced, without a trial, to Count 4, First Degree Kidnapping with Use of a Deadly Weapon, as it originally appeared in the 2013 indictment, in Department 12 of the Eighth Judicial District Court. Sentence was imposed over defense objection. See Appendix "7".

§

V.

EXISTENCE OF JURISDICTION BELOW

UNITED STATES SUPREME COURT RULE 10 states:

Review on a writ of certiorari is not a right, but a matter of judicial discretion.

A petition for writ of certiorari will be

granted only for compelling reasons...

Subsection (b) provides, in part:

a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

Subsection (c) reads:

a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

PETITIONER ASSERTS the Right to Due Process as guaranteed by the Fifth Amendment, made applicable to the States by the Fourteenth Amendment; and, Title 42 §§ 1981 and 1981(A) of the United States Code.

The right to the effective assistance of counsel is guaranteed by the Sixth Amendment of the United

States Constitution; and, the "Criminal Justice Act" under 18 § 3006(A).

Petitioner exercises the right guaranteed by the Sixth Amendment, and 28 USC § 1654, to act as his own counsel in this pro se petition.

Pursuant to Supreme Court Rule 12(b), this petition is prepared as is required by Rule 33.2, and does not exceed 40 pages, or 9,000 words.

Because the petitioner is proceeding in forma pauperis, under Rule 34, and, is an inmate confined in an institution and not represented by counsel, the instant petition, and Motion for Leave to Proceed in forma pauperis are the only copies being filed. A copy of each will be sent to attorney for respondent, per instructions of Clerk of Supreme Court.

This petition complies with Rule 14 in all respects, and is submitted with proof of service as required by Rule 29.

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VI.

REASONS FOR GRANTING THE WRIT

A. THE SUPREME COURT OF NEVADA HAS DECIDED MULTIPLE FEDERAL QUESTIONS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

- (1). The Supreme Court of Nevada reversed the petitioner's conviction in Count 4 of C-13-293029-1, First Degree Kidnapping with Use of a Deadly Weapon, Resulting in Substantial Bodily Harm.

The count was reversed on the ground that Department XII of the Eighth Judicial District Court abused its discretion when it allowed the State of Nevada to amend Count 4 to a "different offense" under Nevada Revised Statute 173.095(1).

THE COURT ~~GRANTED~~ however when it ordered the petitioner to be remanded to the district court to be "resentenced" to Count 4, as it originally appeared in the 2013 indictment, without a trial.

When the trial evidence or the jury charge operates to "broaden the possible bases for conviction from that which appeared in the indictment," the indictment has been constructively amended. United

States v Miller, 471 US 130, 138, 85 L.Ed. 2d 99, 105 S.Ct. 1311. (1985). Constructive amendment is a per se violation of the Fifth Amendment. Stirone v United States, 361 U.S. 212, 4 L.Ed. 2d 252, 80 S.Ct. 270 (1960).

The Supreme Court of Nevada's order remanding Arenas to be resentenced without a new trial on Count 4 conflicts with the Second Circuit Court of Appeals's decision in United States v Milstein, 401 F.3d 53 (2005); and, with this Court's decisions in Alleyne and Apprendi.

BECAUSE THE CONSTITUTIONALITY of a statute of the State of Nevada is drawn into question, to-wit: any statute that permits the court to resentence the petitioner to a different offense than the one the jury found him guilty of - without a new trial - when the original conviction was reversed because of an abuse of the district court's discretion, 28 USC §2403(b) may apply. This Honorable Court should exercise its supervisory powers over the lower courts and issue the writ. The petitioner prays that the Court will advise Supreme Court of Nevada to vacate Arenas's conviction on Count Four, and remand for a new trial on that count, should State of Nevada wish to pursue the matter;

(2) The Supreme Court of Nevada erred when it concluded that the Eighth Judicial District Court did not err in finding that the petitioner abandoned his 1997 Land Rover in Tijuana, Mexico.

The Nevada Supreme Court also erred when it concluded that the district court properly denied the petitioner's multiple motions to suppress evidence without holding evidentiary hearings.

The Court's decision is in direct conflict with the Fourth and Fourteenth Amendments, and, with the Supreme Court's decisions in Rios, Katz, Elkins, Skinner v Railway Executives Ass'n, Carroll, Illinois v Gates, Preston, Gant, Segura, Davis, Giordano, and Wong Sun.

The Nevada Supreme Court's decisions comport to an unreasonable application of federal law. Williams v Taylor, 529 US 362, 410, 120 S.Ct. 1495, 1522, 146 L.Ed. 2d 389, 428 (2000).

The district court's denials of the petitioner's motions for evidentiary hearings resulted in a "clear factual error" in the state Supreme Court's analysis. Wiggins v Smith, 539 US 510 (2003). The Court failed to provide Arenas with a "full and fair opportunity" to litigate his Fourth Amendment claims. Stone v Powell, 428 US 465, 494, 46 S.Ct. 3037, 3052, 49 L.Ed. 2d 1067, 1088 (1976).

Because the state court's failure to find facts is actually an unreasonable determination of facts, the petitioner is entitled to evidentiary hearings to resolve all factual disputes. Townsend v Sain, 372 US 293 (1963); Ford v Wainwright, 477 US 399, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986).

(3) The Supreme Court of Nevada's conclusion that the petitioner was not prejudiced by cumulative prosecutorial misconduct is erroneous, and unreasonable. Davis v Ayala, 135 S.Ct. 2187, 2198, 2198, 142 L.Ed. 2d 323 (2015).

Caldwell v Mississippi, 472 US 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed. 2d 231, 239 (1985), established that where, in a capital case, a prosecutor makes statements to the sentencing jury that diminish the jury's sense of responsibility, the heightened requirements of the Eighth Amendment are not met.

The prosecutor's invocation of the Bible, and Exodus 20:13 during penalty stage closing argument violated the petitioner's rights under the Eighth and Fourteenth Amendments.

THE PETITIONER respectfully urges that all aspects

of the Supreme Court of Nevada's decision are erroneous and at variance with this court's decisions as explained in the argument below.



VII.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

I. THE SUPREME COURT OF NEVADA ERRED WHEN IT REMANDED THE PETITIONER TO BE "RESENTENCED," WITHOUT A NEW TRIAL, TO A COUNT THAT WAS REVERSED BECAUSE AN ABUSE OF THE DISTRICT COURT'S DISCRETION

The Nevada Supreme Court reversed Count 4 in C-13-293029-1 on the ground that petitioner was convicted on a ground not alleged by the grand jury's indictment.

The amendment of the "First-Degree Kidnapping With Use of a Deadly Weapon" count to "First-Degree Kidnapping With Use of a Deadly Weapon, Resulting in Substantial Bodily Harm," resulted in a "different offense" under Nevada Revised Statute 173.095(1).

A COURT'S JURY INSTRUCTION that constructively

amends an indictment violates a defendant's rights under the Fifth Amendment, per se, to be tried only on charges presented by a grand jury.

"[B]ecause of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted the petitioner. If so, he was convicted on a charge the grand jury never made against him." Stirone v. United States, 361 U.S. 212, 218-19, 4 L.Ed. 2d 252, 80 S.Ct. 270 (1960)

Arenas was tried under Nevada's capital penalty statute, Supreme Court Rule 250. Pursuant to jury instruction Number 33:

"[A] Killing which is committed in the perpetration of a robbery and/or kidnapping is deemed to be Murder of the First Degree, whether the killing is intentional or unintentional or accidental..." See Appendix "17."

Based on the evidence produced at trial, the petitioner was acquitted of robbery. But because he was convicted of the amended Count 4, Arenas was convicted of First-Degree Murder, under the Felony Murder Rule.

On direct appeal, the Supreme Court of Nevada reversed Arenino's conviction on Count 4 because the district court abused its discretion when it allowed the prosecution to amend the charge to "a different offense." The petitioner asserts that the trial error of federal law had a 'substantial or injurious effect in determining the jury's verdict' on the First-Degree Murder conviction. Such an error is not harmless, and cannot be remedied by "resentencing" on the reversed Kidnapping offense. O'Neal v McAninch, 513 US 432, 436, 115 S.Ct. 992, 994, 130 L.Ed. 2d 947, 952 (1995).

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

This right, in conjunction with the Due Process Clause, requires that each element be proved to a jury beyond a reasonable doubt." Alleyne v United States, 570 US 99, 104 S.Ct. 2151, 186 L.Ed. 2d 314 (2013).

In Apprendi v New Jersey, 530 US 466, 120 S.Ct. 2346, 147 L.Ed. 2d 435 (2000), this Court held that any fact that

"Exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an element that must be submitted to a jury.

The jury never authorized any punishment for the offense of First-Degree Kidnapping With Use of a Deadly Weapon, because that is a different offense, pursuant to Nevada Revised Statute 173.095(1), than the charge the jury found Arenas guilty of.

In United States v. Milstein, 401 F.3d 53 (2005), the Second Circuit Court of Appeals vacated Milstein's conviction in Count 3, and remanded for a new trial on that count. The Court's decision was based on a set of facts that are materially indistinguishable from the facts in the case at bar.

At his March 18, 2022 resentencing hearing in the Eighth Judicial District Court, the petitioner read this exact argument into the record. See Appendix "7".

Because the Nevada Supreme Court confronted a set of facts that were materially indistinguishable from decisions of the Supreme Court and nevertheless arrived at a different result than the Supreme Court, the state court's decision is "contrary" to federal law. Cf. Lockyer v. Andrade, 538 US 63, 73, 123 S. Ct. 1166, 1173, 155 L. Ed. 2d 144, 156 (2003).

It is Plain Error (FRCP Rule 52(b)) for the Nevada Supreme Court to presume "without preservation" that the jury would have found Arenas guilty of Count 4 - as it originally appeared in the 2013 indictment - had the petitioner not first been prejudiced by the district court's abuse of discretion. See Big Pond v State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); Title 42 USC § 1981(A).

A FEDERAL COURT will not review a Federal issue if the state court's judgment is based on an independent and adequate state law ground, Harris v Reed, 489 US 255, 260, 109 S.Ct. 1038, 1042, 103 L.Ed2d 308, 315 (1989).

In this instance the state cannot establish such an independent and adequate state law ground. The state court's decisions are interwoven with the Fifth Amendment and Federal constitutional rulings, and are therefore not adequate to bar Supreme Court review. 28 USC § 2403(b). Stewart v Smith, 536 US 856, 860, 122 S.Ct. 2578, 2581, 153 L. Ed. 2d 762, 767 (2002). See also, Lee v Kemna, 534 US 362, 122 S.Ct. 877, 151 L. Ed 2d 820 (2002).

BECAUSE THE FEDERAL COURT'S ROLE is to guard against extreme malfunctions in the state crim-

inal justice systems, Davis v Ayala, 135 S.Ct. 2187, 2202, 192 L.Ed. 2d 323 (2015), the petitioner respectfully prays that this Honorable Court will instruct the Supreme Court of Nevada to vacate Arenas's conviction in Count Four forthwith, and to remand to the district court for a new trial on that count, should the State of Nevada wish to pursue the matter.

II. THE SUPREME COURT OF NEVADA'S CONCLUSION THAT THE EIGHTH JUDICIAL DISTRICT COURT DID NOT ERR IN FINDING THAT THE PETITIONER VOLUNTARILY ABANDONED HIS 1997 LAND ROVER WAS BASED ON AN UNREASONABLE DETERMINATION OF FACTS IN LIGHT OF THE EVIDENCE PRESENTED AT STATE COURT PROCEEDINGS.

The petitioner urges that the settlement of the principles in this case are of importance to the public, as distinguished from the petitioner alone because there is a real and embarrassing conflict of opinion between the Nevada Supreme Court, and the U.S. Courts of Appeals, and the United States Supreme Court. NLRB v Pittsburgh S.S. Co., 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479, 27 L.HRM (BNA) 2382, 19 Lab Cas. (CCH) ¶66192 (1951).

SUPREME COURT RULE 10 states that a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

In the case at bar, the petitioner's complaint consists of both errors.

First, the Eighth Judicial District Court's factual finding that the petitioner's 1997 Land Rover was voluntarily abandoned in Tijuana is erroneous:

(a) The vehicle was seized in Mexico, and transported to the United States by the Tijuana police at the extrajudicial request of FBI Border Liaison Agent Jose Robledo;

(b) The seizure was performed after the petitioner was in custody in the United States, so it was not "incident to" the petitioner's arrest. The petitioner never denied ownership of the vehicle, which was seized before Arenas was interrogated;

(c) Agent Robledo had no probable cause to believe the Land Rover would contain contraband, or evidence of a crime, because he had not communicated with the Las Vegas police about any aspect of LVMPD's investigation;

(d) The district court concluded that the Land

Rover had been intentionally abandoned without holding an evidentiary hearing to resolve any factual disputes; and,

(e) The petitioner was not provided with a "full and fair opportunity" to litigate his Fourth Amendment claims.

Second, while it is a properly stated rule of law that what one willingly exposes to the public is not subject to Fourth Amendment protection, the law is misapplied in the petitioner's case.

Because the role of the federal courts is "to guard against extreme malfunctions in the state criminal justice systems," Davis v Ayala, 135 S.Ct. @ 2202, the petitioner prays that the Court will find that the Nevada Supreme Court unreasonably applied clearly established Supreme Court precedent in denying Arenas's substantial Fourth and Fourteenth Amendment claims.

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On Monday, August 12, 2013, the Las Vegas Metropolitan Police Department ("LVMPD") received a call at 5:03pm informing them that a corpse had been discovered, bound inside a suitcase, in a dumpster on Ringe Lane.

On Tuesday, August 13, 2013, the Clark County Medical Examiner's office performed an autopsy on the body.

The decedent was identified as CARL SIMON. Simon's death was ruled a homicide.

On Wednesday, August 14, 2013, the petitioner drove his 1997 Land Rover to Barstow, California from Las Vegas. The following day, Arenas drove from Barstow to San Diego, California, then into Tijuana, Baja California, Mexico.

On Friday, August 16, 2013, LVMPD obtained a warrant to arrest Arenas for Carl Simon's murder. See Appendix "8". The petitioner, who had rented a room at the Hotel Tapatio in Tijuana, was unaware that the warrant had issued.

ON SATURDAY, AUGUST 17, 2013, Arenas parked his Land Rover on Avenida Miguel Negrete in Tijuana. Shortly thereafter, the petitioner was arrested by the Tijuana Municipal Police for carrying an open container.

Arenas's arrest in Mexico was unrelated to the Las Vegas warrant. When the petitioner was transported to jail, the Land Rover remained parked on Avenida Miguel Negrete.

AT OR ABOUT SIX PM on Sunday, August 18, 2013, Arenas was released from the Tijuana jail.

From his release from jail on Sunday night until sundown, Monday, August 19, 2013, the petitioner

searched for his Land Rover in vain.

Shortly after 9pm, Monday, August 19, 2013, Arenas attempted to re-enter the United States at the U.S. Customs and Border Protection ("USCBP") San Ysidro Port of Entry. When Arenas presented his Nevada driver license to the Homeland Security Agent at the pedestrian entry, the petitioner was arrested under the authority of Federal Bureau of Investigation ("FBI") Warrant #393724 VA 2. See Appendix "9".

*

On Monday, August 19, 2013, FBI Special Agent ("SA") DANIEL COXON, of the Bureau's Las Vegas Division, contacted Agent JOSE ANTONIO ROBLES of FBI's San Diego Border Liaison Office. See Appendix "10".

SA Coxon told Agent Robles that there was a warrant for Arenas's arrest in Las Vegas; and, that GPS tracking of Arenas's Land Rover indicated that the vehicle was in Tijuana.

The warrant for Arenas's arrest, however, did not particularize the 1997 Land Rover as a "thing to be seized."

After Arenas had been arrested at the San Ysidro Port of Entry, he was transported to the San Diego County Jail.

On Tuesday, August 20, 2013, prior to the petitioner being interrogated by LVMPD Homicide Detectives, SA Coxon requested Border Liaison Agent Robbleto's assistance in recovering Arenas's Land Rover from Tijuana extrajudicially.

ARTICLE 12, SECTION (1) of the Treaty on Cooperation Between the United Mexican States and the United States of America for Mutual Legal Assistance provides:

A request for search, seizure, and delivery of any object acquired thereby to the requesting State shall be executed if it includes the information justifying such action of the laws of the requested party.

In an unclassified FBI document dated 9/03/13 (see Appendix "11"), BLO Agent Robbleto wrote (and later testified at the petitioner's trial - see Appendix "12", pg. 003606), that he personally contacted Tijuana Police Department ("TJPD") Liaison Officer ALEJANDRO LARES. Lares agreed to have the Land Rover towed to the USCBP Otay Mesa Port of Entry in San Diego, without a court order.

Article 12, Section (2) of the Mutual Legal Assist-

ance Treaty provides:

The authority that has executed a request for search and seizure shall provide to the Coordinating Authority such certification as may be specified in the request concerning the identity of the object seized, the integrity of its condition, and the continuity of custody thereof. Such certification shall be admissible in evidence in the requesting Party as proof of the truth of the matters set forth therein.

See Appendix "13".

As stated, no warrant authorizing seizure of the Land Rover ever existed. TIBD Officer Laves, for his part, failed to provide Agent Robledo with a chain-of-custody record, or even the name of the company who towed the vehicle from Tijuana to Otay Mesa.

*

A. The Seizure of the Land Rover Was
Not Incident to the Petitioner's Arrest

THE UNITED STATES SUPREME COURT has consistently construed the Fourth Amendment's protections "as pro-

scribing only governmental action." United States v. Karim Hussein Al Nasser, 555 F.3d 722, 725 (9th Cir. 2009) (quoting United States v. Jacobsen, 466 US 109, 113, 104 S.Ct. 1652, 80 L. Ed.2d 85 (1984)). Accordingly a wrongful seizure by a private party does not violate the Fourth Amendment unless the private party "as an instrument or agent" of the state in effecting a [seizure]. Walther, 652 F.2d @ 791; see also Skinner v. Railway Labor Executives Ass'n, 489 US 602, 614, 109 S.Ct. 1402, L. Ed. 2d 639 (1989) (explaining that the Fourth Amendment "does not apply to a [seizure], even an arbitrary one, effected by a private party on his own initiative.")

Tipana Police Officer Laro's actions were not "of his own initiative." They were in direct response to the extrajudicial request to deliver the vehicle made by Agent Robledo. See Elkins v. United States, 364 US 206, 80 S.Ct. 1437 (1960).

When Homeland Security Agents at the San Ysidro Port of Entry saw that there was an outstanding warrant for Arenas's arrest, they had an obligation to detain the petitioner. United States v. Leon, 468 US 897, 920, n. 21 (1984) (internal quotation marks omitted.)

Nevertheless, the warrant was not an "intervening circumstance" wholly independent of the seizure of the Land Rover. Utah v. Strieff, 579 US — (2016).

The Tijuana Police seized the Land Rover and transported it to the Otay Mesa Port of Entry only because Agent Robbleto asked them to, specifically, once Arenas had been arrested and was in custody.

Because police were not in "hot-pursuit" of the car, there was no lawful reason to seize it without a court order. Warden v Hayden, 387 US 294, 298-99, 18 L. Ed. 2d 782, 787, 87 S.Ct. 1642,

"The purpose of the doctrine permitting [seizures] incident to arrest is to allow discovery and preservation of destructible evidence." Chimel v California, 395 US 752, 762-63, 89 S.Ct. 2034, 2039-40, 23 L.Ed. 2d 685 (1969).

Once Arenas was under arrest and in custody though, [the seizure], made at another place and without a warrant, [was] simply not incident to the arrest." Preston v United States, 376 US 364, 367, 11 L.Ed. 2d, 777, 780, 84 S.Ct. 881 (1964), See also, Arizona v Cant, 556 US 332, 339 (2009).

*
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B. The Supreme Court of Nevada's Application of the Facts in United States v Ramirez to the Petitioner's Case is Erroneous Because it Incorporates Well-Settled Principles of Federal Law Incorrectly

ON PAGE EIGHT of the Supreme Court of Nevada's Order Affirming Arenas's Conviction, in Part, the Court wrote:
"[V]oluntarily abandoned property is not subject to Fourth Amendment protections." State v.

Lisenbee, 116 Nev. 1129, 1130, 13 P.3d 947, 951 (2000)

Here, Arenas drove his car into Mexico, and law enforcement subsequently arrested him crossing the United States / Mexico border on foot. Under these facts, we conclude that the district court did not err in finding that Arenas abandoned his vehicle and therefore the district court properly denied his motion to suppress. See United States v. Ramirez, 148 F.3d 345, 353 (5th Cir. 1998).

In Ramirez, the Government claimed that the defendant abandoned his car in the United States, then fled to his native Mexico to avoid prosecution.

In the instant case, the Supreme Court of Nevada concluded that Arenas abandoned his Land Rover in Mexico, then returned to his native United States on foot, only to be arrested.

That is where any similarity between the two cases ends.

IN Ramirez, TEXAS AUTHORITIES CONTACTED the defendants relatives several times in an attempt to locate him, and to determine ownership of the car he parked at his co-defendant's restaurant.

Two weeks after the car had been abandoned, Ramirez's wife and mother-in-law told authorities that the defendant had fled to Mexico. The government then conducted an ion scan of the vehicle, which yielded evidence that was introduced at trial. Based on the confirmation from Ramirez's family that Ramirez had in fact fled the country, the officers had a good faith reason to believe that the car had been abandoned.

In Arenas's case, no law enforcement agency ever developed information that the petitioner was fleeing the country, nor that Arenas had abandoned his vehicle. The car had been transported to the Otay Mesa Port of Entry before police even spoke to the petitioner.

Agent Robledo testified at Arenas's trial that he never spoke to anyone in the LVMPD about their investigation of Simon's murder. Therefore, the Agent had no reason to believe that the vehicle would contain evidence of a crime. The Tijuana Police Department's seizure and transport of the Land Rover,

then, was a fishing expedition "in the hope that something would turn up." Taylor v Alabama, 457 US 687, 691 (1982).

Two drops of the decedent's blood, found beneath the Land Rover's rear bench seat, adduced during the subsequent search of the vehicle, substantially harmed the petitioner's trial.

In Katz v United States, 389 US 347, 19 L. Ed 2d 576, 88 S. Ct. 557, the Court wrote:

What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. See Lewis v United States, 385 US 206, 210, 17 L. ed 2d 312, 315, 87 S. Ct. 424; United States v. Lee, 274 US 559, 563. 71 L. ed 1202, 1204, 47 S. Ct. 746.

But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See Rios v United States, 364 US 253 L. ed 2d 1688, 86 S. Ct. 1431; Ex parte Jackson, 46 US 727, 733 24 L. ed 877, 879.

Arenas cannot be said to have "knowingly exposed"

his hand over to the public. That he would be arrested within an hour was an unforeseen circumstance. That a warrant had issued for his arrest in Las Vegas was unknown to the petitioner.

When he parked on Avenida Miguel Negrete on Saturday, August 17, 2013, Arenas was not "running from the police." He demonstrated he wanted to preserve his effects as private by parking the car legally, and locking the doors.

When Arenas was arrested at San Ysidro two nights later, he told Homeland Security exactly who he was, and that he'd just been released from a Tijuana jail, and could not find his car.

The Nevada Supreme Court's conclusion that the vehicle had been purposely abandoned bears scant resemblance to the Ramirez case, and involves an unreasonable interpretation of Bios v United States.

THE COURT wrote, on page nine of the Order Affirming the petitioner's conviction, in part:
[W]e conclude that the automobile exception applied... "a police officer who has probable cause to believe the car contains... evidence of a crime must either seize the vehicle while a warrant is sought or

search the vehicle without a warrant.
Given probable cause, either course is constitutionally reasonable. Nevada v Hloyd, 129 Nev. Adv. Rep 79 @750, 312 P.3d 467, 474 (2013)

Probable cause exists when the totality of the facts and circumstances within an officer's knowledge at the moment of [the seizure] are sufficient to conclude the suspect had committed or was committing an offense. United States v Wadley, 80 F.3d 129, 132 (5th Cir.), cert. denied, 117 S. Ct. 83, 136 L. Ed 2d 40 (1996).

Per his testimony at trial, Agent Bobbito had not discussed any aspect of the investigation with LV-MPD. Therefore, he had no ground upon which to base his suspicion that the Land Rover had been used in Mr. Siman's murder, in any degree.

The fact is that on the sparse information at the Agent's command, no warrant could have issued consistently with rules Three and Four of the Federal Rules of Criminal Procedure. Giordano v United States, 357 US 480, 486; Carroll v United States, 267 US 132, 45 S. Ct. 280, 69 L. Ed. 543, 70 3656 (1925).

ARENAS MOVED THE DISTRICT COURT FIVE TIMES, from 2013 to 2018, for an evidentiary hearing.

Because the court denied all the petitioner's motions, the court did not determine any facts, but only drew conclusions.

Petitioner urges that the court's failure to find facts is actually an unreasonable determination of the facts "in light of the evidence presented." Miller-El v Dretke, 545 US 231, 240-65, 125 S.Ct. 2317, 2325-40, 162 L.Ed 2d 196, 214-30 (2005).

THE COURT'S APPLICATION OF THE FACTS in Ramirez to the petitioner's case is unreasonable because Ramirez is not "clearly established Federal law, as determined by the Supreme Court." Williams v Taylor, 529 US 362, 402-03, 120 S.Ct. 1495, 1518, 146 L.Ed 2d 389, 424 (2000).

Because the facts in the petitioner's case are materially indistinguishable from those in Elkins, Skinner, Katz, Rios, Giordanello, and Taylor v Alabama, *infra*, the Supreme Court of Nevada was unreasonable in finding that Arenas's rights were not violated, and that the outcome of the trial was affected by those violations.

This Honorable Court should issue the writ *instant* because the Nevada Supreme Court was unreasonable in not finding an error in the Eighth Judi-

cial District Court's conclusions. Davis v Ayala, 135 S Ct 2187, 2198, 192 L. Ed 2d 323 (2015).



III. THE SUPREME COURT OF NEVADA'S CONCLUSION THAT THE PETITIONER WAS NOT PREJUDGED BY CUMULATIVE PROSECUTORIAL MISCONDUCT IS ERRONEOUS

In the Order affirming Arenas's conviction, in part, the Supreme Court of Nevada agreed that the prosecution "acted inappropriately" by disparaging counsel during its rebuttal of defense's closing argument. Barron v State, 105 Nev 767, 780, 783 P.2d 444, 452 (1989). See Appendix "2", page 10.

The Court held, however, that "the prosecutor's comments did not result in an unfair trial and do not warrant reversal."

In a footnote on page ten of the Order, the Court acknowledged that Arenas claimed the prosecutor improperly cited religious language during the penalty hearing. But because counsel "did not provide any relevant authority supporting the claim," the Court declined to address the issue.

BEFORE SENTENCE WAS IMPOSED in C-13-293029-1, Are-

nas spoke to the jury. As part of his allocution, the petitioner accepted that the jury found him criminally responsible for Simon's murder. Arenas asked the jury to consider that only one witness identified him as the murderer: co-defendant TITORESA ALLEN, who testified in exchange for a reduced sentence.

Arenas cited Deuteronomy 19:15:

One witness is not enough to convict anyone accused of a serious crime or offense they may have committed. A matter must be established by two or three witnesses.

The State did not object.

On State's rebuttal, Chief Deputy District Attorney Giancarlo Pesci reminded the jury that the State in fact called thirty witnesses during the guilt phase (Allen was the only one of the thirty to implicate Arenas).

Pesci then said, "I mean, if we're going to talk about the Old Testament -" and displayed a Power Point deck on the courtroom projector, which read:

Exodus 20:13 Thou shalt not Kill

See Appendix "15", pages 5886 (a) and (b).

Counsel for Arenas objected immediately.

After the Hon. Judge MICHELLE LEAVITT excused the jury, defense counsel CHARLES CANO Moved the Court for a mistrial, on the ground that the Power Point slide was before the jury. The prosecutor Knew, or should have known, that his misconduct rendered petitioner's trial unfair.

Judge Leavitt sustained the objection; but denied the defense Motion for mistrial.

The jury sentenced Arenas to life without possibility of parole.

A. Arenas was Actually Prejudiced by the Nevada Supreme Court's Arbitrary Disregard for the Concept that a Prosecutor May Not Cite God or the Bible as Legal Authority

THE COURT ~~ERRORS~~ when It wrote "[P]etitioner did not provide any relevant authority supporting the claim."

Special Public Defender NATHAN AFSHAR cited a California case, People v Tully, 54 Cal. 4th 952, 1026 to 1027, 282 P.3d 173, 242 (2012), into the record. The California Supreme Court did not reverse Tully's conviction, but found that the prosecutor committed misconduct by citing the Old Testament and biblical passages as authority in legal proceedings. See US Supreme Court Rule 10(b).

Petitioner urges that it was of no import whether counsel provided relevant authority to support the prosecutorial misconduct claim. It is well-settled that a prosecutor's invocation of God in a penalty stage closing argument violates a defendant's Eighth Amendment rights.

To do so implies that a jury can rely on "higher authority." Where, in a capital case like the petitioner's, a prosecutor makes statements to the sentencing jury that diminish the jury's sense of responsibility, the heightened requirements of the Eighth Amendment are not met, and the sentence... cannot stand. Caldwell v Mississippi, 472 US 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed 2d 231, 239 (1985).

THE SUPREME COURT OF NEVADA acknowledged that the prosecutor committed misconduct by disparaging defense counsel during closing argument.

Substantial evidence of cumulative prosecutorial misconduct in this case would be obvious, but for the Court's arbitrary failure to recognize the State's invocation of Exodus 20:13 as an egregious violation of Arenas's Eighth Amendment rights.

Arenas provided the Supreme Court of Nevada with a "fair presentation" of these Federal claims in his direct appeal.

Because the Court's conclusions were based on objectively unreasonable factual determinations in light of the evidence presented in state court proceedings, rules were applied that "contradict the governing law set forth in [United States Supreme Court] cases." Williams v. Taylor, 529 US @ 405, 120 S. Ct. @ 1519, 146 L. Ed. 2d @ 425 (2000).

The petitioner respectfully prays that this Honorable Court will issue the writ, instructing the Supreme Court of Nevada to vacate Arenas's convictions forthwith, and to remand the case to the district court for a new trial.

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CONCLUSION

THE SUPREME COURT OF NEVADA'S ORDER remanding Arenas to be sentenced to Cant Four, without a new trial, involves an unreasonable application of Mistake and Apprendi.

A PETITIONER CANNOT COMPLAIN about the introduction of illegally obtained evidence if the state court afforded him a "full and fair opportunity" to raise the

error at trial and on appeal. Stone v Powell, 428 US 465 (1976).

Because Arenas "did not receive a full, fair and adequate hearing in the state court proceeding," the Nevada Supreme Court's CONCLUSION that his hand Rover was abandoned is a determination to which the presumption of correctness required by Townsend v Sabin, 372 US 293 (1963) cannot be said to attach. Ford v Wainwright, 477 US 399, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986).

FINALLY, the prosecutor disparaged counsel, and put Exodus 20:13 Thou Shalt Not Kill before the jury. Even if both of the prosecutor's errors were harmless individually, together they violated Arenas's right to a fair trial - especially when added to the district court's abuse of discretion in allowing the State to amend Count 4 to a "different offense," in violation of the Fifth Amendment. Stirone, 361 US 212 (1960).

"The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting trial unfair." Parle v Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v Mississippi, 410 US 284 (1973); Montana v Englehardt, 518 US 37, 53 (1996)).

WHEREFORE the petitioner has established herein the existence of disputed facts which, if true, would entitle him to relief, this Honorable Court should issue the writ forthwith instructing the Nevada Supreme Court to vacate Arenas's convictions in C-13-293029-1 and Supreme Court Case No. 78673 instantor, and to remand to the district court for further proceedings consistent with the clearly established Constitutional precedents enumerated, *infra*.

Respectfully submitted on this 5th day of May, 2022.

PRO SE REPRESENTATION

_____*_____
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EMILIO EVALIO ARENAS, ID 1051999 - PETITIONER

- v. -

THE STATE OF NEVADA - RESPONDENTS

I, EMILIO EVALIO ARENAS, ID 1051999, do swear or de-

declare that on this date, May 5, 2022, as required by Supreme Court Rule 29. I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and that party's counsel, and on every other person required to be served, by depositing an envelope in the United States mail properly addressed to them with first-class postage prepaid.

The names and addresses of those served are as follows:

Pursuant to Supreme Court Rule 12(2): An inmate confined to an institution, if proceeding in forma pauperis and not represented by counsel, need only file an original petition and motion.

Attorney for respondent

Aaron D. Ford, Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

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

Executed on May 5, 2022

Emilio Emilio Arenas

EMILIO EMILIO ARENAS, ID 1051919

HIGH DESERT STATE PRISON

P.O. Box 650

INDEAN SPRINGS, NEVADA 89070