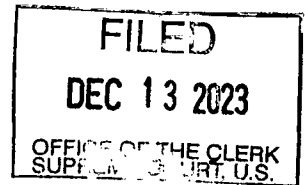


ORIGINAL

No. 23-6431



In THE

Supreme Court of The United States

Mariano Madrid
Petitioner,

v.

The State of Nevada
respondent.

On Petition for writ of Certiorari to the
9th Circuit Court of Appeals and United States
District Court; District of Nevada

Petition For Writ of Certiorari

Mariano Madrid
#1006135
S.D.C.C. P.O. Box 208
Indian Springs, NV
89070

Questions Presented

I. Where Trial Court failed to provide "Voluntary Manslaughter" Instructions, a Necessarily Included Offense/Lesser Included Offense. Did this so violate petitioners 6th & 14th Amend. Rights. In accordance to the opinion in Armstead v. Frank, In compliance to NRS 200.050 (as a serious and highly provoking injury sustained). Under what circumstances does a defendant enjoy the right to have the Jury instructed on "Voluntary Manslaughter" as in Rosas v. State, 122 Nev. 1258 and Newson v. State? Where Mr. Madid suffered a through and through stab wound to his right forearm while trying to defend from being stabbed in the chest. (prior to victim being killed). In Question to U.S. v. Corner (1970 App. D.C.) 137 U.S. App. DC 214, under Rule 31(c); Roster 986 F.2d at 1290-91.

II. Did Trial Court err in not providing a "Voluntary Intoxication Instruction, where evidence was provided to negate the capacity to formulate Premeditation, Deliberation and Willfulness. Elements essential to sustain a murder charge. The states burden of proof could not be met beyond a reasonable doubt, because the Jury was not Instructed here to even consider these facts. Was there Prejudice and consequently a violation of due process under the 6th & 14th Amend? Was this decision in direct conflict in the decision made in Dearman v. State 93 Nev 364 and Vincent v. State 97 Nev. 169. Where the state decided the jury needed to be informed as to possible effects of intoxication upon formation of criminal intent, and its relevancy in a prosecution for murder? Was trial counsel ineffective for not requesting such instruction? see. Montana v. Egelhoff's (decision) (supreme court reversed as the respondent "had a due process right" to have all relevant evidence to rebut considered by jury, including his intoxication) as well as State v. Seely, 212 Kan. 195 (intoxication instruction warranted)

III. Was Trial Counsel ineffective in not Filing any Pretrial motions, as well for Failing to obtain "Brady" Evidence, for State witnesses criminal histories (impeachment value)? As to Brady v. Maryland; Engle v. U.S. 405 U.S. 150. Did Trial counsel err by failing to file pretrial defensive motions and states witness discovery motions? This in relation to Impeachment Evidence to be used as exculpatory evidence to discredit state witness credibility and truthfulness, none the less as material. In accord to Rule 609; United States v. Agurs; 427 U.S. 97.

IV. Where Trial Counsel failed to conduct adequate Pretrial Investigation, to develop potential defense witnesses? Was Petitioner's 6th and 14th Amend. violated by not doing so? When Counsel stated the decision to do so was not "Trial Strategy" (but he just didn't do it). Petitioner on the other hand has shown and developed by way of Private Investigator defense witnesses, in which Trial counsel overlooked and failed to obtain and subpoena (reluctant to contact) was counsel's failure prejudicial under the ruling in Sandburn v. State, 812 P.2d 1279, as well as the 9th circuits decision in Sanders v. Ratelle 21 F.3d 1146? Where inadequate pretrial investigation constituted ineffectiveness.

V. Was Trial Counsel Ineffective for not highlighting Mr. Madrid injury to his Right Forearm, as a serious and "Highly Provoking injury"? As well for failing to subpoena expert witnesses/E.R. physicians, in relation to medical evidence in support of a Manslaughter Theory of Defense in accord to NRS.200.050(1) and NRS. 175.501? Was this in conflict with the decision in Rosas v. State 122 Nev. 126, as well as the one in Weaver v. Johnson, 2020 U.S. Dist LEXIS 118 (87), were the 6th & 14th Amendments violated in not doing so?

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VI. Did Trial Counsel Err in being Ineffective for allowing suggestive photographic lineup procedures to go unchallenged at trial? Such as the issues presented in Simmons v. United States and Manson v. Braithwaite. Specifically, where detectives showed photos singly to witnesses of suspect rather than in a six pack. And stopping recorded interviews. (leaving what was said off record.) But testifying that during that time "through much persuasion" witness was able to identify the suspect. Where these procedures impermissibly suggestive under Berry v. State and Rivera v. McKendrick? And does it pose a threat to constitutional rights in violate? 6th & 14th.

VII. Was the defendant prejudiced when his 6th & 14th Amend. rights were purged at Trial by the admittance of "Character Evidence" (under NRS 48.045; FRE 404(a)(6))? when his (Rap) music C.D. was played in court without limiting instruction; Petrucelli hearing nor objection, for no other purpose than to excite the jury to convict. No 404(b) challenge was made by counsel, yet this evidence had no other place at trial other than to prove "bad character." Was this evidence relevant, and for what purpose, in relation to the decision in Michelson v. United States? Is this type of evidence not criticized? 6th cir. decision (1975) United States v. Ring.

VIII. Was the defendants 4th & 5th Amend. Violated at Trial when "Character Evidence" was presented by way of "Field Interview Cards," to prove "Prior Bad Acts" in direct contrast to NRS 48.045; FRE 404(a)(6), which prohibits the use of? In relation to decisions made in Somee v. State, 124 Nev. 434 and Rodriguez v. People; 21 Cal App. 4th 232. Does this admittance confuse the issue of guilt and innocence of the specific offense charged at trial? as in U.S. v. Ring, 513 F.2d 1001, 1004 (6th cir.)

IX. Did the admittance of false evidence by prosecution prejudice the defendant in violation of his 14th Amend Rights? Where Gun Photos were proffered by the state, to the jury, as if they were the murder weapon indeed used. Soliciting the fact that the photos of the weapon portrayed was the weapon used and belonged to defendant. When in fact no weapon was ever recovered or linked to defendant. Question is in relation to decisions made in Washington v. Hotbaver 228 F.3d 689 (6th Cir.) and Napue v. Illinois, 360 U.S. 264. Can this error go and be tolerated as unsolicited it never objected to or goes uncorrected by prosecution? Const. Law 3840; Appeal and Error §806, §708.

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Parties to the Proceedings Below

This Petition stems from a criminal prosecution by the state of Nevada in which Petitioner, Mariano Madrid, was the defendant.

On appeal to the 9th Circuit Court of Appeals and the United States District Court District of Nevada Mr. Madrid was the appellant and the state of Nevada was the appellee.

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Petition For Writ of Certiorari

Mariano Madrid, an inmate currently incarcerated at Southern Desert Correctional Center in Indian Springs, Nevada. Respectfully Petitions this Court for a Writ of Certiorari to review the Judgement of the United States District Court, District of Nevada and the 9th Circuit Court of Appeals.

Opinions Below

Judgement of Conviction case no. 05C214015; Order of Affirmance Nev. Sup. Ct. No. 50115; 125 Nev. 1058; 281 P.3d 1197
Order of Affirmance Nev. Sup. Ct. No. 63916; 2014 Nev. Un. Pub. LEXIS 1865; 130 Nev. 1212, Order case dismissed United States District Ct. Dist of Nevada; case no. 2:15-cv-00118-JAD-PAL; 2017 U.S. Dist. LEXIS 39654; Order of Affirmance Ct. of Appls Nevada; No. 73454; 2018 Nev. App. Un. pub. LEXIS 160; 134 Nev. 976, Order of Affirmance Ct. Appls Nevada; No. 77724; 2019 Nev. App. Un. Pub. LEXIS 712; 135 Nev. 681, United States Dist. Ct. Dismissal of §2254; case no. 2:19-cv-01659-APG-NJK; 2022 U.S. Dist. LEXIS 161129, Denial of C.O.A and Motion 9th Cir. Ct. Appls. case no. 22-16639; 2022 U.S. App. LEXIS 33256

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Jurisdiction

A Judgement of Conviction was entered on September 10th, 2007. An order of Affirmance was entered by the Nevada Supreme Court in Mr. Madid's case May 1st 2009. The Remittitur by the Nevada Supreme Court was entered June 4th, 2009. On August 26th, 2013, the 8th Judicial District Court entered their Facts and Findings. A second Order of Affirmance was entered by the Nevada Supreme Court November 13th, 2014. A second Remittitur after denial was entered by the Nevada Supreme Court December 17th, 2014. A Criminal order to statistically close case was entered by the 8th Judicial District Court February 2nd 2016. Facts & Findings were filed May 8th 2017. A Federal Habeas was filed in case no. 2:15-cv-00118-JAD-PAL. Case was dismissed by the United States District Court District of Nevada on Nov. 27th 2017. The Nevada Court of Appeals entered an order of Affirmance March 14th 2018. A Remittitur was entered by Nevada Supreme Court April 18th, 2018. A third Facts & Findings was entered by the 8th Judicial Court on December 5th, 2018. Nevada Court of Appeals Affirmed the denial August 13th 2019. Remittitur entered September 20th, 2019. §2254 was filed in case no. 2:19-cv-01659-AP6-NJK. Denied September 6th, 2022 by U.S. Dist. Ct. Dist. of Nevada. C.O.A. Filed to 9th Circuit case no. 22-16639. C.O.A. Denied September 7th, 2022. Reconsideration and 60(B) Motion Filed. Denied by 9th Cir. October 25, 2022. Instant Petition Writ of Certiorari filed, under 28 U.S.C. §1257 invoked.

Constitutional and Statutory Provisions Involved

U.S. Const. Amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. IV

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.

U.S. Const. Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in times of war or public danger. Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of Law, nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI.

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

U.S. Const. Amend. XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. 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.)

NRS. 200.050 Voluntary Manslaughter

"Voluntary manslaughter requires" a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, an attempt by the person killed to commit a serious personal injury on the person killing.

NRS. 193.220 Voluntary Intoxication

"no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent."

NRS. 175.501 Lesser Included Offense

"Jury may convict of Lesser Included Offense or attempt. The defendant may be found guilty or guilty by mentally ill of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

NRS. 193.169 Gang Enhancement

"prohibits the court and the state from applying the additional penalty of the gang enhancement when the weapon enhancement has been applied and vice versa when the gang enhancement is applied, the enhancement of a weapon cannot be applied."

NRS. 193.165(4) Weapon Enhancement

(4) Provisions of subsection 1, 2, and 3 do not apply where the use of a firearm, other deadly weapon is a necessary element of crime.

NRS. 48.045 Evidence of Character inadmissible to prove conduct; other crimes.

(1) "Evidence of a person's Character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion."

FRE 404, Rule 404(A)(1)

(A) Character Evidence

(1) Prohibited uses, Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character trait.

FRE 404, Rule 404(B)(1)

(B) Crimes, wrongs other acts

(1) Prohibited uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

Rule (609)

"For any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving or the witness's admitting - a dishonest act or false statement."

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Statement of Case

On or about May 21st, 2005 the appellant and several friends all went to a Highschool party in Henderson, Nevada. The party was thrown by Arlin Delgado and her sisters. (at the time Arlin 21yrs old, her sisters 16, 15 and 12yrs old.) Although they invited their underage friends alcohol and drug usage was present as testified to at trial. Various individuals brought various forms of alcohol and displayed illicit drug usage (mainly marijuana and methamphetamine) Arlin Delgado testified at trial that the party was starting to get out of hand and there were lots of underage people drinking, etc. at her party. In which she told everybody to leave because they were all underage drinking and she didn't want them there. A lot of people then moved to the front of the house where an incident began to thicken, which resulted in the stabbing of Mariano Madrid and the shooting death of Ricardo Macias, a known SURFOS gang member.

Reports and Testimony were that an altercation between another gang member (neither defendant or victim) Joel Sandivul of "DLK" gang had an argument with Ricardo Macias (victim) in the backyard. (states witness Jesse Lackey testified that Joel and Ricardo had been in fights before and had a History of Beef and violence with each other.) The testimony at trial was that there was friction between the two of these individuals and that on this particular night they had a confrontation at the front doorway. Where Ricardo Macias (who's gang moniker was "Cyclone") issued a gang challenge to Joel Sandivul by saying the name of his gang "SURFOS" when "Joel" passed by him. Deliberately attempting to insult and challenge "Joel". It was reported and testified to that "Joel" exited the front door to which Ricardo Macias and "Jesse Lackey" followed him outside. States witness "Francisco Solis" testified that "Mr. Madrid" was trying to intercede and keep a fight from

happening between Joel and Macias, and in fact told Joel and Macias both they were not going to fight in his neighborhood.

At this point Defense witness "Ernest Duron", testified that he saw Ricardo reaching for something in his waistband, so he punched Macias. At which time a huge fight/maylay broke out in the street. Immediately following "Macias" being punched, Solis heard somebody (defendant) screaming "Don't fight, Don't Fight." states witness "Ignacio Cervantes" testified that "Macias" pulled out a knife and started to chase Duron. (Ernest Duron, also testified that the deceased "Macias" chased him and Mariano Madrid with a knife.) Defense witness "Chris Hosely", also testified that the victim had turned his attention on him and the appellant. To which Mr. Madrid was "stabbed" with a butterfly knife. (Three (3) people testified to seeing the victim "Ricardo Macias" stab Madrid) (Ignacio Cervantes, Ernest Duron and Chris Hosely.) [(and since Four (4) eyewitnesses have come forward with sworn and written affidavits, stating that the victim "Ricardo Macias" had stabbed Mr. Madrid before the shooting.)].

A Fact that was conceded to by the state as well. where District Attorney "David Schubert" stated, "We did not test the knife for fingerprints or blood, because we don't need to, we know who's blood it is and we know who stabbed Mr. Madrid." "We are not here to find that out, but to find out who shot "Ricardo Macias."

Shooting

Regarding the shooting of Macias states witnesses (Both Friends and Fellow members of "Ricardo Macias" gang) testified that the appellant was the shooter. As there are multiple differences in testimonies and discrepancies, from which hand appellant used to shoot to who was Truly with "Macias" when he was shot. (where one witnesses

testimony contradicts the next as all four testified to being with the victim singly and running in opposite directions than the next. This includes negating facts and lying to police and detectives. (In one such case witness "Jesse Lackey" while interviewed was viewed as being difficult and uncooperative in I.D. a suspect. Detective Gerald Collins, Hutchings stopped the recorded interview for some 20 min. before resuming. Stating "through much persuasion" Lackey was able to I.D. Mr. Madrid, as the shooter. Detective Hutchings testified that Madrid's arrest was based "solely" on Jesse Lackey's identification.

From witnesses fleeing to Mexico to avoid police and the witnesses coming together to "get their stories straight," after police informed them they had no leads. Leaving them free to make up their own story, it's peculiar how 4 state witnesses "All Friends" of the victim and "Fellow gang members," out of "revenge" (their words) I.D. Mr. Madrid as the shooter. All solely based upon Jessie Lackey I.D. By way of nothing less than "suggestive photographic lineup procedures and interrogation tactics."

But during trial it became apparent that testimonies were not truthful, but deliberately lying and misleading. Ex. State witness Sergio Diaz when testifying that he was "five feet" away from Macias when he was shot. That he seen the appellant fire.

The Fatal mistake here, that Diaz was lying. Is that he had testified that both him and the victim WERE FACING the appellant when he was shooting at them. The Autopsy reports showed that Macias was shot from behind, and not the front. According to the report he was shot in the right calf; left leg and back shoulder exiting the throat. Where bullet trajectory pointed to Ricardo being bent over. (All Facts not challenged by counsel). Ultimately, Mr. Madrid was arrested.

On August 22, 2005 an Information was filed charging Mariano Madrid with one count of Murder with the use of a deadly weapon - with the Intent to promote, further or Assist Criminal Gang. On March 8th, 2007 Mr. Madrid was found guilty by jury of the charges alleged in the information. On July 25th, 2007 Mr. Madrid was sentenced to a term of 20yrs to Life for First Degree Murder and a consecutive 20yrs to Life for the Gang Enhancement. Madrid's Judgement of Conviction was entered August 9th 2007.

A timely notice of Appeal was filed Aug. 28, 2007 which was decided and denied by the Nevada Supreme Court May 1st, 2009. Order of Affirmance and Reaffirmance was issued June 4, 2009. On May 26, 2010 Madrid filed his petition for writ of Habeas Corpus (PC). First Amended Petition was filed April 15th, 2011 along with Supplemental Points and Authorities May 11, 2012. That proceeding concluded with the denial of his appeal Dec. 10, 2014.

Mr. Madrid filed his first federal habeas proceeding with the U.S. Dist. Ct. D. of Nev. with respect to his conviction and sentence in Jan. 2015. see Madrid v. Neven, 2:15-cv-00118-TAD-PAL. Simultaneously Madrid filed a petition or Petition for Writ of Habeas Corpus in the State district court case no. OSC214075 October 2017. Madrid's first Federal proceedings were dismissed without prejudice in order to exhaust unexhausted claims Nov. 2017.

Nev. Ct. App's subsequently affirmed the lower court's dismissal of Madrid's state petition as untimely and successive. Those state proceedings concluded on Aug. 13, 2019.

Madrid initiated his Second Federal Habeas §2254 proceedings Sept. 16, 2019. See Madrid v. Hutchings, 2:19-cv-01659-APG-NJK. On Sept. 6, 2022 the United States District Court of Nevada denied Mr. Madrid's petition with prejudice and denied a Certificate of Appealability.

Sept. 6th, 2022 petitioner filed notice of appeal to the 9th Circuit

court of appeals. Along with an Application for C.O.A to the
9th Cir. Ct. of Appls. October 18th, 2022 case no. 22-16639.

The 9th Circuit denied the C.O.A application on Sept. 7, 2023
followed Mr. Madrid filed a Request for Reconsideration along with
a Rule 60(B) motion on Sept. 18th 2023 nine days later. Which was
ultimately denied October 25, 2023 by circuit judges Collins and Lee.

The instant Petition and Request for Writ of Certiorari
is now at this time being submitted respectfully for consideration.

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Reasons For Granting Writ of Certiorari

The U.S. Dist. Ct. of Nevada's decision violates the self-evident decision held by this Court in Winship. Due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. At stake in this case are "constitutional protections of surpassing importance." The 14th Amendment precept of deprivation of liberty without due process and 6th Amendment guarantee in criminal prosecutions "Entitlement to a jury determination that he is guilty of every element of crime beyond reasonable doubt." Characterization of fact to be proven characterized in Mullaney v. Wilbur. There this Court invalidated a Maine statute which gave defendant the burden of proving he acted with a lesser degree of culpability "heat of passion & provocation," to obtain conviction of manslaughter vs. murder. The Nevada courts including the U.S. Dist. Ct. has done precisely what this Court has forbidden, circumventing Winship's protection by characterizing a fact necessary for conviction as a sentencing factor. Mitigating vs. Element. The 6th & 14th Amendment demand a state to prove Premeditation, Deliberation, Willfulness beyond a reasonable doubt. The state failed on its face to, actually prove these elements beyond a reasonable doubt, as they never disproved that Mr. Madrid was intoxicated that night. The state cannot argue that the killing took place under clear and conscious "mind" when evidence of intoxication was abundant and present. As there was clearly a diminished mental capacity due to drug and alcohol usage. Therefore the state cannot say for certain that Mr. Madrid was able to form the "specific" intent required, negating Premeditation, Deliberation and Willfulness. As well the jury was never instructed on "Voluntary Intoxication" to even consider these factors. Facing hand in hand with the lack of "Voluntary Manslaughter" instructions pursuant to NRS. 200.650. A the jury was not provided any instruction on the consideration or definition of a "Serious and Highly Provoking Injury." Such as the one Mr. Madrid sustained when the victim stabbed him prior to shooting. The state never proved beyond a reasonable doubt that Mr. Madrid did not sustain a "Serious and Highly Provoking Injury," one that would arouse a passive that obscured or disturbed to such an extent to cause the ordinary person of average disposition "to kill," therefore their burden of proof was not met. Not only was there defect in integrity of the Federal Rules

proceedings, but a determination on the merits was precluded by procedural ruling. The flaw in quality of completeness and wholeness of the Habeas proceedings are alarming. As egregious errors took place, leaving the Jury unable and not allowed to express complete factual conclusions. Specifically involving the lack of "Voluntary Manslaughter" and "Voluntary Intoxication" instructions. Both warranted to be disproved by beyond reasonable doubt. NRS 175.501 states "A defendant is entitled to a jury instruction on a lesser-included offense if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of that offense." Equally consistent with the ruling in (Rosas, 122 Nev. at 1214, 147 P.3d at 1106) "A defendant need not demonstrate that a requested lesser-included offense instruction would be consistent with his testimony or theory of defense."

All things considered it not for the absence of the lesser-included offense instruction of "Voluntary Manslaughter" and "Voluntary intoxication, Mr. Madrid would not have been found Guilty of 1st Degree Murder. As the state could not meet its burden of proof beyond a reasonable doubt that diminished capacity and a serious and highly provoking injury did not exist. The Jury could have inferred from the instructions that they had a duty to decide whether Petitioner acted out of heat of passion and with a diminished capacity negating the elements of Murder. And if found guilty could have found a lesser-included offense to be suitable. But instead the state was relieved of its Burden of proof in not providing such instructions. Prejudicing Mr. Madrid and violating his 6th & 14th Amendment rights.

Manslaughter

Failure to provide a lesser-included offense instruction on "Voluntary Manslaughter" or any lesser included offenses of 1st Degree Murder, violated Petitioner's rights. And actually prejudicing him in receiving a fair trial. If instructed properly, the Jury's decision would have been substantially different. Regardless of defense, the nature of the evidence of Mr. Madrid being stabbed speaks volumes, as a defense. A foundation was laid, but yet no instruction was given. The element of malice was clearly negated by the extreme provocation of being stabbed through and through the arm by victim. The Burden

should then have been shifted on the state to prove beyond a reasonable doubt the "absence" of "sudden quarrel and heat of passion". Not being possible by the evidence, the state would have been unable to meet their burden. Which in turn would not have allowed them to convict or sustain a Murder charge. There is plenty of evidence in this case to show the Court that a reasonable jurist would conclude that the petitioner acted if so, out of passion and not malice. By not providing such instruction renders the trial and its outcome unreliable and unfair. The confidence in this conviction has been undermined.

18 U.S.C. § 1112(a) "Voluntary manslaughter is defined as the unlawful killing of a human being without malice upon sudden quarrel or heat of passion." United States v. Alexander, 152 U.S. App DC 371. "When a defendant charged with Murder introduces evidence of a sudden quarrel or heat of passion, the evidence acts in the nature of a defense to the Murder charge." United States v. Lesing, 833 F.2d 156, 160 (6th Cir.) Mullaney v. Wilbur, 421 U.S. 684, 704 "Once such evidence is raised the burden is on the government to prove beyond a reasonable doubt the absence of sudden quarrel or heat of passion, before a conviction for murder can sustain."

Even though sufficient evidence was proffered, as evidence existed undeniable and factually that Mr. Madrid sustained a "serious and highly provoking injury" in such quinn no instruction was given. The petitioner need not show that a Manslaughter instruction would not have undermined counsel's strategy. This is a question of due process, not of contradiction of testimony. Although testimony was presented that the victim did own/have a knife and was seen pulling it out and chasing the petitioner. Facts that the state conceded too. By reasoning that they already knew the victim stabbed Mr. Madrid and that's why the knife recovered wasn't tested for blood or any fingerprints. Knowing the knife belonged to victim. It's highly likely that Madrid would not have been found guilty of the elements of murder with respect to malice, due to this injury. If Jury was properly instructed, in regards to "Voluntary Manslaughter" and "Voluntary intoxication", as well as their rolls in a murder trial. By Not giving These instructions petitioner was prejudiced. His liberties obstructed and fairness of rights, due process. Although and through stab wound during an attempt by victim to inflict serious bodily harm even death.

Intoxication

By not instructing or holding a brief as to the scope of "Intoxication" to proffer an instruction due process rights were violated, as this could have negated the "specific intent" and mental capacity needed for murder. Along with its elements of "willfulness; Premeditation; Deliberation." If Jury would have been instructed specifically or in a limited way, as whether the petitioner acted with the required specific intent and mental capacity, required. The state could not have met its burden of proof, as the record suggests that labs were drawn. This instruction "relates to a lesser-included offense must be assessed by the reviewing court as to "the likelihood that the defendant's jury would have convicted on the lesser included-offense." Crane, 798 F.3d at 849. Here the court can agree that there is a reasonable likelihood that the jury would have convicted of Voluntary Manslaughter. It instructed properly of said lesser included offense, given evidence of both. Stabbing and intoxication. The "Voluntary Manslaughter" instruction would have been considered in tandem on whether this issue was "imperfect self-defense," under diminished capacity, resulting in Voluntary Manslaughter in relation with intoxication. As Petitioner was never the aggressor initiating wrong doing/fault. As it was the victim who was carrying a Butterfly Knife issuing problems and who stabbed Mr. Madrid, as states witnesses attested. Its reasonably likely that under these circumstances the jury would have returned a different result. Consistent with accounts, that the victim had a knife; brandished the knife then he stabbed Mr. Madrid, who repeatedly played peace keeper. By precluding the jury from considering this evidence due process rights were violated. As "Voluntary Intoxication" evidence was relevant to decide whether the elements of murder existed. Petitioner's claim implicates a Federal Constitutional right to this evidence regarding the relevant charge of murder. The Lack of this instruction infected the entire trial and its outcome. In context, it is likely that a jury would have found that while intoxicated the petitioner was incapable of the elements of murder. The Lack of instruction warrants Certiorari. Deurman v. State, 93 Nev. 364, 866 P.2d 462. "In this state, in a prosecution for murder, evidence of the intoxication of the accused is relevant. For the purpose of a jury determination of whether defendant lacked the capacity to deliberate and premeditate, required of first degree murder." Montana v. Egelhoff, 518 U.S. 37 (1996)

This error had a substantial and injurious effect and influence in determining the jury's verdict. The pertinence here goes hand in hand with counsel's failure to hire an investigator for pretrial investigation to hire expert witnesses to testify to effects of alcohol and also Marijuana intoxication as to its effects on the mind and mental state.

Ultimately Petitioners right to establish consumption of intoxicants and substances with intoxicating effects to be considered towards effects on the mind and mental state were circumvented. Allowing the state the opportunity to, not have to meet its burden of proof, as to Every element of murder. Vincent v. State, 97 Nev. 169, 625 P.2d 1172. "This section requires that the jury be informed as to the possible effects of intoxication, upon formation of criminal intent."

Pretrial Motions

Deficiency was shown in the failure to file any pretrial defense motions. By not obtaining "Brady" evidence against states witnesses and taking District Attorney at their word, that there wasn't any criminal issues or information for the states witnesses (in regards to impeachment value). This was arguably outside of reasoned professional judgement by not filing a pretrial motion in Limine to request the common wealth information and (Crimen Falsi) info for state witnesses. Counsel could have filed the Motions Below:

- (1.) Motion for disclosure of statements made by Madrid.
- (2.) Motion to suppress Madrid's statements (as he was interviewed while at hospital after a traumatic injury and under the influence of medications given to him at the E.R.)
- (3.) Motion to demand inspection and independent testing of all physical evidence pursuant to statute and the states duty to disclose "Brady" Material.
- (4.) Motion in Limine to preclude state from introducing evidence of any uncharged misconduct.
- (5.) Motion in Limine to preclude introduction of prior Juvenile convictions of defendant.
- (6.) Motion to dismiss based upon destruction of evidence for failure to preserve evidence for review by defense counsel.
- (7.) Motion in Limine to identify all opinions to be offered by the states gang expert and to preclude the introduction of other opinions.
- (8.) Motion for disclosure of the gang files and recorded criminal information regarding states witnesses and friends of the decedent.
- (9.) Motions to compel the state to narrow its evidence and to insure that all

information was properly disclosed or excluded, as no viable offer negotiating the case as to charges took place.

This goes hand in hand with a total failure to investigate case on the part of counsel. As they had a duty to explore and investigate all avenues leading to the facts. A strategy can't be deployed if there is no investigation of facts.

The relevancy here as to impeachment value, is once again the criminal histories at very least fit into trial in the aspect of shedding light on the states witnesses and their credibility and truthfulness. Showing not only discrepancies in testimony, but providing motive for combined testimony against petitioner, casting doubt on witnesses Honesty and Legitimacy. Further precluding the state from witness vouching and painting the picture of state witnesses being squeaky clean. By not filing defensive Pretrial motions the state was allowed to intentionally withhold prejudicial evidence in violation of Brady and contrary to the rulings in Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980)

Impeachment evidence is exculpatory when the reliability of a witness is determinative of guilt or innocence. This is considered material under "Brady." Trial Counsel should have filed Pretrial Motions requesting information pertaining to the disclosure of promises and inducements made to state witnesses, in exchange for testimony and/or cooperation. As well as motions requesting material information pertaining to Criminal Histories and Background for impeachment purposes. As well as requesting to unseal and disclose both Juvenile records and SCOPE info of witnesses. A clear violation of Amendment rights.

Pretrial Investigation

The prejudicial impact of not doing any Pretrial Investigation/investigate case, prevented the Petitioner the opportunity for defense as well as to develop defense witnesses. No reasonable/meaningful investigation was made into charges attributed, resulting in lack of defense and decision making at trial. Counsel's investigation was deficient. By hiring a private investigator petitioner has shown this in his own right. Successfully attempting to recontact potential witnesses to develop

and obtain statements via sworn affidavits of then "potential" witnesses. Who all in some way, shape or form could discredit the states witness testimonies and credibility, as well as events that night. Including the state's theory, whether its testimony of Madrid's intoxication, Madrid being stabbed, or identifying another shooter. The Affidavits proffered of witnesses stemming from 2012-2020 are those of Gloria Gomez; Steven Scott; Christine Torres; Adrian Taramillo. Actually and factually identify another shooter who was not Mr. Madrid. Further investigation of these witnesses would have developed testimonies with information not offered at trial. That would have overcome the inconsistent testimonies of the states witnesses. Placing not only doubt but questions in the mind of the jury. As well medical experts and testimony should have been sought. From lab technicians in accordance to toxicology and lab done in regards to Mr. Madrid's intoxication, to the treating physician and dictating radiologist. To testify to Madrid's state upon arrival; extent of injury; medical records and explain labs and the Toxicology report, in relation to intoxication and Madrid's range of motion after being stabbed. Further expert witnesses could have been retained as well to explain the facts and effects of alcohol and marijuana intoxication and how it relates to the mind and its mental state. By not doing so poses a fundamental miscarriage of justice as the more time that goes by the more difficult it is to contact witnesses and relevancy settles in amongst other factors including but not limited to sickness and death. This info along with impeachment evidence proffered in this writ would collectively paint a different picture of the events that night. Showing it to be highly conceivable that the prosecution would not have been able to meet its burden. U.S.v. Gronic; Powell v. Alabama

Injury

The Failure to Highlight injury as "serious and highly provocative" prejudiced Petitioner, impermissibly infringing on his right to a defense. No investigation was done in regards to the treating physicians notes and Hospital records. By not subpoenaing treating physicians and Hospital nurses, to expertly testify to Madrid's stab wound. An Expert witness could have testified to the severity along with range of motion

and lack of mobility. In both his arm and hand, showing that Madrid suffered tendon damage, which would have played a roll in whether he was even capable of firing a gun. The seriousness of this issue and injury were downplayed, as it was highly prejudicial to do so as Madrid's injury posed information that could have been used as exculpatory evidence in relation to a lesser included offense and their instructions, given seriousness of the stab wound. Placing doubt in the minds of jurors if Mr. Madrid was even capable of this, given the extent of injury and damage caused by the stabbing. By proving a "serious and highly provoking" injury existed, may very well have bridged the theory of defense into "Voluntary Manslaughter" requiring an instruction, while also simultaneously shifting the burden to the state to prove otherwise. NRS. 200.050 see decision Rosas v. State, 122 Nev. 126, Weaver v. Johnson, 2010 U.S. Dist LEXIS 118 (1987)

Photographic Line up

Mr. Madrid was unduly prejudiced and unfairly singled out for misidentification as the photographic lineup didn't show that the participants were sufficiently similar in skin color, age, facial hair, weight and hair style. Thus not insuring Petitioner wouldn't be singled out. As petitioner was the only person in the photographic lineup that had even attended the party that night. These circumstances in Mr. Madrid's case was suggestive and gave rise to a substantial likelihood of irreparable misidentification. Such as photographic lineup procedures, such as showing witnesses photographs separately instead of collectively, in a photo-six pack. Confusing witnesses by asking if they recognized anyone from the party vs. "recognize the shooter." Actually, stopping interviews to "persuade" witnesses to I.D. a suspect when uncooperative. Suggesting witnesses were coached to I.D. petitioner. These procedures clearly give rise to a possible likelihood of irreparable damage and misidentification. These procedures suggest and paint a picture of uncertain witnesses becoming certain after interviews when detective had no leads. All who were friends and fellow gangmembers of the victim, the opportunity to create false information in an attempt to rally against petitioner out of vengeance for their friend. Rivers v. McKendrick, 448 F.2d 30; Berry v. State, 834 P.2d 1002.

Bad Acts / C.D.

The issue of character evidence in relation to petitioner's rap music C.D. violated not only Mr. Madril's confrontation rights but a challenge under Rule 404 as to probative value and prejudice. Not only, was Mr. Madril not afforded the opportunity to cross examine the likes of fellow artists/performers and procedures. As well as the context of the music and its lyrical basis, as well as publishing and recording dates. In which to argue the claim that the song "Bullet Holes" was made contemptuously immediately after the shooting. While the admittance of the C.D. may have been camouflaged as to proving gang involvement or intent. But its clear that the character basis was to "excite or strike an emotional" response amongst Jurists. The music was clearly admitted for this purpose of character evidence, that in the states mind would paint a picture of Madril's Bad Character, in light of the proceedings and circumstances. By the admittance of this character evidence the door was allowed to be open for the D.A. to dwell and remark repeatedly the character and bad acts of Mr. Madril as to the lyrics in highlight. Deliberately dissecting the lyrics on "powerpoint" to paint the picture that "If you Sing about it, you do it." This influence proffered by the state by way and through character evidence plagued the Trial proceedings as the D.A. was allowed to comment and remark as to Petitioner's character, through the music's lyrics and continuously play the song as an Audio aid towards those comments and remarks. Neither counsel required the opportunity to listen to the C.D. outside of the Jurists presence and prior to it being played for the first time. No 404(a)(6) challenge was issued on the basis of a Petrocelli hearing for a limiting instruction or a curative instruction. By not doing so this allowed the character evidence to be admitted and the character assassination commence, where prosecutorial misconduct followed which violation of due process ensued. Rule 404(a)(6); United States v. Ring; 513 F.2d 1001, 1004 (6th cir. 1975) "In jury trials, evidence of a criminal defendants bad acts or prior misconduct is inadmissible to show criminal propensity, because it 'tends' to confuse the issue of guilt or innocence.")

Field Interview Cards

The introduction of Field interview cards being allowed without challenge as "Character Evidence" allowed "Prior Uncharged bad act" evidence outside the scope of record to be admitted. Admitted for the sole purpose to show Criminal propensity. For nothing more then to confuse the details and facts being tried. In an objective to sway the jury to convict based on persistent ad hominem attacks in conformity with Mr. Madrid's Character. No 404(b) objection was made to the rhetoric and comments by the state. Allowing the state to make remarks and comments towards Mr. Madrid's Character on "Bad Acts" outside the scope of evidence, irrelevant to the case. Violating Mr. Madrid's 14th Amend. As these "F.I." cards were already obtained in violation of Petitioner's 4th & 5th Amendment rights prescribed. As no criminal activity was committed during these stops by school campus officers. Neither going through a chain of command or custody. The admittance of these cards as evidence opened the door and allowed the "D.A." to introduce and solicit irrelevant "Character Evidence" and "prior uncharged bad acts" at trial outside of the scope of evidence to prove criminal propensity. Highlighting "Bad Character," developing not a quest for the truth of that night, but an onslaught of character assassination. A pervasive character attack ensuing every corner of trial. Time and time again by way of this evidence seeking to prove criminal propensity and that the Petitioner's character acted in accordance to the crime. This was done for one purpose to present "bad act" conduct, that Mr. Madrid had an affinity of crime, gang involvement and culture, from the states view of enhancement value. But in reality the more the state was allowed to flood trial and overwhelm the jury with this type of evidence, the better their chances to convict, under the guise and excuse for enhancement towards gangs. This Evidence was inadmissible regardless under Federal Rule, but none the less allowed and made room for speculation that was tolerated by the court and unchallenged by counsel. Alleged "Facts" from "F.I." cards that were admitted and introduced from Detective's "memory" alone. Referring to memory as to prior uncharged criminal complaints to muddy Petitioner's character. Clearly, prejudicial & irrelevant.

Somee v. State, 124 Nev. 434; Brown v. Texas Supra; 443 U.S. at 52 (61 L.ed.2d at 313)

Michelson v. United States; 335 U.S. 469, 476; 93 L.ed 168, 169. Oct. 21/3 1948; U.S. v. Ring; 513

F.2d 1001, 1004 (6th Cir. 1975)

Gun Photos

No doubt the introduction of gun photos as visual aids that were presented as the "Murder weapon", But were Not the murder weapon was confusing to say the least. Confusing to the issue of guilt or innocence as the photos were portrayed as the weapon used in the crime. Specifically during closing arguments where district attorney David Schubert, presented this evidence stating "The Murder Weapon" while using powerpoint on an overhead projector soliciting "Known" false evidence to the jury creating confusion. This was a violation of petitioner's due process rights as no challenge was made and no corrective instruction or corrective action taken by the Court. Petitioner's right to confrontation of evidence to the gun photos was stripped as no objections were made creating prejudice, as the state was allowed to submit this false evidence as fact without correction. No admonishments were given, and no briefs to admit were held. Allowing false testimony by the state to go uncorrected as prosecutorial misconduct by way of these comments and remarks while presenting these photos as visual aid. Where the state repeatedly stated the photo was "the murder weapon"; "the weapon used." These comments in conjunction with gross inadmissibility of these photos as visual aid, surely impacted the jury and gave rise to confusion, as to whether the photos were for were not the "actual" murder weapon. This presentation and its remarks infected trial and surely prejudiced petitioner. Violating due process. Washington v. Hubbauer, 228 F.3d 689/6th Cir.)
Napue v. Illinois, 360 U.S. 264; Constitutional Law §840 - due process, false evidence.

From the beginning stemming from Counsel's ineffectiveness at trial plain error has occurred. By way of Counsel; both state and court, a series of chained events have transpired and gone uncorrected. Depriving Petitioner

of his Amendment rights to fair trial and due process. Mr. Madrid now stands as an incarcerated person of nearly Eighteen years, due to the errors of both the court and counsel. Petitioner contends that the decisions of the U.S. Dist. Ct. of Nevada; as well as Nevada Supreme Court and 8th Judicial Court, are and were both "contrary" and "unreasonable" in applying law/rule. With respect to the state, the adjudication in this case has never been decided on its Merits but only procedure. Instead unreasonable application of clearly established Federal Law, as determined by this High Court was ignored. Under Contrary and Unreasonable application clauses of the United States §2254(d)(1). This clear and established Federal law was overlooked in deciding in totality. As only state statute and procedures were recognized and followed. Petitioner asks here today that this High Court, review now in totality the circumstances and issues surrounding this case as applicable to Federal Rule and Law. Sgiz v. Ortiz, 392 F.3d 1166 (10th Cir. 2004) (Tennard v. Duffke, 542 U.S. 274 (2004))

Through lack of preparation and the total non-existence of Investigation, Petitioner's Trial was plagued with Constitutional issues. Leaving the results of Trial unfair and counsel's performance deficient. These egregious errors prejudiced the petitioner and deprived him of due process of law, creating a Fundamental Miscarriage of Justice. The denials sustained in this case by the lower courts are Unreasonable, as they are in direct conflict and contrary to clearly established law and decisions. As a Just Court Petitioner requests this court consider all the information in this case. That your Justices exercise wisdom and understanding in deciding this case. That this Honorable court GRANT Writ of Certiorari, and give relief where it is much needed.

As the previous decisions made by the lower courts are Erroneous as applicable to prior state rulings and Federal decisions. It is important that Writ of Certiorari be GRANTED in this manner to prevent wrongful incarceration of another innocent person and prevent a Fundamental

Miscarriage of Justice, and loss of Life and Liberty as prescribed by the U.S. Constitution. As the State of Nevada can "No Longer" be allowed to Interpret as they will or apply as they choose to see fit, when Law is clearly established. Jeopardizing the integrity of this Court and its thoroughness in its rulings. Creating a "Force and a Mockery" of Law. The National impact of the decision here, is that if left uncorrected, similar Questions such as those being presented here, will go unresolved and ignored. Allowing room for any Future error to stand uncorrected and unresolved. Leaving the next man to be incarcerated unjustly and of deprivation of Life, Liberty and Constitutional guarantees. A reminder how the State of Nevada does not acknowledge any retractivity, and has no grandfather laws. The decision of the U.S. Dist. Ct. of Nevada's decision is Absolutely in Direct Conflict with not only its own Nevada decision from the past. But also other Circuit Court decisions and the U.S. Supreme Court rulings as well (see Case Citations in Questions presented and Table of Authorities.) To be sure that the Questions presented are not ambiguous to and with prior Federal Court Rulings and decisions. These questions have been presented the best they could be for clarification as to application and interpretation. On "whether or Not" the state court/lower courts did in fact decide incorrectly in this case. As the incorrect application of these "clearly" established laws, could very well pose a threat of Miscarriage of Justice fundamentally to all Americans Protected by the United States Constitution and its guarantees. Very well leaving innocent people wrongfully incarcerated. The following cases/citations should be considered in relation to reason and questions presented. As they have been decided differently, but involve similar issues to Mr. Madrid.

United States v. Hernandez, 476 F.3d 791 (9th Cir. 2007) (lesser included offense instructions warranted); People v. Waidlay, (2002) 22 Cal. 4th 690, 637, 94 Cal. rptr.2d 396, 996 P.2d 46 (Court responsible for Sua Sponte instruction of lesser included offense)

Tavara v. State, 117 Nev. 725 (2001) (Supreme court held trial court was required to give instruction on purpose of admitting evidence); *People v. Callie*, (1981) 30 cal 3d 43, 64 174 cal. rptr. 458, 634 P.2d 534 (minimal evidence, but highly prejudicial evidence of past offenses.)

United States v. Marinovich, 539 F.2d at 922 (court encouraged trial judge to give limiting instruction) *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985); *Walker v. Fulgiani*, 83 Nev. 154, 157, 425 P.2d 794, 795 (1967) (past criminal history is reversible error)

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Conclusion

For the foregoing reasons Mr. Madrid Respectfully requests that this Honorable Court Grant Writ of Certiorari. As this courts intervention is vital. Because the Nevada, U.S. Dist. Ct. has ignored the lessons on the constitutions guarantees of Due Process of Law and Fair Trial. There is Absolutely a Flaw in Quality of completeness and whole ness of the habeas proceedings as numerace facts and evidence were overlooked. Leaving a defect in integrity of the Federal Habeas proceeding. As the procedural ruling precluded a determination on the merits. The Petition for Writ of Certiorari is warranted and should be granted here. The Judgement below should be vacated; reversed and remanded for further proceedings in the lower courts as to a new trial and/or sentencing in accordance to Federal decisions.

Respectfully Submitted,
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