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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| BRUCE BIRCH,<br><br>Petitioner-Appellant,<br><br>v.<br><br>RENEE BAKER, Warden,<br><br>Respondent-Appellee. | No. 15-17429<br><br>D.C. No.<br>2:11-cv-00516-GMN-CWH<br>District of Nevada,<br>Las Vegas<br><br>ORDER |

Before: SCHROEDER and TALLMAN, Circuit Judges, and WHALEY,* District Judge.

The panel has voted to deny the petition for panel rehearing; Judge Tallman has voted to deny the petition for rehearing en banc and Judge Schroeder and Judge Whaley so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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* The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

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

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| BRUCE BIRCH,<br><br>Petitioner-Appellant,<br><br>v.<br><br>RENEE BAKER, Warden,<br><br>Respondent-Appellee. | No. 15-17429<br><br>D.C. No.<br>2:11-cv-00516-GMN-CWH<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, Chief Judge, Presiding

Submitted September 13, 2017**
San Francisco, California

Before: SCHROEDER and TALLMAN, Circuit Judges, and WHALEY,*** District Judge.

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

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

*** The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

Petitioner Bruce Birch appeals the district court's order denying his petition for writ of habeas corpus under 28 U.S.C. § 2254. We review *de novo*. *Hedlund v. Ryan*, 854 F.3d 557, 565 (9th Cir. 2017). Habeas relief may not be granted unless the state court's "last reasoned decision" adjudicating the merits of the claim—in this case, the Nevada Supreme Court decision—is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014). We affirm.

Birch argues that he was denied his Sixth Amendment right to effective assistance of counsel based on an "actual conflict of interest" with his lawyer, Bruce Lindsay. To establish a Sixth Amendment violation, a petitioner must show that (1) his lawyer "actively represented conflicting interests," and (2) the "actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980); *see also United States v. Baker*, 256 F.3d 855, 860 (9th Cir. 2001).

Birch claims that an "actual conflict of interest" arose, after Birch spat on Lindsay's face during pretrial proceedings and stabbed Lindsay's hand with a pencil during one of his trials. However, the Supreme Court has only recognized "actual conflicts of interest" in joint representation cases, whereby an attorney represents multiple clients with divergent interests. *See, e.g.*, *Mickens v. Taylor*, 535 U.S. 162, 166–69 (2002); *Holloway v. Arkansas*, 435 U.S. 475, 487–90 (1978); *Glasser v. United States*, 315 U.S. 60, 75–76 (1942), *superseded by rule on other grounds*, *Bourjaily v. United States*, 483 U.S. 171 (1987). Further, the record does not reflect that any alleged conflict of interest "adversely affected" Lindsay's performance. Despite the spitting and stabbing incidents, Lindsay continued to zealously represent Birch during two trials and sentencing. Therefore, the Nevada Supreme Court's decision was not contrary to clearly established federal law.

**AFFIRMED.**

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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|---|---|
| BRUCE BIRCH,<br>Plaintiff,<br>v.<br>DWIGHT NEVEN,<br>Defendant. | Case No. 2:11-cv-00516-GMN-CWH<br>ORDER |

This counseled habeas petition is before the court for a decision on the merits (ECF No. 71).

## I. Procedural History and Background

In his amended petition, petitioner Birch challenges three separate criminal convictions (ECF No. 71). Birch was charged with conspiracy to commit burglary in Case No. CR07-1714A (the Home Depot case), for allegedly attempting to steal various items from a Home Depot store in June, 2007. He was charged with burglary in Case No. CR08-1585 (the Sears case), for allegedly stealing several wrenches from a Sears store on February 21, 2008. And he was charged with possession of a stolen Ford truck in a Walmart parking lot on February 21, 2008, in Case No. CR08-1586 (the Ford truck case).

Birch pled guilty in the Home Depot case (exhibits to first amended petition, ECF No. 71, exhs. 14, 15)[1] and went to trial on the Sears and Ford truck cases. A jury found

[1] The exhibits referenced in this order are exhibits to the first amended petition, ECF No. 71 and are found at ECF Nos. 72-77, unless otherwise noted.

Birch guilty in both cases. Exhs. 113, 114. On March 27, 2009, the state district court conducted a sentencing hearing on all three convictions. Exh. 111. The court adjudicated Birch a habitual criminal and sentenced him as follows: in the Home Depot case, to a term of 19 to 48 months; in the Sears case, to a term of life without the possibility of parole, consecutive to the Home Depot sentence; and in the Ford truck case, to a term of life without the possibility of parole, concurrent to the Sears sentence. *Id*. at 41-42; Exhs. 112–114. The three judgments of conviction were entered that same day. Exhs. 112–114.

Birch appealed the three convictions and filed three separate appellate briefs. Exhs. 116, 118, 120, 153, 155, 156. The Nevada Supreme Court consolidated the appeals and affirmed the three convictions on March 11, 2010. Exh. 163. Remittitur issued on April 7, 2010. Exhs. 164-166. Birch did not file a state postconviction petition.

This Court granted respondents' motion to dismiss in part (ECF No. 89) and Birch elected to abandon his unexhausted claims (Exh. 90). Respondents have answered the remaining grounds (ECF No. 94), and Birch filed a counseled reply (ECF No. 98).

## II. Legal Standard under the Antiterrorism and Effective Death Penalty Act (AEDPA)

28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), provides the legal standards for this court's consideration of the petition in this case:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). This court's ability to grant a writ is limited to cases where "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86 (2011). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1398 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Andrade*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

In determining whether a state court decision is contrary to federal law, this court looks to the state courts' last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). Further, "a determination of a factual issue made by a state court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

**III. Instant Petition**

**a. Sixth Amendment Right to Counsel Claims**

**Ground 1**

Birch asserts as ground 1A that he was denied his Sixth Amendment right to conflict-free counsel because an actual conflict of interest between Birch and his counsel existed (ECF No. 71, pp. 22-34). In ground 1B, petitioner claims that the trial court violated his Sixth Amendment rights by failing to grant his motion for substitute counsel based on a breakdown in the attorney-client relationship. *Id*. at 22, 34-35).

The Sixth Amendment right to counsel encompasses a right to representation free from conflicts of interest. *Lewis v. Mayle*, 391 F.3d 989, 995 (9th Cir.2004). To establish a violation of the right to conflict-free counsel, the petitioner must show either that (1) in spite of an objection, the trial court failed to allow him the "opportunity to show that potential conflicts impermissibly imperil his right to a fair trial;" or (2) that an actual conflict of interest existed. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *Alberni v. McDaniel*, 458 F.3d 860, 869-870.

In several cases in which the United States Supreme Court has defined the right to conflict-free counsel, the defense attorney actively and concurrently represented conflicting interests. *Mickens v. Taylor*, 535 U.S. 162, 166-167 (2002) (discussing earlier authority); *see also Holloway v. Arkansas*, 435 U.S. 475 (1978) (attorney representing co-defendants); *Cuyler*, 446 U.S. at 337-38 (same). In those cases, the

Court created, in effect, a distinction between an actual conflict of interest, and a mere hypothetical one. Indeed, in *Mickens*, the Court held that "actual conflict" is defined by the effect a potential conflict had on counsel's performance, explaining that: "an actual conflict of interest [means] precisely a conflict that affected counsel's performance-as opposed to a mere theoretical division of loyalties." *Id*. at 171; 172 n. 5 ("[W]e have used 'conflict of interest' to mean a division of loyalties that affected counsel's performance.").

With respect to a breakdown in the attorney-client relationship, the Supreme Court has made it clear that the Sixth Amendment guarantee of counsel does not guarantee a meaningful attorney-client relationship. *Morris v. Slappy*, 461 U.S. 1, 14 (1983). The Ninth Circuit has noted that if a conflict is of an indigent defendant's own making, that is if he or she sabotaged the attorney-client relationship or failed to make reasonable efforts to develop the relationship, he may still have "received what the Sixth Amendment required in the case of an indigent defendant." *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000).

The following problems between Birch and several attorneys who attempted to represent him are reflected by the record and set forth both in Birch's amended petition and respondents' answer (ECF Nos. 71, 94). Birch was initially represented by Mazie Pusich in the three cases. Pusich filed a motion for competency evaluation in March 2008 and related that:

> One evening [Birch] left rambling, incoherent and profane messages on several public defender phones. He appeared to have called every number between our receptionist and our fax machine. There are over fifty numbers. The vast majority of these employees did not know Mr. Birch or his case, and had no idea why he was calling to yell and swear at them.

Exhs. 23, 24.

The state district court granted the motion for a competency evaluation. Exh. 26. Two psychiatric professionals evaluated Birch, and both found him competent to stand trial. Exh. 30. In June 2008, Pusich informed the court of a possible conflict of interest with Birch. Birch also asked for new counsel, stating that he was in bitter conflict with Pusich. Exh. 38. The court granted Birch's request and appointed John Oakes as counsel in July 2008.

On July 21, 2008, Judge Jerome Polaha recused himself from Birch's case because Birch sent him a threatening letter:

> As presiding judge over this matter, I am compelled to recuse myself from further involvement with it based upon an event that I consider an implied threat from the defendant. An ex-parte letter was delivered to my chambers from the defendant in which he advised that he was aware of my personal residence and he set it out in the letter. I took that as an implied threat to the point that I advised court security about it.

Exh. 48.

The case was reassigned to Judge Patrick Flanagan, who presided over the three cases. Exh. 52. In September 2008, John Oakes filed a motion to withdraw based on Birch's "outrageous" conduct and "a complete breakdown of the attorney-client relationship." Exh. 61. Oakes explained: "Mr. Birch has left numerous threatening messages on the office voice mail and has threatened counsel personally." *Id*. The state district court granted the motion to withdraw and appointed attorney Robert Lindsay. Exh. 65.

By October 2008, Birch accused Lindsay of acting on behalf of the district attorney and called Lindsay a "pathological liar"; Birch also demanded a fourth attorney. Exh. 73. At an October 24, 2008 hearing, Lindsay stated that he had "the inability to deal with this man and that's the simple and short of it." Exh. 74, p. 5. While Lindsay did say that he believed that the court would have to appoint another attorney for Birch at some point, he also commented that

> I believe [Birch] wants a different lawyer, and I've been kind of opposing that, because I believed at some point, I would end up just being able to deal with him and go forward. But it's just really fairly ridiculous . . . . But he should at some point realize there's no other lawyer coming.

*Id*. at 7-8.

At that hearing, Birch told the court that he had been unable to call Lindsay, when Lindsay visited him at the jail he screamed at him and threatened him, and that their relationship had "deteriorated to the point beyond help." *Id*. at 10. Lindsay responded, stating that clients have been able to call him from the jail for thirty-five years. *Id*. at 14. The court denied the motion to withdraw. *Id*. at 12.

On January 9, 2009, the state district court held a hearing to confirm trial dates of January 20 and 26, 2009. Exh. 78. At that hearing, Birch claimed that he would be inheriting some money from his mother's estate and that he would know the details within two weeks. *Id*. at 7-8. Birch stated that depending on the sum he would either hire counsel or hire an investigator "to prove the allegations I made to the [state] bar and get [Lindsay off the case]." *Id*. at 8. He asked to continue the trials or appoint new counsel. The court denied the request. *Id*. Birch, who has admitted he is hepatitis C positive, then spit in Lindsay's face and eye. Exh. 97. The court ordered Birch removed from the courtroom. Exh. 78, p. 8. Lindsay then stated for the record: "I will do absolutely everything I can to defend this man. . . . I understand he's unhappy with me and he was unhappy with previous counsel and he's going to be unhappy with next counsel . . . . [I will] try to defend him the very, very best I can." *Id*. at 8-9.

Next, on January 14, 2009, the court held a hearing with Lindsay and the district attorney present. Exh. 81. Lindsay reported that he had undergone blood tests after the spitting incident, but maintained: "I have no trouble trying the case, no trouble at all." *Id.* at 7.

Then at a status hearing on January 23, 2009, Birch again complained that Lindsay was not communicating with him, had not filed certain motions or conducted certain investigation. Exh. 93.

Lindsay responded:

> And, your Honor, just for the record, I've never threatened him personally. And I would like the Court to know that I'm not the first lawyer he's had that he's made allegations that turned out not to be correct.
> . . . .

> I stand ready [to] help him with a plea . . . . It's important to know, he's personally attacked me, he's hepatitis C. I need it on the record. I've been to the doctor a few times. I've already had my blood drawn a few times. I've been told the wonderful news that the incubation period for that stuff is six months to six years and nobody really knows.
>
> So when I tell them that I won't forget what he did to me, I'm trying to let him know that it's completely unacceptable behavior. He's trying to infect me. And it's not just rude, it's truly criminal.
>
> . . . .
>
> But he needs to know there are consequences to this little theatrical stuff he's pulling. I intend to defend him as vigorously as possible given the circumstances . . . . and I intend to do as good a job as I possibly can on behalf of my client in spite of the fact that he's done everything he can to personally offend me and personally offend my children and all of the rest of it, your Honor.
>
> . . . .
>
> I've been up to the jail numerous times. He refuses to see me. There's nothing I can do about that, and that is not the consequence of my actions. Just for the record, I have been there, I have been sitting with the files, I've been ready to talk to him, and he's basically called me every name he can think of.
>
> . . . .
>
> Anyway, I stand ready to do everything a defense lawyer can do for this man.

*Id*. at 11-14.

When the Sears trial commenced on Monday, January 26, 2009, Birch asked for a continuance. Exh. 97. He stated that Lindsay did not come to discuss the trial with him over the weekend and that they had not discussed his defense until that morning. Exh. 97, p. 7. Notably, Birch also admitted that he had previously refused to meet with Lindsay and that Lindsay had never threatened him. *Id*. at 9, 12.

Lindsay stated that Birch had refused to meet with him the previous Thursday and had never given him the name of any potential witness. *Id*. at 10. The court denied the motion for a continuance. *Id*. at 13. Lindsay again asserted that he had "the ability to professionally and vigorously defend [Birch] in front of a jury." *Id*. at 11.

After a recess at the close of evidence in the Sears trial, in the presence of the jury, Birch stabbed Lindsay in the hand with a pencil, resulting in a wound that required medical attention. Exh. 98, pp. 240, 245-246. The judge ordered Birch removed from the courtroom. About four hours later, outside the presence of the jury, Lindsay maintained: “I believe I can remove my personal feelings from my professional responsibilities. And I can guarantee you, I’m going to do it. I’m going to give him the best closing I possibly can given the circumstances of this case.” *Id*. at 243.

During his closing argument, Lindsay repeatedly reminded the jury that its duty was to consider only the facts of the case and that it was improper to consider or even mention or discuss Birch’s restraints or his conduct in court. *Id*. at 259-266. Lindsay then represented Birch at the Ford truck trial, which began the day after the Sears trial concluded.

Petitioner urges that the Nevada Supreme Court overlooked this claim on appeal, and therefore, it is now subject to *de novo* review (ECF No. 71, p. 34; ECF No. 98, pp. 4-8). Even under *de novo* review, however, ground 1 fails.

The court has difficulty imagining how petitioner could have made it more difficult for any attorney to zealously represent him. However, petitioner cannot demonstrate that Lindsay had an “actual conflict,” that is, that the conflict between Lindsay and his client affected Lindsay’s performance.

The evidence presented at the two trials demonstrated the following: Reno police officers surveilled Birch at Walmart on the day in question. Exh. 97, pp. 99-110; 145-152; 156-166; 169-173. They observed him going in and out of Walmart with white bags. He eventually placed a bag in the back of a Ford pickup truck. Officers observed Birch take white plastic bags out of the truck and then take the bus to Meadowood Mall. He entered Sears, left the bags at the customer service counter and proceeded to the hardware department. *Id*. He was then monitored on Sears’ video surveillance. *Id*. at 114-142. The prosecutor played several segments of the surveillance video for the jury. A Sears employee testified that he and a police officer observed Birch via video spend about one and one-half to two hours walking the aisles in the tool section. The employee testified that it appeared to him from watching the surveillance camera that

Birch placed some tools into his jacket pockets. Birch made no purchases. Officers stopped Birch after he exited the store. They brought him back into Sears where they discovered six or seven wrenches and a pair of pliers in his jacket pockets. The Sears employee identified the items as Sears property by their UPC codes. *Id*. Officers arrested Birch and brought him to the station for questioning. *Id*. at 183. Officer Clint Bellamy read Birch the *Miranda* warnings. *Id*. at 184-188. Bellamy testified that Birch agreed to talk to police, and during the interview he stated that he steals to support his drug habit. *Id*. at 189. During the approximately one and one-half hour interview, Birch never denied stealing the tools. *Id*. at 190.

In his closing argument, Lindsay reminded the jury that it was their duty to disregard Birch's conduct in the courtroom and his physical restraints. Exh. 98, pp. 66-73. He argued that the surveillance videos did not clearly show a theft and that several police officers testified that they did not see Birch steal any items. He pointed out that officers testified that Birch had a wallet on him containing $1.27 and no credit or debit cards, but no wallet was in the evidence inventory. *Id*.

With respect to the Ford truck trial, the evidence presented at trial demonstrated the following:

A Washoe County sheriff deputy and a Reno police officer both testified that they were part of the surveillance team that observed Birch going in and out of stores in a Walmart shopping center on February 21, 2008. Exh. 105, pp. 111-123; 134-146. They watched Birch place a white plastic shopping bag in the bed of a red Ford pickup truck with a snow plow on the front. They later saw Birch retrieve two shopping bags from the truck bed. On February 22, 2008, the truck was reported stolen. The deputy filled out a property receipt and checked the keys that were in Birch's secured property out of the property room. He took the keys down to the Ford truck, which was still in the Walmart shopping center. Of the two Ford keys, one unlocked the driver's door and the other turned the ignition. The truck did not start as the battery was dead. *Id*.

Robert Wilson testified that on February 22, 2008—the day after Birch was arrested—he discovered that his Ford pickup plow truck was missing from where it had been parked in Douglas County. Exh. 105, pp. 96-108. Wilson stated that he had one set of keys for the truck and that the keys had been left in the truck under the floor mat. He had last seen the truck on February 20th. In response to a call from Reno police officers, Wilson met them at a Reno shopping mall where his Ford truck was parked and gave him the keys. Wilson testified that he had never seen Birch prior to this case and that Birch did not have permission to drive or possess the truck. *Id*.

Lindsay successfully moved for severance of the trials. At a break early in the Sears trial, Lindsay reported to the court that he and his client were communicating and working very well together and that he had two potential witnesses he would interview. Exh. 97, pp. 143-144. On cross-examination he elicited testimony from police officers that they did not know what items were in Birch's bags or otherwise in his possession prior to Birch entering Sears. Exh. 97, pp. 141-142, 153. On cross examination, the Sears employee acknowledged that if the tools had been purchased, the UPC would scan in the same manner. *Id*. at 142.

With respect to the Ford truck trial, Lindsay elicited testimony by Wilson on cross examination that he did not see who took the truck and did not know exactly when the truck was taken. Exh. 105, p. 106. Lindsay elicited testimony from the officers that they never saw Birch open the doors of the truck or drive the truck, that they did not know how the truck got to the shopping center, and that when Birch left the shopping center he took two buses to get to Meadowood Mall. Exh. 105, pp. 124-125; 167-168. Under questioning from Lindsay, one officer conceded that Birch could have been telling the truth that his friend drove the truck to the parking lot and could have appeared evasive in his answers because he did not want to get his friend into trouble. *Id*. at 169-171.

After the jury instructions were settled, Birch asked to be allowed to leave the courtroom for closing arguments. Exh. 106, pp. 196-197. In his closing argument, Lindsay pointed out every unusual and potentially inconsistent fact. *Id*. at 211-221. He argued that it was odd that Birch placed bags in the truck bed instead of inside the cab and that such action was inconsistent with having actual or constructive possession of the truck. He pointed out that no evidence was presented regarding who drove the truck to the Walmart parking lot or that the battery was dead on the day Birch was arrested. *Id*.

At sentencing, the court first considered the sentences for the underlying convictions. Exh. 111, p. 12. Lindsay argued that the Sears theft and possession of a stolen vehicle were probably the smallest and least egregious felonies for which he has gone to trial in his thirty-six-year career. *Id*. at 12-15. He acknowledged that Birch goes out of his way to "aggravate the system," but urged the court to step back and remember the convictions are for "very small things." He pointed out that the truck and the Sears items were returned, thus all victims were made whole. He also noted Birch was fifty-two-years-old when he argued that the court should not to sentence him to the maximum term. *Id*.

With respect to the habitual criminal determination, the prosecution submitted certified copies of six prior felony convictions for Birch. *Id*. at 22-33. The prosecutor discussed Birch's consistent criminal history over thirty-five years, with thirty-three total convictions and eleven felonies. He pointed out that any large gaps in arrests for Birch occurred when he was serving prior prison terms. He introduced letters that Birch wrote when he was in custody on the Sears and Ford truck charges to some of the police officers involved. In the letters Birch taunted the officers, telling him he needs to steal and daring them to catch him. *Id*.

In response, Lindsay urged the court that the underlying sentences that the court had already imposed were severe and that Birch was already facing incarceration until about age seventy. *Id*. at 35-38. He argued that Birch may conduct himself quite differently at age seventy-years-old. He then argued that if the court was inclined to adjudicate Birch a habitual criminal that the court should sentence him to five to 20 or ten to 25 years. *Id*.

Birch then had an opportunity to address the court. *Id*. at 38-39. He stated that it is impossible to prove that someone is beyond rehabilitation. He concluded by stating that Lindsay "did a fine job. I apologize for disrespecting the courtroom, him and everybody else . . . ." *Id*. at 39. The court then adjudicated Birch a habitual criminal and sentenced him to life in prison without the possibility of parole. *Id*. at 43.

In ground 1 of this petition, Birch has failed to demonstrate that Lindsay had an "actual conflict" –that is, that the conflict between Birch and Lindsay affected Lindsay's performance. As set forth above, Lindsay strove to highlight the gaps in evidence at both trials. First, he argued and won a motion to sever the trials. With respect to the Sears trial, on cross examinations he elicited testimony that no one knew what items Birch had on his person when he entered Sears and that the UPC codes on the items would have scanned in the same manner whether Birch paid for them or not. He argued and lost a motion to suppress Birch's statement to an officer "I steal to support my habit." Exh. 97, pp. 73-82. During closing arguments Lindsay made the best of a difficult situation. He could not undo what the jury had witnessed earlier that day—Birch stabbing him in the hand with a pencil.

With respect to the Ford trial, on cross examinations Lindsay elicited testimony that no witnesses observed Birch drive the truck to the parking lot, or drive it at all, or enter the truck's cab; no one could testify as to how the truck got to the parking lot or whether the battery was dead on the day Birch was arrested. In his closing argument, Lindsay urged that Birch's actions that day, including never opening the truck doors or entering the vehicle and taking two buses to Meadowood Mall, meant the jury could not find Birch guilty beyond a reasonable doubt.

Lindsay also had an uphill battle at sentencing. Petitioner's references to mitigating evidence that Lindsay failed to present are disingenuous. Birch was evaluated and deemed competent by two psychiatric examiners. Birch mentioned at the sentencing hearing that he has cirrhosis of the liver; this single reference is the only mention of any medical condition. Lindsay emphasized at sentencing that his client was older and facing potentially the remainder of his life in prison even with the minimum terms that could be imposed. Nothing in the record suggests that the conflict between petitioner and Lindsay affected Lindsay's performance.

Similarly, the trial court did not err in denying petitioner's requests for yet another attorney. Birch stated that he wanted to be represented by counsel, yet not only did he not make meaningful attempts to foster a meaningful attorney-client relationship, he actively antagonized and even threatened the three attorneys who were appointed in turn to represent him as well as the first trial judge on the cases. Two psychological examiners found him mentally competent. Petitioner's actions were a repeat and continuance of his obstreperous pattern of behavior with every attorney who tried to represent him. The second trial judge made a reasoned, balanced calculation to safeguard Birch's right to a speedy resolution to his cases in light of Birch's well-established pattern of refusing to work with counsel. Birch consistently worked to sabotage his defense, and the trial court afforded him what the Sixth Amendment requires. Birch has failed to demonstrate either that in spite of his objection, the trial court failed to allow him the opportunity to show that potential conflicts impermissibly imperiled his right to a fair trial, or that an actual conflict of interest—one that affected Lindsay's performance—existed. *Cuyler*, 446 U.S. at 348. Accordingly, federal habeas relief as to ground 1 is denied.

**Ground 5**

Birch claims that the trial court violated his Sixth and Fourteenth Amendment right to self-representation when it failed to hold a hearing pursuant to *Faretta v. California* when Birch requested to represent himself (ECF No. 71, pp. 45-47).

Criminal defendants have a Sixth Amendment right to self-representation at trial. *Faretta v. California*, 422 U.S. 806, 818-819 (1975). However, while the Sixth Amendment right to counsel attaches unless affirmatively waived, a defendant must assert the right to self-representation. *Sandoval. v. Calderon*, 241 F.3d 765, 774 (9th Cir. 2001) (internal citation omitted). The Ninth Circuit Court of Appeals has stated that if a "defendant's request to proceed *pro se* is timely, not for the purposes of delay, unequivocal, voluntary, intelligent and the defendant is competent, it must be granted." *U.S. v. Maness*, 566 F.3d 894, 896 (9th Cir. 2009). In *Faretta*, the Court held that a request made "weeks before trial" was timely. 422 U.S. at 835; *see also Marshall v. Taylor*, 395 F.3d 1058, 1061-1062 (9th Cir. 2005) (denying habeas relief when the defendant made his request to represent himself on the day trial was to start).

As recounted above, Lindsay was Birch's third attorney in these matters. On Monday, January 26, 2009, the first day of trial in the Sears case, Birch made a lengthy statement to the court. Exh. 97, pp. 7-9. He complained that Lindsay did not visit him the weekend before the trial. He claimed that an investigative report missing from his file would show that he had a wallet with credit cards in it when he was arrested. He argued that he was never provided an investigator, that Lindsay was overlooking the real issue of whether he intended to steal, and that he was being framed. In the middle of his statements, Birch said: "I'm not capable of representing myself. I would like to represent myself, but I'm not capable at this point. And I know you're not [sic] going to say no, but I would like a couple of weeks, I'll represent myself." *Id*. at 8. Birch acknowledged that he had refused to see Lindsay in the past. *Id*. at 9. Birch then continued asserting that he had money in his wallet when he was arrested and that the issue was whether he had intent to steal. He concluded by asking the judge to either continue trial so that he and Lindsay could "come to terms" or so that he could represent himself. *Id*.

Lindsay then discussed with the court—and Birch agreed—that Birch refused to see Lindsay right up to the Friday prior to trial. *Id*. at 11-12. Birch finally asked the court "Can I get a continuance? Can I get rid of Mr. Lindsay?" *Id*. at 13. The court denied the motion to continue and denied the motion to recuse Mr. Lindsay. *Id*. The court addressed other preliminary matters, and then jury selection began.

In affirming the denial of this claim, the Nevada Supreme Court reasoned that "[e]ven if this comment can be construed as a waiver of his right to counsel," the record reflects that the trial court did not err in summarily rejecting Birch's request because it was untimely and made for the purpose of delay. Exh. 163, p. 6.

As set forth in the discussion of ground 1, Birch engaged in a pattern of disruptive, threatening and even dangerous behavior, including refusing to work with a series of appointed counsel, personally threatening counsel and the trial judge, leaving profane telephone messages with the Public Defender's office, and spitting in Lindsay's face and eye. The right to self-representation does not attach until asserted. *Sandoval*, 241 F.3d at 774. The Nevada Supreme Court pointed out that Birch did not necessarily make an unequivocal request to represent himself. It then reasonably concluded that, based on the entire record, any such self-representation request was untimely and made for the purpose of delay, and therefore, the trial court did not err in summarily denying the request. Birch has failed to demonstrate that the Nevada Supreme Court's decision is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to ground 5.

### b. Sufficiency of the Evidence and Police Interview Claims

**Ground 4**

Birch contends that his Fifth and Fourteenth Amendment due process rights were violated because insufficient evidence supported the guilty verdict in both trials (ECF No. 71, pp. 41-45).

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (citing *In re Winship*, 397 U.S. 358 (1970)). On federal habeas corpus review of a judgment of conviction pursuant to 28 U.S.C. § 2254, the petitioner "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id*. at 324. "[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id*. at 324 n.16. On habeas review, this court must assume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution and must defer to such resolution. *Id*. at 326. Generally, the credibility of witnesses is beyond the scope of a review of the sufficiency of the evidence. *Schlup v. Delo*, 513 U.S. 298, 330 (1995).

The Nevada Supreme Court affirmed the denial of this claim with respect to the Sears trial, reasoning:

> The evidence adduced at trial shows that Birch entered a Sears store, knelt down beside a tool display, and exited the store with several wrenches and a pair of pliers in his pocket. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Birch entered the Sears store with the intent to commit larceny. *See Jackson*, 443 U.S. at 319; *McNair*, 108 Nev. at 56, 825 P.2d at 573; NRS 205.060(1).

Exh. 163, p. 6.

As discussed in relation to ground 1, the prosecution presented the following evidence: a Sears employee testified at trial that he observed Birch via video surveillance: "over the course of an hour and a half to two hours, [Birch] selected several wrenches and proceeded to conceal them on his person." Exh. 97, p. 129. The employee testified that Birch made no purchases. *Id*. at 140. Officers testified that Birch was apprehended upon exiting the store and was in possession of several Sears tools. *Id*. at 136. Officers testified that Birch was not carrying any sufficient form of payment to purchase tools at the time of his arrest. *Id*. at 163. Officer Bellamy testified that after receiving *Miranda* warnings Birch admitted he stole to support his drug habit and affirmatively acknowledged his guilt with respect to the Sears theft. *Id*. at 189-190.

Birch argues the evidence is insufficient because no witness personally observed him steal anything, the surveillance videos do not ever show Birch concealing tools on his person, the fact that police lost Birch's wallet was suspicious, and no evidence was presented to show Birch had the intent to steal when he entered Sears (ECF No. 71, p. 43).

Respondents point out that, in Nevada, intent to commit burglary can be established by direct or circumstantial evidence. *Moore v. State*, 126 P.3d 508, 513 (Nev. 2006). Viewed in the light most favorable to the prosecution, a rational juror could have reasonably concluded that the State presented sufficient evidence to find Birch guilty beyond a reasonable doubt. *Jackson*, 443 U.S. at 324. Petitioner has failed to demonstrate that the Nevada Supreme Court's decision is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to Birch's claim that insufficient evidence supported the verdict in the Sears case.

With respect to the Ford truck trial, the Nevada Supreme Court affirmed the denial of this claim as follows:

> The evidence adduced at trial shows that Birch placed one shopping bag into the bed of a pickup truck and later retrieved two bags from the bed of the truck. Further, when he was searched incident to an arrest on other charges, keys fitting the truck were discovered on his

> person. In addition, the owner testified that he reported the truck stolen and had not given Birch permission to use it. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Birch possessed the truck with reason to believe it had been stolen. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS 205.273(1)(b).

Exh. 163, pp. 2-3.

As discussed in relation to ground 1, the prosecution presented the following evidence: police officers testified that they observed Birch going in and out of stores in a Walmart shopping center on February 21, 2008. Exh. 105, pp. 111-123; 134-146. They watched Birch place a white plastic shopping bag in the bed of a red Ford pickup truck with a snow plow on the front. They later saw Birch retrieve two shopping bags from the truck bed. When Birch was detained in relation to the Sears theft, he was evasive when questioned about the owner of the truck. *Id*. at 152-153. On February 22, 2008, the truck was reported stolen. *Id*. at 111-123; 134-146. A deputy checked out the keys that were in Birch's secured property and verified that they opened the truck and turned the ignition. The truck did not start as the battery was dead. *Id*.

Robert Wilson testified that he discovered his Ford pickup plow truck was missing on February 22, 2008—the day after Birch was arrested—and reported the theft. Exh. 105, pp. 96-108. In response to a call from Reno police officers, Wilson met them at a Reno shopping mall where they gave him the Ford truck keys. Wilson had to jump-start the truck. Wilson testified that he had never seen Birch prior to this case and that Birch did not have permission to drive or possess the truck. *Id*.

Birch argues that insufficient evidence supported his conviction because no evidence was presented that he ever entered or drove the truck, knew that it was stolen or had an opportunity to steal a truck in Douglas County (ECF No. 71, p. 45).

Respondents point out that, in Nevada, "possession" includes constructive possession: "the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. *Palmer v. State*, 920 P.2d 112, 115 (Nev. 1996). Viewed in the light most favorable to the prosecution, a rational juror could have reasonably concluded that the State presented sufficient evidence to find Birch guilty beyond a reasonable doubt. *Jackson*, 443 U.S. at 324. Petitioner has failed to demonstrate that the Nevada Supreme Court's decision is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to Birch's claim that insufficient evidence supported the verdict in the Ford truck case. Thus, ground 4 is denied in its entirety.

**Ground 6**

Birch asserts that the prosecutor's presentation of testimony regarding Birch's silence during a police interview and the prosecutor's assertion in closing argument that such silence evidenced Birch's guilt violated his Fifth and Fourteenth Amendment rights to remain silent (ECF No. 71, pp. 47-49).

In *Doyle v. Ohio*, the United States Supreme Court held that "the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment. 426 U.S. 610, 619 (1976). The Court subsequently clarified that a defendant may be examined at trial about prior statements made voluntarily after receiving *Miranda* warnings that are inconsistent with his trial testimony. *Anderson v. Charles*, 447 U.S. 404, 408 (1980). In *Anderson*, the defendant told police, after receiving *Miranda* warnings, that he stole a car from a certain location. *Id*. at 406. At trial, the defendant testified to a different version of events, including asserting that he took the car from a different location. *Id*. The Court reasoned that "*Doyle* does not apply to the facts of this case. Each of two inconsistent descriptions of events may be said to involve "silence" insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of silence." *Id*. at 409.

The Ninth Circuit has also explained that the prosecution "may properly point out inconsistencies between a defense presented at trial and a statement given after arrest. *U.S. v. Hoac*, 990 F.2d 1099 (9th Cir. 1993) (citing *U.S. v. Ochoa-Sanchez*, 676 F.2d 1283, 1286 (9th Cir. 1982). The court of appeals has also stated that this rationale applies even when the defendant does not testify at trial. *Hoac*, 990 F.2d at 1104; *Klepper v. United States*, 331 F.2d 694, 701 (9th Cir. 1964). Further, that court has concluded that a "non-answer to a question did not constitute either a total or selective revocation of [the defendant's] earlier waiver of Fifth Amendment rights . . . and it was thus not error to allow testimony to that event." *United States v. Lorenzo*, 570 F.2d 294, 297-298 (9th Cir. 1978) (cited with approval in *U.S. v. Caruto*, 532 F.3d 822, 829 (9th Cir. 2008).

The Nevada Supreme Court affirmed the denial of this claim:

> Birch argues that the district court erred in admitting . . . evidence that during his police interview Birch did not deny culpability or profess his innocence . . . . We conclude that this argument lacks merit. As Birch waived his right to remain silent and spoke with detectives, the State's questions concerning his failure to deny the charges did not constitute improper comment on his right to remain silent. *See Anderson v. Charles*, 447 U.S. 404, 408 (1980) (providing that questioning about prior inconsistent statements does not improperly comment on right to remain silent because defendant was not induced to remain silent by warnings); *see also Maginnis v. State*, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977) (providing that defendant's failure to speak or equivocation in the face of accusation of having committed crime may be offered as implied admission of guilt).

Exh. 163, p. 7.

Officer Bellamy testified at trial that he gave Birch a form that set forth the *Miranda* warnings. Exh. 97, pp. 185-190. Birch initialed after each section, wrote "yes" in answer to the question "do you understand each of these rights?" and wrote "yes" in answer to the question "having these rights in mind, do you wish to talk to us now?" Bellamy testified that Birch then told him that he steals to support his drug habit. Bellamy testified that the other officer present asked Birch if he understood that the police had him "dead bang" on Sears and that Birch responded affirmatively. He testified that at no time during the approximately ninety-minute interview did Birch deny culpability. *Id*.

During closing arguments, the prosecutor pointed out that Birch signed the waiver of his *Miranda* rights. Exh. 98, p. 64. The prosecutor stated that Birch had acknowledged it when the officers told him they had him "dead bang" on Sears. *Id*.

This court concludes that this claim lacks merit. The record reflects that Birch knowingly and voluntarily waived his *Miranda* rights and then proceeded to speak to police detectives for about ninety minutes. Even if there can be some dispute as to whether Birch responded in some manner in the affirmative or in agreement to a detective's statement that the police had Birch "dead bang" on Sears, testimony regarding his failure to answer a specific question in the course of an extended interview is not a comment on his invocation of his Fifth Amendment rights and is not improper. Birch has failed to demonstrate that the Nevada Supreme Court's affirmance of the denial of this claim is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to ground 6.

### c. Physical Restraints and Exclusion Claims

**Ground 2**

Here, Birch claims that his Fifth and Fourteenth Amendment rights to due process were violated when he was forced to appear at trial in physical restraints and a spit hood (ECF No. 71, pp. 35-38).

A criminal defendant has Fifth and Fourteenth Amendment due process rights to be free from physical restraints that are visible to the jury. *Deck v. Missouri*, 544 U.S. 622, 628-629 (2005). However, a trial court may make a determination that state interests such as "physical security, escape prevention, or courtroom decorum" necessitate further restraint in a particular instance. *Id*. The United States Supreme Court has emphasized that trial courts confronted with consistently disruptive, defiant defendants "'must be given sufficient discretion to meet the circumstances of each case.'" *Stewart v. Corbin*, 850 F.2d 492 (9th Cir. 1988), quoting *Illinois v. Allen*, 397 U.S. 337, 343-344 (1970).

The Nevada Supreme Court denied this claim with respect to the Ford truck case as follows:

> First, Birch argues that the use of visible physical restraints and a spit hood violated his right to a fair trial. Birch, who admitted that he had Hepatitis C, had spat in his counsel's face during a pretrial hearing. Further, he stabbed his counsel in the hand during a prior trial. Therefore, we conclude that the district court did not abuse its discretion in this regard. *See Hymon v. State*, 121 Nev. 200, 207, 111 P.3d 1092, 1098 (2005).

Exh 163, p. 2. The Nevada Supreme Court also denied this claim with respect to the Sears case, referring to its discussion above with respect to the Ford truck case. *See id*. at 4.

During the Sears trial, the trial court made the following factual findings and conclusions of law concerning the physical restraints and Birch's ultimate removal from the courtroom:

> . . . [T]he Court finds as a matter of fact that, one, the defendant has been charged with the felony of burglary. An amended information has charged him with being an habitual criminal. Two, on January 9th, 2009, in his court appearance, defendant spit at his attorney, Bruce R. Lindsay, and was removed from the courtroom. On or about January 12, 2009, this Court was informed that the defendant admitted he was positive for hepatitis C viruses.
>
> Four, that based upon the defendant's admission, this Court ordered that the defendant be fitted with a spit hood and restrained during all further court proceedings. The Court did that to protect court personnel and the public during the defendant's appearances in court.
>
> Five, that on or about January 14th, 2009, defendant appeared in Court and informed the Court he was on suicide watch at the Washoe County

> Jail. Based upon the defendant's own admission, it appeared to the Court that he was a danger of self-destruction and, therefore, restraint was appropriate.
>
> Six, based upon his prior assaultive behavior, his admission that he was carrying a communicative disease and he was on suicide watch and, therefore, a danger to his attorney, the court staff, the public and himself, this Court ordered that the defendant be restrained during his trial on the burglary charge.
>
> Seven, that despite such restraints, on January 27th, 2009, after the jury had been seated to hear jury instructions and closing arguments, the defendant produced a sharp instrument and attacked his counsel inflicting a wound, which required a recess of court proceedings and the transfer of counsel to Renown Hospital for immediate treatment.
>
> . . . [discussing Nevada contempt statutes].
>
> Therefore, the Court finds the defendant has acted in a contemptuous manner in violation of the ordinar[]y administration of justice in these proceedings.
>
> Two, that this Court has considered all measures necessary to ensure the safety of court personnel, counsel and the general public while attempting to use the least restraint necessary in providing the defendant with the opportunity to participate in a speedy, public and fair trial.
>
> And, three, based upon his actions, the defendant is hereby found in contempt of court and has therefore forfeited his right to participate in further court proceedings.
>
> . . .
>
> The Court finds that alternative means of providing for Mr. Birch's participation through video or audio would not produce a timely resolution of this matter, and, therefore, in this Court's discretion, I will decline to order that video or audio participation be provided to Mr. Birch in his trial.

Exh. 98, pp. 244-48. The trial court had also noted that it was 3:00 pm and the jury had been in recess since 11:30 that morning (while Lindsay received medical attention for his hand). The court observed that Birch had been present at all of the trial proceedings, including the presentation of evidence and the settling of jury instructions and was also canvassed about his right to testify. *Id*. at 244. The court concluded that closing argument was not a critical stage of the proceedings and that Birch's absence did not violate his constitutional rights. *Id*.

At the Ford truck trial, the trial court repeated these findings and further clarified that, in the Sears trial, "[t]he Court restrained only [Birch's] hands to prevent his hands from reaching up and removing the hood . . . . The Court did not order his legs to be shackled." Exh.104, p. 22. The record reflects that during the Ford truck trial, Birch was "shackled, his legs are shackled, his hands are shackled and his hands are restrained in front of his body by a black box handcuff and he is wearing a spit hood." *Id*. at 21; *see also id*. at 24 (finding no reasonable alternatives to these measures to ensure courtroom security).

The trial court also instructed the jury in each case that: "[t]he defendant has been placed in restraints and has worn a hood during the course of this trial. This was done upon the order of this court. This should not be considered by the jury in arriving at a verdict." Exh. 99, p. 9 (Instruction No. 17A); Exh. 108, p. 19 (Instruction No. 18).

The state district court's factual findings are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1). The state district court laid out detailed factual findings—set out above—and then weighed Birch's right to be present, his right to a speedy trial, his conduct, his future threatened conduct, and the need for safety and security for all court personnel. Birch has failed to demonstrate that the Nevada Supreme Court's affirmance of the denial of this claim is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to ground 2.

**Ground 3**

Birch asserts that his Fifth, Sixth and Fourteenth Amendment rights to trial by jury, confrontation, and due process were violated when he was excluded from participation in peremptory challenges and from closing arguments in the Sears case and from a "read back" conducted in the Ford case (ECF No. 71, pp. 38-41).

"The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment." *U.S. v. Gagnon*, 470 U.S. 522, 526 (1985). However, a defendant has a Fourteenth Amendment due process right to be present in some situations where he or she is not confronting witnesses or evidence against him or her. *Id*. A defendant has the right to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). That is, a defendant has the right to be present when his presence reasonably, substantially relates to his opportunity to fully defend against the charge. *Id*. The Court has also cautioned that "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only," (*Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934); *see also Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975)), and that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. *Snyder*, 291 U.S., at 115. A defendant may, by disruptive behavior, forfeit or waive his right to be personally present during proceedings. *Illinois v. Allen*, 397 U.S. 337, 342-343 (1970).

The Nevada Supreme Court denied these claims, reasoning that Birch had no unlimited right to be present at every proceeding and that he had failed to demonstrate prejudice. Exh. 163, pp. 3, 5-6.

With respect to the Sears trial, Lindsay was present at the conference discussing peremptory challenges, and he delivered the closing arguments. Exh. 97, pp. 61-95; Exh. 98, pp. 66-74. With respect to the Ford truck trial, a juror sent the court a note requesting a transcript or video of one of the police detective's testimony. Exh. 106, pp. 50-51. The court conferred with counsel and counsel approved of the court's response to the juror. The court then responded by informing the juror that no such transcript or video existed, and therefore, the jury would have to rely on its own notes and recollections. *Id*.

This court agrees with respondents that the Nevada Supreme Court did not unreasonably apply Supreme Court precedent in denying these claims. First, the court notes that Birch himself requested to leave the courtroom and not be present for the closing arguments in the Ford truck case. Exh. 106, p. 20. Thus, he was not present when the issue of the juror's request for a transcript or video of testimony surfaced and was discussed by the court and counsel immediately before closing arguments. *Id*. at 50-51. Further, Birch forfeited his right to be present during trial by his disruptive and dangerous behavior—particularly after the point at which he stabbed Lindsay in the hand with a pencil before the closing arguments in Sears. Moreover, the Nevada Supreme Court did not unreasonably conclude that Birch failed to demonstrate that he suffered prejudice. Birch's vague allegations that he could have provided input and that the outcomes might have been different do not demonstrate that his absence had a substantial or injurious effect or influence in the jurys' deliberations. Federal habeas relief is denied as to ground 3.

**d. Remaining Claims**

**Ground 7**

Birch claims that his sentences of concurrent terms of life in prison without the possibility of parole for the Sears and Ford truck matters is excessive and constitutes cruel and unusual punishment in violation of the Eighth Amendment and violated his Fifth and Fourteenth Amendment due process rights (ECF No. 71, pp. 49-52). Specifically, Birch asserts that 1) the sentencing judge erroneously found that his offenses were recent; 2) his sentences are grossly disproportionate to his crimes; and 3) the jury should have conducted the sentencing analysis. *Id*. at 50-52.

Under Nevada law, if a person is convicted of a felony has three previous felony convictions, the district court may sentence the person as a habitual criminal. NRS 207.010(b). The potential sentences include life without the possibility of parole. *Id*.

With respect to the Ford truck case, the Nevada Supreme Court affirmed the denial of this claim:

> Having found at least three prior felony convictions, the district court adjudicated Birch a habitual criminal. The sentence imposed is within the statutory limits, *see* NRS 207.010(1)(a), and Birch has not alleged that the sentencing statutes are unconstitutional. We conclude that the sentence imposed is not grossly disproportionate to the offense for the purposes of the constitutional prohibitions against cruel and unusual punishment. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion). We further conclude that Birch failed to demonstrate that the district court punished Birch for his behavior in court or otherwise abused its discretion in sentencing him. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

Exh. 163 at 4. The Nevada Supreme Court denied this claim with respect to the Sears case for the same reasons. *See id*. at 5-6.

At the sentencing hearing, the State introduced certified copies of six prior felonies. Exh. 111, pp. 23-24. The presentencing report reflects 33 convictions, including 11 felony convictions. Exh. 191, p. 2.[2] The report concludes:

> Appearing before the Court is a man who began his adult criminal life in 1974 and has continued essentially without interruption to date. At 53 years of age the defendant has amassed an extensive criminal history. As a result, he has spent an inordinate amount of time in prison and/or jail for various theft and violent related offenses. There is little doubt that the defendant is a habitual criminal who is a drain on society and it[]s assets.
>
> He has further been afforded the opportunity to participate in periods of community supervision, some of which he was unable to complete successfully. It is unlikely that anything that the Division of Parole and Probation could offer, or any leniency granted by the Court, would motivate the defendant to stop committing criminal offenses and lead a more pro-social lifestyle.

*Id*. at 9. The State also introduced several letters that Birch had sent to police detectives involved in the Sears and Ford truck cases while he was in custody on the charges in these cases. Exh. 111, pp. 18, 30-31. Birch wrote one to Detective Reed

[2] Exhibits 191-192 are found at ECF No. 95.

Thomas, stating: "I need to go steal, Reed, I need to go steal bad and I'm going to be soon anyway. I want to call you while I'm stealing. I dare you to catch me stealing, Reed. You are not good enough to catch me doing shit." *Id*. at 30. Birch wrote a letter to Scott Pearson in the district attorney's office, saying: "I want to go steal, Scott, bad. I want Reed to try to catch me again." *Id*. at 31.

In adjudicating Birch a habitual criminal, the sentencing court stated:

> The record will reflect that I have had an opportunity to review the criminal, prior criminal history and while it is a lengthy one, it is one primarily dominated by nonviolent offenses. However, the court did note that there was a robbery in his criminal history and other offenses involving firearms that take it beyond the economic realm. . . . The court finds that the defendant has three prior felony convictions that pass constitutional muster. That in his presentence investigation report, it appears that several convictions were for violent offenses. The court finds that the offenses were recent and that it is just and proper, based upon the nature and gravity of the prior convictions to enhance the defendant's sentence pursuant to NRS 207.010.

Exh. 111, pp. 40-42.

Birch argues that it was not "just and proper" to sentence him as a habitual criminal because of "the non-violent nature of the crimes . . . and the generally stale and remote predicate felonies . . . ." (ECF No. 71, p. 51). Specifically, Birch first argues that the trial court erred in finding that the predicate felonies were recent (ECF No. 71, p. 51). Respondents acknowledge that those six felonies were not recent (ECF No. 94, p. 41). However, Birch's presentence investigation report indicates that his criminal history included not only recent offenses, but also offenses that involved violence or the threat of violence, such as: a 1993 domestic violence conviction, a 1994 firearm conviction, and a 1997 robbery charge that resulted in a burglary conviction. *See* Exh. 191, pp. 3-5. Contrary to Birch's assertion, the sentencing court did not find that the submitted predicate felonies were recent, but that he has a lengthy criminal history, including recent offenses.

Second, within ground 7 Birch argues that his sentences are grossly disproportionate to his crimes (ECF No. 71, p. 51-52). The Eighth Amendment forbids cruel and unusual punishment, such as "barbaric punishments," *Solem v. Helm*, 463 U.S. 277, 284 (1983), and "extreme" sentences that are "grossly disproportionate" to the crime, *Ewing v. California*, 538 U.S. 11, 23 (2003). The Eighth Amendment does not, however, require strict proportionality between crime and sentence. *Id*. In *Lockyer v. Andrade*, the Supreme Court invoked a "gross disproportionality principle," the "precise contours of [which] are unclear," and which applies "only in the 'exceedingly rare' and 'extreme' case." 538 U.S. 63, 72-73 (2003)(citations omitted). In determining whether a sentence is grossly disproportionate, the reviewing court considers the severity of the sentence, the gravity of the offense, and the defendant's criminal history. *Taylor v. Lewis*, 460 F.3d 1093, 1098-1101 (9th Cir. 2006). Successful challenges based on proportionality are "exceedingly rare." *Id*. at 1098. A long sentence may be constitutional even if the most recent offense was minor or nonviolent. *See, e.g., Andrade*, 538 U.S. at 77; *Ewing*, 538 U.S. at 30-31; *Rummel v. Estelle*, 445 U.S. 263, 285 (1980).

The Nevada Supreme Court pointed out that Birch does not argue that his sentences are not within the statutory limits or that the sentencing scheme is unconstitutional. The presentencing report details a lengthy criminal history that dates back to 1974. The majority of the offenses are nonviolent, though several are violent. Exh. 191. Birch has not demonstrated that this is an extreme or exceedingly rare case, or that the Nevada Supreme Court's affirmance of the denial of this claim is contrary to, or involves an unreasonable application of, clearly established federal law. Accordingly, this court denies habeas relief as to ground 7.

**Ground 8**

Finally, Birch argues that he is entitled to habeas relief because of the cumulative effect of errors raised on appeal and in his federal petition (ECF No. 71, p. 52).

Under Ninth Circuit precedent, habeas relief may be available based on the aggregate effect of multiple errors even though the errors considered in isolation do not rise to the level of a constitutional violation. *See Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir. 2003). "[C]umulative error warrants habeas relief only where the errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

As set forth in this order, Birch's claims of error lack merit. In addition, the evidence establishing Birch's guilt was strong, thus the cumulative impact of any errors falls well short of rendering it fundamentally unfair. Ground 8 is denied. 28 U.S.C. § 2254(b)(2).

Accordingly, the petition is denied in its entirety.

## IV. Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id*.

Having reviewed its determinations and rulings in adjudicating Birch's petition, the court finds that none of those rulings meets the *Slack* standard. The court therefore declines to issue a certificate of appealability for its resolution of any of Birch's claims.

**IT IS THEREFORE ORDERED** that the amended petition (ECF No. 71) is **DENIED** in its entirety.

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

**IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly and close this case.

DATED: 7 December 2015.

GLORIA M. NAVARRO, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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|---|---|
| BRUCE BIRCH,<br>Petitioner,<br>vs.<br>DWIGHT NEVEN, et al.,<br>Respondents. | 2:11-cv-00516-GMN-CWH<br>**REPLY TO RESPONDENTS' ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS (CR 94)** |

Petitioner, Bruce Birch, through his attorney of record, Jonathan M. Kirshbaum, Assistant Federal Public Defender, hereby files this Reply to the Answer filed by Respondents. This Reply is based upon the attached points and authorities, and all pleadings, documents and exhibits on file herein..

DATED this 12th day of December, 2013.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: */s/ Jonathan M. Kirshbaum*
Jonathan M. Kirshbaum
Assistant Federal Public Defender

## POINTS AND AUTHORITIES

### I.

### INTRODUCTION

On July 3, 2013, this Court ordered Respondent's to file an answer to Birch's second amended once Birch abandoned his unexhausted claim, which occurred on July 29, 2013. CR 89, 90, 91. The State filed its answer on October 18, 2013, responding to the merits of the claims in the second amended petition. CR 94. Respondents also contest Birch's contention in the second amended petition that AEDPA deference should not be applied to Ground One. Id. This Reply addresses the claims on their merits and explains why Respondents arguments are unavailing.

### II.

### STANDARD OF REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), which permits a federal court to grant habeas relief affecting a state prisoner if the state court's ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" federal law if it: (1) "applies a rule that contradicts the governing law" set forth in Supreme Court case authority, or (2) applies controlling law to a set of facts that is "materially indistinguishable" from a Supreme Court decision but nevertheless reaches a different result. See Riley v. Payne, 352 F.3d 1313, 1317 (9th Cir. 2003), citing Lockyer v. Andrade, 538 U.S. 63, 74 (2003). When a state court's decision is "contrary to" federal law, no deference under the AEDPA is appropriate and the claim should be reviewed de novo. Lafler v. Cooper, 132 S. Ct. 1376, 1390 (2012).

A state court's decision is an "unreasonable application" of federal law if it is "objectively unreasonable." Lockyer, 538 U.S. at 75. Federal courts generally defer to the state court's application of controlling federal law unless it was "objectively unreasonable." Williams v. Taylor, 529 U.S. 363

(2000). Section 2254(d)(2) authorizes federal courts to grant habeas relief in cases where the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The unreasonable determination clause applies more commonly to situations where a petitioner challenges a state court's findings based solely on the state court record. See Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004). In conducting this type of "intrinsic review," a federal court must be deferential to state fact-finding that is supported by the state record. (Id.). However, a petitioner may successfully challenge a state court's findings based on a claim that the finding "is unsupported by sufficient evidence," "the process employed by the state was defective" or "that no finding was made by the state court at all." Id. (citing Wiggins v. Smith, 539 U.S. 510, 529-33 (2003)); Weaver v. Thompson, 197 F.3d 359, 363 (9th Cir.1999).

The Supreme Court recently reaffirmed the extensive deference owed a state court decision observing as follows: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 131 S.Ct. 770, 786-87 (2011).

The Ninth Circuit has recently clarified how the fairminded jurist standard should be applied, explaining that the focus remains on whether or not the state court's decision was unreasonable:

> The "fairminded jurist" standard is an objective standard of law, not a reference to the quality of the judge making the decision. The standard, therefore, does not require us to evaluate whether the individual jurists are "fairminded" in the sense that they are generally impartial and honest adjudicators, but rather whether there could objectively be fairminded disagreement as to the outcome dictated by the Supreme Court's clearly established law. Fairminded jurists can make mistakes in legal reasoning or judgment, and if such a mistake is beyond reasonable legal disagreement, the "fairminded jurist" standard is satisfied. Were we to apply a fairminded jurist standard literally, a federal court could never reverse a state court's habeas decision. For every state appellate court contains at least one fairminded jurist, if not a majority of its supreme court or appellate court members who voted to reject the petitioner's arguments. When we reverse a state court's habeas decision we are surely not saying that all the state court justices whom we are reversing are not fairminded jurists, but rather that objectively the answer is one that a fairminded jurist should reach.

Dow v. Virga, 729 F.3d 1041, 1051 n.8 (9th Cir. 2013).

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If a claim was not "adjudicated on the merits" in state court, no deference is necessary under § 2254(d) and the review is de novo. Amado v. Gonzalez, 734 F.3d 936, 944 (9th Cir. 2013). If a federal constitutional claim was presented to the state court and the state court denied all relief, there is a presumption that the state court adjudicated the federal constitutional claim on the merits, even if the opinion itself does not address the federal constitutional claim. Johnson v. Williams, 133 S.Ct. 1088, 1094-96 (2013). However, this presumption is rebuttable "by the legal principles involved" and the "factual context applicable to a particular case," Ayala v. Wong, 730 F.3d 831, 844 (9th Cir. 2013), such as when "the state standard is quite different from the federal standard," "the state standard is *less* protective" than the federal standard, "or if a provision of the Federal Constitution or a federal precedent was simply mentioned in passing in a footnote or was buried in a string cite." Johnson, 133 S.Ct. at 1096 (emphasis in original); accord Amado, 734 F.3d at 945.

## III.

## GROUNDS FOR RELIEF

## GROUND ONE

**BIRCH WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BASED UPON THE ACTUAL CONFLICT OF INTEREST BETWEEN BIRCH AND HIS ATTORNEY AND THE COURT'S FAILURE TO SUBSTITUTE COUNSEL BASED ON THE BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP.**

### A. Because the State Court Did Not Adjudicate the Conflict of Interest Claim on the Merits, Review of this Claim Should be *De Novo*

In its opinion, the Nevada Supreme Court did not expressly decide the conflict of interest issue even though it had been fairly presented in Birch's opening brief. Respondents acknowledge that the Nevada Supreme Court's decision was silent on this issue. CR 94 at 7. Based on the factual context and the legal principles involved, Birch can overcome the presumption that the Nevada Supreme Court's silence on the issue was an adjudication on the merits of the conflict-of-interest claim.[1]

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[1] Respondents argue that Birch made "no attempt to rebut the presumption" in his second amended petition. CR 94 at 8. Of course, Birch was not in a position to rebut the presumption in his second amended petition because the presumption did not exist at that time. At the time the second amended petition was filed, Birch argued that the claim should be reviewed de novo because the state court failed to address the claim – the prevailing law in the circuit at that time. Johnson, which (continued...)

Birch can overcome the presumption that the claim was adjudicated on the merits because the state standard that the Nevada Supreme Court used was both different and less protective than the federal standard. In the Nevada Supreme Court, Birch presented the ground as both an argument that the trial court abused its discretion in failing to grant the request to substitute counsel and that he also suffered a constitutional violation due to the conflict of interest. Ex. 155 at 17-20; Ex. 156 at 17-19. Critically, Birch pointed out that there were different standards of review for the two challenges. He asserted that, with respect to the constitutional challenge, the standard was de novo review. Ex. 155 at 17; Ex. 156 at 17. With respect to the denial of substitute counsel, the review was for an abuse of discretion. Id. Thus, the briefs made clear that there were two separate types of review that needed to occur in this case. Critically, the Nevada Supreme Court had to engage in a higher level of review with respect to the constitutional challenge.

It is clear from the court's decision that it did not engage in that higher level of review with respect to the conflict-of-interest claim. As the State does not contest, the court did not specifically address the constitutional conflict-of-interest claim. Rather, it only reviewed the substitution of counsel claim for an abuse of discretion:

> Birch argues that the district court abused its discretion in denying his motion for new counsel in all three cases. Birch was being represented by his third attorney after relationships with his prior counsel had deteriorated. Despite being spat on and attacked in court, Birch's counsel repeatedly assured the district court that despite Birch's behavior, he would zealously represent Birch. Therefore, Birch fails to demonstrate that the district court abused its discretion in this regard. See Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005).

Ex. 163 at 1-2. Because the court only reviewed the issue for an abuse of discretion, it necessarily did not address the constitutional conflict of issue claim, as that review had to be de novo. See Amado, 734 F.3d at 946-47 (concluding that petitioner had overcome presumption where state court opinion only applied restrictive state law newly discovered evidence standard and not constitutional Brady standard).

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[1](...continued)
established the presumption in a situation such as Birch's, was decided approximately two months after the petition was filed. This reply is the first available opportunity for Birch to address the presumption.

The situation here is nothing like the one in Johnson. Preliminarily, the Nevada Supreme Court's decision was not a summary disposition or one where the court decided some claims but not others. Rather, it was clear that the court sought to address each of Birch's issues in his multiple appeals. This supports the conclusion that the court "overlooked" the constitutional conflict-of-interest claim. Cf. Johnson, 133 S.Ct. at 1094.

Otherwise, the differences between this case and Johnson rebut the presumption that there was a decision on the merits here. In Johnson, the habeas petitioner had presented both a state and federal claim to the state courts, but the state court never explicitly addressed the claim as a federal constitutional violation. Johnson, 133 S Ct. at 1093. Nevertheless, the Supreme Court concluded that this decision was an adjudication on the merits on the federal constitutional claim for two main reasons: (1) the state court decision on which the state court relied had considered the federal constitutional claim; and (2) the state and federal claims were "similar" and had been presented as "interchangeable." Id. at 1098-99. This situation here is unlike Johnson. In the first instance, the Nevada Supreme Court's analysis did not implicitly or indirectly address the conflict-of-interest claim. The court did not discuss Birch's claims about the basis for the conflict of interest and did not discuss the claims that this conflict adversely affected counsel's performance, despite the fact that these were alleged in the briefs. This question was a different one from the substitution of counsel issue, which was based on the breakdown in the attorney-client relationship. Further, the case on which the Nevada Supreme Court relied, Garcia, solely concerned substitution of counsel, not a conflict-of-interest issue. Additionally, Birch did not present these claims as interchangeable. As discussed above, he distinguished between the two types of claims, pointing out that there were different standards of review.

Respondents claim that it is Birch's fault that the state court failed to address his constitutional claim. They criticize Birch for presenting the conflict of interest and substitution issues as a "compound" claim that focused on the actions of two different actors. CR 94 at 8. This argument is unavailing. There can be no doubt, as this Court has previously found, that Birch fairly presented the constitutional conflict-of-interest issue. In fact, he couldn't have been any more clear about it. The point heading itself indicated that there were two separate issues. Birch specifically described the conflict of interest in the brief and then gave the correct constitutional legal standard. As mentioned before, he identified two separate standards of review. It was through no fault of Birch's that the Nevada Supreme Court overlooked the conflict-of-interest claim.

To be sure, similar to the petitioner in Johnson, Birch did not seek rehearing after the Nevada Supreme Court failed to address the conflict-of-interest issue. However, under the circumstances here, that does not represent clear evidence that Birch believed that the Nevada Supreme Court had adjudicated this claim on the merits. In the first instance, it must be emphasized that Birch fairly and explicitly presented the federal constitutional claim in his brief. He gave the Nevada Supreme Court a clear opportunity to decide upon the claim. Once the Nevada Supreme Court failed to address this claim, there was no obligation that he ask again through rehearing. The decision on whether to seek rehearing is a strategic one. It is not automatic for litigants to file such petitions, even when the state court overlooks a claim. These petitions are rarely granted and appellate attorneys often believe that it is not a worthwhile strategy to pursue them. There is nothing in the record to indicate why no petition for rehearing was filed. It also cannot be deduced from the circumstances here why rehearing was not sought. That is in contrast to Johnson where it could be inferred that the failure to seek rehearing on the constitutional claim was due to the petitioner's "litigation strategy" of making the state law and constitutional claim "interchangeable." Johnson, 133 S.Ct. at 1099. Thus, the lack of a petition for rehearing provides very little evidence that Birch considered the Nevada Supreme Court's opinion an adjudication on the merits of his conflict of interest claim.

At bottom, the answer here cannot simply be that, because the Nevada Supreme Court affirmed the conviction, the court necessarily decided the conflict of interest claim. The United States Supreme Court squarely rejected that approach in Johnson. Johnson, 133 S. Ct. at 1096-97. Indeed, the Supreme Court has recently emphasized that state courts have a "solemn responsibility equally with federal courts to safeguard constitutional rights" and they have a "duty" to "adjudicate claims of constitutional wrong." Burt v. Titlow, __ S.Ct. __, 2013 WL 5904117, at *4 (Nov. 5, 2013). Based on the factual context and the legal principles involved, it is clear that the state court did not fulfill that duty and failed to address a fairly presented constitutional claim. Birch has overcome the presumption that the Nevada Supreme Court's silence on his conflict-of-interest issue was an adjudication on the merits.

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Alternatively, to the extent there was an adjudication on the merits, the Nevada Supreme Court's decision on the conflict-of-interest claim was contrary to clearly established law. Because there was no explicit discussion of the conflict-of-interest claim, the only logical inference to draw from the state court's decision is that, if it was attempting to address this claim (as opposed to overlooking it), the court's analysis on the substitution argument was meant to cover the conflict-of-interest arguments. However, the standard that the state court used in resolving that claim was clearly more narrow than the federal standard for the conflict of interest claim and did not consider the required multi-factored approach (i.e. whether a conflict existed and whether that conflict affected counsel's performance). Such a restrictive analysis is contrary to federal law. See generally Benn v. Lampert, 283 F.3d 1040, 1051 & n.5 (9th Cir. 2002) ("[t]he addition, deletion, or alteration of a factor in a test established by the Supreme Court also constitutes a failure to apply controlling Supreme Court law under the 'contrary to" clause of AEDPA," citing Williams v. Taylor, 529 U.S. 362. 405-06 (2000)); see also Lafler, 132 S. Ct. at 1390.

Accordingly, Amended Ground 1.A should be reviewed de novo.

B. Amended Ground 1.A - Actual Conflict of Interest

Birch's attorney, Robert Bruce Lindsay, operated under an actual conflict of interest that had an adverse effect on his representation of Birch. The record establishes that Lindsay's loyalties were divided. Lindsay's fear and animosity towards Birch overwhelmed his ability to zealously and single-mindedly represent Birch as a result of two in-court assaults. Further, Lindsay had been placed in an antagonistic position to his own client once Birch had been charged with the assaults. These conflicts had an adverse effect on Lindsay's representation of Birch. In such a situation, prejudice is presumed. Respondents' arguments to the contrary have no merit. For the reasons discussed below, the petition should be granted.

1. Statement of Facts

Birch was charged with theft-related charges in three separate informations filed in the Second Judicial District Court based on three separate incidents: (1) under case number CR07-1714A, Birch was originally charged with conspiracy to commit burglary for attempting to steal various items from Home Depot in Sparks on June 11, 2007 ("Home Depot") (Ex. 2); (2) under case number CR08-1585, Birch was charged with burglary for allegedly stealing several tools from a Sears in Reno on February 21, 2008 ("Sears") (Ex. 56); and (3) under case number CR08-1586, Birch was charged with possession of a stolen Ford Truck in a parking lot outside a Walmart in Reno on February 21, 2008 ("Ford Truck") (Ex. 57).

The Home Depot prosecution occurred first after Birch's arrest in June 2007. In a Second Amended information filed on January 4, 2008, Birch was charged with attempted grand larceny. Ex. 13. On that day, Birch appeared in court represented by Mazie Pusich and pled guilty to the Second Amended information. Ex. 15 at 4.

On February 21, 2008, Birch was arrested for the Sears and Ford Truck incidents. See Ex. 16-17. Pusich was assigned to represent him in those case. Id.

On June 11, 2008, prior to sentencing on the Home Depot case, Pusich told the court of a possible conflict of interest with Birch. Birch asked for new counsel, stating that he was in bitter conflict with her.[2] Ex. 38. The court relieved Pusich and, in July 2008, appointed John Oakes as alternate counsel.[3] Exs. 47, 49, 51.

On September 4, 2008, Oakes motion to withdraw as counsel based on a collapse in the attorney-client relationship was summarily granted. Exs. 60-63. On September 9, 2008, Robert Bruce Lindsay was assigned as counsel in all three cases. Exs. 64-66. On September 12, 2008, Birch, represented by Lindsay, was arraigned on the Sears case and the Ford Truck case. Ex. 70. Lindsay then represented Birch at the Sears trial on January 26 and 27, 2009, and the Ford Truck trial on January 27 and 28, 2009.

The relationship between Lindsay and Birch began to breakdown soon after Lindsay's appointment. At a court date on October 24, 2008, Lindsay stated that he has "had the inability to deal

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[2] In March 2008, the court granted Pusich's request for a competency examination. Exs. 23, 24, & 26. Pusich claimed that Birch had been acting "volatile and unpredictable." Ex. 23 at 3. She noted that Birch had previously been referred to Northern Nevada Adult Mental Health Services for treatment, but had not followed up. Ex. 24 at 3. She described an incident in which Birch "left rambling, incoherent and profane messages on several public defender phones. He appeared to have called every number between our receptionist and our fax machine. There are over fifty numbers. The vast majority of those employees did not know Mr. Birch or his case, and had no idea why he was calling to yell and swear at them." Id. After an examination, Birch was found to be competent. Ex. 30.

[3] In July 2008, the District Court Judge on the Home Depot case, Jerome M. Polaha, recused himself based on an implied threat in a letter he received from Birch. See Ex. 48. The case was reassigned to District Court Judge Patrick Flanagan, who presided over all three cases. Ex. 52.

with this man and that's the simple and short of it." Ex. 74 at 4. Lindsay stated that Birch "is a fairly abusive man and the things that he said to me for the last month or whatever it's been just silly, just ridiculous," adding that he "is a most difficult client." Id. at 5. He concluded, "I believe you're going to have to appoint another lawyer for him." Id. at 6.

Birch spoke to the court directly and stated that "our attorney-client relationship has deteriorated to the point beyond help." Lindsay was unprepared and did not have necessary documents. Lindsay's phone would not accept his calls. Ex. 74 at 9, 11. Birch had filed grievances against Lindsay. During an attorney visit on the prior night, Lindsay screamed at Birch and made threatening gestures towards him. Id. at 9. When they were in court on the Sears and Ford Truck cases, "two deputies stood between us to keep us apart." Id. at 9-10. The court did not address Birch's complaints about Lindsay. Id. at 13.

At the motion to confirm trial hearing on the Sears and Ford Truck cases, held on January 9, 2009, an actual conflict of interest materialized when Birch spit in Lindsay's face in court. Near the end of the proceeding, Birch informed the court that he was "coming into some money from my mother's estate" and he would know the amount in two weeks. If the amount was sufficient, he intended to either hire a new attorney or hire an investigator to prove his allegations against Lindsay to "get him off the case." He asked for a 30-day adjournment. The court denied that request. Ex. 78 at 6-7.

In response, Birch stated, "How do I get him off? Do I have to spit in his face right here right now? Because I'm going to. He's not representing me. He's taking me down the drain." Ex. 78 at 7. At that point, "Commotion ensued." The "commotion" was Birch spitting in Lindsay's face, with some spit landing in Lindsay's eye. See, e.g., Ex. 97 at 14. The court ordered Birch out of the courtroom. Lindsay stated, "I will do everything I can as a defense lawyer." Ex. 78 at 7.

On January 14, 2009, an "in chambers" status hearing was held outside of Birch's presence. Ex. 81 at 3. Lindsay stated that he "went yesterday to have my blood tested for five, six, seven different things that are apparently very communicable by being spit in the eye, none of them much fun, from the AIDS test to the hepatitis test to about five of them I've never even heard of." Id. at 3. Citing to Garey v. United States, 540 F.3d 1253 (11th Cir. 2008), Lindsay argued that a defendant's conduct can "waive[ ] your appointed counsel." Id. at 3-4; see also id. at 8-9. He argued that "they don't have the right to abuse me out there out there, but the law is very clear that it if you're going to be in conflict, and that case, as I got it, is much like this . . . ." Id. at 4. Lindsay indicated that he had fears about how Birch would treat him in the future: "I do not want to get spit on again and he has made threats, I believe, saying that he's going to get me no matter what, and I do not want to have my, you know, I don't want to get knifed in the throat. I'm sorry. Those are real concerns for me." Id. at 6. The court did not respond to Lindsay's arguments. Id. at 7-10.

The bailiff, Deputy Lorring, confirmed that he had charged Birch with "felony propelling, which is a category B felony." Ex. 81 at 12.

Lindsay again expressed his anxiety and concerns about representing Birch. At a status hearing on January 23, 2009, Birch asked the court to relieve Lindsay. Ex. 93 at 7. Birch stated, "He treat[s] me like a piece of crap." Id. He added that Lindsay was rude and abrasive to him, saying "I'm never going to forget this. Then he said, if I come back dirty, I'm going to have you charged." Id. at 7-8. Lindsay also said, "I want you to beg me to come see you." Id. at 8. He stated that Lindsay had not done any investigation, had not filed appropriate motions, and had not discussed the defense with him. Id. at 5, 8-9. Birch had filed 43 complaints against Lindsay in "an attempt to get rid of him." Id. at 5. Birch added, "I have cirrhosis of the liver. I don't have 10 years left." Id. at 9. The court did not address the request.

Lindsay accused Birch of making false allegations against him and all of his prior attorneys. Ex. 93 at 11-12. He emphasized, "It's important to know, he's personally attacked me, he's hepatitis C. I need it on the record. I've been to the doctor a few times. I've already had my blood drawn a few times. I've been told the wonderful news that the incubation period for that stuff is six month to six years and nobody really knows." Id. at 12. He did not deny that he had made the comments to Birch. He explained that he was trying to tell Birch that it was unacceptable behavior. Birch was "trying to infect me. And it's not just rude, it's truly criminal." Id. at 12-13. He said that Birch "needs to know there are consequences to this little theatrical stuff he's pulling." Id. "[I]n spite of the conflict we have here going," Lindsay "intend[ed] to do as good a job as I possibly can on behalf of my client in spite of the fact that he's done everything he can to personally offend me and personally offend my children and all of the rest of it, your Honor." Id. at 12, 13-14.

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On the day the Sears trial began, January 26, 2009, Birch once again stated that he did not want Lindsay representing him. Lindsay did not visit him over the weekend to discuss the case. They had never discussed "one word of the defense" and he was facing "multiple life sentences here." Ex. 97 at 6. Birch explained that Lindsay was not focusing on the main defense – that there was no evidence to show that he had an intent to steal when he entered Sears. Id. at 6-7. Birch asked to represent himself and asked for a couple of weeks to prepare. Id. at 7. Lindsay acknowledged that he did not go to see Birch over the weekend because Birch had said things in court that were "clearly not true." Id. at 9-10. Birch asked the court for a continuance or to "get rid of Mr. Lindsay." The court denied the request. Id. at 12.

After a recess at the close of the evidence, the jury returned to the courtroom and the court asked for the parties to stipulate to the presence of the jury. At that point, "commotion ensued." Ex. 98 at 240. The "commotion" was that Birch had stabbed Lindsay in the hand with a pencil. Id. at 245-46. The stabbing required Lindsay to go to the hospital for "immediate treatment." Id. at 246. When the trial resumed, Lindsay guaranteed the court that he would give the best closing he could possibly give "given the circumstances of the case." Id. at 243.

Despite the fact that Lindsay's fear and anxiety of a physical attack had been realized, Lindsay continued his representation of Birch at the Ford Truck trial that began the day after the Sears trial ended. Lindsay's animosity towards Birch was evident at a status conference in court before the trial began. Lindsay accused Birch of being "less than honest" and had repeatedly accused him of "things that never happened." Ex. 104 at 7. Lindsay's desire at that point was to "protect himself" against future claims that Birch may make against him. He believed that Birch was going to "make up" allegations against him. Id.

During the Ford trial, Birch informed the court that he was "booked" on both January 27 and 28 for the stabbing. Ex. 106 at 187. He now had "pending charges" against him, making Lindsay a witness against him. Id. Lindsay stated that, while he refused to pursue any charges, he acknowledged that he had no control over what the District Attorney's Office did. Id. at 188.

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2. Analysis

The Sixth Amendment right to counsel includes the right to representation free from conflicts of interest and undivided loyalties. Lewis v. Mayle, 391 F.3d 989, 995 (9th Cir. 2004) (citing Wood v. Georgia, 450 U.S. 261, 271 (1981)). In order to establish that counsel was ineffective due to a conflict of interest, a defendant must show that a conflict of interest existed and that it had an adverse effect on counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); see also Mickens v. Taylor, 535 U.S. 162, 171-74 (2002). If an actual conflict of interest is established, the defendant does not need to prove Strickland prejudice. Cuyler, 446 U.S. at 349-50. This is so because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." Strickland v. Washington, 466 U.S. 668, 692 (1984).

The Supreme Court defines an actual conflict "by the effect a potential conflict had on counsel's performance." Houston v. Schomig, 533 F.3d 1076, 1081 (9th Cir. 2008) (citing Mickens 535 U.S. at 171). The Sixth Amendment does not protect against a "mere theoretical division of loyalties," Mickens, 535 U.S. at 171; rather, it protects against conflicts of interest that adversely affect counsel's performance. Alberni v. McDaniel, 458 F.3d 860 at 870 (9th Cir. 2007). This Court has provided that an attorney has an actual conflict of interest when during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action. United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001). While the Supreme Court cases on conflict of interest concern multiple representation, courts have applied the Cuyler standard to other types of conflicts of interest. This Court has applied the Cuyler standard to situations where there is a conflict between the defendant and the attorney's personal interests. See, e.g., United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001); Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988); United States v. Hoffman, 733 F.2d 596, 601-02 (9th Cir. (1984); United States v. Hearst, 638 F.2d 1190, 1197-98 (9th Cir. 1980).[4]

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[4] Respondents argue that habeas relief should not be granted under § 2254(d)(1) because there is no clearly established law that the Cuyler standard applies to the conflicts of interest set forth in the second amended petition. CR 94 at 14-15. However, as discussed above, § 2254(d)(1) does not apply to this claim. In any event, even assuming arguendo that it does, the failure to follow Cuyler in this case would represent an unreasonable application of that clearly established standard as it would be (continued...)

The actual conflict of interest in this case was clear. Lindsay's loyalties were divided between his duty to represent Birch and his own personal interests. Lindsay's personal fear and animosity towards Birch overwhelmed his ability to zealously and single-mindedly represent his client. The in-court assaults had a direct impact on Lindsay's ability to represent Birch. It is simply illogical to conclude that any ethical or rational attorney could put those incidents out of his mind and remain as counsel for the individual who attacked him. Lindsay pointedly articulated those anxieties and concerns before the Sears trial began, but the court simply ignored those statements. Remarkably, despite the admitted "conflict" and Lindsay's belief that Birch had to face "consequences" for his behavior, Lindsay represented Birch at the two trials.

An additional conflict was present in this case. Due to the in-court assaults, charges had been brought against Birch and were pending during the trials. At the October 24, 2008 court date before the Sears trial began, the courtroom deputy indicated that Birch had been charged with felony propelling due to the spitting incident. Then, at the beginning of the Ford trial, Birch informed the court that charges had been filed based on the stabbing. Birch was "booked" on those charges, showing that the case had moved beyond the realm of mere possibility. Regardless of whether Lindsay personally wanted to pursue those cases, he acknowledged that he had no control over whether the district attorney's office would pursue them. No one disputed that these charges were pending during the trials. This represented an irreconcilable conflict as Lindsay was placed in an antagonistic position with his own client. This conflict of interest actually exacerbated the other underlying conflict of interest as Lindsay demonstrated that, as a victim of an assault, he was harboring anger towards Birch and was focused on protecting his own interests.

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Respondents argue that there can be no actual conflict of interest here because it was Birch that

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[4](...continued)
unreasonable to fail to extend that holding to the conflicts of interest here, which concerned an attorney who was actively representing competing interests – his own and his client's. While Mickens does shed doubt on whether Cuyler could be extended to this situation, that portion of Mickens is dicta. See Moss v. United States, 323 F.3d 445, 460 (6th Cir. 2003). It does not foreclose an argument that it would be unreasonable to fail to extend Cuyler to the situation here. Williams v. Taylor, 529 U.S. 362, 407 (2000) ("a state-court decision also involves an unreasonable application of this Court's precedent if the state court . . . unreasonably refuses to extend [a legal] principle to a new context where it should apply").

caused the conflict.[5] CR 94 at 9. However, in making this assertion, Respondents do not point to any conflict of interest authority in support. Rather, Respondents rely upon cases that focus on whether a defendant's request for substitution of counsel should be granted based on the breakdown in the attorney-client relationship. See Id. Those cases are inapposite to the conflict of interest claim. Whether or not a conflict of interest was present is a separate question that exists independently from whether there has been an irreparable breakdown in the relationship. The conflict of interest question is about divided loyalties, which can occur in a variety of ways, including a defendant's conduct. The only relevant question is whether that conflict existed and whether it had an adverse effect on the attorney's performance. Respondents do not point to a case where a court rejected a conflict of interest claim based on a defendant's own making.

Where there is an actual conflict of interest that is arguably the result of a defendant's conduct, the appropriate response is not for conflicted counsel to remain on the case. The attorney's divided loyalties created a serious danger that the attorney will be unable to zealously represent the client. The conflict of interest would potentially have an adverse effect on the attorney's performance, which, as discussed in detail below, repeatedly occurred here. Rather, the appropriate response is to find that the defendant has waived his right to counsel. There is well-settled authority justifying that result. See United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005). In fact, Lindsay himself proposed such a solution as a result of the conflict, citing to United States v. Garey, 540 F.3d 1253, 1264 (11th Cir. 2008), immediately after the spitting incident. The court should have followed Lindsay's advice as he was clearly indicating to the court that the conflict would affect his performance.

And there can be no doubt that the actual conflict of interest actually had an adverse effect on Lindsay's representation of Birch at both trials and at sentencing. With respect to the Sears trial, the record shows that Lindsay did not visit or communicate with Birch about the defense before trial. Lindsay specifically stated that he did not visit Birch during the weekend on the eve of trial *to spite him*. When he did visit Birch, he was "rude and abrasive" and, according to Birch, had assaulted him.

[5] To note, it is debatable whether it was Birch's actions that caused the conflict. Before the spitting incident, Birch asserted that Lindsay was the instigator, yelling at Birch and making threatening gestures towards him.

Lindsay did not conduct any pretrial investigation of the suspicious fact that Birch's wallet was lost after his arrest. He would never communicate with Birch at breaks during the trial. At trial, none of Lindsay's cross-examination of the State's witnesses lasted over two pages and, for one witness, was only two questions. Ex. 97 at 108-09, 139-40, 141, 151-52, 165-66, 190. It is clear that Lindsay's own personal interests and antagonism towards the person who assaulted him led him to fail to act as competent counsel for Birch.

The actual conflict also led Lindsay to take actions in front of the jury that prejudiced Birch. Lindsay characterized both the case and Birch in his closing argument in a way that severely prejudiced Birch. Lindsay began his closing by stating, "It hasn't been an easy case and that's to say the least." Ex. 98 at 259. Later, he focused on the spit hood and restraints and made a bizarre and prejudicial characterization of Birch's appearance as resembling "Hannibal Lechter" or some other "monster." Id. at 263. Lindsay's personal feelings towards Birch overwhelmed his ability to protect Birch's right to a fair trial.

The conflict also had an adverse effect on Lindsay's representation at the Ford Truck trial. Lindsay failed to file a timely and sufficient motion to suppress the seizure of the Ford Truck keys in Birch's possession, a highly critical piece of evidence to the State's case. Indeed, Lindsay did not argue inventory search law as a means of seeking to suppress the introduction of the keys as evidence, namely that a search warrant was necessary to seize the keys once they had been inventoried. This was a significant omission for which there is no tactical or strategic justification. Indeed, he only grudgingly argued that there was no probable cause for seizing the keys because the jail receipt's February 21 date of when the police seized the keys predated when the vehicle was reported stolen,[6] after his client demanded that such argument be made, a fact acknowledged on the face of the motion to suppress ("This Motion is based upon the specific requests of Bruce Birch and is therefore being filed upon his behalf"). See Ex. 107. Counsel's approach to the subject of suppression of the keys – a critically important issue

[6] Specifically, after his arrest on February 21, 2008, Birch's property, which included two Ford Truck keys, was inventoried as personal property at the jail. Ex. 175. According to the jail's records, an officer came and removed the keys on February 21, 2008, before the Ford truck had been reported stolen. Ex. 174. Despite this unambiguous document, this officer testified at trial that this occurred on February 22, 2008, after he had learned the truck had been stolen. Ex. 105 at 116, 160.

to Birch as well as the case itself – raises serious doubt as to whether counsel was truly motivated to defend Birch on account of his animosity and antagonistic position to Birch.

In a similar vein, even though Lindsay did argue that there was a discrepancy in the date on which the keys were seized, he failed to conduct any investigation into the issue. Just as with the Sears trial, Lindsay's questioning of the State's four witnesses was exceedingly brief: only one cross-examination exceeded two pages with that one only lasting five. Id. at 93, 105-06, 123-24, 166-71. His actions at trial demonstrate that his own personal interests had an effect on his behavior.

Further, Lindsay's actual conflict had an adverse effect on his representation of Birch at sentencing. Lindsay's emphasis on placing his own interests above those of his client's repeatedly resulted in Lindsay prejudicing Birch in front of the court, the entity responsible for imposing punishment. Lindsay described Birch as a liar (see Ex. 97 at 10; Ex. 104 at 7), and a pretender (Ex. 93 at 14; Ex. 97 at 10). He argued that Birch had made false allegations against all of his attorneys. Ex. 97 at 10; Ex. 104 at 7, 19. He accused Birch of asking him to present an illegal argument. Ex. 106 at 188. He emphasized to the court that Birch had physically attacked him and he was suffering and anxious as a result. Ex. 93 at 12. He argued to the court that Birch had to face "consequences" for his actions. Id. at 12-13.

More important, the actual conflict led Lindsay to completely fail in his role as advocate at the sentencing proceeding. At sentencing on March 27, 2009, the court had the parties address sentencing on the three separate convictions before considering any enhancements. Lindsay pointed out that Birch had been before courts "literally his whole life . . . and we're back here again." Ex. 111 at 11. He complained, "My problem is I have a client who has somehow managed to take these little, itty-bitty cases and turn them into – you know, he's 53 years old. He's looking at somehow throwing the rest of his life away over nickel, dime cases." Id. at 12. He added, "My client goes out of his way to aggravate the system. My client goes out of his way to poke people in the eye and make sure he gets some sort of attention." Id. He reiterated, "Mr. Birch has somehow figured out a way to aggravate the world in a way that he's now standing in front of you with enormous time." Id. at 13. An allegedly unconflicted advocate would not paint such a picture of his own client. He sounded more like a prosecutor than a defense attorney.

Lindsay did not present any mitigation evidence even though the record was replete with mitigating factors. The importance of mitigation evidence cannot be minimized here. Birch was facing the most severe sentence that could be imposed outside of the death penalty. But his conflicted attorney did essentially nothing to stand in the way of its imposition. The only reasonable inference to draw is that, as a result of the actual conflict of interest, Lindsay was simply unconcerned with how severely Birch was punished.

Lindsay barely articulated a defense to the habitual criminal allegation. In fact, he described his own response to the question of whether a sentence of life without parole should be imposed as "pretty brief." Ex. 111 at 34. He focused predominantly on platitudes about human nature and irrelevant arguments about wall street executives. Id. at 34-35.

However, the record shows that there was significant mitigation evidence that could have been presented. First, there clearly were mental health issues present in this case. Birch's conduct put Lindsay on notice that mental health was a potential mitigating factor.[7] Further, the prosecution submitted "rambling" letters at sentencing that Birch had written to police officers, in which he expressed a compulsion to steal and alleged a conspiracy against him. Ex. 111 at 29-30; Exs. 182 & 183. Birch also admitted to having a serious drug problem, which led him to commit crime. The combination of mental health issues and drug addiction represented compelling extenuating circumstances for his criminal conduct. These are factors that would have justifies less than the absolute maximum sentence.

Birch's physical health issues also represented a mitigating factor. Birch discussed his health issues in court before trial, once again putting Lindsay on notice. But Lindsay never mentioned it. Birch's ill physical health was a far more compelling reason for imposing a lesser sentence than Lindsay's argument at sentencing that Birch's age alone supported such a sentence.

Lindsay failed to argue that the nature of the prior criminal history did not support the imposition of the absolute maximum available sentence. However, several arguments were available to the defense. Birch had always accepted responsibility in his prior cases, there were no allegations that Birch had ever

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[7] There was also the motion for a competency examination, which indicated that Birch had been referred for mental health treatment and which also documented his erratic behavior.

caused physical injury to anyone, and almost all of the prior crimes were for drugs or relatively minor property crimes, such as shoplifting inexpensive items.

Respondents describe all of these examples as "alleged prejudice from the conflict of interest." CR 94 at 16. However, that is not an accurate description of the conflict-of-interest standard. Prejudice is presumed when there is an actual conflict of interest that had an adverse effect on counsel's performance. Cuyler, 446 U.S. at 349-50. These examples of Lindsay's performance and acts of omission are not claims of prejudice, but rather demonstrations of how the conflict affected his performance. In other words, these demonstrate that an actual conflict of interest existed in this case. See Alberni, 458 F.3d at 870.[8]

At bottom, there can be no doubt that Lindsay's conflict of interest had an adverse effect on his performance. This was particularly acute at sentencing where it was clear that Lindsay was completely indifferent to the punishment that Birch received. Indeed, he had previously expressed his belief that Birch should face "consequences" for his actions. Birch's rights under the Sixth Amendment were violated. The writ should be granted and the conviction and sentence vacated.

C. Amended Ground 1.B - Substitution of Counsel

A complete breakdown in the relationship between an attorney and client may give rise to a presumption of ineffectiveness in violation of the Sixth Amendment. See Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970) (citing Entsminger v. Iowa, 386 U.S. 748 (1967)); accord, Frazer v. United States, 18 F.3d 778, 781, 785 (9th Cir. 1994) (citing United States v. Cronic, 466 U.S. 648, 660 (1984) (defective attorney-client relationship, including racial slur and threatened ineffective assistance, entitles defendant to new trial "without inquiry into the actual conduct of the trial")); United States v. Moore, 159 F.3d 1154, 1158-61 (9th Cir. 1998) (breakdown in attorney-client relationship over non-communication and inadequate investigation and trial preparation and attorney's "apprehension of physical harm" equals "irreconcilable conflict [which] undermines confidence in trial proceedings and is reversible error"); Schell v. Witek, 218 F.3d 1017, 1026 (9th Cir. 2000) (constitutional question is

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[8] Despite no Strickland argument presented in the petition, Respondents also analyze the claims as Strickland ineffective assistance of counsel claims. Such an analysis is not necessary here. Birch is solely arguing that there was an actual conflict of interest for which prejudice must be presumed.

whether attorney-client conflict "had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment").

Further, a court has the obligation to inquire into allegations of a conflict of interest that could violate the right to the effective assistance of counsel. Holloway v. Arkansas, 435 U.S. 475, 484-85 (1978).

The facts here clearly demonstrate that Birch was deprived of his right to counsel when the court failed to grant his motion for substitution of counsel. On September 9, 2008, Robert Bruce Lindsay was assigned to represent Birch in the Sears and Ford truck cases. Exs. 64-66. There were strong indications on the record that there had been a collapse in the relationship between Lindsay and Birch soon after he had been assigned. Ex. 74. Birch took every step he could to convey this to the court in order to obtain counsel who would advocate on his behalf. As early as October 24, 2008 – months before the trials began – Birch informed the court that Lindsay was not communicating with him, conducting an investigation, or even accepting his phone calls. Birch stated that Lindsay had made threatening gestures towards him the night before. Ex. 74 at 9-11. For his part, Lindsay complained that Birch's conduct was "ridiculous" and "abusive" and that another lawyer had to be appointed. Id. at 4, 6. At this point, the court was required to conduct an inquiry to determine whether there had been a breakdown in the relationship and new counsel should be appointed. However, the court simply did nothing.

The same pattern repeated itself at the January 9, 2009 court date. Birch had asked for an adjournment to hire an attorney. Ex. 78 at 7. In light of the previous complaints indicating a breakdown in their relationship, the court should have conducted an inquiry after Birch had reiterated that he needed different counsel. However, the court simply denied the request without any substantive inquiry or consideration.

The court never conducted a sufficient inquiry into the depths of the breakdown in the attorney-client relationship. Despite numerous requests from Birch, the court would never even acknowledge substitution of counsel as an option. Rather, the court either ignored the requests or summarily rejected them despite clear evidence that Lindsay was not in a position to provide effective representation to Birch. Birch repeatedly complained that, due to Lindsay's failure to act as his advocate, they were in bitter conflict. Nevertheless, it was made apparent to Birch that no matter how strenuously or vociferously he complained about Lindsay it was not going to get the court to listen to his deep-seated concerns. It can only be surmised that the court's failure to even entertain the idea of substitution of counsel, despite the fundamental problems that Birch was expressing, was the proximate cause of the actual conflict that developed here. Birch felt helpless and desperate in the face of the court's refusal to provide him with an attorney who would actively represent his interests. Further, after it became readily apparent that Lindsay was not in a position to zealously represent Birch after the actual conflict arose, the court would not entertain Birch's motion for substitute counsel on January 23 and 26, 2009, before the Sears trial (see Ex. 93 at 7; Ex. 97 at 12); or January 28, 2009, before the Ford Truck trial began (see Ex. 104 at 13-14, 18).

The Nevada Supreme Court rejected this claim on the ground that Lindsay repeatedly assured the trial court that he could zealously represent Birch. Ex. 163 at 1-2. This decision was unreasonable. While Lindsay made statements that he could put his personal feelings aside and fulfill his professional responsibilities, this statement cannot be credited.[9] Indeed, Lindsay's multiple expressions of anger and animosity towards Birch fully undermine those statements.

The court's failure to conduct a sufficient inquiry or grant Birch's request for the substitution of counsel based on the breakdown in the attorney-client relationship violated his right to the effective assistance of counsel. The state court's decision was an unreasonable application of clearly established

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[9] Lindsay has a documented history of failing to abide by his professional responsibilities as a lawyer. For example, in Middleton v. Warden, 98 P.3d 694 (Nev. 2004), the Nevada Supreme Court removed Lindsay as appellate counsel because of bizarre unprofessional behavior, which included deleting the last eight pages of the appellate brief he filed in order to fit the brief within the court's page limit requirement. Lindsay's "'amended' opening brief was simply the original submitted brief with the final eight pages excised[,] . . . abruptly ending the discussion of one issue and completely omitting any discussion of four other issues listed in the brief's table of contents." Id. at 696-97. The court chastised Lindsay's disregard for "the obligations incumbent upon him as counsel for a client facing a death sentence." Id. at 697. As a result of Middleton Lindsay received a public reprimand. See Ex. 184. In fact, the Nevada Supreme Court removed Lindsay from *Birch's own appeal* as a result of Middleton. Exs. 133 & 134. It demonstrates how Lindsay completely disregards both his ethical responsibilities and court rules. The Nevada Supreme Court has sanctioned Lindsay in two other appeals (see NSC docket numbers 33643, 38126), and has threatened sanctions in at least nine others (see NSC docket numbers 35298, 35300, 36885, 37086, 37956, 37957, 38671, 40518/40519, 43223). The docket sheets are available through the Nevada Supreme Court's website: http://caseinfo.nvsupremecourt.us/public/caseSearch.do. See also Bradley Dwight Heinz v. State, 2d Jud. Dist. Ct, County Of Washoe, Case No. CR03P1571 (order dated October 5, 2011, granting habeas petition based on Lindsay's deficient performance at trial) (attached as Ex. 185).

law. The writ should be granted and Birch's conviction and sentence vacated.

## GROUND TWO

**PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN HE WAS FORCED TO APPEAR AT TRIAL IN SHACKLES AND A SPIT HOOD.**

The United States Constitution forbids the use of physical restraints at any phase in a criminal trial unless the use is warranted by an "essential state interest. . . specific to the defendant on trial." Deck v. Missouri, 544 U.S. 622, 624 (2005) (citing Holbrook v. Flynn, 475 U.S. 560, 568-79 (1986)); Illinois v. Allen, 397 U.S. 343-44 (1970)). Only "compelling circumstances that some measure is necessary to maintain the security of the courtroom" justify such restraints. Gonzalez v. Pliler, 341 F.3d 897, 901 (9th Cir. 2003). The inherent prejudice that ensues from jurors viewing a restrained defendant requires a court to "pursue less restrictive means before imposing physical restraints." Id. (citing Morgan v. Bunnell, 24 F.3d 49, 51 (9th Cir. 1994)). The Supreme Court has stated that physical restraints should be used as a "last resort." Illinois v. Allen, 397 U.S. 337, 344 (1970).

The use of physical restraints, in particular the highly prejudicial spit hood, violated Birch's due process rights. At both the Sears and Ford Truck trials, Birch was forced to appear before the jury in visible restraints, namely shackles and a spit hood. At the Sears trial, the court ordered that Birch be placed in a belly chain, handcuffs, and a spit hood. Ex. 97 at 15. At the Ford truck trial, the court ordered that Birch wear a spit hood and that his legs and hands be shackled with his hands restrained in front of his body by a "black box" handcuff. Ex. 104 at 20-21.

These restraints were clearly visible to the jury, as the prosecutor admitted at the Sears trial. Ex. 98 at 241-42. And the shackles were even more visible at the Ford Truck trial as a "black box" handcuff was used. Of course, there simply was no possible way of hiding the spit hood from the jury. The photo of Birch in this restraint shows just how conspicuous and terrifying the spit hood actually was. Ex. 176. The court was well aware of this as it attempted to minimize the extreme prejudice to Birch by stating to prospective jurors during jury selection at both trials that the spit hood was related to a "medical" condition. Ex. 7 at 42; Ex. 105 at 27. However, the jury at the Sears trial learned that this was simply a cover story as a witness identified the apparatus at trial as a "spit hood." Ex. 97 at 113.

Beyond simply being visible to the jury, the restraints and spit hood were repeatedly brought to the jury's attention at trial. During voir dire at the Sears trial, Birch's own attorney, Robert Bruce Lindsay, stated to the jury, "My client is wearing a headgear that is probably at least unattractive, perhaps a little frightening. I think that you can see that he has some restraints on, and I'm not trying to draw attention to that, I'm just trying to very candidly deal with it." Ex. 97 at 53. He separately referred to the restraints as "frightening." Id. at 55.

During the Sears trial, four of the five identifying witnesses identified Birch as the person with the hood on his head. Ex. 97 at 98, 113, 145, 155-56. Two of the three identifying witnesses at the Ford Truck trial identified Birch as the person wearing the hood. Ex. 105 at 84, 135. During closing argument at the Sears trial, Lindsay asked the jury to disregard the physical restraints and the "mask." Ex. 98 at 259, 263. He stated, "The fact that he had a mask on, whatever that is called, it has, you know, he may look frightening, you might think of him as Hannibal Lechter or one of [sic] monster." Id. at 263. Upon the State's request (Ex. 98 at 242), the court instructed the jury at both trials that "[t]he defendant has been placed in restraints and has worn a hood during the course of this trial. This was done upon the order of this court." Ex. 99, #17A; Ex. 108, #18. And the prejudicial impact of the restraints could only have been heightened due to the presence of multiple officers around Birch as he sat in the courtroom. See Ex. 105 at 109.

It must be remembered that Birch was presented to the jury in highly visible restraints even though he was charged with only minor property crimes with absolutely no allegations of violent conduct. In the first trial, he was charged with stealing six or seven wrenches from Sears. In the second trial, he was accused of possessing a stolen truck worth less than $2,500. It is difficult to see how a defendant facing property crimes could receive a fair trial when standing before a jury in such "frightening" restraints surrounded by officers.

Birch personally pleaded with the court to remove the spit hood before the trials began. Ex. 93 at 9. There clearly was a far less restrictive alternative to the spit hood, namely a surgeon's mask, but there was no indication that the court considered this type of less restrictive alternative. This was critical here as the spit hood, even more than the shackles, was inherently prejudicial. Indeed, there is not a single published opinion in any jurisdiction in this country where a spit hood was discussed as an appropriate physical restraint during a criminal trial. The reason for this is self-evident. The restraint covers the defendant's entire head. It is a highly restrictive and conspicuous restraint that must necessarily be used with extreme caution. With the restraints on Birch's hands, there is no justification for such an extreme restraint. Covering his mouth with a surgeon's mask would have had the exact same effect as the spit hood, but with far less prejudice. The Nevada Supreme Court's decision, which does not even weigh the prejudicial impact of this particular restraint in the courtroom, cannot be considered reasonable.

The prejudicial impact of the visible restraints was increased due to the weaknesses in the evidence against Birch. There were numerous problems with the State's evidence in both cases. For example, in the Sears case, no witness personally observed Birch steal anything. The surveillance videos do not ever show Birch concealing tools in his pockets. No witness could testify about what Birch had in his possession prior to entering the store. The evidence that Birch had the intent to steal at the time he entered Sears was non-existent. There was no evidence that he entered the store unlawfully. There was also the suspicious fact that the police lost Birch's wallet. Even the court acknowledged at sentencing that Sears was a close case. Ex. 111 at 41.

With respect to the Ford Truck case, the State's evidence had similar problems. There was no evidence that Birch ever entered the truck, drove the truck, or did anything other than access the truck's wide-open bed. There was no evidence showing when the truck entered the lot, or that Birch was the one who drove it there. There was no evidence that Birch knew that the truck was stolen or how he even came into possession of the keys to the truck. Birch did not know the owner of the truck, who lived in Douglas County. There was no evidence to show that Birch was anywhere near the Carson Valley Center in Douglas County, where the owner parked the truck, or that he had the capability to travel to that area at the time the truck was stolen.

For these reasons, Birch's due process rights were violated. The writ should be granted and Birch's conviction and sentence vacated.

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## GROUND THREE

**BIRCH WAS DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF TRIAL BY JURY, CONFRONTATION AND DUE PROCESS OF LAW WHEN HE WAS EXCLUDED FROM PARTICIPATION IN THE PEREMPTORY CHALLENGES AND FROM CLOSING ARGUMENT IN THE SEARS CASE AND FROM A "READ BACK" CONDUCTED IN THE FORD TRUCK CASE.**

"[T]he right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." Rushen v. Spain, 464 U.S. 114, 117 (1983); accord, e.g., Illinois v. Allen, 397 U.S. 337, 338 (1970). A defendant must be present where his presence bears "a relation, reasonably substantial, to his opportunity to defend" against the charges and his presence would contribute to the fairness of the proceedings. Kentucky v. Stincer, 482 U.S. 730, 745 (1987); Snyder v. Commonwealth, 291 U.S. 97, 106 (1934). This includes the right to be present at the voir dire and empanelling of the jury, Diaz v. United States, 223 U.S. 442, 455 (1912); and closing arguments, Snyder, 291 U.S. at 106. The right of presence derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments. United States v. Gagnon, 470 U.S. 522, 526 (1985)(per curiam). Such federal constitutional "right of the accused to be present at his trial" has long been embodied in Nevada statutory law. See Snyder, 291 U.S. at 131 & n.22 (reference to Nevada Comp. Laws, 1929, vol. 5, §§ 10654 and 10921).

> Except as otherwise provided in this title, the defendant must be present . . . at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence . . . .

Nev. Rev. Stat. § 178.388 (1)(formerly Nev. Rev. Stat. § 174.490 and Nevada Comp. Laws, 1929, vol. 5, §§ 10654 and 10921).

A. Absence from Exercise of Peremptory Challenges

Birch's constitutional rights were violated when he was excluded from the impanelling of the jury, namely when his attorney exercised peremptory challenges at an in-chambers proceeding.

After the jury was passed for cause in the Sears case the judge elected to address peremptory challenges with counsel in chambers outside the presence of the jury and Birch.

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> THE COURT: . . . [T]he jury has been passed for cause. Let me tell you what the next couple of steps are going to be. I'm going to meet with the attorneys in chambers . . . .
>
> What the attorneys are going to do is exercise what they call peremptory challenges . . . .

Ex. 97 at 58. The peremptory challenges were then made with only the judge, clerk and counsel present. Ex. 97 at 60-62. Birch was neither present nor consulted as to his views.

In conducting peremptory challenges in such manner the court denied Birch his Sixth and Fourteenth Amendment rights to be present at his jury's impaneling. The Supreme Court has clearly established that a defendant has the right to be present at this stage of the trial. Diaz, 223 U.S. at 455. The Nevada Supreme Court's decision that Birch did not have an "unlimited right" to be present at every proceeding and that his absence did not prejudice him was clearly unreasonable. In the first instance, the legal standard that the Nevada Supreme Court used is contrary to clearly established law. The question is not whether a defendant has an "unlimited right," but whether the particular part of the trial from which he was excluded is a "critical stage" of the trial. The Supreme Court has definitively stated that it is. Indeed, it is clear why Birch's presence would have contributed to the fairness of the proceedings. Birch could have provided meaningful input into the decisions respecting which jurors to peremptorily challenge. He was able to observe the jurors' demeanor during voir dire and listen to their answers. He was in a unique position to give advise or suggestions to his attorneys. This was important here since, as discussed in Ground Two, Birch appeared before the jury in restraints and a spit hood. He would have been in a good position to see whether any of the jurors had reacted to those extreme restraints. Thus, the Nevada Supreme Court's analysis was contrary to clearly established law.

It was further unreasonable to conclude that Birch was not prejudiced here. His exclusion from this proceeding cannot be considered harmless since, with Birch's input, the final juror venire might have been different and might not have convicted Birch of the Sears burglary charge. Further, there were numerous problems with the State's evidence in the Sears case, no witness personally observed Birch steal anything. The surveillance videos do not ever show Birch concealing tools in his pockets. No witness could testify about what Birch had in his possession prior to entering the store. The evidence that Birch had the intent to steal at the time he entered Sears was non-existent. There was no evidence that he entered the store unlawfully. There was also the suspicious fact that the police lost Birch's wallet. Even the court acknowledged at sentencing that Sears was a close case. Ex. 111 at 41.

Consequently, Birch's constitutional rights were violated based on his exclusion from the empanelling of the jury in the Sears case.

B. Absence from Closing Argument in Sears Case

The Supreme Court has made clear that a defendant has the right to be present at the summing up of counsel. Snyder, 291 U.S. at 106. Birch's exclusion from the closing argument at the Sears trial violated this clearly established right. The Nevada Supreme Court used the same reasoning in addressing this claim as it did with respect to the right to be present during jury selection. For the same reasons as discussed above, this analysis is contrary to clearly established law. The question is not whether the right is unlimited, but whether he had a right to be present at this type of proceeding. Birch had an established right to be present as it is a critical stage.

There can be no doubt that Birch was excluded from this stage of the trial. As the Sears trial was coming to an end Birch's frustration with Lindsay boiled over and culminated in Birch stabbing Lindsay with a sharp instrument. Birch was then removed from the courtroom. Considered in the context of the continuing deterioration of the Birch/Lindsay relationship of which the court was aware prior to trial, including Lindsay's fears of physical attack by Birch (see Ex. 98 at 240, 245-47), the incident could have been prevented had the court taken seriously the deterioration of the Birch/Lindsay relationship and heeded Birch's repeated pre-trial requests that Lindsay be taken off his case. While a defendant can waive the right to be present through his own conduct, that was not an appropriate result her. Instead of banning Birch from the courtroom because of this highly regrettable but predictable incident the court could have taken less restrictive measures, e.g., made arrangements for video or audio conferencing between Birch and the courtroom. The court's later conclusion that time did not permit such action is an inadequate explanation for denying Birch's constitutional right to be present.

It was also unreasonable for the state court to conclude that Birch's exclusion from this proceeding did not cause him prejudice. Certainly, the jury noticed that, after the altercation between Birch and Lindsay, Birch was not present in the courtroom for closing arguments. The court never instructed the jury as to how to assess Birch's absence. Thus, the court's failure to arrange for reasonable alternatives to simply excluding him from the final stages of the Sears trial resulted in prejudice to Birch.

C. Exclusion from Jury Deliberations

During deliberations in the Ford truck case the jury forwarded a question to the court with respect to Detective Reed Thomas' testimony.

> THE COURT: . . . Earlier the Court received a note from the jury, which said, can we have a transcript or video of Reed Thomas' testimony, Eric Krump, dated today, juror number six. The Court conferred with counsel and after consulting with counsel and with their approval, the Court responded as such, there is no transcript or video of Reed Thomas' testimony. Please rely upon your notes and recollection, dated and signed.

Ex. 106 at 227; Ex. 109. During the discussion as to the appropriate response to make to the jury question, Birch was neither present nor consulted as to his views.

> MR. YOUNG [prosecutor] The only thing I wanted to, and I think you covered it, make clear that it was a conference call between yourself, myself and Mr. Lindsay and we all agreed to that response.
>
> THE COURT: Okay.
>
> MR. LINDSAY: That is a correct statement. I believe we all three suggested that was the proper thing to do and we all three agreed via conference call, your Honor, an hour ago or something.

Ex. 106 at 228, ll. 1-9.

Detective Thomas' testimony was critical to the jury's consideration of the case as he testified that he saw Birch set bags in the back of the Ford truck, walk away, return to retrieve the bags and then take a bus to Meadowood Mall. According to Detective Thomas, Birch had the keys to the Ford truck in his possession when he was booked into the jail. Detective Thomas also testified about Birch's purported statement to Detective Bellamy regarding what Birch did to support a drug habit. Ex.105 at 144-53. The court avoided the question rather than seek to provide a playback or transcript of Detective Thomas' testimony by merely telling the jury there was no transcript or video of Detective Thomas's testimony and that they needed to rely on their notes and recollection. Ex. 106 at 227.

The Nevada Supreme Court concluded that Birch's exclusion from this proceeding did not represent a constitutional violation because he did not have an "unlimited" right to be present. However, as discussed before, this analysis was contrary to clearly established law. The legal question here is whether this part of the trial was a "critical stage." Because the jury was actively deliberating as to whether to acquit him or find him guilty, Birch had a right to participate in a conference regarding a jury question about the key witness's testimony. See Frantz v. Hazey, 533 F.3d 724, 742-43 (9th Cir. 2008) (court's preparation of response to note from deliberating jury is critical stage of trial).

It was unreasonable to conclude that there was no prejudice here. Had Birch been permitted to attend the conference regarding the jury question, he would have been able to advise and communicate to his counsel his concerns and demand a read back to the jury of any available transcript of that testimony, and the outcome of the trial may well have been different. This was critical here since the presence of Lindsay alone was not sufficient to protect Birch's rights. As discussed at length in Ground 1(A), Lindsay was laboring under an actual conflict of interest that affected his performance. This permeated all aspects of the trial, including this stage. The district court's failure to provide Birch an opportunity to be present for a play back of Detective Thomas's trial testimony violated Birch's Sixth Amendment right to a fair trial and to be present during critical stages of the trial and resulted in error that was not harmless.

For the above reasons the writ should be granted as to both the Sears and Ford truck cases and the convictions and sentences vacated.

## GROUND FOUR

**BIRCH WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT A FINDING OF GUILT OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.**

Evidence is sufficient to support a conviction whenever, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). A state-court decision rejecting a sufficiency challenge may not be overturned on federal habeas unless the "decision was 'objectively unreasonable.'" Cavazos v. Smith, 132 S.Ct. 2, 4 (2011). The Supreme Court has described habeas review of a legal insufficiency claim as "twice-deferential." Parker v. Matthews, 132 S.Ct. 2148, 2152 (2012).

A. Sears Case.

Under case number CR08-1585, Birch was charged in an information with burglary for allegedly stealing several tools from a Sears store in Reno on February 21, 2008. Ex. 56.

The State's evidence at trial established that, on February 21, 2008, Detective Reed Thomas, Officer Scott Smith and Sergeants Clint Bellamy and Gerald Rhodes were conducting surveillance at a Walmart in Reno. Ex. 97 at 96-97, 144-45, 155. They were stationed in the parking lot when they saw Birch going in and out of Walmart carrying white plastic Walmart bags. Id. at 97, 99. Birch eventually walked over to the bus stop and got on a bus. He later transferred to a second bus and took it to the Meadowood Mall in Reno. Id. at 99-100.

Still carrying the white bags, Birch entered the mall through the south doors. Ex. 97 at 100. Detective Thomas continued to watch him and saw Birch enter a Sears store. Birch stopped at the customer service desk and left his white plastic bags. Id. at 101-03. Birch then entered the hardware department. Id. at 102. At that point, Thomas left the store and remained outside the store while Birch was inside. Id.

Meanwhile, Sergeant Gerald Rhodes went to the Sears' loss prevention office and spoke to Jeremy Tye, a loss prevention associate. Ex. 97 at 110, 146. He asked Tye to locate Birch on the stores surveillance system, which he did. Id. at 112-13. Tye and Rhodes watched Birch on the surveillance videos for nearly two hours. Id. at 115. The surveillance videos (attached as Ex. 177-180) were admitted into evidence and shown to the jury. Ex. Id. at 116.

Birch eventually went over to the store's open tools area. Birch stayed there for almost an hour, walking up and down the aisles and looking around. Ex. 97 at 114. Sergeant Rhodes saw Birch squat down and pull items off of the hanging rods, including a wrench. Birch would then move to areas outside of the view of the surveillance camera. Id. at 149-50. For his part, Tye claimed to see Birch picking up tools and "concealing" them in his jacket pockets. Id. at 115, 127-28. However, the videos do not show this Birch concealing anything in his pockets. At one point, the video zoomed in on Birch's pocket and an indistinguishable object can be seen. Tye and Sergeant Rhodes admitted that they did not know whether Birch had any tools on him when he entered the store. Id. at 139-40, 151-52.

/ / /

Birch stopped at the customer service desk on his way of the store and grabbed the white plastic bags. Ex. 97 at 104. Once Birch had exited the mall, officers stationed outside detained him. Id. at 104-05. Officer Smith searched Birch and found five Craftsman wrenches and a pair of pliers in his jacket pockets. Id. at 155-57, 159-60. Birch was brought back to Sears and the tools were photographed. Id. at 135-36, 161. Sergeant Rhodes could not definitively state that one of the wrenches in the photo was the wrench that he saw Birch grab. Id. at 151.

Smith found a wallet in Birch's possession. Birch was carrying $1.27. Smith did not find any credit or debit cards in Birch's possession. He did not have a checkbook or giftcards. Ex. 97 at 161-62. The wallet was not checked into evidence but left with Birch's property. Id. at 165-66.

At the police station, Sergeant Clint Bellamy and Detective Thomas spoke with Birch after Birch waived his Miranda rights. Ex. 97 at 105-06, 172-73, 182, 184-86. During the interview, Birch stated that he "steals" to support his drug habit. Id. at 188. At one point, Thomas said to Birch that they had him "dead bang on Sears." Birch agreed. Id. at 188-89.

The defense called Evo Novak, who was an investigator for the Washoe County Public Defender's Office. He worked on Birch's case. He testified that Birch's wallet was not listed on the Washoe County Sheriff's property form. Ex. 98 at 214-16. Birch's other property, including what had allegedly been found in the wallet, was listed on the form. Id. at 217-19.

Detective Thomas was recalled. He read from the recorded version of Birch's statement. Birch stated, "I have a story, man. I lost control over a female. I totally lost control of someone – and then there's a hesitation. And he said, fucking doing drugs and stealing to support my habit and her habit and her friend and through me she was supporting three other guys that she was screwing." Ex. 98 at 228.

In rebuttal, the State recalled Officer Smith. He testified that, after the search, the wallet was placed back in Birch's pocket. Ex. 98 at 237.

The State court's decision that the evidence was legally sufficient to support the conviction was unreasonable. No witness personally observed Birch steal anything. The most salient fact in this case is that the surveillance videos do not ever show Birch concealing tools on his person. Thus, while Tye testified that he observed this, that testimony cannot be considered accurate. Tye only watched Birch on the videotape and the videotape does not show this. No witness could testify that he actually saw

Birch steal the tools. In a similar vein, no witness could testify about what Birch had in his possession prior to entering the store. While it was suggested at trial that the video showed a metal object in Birch's pocket, a review of the video shows that it was impossible to see what the item was. Sergeant Rhodes could not confirm that one of the wrenches found on Birch was the same wrench he saw Birch handle in the store. Sergeant Rhodes' opinion that Birch did not have heavy items in his pocket, but did after he was in the store, was patently absurd. Such a conclusion cannot be drawn from the low-quality surveillance video. The evidence that Birch had the intent to steal at the time he entered Sears was also non-existent. Birch's statement to the police was ambiguous. He never specifically admitted to committing this crime. Finally, there was the suspicious fact that the police lost Birch's wallet. Even the court acknowledged at sentencing that this was a close case. Ex.111 at 41. Thus, the evidence against Birch cannot be considered legally sufficient.

B. Ford Truck

Under case number CR08-1586, Birch was charged in an information with possession of a stolen Ford Truck in a parking lot outside a Walmart in Reno on February 21, 2008. Ex. 57.

The State's evidence at trial established that, on February 21, 2008, Detectives Reed Thomas and David Frankel and Officer Scott Smith were surveying Walmart and saw Birch walking around the parking lot. Ex. 105 at 83-85, 108, 133-34. Birch was carrying a white shopping bag. Id. at 86, 136. The officers saw Birch put the bag in the bed of a red Ford pickup truck with license plate 275 VBA. Id. at 110, 136. Birch walked away from the truck, but later returned to the truck and grabbed two bags out of the bed of the truck. Id. at 86, 111, 138. Birch left the parking lot and got on a bus. He transferred to a second bus and went to the Meadowood Mall. Id. at 88-89, 111-12, 140. When he exited the mall, Birch was arrested on an unrelated charge. Id. at 88-89.

Officer Smith searched Birch's person and found a set of keys in his left front pants pocket. One of the keys had a Ford emblem on it. Ex. 105 at 90. Officer Smith gave the keys back to Birch. Id. at 90, 141.

The officers admitted that they never saw Birch open the doors to the truck and never saw Birch driving the truck. They never saw Birch get into the cab of the truck. Ex. 105 at 93, 123, 167. They did not know how the truck got to the parking lot. Id. at 124, 166.

Detective Thomas was present when Birch was interviewed. Birch said that it was "Shane's truck." Ex. 105 at 152, 156.

Detectives Thomas and Frankel ran the truck at the time of Birch's arrest but it was not reported as stolen. Ex. 105 at 112-13. On the following day, February 22, 2008, the records clerk informed them that the truck was now being reported as stolen. Id. at 114. Frankel accessed Birch's property and retrieved the key ring that was found in his possession. Id. at 116, 160. The key ring had two keys with the Ford emblem. Id. at 116. Frankel filled out a property receipt for the keys. Frankel admitted that the property receipt was dated February 21, 2008. Id. at 116-18.

Thomas and Frankel went back to the parking lot and tried the keys. One of the keys opened the door to the truck. Ex. 105 at 120-21, 161. The second key fit in the ignition and it turned the ignition, but the truck would not start because the battery was dead. Id. at 120, 161. Thomas called the owner of the truck, Robert Wilson, and asked him to come pick it up. Id. at 162.

Robert Wilson lived in Douglas County and worked in, among other things, snow removal. Ex. 105 at 95, 102. He parked his trucks near the Carson Valley Center in Douglas County. Id. at 95. On February 22, 2008, he noticed that one of his trucks had been stolen. It was a red 1976 Ford truck with license plate 275 VBA. Id. at 98-99. It was valued at less than $2500. Id. at 98. He reported it stolen to the police on February 22, 2008. Id. at 96. He had one set of keys for the truck and they had been left under the floor mat. Id. at 100, 107. The last time he had seen the truck was two days earlier. Id. at 100-01.

Wilson received a call from the police about the truck and went to Reno to pick it up. Ex. 105 at 101. The truck's battery was dead, but he jumped it. Id. at 103. Nobody named Shane worked for him. He had only met one Shane, 15 years earlier, and he was now living "back East." Id. at 104-05, 106.

The state court's decision that there was legally sufficient evidence to support the conviction was unreasonable. There was no evidence that Birch ever entered the truck, drove the truck, or did anything other than access the truck's wide-open bed. There was no evidence showing when the truck entered the lot or that it was Birch who drove it to the lot. There was no evidence that Birch knew that the truck was stolen or how he even came into possession of the keys. Birch did not know the owner of the truck, who resided in Douglas County. There was no evidence to show that Birch was anywhere near the Carson Valley Center, or had the capability to travel to that area, at the time the truck was stolen.

For these reasons, the evidence cannot be considered constitutionally sufficient in either the Sears case of the Ford Truck case. The writ should be granted and Birch's conviction and sentence vacated.

**GROUND FIVE**

**BIRCH WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO SELF REPRESENTATION WHEN THE COURT FAILED TO HOLD A HEARING PURSUANT TO FARETTA V. CALIFORNIA WHEN BIRCH REQUESTED THE OPPORTUNITY TO REPRESENT HIMSELF.**

A defendant in a state criminal trial has a Sixth Amendment constitutional right to proceed without counsel, and the State may not force a lawyer upon a defendant who "knowingly and intelligently" asserts that right. Faretta v. California, 422 U.S. 806, 835-36 (1975). The United States Supreme Court in Faretta specifically stated that a defendant has a constitutionally protected right to represent himself at trial. Id. at 815-816. The Court further held that "[b]ecause these rights are basic to our adversary system of criminal justice, they are part of the due process of law that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States." Id. at 818. The Court went on to further explain that the "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Id. at 819.

On September 9, 2008, Robert Bruce Lindsay was assigned to represent Birch in the Sears and Ford truck cases. Exs. 64-66. There were strong indications on the record that there had been a collapse in the relationship between Lindsay and Birch soon after he had been assigned. Ex. 74. Birch took every step he could to convey this to the court in order to obtain counsel who would advocate on his behalf. As early as October 24, 2008 – months before the trials began – Birch informed the court that Lindsay was not communicating with him, was not conducting an investigation, and was not accepting his phone calls. Birch stated that Lindsay had made threatening gestures towards him the night before. Id. at 9-11. The court did not address the breakdown in the relationship.

At the January 9, 2009 motion to confirm trial hearing, Birch asked for an adjournment to hire an attorney or hire a private investigator to prove his claims against Lindsay. The court denied the request. Ex. 78 at 6-7. In response, Birch spit in Lindsay's face. See, e.g., Ex. 97 at 14. At the following court date on January 14, 2009, held in chambers outside Birch's presence, Lindsay argued that Birch's conduct should result in a waiver of appointed, citing to Garey v. United States, 540 F.3d 1253 ($11^{th}$ Cir. 2008). Ex. 81 at 3-4, 8-9. The court did not address Lindsay's argument.

At a court date on January 23, 2009, Birch once again complained about Lindsay, saying that he had not done any investigation, had not filed appropriate motions, and had not discussed the defense with him. Ex. 93 at 5, 8-9. He had filed 43 complaints against Lindsay in "an attempt to get rid of him." Id. at 5. Birch added that Lindsay was rude and abrasive to him, saying "I'm never going to forget this. Then he said, if I come back dirty, I'm going to have you charged." Id. at 7-8. Lindsay also said, "I want you to beg me to come see you." Id. at 8. Birch asked the court to relieve Lindsay. Id. at 7. The court did not address the request.

Before the Sears trial began, Birch once again stated that he did not want Lindsay representing him. Ex. 97 at 6. Birch specifically asked to represent himself and asked for a couple of weeks to prepare. Id. at 7. Birch asked the court for the continuance or to "get rid of Mr. Lindsay." The court denied the request. Id. at 12.

The Nevada Supreme Court concluded that Birch's request to represent himself was not clear and unequivocal and that it was untimely, done for the purpose of delay. This decision was unreasonable. Birch clearly and expressly asserted his desire for self-representation. He specifically stated that he wanted to represent himself. Despite this unequivocal request, the court never conducted the required hearing. His request was clearly not untimely nor done for the purpose of delay. There was an obvious purpose for the request: to get Lindsay off his case after the breakdown in their relationship. It was made on the heels of the court repeatedly and summarily denying Birch's multiple requests to replace Lindsay with substitute counsel. Under those circumstances, it was more than reasonable for Birch to make the request at the time that he did. He had tried every other appropriate mechanism to have Lindsay removed from his case, but to no avail. Put simply, the timing of the request was irrelevant. What was more important was the reasons why it had to be made and why, in the context of the case, it had to be considered. But the court refused to even consider the request for self-representation at all, much less hold a hearing to resolve the request as required by Faretta. Such failure denied Birch his Sixth and Fourteenth Amendment right to self-representation. The State court's decision was unreasonable.

For these reasons, the petition should be granted and the conviction in the Sears case should be vacated.

## GROUND SIX

**THE PROSECUTOR'S PRESENTATION OF TESTIMONY AS TO THE PETITIONER'S SILENCE DURING A POLICE INTERVIEW FOLLOWING THE SEARS ARREST AND ASSERTION IN CLOSING ARGUMENT THAT SUCH SILENCE WAS EVIDENCE OF BIRCH'S GUILT OF THE CRIME CHARGED DENIED HIM HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT.**

Prior to trial, defense counsel objected to the introduction of Birch's silence in the face of accusation during the police interrogation that he committed the theft at Sears. The court overruled the objection and allowed such evidence into the case.

> MR. LINDSAY: . . . I don't know that you're not allowed to stand silent when accused. We don't have the tacit admissions they had in the Middle Ages, you're a witch and if they don't - - if you don't deny you're a witch, they burn you. I see it as an enormously different matter, because I don't think tacit admissions are admissions.
>
> . . . . .
>
> MR. LINDSAY: If you don't deny it , is that an admission?
>
> THE COURT: I don't want to get too academic. Your record is made. That will be the ruling of the court.

Ex. 97 at 82-84.

Specifically, the judge ruled that the testimony concerning Birch's silence with respect to denial of guilt was admissible.

> . . . I will permit the question and answer of the detectives, during the entire interview with the defendant, at no time did he deny culpability or claim innocence. I think that's a fair question to be asking, for the detectives to say, no, he didn't. I think that's fair game.

Ex. 97 at 81-82.

The testimony of Birch's silence in the face of accusations was introduced into evidence at trial and then affirmatively used as evidence of guilt. The evidence at trial showed that, after Birch signed a form with respect to waiver of a defendant's rights under Miranda v. Arizona he was interviewed on

February 21, 2008, at the Reno Police Department's headquarters. Ex. 97 at 182-84. According to the trial testimony of one of the two officers conducting the interview (Officer Bellamy), Birch made the following statements at that time.

> A. He told me that he steals to support his drug habit.
>
> Q. Okay. Later on in the interview, Mr. Birch was confronted with or advised with a statement, which was said, we got you dead bang on Sears?
>
> A. Yes.
>
> Q. You remember that being advised to the defendant?
>
> A. Detective Thomas told him that, we have you dead bang on Sears, which I understood as we know you did the incident at Sears and Mr. Birch agreed. <u>He didn't say anything that would explain how he did not commit that act at Sears</u>.
>
> . . . . .
>
> Q. How long did your interview with the defendant last?
>
> A. It was, I believe, just under an hour and a half.
>
> Q. Okay. <u>At any time during the course of that hour and a half interview, did he deny his culpability or responsibility at Sears</u>?
>
> A. <u>Not one time</u>.
>
> Q. <u>Did he at any time during that interview claim that you guys had the wrong guy</u>?
>
> A. <u>Not at all</u>.

Ex. 97 at 188-89 (emphasis added).

At closing argument the State characterized Birch's silence as proof that he was guilty of the burglary charged.

> . . . And we get to the interview, an hour and a half long interview. At no time did Mr. Birch say, I didn't do it. At no time did he say, I walked into Sears with these tools.
>
> What did he say? He said, yeah, you guys have me dead bang at Sears. Common sense and judgment, ladies and gentlemen, that's what we instill in you as jurors and expect you to use. To the question of stealing there's no question there.

Ex. 98 at 269.

On direct appeal the Nevada Supreme Court affirmed the trial court's admission of such evidence citing United States Supreme Court authority deemed to be controlling.

> We conclude that this argument lacks merit. As Birch waived his right to remain silent and spoke with detectives, the State's questions concerning his failure to deny the charges did not constitute improper comment on his right to remain silent. See Anderson v. Charles, 447 U.S. 404, 408 (1980) (providing that questioning about prior inconsistent statements does not improperly comment on right to remain silent because defendant was not induced to remain silent by warnings). . . .

Ex. 163 at 6.

The Nevada Supreme Court's decision was both contrary to, and an unreasonable application of clearly established federal law. Under Doyle v. Ohio, 426 U.S. 610, 619 (1976), the Supreme Court held it violates due process for the State to use a defendant's silence against him at trial after he has received Miranda warnings. In Anderson v. Charles, 447 U.S. 404, 408 (1980), the Supreme Court held that the State may impeach a defendant who testifies at trial with post-Miranda silence as a prior inconsistent statement. In Charles, the Court clarified that the primary inquiry in cases where a defendant waives his Miranda rights is whether the prosecutor's question or argument is "designed to draw meaning from silence" or instead merely "to elicit an explanation for a prior inconsistent statement." Charles, 447 U.S. at 409; accord, e.g., United States v. Caruto, 532 F.3d 822, 830 (9th Cir. 2008) (explaining the difference between Doyle and Charles).

Here, the prosecutor clearly violated Doyle as he specifically asked the jury to draw meaning from Birch's silence. After eliciting testimony from a detective that Birch remained silent in the face of accusations that he committed the crime, the prosecutor in closing asked the jury to specifically consider this silence as evidence of guilt. Indeed, the prosecutor could not have been using this silence as impeachment material because Birch never took the stand and never gave a statement that was inconsistent with his prior statement to the police. Thus, the only potential use of this silence was as affirmative evidence of guilt. The Supreme Court has never condoned the use of silence as direct evidence of guilt. In upholding the use of Birch's silence, the Nevada Supreme Court's decision was contrary to the clearly established decisions of Doyle and Charles.[10] No deference is required under § 2254(d)(1) and this claim is, therefore, reviewable de novo. Applying such standard of review it is clear that the prosecution's reference to Birch's silence violated Doyle and did not present the "impeachment" use of silence as at issue in Charles. At the very least, the state court's decision was an unreasonable application of those two decisions.

This constitutional error cannot be considered harmless. Under Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), a habeas petitioner is entitled to relief where the constitutional violation had a "substantial and injurious effect or influence in determining the jury's verdict." Where the record is so evenly balanced that a judge "'feels himself in virtual equipoise as to the harmlessness of the error'" and has 'grave doubt' about whether an error affected a jury [substantially and injuriously], the judge must treat the error as if it did so.'" Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quoting O'Neal v. McAninch, 513 U.S. 432, 435, 437–38 (1995)). When a court conducts a harmless error analysis under Brecht, the question is not "whether there was sufficient evidence to support the conviction in the absence of the constitutional error," but whether it "likely had a substantial and injurious impact on the verdict." Taylor v. Maddox, 366 F.3d 992, 1016-17 (9th Cir. 2004); see also Kotteakos v. United States, 328 U.S. 750, 768 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.").

There were numerous problems with the State's evidence in the Sears case. No witness personally observed Birch steal anything. The surveillance videos do not ever show Birch concealing tools in his pockets. No witness could testify about what Birch had in his possession prior to entering the store. The evidence that Birch had the intent to steal at the time he entered Sears was non-existent. There was no evidence that he entered the store unlawfully. There was also the suspicious fact that the police lost Birch's wallet. Even the court acknowledged at sentencing that Sears was a close case. Ex.

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[10] The State's reliance upon United States v. Lorenzo, 570 F.2d 294, 297-98 (9th Cir. 1978), is misplaced. The court in Lorenzo found that a "non-answer" to a specific question did not constitute silence. The situation here went beyond a "non-answer" to a specific question. The State specifically used Birch's silence in the face of accusation during an entire interrogation as affirmative evidence of guilt. This represented a far more intrusive and aggressive request to draw meaning from silence than at issue in Lorenzo.

111 at 41. Indeed, it can be presumed that it was due to the weaknesses in the State's case that the prosecutor sought to affirmatively use Birch's silence against him, a prejudicial tactic that could have only had an impact on the jury.

For these reasons, the writ should be granted and the Sears conviction and sentence vacated.

## GROUND SEVEN

**SENTENCING BIRCH TO CONCURRENT LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCES FOR THE SEARS AND FORD TRUCK MATTERS CONSTITUTED EXCESSIVE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND DENIED PETITIONER HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.**

A sentence violates the Eighth Amendment if it is grossly disproportionate to the crime. Ramirez v. Castro, 365 F.3d 755, 763-67 (9th Cir. 2004) (citing Solem v. Helm, 463 U.S. 277, 296-97 (1983)); Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). In assessing an Eighth Amendment disproportionality claim, this Court considers the severity of the sentence, the gravity of the offense, and the criminal history of the defendant. Taylor v. Lewis, 460 F.3d 1093, 1098-1101 (9th Cir. 2006).

The Supreme Court has held unconstitutional a sentence of life imprisonment without parole for a seven time nonviolent felon. Ramirez, 365 F.3d at 764 (citing Solem, 463 U.S. at 303). In Solem, the defendant (Helm) was sentenced to life without parole under South Dakota's recidivist statute for uttering a no account check in the amount of $100 and had seven non-violent prior convictions including burglary, grand larceny, and other property offenses. Id. In Solem, the Court stated that the proportionality analysis should be guided by objective criteria, including:

> (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Id. (citing Solem, 463 U.S. at 292). In holding that Helm's sentence was unconstitutional, the Court recognized that his life without parole sentence was "far more severe" than the life with parole sentence affirmed in Rummel v. Estelle, 445 U.S. 263 (1980), in which parole was available after twelve years, and that "Nevada was the only other state that might have given Helm the same sentence for his crime, but there was no evidence Nevada had actually ever given such a sentence to someone 'whose prior offenses were so minor.' " Id. (citing Solem, 463 U.S. at 299-300). Although the Supreme Court has held that less severe sentences under California's three-strike laws did not violate the Eighth Amendment, see Ewing v. California, 538 U.S. 11 (2003) (affirming sentence of 25 years to life); Lockyer v. Andrade, 538 U.S. 63 (2003) (affirming two sentences of 25 years to life), Solem remains good law and supplies the guiding analysis here.

The Nevada Supreme Court's decision upholding Birch's sentence of life without the possibility of parole ("LWOP") for two non-violent offenses was an unreasonable application of clearly established law. This case is one of those "exceedingly rare" and "extreme" cases, see Lockyer v. Andrade, 538 U.S. at 73, in which the harshness of the sentence imposed is grossly disproportionate to the crime involved, even considering past offenses. Outside of the death penalty, Birch received the absolute harshest penalty that can be imposed in Nevada.[11] He has been sentenced to die in prison. However, Birch was convicted of two lower level, non-violent crimes: burglary based on shoplifting and possession of stolen property. The value of the property that Birch was convicted of shop lifting in the Sears case was far less than $100. The value of the truck was far less than $2500. Such a harsh sentence, on its face, is highly disproportionate to the level of criminal conduct here. In fact, it is incomprehensible.

Birch's priors, though numerous, are no more serious than the defendant's in Helm. Clearly, the prior convictions on which the State sought habitual treatment did not justify the extremely harsh sentence. Birch's habitual criminal sentences were based on the following felony convictions: (1) 2000 burglary conviction, Case No. C156435, sentenced to 16-72 months consecutive to Case No. C141122 (Ex. 173), (2) 1998 burglary conviction, Case No. C141122, sentenced to 16-72 months suspended and placed on probation (Ex. 172), (3) 1994 possession of a controlled substance conviction, Case No. C108104, sentenced to one year in prison (Ex. 171), (4) 1984 possession of stolen property conviction, Case No. C64311, sentenced to 10 years imprisonment (Ex. 170), (5) 1975 sale of a controlled substance conviction, Case No. 32226, sentenced to six years' imprisonment consecutive to sentence in Case No.

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[11] Under Nevada law an LWOP sentence rendered on or after July 1, 1995, as here, may not be commuted by the Pardons Board to a sentence allowing parole.

29835 (Exs. 169), and (6) 1976 burglary conviction, Case No. 29835, sentenced to seven years' imprisonment (Ex. 168).

The prior convictions set forth above do not warrant LWOP sentences since none involve violence; one was for selling heroin in 1974, 35 years prior to sentencing; one was for burglary in 1975, 34 years earlier; one was for possession of stolen property and entailed possession of a small amount of jewelry in 1983, 26 years earlier; and one was for possessing marijuana in 1992, 17 years earlier. The other two convictions were for burglary offenses, the latest of which occurred in 1998. In short, the offenses used to support the habitual criminal finding were generally stale and remote. Moreover, as testified to by Birch, one of the burglary convictions concerned the theft of Christmas cards from a Hallmark store and another theft of a bottle of Vodka from a grocery store. Ex. 111 at 18.

The State is simply wrong to say that Birch has a violent criminal history. The State points to four things in the PSR to indicate prior violence in his background: a 1993 domestic violence conviction, a 1994 firearm conviction, a 1997 robbery charge that resulted in a burglary conviction, and a 2008 harassment/threats charge. CR 94 at 36. None of these allegations represent a prior violent criminal history. In the first instance, two of these only concern charges, not convictions. Birch retains the presumption of innocence as to criminal charges. As such, they clearly are not a part of his criminal history. Moreover, the robbery charge was reduced to a non-violent burglary conviction and the 2008 charge was dismissed. The existence of the 1993 domestic violence conviction does not represent prior violent conduct. "Domestic violence" as defined in Nevada does not necessarily include conduct that would be classified as violent. <u>See</u> N.R.S. 33.018. The State provided no evidence that this misdemeanor conviction was actually based on violent conduct. Finally, the "firearm conviction" was a federal conviction for "ex-felon in possession of a firearm." CR 95. Under federal law, this is not considered a violent crime. <u>United States v. Garcia-Cruz</u>, 978 F.2d 537, 542-43 (9th Cir. 1992). Thus, Birch's prior criminal conduct did not justify such a grossly disproportionate sentence to the crimes for which he was convicted. Further, as discussed in Ground One, there were extenuating factors for all of Birch's prior criminal conduct, namely his mental illness and drug addiction.

Because Birch's case is comparable to <u>Solem</u>, there is an inference of disproportionality that requires this Court to proceed to the intra- and inter-jurisdictional analyses. <u>Ramirez</u>, 365 F.3d at 770.

An intrajurisdictional analysis "compare[s] the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." Id. at 770 (quoting Solem, 463 U.S. at 291).

Without the habitual enhancement, Birch would have faced maximum terms of one to five years for felony possession of the stolen vehicle, NRS 205.273, and one to ten years for the burglary. NRS 205.060(2). Under the habitual criminal statute (NRS 207.010), Birch was punished more severely than many murderers and child sex assault convicts under Nevada law. See NRS 200.366(3) (a-c) (sex assault of a minor punishable by life with parole); NRS 200.030(4) (first degree murder punishable by death, life with or without parole, or a term of years); NRS 200.030(5) (second degree murder punishable by life with parole). The convictions for burglary based on shoplifting and possession of stolen property do not carry the same degree of criminal culpability as these more serious Category A violent offenses. Birch's sentence was extreme even by Nevada standards.

As to the interjurisdictional analysis, Birch's sentence can be compared to the punishments meted out in Solem and under the California three strikes law. See Ramirez, 365 F.3d at 772 (quoting Solem, 463 U.S. at 29, and comparing "the sentences imposed for commission of the same crime in other jurisdictions"). In Ramirez, this Court recognized that California's three strikes laws is the "most stringent in the nation," id., and the Supreme Court stated in Solem that only in Nevada could Helm have received a sentence of life without parole based on a theft offense and a history of nonviolent property offenses. Solem, 463 U.S. at 299-300.[12]

In light of the non-violent nature of the crimes for which Birch was sentenced in these cases and the generally stale and remote predicate felonies set forth above, the sentences are grossly disproportionate to the non-violent acts for which Birch was convicted and inconsistent with Nevada sentencing practices. For the reasons outlined above, the Nevada Supreme Court's decisions was an

[12] The ACLU has recently determined that approximately 652 of the more than two million people in American prisons have been sentenced to LWOP for non-violent property offenses. See ACLU, "A Living Death: Life Without Parole for Nonviolent Offenses," at 23 (November 2013) (Available at https://www.aclu.org/criminal-law-reform/living-death-life-without-parole-nonviolent-offenses-0).

unreasonable application of, and contrary to, clearly established law.

The writ should be granted and the sentences vacated.

## GROUND EIGHT

**PETITIONER IS ENTITLED TO RELIEF BECAUSE OF THE CUMULATIVE EFFECT OF THE ERRORS RAISED IN THIS PETITION.**

The Supreme Court has established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007), citing Chambers, 410 U.S. at 298, 302-03 (combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"). The errors set forth in Grounds One through Six above implicate important federal constitutional rights. The cumulative effect of the errors severely prejudiced Birch, deprived him of a fair trial on the issue of his guilt or innocence of the charges and also rendered his convictions and excessively punitive sentence inherently unreliable.

Accordingly, the writ should be granted and petitioner's unconstitutional convictions and sentence vacated and corrected.

DATED this 12th day of December, 2013.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: */s/ Jonathan M. Kirshbaum*
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

**CERTIFICATE OF SERVICE**

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

That on December 12, 2013, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

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Susan Kline, An Employee of the
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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEVADA**

BRUCE BIRCH,

Petitioner,

vs.

DWIGHT NEVEN, *et al.*,

Respondents.

Case No. 2:11-cv-00516-GMN-CWH

**ANSWER**

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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEVADA**

| | |
|---|---|
| BRUCE BIRCH,<br>Petitioner,<br>vs.<br>DWIGHT NEVEN, *et al.*,<br>Respondents. | Case No. 2:11-cv-00516-GMN-CWH<br><br>**ANSWER** |

Respondents, by and through counsel, Catherine Cortez Masto, Attorney General of the State of Nevada, answer Petitioner Bruce Birch's ("Birch") first-amended federal habeas petition ("amended petition"). This answer is based on the following points and authorities, together with all pleadings, papers, and exhibits on file.

## I. STATEMENT OF THE CASE

Birch is an inmate in the lawful custody of the Nevada Department of Corrections. On April 7, 2011, Birch initiated this action by filing a proper person federal habeas petition. Docket #1. Following the appointment of counsel, Birch filed a first-amended federal petition on December 14, 2012. Docket #71. The amended petition challenges three separate criminal convictions: 1) an attempted grand larceny conviction obtained through Birch's guilty plea and stemming from a June 2007 incident at a Home Depot ("the Home Depot case," Nevada district court number 07-1714A); 2) a burglary conviction obtained through a jury trial and stemming from a February 2008 incident at a Sears department store ("the Sears case," Nevada district court number 08-1585); and 3) a possession of



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stolen motor vehicle conviction, also obtained through a jury trial ("the Ford truck case," Nevada district court number 08-1586). *See id*. at 2-15. On March 27, 2009, the state district court held a sentencing hearing with respect to all three convictions. *See* Exhibit 111.[1] At the sentencing hearing, the state district court adjudicated Birch a habitual criminal. *Id.* at 41-42. The state district court subsequently sentenced Birch to a term of 19 to 48 months in the Home Depot case, Exhibit 112; a consecutive term of life without the possibility of parole in the Sears case, Exhibit 113; and a second, concurrent term of life without the possibility of parole in the Ford truck case, Exhibit 114. The state district court entered all three judgments of conviction on March 27, 2009. *See* Exhibits 112, 113, 114.

Birch filed a direct appeal as to each of his three convictions, *see* Exhibits 116, 118, 120, and filed three separate appellate briefs, *see* Exhibits 153, 155, 156. The Nevada Supreme Court elected to consolidate the appeals, and affirmed Birch's three convictions in an order dated March 11, 2010. *See* Exhibit 163. Remittitur issued on April 7, 2010. Exhibits 164, 165, 166.

Birch did not file a state post-conviction action.

On February 13, 2013, Respondents filed a motion to dismiss Birch's amended federal petition and therein argued that Amended Claims 3 (in part), 4 (in part), and 6 were untimely; and that Amended Claim 1 was unexhausted. Docket #82. This Court dismissed as unexhausted the allegations in Amended Claim 1 that counsel failed to 1) challenge the intent element of the Sears case; 2) object to petition being placed in restraints; and 3) object to the judge's commentary on video evidence, and denied the balance of the motion. *See* Docket #89 at 18. Birch elected to abandon these unexhausted allegations and proceed on the merits of his claims. Docket #90. This answer follows.

## II. STATEMENT OF FACTS

### A. Sears Case

In the Sears case, the State's evidence included the following: Reed Thomas, a detective employed by the Reno Police Department ("Detective Thomas"), testified that he was conducting surveillance at a Reno, Nevada, Wal-Mart store on February 21, 2008. Exhibit 97 at 97. While conducting surveillance at Wal-Mart, Detective Thomas observed Birch carry white grocery bags in and

[1] All references to exhibits, except to Exhibits 191 and 192, correspond to Birch's index filed in connection with the first-amended petition. *See* Docket #72.



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out of the store and place one of the bags in a Ford pickup truck that was parked outside the store. *Id*. at 97-98. Birch later returned and removed two white bags from the back of the truck before boarding a bus near the store. *Id*. at 99. Detective Thomas continued his surveillance as Birch transferred to another bus in downtown Reno and eventually entered a J.C. Penney store in the Meadowood Mall. *Id*. at 100. Detective Thomas followed Birch on foot out of the J.C. Penney store and into a Sears store. *Id*. at 101. At the time he entered the Sears store, Birch was still carrying the white grocery bags. *See id*. at 100-01. Birch subsequently walked into the Sears hardware department, at which point Detective Thomas stopped following Birch because he had received information from his supervisor that Birch's actions would be monitored through video surveillance. *Id*. at 102.

Jeremy Tye, a loss prevention associate at Sears ("Associate Tye"), testified that he was conducting video surveillance at the Sears store on February 21, 2008. *Id*. at 112. While conducting surveillance, Associate Tye observed Birch conceal a number of wrenches in his jacket. *Id*. at 115. During direct examination of Associate Tye, the State introduced video evidence depicting Birch kneeling down in an aisle displaying small tools and concealing several wrenches on his person. *Id*. at 125-28. Birch subsequently exited the store and was apprehended by law enforcement officers. *See id*. at 133-35. After escorting Birch to a detention room at Sears, the law enforcement officers recovered six wrenches and a pair of pliers from Birch's person. *Id*. at 135. These tools were the property of Sears and had not been purchased by Birch. *Id*. at 136-39.

Gerald Rhodes, a sergeant employed by the Reno Police Department ("Sergeant Rhodes"), testified that on February 21, 2008, he arrived at the Sears store and conducted video surveillance of Birch with Associate Tye. *Id*. at 146. Sergeant Rhodes further testified that when Birch entered the store his jacket pockets were not heavy and opined, based on his professional experience and training, that Birch's jacket pockets did not contain any heavy items at that time. *See id*. at 148; *see also id.* (noting that at one point Birch pulled gloves and a piece of paper out of his pockets). Sergeant Rhodes also testified concerning video surveillance depicting Birch removing tools from the Sears display and concealing them on his person. *Id*. at 149-50.

Scott Smith, a police officer employed by the Reno Police Department ("Officer Smith"), testified that he conducted the search of Birch's person incident to his arrest. *Id*. at 158. During his

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search, Officer Smith found the wrenches and the pliers in Birch's jacket pockets. *Id*. at 161. Officer Smith did not find any receipt from Sears indicating that Birch had purchased the tools. *Id*. Officer Smith also searched Birch's wallet, which contained $1.27 in cash and change. *Id*. at 162. Officer Smith did not locate any credit cards, a checkbook, or any other means of payment during his search. *Id*.

Clint Bellamy, a police officer employed by the Reno Police Department ("Officer Bellamy"), testified that he conducted an interview of Birch subsequent to Birch's arrest. *Id*. at 173. Officer Bellamy further testified that Birch waived his *Miranda* rights in writing and by verbal acknowledgement. *Id*. at 174-75. After waiving his *Miranda* rights, Birch admitted to Officer Bellamy that "he steals to support his drug habit." *Id*. at 188. Birch also affirmatively acknowledged his guilt with respect to the Sears theft during the interview with Officer Bellamy. *See id*. at 188-89.

**B. <u>Ford Truck Case</u>**

In the Ford truck case, the State's evidence included the following: Scott Smith, a police officer employed by the Reno Police Department ("Officer Smith"), testified concerning his role in the surveillance conducted by the Reno Police Department at a Reno Wal-Mart near Northtowne Lane on February 21, 2008. Exhibit 105 at 83-84. Officer Smith further testified that he conducted a search incident to Birch's arrest at the Meadowood Mall and found a set of keys, one of which had the word "Ford" on it. *Id*. at 89-90. As he was unaware that the truck keys were associated with a stolen vehicle, Officer Smith did not confiscate the keys. *Id*. at 90-91.

Robert Wilson, a private business owner ("Mr. Wilson"), testified that on February 22, 2008, he noticed that his red Ford pickup truck was missing. *Id*. at 97. The Ford truck was used by Mr. Wilson in his snow removal business. *Id*. at 98. Mr. Wilson reported the theft of the truck the same day to local law enforcement officers. *Id*. at 100. Mr. Wilson had last seen the truck on February 20, 2008, and had left the truck's only set of keys in the truck under the floor mat. *Id*. Law enforcement officers subsequently contacted Mr. Wilson to notify him that his truck had been located in a Reno shopping mall. *Id*. at 101. After receiving the truck keys from the police, Mr. Wilson attempted to start the truck but the truck's battery was dead. *Id*. at 102-03. Mr. Wilson thereafter succeeded in making the truck

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operable with the use of car jump-starter device. *Id*. at 103. Mr. Wilson further testified that Birch did not have permission to drive or possess the truck at any time. *Id*. at 104.

David Frankel, a police officer employed by the Washoe County Sheriff's Office ("Officer Frankel"), testified that he was one of the officers conducting surveillance at the Reno Wal-Mart on February 21, 2008. *Id*. at 108. While conducting surveillance, Officer Frankel observed Birch approach a red Ford truck parked in the Wal-Mart parking lot. *Id*. at 109-10. Birch placed a white plastic bag in the bed of the truck. *Id*. at 110. Sometime later that morning, Birch returned to the truck and retrieved two plastic bags before boarding a bus. *Id*. at 111. After observing Birch approach the truck, Officer Frankel requested a records check on the truck and was informed, the following day, that the truck had been reported stolen. *Id*. at 112-15. After discovering that the truck had been reported stolen, Officer Frankel went to the jail where Birch was being held in custody and checked out the set of keys that had been found on Birch's person subsequent to his arrest. *Id*. at 115-16. Officer Frankel then took the keys back to the Wal-Mart parking lot and tried the keys in the red Ford truck he had observed earlier in connection with his surveillance of Birch. *Id*. at 120. The keys unlocked the truck door and turned the ignition. *Id*. Officer Frankel further testified that he was present when Birch was interviewed subsequent to his arrest, that Birch denied touching the truck during the interview, and that this assertion was contrary to Officer Frankel's observations of Birch in the Wal-Mart parking lot. *Id*. at 151-52. Officer Frankel also testified that Birch asserted that the truck belonged to someone named Shayne but failed to provide any additional details concerning the possible owner, and that this vague response and Birch's subsequent attempt to change the subject indicated to him that Birch was being evasive. *Id* at 153, 156-57. Birch later admitted that he stole to support his drug habit and the drug habit of his girlfriend. *Id*. at 158-59.

**C. <u>Home Depot Case</u>**

In the Home Depot case, the State charged Birch by way of criminal information with two counts of attempted grand larceny involving tools unlawfully taken from a Reno Home Depot on June 11, 2007. Exhibit 13. Birch pled guilty to both counts. *See* Exhibit 14.

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## III. DENIAL OF FACTUAL ALLEGATIONS

Respondents deny all factual allegations in Birch's amended federal petition save and except those expressly found by a Nevada court of competent jurisdiction to be true.

## IV. STANDARD OF REVIEW

Because the instant federal habeas petition was filed after April 24, 1996, this action is governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Under the highly deferential standard set forth in section 2254(d), a federal court must deny habeas relief with respect to any claim adjudicated on the merits in a state court proceeding, unless the petitioner can show that the state court adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The phrase "clearly established" refers "to the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). This formidable standard reflects the view that habeas corpus is "'a guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

The United States Supreme Court has held that a state decision is "contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Early v. Packer*, 537 U.S. 3, 8 (2003) (quoting *Williams*, 529 U.S. at 405-06). However, AEDPA does not require citation to—or even awareness of—Supreme Court precedents in a state court decision, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Packer*, 537 U.S. at 8.

A state decision involves an "unreasonable application" of clearly-established federal law "if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413.

"[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). In addition, the term "unreasonable" is not synonymous with "incorrect" or "erroneous." *Williams*, 529 U.S. at 412. Instead, to prevail under the "unreasonable application" clause, the petitioner must show "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Richter*, 131 S.Ct. at 786-87. The Supreme Court has emphasized that "[i]f this standard is difficult to meet, that is because it was meant to be." *Id.* at 786.

In a federal habeas proceeding, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner has the burden of rebutting the presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitations of section 2254(d) on the record that was before that state court. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1400 (2011) ("[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review."); 28 U.S.C. § 2254(d)(2) (barring habeas relief unless state court adjudication "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.").

## V. THE MERITS

Birch's federal habeas claims lack merit and should be denied.

### A. The Nevada Supreme Court Reasonably Denied Birch's Sixth Amendment Claims Based On Conflict of Birch's Own Making

In Amended Claim 1A, Birch asserts he was denied his Sixth Amendment right to conflict-free counsel because counsel was operating under an "actual conflict of interest." *See* Docket #71 at 22. The Nevada Supreme Court denied this claim without comment. *See* Exhibit 163 at 1-2 (only addressing claim that the trial court abused its discretion in denying Birch's motion for new counsel).

#### 1. This Court should apply AEDPA deference in evaluating Amended Claim 1A

As an initial matter, Birch argues that this Court should review Amended Claim 1A *de novo* because the Nevada Supreme Court failed to address his Sixth Amendment legal theory despite having



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been presented with the theory in Birch's opening brief. Docket #71 at 34. This argument should be rejected. In his opening brief, Birch introduced his claim as follows:

> THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR NEW COUSNEL AFTER TRIAL COUNSEL HAD BEEN SPIT BY APPELLANT ON PRIOR TO TRIAL AND PHSYCIALLY ATTACKED BY APPELLANT IN OPEN COURT PRIOR TO THE JURY VERDICT. REFUSAL OF TRIAL COUNSEL TO WITHDRAW VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

Exhibit 156 at 17. Accordingly, Birch presented the Nevada Supreme Court with a compound claim that challenged the actions of two different actors (the trial court and trial counsel) under at least two different legal theories (rights to due process and the effective assistance of counsel). While it is undeniable that Birch made reference to the Sixth Amendment and the right to counsel in this brief, it is also true that he is at least partly responsible for the lack of discussion in the Nevada Supreme Court's order on this issue due to his emphasis on the trial court's denial of his motion for new counsel and his failure to plead separate claims separately. *See id*. at 17-19. Furthermore, after the Nevada Supreme Court rendered its decision Birch did not petition that court for rehearing or bring this alleged oversight to the attention of the court by any other means. Therefore, Birch's attempt to cry foul at this late juncture is suspect and this Court should reject his argument that he is entitled to *de novo* review of Amended Claim 1A.

This conclusion is supported by the United States Supreme Court's recent decision in *Johnson v. Williams*, 133 S.Ct. 1088 (2013). The *Williams* court held that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted." *Id*. at 1096.

Birch makes no attempt to rebut this presumption here. *See* Docket #71 at 34 (asserting, without more, that Birch is entitled to *de novo* review because the Nevada Supreme Court did not address his specific constitutional claim). In the absence of any express discussion of Birch's Sixth Amendment theory or any persuasive justification to depart from the presumption that his claims were denied on the merits, this Court must apply AEDPA deference and conduct an independent inquiry into "what

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arguments or theories support or . . . could have supported the state court's decision; and then . . . ask whether it is possible fairminded jurists could disagree that those argument or theories are inconsistent with the holding in a prior decision of [the United States Supreme] Court." *See Richter*, 131 S.Ct. at 786; *Williams*, 133 S.Ct. at 1091 (stating that the *Williams* holding "follows logically from our decision in *Harrington v. Richter*"); *see also Williams*, 133 S.Ct. at 1099 (finding that the petitioner failed to rebut the presumption that AEDPA deference applied where, among other things, she had failed to petition the state court for rehearing or otherwise bring the alleged oversight to the attention of that court).

**2. The Nevada Supreme Court Reasonably Denied Amended Claim 1A Because A Conflict Of A Defendant's Own Making Does Not Implicate The Sixth Amendment**

While the Sixth Amendment right to counsel guarantees a defendant the rights to conflict-free representation and the effective assistance of counsel, not every conflict or disagreement between the defendant and counsel implicates the Sixth Amendment. *See Morris v. Slappy*, 461 U.S. 1, 13-14 (1983); *Daniels v. Woodford*, 428 F.3d 1181, 1196 (9th Cir. 2005), *cert. denied*, 550 U.S. 968 (2007). Thus, "[i]t may be the case, for example, that because the conflict was of [the defendant's] own making, or arose over decisions that are committed to the judgment of the attorney and not the client, in fact [the defendant] actually received what the Sixth Amendment required in the case of an indigent defendant, notwithstanding the State trial court's failure to inquire." *Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000) (en banc) (internal citations omitted); *see also Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) (citing *Morris*); *Daniels*, 428 F.3d at 1198 (a breakdown based on the defendant's refusal to communicate with appointed counsel does not warrant substitution where "the defendant's refusal to cooperate demonstrates 'unreasonable contumacy'") (quoting *Brown*, 424 F.2d at 1169)); *Crandell v. Bunnell*, 144 F.3d 1213, 1218 (9th Cir. 1998) (an indication that the defendant "sabotaged the relationship or failed to make reasonable efforts to develop the relationship with his appointed counsel" might be sufficient to uphold denial of a substitution motion), *overruled in part on other grounds in Schell*; *United States v. George*, 85 F.3d 1433, 1438 (9th Cir. 1996) (no "conflict" where defendant's "own antics" caused any communication problem with counsel).

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Here, any conflict between Birch and his attorneys was prompted by Birch's own antics and obstreperous behavior. Birch was initially represented by Maizie Pusich ("Attorney Pusich") in each of the three cases at issue. *See* Docket #71 at 23. In a motion for competency evaluation filed in March 2008, Attorney Pusich described Birch as "volatile and unpredictable," and related the following:

> One evening he [Birch] left rambling, incoherent and profane messages on several public defender phones. He appeared to have called every number between our receptionist and our fax machine. There are over fifty numbers. The vast majority of these employees did not know Mr. BIRCH or his case, and had no idea why he was calling to yell and swear at them.

Exhibit 23 at 3; *see also* Exhibit 24 (affidavit of Attorney Pusich). The state district court granted the motion for a competency evaluation, *see* Exhibit 26, and Birch was subsequently evaluated by two psychiatric professionals. Notably, both of these psychiatric professionals found Birch competent to stand trial. Exhibit 30 at 3.

At a June 2008 hearing in the Home Depot case, Birch admitted he had "called [Attorney Pusich] names and threatened and yelled at her on several occasions," and insisted that Attorney Pusich be replaced. Exhibit 38 at 6. The trial court granted Birch's request, and John Oakes ("Attorney Oakes") was subsequently appointed to represent Birch. *See* Exhibit 47.

On July 21, 2008, Judge Jerome Polaha recused himself from Birch's case. Exhibit 48. In the order of recusal, Judge Polaha explained that the recusal was necessary due to a threatening letter he received from Birch:

> As presiding judge over this matter, I am compelled to recuse myself from further involvement with it based upon an event that I consider an implied threat from the defendant. An *ex-parte* letter was delivered to my chambers from the defendant in which he advised that he was aware of my personal residence and he set it out in the letter. I took that as an implied threat to the point that I advised court security about it.

Exhibit 48 at 1. Birch's case was reassigned to Judge Patrick Flanagan. Exhibit 52.

Birch's obstructive and threatening behavior continued after he was appointed new counsel. In September 2008, Attorney Oakes filed a motion to withdraw because "Mr. BIRCH has left numerous threatening messages on the office voice mail and has threatened Counsel personally." Exhibit 61 at 2. Attorney Oakes further described Birch's conduct as "outrageous" and stated that the conduct had

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resulted in "a complete break-down of the Attorney-Client relationship." *Id*. The state district court granted the motion to withdraw and appointed a third lawyer to represent Birch: Robert Lindsay ("Attorney Lindsay"). Exhibit 65 (order dated September 9, 2008).

Shortly after Attorney Lindsay's appointment, Birch accused Attorney Lindsay of being an agent of the District Attorney and a "pathological liar," and demanded that he be provided yet a fourth lawyer. *See* Exhibit 73 (Birch's *pro se* letter filed October 23, 2008). At a hearing held on October 24, 2008, Attorney Lindsay responded to Birch's accusations by describing Birch as "a most difficult client" who refused to work with him despite counsel's best efforts. Exhibit 74 at 5. For his part, Birch asserted that Attorney Lindsay did not respond to his phone calls and that Attorney Lindsay had yelled and made threatening gestures toward him during an attorney-client meeting at the jail. *Id*. at 9-10. At the conclusion of the hearing the trial court denied Birch's request for a new attorney. *Id*. at 11.

On January 9, 2009, Birch returned to state court for a hearing to confirm dates for his upcoming trials. *See* Exhibit 78. During the hearing, Birch asserted that he would be "coming into some money from my mother's estate . . . within two weeks," and that he would use this money to hire private counsel or an investigator. *Id*. at 6-7. The trial court denied Birch's request to continue the trials or appoint new counsel.[2] *Id*. at 7. Following the trial court's ruling, Birch, who had tested positive for Hepatitis C, spat in the face of Attorney Lindsay. *Id*. at 7; *see also* Exhibit 97 at 14 (trial judge describing the incident at trial). Some of Birch's spit landed in Attorney Lindsay's eye, and "commotion ensued." Exhibit 78 at 7; Exhibit 97 at 14. The trial court ordered Birch removed from the courtroom. Exhibit 78 at 7. After Birch had been removed, Attorney Lindsay assured the court that despite Birch's behavior, he would "do absolutely everything I can to defend this man." *Id*.

On January 14, 2009, the trial court held an "in chambers" status hearing to discuss court security for the upcoming trial. Exhibit 81. During the hearing, Attorney Lindsay expressed concern

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[2] Respondents note that the trial court's decision to deny Birch's request was entirely reasonable given Birch's history of obstructive behavior, the uncertainty as to whether Birch would in fact obtain money to hire counsel, and Birch's failure to inform the Court of this contingency until the eve of trial.



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for own his safety[3] but again assured the court that "I have no trouble trying the case, no trouble at all." *Id*. at 6.

At a subsequent status hearing on January 23, 2009, Birch reiterated his complaint that Attorney Lindsay was not communicating with him and stated that Attorney Lindsay had not filed certain motions or conducted certain investigation in accordance with Birch's wishes. Exhibit 93 at 5-9. Attorney Lindsay responded to these allegations at some length as follows:

> And, your Honor, just for the record, I've never threatened him personally. And I would like the Court to know that I'm not the first lawyer he's had that he's made allegations that turned out not to be correct.
>
> . . . .
>
> I stand ready [to] help him with a plea . . . . It's important to know, he's personally attacked me, he's hepatitis C. I need it on the record. I've been to the doctor a few times. I've already had my blood drawn a few times. I've been told the wonderful news that the incubation period for that stuff is six months to six years and nobody really knows.
>
> So when I tell them that I won't forget what he did to me, I'm trying to let him know that it's completely unacceptable behavior. He's trying to infect me. And it's not just rude, it's truly criminal.
>
> . . . .
>
> But he needs to know there are consequences to this little theatrical stuff he's pulling. I intend to defend him as vigorously as possible given the circumstances . . . . and I intend to do as good a job as I possibly can on behalf of my client in spite of the fact that he's done everything he can to personally offend me and personally offend my children and all of the rest of it, your Honor.
>
> . . . .
>
> I've been up to the jail numerous times. He refuses to see me. There's nothing I can do about that, and that is not the consequence of my actions. Just for the record, I have been there, I have been sitting with the files, I've been ready to talk to him, and he's basically called me every name he can think of.
>
> . . . .
>
> Anyway, I stand ready to do everything a defense lawyer can do for this man.

*Id*. at 11-14.

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[3] Birch had sent letters to the District Attorney suggesting he had "other ways to get Mr. Lindsay off the case." Exhibit 81 at 7.



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On January 26, 2009, the Sears trial commenced. *See* Exhibit 97. Outside the presence of the jury, Birch was permitted to make a statement in which he asserted that Attorney Lindsay had not come to see him since the previous hearing, had not completed certain investigation, and was not focusing on the intent element. *Id*. at 6-8. Attorney Lindsay responded that he had attempted to see Birch but that Birch had refused him, that Birch had never given him a name of a potential witness, and that Birch had not discussed the intent element with him "other than once saying he didn't think they could prove that he intended it, and I tried to explain to him that intent can be proven other by an admission." *Id*. at 9. Attorney Lindsay also informed the court that "I think that his belief is that if he fights with me enough, he can never be prosecuted, he can never go forward," and reiterated his prior statement that despite Birch's behavior, he had "the ability to professionally and vigorously defend him [Birch] in front of a jury." *Id*. at 11.

After a recess at the close of evidence in the Sears trial, the jury returned to the courtroom. Exhibit 98 at 240. The court asked the attorneys to stipulate to the presence of the jury, and then "commotion ensued." *Id*. The reason for the "commotion" was that Birch had stabbed Attorney Lindsay in the hand with a pencil, resulting in a wound that required medical attention. *Id*. at 245-46. Despite having just been attacked by Birch, Attorney Lindsay offered a suggestion that would balance courtroom security needs with Birch's constitutional rights and assured the court that:

> . . . I do intend to give as fine a, as strong a closing argument as I possibly can. I do not hold a—I'm not happy, obviously, with my client's conduct. But I believe I can remove my personal feelings from my professional responsibilities. And I can guarantee you, I'm going to do it. I'm going to give him the best closing I possibly can give the circumstances of this case.

*Id*. at 243. The trial court then made a number of findings concerning Birch's behavior, including that Birch had "acted in a contemptuous manner in violation of the ordinar[]y administration of justice." *Id*. at 244-46.

At closing argument in the Sears case, Attorney Lindsay repeatedly admonished the jury not to consider Birch's conduct and argued vigorously for Birch's innocence on the ground that the State had failed to prove the elements of the offense, including the intent element. *See id*. at 259-67.

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In summary, the record illustrates a pattern of attempts by Birch to frustrate the judicial process by engaging in disruptive and obstreperous behavior. Birch refused to work with any of the three trial attorneys appointed to represent him at trial,[4] and physically attacked Attorney Lindsay by spitting in his face and stabbing him in the hand. Despite being mistreated in this way, Attorney Lindsay repeatedly assured the trial court that he would zealously represent Birch and soldiered on to ensure Birch received a fair trial. This pattern demonstrates that any conflict between Birch and Attorney Lindsay was of Birch's own making. Because any conflict resulted from Birch's own misbehavior, the conflict does not implicate the Sixth Amendment. *See Schell*, 218 F.3d at 1026. This is a reasonable basis that could have supported the Nevada Supreme Court's decision to deny Amended Claim 1A, and the claim should therefore be rejected. *See Richter*, 131 S.Ct. at 786 (where state court denies a constitutional claim without explanation, the federal habeas court must determine what arguments could have supported the state court's decision and then apply section 2254(d)).

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**3. Amended Claim 1A Fails Because The United States Supreme Court Has Not Extended Sixth Amendment Conflict Of Interest Jurisprudence Beyond Conflicts Involving Multiple Concurrent Representation**

Amended Claim 1A should also be rejected because the United States Supreme Court has not extended Sixth Amendment conflict of interest jurisprudence beyond conflicts involving multiple concurrent representation. In order to establish a violation of the Sixth Amendment right to conflict-free representation, a petitioner must demonstrate that: (1) counsel actively represented conflicting interests, and (2) an actual conflict of interest adversely affected counsel's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348–50 (1980). However, the United States Supreme Court has only addressed "actual conflicts" in the context of attorney representation of multiple defendants. *See Mickens v. Taylor*, 535 U.S. 162, 174–76 (2002).

In fact, the Supreme Court has held that conflicts other than multiple representation, such as conflicts based on financial issues, are not constitutionally based. *Id*. at 174–75 (stressing that the language of *Sullivan* "does not clearly establish, or indeed even support . . . expansive application" of

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[4] Respondents note that Birch was appointed replacement counsel in this proceeding in May 10, 2012. Docket #65. A letter from Glynn Cartledge, Birch's former counsel, references Birch's refusal to work with her, *see* Docket #49, Exhibit A at 1, and is further evidence that Birch's problems with his attorneys are of his own making.

the Court's conflict of interest jurisprudence, and that until "a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.") (quoting *Sullivan*, 446 U.S. at 350) (emphasis added in *Mickens*); *see also Earp v. Ornoski*, 431 F.3d 158, 1184 (9th Cir. 2005) (noting the *Mickens* Court "specifically and explicitly concluded that *Sullivan* was limited to joint representation, and that any extension of *Sullivan* outside of the joint representation context remained, 'as far as the jurisprudence of [the Supreme Court was] concerned, an open question.'") (quoting *Mickens*, 535 U.S. at 176).

Because this case does not involve the representation of multiple defendants and because the United States Supreme Court has not extended its Sixth Amendment conflict of interest jurisprudence beyond such conflicts, Birch cannot qualify for federal habeas relief under AEDPA on his conflict claim. *See* 28 U.S.C. § 2254(d)(1) (federal habeas petitioner must show state court's adjudication was contrary to or an unreasonable application of United States Supreme Court precedent); *see also Carey v. Musladin*, 549 U.S. 70, 76 (2006) (denying federal claim under AEDPA where issue was "an open question in our jurisprudence"); *Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007) (finding that no clearly established Supreme Court precedent supported the petitioner's "construction of 'conflict of interest' as describing a disagreement between attorney and client over trial strategy"); *Earp*, 431 F.3d at 1184 (rejecting conflicts claim when defense counsel and client had an intimate relationship, and stating, "While our circuit's precedent has expanded the scope of the *Sullivan* exception to apply in other contexts, and while we strongly disapprove of [counsel's] unprofessional behavior as reflected in her conduct at bar, the advent of AEDPA forecloses the option of reversing a state court determination simply because it conflicts with established circuit law."). This is a reasonable basis that could have supported the Nevada Supreme Court's decision to deny Amended Claim 1A, and the claim consequently lacks merit and should be denied.[5]

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[5] Respondents have addressed Amended Claim 1A under the United States Supreme Court's conflict of interest jurisprudence because Birch describes his claim as "based upon the actual conflict of interest between Birch and his attorney," Docket #71 at 22, asserts that "prejudice is presumed" where an actual conflict exists (as set forth more fully in *Cuyler v. Sullivan*, the seminal case on conflicts of interest), *id.*, and argues that "[Attorney] Lindsay's fear and animosity towards Birch overwhelmed his ability to zealously and single-mindedly represent his client," *id.* at 27. Birch does not argue in Amended Claim 1A that his Sixth Amendment rights were violated due to an "irreconcilable conflict," *see id.* at 22-34, which would be evaluated under a different standard for Sixth Amendment purposes, *see*



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**4. Birch's allegations of attorney misconduct**

As illustrative of alleged prejudice stemming from the conflict of interest,[6] Birch points to various instances of alleged attorney misconduct, including Attorney Lindsay's failure to communicate with Birch, failure to investigate the loss of Birch's wallet in the Sears case, failure to adequately cross-examine State witnesses in the Sears and Ford truck cases, making prejudicial comments during closing argument in the Sears and Ford truck cases, failing to file a motion to suppress or investigate the keys in the Ford truck case, failing to cite relevant Nevada case law for the purpose of suppressing Birch's statement concerning drug use, and failing to present evidence of Birch's alleged mental and physical health issues at sentencing in the Ford truck case. Docket #71 at 28-34; *see also* Docket #90 at 9-14 (Birch's submission of Amended Claim 1 after omitting factual allegations dismissed in this Court's order of July 3, 2013). However, Birch's conflict of interest claim must fail for the reasons stated above, and his allegations of attorney misconduct therefore do not warrant further consideration.

While Birch does not identify the allegations of attorney misconduct in Amended Claim 1A as independent from his conflict of interest claim and should therefore not be considered as such, they nevertheless lack merit under *Strickland*.[7] For a habeas petitioner to prevail on a *Strickland* claim of ineffective assistance of counsel, the petitioner must make two showings: 1) his or her counsel provided deficient performance, and 2) there was prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687-692 (1984).

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*United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998) (noting distinction), and Respondents object to any attempt by Birch to characterize it as such.

[6] Under Habeas Rule 2(c), Birch, who filed the amended petition with the assistance of counsel, was required to state separately claims based on separate congeries of facts. *See Hebner v. McGrath*, 543 U.S. F.3d 1133, 1139 (9th Cir. 2008). Birch's allegations of attorney misconduct in Amended Claim 1A are based on separate congeries of facts. *See* Docket #71 at 28-34 (alleging specific instances of deficient performance). Had he intended to present these allegations as independent constitutional violations, he could have easily done so. Instead, Birch presented them only in the context of his conflict of interest legal theory and for the limited purpose of demonstrating that the conflict had an adverse effect on counsel's performance. *See, e.g., id.* at 28 (stating that "there can be no doubt that the actual conflict of interest had an adverse effect on Lindsay's representation" and commencing summary of alleged misconduct).

[7] Birch does not cite to *Strickland* anywhere in the first-amended petition. *See* Docket #71. This further supports the conclusion that his allegations of attorney error are not separate from his conflict of interest claim. However, Respondents nevertheless address them here under *Strickland* in an abundance of caution.

To establish deficient performance, the habeas petitioner must show "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687. Counsel's performance must be evaluated from the perspective of counsel at the time of the conduct at issue, and the court must indulge a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.* at 689. In addition, counsel's performance should be evaluated in substantial part on the defendant's own statements and actions. *Id.* at 691.

To establish prejudice, the habeas petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

Because the deferential standards created by *Strickland* and section 2254(d) "apply in tandem," a state court's denial of an ineffective assistance of counsel claim is entitled to double deference. *Richter*, 131 S.Ct. at 789. To prevail on such a claim in a federal habeas proceeding, the petitioner has the burden to show there is no reasonable argument he received effective assistance of counsel under *Strickland*'s deferential standard. *See id.* ("When § 2254(d) applies, the question is not whether counsel's actions are reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.").

Birch elected not to pursue a state post-conviction action, and consequently fails to present testimony from Attorney Lindsay or any other evidence outside of the trial record that would establish a link between the conflict and the alleged deficient performance or serve as a basis to overcome the "strong presumption" that Attorney Lindsay's decisions were based on reasonable trial strategy.[8] *See id.* Moreover, Attorney Lindsay repeatedly assured the trial court that he would continue to represent Birch

[8] Birch asserts that the Nevada Supreme Court has reprimanded, sanctioned, or threatened to sanction Attorney Lindsay in various cases. Docket #71 at 27-28 n.5. This evidence does not appear to have been presented to the Nevada Supreme Court, *see* Exhibit 155 (Birch's opening brief); Exhibit 159 (Birch's reply brief), and therefore cannot be considered in this proceeding. *See Cullen v. Pinholster*, 131 S.Ct. at 1400 ("[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review."); 28 U.S.C. § 2254(d)(2) (barring habeas relief unless state court adjudication "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.").



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to the best of his ability despite Birch's misbehavior. *See, e.g.*, Exhibit 78 at 7; Exhibit 98 at 243. Given the egregious nature of Birch's misbehavior and *Strickland*'s instruction that counsel's performance is to be evaluated based in substantial part on the defendant's own statements and actions, *Strickland*, 466 U.S. at 691, the record supports the conclusion that under the circumstances Attorney Lindsay's performance not only met the objective standard of reasonableness, but was a minor act of heroism. Moreover, Birch fails to show that, but for any of these alleged errors, there was a reasonable probability of acquittal as the State's cases against him were strong. *See infra* Part V.D.2 (addressing evidence presented by the State in the Sears case); Part V.D.3. (addressing evidence presented by the State in the Ford truck case).

**5. The Nevada Supreme Court reasonably denied Amended Claim 1B**

In Amended Claim 1B, Birch asserts that his right to counsel was violated when the trial court failed to grant his request for substitution of counsel. Docket #71 at 34. The Nevada Supreme Court denied this claim as follows:

> Birch argues that the district court abused its discretion in denying his motion for new counsel in all three cases. Birch was being represented by his third attorney after relationships with his prior counsel had deteriorated. Despite being spat on and attacked in court, Birch's counsel repeatedly assured the district court that despite Birch's behavior, he would zealously represent Birch. Therefore, Birch fails to demonstrate that the district court abused its discretion in this regard. *See Garcia v. State*, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005).

Exhibit 163 at 1-2.

Birch points to no clearly-established federal law to meet his burden under section 2254(d)(1), but argues that the trial court erroneously failed to conduct an inquiry to determine whether there had been a breakdown in the attorney-client relationship after Birch asked that Attorney Lindsay be removed from the case. *Id*. at 71.

A trial court that is alerted to the possibility of a conflict of interest has an affirmative duty to inquire about the conflict and to determine whether new counsel should be appointed. *Wheat v. United States*, 486 U.S. 153, 160 (1988). However, "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id*. at 159; *see also Morris v. Slappy*,



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461 U.S. 1, 13-14 (1983) (holding that the Sixth Amendment requires only competent representation and does not guarantee a "meaningful relationship" between an accused and counsel). Moreover, trial court judges who investigate potential conflicts of interest face the prospect of being "whip-sawed" by claims of error no matter which way they rule, *Wheat*, 486 U.S. at 161, and must therefore be allowed "substantial latitude" in deciding whether to grant a defendant's substitution request, *id*. at 163. The Ninth Circuit has held that a trial court is not compelled to substitute counsel when the conflict is due to the defendant's "unreasonable contumacy." *Daniels v. Woodford*, 428 F.3d 1181, 1198 (9th Cir. 2005) (citations omitted).

The Nevada Supreme Court's denial of Amended Claim 1B was reasonable and supported by the record. Birch began complaining about Attorney Lindsay in October 2008, soon after Attorney Lindsay was appointed and after Birch's relationships with two other attorneys had deteriorated due to Birch's uncooperative behavior. *See* Exhibit 73. Following these initial complaints, the trial court allowed Birch to state his concerns on the record on at least three other occasions. *See* Exhibit 74 at 5-12 (hearing on October 24, 2008); Exhibit 93 at 5-14 (hearing on January 23, 2009); Exhibit 97 at 6-11 (hearing on January 26, 2009). The trial court denied Birch's request for substitute counsel on January 9, 2009, *see* Exhibit 78 at 7, and again on January 26, 2009, Exhibit 97 at 12. Birch offers no argument as to why the trial court's inquiries into his complaints about Attorney Lindsay were inadequate to reach an informed decision, and does not say what additional evidence he would have presented if the trial court had questioned him privately. *See* Docket #71.

Moreover, Attorney Lindsay repeatedly assured that he could effectively represent Birch despite Birch's behavior. *See, e.g.*, Exhibit 78 at 7; Exhibit 98 at 243. And given Birch's pattern of uncooperative behavior (including the withdrawal of two prior attorneys and the recusal of one judge) and Attorney Lindsay's representations, there is ample record support for the conclusion that any communication problems between Birch and Attorney Lindsay were of Birch's own making. *See*, *e.g.*, Exhibit 93 at 11-14 (Attorney Lindsay addressing communication problems at hearing on January 23, 2009). Therefore, the Nevada Supreme Court's denial of Amended Claim 1B was reasonable and the claim should be denied.

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**B. <u>The Nevada Supreme Court Reasonably Denied Birch's Claims Concerning Physical Restraints</u>**

In Amended Claim 2, Birch asserts that his constitutional rights were denied in the Sears and Ford truck cases when he was forced to appear at trial in shackles and a spit hood. Docket #71 at 35. The Nevada Supreme Court denied this claim with respect to the Ford truck case as follows:

> First, Birch argues that the use of visible physical restraints and a spit hood violated his right to a fair trial. Birch, who admitted that he had Hepatitis C, had spat in his counsel's face during a pretrial hearing. Further, he stabbed his counsel in the hand during a prior trial. Therefore, we conclude that the district court did not abuse its discretion in this regard. *See Hymon v. State*, 121 Nev. 200, 207, 111 P.3d 1092, 1098 (2005).

Exhibit 163 at 2. The Nevada Supreme Court denied Birch's claim with respect to the Sears case for the same reasons. *See id*. at 4. During the Sears case, the trial court made the following factual findings and conclusions of law concerning the physical restraints:

> . . . [T]he Court finds as a matter of fact that, one, the defendant has been charged with the felony of burglary. An amended information has charged him with being an habitual criminal. Two, on January 9th, 2009, in his court appearance, defendant spit at his attorney, Bruce R. Lindsay, and was removed from the courtroom. On or about January 12, 2009, this Court was informed that the defendant admitted he was positive for hepatitis C viruses.
>
> Four, that based upon the defendant's admission, this Court ordered that the defendant be fitted with a spit hood and restrained during all further court proceedings. The Court did that to protect court personnel and the public during the defendant's appearances in court.
>
> Five, that on or about January 14th, 2009, defendant appeared in Court and informed the Court he was on suicide watch at the Washoe County Jail. Based upon the defendant's own admission, it appeared to the Court that he was a danger of self-destruction and, therefore, restraint was appropriate.
>
> Six, based upon his prior assaultive behavior, his admission that he was carrying a communicative disease and he was on suicide watch and, therefore, a danger to his attorney, the court staff, the public and himself, this Court ordered that the defendant be restrained during his trial on the burglary charge.
>
> Seven, that despite such restraints, on January 27th, 2009, after the jury had been seated to hear jury instructions and closing arguments, the defendant produced a sharp instrument and attacked his counsel inflicting a wound, which required a recess of court proceedings and the transfer of counsel to Renown Hospital for immediate treatment.



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> . . . [discussing Nevada contempt statutes].
>
> Therefore, the Court finds the defendant has acted in a contemptuous manner in violation of the ordinar[]y administration of justice in these proceedings.
>
> Two, that this Court has considered all measures necessary to ensure the safety of court personnel, counsel and the general public while attempting to use the least restraint necessary in providing the defendant with the opportunity to participate in a speedy, public and fair trial.
>
> And, three, based upon his actions, the defendant is hereby found in contempt of court and has therefore forfeited his right to participate in further court proceedings.
>
> . . .
>
> The Court finds that alternative means of providing for Mr. Birch's participation through video or audio would not produce a timely resolution of this matter, and, therefore, in this Court's discretion, I will decline to order that video or audio participation be provided to Mr. Birch in his trial.

Exhibit 98 at 244-48. At the Ford truck trial, the trial court repeated these findings and further clarified that, in the Sears trial, "[t]he Court restrained only his hands to prevent his hands from reaching up and removing the hood . . . . The Court did not order his legs to be shackled." Exhibit104 at 22. The record reflects that during the Ford truck trial, Birch was "shackled, his legs are shackled, his hands are shackled and his hands are restrained in front of his body by a black box handcuff and he is wearing a spit hood." *Id.* at 21; *see also id.* at 24 (finding these measures to be the only suitable means of ensuring courtroom security). The trial court also instructed the jury in each case that: "[t]he defendant has been placed in restraints and has worn a hood during the course of this trial. This was done upon the order of this court. This should not be considered by the jury in arriving at a verdict." Exhibit 99 at 19 (Instruction No. 17A); Exhibit 108 at 19 (Instruction No. 18). The factual findings of the state courts are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

Birch points to no clearly-established federal law to meet his burden under section 2254(d)(1), but argues that the physical restraints violated his due process rights because the restraints were visible to the jury, the restraints were repeatedly brought to the attention of the jury, and because there trial court could have maintained courtroom security with less prejudicial alternatives such as surgeon's mask or Birch's appearance by video. Docket #71 at 36-37.

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The due process guarantees of "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial . . . . [such as] security problems and the risk of escape at trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005).

Here, the circumstances justifying the physical restraints were compelling. As found by the district court, those circumstances included: 1) Birch had been charged with a felony; 2) Birch was being prosecuted as a habitual criminal; 3) Birch spat in counsel's face; 4) Birch tested positive for hepatitis C; 5) Birch was on suicide watch; and 6) that despite being restrained during the Sears trial, Birch managed to stab Attorney Lindsay in the hand and inflict a wound that required immediate medical attention. Exhibit 98 at 244-48. Taken together, these circumstances demonstrate that Birch posed a significant security risk and that the trial court's decision to impose physical restraints was a reasonable one. And while the record does show that there were references to Birch wearing the hood during the trials, the jurors were instructed not to consider the hood or other physical restraints in arriving at a verdict.[9] *See* Exhibit 99 at 19 (Instruction No. 17A); Exhibit 108 at 19 (Instruction No. 18); *see also Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007) ("We presume that jurors follow the instructions.") (citation omitted). In addition, the trial court made factual findings at both trials that it had considered alternative means of restraining Birch and determined that the use of shackles and a spit hood were the only suitable means to ensure courtroom security. *See* Exhibit 98 at 247-48; Exhibit 104 at 24. These factual findings are entitled to deference under section 2254(e)(1), and Birch offers no evidence in support of his assertions that the Court's concerns could have been addressed through the use of a surgeon's mask or Birch's appearance by video, or that the jurors disregarded the instruction not to consider the hood or restraints in reaching a verdict. *See* Docket #71 at 35-38. For all these reasons, the Nevada Supreme Court reasonably denied Birch's claims concerning physical restraints, and Amended Claim 2 lacks merit.

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[9] The record is unclear as to whether and to what extent the shackles were visible to the jurors. Birch notes that the prosecutor requested an instruction addressing the shackles after stating his belief that the jury had seen Birch's "belly restraints," *see* Exhibit 98 at 242; however, this request also suggests that some effort was made to conceal the restraints and Birch failed to develop this fact in state court. In any event, the jurors were instructed not to consider the hood or the restraints in arriving at a verdict. *See* Exhibit 99 at 19 (Instruction No. 17A); Exhibit 108 at 19 (Instruction No. 18).



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**C. <u>The Nevada Supreme Court Reasonably Denied Birch's Claims That He Was Excluded From Participation In Certain Parts Of The Sears Case And From A "Read Back" Conducted In The Ford Truck Case</u>**

In Amended Claim 3, Birch asserts that his constitutional rights to confrontation and due process were violated when he was excluded from participation in a conference to discuss peremptory challenges and from closing argument in the Sears case, and from a "read back" conducted in the Ford truck case.[10] Docket #71. The Nevada Supreme Court denied these claims on the grounds that Birch did not have an unlimited right to be present at these proceedings and had failed to show that he was prejudiced by his absence. *See* Exhibit 163 at 2 (addressing Ford truck case), 4-5 (addressing Sears case). Birch argues that he had a right to be present during all of the identified proceedings and that if present he could have provided input that might have resulted in a different outcome. *See* Docket #71 at 39-41.

"[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *Campbell v. Rice*, 302 F.3d 892, 898 (9th Cir. 2002). "The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but [the Supreme Court has] recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam) (citation omitted). The Due Process Clause guarantees the defendant the right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge." *Stincer*, 482 U.S. at 745 (citations omitted). Thus, "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819–20 & n.15 (1975). A defendant's right to be personally present during trial may, however, be forfeited or waived by his disruptive behavior. *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970). The right to be present at all critical stages, like most constitutional rights, is subject to

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[10] It should be noted that while the jury requested a "read back" in the Ford case with respect to Detective Thomas' testimony, the testimony was not provided a second time because there was no transcript or video recording of the testimony. *See* Exhibit 106 at 228.



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harmless error analysis "'unless the deprivation, by its very nature, cannot be harmless.'" *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005) (quoting *Rushen v. Spain*, 464 U.S. at 117 n.2).

Birch's arguments lack merit and should be rejected. Defense counsel was present during each of the three proceedings and had the opportunity to protect Birch's rights. *See* Exhibit 97 at 60 (indicating Attorney Lindsay was a participant in the "in chambers" conference to discuss peremptory challenges); Exhibit 98 at 259 (Attorney Lindsay delivered closing arguments in the Sears case); Exhibit 106 at 228 (Attorney Lindsay indicating that he was present at the conference call in which the issue of Detective Thomas' testimony was discussed). Birch's generalized allegations that he could have provided input during these proceedings does not show that his presence would have added to his defense or that his absence during any of these proceedings had a substantial or injurious effect or influence in determining the jury's verdict. *See* Docket #71 at 39-41. Moreover, Birch's right to be personally present during his trials was forfeited or waived by his disruptive behavior, particularly during closing argument in the Sears case which followed soon after Birch had attempted to sabotage the proceeding by stabbing Attorney Lindsay in the hand in the presence of the jury. Exhibit 98 at 240.

With respect to the Ford truck trial, the State and defense counsel agreed that there was no transcript or video of Detective Thomas' testimony and that the jury would therefore have to rely on their memory and notes, Exhibit 106 at 227, and any input Birch could have provided concerning the testimony consequently would not have impacted the verdict.[11] Birch has not shown that his absence during certain proceedings in the Sears and Ford truck trial amounted to constitutional error or that the Nevada Supreme Court misapplied United States Supreme Court precedent beyond all reasonable argument, and Amended Claim 3 should therefore be denied. *See Egger v. United States*, 509 F.2d 745, 748 (9th Cir. 1975) (section 2255 motion alleging a constitutional right to be present at sidebar conferences failed, because the error, if any, was constitutionally harmless).

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[11] Even if a "read back" to the jury had occurred in the Ford truck case, Birch's ability to influence the proceeding would have been "negligible," as his role would have been limited to that of an observer. *See Hegler v. Borg*, 50 F.3d 1472, 1476-78 (9th Cir. 1995); *see also id*. at 1477 (concluding that the right to be present during a "read back" is not fundamental).

**D. The Nevada Supreme Court Reasonably Denied Birch's Claims That There Was Insufficient Evidence Presented At The Sears And Ford Truck Trials To Find Him Guilty Beyond A Reasonable Doubt**

In Amended Claim 4, Birch asserts that the his constitutional right to due process was violated in the Sears and Ford truck cases because the State failed to present sufficient evidence to find him guilty beyond a reasonable doubt. Docket #71 at 41.

**1. Applicable law**

In seeking to overturn his conviction based on a claim of insufficient evidence, Birch faces a "considerable hurdle." *Davis v. Woodford*, 333 F.3d 982, 992 (9th Cir. 2003). Under the standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), the jury's verdict must stand if, after viewing the evidence in the light most favorable to the prosecution, *any* rational trial of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. Accordingly, the reviewing court, when faced with a record of historical facts that supports conflicting inferences, must presume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the determination does not appear on the record, and must defer to that resolution. *Id.* at 326; *see also United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) ("This means that a court of appeals may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial."). In evaluating a *Jackson* claim, the reviewing court '"must consider all of the evidence admitted by the trial court,' regardless of whether that evidence was admitted erroneously," *McDaniel v. Brown*, 130 S.Ct. 665, 672 (2010) (quoting *Lockhart v. Nelson*, 488 U.S. 33 at 41 (1988)), but must not consider any evidence that was not presented at trial, *Herrera v. Collins*, 506 U.S. 390, 402 (1993). Sufficiency of the evidence claims are judged by the elements defined by state law, *Jackson*, 443 U.S. at 324 fn.16, and are entitled to double deference under AEDPA, *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005) ("After AEDPA, we apply the standards of *Jackson* with an additional layer of deference."); *see also McDaniel v. Brown*, 130 S.Ct. 665, 673 (2010) (discussing heightened deference required when reviewing a *Jackson* sufficiency of the evidence claim).

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**2. The Sears trial**

The Nevada Supreme Court denied Birch's claim with respect to the Sears trial as follows:

> Fourth, Birch argues that there was insufficient evidence to sustain his conviction. The evidence adduced at trial shows that Birch entered a Sears store, knelt down beside a tool display, and exited the store with several wrenches and a pair of pliers in his pocket. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Birch entered the Sears store with the intent to commit larceny. *See Jackson*, 443 U.S. at 319; *McNair*, 108 Nev. at 56, 825 P.2d at 573; NRS 205.060(1).

Exhibit 163 at 5.

The Nevada Supreme Court's determination is supported by evidence presented by the State at trial. This evidence includes Associate Tye's testimony that he observed "[o]ver the course of an hour and a half to two hours, he [Birch] selected several wrenches and proceeded to conceal them on his person," Exhibit 97 at 128; the video surveillance showing Birch in the Sears store kneeling next to a small tools display and a wrench protruding from his jacket pocket, *id.* at 126-27; the physical evidence and related testimony establishing that Birch was in the possession of Sears' property immediately after exiting the store, *id*. at 135; testimony establishing that Birch had not paid for the tools, *id*. at 139; Sergeant Rhodes' opinion that Birch's jacket pockets did not contain any heavy items when he entered the Sears store, *id*. at 148; Officer Smith's testimony establishing that Birch was not carrying sufficient money or any other form of payment to purchase the tools at the time of his arrest, *id*. at 162; and Officer's Bellamy's testimony that Birch admitted that he stole to support his drug habit and affirmatively acknowledged his guilt with respect to the Sears theft, *id*. at 188-89.

Birch's arguments that this evidence was insufficient lack merit and should be rejected. Birch first asserts that "[n]o witness personally observed Birch steal anything" or "conceal[] tools on his person." Docket #71 at 43. These statements are either inaccurate, *see* Exhibit 97 at 126-28 (Associate Tye's testimony), or insignificant, as there is ample evidence establishing that Birch took the tools out of the Sears store without paying for them. Furthermore, the intent to commit burglary can be established by either direct or circumstantial evidence in Nevada, *see Moore v. State,* 122 Nev. 27, 35 (Nev. 2006) (finding circumstantial evidence alone was sufficient to establish the intent required by Nevada's burglary statute), and Birch fails to show why the Nevada Supreme Court's conclusion that



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the State had established the intent element based on the evidence presented at trial was unreasonable, *see* Docket #71 at 43 (stating only that "[t]he evidence that Birch had the intent to steal at the time he entered Sears was non-existent"). Viewed in the light most favorable to the prosecution as required by *Jackson*, a rational juror could reasonably conclude that the State's evidentiary presentation in the Sears case was more than sufficient evidence for the jury to find Birch guilty beyond a reasonable doubt, and Birch's claim should therefore be denied.

**3. The Ford truck trial**

The Nevada Supreme Court denied Birch's claim with respect to the Ford truck trial as follows:

> Third, Birch argues that there was insufficient evidence to sustain his conviction for possession of a stolen vehicle. The evidence adduced at trial shows that Birch placed one shopping bag into the bed of a pickup truck and later retrieved two bags from the bed of the truck. Further, when he was searched incident to an arrest on other charges, keys fitting the truck were discovered on his person. In addition, the owner testified that he reported the truck stolen and had not given Birch permission to use it. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Birch possessed the truck with reason to believe it had been stolen. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS 205.273(1)(b).

Exhibit 163 at 2-3.

The Nevada Supreme Court's determination is supported by evidence presented by the State at trial. This evidence includes Officer Smith's testimony that he found a set of keys in Birch's pocket, one of which had the word "Ford" on it, Exhibit 105 at 83-84; Mr. Wilson's testimony concerning his reporting of the theft of the truck and that Birch did not have permission to use his truck, *id*. at 100, 104; Officer Frankel's testimony that he observed Birch approach the truck in the Wal-Mart parking lot and place and retrieve plastic bags in the bed of the truck, *id*. at 109-11; Officer Frankel's testimony that the keys found on Birch's person opened the door and turned the ignition of the truck, *id*. at 120; Officer Frankel's testimony that Birch provided evasive answers when questioned about the owner of the truck, *id*. at 151-57; and Birch's admission that he stole to support his drug habit, *id*. at 158-59.

Birch asserts that this evidence was insufficient to support the conviction for possession of a stolen vehicle because there was no evidence that he ever entered the truck, drove the truck, knew the truck was stolen, or had the opportunity to steal the truck in Douglas County. Docket #71 at 45.

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These arguments lack merit and should be rejected. In *Palmer v. State,* 112 Nev. 763 (Nev. 1996), the Nevada Supreme Court noted that "possession" is not defined in Nevada's statute prohibiting possession of a stolen vehicle. *Palmer*, 112 Nev. at 768. However, the *Palmer* court went on to define "possession" to include "constructive possession," which involves "the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . ." *Id*. The *Palmer* court then turned to the facts of the case and determined that the defendant was in "possession" of the vehicle in question because a witness testified that he observed the defendant dismantling the vehicle, despite the fact that the defendant did not have keys to the vehicle and no one saw him drive the vehicle. *Id*. at 115.

Here, a rational juror could have reasonably determined, based on the State's evidence that the truck keys were found on Birch's person and that Birch exercised dominion over the truck by placing and retrieving plastic bags into the bed of the truck, that the truck was in Birch's actual or constructive possession. *See Palmer*, 112 Nev. at 768. Moreover, a rational juror could have reasonably determined that Birch knew the truck was stolen based on Mr. Wilson's testimony that he reported the truck stolen and that Birch did not have permission to use the truck, and Birch's evasive responses when questioned about the owner of the truck. Therefore, the Nevada Supreme Court reasonably denied, under *Jackson*'s deferential standard, Birch's insufficiency claims, and Amended Claim 4 therefore lacks merit.

**E. <u>The Nevada Supreme Court Reasonably Denied Birch's *Faretta* Claim</u>**

In Amended Claim 5, Birch asserts that he was denied his right to self-representation when the trial court failed to hold a *Faretta* hearing when he requested to represent himself in the Sears case. Docket #71 at 45. The Nevada Supreme Court denied this claim as follows:

> Third, Birch argues that the district court failed to conduct a *Faretta* canvas when he requested to represent himself at trial. During a statement to the court in which Birch sought new counsel, Birch said, "I would like to represent myself, but I'm not capable at this point." He then requested a continuance of two weeks to prepare. Even if this comment can be construed as a waiver of his right to counsel, we conclude, based on the record, that the district court did not err in summarily rejecting Birch's request because it was untimely and made for the purpose of delay. *See Tanksley v. State*, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1996); *see also Vanisi v. State*, 117 Nev. 330, 338, 22 P.3d 1164, 1170 (2001).

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Exhibit 163 at 5. The Nevada Supreme Court's factual findings that the request was untimely and made for the purpose of delay are entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(e)(1).

**1. Applicable law**

In *Faretta v. California*, 422 U.S. 806 (1975), the United States Supreme Court held that criminal defendants have a Sixth Amendment right to self-representation at trial. *Faretta*, 422 U.S. at 818–19. This right, however, is neither automatic, nor without qualification. Thus, "[w]hile the right to counsel attaches unless affirmatively waived, the right to self-representation does not attach until asserted." *Sandoval v. Calderon*, 241 F.3d 765, 774 (9th Cir. 2001) (citation omitted). And to properly invoke the right, the defendant must be competent, and the request must be "timely, not for purposes of delay, unequivocal, voluntary, [and] intelligent[.]" *United States v. Maness*, 566 F.3d 894, 896 (9th Cir. 2009) (per curiam). The Supreme Court has not articulated when a *Faretta* request will be considered "untimely," but has found that a motion made "weeks before trial" is properly presented. *See Faretta*, 422 U.S. at 835. *Faretta* otherwise provides no guidance as to what constitutes a timely request for self-representation. *Id*. at 852 (Blackmun, J., dissenting); *see also Stenson v. Lambert*, 504 F.3d 873, 884–85 (9th Cir. 2007) (*Faretta* "indicates only that a motion for self-representation made 'weeks before trial' is timely").

**2. Analysis**

The record supports the Nevada Supreme Court's conclusion that Birch is not entitled to relief on his self-representation claim because the request was untimely. Birch did not request to represent himself until January 26, 2009, the first day of trial in the Sears case. *See* Exhibit 97 at 7. As the request was made on the first day of trial, the trial court reasonably determined that the request was untimely. *See Marshall v. Taylor*, 395 F.3d 1058, 1060-61 (9th Cir. 2005) (holding that "[b]ecause the Supreme Court has not clearly established when a *Faretta* request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely," and denying relief where defendant requested to represent himself on the first day of trial). Birch cites no authority, clearly-established or otherwise, to support his argument that his earlier requests for substitute counsel excused his obligation to make a timely request to represent himself, and

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this argument therefore lacks merit and should be rejected.[12] *See Sandoval*, 241 F.3d at 774 (the right to self-representation "does not attach until asserted.").

The record also supports the Nevada Supreme Court's conclusion that Birch's request for self-representation was made for the purpose of delay. Prior to making the request, Birch engaged in a pattern of obstreperous behavior that included refusing to work with appointed counsel; making personal threats towards his counsel and the trial judge; leaving scores of profane telephone messages with the Public Defender's office; and spitting in the face of Attorney Lindsay during a hearing, an incident that required Birch's removal from the courtroom. *See supra* Part V.A.2. Consequently, the Nevada Supreme Court reasonably found that Birch's request, made the day of trial was scheduled to commence and in the context of repeated attempts to disrupt the trial, was advanced for the improper purpose of delay. Because Birch did not properly assert his right to self-representation, the trial court did not err in not holding a *Faretta* hearing. *See Sandoval*, 241 F.3d at 774 (the right to self-representation "does not attach until asserted."). Birch's arguments fall well short of AEDPA's required showing that the Nevada Supreme Court's denial of his *Faretta* claim was an error "understood and comprehended in existing law beyond any possibility for fair-minded disagreement," *Richter*, 131 S.Ct. at 786-87, and Amended Claim 5 should therefore be denied.

### F. <u>The Nevada Supreme Court Reasonably Denied Birch's Claim Concerning His Right To Remain Silent</u>

In Amended Claim 6, Birch asserts that his constitutional right to remain silent was violated in the Sears case when a State witness commented at trial that Birch did not deny culpability during a police interview and when the prosecutor referenced this testimony during closing argument. Docket #71 at 47. The Nevada Supreme Court denied this claim as follows:

> Sixth, Birch argues that the district court erred in admitting (1) evidence that during his police interview Birch did not deny culpability or profess his innocence and (2) prior bad act evidence of his drug addiction. We conclude that this argument lacks merit. As Birch waived his right to remain silent and spoke with detectives, the State's questions concerning his failure to deny the charges did not constitute improper comment on his right to remain silent. *See Anderson v. Charles*, 447 U.S. 404, 408 (1980) (providing that questioning about prior inconsistent statements does not

[12] A request for self-representation is of course quite different from a request for substitute counsel, and is addressed under the specific constitutional framework set forth in *Faretta* and its progeny.



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> improperly comment on right to remain silent because defendant was not induced to remain silent by warnings); *see also Maginnis v. State*, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977) (providing that defendant's failure to speak or equivocation in the face of accusation of having committed crime may be offered as implied admission of guilt).

Exhibit 163 at 6.

Birch argues that the Nevada Supreme Court unreasonably applied *Anderson v. Charles* and ruled contrary to *Doyle v. Ohio*, 426 U.S. 610 (1976), because under *Doyle* a defendant "[can]not be penalized for his silence." Docket #71 at 49. Birch further asserts that *Anderson* did not apply this aspect of *Doyle* "to preclude impeachment by prior inconsistent statements not by silence, a circumstance not present in this case." *Id*.

Birch's arguments are meritless. In *Doyle,* the Supreme Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving *Miranda* warnings violates due process. *Doyle*, 426 U.S. at 619. However, the Supreme Court later clarified in *Anderson* that:

> [A] defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all . . . .
>
> Each of two inconsistent descriptions of events may be said to involve "silence" insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of "silence . . . ."

*Anderson*, 447 U.S. at 408-09. Thus, a prosecutor may explore a defendant's voluntary speech after waiver in relation to a defense presented at trial, with or without accompanying testimony from the defendant. *See United States v. Hoac*, 990 F.2d 1099, 1104 (9th Cir. 1993) (rationale allowing government to "point out inconsistencies between a defense presented at trial and a statement given after arrest[,] . . . applies even when the defendant does not testify at trial.") (citing, *inter alia*, *United States v. Ochoa–Sanchez*, 676 F.2d 1283, 1286 (9th Cir. 1982) (prosecutor may probe all relevant evidence bearing on credibility, including "all post-arrest statements and the surrounding circumstances under which they were made, including defendant's failure to provide critical details")).

This case does not involve "silence" induced by *Miranda* warnings. At trial Officer Bellamy testified that Birch was advised of his right to remain silent prior to the interview and that Birch knowingly and voluntarily waived this right. *See* Exhibit 97 at 184-87. Following the waiver of his *Miranda* rights, Birch spoke with Officer Bellamy for approximately 90 minutes. *Id*. at 189. Because



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Birch voluntarily waived his right to remain silent and asserted his innocence at trial, *see* Exhibit 98 at 259-67 (Birch's closing argument in the Sears case), *Doyle* is inapplicable and Officer Bellamy's testimony concerning Birch's failure to deny culpability was properly admitted under *Anderson*. *See United States v. Lorenzo*, 570 F.2d 294, 297-98 (9th Cir. 1978) (finding a "non-answer" to a question did not constitute "either a total or a selective revocation of [the defendant's] earlier waiver of his Fifth Amendment rights," and that "it was thus not error to allow testimony as to that event") (*cited with approval in United States v. Caruto*, 532 F.3d 822, 829 (9th Cir. 2008)). As Birch voluntarily waived his rights and Officer Bellamy's testimony was properly admitted, it follows that the prosecutor's comment on the testimony during closing argument also passes constitutional muster. Birch has not shown that the Nevada Supreme Court's decision to deny his claim concerning his right to remain silent was an error "understood and comprehended in existing law beyond any possibility for fair-minded disagreement," *Richter*, 131 S.Ct. at 786-87, and Amended Claim 6 should therefore be denied.

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**G. <u>The Nevada Supreme Court Reasonably Denied Birch's Claim That His Concurrent Sentences Of Life Without The Possibility Of Parole Constitute Cruel And Unusual Punishment</u>**

In Amended Claim 7, Birch asserts that the prohibition against cruel and unusual punishment was violated when he was adjudicated a habitual criminal and sentenced to concurrent terms of life without the possibility of parole with respect to the Sears and Ford truck cases. Docket #71 at 49. At sentencing, the trial court summarized the applicable statutory framework for making a determination of criminal habituality, considered Birch's individual circumstances and criminal history, and adjudicated Birch a habitual criminal as follows:

> As Mr. Young had pointed out, the decision to adjudicate somebody as a habitual criminal is not an automatic one. Even if you have dozens of convictions themselves, there's not an automatic equation of one being an habitual criminal. Sometimes these convictions are old, they're stale, sometimes they're for minor crimes.
>
> The court is charged with the obligation to weigh the appropriateness of this most severe penalty in each individual case. Taking into account each individual, their background and the nature and age of these prior convictions.
>
> The Nevada Supreme Court said that such a person, being someone who is facing an adjudication of habitual criminal, is at the mercy of the Court and is thus subject to the broadest kind of judicial discretion.

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> The record will reflect that I have had an opportunity to review the criminal, prior criminal history and while it is a lengthy one, it is one primarily dominated by nonviolent offenses. However, the Court did note that there was a robbery in his criminal history and other offenses involving firearms that take it beyond the economic realm.
>
> And I want to address this argument about the relative weight of these types of crimes, the nickel and dime crimes.
>
> . . .
>
> We live in a country with—in dire economic straits. Retailers, merchants, whether they're national merchants like Sears or Wal-Mart or a small shop on the Truckee River, trying to make a go at it, they hire young men and women, senior citizens. They give them a paycheck, which enables them to live with dignity, pay the[] rent, put food on the table, roof over their head, clothes on their back. And these crimes are of an insidious nature, because while they may not rise to the level of an attempted murder . . . they have as much detrimental impact to the fabric of our community as any other.
>
> I've given this case a lot of thought. And . . . wrestled with what to do in this particular case with this particular individual and the message any sentence would send to the community at large. And . . . I stole and I gave it back . . . no harm, no foul, well go back to square one is not the message this Court is going to send.
>
> I want to place on the record what this Court is not going to consider. There was an incident that occurred during the course of one of these trials involving Mr. Birch and Mr. Lindsay. The Court is not considering the actions of the defendant during the course of these trials.
>
> It's my understanding that this case was transferred to this department because of a threat made to the previous judge. The Court is not taking into consideration any threats that may or may not have been made to another judicial officer.
>
> . . .
>
> The court finds that the defendant has three prior felony convictions that pass constitutional muster. That in his presentence investigation report, it appears that several convictions were for violent offenses. The Court finds that the offenses were recent and that it is just and proper, based upon the nature and gravity of the prior convictions to enhance the defendant's sentence pursuant [] to NRS 207.010.
>
> I want to emphasize that the Court has discretion and need not automatically sentence Mr. Birch as an habitual criminal. The Court having considered all the factors exercise it[]s discretion and hereby adjudications the defendant as an habitual criminal.

. . .

. . .

Exhibit 111 at 38-42. The trial court then sentenced Birch to concurrent sentences of life without the possibility of parole on the Sears and Ford truck cases. *Id.* at 42. The Nevada Supreme Court denied Birch's Eighth Amendment claim with respect to the Ford truck case as follows:

> Seventh, Birch argues that his sentence is cruel and unusual punishment and that the district court vindictively punished him for his outburst in court. Having found at least three prior felony convictions, the district court adjudicated Birch a habitual criminal. The sentence imposed is within the statutory limits, *see* NRS 207.010(1)(a), and Birch has not alleged that the sentencing statutes are unconstitutional. We conclude that the sentence imposed is not grossly disproportionate to the offense for the purposes of the constitutional prohibitions against cruel and unusual punishment. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion). We further conclude that Birch failed to demonstrate that the district court punished Birch for his behavior in court or otherwise abused its discretion in sentencing him. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

Exhibit 163 at 4. The Nevada Supreme Court denied this claim with respect to the Sears case for the same reasons. *See id*. at 5-6.

Birch argues in the federal petition that his sentences were unconstitutionally excessive based on the following arguments: 1) the sentencing judge erroneously found that Birch's offenses were recent; 2) Birch's sentences are grossly disproportionate to his crimes; and 3) the sentencing analysis should have been conducted by a jury. Docket #71 at 50-52. These argument lack merit and should be rejected.

**1. The sentencing judge correctly found that Birch's criminal history included recent offenses**

Birch's argument that the sentencing judge erred in finding that his offenses were "recent" is based on a less than complete assessment of his criminal history and a cramped interpretation of the judge's ruling. While it is true that the six felonies introduced by the State for the purpose of qualifying Birch for possible habitual criminal adjudication were not recent, the presentence investigation reports filed in connection with the Sears and Ford truck cases indicate that in 2007 and 2008 Birch was arrested on numerous felony and misdemeanor charges, many of which remained pending at the time Birch was sentenced. *See* Exhibit 191 at 5-6 (presentence investigation report filed in Sears case) (filed under seal); Exhibit 192 at 5-6 (presentence investigation report filed in the Ford truck case)

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(filed under seal). In addition, the record indicates that the sentencing judge's findings that Birch had recent offenses and violent offenses was not based exclusively on the six prior felonies introduced by the State as Birch suggests, but on the much more complete overview of Birch's criminal history available in the presentence investigation report. *See* Exhibit 111 at 41 (concluding that "[T]he court finds that the defendant has three prior felony convictions that pass constitutional muster. That *in his presentence investigation report*, it appears that several convictions were for violent offenses. The Court finds that the offenses were recent and that it is just and proper, based upon the nature and gravity of the prior convictions to enhance the defendant's sentence . . . .") (emphasis added). Therefore, Birch's assertion that the sentencing judge erroneously concluded that Birch had recent offenses is meritless and should be rejected.

**2. The Nevada Supreme Court reasonably applied clearly-established federal law in determining the sentences were not grossly disproportionate to Birch's crimes**

Birch further argues that his sentences are grossly disproportionate to his crimes. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The cruel and unusual punishment clause prohibits both "barbaric punishments," *Solem v. Helm*, 463. U.S. 277, 284 (1983), and "extreme" sentences that are "grossly disproportionate" to the crime, *Ewing v. California*, 538 U.S. 11, 23 (2003) (plurality opinion) (citation omitted). This "narrow" proportionality rule applies to non-capital sentences. *Ewing*, 538 U.S. at 23.

At the time of the Nevada Supreme Court's decision affirming Birch's convictions in March 2010, the only clearly-established federal law regarding the proportionality of sentences was a "gross disproportionality principle," the "precise contours of [which] are unclear," and which applies "only in the 'exceedingly rare' and 'extreme' case."[13] *See Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2003) (citations omitted); *Norris v. Morgan*, 622 F.3d 1276, 1286 (9th Cir. 2010) (surveying the "disarray" of Supreme Court jurisprudence on the disproportionality principle that culminated in

[13] Given the gross disproportionality rule's remarkable lack of specificity, this Court should apply exceptionally broad deference in reviewing the Nevada Supreme Court's decision to affirm Birch's sentence pursuant to the "unreasonable application" clause of section 2254(d)(1). *See Yarborough v. Alvarado*, 541 U.S. 652, 652 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.")



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*Andrade*). In determining whether a sentence is grossly disproportionate, the reviewing court considers the severity of the sentence, the gravity of the offense, and the defendant's criminal history. *Taylor v. Lewis*, 460 F.3d 1093, 1098-1101 (9th Cir. 2006).

As noted by the Nevada Supreme Court, Birch does not assert that his concurrent life sentences without the possibility of parole is not within statutory limits or that the sentencing scheme is unconstitutional. *See* Docket #71 at 50-52. What Birch does say is that it was not "just and proper" to sentence him as a habitual criminal because of "the non-violent nature of the crimes . . . and the generally stale and remote predicate felonies . . . ." *Id*. at 51. However, the presentence investigation report indicates that Birch's criminal history included not only recent offenses, but also offenses that involved violence or the threat of violence, such as: a 1993 domestic violence conviction, a 1994 firearm conviction, a 1997 robbery charge that resulted in a burglary conviction, and a 2008 harassment/threats to cause bodily injury charge. *See* Exhibit 191 at 3-5. In all, Birch accumulated a total of 33 convictions, including 11 felony convictions. Exhibit 191 at 2. The report concludes:

> Appearing before the Court is a man who began his adult criminal life in 1974 and has continued essentially without interruption to date. At 53 years of age the defendant has amassed an extensive criminal history. As a result, he has spent an inordinate amount of time in prison and/or jail for various theft and violent related offenses. There is little doubt that the defendant is a habitual criminal who is a drain on society and it[]s assets.
>
> He has further been afforded the opportunity to participate in periods of community supervision, some of which he was unable to complete successfully. It is unlikely that anything that the Division of Parole and Probation could offer, or any leniency granted by the Court, would motivate the defendant to stop committing criminal offenses and lead a more pro-social lifestyle.

*Id*. at 9.

Given Birch's remarkably lengthy criminal history and demonstrated unwillingness to live within the confines of the law, the sentencing judge reasonably adjudicated him a habitual criminal and sentenced him accordingly, even where his most recent convictions were nonviolent. *See Andrade*, 538 U.S. at 77 (a long sentence may be constitutional even if the most recent offense was minor or nonviolent); *Ewing*, 538 U.S. at 30–31 (same); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (same). Birch has not shown that it is clear beyond argument that this is an "exceedingly rare" or "extreme" case

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that would fall within the ambit of the gross disproportionality rule, and his claim should therefore be denied.[14]

**3. Birch's assertion that the sentencing analysis should have been conducted by a jury pursuant to *Apprendi v. New Jersey* is foreclosed by Ninth Circuit precedent**

Birch's final argument is that his sentences are unconstitutional because "the sentencing analysis conducted by the court should have been conducted by a jury under *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)]." Docket #71 at 51-52. Birch's counsel acknowledges that he is aware of contrary rulings on this issue by the Nevada Supreme Court and the Ninth Circuit, and states that he asserts this claim "to preserve it for Birch with respect to any future litigation of his case." *Id*. at 52 n.10.

Birch's *Apprendi* argument was squarely rejected by the Ninth Circuit in *Tilcock v. Budge*, 538 F.3d 1138 (9th Cir. 2008). There, the Ninth Circuit considered Nevada's habitual criminal statute and held the following:

> Under *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) Under section 207.010, if a person has three qualifying felony convictions and is convicted of another felony, the person "*is* a habitual criminal and *shall* be punished" as one, Nev. Rev. Stat. § 207.010(1)(b) (emphases added), unless a prosecutor or a judge exercises discretion to be more lenient, *id.* § 207.010(2). Thus, under the terms of the statute, the fact of Petitioner's prior convictions alone exposed Petitioner to the statutory maximum of life imprisonment without the possibility of parole. The statute does not require or even authorize additional judicial factfinding to determine whether a defendant is a habitual criminal. Instead, "[t]he plain language of Nevada Revised Statutes § 207.010(2) grants the [trial] court discretion to *dismiss* a count of habitual criminality, not the discretion to *impose* such an adjudication based on factors other than prior convictions." *O'Neill v. State*, 123 Nev. 9, 153 P.3d 38, 40 (Nev.) (emphases added), *cert. denied*, --- U.S. ----, 128 S.Ct. 153, 169 L.Ed.2d 105 (2007). The opportunity for leniency by the prosecutor or the judge is a judgment call, not a factual finding. And that discretion can only reduce, not increase, the statutorily imposed maximum punishment.

. . .

[14] Birch hints, without further elaboration, that the sentencing judge improperly considered his attacks on Attorney Lindsay at sentencing. *See* Docket #71 at 51 ("While the Court disclaimed consideration of Birch's misbehavior in court in sentencing him the LWOP sentences suggest otherwise."). This allegation is meritless, as the sentencing judges expressly disavowed any consideration of Birch's misbehavior and Birch has not shown otherwise. *See* Exhibit 111 at 40-41.



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*Tilcock*, 538 F.3d at 1144. Consequently, Birch's *Apprendi* argument is foreclosed by governing Ninth Circuit precedent and should be denied.

**H. <u>The Nevada Supreme Court Reasonably Denied Birch's Cumulative Error Claim</u>**

In Amended Claim 8, Birch asserts that he is entitled to habeas relief because of the cumulative effect of the errors alleged in his federal petition. Docket #71 at 52. This claim lacks merit and should be rejected. In *Ybarra v. McDaniel*, 656 F.3d 984 (9th Cir. 2011), the Ninth Circuit held that habeas relief under a cumulative error theory may be appropriate when there is a "'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case." *Ybarra*, 656 F.3d at 1001 (quoting *Parle v. Runnells*, 505 F.3d 922, 927 (9th Cir. 2007)). However, Birch has not shown any error in this case and makes no attempt to show how any perceived errors may have amplified one another in relation to a key issue. Amended Claim 8 therefore lacks merit and should be denied.

## VI. CONCLUSION

Birch's federal habeas claims lack merit and the amended petition should be denied.

RESPECTFULLY SUBMITTED this 18th day of October, 2013.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Jared M. Frost
JARED M. FROST
Deputy Attorney General

## CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 18th day of October, 2013, I served a copy of the foregoing ANSWER, by U.S. District Court CM/ECF electronic filing to:

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Attorney for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

| | |
|---|---|
| BRUCE BIRCH,<br><br>Petitioner,<br><br>vs.<br><br>DWIGHT NEVEN, et al.,<br><br>Respondents. | 2:11-cv-00516-GMN-LRL<br><br>**FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254** |

Petitioner, Bruce Birch ("Birch"), by and through his attorney of record, Paul G. Turner, Assistant Federal Public Defender and Jonathan M. Kirshbaum, Research and Writing Specialist, files this First Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to U.S.C. § 2254.[1]

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[1] The Exhibits referenced in this First Amended Petition are identified as "Ex." Petitioner reserves the right to file supplemental exhibits as needed and relevant.

**PETITION**[2]

**I.**

**PROCEDURAL BACKGROUND**

**TRIAL COURT - CR07-1714A**

1. On March 27, 2009, the Clerk of Second Judicial District Court, Washoe County, Nevada, entered a Judgment of Conviction in the case entitled State of Nevada v. Bruce Harrison Birch, Case No. CR07-1714A. (Ex. 112.)

2. Bruce Birch ("Birch") pled guilty to the crime of Attempted Grand Larceny and was sentenced to a minimum term of imprisonment of nineteen (19) months and a maximum of forty-eight (48) months. Birch was given credit for nineteen (19) days of time served. The Nevada Department of Corrections houses Birch at Ely State Prison. (Id.)

3. On July 8, 2007, Birch, in proper person, filed a Waiver of Preliminary Examination. (Ex. 1.)

4. The Information was filed on July 9, 2007, charging Birch with Conspiracy to Commit the Crime of Burglary, a violation of Nevada Revised Statute ("NRS") 205.060(1) and NRS 199.480, a gross misdemeanor (Count 1). (Ex. 2.)

5. A Recommendation Revoking Pretrial Release and Order was filed on November 30, 2007, wherein the court revoked Birch's pretrial release and set bail at $12,500. (Ex. 9.)

6. The Amended Information was filed on December 7, 2007, charging Birch with Burglary, a violation of NRS 205.060(1), a felony (Counts 1-2) and Grand Larceny, a violation of NRS 205.220, a felony. (Ex. 11.)

7. Following several continuances for negotiations, an Entry of Plea hearing was held on December 13, 2007, before the Honorable Jerome M. Polaha. (Ex. 12.) Birch was present throughout with Washoe County Deputy Public Defender, Mazie Pusich. The state advised that negotiations had broken down and that an Amended Information would need to be filed in order to correctly charge Birch as the current information was for a fictional charge based upon the anticipated result of negotiations.

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[2] Counsel has sent Petitioner a Verification and Acknowledgment of the Amended Petition for Petitioner's signature and will file that pleading with this Court upon receipt from Petitioner.

(Id.)

8. The Second Amended Information was filed on January 4, 2008, charging Birch with Attempted Grand Larceny, a violation of NRS 193.330, being an attempt to violate NRS 205.220, a felony (Count 1) and Attempted Grand Larceny, a violation of NRS 193.330, being an attempt to violate NRS 205.220, a gross misdemeanor (Count 2). (Ex. 13.)

9. On January 4, 2008, Birch pled guilty to Counts 1-2 as listed in the Second Amended Information. (Ex. 14.) A hearing was held that same day, wherein the district court accepted Birch's plea and set the sentencing hearing. (Ex. 15.)

10. A hearing was held on February 28, 2008. (Ex. 19.) Birch was present throughout with attorney Pusich. At the hearing, Pusich requested that the sentencing of Birch be continued for a competency examination of Birch. The court requested that she put her request in writing. (Id.) On March 3, 2008, Birch filed a Motion re: Competency Evaluation and an Affidavit in Support. (Exs. 23 and 24.) Attorney Pusich argued that an evaluation was necessary due to Birch's volatile and unpredictable behavior. She further advised the Court that subsequent to Birch's arrest, he was released to Court Services Supervision and was referred to the Northern Nevada Adult Mental Health Services where treatment was recommended but not followed up on due to Birch being re-arrested on new charges. (Id.) At a hearing held March 6, 2008 (Ex. 25), the court granted Birch's Motion at that time. (Id.) An Order for Psychiatric Evaluation was filed on March 11, 2008. (Ex. 26.)

11. On April 24, 2008, a hearing was held before the Honorable Jerome M. Polaha regarding Birch's report on his psychiatric evaluation. (Ex. 30.) Birch was present throughout with attorney Pusich. Birch was found to be competent at that time. Due to new charges being filed in case numbers CR08-1585 and CR08-1586, Ms. Pusich requested that the sentencing be continued until after the preliminary hearing in those cases. Additionally, the state requested a new pre-sentence investigation report be prepared in order to accurately reflect the charges to which Birch pled and to reflect the charges pending in Birch's other cases. The court granted both requests at that time. (Id.)

12. On May 2, 2008, Birch filed a Motion for Specific Performance of Plea Negotiations. (Ex. 31), arguing that the gross misdemeanor charge of grand larceny was the only charge properly before the court as Birch waived the preliminary hearing to that charge only; therefore, the court should

not be allowed to sentence Birch to a felony charge. (Id.) The state filed an Opposition on May 7, 2008 (Ex. 32) and Birch filed a Reply on May 9, 2008 (Ex. 33). A hearing on the Motion was held on June 5, 2008, before Judge Polaha. (Ex. 35.) Birch was present throughout with attorney Pusich. Following argument by counsel for Birch and the state, the court continued the hearing for further argument.

13. On June 11, 2008, a hearing for additional argument on Birch's Motion for Specific Performance of Plea Negotiations was held before the Honorable Jerome M. Polaha. (Ex. 38.) Birch was present throughout with attorney Pusich. At this time, Ms. Pusich advised the court that Birch no longer wished to have her represent him and requested to be relieved as counsel. The court granted her request and appointed the Alternate Public Defender to represent Birch. (Id.)

14. On June 18, 2008, a Substitution of Counsel was filed substituting Robert Bell for the Washoe County Alternate Public Defender's Office. (Ex. 43.) On June 20, 2008, a Substitution of Counsel was filed substituting the Washoe County Public Defender's Office for the Washoe County Alternate Public Defender's Office. (Ex. 44.)

15. On July 21, 2008, the court entered an Order appointing John Oakes as counsel for Birch. (Ex. 47.)

16. The Honorable Jerome M. Poloha recused himself from Birch's case on July 21, 2008, based upon a letter he received from Birch which contained a statement the judge considered to be an implied threat. (Ex. 48.) A Case Assignment Notification was filed on July 23, 2008 (Ex. 51) and the Honorable Patrick Flanagan entered an Order Accepting Reassignment on July 24, 2008 (Ex. 52).

17. On July 29, 2008, a pro per Inmate Request Form was filed wherein Birch indicated that he had a bitter conflict with attorney Oakes and could not allow Mr. Oakes to represent him. (Ex. 53.)

18. On September 3, 2008, attorney Oakes filed a Motion to Withdraw as Attorney of Record. (Ex. 60.) Mr. Oakes indicated that the attorney-client relationship had deteriorated to a point that he no longer believed he could zealously represent Birch. (Id.) A second Motion to Withdraw as Attorney of Record was filed on September 4, 2008. (Ex. 61.) An Order Allowing Withdrawal of Attorney of Record was filed on September 4, 2008. (Ex. 63.)

19. On September 9, 2008, an Order was entered appointing attorney Robert Lindsay as counsel for Birch. (Ex. 64.)

20. On October 23, 2008, Birch, in proper person, filed a Matter of Record Cease and Desist, Notice of Termination Letter to Attorney in all three (3) of his cases. (Ex. 73.) Birch alleged, among other things, that his attorney, Robert Lindsay, could not properly represent him as Lindsay would not accept his telephone calls, Lindsay was not permitted to practice law in the Nevada Supreme Court without prior approval and Birch had insulted Lindsay and his family causing a deterioration of the attorney-client relationship. Birch requested that Lindsay be removed from his case. (Id.)

21. On October 24, 2008, a hearing on Birch's Motion for Specific Performance of Plea Negotiations was held before the Honorable Patrick Flanagan. (Ex. 74.) Birch was present throughout with attorney Lindsay. The court denied Birch's Motion at that time. The court further denied Birch's request for Lindsay to withdraw from his case. (Id.)

22. A Recommendation Revoking Pretrial Release and Order was filed on January 28, 2009 wherein the court revoked Birch's pretrial release and set bail at $12,500. (Ex. 101.)

23. The sentencing hearing took place on March 27, 2009. (Ex. 111.) The sentence the trial court imposed is set forth above in paragraph two. The judgment of conviction followed on that same day. (Ex. 112.)

24. On March 31, 2009, an Order was filed wherein the Court dismissed Count 2 of the Second Amended Information. (Ex. 115.)

**TRIAL COURT - CR08-1585**

25. On March 27, 2009, the Clerk of Second Judicial District Court, Washoe County, Nevada, entered a Judgment of Conviction in the case entitled State of Nevada v. Bruce Harrison Birch, Case No. CR08-1585. (Ex. 113.)

26. Following a two-day jury trial, the jury convicted Birch of Burglary (Count 1). The court further adjudged Birch a habitual criminal as defined in NRS 207.010. Birch was sentenced to a term of life without the possibility of parole. Birch's sentence in this case was ordered to run consecutive to the sentence imposed in CR07-1714A and concurrent to the sentence imposed in CR08-1586. Birch was given credit for four hundred (40) days of time served. The Nevada Department of Corrections houses Birch at Ely State Prison. (Id.)

27. The Criminal Complaint was filed on February 26, 2008, charging Birch with Burglary,

a violation of NRS 205.060(1), a felony (Count 1). (Ex. 18.)

28. On February 27, 2008, a hearing was held before the Honorable Peter Sferrazza wherein the Washoe County Public Defender was appointed to represent Birch. (Ex. 16.)

29. On March 13, 2008, Birch filed a Motion for Own Recognizance Release or in the Alternative Reduction of Constitutionally Excessive Bail in case numbers CR08-1585 and CR08-1586. (Ex. 27.) The state filed an Opposition on March 27, 2008. (Ex. 28.)

30. On June 5, 2008, Birch filed a Renewed Motion for Own Recognizance Release or in the Alternative Reduction of Unconstitutional Bail in case numbers CR08-1585 and CR08-1586. (Ex. 36.)

31. The joint preliminary hearing in case numbers CR08-1585 and CR08-1586 was held on June 5, 2008, with the Honorable Harold Albright, Justice of the Peace, presiding. (Ex. 37.) Birch was present throughout with attorney Pusich. Following the testimony of witnesses, the Court continued the hearing for argument on Birch's Renewed Motion for Own Recognizance Release or in the Alternative Reduction of Unconstitutional Bail. (Id.) On June 11, 2008, the continued hearing was held before the Honorable Harold Albright, Justice of the Peace. (Ex. 16.) Birch was present throughout with attorney Pusich. At the hearing, Ms. Pusich advised the court that Birch no longer wished to have her represent him and requested to be relieved as counsel. The court granted Ms. Pusich's request and appointed the Alternate Public Defender to represent Birch. The hearing was continued. (Id.)

32. On June 11, 2008, a Case Conflict Notification was filed by the Washoe County Public Defender's Office. (Ex. 39.)

33. On June 12, 2008, a Conflict Notification was filed by the Alternate Public Defender's Office. (Ex. 40.)

34. The continued preliminary hearing was held on July 7, 2008, with the Honorable Harold Albright, Justice of the Peace, presiding. (Ex. 16.) Birch appeared at this hearing in proper person. At the hearing, district attorney Scott Pearson advised the court that the case had been referred to the conflict group for appointment of counsel by Robert Bell; however, Mr. Bell requested that the pending Motion for Own Recognizance Release or in the Alternative Reduction of Unconstitutional Bail be ruled upon so the case could be bound over to the district court and the State could file a notice of intent to seek the habitual sentence which would require Mr. Bell to appoint an hourly attorney. Following

colloquy between the court and Birch, the court continued the hearing for Birch to be afforded representation of counsel. (Id.)

35. On July 22, 2008, the court entered an Order appointing John Oakes as counsel for Birch. (Ex. 49.)

36. The continued preliminary hearing was held on August 25, 2008, with the Honorable Harold Albright, Justice of the Peace, presiding. (Ex. 16.) Birch was present throughout with attorney Oakes. At the hearing, the court granted Birch's Motion for Own Recognizance Release or in the Alternative Reduction of Unconstitutional Bail and ordered the bail set at $250,000 bondable. (Id.) Additionally, Birch was bound over to the district court on count 1 as listed in the Criminal Complaint. (Ex. 16.)

37. The Information was filed on August 26, 2008, charging Birch with Burglary, a violation of NRS 205.060(1), a felony (Count 1). (Ex. 56.)

38. On September 3, 2008, attorney John Oakes filed a Motion to Withdraw as Attorney of Record (Ex. 60), indicating that the attorney-client relationship had deteriorated to a point that he no longer believed he could zealously represent Birch. (Id.) An Order Allowing Withdrawal of Attorney of Record was filed on September 4, 2008. (Ex. 63.)

39. On September 9, 2008, an Order was entered appointing attorney Robert Lindsay as counsel for Birch. (Ex. 65.)

40. The joint initial arraignment in case numbers CR08-1585 and CR08-1586 was held on September 12, 2008, before the Honorable Patrick Flanagan. (Ex. 70.) Birch was present throughout with attorney Lindsay. Birch pled not guilty to the charges as listed in the Information and waived the sixty (60) day rule. (Id.)

41. A Request, Stipulation and Order re Pre-Preliminary Hearing and Pre-Trial Reciprocal Discovery (Felony and Gross Misdemeanor Cases) was filed on October 2, 2008. (Ex. 71.)

42. On October 23, 2008, Birch, in proper person, filed a Matter of Record Cease and Desist, Notice of Termination Letter to Attorney in all three (3) of his cases. (Ex. 73.) Birch alleged, among other things, that his Lindsay, could not properly represent him as Lindsay would not accept his telephone calls, Lindsay was not permitted to practice law in the Nevada Supreme Court without prior

approval and Birch had insulted Lindsay and his family causing a deterioration of the attorney-client relationship. Birch requested that Lindsay be removed from his case. (Id.)

43. On January 2, 2009, the state filed a Motion to Join Counts. (Ex. 75.) The state sought permission to join the charges of CR08-1585 and CR08-1586 and to prosecute the two cases in one trial. (Id.)

44. On January 9, 2009, a hearing was held on the court's Motion to Confirm Trial was held jointly in case numbers CR08-1585 and CR08-1586, before the Honorable Patrick Flanagan. (Ex. 76.) Birch was present with attorney Lindsay. The state and defense counsel confirmed the trial dates for the two scheduled trials. During the hearing, Lindsay requested additional time to respond to the state's Motion to Join Counts, which the court granted. Additionally, Birch moved for a continuance of the trials indicating that he would be coming into a sum of money from his mother's estate and desired to either hire an attorney of his choosing or to hire an investigator to prove his allegations against Lindsay in order to have Lindsay removed from the case. The court denied Birch's oral motion. (Id.)

45. The state filed a Motion to Amend Information on January 13, 2009 in which the state sought permission to charge Birch with being a habitual criminal pursuant to NRS 207.010(1)(b). (Ex. 79.)

46. A hearing was held on January 14, 2009, before the Honorable Patrick Flanagan, in Chambers. (Ex. 81.) Birch was not present for this hearing but attorney Lindsay did appear. At the hearing, Lindsay discussed several concerns he had with regard to representing Birch at trial at length. At the conclusion of the hearing, the court agreed to call Birch into court the Friday before trial in an effort to encourage Birch to communicate with Lindsay and to further inform him that his continued behavior could possibly result in an implied waiver of counsel. Furthermore, the state advised that it would be making a motion to amend its Motion to Join Counts. (Id.)

47. On January 15, 2009, the state filed a Supplement to Motion to Join Counts. (Ex. 82.) The state requested permission to join the Burglary charge in CR08-1585 with the Possession of a Stolen Motor Vehicle charge in CR08-1586. (Id.) Birch filed an opposition on January 16, 2009. (Ex. 84.)

48. On January 16, 2009, Birch filed a Motion to Limit the Use of the Defendant's Statement Against Him, and to Strike and Keep from the Jury the Prejudicial Statements Made to the Officers on

February 21, 2008 (Ex. 85) and a Motion for Discovery and for Exculpatory Evidence Brady, Gigglio and Other Bad Acts Evidence (Ex. 86).

49. A status hearing was held on January 16, 2009, before the Honorable Patrick Flanagan. (Ex. 89.) Birch was present throughout with attorney Lindsay. At the hearing, Lindsay advised the court that negotiations were ongoing with regards to Birch's pending cases and that it was possible that the cases could be resolved. The court vacated the trial date and scheduled a status hearing regarding the negotiations. (Id.) The status hearing was held on January 21, 2009. (Ex. 90.) At the hearing, Lindsay advised the court that he could not visit with Birch over the weekend due to the fact that Birch was in the infirmary and the jail had refused to allow Lindsay to visit with Birch. The court continued the hearing to allow Lindsay to meet and discuss the negotiations with Birch. Furthermore, the court denied the state's January 2, 2009, Motion to Join Counts. (Id.) The second status hearing was held on January 23, 2009. (Ex. 93.) Birch was present throughout with attorney Lindsay. At the hearing, Lindsay advises the court that the negotiations had fell thru and Birch would be proceeding to trial on all of his pending cases. The court granted the state's January 13, 2009, Motion to Amend Information and arraigned Birch on the additional charge of being a habitual criminal at that time. Birch pled not guilty to the new charge. (Id.)

50. The Amended Information was filed on January 23, 2009, charging Birch with Burglary, a violation of NRS 205.060(1), a felony (Count 1) and Being an Habitual Criminal, as defined in NRS 207.010 (Count 2). (Ex. 91.)

51. On January 23, 2009, the state filed a Motion to Admit Evidence of Other Acts During the State's Case-in-Chief. (Ex. 92.) The state sought to introduce evidence of Birch's activities at Walmart and in the Walmart parking lot shortly before the charged crime occurred. (Id.) Birch filed an opposition on January 26, 2009. (Ex. 94.)

52. On January 26, 2009, the state filed a Motion in Limine to Admit Evidence of Defendant Carrying a Bag(s) During the State's Case-in-Chief (Ex. 96) and a Motion in Limine to Admit Statements of the Defendant During the State's Case-in-Chief (Ex. 95). Prior to the start of trial on January 26, 2009, the Court granted the state's January 23, 2009 Motion to Admit Evidence of Other Acts (Ex. 97 at 69), granted the state's January 26, 2009 Motion in Limine to Admit Evidence of

Defendant Carrying a Bag(s) (Ex. 97 at 71) and granted in part the state's Motion in Limine to Admit Statements of the Defendant (Ex. 97 at 81 - 82).

53. The case proceeded to trial on January 26, 2009, and continued through January 27, 2009. The Honorable Patrick Flanagan presided. (Exs. 97 and 98.) Lindsay represented Birch throughout the trial.

54. The sentencing hearing took place on March 27, 2009. (Ex. 111) The sentence the trial court imposed is set forth above in paragraph twenty-five (25). The judgment of conviction followed on that same day. (Ex. 113.)

**TRIAL COURT - CR08-1586**

55. On March 27, 2009, the Clerk of Second Judicial District Court, Washoe County, Nevada, entered a Judgment of Conviction in the case entitled State of Nevada v. Bruce Harrison Birch, Case No. CR08-1586. (Ex. 114.)

56. Following a two-day jury trial, the jury convicted Birch of Possession of a Stolen Motor Vehicle (Count 1). The court further adjudged Birch a habitual criminal as defined in NRS 207.010. Birch was sentenced to a term of life without the possibility of parole. Birch's sentence in this case was ordered to run consecutive to the sentence imposed in CR07-1714A and concurrent to the sentence imposed in CR08-1585. Birch was given credit for four hundred (40) days of time served. The Nevada Department of Corrections houses Birch at Ely State Prison. (Id.)

57. The Criminal Complaint was filed on February 28, 2009, charging Birch with Possession of a Stolen Motor Vehicle, a violation of NRS 205.273, a felony (Count 1) and Burglary, a violation of NRS 205.060(1), a felony (Count 2). (Ex. 20.)

58. On February 29, 2008, a hearing was held before the Honorable Peter Sferrazza wherein the Washoe County Public Defender was appointed to represent Birch. (Ex. 17 and 22.)

59. On March 13, 2008, Birch filed a Motion for Own Recognizance Release or in the Alternative Reduction of Constitutionally Excessive Bail in case numbers CR08-1585 and CR08-1586. (Ex. 27.) The state filed an opposition on March 27, 2008. (Ex. 28.)

60. On June 5, 2008, Birch filed a Renewed Motion for Own Recognizance Release or in the Alternative Reduction of Unconstitutional Bail in case numbers CR08-1585 and CR08-1586. (Ex. 36.)

61. The joint preliminary hearing in case numbers CR08-1585 and CR08-1586 was held on June 5, 2008, with the Honorable Harold Albright, Justice of the Peace, presiding. (Ex. 37.) Birch was present throughout with attorney Pusich. Following the testimony of witnesses, the court continued the hearing for argument on Birch's Renewed Motion for Own Recognizance Release or in the Alternative Reduction of Unconstitutional Bail. (Id.) On June 11, 2008, the continued hearing was held before the Honorable Harold Albright, Justice of the Peace. (Ex. 38.) Birch was present throughout with attorney Pusich. At the hearing, Ms. Pusich advised the court that Birch no longer wished to have her represent him and requested to be relieved as counsel. The court granted Ms. Pusich's request and appointed the Alternate Public Defender to represent Birch. (Id.)

62. On June 12, 2008, a Case Conflict Notification was filed by the Washoe County Public Defender's Office. (Ex. 41.)

63. On June 12, 2008, a Conflict Notification was filed by the Alternate Public Defender's Office. (Ex. 42.)

64. The continued preliminary hearing was held on July 7, 2008, with the Honorable Harold Albright, Justice of the Peace, presiding. (Ex. 17.) Birch appeared at this hearing in proper person. At the hearing, district attorney Scott Pearson advised the court that the case had been referred to the conflict group for appointment of counsel by Robert Bell; however, Mr. Bell requested that the pending Motion for Own Recognizance Release or in the Alternative Reduction of Unconstitutional Bail be ruled upon so the case could be bound over to the district court and the state could file a notice of intent to seek the habitual sentence which would require Mr. Bell to appoint an hourly attorney. Following colloquy between the court and Birch, the court continued the hearing for Birch to be afforded representation of counsel. (Id.)

65. On July 22, 2008, the court entered an Order appointing John Oakes as counsel for Birch. (Ex. 50.)

66. The continued preliminary hearing was held on August 25, 2008, with the Honorable Harold Albright, Justice of the Peace, presiding. (Ex. 17.) Birch was present throughout with attorney Oakes. At the hearing, the court granted Birch's Motion for Own Recognizance Release or in the Alternative Reduction of Unconstitutional Bail and ordered the bail set at $250,000 bondable. (Id.)

Additionally, Birch was bound over to the district court on counts 1-2 as listed in the Criminal Complaint. (Ex. 17 at 2.)

67. The Information was filed on August 26, 2008, charging Birch with Possession of a Stolen Motor Vehicle, a violation of NRS 205.273, a felony (Count 1) and Burglary, a violation of NRS 205.060(1), a felony (Count 2). (Ex. 57.)

68. On September 3, 2008, attorney John Oakes filed a Motion to Withdraw as Attorney of Record. (Ex. 60.) Mr. Oakes indicated that the attorney-client relationship had deteriorated to a point that he no longer believed he could zealously represent Birch. (Id.) A second Motion to Withdraw as Attorney of Record was filed on September 4, 2008. (Ex. 62.) An Order Allowing Withdrawal of Attorney of Record was filed on September 4, 2008. (Ex. 63.)

69. On September 9, 2008, an Order was entered appointing attorney Robert Lindsay as counsel for Birch. (Ex. 66.)

70. The joint initial arraignment in case numbers CR08-1585 and CR08-1586 was held on September 12, 2008, before the Honorable Patrick Flanagan. (Ex. 70.) Birch was present throughout with attorney Lindsay. Birch pled not guilty to the charges as listed in the Information and waived the sixty (60) day rule. (Id.)

71. A Request, Stipulation and Order re Pre-Preliminary Hearing and Pre-Trial Reciprocal Discovery (Felony and Gross Misdemeanor Cases) was filed on October 7, 2008. (Ex. 71.)

72. On October 23, 2008, Birch, in proper person, filed a Matter of Record Cease and Desist, Notice of Termination Letter to Attorney in all three (3) of his cases. (Ex. 73.) Birch alleged, among other things, that his attorney, Robert Lindsay, could not properly represent him as Lindsay would not accept his telephone calls, Lindsay was not permitted to practice law in the Nevada Supreme Court without prior approval and Birch had insulted Lindsay and his family causing a deterioration of the attorney-client relationship. Birch requested that Lindsay be removed from his case. (Id.)

73. On January 2, 2009, the state filed a Motion to Join Counts. (Ex. 75.) The state sought permission to join the charges of CR08-1585 and CR08-1586 and to prosecute the two cases in one trial. (Id.)

74. On January 9, 2009, a hearing was held on the court's Motion to Confirm Trial was held

jointly in case numbers CR08-1585 and CR08-1586, before the Honorable Patrick Flanagan. (Ex. 78.) Birch was present with attorney Lindsay. The state and defense counsel confirmed the trial dates for the two scheduled trials. During the hearing, Lindsay requested additional time to respond to the state's Motion to Join Counts, which the court granted. Additionally, Birch moved for a continuance of the trials indicating that he would be coming into a sum of money from his mother's estate and desired to either hire an attorney of his choosing or to hire an investigator to prove his allegations against Lindsay in order to have Lindsay removed from the case. The court denied Birch's oral motion. (Id.)

75. The state filed a Motion to Amend Information on January 13, 2009 in which the state sought permission to charge Birch with being a habitual criminal pursuant to NRS 207.010(1)(b). (Ex. 80.)

76. A hearing was held on January 14, 2009, before the Honorable Patrick Flanagan, in Chambers. (Ex. 81.) Birch was not present for this hearing but attorney Lindsay did appear. At the hearing, Lindsay discussed several concerns he had with regard to representing Birch at trial at length. At the conclusion of the hearing, the court agreed to call Birch into court the Friday before trial in an effort to encourage Birch to communicate with Lindsay and to further inform him that his continued behavior could possibly result in an implied waiver of counsel. Furthermore, the state advised that it would be making a motion to dismiss it's Motion to Join Counts. (Id.)

77. On January 16, 2009, Birch filed a Motion to Limit the Use of the Defendant's Statement Against Him, and to Strike and Keep from the Jury the Prejudicial Statements Made to the Officers on February 21, 2008 (Ex. 85) and a Motion for Discovery and for Exculpatory Evidence Brady, Gigglio and Other Bad Acts Evidence (Ex. 86).

78. On January 16, 2009, the state filed Motion to Dismiss Count II of the Information. (Ex. 87.) The state indicated that Count 2 had previously been dismissed at the preliminary hearing but was inadvertently charged in the Information. (Id.)

79. A status hearing was held on January 16, 2009, before the Honorable Patrick Flanagan. (Ex. 89.) Birch was present throughout with attorney Lindsay. At the hearing, Lindsay advised the court that negotiations were ongoing with regards to Birch's pending cases and that it was possible that the cases could be resolved. The court vacated the trial date in CR08-1585 and scheduled a status hearing

regarding the negotiations. (Id.)

80. The status hearing was held on January 21, 2009. (Ex. 90.) Birch was present throughout with attorney Lindsay. At the hearing, Lindsay advised the court that he could not visit with Birch over the weekend due to the fact that Birch was in the infirmary and the jail had refused to allow Lindsay to visit with Birch. The court continued the hearing to allow Lindsay to meet and discuss the negotiations with Birch. Furthermore, the court denied the state's January 2, 2009, Motion to Join Counts and granted the state's January 16, 2009, Motion to Dismiss Count II of the Information. (Id.) The second status hearing was held on January 23, 2009. (Ex. 93.) Birch was present throughout with attorney Lindsay. At the hearing, Lindsay advises the court that the negotiations had fell thru and Birch would be proceeding to trial on all of his pending cases. (Id.)

81. The Amended Information was filed on January 28, 2009, charging Birch with Possession of a Stolen Motor Vehicle, a violation of NRS 205.273, a felony (Count 1) and Being an Habitual Criminal, as defined in NRS 207.010 (Count 2). (Ex. 103.)

82. On January 28, 2009, the state filed a Motion in Limine to Admit Statements of the Defendant During the State's Case-in-Chief seeking to admit evidence of Birch's statements subsequent to his arrest. (Ex. 102.)

83. A status hearing was held on January 28, 2009, before the Honorable Patrick Flanagan. (Ex. 104.) Birch was present throughout with attorney Lindsay. At the hearing, the court granted the state's January 13, 2009, Motion to Amend Information and arraigned Birch on the Amended Information. Birch pled not guilty to the charges as listed. (Id.)

84. Prior to the start of trial on January 28, 2009, the court granted the state's January 28, 2009, Motion in Limine to Admit Statements of the Defendant (Ex. 105 at 70) and granted the state's oral Motion to Admit Evidence of Defendant Carrying Bags (id.).

85. On January 29, 2009, Birch filed a Motion to Dismiss and Motion to Suppress Evidence of Keys from February 21st and 22nd 2008 for Lack of Probable Cause Pursuant to the 4th Amendment to the United States Constitution and the 5th and 6th Amendment Right to Due Process and a Fair Trial by an Impartial Jury. (Ex. 107.) Birch argued that the state lacked probable cause when it took keys to the Ford Truck on February 21, 2008, and used them to open the truck when the truck itself was not

reported stolen until February 22, 2008. Birch requested that the Complaint be dismissed or that the evidence of the keys be dismissed. (Id.) On the second day of Birch's trial, January 29, 2009, the court denied Birch's Motion (Ex. 106 at 195) and granted his oral Motion to Leave the Courtroom (Ex. 106 at 197).

86. The case proceeded to trial on January 28, 2009 and continued through January 29, 2009. The Honorable Patrick Flanagan presided. (Exs. 105-106.) Lindsay represented Birch throughout the trial.

87. The sentencing hearing took place on March 27, 2009. (Ex. 111.) The sentence the trial court imposed is set forth above in paragraph fifty-one (51). The judgment of conviction followed on that same day. (Ex. 114.)

**DIRECT APPEAL OF CR07-1714A**

88. A timely pro per Notice of Appeal from the conviction and sentence was filed on April 1, 2009 and was docketed in the Nevada Supreme Court as Case No. 53537. (Ex. 116.)

89. On April 20, 2009, Birch, in proper person, filed a Motion to Remove Robert Lindsay as Counsel of Record and Reappoint Appellate Counsel Due to Conflict of Interest. (Ex. 132.)

90. On April 27, 2009, the Nevada Supreme Court filed an Order Granting Motion and Remanding for Counsel. (Ex. 134.) The court granted Birch's April 20, 2009, Motion and remanded the appeal to the district court for the purpose of securing appellate counsel. (Id.)

91. On May 4, 2009, the district court filed an Order removing Robert Lindsay as counsel for Birch and referring the matter to Robert Bell for the appointment of appellate counsel. (Ex. 137.) A Recommendation and Order Appointing Counsel was filed on May 13, 2009, appointing Karla Butko as counsel for Birch. (Ex. 138.) Ms. Butko made her appearance in the Nevada Supreme Court on May 19, 2009. (Ex. 146.)

92. The Fast Track Statement was filed on July 10, 2009. (Ex. 153.) Ms. Butko raised the following issues on appeal:

I. APPELLANT WAS DENIED HIS RIGHT TO COUNSEL UNDER THE SIXTH & FOURTEENTH AMENDMENTS WHEN HIS REQUEST FOR SUBSTITUTE COUNSEL WAS DENIED BY THE DISTRICT COURT.

II. THE SENTENCE IMPOSED BY THE DISTRICT COURT CONSTITUTED

AN ABUSE OF DISCRETION. THE SENTENCE IMPOSED CONSTITUTED A CRUEL AND UNUSUAL SENTENCE IN VIOLATION OF THE EIGHTH AMENDMENT. THE SENTENCE RELIEF UPON SUSPECT EVIDENCE.

III. THE PROCESS UTILIZED BY THE COURT AT ENTRY OF PLEA, IN GAINING JURISDICTION OF THE CASE AND ON SENTENCING VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

93. The Fast Track Response was filed on August 5, 2009. (Ex. 154.)

94. On March 11, 2010, the Nevada Supreme Court filed an Order of Affirmance, denying Birch relief on appeal. (Ex. 163.) Remittitur issued on April 7, 2010. (Ex. 166.)

**DIRECT APPEAL OF CR08-1585**

95. A timely pro per Notice of Appeal from the conviction and sentence was filed on April 1, 2009, and was docketed in the Nevada Supreme Court as Case No. 53536. (Ex. 118.)

96. On April 20, 2009, Birch, in proper person, filed a Motion to Remove Robert Lindsay as Counsel of Record and Reappoint Appellate Counsel Due to Conflict of Interest. (Ex. 132.)

97. On April 27, 2009, the Nevada Supreme Court filed an Order Remanding for Counsel. (Ex. 133.) The court remanded the appeal to the district court for the purpose of securing appellate counsel. (Id.)

98. On April 30, 2009, the district court filed an Order removing Robert Lindsay as counsel for Birch and referring the matter to Robert Bell for the appointment of appellate counsel. (Ex. 135.) A Recommendation and Order Appointing Counsel was filed on May 13, 2009, appointing Karla Butko as counsel for Birch. (Ex. 139.) Ms. Butko made her appearance in the Nevada Supreme Court on May 19, 2009. (Ex. 145.)

99. The Opening Brief was filed on September 16, 2009. (Ex. 155.) Ms. Butko raised the following issues on appeal:

I. TRIAL BEFORE A JURY WEARING A SPIT HOOD AND VISIBLE RESTRAINTS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS UNDER THE FIFTH AMENDMENT. ACTIONS OF RESTRAINT INFRINGED UPON THE PRESUMPTION OF INNOCENCE.

II. ABSENCE OF APPELLANT AT A CRITICAL STAGE OF THE TRIAL DENIED APPELLANT HIS RIGHTS UNDER THE SIXTH AMENDMENT AND UNDER NEVADA LAW. APPELLANT DID NOT WAIVE HIS RIGHT TO BE PRESENT DURING HIS TRIAL.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR NEW COUNSEL AFTER TRIAL COUNSEL HAD BEEN SPIT [ON] BY APPELLANT PRIOR TO TRIAL AND PHYSICALLY ATTACKED BY APPELLANT IN OPEN COURT PRIOR TO THE JURY VERDICT. REFUSAL OF TRIAL COUNSEL TO WITHDRAW VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

IV. THE DISTRICT COURT FAILED TO CONDUCT A *FARETTA* CANVAS WHEN APPELLANT REQUESTED TO REPRESENT HIMSELF.

V. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION.

VI. THE SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR A SHOPLIFTING INCIDENT INVOLVING SIX WRENCHES FROM SEARS WAS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO DISMISS THE HABITUAL OFFENDER ENHANCEMENT FILED BY THE STATE UNDER NRS 207.010. THE HABITUAL OFFENDER ENHANCEMENT WAS UNCONSTITUTIONAL AS APPLIED HEREIN UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

VII. THE JURY SELECTION PROCESS UTILIZED BY THE COURT VIOLATED THE DUE PROCESS RIGHTS OF APPELLANT AND HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS.

VIII. ADMISSION OF THE DEFENDANT'S STATEMENTS TO DETECTIVE BELLAMY WAS AN ABUSE OF DISCRETION UNDER 48.035.

IX. CUMULATIVE ERRORS WARRANT RELIEF.

100. The Answering Brief was filed on October 15, 2009 (Ex. 157) and the Reply Brief was filed on November 12, 2009 (Ex. 160).

101. On March 11, 2010, the Nevada Supreme Court filed an Order of Affirmance, denying Birch relief on appeal. (Ex. 163.) Remittitur issued on April 7, 2010. (Ex. 165.)

**DIRECT APPEAL OF CR08-1586**

102. A timely pro per Notice of Appeal from the conviction and sentence was filed on April 1, 2009, and was docketed in the Nevada Supreme Court as Case No. 53535. (Ex. 120.)

103. On April 20, 2009, Mr. Birch, in proper person, filed a Motion to Remove Robert Lindsay as Counsel of Record and Reappoint Appellate Counsel Due to Conflict of Interest. (Ex. 132.)

104. On April 27, 2009, the Nevada Supreme Court filed an Order Remanding for Counsel.

(Ex. 133.) The court granted Birch's April 20, 2009, Motion and remanded the appeal to the district court for the purpose of securing appellate counsel. (Id.)

105. On April 30, 2009, the district court filed an Order removing Robert Lindsay as counsel for Birch and referring the matter to Robert Bell for the appointment of appellate counsel. (Ex. 136.) A Recommendation and Order Appointing Counsel was filed on May 13, 2009, appointing Karla Butko as counsel for Birch. (Ex. 140.) Ms. Butko made her appearance in the Nevada Supreme Court on May 19, 2009. (Ex. 144.)

106. The Opening Brief was filed on September 18, 2009. (Ex. 156.) Ms. Butko raised the following issues on appeal:

I. TRIAL BEFORE A JURY WEARING A SPIT HOOD AND VISIBLE RESTRAINTS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS UNDER THE FIFTH AMENDMENT. ACTIONS OF PHYSICALLY VISIBLE RESTRAINT INFRINGED UPON THE PRESUMPTION OF INNOCENCE.

II. ABSENCE OF APPELLANT AT A CRITICAL STAGE OF THE TRIAL DENIED APPELLANT HIS RIGHTS UNDER THE SIXTH AMENDMENT AND UNDER NEVADA LAW. APPELLANT DID NOT WAIVE HIS RIGHT TO BE PRESENT DURING JURY DELIBERATIONS/QUESTIONS.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR NEW COUNSEL AFTER TRIAL COUNSEL HAD BEEN SPIT ON BY APPELLANT PRIOR TO TRIAL AND PHYSICALLY ATTACKED BY APPELLANT IN OPEN COURT ON A PRIOR TRIAL WHICH ENDED THE DAY BEFORE THIS TRIAL AND FOR WHICH CONDUCT APPELLANT WAS CHARGED WITH ADDITIONAL CRIMES. REFUSAL OF TRIAL COUNSEL TO WITHDRAW VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT.

IV. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION. APPELLANT WAS MERELY PRESENT NEAR THE VEHICLE AND DID NOT EXERCISE CONSTRUCTIVE POSSESSION OF THE VEHICLE.

V. THE COURT IMPROPERLY ADMITTED EVIDENCE AS CONSCIOUSNESS OF GUILT EVIDENCE UNDER NRS 48.045(2). THE JURY WAS IMPROPER[LY] INSTRUCTED ON CONSCIOUSNESS OF GUILT.

VI. THE COURT IMPROPERLY DENIED THE MOTION TO SUPPRESS EVIDENCE OF THE KEYS IN APPELLANT'S PROPERTY AT THE JAIL, WHICH WERE IMPROPERLY SEIZED IN VIOLATION OF THE FOURTH & FOURTEENTH AMENDMENTS.

VII. THE SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR A CRIME WHICH ALLEGED CONSTRUCTIVE POSSESSION OF A STOLEN TRUCK WAS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO DISMISS THE HABITUAL OFFENDER ENHANCEMENT FILED BY THE STATE UNDER NRS 207.010. THE HABITUAL OFFENDER ENHANCEMENT WAS UNCONSTITUTIONAL AS APPLIED HEREIN UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

VIII. ADMISSION OF THE DEFENDANT'S STATEMENTS TO DETECTIVE BELLAMY WAS AN ABUSE OF DISCRETION UNDER 48.035. ADMISSION OF IMPROPER BAD ACT EVIDENCE TAINTED THE TRIAL.

IX. CUMULATIVE ERRORS WARRANT RELIEF.

107. The Answering Brief was filed on October 16, 2009 (Ex. 158) and the Reply Brief was filed on November 12, 2009 (Ex. 159).

108. On March 11, 2010, the Nevada Supreme Court filed an Order of Affirmance, denying Birch relief on appeal. (Ex. 163.) Remittitur issued on April 7, 2010. (Ex. 164.)

**FEDERAL POST-CONVICTION**

109. Birch mailed his pro per Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody in the instant action on April 5, 2011. (CR 1.)

110. In April 2011, Birch, in proper person, filed a Motion to File Additional Pages in 2254 Habeas Corpus. (CR 2.)

111. On April 15, 2011, Birch, in proper person, filed a Motion to Amend 2254. (CR 8.)

112. On April 18, 2011, Birch, in proper person, filed a Motion to Extend Prison Copywork Limit. (CR 7.)

113. This Court entered an Order on April 21, 2011, directing Birch to either file a motion to proceed in forma pauperis or to pay the required filing fee. (CR 9.)

114. On April 26, 2011, Birch, in proper person, filed an Explanation of I.F.P. Delinquency and Request for Order or Intervention. (CR 12.)

115. On April 27, 2011, Birch, in proper person, filed a Motion for Intervention and I.F.P. Status. (CR 13.)

116. This Court entered an Order on May 3, 2011. (CR 14.) The Court granted Birch's

Application to Proceed In Forma Pauperis, construed Birch's Motion for Intervention as a Motion for Counsel and granted the motion, appointed the Federal Public Defender's Office to represent Mr. Birch and denied Birch's other pending motions as moot. (Id.)

117. On May 6, 2011, Birch, in proper person, filed an Exhaustion Declaration re No State Remedy Available On All 3 Cases. (CR 15.) Birch indicated that he was blocked from filing anything with the district or justice courts and therefore could not proceed on post-conviction in state court. (Id.)

118. On May 6, 2011, Birch, in proper person, filed a Motion to File Extended 2254 (CR 16), an Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (CR 17), a Motion to Amend (CR 18), a Motion to Consolidate (CR 19), a Statement (CR 20) and an Application to Proceed In Forma Pauperis (CR 21).

119. This Court entered an Order on May 10, 2011. (CR 22). The Court denied Birch's Application to Proceed In Forma Pauperis as moot, denied CR 16, 18 and 19 without prejudice and ordered the Clerk to not accept any additional pro se filings pending the appearance of counsel. (Id.)

120. Deputy Attorney General, Jared M. Frost filed a Notice of Representation of Respondents on May 12, 2011. (CR 23.)

121. On May 25, 2011, Assistant Federal Public Defender, John C. Lambrose filed a Notice of Conflict indicating that the Federal Public Defender's Office could not represent Birch in the instant action. (CR 26).

122. This Court entered an Order on June 7, 2011, wherein the Court appointed Glynn Cartledge as counsel for Birch and ordering an amended petition be filed within ninety (90) days. (CR 27.)

123. On February 15, 2012, Birch, in proper person, filed a Motion to Take This Case Off Calendar, Motion to Amend and Motion to Waive Conflict of Interest with the FPD and Revert it Back to Them, Request for Intervention. (CR 40 - 43.) In his Motion, Birch requested that this Court remove Glynn Cartledge as his counsel of record and allow Birch to waive the conflict of interest with the Federal Public Defender's Office. (Id.)

124. On February 15, 2012, Birch, through counsel, filed a Motion for Ex-Parte Status Hearing With Petition and His Counsel to Appear Telephonically. (CR 44.)

125. On February 16, 2012, Birch, in proper person, filed an Affidavit and Letters from Attorney in Support of Her Removal and Replacement. (CR 45). In his Affidavit, Birch cites a number of reasons and encloses several letters from his attorney in support of his request for replacement counsel. (Id.)

126. On February 17, 2012, attorney Cartledge filed a Motion to Withdraw indicating that Birch had created an irreparable conflict that could not be resolved and has undermined his counsel's ability to represent him consistent with her ethical obligations to him. (CR 46.)

127. On February 22, 2012, this Court entered a Minute Order in Chambers scheduling a motion hearing for March 22, 2012. (CR 47.)

128. On February 22, 2012, Birch, in proper person, filed a Motion for Appointment of Unbiased Monitor or Special Master in the Case with Attorney. (CR 48.)

129. On February 23, 2012, Birch, in proper person, filed a Motion for Request to Take Judicial Notice. (CR 49.)

130. This Court entered an Order on February 24, 2012, denying Birch's Motion for Appointment of Unbiased Monitor or Special Master in the Case with Attorney and ordered the Clerk to not accept any additional pro se filings until further order of the Court resolved all pending motions. (CR 50.)

131. On February 29, 2012, Birch, through counsel, filed a Supplemental Petition for a Writ of Habeas Corpus and Exhibits. (CR 53 - 60.)

132. A hearing was held on March 21, 2012, before Judge Gloria M. Navarro. (CR 61.) Birch was represented by Glynn Cartledge at the hearing and appeared telephonically. At the hearing, this Court ordered CR 40 - 45 and 49 be withdrawn and sealed. This Court further ordered that the Motion to Withdraw as Counsel, CR 46, be scheduled for a hearing on March 30, 2012. (Id.)

133. A hearing was held on March 30, 2012, before Judge Gloria M. Navarro. (CR 62.) Birch was represented by Glynn Cartledge at the hearing and appeared telephonically. At the hearing, this Court ordered Ms. Cartledge to file the proper paperwork to have Birch evaluated and continued the hearing. This Court further ordered the Clerk to contact the Federal Public Defender's Office regarding representation of Mr. Birch. (Id.)

134. A hearing was held on April 6, 2012, before Judge Gloria M. Navarro. (CR 63.) Birch was represented by Glynn Cartledge at the hearing and appeared telephonically. Lori C. Teicher of the Federal Public Defender's Office also appeared telephonically. At the hearing, this Court granted Ms. Cartledge's Motion to Withdraw as Counsel and appointed the Federal Public Defender's Office as counsel for Birch. This Court further ordered that the second amended petition would be due on September 7, 2012. (Id.)

135. Assistant Federal Public Defender, Paul G. Turner made his appearance in the instant matter on May 3, 2012. (CR 64.) The instant petition follows:

## II.

## GROUNDS FOR RELIEF

### GROUND ONE

**BIRCH WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BASED UPON THE ACTUAL CONFLICT OF INTEREST BETWEEN BIRCH AND HIS ATTORNEY AND THE COURT'S FAILURE TO SUBSTITUTE COUNSEL BASED ON THE BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP.**

**Statement of Exhaustion:** This claim was presented as Ground 3 in the direct appeal from the judgment of conviction and sentence in the Sears case, NSC docket #53536, and as Ground 3 in the direct appeal from the judgment of conviction and sentence in the Ford Truck case, NSC docket # 53535 (Ex. 155 at 17-20; Ex. 156 at 17-19; Ex. 159 at 7-11; Ex.160 at 7-11).

A. Actual Conflict of Interest

1. Pursuant to a defendant's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has the right to an attorney free from conflicts of interest. When a defendant's attorney is burdened by an actual conflict of interest, prejudice is presumed.

2. Birch was charged with theft-related charges in three separate informations filed in the Second Judicial District Court based on three separate incidents: (1) under case number CR07-1714A, Birch was originally charged with conspiracy to commit burglary for attempting to steal various items

from Home Depot in Sparks on June 11, 2007 ("Home Depot") (Ex. 2); (2) under case number CR08-1585, Birch was charged with burglary for allegedly stealing several tools from a Sears in Reno on February 21, 2008 ("Sears") (Ex. 56); and (3) under case number CR08-1586, Birch was charged with possession of a stolen Ford Truck in a parking lot outside a Walmart in Reno on February 21, 2008 ("Ford Truck") (Ex. 57).

3. The Home Depot prosecution occurred first after Birch's arrest in June 2007. In a Second Amended information filed on January 4, 2008, Birch was charged with attempted grand larceny. Ex. 13. On that day, Birch appeared in court represented by Mazie Pusich and pled guilty to the Second Amended information. Ex. 15 at 4.

4. On February 21, 2008, Birch was arrested for the Sears and Ford Truck incidents. See Ex. 16-17. Pusich was assigned to represent him in those case. Id.

5. On June 11, 2008, prior to sentencing on the Home Depot case, Pusich told the court of a possible conflict of interest with Birch. Birch asked for new counsel, stating that he was in bitter conflict with her.[3] Ex. 38. The court relieved Pusich and, in July 2008, appointed John Oakes as alternate counsel.[4] Exs. 47, 49, 51.

6. On September 4, 2008, Oakes motion to withdraw as counsel based on a collapse in the attorney-client relationship was summarily granted. Exs. 60-63. On September 9, 2008, Robert Bruce Lindsay was assigned as counsel in all three cases. Exs. 64-66. On September 12, 2008, Birch, represented by Lindsay, was arraigned on the Sears case and the Ford Truck case. Ex. 70. Lindsay then represented Birch at the Sears trial on January 26 and 27, 2009, and the Ford Truck trial on January 27 and 28, 2009.

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[3] In March 2008, the court granted Pusich's request for a competency examination. Exs. 23, 24, & 26. Pusich claimed that Birch had been acting "volatile and unpredictable." Ex. 23 at 3. She noted that Birch had previously been referred to Northern Nevada Adult Mental Health Services for treatment, but had not followed up. Ex. 24 at 3. She described an incident in which Birch "left rambling, incoherent and profane messages on several public defender phones. He appeared to have called every number between our receptionist and our fax machine. There are over fifty numbers. The vast majority of those employees did not know Mr. Birch or his case, and had no idea why he was calling to yell and swear at them." Id. After an examination, Birch was found to be competent. Ex. 30.

[4] In July 2008, the District Court Judge on the Home Depot case, Jerome M. Polaha, recused himself based on an implied threat in a letter he received from Birch. See Ex. 48. The case was reassigned to District Court Judge Patrick Flanagan, who presided over all three cases. Ex. 52.

7. The relationship between Lindsay and Birch began to breakdown soon after Lindsay's appointment. At a court date on October 24, 2008, Lindsay stated that he has "had the inability to deal with this man and that's the simple and short of it." Ex. 74 at 4. Lindsay stated that Birch "is a fairly abusive man and the things that he said to me for the last month or whatever it's been just silly, just ridiculous," adding that he "is a most difficult client." Id. at 5. He concluded, "I believe you're going to have to appoint another lawyer for him." Id. at 6.

8. Birch spoke to the court directly and stated that "our attorney-client relationship has deteriorated to the point beyond help." Lindsay was unprepared and did not have necessary documents. Lindsay's phone would not accept his calls. Ex. 74 at 9, 11. Birch had filed grievances against Lindsay. During an attorney visit on the prior night, Lindsay screamed at Birch and made threatening gestures towards him. Id. at 9. When they were in court on the Sears and Ford Truck cases, "two deputies stood between us to keep us apart." Id. at 9-10. The court did not address Birch's complaints about Lindsay. Id. at 13.

9. At the motion to confirm trial hearing on the Sears and Ford Truck cases, held on January 9, 2009, an actual conflict of interest materialized when Birch spit in Lindsay's face in court. Near the end of the proceeding, Birch informed the court that he was "coming into some money from my mother's estate" and he would know the amount in two weeks. If the amount was sufficient, he intended to either hire a new attorney or hire an investigator to prove his allegations against Lindsay to "get him off the case." He asked for a 30-day adjournment. The court denied that request. Ex. 78 at 6-7.

10. In response, Birch stated, "How do I get him off? Do I have to spit in his face right here right now? Because I'm going to. He's not representing me. He's taking me down the drain." Ex. 78 at 7. At that point, "Commotion ensued." The "commotion" was Birch spitting in Lindsay's face, with some spit landing in Lindsay's eye. See, e.g., Ex. 97 at 14. The court ordered Birch out of the courtroom. Lindsay stated, "I will do everything I can as a defense lawyer." Ex. 78 at 7.

11. On January 14, 2009, an "in chambers" status hearing was held outside of Birch's presence. Ex. 81 at 3. Lindsay stated that he "went yesterday to have my blood tested for five, six, seven different things that are apparently very communicable by being spit in the eye, none of them much fun, from the AIDS test to the hepatitis test to about five of them I've never even heard of." Id.

at 3. Citing to Garey v. United States, 540 F.3d 1253 (11th Cir. 2008), Lindsay argued that a defendant's conduct can "waive[ ] your appointed counsel." Id. at 3-4; see also id. at 8-9. He argued that "they don't have the right to abuse me out there out there, but the law is very clear that it if you're going to be in conflict, and that case, as I got it, is much like this . . . ." Id. at 4. Lindsay indicated that he had fears about how Birch would treat him in the future: "I do not want to get spit on again and he has made threats, I believe, saying that he's going to get me no matter what, and I do not want to have my, you know, I don't want to get knifed in the throat. I'm sorry. Those are real concerns for me." Id. at 6. The court did not respond to Lindsay's arguments. Id. at 7-10.

12. The court asked the bailiff, Deputy Lorring, whether there were any security issues. Lorring stated that they had "spit hoods and stuff that we can put over him prior so he can't spit on any of us." Ex. 81 at 11. Lindsay did not object to this measure or ask for a less restrictive alternative. Lorring confirmed that he had charged Birch with "felony propelling, which is a category B felony." Id. at 12.

13. Lindsay again expressed his anxiety and concerns about representing Birch. At a status hearing on January 23, 2009, Birch asked the court to relieve Lindsay. Ex. 93 at 7. Birch stated, "He treat[s] me like a piece of crap." Id. He added that Lindsay was rude and abrasive to him, saying "I'm never going to forget this. Then he said, if I come back dirty, I'm going to have you charged." Id. at 7-8. Lindsay also said, "I want you to beg me to come see you." Id. at 8. He stated that Lindsay had not done any investigation, had not filed appropriate motions, and had not discussed the defense with him. Id. at 5, 8-9. Birch had filed 43 complaints against Lindsay in "an attempt to get rid of him." Id. at 5. Birch added, "I have cirrhosis of the liver. I don't have 10 years left." Id. at 9. The court did not address the request.

14. Lindsay accused Birch of making false allegations against him and all of his prior attorneys. Ex. 93 at 11-12. He emphasized, "It's important to know, he's personally attacked me, he's hepatits C. I need it on the record. I've been to the doctor a few times. I've already had my blood drawn a few times. I've been told the wonderful news that the incubation period for that stuff is six month to six years and nobody really knows." Id. at 12. He did not deny that he had made the comments to Birch. He explained that he was trying to tell Birch that it was unacceptable behavior.

Birch was "trying to infect me. And it's not just rude, it's truly criminal." Id. at 12-13. He said that Birch "needs to know there are consequences to this little theatrical stuff he's pulling." Id. "[I]n spite of the conflict we have here going," Lindsay "intend[ed] to do as good a job as I possibly can on behalf of my client in spite of the fact that he's done everything he can to personally offend me and personally offend my children and all of the rest of it, your Honor." Id. at 12, 13-14.

15. Remarkably, despite the "conflict" and Lindsay's belief that Birch had to face "consequences" for his behavior, Lindsay represented Birch at the Sears trial that began the next week. Unfortunately, the actual conflict became even more acute during the trial.

16. On the day that trial began, January 26, 2009, Birch once again stated that he did not want Lindsay representing him. Lindsay did not visit him over the weekend to discuss the case. They had never discussed "one word of the defense" and he was facing "multiple life sentences here." Ex. 97 at 6. Birch explained that Lindsay was not focusing on the main defense – that there was no evidence to show that he had an intent to steal when he entered Sears. Id. at 6-7. Birch asked to represent himself and asked for a couple of weeks to prepare. Id. at 7. Lindsay acknowledged that he did not go to see Birch over the weekend because Birch had said things in court that were "clearly not true." Id. at 9-10. Birch asked the court for a continuance or to "get rid of Mr. Lindsay." The court denied the request. Id. at 12.

17. After a recess at the close of the evidence, the jury returned to the courtroom and the court asked for the parties to stipulate to the presence of the jury. At that point, "commotion ensued." Ex. 98 at 240. The "commotion" was that Birch had stabbed Lindsay in the hand with a pencil. Id. at 245-46. The stabbing required Lindsay to go to the hospital for "immediate treatment." Id. at 246. When the trial resumed, Lindsay guaranteed the court that he would give the best closing he could possibly give "given the circumstances of the case." Id. at 243.

18. Despite the fact that Lindsay's fear and anxiety of a physical attack had been realized, Lindsay continued his representation of Birch at the Ford Truck trial that began the day after the Sears trial ended. Lindsay's animosity towards Birch was evident at a status conference in court before the trial began. Lindsay accused Birch of being "less than honest" and had repeatedly accused him of "things that never happened." Ex. 104 at 7. Lindsay's desire at that point was to "protect himself"

against future claims that Birch may make against him. He believed that Birch was going to "make up" allegations against him. Id.

19. During the Ford trial, Birch informed the court that he was "booked" on both January 27 and 28 for the stabbing. Ex. 106 at 187. He now had "pending charges" against him, making Lindsay a witness against him. Id. Lindsay stated that, while he refused to pursue any charges, he acknowledged that he had no control over what the District Attorney's Office did. Id. at 188.

20. The actual conflict of interest in this case was clear. Lindsay's loyalties were divided. Lindsay's fear and animosity towards Birch overwhelmed his ability to zealously and single-mindedly represent his client. There had been a direct impact on his ability to represent Birch as a result of the assaults in court. It is simply illogical to conclude that any ethical or rational attorney could put those incidents out of his mind and remain as counsel for the individual who attacked him. Lindsay pointedly articulated those anxieties and concerns before the Sears trial began, but the court simply ignored those statements.

21. During the Ford Truck trial, it became clear that an additional actual conflict was present. As Birch indicated during that trial, criminal charges had been filed against him based upon the stabbing. Birch was "booked" on those charges, showing that the case had moved beyond the realm of mere possibility. It can also be presumed that, based on Deputy Lorring's statement, Birch had been booked on the propelling charges as well. Regardless of whether Lindsay personally wanted to pursue those cases, he acknowledged that he had no control over whether the district attorney's office would pursue them. At the time that the Ford trial was happening, Birch made clear that charges were pending. No one disputed that this was true. This placed Lindsay in an antagonistic position with Birch. Indeed, regardless of the status of the criminal charges, Lindsay demonstrated that, as a victim of an assault, he was harboring anger towards Birch and was focused on protecting his own interests.

22. While Lindsay made statements that he could put his personal feelings aside and fulfill his professional responsibilities, this statement cannot be credited.[5] Indeed, Lindsay's multiple

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[5] Lindsay has a documented history of failing to abide by his professional responsibilities as a lawyer. For example, in Middleton v. Warden, 98 P.3d 694 (Nev. 2004), the Nevada Supreme Court removed Lindsay as appellate counsel because of bizarre unprofessional behavior, which included (continued...)

expressions of anger and animosity towards Birch fully undermine those statements.

23. Moreover, despite these assurances, there can be no doubt that the actual conflict of interest had an adverse effect on Lindsay's representation of Birch at both trials and at sentencing. With respect to the Sears trial, the record shows that Lindsay did not visit or communicate with Birch about the defense before trial. Lindsay specifically stated that he did not visit Birch during the weekend on the eve of trial *to spite him*. When he did visit Birch, he was "rude and abrasive" and, according to Birch, had assaulted him. Lindsay did not conduct any pretrial investigation of the suspicious fact that Birch's wallet was lost after his arrest. He would never communicate with Birch at breaks during the trial. Lindsay never gave Birch to explain to him his theory of the defense, namely that he did not have an intent to steal before entering Sears. Indeed, Lindsay did not pursue this strategy at trial. Lindsay also did not challenge the element asking whether or not Birch was unlawfully in the store. Ex. 99, #23 ("Bruch Harrison Birch did willfully and *unlawfully* [ ] enter Sears.") (emphasis added). At trial, none of Lindsay's cross-examination of the State's witnesses lasted over two pages and, for one witness, was only two questions. Ex. 97 at 108-09, 139-40, 141, 151-52, 165-66, 190. Lindsey's limited questioning omitted critical questions that could have been used to challenge those elements of the burglary.

24. As discussed in Ground Two, Lindsay did not voice a single objection to Birch being placed in restraints and a highly prejudicial spit hood during the trial. His statements on the record showed that he was clearly more concerned about his own safety than the potential prejudice to Birch. As discussed in Ground Three, Lindsay did not advocate for his client's presence during critical stages

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[5] (...continued)
deleting the last eight pages of the appellate brief he filed in order to fit the brief within the court's page limit requirement. Lindsay's "'amended' opening brief was simply the original submitted brief with the final eight pages excised[,] . . . abruptly ending the discussion of one issue and completely omitting any discussion of four other issues listed in the brief's table of contents." Id. at 696-97. The court chastised Lindsay's disregard for "the obligations incumbent upon him as counsel for a client facing a death sentence." Id. at 697. As a result of Middleton Lindsay received a public reprimand. See Ex. 184. In fact, the Nevada Supreme Court removed Lindsay from *Birch's own appeal* as a result of Middleton. Exs. 133 & 134. The Nevada Supreme Court has sanctioned Lindsay in two other appeals (see NSC docket numbers 33643, 38126), and has threatened sanctions in at least nine others (see NSC docket numbers 35298, 35300, 36885, 37086, 37956, 37957, 38671, 40518/40519, 43223). The docket sheets are available through the Nevada Supreme Court's website: http://caseinfo.nvsupremecourt.us/public/caseSearch.do. See also Bradley Dwight Heinz v. State, 2d Jud. Dist. Ct, County Of Washoe, Case No. CR03P1571 (order dated October 5, 2011, granting habeas petition based on Lindsay's deficient performance at trial) (attached as Ex. 185).

of the trial, presumably because he did not want to work with Birch due to the actual conflict.

25. The actual conflict also affected Lindsay's performance during the deliberations. The jury asked to watch the surveillance videotape to view images of Birch inside Sears, including an image of when the videotape zoomed in on one of Birch's pockets. Responding to the jury's specific inquiry the judge provides his personal opinions as what the videotape evidence shows.

> THE COURT: It was during the testimony of Mr. Tye, they zeroed on, it looked like there was a silver object in his pocket. Unfortunately my notes weren't as detailed. I recall the clip. It would have been the second to the last one . . . .
>
> THE COURT: Just before he left, the camera zoomed in, Mr. Tye's testimony, security for Sears, zoomed in on Mr. Birch's jacket pockets and there appears to be a shiny object in what would be his left front pocket. I would assume it would be the last video.

Ex. 98 at 274, l. 23 – 275, l. 3; ll. 9-13 (emphasis added).

26. The judge's commentary on the evidence was improper. In a case where the issue was whether Birch improperly removed certain tools, including wrenches, from the store, the judge's comments about seeing "a silver object" and "a shiny object" in Birch's jacket's pockets would have substantially influenced the jury in finding that Birch had taken the tools in question from Sears. Notwithstanding the significant prejudice to his client, Birch, resulting from the court's improper commentary on the evidence Lindsay neither objected to such comments nor sought an instruction admonishing the jury to ignore such commentary. Lindsay's failure in this regard further exemplifies his apparent lack of interest or commitment towards defending his client.

27. The actual conflict also led Lindsay to take actions in front of the jury that prejudiced Birch. Lindsay characterized both the case and Birch in his closing argument in a way that severely prejudiced Birch. Lindsay began his closing by stating, "It hasn't been an easy case and that's to say the least." Ex. 98 at 259. Later, he focused on the spit hood and restraints and made a bizarre and prejudicial characterization of Birch's appearance as resembling "Hannibal Lechter" or some other "monster." Id. at 263. Lindsay's personal feelings towards Birch overwhelmed his ability to protect Birch's right to a fair trial.

28. The conflict also had an adverse effect on Lindsay's representation at the Ford Truck trial. Lindsay failed to file a timely and sufficient motion to suppress the seizure of the Ford Truck keys in

Birch's possession, a highly critical piece of evidence to the State's case. Indeed, Lindsay did not argue inventory search law as a means of seeking to suppress the introduction of the keys as evidence, namely that a search warrant was necessary to seize the keys once they had been inventoried. This was a significant omission for which there is no tactical or strategic justification. Indeed, he only grudgingly argued that there was no probable cause for seizing the keys because the jail receipt's February 21 date of when the police seized the keys predated when the vehicle was reported stolen,[6] after his client demanded that such argument be made, a fact acknowledged on the face of the motion to suppress ("This Motion is based upon the specific requests of Bruce Birch and is therefore being filed upon his behalf"). See Ex. 107.

29. Counsel's approach to the subject of suppression of the keys – a critically important issue to Birch as well as the case itself – raises serious doubt as to whether counsel was truly motivated to defend Birch. In a similar vein, even though Lindsay did argue that there was a discrepancy in the date on which the keys were seized, he failed to conduct any investigation into the issue. Just as with the Sears trial, Lindsay's questioning of the State's four witnesses was exceedingly brief: only one cross-examination exceeded two pages with that one only lasting five. Id. at 93, 105-06, 123-24, 166-71.

29. Lindsay's conflict of interest also had an impact on how he approached an evidentiary issue that had an effect on the outcome of both trials. At the Sears trial, Officer Clint Bellamy testified that Birch "told me that he steals to support his drug habit." Ex. 97 at 188. At the Ford Truck trial, Detective Reed Thomas testified that Birch had made the same statement. Ex. 105 at 158. The State had moved to admit this testimony under Nevada Revised Statutes § 48.045 as evidence of other bad acts or crimes to prove motive. See Ex. 95 at 3-5; see also Ex. 102. Defense counsel had characterized the testimony as (1) vague ("he doesn't say I stole this to support this drug habit"), (2) misuse of character evidence, and (3) as "more prejudicial than probative" because not fact specific. Ex. 97 at 76-77. However, the court admitted the evidence (Ex. 97 at 79; Ex. 105 at 71).

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[6] Specifically, after his arrest on February 21, 2008, Birch's property, which included two Ford Truck keys, was inventoried as personal property at the jail. Ex. 175. According to the jail's records, an officer came and removed the keys on February 21, 2008, before the Ford truck had been reported stolen. Ex. 174. Despite this unambiguous document, this officer testified at trial that this occurred on February 22, 2008, after he had learned the truck had been stolen. Ex. 105 at 116, 160.

30. The impact of the evidence of this prejudicial evidence was felt at both trials. At the Sears trial, the first words from the State in the opening portion of its closing argument contained this graphic language.

> MR. YOUNG: The defendant's own express words, which rang clear and true with the detectives when they were interviewing him, the exact words, f____ing doing drugs and stealing to support my habit and her habit and her friend. Ladies and gentlemen, that statement, that is what this case is about. The defendant needed to support a habit. To do that, he stole. And on February 21st of 2008, he was intent on finding a way to fuel that habit. He made Sears his victim in the process.

Ex. 98 at 251-52.

31. At the Ford trial, the State focused on this statement in its closing argument:

> MR. YOUNG: [T]here was an interview, and you remember the testimony about that. What occurred during the interview, or what was said, one, that the defendant admitted he had a drug habit and he steals to support that habit and the habit of a girl and a friend of that girl.
>
> Detective Thomas, if you recall, talked to you about the connection and the interplay between drugs and property and the fact that people will steal, barter and trade and sell in order to fuel that habit.

Ex. 106 at 204. The State later emphasized that Birch stated: "I steal to support the habit." Id. at 209.

32. The State having focused intently on the drug-habit statement, including saying that it was "what this case is about[,]" it is clear from the guilty verdict that the statement was extremely harmful to Birch's defense in both cases.

33. In his pretrial motion to limit the use of Birch's drug use statements filed January 16, 2009 (Ex. 94) and his January 26 comments at trial noted above defense counsel cited no case authorities rejecting such testimony. However, six months before the trial the Nevada Supreme Court had decided Diomampo v. State, 185 P.3d 1031 (2008), where the defendant argued in part that, "the State improperly suggested, through the questioning of Officer Wojcik, that "methamphetamine users 'normally' support their habit by robbing and burglarizing people . . . ." Id. at 1041. The court agreed, finding plain error:

> While the State correctly observed that Diomampo failed to object or seek a curative instruction from the trial court concerning the evidence that methamphetamine users have certain propensities, we conclude that this claim upon appeal is subject to plain error analysis and that the record below demonstrates plain error. Specifically, admitting Officer Wojcik's testimony that methamphetamine users normally support their habits by committing robberies affected Diomampo's substantial rights

> because it permitted the jury to draw inferences about Diomampo's character and his conforming propensity to commit other crimes.

Id. at 1041-42. The Nevada Supreme Court further concluded that "this testimony was not 'prior bad act' evidence admissible as an exception to the prohibitions in NRS 48.045(2) concerning character evidence." Id. at 1042.

34. The trial court had preliminarily rejected the admission of such evidence, and only after further argument from the state did the court decide to admit it. Compare Ex. 97 at 18 with Ex. 97 at 79. In light of the Diomampo opinion the State's argument for admission of the drug habit evidence in Birch's case was wrong since it had been rejected months earlier in a reported case. If Lindsay had brought Diomampo to the trial court's attention the evidence would likely not have been admitted. Lindsay's failure to cite any case and, in particular, his failure to cite this controlling precedent suggests that he made little, if any, effort to develop meaningful defenses in the two cases.

35. Lindsay's actual conflict had an adverse effect on his representation of Birch at sentencing. Lindsay's emphasis on placing his own interests above those of his client's repeatedly resulted in Lindsay prejudicing Birch in front of the court, the entity responsible for imposing punishment. Lindsay described Birch as a liar (see Ex. 97 at 10; Ex. 104 at 7), and a pretender (Ex. 93 at 14; Ex. 97 at 10). He argued that Birch had made false allegations against all of his attorneys. Ex. 97 at 10; Ex. 104 at 7, 19. He accused Birch of asking him to present an illegal argument. Ex. 106 at 188. He emphasized to the court that Birch had physically attacked him and he was suffering and anxious as a result. Ex. 93 at 12. He argued to the court that Birch had to face "consequences" for his actions. Id. at 12-13.

36. More important, the actual conflict led Lindsay to completely fail in his role as advocate at the sentencing proceeding. At sentencing on March 27, 2009, the court had the parties address sentencing on the three separate convictions before considering any enhancements. Lindsay pointed out that Birch had been before courts "literally his whole life . . . and we're back here again." Ex. 111 at 11. He complained, "My problem is I have a client who has somehow managed to take these little, itty-bitty cases and turn them into – you know, he's 53 years old. He's looking at somehow throwing the rest of his life away over nickel, dime cases." Id. at 12. He added, "My client goes out of his way

to aggravate the system. My client goes out of his way to poke people in the eye and make sure he gets some sort of attention." Id. He reiterated, "Mr. Birch has somehow figured out a way to aggravate the world in a way that he's now standing in front of you with enormous time." Id. at 13. An allegedly unconflicted advocate would not paint such a picture of his own client.

37. Lindsay did not present any mitigation evidence even though the record was replete with mitigating factors. The importance of mitigation evidence cannot be minimized here. Birch was facing the most severe sentence that could be imposed outside of the death penalty. But his conflicted attorney did essentially nothing to stand in the way of its imposition. The only reasonable inference to draw is that, as a result of the actual conflict of interest, Lindsay was simply unconcerned with how severely Birch was punished.

38. Preliminarily, Lindsay barely articulated a defense. In fact, he described his own response to the question of whether a sentence of life without parole should be imposed as "pretty brief." Ex. 111 at 34. He focused predominantly on platitudes about human nature and irrelevant arguments about wall street executives. Id. at 34-35.

39. However, the record shows that there was significant mitigation evidence to present. First, there clearly were mental health issues present in this case. Birch's conduct put Lindsay on notice that mental health was a potential mitigating factor.[7] Further, the prosecution submitted "rambling" letters at sentencing that Birch had written to police officers, in which he expressed a compulsion to steal and alleged a conspiracy against him. Ex. 111 at 29-30; Exs. 182 & 183.

40. Birch's physical health issues also represented a mitigating factor. Birch discussed his health issues in court before trial, once again putting Lindsay on notice. But Lindsay never mentioned it. Birch's ill physical health was a far more compelling reason for imposing a lesser sentence than Linday's argument at sentencing that Birch's age alone supported such a sentence.

41. Lindsay failed to argue that the nature of the prior criminal history did not support the imposition of the absolute maximum available sentence. However, several arguments were available to the defense. Birch had always accepted responsibility in his prior cases, there were no allegations that

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[7] There was also the motion for a competency examination, which indicated that Birch had been referred for mental health treatment and which also documented his erratic behavior.

Birch had ever caused physical injury to anyone, and all of the prior crimes were for drugs or relatively minor property crimes, such as shoplifting inexpensive items.

42. Although Birch presented this specific constitutional claim to the Nevada Supreme Court on direct appeal, that court did not address it. See Ex. 163. This claim is, therefore, reviewable de novo under the Antiterrorism and Effective Death Penalty Act ("AEDPA."). For these reasons, Birch was deprived of the effective assistance of counsel. The writ should be granted and Birch's conviction and sentence vacated.

B. Substitution

1. Birch was deprived of his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution when the court failed to grant Birch's request for substitution of counsel based on the breakdown in the attorney-client relationship. Birch hereby incorporates Ground 1.A as if fully set forth herein.

2. On September 9, 2008, Robert Bruce Lindsay was assigned to represent Birch in the Sears and Ford truck cases. Exs. 64-66. There were strong indications on the record that there had been a collapse in the relationship between Lindsay and Birch soon after he had been assigned. Ex. 74. Birch took every step he could to convey this to the court in order to obtain counsel who would advocate on his behalf. As early as October 24, 2008 – months before the trials began – Birch informed the court that Lindsay was not communicating with him, conducting an investigation, or even accepting his phone calls. Birch stated that Lindsay had made threatening gestures towards him the night before. Ex. 74 at 9-11. For his part, Lindsay complained that Birch's conduct was "ridiculous" and "abusive" and that another lawyer had to be appointed. Id. at 4, 6. At this point, the court was required to conduct an inquiry to determine whether there had been a breakdown in the relationship and new counsel should be appointed. However, the court simply did nothing.

3. The same pattern repeated itself at the January 9, 2009 court date. Birch had asked for an adjournment to hire an attorney. Ex. 78 at 7. In light of the previous complaints indicating a breakdown in their relationship, the court should have conducted an inquiry after Birch had reiterated that he needed different counsel. However, the court simply denied the request without any substantive inquiry or consideration.

4. The court never conducted a timely inquiry into the depths of the breakdown in the attorney-client relationship. Despite numerous requests from Birch, the court would never even acknowledge substitution of counsel as an option. Rather, the court either ignored the requests or summarily rejected them despite clear evidence that Lindsay was not in a position to provide effective representation to Birch. Birch repeatedly complained that, due to Lindsay's failure to act as his advocate, they were in bitter conflict. Nevertheless, it was made apparent to Birch that no matter how strenuously or vociferously he complained about Lindsay it was not going to get the court to listen to his deep-seated concerns. It can only be surmised that the court's failure to even entertain the idea of substitution of counsel, despite the fundamental problems that Birch was expressing, was the proximate cause of the actual conflict that developed here. Birch felt helpless and desperate in the face of the court's refusal to provide him with an attorney who would actively represent his interests. Further, after it became readily apparent that Lindsay was not in a position to zealously represent Birch after the actual conflict arose, the court would not entertain Birch's motion for substitute counsel on January 23 and 26, 2009, before the Sears trial (see Ex. 93 at 7; Ex. 97 at 12); or January 28, 2009, before the Ford Truck trial began (see Ex. 104 at 13-14, 18).

5. The court's failure to conduct an inquiry or grant Birch's request for the substitution of counsel violated his right to the effective assistance of counsel. The writ should be granted and Birch's conviction and sentence vacated.

## GROUND TWO

### PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN HE WAS FORCED TO APPEAR AT TRIAL IN SHACKLES AND A SPIT HOOD.

**Statement of Exhaustion:** This claim was presented as Ground 1 in the direct appeal from the judgment of conviction and sentence in the Sears case, NSC docket #53536, and as Ground 1 in the direct appeal from the judgment of conviction and sentence in the Ford Truck case, NSC docket #53535 (Ex. 155 at 14-16; Ex. 156 at 13-16; Ex. 159 at 2-6; Ex. 160 at 2-6); and was denied in the Order of Affirmance on direct appeal (Ex. 163 at 2, 4).

1. The Due Process Clause guarantees that a defendant has a right to remain free of physical

restraints that are visible to the jury.

2. At both the Sears and Ford Truck trials, Birch was forced to appear before the jury in visible restraints, namely shackles and a spit hood. At the Sears trial, the court ordered that Birch be placed in a belly chain, handcuffs, and a spit hood. Ex. 97 at 15. At the Ford truck trial, the court ordered that Birch wear a spit hood and that his legs and hands be shackled with his hands restrained in front of his body by a "black box" handcuff. Ex. 104 at 20-21.

3. These restraints were clearly visible to the jury, as the prosecutor admitted at the Sears trial. Ex. 98 at 241-42. And the shackles were even more visible at the Ford Truck trial as a "black box" handcuff was used. Of course, there simply was no possible way of hiding the spit hood from the jury.[8] The court was well aware of this as it attempted to minimize the extreme prejudice to Birch by stating to prospective jurors during jury selection at both trials that the spit hood was related to a "medical" condition. Ex. 7 at 42; Ex. 105 at 27. However, the jury at the Sears trial learned that this was simply a cover story as a witness identified the apparatus at trial as a "spit hood." Ex. 97 at 113.

4. Beyond simply being visible to the jury, the restraints and spit hood were repeatedly brought to the jury's attention at trial. During <u>voir dire</u> at the Sears trial, Birch's own attorney, Robert Bruce Lindsay, stated to the jury, "My client is wearing a headgear that is probably at least unattractive, perhaps a little frightening. I think that you can see that he has some restraints on, and I'm not trying to draw attention to that, I'm just trying to very candidly deal with it." Ex. 97 at 53. He separately referred to the restraints as "frightening." <u>Id.</u> at 55.

5. During the Sears trial, four of the five identifying witnesses identified Birch as the person with the hood on his head. Ex. 97 at 98, 113, 145, 155-56. Two of the three identifying witnesses at the Ford Truck trial identified Birch as the person wearing the hood. Ex. 105 at 84, 135. During closing argument at the Sears trial, Lindsay asked the jury to disregard the physical restraints and the "mask." Ex. 98 at 259, 263. He stated, "The fact that he had a mask on, whatever that is called, it has, you know, he may look frightening, you might think of him as Hannibal Lechter or one of [sic] monster." <u>Id.</u> at 263. Upon the State's request (Ex. 98 at 242), the court instructed the jury at both trials that "[t]he

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[8] A photograph taken of Birch in the spit hood that was posted on January 28, 2009, on KOLO 8 news's website, has been attached as an exhibit. Ex. 176.

defendant has been placed in restraints and has worn a hood during the course of this trial. This was done upon the order of this court." Ex. 99, #17A; Ex. 108, #18. And the prejudicial impact of the restraints could only have been heightened due to the presence of multiple officers around Birch as he sat in the courtroom. See Ex. 105 at 109.

6. It must be remembered that Birch was presented to the jury in highly visible restraints even though he was charged with only minor property crimes with absolutely no allegations of violent conduct. In the first trial, he was charged with stealing six or seven wrenches from Sears. In the second trial, he was accused of possessing a stolen truck worth less than $2,500. It is difficult to see how a defendant facing property crimes could receive a fair trial when standing before a jury in such "frightening" restraints surrounded by officers.

7. Birch personally pleaded with the court to remove the spit hood before the trials began. Ex. 93 at 9. There clearly were reasonable alternatives to the spit hood, such as a surgeon's mask, but there was no indication the court considered such alternatives. Even the prosecutor suggested at one point that a "two-way camera" could be used to allow Birch's participation. Ex. 81 at 8. However, the court immediately dismissed it without any further consideration. Id.

8. The prejudicial impact of the visible restraints was increased due to the weaknesses in the evidence against Birch. There were numerous problems with the State's evidence in both cases. For example, in the Sears case, no witness personally observed Birch steal anything. The surveillance videos do not ever show Birch concealing tools in his pockets. No witness could testify about what Birch had in his possession prior to entering the store. The evidence that Birch had the intent to steal at the time he entered Sears was non-existent. There was no evidence that he entered the store unlawfully. There was also the suspicious fact that the police lost Birch's wallet. Even the court acknowledged at sentencing that Sears was a close case. Ex. 111 at 41.

9. With respect to the Ford Truck case, the State's evidence had similar problems. There was no evidence that Birch ever entered the truck, drove the truck, or did anything other than access the truck's wide-open bed. There was no evidence showing when the truck entered the lot, or that Birch was the one who drove it there. There was no evidence that Birch knew that the truck was stolen or how he even came into possession of the keys to the truck. Birch did not know the owner of the truck, who lived

in Douglas County. There was no evidence to show that Birch was anywhere near the Carson Valley Center in Douglas County, where the owner parked the truck, or that he had the capability to travel to that area at the time the truck was stolen.

10. For these reasons, Birch's due process rights were violated. The writ should be granted and Birch's conviction and sentence vacated.

## GROUND THREE

**BIRCH WAS DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS OF TRIAL BY JURY, CONFRONTATION AND DUE PROCESS OF LAW WHEN HE WAS EXCLUDED FROM PARTICIPATION IN THE PEREMPTORY CHALLENGES AND FROM CLOSING ARGUMENT IN THE SEARS CASE AND FROM A "READ BACK" CONDUCTED IN THE FORD TRUCK CASE.**

Statement of Exhaustion: This claim was presented as Ground 7 in the direct appeal from the judgment of conviction and sentence in the Sears case, NSC docket #53536, and as Ground 2 in the direct appeal from the judgment of conviction and sentence in the Ford Truck case, NSC docket # 53535 (Ex. 155 at 27-28; Ex. 156 at 16-17; Ex. 159 at 6-7; Ex.160 at 6).

1. As a criminal defendant Birch had federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution to be present at all critical stages of his trials, including the empaneling of his jury. Such rights are also encompassed within Nevada statutory law (Nev. Rev. Stat. § 178.388) and federal procedure (Fed.R.Crim.P. 43(a)). As set forth below, in the Sears and Ford truck trials Birch's constitutional right to be present was violated three times.

2. The events in this case that resulted in Birch's exclusion from significant portions of his trials were grounded in the conflict between Birch and Lindsay - a conflict that existed and was on record long before the Sears and Ford truck jury trials commenced. At all times leading up to the Sears trial Birch essentially begged the court to terminate Lindsay's representation of him and either let him have a new attorney or allow him to represent himself, repeatedly citing Lindsay's failure to meet with him, work with him, prepare for trial and treat him like a human being. The district court's disregard of these warning signs and its refusal to investigate the extent to which the attorney-client relationship between Lindsay and Birch had deteriorated resulted in a pre-trial incident in which Birch spit in Lindsay's face. See Ex. 78 at 7, ll. 7-11. As a result of that incident Birch was shackled at trial and wore

a spit hood. Nevertheless, Birch went into his first trial (Sears) with a conciliatory attitude and behaved well without any outbursts or other expressions of his frustration during voir dire of the jury panel.

**SEARS CASE**

3. After the jury was passed for cause in the Sears case the judge elected to address peremptory challenges with counsel in chambers outside the presence of the jury and Birch.

> THE COURT: . . . [T]he jury has been passed for cause. Let me tell you what the next couple of steps are going to be. I'm going to meet with the attorneys in chambers . . . .
>
> What the attorneys are going to do is exercise what they call peremptory challenges . . . .

Ex. 97 at 58, ll. 8-15. The peremptory challenges were then made with only the judge, clerk and counsel present. Ex. 97 at 60-62. Birch was neither present nor consulted as to his views.

4. In conducting peremptory challenges in such manner the court denied Birch his Sixth and Fourteenth Amendment rights to be present at his jury's impaneling and to have input into the decisions respecting which jurors to peremptorily challenge. Such error was not harmless since, with Birch's input, the final juror venire might have been different and might not have convicted Birch of the Sears burglary charge.

5. As the Sears trial was coming to an end Birch's frustration with Lindsay boiled over and culminated in Birch stabbing Lindsay with a sharp instrument. Birch was then removed from the courtroom. Considered in the context of the continuing deterioration of the Birch/Lindsay relationship of which the court was aware prior to trial, including Lindsay's fears of physical attack by Birch (see Ex. 98 at 240, l. 8; 245-47), the incident could have been prevented had the court taken seriously the deterioration of the Birch/Lindsay relationship and heeded Birch's repeated pre-trial requests that Lindsay be taken off his case. Instead of banning Birch from the courtroom because of this highly regrettable but predictable incident the court could have taken less restrictive measures, e.g., made arrangements for video or audio conferencing between Birch and the courtroom. The court's later conclusion that time did not permit such action is an inadequate explanation for denying Birch's constitutional right to be present.

6. Certainly, the jury noticed that, after the altercation between Birch and Lindsay, Birch

was not present in the courtroom for closing arguments. The court never instructed the jury as to how to assess Birch's absence. Thus, the court's failure to arrange for reasonable alternatives to the final stages of the Sears trial resulted in Birch's improper exclusion from the courtroom at the conclusion of the trial, thereby prejudicing him with the jury.

**FORD TRUCK CASE**

7. During deliberations in the Ford truck case the jury forwarded a question to the court with respect to Detective Reed Thomas' testimony.

> THE COURT: . . . Earlier the Court received a note from the jury, which said, can we have a transcript or video of Reed Thomas' testimony, Eric Krump, dated today, juror number six. The Court conferred with counsel and after consulting with counsel and with their approval, the Court responded as such, there is no transcript or video of Reed Thomas' testimony. Please rely upon your notes and recollection, dated and signed.

Ex. 106 at 227, ll. 12-20; Ex. 109. During the discussion as to the appropriate response to make to the jury question, Birch was neither present nor consulted as to his views.

> MR. YOUNG [prosecutor] The only thing I wanted to, and I think you covered it, make clear that it was a conference call between yourself, myself and Mr. Lindsay and we all agreed to that response.
>
> THE COURT: Okay.
>
> MR. LINDSAY: That is a correct statement. I believe we all three suggested that was the proper thing to do and we all three agreed via conference call, your Honor, an hour ago or something.

Ex. 106 at 228, ll. 1-9.

8. Detective Thomas' testimony was critical to the jury's consideration of the case as he testified that he saw Birch set bags in the back of the Ford truck, walk away, return to retrieve the bags and then take a bus to Meadowood Mall. According to Detective Thomas, Birch had the keys to the Ford truck in his possession when he was booked into the jail. Detective Thomas also testified about Birch's purported statement to Detective Bellamy regarding what Birch did to support a drug habit. Ex.105 at 144-53. The court avoided the question rather than seek to provide a playback or transcript of Detective Thomas' testimony by merely telling the jury there was no transcript or video of Detective Thomas's testimony and that they needed to rely on their notes and recollection. Ex. 106 at 227, 18-20.

9. Because the jury was actively deliberating as to whether to acquit him or find him guilty,

Birch had a right to participate in a conference regarding a jury question about the key witness's testimony. Had Birch been permitted to attend the conference regarding the jury question, he would have been able to advise and communicate to his counsel his concerns and demand a read back to the jury of any available transcript of that testimony, and the outcome of the trial may well have been different. The district court's failure to provide Birch an opportunity to be present for a play back of Detective Thomas's trial testimony violated Birch's Sixth Amendment right to a fair trial and to be present during critical stages of the trial and resulted in error that was not harmless.

10. For the above reasons the writ should be granted as to both the Sears and Ford truck cases and the convictions vacated.

## GROUND FOUR

**BIRCH WAS DENIED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT A FINDING OF GUILT OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.**

**Statement of Exhaustion**: This claim was presented as Ground 5 in the direct appeal from the judgment of conviction and sentence in the Sears case, NSC docket #53536, and as Ground 4 in the appeal from the judgment of conviction and sentence in the Ford Truck case, NSC docket #53535 (Ex. 155 at 21-22; Ex. 156 at 19-21; Ex. 159 at 11-12); and was denied in the Order of Affirmance on direct appeal (Ex. 163 at 2-3, 5).

1. Sufficient evidence to support a verdict beyond a reasonable doubt must exist in order to satisfy the Due Process Clause of the United States Constitution.

2. Sears Case. Under case number CR08-1585, Birch was charged in an information with burglary for allegedly stealing several tools from a Sears store in Reno on February 21, 2008. Ex. 56.

3. The State's evidence at trial established that, on February 21, 2008, Detective Reed Thomas, Officer Scott Smith and Sergeants Clint Bellamy and Gerald Rhodes were conducting surveillance at a Walmart in Reno. Ex. 97 at 96-97, 144-45, 155. They were stationed in the parking lot when they saw Birch going in and out of Walmart carrying white plastic Walmart bags. Id. at 97, 99. Birch eventually walked over to the bus stop and got on a bus. He later transferred to a second bus and

took it to the Meadowood Mall in Reno. Id. at 99-100.

4. Still carrying the white bags, Birch entered the mall through the south doors. Ex. 97 at 100. Detective Thomas continued to watch him and saw Birch enter a Sears store. Birch stopped at the customer service desk and left his white plastic bags. Id. at 101-03. Birch then entered the hardware department. Id. at 102. At that point, Thomas left the store and remained outside the store while Birch was inside. Id.

5. Meanwhile, Sergeant Gerald Rhodes went to the Sears' loss prevention office and spoke to Jeremy Tye, a loss prevention associate. Ex. 97 at 110, 146. He asked Tye to locate Birch on the stores surveillance system, which he did. Id. at 112-13. Tye and Rhodes watched Birch on the surveillance videos for nearly two hours. Id. at 115. The surveillance videos (attached as Ex. 177-180) were admitted into evidence and shown to the jury. Ex. Id. at 116.

6. Birch eventually went over to the store's open tools area. Birch stayed there for almost an hour, walking up and down the aisles and looking around. Ex. 97 at 114. Sergeant Rhodes saw Birch squat down and pull items off of the hanging rods, including a wrench. Birch would then move to areas outside of the view of the surveillance camera. Id. at 149-50. For his part, Tye claimed to see Birch picking up tools and "concealing" them in his jacket pockets. Id. at 115, 127-28. However, the videos do not show this Birch concealing anything in his pockets. At one point, the video zoomed in on Birch's pocket and an indistinguishable object can be seen. Tye and Sergeant Rhodes admitted that they did not know whether Birch had any tools on him when he entered the store. Id. at 139-40, 151-52.

7. Birch stopped at the customer service desk on his way of the store and grabbed the white plastic bags. Ex. 97 at 104. Once Birch had exited the mall, officers stationed outside detained him. Id. at 104-05. Officer Smith searched Birch and found five Craftsman wrenches and a pair of pliers in his jacket pockets. Id. at 155-57, 159-60. Birch was brought back to Sears and the tools were photographed. Id. at 135-36, 161. Sergeant Rhodes could not definitively state that one of the wrenchs in the photo was the wrench that he saw Birch grab. Id. at 151.

8. Smith found a wallet in Birch's possession. Birch was carrying $1.27. Smith did not find any credit or debit cards in Birch's possession. He did not have a checkbook or giftcards. Ex. 97 at 161-62. The wallet was not checked into evidence but left with Birch's property. Id. at 165-66.

9. At the police station, Sergeant Clint Bellamy and Detective Thomas spoke with Birch after Birch waived his Miranda rights. Ex. 97 at 105-06, 172-73, 182, 184-86. During the interview, Birch stated that he "steals" to support his drug habit. Id. at 188. At one point, Thomas said to Birch that they had him "dead bang on Sears." Birch agreed. Id. at 188-89.

10. The defense called Evo Novak, who was an investigator for the Washoe County Public Defender's Office. He worked on Birch's case. He testified that Birch's wallet was not listed on the Washoe County Sheriff's property form. Ex. 98 at 214-16. Birch's other property, including what had allegedly been found in the wallet, was listed on the form. Id. at 217-19.

11. Detective Thomas was recalled. He read from the recorded version of Birch's statement. Birch stated, "I have a story, man. I lost control over a female. I totally lost control of someone – and then there's a hesitation. And he said, fucking doing drugs and stealing to support my habit and her habit and her friend and through me she was supporting three other guys that she was screwing." Ex. 98 at 228.

12. In rebuttal, the State recalled Officer Smith. He testified that, after the search, the wallet was placed back in Birch's pocket. Ex. 98 at 237.

13. The evidence was insufficient to support the conviction. No witness personally observed Birch steal anything. The surveillance videos do not ever show Birch concealing tools on his person. No witness could testify about what Birch had in his possession prior to entering the store. While the video seemed to show a metal object in Birch's pocket, it was impossible to see what the item was. Sergeant Rhodes could not confirm that one of the wrenches found on Birch was the same wrench he saw Birch handle in the store. The evidence that Birch had the intent to steal at the time he entered Sears was non-existent. There was also the suspicious fact that the police lost Birch's wallet. Even the court acknowledged at sentencing that this was a close case. Ex.111 at 41.

14. Ford Truck. Under case number CR08-1586, Birch was charged in an information with possession of a stolen Ford Truck in a parking lot outside a Walmart in Reno on February 21, 2008. Ex. 57.

15. The State's evidence at trial established that, on February 21, 2008, Detectives Reed Thomas and David Frankel and Officer Scott Smith were surveilling Walmart and saw Birch walking

around the parking lot. Ex. 105 at 83-85, 108, 133-34. Birch was carrying a white shopping bag. Id. at 86, 136. The officers saw Birch put the bag in the bed of a red Ford pickup truck with license plate 275 VBA. Id. at 110, 136. Birch walked away from the truck, but later returned to the truck and grabbed two bags out of the bed of the truck. Id. at 86, 111, 138. Birch left the parking lot and got on a bus. He transferred to a second bus and went to the Meadowood Mall. Id. at 88-89, 111-12, 140. When he exited the mall, Birch was arrested on an unrelated charge. Id. at 88-89.

16. Officer Smith searched Birch's person and found a set of keys in his left front pants pocket. One of the keys had a Ford emblem on it. Ex. 105 at 90. Officer Smith gave the keys back to Birch. Id. at 90, 141.

17. The officers admitted that they never saw Birch open the doors to the truck and never saw Birch driving the truck. They never saw Birch get into the cab of the truck. Ex. 105 at 93, 123, 167. They did not know how the truck got to the parking lot. Id. at 124, 166.

18. Detective Thomas was present when Birch was interviewed. Birch said that it was "Shane's truck." Ex. 105 at 152, 156.

19. Detectives Thomas and Frankel ran the truck at the time of Birch's arrest but it was not reported as stolen. Ex. 105 at 112-13. On the following day, February 22, 2008, the records clerk informed them that the truck was now being reported as stolen. Id. at 114. Frankel accessed Birch's property and retrieved the key ring that was found in his possession. Id. at 116, 160. The key ring had two keys with the Ford emblem. Id. at 116. Frankel filled out a property receipt for the keys. Frankel admitted that the property receipt was dated February 21, 2008. Id. at 116-18.

20. Thomas and Frankel went back to the parking lot and tried the keys. One of the keys opened the door to the truck. Ex. 105 at 120-21, 161. The second key fit in the ignition and it turned the ignition, but the truck would not start because the battery was dead. Id. at 120, 161. Thomas called the owner of the truck, Robert Wilson, and asked him to come pick it up. Id. at 162.

21. Robert Wilson lived in Douglas County and worked in, among other things, snow removal. Ex. 105 at 95, 102. He parked his trucks near the Carson Valley Center in Douglas County. Id. at 95. On February 22, 2008, he noticed that one of his trucks had been stolen. It was a red 1976 Ford truck with license plate 275 VBA. Id. at 98-99. It was valued at less than $2500. Id. at 98. He

reported it stolen to the police on February 22, 2008. Id. at 96. He had one set of keys for the truck and they had been left under the floor mat. Id. at 100, 107. The last time he had seen the truck was two days earlier. Id. at 100-01.

22. Wilson received a call from the police about the truck and went to Reno to pick it up. Ex. 105 at 101. The truck's battery was dead, but he jumped it. Id. at 103. Nobody named Shane worked for him. He had only met one Shane, 15 years earlier, and he was now living "back East." Id. at 104-05, 106.

23. The evidence was insufficient to support the conviction. There was no evidence that Birch ever entered the truck, drove the truck, or did anything other than access the truck's wide-open bed. There was no evidence showing when the truck entered the lot or that it was Birch who drove it to the lot. There was no evidence that Birch knew that the truck was stolen or how he even came into possession of the keys. Birch did not know the owner of the truck, who resided in Douglas County. There was no evidence to show that Birch was anywhere near the Carson Valley Center, or had the capability to travel to that area, at the time the truck was stolen.

24. For these reasons, the evidence cannot be considered constitutionally sufficient in either the Sears case of the Ford Truck case. The writ should be granted and Birch's conviction and sentence vacated.

## GROUND FIVE

### BIRCH WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO SELF REPRESENTATION WHEN THE COURT FAILED TO HOLD A HEARING PURSUANT TO FARETTA V. CALIFORNIA WHEN BIRCH REQUESTED THE OPPORTUNITY TO REPRESENT HIMSELF.

**Statement of Exhaustion**: This claim was presented as Ground 4 in the direct appeal from the judgment of conviction and sentence in the Sears case, NSC docket #53536 (Ex. 155 at 20-21; Ex. 160 at 11-12); and was denied in the Order of Affirmance on direct appeal (Ex. 163 at 5).

1. Under the Sixth and Fourteenth Amendments to the United States Constitution, a defendant has the right to self-representation. Birch hereby incorporates Ground 1 as if fully set forth herein.

2. On September 9, 2008, Robert Bruce Lindsay was assigned to represent Birch in the Sears

and Ford truck cases. Exs. 64-66. There were strong indications on the record that there had been a collapse in the relationship between Lindsay and Birch soon after he had been assigned. Ex. 74. Birch took every step he could to convey this to the court in order to obtain counsel who would advocate on his behalf. As early as October 24, 2008 – months before the trials began – Birch informed the court that Lindsay was not communicating with him, was not conducting an investigation, and was not accepting his phone calls. Birch stated that Lindsay had made threatening gestures towards him the night before. Id. at 9-11. The court did not address the breakdown in the relationship.

3. At the January 9, 2009 motion to confirm trial hearing, Birch asked for an adjournment to hire an attorney or hire a private investigator to prove his claims against Lindsay. The court denied the request. Ex. 78 at 6-7. In response, Birch spit in Lindsay's face. See, e.g., Ex. 97 at 14. At the following court date on January 14, 2009, held in chambers outside Birch's presence, Lindsay argued that Birch's conduct should result in a waiver of appointed, citing to Garey v. United States, 540 F.3d 1253 (11th Cir. 2008). Ex. 81 at 3-4, 8-9. The court did not address Lindsay's argument.

4. At a court date on January 23, 2009, Birch once again complained about Lindsay, saying that he had not done any investigation, had not filed appropriate motions, and had not discussed the defense with him. Ex. 93 at 5, 8-9. He had filed 43 complaints against Lindsay in "an attempt to get rid of him." Id. at 5. Birch added that Lindsay was rude and abrasive to him, saying "I'm never going to forget this. Then he said, if I come back dirty, I'm going to have you charged." Id. at 7-8. Lindsay also said, "I want you to beg me to come see you." Id. at 8. Birch asked the court to relieve Lindsay. Id. at 7. The court did not address the request.

5. Before the Sears trial began, Birch once again stated that he did not want Lindsay representing him. Ex. 97 at 6. Birch specifically asked to represent himself and asked for a couple of weeks to prepare. Id. at 7. Birch asked the court for the continuance or to "get rid of Mr. Lindsay." The court denied the request. Id. at 12.

6. As can be seen, Birch expressly and clearly asserted his desire for self-representation. Yet, the court never conducted the required hearing. This request was made on the heels of the court repeatedly and summarily denied Birch's multiple requests to replace Lindsay with substitute counsel. Under those circumstances, it was more than reasonable for Birch to make the request at the time that

he did. The court refused to even consider the request for self-representation at all, much less hold a hearing to resolve the request as required by Faretta v. California, 422 U.S. 806 (1975). Such failure denied Birch his Sixth and Fourteenth Amendment right to self-representation. The writ should be granted and Birch's convictions vacated.

## GROUND SIX

**THE PROSECUTOR'S PRESENTATION OF TESTIMONY AS TO THE PETITIONER'S SILENCE DURING A POLICE INTERVIEW FOLLOWING THE SEARS ARREST AND ASSERTION IN CLOSING ARGUMENT THAT SUCH SILENCE WAS EVIDENCE OF BIRCH'S GUILT OF THE CRIME CHARGED DENIED HIM HIS FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT.**

Statement of Exhaustion: This claim was presented as Ground 3 in the direct appeal from the judgment of conviction and sentence in the Sears case, NSC docket #53536 (Ex. 155 at 28-29); and was denied in the Order Of Affirmance on direct appeal (Ex. 163 at 6).

1. After Birch signed a form with respect to waiver of a defendant's rights under Miranda v. Arizona he was interviewed on February 21, 2008, at the Reno Police Department's headquarters. Ex. 97 at 182-84. According to the trial testimony of one of the two officers conducting the interview (Officer Bellamy), Birch made the following statements at that time.

> A. He told me that he steals to support his drug habit.
>
> Q. Okay. Later on in the interview, Mr. Birch was confronted with or advised with a statement, which was said, we got you dead bang on Sears?
>
> A. Yes.
>
> Q. You remember that being advised to the defendant?
>
> A. Detective Thomas told him that, we have you dead bang on Sears, which I understood as we know you did the incident at Sears and Mr. Birch agreed. He didn't say anything that would explain how he did not commit that act at Sears.
>
> . . . . .
>
> Q. How long did your interview with the defendant last?
>
> A. It was, I believe, just under an hour and a half.
>
> Q. Okay. At any time during the course of that hour and a

> <u>half interview, did he deny his culpability or responsibility at Sears</u>?
>
> A. <u>Not one time</u>.
>
> Q. <u>Did he at any time during that interview claim that you guys had the wrong guy</u>?
>
> A. <u>Not at all</u>.

Ex. 97 at 188-89 (emphasis added).

2. The judge had ruled pretrial that the testimony concerning Birch's silence with respect to denial of guilty, as highlighted above, was admissible.

> . . . I will permit the question and answer of the detectives, during the entire interview with the defendant, at no time did he deny culpability or claim innocence. I think that's a fair question to be asking, for the detectives to say, no, he didn't. I think that's fair game.

Ex. 97 at 81-82.

3. Prior to trial, defense counsel had lodged his objection to the introduction against Birch of his silence respecting culpability for the Sears matter but the court overruled such objection and allowed such evidence into the case.

> MR. LINDSAY: . . . I don't know that you're not allowed to stand silent when accused. We don't have the tacit admissions they had in the Middle Ages, you're a witch and if they don't - - if you don't deny you're a witch, they burn you. I see it as an enormously different matter, because I don't think tacit admissions are admissions.
>
> . . . . .
>
> MR. LINDSAY: If you don't deny it , is that an admission?
>
> THE COURT: I don't want to get too academic. Your record is made. That will be the ruling of the court.

Ex. 97 at 82-84.

4. At closing argument the state characterizes Birch's silence as proof that he is guilty of the burglary charged.

> . . . And we get to the interview, an hour and a half long interview. At no time did Mr. Birch say, I didn't do it. At no time did he say, I walked into Sears with these tools.
>
> What did he say? He said, yeah, you guys have me dead bang at Sears. Common sense and judgment, ladies and gentlemen, that's what we instill in you as jurors and expect you to use. To the question of

stealing there's no question there.

Ex. 98 at 269.

5. On direct appeal the Nevada Supreme Court affirmed the trial court's admission of such evidence citing United States Supreme Court authority deemed to be controlling.

> We conclude that this argument lacks merit. As Birch waived his right to remain silent and spoke with detectives, the State's questions concerning his failure to deny the charges did not constitute improper comment on his right to remain silent. See Anderson v. Charles, 447 U.S. 404, 408 (1980) (providing that questioning about prior inconsistent statements does not improperly comment on right to remain silent because defendant was not induced to remain silent by warnings) . . . .

Ex. 163 at 6. In doing so the court unreasonably applied Anderson v. Charles and acted contrary to the clearly established federal law found in Doyle v. Ohio, 426 (426 U.S. 610 (1976), where the Court found it implicit in the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), that a defendant not be penalized for his silence. In Anderson the Supreme Court expressly declined to apply Doyle to preclude impeachment by prior inconsistent statements not by silence, a circumstance not present in this case.

6. The prosecutor's assertion to the jury that Birch's silence constituted proof of guilt for the Sears matter violated Doyle, the Nevada Supreme Court's affirmance being a decision contrary to clearly established federal law, i.e. Doyle. This claim is, therefore, reviewable de novo under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Applying such standard of review it is clear that the prosecution's reference to Birch's silence violated Doyle and that, in light of the harm such references caused in allowing the jury to convict Birch because of his silence during police interrogation, the writ should be granted and the Sears conviction reversed.

## GROUND SEVEN

**SENTENCING BIRCH TO CONCURRENT LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCES FOR THE SEARS AND FORD TRUCK MATTERS CONSTITUTED EXCESSIVE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND DENIED PETITIONER HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.**

Statement of Exhaustion: This claim was presented as Ground 6 in the direct appeal from the judgment of conviction and sentence in the Sears case, NSC docket #53536, and as Ground 7 in the direct appeal from the judgment of conviction and sentence in the Ford Truck case, NSC docket #53535 (Ex. 155 at 22-27; Ex. 156 at 24-28; Ex. 159 at 13-15; Ex. 160 at 14-16.

1. Based on the state's requests set forth in Count II of the amended informations (Exs.91 & 103), on March 27, 2009, the Honorable Patrick Flanagan, District Judge, Second Judicial District Court, Reno, Nevada, adjudicated Birch as an habitual criminal and sentenced him to concurrent life without the possibility of parole (LWOP) sentences for the crimes of burglary (Sears store, Case No. CR08-1585) and possession of a stolen vehicle (Ford truck, Case No. CR08-1586). (Ex. 113 & 114.) Under Nevada Revised Statute ("NRS") 207.010 if Birch was proven to have three prior felony convictions the sentencing judge could, but was not required to, find him to be an habitual criminal and sentence him on each count of conviction to "(1) For life without the possibility of parole; (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or (3) for a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served." NRS 207.010(1)(b).

2. Birch's habitual criminal sentences were based on the following prior 8th Judicial District Court, Clark County, Nevada, felony convictions: (1) 2000 burglary conviction, Case No. C156435, sentenced to 16-72 months consecutive to Case No. C141122 (Ex. 173), (2) 1998 burglary conviction, Case No. C141122, sentenced to 16-72 months suspended and placed on probation (Ex. 172), (3) 1994 possession of a controlled substance conviction, Case No. C108104, sentenced to one year in prison (Ex. 171), (4) 1984 possession of stolen property conviction, Case No. C64311, sentenced to 10 years imprisonment (Ex. 170), (5) 1975 sale of a controlled substance conviction, Case No. 32226, sentenced to six years' imprisonment consecutive to sentence in Case No. 29835 (Exs. 169), and (6) 1976 burglary conviction, Case No. 29835, sentenced to seven years' imprisonment (Ex. 168).

3. The prior convictions set forth above do not warrant LWOP sentences since none involve violence; one was for selling heroin in 1974, 35 years prior to sentencing; one was for burglary in 1975, 34 years earlier; one was for possession of stolen property and entailed possession of a small amount of jewelry in 1983, 26 years earlier; and one was for possessing marijuana in 1992, 17 years earlier. The other two convictions were for burglary offenses, the latest of which occurred in 1998. In short, the

offenses used to support the habitual criminal finding were generally stale and remote. Moreover, as testified to by Birch, one of the burglary convictions concerned the theft of Christmas cards from a Hallmark store and another theft of a bottle of Vodka from a grocery store. Ex. 111 at 18.

4. In Nevada judges have discretion to decline to sentence a defendant as an habitual criminal when the prior offenses are stale or trivial or where an adjudication of habitual criminality would not serve the purposes of the statute or interests of justice. Due process requires the district court to exercise its discretion and weigh the appropriate factors for determining whether it was "just and proper" for the defendant to be punished as a habitual criminal before adjudication. Here, the court's finding "that the offenses were recent and that it is just and proper, based upon the nature and gravity of the prior convictions to enhance the defendant's sentence pursuant be [sic] to NRS 207.010" (Ex. 111 at 41, ll. 18-21) (emphasis added) is factually wrong. The predicate felonies were not recent.

5. Nevada's habitual criminal statute (NRS 207.010) creates a liberty interest in sentencing procedures protected by the Due Process Clause of the Fifth and Fourteenth Amendments. If the state court fails to properly determine that it was just and proper for the defendant to be adjudged a habitual criminal, the court has violated the defendant's rights to due process. In this case, the court's application of NRS 207.010 was an abuse of discretion denying due process, produced an excessive sentence and constituted cruel and unusual punishment under the Eighth Amendment.

6. The Eighth Amendment of the United States Constitution forbids an extreme sentence that is grossly disproportionate to the crime. While the Court disclaimed consideration of Birch's misbehavior in court in sentencing him the LWOP sentences suggest otherwise. The permanent exclusion of parole[9] for a non-violent offender is a sentence grossly disproportionate to the crime.

7. In light of the non-violent nature of the crimes for which Birch was sentenced in these cases and the generally stale and remote predicate felonies set forth above, it was not "just and proper" for the court to sentence Birch as an habitual criminal. In addition, the sentencing analysis conducted

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[9] Under Nevada law an LWOP sentence rendered on or after July 1, 1995, as here, may not be commuted by the Pardons Board to a sentence allowing parole.

by the court should have been conducted by a jury under Apprendi.[10] The court's failure to apply prevailing precedent and decline to sentence Birch to LWOP sentences as a habitual criminal denied Birch his right to due process of law under the Fifth and Fourteenth Amendments and to freedom from cruel and unusual punishment under the Eighth and Fourteenth Amendments.

8. The sentences are grossly disproportionate to the non-violent acts for which Birch was convicted and inconsistent with Nevada sentencing practices. As such, they are prohibited by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The writ should be granted and the sentences vacated.

**GROUND EIGHT**

**PETITIONER IS ENTITLED TO RELIEF BECAUSE OF THE CUMULATIVE EFFECT OF THE ERRORS RAISED ON APPEAL AND IN THIS PETITION.**

Statement of Exhaustion: This claim was presented as Ground 9 in the direct appeal from the judgment of conviction and sentence in the Sears case, NSC docket #53536, and as Ground 9 in the direct appeal from the judgment of conviction and sentence in the Ford Truck case, NSC docket #53535 (Ex. 155 at 29-30; Ex. 156 at 22-24; Ex. 159 at 15; Ex. 160 at 16); ; and was denied in the Order of Affirmance on direct appeal (Ex. 163 at 4, 7).

1. The errors set forth in Grounds One through Six above implicate important federal constitutional rights. The cumulative effect of the errors severely prejudiced petitioner, deprived him of a fair trial on the issue of his guilt or innocence of the charges and also rendered his convictions and excessively punitive sentence inherently unreliable.

2. The writ should be granted and petitioner's unconstitutional convictions and sentence vacated and corrected.

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[10] Counsel is aware of the contrary ruling by the Nevada Supreme Court on such issue and of contrary precedent in the United States Court of Appeals for the Ninth Circuit. Accordingly, he asserts such claim in order to preserve it for Birch with respect to any future litigation of his case.

## III.

## PRAYER FOR RELIEF

Accordingly, petitioner respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Birch brought before the Court so that he may be discharged from his unconstitutional confinement;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this amended petition and any defenses that may be raised by respondents; and

3. Grant such other and further relief as, in the interests of justice, may be appropriate.

DATED this 14th day of December, 2012.

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: */s/ Paul G. Turner*
PAUL G. TURNER
Assistant Federal Public Defender

**CERTIFICATE OF SERVICE**

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

That on December 14, 2012, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Jared M. Frost
Deputy Attorney General
Nevada Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

*/s/ Leianna Montoya*
Leianna Montoya, an Employee of the
Federal Public Defender's Office

IN THE SUPREME COURT OF THE STATE OF NEVADA

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|---|---|
| BRUCE HARRISON BIRCH, Appellant, vs. THE STATE OF NEVADA, Respondent. | No. 53535 |
| BRUCE HARRISON BIRCH, Appellant, vs. THE STATE OF NEVADA, Respondent. | No. 53536 |
| BRUCE HARRISON BIRCH, Appellant, vs. THE STATE OF NEVADA, Respondent. | No. 53537 ✓ |

FILED

MAR 11 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 53535 is an appeal from a judgment of conviction, pursuant to a jury verdict, for possession of a stolen vehicle. Docket No. 53536 is an appeal from a judgment of conviction, pursuant to a jury verdict, for burglary. Docket No. 53537 is an appeal from a judgment of conviction, pursuant to a guilty plea, for attempted grand larceny. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. We elect to consolidate these appeals for disposition. NRAP 3(b).

Birch argues that the district court abused its discretion in denying his motion for new counsel in all three cases. Birch was being represented by his third attorney after relationships with his prior counsel had deteriorated. Despite being spat on and attacked in court, Birch's counsel repeatedly assured the district court that despite Birch's behavior, he would zealously represent Birch. Therefore, Birch fails to demonstrate that the district court abused its discretion in this regard. See Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005).

Docket No. 53535

First, Birch argues that the use of visible physical restraints and a spit hood violated his right to a fair trial. Birch, who admitted that he had Hepatitis C, had spat in his counsel's face during a pretrial hearing. Further, he stabbed his counsel in the hand during a prior trial. Therefore, we conclude that the district court did not abuse its discretion in this regard. See Hymon v. State, 121 Nev. 200, 207, 111 P.3d 1092, 1098 (2005).

Second, Birch argues that his right to due process was violated because he was not present when a juror requested a playback of testimony during deliberations, which the district court refused. We conclude that this argument lacks merit. Birch did not "have an unlimited right to be present at every proceeding," and he failed to show that he was prejudiced by his absence. See Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001).

Third, Birch argues that there was insufficient evidence to sustain his conviction for possession of a stolen vehicle. The evidence adduced at trial shows that Birch placed one shopping bag into the bed of a pickup truck and later retrieved two bags from the bed of the truck. Further, when he was searched incident to an arrest on other charges, keys fitting the truck were discovered on his person. In addition, the owner testified that he reported the truck stolen and had not given Birch permission to use it. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Birch possessed the truck with reason to believe it had been stolen. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS 205.273(1)(b).

Fourth, Birch argues that the district court abused its discretion in admitting his statement to the police that he steals to support his drug habit. We conclude that this claim lacks merit. While the statement alluded to uncharged conduct, it was also relevant to Birch's motive for committing the instant crime, see NRS 48.045(2), and was not unduly prejudicial, Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 110 (2008).

Fifth, Birch argues that the district court improperly instructed the jury on consciousness of guilt. Because he failed to object, we review this claim for plain error. See Gaxiola v. State, 121 Nev. 638, 647-48, 119 P.3d 1225, 1232 (2005). As the instruction was not inconsistent with Nevada law, see State v. Salgado, 38 Nev. 64, 75-76, 145 P. 919, 923 (1914) (providing that statements that are intended to set up a false defense are admissible to show consciousness of guilt), overruled on other grounds by Bryant v. State, 72 Nev. 330, 305 P.2d 360 (1956), we conclude that Birch failed to demonstrate plain error.

Sixth, Birch argues that the district court erred in denying his motion to suppress. We conclude that this claim lacks merit. Officers did not need to obtain a warrant to inspect and remove keys from the property room at the jail once they had already been subject to search and seizure incident to Birch's arrest. See U.S. v. Turner, 28 F.3d 981, 983 (9th Cir. 1994).

Seventh, Birch argues that his sentence is cruel and unusual punishment and that the district court vindictively punished him for his outburst in court. Having found at least three prior felony convictions, the district court adjudicated Birch a habitual criminal. The sentence imposed is within the statutory limits, see NRS 207.010(1)(a), and Birch has not alleged that the sentencing statutes are unconstitutional. We conclude that the sentence imposed is not grossly disproportionate to the offense for purposes of the constitutional prohibitions against cruel and unusual punishment. See Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). We further conclude that Birch failed to demonstrate that the district court punished Birch for his behavior in court or otherwise abused its discretion in sentencing him. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

Eighth, Birch argues that cumulative error warrants relief. Because we conclude that Birch failed to demonstrate error with regard to any claims discussed above, he is not entitled to relief on this basis. Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

Docket No. 53536

First, Birch argues that the use of visible physical restraints and a spit hood violated his right to a fair trial. For the reasons stated above, we conclude that the district court did not abuse its discretion. See Hymon, 121 Nev. at 207, 111 P.3d at 1098.

Second, Birch argues that his due process rights were violated when he was not present for the exercise of peremptory challenges in chambers and for closing arguments after he had been removed for attacking his counsel. We conclude that this argument lacks merit because Birch did not "have an unlimited right to be present at every proceeding," Gallego, 117 Nev. at 367, 23 P.3d at 240, and he has not shown that he was prejudiced by those absences, see id. at 368, 23 P.3d at 240.

Third, Birch argues that the district court failed to conduct a Faretta[1] canvas when he requested to represent himself at trial. During a statement to the court in which Birch sought new counsel, Birch said, "I would like to represent myself, but I'm not capable at this point." He then requested a continuance of two weeks to prepare. Even if this comment can be construed as a waiver of his right to counsel, we conclude, based on the record, that the district court did not err in summarily rejecting Birch's request because it was untimely and made for the purpose of delay. See Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997); see also Vanisi v. State, 117 Nev. 330, 338, 22 P.3d 1164, 1170 (2001).

Fourth, Birch argues that there was insufficient evidence to sustain his conviction. The evidence adduced at trial shows that Birch entered a Sears store, knelt down beside a tool display, and exited the store with several wrenches and a pair of pliers in his pocket. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Birch entered the Sears store with the intent to commit larceny. See Jackson, 443 U.S. at 319; McNair, 108 Nev. at 56, 825 P.2d at 573; NRS 205.060(1).

Fifth, Birch argues that his sentence is cruel and unusual punishment and that the district court vindictively punished him for his

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[1]Faretta v. California, 422 U.S. 806 (1975).

outburst in court. Having found at least three prior felony convictions, the district court adjudicated Birch a habitual criminal. The sentence imposed is within the statutory limits, see NRS 207.010(1)(a), and Birch has not alleged that the sentencing statutes are unconstitutional. We conclude that the sentence imposed is not grossly disproportionate to the offense for purposes of the constitutional prohibitions against cruel and unusual punishment. See Blume, 112 Nev. at 475, 915 P.2d at 284; Harmelin, 501 U.S. at 1000-01 (plurality opinion). We further conclude that Birch failed to demonstrate that the district court punished Birch for his behavior in court or otherwise abused its discretion in sentencing him. See Houk, 103 Nev. at 664, 747 P.2d at 1379.

Sixth, Birch argues that the district court erred in admitting (1) evidence that during his police interview Birch did not deny culpability or profess his innocence and (2) prior bad act evidence of his drug addiction. We conclude that this argument lacks merit. As Birch waived his right to remain silent and spoke with detectives, the State's questions concerning his failure to deny the charges did not constitute improper comment on his right to remain silent. See Anderson v. Charles, 447 U.S. 404, 408 (1980) (providing that questioning about prior inconsistent statements does not improperly comment on right to remain silent because defendant was not induced to remain silent by warnings); see also Maginnis v. State, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977) (providing that defendant's failure to speak or equivocation in the face of accusation of having committed crime may be offered as implied admission of guilt). While the statement about his drug use alluded to uncharged conduct, it was also relevant to Birch's motive for committing the instant crime. See NRS 48.045(2).

Seventh, Birch argues that cumulative error warrants relief. Because Birch failed to demonstrate error with regard to any claims discussed above, he is not entitled to relief on this basis. Hernandez, 118 Nev. at 535, 50 P.3d at 1115.

Docket No. 53537

First, Birch argues that his sentence constituted cruel and unusual punishment and that the district court abused its discretion by relying on stale convictions and impalpable and highly suspect evidence in sentencing him. However, the 19-48 month sentence imposed is within the statutory limits. NRS 193.130(2)(d); NRS 205.222(2); NRS 193.330(1)(a)(4). Birch has not alleged that the sentencing statutes are unconstitutional, and we conclude that the sentence imposed is not grossly disproportionate to the offense for purposes of the constitutional prohibitions against cruel and unusual punishment. See Blume, 112 Nev. at 475, 915 P.2d at 284; Harmelin, 501 U.S. at 1000-01. Nor has Birch shown that the district court improperly relied on stale convictions or impalable evidence in sentencing him. McGervey v. State, 114 Nev. 460, 467, 958 P.2d 1203, 1208 (1998); Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Second, Birch contends that he should have been made to plead guilty to only one offense with two sentencing options instead of one felony and one misdemeanor offense. We conclude that this claim lacks merit. Birch acknowledged in his plea agreement and during the plea canvass that he was pleading guilty to both charges and that the district court would dismiss one at sentencing. As his judgment of conviction reflects only one charge, he cannot show that he was subject to redundant convictions. See Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751 (2003).

Third, Birch contends that the district court erred in permitting the State to amend the information. We conclude that this argument lacks merit becuase Birch waived any challenge to the denial of his due process rights by pleading guilty. See Tollett v. Henderson, 411 U.S. 258, 267 (1973); Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). Therefore, we conclude that this claim lacks merit.

Having reviewed the record on appeal, and for the reasons set forth above, we

ORDER the judgments of conviction AFFIRMED.

Hardesty, J.

Douglas, J.

Pickering, J.

cc: Hon. Patrick Flanagan, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

Supreme Court of Nevada

(O) 1947A

CODE 1850

FILED

MAR 27 2009

HOWARD W. CONYERS, CLERK
By: M. Conway
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

BRUCE HARRISON BIRCH,

Defendant.

Case No. CR08-1586

Dept. No. 7

## JUDGMENT

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

That Bruce Harrison Birch is guilty of the crime of Possession of a Stolen Motor Vehicle, a violation of NRS 205.273, a felony, as charged in the Amended Information, and this Court having found the Defendant to be a Habitual Criminal as defined in NRS 207.010, that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life, without the possibility of parole, to run consecutive to the sentence imposed in CR07-1714A and to run concurrent to the sentence imposed in Case No. CR08-1585, with four hundred (400) days credit for time served. It is further ordered

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that the Defendant shall pay the statutory Twenty-Five Dollar ($25.00) administrative assessment fee and the Court hereby waives attorney's fees relating to this case.

Dated this 27th day of March, 2009.

Patrick Flanagan
DISTRICT JUDGE

CODE 1850

FILED

MAR 27 2009

HOWARD W. CONYERS, CLERK
By: M. Conway
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

BRUCE HARRISON BIRCH,

Defendant.
_______________________________/

Case No. CR08-1585

Dept. No. 7

## JUDGMENT

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

That Bruce Harrison Birch is guilty of the crime of Burglary, a violation of NRS 205.060(1), a felony, as charged in the Amended Information, and this Court having found the Defendant to be a Habitual Criminal as defined in NRS 207.010, that he be punished by imprisonment in the Nevada Department of Corrections for a term of Life, without the possibility of parole, to run consecutive to the sentence imposed in CR07-1714A and to run concurrent to the sentence imposed in Case No. CR08-1586, with four hundred (400) days credit for time served. It is further ordered that the Defendant shall pay the statutory Twenty-Five Dollar ($25.00) administrative assessment fee, reimburse the County of Washoe the sum of Five Hundred Dollars ($500.00) for legal representation and submit to a DNA analysis test for the purpose of determining genetic markers and pay a testing fee of One Hundred Fifty Dollars ($150.00), if not previously ordered.

Dated this 27th day of March, 2009.

Patrick Flanagan

DISTRICT JUDGE