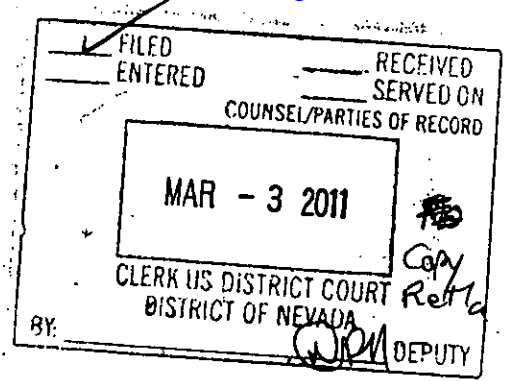


Matthew James Tjeltveit
 Name 83651
 Prison Number
Ely State Prison
 Place of Confinement



**UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA**

Matthew James Tjeltveit, Petitioner,)
 (Full Name))
 vs.)
E. K. McDaniel, Respondent,)
 (Name of Warden, Superintendent, jailor or)
 authorized person having custody of petitioner))
 and)
The Attorney General of the State of Nevada)

3:11-cv-00163

CASE NO. _____
 (To be supplied by the Clerk)

**PETITION FOR A
 WRIT OF HABEAS CORPUS
 PURSUANT TO 28 U.S.C. § 2254
 BY A PERSON IN STATE CUSTODY
 (NOT SENTENCED TO DEATH)**

- Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: Steven P. Elliot, In the Second Judicial District Court of the state of Nevada in and for the county of Washoe, Dept. #10
- Full date judgment of conviction was entered: 6/7/07. (month/day/year)
- Did you appeal the conviction? Yes ___ No. Date appeal decided: 1/22/08.
- Did you file a petition for post-conviction relief or petition for habeas corpus in the state court? Yes ___ No. If yes, name the court and date the petition was filed: In the Second Judicial District Court of the state of Nevada, Dept #10 8/5/08. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? Yes ___ No. Date the appeal was decided: 1/13/11. Have all of the grounds stated in this petition been presented to the state supreme court? Yes ___ No. If no, which grounds have not? _____
- Date you are mailing (or handing to correctional officer) this petition to this court: 03/01/2011
 Attach to this petition a copy of all state court written decisions regarding this conviction.

§2254-Form
 eff. 1/97

Paid Amt \$ 5.00 Date 3/3/2011
 Receipt # NVPW0252 Initials KLO

①

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? Yes No. If no, what was the prior case number? 3:08-cv-00054-LRJ-VPC And in what court was the prior action filed? U.S. District Court District of Nevada
- Was the prior action denied on the merits or dismissed for procedural reasons (check one). Date of decision: 4/28/09. Are any of the issues in this petition raised in the prior petition? Yes No. If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this successive petition? Yes No.
7. Do you have any petition, application, motion or appeal (or by any other means) now pending in any court regarding the conviction that you are challenging in this action? Yes No. If yes, state the name of the court and the nature of the proceedings: _____

8. Case number of the judgment of conviction being challenged: CR-OSP2796
9. Length and terms of sentence(s): Two terms of 20-Life consecutive
10. Start date and projected release date: 11-29-05 to Life
11. What was (were) the offense(s) for which you were convicted: Murder with the use of a firearm.

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

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

	Name of Attorney	Appointed	Retained	Pro se
arraignment and plea	<u>Jenny Hubach</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
trial/guilty plea	<u>John Calvert</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
sentencing	<u>John Calvert</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
direct appeal	<u>represented myself</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
1st post-conviction petition	<u>Aziz Merchant</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
appeal from post conviction	<u>Aziz Merchant</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2nd post-conviction petition	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
appeal from 2nd post-conviction	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

②

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

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 6th, 8th, and 14th Amendment right to Effective assistance of counsel based on these facts:

Petitioner's conviction was obtained as the result of ineffectiveness of counsel at trial, Strickland v. Washington, 466 U.S. 668 (1984), Counsel John Calvert did not follow trial strategy, he allowed the District attorney to make statements harmful to petitioner's case, without objection. Then counsel failed to provide jury instructions adequate for the crime committed, and obviously so, resulting in an ineffective assistance of trial counsel. Petitioner's counsel was laboring under a prejudicial conflict of interest, Wheat v. U.S., 486 U.S. 153 (1988) Petitioner's counsel was found out after trial to have been working with petitioner's previous counsel, Jenny Hubach, who petitioner had numerous personal conflicts with, which resulted in petitioner filing a complaint with the Nevada state bar. Yet John Calvert did not admit working with Jenny Hubach until after trial when, petitioner's counsel was ineffective at sentencing by failing to present mitigating evidence, Williams v. Taylor 528 U.S. 362 (2000), by failing to argue for a lesser sentence. Petitioner was denied right to counsel on appeal, Douglas v California; 372 U.S. 353 (1963), and petitioner's conviction was obtained as the result of ineffectiveness of counsel on appeal, Smith v. Robbins, 528 U.S. 259 (2000). When John Calvert, after trial and sentencing failed to file a direct appeal from conviction, resulting in the petitioner having to learn a brand new process on his own, and filing a late appeal that was subsequently dismissed because of said tardiness. Petitioner's conviction was a result of cumulative errors of counsel, i.e., errors that, although not prejudicial individually, are cumulatively prejudicial, Mak v. Blodgett, 970 F.2d 614 (9th cir 1992) apply and Strickland v. Washington 466 U.S. 668 (1984)

Exhaustion of state court remedies regarding Ground 1:

▶ **Direct Appeal:**

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

Yes ___ No. If no, explain why not: _____

▶ **First Post Conviction:**

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

Yes ___ No. If no, explain why not: _____

If yes, name of court: Second Judicial District court date petition filed 8/5/08

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

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

▶ **Second Post Conviction:**

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

___ Yes ___ No. If yes, explain why: _____

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

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

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

▶ **Other Proceedings:**

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

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

GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 6th, 8th, and 14th Amendment right to Confrontation of Witnesses, based on these facts:

The court admitted prejudicial hearsay that could not be effectively cross-examined by the defense, (or evidence that was admissible under state law, but which denied petitioner the right to confrontation), Douglas v. Alabama, 380 U.S. 415 (1965), and Dutton v. Evans, 400 U.S. 74 (1970). Petitioner's trial counsel and trial court allowed hearsay that could not be affectively argued when witnesses were allowed to testify that they knew, and heard statements from the petitioner, when in fact, they did not know, let alone hear statements from the petitioner, as well as allowing the District Attorney to make false statements directly to the jury without objection.

Exhaustion of state court remedies regarding Ground 2:

▶ **Direct Appeal:**

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

Yes ___ No. If no, explain why not: _____

▶ **First Post Conviction:**

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

Yes ___ No. If no, explain why not: _____

If yes, name of court: Second Judicial District Court date petition filed 8/5/08.

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

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

▶ **Second Post Conviction:**

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

___ Yes ___ No. If yes, explain why: _____

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

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

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

▶ **Other Proceedings:**

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

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

GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 6th, 8th, and 14th Amendment right to Due Process based on these facts:

There was a total failure to give jury instructions on every essential element of the offense. Sullivan v. Louisiana, 508 U.S. 275 (1993) The jury was instructed only on self defense and 1st degree murder, leaving out Manslaughter and 2nd degree, which denied petitioner the right to be convicted of the correct crime. Petitioner was convicted of murder without the court having instructed the jury that it could not convict of murder if it found that petitioner had a mitigating mental state. Sawyer v. Smith, 497 U.S. 227 (1990). Not only was the jury not given this instruction, but the petitioner was not given any type of psychological evaluation prior to trial. The prosecution obtained a conviction on a factual basis different than as charged. Russell v. U.S., 369 U.S. 749 (1962). The first degree murder that was obtained by prosecution, used the argument that petitioner was committing a felony when the murder was committed, however the felony that was supposedly being committed, was not used as a charge in any way against the petitioner

Exhaustion of state court remedies regarding Ground 3:

▶ **Direct Appeal:**

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

Yes ___ No. If no, explain why not: _____

▶ **First Post Conviction:**

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

Yes ___ No. If no, explain why not: _____

If yes, name of court: Second Judicial District Court date petition filed 8/5/08.

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

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

▶ **Second Post Conviction:**

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

___ Yes ___ No. If yes, explain why: _____

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

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

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

▶ **Other Proceedings:**

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



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

GROUND 4

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 6th, 8th, and 14th Amendment right to Due Process, based on these facts:

Petitioner's conviction was obtained in violation of a state statute (or state constitutional provision), which in turn denied petitioner his fundamental rights, Hewitt v. Helms, 59 U.S. 460 (1983), and Ford v. Wainwright, 447 U.S. 399 (1983). State law was violated so as to deny petitioner a state-created liberty interest in violation of the constitution. Clemons v. Mississippi, 494 U.S. 738 (1990). Under NRS 174.085, s.s. 5, it states that, "The state may voluntarily dismiss a criminal complaint without prejudice to the right to file another complaint", and "After the dismissal the court shall order the defendant released from custody". Now the initial arrest and charge, was on a criminal complaint, that was not dismissed after the petitioner's arrest, yet the prosecutor obtained a Grand Jury indictment, so that the petitioner's right to a preliminary hearing was denied. Had the prosecutor voluntarily dismissed the initial complaint there would be no violation, however, without that voluntary dismissal of the criminal complaint, the subsequent indictment that was pursued, could not have existed by law, let alone proceed to trial and conviction.

Exhaustion of state court remedies regarding Ground

▶ **Direct Appeal:**

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

Yes ___ No. If no, explain why not: _____

▶ **First Post Conviction:**

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

Yes ___ No. If no, explain why not: _____

If yes, name of court: Second Judicial District Court date petition filed 8/5/08

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

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

▶ **Second Post Conviction:**

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

___ Yes ___ No. If yes, explain why: _____

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

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

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

▶ **Other Proceedings:**

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

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

GROUND 5

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 6th, 8th, and 14th Amendment right to a fair trial based on these facts:

Petitioner's conviction was obtained as a result of the prosecutor's misstatements of fact, *Berger v. U.S.*, 295 U.S. 78 (1935). The prosecutor consistently argued that the murder was committed during a robbery that did not occur, as well as argued that the act of pulling a gun from the waistband up to firing ~~possession~~ was premeditation. Prosecutorial misconduct deprived petitioner of his constitutional rights. *Darden v. Wainwright*, 477 U.S. 168 (1986)

Exhaustion of state court remedies regarding Ground

▶ **Direct Appeal:**

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

Yes ___ No. If no, explain why not: _____

▶ **First Post Conviction:**

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

Yes ___ No. If no, explain why not: _____

If yes, name of court: Second Judicial District Court date petition filed 8/5/08.

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

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

▶ **Second Post Conviction:**

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

___ Yes ___ No. If yes, explain why: _____

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

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

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

▶ **Other Proceedings:**

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

POINTS AND AUTHORITIES**GROUND 6**

Matthew Tjeltveit's trial counsel's decision to pursue a self-defense theory of the case fell below an objective standard of reasonableness that prejudiced Matthew Tjeltveit in violation of his right to effective assistance counsel under the federal constitution's 5th, 6th, 8th and 14th amendments.

Matthew Tjeltveit's trial counsel should not have pursued a self-defense theory that suggested Matthew was protecting his child against an unsubstantiated threat that the victim had no present ability to perform at the time the victim uttered the threat. Trial counsel's performance in pursuing a self-defense theory of the case fell below an objective standard of reasonableness that prejudiced Matthew. Instead, trial counsel should have pursued a voluntary manslaughter theory of the case. Trial counsel's ineffective self-defense theory of the case along with trial counsel providing a self-defense jury instruction to the jury prejudiced Matthew and worked to his extreme detriment. But for trial counsel's ineffectiveness in pursuing a self-defense theory of the case that prejudiced Matthew, he would have been acquitted for first-degree murder and instead would have been convicted of voluntary manslaughter.

The State's case that Matthew killed the victim was about as airtight as a case could be because Matthew admitted killing the victim to five separate individuals, all of whom were Matthew's friends or acquaintances and all of whom were called during the State's case-in-chief. See Trial Transcript of Monday, March 19 and Tuesday March 20, 2007¹ at 160:10-11, 161:19-23, 167:10-11(Ashlee Reedy, friend of Matthew), 192:18-20, 194:2-3, 196:21-24(Jason Holder, friend of Matthew), 274:22-24, 275:1-2, 279:1-24(Krystal Gari, former live-in girlfriend with Matthew and had son together), 290:22-24, 291:1-4 & 17-19, Krista Gaddis, acquaintance and on friendly terms with Matthew), and 296:22-24, 298:16-24, 299:1-8, 300:3-10(Breanne Cambra, formerly engaged to Matthew and still has feelings for Matthew). Matthew also testified and did not deny killing the victim. Id. At 319:3-7.

The sole question for the jury was whether the killing should be punished as first degree murder or manslaughter as self-defense was factually impossible. The jury however never was faced with such a dichotomous decision. Instead, Matthew's trial counsel pursued a self-defense theory of the case that any lawyer objectively looking at the facts of this case should have known would convince no rational juror to acquit Matthew.

Matthew testified and admitted to shooting the victim in the head after he threatened to cut up his son and send his son to him in pieces. In Matthew's own words, he "snapped" and "immediately" shot his erstwhile friend in the face. Id. At 319:3-7. Rather than rebut the contention of voluntary manslaughter, the State's case in chief focused on calling witnesses to whom Matthew admitted killing the victim immediately after he threatened to cut up his son. Ashley Reedy, a friend of Matthew's, testified that Matthew told her that he had shot the victim in the head in response to the victim threatening to cut up his son into pieces. Id. At 169:13-18. Jason Holder, a friend of Matthew's, testified in even more blunt terms, stating that Matthew told him that he "fucked up" and "snapped" and that the victim was dead. Id. At 196:23-24. Notably, in the State's case-in-chief, the State never attempted to impeach any witness that presented Matthew as having only shot the victim in reaction to his threat regarding Matthew's son. Instead, the State focused on showing the jury that Matthew in fact did kill the victim. The State through its own case-in-chief left open i.e. created a factual dispute regarding whether the killing was premeditated and deliberate or the result of a rash impulse where the voice of reason and humanity did not intervene. In short, it was the State that created the factual dispute of whether the victim's murder should be punished as first degree murder or voluntary

¹The trial transcripts for March 19 and 20, 2007 are one volume numbered from page 1-352. The trial transcript for March 21, 2007, the last day of the trial, was prepared by a different court reporter and begins again at page 1.

1 manslaughter. Yet, trial counsel ignored the weakness (or perhaps invitation) in the State's case to
2 argue voluntary manslaughter and instead pursued a self-defense theory supported by absolutely no
3 evidence at trial.

4 The prejudice that inured to Matthew is substantial. First degree murder carries a maximum
5 penalty of life without the possibility of parole whereas voluntary manslaughter carries a maximum
6 penalty of 10 years with minimum parole eligibility of 1 year. See NRS 200.0304(b), NRS 200.080.

7 But for trial counsel's ineffectiveness in pursuing a self-defense theory of the case supported by
8 no evidence, Matthew would have been acquitted of first degree murder and convicted of voluntary
9 manslaughter. If granted an evidentiary hearing, Matthew's trial counsel would testify as follows: He
10 would admit that had he actually thoroughly discussed and reviewed the facts of this case with his client
11 and based upon the standard of what a reasonable lawyer would do, he would have declined to pursue
12 a self-defense theory of the case because no rational jury would have found that Matthew acted in self-
13 defense under the circumstances. Trial counsel would admit that this is the classic case of a factual
14 dispute regarding whether the defendant committed voluntary manslaughter and that but for his
15 ineffectiveness, Matthew would have been acquitted of first degree murder and convicted of
16 manslaughter. Trial counsel would admit that this theory of the case fell below an objective standard of
17 reasonableness and that his theory of the case prejudiced Matthew because self-defense was supported
18 by no evidence, but voluntary manslaughter was supported by ample evidence.

19 Matthew would testify as follows: Matthew never agreed with his trial counsel to pursue a self-
20 defense theory of the case or any other theory for that matter. In fact, trial counsel never discussed his
21 trial strategy with his client. Had trial counsel thoroughly and properly discussed trial strategy with his
22 client, Matthew would testify that his sole focus at trial would be to convince the jury to acquit him of
23 first-degree murder and convict him of voluntary manslaughter.

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POINTS AND AUTHORITIES**GROUND 7**

Matthew Tjeltveit's trial counsels' failure to ask for a jury instruction on when Matthew formed the requisite intent to commit the alleged robbery of the victim fell below an objective standard of reasonableness that prejudiced Matthew Tjeltveit in violation of his right to effective assistance counsel under the federal constitution's 5th, 6th, 8th, and 14th amendments.

Based upon the evidence produced at trial, there was substantial dispute as to whether Matthew shot the victim because of the victim's threat to cut his son up into little pieces or did so to rob the victim of his possessions. This is important because the State proceeded upon alternate theories of first degree murder as allowed by law; felony murder with robbery or attempted robbery being the underlying felony and murder occurring with malice, premeditation and deliberation. See Indictment, filed December 7, 2007, on file herein. It was undisputed that Matthew was in possession the victim's possessions such as his car after the killing took place. The question is whether Matthew formed the intent to rob before or after the killing. Jury instruction 21 defined felony murder in the contest of the State's theory of robbery. Trial counsel however made no request for an instruction that if the intent to commit the robbery or attempted robbery of the victim was formed after the killing, then the State has not proven that Matthew is guilty of felony murder beyond a reasonable doubt because the requisite intent to commit robbery was not present during the killing. In other words, if the jury found that Matthew did it fact kill the victim in reaction to the victim's comments about his son and only after killing the victim did Matthew panic and take the victim's car, then Matthew could not be guilty as a matter of law of felony murder based upon the State's theory.

Matthew's behavior immediately after the killing supports a theory of an individual who shot the victim impulsively in reaction to the threat he made towards his son and only after panicked and drove off in the victim's car. Matthew first called his friend Jason Holder, who was with his girlfriend Ashlee reedy. Ashlee Reedy initially picked up the phone in the early morning hours immediately after the killing and noted Matthew's panicked voice. See March 19 and March 20, 2007 Trial Transcript at 163:20-23. Matthew's voice was also stressed-out, nervous and scared. Id. At 164:11-15. The state's own question and subsequent answer by Ashlee reedy supports Matthew's potential defense to felony murder that he did not intend to rob the victim but only took the victim's car after he panicked.

Q: So it was in response to that statement by [the victim] about the defendant's children and cutting them into pieces and sending them to him, according to the defendant that caused him to react and shoot the victim in the head.

A: Correct.

Id. At 170:11-15. The State did not produce a single witness that produced a different reason for why Matthew shot the victim in the head as stated by Matthew to any State witness.

The defendant need not be the one to present evidence that supports his theory of defense. Rosas v. State, 122 Nev. 1258, 147 P.3d 1101, 1108 (2006). Trial counsel should have immediately noticed this pattern in the testimony of the State's witnesses and asked for an instruction that the jury make a determination whether Matthew formed the intent to rob before or after the killing and if the intent was formed after that the jury must acquit Matthew of felony murder.

The evidence for traditional first degree murder requiring premeditation, deliberation willfulness and malice aforethought was weak. The State submitted general jury verdict forms without requiring unanimity as to the theory of first degree murder as allowed by Schad v. Arizona, 501 U.S. 524 (1991) and Crawford v. State, 121 Nev. 746, 750, 121 P.3d 582, 586 (2005). It is likely that the jury convicted Matthew of first degree murder based upon felony murder without any consideration of when he formed the intent to rob before or after the killing. But for trial counsel's ineffectiveness in failing to request an instruction regarding a jury determination of when Matthew formed the intent to

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rob the victim, Matthew would have been acquitted of felony murder. The jury would have also unlikely convicted Matthew of traditional first degree murder and instead convicted Matthew of voluntary manslaughter. Of course, the prosecution is going to disagree. But the point is that it was ultimately for the jury to decide whether or not Matthew formed the Intent to rob before or after the killing and Matthew's ineffective trial counsel prevented the jury from making this determination.

If granted an evidentiary hearing, Matthew would testify that he did not form the intent to take the victim's vehicle until after he impulsively shot the victim in the head as a result of the victim threatening to cut up his son. He only took the vehicle after he panicked as a confirmed by the Stat's own witnesses presented during the State's case-in-chief. He would testify credibly and the jury would have believed and acquitted him of first degree murder and convicted him of voluntary manslaughter.

Trial counsel would admit that he should have asked for a jury instruction regarding the precise time of the formation of the intent to take the victims possessions. He would admit that but for his failing to ask for an instruction regarding a jury determination of when his client formed the intent to rob the victim, Matthew would have been acquitted of felony murder and first degree murder and convicted of manslaughter.

POINTS AND AUTHORITIES**GROUND 8**

Matthew Tjeltveit has a valid appeal deprivation claim under Nevada Rules of Appellate Procedure 4(c) that went into effect July 1, 2009.

Nevada rule of Appellate Procedure 4(c) allows for the untimely notice of appeal from a judgment of conviction provided a post-conviction petition for writ of habeas corpus has been timely filed and asserts a viable claim that the petitioner was unlawfully deprived of the right to a timely direct appeal.

Matthew filed his original post-conviction petition of August 5, 2009. The Nevada Supreme Court issued the remittitur from Matthew's untimely pro per notice of appeal on January 25, 2008. Matthew's petition is therefore timely properly filed in accordance with the provisions of NRS 34.720 and NRS 34.830.

Matthew's trial counsel also unlawfully deprived him of his right to directly appeal his very serious conviction of first degree murder with the use of a firearm. If granted an evidentiary hearing, Matthew would testify as follows regarding his appeal deprivation claim. Matthew was told by his trial counsel immediately after sentencing that he would appeal his conviction. Matthew was then immediately after sentencing unable to contact his attorney regarding his appeal because his attorney did not visit him, respond to his letters or accept his phone calls. Matthew then filed a pro per notice of appeal that was dismissed by the Nevada Supreme Court in an unpublished written opinion on December 27, 2007 from which the remittitur issued on January 25, 2008. If allowed to directly appeal his conviction, he would raise the following issues which would likely result in reversal and remand of his case for a new trial.

Plain error and prosecutorial misconduct so infected Matthew's jury instructions that these instructional errors require this court to reverse and remand Matthew's first degree murder conviction with use of a firearm for a new trial. Trial counsel never objected to any jury instructions. This Court must then review the jury instructions for plain error. Garcia v. State, 121 Nev. 327, 334, 113 P.3d 836 840 (2005). This court has a duty to protect Matthew's right to reversal and remand of his case because the errors were so plain and patently prejudicial that this court must *sua sponte* step in and protect Matthew's right to a fair trial. McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739,745 (1998).

The State proceeded upon alternate theories of first degree murder as allowed by law; felony murder with robbery or attempted robbery being the underlying felony and murder occurring with malice, premeditation and deliberation. See Indictment, filed December 7, 2007, on file herein. When it came time to settle jury instructions at the close of trial, the trial court settled all instructions with the exception of instruction 21, the felony murder jury instruction which the prosecution apparently did not provide to either the court or trial counsel prior to the morning of March 21, 2009, when jury instructions were settled in chambers. See March 21, 2007, trial transcript at 4:20-23 & 7:7-9. Instruction 21, the felony murder jury instruction, was then produced by the State's attorney in chambers after lunch and prior to afternoon closing arguments. Trial counsel for Matthew did not object to instruction 21. This is despite instruction 21 being an incorrect statement of felony murder as alleged by the State. Id. At 8:1-22. The State proceeded upon alternate theories of first degree murder as allowed by law; felony murder with robbery or attempted robbery being the underlying felony and murder occurring with malice, premeditation and deliberation. See Indictment, filed December 7, 2005, on file herein. Yet, the State's instruction 21 nowhere references any instruction on the elements of attempted robbery. See Jury Instruction 21, filed March 21, 2007, on file herein. Instead State's jury instruction 21 references the robbery or attempted robbery as an element of felony murder and does go on to define robbery but completely leaves out any definition or explanation of the elements of attempted robbery. Id. In fact, nowhere in any of the jury instructions is an attempt under Nevada law properly defined in the context of felony murder and attempted robbery.

1 The jury cannot logically convict someone of a crime for which they do not know the elements.
2 As a result, Matthew's conviction must be overturned and his case remanded for a new trial with a
3 proper felony murder jury instruction.

4 This court should also consider the aforementioned instructional error claim in the context of
5 prosecutorial misconduct. First, the Court must determine whether the prosecutor's conduct of
6 submitting an incomplete and hence incorrect jury instruction was improper; and two, the court must
7 consider whether the improper jury instruction submitted by the prosecutor warrants reversal. *Valdez*
8 *v. State, Nev.*, 196P.3d 465, 476 (2008). Submitting an improper and incomplete jury instruction is
9 improper. The question then becomes whether an improperly instructed jury reaching a verdict based
10 upon faulty instructions should be overturned and reversed. This question turns on whether the
11 prosecutorial misconduct of improperly instructing a jury on the elements of felony murder as alleged
12 by the State is of a constitutional dimension. If the prosecutor improperly instructing the jury is of a
13 constitutional dimension, then this Court must reverse unless the State demonstrates, beyond a
14 reasonable doubt, that the error did not contribute to the verdict. *Id.*

15 The prosecutor submitting an incomplete and improper jury instruction constitutes
16 prosecutorial misconduct of a constitutional dimension that requires reversal of Matthew's murder
17 conviction. Likewise the felony murder jury instruction constitutes plain error that requires reversal.
18 Each claim separately and even more so together combine to render Matthew's murder conviction
19 constitutionally infirm, leaving this court with only to reverse and remand Matthew's case for a new
20 trial.
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WHEREFORE, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.

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

[Handwritten Signature]
(Signature of Plaintiff)

03/01/2011
(Date)

(Signature of attorney, if any)

(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.**

See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at Ely state Prison on 03/01/2011
(Location) (Date)

[Handwritten Signature]
(Signature)

83651
(Inmate prison number)

Last Page

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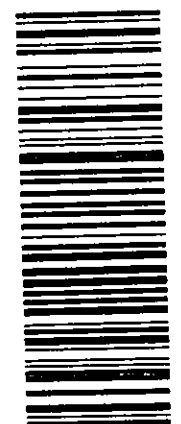
JUD MESSAGES

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