Jerry Harkins
Name
85126
Prison Number
NNCC
Place of Confinement

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Jerry Harkins, Petitioner,
(Full Name)

vs.

Jack Palmer, Respondent,
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner)

and

The Attorney General of the State of Nevada

3:10-cv-00372

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)

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1. Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: Second Judicial District-Reno Judge Adams.
2. Full date judgment of conviction was entered: 3/11/05. (month/day/year)
3. Did you appeal the conviction? X Yes ___ No. Date appeal decided: 10/12/2006.
4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state court? X Yes ___ No. If yes, name the court and date the petition was filed: Second Judicial District 11/02/07. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? X Yes ___ No. Date the appeal was decided: 6/9/2010. Have all of the grounds stated in this petition been presented to the state supreme court? X Yes ___ No. If no, which grounds have not? ____
5. Date you are mailing (or handing to correctional officer) this petition to this court: 6/17/10.

Attach to this petition a copy of all state court written decisions regarding this conviction.

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? X Yes ___ No. If no, what was the prior case number ? _____. And in what court was the prior action filed? _____.
Was the prior action ___ denied on the merits or ___ dismissed for procedural reasons (check one). Date of decision: ___/___/___. 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 X 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: CR04-0545.

9. Length and terms of sentence(s): Twenty to Life; Consecutive to same.

10. Start date and projected release date: 12-1-2003; 12-1-2043.

11. What was (were) the offense(s) for which you were convicted: First degree Murder with the use of a firearm.

12. What was your plea? ___ Guilty X 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	Jennifer Lunt & Carl Hylin	X	___	___
trial/guilty plea	" " " "	X	___	___
sentencing	" " " "	X	___	___
direct appeal	Cheryl Bond - Public Defender	X	___	___
1st post-conviction petition	Mace J. Yampolsky	___	X	___
appeal from post conviction	Mary Lou Wilson	X	___	___
2nd post-conviction petition	_____	___	___	___
appeal from 2nd post-conviction	_____	___	___	___

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 and 14th Amendment right to Due Process & Equal Protection based on these facts:

Petitioner incorporates all issues raised on direct appeal and seeks review by this court for the following reasons.

1) The District Court erred by admitting Deriso's statement "Jerry shot me and he was paid to do it", which was made in response to the 911 dispatcher's questions.

The Nevada Supreme Court assumed that all 911 operators are police. This assumption is in error. In Washoe County, the 911 switch-board is run by emergency operators independant of any law enforcement entities.

Based on this, the victims statement clearly falls under "testimonial hearsay" and must be Supressed.

The Nevada Supreme Court erred in its Affirmation on direct appeal by making a finding based on assumption and contrary to clearly established federal standards and Supreme Court case law.

Petitioner incorporates all arguments presented.

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?

X 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 X No. If no, explain why not: It was previously raised on direct appeal and not cognizable.

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: _____

_____.

- **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 X No. If yes, explain: _____

_____.

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

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 and 14th Amendment right to Due process & Equal protection based on these facts:

The Petitioner incorporates all issues raised on direct appeal and seek review by this Court. for the following reason:

The district Court erred in its instruction on self-defense based on apparent danger.

The petitioner was attacked by the victim and the petitioner presented sufficient evidence to warrant a self-defense instruction on a theory of apparent danger. The district court's error was not harmless and the Nevada Supreme Court erred by ruling contrary to clearly established federal and Supreme Court rulings.

Petitioner herein incorporates all arguments presented on direct appeal.

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?

X 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 X No. If no, explain why not: It was previously raised on direct appeal and not cognizable.

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: _____

_____.

- **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 X No. If yes, explain: _____

_____.

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

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 & 14th Amendment right to Due process, fair trial & Equal Protection based on these facts:

The Nevada Supreme Court erred by arbitrarily refusing to address the petitioner's three additional issues raised on direct appeal despite each issues obvious and apparent merit.

1) The prosecution failed to prove beyond a reasonable doubt that Harkins did not act in self-defense;

2) The district Court erred by not granting a mistrial based on an outburst by a defense witness that was overheard by several jurors;

and 3) The prosecutor committed misconduct by making certain statements during closing arguments.

The Supreme Court erred in its refusal to address these issues that were properly raised on direct appeal.

Petitioner herein incorporates all arguments presented on direct appeal.

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?

X 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 X No. If no, explain why not: These were previously raised on direct appeal and not cognizable.

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: _____

_____.

▸ **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 X No. If yes, explain: _____

_____.

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

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 14

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th & 14th Amendment right to Effective Assistance & Equal Protection, based on these facts:

Trial Counsel was ineffective in failing to move for a change of venue.

The district court erred in its findings of facts and conclusions of law, the circumstances did not have anything to do with publicity.

The change of venue was necessary because the victim was the justice of the Peace Mrs. Deriso who was and still is on the bench in Sparks.

Petitioner herein incorporates and refers to the Original state Petition Ground 1.

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 X No. If no, explain why not: Not cognizable on direct appeal.

- **First Post Conviction:**

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

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

If yes, name of court: Second Judicial District date petition filed 11/02/07.

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

If yes, did you raise this issue? X 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 X 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 5

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th & 14th Amendment right to Effective Assistance & Equal Protection, based on these facts:

Trial Counsel was ineffective in failing to investigate. Trial Counsel made no effort to investigate witnesses who were readily Available that could have established and testified that the victim always carried and threatened to use a knife. Petitioner clearly demonstrated that he was prejudiced because had trial Counsel investigated he would have had Support for petitioner's claim of self-defense.

It is a reasonable probability that there would have been a different outcome at trial had counsel performed these easily available investigations.

The District Court erred in denying this claim and the Nevada Supreme Court ruled contrary to clearly established federal standards and U.S. Supreme Court rulings.

Petitioner herein incorporates and refers to the Original State petition Ground 2

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 X No. If no, explain why not: This ground was not cognizable on direct appeal.

▸ **First Post Conviction:**

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

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

_____.

If yes, name of court: Second Judicial District date petition filed 11/02/07.

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

_____.

If yes, did you raise this issue? X 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 X 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

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 6

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th and 14th Amendment right to Effective Assistance & Equal Protection, based on these facts:

Trial Counsel was ineffective for failing to conduct an investigation to find the knife or sharp object that was used by the victim to stab the petitioner and for failing to argue that the State failed to collect exculpatory evidence. Prejudice to the petitioner is obvious and assumed when the State fails to collect exculpatory evidence and should be assumed when counsel fails to perform even the most rudimentary of investigations to support his clients assertions.

Further, petitioner demonstrated that there is a reasonable probability that had counsel conducted this investigation it would have substantially changed the outcome of the trial. Had the sharp object been found it would have supported the petitioner's version of events and supported his claim of self-defense.

Therefore, the district court erred by denying his claim and the Nevada Supreme Court ruled contrary to clearly established federal standards and U.S. Supreme Court rulings.

Petitioner incorporates Ground 3 of the Original Petition.

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 X No. If no, explain why not: this ground was not cognizable on direct appeal.

▸ **First Post Conviction:**

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

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

If yes, name of court: Second Judicial District date petition filed 11/02/07.

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

If yes, did you raise this issue? X 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 X 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 37

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 5th, 6th and 14th Amendment right to Due process, Effective Assistance, & Equal protection based on these facts:

Petitioner argues that the state failed to collect exculpatory evidence.

The district court failed to address this issue. The Nevada Supreme Court erred in stating that the petitioner failed to raise this claim on direct appeal. This claim was raised and arbitrarily dismissed when it was raised.

The Nevada Supreme Court acted capriciously and arbitrarily by denying this issue and ruled contrary to clearly established federal standards and U.S. Supreme Court rulings.

Petitioner herein incorporates and refer's to the Original state petition Ground 4.

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?

X 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?

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

_____.

If yes, name of court: Second Judicial District date petition filed 11/02/07.

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

_____.

If yes, did you raise this issue? X 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 X No. If yes, explain: _____

_____.

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)

(Signature of Plaintiff)

6-17-10
(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 NNCC (Location) on 6-17-10 (Date).

(Signature)

85126
(Inmate prison number)

122 Nev., Advance Opinion 84

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY HARKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45024

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a firearm. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Affirmed.

Jeremy T. Bosler, Public Defender, and Cheryl D. Bond, Deputy Public Defender, Washoe County,
for Appellant.

George Chanos, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy, Deputy District Attorney, Washoe County,
for Respondent.

BEFORE DOUGLAS, BECKER and PARRAGUIRRE, JJ.

OPINION

By the Court, BECKER, J.:

Appellant Jerry Harkins shot Miles Deriso in the early morning of December 1, 2003. Deriso died shortly thereafter. A jury found Harkins guilty of first-degree murder with the use of a firearm. The district court sentenced Harkins to serve two consecutive terms of life

imprisonment with the possibility of parole after twenty years has been served in each term.

Harkins raises two primary arguments on appeal. First, he argues that a statement made by Deriso during a 911 telephone call prior to Deriso's death was testimonial. Therefore, Harkins contends that the district court erred by not excluding the statement under Crawford v. Washington[1] because Deriso was unavailable to testify at trial and Harkins did not have a prior opportunity to cross-examine Deriso. Second, Harkins argues that the district court erred by failing to properly instruct the jury on self-defense based on apparent danger.[2]

We first conclude that Deriso's statement was a dying declaration and, as such, the statement's admission did not violate Harkins' Sixth Amendment right to confrontation as defined in Crawford. Dying declarations were recognized at common law as an exception to the right to confrontation, and that exception was not repudiated by the Sixth Amendment. We also take this opportunity to clarify the testimonial nature of statements made during a 911 emergency call. In so doing, we conclude that Deriso's statement made during the 911 call is nontestimonial. Next, we conclude that, although the district court erred

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[1]541 U.S. 36 (2004).

[2]Harkins raises three additional arguments on appeal: (1) the prosecution failed to prove beyond a reasonable doubt that Harkins did not act in self defense, (2) the district court erred by not granting a mistrial based on an outburst by a defense witness that was overheard by several jurors, and (3) the prosecutor committed misconduct by making certain statements during closing argument. We conclude that each argument lacks merit.

by giving an improper self-defense instruction based on apparent danger, the error was harmless beyond a reasonable doubt. Thus, we affirm Harkins' conviction.

FACTS

Harkins' stepson, Tylo,[3] was friends with Deriso's son Brandon. In August 2003, Tylo telephoned Brandon, but Deriso answered. During their conversation, Deriso allegedly solicited Tylo to kill Brandon. After their conversation, Tylo told his mother about Deriso's proposition; neither informed the police. However, Tylo's mother informed Susan Deriso, Brandon's mother and Deriso's ex-wife, who said she would take care of it, but she also did not inform the police. Tylo and his mother also told Harkins about Deriso's solicitation.

Months later, Harkins ran into Deriso at the grocery store, and Deriso gave Harkins an open invitation to come to Deriso's house for a drink. Around Thanksgiving, Harkins stopped by Deriso's house. While talking, Deriso asked Harkins for some pain pills, which Harkins had because of back surgery. Harkins said he would have to think about it.

A few days later, on the evening of November 30, 2003, Harkins had several family members at his house, and he was drinking. After dinner, Harkins went to his usual poker game where he drank more alcohol. Harkins returned home at approximately 12:30 a.m. on December 1, 2003. He then took several of his prescription medications, including Percocet, methadone, and Neurontin. Rather than going to sleep, Harkins decided to take some pain pills to Deriso.

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[3]Harkins is not technically Tylo's stepfather, but Harkins helped raise Tylo for approximately twenty years.

Harkins parked his van several blocks away from Deriso's house, allegedly because he did not want anyone to be able to find him. He then walked to Deriso's house, knocked on the door, and Deriso let Harkins in. The two discussed Deriso's recent divorce, and Deriso became increasingly angry. Deriso also expressed anger about Tylo because Tylo had talked about Deriso's solicitation of him to kill Brandon. Deriso then allegedly said that he would have to kill Tylo. Harkins said he was done listening and began to leave. According to Harkins, Deriso hit him, and the two fought, with Deriso slashing at Harkins with a knife. Harkins was able to get the knife away from Deriso and throw Deriso out of the way. Harkins left and walked to his van.

While walking to his van, Harkins decided to return to talk to Deriso because he could not leave the situation as it was. Harkins retrieved a loaded .32 caliber revolver from his van, put on a latex glove, and started back to Deriso's house. Harkins thought the gun would be enough to scare Deriso into not following through with his threat to kill Tylo. On his way to Deriso's house, Harkins allegedly unloaded the gun, but reloaded it without thinking. At Deriso's door, Harkins allegedly hid the gun underneath his shirt and then knocked on the door. Deriso let Harkins in.

According to Harkins, Deriso immediately began attacking him. Harkins thought Deriso was stabbing him with a screwdriver or an ice pick. At one point, Deriso allegedly stabbed Harkins in the neck. The two fought some more. Then, according to Harkins, he fell backward and fired one shot from his gun while he was falling. When Harkins got up, Deriso was gone. Harkins left through the front door, dropping his gun in a trash can outside the house. An officer later dispatched to the scene

found Harkins walking in the neighborhood with blood stains on his shirt. Harkins was transported to Washoe Medical Center where he was treated for minor lacerations on his neck, abdomen, left wrist, and left forearm—none of which were life-threatening wounds.

After being shot, Deriso ran to his neighbor Wayne Whitton's house. Whitton called 911. The dispatcher gave Whitton instructions on how to care for Deriso while waiting for the ambulance. Then, the dispatcher asked Whitton if Deriso knew who shot him. Whitton relayed the question to Deriso. According to Whitton's trial testimony, Deriso responded, "Jerry shot me and he was paid to do it." Deriso died shortly thereafter.

Before trial, Harkins filed a motion in limine to preclude Whitton from testifying about Deriso's statement in response to the 911 dispatcher's question. Counsel for Harkins argued that the statement was testimonial and, therefore, should be excluded under Crawford as a violation of Harkins' right to confrontation. The State contended that as a statement made during a 911 emergency call, it was not testimonial and, therefore, was admissible under Crawford. The State also argued that Deriso's statement was a dying declaration, which should be admitted as an exception to the confrontation right under the Sixth Amendment.

The district court denied Harkins' motion. In doing so, the district court found that the statement merited a high degree of trustworthiness and reliability, which the court concluded was the rationale for admitting dying declarations. The district court also indicated that the 911 call was made in an attempt to save Deriso's life. Therefore, the district court concluded that under Crawford and the rule on dying declarations, the statement was admissible. Counsel for Harkins

again objected during Whitton's testimony regarding the statement, but the district court overruled the objection.

At trial, Harkins asserted a theory of self-defense, on which the district court instructed the jury. The jury found Harkins guilty of first-degree murder with the use of a firearm.

DISCUSSION

Admissibility of Deriso's statement made in response to the 911 dispatcher's question

Harkins contends that the district court erred by admitting Deriso's statement—"Jerry shot me and he was paid to do it"—made in response to the 911 dispatcher's question. We conclude that the district court did not err for two reasons. First, the statement was a dying declaration and, therefore, it is an exception to the confrontation protection afforded by the Sixth Amendment. Second, the statement is not testimonial and, therefore, admission of the statement did not violate Harkins' Sixth Amendment confrontation right.

As we have discussed in prior cases, the United States Supreme Court in Crawford concluded that "if a hearsay statement of an unavailable declarant is 'testimonial' in nature, the statement is admissible only if the defendant had prior opportunity to cross-examine the declarant concerning [the statement]."[4] In reaching this conclusion, the Court overturned Ohio v. Roberts[5] with regard to testimonial hearsay.[6]

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[4]Pantano v. State, 122 Nev. ___, ___, 138 P.3d 477, 481 (2006) (citing Crawford, 541 U.S. at 68).

[5]448 U.S. 56 (1980).

[6]Crawford, 541 U.S. at 68.

Since the Supreme Court decided Crawford, this court has addressed a number of Crawford-related issues. Here, we address two additional issues: (1) whether a dying declaration is an exception to the Sixth Amendment right to confrontation, and (2) whether statements made during a 911 emergency call are testimonial.

As a dying declaration, Deriso's statement is an exception to the protection afforded by the Confrontation Clause

The district court found that Deriso's statement was a dying declaration. We will not disturb this finding absent an abuse of discretion.[7] Under NRS 51.335, "[a] statement made by a declarant while believing that his death was imminent is not inadmissible under the hearsay rule if the declarant is unavailable as a witness." The belief by the declarant in his impending death "may be inferred from circumstances such as the nature of the declarant's wounds or injury."[8] As we have stated, "If the declarant subjectively senses impending death without any hope of recovery, then there is present the vibrant requisite which the law demands to waive the solemnity of an oath and to receive the decedent's testimony without cross examination."[9]

We conclude that the district court correctly found Deriso's statement to be a dying declaration. When Deriso came through Whitton's

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[7]See Bishop v. State, 92 Nev. 510, 517, 554 P.2d 266, 271 (1976).

[8]Id. at 518, 554 P.2d at 271 (citing Ennis v. State, 91 Nev. 530, 539 P.2d 114 (1975); Wilson v. State, 86 Nev. 320, 468 P.2d 346 (1970); State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948), overruled on another grounds by Ex Parte Wheeler, 81 Nev. 495, 406 P.2d 713 (1965)).

[9]Id. at 518, 554 P.2d at 271-72.

door, he immediately asked Whitton to call 911 because he had been shot. Whitton testified that Deriso appeared to be in pain. When Whitton relayed the 911 dispatcher's question to Deriso of who shot him, Deriso was lying on the floor and he had trouble speaking. According to Whitton, when Deriso spoke, "he would come in and he would go out." At the time Deriso made the statement at issue, he appeared to Whitton to be seriously injured and in serious distress. He lost consciousness soon after the ambulance arrived. Deriso died approximately an hour and a half later. Based on these facts, when Deriso stated, "Jerry shot me and he was paid to do it," he likely believed his death was imminent. Therefore, the statement qualifies as a dying declaration.

Admission of Deriso's dying declaration did not violate Harkins' Sixth Amendment right to confrontation even though Deriso was unavailable as a witness at trial and Harkins did not have a prior opportunity to cross-examine him. In analyzing the Confrontation Clause, the Supreme Court in Crawford relied heavily on the right of confrontation as it existed "at common law, admitting only those exceptions established at the time of the founding."[10] The Court stated that "there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case."[11] But the Court noted one possible exception recognized at common law—dying declarations:

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[10]Crawford, 541 U.S. at 54; see also People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004) (admitting dying declaration as exception to Sixth Amendment confrontation right), cert. denied, ___ U.S. ___, 126 S. Ct. 61 (2005).

[11]Crawford, 541 U.S. at 56.

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis.[12]

Based on this comment by the Court and on the history of dying declarations, several state courts have adopted the view that the admission of dying declarations, including those that are testimonial, does not violate the Confrontation Clause.[13] As the California Supreme Court observed, "Dying declarations were admissible at common law in felony cases, even when the defendant was not present at the time the statement was taken."[14] The common law permitted dying declarations so long as the declarant was conscious of his danger at the time of making the declaration.[15] According to the Supreme Court in 1895,

> The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits . . . being used against the prisoner in

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[12]Id. at 56 n.6 (citations omitted).

[13]See, e.g., Monterroso, 101 P.3d at 972; People v. Gilmore, 828 N.E.2d 293, 302-03 (Ill. App. Ct. 2005); State v. Martin, 695 N.W.2d 578, 585-86 (Minn. 2005).

[14]Monterroso, 101 P.3d at 972 (citing T. Peake, Evidence 64 (3d ed. 1808)).

[15]See id. (citing King v. Reason, 16 How. St. Tr. 1, 24-25 (K.B. 1722)).

> lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury . . . .[16]

The Confrontation Clause, like other provisions in the Bill of Rights, is subject to exceptions, "recognized long before the adoption of the [C]onstitution, and not interfering at all with its spirit."[17] A dying declaration is one such exception to the Confrontation Clause.

> [Dying declarations] are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination, nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility.[18]

We agree with the states that recognize dying declarations as an exception to the Sixth Amendment confrontation right. With the Supreme Court's statement that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law,

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[16]Mattox v. United States, 156 U.S. 237, 242 (1895).

[17]Id. at 243 ("We are bound to interpret the [C]onstitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a [B]ill of [R]ights are subject to exceptions . . . .").

[18]Id. at 243-44.

admitting only those exceptions established at the time of the founding,"[19] it follows that because dying declarations were recognized at common law as an exception to the right of confrontation, they should continue to be recognized as an exception. We therefore conclude that the district court did not err in admitting Deriso's dying declaration.

Because Deriso's statement was not testimonial, the statement's admission did not violate Crawford

We further take this opportunity to address whether statements made in the context of a 911 emergency call are testimonial under Crawford. We conclude that Deriso's statement was not testimonial and therefore admission of the statement did not violate Crawford. Deriso's statement—"Jerry shot me and he was paid to do it"—was made in response to the 911 dispatcher's question asking if Deriso knew who shot him.[20] In Crawford, the Supreme Court did not specifically adopt a definition of "testimonial," but the Court concluded that some statements qualify as testimonial under any definition.[21] Among such statements are "[s]tatements taken by police officers in the course of interrogations."[22] The Court concluded that these statements "are . . . testimonial under

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[19]Crawford, 541 U.S. at 54.

[20]For purposes of this opinion, we assume without deciding that a 911 dispatcher is an agent of the police, and therefore, we consider the dispatcher's acts to be acts of the police. We further assume that Whitton played no intervening role in relaying to Deriso the question asked by the 911 dispatcher. The record indicates that Whitton was merely a conduit for information between the 911 dispatcher and Deriso.

[21]See Crawford, 541 U.S. at 52.

[22]Id.

even a narrow standard."[23] The standard that police interrogations produce testimonial statements applied easily to the facts of Crawford: the declarant was in police custody, had been given a Miranda warning, and had engaged in a tape-recorded conversation with police.[24] But the standard is not always easily applied.

In the recent case of Davis v. Washington, and its companion case, Hammon v. Indiana, the Supreme Court more specifically addressed the dichotomy between testimonial and nontestimonial statements made during police interrogations.[25] The Court held,

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[26]

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[23]Id.

[24]See Davis v. Washington, 547 U.S. ___, ___, 126 S. Ct. 2266, 2278 (2006) (citing Crawford, 541 U.S. at 53 n.4).

[25]See id. at ___, 126 S. Ct. at 2270.

[26]Id. at ___, 126 S. Ct. at 2273-74. For the purposes of its opinion, the Court limited its holding to interrogations. See id. at ___ n.1, 126 S. Ct. at 2274 n.1. The Court was careful to note that statements made in the absence of an interrogation could be considered testimonial and that "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions that the Confrontation Clause requires us to evaluate." Id.

The Court's application of this rule to the facts of Davis and Hammon provides further insight into the dichotomy between testimonial and nontestimonial statements.

Davis involved a domestic disturbance between Michelle McCottry and her boyfriend, Adrian Davis. During a 911 call with McCottry, the 911 dispatcher ascertained that McCottry's boyfriend was "jumpin' on [her] again," there were no weapons at the scene, the boyfriend was using his fists, and he had not been drinking. The 911 dispatcher then asked McCottry what her boyfriend's name was. McCottry responded that it was Adrian Davis and stated, "He's runnin' now." The dispatcher learned that Davis had run out the door after hitting McCottry and that he was leaving in a car. At that point, the 911 dispatcher told McCottry, "Stop talking and answer my questions." The dispatcher then gathered more information about Davis and his purpose for being at McCottry's house. Police officers arrived soon thereafter.[27]

At trial, the state's only witnesses were the two police officers who responded to the 911 call. McCottry was unavailable to testify. The trial court also admitted a recording of the 911 call. Davis objected to admission of the recording based on the Confrontation Clause, but the court overruled the objection. The jury convicted Davis of violation of a domestic no-contact order. The Washington Court of Appeals affirmed. The Supreme Court of Washington also affirmed, concluding that the portion of the 911 call in which McCottry identified Davis was not

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[27]Id. at ___, 126 S. Ct. at 2270-71.

testimonial and that if other portions were testimonial, their admission was harmless beyond a reasonable doubt.[28]

In analyzing the testimonial nature of McCottry's statements to the 911 dispatcher, the United States Supreme Court concluded that "the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency."[29] The Court began with the general proposition that at least the initial interrogation conducted in a 911 call is "ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance."[30] The Court then looked at several facts surrounding the circumstances of the 911 call.

First, McCottry was describing events to the 911 dispatcher "as they were actually happening, rather than 'describ[ing] past events."[31] In comparison, the interrogation in Crawford occurred several hours after the events described took place.[32]

Second, "any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency."[33]

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[28]Id. at ___, 126 S. Ct. at 2271-72.

[29]Id. at ___, 126 S. Ct. at 2277.

[30]Id. at ___, 126 S. Ct. at 2276.

[31]Id. (quoting Lilly v. Virginia, 527 U.S. 116, 137 (1999)).

[32]See id.

[33]Id.

McCottry's call was a call for help against a physical threat as opposed to providing a report of a crime absent imminent danger.[34]

Third, when viewed objectively, the nature of the 911 dispatcher's questions were such that McCottry's responses were "necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past."[35] Regarding the 911 dispatcher's question to McCottry of her boyfriend's name, the Court concluded even that information was necessary to attend to the emergency "so that the dispatched officers might know whether they would be encountering a violent felon."[36]

Fourth, the difference in the level of formality between McCottry's interrogation and Crawford's was substantial. "Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe."[37]

From the above facts, the Court concluded that the primary purpose of the interrogation was to assist in an ongoing emergency.[38]

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[34]Id.

[35]Id.

[36]Id. (citing Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 186 (2004)).

[37]Id. at ___, 126 S. Ct. at 2276-77.

[38]Id. at ___, 126 S. Ct. at 2277.

Additionally, the Court stated that McCottry "was not acting as a witness; she was not testifying. What she said was not 'a weaker substitute for live testimony' at trial."[39] "No 'witness' goes into court to proclaim an emergency and seek help."[40]

The Court also noted that an interrogation that begins for the purpose of determining the need for emergency assistance can result in testimonial statements once that purpose has been achieved.[41] For example, once the 911 dispatcher gathered the necessary information from McCottry to address the emergency, McCottry's later responses to the disptcher's questions could be considered testimonial.[42]

The Court reached the opposite conclusion, that the statements at issue were testimonial, in Davis's companion case, Hammon. There, the Court concluded that statements were testimonial when made to an officer for purposes of taking an affidavit after a domestic-violence emergency had ended. While taking statements from Amy Hammon, the officer interrogated her in a separate room, away from

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[39]Id. (quoting United States v. Inadi, 475 U.S. 387, 394 (1986)).

[40]Id.

[41]Id.

[42]Id. ("[A]fter the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the 'structured police questioning' that occurred in Crawford.").

her husband, Hershel.[43] This more formal interrogation was similar to that in Crawford. "Both declarants were actively separated from the defendant—officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over."[44] Conversely, in comparing Hammon to Davis, the Court noted that the declarant in Davis made her statements while in immediate danger and that she was describing events as they were happening in order to seek aid.[45]

Together, Crawford, Davis, and Hammon demonstrate that when determining whether a statement is testimonial, it is necessary to look at the totality of the circumstances surrounding the statement. This conclusion is reflected in our post-Crawford precedent on the issue of what constitutes a testimonial statement.

In Flores v. State, we concluded that a statement is testimonial if it "'"would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."'"[46] We then applied this "objective witness test" in Medina v. State where we

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[43]See id. at ___, 126 S. Ct. at 2278.

[44]Id.

[45]Id. at ___, 126 S. Ct. 2279.

[46]121 Nev. ___, ___, 120 P.3d 1170, 1178-79 (2005) (quoting Crawford, 541 U.S. at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3)) (emphasis added in Flores).

examined the testimonial nature of statements made by a rape victim.[47] In Medina, we concluded that the victim's spontaneous statements to her neighbor were nontestimonial but that statements made to a forensic nurse for the purpose of gathering evidence for possible use in a later prosecution were testimonial.[48]

Recently, we addressed in Pantano v. State the issue of "whether a child-victim's statements to a parent regarding a sexual assault constitute testimonial hearsay under . . . Crawford."[49] We concluded that the child's statements to her father were nontestimonial given the circumstances surrounding the father's questioning of his daughter.[50] He was "inquiring into the health, safety, and well-being of the child," not gathering evidence for purposes of litigation.[51]

Based on United States Supreme Court and Nevada precedent addressing the issue of whether a hearsay statement is testimonial, it is abundantly clear that the inquiry requires examination of the totality of the circumstances surrounding the making of the statement. We have begun with a general rule: whether the statement would, under the circumstances of its making, ""lead an objective witness reasonably to

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[47]122 Nev. ___, 131 P.3d 15 (2006).

[48]See id. at ___, 131 P.3d at 20.

[49]122 Nev. at ___, 138 P.3d at 479. The opinion also addressed the constitutionality of NRS 51.385. Id.

[50]Id. at ___, 138 P.3d at 483.

[51]Id.

believe that the statement would be available for use at a later trial.'"[52] We now take the opportunity to further refine this rule by presenting a nonexhaustive list of factors for courts to consider in determining whether a statement is testimonial: (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question (e.g., whether the statement was the product of a police interrogation); (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events made in a more formal setting sometime after the exigency had ended. No one factor is necessarily dispositive, and no one factor carries more weight than another. These factors will assist courts in ascertaining the relevant facts surrounding the circumstances of a hearsay statement in order to determine its testimonial nature.

By applying these factors to the instant case, we conclude that Deriso's statement—"Jerry shot me and he was paid to do it"—was not testimonial. First, Deriso's statement was made to an agent of the police (the 911 dispatcher).

Second, the part of Deriso's statement that "Jerry shot me" was in response to the dispatcher's question of whether Deriso knew who shot him. However, the portion of the statement that "he was paid to do

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[52]Flores, 121 Nev. at ___, 120 P.3d at 1178-79 (quoting Crawford, 541 U.S. at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3)) (emphasis added in Flores).

it" was additional spontaneous information not in response to the question.

Third, the purpose of the inquiry was to address the ongoing emergency of Deriso's severe injury and to ascertain the danger of the situation. Although the assailant's name was not likely necessary to assist Deriso medically, that information could be used by police to prevent further harm. Similarly, the information that "he was paid to do it" was not relevant in assisting Deriso medically, but that information could also be used by police to determine the extent of the danger at the scene, i.e., the seriousness of Harkins' intent to kill Deriso and whether he might return to the scene to ensure the job was completed. And again, Deriso made that portion of the statement spontaneously, not in response to the dispatcher's question.

Fourth, the statement was made during an ongoing emergency. Although Harkins had run out the door of Deriso's house, an objective witness in the same circumstances would not have known that, and Harkins could still have been a threat to Deriso or Whitton. There was no indication that Harkins left the area completely at that point. Further, Deriso made his statement only minutes after being shot while bleeding on Whitton's floor, rather than in a more formal setting after the emergency had ended where he could calmly recount past events.

Based on these facts, Deriso made his statement "in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to

meet an ongoing emergency."[53] Therefore, the statement is not testimonial, and its admission did not violate Harkins' Sixth Amendment right to confrontation.[54] Thus, we conclude that the district court did not err.

The district court's error in its instruction on self-defense based on apparent danger was harmless beyond a reasonable doubt

Next, Harkins argues that the district court erred in its jury instruction on self-defense based on apparent danger. A defendant has the right to have the jury instructed on a theory of the case that is supported by the evidence, "no matter how weak or incredible that evidence may be."[55] The State does not dispute that Harkins presented evidence sufficient to warrant a self-defense instruction on a theory of apparent danger. Upon reentering Deriso's house after retrieving a gun, Harkins was attacked by Deriso. Harkins testified that it felt like Deriso was stabbing him in the neck with what he thought was an ice pick or a

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[53]Davis, 547 U.S. at ___, 126 S. Ct. at 2273.

[54]As a nontestimonial statement, it is subject to analysis under Ohio v. Roberts. See Gaxiola v. State, 121 Nev. 638, 646, 119 P.3d 1225, 1231 (2005) ("'Crawford does not overrule the Court's pre-existing Confrontation Clause jurisprudence, enunciated in Ohio v. Roberts, and its progeny, as it applies to nontestimonial statements.'" (quoting U.S. v. McClain, 377 F.3d 219, 221 n.1 (2d Cir. 2004))). Under Roberts, Deriso's hearsay statement is admissible if it either "(1) falls within a 'firmly rooted' hearsay exception, or (2) the statement reflects 'particularized guarantees of trustworthiness.'" Flores, 121 Nev. at ___, 120 P.3d at 1174 (quoting Roberts, 448 U.S. at 66). As discussed above, a dying declaration is a firmly rooted hearsay exception. Therefore, the district court correctly admitted the statement under Roberts as a dying declaration.

[55]Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000).

screwdriver. Deriso then allegedly put Harkins in a headlock and stabbed him some more, shouting that he had stabbed Harkins in the jugular.

Over the objection of Harkins and the State, the district court instructed the jury as follows:

> Self-defense is a defense to homicide even though the danger to life or personal security may not have been real. If you find that Mr. Harkins, under the circumstances, and from his viewpoint, would have reasonably believed that he was in imminent danger of death or great bodily harm, you may find him not guilty.

Harkins and the State had proposed an alternative jury instruction based upon this court's decision in Runion v. State.[56] Nevertheless, the district court refused to use the second alternative.

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[56]Id. at 1051-52, 13 P.3d at 59. The relevant sample instruction states,

> Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:
>
> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be killed or suffer great bodily injury; and
>
> 2. He acts solely upon these appearances and his fear and actual beliefs; and
>
> 3. A reasonable person in a similar situation would believe himself to be in like danger.

continued on next page . . .

We conclude that the district court erred in giving the instruction, but that the error was harmless beyond a reasonable doubt. The last clause of the instruction states, "you may find him not guilty." This permissible language to the jury is directly contrary to our sample instruction from Runion, which states, "If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty."[57]

The error is harmless beyond a reasonable doubt, however, in light of several other considerations. Foremost, the district court also gave the jury additional instructions from Runion. Another of the jury instructions described the State's burden of proof to disprove self-defense and provided that if the State failed to meet that burden, the jury "must" find Harkins not guilty:

> If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find

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. . . continued

> The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.
>
> If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.

Id.

[57]Id. at 1052, 13 P.3d at 59 (emphasis added).

> that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.

Thus, the burden-of-proof instruction properly informed the jury of its duty to acquit if the State did not meet its burden.

Additionally, the district court accurately instructed the jury that self-defense is not available to an original aggressor.[58] Substantial evidence indicates that Harkins was the original aggressor. Harkins returned to Deriso's house with a loaded gun after having donned a latex glove. Although Harkins testified that he hid the gun under his shirt when Deriso answered the door, the jury could have reasonably believed that, given the previous altercation, Harkins was the aggressor. Further, Harkins' apparent danger theory stems from his alleged belief that Deriso stabbed him in the neck with either a screwdriver or an ice pick. However, the police recovered no such implement at the scene. The only similar item recovered was a knife, which had Deriso's blood, not Harkins' blood, on it. Harkins also testified that Deriso grabbed him by the hair, but the only clumps of hair recovered from the scene were Deriso's. Based on these facts and the other, proper, jury instruction, we conclude that the district court's error in the instruction was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, we conclude that a dying declaration is an exception to a defendant's Sixth Amendment confrontation right. We

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[58]See id. at 1051, 13 P.3d at 59.

further conclude that Deriso's statement at issue in this case was nontestimonial under the circumstances and, therefore, its admission did not violate Harkins' confrontation right. We also conclude that, although the district court erred in its self-defense jury instruction based on apparent danger, the error was harmless beyond a reasonable doubt. Accordingly, we affirm Harkins' conviction.

Becker, J.
Becker

We concur:

Douglas, J.
Douglas

Parraguirre, J.
Parraguirre

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

JERRY HARKINS,

Petitioner,

v.

Case No. CR04P0545

Dept. No. 6

NORTHERN NEVADA CORRECTIONAL CENTER,

Respondent.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus. Petitioner Harkins was charged with murder stemming from the shooting death of Miles Deriso in the early morning hours of December 1, 2003. He was represented at trial by two experienced attorneys, Jennifer Lunt and Carl Hylin. He advanced a defense of self-defense but the jury found him guilty of first-degree murder with the use of a deadly weapon. He was sentenced to two consecutive terms of life with the possibility of parole. He appealed but the judgment was affirmed. *Harkins v. State*, 122 Nev. 974, 143 P.2d 706 (2006). He then filed, through counsel, a timely petition for writ of habeas corpus.

On June 9, 2008, this court entered an order dismissing ground three of the petition, a claim that would have had this court exercise supervisory authority over the Supreme Court.

The balance of the claims were set for a hearing.

On March 12, 2009, the parties appeared for a hearing. The court heard testimony from attorneys Lunt and Hylin and from petitioner Harkins, but from no other witnesses. These findings are based on the relative credibility of those witnesses.

Ground One was a claim that trial counsel was ineffective in failing to move for a change of venue. This was supported solely by testimony from counsel indicating that there was some publicity, although it was not excessive. The court is not persuaded that the publicity was extraordinary in this case or that any other circumstances would not have led reasonable counsel to seek a change of venue. More significantly, the motion never became ripe. NRS 174.455 precludes granting a change of venue before the court conducts the voir dire and it becomes apparent to the court that the parties will be unable to select a fair and impartial jury. That circumstance never arose in this case. Despite the popularity of the victim's former spouse, trial counsel testified that they had no difficulty in selecting a jury and that they were satisfied with the jury that was seated. This court's own observations confirmed that the case presented no extra difficulty in empaneling a fair and impartial jury. Thus, there was no viable motion for a change of venue.

The second claim alleged that trial counsel was ineffective in failing to investigate. The court first notes that there was scant evidence presented in the habeas corpus hearing that was not presented at trial.

One who would claim ineffective assistance of counsel must bear the burden of proving that the circumstances would have inspired reasonable counsel to investigate some specific aspect of the case. In addition, the petitioner must prove the results of the investigation – that the reasonable lawyer would have discovered evidence of such significance that a different result was likely. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Upon consideration of the evidence, and the relative credibility of the witnesses, the court finds that both prongs were unproven.

Harkins's claim is that counsel failed to uncover two types of evidence. The first is prior acts of violence of the victim. The order of this court at trial allowed for specific instances of violence that were known to the defendant. Harkins did not identify any such acts that were previously known to him that he was unable to testify to at trial. Specific acts not known to the defendant are not admissible to prove that the victim was the aggressor. Instead, the proper evidence is opinion and reputation evidence. No such evidence was presented in the habeas corpus hearing.

The second assertion is that counsel should have investigated and discovered evidence that the victim routinely carried a knife with a tool that could have been used to inflict the relatively minor injuries suffered by Harkins. The court finds that counsel had no reason to seek out such evidence. Although Harkins claimed that there was a police report with that information that might have inspired an investigation, no such report was produced in evidence. Harkins denied knowing who authored the report or the subject matter or anything else about it and the court is not persuaded that such a report existed or that it would have inspired counsel to investigate.

Likewise, the court finds that Harkins produced virtually nothing relating to the results of the investigation. The only evidence was his own testimony and the court finds that his claim that the reason he failed to mention it at trial was because no one asked is incredible. The court also finds that the additional bit of testimony from Harkins would not have had any impact on the trial. All he could say is that at some time in the past, perhaps a year before the crime, he believed that Deriso often carried a "leatherman" tool. He denied that he had ever seen such a tool and his claim that others thought he routinely carried it had several layers of hearsay.

The trial evidence showed that no knife or ice pick or similar device was discovered in Deriso's home or nearby. Given that, the court concludes that counsel would not have had reason to investigate the issue of whether Deriso often carried such a device. Furthermore,

there is still no reason to believe that any additional investigation would have led to evidence supporting the conclusion that Deriso had a leatherman tool or an ice pick at the time of the crime, or that he deployed it in the encounter with Harkins. On the contrary, about all that was proved is that it was the defendant himself who routinely carried a device that was capable of inflicting the superficial puncture wounds that the defendant suffered. Accordingly, the court finds that the additional evidence presented in the habeas corpus hearing would not have altered the outcome of the trial.

The petitioner bears the burden of proving his claims by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). Upon consideration of all the evidence, the court remains unpersuaded concerning each claim. Accordingly, the petition for writ of habeas corpus (post-conviction) is denied.

DATED this 14 day of April, 2009.

DISTRICT JUDGE

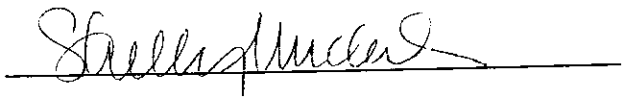
CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Mace J. Yampolsky, Esq.
625 S. Sixth Street
Las Vegas, NV 89101

Jerry Harkins #85126
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

DATED: April 3, 2009.



IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY HARKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53501

FILED

JUN 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel, but review the court's

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

First, appellant argues that his trial counsel was ineffective for failing to seek a change of venue as the case received pretrial publicity because the victim was the ex-husband of a Sparks justice of the peace. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that there was no difficulty seating an impartial jury. Further, appellant failed to demonstrate a reasonable likelihood that a fair and impartial jury could not have been seated in Washoe County. NRS 174.455; Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Given the strength of the evidence produced at trial, appellant fails to demonstrate a reasonable probability that the outcome of trial would have been different had his counsel sought a change of venue. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to investigate witnesses who could have testified that the victim always carried a knife. Appellant failed to demonstrate that he was prejudiced. Other than the witness who testified at trial that the victim often carried a knife, appellant fails to identify any other witnesses that trial counsel should have investigated. Accordingly, appellant fails to demonstrate a reasonable probability that there would have been a different outcome at trial had counsel performed further investigation in

this area. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.[1]

Third, appellant argues that his trial counsel was ineffective for failing to conduct an investigation to find the sharp object used by the victim to stab appellant and for failing to argue the State failed to collect exculpatory evidence. Appellant fails to demonstrate that he was prejudiced. Appellant fails to demonstrate that an investigation would have uncovered the stabbing implement and appellant fails to demonstrate a reasonable probability that such an investigation would have changed the outcome of trial. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); Wiggins v. Smith, 539 U.S. 510, 534 (2003). Further, given the strength of the case against him, appellant fails to demonstrate a reasonable probability that the result of the proceedings would have been different if the sharp object would have been available. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). Therefore, the district court did not err in denying this claim.

Next, appellant argues that the State improperly failed to collect exculpatory evidence. Appellant failed to demonstrate good cause for failing to raise this claim in his direct appeal, and therefore, we

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[1]To the extent that appellant argues the district court erred in denying his claim that his trial counsel was ineffective for failing to investigate additional prior acts of violence committed by the victim, appellant fails to provide cogent argument as to how the district court erred in denying this claim. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

conclude that the district court did not err in denying this claim. See NRS 34.810(1)(b)(2).

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Brent T. Adams, District Judge
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

Jerry Harkins #85126
P.O. Box 7000
Carson City, Nv. 89702

FIRST CLASS

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US P

U.S. District Court (Reno)

400 S. Virginia Street
Suite 400
Reno, Nv. 89501

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