IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

NARCUS WESLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 57473

APPEAL FROM DENIAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE JAMES BIXLER, PRESIDING

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Mr. Wesley's trial began on April 9, 2008. Mr. Wesley's trial concluded on April 18, 2008. The jury returned with a verdict of guilt as to all counts (A.A. Vol 1 pp. 116-121). On July 3, 2008, Mr. Wesley was sentenced as follows: Count 1, Conspiracy to commit Burglary: 12 months; Count 2, Conspiracy to commit robbery: 72-180 months; Counts 3 and 11, Burglary while in possession of a deadly weapon: 72-180 months; Counts 4, 6, 7, and 9, robbery with use of a deadly weapon: 60-180 months plus a consecutive 60-180 months for the use of a deadly weapon; Counts 5 and 8, Assault with a deadly weapon: 24-72 months; Count 10, first degree kidnapping: 72-108; Counts 12-15 and 17, sexual assault with use of a deadly weapon: 10 years to life with a consecutive 8-20 years for the use of a deadly weapon; Count 16, coercion with use of a deadly weapon: 24-72 months with a consecutive 24-72 months for the use of a deadly weapon and Count 18, open and gross lewdness with use of a deadly weapon: 12 months. All sentences were ordered to run concurrent and Mr. Wesley received 185 days credit for time served (A. A. Vol. 1 pp. 122-126).

Mr. Wesley's judgment of conviction was filed on July 16, 2008. Thereafter, on July 18, 2008, the State appealed the sentence alleging that the sentences in counts 12-15 and 17 were improper. On July 31, 2008, Mr. Wesley filed his notice of cross-appeal. On September 3, 2008, the Nevada Supreme Court dismissed the State's appeal for the lack of jurisdiction and allowed Mr. Wesley to continue his appeal challenging his convictions.

On September 16, 2008, the State filed a motion to correct an illegal sentence. The State succeeded in this motion and Mr. Wesley's sentences on counts 12-15 and 17 were increased to 10 years to life. An amended judgment of conviction was filed on October 8, 2008.

Mr. Wesley's Order of Affirmance was filed on March 11, 2010 (A.A. Vol. 7 pp. 1278-1281). Mr. Wesley's remittitur was entered on April 8, 2010 (A.A. Vol. 7 pp. 1282).

Mr. Wesley filed the instant petition for writ of habeas corpus on September 9, 2010. A hearing was held on the petition on December 7, 2010, wherein Mr. Wesley's petition was denied. The Findings of Fact, Conclusions of Law and Order was filed by the district court on January 4, 2011. A timely notice of appeal was filed on December 28, 2010 (A.A. Vol. 7 pp.

1312-1313).On February 11, 2011, this Court remanded the instant case back to the district court for the appointment of counsel. The instant appeal follows.

STATEMENT OF FACTS

On February 18, 2007, Danielle Browning was visiting her boyfriend, Justin Richardson (A.A. Vol. 4 pp. 813-815). Justin Richardson also lived with his roommates David Motchinbaucher, Justin Foucault, and Ryan Tognotti (A.A. Vol. 4 pp. 815-816). On February 18, at approximately 8:00-9:00 p.m. Danielle and Justin Richardson went to bed because Justin had to wake up early for work (A.A. Vol. 4 pp. 817). Prior to going to bed, Danielle observed Ryan's little brother, Clint present in the residence (A.A. Vol. 4 pp. 817). Danielle and Justin woke up when someone began to knock on the door (A.A. Vol. 4 pp. 818). Justin and Danielle were told to place their hands on their heads and walk to the front room (819). Danielle noticed two individuals she did not recognize (A.A. Vol. 4 pp. 819). Both were African American. One suspect was short and stocky and the other suspect was tall and thin (A.A. Vol. 4 pp. 819). The short stocky suspect had a gun (A.A. Vol. 4 pp. 819). The taller thinner suspect claimed to have a gun (A.A. Vol. 4 pp. 823).

Danielle and Justin were ordered to lay face down on the ground. In the front room, Danielle noticed the other occupants of the home and Aitor Eskandon were also laying on the ground (A.A. Vol. 4 pp. 20, 889). The suspects began taking the victims cell phones and wallets. The suspects demanded money (A.A. Vol. 4 pp. 828). The suspects then inquired about pin numbers for ATM machines because they wanted more money (A.A. Vol. 4 pp. 828). Two of the victims provided pin numbers (A.A. Vol. 4 pp. 828).

Thereafter, the stockier suspect took Ryan to an ATM machine (A.A. Vol. 4 pp. 828). The taller suspect stayed with the other victims until the other suspect and Ryan returned (A.A. Vol. 4 pp. 830). During that time, the taller suspect asked where the ATM was because it was taking a long time (A.A. Vol. 4 pp. 830). The taller suspect stood above the victims "kind of pacing" (A.A. Vol. 4 pp. 830).

When the stockier suspect returned, he stated "we are ninety percent of the way done and the last ten percent was up to Danielle" (A.A. Vol. 4 pp. 831). The stockier suspect demanded

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that Danielle perform oral sex upon Justin (A.A. Vol. 4 pp. 831-832). The stockier suspect placed a pillow over Justin's face (A.A. Vol. 4 pp. 832). Justin was also ordered to perform oral sex on Danielle (A.A. Vol. 4 pp. 832). Justin was nervous, and was unable to become erect (A.A. Vol. 4 pp. 832). Danielle explained that the stockier guy appeared to be "the main one" (A.A. Vol. 4 pp. 832). The victims were told if they did not cooperate they would be hurt (A.A. Vol. 4 pp. 833). The taller suspect then ordered Ryan to perform sex because Justin could not perform (A.A. Vol. 4 pp. 834-835). Ryan was handed a bottle of lotion and ordered to become erect (835). Ryan was also unable to become erect (A.A. Vol. 4 pp. 835).

The stockier suspect ordered Danielle to sit on the staircase. The stockier suspect then began to touch Danielle's chest area (A.A. Vol. 4 pp. 836-839). Then, the skinnier suspect ordered Danielle to sit in a blue recliner chair and placed his finger in her vagina (A.A. Vol. 4 pp. 839-841). The skinnier suspect asked Danielle if she liked it and she responded "no" (839-840). When the thinner suspect touched Danielle, he was holding a gun (A.A. Vol. 4 pp. 841).The stockier suspect then ordered the skinnier suspect to stop and gave Danielle her clothes back (A.A. Vol. 4 pp. 842).

The suspects stated that they were looking for Grant and that it was Grant's fault that this occurred (A.A. Vol. 4 pp. 843). Before leaving, some of the victims asked if they could have their phones back and the suspects stated that they would leave them outside (A.A. Vol. 4 pp. 844). After leaving, the stockier suspect reentered the house and told them that one of the victims had moved, then he said he was just joking (A.A. Vol. 4 pp. 844).

After a few minutes, the victims left the house and went to Clint's apartment (A.A. Vol. 4 pp. 845-846). There, the police were contacted (A.A. Vol. 4 pp. 846).Danielle was taken to the hospital where a sexual assault examination was performed (A.A. Vol. 4 pp. 847).

At trial, Danielle identified Narcus Wesley as the taller thinner suspect (849-850). Danielle identified Narcus Wesley by his body type (A.A. Vol. 4 pp. 850).

Justin Richardson also believed that both men had guns in their hand (A.A. Vol. 4 pp. 891-892). According to Justin, the stockier suspect did all the talking (A.A. Vol. 5 pp. 896). However, Justin explained that the skinnier suspect told the victims that he would shoot them if

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they moved (A.A. Vol. 5 pp. 898-899). Justin described how he retrieved condoms for the stockier suspect. The stockier suspect then whispered that he had a reputation for being crazy and placed Justin on the floor putting the gun against the back of his head (A.A. Vol. 5 pp. 922-923). Justin Richardson identified Narcus Wesley as having the same body type as the tall thin suspect (A.A. Vol. 5 pp. 926-927).

All the cell phones were located right outside the house except for Danielle's (A.A. Vol. 5 pp. 929). Danielle's cell phone was missing (A.A. Vol. 5 pp. 929).

Ryan Tognotti was at home with his roommates and friends about to watch a movie when there was a knock on the front door (A.A. Vol. 5 pp. 977). As Ryan was about to grab the door handle he noticed an individual outside (A.A. Vol. 5 pp. 977). One of the individuals asked for an individual named Grant (A.A. Vol. 5 pp. 977). Ryan knew that Grant had previously lived at the address (A.A. Vol. 5 pp. 977-978). Then, the suspects pulled out handguns and entered the residence (A.A. Vol. 5 pp. 978). The suspects had the victims lay on the ground (A.A. Vol. 5 pp. 979).

Ryan volunteered to go with the short stocky suspect to retrieve money from an ATM (A.A. Vol. 5 pp. 981). Ryan proceeded to the Wells Fargo bank on St. Rose and Eastern where he withdrew four hundred dollars (A.A. Vol. 5 pp. 982-983). Ryan then withdrew an additional five hundred dollars using Justin's card (A.A. Vol. 5 pp. 983). When Ryan returned to the home he was ordered to lay face down on the ground (A.A. Vol. 5 pp. 984). Ryan heard the shorter suspect use the word "Marcus" (A.A. Vol. 5 pp. 987). Ryan identified Narcus Wesley as the taller thinner man based upon body type (A.A. Vol. 5 pp. 987).

Prior to August 2007, Grant Hieb lived at Great Dane Court (the residence in questions) (A.A. Vol. 5 pp. 1037). While living at Great Dane Court, Grant used to work out with Kameron Wilson (A.A. Vol. 5 pp. 1037). In February 2007, Henderson police knocked on Grant's door requesting permission to speak with him (A.A. Vol. 5 pp. 1038). Police asked Grant if he was aware of anyone who could possibly have been interested in robbing him (A.A. Vol. 5 pp. 1038). Grant told police that he suspected Mr. Wilson was the individual involved (A.A. Vol. 5 pp. 1039). Grant was unaware who the other individual could be (A.A. Vol. 5 pp.

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1039). Grant admitted that he had sold marijuana at the Great Dane residence (A.A. Vol. 5 pp. 1039). Grant testified that police seized marijuana and approximately seven thousand dollars when they arrived at his apartment (A.A. Vol. 5 pp. 1039). Grant explained that Mr. Wilson had previously robbed him (A.A. Vol. 6 pp. 1042).

Detective Rodrigo Pena became aware that Danielle's phone was used in the area of the Circus Circus hotel (A.A. Vol. 6 pp. 1045-1047). Detective Pena also learned that Mr. Wilson was staying at the Circus Circus hotel (A.A. Vol. 6 pp. 1047). A search warrant was obtained for room 8744 at the Circus Circus hotel (A.A. Vol. 6 pp. 1047). Police obtained and executed a search warrant at the 4232 Gay Lane (A.A. Vol. pp. 1066-1074). [1]

During the interview of co-defendant, Delarian Wilson, he described his co-offender as Narcus. Mr. Wilson identified a picture of Narcus Wesley as his co-offender (A.A. Vol. 6 pp. 1075). Mr. Wilson stated that they played football together at UNLV (A.A. Vol. 6 pp. 1074).

After placing Mr. Wesley in custody, he was read his Miranda rights (A.A. Vol. 6 pp. 1067). During a search of the Gay Lane residence, a rifle was located (A.A. Vol. 6 pp. 1077). Detective Curtis Weske testified the defendant admitted being present at the residence (A.A. Vol. 6 pp. 1086). Mr. Wesley stated that Mr. Wilson asked him to go with him to obtain marijuana (A.A. Vol. 6 pp. 1086). Mr. Wesley denied having possession of a gun (A.A. Vol. 6 pp. 1086). Mr. Wesley stated that he actually touched Danielle but she had indicated that she didn't mind (A.A. Vol. 6 pp. 1087). Mr. Wesley stated that he touched Danielle because he "didn't want to be a punk" (A.A. Vol. 6 pp. 1087). Mr. Wesley described the situation as though he was "in the movies" (A.A. Vol. 6 pp. 1087).

Mr. Wilson implicated Mr. Wesley in his statement to the police. Mr. Wilson stated that Narcus Wesley's gun was fake (A.A. Vol. 6 pp. 1096). At first, Mr. Wilson indicated that "Christopher" was involved in the crime (A.A. Vol. 6 pp. 1102). Mr. Wilson later changed his story, stating "Christopher and DC" were involved (A.A. Vol. 6 pp. 1102). Thereafter, Mr.

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[1]The police obtained the search warrant believing that Nevada Power provided the address for Narcus Wesley when Nevada Power actually had provided the address for Narvus Wesley (the defendant's father) (A.A. Vol. 6 pp. 1074-1080).

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Wilson changed his story implicating Narcus (A.A. Vol. 6 pp. 1103). Mr. Wilson stated that he never had a gun and that he was not in charge (A.A. Vol. 6 pp. 1103). Mr. Wilson claimed that Grant had taken his business (A.A. Vol. 6 pp. 1103). Mr. Wilson also stated that he was not the one who stated "were 90 percent done we have 10 percent left to do" (A.A. Vol. 6 pp. 1103). Mr. Wilson denied any involvement in sexual conduct (A.A. Vol. 6 pp. 1103).

As a result of the investigation, Mr. Wesley and Mr. Wilson were arrested for the instant offenses.

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington ,466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel

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guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. This Court has held "claims of ineffective assistance of counsel must be reviewed under the "reasonably effective assistance" standard articulated by the U.S. Supreme Court in Strickland v. Washington, requiring Troxel to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108,901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 Nev. 1996).

In meeting the prejudice requirement of ineffective assistance of counsel claim, Mr. Wesley must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Reasonable probability is probability sufficient to undermine confidence in the outcome. Kirksey v. State, 112 Nev. at 980. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745,783 P.2d 430 Nev. 1989); Olausen v. State, 105 Nev. 110,771 P.2d 583 Nev. 1989).

In the instant case, Mr. Wesley's proceedings were fundamentally unfair. The defendant received ineffective assistance of counsel. Based upon the following arguments:

II. MR. WESLEY RESPECTFULLY REQUESTS THIS COURT REVERSE HIS CONVICTIONS OR ALTERNATIVELY REMAND THE CASE TO THE DISTRICT COURT FOR PURPOSES OF HOLDING AN EVIDENTIARY HEARING ON THE POST-CONVICTION ISSUES.

In the instant case, Mr. Wesley filed a hand-written pro per Petition for Writ of Habeas Corpus on September 9, 2010. In the petition, Mr. Wesley articulated detailed reasons why he received ineffective assistance of trial counsel.

Defense counsel conceded Mr. Wesley's guilt in violation of the fifth, sixth and fourteenth amendments to the United States Constitution. Additionally, Mr. Wesley received ineffective assistance of counsel based on counsel's strategic decision to introduce the co-

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defendant's statements which directly implicated Mr. Wesley in violation of the fifth, sixth and fourteenth amendments to the United States Constitution.

The United States Supreme Court in Strickland v. Washington ,466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. In Nevada, this Court has held "claims of ineffective assistance of counsel must be reviewed under the "reasonably effective assistance" standard articulated by the U.S. Supreme Court in Strickland v. Washington, requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099, 1108,901 P.2d 676, 682 (Nev. 1995), and Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 Nev. 1996).

In the instant case, Mr. Wesley should have been provided an opportunity to present evidence at an Evidentiary Hearing.

A petitioner is entitled to an evidentiary hearing where the petitioner raises a colorable claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir.1991) (remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance); Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir.1987) ("[W]here a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this

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claim, we must remand to the district court for an evidentiary hearing."); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (without the aid of an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions concerning evidence were made for tactical reasons).

A. DEFENSE COUNSEL CONCEDED MR. WESLEY'S GUILT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Wesley states in his pro per petition that he did not authorize his attorneys to concede his guilt. On direct appeal, Mr. Wesley argued the defense conceded his guilt. In the Order of Affirmance, this Court explained,

> Finally, Wesley claimed that trial counsel was ineffective for admitting guilt during opening statements. We decline to address this claim because "on direct appeal, this court does not address claims of ineffective assistance of counsel". Citing, Ouanbengboune v. State, 125 Nev. __, 220 P.3d 1122, 1125, N 1 (2009) (A.A. Vol. 7 pp. pp. 1281)

In fact, trial counsel did not just concede guilt during opening statements, trial counsel admitted guilt throughout the trial.

In opening statement, trial counsel stated, "as the State said and they are correct, Danielle Browning was raped. Many of those kids were robbed. One of those kids was kidnapped. They were terrorized for upwards for two hours. They had guns waived in their faces. I'm not disputing that. I'm not disputing that" (A.A. Vol. 4 pp. 802). On direct appeal, this was the only cite provided to this court by appellate counsel. However, the concession of guilt continued throughout the trial. Again, during opening argument, trial counsel stated, "at the end of this trial, all we ask you to do is to hold Narcus Wesley responsible for what he did, nothing more, and certainly nothing less. Thank you" (A.A. Vol. 4 pp. pp. 806).

During cross-examination of Detective Curtis Weske, defense counsel stated, "I want to talk to you a little bit about Narcus Wesley's confession". The detective answered, "yes sir" (A.A. Vol. 6 pp. 1106). Here, defense counsel referred to Mr. Wesley's statement as a confession. According to Webster's dictionary, a confession can be defined as:

> A statement of what is confessed: A written or oral acknowledgment of guilt by a party accused of an offense".

It is extremely rare to read defense counsels admission to a jury that the defendant has

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confessed. On direct appeal, this Court noted that it would not consider ineffective assistance of counsel. This Court noted that appellate counsel had raised the issue of the concession of guilty in opening argument. However, during trial, defense counsel concluded that his client had made admissions which amounted to a confession.

During closing argument, defense counsel told the jury, "what Narcus did was vile, it was disgusting. It was horrific. And Danielle didn't deserve that. She didn't deserve that. It was bad, and don't think that anybody in this room doesn't feel that way" (pp. 1194).

Thereafter, defense counsel attempts to argue that Mr. Wesley's vile and disgusting conduct occurred under duress. Unbelievably, defense counsel argued duress even though he told the jury Narcus was present throughout the entire incident. During the incident, the co-defendant left with one victim for approximately thirty minutes. Hence, what viable duress defense could be argued when defense counsel concedes that Mr. Wesley was present with the victims for approximately thirty minutes without the presence of the co-defendant. The duress defense was laughable. In fact, the duress defense was made comical in the very first sentences during the prosecutors rebuttal closing argument. The prosecutor began the rebuttal closing argument explaining, **"the guys a hero. He took one for the team. He stuck his finger in her vagina to save the world"** (A.A. Vol. 6 pp. 1194-1195). At this point, it would not be hard to imagine that the jurors were laughing in their own minds about the ridiculous defense that had been presented.

In this pro per petition, Mr. Wesley explained,

> Trial counsel was ineffective for conceding the petitioners guilt in his opening statement and in their closing argument, without obtaining the petitioners consent when the petitioner pled not guilty to all the charges (A.A. Vol. 7 pp. 1288).

There is uncontradicted State and Federal case law supporting the proposition that trial counsel may not concede a defendant's guilty before a jury without the consent of the defendant. When counsel concedes a client's guilt during the guilt-innocence phase of trial in spite of the client's earlier plea of not guilty and without the defendant's consent, counsel provides ineffective assistance of counsel regardless of the weight of evidence against the defendant or the wisdom of counsel's "honest approach" strategy. Francis v. Spraggins, 720 F.2d 1190 (11th

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Cir.1983) [, cert. denied, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835 (1985)]; Wiley v. Sowders, 647 F.2d 642 (6th Cir.1981) [, cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981)], State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (N.C.1985)[, cert. denied, 476 U.S. 1123, 106 S.Ct. 1992, 90 L.Ed.2d 672 (1986)].

The gravity of the consequences of a decision to plead guilty or to admit one's guilt demands that the decision remain in the defendant's hand. An attorney cannot deprive his or her client of the right to have the issue of guilt or innocence presented to the jury as an adversarial issue on which the state bears the burden of proof without committing ineffective assistance of counsel. "The adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate' (citation omitted). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." U.S. v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). "A lawyer may make a tactical determination of how to run a trial, but the due process clause does not permit the attorney to enter a guilty plea or admit facts that amount to a guilty plea without the client's consent." Brown v. Rice, 693 F.Supp. 381, 396 (W.D.N.C.1988), Brown v. Dixon, 891 F.2d 490 (4th Cir.1989), cert. denied, 495 U.S. 953, 110 S.Ct. 2220, 109 L.Ed.2d 545 (1990). (FN1)

These cases demonstrate that an attorney has no right to concede a defendant's guilt before a jury, when the defendant has pled not guilty and has not provided consent to the attorney to concede the issue of guilt. Additionally, it is important to note that these cases range from different areas of the United States and yet, certiorari to the United States Supreme Court was denied each and every time. Therefore, it is safe to conclude that the law of the land is that defense counsel may not tactfully choose to concede guilt in an effort to provide some form of leniency at the time of sentencing.

In Jones v. Nevada, 877 P.2d 1052, 110 Nev. 730 (Nev. 1994), this Court reversed the conviction of Mr. Jones wherein his attorney conceded that the defendant was guilty of second degree murder even though the defendant had pled not guilty. In Jones, the defendant was convicted of stabbing to death his live in girlfriend. The defendant was sentenced to die. The

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defendant had pled not guilty. However, during closing argument, his trial counsel had argued to the jury that Mr. Jones should be found guilty of second degree murder. *Id.* Although the Jones case is a capital case, Mr. Wesley would argue it is on point with his case. This Court considered the basic standard for ineffective assistance of counsel. *Id. at 1057.* The Court found that appellant was able to demonstrate that his trial counsel representation's fell below an objective standard of reasonableness. However, the second prong of Strickland standard, was not necessarily met according to the Nevada Supreme Court *Id.* citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

This Court explained that,

> We are unable to conclude with a strong degree of certainty that the second prong of the Strickland test, which requires a showing of prejudice, has also been met. Nevertheless, in a capital case involving an error of this magnitude, we are constrained to give the full benefit of the doubt on this issue to Jones. In addressing this same issue, the Supreme Court of North Carolina determined that prejudice may be presumed where defense counsel improperly concedes his client's guilt: . . . . Id.

The Nevada Supreme Court's ruling in the Jones case is completely consistent with the rulings in numerous other courts where certiorari to the United States Supreme Court was denied. Therefore, it appears that a defense counsel cannot concede his client's guilt without the defendant's consent.

In Jones, this Court found:

> When counsel concedes a client's guilt during the guilt-innocence phase of trial in spite of the client's earlier plea of not guilty and without the defendant's consent, counsel provides ineffective assistance of counsel regardless of the weight of evidence against the defendant or the wisdom of counsel's "honest approach" strategy. Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983)[, cert. denied, 470 U.S. 1059, 84 L. Ed. 2d 835, 105 S. Ct. 1776 (1985)]; Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981)[, cert. denied, 454 U.S. 1091, 70 L. Ed. 2d 630, 102 S. Ct. 656 (1985)], State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (N.C. 1985)[, cert. denied, 476 U.S. 1123, 90 L. Ed. 2d 672, 106 S. Ct. 1992 (1986)]. The gravity of the consequences of a decision to plead guilty or to admit one's guilt demands that the decision remain in the defendant's hand. An attorney cannot deprive his or her client of the right to have the issue of guilt or innocence presented to the jury as an adversarial issue on which the state bears the burden of proof without committing ineffective assistance of counsel. "The adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate' (citation omitted). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." U.S. v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed. 2d 657

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(1984). A lawyer may make a tactical determination of how to run a trial, but the due process clause does not permit the attorney to enter a guilty plea or admit facts that amount to a guilty plea without the client's consent.

In the instant case, defense counsel conceded Mr. Wesley's guilt in opening argument, closing argument, and during the questioning of the lead detective. On direct appeal, appellate counsel made this Court aware that trial counsel had conceded guilt in opening argument. However, a review of the record indicates that the concession of guilt occurred throughout the trial. Defense counsel had no right to deprive the client of the right to have the issue of guilt or innocence presented to the jury in an adversarial manner. Counsel has the right to make certain tactical determinations on how to run the trial, but the due process clause dictates that defense counsel had no right to concede Mr. Wesley's guilt.

In the Findings of Fact and Conclusions of Law, the district court ruled that defense counsel "is entitled to handle trial strategy and the day to day decision making during trial". Mr. Wesley recognizes that counsel has the right to certain strategic decisions, however, Mr. Wesley disputes that trial counsel has a right to concede guilt without Mr. Wesley's consultation and consent. Here, Mr. Wesley was given no notice that his attorneys would acquiesce to the State's theory concluding that Mr. Wesley's conduct was "horrific and vile". Mr. Wesley did not consent to his attorney's referring to his statement as a confession. If counsel desired to follow this strategy, trial counsel should have obtained Mr. Wesley's permission.

In Mr. Wesley's pro per petition, he specifically requested an evidentiary hearing. In the instant case, the matter should be reversed because defense counsel conceded Mr. Wesley's guilt. Alternatively, Mr. Wesley requests this Court remand this matter to have the district court make findings of fact and conclusions of law on the issue of why defense counsel conceded Mr. Wesley's guilt without the client's permission.

B. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S STRATEGIC DECISION TO INTRODUCE THE CO-DEFENDANT'S STATEMENTS WHICH DIRECTLY IMPLICATED MR. WESLEY IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Mr. Wesley's pro per petition, he complains that trial counsel was ineffective for permitting the co-defendant's statements into evidence. The co-defendant's statements directly

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implicated Mr. Wesley.

On direct appeal, appellate counsel complained the district court erred in admitting co-conspirator, Delarian Wilson's hearsay statements and guilty plea. This Court explained,

> And Wilson's confession and guilty plea were admitted by the defense over the State's objection" See, Ford v. State, 122 Nev. 796, 805, 138 P.3d 500, 506 (2006) (confrontation rights may be waived through counsel); Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005)(a party who participates in an alleged error is estopped from raising any objection on appeal)(Order of Affirmance pp. 1-2).

Mr. Wesley specifically complains that trial counsel was ineffective in placing highly incriminating evidence in front of the jury without Mr. Wesley's consultation and consent. A review of the trial transcript provides no reasonable basis for trial counsel to introduce this evidence before the jury. During direct examination of Detective Curtis Weske, the prosecutor elicited that both defendants were implicating each other (A.A. Vol. 6 pp. 1089). This evidence was presented without objection from defense counsel. Here, the State elicited evidence that Mr. Wilson had implicated the defendant on direct examination.

Prior to cross-examination, a hearing was held outside the presence of the jury. During the hearing, defense counsel explained their intent to play an hour and a half CD of an interview between Detective Weske and co-defendant Wilson. During the hearing, the prosecutor specifically states, "...as during this interview where he puts the culpability on Narcus Wesley, where he says that, yeah, I was there, but Narcus had the gun and Narcus did the stuff" (A.A. Vol. 6 pp. 1097). During the hearing, the district court displays some concern for defense counsel's tactics, explaining, "I don't know why, you guys all know what it says, I don't, I don't know why you want it in" (A.A. Vol. 6 pp. 1098). The district court further states, "you better be absolutely certain, because from a strategic perspective, this certainly does make this take a turn ninety degrees" (A.A. Vol. 6 pp. 1099).

The prosecutor also expressed serious reservations with this strategy. The prosecutor stated,

> Based on the motions filed pre-trial, this defendant was deprived of his right to confront Delarian Wilson, and now they are playing the vary tape that implicates to some extent their client, they understand and have made that strategic decision. For purposes of counsel, I'd ask to put that on the record (A.A. Vol. 6 pp. 1099).

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Defense counsel explains that he did have a concern about "Bruton issues" (A.A. Vol. 6 pp. 1099). However, defense counsel decided to ignore the rational enunciated by the United States Supreme Court in Bruton v. United States, 391 U.S. 123, 88 Sup. Ct. 620, 20 L. Ed 2d 476 (1968), and play the statement of the co-defendant which clearly incriminated Mr. Wesley. Defense counsel questioned Detective Weske regarding the evolution of Mr. Wilson's statement. [2] Mr. Wilson's story implicated Mr. Wesley in the following ways: 1) Mr. Wilson denied ever having a gun (A.A. Vol. 6 pp. 1103); 2) Mr. Wilson claimed he was not in charge (A.A. Vol. 6 pp. 1103); 3) Mr. Wilson was not the person who stated, "we're 90 percent done, we have 10 percent left to do" (A.A. Vol. 6 pp. 1103); 4) Mr. Wilson denied having anything to do with sexual conduct (A.A. Vol. 6 pp. 1103); 5) Mr. Wilson never ordered any sexual activity (A.A. Vol. 6 pp. 1103); and 6) Mr. Wesley was the other perpetrator.

Directly after presenting evidence of Mr. Wilson's incriminating statement of Mr. Wesley, defense counsel decided to question Detective Weske regarding Mr. Wesley's statement. Defense counsel stated, "I want to talk to you a little bit about Narcus Wesley's confession" (A.A. Vol. 6 pp. 1106). Therefore, defense counsel successfully presented an hour and a half of unconfronted statements from Mr. Wilson implicating Mr. Wesley. Directly after, defense counsel begins questioning Detective Weske regarding Mr. Wesley's "confession". Directly after that strategic choice, defense counsel decided to introduce and admit the guilty plea agreement and canvass of Mr. Wilson (A.A. Vol. 6 pp. 1105). Again, the plea canvass implicated Mr. Wesley. During the plea canvass Mr. Wilson admitted to aiding and abetting Mr. Wesley in the commission of the sexual assault.

The State would not have been permitted to introduce any of this evidence. Numerous states have recognized that a co-defendant's guilty plea is inadmissible. "A guilty plea or conviction of a co-defendant may not be used as substantive evidence of another defendant's guilt" People v. Brunner, 797 P.2d 788 (Colo. App. 1990). The State of Wyoming has ruled that

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[2] Mr. Wilson changed his story approximately three times. On the third occasion, Mr. Wilson began to significantly incriminate Mr. Wesley. It appears that defense counsel's strategy was to demonstrate that Mr. Wilson had an evolving story. However, the result was an unconfronted direct incrimination of their own client.

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the right to a fair trial embraces the right not to be convicted in whole or in part upon the guilty plea of co-conspirators. Capshaw v. State, 11 P.3d 905 (Wyo. 2000); (See also, Hall v. State, 109 P.3d 499 (2005 Wy. 35). In Waldon v. State, 113 Nev. 853, 944 P.2d 762 (1997), this Court reversed the murder conviction where the inadmissible evidence was presented. This Court has determined that a co-defendants change of plea statement and penalty hearing statement in which the co-defendant admitted to stabbing the victim was not admissible during the guilt phase of defendant's murder trial. Here, defense counsel decided to introduce Mr. Wilson's guilty plea and canvass which directly implicated Mr. Wesley. Interestingly enough, the guilty plea and canvass of Mr. Wilson would have provided significant credibility to Mr. Wilson. Mr. Wilson was accepting responsibility for serious crimes and telling the court that he committed the crimes with Mr. Wesley. This was the strategy of defense counsel.

Neither the State nor defense counsel should have been permitted to introduce Mr. Wilson's statements to the police which provided overwhelmingly incriminating evidence against Mr. Wesley.

In Bruton v. United States, 391 U. S. 123; 88 S.Ct. 620; 20 L.E.2d 476 (1968), the United States Supreme Court reversed the conviction of the Petitioner based on the trial judge admitting evidence of the non testifying co-defendant. Id. In Bruton, the United States Supreme Court held that,

> The court held that despite the limiting instruction, the introduction of the accomplices out of court confession at Petitioner's trial violated Petitioner's right protected by the United States Constitution Amendment Six, to cross-examine witnesses.

In, Cruz v. New York, 107 S.Ct. 1714 (1987), at 1717; the United States Supreme Court held that, "[T]he confrontation clause of the Sixth Amendment guarantees the right of a criminal defendant to be confronted with the witnesses against him." The United States Supreme Court further stated, "[w]e have held that guarantee, extended against the states by the Fourteenth Amendment, includes the right to cross-examine witnesses." See, Pointer v. Texas, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965).

In Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.E.2d 117, (1999), the United States Supreme Court considered a Bruton issue similar to the instant case. In Lilly, the U.S.

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Supreme Court considered the issue of whether Mr. Lilly's Sixth Amendment Right to confront the witnesses against him was violated by admitting into evidence at trial a non testifying accomplices' entire confession that contained some statements against the accomplices penal interests and others that inculpated the accused. Id. at 120. In Lilly, three people were accused of several crimes including first degree murder. Id. One of the defendants implicated himself in some of the crimes and stated that Mr. Lilly had instigated the car jacking and that Mr. Lilly was the one who committed the murder. Lilly, 527 U.S. 116 at 125. Mr. Lilly was sentenced to death. Lilly,527 U. S. 116, 122.

In Mr. Lilly's trial, the commonwealth called Mark (the man who gave the incriminating statements) to testify in a severed trial against Mr. Lilly. Mark invoked his right to the Fifth Amendment privilege against self incrimination. The commonwealth therefore, introduced the evidence based upon the unavailability of Mark and the fact that the statement was made against his penal interest. Id. at 121, 527 U. S. 116, 121. The Supreme Court of Virginia affirmed Mr. Lilly's sentence of death.

The United States Supreme Court provided that, "[o]ur concern that this decision represented a significant departure from our confrontation clause juris prudence prompted us to grant Certiaori." 527 U. S. 116, 123. In Lilly, the United States Supreme Court provides and extensive history regarding the confrontation clause.

In Lilly, the U.S. Supreme Court provides many examples of previous cases to establish the development of the confrontation clause. Citing to Grey v. Maryland, 523 U. S. 185, 194-195-140 L.E.2d 294, 118 S.Ct. 1151 (1998), for the proposition that because the use of an accomplice's confession creates a special, and vital, need for cross-examination, if a prosecutor desires to offer such evidence must comply with Bruton, hold separate trials, use separate jurys, or abandon the use of the confession. Id. at 200.

In Lilly, the United States Supreme court explained that,

> The third category includes cases, like the one before us today, in which the government seeks to introduce a confession by an accomplice which incriminates a criminal defendant." The practice of admitting statements in this category under an exception to the hearsay rule - - to the extent that such a practice exists in certain jurisdictions - - is, unlike the first category or even the second, of quite recent vintage. This category also typically includes statements that, when

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> offered in absence of the declarant functions similarly to those used in the ancient ex parte affidavit system. 527 U. S. 116, 130-131.
>
> The United States Supreme Court further provided that "[M]ost important, this third category of hearsay encompasses statements that are inherently unreliable." Id. "[C]onsistent with this scholarship and the assumption that underlies the analysis in our Bruton line of cases, we have over the years spoken with one voice in declaring presumptively unreliable accomplices confessions that incriminate defendant." Citing to Lee v. Illinois, 476 U.S. 530, 90 L.E.2d 514, 106 S.Ct. 2056 (1986).

In Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934 85 S.Ct. 1074 (1965), the United States Supreme Court held that the confrontation clause was plainly violated when a non testifying accomplices confession which shifted the responsibility and implicated the defendant as the trigger man was admitted into evidence. Id. at 419.

Here, the State briefly introduced evidence that Mr. Wilson had implicated Mr. Wesley. However, defense counsel opened pandoras box by presenting Mr. Wilson's statement to the police, guilty plea, and plea canvass. Defense counsel also referred to Mr. Wesley's statement as a "confession". By the time defense counsel was done with their cross-examination, the jury could have no doubt that Mr. Wesley was guilty of all of the crimes charged. Mr. Wesley would respectfully request that this Court review the trial transcript of Detective Weske in order to ascertain who the prosecutor was in the case.

It is true that trial counsel has a right to make certain strategic choices. However, trial counsel should not have a strategic right to make choices that obviously harm the client. The defendant's right to a fair trial trumps the right of defense counsel to make any and all strategic choices no matter how unreasonable they seem. In the instant case, defense counsel acquiesced to the State's theory. Defense counsel referred to Mr. Wesley's conduct as vile. Defense counsel told the jury to hold Mr. Wesley responsible for his conduct. Defense counsel referred to Mr. Wesley's statement as a "confession". Over the State's objection and the trial court's significant concern, defense counsel introduced an unconfronted statement of a co-conspirator which directly implicated Mr. Wesley. Over the State's objection and the court's concern, defense counsel introduced Mr. Wilson's plea and canvass which directly implicated Mr. Wesley. At some point, the court needs to make it abundantly clear to defense attorneys that not all strategic choices will be tolerated.

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In United States v. Swanson, 943 F.2d 1070 (1991), the ninth circuit considered an extreme example of the dereliction of duty of defense counsel. In Swanson, during closing argument, defense counsel asserted that he would not insult the jury's intelligence by alleging his client's innocence. Id. In Swanson, defense counsel told the jury that his "job" was to make the government prove the case beyond a reasonable doubt. 943 F.2d 1070, 1071. Defense counsel then stated that the evidence was overwhelming and that he would not insult the jurors intelligence. Id. Defense counsel told the jury that he did not think the evidence rose to a level of raising reasonable doubt. Id. The ninth circuit held that the performance of defense counsel caused the breakdown in the adversarial system and relieved the government of proving its case beyond a reasonable doubt. Id. In Swanson, the court explained, "the sixth amendment provides that in all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense. The Supreme Court has instructed that the sixth amendment recognizes the right to assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results" (internal quotations omitted); citing Strickland v. Washington, 466 U.S. 668, 685, 80 L. 2d 674, 104 Sup. Ct. 2052 (1984).

The ninth circuit recognized what is most applicable to the instant case:

> The Strickland test, requiring a showing of prejudice caused by counsels ineffectiveness is applicable 1) in cases where the record reflects that an attorneys errors or omissions occurred during an inept attempt to present a defense, or 2) that he or she engaged in an unsuccessful tactical maneuver that was intended to assist the defendant in obtaining a favorable ruling. 943 F.2d 1070, 1073 HD 6.See, Harding v. Lewis, 834 F.2d 853, 859 (9th Cir. 1997).

In United States v. Cronic, 466 U.S. 648, 80 L. Ed 2d 657, 104 Sup. Ct. 2039 (1984), decided on the same day as Strickland, "the United States Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed" Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (En Banc) (Citing Cronic, 466 U.S. at 658.). "Cronic presumes prejudice when there has been an actual breakdown in the adversarial process at trial" Toomey v. Bunnell, 898 F.2d 741, 744 n. 2 (9th Cir.).

The court was concerned with the loss of the adversarial process. Mr. Wesley recognizes that defense counsel's conduct in Swanson was an unusually extreme example of the breakdown

of the adversarial process. However, the instant case also reflects a unique situation. The strategic decisions made by defense counsel in the instant case, result in the breakdown of the adversarial process. Here, the trial court expressed concerns for defense counsel's tactics.

As noted in the order of affirmance, this Court recognized that defense counsel introduced the co-defendant's statements incriminating the defendant. The facts adduced in the instant case are a complete breakdown of the adversarial process. It seems defense counsel made decisions that contradicted the reasoning of case law enunciated by the United States Supreme Court. There could be no reasonable rational for several of defense counsels decisions. There is only one rational for these type of decisions. The same rational is enunciated by defense counsel in Swanson, not to insult the jury's intelligence and gain the jury's favor by defense counsel presenting himself with credibility. However, to present credibility by agreeing with the State and harming the defendant is a complete breakdown of the system. Mr. Wesley would contend that the actions of defense counsel grew to a level that prejudice is presumed.

Mr. Wesley would request that this Court reverse his convictions based upon a violation of the fifth, sixth, and fourteenth amendments to the United States Constitution. Alternatively, Mr. Wesley would respectfully request this Court remand the matter for an Evidentiary Hearing.

III. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO ADDRESS ON APPEAL THE ISSUE OF ACTUAL CONFLICT OF INTEREST IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Mr. Wesley's pro per petition, he complains that trial counsel failed to withdraw from representing him even though they had previously represented Mr. Wesley's father (petition 5, d). Mr. Wesley further argued that there was a conflict of interest and the public defenders should have withdrawn (petition 5d). During direct examination of Detective Weske, the prosecutor began questioning the Detective regarding the search of the defendant's fathers home. Mr. Wesley and his father were present at the time the search began. The prosecutor questioned the detective as follows:

Q: And did you discover something while you were in the house at some point?
A: Yes.
Q: What did you discover?

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A: A rifle (A.A. Vol. 6 pp. 1077).

At a hearing outside the presence of the jury, defense counsel made the following statement:

> Judge, I've been scared to death of the issue for the entire trial, and so scared to death of this issue that I actually mentioned it to Ms. Collins during jury selection and I mentioned it to Ms. Luzaich during jury selection. I mentioned it again I believe it was Friday, last week Friday. We have actually had conferences at the bench about it. And that is, that there was a rifle that was found pursuant to the search warrant at the Gay Lane address (A.A. Vol. 6 pp. 1079).

Defense counsel further explained,

> This is the particular and precise issue that I've addressed with counsel. It's been my fear that if this, God forbid, comes into evidence, which it now has, and that's why I've tried to give everybody a heads up numerous times, if it comes into evidence I got a real problem. My stomach is in knots because we've got a gun found at my client's residence, and I got no way that I can defend that without throwing my other client, Narvus Wesley under the bus. That is the problem. That is the problem that I've made clear from jump street (A.A. Vol. 6 pp. 1079).

Defense counsel explained that Narvus Wesley (the defendant's father) was a client of the public defenders office regarding the rifle that was located (A.A. Vol. 6 pp. 1080). Defense counsel then explained that he was now weighing the interests of more than Narcus Wesley's interests because he was concerned to argue that the rifle belonged to Narvus Wesley because he was an ex-felon (A.A. Vol. 6 pp. 1080-1081). Defense counsel then moved for a mistrial (A.A. Vol. 6 pp. 1079). [3]Defense counsel claimed that he felt that there was a conflict of interest (A.A. Vol. 6 pp. 1081). Both the State and the defense recognized that the case against the defendant's father had been dismissed. However, it should be noted that defense counsel would obviously have concern that the United States district attorney's office would not be bound by the State's decisions. Throughout Las Vegas, the United States Attorney's Office often prosecutes felons for being in possession of a firearm. The penalties are quite severe for such a conviction.

Defense counsel recognized the issue prior to trial. Defense counsel should have filed a motion to withdraw based upon the conflict of interest.

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[3]The district court sua sponte issued a curative instruction advising the jury that the rifle belonged to Narcus' father and did not belong to the defendant (1081). The district court denied the request for mistrial.

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The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense". This right to counsel includes a "correlative right to representation that is free from conflicts of interest" Wood v. Georgia, 450 U.S. 261, 271, 67 L.Ed. 2d 220, 101 Sup. Ct. 1097 (1981); See also, Cuyler v. Sullivan, 446 U.S. 335, 345, 64 L.Ed. 2d 333, 100 Sup. Ct. 1708 (1980). Whether a defendant's representation "violates the sixth amendment right to effective assistance of counsel is a mixed question of law and fact that is reviewed de novo" Triana v. United States, 205 F.3d 36, 40 (2nd Cir. 2000)(quoting United States v. Brau, 159 F.3d 68, 74 (2nd Cir. 1998), cert denied 531 U.S. 956 (2000).

Conflicts of interest can be placed into three categories. The first category describes those conflicts that are so severe that they are deemed per say violations of the sixth amendment. Such violations are unwaivable and do not require of showing that the defendant was prejudiced by his representation. See, United States v. Fulton, 5 F.3d 605, 611 (2nd Cir. 1993); United States v. John Doe # 1, 272 F.3d. 116, 125 (2nd Cir. 2000); Finlay v. United States, 537 U.S. 851, 154 L.Ed. 2d 82, 123 Sup. Ct. 204 (2002); Armienti v. United States, 234 F.3d 820, 823 (2nd Cir. 2000). By contrast when an actual conflict of interest occurs when the interest of the defendant and his attorney "diverge with respect to a material factual or legal issue or to a course of action" United States v. Schwarz, 283 F.3d 76, 91 (2nd Cir. 2002). To violate the sixth amendment, such conflicts must adversely affect the attorney's performance. See, United States v. Levy, 25 F.3d 146, 152 (2nd Cir. 1994). Lastly, a clients representation suffers from a potential conflict of interest if "the interest of the defendant may place the attorney under inconsistent duties at some time in the future" United States v. Kliti, 156 F.3d 150, 153 (2nd Cir. 1998). To violate the sixth amendment such conflicts must result in prejudice to the defendant. Levy, 25 F.3d at 152.

While a defendant is generally required to demonstrate prejudice to prevail on a claim of ineffective assistance of counsel. See, Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 Sup. Ct. 2052 (1984), this is not so when counsel is burdened by an actual conflict of interest. Id. 466 U.S. at 692. Prejudice is presumed under such circumstances. See also, United

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States v. Malpiedi, 62 F.3d 465, 469 (2nd Cir. 1995); United States v. Iorizzo, 786 F.2d 52, 58 (2nd Cir. 1986). Therefore, a defendant claiming he was denied a right to conflict free counsel based on an actual conflict need not establish a reasonable probability that, but for the conflict or a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only establish 1) an actual conflict of interest that 2) adversely affected his counsel's performance. See, Cuyler v. Sullivan, 446 U.S. 335, 348, 64 L.Ed 2d 333, 100 Sup. Ct. 1708 (1908); See also, Levy, 25 F.3d at 152.

"An attorney has an actual, as opposed to potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interest diverge with respect to the material factual or legal issue or to a course of action." Winkler v. Keane, 7 F.3d 304, 307 (2nd Cir. 1993).

Mr. Wesley appeared to be unaware of the potential conflict of interest until the issue occurred during trial. Here, an actual conflict of interest existed between the interests of Narcus Wesley and his father. Both were represented by the public defenders office. In the instant case, the public defender explained that he had "knots in his stomach" and "felt sick" because of the concern he had over the potential issue. The public defender was left in a quandary between the interests of Narcus and Narvus Wesley. It would have been incumbent upon counsel to file a pre-trial motion to suppress any mention of the rifle or alternatively a request to withdraw based upon a conflict of interest. In the instant case, Narcus Wesley had a right to conflict free counsel. Mr. Wesley received ineffective assistance of trial counsel and appellate counsel for failure to raise the issue on direct appeal. Mr. Wesley would respectfully request that this Court reverse his convictions and permit him to proceed to trial with conflict free counsel.

IV. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the pro per petition, Mr. Wesley complains that trial counsel failed to properly conduct a pre-trial investigation. Specifically, Mr. Wesley complains that defense counsel should have presented a serious of witnesses regarding the defendant's good character. The district court denied Mr. Wesley's contention explaining that the trial tactics and day to day

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decision making during the trial are the responsibility of counsel and not the client.

Next, Mr. Wesley complained that defense counsel failed to impeach Danielle with a police report that contradicted her trial testimony. The district court denied Mr. Wesley's allegations. Mr. Wesley contended that a police report would have contradicted the victims trial testimony. Mr. Wesley complained that his lawyers failed to investigate the motives of the witnesses to present false accusations. In the event this Court does not grant reversal, Mr. Wesley respectfully requests that this Court remand the case for an Evidentiary Hearing to explore the issues presented.

Counsel's complete failure to properly investigate renders his performance ineffective.

> [F]ailure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See U.S. v. Gray, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decide[s] not to put them on the stand." Id. at 712. See also Hoots v. Allsbrook, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); Birt v. Montgomery, 709 F.2d 690, 701 (7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), the Supreme Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses.

In Love, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

"The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, at 2070, 80 L.Ed.2d 674 (1984). The Nevada Supreme Court reviews claims of ineffective assistance of counsel under a reasonable effective assistance standard enunciated by the United States Supreme Court in Strickland and adopted by the Nevada Supreme Court in Warden v. Lyons,

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100 Nev. 430, 683 P.2d 504, (1984); *see* Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Under Strickland, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

"An error by trial counsel, even if professionally unreasonable, does not warrant setting aside a judgment of a criminal proceeding if the error had no effect on the judgment. Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. Thus Strickland also requires that the defendant be prejudiced by the unreasonable actions of counsel before his or her conviction will be reversed. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id. at* 694, 104 S.Ct. at 2068. Additionally, the Strickland court indicated that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id. at* 696, 104 S.Ct. at 2069.

In the instant case, Mr. Wesley requests that this Court remand this matter for an evidentiary hearing so that Mr. Wesley can present evidence establishing the failure to properly investigate in violation of the sixth and fourteenth amendment to the United States Constitution.

V. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO ATTEMPT TO PRECLUDE SUGGESTIVE PRE-TRIAL IDENTIFICATION IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the pro per petition, Mr. Wesley specifically complains that the identification procedures used were impermissibly suggestive (A.A. Vol. 7 pp. 1302) During trial, testimony

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was elicited that Mr. Wilson identified Mr. Wesley's photograph. As was enunciated in argument two, there were numerous violations of the rule established in Bruton v. United States, 391 U.S. 123, 88 Sup. Ct. 620, 20 L. Ed. 2d 476 (1968). Here, Mr. Wilson did not testify yet evidence that he had identified Mr. Wesley by way of photograph were admitted. Defense counsel should have filed a pre-trial motion to exclude the pre-trial identification of Mr. Wesley as impermissibly suggestive.

In Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 the United States Supreme Court states that pre-trial lineups are for the purpose of identification and should not be suggestive.

A conviction based on eyewitness identification of the accused at trial following a pretrial identification will be set aside on the ground of improper pretrial identification only if the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Neil v. Biggers 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401.

In the instant case, Mr. Wesley received ineffective assistance of counsel for failure to file a pre-trial motion to preclude the photographic identification of Mr. Wesley. First, the identification during trial violated Bruton. Second, the line-up was impermissibly suggestive as outlined in Biggers.

VI. MR. WESLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE OF TRIAL COUNSEL TO REQUEST DANIELLE BROWNING TO UNDERGO A PSYCHOLOGICAL EXAM.

In the pro per petition, Mr. Wesley complained that trial counsel should have requested a psychological examination of Danielle Browning. The district court specifically denied Mr. Wesley's claim.

In Abbott v. Nevada, 122 Nev. 715, 138 P. 3d 462 (2006), this Court specifically overruled Romano, 120 Nev. 613, 97 P.3d 594 (2004), for the proposition that Romano impermissibly restricted a defendant's access to an independent psychological evaluation of an alleged victim. In Chapman v. State, 117 Nev. 1, 16 P.3d 432 (2001), this Court concluded that a clinical forensic interviewer who interviews a victim is not an expert for purposes of

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Koerschner. However, in Abbott, this Court concluded that Chapman incorrectly announced a blanket rule, and the Court clarified Chapman's holding. This Court concluded that when a clinical forensic interviewer analyzes, and not merely recites, the facts of the interview, and states whether there was evidence the victim was coached or was biased against the defendant, the clinical forensic interviewer would be deemed an expert witness for purposes of applying Koerschner rule. Abbott, at 138 P.3d 462, 465. Also citing Koerschner v. State, 116 Nev. 111, 13 P.3d 451 (2000).

In Abbott, this Court determined that it is within the sound discretion of the district court whether to grant or deny a defendant's request for a psychological examination.

In Abbott, this Court explained,

> First, under Koerschner, whether the State utilizes other tactics, including a psychological expert, is merely a factor to be considered with whether there is little or no corroboration evidence and whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. Also, Koerschner contemplated that error was committed when a defendant is refused a psychological examination of the victim where the State has the benefit of an expert analysis and the other two factors are satisfied. Finally, there may be instances where the veracity of a child witness may be brought into question because of his or her emotional or mental state and necessitate a psychological examination, even though the State has had no access to or benefit from an expert opinion. Id. at 468. (citations and quotations omitted).

In Abbott, this Court further explained,

> A person need not be a licensed psychologist or psychiatrist in order for their testimony to constitute that of an expert. Where a State's expert testifies concerning behavioral patterns and responses associated with victims of child sexual abuse, courts have recognized that this type of testimony puts the child's behavioral and psychological characteristics at issue. Id. at 470.

In the instant case, trial counsel should have filed a pre-trial motion requesting a psychological examination of Danielle Browning.

VII. MR. WESLEY'S JURY WAS UNCONSTITUTIONAL BASED UPON THE FAILURE OF THE JURY TO REPRESENT A CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Mr. Wesley's pro per petition, he specifically complains that his jury was unconstitutionally selected. Mr. Wesley points to the fact that there was only African American male on the jury. Mr. Wesley is an African American male. Mr. Wesley explains that all of the

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jurors were over the age of thirty-five and Mr. Wesley was only twenty-five. Mr. Wesley also complains that the jury make up included ten females and two males (A. A. Vol. 7 pp. 1300). In the Order of Affirmance, this Court explained,

> Wesley makes a passing claim in the conclusion of his Opening Brief that the district court erred by permitting the peremptory challenge of an African American potential juror in violation of Batson v. Kentucky, 476 U.S. 79 (1986). A review of the record reviews no error in this regard (A.A. Vol. 7 pp. 1280).

Mr. Wesley raises the issue to make sure that the issue is properly preserved for potential federal review. Mr. Wesley recognizes that this Court has already considered the Batson issue. However, the undersigned is concerned that the proper standard and case law from Mr. Wesley's direct appeal Opening Brief my not be considered adequate for federal review.

In State of Arizona v. Holder, 155 Ariz. 83 , 745 P.2d 141(1987), the court stated:

> A criminal defendant can use the facts and circumstances of his individual case to make a prima facie showing that the state is violating his equal protection rights by using peremptory challenges systematically to exclude members of the defendant's race from the jury.

The Holder court also held,

> In Batson, the United States Supreme Court indicated that to establish a prima facie case the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of race. 155 Ariz. 83 , 745 P.2d 141(1987).

Mr. Wesley did not receive a jury of his peers in violation of the United States Constitution. Mr. Wesley places the State on notice that he believes that his jury was unconstitutionally selected.

VIII. COUNSEL FOR MR. WESLEY ADOPTS ALL ISSUES RAISED BY THE DEFENDANT IN HIS PRO PER PETITION FOR WRIT OF HABEAS CORPUS THAT ARE NOT BRIEFED ABOVE.

IX. MR. WESLEY'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

In Dechant v. State, 10 P.3d 108, 116 Nev. 918 (2000), this Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant,

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this Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

Based on the foregoing, Mr. Wesley would respectfully request that this Court reverse his conviction based upon cumulative errors at trial.

CONCLUSION

Based on the foregoing, Mr. Wesley respectfully requests this Court order reversal of his convictions. Alternatively, Mr. Wesley requests this Court remand this matter for an Evidentiary Hearing.

DATED this 22nd day of September, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amended appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of September, 2011.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September ___, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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