IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ROSS,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

No. 63624

Electronically Filed
Feb 20 2014 11:21 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

Appeal from Order Denying Petition for Writ of Habeas Corpus (Post Conviction) which was Denied on June 12, 2013, by the Honorable Judge Michael Villani, Eight Judicial District Court, Case No. C236169

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to NRS 177.015. The District Court entered its Findings of Fact, Conclusions of Law and Order on June 12, 2013. The Notice of Entry of Findings of Fact, Conclusions of Law, and Order was entered on June 17, 2013. The Notice of Appeal was filed on July 16, 2013. The appeal is from a final order denying the Defendant's Petition for Writ of Habeas Corpus (post-conviction).

STATEMENT OF THE ISSUES

I. The Trial Court erred in Concluding that Trial Counsel was not Ineffective for Violating Ross's 6th Amendment Right to Speedy Trial.

II. The Trial Court erred in Concluding that Trial Counsel was not Ineffective for failing to engage in pretrial discovery.

III. The Trial Court erred in Concluding that Trial Counsel was not Ineffective for failing to communicate with Petitioner prior to trial.

IV. Trial Counsel' s Performance During the Preliminary Hearing and Trial Fell Below an Objective Standard of Effective Assistance Counsel.

V. The Trial Court erred in concluding that Trial Counsel was not Ineffective for Failing to Move to Dismiss the Criminal Counts after the Jury's Verdict in Light of the Overwhelming Evidence of Reasonable Doubt.

VI. The Trial Court erred in Concluding that Trial Counsel was not Ineffective for failing to retain defense experts.

VII. The Trial Court erred in Concluding that the Cumulative Effect of all errors did not Constitutes Ineffective Assistance.

STATEMENT OF THE CASE

On May 23, 2007, Ronald Ross was charged by Criminal Complaint with twenty (20) counts, to wit: Count 1- Burglary; Count 2-Larceny from the Person; Count 3-Burglary; Count 4-Possession of Credit or Debit Card without Cardholder's Consent; Count 5- Fraudulent Use of Credit or Debit Card; Count 6-Theft; Count 7- Burglary; Count 8- Grand Larceny; Count 9- Burglary; Count 10-Larceny from a Person, Victim 60 Years of Age or Older; Count 11-Burglary; Count 12- Possession of Credit or Debit Card without Cardholder's Consent; Count 13- Fraudulent Use of Credit or Debit Card; Count 14- Theft; Count 15-Possession of Credit or Debit Card without Cardholder's Consent; Count 16-Fraudulent Use of Credit or Debit Card; Count 17- Theft; Count 18- Conspiracy to Commit Larceny; Count 19- Conspiracy to Commit Larceny; Count 20-Conspiracy to Commit Larceny.

On November 12, 2008, the trial proceedings commenced. After the jury deliberated, they returned a verdict of guilty on counts I through VII. The State argued for large habitual treatment. The Court then imposed the following sentence: Count I—life with the possibility of parole after 10 years; Count II—life with the possibility of parole after 10 years to run concurrent with Count I; Count

III through VII inclusive, life in prison with the possibility of parole after 10 years, to run consecutive to Counts I and II. (Appendix, Vol. II, pp. 404-406, hereinafter "APP") The Court ordered restitution in the amount of $270.00. The Court gave Ross credit for 200 days time served.

This case arises from the Court's denial of Ross's Post Conviction Petition for Writ of Habeas Corpus and Supplements thereto. The Notice of Appeal was timely filed.

STATEMENT OF FACTS

On May 23, 2007, Ronald Ross was charged by Criminal Complaint with twenty (20) counts, to wit: Count 1—Burglary; Count 2—Larceny from the Person; Count 3—Burglary; Count 4—Possession of Credit or Debit Card without Cardholder's Consent; Count 5—Fraudulent Use of Credit or Debit Card; Count 6—Theft; Count 7—Burglary; Count 8—Grand Larceny; Count 9—Burglary; Count 10—Larceny from a Person, Victim 60 Years of Age or Older; Count 11—Burglary; Count 12—Possession of Credit or Debit Card without Cardholder's Consent; Count 13—Fraudulent Use of Credit or Debit Card; Count 14—Theft; Count 15—Possession of Credit or Debit Card without Cardholder's Consent; Count 16—Fraudulent Use of Credit or Debit Card; Count 17—Theft; Count 18—Conspiracy to Commit Larceny; Count 19—Conspiracy to Commit Larceny; Count 20-Conspiracy to Commit Larceny.

Attorney Craig Jorgenson was appointed to represent Ross.

A Preliminary Hearing was conducted on June 19, 2007. (APP, Vol. IV, pp. 896-937 and Vol. I, pp. 101-115) Georgia Stathopoulos testified that she was visiting Las Vegas in March, 2007. (APP., Vol. IV, pp. 898-900) On March 17, 2007, she was at the Tropicana Hotel. (*Id.* at 898). After eating at the buffet, Georgia stopped to play at a slot machine and won. She identified Ross as an individual who came up to her and started asking her questions about the machine and her winning. Georgia testified there was another man with Ross. Georgia testified that her purse was not zippered shut. Georgia testified that when she returned to her hotel room, she noticed her purse was missing. (APP., p. 899) After discovering her wallet was missing, she went back to the buffet to see if she had dropped her wallet. She testified that inside her wallet was her driver's license, some cash and approximately 10 credit cards. Georgia contacted hotel security. Georgia immediately cancelled her credit cards.

The State called Deja Jarmon. (APP., p. 901) He testified that he was the third key supervisor at Sheikh Shoes. He was working at the shoe store on March 17, 2007. Mr. Jarmon testified that on March 17, 2007, Mr. Ross came into the store. After selecting merchandise to purchase, Mr. Ross presented a credit card for payment. (APP., p. 902) While the store's policy is to check identification with the credit card, Mr. Jarmon did not do so on this occasion. The credit card

was approved. The amount of the purchase was $490.07. Following the purchase, Mr. Jarmon received a telephone call indicating the credit card used to make the purchase was stolen. (APP., p. 903) Despite this hearsay testimony, Mr. Jorgensen failed to lodge any objections. The store's surveillance video was reviewed. Mr. Jarmon was uncertain whether the police retained a copy of the surveillance video. (APP., p. 905)

Next, James Violette testified. (APP., pp. 906-908) James was playing slots at the Santa Fe Station on March 23, 2007. James identified Ross has being in the Santa Fe Station on March 23, 2007, who sat next to James. James had approximately $800.00 sitting under his pack of cigarettes. James then noticed his cigarettes and money were gone, except $100.00. James reported the missing money to the slot personnel. The Santa Fe Station reimbursed James. (APP., p. 907)

Next, Dennis McCann testified. (APP., pp. 908-909) Dennis is the director of surveillance at the Santa Fe Station. Dennis testified there were several recordings which captured the incident to which James Violette testified. (APP., p. 909) Dennis testified he provided the surveillance videos of the event to the Metropolitan Police.

Next, Julie Holl testified. (APP., pp. 911-913) Julie testified she is employed as a detective for the Metropolitan Police. Julie identified Mr. Ross.

Julie testified she was contacted by Dennis McCann from Santa Fe Station. Julie reviewed the tapes provided by Santa Fe Station. (APP., p. 913) She testified that Ross was clearly depicted on the video produced.

Next, Les Silva testified. (APP., pp. 915-916) Les testified that he has been employed as the surveillance director at both the Paris and Flamingo Hotel & Casinos. Les testified generally about how the surveillance systems work. (APP., p. 916)

Next, Darrell Flenner testified that he is employed by the Las Vegas Metropolitan Police Department in the tourist safety unit. (APP., pp. 918-921) Darrell has been trained in pick pocketing and distraction thefts. Darrell identified Mr. Ross. Darrell investigated the alleged pick pocketing from Ms. Stathopoulos at the Tropicana. Darrell reviewed the surveillance video of this event and identified Ross on the video. (APP., p. 919)

Over defense objection, the Court continued the preliminary hearing which did not conclude on June 19, 2007. (APP., p. 922)

On August 17, 2007, the State filed an Amended Criminal Complaint. In the Amended Criminal Complaint, the State struck from the original Criminal Complaint Counts 9, 10, 11, 12, 13, 14, 15, 16, 17, and 20.

The Preliminary Hearing resumed on August 17, 2007. During the continued preliminary hearing, Paul Simeon and Charles Cauwell testified. (APP.,

pp. 101-115) At the conclusion of the preliminary hearing, the Court bound Ross over on ten (10) counts from the Amended Criminal Complaint. (APP., p. 109)

On August 22, 2007, the State filed its Information. (APP., pp. 86-90). Pursuant to the Information, Ross was charged with Burglary (Felony—NRS 205.060), Larceny from the Person (Felony—NRS 205.067), Possession of Credit Card with Cardholder's Consent (Felony—NRS 205.690), Fraudulent use of Credit Card (Felony—NRS 205.760), Theft (Felony—NRS 205.0835, 205.0832); Larceny From a Person, Victim 60 years of age or Older (Felony—NRS 206.270, 193.1687); and Conspiracy to Commit Larceny (Gross Misdemeanor—NRS 205.220, 205.222, 199.480). On August 23, 2007, the State filed an Amended Information. (APP., pp. 91-95) However, the charges themselves were not amended. On August 24, 2007, the State filed its Second Amended Information. (APP., pp. 96-100) Again, the charges themselves were not amended.

On September 5, 2007, the Defendant was arraigned. (APP., pp. 407-410). Mr. Ross entered a "not guilty" plea and invoked his right to a speedy trail.

On October 9, 2007, the Court held a status check. (APP., pp. 757-758) The State requested a continuance, which was granted until October 11, 2007. At the continued hearing on October 11, 2007, the Court continued the trial date based on actions in other cases, including one pending before the Nevada Supreme Court. (APP., 773-777)

On December 11, 2007, the Court held a status check. (APP., pp. 768-772) The Court again continued the matter, this time for six months.

On June 10, 2008, the Court again held a Status Check. (APP., pp. 764-767) At the State's request, the matter was once again continued.

On July 8, 2008, the Court once again held a Status Check. (APP., pp. 759-763) During this status check, the Court made a specific inquiry regarding whether Ross had waived his right to speedy trial. Mr. Ross specifically responded to the Court that he had NOT waived his right to a speedy trial. (APP., p. 761) Despite this lack of waiver, the Court set the trial beyond the 60 day time requirement, setting the matter for trial on September 2, 2008. (APP., p. 762)

On August 26, 2008, the Court held a Calendar Call. (APP., pp. 780-782) Despite Court orders to the contrary, Ross was transported to prison and was unavailable for the calendar call. The Court held the continued calendar call on September 2, 2008. Again, Mr. Ross was not transported. The matter was again continued.

The Court held the second continued calendar call on September 16, 2008. (APP., pp. 783-790) Because of all the transportation errors, the previously set trial date was vacated. *Id.* The Court set the trial date for November 10, 2008. (APP., p. 789) Ross made an objection on the record because the case had been

going on for 478 days despite having invoked his right to a speedy trial. (APP., 788)

On October 23, 2008, the Court held a hearing on the State's Request Conflict of Trail Date. (APP., pp. 791-794). During this hearing, the Court noted it had received a letter from Mr. Ross stating that he was not happy with his trial counsel, Mr. Jorgensen, because of the apparent speedy trial violations as well as his inability to communicate with Mr. Jorgensen. Ultimately, the Court continued this hearing until October 30, 2008. (APP., p. 793)

On October 30, 2008, the Court held the continued hearing previously scheduled for October 23, 2008. (APP., pp. 795-796) No change was made to the trial date.

On November 4, 2008, the Court held a Calendar Call. (APP., pp. 797-801) Mr. Ross moved to represent himself but with the assistance of counsel. (APP., p. 799) The Court denied the request.

On November 12, 2008, trial proceedings commenced. (APP., Vol. II, 411-678) This was 541 days after charges were initially filed. This delay occurred despite the fact that Mr. Ross asserted and specifically did not waive his right to a speedy trial. Further, at no time did Mr. Ross request a single continuance, but rather all delays arose from the actions of the State or the Court.

On November 12, 2008, the State filed its Third Amended Information. (APP., pp. 118-120) This time, the charges were amended. In the Third Amended Information, the Defendant was charged with Burglary (Felony—NRS 205.060), Larceny from the Person (Felony—NRS 205.270), Possession of Credit Card with Cardholder's Consent (Felony—NRS 205.690), Fraudulent use of Credit Card (Felony—NRS 205.760), Theft (Felony-NRS 205.0835, 205.0832); and Conspiracy to Commit Larceny (Gross Misdemeanor—NRS 205.220, 205.222, 199.480).

TRIAL

At the commencement of the proceedings, the State admitted that the surveillance tape from the Santa Fe did not depict Ross. (APP., Vol. II., p. 413) Therefore, the State moved to dismiss all charges which allegedly occurred at the Santa Fe.

Jury selection began in this action. (APP., pp. 416-490) During the jury selection, Defense counsel Jorgensen asked only six (6) questions during the entire *voir dire*. Further, Jorgensen did not challenge a single juror for cause. (APP., p. 487) This occurred despite one potential Juror, No. 187, specifically testifying that she worked with one of the detective witnesses who would testify during the trial of this matter. (APP., p. 425) Also, Jurors Nos. 200 and 208 testified that each was the victim of having her credit card stolen and used. (APP., pp. 32 & 37).

After jury selection, the Prosecution raised the issue of a potentially unavailable witness. (APP., pp. 492- The Prosecution stated the witness was Deja Jarmon was currently in a hospital in California for heart reasons. The Prosecution admitted knowing the location of the witness and failing to make the motion based on unavailability within the 15 day time limit. (APP., p. 493) The Prosecution brought its investigator to testify. Matthew Johns, the investigator, testified he was employed as a criminal investigator for the Clark County District Attorney's office. (APP., p. 493) Johns testified that as the investigator, he was charged with serving subpoenas on witnesses set to testify for trial. (APP., p. 495) Johns testified he received the subpoenas for witnesses who were going to testify on this case on October 16th. Johns testified he received a subpoena to serve on Deja Jarmon. Johns testified they had a valid address for Mr. Jarmon. Johns further testified he made contact with Mr. Jarmon's girlfriend. (APP., p. 496) Johns testified he had a current telephone number for Mr. Jarmon and consistently attempted to contact Mr. Jarmon. Johns left approximately 10 to 15 messages for Mr. Jarmon. While Johns had three contacts with the girlfriend, he never had personal contact with Mr. Jarmon. (APP., p. 497) Johns testified that he learned the morning of the commencement of the trial that Mr. Jarmon was in a hospital in San Bernardino due to a heart condition. Johns was unable to confirm that Mr. Jarmon was in the hospital. (APP., p. 498)

Defense counsel cross-examined Johns. (APP., pp. 498-499) Johns admitted that while the girlfriend stated Mr. Jarmon was in a hospital, she did not tell Johns the name of the hospital. Johns admitted that since receiving the subpoena for Mr. Jarmon in mid-October, he had neither seen nor spoken with Mr. Jarmon. (APP., p. 499)

At the conclusion of Johns examination, the Prosecutor was put under oath, and made an oral motion to utilize Mr. Jarmon's preliminary hearing testimony. (APP., p. 500-501) The basis for late filing the motion was (a) the State did not know Mr. Jarmon would be unavailable and (b) that Mr. Jarmon just went into the hospital on the Friday prior to the commencement of the trial, which was past the calendar call date.[1] After the State's argument, Defense counsel effectively failed to make any argument regarding the timeliness of the motion. To the contrary, Defense counsel stated that he did not believe the timeliness was relevant because the State didn't have 15 days from the date they learned of Mr. Jarmon's unavailability. (APP., Vol. II, pp. 502 through Vol. III, p. 507) Effectively,

[1] It is interesting that Johns testified that he had no contact with Mr. Jarmon and was unable to confirm that Mr. Jarmon was in fact in a hospital in San Bernardino, yet the prosecutor was able to proffer to the Court that Mr. Jarmon's admission into the hospital just occurred on the Friday before the commencement of the trial, information which could not be known absent contact with Mr. Jarmon or confirmation from a hospital which was specifically denied by Johns during examination.

counsel waived any argument regarding timeliness despite the fact that the State knew that it had not served the subpoena within the required fifteen (15) day period and, therefore, on that basis alone could have and should have moved based on Mr. Jarmon's unavailability. Defense counsel did argue a confrontation clause violation. (APP., Vol. III, p. 503). Counsel argued that cross-examination which occurs during a preliminary hearing is a fiction in the context of the Confrontation Clause because the purposes of the two examinations are so markedly different. (APP., pp. 503-506).

Following argument, the Court concluded the State established good cause for not making the motion regarding unavailability within the prescribed time limit. (APP., p. 510, lines 4-10) The Court found under the totality of the circumstances, the preliminary hearing transcript could be used *in lieu* of live testimony from the witness that the Court concluded was unavailable.

After the Court instructed the jury, the State made its opening argument. (APP., 528-531) The Defense then made its opening argument. (APP. 532-535)

The State then called its first witness, Georgia Sthathopoulos ("Georgia"). (APP.. pp. 535-562). Georgia was on vacation in Las Vegas staying at the Tropicana in March, 2007. (APP., p. 536) On March 17, 2007 at approximately 1:00 p.m., Georgia had just completed eating at the buffet in the Tropicana. On her way back to her hotel room, Georgia stopped to play one of the machines. Georgia

was carrying a purse. (APP., p. 537) Georgia's wallet was in her purse. Included among the items in Georgia's wallet was a Chase Bank credit card. Georgia also had approximately $150.00 in cash in her wallet. (APP., p. 538) Georgia took money out of her purse to play the slot machine and did not zip her purse closed. (APP., p. 539).

While Georgia was playing the machine, it began to make a lot of noise and two young men approached her. (APP., p. 540) Georgia identified Mr. Ross as one of the men who approached her in the casino. Georgia testified that the men were very close to her but she did not recall whether they touched her or not. (APP., p. 541) Georgia testified that the men asked her how the machine worked, what she had won, and her attention was entirely focused on the machine. (APP., p. 542). Georgia stated that the men remained close to her for approximately a couple of minutes. (APP., p. 543) Shortly after the men left, so did Georgia and her husband.

Georgia and her husband proceeded to their hotel room. Georgia testified that while she was playing the slot machine and *en route* to her hotel room, no one was as close to her as the two men about whom she previously testified. Georgia testified that once she got to her hotel room, she noticed her wallet was gone. Georgia immediately thought that perhaps she lost her wallet at the buffetGeorgia did not find her wallet at the buffet. Georgia then contacted security and the

police. Georgia also contacted her credit card company. (APP., p. 545) Georgia was informed that her credit card was used at a shoe store after 1 o'clock. Georgia testified that she never gave the Defendant permission to take her wallet nor use her credit card. (APP., p. 546)

During the examination, the State showed Georgia the receipt from the shoe store. Georgia testified that she had never seen the receipt before. (APP., p. 547) Defense counsel stipulated to the conditional admission of the credit card receipt with the foundation laid by other witnesses. Georgia testified that it was not her signature on the receipt.

On cross-examination, Georgia testified that she went to the buffet at the Tropicana at approximately 12:30 in the afternoon. (APP., p. 549) Georgia paid for the lunch, but does not recall how she paid for it. (APP., p. 550) Georgia testified that when she got to the slot machine, after paying for lunch she had a dollar left which she took out of her wallet. (APP., 541) However, Georgia was unsure whether she actually had to unzip her purse or whether it was already unzipped when she took the dollar out of her purse. (APP., p. 552) When asked about the age of the persons who approached her, Georgia stated that she didn't pay that close attention. Georgia testified that she could not describe how the persons who approached her were dressed. (APP., p. 553). Georgia did not recall whether the weather was cold enough to wear a jacket outside. Georgia did not

recall the physical size or height of the persons who approached her. (APP., p. 554) Georgia continued to play the slot machine after the men left until she had completed spending all of the money or plays in the machine. (APP., p. 555)

Georgia testified that it was not immediately, but shortly after she arrived in her room that she glanced in her purse and noticed the wallet was gone. (APP., p. 556) Georgia testified that her first inclination was to go back to the restaurant. However, she did not retrace her steps to see if she dropped the wallet. Georgia did not go back to the slot machine to see if her wallet was at the slot machine. Georgia stated she didn't think to look at the slot machine for her wallet. (APP., p. 557)

On redirect, Georgia testified that at approximately 1:45 p.m. she called the credit card company. The credit card company informed her there had already been a charge on the card at the shoe store. Georgia stated that she did not recall making a statement to the police that the shoe store clerk told her that the person who used the card came into the store with a girl. (APP., p. 559) Georgia then gave specific responses to questions quoting statements made by the shoe clerk she spoke with, without any hearsay objections lodged by Defense counsel. (APP., 560)

The State's next witness was Deja Jarmon, whose testimony was presented from the preliminary hearing through a reader. (APP., 564-581) Deja Jarmon

testified that he was the third key supervisor at Sheikh Shoes. He was working at the shoe store on March 17, 2007. Mr. Jarmon testified that on March 17, 2007, Mr. Ross came into the store. (APP., p. 566) After selecting merchandise to purchase, Mr. Ross presented a credit card for payment. (APP., p. 567) While the store's policy is to check identification with the credit card, Mr. Jarmon did not do so on this occasion. The credit card was approved. The amount of the purchase was $490.07. Following the purchase, Mr. Jarmon received a telephone call indicating the credit card used to make the purchase was stolen. (APP., p. 571) Despite this hearsay testimony, Mr. Jorgensen failed to lodge any objections. The store's surveillance video was reviewed. (APP., p. 572) Mr. Jarmon was uncertain whether the police retained a copy of the surveillance video.

The State then called Luis Valadez to testify. (APP., pp. 582-602) Mr. Valadez was employed at Sheikh Shoes on March 17, 2007. (APP., p. 583) He was a salesperson. Mr. Valadez identified Mr. Ross as a person who was in the shoe store on March 17, 2007. (APP., p. 584) March 17, 2007 was the first time he had ever seen Mr. Ross in the store. (APP., p. 585) Mr. Valadez could not remember what Ross did when he got into the store on March 17, 2007. Mr. Valadez testified that he remembered the Mr. Ross making a purchase with a credit card but he did not know what card was used as he did not conduct the transaction. (APP., p. 586)

On cross-examination, Mr. Valadez testified that he no longer works at the shoe store. (APP., p. 590) Mr. Valadez further testified that he did not remember the whole day. (APP., p. 596) In fact, Mr. Valadez testified on cross-examination that he didn't actually see Mr. Ross use a credit card to make the purchase. It was only because a police detective made a print out of a receipt that Mr. Valadez learned the purchase was with a credit card.

The State then called Kevin Hancock to testify. (APP., p. 602-633) Mr. Hancock was employed at Sheikh Shoes on March 17, 2007. (APP., p. 603) Mr. Hancock specifically testified that between the hours of 1:00 and 2:00 p.m. on March 17, 2007, he was on break. Mr. Hancock reviewed the surveillance video. Mr. Hancock identified Mr. Ross as the person depicted on the surveillance video. (APP., p. 604) Mr. Hancock laid foundation for the credit card receipt of which Ms. Georgia Sthathopoulos testified and which was conditionally admitted subject to later witnesses providing foundation. (APP., p. 607) In addition, Mr. Hancock testified that the store had a surveillance system. (APP., 610) While Mr. Hancock knew how to view the video captured by the surveillance system, he did not know how to make a copy of it. (APP., p. 611) Mr. Hancock stated the system was digital and that if the tape was not taken off the system within a short period of time it would be lost. Mr. Hancock testified that while they contacted someone in

an attempt to save the video, the person did not come out and the video was not saved. (APP., p. 612)

On cross-examination, Mr. Hancock testified that while he had been working for the company since 2005, he had only been working at this store for approximately two months. (APP., p. 603) Prior to the police arriving at the store, Mr. Hancock did not recall when he realized that someone had used a credit card to make the purchase. (APP., p. 616) Mr. Hancock only reviewed the video tape because of the police request. Mr. Hancock reviewed the video tape with the detective. (APP., p. 617) Mr. Hancock admitted that he was not watching the cashiering counter when the transaction was rung up. (APP., p. 618) Mr. Hancock testified that the video surveillance system would erase the recordings every week or two. (APP., p. 619) Mr. Hancock testified the store is equipped with five or six surveillance cameras all of which capture the events which occur in the store. APP., p. 628) Mr. Hancock testified that he did not personally witness the transaction.

The State then called William Rader to testify. (APP., pp. 634-641) Mr. Rader is a detective with the Las Vegas Metropolitan Police Department. (APP., p. 634) Mr. Rader was working on March 24, 2007. Mr. Rader was assigned to the Tourist Safety Unit. (APP., p. 635) Mr. Rader was working with Detective Flenner regarding an incident at the Tropicana casino. Mr. Rader identified Mr.

Ross in the Courtroom. On March 24, 2007, Mr. Rader went to Sheikh shoe store. Mr. Rader put together and showed a photographic lineup to three employees at the shoe store. (APP., p. 636) Mr. Rader testified he followed protocol with respect to the photographic lineup. Mr. Rader testified that Mr. Valadez, Mr. Hancock and Mr. Jarmon all identified Mr. Ross from the photographic lineup he presented to them to review. (APP., p. 640)

On cross examination, Mr. Rader admitted that his involvement with this case was limited to creating the photographic lineup and showing it to the store clerks. (APP., p. 641) Mr. Rader did not view the surveillance video from the store.

The State then called Darrell Flenner to testify. (APP., pp. 642-674) Mr. Flenner is employed by Las Vegas Metropolitan Police Department. (APP., p. 642) Mr. Flenner is a detective in the Tourist Safety Unit. (APP., p. 643) Mr. Flenner testified about his on the job and other training. Mr. Flenner testified hypothetically about how distraction thefts generally occur. (APP., p. 644) Mr. Flenner testified he was familiar with Mr. Ross. (APP., p. 645) Mr. Flenner identified Mr. Ross in Court.

Mr. Flenner testified that on March 17, 2007, he investigated a distraction theft at the Tropicana Hotel and Casino. The alleged victim was Georgia

Stathopoulos. (APP., p. 646) Mr. Flenner reviewed the surveillance video of the incident.

The State sought to admit the surveillance video from the incident at the Tropicana into evidence. Defense counsel stipulated to its admission. The surveillance video was played for the jury. Mr. Flenner identified Mr. Ross on the surveillance video. (APP., p. 647) Mr. Flenner testified that the video depicts a jacket over the arm which is used matador style to conceal what the hand is doing. (APP., p. 648) Mr. Flenner testified it was something he had seen many times before. Mr. Flenner testified that the video depicts distraction through pointing which is a common practice in distraction thefts. (APP., p. 649) Mr. Flenner testified that the video tape depicts a hand off between the two suspects which Mr. Flenner stated was handing the coat and its contents. (APP., p. 651) Mr. Flenner was asked whether you could see the wallet in the video and he testified that you could see "the black thing; it – it's in – it's in the jacket." (APP., p. 652)

Mr. Flenner also testified he viewed a video tape from the shoe store. (APP., p. 653-654) However, Mr. Flenner admitted that while he viewed the video on the computer, he was not able to obtain a copy of the surveillance video. When asked whether he could identify Mr. Ross from the surveillance video, Mr. Flenner testified that it was from far away but the clothing seemed to match. (APP., p. 655) Mr. Flenner based this judgment not on what he saw on the shoe store

surveillance video alone but rather by assumption based on the clothing appearing to be the same as that worn by the person depicted on the Tropicana video. (APP., p. 656) Mr. Flenner testified that it was approximately fifteen minutes from the Tropicana to the shoe store. (APP., p. 657)

On cross-examination, Mr. Flenner testified that when he initially received the call regarding the incident at the Tropicana, he did not immediately go to the Tropicana but rather called the Tropicana investigator. (APP., p. 660) However, he did speak with Georgia Stathopoulos over the telephone. Mr. Flenner did not remember whether he began his investigation of the case on the day it was referred to him or some day thereafter. (APP., p. 661) Mr. Flenner did not originally watch the Tropicana surveillance video at the Tropicana, but rather a swing shift officer picked the tape up and Mr. Flenner watched it at police headquarters. (APP., p. 662) Mr. Flenner did not view the original tape, only a copy. (APP., p. 663) Mr. Flenner further testified that what struck him from the shoe store surveillance video is that the cloths were the same as those worn by the persons in the Tropicana. (APP., p. 664) Mr. Flenner admitted that the perspective of the shoe store's video was from the front doors looking into the store so that if a customer was making a purchase at the sale's counter, you could only see the customer's back. (APP., p. 665) Mr. Flenner was unable to see the store employee who was assisting the customer. Mr. Flenner knew what portion of the surveillance to look

at based on information provided by Georgia Stathopoulos. (APP., p. 666) Mr. Flenner ultimately met the clerk who handled the transaction, after viewing the video tape but was uncertain whether he could identify the clerk from having viewed the tape. (APP., p. 668) Mr. Flenner could not tell from the surveillance tape how the transaction was paid. (APP., p. 669)

Following cross-examination, a juror had two questions. Mr. Flenner responded to the questions by first stating that the resolution of the video from the store surveillance was better than the resolution from the Tropicana video. (APP., p. 673) In addition, Mr. Flenner testified he viewed only one angle of the store surveillance video, not multiple angles.

Following the examination of Mr. Flenner, the State rested. (APP., 674) Thereafter, the Defense stated it did not have any witnesses and rested as well. After the jury was excused, the Court discussed the time to resume the next day as well as jury instructions. (APP., pp. 674-678) The Court specifically inquired whether the defense had any jury instructions it would submit to which trial counsel responded, "No." (APP., p. 676, lines 19-21). The Court made further inquiry into whether the defense wanted to propose an instruction regarding the defendant not testifying and the defense responded it did not want such an instruction. (APP., p. 677)

On November 13, 2008, twenty eight (28) Jury Instructions were filed in Court. Neither the State nor defense lodged any objections to the Jury Instructions. (APP., p. 704) The Court thereafter instructed the jury. (APP., p. 706-719) The State then made its closing argument. (APP., p. 719-731) The Defense then made its closing argument. (APP., p. 731-743) The State made rebuttal arguments. (APP., p. 743-752)

After the jury deliberated, they returned a verdict of guilty on counts I through VII. Sentencing was originally set for January 29, 2009. (APP., p. 802-806) However, because Mr. Ross was disputing some of the felony convictions presented by the State, the Court continued the sentencing until April 7, 2009.

The State argued for large habitual treatment. (APP., p. 679-702) The State produced booking photographs from five prior felony convictions both within and without the State of Nevada. The State argued the sentence should be 10 to life.

Mr. Ross addressed the Court. (APP., p. 686-691 Mr. Ross inquired of the Court whether it had a letter which Mr. Ross wrote directly to the Judge. The Court stated that it did not have the letter. (APP., p. 686-687) Mr. Ross expressed his concern over his right to a speedy trial. (APP., p. 687) Mr. Ross argued that most of the cases referred to by the State were nonviolent crimes which were too remote to be considered on sentencing. (APP., p. 688) The Court informed Mr. Ross it was only going to consider the five felonies. (APP., p. 690) Mr. Jorgensen

argued that absent fingerprint matching, the photographs are not relevant and do not rise to the level of beyond a reasonable doubt. (APP., p. 696) Mr. Jorgensen argued that the conduct does not merit a life sentence but rather should be treated as small habitual, if at all. (APP., p. 697)

The Court then imposed the following sentence: Count I—life with the possibility of parole after 10 years; Count II—life with the possibility of parole after 10 years to run concurrent with Count I; Counts III through VII inclusive, life in prison with the possibility of parole after 10 years, to run consecutive to Counts I and II. (APP., p. 700-701) The Court ordered restitution in the amount of $270.00. The Court gave Ross credit for 200 days time served.

SUMMARY OF ARGUMENT

The Trial Court erred in denying the Post Conviction Petition for Habeas corpus. The evidence presented and the record established that Mr. Ross's VI Amendment right to effective assistance of counsel was violated because counsel:

1. Failed to secure a speedy trial;
2. Failed to adequately prepare including reviewing evidence produced prior to trial;
3. Failed to file pretrial motions;
4. Failed to argue the prejudice of evidence lost prior to trial;
5. Failed to adequately prepare for jury selection;
6. Failed to adequately prepare for trial;
7. Failed to retain defense experts;
8. Failed to object to the State's use of expert witness;
9. Failed to make appropriate objections during trial;

10. Failed to adequately prepare for sentencing; and
11. Cumulative effect of all errors.

ARGUMENT

I. General Legal Arguments

The Sixth Amendment to the United States Constitution provides:

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

VI Amend., U.S. Const. It is by this standard which the Petition for Writ of Habeas Corpus must be judged.

Ineffective assistance of counsel claims are never heard on direct appeal. *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006). While substantive arguments presented on direct appeal may in some cases become the law of the case, because those decisions on the merits did not consider nor address whether such conduct constitutes ineffective assistance of counsel, the law of the case doctrine does not bar consideration of those matters in this Petition. *See e.g. McConnell v. State*, 125 Nev. Adv. Op. No. 24, 49722, fn. 1, 212 P.3d 307 (2009).

A claim that counsel provided constitutionally inadequate representation is subject to the two-part test established by the Supreme Court in *Strickland v.*

Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of trial or appellate counsel, a defendant must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Id*. at 687. A court need not consider both prongs of the *Strickland* test if a defendant makes an insufficient showing on either prong. *Id*. at 697. "A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review." *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

On the first prong of the analysis, the petitioner's burden is to show that counsel's performance fell below an "objective standard of reasonableness." *Strickland, supra*, at 689. Obviously, there are a number of factors which must be evaluated to determine whether the complained of act or omission fell below that standard, which factors vary based on the nature of the allegation.

On the second prong, to establish prejudice the petitioner must show that but for the attorney's mistakes, there is a reasonable probability the result of the proceeding would have been different. *Strickland*, *supra*, at 687-88. Obviously, there is a degree of speculation with respect to the prejudice prong, as no one can to a degree of absolute certainty know whether a jury would have concluded differently. A reasonable probability is "probability sufficient to undermine confidence in the outcome." *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000)

(*citing Strickland*, 466 U.S. at 687). Nonetheless, where there is a reasonably probability that the error was sufficiently significant as to suggest a potentially different outcome, ineffective assistance of counsel should be found in order to exalt the protections of the Constitution over mindless convictions.

In order to avoid the distorting effects of hindsight, the evaluation begins with the strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, supra*, at 689. The presumption is rebuttable considering the totality of the circumstances.

The Sixth Amendment to the United States Constitution provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .” Mr. Ross’s counsel was ineffective for failing to insure his right to that speedy trial.

In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Supreme Court deemed trial counsel's lack of investigation to be deficient under *Strickland's* performance prong. The *Kimmelman* defendant was charged with rape, and his lawyer had neglected to file a timely motion to suppress an incriminating bed sheet seized without a search warrant. *See* 477 U.S. at 368-69. The trial record revealed that Defendant’s counsel conducted no pretrial discovery. The Court held that counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn

over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned. *Id*. at 385. Despite "applying a heavy measure of deference to his judgment," the Court found "counsel's decision unreasonable, that is, contrary to prevailing professional norms." *Id*.

Counsel's representation may be deficient constituting ineffective assistance of counsel for failing to communicate with the Petitioner. Adequate consultation between attorney and client is an essential element of the effective assistance of counsel. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. "From counsel's function as assistant to the defendant derives the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id*. *See also Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029 (2000) and *Johnson v. Parker,* Civil Action No. 1:06CV217-SA-JAD (N.D.Miss. 9-12-2008)(failure to communicate may be both a symptom and cause of ineffective assistance).

Trial counsel was ineffective for failure to lodge objections during many of the pretrial and trial proceedings. The failure to object may result in a properly laid ineffective assistance of counsel claim. *See e.g. Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), *cert. denied*, 471 U.S. 1004 (1985). In addition, the

failure to object leads to a failure to preserve error for purposes of direct appeal. The failure to preserve issues for appellate review can constitute ineffective assistance of counsel. *See e.g. Martin v. State*, 501 So.2d 1313 (Fla. 1st DCA 1986); *Crenshaw v. State*, 490 So.2d 1054 (Fla. 1st DCA 1986).

A claim for ineffective assistance of counsel may lie for failing to move to dismiss a criminal count. In the instant case, trial counsel should have moved to dismiss all counts following the jury's verdict as the evidence established irrefutable reasonable doubt. To determine whether the failure to move to dismiss the charge was ineffective, this Court must decide whether the failure to move to dismiss was prejudicial. *See Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 ("If it is easier to dispose of an effectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."). To prove prejudice, Mr. Ross must show that (1) there is a reasonable probability that, but for counsel's errors, the ultimate result of the proceeding would have been different (S*ee Id*. at 694, 104 S.Ct. at 2068) and (2) that counsel's deficient performance rendered the trial fundamentally unfair. S*ee Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

A claim for ineffective assistance of counsel may lie for failing to retain defense experts. Ineffective assistance of counsel claims are analyzed under the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Under *Strickland*, Mr. Ross must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense such that he was deprived of a "fair trial, a trial whose result is reliable." *Id*. at 687, 104 S.Ct. at 2064.

Finally, where the errors of counsel are numerous, their cumulative effect may constitute ineffective assistance of counsel. *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Thus, "[t]he cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Id.*

II. Trial Counsel was Ineffective for Violating Ross's 6th Amendment Right to Speedy Trial.

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." The Sixth Amendment right to a speedy trial does not require a trial to commence within a specific number of days, and the United States Supreme Court has refused to quantify a specific time period. *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009). Instead, the Supreme Court uses a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Barker v. Wingo*, 407 U.S. 514, 529 (1972). "`[S]ome of the factors' that courts should weigh include `[l]ength of delay, the reason for the delay, the defendant's assertion of his right,

and prejudice to the defendant.'" *Brillon*, 129 S. Ct. at 1290 (*quoting Barker*, 407 U.S. at 529). "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530.

First, the length of delay was severe. It took in excess of 540 days to bring the action to trial. Second, the reasons for the delay were several. The State continually sought continuances in violation of Mr. Ross's right to a speedy trial. Mr. Ross clearly invoked his right to a speedy trial, to the extent it was the subject to dialogue by the Court. The delay was clearly prejudicial to Mr. Ross. Not only was he subject to incarceration for an extended period of time, but also valuable evidence which could have exonerated Ross was no longer available, including the surveillance from the shoe store. It was ineffective assistance of counsel to fail to insist upon Ross's right to a speedy trial when that right was specifically invoked by Ross.

III. Trial Counsel was Ineffective Based on Failure to Engage in Pretrial Discovery.

Trial counsel further failed to conduct appropriate pretrial discovery, including obtaining surveillance video from both the shoe store which would have exonerated Ross. In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Supreme Court deemed trial counsel's lack of investigation to be deficient under *Strickland's*

performance prong. The *Kimmelman* defendant was charged with rape, and his lawyer had neglected to file a timely motion to suppress an incriminating bed sheet seized without a search warrant. *See* 477 U.S. at 368-69. The trial record revealed that Defendant's counsel conducted no pretrial discovery. The Court held that counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned. *Id*. at 385. Despite "applying a heavy measure of deference to his judgment," the Court found "counsel's decision unreasonable, that is, contrary to prevailing professional norms." *Id*.

The instant case is no different. Counsel's failure to conduct pretrial investigation through obtaining surveillance videos from the shoe store precluded the presentation of a defense for Mr. Ross. Specifically, the surveillance videos may well have created a reasonable doubt that Mr. Ross in fact used a credit card to make any purchases at the shoe store and may well have created a reasonable doubt concerning whether the individual depicted was in fact Mr. Ross. Remember, the State dismissed several counts at the beginning of trial because the video from Santa Fe Station did not depict Mr. Ross. This failure to obtain discovery fell so far below professional norms that it unquestionably was not a

matter of strategic judgment but rather a breach of professional norm. As previously discussed, these failures resulted in convictions which would not have occurred but for these failures. Counsel was ineffective and the trial court must be reversed.

IV. Trial Counsel was Ineffective Based on the Failure to Communicate with Petitioner Prior to Trial.

Counsel's representation may be deficient constituting ineffective assistance of counsel for failing to communicate with the Petitioner. Adequate consultation between attorney and client is an essential element of the effective assistance of counsel. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. "From counsel's function as assistant to the defendant derives the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id. See also Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029 (2000) and *Johnson v. Parker,* Civil Action No. 1:06CV217-SA-JAD (N.D.Miss. 9-12-2008)(failure to communicate may be both a symptom and cause of ineffective assistance).

There was a clear break down in communication between trial counsel and Mr. Ross. This failure precluded Mr. Ross from being able to effectively assist counsel in the preparation of his defense. Prejudice arose because Mr. Ross was

unable to explain his conduct, any potential alibis, or otherwise present evidence in his defense. This resulted in prejudice.

V. Trial Counsel' s Performance During the Preliminary Hearing and Trial Fell Below an Objective Standard of Effective Assistance Counsel.

Trial counsel was ineffective for failing to lodge objections during many of the pretrial and trial proceedings. The failure to object may result in a properly laid ineffective assistance of counsel claim. *See e.g. Warden v. Lyons,* 100 Nev. 430, 683 P.2d 504 (1984), *cert. denied,* 471 U.S. 1004 (1985). In addition, the failure to object leads to a failure to preserve error for purposes of direct appeal. The failure to preserve issues for appellate review can constitute ineffective assistance of counsel. *See e.g. Martin v. State,* 501 So.2d 1313 (Fla. 1st DCA 1986); *Crenshaw v. State,* 490 So.2d 1054 (Fla. 1st DCA 1986).

The entire trial transcript is almost entirely devoid of any objections lodged by defense counsel during the testimony of the witnesses. Teh followign examples show the ineffectiveness of trial counsel:

1. Despite not designating Detective Rader as an expert, he was permitted to render expert opinions throughout his testimony regarding the methods and manners commonly utilized by pick pockets and distraction thefts. (APP., pp. 634-641) Not a single objection was lodged.;

2. No objection to the State's identification interpretation during closing argument (APP., pp. 719-731);

3. No objection to prior bad acts implication by investigating detective when State states that, "Defendant enters the shoe store with the *same* second subject." (APP., p. 746, lines 3-4); and

4. No objection to hearsay regarding the State's use of the Defendant's pending negotiations in other jurisdictions during Sentencing (APP., p. 684)

Clearly, it is the duty of defense counsel to insure that the proceedings are fair and that the State only puts before the finder of fact admissible evidence. There is no justifiable trial tactic which affords the State admission of evidence not otherwise admissible. Further, when defense counsel permits the admission of otherwise inadmissible evidence, not only are prejudicial matters presented to the jury but in addition it results in a failure to preserve the issues for direct appeal. Mr. Ross was prejudiced by the failure to timely object. First, inadmissible evidence was presented for the jury's consideration. Second, matters which should have been preserved for appeal were not. This prejudice could well have resulted in a different result. One can only speculate regarding jury deliberations, but assuming they considered all of the evidence presented, they also considered evidence which should have been excluded. But for such evidence, the jury may not have rendered a guilty verdict on all counts.

Finally, trial counsel failed to renew his best evidence objection from the Preliminary Hearing or to properly challenge the use of a Preliminary Hearing transcript in lieu of live testimony. Trial counsel made not offer of proof regarding

questions he was not able to ask Deja Jarmon at the Preliminary Hearing. This was a huge issue as Mr. Jarmon testified about the contents of a video that was destroyed before the defense was able to review it.

VI. Trial Counsel was Ineffective for Failing to Move to Dismiss the Criminal Counts After the Jury's Verdict in Light of the Overwhelming Evidence of Reasonable Doubt.

A claim for ineffective assistance of counsel may lie for failing to move to dismiss a criminal count. To determine whether the failure to move to dismiss the charge was ineffective, this Court must decide whether the failure to move to dismiss was prejudicial. *See Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 ("If it is easier to dispose of an effectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."). To prove prejudice, Mr. Ross must show that (1) there is a reasonable probability that, but for counsel's errors, the ultimate result of the proceeding would have been different, see id. at 694, 104 S.Ct. at 2068, and (2) that counsel's deficient performance rendered the trial fundamentally unfair. *See Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

This particular ground is related to each count upon which Ross was convicted. The evidence presented, as set forth above was so riddled with reasonable doubt that it was plain error to not move for a directed verdict at the close of the State's case on all counts. Further, after the jury rendered its verdict, it

was equally plain error for counsel not to seek to arrest the verdict or for a judgment notwithstanding the verdict.

In the instant case, there was no evidence of any criminal wrongdoing on the part of Mr. Ross. Rather, the identification of Mr. Ross was made merely based on clothing, which clothing was neither unique nor special. In addition, the clothing which was used to identify Mr. Ross was not introduced into evidence. There was simply no evidence of criminal wrongdoing which was presented to the Court.

The failure of counsel to move for a directed verdict on this count fell below the standard of objective reasonable conduct. Further, it was clearly prejudicial. If such a motion had been made and granted, no conviction could have resulted. This constituted ineffective assistance of counsel. The trial court erred in failing to grant the Petition.

VII. Trial Counsel was Ineffective for Failing to Retain Defense Experts.

A claim for ineffective assistance of counsel may lie for failing to retain defense experts. Ineffective assistance of counsel claims are analyzed under the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under *Strickland*, Mr. Ross must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense such that he

was deprived of a "fair trial, a trial whose result is reliable." *Id*. at 687, 104 S.Ct. at 2064.

During the trial of this action, the State called Detective Rader to testify. Detective Rader was not involved in the investigation of any of the crimes charged, other than to review the surveillance video. Despite having not been designated as an expert, Detective Rader rendered expert opinions throughout the proceedings regarding the manner in which pick pockets and persons engaged in crimes of distraction operate. The Defense failed to call a counter expert to testify to refute the opinions that Mr. Ross's behavior and conduct as evidenced on the surveillance video was consistent with the conduct of a person engaging in pick pocketing. Had a counter expert been called to rebut the expert opinions rendered by Detective Rader, such an expert would have opined that Mr. Ross's conduct was consistent with non-criminal activity. Such an opinion would have diminished the credibility of the State's non-designated expert and would have created reasonable doubt.

Mr. Ross was prejudiced by the failure to both retain experts and present an expert defense that his conduct was not criminal. Specifically, if such a defense were presented, it would have shown that Mr. Ross's conduct was as consistent with non-criminal activity and did not fit the pattern of behavior or mode of operation of a pick pocket. Upon presentation of such proof, no convictions would

have been entered against Mr. Ross. The trial court erred and it should be reversed based on those errors.

VIII. The Cumulative Effect of All Errors Constitutes Ineffective Assistance.

Finally, where the errors of counsel are numerous, their cumulative effect may constitute ineffective assistance of counsel. *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Thus, "[t]he cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Id.*

As discussed in both the Mr. Ross's original Petition and its Supplement, there were numerous grounds of ineffective assistance of counsel. These grounds should have been developed through live testimony during an Evidentiary Hearing. While Mr. Ross believes that each alone was sufficient to grant his Petition, collectively they were overwhelming. The trial court should have granted the Petition. In the very least, the trial court should have conducted an evidentiary hearing to supplement the record regarding the allegations set forth.

CONCLUSION

The trial court should be reversed. The Petition should be granted. In a number of ways, Mr. Ross's constitutionally protected to effective assistance of counsel were violated. Each of these grounds individually are alone sufficient,

however cumulatively they are overwhelmingly so. Mr. Ross suffered prejudice as a result of these ineffective assistance claims. But for these constitutional violations, the outcome of the proceedings would have been different. As such, the trial court should be reversed.

DATED this 14th day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 14th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of February, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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