IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
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DAIMON MONROE,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

DOCKET NO.: 65827

D.Ct. Case No.: 06-C-228752

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal under **NRAP 4** and/or **NRS 34.575**.

ISSUES ON APPEAL

I. THE DISTRICT COURT'S FINDING THAT THE APPELLANT'S FIRST TWO ISSUES ARE RES JUDICATA WAS ERROR.
   a. A History on the Application of procedural bars to Post-Conviction Writs in Nevada Shows the lower court's decision is in error.

II. THE LOWER COURT COMMITTED CLEAR ERROR IN APPLYING EQUITABLE ESTOPPEL TO ISSUES NOT RAISED AT TRIAL OR ON DIRECT APPEAL.

III. TRIAL COUNSEL FAILED TO INVESTIGATE AND CHALLENGE THE PHOTOGRAPH OF THE WARRANT, ALLEGED TO HAVE BEEN TAKEN AT THE PLACE OF SEARCH, WITHOUT APPROPRIATE VERIFICATION OF THE TIME OR PLACEMENT OF THE PHOTOGRAPH.

PROCEDURAL HISTORY

The Appellant was charged by way of Indictment on December 13, 2006, with twenty-seven counts. Count 1 for Conspiracy to possess stolen property and/or commit burglary (Gross Misdemeanor NRS 205.275, 199.480); and Counts 2-27 - for Possession of Stolen Property (Felony - NRS 205.275). A notice of intent to seek habitual criminal adjudication was; Count filed by the State on April 30, 2008. The matter went to a jury trial on May 13, 2008 and was adjudicated guilty on Counts 1-27. The Appellant was sentenced to: Count 1 - 12 months in the Clark County Detention Center; Counts 2-14 - life without the possibility of parole; Counts 2-14

to run concurrently to one another; County 15-27 - Life with the possibility of parole, Counts 15-27 to run concurrently with each other, but consecutively to Counts 2-14. The Court also ordered the Appellant's sentence in this case to run consecutively to his sentence in Case No. C227874. The Judgment of Conviction was filed on November 4, 2008.

The Appellant filed a timely direct appeal on November 19, 2008. The direct appeal was filed by attorney Marty Hart and the matter was heard on July 30, 2010, affirming Counts 1-10 and 12-27 both as to the convictions and the sentences. Count 11 was vacated by the court. The Remittitur was issued on August 24, 2010.

The Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on July 7, 2011. The State filed its Response on October 13, 2011. The matter was calendared for oral argument on January 5, 2012. However, prior to the hearing on the writ, on December 15, 2011, the Appellant filed a Notice of Appeal. On January 26, 2012, the Nevada Supreme Court dismissed the Appellant's appeal for lack of jurisdiction. On January 19, 2012 the district court denied the Appellant's PCR writ in the district court without prejudice. The Nevada Supreme Court issued its Remittitur on February 21, 2012.

Following the issuance of the Remittitur, the Appellant filed several motions in the district court seeking various forms of relief, however, he did not file a New

PCR Writ or seek to renew the previous PCR Writ by asking it to be placed back on calendar. On March 29, 2013, over a year later, the State filed a Motion to put the PCR Writ back on to address the merits of the PCR Writ. At his juncture, the court appointed Michael H. Schwarz, Esq.

Counsel Schwarz, reviewed the lower court record, as well as the appellate record and did not ascertain any legal issues in the file. On March 18, 2014, Michael H. Schwarz notified the court that there would be no supplemental Petition to the Pro Per PCR Writ. The court then took the matter under advisement.

On May 20, 2014, the lower court issued its Order Denying the Appellant's PCR Writ in the district court. The Notice of Entry of Order was filed on May 27, 2014. The Appellant filed a Notice of Appeal on June 03, 2013 and the matter is now before this Honorable Court.

FACTS

On the evening of September 26, 2006 officer Lance Hardman was responding to a burglar alarm call at Just For Kids Dentistry. **[AA; P. 102, lis. 15-25 through P. 103, lis. 1-2]** Mean while, Officer Kennth Salisbury had already responded to the Just For Kids Dentistry call. Officer Salisbury observed a white mini-van parked in front of the Just For Kids Dentistry **[AA; P. 123, lis. 1-6]** As Officer Salisbury pulled up to the intersection of the Just For Kids Dentistry, the white mini-van began to move.

[AA; P. 123, lis. 11-21] Officer McDonald pulled in behind the white mini-van as it was leaving the parking lot of the Just For Kids Dentistry. **[AA; P. 124, lis. 13-16]** Officer Salisbury then followed and pulled in behind Officer McDonald. **[AA; P. 125, lis. 7-10]** Officer Hardman arrived at the Just For Kids Dentistry, found that there was nothing missing and cleared. Officer Hardman was going to respond to another burglary call, which was approximately 1.5 miles away. **[AA; P. 104, lis. 2-6]** On his way to the other burglary, Officer Hardman stopped briefly at the car stop of the mini-van to check on his fellow officers. **[AA; P. 104, lis. 6-9; AA; P. 105, lis. 9-12]** While at the stop with the mini-van, Officer Hardman looked inside of the vehicle's open doors and was able to view the contents. **[AA; P. 29, lis. 24-25 through P. 30, lis. 1-6]** He then drove to the next burglary, where actual items had been taken at the Anku Crystal Palace. **[AA; P. 104, lis. 10-17]** Officer Hardman believed that the objects that were in the van were related to the burglary at the Anku Crystal Palace. **[AA; P. 108, lis. 17-23]** The objects in the mini-van were identified as the items missing in the burglary of the Anku Crystal Palace and the Appellant and the other passenger of the mini-van were placed under arrest.

As part of an ongoing investigation of a burglary ring, the Las Vegas Metropolitan Police Department's R.O.P.E. Team conducted further investigations and located several storage units that were searched, along with the Appellant's

residence. Stolen property was found at all locations.

It is and has been the Appellant's position before, during and after trial that no search warrant was ever presented at the Appellant's residence when the search was conducted. The only thing that was provided to the Appellant or the residents of the Appellant's home was the return, listing the property that had been taken. After the Appellant began asserting that there was no search warrant served on the date of the search, a photograph appeared during the Appellant's trial that showed a search warrant on the coffee table at his residence. It is the Appellant's position that this a photograph that was taken at some date after the search was executed.

It is the Appellant's position that although neither he, nor his counsel were able to prove that the photograph of the search warrant was taken long after the search was conducted, that the photograph does not disprove his position no search warrant was ever presented at the date and time of the search. The photograph is a mere inference because not only can the Appellant not establish the date that the photograph was taken, but the State cannot unequivocally establish the date the photograph was taken either. In order to show that it was properly served on the Appellant, a picture of the officer presenting the search warrant to the Appellant would have been appropriate method of proving this issue. Instead, a picture with the search warrant sitting on a piece of furniture was submitted. This is merely evidence that the entire issue as to

whether the search warrant was even present or presented at or during the search was nothing more than a ruse, at best this photo merely constituted an permissive inference (or a rebuttable presumption). As such, the trial counsel did not raise this issue, because he simply did not believe his client and did not investigate or take any kind of affirmative action to counter the State's fall back position that it was present.

LAW AND ARGUMENT

I.

THE DISTRICT COURT'S FINDING THAT THE APPELLANT'S FIRST TWO ISSUES ARE RES JUDICATA WAS ERROR.

a. A History on the Application of procedural bars to Post-Conviction Writs in Nevada Shows the lower court's decision is in error.

The lower court's decision regarding this issue is a question of law. Whether claim preclusion is available is a questions of law reviewed *de novo*. See ***Five Star Capital Corp. v. Ruby***, 124 Nev. 1048, 1058, 1094 P.3d 709, 715 (2008); ***University & Cmty Coll. Sys. v. Sutton***, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004) (reviewing *de novo* whether issue preclusion is available). The Ninth Circuit reviews *de novo* whether a defendant's Sixth Amendment rights were violated as a question of law. ***U.S. v. Hernandez***, 937 F.2d 1490, 1493 (9th Cir. 1991)(citing ***U.S. v. McConney***, 728 F.2d 1195, 1201` (9th Cir.)(*en banc*), ***cert. denied***., 469 U.S. 824 (1984)).

Even if trial counsel does not object, the Nevada Supreme Court can review the

matter for clear error. ***Green v. State***, 119 Nev. 542, 545 (2003). Additionally, this claim implicates issues of constitutional magnitude, which may be raised ". . . for the first time on appeal." ***Phipps v. State***, 11 Nev. 1276, 1280 (Nev. 1995).

There appears to be much confusion by the State regarding the application of issue preclusion and/or claim preclusion, more commonly referred to as procedural bars. Especially as they relate to post-conviction proceedings. The State's argument has been repeatedly been made at the district court with varying degrees of success.

Before understanding how ineffective assistance of counsel claims are processed by the judicial system in Nevada, a reference to the history of ineffective assistance of counsel claims must be made. This reference can be found in ***Pellegrini v. State***, 117 Nev. 860, 34, P.3d 519 (2001), wherein the Court stated,

> Before the 1980's, this court was generally willing to review claims of ineffective assistance of counsel on direct appeal, *see, e.g.,* ***Donovan v. State***, 94 Nev. 671, 674-75, 584 P.2d 708, 711 (1978), and recognized that such claims could be waived by failure to raise them on direct appeal. *See* ***Lishcke*** , 90 Nev. at 222-223 & n. 1, 523 P.2d at 7 & n.1. As early as 1975, however, we had begun to recognize such claims, if without support of the record, were not appropriate for consideration on direct review. *See* ***Brackenbrough v. State***, 91 Nev. 487, 537 P.2d 1194 (1975). In 1981, we decided ***Gibbons v. State***, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981), where we declined to consider a claim of ineffective assistance of counsel on direct appeal because it was unclear whether counsel in that case had any basis for his actions which, from the record, were seemingly ineffective. We declared that "the more appropriate vehicle for presenting a claim of ineffective assistance of counsel is through post-conviction relief." ***Id.*** at 523, 634 P.2d at 1216.
>
> In step with our decisions limiting the availability of review on

> direct appeals of most claims of ineffective assistance of counsel, **we also held that such claims, if properly brought for the first time in a post-conviction petition, *would not be subject to the post-conviction procedural bar for waiver***. ***Bolden v. State***, 99 Nev. 181, 183, 569 P.2d 886, 887 (1983). But this left open the question of whether such claims were waived if they would have been appropriate for resolution on direct appeal without an evidentiary hearing. **Ultimately, we adopted a bright-line rule** in ***Daniels v. State***, 100 Nev. 579, 580, 688 P.2d 315, 316 (1984)(overruled on other grounds by ***Varwig v. State***, 104 Nev. 40, 752 P.2d 760 (1988). The Legislature subsequently amended the waiver provisions at NRS 177.375 applicable to guilty pleas to reflect that such claims were properly brought in a post-conviction petition. *See* 1987 NEV. STAT. CH. 539, §45. at 1231-32.) and held that, "**[b]ecause of the usual need for an evidentiary hearing to resolve a claim of ineffective assistance of counsel, *the failure to raise the claim on direct does not constitute a wavier of the claim* for purposes of post-conviction proceedings**. (Emphasis added.)

In the ***Pellegrinni*** case this Court clarified its previous holdings, referring to their statements in ***Pertgen v. Nevada***, 110 Nev. 554, 875 P.2d 361, 364 (1994), to wit:

> Under certain circumstances, a valid claim of ineffective assistance of appellate counsel may establish good cause such that we may review apparently meritorious issues that should have been raised on direct appeal. Under the unique circumstances of this case, we consider appellants allegations to be sufficient to overcome this significant procedural hurdle. **Moreover, the power of this court to address plain error or issues of constitutional dimension *sue sponte* is well established**. ***Emmons v. State***, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991); See also, ***Edwards v. State***, 107 Nev. 150, 153 n. 4, 808 P.2d. 528, 530 n. 4 (1991)(where appellant presents an adequate record for reviewing serious constitutional issues, this court will address such claims on the merits). Because this case involves the ultimate punishment and because appellant's claims of ineffective assistance of counsel are directly related to the merits of his claims, we will consider appellant's claims on the merits in order to determine whether appellant received ineffective assistance of counsel. ***Pertgen***, 110 Nev. At 560,

875 P.2d at 364. (Emphasis added.)

This Court went on to state in ***Pellegrini*** that,

> This language confuses the waiver analysis as it applies to claims of ineffective assistance of counsel. ***Pertgen*** incorrectly indicated that procedural bars for waiver are applicable to claims of ineffective assistance of counsel initially brought in a first post-conviction proceeding. **Ineffective assistance of counsel claims are properly raised for the first time in a timely first post-conviction petition; *thus the cause and prejudice analysis is not necessary* in determining whether these claims are appropriately considered on the merits**. (Emphasis added.) See ***infra***, page 2, lines 12-28.

As to whether claims for ineffective assistance of counsel can be addressed on direct appeal the court stated,

> [W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal **unless there has already been an evidentiary hearing** (***Feazell v. State***, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995)) **or where an evidentiary hearing would be unnecessary**. ***Mazzan v. State***, 100 Nev. 74, 80, 675 P.2d 409, 413 (1984). (Emphasis added.)

This Court has stated that, "this court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal." ***Corbin v. State***, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995). Because of this Court's holdings requiring claims of ineffective assistance of counsel to be brought and addressed in post-conviction Writs of Habeas Corpus, it is clear that this Court believed that it was prudent to set a bright-line rule regarding the waiver of these claims. This is exactly what this Court did in ***Daniels v. State***, 100 Nev. 579, 580,

688 P.2d 315, 316 (1984), *overruled on other grounds by* ***Varwig v. State***, 104 Nev. 40, 752 P.2d 760 (1988).[1]

In ***Pellegrini***, this Court stated,

> [W]e reaffirm our previous holding in ***Daniels*** and **specifically hold that claims of ineffective assistance of counsel brought in a timely first post-conviction petition for a writ of habeas corpus *ARE NOT SUBJECT TO DISMISSAL ON GROUNDS OF WAIVER*, regardless of whether the claims could have been appropriately raised on direct appeal**. That being stated, ***Pertgen*** does not stand for a relaxation of the procedural bars for waiver - the issue of ineffective assistance of counsel was appropriately raised in the post-conviction proceeding under review. **THE PROCEDURAL BAR IS NOT APPLICABLE TO THE CLAIM**. (Emphasis added).

And, finally to put the State's inapplicable argument to rest is the language in ***Pellegrini*** stating,

> ***Pertgen*** failed to make a crucial distinction: **trial court error may be appropriately raised in a timely first post-conviction petition *in the context of claims of ineffective assistance of counsel***, but independent claims based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised in a direct appeal. *See* NRS 34.810(1)(b).

Although the issue of waiver was applied to ***Pellegrini***, it was only applied because Pellegrini's post-conviction petition was *a* ***successive filing***, raising "the same" issues. Therefore, the only way that the waiver issue in ***Pellegrini*** would apply to this

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[1] The Legislature subsequently amended the waiver provisions at NRS 177.375 applicable to guilty pleas to reflect that such claims were properly brought in a post-conviction petition. See 1987 NEV. STATE., CH. 539, § 45, at 1231-32.

case is if the Appellant had filed a successive petition. Since the Appellant has not made a successive filing, the application of the issue of waiver and/or procedural bar in ***Pellegrini*** - does not apply to this case.

Simply put, this Court has already held that procedural bars and/or waivers do not apply to timely filed ***first*** post-conviction writs. In addition, the language of this Court was very clear in ***Pellegrini***, in that,

> [**T]rial court error may be appropriately raised in a timely *first* post-conviction petition *in the context of claims of ineffective assistance of counsel***, but ***independent claims*** *based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised in a direct appeal*. (Emphasis added.)

Basically what this Court has stated is that any post-conviction claim - as long as it was framed within the contextual paradigm of "ineffective assistance of counsel" - is not subject to the normal procedural bars, *e.g.*, "law of the case" and "waiver." Thus counsel is perplexed by the State's arguments relating to Waiver, Law of the Case, Issue Preclusion and the like. According to this Court's precedence - NONE APPLY to timely filed ***first*** post-conviction petitions.

A post-conviction petitioner can therefore raise ANY ISSUE that the Petitioner wants to raise as long as it is framed within the contextual paradigm of a timely filed first "ineffective assistance of Counsel" post-conviction claim. In doing so, the Petitioner is exempt from the "law of the case" and/or the "procedural bar" doctrine.

Otherwise, the right to challenge constitutionally ineffective assistance of counsel is eviscerated. To hold otherwise is a blatant denial of a Petitioner's 5th, 6th and 14th Amendment rights - both substantive and procedural. The United States Supreme Court stated in ***Carey v. Piphus***, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978)

> "That **the right to procedural due process is 'absolute**,' and 'the law recognizes the importance to organized society that those right be scrupulously observed.' [cited omitted] Thus, **the 'absolute' right to adequate procedures stands independent from the ultimate outcome of the hearing**. *See* ***Carey***, 435 U.S. at 266-67, 98 S.Ct. 1054." (Emphasis added.)

Trial and/or appellate counsel's failures to raise issues considered to be important by post-conviction counsel cannot be considered a tacit waiver and procedural bar if the issues are raised within the contextual paradigm of "ineffective assistance of Counsel." Is this not the very essence of an ineffective assistance of counsel claim anyway?

In this case, it becomes even more poignant because it was not until an evidentiary hearing was held on the other issues, on remand, that some issues became more glaringly defined and took on a heading of their own. As the failures of trial counsel cannot be raised on direct appeal and it is fairly obvious that ineffective assistance of counsel claims regarding appellate counsel cannot be raised until after

the direct appeal is completed, then reason and logic dictate that those issues may be raised on a timely filed first post-conviction Writ.

Therefore, the lower court committed error in refusing to consider the Appellant's Issues in its Order denying the Petitioner's post-conviction writ.

II.

THE LOWER COURT COMMITTED CLEAR ERROR IN APPLYING EQUITABLE ESTOPPEL TO ISSUES NOT RAISED AT TRIAL OR ON DIRECT APPEAL.

The lower court committed clear error in its decision by refusing to consider issues that were either raised at trial or on direct appeal because of equitable estoppel. Holding that these issues were either moot or were subject to issue preclusion through *res judicata*.

The fact that issues were not raised at trial or on direct appeal is precisely what some of the components of ineffective assistance of counsel may well be comprised of. This, as well as the allegation that issues raised on appeal, although either improperly or poorly argued, cannot be considered by the PCR court because of issue preclusion. It is the Appellant's position that he can raise any issue that he wants in his PCR as long as it is raised within the *contextual paradigm* of ineffective assistance of counsel.

This Court spoke clearly in ***Pellegrini v. State***, 117 Nev. 860, 34, P.3d 519

(2001), that procedural bars and waiver ARE NOT applicable to PCR proceedings,

> This language confuses the waiver analysis as it applies to claims of ineffective assistance of counsel. ***Pertgen*** *incorrectly* indicated that procedural bars for waiver are applicable to claims of ineffective assistance of counsel initially brought in a first post-conviction proceeding. Ineffective assistance of counsel claims are properly raised for the first time in a timely first post-conviction petition; **thus the cause and prejudice analysis is not necessary in determining whether these claims are appropriately considered on the merits**. (Emphasis added.) See ***infra***, page 2, lines 12-28.

The State asks this Court to give great deference to and follow the decision of the lower court. However, the State's arguments for their position are circuitous, confusing, clearly intended to obfuscate and are antipodal to existing and accepted legal standards enunciated by this Court itself. It can easily be seen after reviewing the applicable case law that the lower court's findings were an abuse of discretion. This is because the lower court did not make a determination as to whether trial counsel conducted an appropriate investigation into the case before first making its ruling on trial counsel's strategic decisions.

Without making that determination first, the lower court could not legally make a decision as to whether or not trial counsel's strategic decisions were "reasonable" under the circumstances of the case.

This Honorable Court held in ***Warner v. State***, 102 Nev. 635, 729 P.2d 1359 (1986),

> Counsel's **failure to investigate and lack of preparation for trial left appellant without a defense at trial**. Under the circumstances, of the present case, we conclude that trial counsel's performance was so deficient as to render the trial result unreliable. Accordingly, we conclude that appellant was denied his Sixth Amendment right to the effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 104 Sct. 2052, 80 L.Ed.2d 674 (1984). (Emphasis added.)

And, again, this Honorable Court held in ***Jackson v. Warden***, 91 Nev. 430, 432-3 (1975), that

> The court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings. [case law omitted].
> Apart from the circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. [cites omitted]
> It is not enough to assume that counsel thus precipitated into the case, thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what prompt and thoroughgoing investigation might disclose as to the facts. **No attempt was made to investigate**. No opportunity to do so was given. Defendants were immediately hurried to trial . . . Under the circumstances disclosed, we hold that defendant were not afforded the right of counsel in any substantial sense. To decide otherwise would simply be to ignore actualities. ***Powell v. Alabama***, 287 U.S. at 58, 53 S.Ct. At 60 (1932). (Emphasis added.)

The American Bar Association Standards for defense attorneys sets forth in PART IV; INVESTIGATION AND PREPARATION:

> **Standard 4-4.1 Duty to Investigate**
> (a) Defense counsel should **conduct a prompt investigation of the**

> **circumstances of the case** and ***explore all avenues*** **leading to facts relevant to the merits of the case** and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty. (Emphasis added.)

Trial counsel did not conduct an independent investigation in this case and "explore all avenues leading to facts relevant to the merits of the case." Trial counsel did not seek to enforce the Appellant's rights under **NRS 47.250(4)**. Seeking to obtain the benefit of the presumption that, the lower evidence submitted would be inferior to the higher evidence not submitted.

ABA DEFENSE STANDARDS; 4-4.1. Reading the DUTY TO INVESTIGATE section in conjunction with DEFENSE FUNCTION: PART I, which sets forth in pertinent part,

> **STANDARD 4-1.2; THE FUNCTION OF DEFENSE COUNSEL.**
> . . .
> (b) The basic duty counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and **advocate with courage and devotion and to render effective, quality representation**. (Emphasis added.)

Were the minimum standards of the American Bar Association were met here? *See* ***Rompilla v. Beard***, 125 S.Ct. at 2466 (finding ABA Standards useful "guidelines to determining what is reasonable")(*quoting* ***Wiggins v. Smith***, 539 U.S. 510, 524, 123 S.Ct. 2527, 156, L.Ed.2d 471 (2003)). Therefore, the error committed by the trial

counsel were not, ". . . harmless beyond a reasonable doubt." *See* ***Chapman v. California***, 386 U.S. 18 (1967). In ***Sanborn, v. State***, 107 Nev. 399, 812 P.2d 1279 (1991), this Honorable Court held that,

> To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, Sanborn must demonstrate that trial standard of counsel's performance **fell below an objective standard of reasonableness**, and **that counsel's deficiencies were so severe that they rendered the jury's verdict unreliable**. See ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); ***Warden v. Lyons***, 100 Nev. 430, 683 P.2d 504 (1084), ***cert. denied***, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985).

If ineffectiveness is found, "[t]he harmless error rule is not applicable where a denial of effective assistance of counsel is found." ***Beasely v. United States***, 491 F.2d 687, 696 (6th Cir. 1974); *Cf.* ***McKeldin v. Rose***, 631 F.2d 458, No. 80-1198 (6th Cir. October 8, 1980)(*per curiam*). This means, then, that review on ineffective assistance of counsel must be *plenary (complete Review)* and cannot be piggy backed on Prong II of ***Strickland***, because Prong II of ***Strickland*** is, in and of itself, a *de facto* harmless error rule already.

The United States Supreme Court in ***Strickland*** required that in order for counsel to be considered ineffective his performance must have fallen "outside the wide range of professionally competent assistance" ***Strickland***, 466 U.S. at 690. In subsequent cases, the Supreme Court went further to define "the wide range" of

competent assistance. The standard "norm" would be at a minimum what the ABA standards for death penalty cases outlines as needed for effective assistance of counsel. "We have long referred [to these ABA standards] as 'guides to determining what is reasonable." ***Rompilla v. Beard***, 545 U.S. 374, 387 (2005); citing ***Wiggins v. Smith***, 539 U.S. 510, 524 (2003).

The lower court's failure to make a finding as to the adequacy of trial counsel's investigation prevented her from making any findings as to the reasonableness of trial counsel's strategic decisions. A finding as to the adequacy of the pretrial investigation is absolutely necessary in order to make the reviewing court's decision legally adequate.

III.

TRIAL COUNSEL FAILED TO INVESTIGATE AND CHALLENGE THE PHOTOGRAPH OF THE WARRANT, ALLEGED TO HAVE BEEN TAKEN AT THE PLACE OF SEARCH, WITHOUT APPROPRIATE VERIFICATION OF THE TIME OR PLACEMENT OF THE PHOTOGRAPH.

Trial counsel was made fully aware that the unmoving position of the Appellant was that the search warrant was never served or presented to the Appellant at the time of the search. Instead of investigating this issue, trial counsel simply accepted the representations of the State and the undated and un-time stamped photo of the search warrant alleged to be on a table in the Appellant's searched residence.

An irrebuttable presumption in a criminal case is unconstitutional. ***County Court v. Allen***, 442 U.S. 140 (1979); ***Mullary v. Wilbur***, 421 U.S. 684 (1975); ***Sandstrom v. Montana***, 442 U.S. 510 (1979); ***Francis v. Franklin***, 471 U.S. 307 (1985) and; ***McLean v. Moran***, 963 F.2d 1360 (1992).

The best evidence of the fact that a search warrant was properly served on the Appellant would have been a picture of the officer holding the Search Warrant right in front of the Appellant. As such, the best evidence was not submitted. Under **NRS 47.250(4)**, "That the higher evidence would be adverse from inferior being produced." Here, the inferior evidence was produced. The fact that a picture was taken of a Search Warrant "on a table," that was alleged to be taken in the residence of the Appellant does not mean that it was properly served. That photograph could have been taken at a later date - or even long after the search had been conducted and the contraband found. Since the Fourth Amendment requires the government to have a search warrant and the State did not prove this with the degree of the higher evidence, then the Appellant was entitled - at trial - to the presumption that the higher evidence would have been adverse to the lower evidence produced. Therefore, the State did not prove that they properly served the Appellant with a search warrant. As such, the evidence taken under the warrant which was insufficient and should have been suppressed. The Appellant's trial counsel did not investigate this simple issue

properly otherwise he would have made the argument below that during trial.

CONCLUSION

For all of the above and foregoing reasons the conviction must be reversed.

/s/ *Michael H. Schwarz*
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Counsel for the Appellant,
Diamon Monroe

CERTIFICATE OF COMPLIANCE

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 [*Word Perfect 11*] in [**14 point font** and Times New Roman font style]; or

[ ] This brief has been prepared in a monospaced typeface using ___ with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of **NRAP 32(a)(4)-(6)** because, excluding the parts of the brief exempted by **NRAP 32(a)(7)(c)**, it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and **contains 5,026 words** [*less than* the maximum of 14,000 words allowed by the Rule]; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[X] Does not exceed 30 pages.

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 15th day of January, 2015

/s/ Michael H. Schwarz

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CERTIFICATE OF SERVICE

I certify that I am an employee or associate of the Office of Michael H. Schwarz, Esq., and that on this 15th day of January, 2015, I served a copy of the foregoing Opening Brief & Appendix[2] (digital copy), through the e-flex filing system at the Nevada Supreme Court, to:

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The Law Office of Michael H. Schwarz, Esq.

[2] A data disk was also mailed to the Respondent(s).