IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD BUDD,	)	
	)	
Appellant,	)	
vs.	)	
	)	Case No.: 66815
STATE OF NEVADA,	)	
	)	
Respondent.	)	
_____	)	

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. BROOKS MADE UNREASONABLE STRATEGIC DECISIONS THROUGHOUT THIS CASE, RESULTING IN ACTUAL PREJUDICE TO BUDD AND UNDERMINING THE OUTCOME OF THIS CASE.

"[T]he *Strickland* decision 'places upon the defendant the burden of showing that counsel's action or inaction was not based on a valid strategic choice.'" *Bullock v. Carver*, 297 F.3d 1036, 1047 (10th Cir. 2002) *citing* Wayne R. LaFave *et al*., *Criminal Procedure* § 11.10(c) at 715 (West 2d 1999); *see also Darden v. Wainwright*, 477 U.S. 168, 186-87, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (discussing presumption that counsel acted strategically); *Gonzales*, 247 F.3d at 1072 (explaining that ineffective assistance of counsel claimant must "overcome the presumption that defense counsel's actions were sound trial strategy"); *Fox*, 200 F.3d at 1295 (same). "Beyond the general presumption of objective reasonableness, *Strickland* further presumes that 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Id. citing Strickland*, 466 U.S. at 690, 104 S.Ct. 2052; *see also Barrett v. United States*, 965 F.2d 1184, 1193 (1st Cir.1992) (distinguishing between presumption that counsel acted objectively reasonably and in a way that might be considered strategic and presumption of validity for strategic choices made after thorough investigation).

Strickland's presumptions-the presumptions (1) that counsel's actions were objectively reasonable because they might have been part of a sound trial strategy and (2) that actual strategic choices made after thorough investigation are "virtually unchallengeable," *Strickland*, 466 U.S. at 689-90, 104 S.Ct. 2052 should not obscure the overriding, and ultimately determinative, inquiry courts must make under *Strickland's* deficient performance prong: whether, after "considering all the circumstances," counsel's performance fell "below an objective standard of reasonableness." *Id*. at 688, 104 S.Ct. 2052; *see Darden*, 477 U.S. at 184, 106 S.Ct. 2464; *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *Fisher v. Gibson*, 282 F.3d 1283, 1292 (10th Cir.2002); *Brecheen*, 41 F.3d at 1365; *Denton v. Ricketts*, 791 F.2d 824, 826 (10th Cir.1986). As the Supreme Court recently explained when discussing *Strickland's* first prong, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe*, 528 U.S. at 480, 120 S.Ct. 1029 (*citing Strickland*, 466 U.S. at 688, 104 S.Ct. 2052); *see Chandler v. United States*, 218 F.3d 1305, 1315-16 (11th Cir.2000) (en banc) (explaining how ultimate inquiry under *Strickland's* first prong is whether counsel's performance was objectively reasonable), *cert. denied*, 531 U.S. 1204, 121 S.Ct. 1217, 149 L.Ed.2d 129 (2001).

Consequently, even where an attorney pursued a particular course of action for strategic reasons, courts still consider whether that course of action was objectively reasonable, notwithstanding *Strickland's* strong presumption in favor of upholding strategic decisions. *See Fisher*, 282 F.3d at 1296 (explaining that " 'the mere incantation of "strategy" does not insulate attorney behavior from review' " (*quoting Brecheen*, 41 F.3d at 1369 (further citation omitted))); *Phoenix v. Matesanz*, 233 F.3d 77, 82 n. 2 (1st Cir.2000) ("We should note that 'virtually unchallengeable' does differ from 'unchallengeable.' Our overall task according to *Strickland* is to determine whether the challenged 'acts or omissions [are] outside the wide range of professionally competent assistance.' " (*quoting Strickland*, 466 U.S. at 690, 104 S.Ct. 2052)); *Washington v. Hofbauer*, 228 F.3d 689, 703-04 (6th Cir.2000) (explaining that even if a court concludes that counsel chose not to cross-examine a witness for strategic reasons, the

> court "cannot stop there, [but] ... must also assess if this strategy was constitutionally deficient").

Bullock at 1047-1048.

In meeting the "prejudice" requirement, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102, 1107 (1996) *citing Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "'[R]easonable probability is a probability sufficient to undermine confidence in the outcome' of the trial." *Hooks v. Workman*, 689 F.3d 1148, 1190 (10th Cir. 2012 *citing Byrd v. Workman*, 645 F.3d 1159, 1168 (*quoting Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

The State argues throughout its Response that Budd has failed to demonstrate prejudice – that a more favorable result would not have been obtained had Brooks provided effective assistance. The State argues Brooks was not ineffective at all and those direct arguments are undertaken *post.*

Budd is placed with the burden of showing Brooks' actions or inactions were not based on a valid strategic choice. *Bullock* at 1047. Herein, Brooks failed at several points to make strategic choices made after the thorough investigation of the law and facts relevant to plausible options. *Id*. Generally,

when choices are made after such an investigation, these choices are *virtually* unchallengeable. *Id*. However, they are still challengeable.

The relevant question in this case is not whether Brooks' choices were strategic but whether they are reasonable. *Id*. at 1047-1048. While Brooks claims he pursued his particular courses of action for what he justifies as a strategic reason to focus on the sentencing phase, this Court must still consider whether that course of action was objectively reasonable. *Id*. As argued below, Brooks unreasonably made strategic decisions, thus meeting the first prong of *Strickland*.

Further, Budd has demonstrated a reasonable probability that, but for Brooks' errors, the result of the trial would have been different. *Kirksey* at 1107. Had Brooks provided Budd with an actual defense rather than focusing only upon the sentencing phase, the jury would have been able to consider reasonable doubt and entertain the lesser included offenses. This is a reasonable probability sufficient to undermine confidence in the outcome of the trial. *Hooks* at 1190. Accordingly, the Dismissal Order requires reversal.

A. Brooks Was Under No Obligation To Disclose The Results Of Any Consultation With An Expert Handwriting Analyst To The State; The Failure To Consult With Such An Expert For Fear Such A Consultation Would Damage Budd's Defense Constitutes Ineffective Assistance And Prejudiced Budd.

Parties to criminal matters are required to exchange witness lists and information relating to expert testimony the parties will present at trial. NRS 174.234 (2); *see also* NRCP (a)(2). If this information is not exchanged in a timely manner, "[t]he court shall prohibit the party from introducing that information in evidence or shall prohibit the expert witness from testifying if the court determines that the party acted in bad faith by not timely disclosing that information pursuant to subsection 2." NRS 174.234(3)(b).

In invalidating certain statutes, this Court determined a defendant could not "…disclose witness statements and the results or reports of mental and physical examinations and scientific tests or experiments" if the defendant did not intend to use such materials at trial without violating the defendant's right against self-incrimination. *Binegar v. Eighth Judicial Dist. Court In and For County of Clark*, 112 Nev. 544, 915 P.2d 889, 894 (1996) ("Such a situation would violate defendant's constitutional guaranties against self-incrimination.").

> A party who is required to provide notice of expert witnesses must also afford notice to the other party of the subject matter on which the expert witness is expected to testify, the curriculum vitae of the expert witness, and all reports made by or at the direction of the expert witness. Parties who receive such notice will thus perceive the need for and will be able to disclose any expert witnesses that they may call in rebuttal.

Grey v. State, 124 Nev. 110, 178 P.3d 154, 161(2008). In *Grey*, this Court held, "[m]ore precisely, we hold that once a party in a criminal case receives notice of expert witnesses, the receiving party must provide reciprocal notice ***if that party intends to present expert rebuttal witnesses***." *Id* (emphasis added).

"Under Strickland 's first prong, counsel's conduct falls to the level of being deficient if 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Eze v. Senkowski*, 321 F.3d 110, 125 (2nd Cir. 2003) *citing Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. *Eze* determined it was "troubling" that defense counsel failed to consult with a medical expert prior to trial due to questions regarding the science at issue in the medical community prior to trial. *Id*. at 128. Defense counsel failed to confront the State's expert with the contradicting studies in this area. *Id*. at 129. *Eze* determined defense counsel "missed out on the change to impeach" with contrary medical literature and she would have been "wise" to consult with an expert in this regard. *Id*. *Eze* continues as follows:

> A defense counsel's decision not to call a particular witness usually falls under the realm of trial strategy that we are reluctant to disturb. *See Luciano*, 158 F.3d at 660. At the same time, however, the decision not to call a witness must be grounded in some strategy that advances the client's interests. *Pavel*, 261 F.3d at 218-19. In *Pavel*, for instance, we refused to excuse as trial strategy the trial counsel's failure to call certain witnesses because

> [counsel's] decision as to which witnesses to call was animated primarily by a desire to save himself labor-to avoid preparing a defense that might ultimately prove unsuccessful. [Counsel's] decision not to call any witnesses other than [the defendant] was thus "strategic" in the sense that it related to a question of trial strategy-which witnesses to call. And it was "strategic" also in that it was taken by him to advance a particular goal.
>
> *Id*. at 218. Because this goal was "mainly avoiding work-not, as it should have been, serving [the defendant's] interests by providing him with reasonably effective representation," we determined that our usual hesitation to disturb such strategic decisions "ha[d] no bearing" in that case. *Id*. at 218-19. In the instant case, the record fails to suggest any plausible trial strategy to explain the defense's decision not to call an expert.

Id.

Herein, the State argues that, had Brooks obtained an expert regarding handwriting analysis, Brooks would have "manufactured" physical evidence that Brooks could have reasonably expected to undermine his argument and directly link Budd to the crimes[1]. *See*, Response at p. 20. However, the State fails to differentiate the difference between Brooks consulting experts to determine whether Budd's defense could be bolstered and Brooks actually calling such an expert at trial.

[1] The State also argues in passing that Budd has raised an unpreserved issue on appeal. Budd avers all issues were preserved below. However, in the event this Court determines otherwise, this Court should apply a plain error analysis to the claim. *See, Leonard v. State*, 117 Nev. 53, 17 P.3d 397, 413 (2001) (even when issues are unpreserved, a plain error analysis may still be applied).

Parties to criminal matters are required to disclose the information related to expert witnesses prior to trial. NRS 174.234 (2); *see also* NRCP (a)(2). If this information is not exchanged in a timely manner, the trial court may prohibit such an expert from testifying at trial. NRS 174.234(3)(b). The disclosure of such information will allow the opposing party the opportunity to locate rebuttal expert testimony, if needed, and then allow time for the disclosure of the rebuttal expert in preparation to call the expert to testify at trial. *Grey* at 161. However, such reciprocal notice is only required if that party actually intends to present such an expert at trial. *Id.*

The State is essentially claiming that, had Brooks consulted with an expert handwriting analyst, Brooks would have been under some sort of obligation to disclose the results of that expert consultation to the State, thereby harming Budd's defense. However, Brooks was under no such obligation unless he actually intended to call an expert witness at trial – which he did not do.

This Court upheld this position in *Binegar*. Brooks was under no obligation to disclose to the State the results or reports obtained from the result of examination or scientific tests or experiments performed by consultation with experts. *Binegar* at 894. Requiring Brooks to disclose incriminating results from consulting with an expert would have violated Budd's right against self-incrimination pursuant to the Fifth Amendment. *Id*.

Brooks's failure to consult with an expert was not based on a valid strategic choice. *See, Bullock* at 1047. This matter is akin to *Eze* inasmuch as Brooks failed to consult with a handwriting expert prior to trial due to questions arising from a layperson's authentication of Budd's handwriting. *Ibid*. at 125. Simply consulting with a handwriting expert and not necessarily calling that expert at trial to testify may have even equipped Brooks with additional information with which to impeach Lewis. *Id*. at 129.

Brooks' decision not to even consult with a handwriting expert was not grounded in reasonable strategy that advanced Budd's interests. *Id*. Brooks' concern about consulting or calling an expert in this case was due to his concern the information would not help Budd. However, Brooks never actually verified this was true by simply consulting with an expert. There was no plausible reason in this matter for Brooks not to at least consult with a handwriting expert. *Id*. Failing to do so failed to serve Budd's interests or his defense. *Id*.

Accordingly, Brooks rendered deficient assistance by first determining that consulting an expert would have damaged Budd's defense and then failing to consult any expert on the subject. This was an unreasonable and implausible strategic choice that damaged Budd's defense. The State relied completely upon layperson authentication of the rap song letter. Brooks failed to state a reasonable reason as to why he determined not to consult with an expert in

handwriting analysis and, as a result, Budd was prejudiced due to the State's reliance upon a layperson authentication. An expert testifying that the handwriting was not Budd's would have bolstered Budd's defense and provided additional information to the jury that the State did not present in consideration of reasonable doubt. "[T]he defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Earl v. State*, 111 Nev. 1304, 904 P.2d 1029, 1032 (1995) *citing Margetts v. State*, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991) (citation omitted). Any increase in evidence supportive of Budd's defense in the guilt phase rather than the sentencing phase undermines confidence in the verdict in this case. Therefore, Brooks rendered ineffective assistance and Budd was prejudiced as a direct result. Such a conclusion requires reversal of the Dismissal Order.

B. Brooks Unreasonably Determined Not To Investigate Steel.

Trial counsel does not act unreasonably in failing to call every conceivable witness that might testify on a defendant's behalf. *Hooks v. Workman*, 689 F.3d 1148, 1190 (10th Cir. 2012); *see Crittenden v. Ayer*s, 624 F.3d 943, 967 (9th Cir.2010) ("Trial counsel's duty to investigate ... does not necessarily require that every conceivable witness be interviewed." (omission in original) (*quoting Douglas v. Woodford*, 316 F.3d 1079, 1088 (9th Cir.2003))

(internal quotation marks omitted)); *see also Rompilla*, 545 U.S. at 383, 125 S.Ct. 2456 ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up."). *Hooks* determined information in an office memorandum was not "novel" or surprising to defense counsel. *Id*. Thus the Tenth Circuit determined, "[c]ounsel must be allowed leeway in prioritizing the evidence and witnesses she puts on." *Id*.; *see Rompilla*, 545 U.S. at 383, 125 S.Ct. 2456 ("[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.").

The State argues Budd has offered no evidence that Steel would have cooperated with the defense or that she had any credibility to lend to his defense. *See,* Response at p. 22. The State argues Brooks determined her testimony would have been based upon hearsay and therefore, counsel adequately investigated and he was not ineffective. *Id*. The State argues it provided ample evidence of its version of events and nothing Steel could have testified to would have mattered. *Id*.

However, in making this argument, the State overlooks that the fact that Steel was cooperating with the defense but Brooks did not follow up with her statement. Thus, the State cannot argue Steel would not have cooperated with the defense. Further, credibility is first investigated by counsel and then

determined by the jury. While Steel's purported testimony may have appeared to be hearsay, investigation of her statement would have either eliminated the hearsay from her statement or lead Brooks to the person(s) who had first-hand accounts. Thus, the State's argument on this issue rings hollow.

Brooks acted unreasonably because Steel's account, if appropriately investigated, would have strengthened Budd's defense in a manner that would have cast reasonable doubt on the State's case in chief. Instead, Brooks was focused on the sentencing phase rather than actually providing Budd with a defense to the charged crimes. Thus, Steel was not simply another "conceivable witness" but had information that the jury would have found to be incredibly helpful in its verdict. *Hooks* at 1190. Interviewing and investigating Steel and her statement would not have required Brooks to scour the globe in search of a defense; rather, the content of her statement lent support to a mitigating circumstance that gave credence to lesser included offenses, which would also have avoided the death penalty. *See, id*. Brooks is afforded some leeway in prioritizing the evidence, but not when counsel fails to give the defendant any defense at all. *Id*. Accordingly, it was ineffective assistance in failing to interview Steel and investigate her claims further and such failure prejudiced Budd. The Dismissal Order must therefore be reversed.

C. The Cumulative Error Herein Violated Budd's Constitutional Right To Due Process.

"Individual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process." *Fahy v. Horn*, 516 F.3d 169, 205 (3rd Cir. 2008) *citing Albrecht v. Horn*, 471 F.3d 435, 468 (3d Cir.2006). "Cumulative errors are not harmless if they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief based on cumulative errors unless he can establish 'actual prejudice.'" *Id*. *citing Albrecht quoting Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

When the claims raised in this appeal from the Dismissal Order are viewed as one large whole, Budd's constitutional right to due process has been violated. *Fahy* at 205. The State argues that, if there is any cumulative error, such error is harmless. However, the deficiencies of counsel in this case had a substantial and injurious effect or influence in determining the jury's verdict. *Id*. Brooks determined to focus on the sentencing phase of the proceedings, which constituted little, if any, defense in the guilt phase. This strategy is unreasonable and is prejudicial to Budd. Accordingly, Budd is entitled to habeas corpus relief and the Dismissal Order should be reversed. The State's argument that Budd received a fair trial is contradicted by Brooks' deficient performance, which

caused actual prejudice to Budd in his defense. *Id*. Thus, this Court's confidence in the verdict herein should be undermined and the Dismissal Order requires reversal.

CONCLUSION

WHEREFORE, based upon the foregoing, Budd respectfully requests that this Court reverse the district court's Dismissal Order and take any such further action as this Court deems necessary.

RESPECTFULLY SUBMITTED this 31st day of August, 2015.

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CERTIFICATION OF COMPLIANCE

1. **I hereby certify** that this Reply 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 this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this Reply Brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the Brief exempted by NRAP 32(a)(7)(C), it is either proportionally spaced, has a typeface of 14 points or more and contains no more than 7,000 words or does not exceed 15 pages.
3. **Finally, I hereby certify** that I have read this Reply 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 Opening 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 of 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 31st day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 31st day of August, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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