

THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CASTANEDA,)		
#2799593,)	CASE NO.: 74988	Electronically Filed May 29 2018 10:38 a.m.
Appellant,)	E-FILE	Elizabeth A. Brown Clerk of Supreme Court
)	D.C. Case: C-11-272657-1	
v.)	Dept.: V	
)		
STATE OF NEVADA,)		
)		
Respondent.)		
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APPELLANT'S OPENING BRIEF

Appeal from a Denial of Post Conviction Relief

Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CASTANEDA,)	
#1196578,)	CASE NO.: 74988
Appellant,)	E-FILE
v.)	D.C. Case: C-11-272657-1
STATE OF NEVADA,)	Dept.: V
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Respondent.)	
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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for ANTHONY CASTANEDA, hereby certifies pursuant to NRAP 26.1(a) that there are no persons nor entities associated with my law practice and that I am a sole practitioner. Furthermore, there are no persons nor entities that have any interest or financial interest in Law Office of Terrence M. Jackson. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 1st day of June, 2018.

Attorney of Record For Anthony Castaneda

//s// Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

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APPELLANT’S OPENING BRIEF

Appeal from a Denial of Post Conviction Relief

Eighth Judicial District Court, Clark County

NATURE OF THE ACTION

This is an Appeal from the Denial of Post Conviction Relief in District Court.

SPECIFICATION OF ERROR

1. Defense Counsel was ineffective under *Strickland* because his lack of preparation pretrial caused him to fail to give the correct statutory notice of expert witness required by NRS 174.234;
2. Defense counsel was ineffective pretrial because he did not do the minimum investigation required by *Strickland* to attempt to contact potentially exculpatory witnesses;
3. Defense counsel was ineffective for failing to file a meritorious Motion to Suppress;
4. Defense counsel was ineffective for failing to submit a necessary theory of the Case Instruction based upon the Ninth Circuit case of *United States v. Flyer*;
5. Defense counsel was ineffective on Direct Appeal by not adequately

researching the law to chose the best Appellate Issues;

6. The accumulation of error in this case requires reversal of the conviction.

SUMMARY OF THE ARGUMENT

Defendant, Anthony Castaneda, was convicted of 15 counts of Possession of Visual Presentation Depicting Sexual Conduct of a Child, a category B felony - NRS 200.700, after a six (6) day jury trial. The Nevada Supreme Court later reversed 14 counts on appeal. *Castaneda v. State*, 132 Nev. Adv. Op. 44. (A.A. 140-157)

Defendant filed a Writ of Habeas Corpus and Supplemental Points and Authorities alleging counsel's ineffectiveness of counsel on multiple grounds. The Petition alleged counsel was ineffective because of lack of pretrial research and failure to adequately investigate pretrial and file necessary motions pretrial.

The most striking failure of counsel was his failure to file the statutory required

Notice of Expert Witness. Because of this failure, the Court precluded this necessary expert from testifying. Defendant submits he was therefore greatly prejudiced under *Strickland*.

Defense counsel committed prejudicial error under *Strickland* when he failed to file a meritorious Motion to Suppress. There was strong evidence available to counsel that the search warrant was defective. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

The case of *Franks v. Delaware*, 438 U.S. 154 (1978) held that a defendant should have the opportunity to challenge the truthfulness of a search warrant's underlying affidavit. Because there existed a substantial question about the truthfulness of the search warrant affidavits in this case (A.A. 1-10, 11-26), Defendant was severely prejudiced by counsel's failure to file a Motion to Suppress requesting a *Franks* hearing.

Counsel was ineffective during trial by not preparing an appropriate theory of the case instruction that dealt with the critical legal issue of what constitutes legal possession of images in unallocated computer space. The recent decision in *United States v. Flyer*, 633 F.3d 911 (9th Cir.2011) was directly relevant to Defendant's case, as it held that before the government may find a person guilty of possessing pornographic images in unallocated space in a computer, the government has the burden to prove beyond a reasonable doubt that:

1. That the defendant had actual knowledge of the presence of such illegal files, and;
2. The defendant also had the forensic software required to access such files.

It is respectfully submitted that an instruction based on the holding in *Flyer* would have prevented the Defendant's wrongful conviction for the mere unknowing, inadvertent, or innocent possession of illegal computer images. Because counsel did

not seek such an important and appropriate instruction in this case, he was ineffective under *Strickland*. The failure to give such an instruction clearly prejudiced the jury because in this case knowledge and intent were the primary issues.

Finally, Defendant submits his appellate counsel was an ineffective advocate on appeal. A review of the entire record including the Defendant's appellate briefs will establish that counsel did not do a competent job choosing the most important issues that had merit, especially those issues concerning jury instructions and insufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979).

The accumulation of errors by counsel mandates the conviction be reversed. *Cooper v. Fitzharris*, 586 F.2d 1325, 1333, (9th Cir.1978) (*En Banc*) cert. den. 440 U.S. 970.

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JURISDICTIONAL STATEMENT

Defendant/Appellant Anthony Castaneda claims jurisdiction pursuant to N.R.S. 177.015(3), which gives the court jurisdiction to review the denial of an Order denying post-conviction relief.

Defendant/Appellant filed timely Notice of Appeal on January 24, 2018.

ROUTING STATEMENT

This is an appeal from the denial of a Petition from a Writ of Habeas Corpus.

Pursuant to NRAP 17, this case should be assigned to the Court of Appeals.

LEGAL ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED BY NOT FINDING
DEFENSE COUNSEL WAS INEFFECTIVE WHEN HIS LACK OF
PREPARATION PRETRIAL CAUSED HIM TO FAIL TO GIVE THE

CORRECT STATUTORY NOTICE FOR AN ESSENTIAL EXPERT
WITNESS;

II. WHETHER THE DISTRICT COURT ERRED BY NOT FINDING
DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CONTACT
POTENTIAL EXCULPATORY WITNESSES IN HIS PRETRIAL
INVESTIGATION;

III. WHETHER THE DISTRICT COURT ERRED IN FAILING TO FIND
DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A
MERITORIOUS MOTION TO SUPPRESS;

IV. WHETHER THE DISTRICT COURT ERRED BY NOT FINDING
DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO SUBMIT A
NECESSARY JURY INSTRUCTION BASED UPON THE HOLDING IN

UNITED STATES v. FLYER;

V. WHETHER DEFENSE COUNSEL RENDERED INEFFECTIVE
ASSISTANCE OF COUNSEL ON DIRECT APPEAL;

VI. WHETHER THE ACCUMULATION OF ERRORS IN THIS CASE
REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

STATEMENT OF THE CASE

Preliminary hearing was held April 14, 2011. Information was filed April 20, 2011. (A.A. 27-33) Defendant was arraigned April 21, 2011, and a trial date was set.

Jury trial began on July 8, 2013. On July 12, 2013, Defendant filed Motion to Dismiss, based upon prosecutorial misconduct by prosecution witness Tami Hines. (A.A. 39-82) That Motion was denied. Defendant was convicted in July 16, 2013, after a seven day trial, when the jury returned a verdict of guilty on all counts. (A.A.

122-126) Defendant was sentenced on October 30, 2013. (A.A. 127-130) An Amended Judgment of Conviction was entered on June 16, 2014. (A.A. 131-135) Defendant was sentenced to 28 to 72 months suspended with probation. Defendant's probation was eventually revoked on June 22, 2015. (A.A. 136-139) On November 25, 2013, Defendant filed Notice of Appeal to the Nevada Supreme Court. The Supreme Court affirmed Defendant's conviction on June 16, 2016. (A.A. 140-157) Defendant had filed a Motion to Withdraw Counsel on December 13, 2015. (A.A. 165-172)

Defendant filed an additional Motion to Withdraw Counsel, Appoint New Counsel and Request an Evidentiary Hearing on January 4, 2017. (A.A. 300-304) Defendant filed a *Pro Per* Post-Conviction Petition for Writ of Habeas Corpus on May 10, 2017. (A.A. 173-233)

The Defendant filed Supplemental Points and Authorities on July 25, 2017.

(A.A. 239-253) The State filed an Opposition to Defendant's Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief on September 20, 2017. (A.A. 254-267) Defendant filed a Reply to State's Opposition to Supplemental Points and Authorities on September 25, 2017. (A.A. 268-275) The Court heard brief argument on the Petition of Habeas Corpus on October 16, 2017. (A.A. 305-309) On January 18, 2018, the Court issued Findings of Fact, Conclusions of Law and Order. (A.A. 283-296) Notice of Entry of Finding of Facts, Conclusions of Law and Order was filed on January 25, 2018. (A.A. 299) Defendant filed Notice of Appeal on January 24, 2018. (A.A. 297-98)

FACTUAL STATEMENT

Defendant/Petitioner Anthony Castaneda was initially charged by criminal complaint and a preliminary hearing was held on April 11, 2011. After the preliminary hearing Defendant was bound over on fifteen counts of possession of

visual presentation depicting sexual conduct of a child. NRS 200.700, 200.730. An information was filed April 20, 2011, then Defendant pled not guilty and trial was set.

Defense counsel did not do the minimum investigation required under *Strickland v. Washington* to have an adequate factual understanding of the case. The result was the Defendant did not locate possible exculpatory witnesses who could have testified. Defense counsel did not even do adequate legal research to know how to file a Notice of Expert Witness. The trial court then refused to hear Defendant's expert witness testify because of Defendant's failure to comply with the notice statute NRS 174.234. Defendant filed two notices pursuant to NRS 174.234 but neither endorsed an expert witness. (A.A. 35-38)

Defense counsel also did not develop the facts or law to file a meritorious Motion to Suppress. The facts established that a key witness, Tami Hines, actually admitted she lied about part of the affidavits supporting the search warrant. (A.A. 1-

10), (A.A. 11-26), (A.A. 40-41) During trial, counsel was ineffective by not being prepared with appropriate theory of the case instruction that would have clarified the important issues of knowledge and intent regarding possession of computer data.

Counsel failed to have a clear and comprehensive strategy of defense and that led to the accumulation of error during the case. Counsel on appeal missed the most important issues and was therefore ineffective.

On appeal, the Nevada Supreme Court granted partial reversal, *Castaneda v. State*, 134 Nev. Adv. Op. 44. (A.A. 140-157) Defendant then filed a timely *Pro Per* Petition for Writ of Habeas Corpus, alleging ineffective assistance of counsel in violation of his Sixth Amendment rights. (A.A. 173-233) Supplemental Points and Authorities were later filed on July 25, 2017. (A.A. 239-253) The State filed Opposition to the Defendant's Supplemental Points and Authorities, disputing the defense counsel was ineffective or that the Defendant was prejudiced. (A.A. 254-267)

After Defendant filed a Reply, the District Court heard argument on October 30, 2017, and then denied Defendant's Petition and entered Findings of Fact, Conclusions of Law and Order on January 18, 2018. (A.A. 283-296)

ARGUMENT

I. COUNSEL WAS INEFFECTIVE UNDER *STRICKLAND* FOR FAILING TO SECURE A NECESSARY EXPERT WITNESS.

It is undisputed counsel did not provide proper statutory notice under NRS 174.234 for his rebuttal computer expert, Leon Mare and the court then disallowed the testimony of Leon Mare. (A.A. 127) It is also undisputed that the State opposed admission of Leon Mare's testimony, arguing vigorously his testimony was inadmissible because it violated the statute. The State would not waive the technical violation by the defense. (A.A. 127), (A.A. 260)

Competent counsel should have foreseen this result. Defense counsel however, who did not comply with the technical requirement of notice required by NRS 174.234, was clearly unprepared and patently ineffective under *Strickland* in arguing to admit this critical rebuttal evidence.

Even though the trial court may have been overly harsh in refusing to allow the necessary defense rebuttal expert to testify, because he was not properly noticed, that failure must be blamed on defense counsel's malfeasance and not just the trial court's overly harsh ruling. NRS 174.234 requires notice that is timely. If counsel had acted effectively, and he was well prepared pretrial, he would have filed the timely notice which was required by statute.

Any competent counsel would also have anticipated that any testimony of Detective Ehler would likely be adverse. The fact some of Ehler's inculpatory testimony had not been previously revealed, and the fact Ehler himself did not testify

directly previously to certain related matters is irrelevant. (*See*, State' Opposition, A.A. 254-267), (*See*, P.H.T. pp. 22 - 75), (A.A. 51-64) A preliminary hearing is merely a probable cause hearing. NRS 171.206. The State was not required to put on more than the minimum evidence necessary to establish probable cause. The State did not have to prove their case beyond a reasonable doubt at the preliminary hearing. *Robertson v. Sheriff*, 85 Nev. 681 (1969) The State was not even required to provide a defendant full discovery prior to a preliminary hearing. *State v. Justice Court*, 112 Nev. 803, 919 P.2 401 (1996)

It is not surprising that the trial judge refused to admit the rebuttal testimony from Leon Mare and instead rejected Defendant's due process argument. (A.A. 127)

The Supreme Court later in affirming the conviction upheld the District Court's ruling. It did not accept the Defendant's due process and Sixth Amendment arguments that the defense counsel should have been allowed to call his expert

witness at trial even though he had failed to properly provide notice. *Castaneda v. State*, 132 Nev. Adv. Op. 44. (A.A. 156) Defendant submits that the pretrial error of his counsel, which prevented him from calling a necessary witness, was the type of egregious ineffective assistance of counsel that mandates reversal because both prongs of *Strickland* are clearly satisfied. It was certainly deficient performance by counsel to not notice an absolutely essential rebuttal witness. This was outside the objective standards of reasonable attorney performance and the Defendant was also clearly prejudiced. It is hard to imagine a stronger case for meeting both prongs of *Strickland*.

In the District Court's Findings of Fact, Conclusions of Law and Order, the court however found counsel was not ineffective, stating "counsel could not be faulted for a reasonable miscalculation." (A.A. 290)

The argument that counsel could not have anticipated Detective Ehler's

testimony defies logic. Detective Ehler worked for the Las Vegas Metropolitan Police Department and the police had arrested Anthony Castaneda. As a general rule when the police testify in a criminal case, they always provide evidence against the defendant arrested.

Finally, the District Court stated that this issue was governed by the law of the case (A.A. 290), citing the decision in *Castaneda v. State*, 132 Nev. Adv. Op. 44 (A.A. 140-157) where the Nevada Supreme Court noted the defendant had been able to make the points he wanted without an expert. *See, Castaneda v. State, supra*. (A.A. 156)

Ineffective assistance of counsel was not however the issue on direct appeal so any statements the court made in its decision concerning the calling of an expert dealt with different issues and are mere dicta. Therefore, it is respectfully submitted the doctrine of ‘the law of the case’ is inapplicable because the same issues were not

being decided by the Supreme Court.

**II. DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT CONTACTING
POTENTIALLY EXCULPATORY WITNESSES DURING HIS
PRETRIAL INVESTIGATION.**

Defendant submits that defense counsel failed his basic duty under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which was to do at least a minimal pretrial investigation.

In this case a minimal pretrial investigation would have included consulting any potential exculpatory witnesses working for the commercial software company SpyBox. Counsel should have contacted the employees of the commercial software company SpyBox because they could have testified concerning the security measures which were used to protect Defendant's computer from being corrupted.

Counsel's failure to call such witnesses prevented him from developing critical evidence showing a lack of intent to possess illegal pornography.

The American Bar Association (ABA) Standards on the Prosecution and Defense function emphasize the crucial importance of investigation by criminal defense attorneys for their clients.

See, ABA Standards 4.1: Duty to Investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include effort 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 the lawyer of facts constituting guilt or his stated desire to plead guilty. (Emphasis added)

The importance of this ABA standard has been recognized and cited by the Nevada Supreme Court for over 40 years. *See, Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473 (1975). Counsel however did not fulfill the elementary command to promptly investigate and develop all the relevant information that would assist his client in the defense. This failure by counsel requires reversal of the conviction.

In *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two pronged test for reversal based upon ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, counsel must show that the deficient performance prejudiced the defense. This requires showing that counsel errors are so serious as to have deprived defendant a fair trial, a trial where the result is reliable. Unless a

defendant makes both showings, he is not entitled to a reversal of the conviction.

(Emphasis added).

In *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991), the Nevada Supreme Court in reversing, recognized the importance of the *Strickland* standard, stating:

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, Sanborn must demonstrate that trial 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*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and *Strickland*, we hold that Sanborn's representation indeed fell below an

objective standard of reasonableness.

Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Id. 403, 404. (Emphasis added)

In this case the defense counsel's failure to properly complete his investigation was analogous to the lack of care counsel gave to the filing of proper procedural notice of expert witness and it was prejudicial error.

Consider the case of *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.471 (2003): "It is evident from the PCRA record that counsel's limited investigation was not the result of such reasoned judgment, but merely the consequence of lackluster performance." (Emphasis added) *See also, Walker v.*

McQuiggans, 656 F.3d 311 (6th Cir.2011), and the cases of *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir.2011) and *Blystone v. Horn*, 664 F.3d 397 (3rd Cir.2011). In *Elmore v. Ozmint*, *supra*, the court noted:

“Because *Elmore*’s lawyer’s investigation never started, there could be no reasonable strategic decision to stop the investigation or forego use of evidence that the investigation could have uncovered.” *Id.* 864 (Emphasis added)

Since intent was the primary issue in this case, the failure to do a reasonable fact investigation to discover exculpatory evidence was error, notwithstanding the District Court’s statement that trial counsel’s failure to call any witnesses is “a virtually unchallengeable decision.” *Dawson v. State*, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

The failure of counsel here to not even do a minimal investigation is clearly

challengeable under *Strickland* and requires reversal.

III. DEFENSE COUNSEL'S FAILURE TO FILE A MERITORIOUS MOTION TO SUPPRESS WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

In *Kimmelman v. Morrison*, 474 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), the Supreme Court found the defense counsel's failure to file a meritorious Motion to Suppress was reversible error under *Strickland v. Washington*. Defendant submits counsel should have filed a Motion to Suppress in this case based upon the defective search warrants. (A.A. 1-10, 11-26) It is likely such a motion would have won and the evidence would have therefore been suppressed.

The case of *Franks v. Delaware*, 438 U.S. 154 (1978), held that a defendant was entitled to an evidentiary hearing to challenge the truthfulness of the search

warrant's underlying affidavit if the defendant could make a preliminary showing that the affidavit included statements knowingly and intentionally falsely made or made with reckless disregard for the truth. Although this requires a fairly high standard of proof, it is respectfully submitted the defense counsel was ineffective for not even requesting a *Franks* hearing in this case because there was substantial evidence the warrant was defective as there were many false statements made by Tami Hines in support of the affidavit. (A.A. 30-42) *See, for example, United States v. Kyllo*, 37 F.3d 526 (9th Cir.1994). A *Franks* hearing in this case could have demonstrated that the government witnesses cited in the search warrant affidavit made statements that could easily have been demonstrated to be untrue.

The District Court however found that defense counsel was not ineffective for failing to file a Motion to Suppress the search warrant. (A.A. 291) The Court found that despite the Defendant showing there existed clear evidence that Tami Hines lied,

this alone was sufficient for a *Franks* hearing because the Defendant had failed to demonstrate the investigators had “engaged in any misconduct.” *Weber v. State*, 121 Nev. 554, 584, 119 P.3d 107, 127 (2005). (A.A. 292)

The District Court, in its Findings of Fact and Conclusions of Law found that a mere lie by a witness in the supporting affidavits wasn’t enough to cause the search warrant’s probable cause determination to be reexamined. The Court unaccountably found that the Defendant failed to make a substantial preliminary showing that the affidavit contained intentionally false or recklessly false statements. (A.A. 292)

Defendant respectfully submits the District Court placed an impossibly high burden on the Defendant at the pleading stage. This burden was inappropriate because it created a nearly impossible bar to challenging any improper government action. Defendant submits the District Court in this case ignored recent case law that does not require a clear and substantial showing of deliberate or reckless misrepresentation

at the pleading stage. *See, United States v. Stanert*, 762 F.2d 775, 781 (9th Cir.1985); *United States v. Gonzalez Inc.*, 412 F.3d 1102, 1112 (9th Cir.2005) In this case Defendant easily alleged enough of a showing of intentionally false or recklessly false statements to have won a Motion to Suppress and therefore the District Court erred in finding counsel was not ineffective.

**IV. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO
SUBMIT A NECESSARY JURY INSTRUCTION ON CRIMINAL
INTENT BASED ON THE NINTH CIRCUIT CASE OF *UNITED
STATES v. FLYER*.**

It is well established that a theory of the case instruction must be given if there is any evidence to support it no matter how weak or incredible. *Williams v. State*, 99 Nev. 530, 665 P.2d 260 (1983) Defendant submits that failure of defense counsel to

prepare any instruction that would explain inadvertent or innocent possession of pornography in the Defendant's unallocated computer space was ineffective assistance under *Strickland*.

The Defendant was entitled to any reasonable theory of the case instructions and to fair and complete instructions on the essential elements of the charges. *Williams v. State*, 99 Nev. 530, 665 P.2d 260 (1983); *Allen v. State*, 98 Nev. 354 (1982), *Barger v. State*, 81 Nev. 548 (1965).

The recent case of *United States v. Flyer*, 633 F.3d 911 (9th Cir.2011) dealt directly with the important issue of the possession of images in unallocated computer space which was the identical legal issue as in the Defendant's case. Based upon the decision in *United States v. Flyer*, the defense counsel should have requested a similar instruction that correctly explained the government's burden of proof in all such cases. Defendant believes his counsel should have proposed an instruction based

upon *Flyer* which read:

“In order to consider the fact that pornographic images were discovered in “unallocated space” on the Defendant’s computer as evidence of guilt showing the Defendant’s criminal possession of such evidence, the government must show: (1) that the Defendant had actual knowledge of the presence of the files, and (2) that the Defendant had the forensic software required to access such files.” *See, Flyer (Id. 919)* (Emphasis added)

An instruction adopted from language in *United States v. Flyer, supra*, or a similar such instruction, was absolutely necessary as the “theory of the case” instruction which would have explained the Defendant’s theory that: inadvertent or innocent possession of unwanted, illegal images on his computer is not a crime. The failure of counsel to have requested such an instruction was error.

The District Court in its Findings of Fact, Conclusions of Law and Order

acknowledged the *Flyer* decision, but then tried to distinguish *Flyer* from the Defendant's case. (A.A. 292, 293) The Court relied on the fact that the images found on the "unallocated space" were merely duplicates of images found on the Defendant's Shuttle desktop. (A.A. 293). The Court also noted the testimony of Tami Hines, who testified she had seen the Defendant using the computer with the charged images ... "every waking hour of the day." (A.A. 293)

Defendant submits these attempts to distinguish *Flyer* were inadequate because the law is clear that if there is some evidence to support a defendant's theory of the case instruction, it should be given. The Defendant's lack of actual knowledge was his most reasonable theory of defense and failure to give a necessary theory of the case instruction must be deemed error.

In every case there is contradictory evidence. The mere fact that some evidence pointed to the Defendant's guilt would not alone make Defendant's proposed

instructions unnecessary or improper.

The credibility of witnesses is always an issue but it is absolutely necessary that a jury be instructed fully and fairly on each element of the criminal charges and on each potential defense. Because counsel was ineffective in providing necessary instructions in this case the charges must be reversed.

V. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL BY NOT ADEQUATELY RESEARCHING THE LAW TO CHOOSE THE BEST ISSUES FOR A REVERSAL.

Although appellate counsel raised numerous issues on appeal, and appellate counsel was partially successful, getting fourteen counts reversed, it is respectfully submitted he did not render effective assistance of counsel in handling Defendant's

appeal. Counsel failed in getting a full reversal of the case because he overlooked the most important issues on appeal that could have reversed the conviction. Those issues include inadequate instruction on criminal intent and the failure to adequately challenge the sufficiency of the evidence.

Effective appellate advocacy in any case requires several distinct but interrelated skills:

(1) Careful review and analysis of the entire record to recognize the important appellate issues. This requires a basic understanding of criminal law, constitutional law and the laws of evidence and trial procedures;

(2) Organizing the record to include all the material facts;

(3) Understanding and researching the law as it applies to the case; and

(4) Writing a persuasive appellate brief that incorporates all the material facts

with the relevant case law and other authorities.

(5) Counsel must be aware of recent changes in the law and be willing to challenge settled law and precedent when necessary.

It is respectfully submitted counsel did not apply all of these skills effectively in preparing Defendant's appeal.

In *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), the Supreme Court found appellate counsel was ineffective for not effectively rebutting the prosecution's theory with expert testimony. It is respectfully submitted that in this case counsel was also ineffective under *Strickland* because there were several potential winning issues on appeal Defendant was clearly prejudiced by his attorney's failure that could have resulted in reversing the conviction.

The legal issue that most likely would have resulted in reversal was the issue

of erroneous instructions regarding criminal intent. In his Habeas Corpus Petition, the defense has argued counsel was ineffective for not submitting appropriate instructions to the jury. *See*, Instructions to Jury, Defendant's Proposed Instructions, and Plaintiff's Proposed Instructions. (A.A. 83-109), (A.A. 110-119), (A.A. 120, 121)

Appellate counsel, who thoroughly researched the law, should have recognized that failure to give a variation of the *Flyer* instruction was reversible error. *See* cases such as *Barger v. State*, 81 Nev. 548, 407 P.2d 584 (1965) and *Allen v. State*, 98 Nev. 354, 647 P.2d 389 (1982), reversing for faulty instructions. Defense counsel also failed in arguing effectively there was insufficient evidence of guilt under *Jackson v. Virginia*, 443 U.S. 307 (1979). In this case, if the correct legal standard of intent had been applied, the State could not have met its burden of proof beyond a reasonable doubt. *Jackson v. Virginia*, as any rational trier of fact properly instructed viewing the evidence in the light most favorable to the prosecution could not have

found the essential elements of the crime beyond a reasonable doubt.

Defendant directs the Court's attention to *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir.1995), where the court reversed because counsel did not raise a *Brady* violation on appeal. The court there stated:

“When a habeas petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, we examine the merits of the omitted issue. *Cook*, 45 F.3d at 392-93; *Dixon*, 1 F.3d at 1083. Failure to raise an issue that is without merit “does not constitute constitutionally ineffective assistance of counsel,” *id.* at 1083 n. 5, because the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal. *See, Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987 (1983). Thus, counsel frequently will “winnow out” weaker claims in order to focus effectively on those more likely to prevail. *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986); *see Tapia v.*

Tansy, 926 F.2d 1554, 1564 (10th Cir.), *cert. den.*, 502 U.S. 835, 112 S.Ct. 115, 116 L.Ed.2d 84 (1991). However, “an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a ‘dead-bang winner,’ even though counsel may have presented strong but unsuccessful claims on appeal.” *Cook*, 45 F.3d at 394-95 (citing *Page v. United States*, 884 F.2d 300, 302 (7th Cir.1989)).

In this case, Mr. Banks’ appellate counsel failed to raise either the *Brady* claim or the ineffective assistance of trial counsel claim on direct appeal. These were not frivolous or weak claims amenable to being winnowed out of an otherwise strong brief. They were clearly meritorious.” *Id.* 1515 (Emphasis added)

As in *Banks*, counsel here failed to raise non-frivolous claims that were likely winners on appeal. This was ineffectiveness under *Strickland*.

...

VI. THE ACCUMULATION OF ERRORS IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION.

The numerous errors and deficiencies of counsel in this case require reversal of the conviction. It can be argued that even considered separately, the errors or omissions of counsel were of such a magnitude that they each require reversal. It is clear, when viewed cumulatively, the case for reversal is overwhelming. *Daniel v. State*, 119 Nev. 498, *see also, Sipsas v. State*, 102 Nev. at 123, 216 P.2d at 235, stating: “The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial.”

A greater prejudice may result from the cumulative impact of multiple deficiencies. *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (*En Banc*), cert. denied, 440 U.S. 970, *Harris by and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir. 1995). The multiple errors of counsel in this case when cumulated together

require reversal. A quantitative analysis makes that clear. *See*, Rachel A. Van Cleave, When is Error Not an Error? Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

Relevant factors to consider in evaluating a claim of cumulative error are [1] whether the issue of guilt is close, [2] the quantity and character of the error, and [3] the gravity of the crime charged. *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State*, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See also*, *Big Pond v. State*, 101 Nev. 1, 692 P.2d 1228 (1985), *Daniel v. State*, 119 Nev. 498, 78 P.3d 890 (2003). *See also*, *Mak v. Blodgett*, 670 F.2d 614 (9th Cir.1991), where the Ninth Circuit stated:

“We do not decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel affirmance of the district court’s grant of habeas corpus as to the

sentence of death.”

The Defendant here was facing a lengthy sentence and needed effective assistance of counsel at every stage of representation. Significant errors by counsel pretrial, throughout the trial and on appeal led to ineffective assistance of counsel under *Strickland*.

Based upon the five substantive errors enumerated in Defendant’s Writ of Habeas Corpus, it is respectfully submitted the prejudicial effect of each error when cumulated raise such substantial questions about the validity of the conviction that it must be reversed.

CONCLUSION

Defendant Anthony Castaneda was wrongly convicted of the specific intent crime of possession of visual presentation depicting sexual conduct of a child. His attorney did not adequately investigate pretrial to secure potential exculpatory

witnesses nor did his attorney even properly notice an essential defense expert witness. Defendant was greatly prejudiced when the trial court precluded his expert witness from testifying because of his counsel's error.

The court erred when it found counsel was not ineffective for failing to file a meritorious Motion to Suppress Evidence. There existed substantial evidence of knowing and intentional falsehoods in the search warrant affidavit and therefore it was likely a Motion to Suppress would have succeeded.

Counsel also failed to assist the court by submitting a correct instruction on the law concerning knowing possession. An instruction based upon the case of *United States v. Flyer* would have greatly aided the jury in understanding the Defendant's theory of the case. Counsel was also ineffective in his appellate representation, not raising the most important issues. The Defendant's claim for cumulative error is indisputable as the facts in this case were close and the quantity and character of the

errors was substantial.

For all of these reasons the Writ of Habeas Corpus should be granted and the case should be reversed and remanded and the conviction set aside. This Honorable Court should order such further proceedings as necessary.

Respectfully submitted this 25th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face 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 WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

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

[X] Proportionately spaced, has a typeface of 14 points or more and contains 5,699 words, which is within the word limit.

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.

Respectfully submitted this 25th day of May, 2018.

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 25th day of May, 2018, I served a copy of the foregoing: Appellant's, Opening Brief as well as Volumes One and Two of the Appendix, as follows:

[X] Via Electronic Service to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Petitioner/Appellant as follows:

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