THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CASTANEDA,	)	
#2799593,	)	
Appellant,	)	**CASE NO.: 74988**
	)	
v.	)	**E-FILE**
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

REPLY TO RESPONDENT'S ANSWERING BRIEF

Appeal from a Denial of Post Conviction Relief
Eighth Judicial District Court, Clark County

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STATEMENT OF ISSUES

I. APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE MERITORIOUS UNDER THE TWO PRONGED *STRICKLAND* TEST;

A. DEFENSE COUNSEL WAS INEFFECTIVE REGARDING WITNESSES;

B. DEFENSE COUNSEL WAS INEFFECTIVE IN PROTECTING DEFENDANT'S FOURTH AMENDMENT RIGHTS BY FAILING TO

ARGUMENT

I. APPELLANT'S CLAIMS OF INEFFECTIVE COUNSEL WERE MERITORIOUS UNDER THE TWO PRONGED *STRICKLAND* TEST.

Defendant does not claim he was entitled to an ideal or perfect defense. *Jackson v. Warden,* 91 Nev. 430, 432 (1975). Defendant has however showed his attorney was both deficient and incompetent under prevailing professional norms in several important respects. *Strickland v. Washington,* 466 U.S. 668, 686-87 (1984).

A. DEFENSE COUNSEL WAS INEFFECTIVE REGARDING WITNESSES.

The State in their response argues that neither defense counsel's failure to properly notice an essential expert witness so he could challenge the State's expert witness, nor counsel's failure to even contact potentially exculpatory witnesses who worked for the Defendant's software company, SpyBox, was attorney error that could be considered ineffective assistance of counsel. (S.R. 12).

The State in their brief cites *Dawson v. State,* 108 Nev. 112, 117 (1992) for the proposition that counsel's decision as to which witnesses to call is 'virtually unchallengeable.' (S.R. 12). Defendant submits the serious mistakes counsel made regarding witnesses in this case were however inexcusable. These mistakes not only should be challenged but should result in reversal because they establish the attorney action in this case clearly fell far below professional norms and therefore was ineffective assistance under *Strickland.*

An attorney's knowledge of the basic rules of pretrial procedure such as the rule which requires an attorney to provide pretrial notice of expert witness(es) to opposing counsel, NRS 174.234, is absolutely essential knowledge for a competent counsel. Whether the trial court's sanction of excluding Defendant's expert witness was overly harsh or unjustified, but for counsel's gross ineffectiveness, the defense would have been able to call that essential expert witness at trial.

Numerous cases have also held failure to investigate to discover exculpatory witnesses is virtually per se ineffective assistance of counsel. *See*, for example, *In re Cordero,* 756 P.2d 1370 (Cal.1987) and *Commonwealth v. Alvarez,* 740 N.E. 2d 610 (Mass.2000). *Strickland* itself states that: "counsel must at a minimum conduct a reasonable investigation enabling him to make informed decisions about how to best

represent his client. *Strickland, Id.* 691. (Emphasis added)

The only remedy for counsel's mishandling of the witness(es) is reversal for ineffectiveness under *Strickland.*

B. DEFENSE COUNSEL WAS INEFFECTIVE IN PROTECTING DEFENDANT'S FOURTH AMENDMENT RIGHTS BY FAILING TO FILE A NECESSARY MOTION TO SUPPRESS.

In *Kimmelman v. Morrison,* 477 U.S. 365 (1986), the United States Supreme Court reversed because counsel failed to file a meritorious Motion to Suppress. The State's Response to Appellant's argument in this case that defense counsel erred by failing to file a meritorious Motion to Suppress was to try to argue that any Motion to Suppress would have been meritless or unsuccessful because there weren't sufficient grounds for such a motion. (S.R. 14).

This was mere wishful thinking by the State. Although the State apparently concedes the search warrant Affidavit may have been tainted with many false statements made by admitted perjurer, Tami Hines, (S.R.14) the State nevertheless claimed that the Defendant was not even entitled to a *Franks* hearing because there was sufficient probable cause to support the warrant irrespective of Tami Hines' lies. (S.R. 14). The District Court echoed the argument of the State in its Findings of Fact,

Conclusions of Law and Order. (A.A. 291, 292). It is respectfully submitted however that counsel had a duty to file a Motion to Suppress in this case under *Kimmelman v. Morrison, supra,* and *Franks v. Delaware,* 438 U.S. 154 (1978) because there was a reasonable likelihood such a motion would have succeeded.

In *Franks v. Delaware,* 438 U.S. 154 (1978), the Supreme Court recognized that if the Affidavit supporting a warrant is based on intentionally false statements or statements made with a reckless disregard for the truth, the warrant is defective and anything seized from the warrant must be suppressed.

The Defendant in this case could have easily shown deliberate falsehood or at least shown reckless indifference to the truth by witnesses to the Affidavit(s) supporting the State's Motion to Suppress. Therefore there was a strong reason to believe a Motion to Suppress would have been granted. Since Defendant was therefore clearly prejudiced by his prior counsel's failure to file a Motion to Suppress and by the prejudicial evidence seized executing that warrant, this was ineffective assistance under *Strickland* requiring reversal.

C. DEFENSE COUNSEL WAS INEFFECTIVE REGARDING PREPARING NECESSARY JURY INSTRUCTIONS ON CRIMINAL INTENT.

The State of Nevada in their response suggests that the case of *United States v. Flyer,* 633 F.3d 911 (9th Cir.2011) did not provide the trial court proper guidance for a jury instruction on intent in this case and therefore defense counsel was not ineffective for not proposing an instruction on intent based upon the *Flyer* case. (S.R. 15).

Nevada is within the jurisdiction of the Ninth Circuit Court of Appeals and is bound by the case law of the Ninth Circuit Court of Appeals. It is respectfully submitted that comparing the *Flyer* case with the facts of the Defendant's case, makes clear that the *Flyer* case is directly on point. It is also clear that an instruction based upon the decision in *Flyer* would have been extremely helpful in explaining to the jury how to evaluate the complex issue of intent in this case which involved the mere possession of computer images. The importance of resolving complex legal question(s) on issues of intent is especially important in a case such as this where the charges involve a serious and highly inflammatory charge like child pornography.

The failure of the court to give a clear and exact instruction on intent was extremely prejudicial and counsel's error by not even preparing such an instruction must be considered ineffectiveness under *Strickland.*

The State attempts to distinguish the *Flyer* case holding by arguing that the trial

evidence in this case distinguishes it from *Flyer.* (S.R. 15, 16). The State however failed to adequately distinguish *Flyer.* The State cited Tami Hines testimony that she had seen the Defendant using the computer "[e]very waking hour of the day" (S.R. 11) and then the State argued that the Defendant's background in computers established that the Defendant therefore had actual contact or interaction with the images in unallocated space. (S.R. 11). These facts alone did not overcome the strong case law which supports giving an instruction on the Defendant's "theory of the case."

A long line of Nevada cases have held that a Defendant is entitled to have his theory of the case instructions given to the jury. *See, Barger v. State,* 81 Nev. 548, 407 P.2d 584 (1965); *Brooks v. State,* 103 Nev. 611, 749 P.2d 893 (1987). All the federal circuits have also required the giving of theory of the case instructions. *See,* for example, *United States v. Main,* 113 F.3d 1046 (9th Cir.1997); *United States v. Swallow,* 109 F.3d 656 (10th Cir.1997); *United States v. Smith,* 217 F.3d 746 (9th Cir.2000).

Although, based upon the facts of this case, the jury may have reasonably drawn an inference that the Defendant may have had knowledge of the alleged computer images, if correctly instructed, the jury may have instead concluded

nevertheless that there was not proof beyond a reasonable doubt that the Defendant had actual knowledge. The Defendant's theory of the case was that he DID NOT KNOWINGLY POSSESS illegal pornographic images on his computer. Even with his extensive prior use of computers, such a theory was clearly possible and the jury needed to be fully and correctly instructed to consider that it was a possible defense even if it was unlikely.

The Ninth Circuit Court of Appeals in *Polk v. Sandoval,* 503 F.3d 903 (9th Cir. 2007) held that incorrect jury instructions deprived the defendant of due process stating:

> "It is clearly established federal law, as determined by the Supreme Court, that a defendant is deprived of due process if a jury instruction "ha[s] the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind. *Sandstrom v. Montana,* 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979); *Francis v. Franklin*, 47 U.S. 307, 326, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1984 or 85) (reaffirming "the rule of *Sandstrom* and the well spring due process principle from which it was drawn."; *See also, In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1968, 25 L.Ed.2d 368 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact

> necessary to constitute the crime with which he is charged.").
>
> In reviewing a habeas petition, "[t]he only question . . . is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (internal quotation marks and citations omitted). "[T]he instruction . . . must be considered in the context of the instructions as a whole and the trial record." *Id.* "If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Middleton v. McNeil,* 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (*per curiam*) (quoting *Estelle,* 502 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *see also, Sarausad v. Porter,* 479 F.3d 671, 692 (9th Cir. 2007) *Id.* 909, 910."

. . .

In this case, as in *Polk v. Sandoval, supra,* having been given incorrect instructions on intent, the jury did not have sufficient guidance to reach a proper decision. The prejudice from the wrongful jury instructions in this case was not theoretical, but actual.

If a jury is given two theories upon which they can convict the defendant and one of them was wrong, it should be obvious, without any need of scientific proof,

that the defendant has been prejudiced.

Anthony Castaneda was denied his fundamental due process right to a fair trial because of the incorrect instructions at trial. Appellant contends therefore, the due process clause of the Constitution requires his conviction must be set aside. The fundamental constitutional rights involved in this case overcome every argument made by the State to support his conviction.

D. DEFENSE COUNSEL WAS INEFFECTIVE ON APPEAL

The State wrongly claimed there was no support for a correctly crafted instruction based on the *Flyer* case. (S.R. 17). The Defendant however respectfully submits for the grounds previously stated in this brief (pp. 5-8) the trial court erred by incorrectly instructing the jury on intent and this was an error that would have been grounds for reversal on appeal. Although defense counsel did not raise this important issue on appeal, it was so critical that the failure to raise this issue on appeal must be reversible error. *See, Banks v. Reynolds*, 54 F.3d 1509 (10th Cir.1995).

Defendant did raise the issue of insufficiency of evidence on direct appeal. He was not however effective or skillful in arguing this issue and the Nevada Supreme Court, in its opinion, denied that issue. This issue however is <u>not</u> barred by the

doctrine of the law of the case because counsel now is not rearguing the prior issue but instead is arguing prior counsel's ineffectiveness, which is a separate issue from the actual insufficiency of the evidence. Defendant now urges the court to review the entire record in light of the reasonable doubt standard of *Jackson v. Virginia,* 443 U.S. 307 (1979), to determine if appellate counsel met his burden under *Strickland* to be an effective appellate advocate when arguing this issue before the court. Review of the record establishes counsel was an ineffective advocate arguing insufficiency of the evidence under *Jackson v. Virginia, supra,* when this case was argued on appeal.

II. CONCLUSION

Defendant Castaneda reasserts all the grounds previously raised in his Opening Brief and asks this Honorable Court to review the entire record on appeal. The entire record shows that defense counsel was ineffective pretrial, during trial and on appeal.

Wherefore, it is respectfully submitted the District Court should be reversed and the Writ of Habeas Corpus be granted and such further relief as is just be ordered.

Respectfully submitted this 17th day of July, 2018.

/s/ Terrence M. Jackson
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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 2,121 words, which is within the word limit and this brief is also within the 15 page 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 this17th day of July, 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 17th day of July, 2018, I served a copy of the foregoing: Appellant's Reply Brief 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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