IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN GONZALES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT No. 78152
Dist Ct. Case. CV 20,547

APPEAL FROM JUDGMENT OF THE HONORABLE
MICHAEL MONTERO

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

KARLA K. BUTKO, Esq.
Attorney for Appellant
P. O. BOX 1249
Verdi, Nevada 89439
(775) 786-7118
State Bar #: 3307

MICHAEL MACDONALD
Humboldt County District Attorney
Attorney for Respondent
P. O. Box 909
Winnemucca, Nevada 89446
(775) 623-6363
Anthony Gordon, Esq.

19-25090

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

PAGE

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

OTHER

I. SUMMARY OF ARGUMENT

This is an appeal by MELVIN LEROY GONZALES, JR, Appellant herein, from the denial of a petition for habeas corpus pursuant to a guilty to three counts of Aggravated Stalking, a Category B Felony, in violation of NRS 200.575(2). At his evidentiary hearing, and in his petition and supplemental petition for writ of habeas corpus, Melvin Leroy Gonzales, Jr., (hereinafter: "Melvin) demonstrated that his guilty plea was not knowing and voluntary, but was obtained due to the coercion of his trial counsel and his lack of understanding during the plea canvas that plea was in his best interest. Melvin believes that counsel failed to discuss available defenses to the crime with disclosure of discovery materials that were readily provided to the defense, there were miscommunications between trial counsel and himself. Melvin argued that the State breached the plea bargain during sentencing and that trial and appellate counsel were ineffective for failing to litigate those issues. Melvin argued that trial counsel was ineffective by failing to litigate a motion to suppressed based upon a lack of apparent authority by the motel manager who opened his motel room for the police. Further, counsel should have moved to sever charges at the trial stage. Melvin argued he was actually innocent of NRS 200.575(2) but if guilty violated NRS 200.575(3), a lesser charge. Each of trial counsel's failures fell below an objective standard of care, constituting ineffective assistance of counsel under *Strickland*.

II. JURISDICTION OF THE COURT

This Court has jurisdiction over the direct appeal from the denial of post-conviction relief under NRS 34.575(1). The District Court filed its Findings of Fact, Conclusions of Law and Judgment on February 1, 2019. 2AA 283-297. The notice of entry of order was filed on February 2, 2019. 2AA 298. A timely notice of appeal from the denial of post-conviction relief was filed by counsel for Melvin on February 15, 2019. 2AA 298.

III. ROUTING STATEMENT

This case involves a consecutive sentence on each of three counts of Aggravated Stalking of One hundred Fifty-six months (13 years) in prison with parole eligibility after service of Sixty-two months (5.16 years) in prison on an aggravated stalking charge, a Category B felony. 1AA 31-34. It is clear that the aggregate time Melvin must serve in prison to be eligible for parole is 186 months (15.5 years) in prison. The maximum sentence is 468 months in prison or 39 years in prison. This is an appeal from denial of a first petition for writ of habeas corpus (post-conviction) and it is timely. Even though this is a post-conviction and the conviction arose from the entry of a plea, the Nevada Supreme Court should hear the case. NRAP 17(b) provides that if this was the direct appeal of this case, it would be presumptively assigned to the Court of Appeals because the case

involves the judgment of conviction arising from a guilty plea, however, NRAP 17(b) (3) does not presumptively assign Category A felony postconviction matters to the Court of Appeals. Hence, the Nevada Supreme Court appears the proper forum for this appeal.

Further, this appeal demonstrates how sentencing matters in this State are extremely diverse. Factually, Mr. Gonzales was not near the victims as he was in Reno and they were in Winnemucca. The action involved sending text messages and no furtherance of a violent act in support of the text messages. The punishment does not fit the crime. The Nevada Supreme Court should decide this case on appeal.

IV. STATEMENT OF ISSUES

1) The State breached the plea bargain on this case at the sentencing hearing by its argument, which was in excess of the plea bargain. The District Court abused its discretion when it failed to find trial and appellate counsel ineffective for failing to argue in support of the contract between Melvin and the State of Nevada.
2) The District Court's decision that the plea was knowing and voluntary constituted an abuse of discretion by the court. The District Court's decision that the NRS 34.810 precluded litigation of post conviction claims that counsel was ineffective is erroneous.

3) Melvin was actually innocent on allegations that he violated NRS 205.575(2)(a). Melvin's actions did not constitute that crime. If Melvin was guilty of stalking, his actions constituted a violation of NRS 200.575(3). Counsel was ineffective in advising a guilty plea to the more serious charge. This conviction is a miscarriage of justice.

4) Counsel was ineffective when counsel failed to litigate a motion to suppress the evidence which was gathered in violation of the 4th, 5th & 6th Amendments to the Constitution.

5) Counsel was ineffective when counsel failed to sever the seven counts in the Complaint to two separate cases, in violation of the 5th, 6th & 14th Amendments.

V. STATEMENT OF THE CASE

A. Procedural History

On October 10, 2013 an Information was filed against Melvin charging him with Three Counts of Aggravated Stalking, a Category B felony in violation of NRS 200.575(2)(a). 1AA 1-4. The preliminary hearing was waived. Melvin was represented by Steve Cochran, Public Defender. Mr. Cochran advised Melvin that he should accept the plea offer rather than litigate the case because he qualified for habitual offender enhancement.

The plea bargain was evidenced by a Guilty Plea Agreement which was filed into court on January 7, 2014. 1AA 21-30. The Guilty Plea Agreement provided as follows:

> "Both sides are free to argue at time of sentencing. The State agrees to recommend that the penalty on each count run concurrent to each other." 1AA 21. Melvin was advised in that document that the possible sanction was 2-15 years in prison but that probation was available. 1AA 24.

At the arraignment on January 7, 2014, Melvin was canvassed by the Court. At the canvas, the Court skipped the critical detail that the State agreed to recommend concurrent sentences on the three charges. 1AA 10. The Court asked counsel if there were collateral consequences of the charge of NRS 200.575(2), i.e., registration requirements, certification requirements. Both attorneys replied there were no collateral consequences. 1AA 13. The Court accepted the guilty plea.

On the date of sentencing, April 15, 2014, Mr. Cochran advised the Court that Melvin was intoxicated and sent electronic text message threats to three people. Mr. Cochran reminded the Court that Melvin was more than a hundred miles away when the threats were texted. 1AA 40. By now, Melvin had been in the Humboldt County jail for a year and a half, 453 days. 1AA 41, 44. Mr. Cochran sought a sentence which included probation for Melvin.

In response, the State argued. The State argued that the Court should follow the recommendation in the presentence report. The presentence report recommended consecutive time on Counts I & II, but concurrent time on Count III. That was not the term of the plea bargain on the case. At the conclusion of the hearing, Judge Montero sentenced Melvin to three consecutive terms of 156 months in prison with parole eligibility at 62 months on each count.

There was a direct appeal of the judgment of conviction. See Docket 65768. In the Fast Track Statement, Mr. Cochran argued that Melvin's actions constituted one course of conduct because he sent the text messages during the same time period to his ex-wife, Connie, and her parents, Mr. & Mrs. Pallett. 1AA 62-66. Mr. Cochran raised the jurisdictional question on direct appeal, arguing that the text messages were sent from Washoe County and that no offense was committed in Humboldt County. 1AA 66-68. Mr. Cochran did not raise the issue of the breach of the plea bargain by the State on direct appeal.

This Court affirmed the conviction of Melvin on November 12, 2014. This Court held that the charges were not redundant. This Court indicated that Melvin could not argue that he would properly be convicted of NRS 200.575(3) because he sent text messages because he pled guilty. Hence, the subject of the validity of the plea was properly brought at postconviction. This Court held that jurisdiction was proper in either county.

On November 16, 2015, Melvin filed a timely petition for writ of habeas corpus (post-conviction). The petition alleged that trial counsel was ineffective under the 4th, 5th, 6th and 14th Amendments because:

Counsel failed to conduct any pretrial investigation; counsel failed to use expert witnesses; counsel did not seek adequate discovery; counsel improperly waived the preliminary hearing; the plea was coerced by counsel; failure to file a motion to withdraw the guilty plea when requested by the client; he was under the influence of psychotropic medications which negatively impacted his ability to assist in his defense and make decisions; he was prejudiced at sentencing stage of the case by counsel's lack of effort; he did not get the benefit of the plea bargain1AA 83-96.

Counsel Butko was appointed to the postconviction and a supplemental petition was filed on behalf of Melvin. The supplemental petition added additional grounds that counsel was ineffective under the 4th, 5th, 6th & 14th Amendments because: 1) Counsel failed to prepare and investigate the illegal search of Melvin's motel room; 2) Counsel failed to demonstrate that Melvin was too intoxicated to violate NRS 200.575(2)(a), he had the complete inability to act upon the threats he made; 3) The guilty plea was coerced by counsel, the plea had no value to Melvin and should not have been accepted, Melvin did not actually violate NRS 200.575(2)(a); 4) counsel should have severed the charges into two separate

cases; 5) Melvin, if guilty, was guilty of violating NRS 200.575(3); 6) Melvin suffered from mental health issues which should have been treated. 1AA 120-135.

The postconviction evidentiary hearing was held on October 4, 2018. The District Court allowed an amendment to the Petition so that Ground 7, the breach of the plea bargain claim, would be alleged and heard at this hearing. After hearing from the witnesses, the District Court denied postconviction relief on all claims. The notice of entry of order entered on February 1, 2019. 2AA 282-297. Melvin appealed by way of counsel with a timely notice of appeal being filed on February 15, 2019. 2AA 298.

B. Factual History:

On January 17, 2013, Winnemucca Police Officer Elizabeth Hill was looking for Melvin. She believed him to be a suspect in a burglary she was investigating. 1AA 156. Officer Hill went to the Economy Inn, where Melvin resided in Room 114 at that time. Melvin was not there. Officers knocked on the door and there was no answer and Officer Hill believed the room to be empty. Officer Hill testified that the manager opened the door of Melvin's room so that Officer Hill could look inside. Once she looked inside, she saw what she believed to be stolen property on the bed of the room. There was nobody in the room and no movement. 1AA 157, 162, 164 . Officer Hill conducted a protective sweep of the room. Melvin did not give police consent to enter his room and had paid his room

fees. 1AA 159, 162. At the time of entry, there was no warrant to search or warrant to arrest Melvin. 1AA 165-66. The items Officer Hill saw on the bed and her information gained from this entry was used to gain a search warrant for the room.

Deputy Sheriff Dave Walls of the Humboldt County Sheriff's Department was also at the Economy Inn on January 18, 2013. The Economy Inn is located about five miles from the address of the stalking victims, Mr. & Mrs. Pallett, at 4140 Rainbow. Deputy Walls listened to the voicemail messages and text messages which allegedly came from Melvin to them. There was no complaint that Melvin had been to their property, was at any location they had been physically present at and the complaints was electronic phone related only. 1AA 170.

While at the Economy Inn, Room 114, Deputy Walls had been unable to locate Melvin. Deputy Walls was standing in the parking lot with Officer Hill when the manager's son opened Melvin's room. Officer Hill and Deputy Walls entered the room to do a protective sweep. 1AA 172. Deputy Walls testified that he was not searching for stolen property, he was searching for Melvin. Deputy Walls announced the police presence before the manager's son opened the door. Nobody answered. He saw no sign of noise or movement inside the room that would make him believe the room was occupied. 1AA 173. Neither police officer

had a warrant of any type. 1AA 174. Once the manager's son opened the door, Officer Hill said, that looks like the stolen property I am looking for. 1AA 179.

The charges against Melvin regarding the stalking electronic texts and voicemails were stated to be a course of conduct occurring from 1/10/2013 to 1/172-13. 1AA 1-4.

Melvin was arrested and charged with the possession of stolen property, the burglary and the stalking counts. This was all in one charging document, in spite of the fact the crimes occurred at different locations, had different victims and witnesses and occurred at different times. 1AA 191.

Mr. Cochran admitted at the evidentiary hearing that the plea bargain was that the State would recommend concurrent sentences on the three felony charges. 1AA 185, 188. Mr. Cochran's fear was that if Melvin was convicted of just one felony count, he could be subjected to habitual offender enhancement because of his criminal history. 1AA 196. Mr. Cochran's testimony in this setting is critical to this writ:

Question by counsel: So on the date of sentencing...., When the State ends its sentencing recommendation for the Court with, Your Honor, I concur with the recommendation contained in the presentence investigation, did you object?

Mr. Cochran: No.

Question by counsel: Why not?

Mr. Cochran: I don't know what recommendation the State's talking about there.

Question by counsel: An so when the State of Nevada argues I concur with the recommendation contained in the presentence investigation, isn't that a breach of the plea bargain"

Mr. Cochran: I guess you'd have to determine what the State, when they say recommendation, which recommendation they're talking about.

1AA 199-200.

Mr. Cochran actually attempted to split hairs on what the obligation to recommend concurrent sentences meant in a plea bargain. 1AA 200. Mr. Cochran did not raise the breach of the plea bargain on direct appeal. Mr. Cochran thought the State met their obligation to recommend concurrent prison terms when it signed the guilty plea agreement. Mr. Cochran did not believe the State was obliged by the plea bargain to stand up at the sentencing hearing and comply with the terms, to recommend concurrent sentences. 1AA 201-202. Mr. Cochran did not seek specific performance of the plea bargain. Mr. Cochran believed the question of whether the State breached the plea bargain was a legal question but he did not raise that question to either the District Court or the Appellate Court. 1AA 206. His testimony was self serving balderdash.

Melvin testified at the evidentiary hearing. Melvin testified that on January 1, 2013, he rented room 114 at the Economy Inn in Winnemucca. 1AA 220.

Melvin had personal property inside the room. Melvin did not give permission for any person to enter that room while he was not there. 1AA 221. Melvin did not give Jared Rogers, the manager's son, permission to enter his room or to let anyone else enter his room. Melvin testified that he understood the plea bargain to that the State would recommend concurrent prison terms. 1AA 225. Melvin would not have entered a plea to three counts of aggravated stalking if the plea bargain was not for a recommendation of concurrent prison terms. 1AA 225.

After entry of the plea, Melvin asked to withdraw his guilty plea. Mr. Cochran told him that the deal was a deal and refused to file the motion.

At the sentencing hearing, Melvin apologized to the victims of the stalking charges. Melvin was 43 years old. The plea offer exposed him to life in prison. Melvin's conduct was text message and voice mail only and he never went near Mr. & Mrs. Pallett. The Court sentenced Melvin to three consecutive prison terms for substantial prison terms. Melvin wanted to appeal. The appeal went forth but the appeal was limited to two issues by Mr. Cochran.

After hearing the case, the District Court denied postconviction relief. The District Court ruled on virtually every issues that NRS 34.810 precluded relief unless the Court found that a fundamental miscarriage of justice occurred. The Court upheld the guilty plea. The Court found no evidence of coercion by counsel at the plea stage of the case. The Court did not find the fact that Melvin pled guilty

to three counts of a serious Category B felony that he did not commit to constitute a miscarriage of justice. The Court did not decide whether counsel was ineffective for failing to object to and litigate the plea bargain breach because the Court felt it could impose any sentence it wanted to upon Melvin, regardless of the State's argument. 2AA 283-295. This appeal follows the Order denying postconviction relief.

VI. ARGUMENT

1. **The State breached the plea bargain on this case at the sentencing hearing by its argument, which was in excess of the plea bargain. The District Court abused its discretion when it failed to find trial and appellate counsel ineffective under the 6th & 14th Amendments for failing to argue in support of the plea bargain contract between Appellant and the State of Nevada. Appellant's due process rights were violated under the 5th Amendment.**

Standard of Review:

Strickland's two-part test applies to challenges of guilty pleas based on ineffective assistance of counsel. *Hill v. Lochart*, 474 U.S. 52, 58 (1985). Defendants have a right to constitutional effective assistance of counsel that extends to the plea bargain stage. See *Missouri v. Frye*, 132 S. Ct. 1399, at 1386-1387. (2012). Harmless-error analysis is not applicable. Specific performance of the agreement was the proper remedy. This case must be remanded for

resentencing before a different judge. *Echeverria v. State*, 119 Nev. 41, 62 P.3d 743 (2003).

Argument:

a. Trial counsel was ineffective by his failure to object to the breach of the plea bargain at the sentencing hearing and when he failed to seek specific performance of the plea agreement.

There can be no good reason that defense counsel did not object when Prosecutor Pasquale argued for consecutive sentences on Count I & II, in violation of the plea bargain. There can be no good reason counsel did not remind the Court of the beneficial plea bargain during counsel's sentencing argument. A review of the plea transcript demonstrates trial counsel's sloppy work on this case. At no time during the plea canvas does the District Court acknowledge that the terms of the plea bargain are that the State will recommend concurrent terms on the three counts of aggravated stalking.

Defendants have a right to constitutional effective assistance of counsel that extends to the plea bargain stage. This is proper in a system in which 97% of federal criminal cases and 94% of state criminal cases negotiate rather than proceed to trial. See *Missouri v. Frye*, 132 S. Ct. 1399, at 1386-1387, (2012).

When the State enters into a plea agreement, it "is held to 'the most meticulous standards of both promise and performance' " with respect to both the

terms and the spirit of the plea bargain. *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting *Kluttz v. Warden*, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)).

The seminal United States Supreme Court decision regarding the government's breach of a plea agreement *is Santobello v. New York*, 404 U.S. 257 (1971). In that case, the prosecutor agreed to make no recommendation as to the sentence. However, at sentencing the prosecutor recommended the maximum sentence. In vacating the judgment of conviction due to the breach of the plea agreement, the Supreme Court explained:

> "we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration [of the appropriate relief for the breach—specific performance or withdrawal of the plea]."
> Id. 262-263.

This was not a minor inaccuracy by the State. When Mr. Cochran testified that he did not understand the terms of the plea bargain, it was clear that he admitted he was ineffective. There is no way a defense attorney could misinterpret an affirmative obligation to "recommend" that the penalty on the three counts run concurrently to each other.

Every breach of a plea bargain requires reversal. Harmless-error analysis is not applicable. Specific performance of the agreement was the proper remedy. This

case must be remanded for resentencing before a different judge. *Echeverria v. State*, 119 Nev. 41, 62 P.3d 743 (2003).

Mr. Cochran's testimony demonstrated that he did not prepare for the sentencing hearing. The plea bargain was better than the recommendation in the presentence report. Prosecutor Pasquale directly violated the terms of the plea bargain when he did not recommend concurrent prison terms. While the State could argue for the amount of prison time, the State could not argue for consecutive sentences. The District Court erred and abused its discretion when it failed to grant relief to Appellant on this issue.

b. Appellate counsel was ineffective by his failure to argue the breach of the plea bargain on direct appeal.

The constitutional right to effective assistance of counsel extends to a direct appeal. *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed in the "reasonably effective assistance" test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996).

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Although deference is given to appellate

counsel's decisions of which issues to raise on appeal, nonetheless, appellate counsel can be held ineffective if they fail to select proper claims for appeal. *Jones v. Barnes*, 463 U.S. 745 (1983).

A claim of ineffective assistance of appellate counsel is reviewed under the *Strickland* test. In order to establish prejudice based on deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. *Lara v. State*, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004) (citing *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114)

Every breach of a plea bargain requires reversal. There was no question by the argument made by Prosecutor Pasquale that the State violated the terms of the plea bargain. A rookie defense attorney knows the difference between the term "recommend" and not object to as critical plea bargain phrases. This plea bargain put an affirmative obligation on the State in that: "The State agrees to recommend that the penalty on each count run concurrent to each other." 1AA 21. This cannot be more simple. The District Court was simply wrong when it refused to grant a new sentencing hearing to Melvin. His due process rights were violated. He lost the right to effective assistance of counsel at a critical stage of the proceedings, the sentencing and direct appeal.

This sentence was in excess of that needed for society's interests. The District Court's sentencing analysis was not 'reasoned' as the law requires (NRS

193.165) and relied upon suspect evidence. See *United States v. Rita*, 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007) and *Gall v. United States*, 128 S. Ct. 586 (2007).

This 43 year old man who sent voice mail and texts was already prosecuted under the wrong section of the statute, i.e., 200.575(2)(a) vs. NRS 200.575(3). The penalty under NRS 200.573 would have been 1-5 years in prison. Melvin's exposure under that statute if the counts ran consecutively was the 15 years for one count of actually conducting the course of conduct found in NRS 200.575(2)(a). There was absolutely no evidence available to demonstrate that Melvin violated the more serious statute. Yet, the District Court imposed a maximum sentence of 39 years on a 43 year old man. The bottom end sentence is over 15 years.

Had the State abided by the terms of the plea bargain, Melvin would never have been sentenced to this much prison time. The State should have argued, at worse case, 6-15 years in prison on the charge with concurrent prison terms. Instead the State argued for 62-156 months + 62-156 months in prison running consecutively. The State's argument violated the terms of the plea bargain. The State's argument should have been the subject of direct appellate review.

This Court should remand this case for a resentencing in front of a Judge who has not been exposed to the breach of the plea and should instruct the State to abide by its negotiation.

2. The District Court's decision that the plea was knowing and voluntary constituted an abuse of discretion by the court. The District Court's decision that the NRS 34.810 precluded litigation of post conviction claims that counsel was ineffective is erroneous.

Standard of Review

The district court erred in denying Melvin's claim of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432–33, 683 P.2d 504, 505 (1984) (adopting the *Strickland* test in Nevada). Deference is given to the district court's factual findings regarding ineffective assistance of counsel but this Court reviews the district court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The validity of a plea may be attacked by demonstrating ineffective assistance of counsel under the Sixth Amendment. *Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004). A defendant is required to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded

guilty and would have insisted on going to trial." *Id.* 120 Nev. at 190-91, 87 P.3d at 537. Melvin testified that absent his counsel's deficiencies, he would have gone to trial, and, that if granted that ability, he still wishes to go to trial. The only remaining determination, then, is whether or not counsel's deficiencies fell below the objective standard of care required by *Strickland.*

Further, for a guilty plea to be considered valid, it must be freely, voluntarily, and knowingly made. *State v. Freese*, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000). The entire record and the totality of the circumstances must be evaluated to determine "a defendant's comprehension of the consequences of a plea, the voluntariness of a plea, and the general validity of a plea." *Id.* The burden to demonstrate the insufficiency of the plea lies with Mr. Parker, and he must demonstrate abuse of discretion. A plea must be reviewed under the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); *McConnell v. State*, 125 Nev. 243, 250, 212 P.3d 307, 312 (2009), as corrected (July 24, 2009).

Argument

Melvin suffered from various mental health issues while this case was pending for 453 days. He remained in jail, indigent and unable to make bail.

Melvin was taking medications prescribed by the jail. While he was deemed competent to proceed, he certainly had weaknesses other clients do not have.

The burden to ensure that a client fully understands the risks of trial and the consequences of accepting a plea bargain rests upon counsel, and the failure to ensure that a client is fully aware of defenses to the charge and the risk of trial rests solely upon counsel. Ultimately, due to some failure to communicate, counsel's advice fell below the applicable standard of care. Mr. Cochran repeatedly testified that he advised Melvin to accept the plea offer because if convicted without the safety net of a plea bargain, habitual offender statutes might apply. Even if this was true, counsel did not investigate this case to be able to competently recommend a plea.

Mr. Cochran told the Court that because the police eventually obtained a search warrant, anything discovered in room 114 of the Economy Inn was not subject to suppression. Mr. Cochran filed no pretrial motions to sever the charges, which were completely unrelated. Mr. Cochran did not file a motion to suppress the items discovered in room 114, even though it was clear that the police entered under the authority of a person who did not have the right to grant them consent to Melvin's property. Probably the most significant failure was when counsel allowed Melvin to plead to three counts of a crime he legally did not commit. There is no evidence that Melvin violated NRS 200.575(2)(a). The record is bare.

Melvin felt threatened to take a deal or get manhandled by a criminal justice system that would misuse the habitual offender enhancement. Mr. Cochran let him feel that way and advised him to plead guilty to 45 year exposure for sending nasty text and voicemail messages.

Ninety-seven percent of federal cases end with a plea bargain. Of the remaining three percent of cases that proceed to trial, sixty-six percent are convicted. So, the reality is that the plea bargaining process is really where the defense attorney should concentrate their efforts. The statistics for Nevada courts are equally has high, with approximately 94% of cases ending in a plea bargain.

The responsibility to communicate to the client which defenses are available lies solely with the attorney. This failure to communicate fell below an objective standard of care. Melvin testified clearly at the evidentiary hearing that had he known the State did not have to abide by its plea bargain, he would have proceeded to trial.

An attorney must make reasonable investigation in preparation for trial, or make a reasonable decision not to investigate. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996). In this case, reasonable investigation certainly included efforts to provide the court with evidence that the actions of Melvin were inconsistent with the prosecution charges and that the case was significantly overcharged to force a deal.

At the plea canvas, counsel did not put on the record the key portion of the plea bargain, the State's obligation to recommend concurrent sentences on all three counts.

A plea is presumed valid, and Melvin bears the burden below of demonstrating that it was not entered into knowingly, voluntarily, and intelligently. See *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), limited on other grounds by *Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994); see also *State v. Lewis*, 124 Nev. 132, 133 n.1, 178 P.3d 146, 147 n.1 (2008) (noting that a no-contest plea is equivalent to a guilty plea insofar as how the court treats a defendant). The Nevada Supreme Court presumes that the lower court correctly assessed the validity of the plea, and it will not reverse the lower court's determination absent a clear showing of an abuse of discretion. *Bryant*, 102 Nev. at 272, 721 P.2d at 368. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). There was confusion demonstrated in the plea canvas which occurred on the case. The plea bargain was not adequately presented to the Court.

Melvin is entitled to withdraw his previously entered guilty plea. Absent counsel's advice Melvin would never have entered the guilty plea to second degree murder with the use of a deadly weapon. He would have proceeded to jury trial.

He waited over a year before entering a plea, quite a lengthy period of time to get to trial and it never happened. See *Hill v. Lockhart*, 474 U.S. 52 (1985) and *Nollette v. State*, 118 Nev. 341, 348-49, 46 P.3d 87, 92 (2002).

The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and the question is a mixed question of law in fact and is subject to independent review. *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993). A petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence. *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)) and *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). When this Court reviews the testimony of Melvin, the testimony of Mr. Cochran and looks at the sentence imposed herein, this Court will agree that Melvin met his burden of proof and that a remedy should have been granted by the Court. The plea should be withdrawn as it was coerced by counsel and not knowing or voluntary.

3. Appellant was actually innocent on violation of NRS 205.575(2)(a). Appellant's actions did not constitute that crime. If Melvin was guilty of stalking, his actions constituted a violation of NRS 200.575(3). Counsel was ineffective in advising a guilty plea to the more serious charge. This conviction is manifestly unjust.

Standard of Review:

An attorney must make reasonable investigation in preparation for trial, or make a reasonable decision not to investigate. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996). A petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence. *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)) and *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). A district court's findings of fact are entitled to deference and will not be disturbed on appeal if they are supported by substantial evidence and are not clearly wrong. *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006). Under Nevada law, a plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a "grossly unfair" outcome). *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); Black's Law Dictionary 1149 (10th ed. 2014) (defining miscarriage of justice).

Argument:

This conviction and the sentence constitute a grossly unfair ending of a case. Mr. Cochran failed to investigate and that the failure of counsel caused Melvin to feel pressured into accepting the State's plea offer. Even after accepting that lousy plea offer, Melvin did not get the benefit of the bargain. See argument prior, in

that that Melvin wanted to proceed to trial but could not do so because his attorney was not prepared and simply continued to threaten him with application of habitual offender statutes.

Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. Strickland v. Washington, 466 U.S. 668, 690-691 (1984).

In *Hargrove* this Court stated that post-conviction claims must consist of more than "bare" allegations and that an evidentiary hearing is mandated only when a post-conviction petitioner asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief. *Hargrove* is the cornerstone of post-conviction habeas review. *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984). The allegation that counsel was ineffective by failing to adequately investigate was supported by the failure of counsel to recite the plea bargain properly at the plea canvas. It is further supported by counsel's failure to argue the plea bargain terms during the sentencing argument. There can be no good reason not to seek strict performance of a plea bargain.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. See also *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir.2002), which held that attorneys have considerable latitude to make strategic decisions about what investigations to conduct once they have gathered sufficient evidence upon which to base their tactical choices. Until a reasonable investigation is conducted counsel is not in a position to make critical strategic decisions or settle on a trial strategy, certainly including the decision to rest on his client's testimony irrespective of the forensic facts, or deem a plea bargain to be in the best interests of the client.

An uninformed strategy is not a reasoned strategy. *Correll v. Ryan*, 539 F.3d 938, 949(9th Cir.2008), cert. denied sub nom. *Schriro v. Correll*, ---U.S. ----, 129 S.Ct. 903, 173 L.Ed.2d 108 (2009). The Supreme Court's holding that the traditional deference owed to the strategic judgments of counsel is not justified where there was not an adequate investigation supporting those judgments, id. at 948-49 (quoting *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527) is on point herein.

To state a procedural due process violation claim under the Fourteenth Amendment's Due Process Clause, the claimant must allege facts showing that the state has deprived him or her of a liberty interest and has done so without providing adequate procedural protections. Once a court has determined that a protected liberty interest has been impaired, the question remains what process is

due. Due process has never been, and perhaps never can be, precisely defined. Accordingly, exactly what procedure is required in any given case depends upon the circumstances. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, it is flexible and calls for such procedural protections as the particular situation demands. The most basic requirement of due process, however, is the opportunity to be heard "at a meaningful time and in a meaningful manner". *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981), *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

A review of the facts, taken in the light best for the State, demonstrates that Melvin, if guilty, violated NRS 205.575(3). There was absolutely not one shred of evidence that Melvin violated the aggravated stalking statute of NRS 200.575(2)(a). The burglary charge was unsupported by any evidence. The possession of stolen property was that of illegally gained evidence in violation of the 4th Amendment right to keep his castle free from police who have no warrant and are fishing. The manager's son had no authority to allow the police into Melvin's room and the police knew that. This case is manifest injustice.

Melvin's Due Process rights under the 5th Amendment were deprived when the District Court did not even hear about a key term of the plea bargain during the

plea canvas and again when his trial attorney failed to seek performance of that plea bargain at sentencing.

4. Counsel was ineffective when counsel failed to litigate a motion to suppress the evidence which was gathered in violation of the 4th, 5th & 6th Amendments to the Constitution.

Standard of Review:

Article 1, Section 18 of the Nevada Constitution and the Fourth Amendment to the United States Constitution prohibit unreasonable searches and seizures such that warrantless searches are per se unreasonable unless an established exception. In Fourth Amendment challenges, this court reviews the district court's findings of fact for clear error but reviews legal determinations de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). When ineffective assistance of counsel claim is based upon counsel's failure to file motion to suppress evidence allegedly obtained in violation of Fourth Amendment, the prejudice prong must be established by showing that claim was meritorious and that there was reasonable likelihood that exclusion of the evidence would have changed result of trial. U.S. Const. amends. 4, 6. *Doyle v. State*, 116 Nev. 148, 995 P.2d 465 (2000).

Argument:

Officers had no reason to believe that Mr. Gonzales was inside the hotel room. Officers knocked on the door, announced their presence, saw no movement, heard no noise and were leaving when the door was opened by the manager's son.

Police had no arrest warrant and no search warrant in hand. This is not a hot pursuit case. Officer Walls had the information about Mr. Gonzales from his earlier shift, at least 12 hours before. This was not an emergency entry case. This was investigative, with Officer Hill looking for stolen property.

This is not a case where the manager's son, Mr. Rogers, had joint access and control over the property. Melvin did not assume the risk that the hotel management would decide to share his private hotel room with the police, in his absence. Mr. Rogers did not have apparent authority to unlock Melvin's private locked hotel room and allow the police to search it.

Whether a person acts as a state's agent rests on two factors: 1) whether the government knew and acquiesced to the person's conduct and 2) whether the person had a motive to act independent of assisting law enforcement. *Lastine v. State*, 134 Nev. Adv. Op. 66 (Ct. App. August 30, 2018). These police officers knew and acquiesced to the manager's son's decision to open the motel room door. These police officers knew that Melvin was not given a chance to object to that conduct. The manager's son had no reason to open that door.... Except to help law enforcement. This entry was illegal. The evidence was the fruit of the poisonous tree and tainted. Obtaining a search warrant after the illegal entry did not purge the unconstitutional nature of the search. Counsel was ineffective for failing to litigate the illegal search.

The leading case is *Hannon v. State*, 125 Nev. 142 (2009), which adopted the *Brigham City* standard, and which case supports the fact that Officer Hill and Officer Walls did not have objective information to justify the warrantless entrance into Melvin's motel room. *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

This search was not like that in *Maryland v. Buie*, 494 U.S. 327 (1990), as Melvin was not present and in the process of being arrested. Police had no reason to conduct a protective sweep of an empty motel room. There must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. Those facts are noticeably missing in this setting. *Hayes v. State*, 106 Nev. 543 (1990).

Warrantless home entries, the chief evil against which the Fourth Amendment protects, are presumptively unreasonable unless justified by a well-delineated exception, such as when exigent circumstances exist. U.S. Const. amend. 4. See *Camacho v. State*, 119 Nev. 395, 400, 75 P.3d 370, 374 (2003). Under established law, see, e.g., *Alward v. State*, 112 Nev. 141, 151, 912 P.2d 243, 250 (1996), overruled in part on other grounds by *Rosky v. State*, 121 Nev. 184, 190-91 & n.10, 111 P.3d 690, 694 & n.10 (2005), one such exigency is the need to "render emergency assistance to an injured occupant or to protect an occupant

from imminent injury." *Brigham City*, 547 U.S. at 403, and *Hannon v. State*, 125 Nev. 142, 207 P.3d 344 (2009).

The police did not have any reason to believe the authority being exercised by this employee was based upon consent given by Melvin. *State v. Taylor*, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998). In fact, just the opposite was true.

Whether in a particular case an apparent consent to search without a warrant was voluntarily given is a question of fact. *State v. Plas*, 80 Nev. 215 (1964) at 253, 391 P.2d at 868. "This court is not a fact-finding tribunal; that function is best performed by the district court." *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983). The District Court was wrong when it relied upon NRS 34.810 to avoid ruling on the issues in this postconviction litigation. 2AA 294-295. If Melvin pled guilty without the effective assistance of counsel, the plea should be set aside.

5. Counsel was ineffective when counsel failed to sever the seven counts in the Complaint to two separate cases, in violation of the 5th, 6th & 14th Amendments.

Standard of Review:

NRS 173.115 provides that separate offenses may be joined if they are (1) based on the same act or transaction or (2) based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. The simultaneous trial of the offenses must render the trial fundamentally unfair,

and hence, result in a violation of due process.' " *Rimer v. State*, 131 Nev., Adv. Op. 36, 351 P.3d 697, 709 (2015).

Argument:

The cumulative effect of adding burglary, possession of stolen property and possession of controlled substance charges into the trial of the aggravated stalking case was prejudicial. The stalking offenses are alleged to have occurred on or about January 10, 2013, through January 17, 2013. Those offenses were concluded by the time the allegations of the other property offenses were alleged. The alleged location of the victims at the time of the text messages was 4140 Rainbow Road, Winnemucca.

The burglary charge was alleged to have occurred on January 17, 2017, with a different victim and a different location. The possession of stolen property charge was alleged to have occurred at the Economy Inn, #114, Winnemucca, Nevada on January 17, 2013. The possession of a controlled substance, methamphetamine, was alleged to have occurred at Economy Inn, #114, Winnemucca, Nevada on January 17, 2013. Both of those charges could have been dismissed once the motion to suppress was granted.

The offenses are certainly nowhere similar in place and time. The witnesses do not overlap. The issues do not overlap. The goal was to prejudice Melvin in front of the jury with the additional charges all being lumped into one criminal

case. Defense counsel was ineffective when defense counsel failed to file a motion to sever. By severing the charges into the property offenses versus the stalking offenses, Melvin would have been able to defend the cases. A joint trial would compromise Melvin's right to a fair trial under the Fifth Amendment and would prevent the jury from making an unreliable judgment about guilt or innocence.

Severance may be required where a failure to sever hinders a defendant's ability to prove his theory of the case. The cumulative effect of adding all of these unrelated charges to one trial was prejudicial to the defense. Severance was warranted. See *Chartier v. State*, 124 Nev. 760, 191 P.3d 1182 (2008).

As this Court held in *Farmer v. State*, 133 Nev. Adv. Op.

> "As our prior decisions demonstrate, the fact that separate offenses share some trivial elements is an insufficient ground to permit joinder as parts of a common scheme. See, e.g., *Mitchell,* 105 Nev. at 738, 782 P.2d at 1342. Instead, when determining whether a common scheme exists, courts ask whether the offenses share such a concurrence of common features as to support the inference that they were committed pursuant to a common design. *State v. Lough*, 889 P.2d 487, 494 (Wash. 1995). Features that this court has deemed relevant to this analysis include (1) degree of similarity of offenses, *Tabish v. State*, 119 Nev. 293, 303, 72 P.3d 584, 591 (2003); (2) degree of similarity of victims, id. at 303, 72 P.3d at 590; (3) temporal proximity, Mitchell, 105 Nev. at 738, 782 P.2d at 1342; (4) physical proximity, *Griego*, 111 Nev. at 449, 893 P.2d at 999; (5) number of victims, id.; and (6) other context-specific features. No one fact is dispositive, and each may be assessed different weight depending on the circumstances. Weber, 121 Nev. at 572, 119 P.3d at 119 ("Determining whether a common scheme or plan existed in this, or any, case requires fact-specific analysis.")."

These charges should have been brought in two separate cases. One set dealt

with the police investigating a burglary, locating stolen property and drugs as a motel room on January 17, 2017. The other charges alleged a course of conduct over a week period of time involving an ex-wife and her parents. There is not a shred of commonality in the two separate cases. Defense counsel's answer was that he did not move to sever because he accepted a plea offer. A strategic choice upon less than adequate investigation cannot be upheld by this Court. Once a severance occurred, the property crimes could be extensively litigated, which they should have been. The stalking charges could then meet with an attack on which portion of NRS 200.575 would apply. That attack would have been successful and the charges reduced to a Category C felony. Instead, this client received 468 months in prison. Prejudice has been shown by Melvin.

CONCLUSION

A review of the totality of the circumstances demonstrates that counsel was ineffective under the 6th & 14th Amendments. The search of the motel room violated the 4th Amendment. Failure to sever the charges violated the Due Process rights of Appellant. The guilty plea was not knowing or voluntary. The State breached the plea bargain. Trial and appellate counsel were ineffective by failing to object to this and to litigate the breach on direct appeal. Trial counsel's failure to investigate available defenses fell below the objective standard of care mandated by *Strickland.*

For these reasons, Mr. Gonzales should be permitted to withdraw his plea and proceed to a trial on the merits of his case. The property located at Room 114 of the Economy Inn on January 17, 2013 should be suppressed. The case should be severed into two cases. Alternatively, Mr. Gonzales should be granted substitute counsel and granted a new sentencing hearing with new counsel and before a judge who has not been subjected to already forming an opinion on the case. Strict performance of the plea bargain should occur. The State should be advised to hold to its contract on sentencing matters.

DATED this 10 day of June, 2019.

By: _____

KARLA K. BUTKO, ESQ.
ATTORNEY FOR APPELLANT
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Nevada State Bar No. 3307

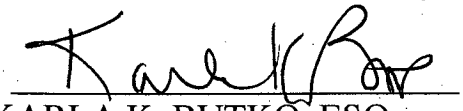
CERTIFICAE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), although it does exceed 30 pages, it meets with the word count and line count of the appellate rules.

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. The document was prepared in Word. There are 36 typed pages, 8896 words in this brief and 827 lines of type. The Brief has been prepared in Word, proportionally spaced type, 14 point Times New Roman with 2.0 line spacing.

DATED this 10th day of June, 2019.

By: 

KARLA K. BUTKO, ESQ.
ATTORNEY FOR APPELLANT
P. O. Box 1249
Verdi, Nevada 89439
(775) 786-7118
Nevada State Bar No. 3307

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada, first class postage paid.

____ Federal Express or other overnight delivery

____ Reno/Carson Messenger Service

addressed as follows:

Michael MacDonald
District Attorney of Humboldt County
P. O. Box 909
Winnemucca, NV 89446
ATTN: Anthony Gordon, Esq.

DATED this 10th day of June, 2019.

Karla K. Butko

KARLA K. BUTKO, Esq.