IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN MAURICE DEAN,	)	
Appellant,	)	
vs.	)	No. 81209
AITOR NARVAIZA,	)	
ELKO COUNTY SHERIFF,	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

APPEAL FROM AN ORDER DENYING

PETITION FOR WRIT OF HABEAS CORPUS

FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ELKO

DAVID B. LOCKIE
Nev. Bar #003999
LOCKIE & MACFARLAN, LTD.
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

Attorneys for Appellant

MARK S. MILLS
Nev. Bar #11660
ELKO CO. DISTRICT ATTORNEY
540 Court Street, 2nd Floor
Elko, Nevada 89801
(775) 738-3101

Attorneys for Respondent

ARGUMENT

Appellant replies to the State's Answering Brief as follows:

1. Trial counsel's performance during voir dire was "deficient" to the point where he "made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington,* 466 U.S. 688, 687 (1994). The State contends that trial counsel's use of an offensive racial epithet in a hand-written note to himself does not constitute Ineffective Assistance of Counsel because the note does not prove that trial counsel was a racist, and the note was harmless because it was never presented to the jury.

A. The issues presented in this case do not turn upon whether Appellant can prove that trial counsel was a "racist." Rather, the question is whether trial counsel's performance was deficient because he improperly addressed the issue of race a such an ineffective manner, rising to the level of deficient performance that prejudiced Appellant. *Strickland v. Washington,* 466 U.S. 668. 687 (1984).

B. The State contends that the offensive note had no impact, because it was never disclosed to the jury. Appellant has never suggested that the jury received the note. Rather, the note provides insight as to why counsel chose such an untenable method to address the issue of race with the jury, and chose to call his client to testify in a manner that would reinforce racial prejudice.

The State mis-characterizes the strategy of addressing the issue of race by means of offending the jury with the overt use of racial stereotypes as "sound:" Thus, the State would have this court endorse references to African-American people "liking watermelon," and being "violent" and "sneaky" and furthermore say "we're not asking you to fall in love with black people" and referring to his client as "a black guy" as a "sound" means by which trial counsel might discover racial bias within a prospective jury. A.A. Vol. 2, p. 38-39.

The following two law review articles address the issue of race and voir dire.

> "Reasonable minds can disagree as to whether it is good trial strategy to voir dire jurors on racial bias. Perhaps the most common view is that reflected by Albert Alschuler, who suggested over twenty-five years ago that voir dire into racial bias would be "minimally useful." Alschuler argued that asking a prospective juror whether he would be prejudiced against the defendant because of the defendant's race would be patronizing and offense. He also argued that no prospective juror would admit to racial bias, even if he was in fact prejudicial against members of a particular group."

Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, UC Irvine Law Review, Vol. 5: 843 (2015) (quoting Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts,* 56 University of Chicago Law Review 153 (1989).

Therefore, a reasonable question arises as to whether trial counsel should even delve into the issue of racial bias. Appellant testified that he was aware of the potential for racial bias, and did not want his attorney to bring the issue of race into the proceedings, at all. A.A. Vol. 2, p.177, 219. However, trial counsel presumably chose to override Appellant's concerns on the grounds that the issue was a matter of trial strategy existing solely within

his purview as the attorney. Appellant understands that there are many issues of trial strategy existing at the discretion of the attorney. However, he respectfully contends that the issue of race is fundamental to the integrity to the proceedings, and the attorney should at least take the client's views into account, rather than simply ignoring, then denigrating him. As it turns out, there is a substantial body of analysis that concurs with Appellant's point of view, as illustrated by the two above-referenced law review articles.

Appellant's point is that trial counsel may legitimately choose to address the issue of race during the process of voir dire. However, that question merits serious consideration in the first place, and once that decision is made, it should be undertaken with care, rather than by use of means overtly calculated to provoke and offend the jury.

Accordingly, regardless of whether this Court were to conclude that trial counsel possessed the exclusive right to determine whether to even address the issue of race in voir dire, the approach trial counsel chose to use was overtly "patronizing and offensive." The decision to intentionally

patronize and offend the jury cannot be excused, and swept under the rubric of "strategy" as a convenient means to resolve this difficult issue.

While the transcript unmistakably reveals that trial counsel deployed a strategy to patronize and offend the jury, trial counsel's misplaced reasoning is further amplified by the note he inscribed during the process: "Schenk is a nigger too." This approach was a deliberate effort on the part of trial counsel, which as he testified, was calculated to "take people down" solely on the basis of race. While the jury did not see the note itself, they were fully exposed to the malignant intention that the note expressed.

The record in this case reveals that trial counsel succeeded in his effort to offend the jury. (A.A. Vol. 1, p. 39).

The State points out trial counsel's testimony that he used offensive racial stereotypes as a means to move the issue of racial bias "from the unconscious to the conscious mind." So they could "rationally and logically see that racial prejudice is kind of stupid." (A.A., Vol 2, p. 139).

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This amateurish view of psychology infers that it is appropriate, as a matter of advocacy and persuasion, to deliberately offend people, and then hope they will be convinced that their thinking is "stupid." Once armed with a self view of "stupidity" they would presumably see the light and mend their ways. This manner and means trying to teach people about sensitive issues regarding racial bias in the context of voir dire is patently absurd, and diminishes the integrity of the entire proceedings.

C. Trial counsel's performance was adversely affected by his animus towards his client.

Appellant concurs with the State's quote from *Strickland v. Washington,* 466 U.S. 668, 689-690: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged

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conduct, and to evaluate conduct from counsel's challenged conduct at the time."

Trial counsel's letter reveals the intense contempt that he harbored towards his client, to the extent that "I've called you worse names than that. . ." [referencing the name "nigger"]. Most importantly, the letter confirms that trial counsel had harbored such animus throughout the course of his representation. Counsel did not hold his contempt in a private manner. Rather, he expressly delivered that message to his client *in writing,* with clear intent to denigrate him, rather than provide an answer or explanation in response to his client's legitimate concerns regarding the issue of race. While the letter was not introduced during the proceedings, it shows that his trial attorney was perfectly willing to act far outside his responsibilities as "counsel."

2. Trial counsel's decision to have his client testify about growing up in a bad neighborhood was "deficient" and fatally prejudicial.

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Trial counsel's testimony dove-tails with his unreasonable performance at trial by having his client testify regarding his upbringing in a bad neighborhood, with actual knowledge of knife-fighting, including how to most effectively kill someone with a knife. The "strategy" of placing his client in this light is directly counter to counsel's ostensible calculations during the process of voir dire:

> "It was my intent to get somebody on that jury . . . who would realize if somebody is sitting at the deliberation table after the trial is over, said, "there is a knife and a black guy, we don't need anything more," that – first of all, we try to prevent anyone at the table from saying that. And second of all, what I was trying to accomplish was that if somebody said that, somebody would stand up on their hind legs and say "we're here to make a decision about Sean Dean, not about blacks and knives." (AA, Vol 2, p. 139).

The testimony trial counsel elicited from his client was:

> Q. Mr. Dean, while you were being raised in Sacramento, California, did you have...friends or associates or people that you knew that got in knife fights?
>
> A. Yes.
>
> Q. Did you ever get in one?
>
> A. A few.

Q. All right. Were you the person with the knife?
A. Excuse me?
Q. Ah. Based on that kind of knowledge, did you learn if you were going to hurt somebody real bad with a knife, maybe kill them, how you would go about doing that?
A. Try to puncture them and twist it and rip it, just try to- try to rip, try to rip something.
Q. Okay, is that something you have ever done?
A. No, sir.
Q. How do you know that's how you are supposed to do it?
A. That's how it has been done ever since I known people that get into knife fights.
Q. Okay.
A. Most effective way to hurt somebody.

AA, Vol. 2, p.38.

Accordingly, despite trial counsel's stated "strategic" intentions, he himself deliberately placed the client in that exact light to the jury. (AA, Vol. 2, p.149).

While the State relies upon trial counsel's testimony - that he discussed this trial strategy with his client - Appellant testified that there was no such discussion, and if he had been made aware that this would be in his trial

testimony, he would never have taken the stand because of the potential for jurors to view growing up in a rough neighborhood and being involved in knife fights is associated with a stereotype that African Americans are violent. AA Vol. 2, p.20. The evidence in question in this case falls squarely within that concern, and this Court should not dismiss his testimony in that regard.

This type of evidence elicited from Appellant by his trial counsel would undoubtedly have been inadmissible pursuant to NRS 48.035 and/or NRS 48.045 had the prosecution sought to introduce it against Appellant. The probative value of such evidence is obviously substantially outweighed by the danger of unfair prejudice, of confusion of the issues and misleading the jury.

This evidence clearly implicates racial stereotypes of violence - as trial counsel put it during the hearing - "there is a knife and a black guy" - which means that trial counsel accomplished the very objective that he purportedly sought to avoid.

3. The errors were not "harmless." The State quotes *Strickland, supra:* "Attorney errors come in infinite variety and as likely to be utterly harmless in a particular case as they are to be prejudicial." Appellant respectfully contends that the manner in which trial counsel injected the issue of race fundamentally affected the integrity of the proceedings, and should not be assumed to have been "harmless."

CONCLUSION

For the forgoing reason, Appellant respectfully requests that this Court reverse the decision of the District Court denying Habeas relief.

DATED this 13 day of January, 2021.

LOCKIE & MACFARLAN, LTD.

DAVID B. LOCKIE
Nevada Bar #2384
Attorneys for Appellant
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Office x5 in 14-point Times New Roman font and *triple spaced.*

2. I further certify that this brief complies with the page or type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I

understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13 day of January, 2021.

LOCKIE & MACFARLAN, LTD.

DAVID B. LOCKIE
Nevada Bar #2384
Attorneys for Appellant
919 Idaho Street
Elko, Nevada 89801
(775) 738-8084

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of January, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Nevada Attorney General

David B. Lockie

Elko County District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid to the following address(es):

Sean Dean #61722
c/o Southern Desert Correctional Ctr
P. O. Box 208
Indian Springs NV 89070-0208

Georgia Jordan