IN THE SUPREME COURT OF THE STATE OF NEVADA

APRIL PARKS, Appellant, v. THE STATE OF NEVADA, Respondent.	 SUPREME COURT CASE NO. 82876 DISTRICT COURT CASE NO. A-19-807564-W

APPELLANT'S OPENING BRIEF

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Appeal from Order Denying Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant April Parks is an individual and there are no corporations, parent or otherwise, or publicly held companies requiring disclosure under Rule 26.1;

2. Appellant April Parks is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented below at trial by Anthony Goldstein, Esq.

DATED this 7th day of September, 2021.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
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I. JURISDICTION

This is an appeal from the denial of a post-conviction petition for writ of habeas corpus in State v. April Parks, Criminal Case No. C-17-321808-1. The written judgment of conviction was filed on January 10, 2019. 2 AA 257. The trial court's order denying post-conviction relief was filed April 12, 2021. 6 AA 1077. A timely notice of appeal was filed on May 4, 2021. 6 AA 1083. This Court has appellate jurisdiction over the instant appeal under NRS 34.575(1), NRS 34.830, NRS 177.015(1)(b), and NRS 177.015(3).

II. ROUTING STATEMENT (RULE 17)

It appears this matter is presumptively assigned to the Court of Appeals, as it is a post-conviction appeal which arises from less than a Category A felony. See NRAP 17(b)(1).

III. ISSUES PRESENTED FOR REVIEW

A. Whether trial counsel was ineffective under the United States or Nevada Constitution by advising Parks to reject a more favorable plea deal and Parks was subsequently sentenced to a much longer period of incarceration.

B. Whether trial counsel was ineffective under the Nevada or United States Constitution when trial counsel failed to adequately prepare for or advocate at the time of sentencing.

C. Whether trial counsel was ineffective under the Nevada or United States Constitution when counsel failed to file a notice of appeal on Parks' behalf after sentencing.

IV. STATEMENT OF THE CASE

On March 8, 2017, the State of Nevada filed a 270-count indictment against Appellant April Parks ("Parks") that alleged many counts of theft, exploitation of an older person, perjury, and other felonies. 1 AA 1. Parks entered into a guilty plea agreement under North Carolina v. Alford, 400 U.S. 25 (1970), on November 5, 2018. 1 AA 176. Under the agreement, Parks pleaded guilty per Alford to two counts of exploitation of an older/vulnerable person, two counts of theft, and one count of perjury. 1 AA 176.

The agreement noted that Parks chose to "reject" a stipulated sentence of eight to twenty years in prison. 1 AA 177. Under the Alford agreement, the State retained the full right to argue for any sentence. Parks also agreed to pay restitution in the stated amount of $559,205.32. Although trial counsel was granted funds to retain a forensic account to examine the State's loss allegation, counsel never followed through with having the expert perform any work or generate a report. 4 AA 684, 688.

Sentencing was held on January 4, 2019. 2 AA 266. Several victim speakers were present in the courtroom. 2 AA 269. Defense counsel objected during the hearing because no proper notice of victim speakers was ever provided. 2 AA 315. Even though the State admitted it sent the notice to the "wrong Goldstein," the Court overruled the objection and allowed the numerous speakers to testify. 2 AA 316-317.

At the end of the sentencing, the judge noted Parole and Probation's recommendation of parole eligibility after 64 months served, and declared "that is absolutely what is not about to happen today." 2 AA 386. The court then sentenced Parks to an aggregate sentence of 192 to 480 months in prison, far longer than either P&P's recommendation or the State's prior offer of an 8-20 year sentence. 2 AA 387.

Despite the onerous sentence imposed, trial counsel never filed a notice of appeal and the appeal time lapsed. But on December 27, 2019, Parks filed a petition for writ of habeas corpus that alleged counsel was ineffective by advising her to accept the "right to argue" style plea

agreement, by failing to prepare for or advocate at sentencing, and by failing to pursue a direct appeal. 1 AA 124.

A supplemental petition was filed on September 30, 2020 which kept those same issues but provided far more factual information to support them. 1 AA 137.

The prosecution in general was some type of collaboration between the District Attorney and Attorney General. As a result, the "State" responded to the supplement through the Attorney General's Office. 4 AA 696. The District Attorney tried to file their own response, but it was not filed until March 2021 and the court refused to consider it when it heard the matter in February. 5 AA 837, 6 AA 1020. The court stated it would hold an evidentiary hearing on the appeal deprivation claim only. 6 AA 1023.

The trial court heard the evidentiary hearing on March 18, 2021. 6 AA 1024. Both trial counsel and Ms. Parks testified. After the hearing, the court denied relief on the claim and denied relief on all claims. 6 AA 1077. This appeal followed.

V. STATEMENT OF FACTS

The facts relevant to the claims raised in this appeal are those related to the post-conviction petition, although that issue necessarily encompasses arguments that could have been raised at the time of sentencing.

As stated above, Ms. Parks decided to resolve the charges against her by accepting responsibility by a guilty plea. The general wisdom of that decision is not under review here. But the decision to accept one offer instead of another is.

At the guilty plea canvass, Parks was asked about why she had accepted an Alford plea where the State retained the right to argue for any lawful sentence, which would include consecutive sentencing between all counts. 1 AA 192-193. She was also asked to confirm that she had rejected a stipulated sentence of 8-20 years here, which would have run concurrent to a second prosecution against her as well. 1 AA 193.

Because it was an Alford plea, the State provided the factual basis for the plea. According to the State, it would have shown at trial that Parks'

company, "A Private Professional Guardian, LLC" was a criminal enterprise in that through it Parks supposedly committed the "numerous criminal offenses" alleged in the original indictment. 1 AA 197.

The State detailed several schemes relevant to the claim trial counsel failed to properly advocate at sentencing. According to the State, the "multiple billing fraud" scheme involved visiting several wards at one facility but billing separate time for all services provided. 1 AA 198. This scheme was alleged to cause a $100,262.25 loss to 27 victims.

Next was the "unnecessary services" scheme in which Parks allegedly inflated billings or used overqualified professionals for menial tasks to bill at a higher rate. 1 AA 198. This scheme was alleged to result in a $60,593.78 loss to 12 victims.

Another issue was the so-called "Christmas gift scam." 1 AA 198. According to the State, Parks would purchase low-cost gifts for wards and then charge exorbitant visitation or delivery fees for the items. This scheme was alleged to result in a $1507.50 loss to 48 victims.

The fourth scheme was styled as the "mortuary and toilet paper scam." 1 AA 199. On one single occasion, a codefendant apparently billed $1600 to 12 individuals for picking up cremated remains or delivering toilet paper.

Next, the State detailed a "court paperwork scam" in which Parks used a codefendant to stand in line to file court paperwork at a high billing rate even though electronic filing was supposedly available. This scheme was alleged to result in a $74,229.90 loss to 109 victims. A related scheme supposedly involved overbilling for making trips to banks in the amount of $67,775.00 on behalf of 130 victims. A final scheme involved excessive billed time to complete Social Security paperwork in the amount of $13,044.00. 1 AA 199.

The State then detailed a series of individual victims and various transactions which it contended Parks used to cause loss to the individuals involved. 1 AA 200-202.

Before sentencing, the State filed a memorandum in which it repeated many of the same scheme allegations committed by Parks. 2 AA

206. The State also provided information about twelve individual victims. 2 AA 213-221. The State argued that the only appropriate sentence was the "maximum" sentence, with all counts run consecutive to each other. 2 AA 221. The State also argued, without a clear analysis of how it arrived at the number, that restitution was required in the amount of $559,205.32. 2 AA 221.

The State used its restitution figure to justify its harsh sentencing request. "The restitution figure of $559,205.32 is a large amount." 2 AA 227. The State also used the fact Parks originally faced "over 200 felony charges" as a basis for its recommendation, despite the reality that the State had exclusive control over how many charges it brought for the same conduct. 2 AA 228. The State further contended that Parks "still has shown no remorse for any of her actions…," ignoring the fact she entered into a guilty plea agreement. 2 AA 228. (Further stating, "While Parks has acknowledged that the State could prove the charges against her, she has refused, thus far, to admit her criminal culpability").

The defense also filed a sentencing memorandum, but it did not provide a particularly deep analysis of mitigating factors and made no effort to identify errors in the State's position. The defense memorandum first pointed out Parks had never used physical violence against any of her wards. 2 AA 233.

Although the defense memorandum claimed to explore the "forensic" accounting of the alleged conduct, the defense arguments were limited to contending that Parks did not steal money because she drove a modest car and eventually filed for bankruptcy. 2 AA 236-37. The defense tried to explain while Parks owned her LLC, others were responsible for billing entries. 2 AA 243. The defense memorandum concluded with "letters of support" from four of Parks' relatives and one friend. 2 AA 246.

Facts related to sentencing issues

At sentencing, the defense sat silently by while speaker after speaker unloaded on Parks. To be sure, Parks had pleaded guilty and some of the information conveyed by speakers was likely relevant. But plenty was not, and the defense could have objected to several statements by speakers or

prosecutors. The relevant facts from sentencing, along with related facts developed during the post-conviction investigation, largely fall into four groups.

1. Facts related to improper arguments by the State

At sentencing, the prosecutor contended that Parks had shown no remorse because she only pleaded guilty under Alford. 2 AA 277. The State also argued that several individuals never needed guardianships. 2 AA 220. The State also tried to argue, with no evidentiary support, the legislative history behind Nevada's exploitation statutes. 2 AA 226. The State also argued that Parks mismanaged funds, left various wards with no guardian, and acted in a "ghoulish" manner.

The post-conviction investigation revealed several additional facts which defense counsel never used. First, contrary to the State's arguments, guardianships overseen by Parks were supported by medical evidence that substantiated the need for the guardianship. An exhaustive review of public guardianship files for several of the individual victims revealed the following:

North: A petition for appointment of temporary guardian was filed by Parks in 2013. 2 AA 389. The petition was supported by a statement from Sanghamitra Basu, a medical doctor licensed by the State of Nevada. 2 AA 398. Dr. Basu personally examined Mr. North and concluded a guardianship was necessary based on symptoms of confusion that could lead to a possible accidental overdose. In addition, in an attached report, Dr. Basu explained that Mr. North was a long-term patient, and that the doctor noticed a "significant" decline in behavior before the guardianship. 2 AA 400. Mr. North could not care for his wife, refused to go to the hospital after a 911 call, and needed daily assistance with medication. 2 AA 400.

Neely: A petition for appointment of temporary guardian was filed in 2014. 2 AA 401. The petition was supported by a statement from Akindele Kolade, a medical doctor licensed by the State of Nevada. 2 AA 410. Dr. Kolade concluded that Ms. Neely needed a guardianship because of a diagnosis of schizophrenia, which prevented her from living independently. It was Dr. Kolade's opinion that Ms. Neely's condition was so substantial

that she would not comprehend the reason for any court proceeding about the guardianship. 2 AA 410.

Mesloh: A petition for appointment of guardian was filed in 2013. 3 AA 412. The petition was supported by a statement from John Reyes, a physician assistant licensed to practice in the State of Nevada. Based on a personal examination, Mr. Reyes concluded a guardianship was necessary based on Mr. Mesloh's several health conditions that required 24-hour case. 3 AA 418. In an attached letter, Mr. Reyes added that Mr. Mesloh agreed the guardianship was in his best interest based on his medical problems and that he was "totally dependent on others for all his care." 3 AA 420.

These are examples. A briefer review about every individual identified by the State shows that <u>every single request for guardianship was supported by the diagnosis of a medical provider</u>: Shanna Maclin, G-15-042610-A, certified by Habim Gemil, M.D.; Georgann Cravedi, G-14-040665-A, certified by Chad Hall, physician; Norman Weinstock, G-08-032656-A, certified by Sofronio Soriano, M.D.; Barbara Lasco, G-14-039735-A, certified

by John Reyes, PA-C; Joseph McCue, G-14-039900-A, certified by Suresh Bhushan, physician; Jack King, G-14-039730-A, certified by Alex Del Rosario, M.D.; Adolfo Gonzalez, G-13-038316-A, certified by Wenwel Wu, M.D. 1 AA 148-149.

The only individual listed by the State that called for a more complicated analysis is Milly Kaplove. Even so, an examination of the record in that matter reveals that, after an evidentiary hearing attended by Ms. Kaplove, the court found that the initial request for a guardianship by Ms. Parks was "justified," but that the ward had since recovered and no longer needed a guardian. 3 AA 422.

Turning to the legislative history arguments, facts available to defense counsel were that the operative statute about exploitation was NRS 200.5099, which was passed in 1995 as part of Assembly Bill 585 and related Senate Bill 416. What little discussion there is suggests revisions were necessary in particular to "keep violent criminals in prison longer and release nonviolent criminals into probation sooner." 3 AA 442. Testimony focused on the need for a "range of penalties for crimes against elders."

3 AA 447. The Division of Aging Services, which proposed the statutory changes, simply concluded that a "range" of penalties was necessary including "up to 20 years imprisonment or fines of up to $25,000 for more serious cases." 3 AA 450.

2. Facts related to lack of notice about victim speakers

As discussed above, the State admitted at the sentencing that it failed to give notice to the defense regarding victim speakers.

As a result, the court heard substantial testimony from multiple victim speakers which went far beyond what would have been authorized under the statute, with no meaningful rebuttal by trial counsel. Highlights include at least one speaker screaming repeatedly that Petitioner was "Hitler" or a "Nazi" 2 AA 367, 370, 379, 380, that Petitioner impersonated a police officer including by use of a LVMPD badge, 2 AA 353, or that Petitioner was "Lilith," 2 AA 378, a reference to a notorious biblical demon.

During the post-conviction investigation, relevant facts about some speakers were identified. While none of this information was located or

used by trial counsel, it would have undercut the accuracy of information presented by the speakers.

Example No. 1: Larry Braslow testified at sentencing on behalf of his mother. Larry specifically requested the court "to be the champions they claim to be for all our beloved elderly. Send a clear message to **anyone** (emphasis added) who wants to steal from and destroy our precious one's lives." 2 AA 322. Effective trial counsel could easily have accessed the publicly available guardianship case and learned that there was evidence in it that Larry had in fact stolen from his mother and that was why a non-family member was appointed guardian in the first place. 3 AA 522. Larry was specifically accused by his mother of having stolen her identity and incurred debt in her name. 3 AA 535. Moreover, in a subsequent filing under the pains and penalties of perjury, Larry's brother Alan asserted that Larry was seeking to "gain control over my mother's finances and I am strongly opposed to that occurring." 3 AA 550.

Example No. 2: The public guardian testified about several individual cases. One involved a Maria Cooper, and as to her, the public guardian asserted there were no cognitive issues and the only impairment was hearing loss – apparently an argument that no guardianship was ever necessary. 2 AA 325.

The public guardian's statements to the court were materially untrue. First, the publicly available petition for guardianship which trial counsel could easily have accessed reveals that the ward suffered from severe panic attacks that led her to call 911 in the middle of the night. 3 AA 577. An examination by Dr. David Wikler revealed a diagnosis of dementia. 3 AA 578. The clock-drawing test, a simple and common tool to screen for dementia, speaks for itself. 3 AA 580.

The public guardian declined to inform the court that not only did Ms. Cooper consent to the guardianship and <u>want</u> April Parks as her guardian, she expressly stated she did not want previously nominated individuals to have control of her estate. 3 AA 582.

Example No. 3: The public guardian argued on behalf of Kathy Godfrey, and contended that no guardianship was necessary in the first instance. 3 AA 334. Yet trial counsel could have accessed publicly available information to determine that Dr. Richard Paguia determined that Ms. Godfrey suffered from chronic alcoholism manifested by increasing falls. 3 AA 591. Court minutes from the proceeding show Ms. Godfrey consented to the guardianship. 3 AA 593.

Example No. 4: The public guardian testified about William Brady, and stated his estate was worth "approximately $148,000" when the guardianship began, but was worth less than $20,000 when the public guardian took over. 2 AA 335. The public guardian explained the guardianship began in 2010 and the public guardian took over in 2015, and that Ms. Parks collected some $33,000 in fees. Effective counsel could have provided some context to these numbers and explained that Ms. Park's fees were collected over a five-year period, leading to a per-year average of $6,600. These fees amount to less than $600 per month. For context, the

accounting from the guardianship shows most of the assets were spent on room and board - $122,000 over a five-year period. 3 AA 598.

Example No. 5: Herman Mesloh (discussed above) testified about his wife's guardianship. Herman explained that his wife "was fine" and did not need a guardianship. 2 AA 339. But effective trial counsel could have obtained the petition from Kathy Mesloh's guardianship and learned that Dr. Robert Chiascione determined a guardianship was necessary because the ward could not bathe, cook, groom, or take her medication without assistance. 3 AA 607.

Example No. 6: Amy Wilkening testified on behalf of her deceased father, Norbert Wilkening. 2 AA 346. She testified Norbert was "conscripted" into guardianship by Ms. Parks. She also referenced in a negative way that the guardianship was based on the analysis of a nurse practitioner. 2 AA 347. While the part about a nurse practitioner is true, there is no allegation this was improper under the law. Moreover, the publicly available petition reveals the nurse practitioner provided much more information than did some of the medical doctors to support his

conclusion, which ultimately was that the guardianship was necessary because of dementia. 3 AA 621. The witness also accused Ms. Parks of lying about the need to dispose of the ward's personal property. 2 AA 348. That said, a publicly available independent property report stated that the value of the ward's personal property was "less than $100 for everything" because most items were broken, garbage, stained with human waste and other biohazards, and in overall poor condition. 3 AA 624.

Example No. 7: Elizabeth Indig testified about her mother, who has the same name. 2 AA 353. Ms. Indig testified that Ms. Parks represented herself as a police officer including the use of a "fake" Metro badge. 2 AA 353. The State never produced any evidentiary support of that allegation. The speaker also testified that she was not allowed to visit her mother during the guardianship because she was a "danger" to her mom because she wanted to bring her macaroni and cheese to eat. 2 AA 353. Yet publicly available documents show Ms. Indig was a danger to her mother because there were prior allegations of serious physical abuse. 4 AA 628-629. In fact, a specific likely mandatory, report of abuse was made by a

social worker about "abuse by this patients daughter, Elizabeth Indig." 4 AA 645. In addition, a neighbor reported that Ms. Indig had stolen her mother's jewelry and taken money for her own use out of the mother's bank account. 4 AA 645.

Court minutes from the guardianship show that Ms. Indig was involved in the guardianship from the beginning, repeatedly declined to follow advice given to her by the guardianship court to include steps she could take to assume the mantle of guardian, and ultimately the request was made to declare her a vexatious litigant. 4 AA 645-646.

Example No. 8: Barbara Neely testified on her own behalf that she never needed a guardianship. 2 AA 356-357. However, her situation has already been discussed including that a medical doctor determined that when Ms. Parks was appointed guardian, a guardianship was necessary. 2 AA 410.

Example No. 9: Julie Belshe testified on behalf of her mother Rennie North. Julie purported to read a letter that her mother wrote. 2 AA 368. Interestingly, the letter switches from first to third person mid-way through.

2 AA 368 ("…making my mom sicker"). While in general Julie was likely permitted to act as a speaker, had she been properly noticed (which she was not), she would not have been permitted to mislead the court into thinking her mother wrote something that Julie herself in fact wrote.

3. Facts related to improperly computed restitution

The State sought $559,205.32 in restitution at the time of sentencing. How it arrived at this number is unknown. Applying even the most basic mathematical analysis would have revealed that the restitution number was incorrect.

Facts available to defense counsel which went unutilized at sentencing include the fact that sworn testimony show the largest individual loss, assigned to Dorothy Trumbich, was inaccurate. The amount assigned to Ms. Trumbich in the judgment of conviction was $167,204.49. That amount is precisely the amount testified to as the loss at the grand jury hearing. 4 AA 654.

What the State neglected to inform the sentencing court is that, pursuant to the sworn grand jury testimony, Parks repaid $50,000 to

Ms. Trumbich's estate when it "went to probate court." 4 AA 654. According to publicly available records, the probate case was filed in early 2014. See W-14-006398. As a result, Parks repaid the $50,000 before even being involved in this criminal case, and that amount never should have been sought as restitution in the first instance, and any remaining amount was paid by insurance.

Another example is the case of Baxter Burns. According to the judgment of conviction, Burns was awarded $32,006.72 in restitution. But deep in the discovery documents provided in the case was evidence that of that amount, Burns confirmed receipt of the return of $8,529.84. 4 AA 656-658.

Just taking these two examples alone, combined they amount to $58,529.84 which should have been deducted from the restitution amount identified in the judgment of conviction. Had this amount been deducted from the restitution of $554,397.71 stated in the judgment of conviction, the total restitution, and total loss would have been reduced to

$495,867.87, if no other adjustments are made based on the State's many mathematical errors.

This Court should know that, although the District Attorney's answer below was untimely and was not considered by the trial court, it contains an important concession that the $58,529.84 discussed above was, in fact, erroneously added to the restitution. 5 AA 861.

4. Facts related to the reasonableness of the sentence

Ms. Parks will move this Court to have the presentence report transmitted for review. Doing so will inform this Court of the information presented in the report at the time of sentencing, which was: That Ms. Parks received a probation success probability score of 66 and would have generally been recommended for probation. Although the report did not recommend probation, it did recommend parole eligibility after 64 months had been served.

In addition, as part of the post-conviction investigation, a survey of similar cases was conducted. While these are mostly theft cases from Nevada, related cases from other jurisdictions are also included to ensure

an adequate sample size. 4 AA 689-691. Then, a statistical analysis of those sentences was performed to determine just how great an outlier Parks' sentence was. 4 AA 692-695. Parks' predicted minimum sentence would have been just 48 months in prison, not the 192-month sentence the court imposed. In a survey of other major theft cases, typically a lot more money went missing and a lot less time was imposed. 4 AA 689-690.

Facts related to the failure to appeal

The trial court's extreme sentence should have provided notice standing alone that Parks would have wanted to appeal. The trial court did ultimately hold an evidentiary hearing on this issue, at which time the following evidence was presented.

Trial counsel testified first and explained that he "definitely" thought Parks could improve on the stipulated eight-year offer by taking the right-to-argue offer. 6 AA 1031. Counsel acknowledged that the sixteen-year sentence ultimately imposed before parole eligibility was double what Parks could have had under the other offer. 6 AA 1032.

Explaining their reactions to the sentence imposed, counsel stated both he and Ms. Parks were "disappointed." 6 AA 1032. Counsel noted that he talked to Ms. Parks in the courtroom right after sentencing, but stated he did not recall what they talked about. 6 AA 1033. Counsel did recall saying he would visit her soon, and did visit her within a day or two.

At the in-person meeting, counsel said he wanted to make sure Parks understood how long the sentence was and see if she had any questions about it. 6 AA 1035. Parks appeared "shell-shocked" over the sentence at the meeting. 6 AA 1035.

Counsel explained that Parks then sent him a letter, and he received it during the thirty-day appeal window. 6 AA 1036 and 1040. According to counsel, the letter asked about a sentence modification, but counsel did not believe "getting a higher sentence than anticipated" was a basis to modify the sentence. Counsel did not believe Parks ever asked him about filing a notice of appeal. 6 AA 1037. Counsel did not believe there were legitimate grounds for an appeal or for post-conviction relief. 6 AA 1038.

Counsel also discussed that he sent a letter back to Parks in which he advised if she had any "gripes" about her sentence that she should file a post-conviction petition. 6 AA 1041-42. Counsel never did file a notice of appeal. 6 AA 1042. Counsel stated that he felt the "better" option was for Parks to file for post-conviction relief, but that if she had specifically requested an appeal he would have filed it. 6 AA 1050.

Ms. Parks also testified, and filled in the details that counsel swore under oath that he could not remember. Parks stated that just after sentencing, she discussed the sentence with counsel and informed her not to panic and that there were appeals and "things we can do." 6 AA 1056. Parks testified she told him to do everything possible and that she wanted to appeal. 6 AA 1056.

Parks explained that she was "shocked" when she heard the sentence but was adamant she informed counsel to do everything possible. 6 AA 1057. Parks agreed that counsel visited her within a day or two of sentencing. Parks explained that counsel said to contact him once she got to prison. 6 AA 1060.

Parks explained that she may have some lay legal knowledge, but had zero knowledge about how criminal appeals work. 6 AA 1060. She stated that counsel discussed with her ways to modify the sentence, and that's where she got the language used in her subsequent letter. 6 AA 1060.

Parks explained that after she wrote the letter to counsel, she expected him to respond by filing an appeal. 6 AA 1062. Counsel wrote her back and took a dismissive tone by telling her to file her own post-conviction petition if she was unhappy. 6 AA 1063.

The court ultimately denied relief on all claims including the deprivation of appeal claim. The court found that while counsel and Parks did discuss how to proceed after sentencing, Parks never directly asked for an appeal to be filed. 6 AA 1080. The court noted that Parks asked for a sentence modification, but that counsel wrote back, invited further inquiry if any, and Parks did not further reply to counsel. 6 AA 1080. On the "totality of the circumstances" the court found counsel complied with the duty to "discuss Petitioner's options" after sentencing. 6 AA 1080.

VI. SUMMARY OF ARGUMENT

In hindsight, there's little question the way guardianships were handled in Clark County during Parks' time as a private guardian was troubled. Fortunately, many changes have occurred since that time. But dumping the entirety of such a complex problem on Ms. Parks ignores the systemic issues that existed during her tenure, and the lopsided sentence the court imposed stemmed from willful ignorance of publicly available facts.

Trial counsel amplified these mistakes and acted ineffectively three ways. First, trial counsel's belief that a "right to argue" plea deal would result in less than eight years of incarceration was flawed and was such a poor strategy that it was like having no strategy at all. This is particularly true where counsel abandoned the work necessary to have a reasonable probability of a better sentence, such as retaining an expert witness or conducting investigation into the claims being made by the aggrieved parties. Counsel could not reasonably have expected to improve on the stipulated offer without putting in the legwork.

Second, counsel did not put in the legwork. The sentencing memorandum was inadequate and made no effort to push back against the egregious accusations made against Ms. Parks. But publicly available documentation would have allowed counsel to do exactly that. Counsel exacerbated this problem by failing to object or otherwise remedy the admitted lack of a proper victim impact notice.

Counsel also failed to identify and object to what are now known to be incorrect computations of restitution by the State. The State of Nevada has now admitted its restitution computation is mistaken by more than $50,000 – nearly ten percent of the total. Because the State relied so heavily at sentencing on the amount of loss to justify its sentencing position, the State cannot now be heard to complain this error was harmless. Reasonably effective counsel would have objected to the improper restitution computation, and had he done so, there was a reasonable probability of a more favorable outcome.

Finally, despite the lopsided sentence imposed that counsel repeatedly described at the evidentiary hearing as "disappointing," no

direct appeal was ever filed. Nevada law requires counsel to appeal when a client expresses dissatisfaction with a sentence, even one that arises from a guilty plea. The district court's analysis failed to consider these requirements and erred by denying Parks her constitutional right to a direct appeal.

VII. ARGUMENT

Ineffective assistance claims present mixed questions of law and fact and are subject to independent review. State v. Love, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102, 1107 (1996). A claim of ineffectiveness of counsel requires a showing that counsel acting for the defendant, was ineffective, and that the defendant suffered prejudice as a result—defined as a reasonable probability of a more favorable outcome. Strickland v. Washington, 466 U.S. 668 (1984).

These errors deprived Parks of her right to effective assistance of counsel under the United States and Nevada Constitutions.

A. Trial counsel was ineffective under the United States or Nevada Constitution by advising Parks to reject a more favorable plea deal and Parks was subsequently sentenced to a much longer period of incarceration.

The claim presented here relies on the longstanding right of criminal defendants to make an informed decision whether or not to plead guilty, as explained in the Supreme Court's 2012 decisions in Missouri v. Frye, 132 S.Ct. 1399 (2012) and Lafler v. Cooper, 132 S.Ct. 1376 (2012). As stated in Frye, the challenge "is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers." Id. at 1406. The Supreme Court held that plea bargaining is a critical stage of proceedings during which a defendant is entitled to effective assistance of counsel because plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Id. at 1407.

> The ultimate holding of Frye is directly relevant to the case at hand: This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer

> was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Id. at 1408.

Neither Frye nor Lafler purport to break new ground. That is, the Sixth Amendment has always encompassed that criminal defendants "are entitled to the effective assistance of competent counsel" during plea negotiations. Lafler, 132 S.Ct. at 1384, citing McMann v. Richardson, 397 U.S. 759, 771 (1970). Nearly every court which has considered the issue has held that Frye and Lafler did not create a new constitutional right which would be retroactively applicable on collateral review, but merely restated longstanding constitutional requirements concerning effective assistance of counsel. Ortiz v. United States, 2012 U.S. Dist. LEXIS 159847 (E.D.N.Y. Nov. 7, 2012) (collecting cases).

The problem here, which is intertwined with the complaints about counsel's performance at the time of sentencing, is that the right-to-argue plea deal Parks accepted had no hope of leading to a better outcome than the stipulated offer, absent serious effort by trial counsel to prepare for the

sentencing proceeding. Trial counsel failed to so prepare, and thus was ineffective in advising Parks to accept the right-to-argue offer.

Parks was only advised that the State "may argue for more than that [8-20 year] stipulated sentence. 1 AA 178. See also plea canvass at 1 AA 193. The written plea agreement and plea canvas left the impression that it was at least possible the State would not ask for more time than the 8-20 year sentence, or at least would not greatly exceed it. In reality, the State ultimately requested that the court maximize every sentence and run every sentence consecutive, for a sentencing recommendation of 307 months to 768 months of incarceration. The incredible recommendation by the State belies any notion that the State gave any good-faith consideration to arguing for equal or less time than the proposed stipulated sentence.

Effective counsel would have explained to the client that the State was not being straightforward when it suggested the mere possibility of a larger sentencing recommendation. That is, effective counsel would have recognized the State's strong desire to make an example of Ms. Parks, and would have warned Ms. Parks that there was a high likelihood of not just a

higher recommendation than 8-20 years by the State, but a high likelihood the actual sentence imposed would also exceed that amount. Had Ms. Parks been given an accurate assessment of the risks and benefits of proceeding with the "right to argue" sentence, she would have stipulated to the 8-20 year sentence instead.

Another problem is that although trial counsel received authorization to retain the services of a forensic accountant, counsel advised Parks to accept a plea deal without receiving any opinion from that accountant. 4 AA 684-688. Counsel was authorized to engage the services of a forensic accountant. But Parks was never provided any assessment of their findings, and counsel's files do not contain any indication of a final report or even preliminary findings by the expert.

Counsel's failure to adequately consult or retain an expert witness has been found to be ineffective assistance of counsel. Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995); see also Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007) (finding that wholesale failure to hire an expert

constituted "most egregious" type of ineffectiveness). In Richey, the court explained:

> Even more importantly, it is inconceivable that a reasonably competent attorney would have failed to know what his expert was doing to test the State's arson conclusion [internal citation and quotation omitted], would have failed to work with the expert to understand the basics of the science involved, at least for purposes of cross-examining the State's experts, and would have failed to inquire about why his expert agreed with the State. A lawyer cannot be deemed effective where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what the expert is doing, and what the basis for the expert's opinion is.

Id. at 362-63.

Counsel therefore advised Parks to accept a guilty plea without first completing an adequate investigation. Had the investigation been completed, many of the other errors including arithmetical errors detailed below and now admitted and acknowledged by the State would have been discovered and Parks would not have accepted the right to argue plea offer.

Relatedly and as explored in detail below, counsel advised Parks to accept the guilty plea while failing to prepare for and perform at the time

of sentencing. These are not mere disagreements with counsel's strategic decisions, because only "informed" strategy choices are reasonable. Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001). That is, while any defense decision can likely be labeled by the prosecution as "strategic," is it only "the sort of conscious, reasonably informed decision made by an attorney with an eye to benefiting his client that the federal courts have denominated 'strategic' and been especially reluctant to disturb." Id.

This Court should "disturb" counsel's decision to advise Parks to accept a right-to-argue guilty plea because it was not a strategy decision, but an uninformed and ill-advised decision. Parks faced 270 felony counts, the sheer number of which alone should have informed counsel that "right to argue" meant the State would seek a large or maximum sentence without any express restriction in the guilty plea agreement. Counsel made the situation worse by failing to utilize an approved expert and failing to adequately prepare for sentencing.

There is a reasonable probability of a more favorable outcome had counsel advised Parks that she should accept the stipulated offer. Eight

years in prison before parole eligibility is half what Ms. Parks is now serving, and in that sense is more "favorable." But the point is made here as well that Parks would have accepted that offer had counsel not acted ineffectively in advising her as detailed above.

The district court's order denied this claim without an evidentiary hearing and gave the issue short shrift. Without the benefit of an evidentiary hearing, the trial court determined there was "no evidence of constitutionally deficient advice by trial counsel that Parks relied on to her detriment." 6 AA 1080. But there is ample evidence of this in the record which includes evidence set forth above, such as the failure to engage an expert, failure to anticipate the State's sentencing position, and failure to adequately prepare for sentencing.

This Court should reverse the district court's denial of this claim and order that the State re-offer Parks the 8-20 year plea deal for acceptance should she so choose, based on counsel's deficient performance in advising Parks to reject that offer.

B. Trial counsel was ineffective under the Nevada or United States Constitution when trial counsel failed to adequately prepare for or advocate at the time of sentencing, or when improper evidence was relied upon by the judge at sentencing and without objection by counsel.

Sentencing courts are required to give proper consideration to non-frivolous arguments for mitigation. Rita v. United States, 551 U.S. 338 (2007). Failure to properly prepare for sentencing and to present mitigating evidence, can constitute ineffective assistance of counsel, even in noncapital cases. Gonzalez v. Knowles, 515 F.3d 1006, 1015 (9th Cir. 2008); Lafler v. Cooper, 132 S.Ct. 1376, 1386 (2012) ("Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because 'any amount of [additional] jail time has Sixth Amendment significance';" citing Glover v. United States, 531 U.S. 192, 203 (2001).

Further, it is a violation of Due Process to impose a sentence based on "misinformation or misreading of court records." Townsend v. Burke, 334 U.S. 736, 741 (1948); Denson v. State, 112 Nev. 489, 915 P.2d 284 (1996)

(Sentence reversed because it punished defendant "for prior acts which were not supported by any evidence").

Trial counsel performed ineffectively either in preparation for or at the time of sentencing in at least four distinct ways.

Failure to challenge improperly computed restitution

Parks had a constitutional right to sentencing based on accurate information. Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976); United States v. Tucker, 404 U.S. 443, 447 (1972). That right extends to restitution, which must also be accurate. United States v. Watchman, 749 F.2d 616, 618 (10th Cir. 1984). Restitution cannot rest on impalpable or highly suspect evidence. Martinez v. State, 115 Nev. 9, 13, 974 P.2d 133 (1999). A defendant has a right to present evidence which challenges the amount of restitution sought. Id.

Parks challenges the accuracy of the restitution order in several ways. First, as outlined above, the $554,397.71 restitution was erroneous because it included amounts, the sworn testimony shows and State concedes, that were already repaid. The repaid amounts include $8,529.84 to Burns, and

$50,000 to Trumbich. The combined amount of this error is $58,529.84, which would reduce the total loss and restitution award to $495,867.87.

While that particular error is conceded, it was far from the only error. As a matter of both due process and State law, the trial court could only award restitution in a specific amount to identified victims. Under NRS 176.033, a sentencing court is only authorized to set restitution "for each victim of the offense." Restitution cannot be set in "uncertain terms." Botts v. State, 109 Nev. 567, 854 P.2d 856 (1993). Restitution must be payable, in a specific amount, to a victim of a crime, which can encompass a specific individual or entity. Igbinovia v. State, 111 Nev. 699, 895 P.2d 1304 (1995).

And to comply with the Due Process Clause, restitution awards must be only for the victim or victims of the offense charged, and the amount "must be just and supported by a factual basis within the record." Burt v. State, 445 S.W. 3d 752, 758 (Tex. Crim. App. 2014).

Reasonably effective counsel would have objected to an award of restitution in violation of these requirements, as well as to consideration of the amount of loss as a basis for the court's sentence.

The award of restitution to named victims in the amended judgment of conviction only adds up to $412,943.02. It's no great mystery where the rest of the award comes from: At the plea canvass, the State documented various "scams" it claimed it could prove at trial, such as the "court paperwork scam," "mortuary and toilet paper scam," "holiday gift scam," "bank deposit scam," and "SSA scam." 1 AA 198-200. But these alleged schemes were never attributed to a specific victim and instead, whether through inadvertence or shoddy investigation, were simply all lumped together.

The judgment of conviction therefore purports to award restitution for these five scams, but there is no record of who those funds would be payable to. Restitution cannot exist in a vacuum, it must be specifically awarded to a victim for an identifiable loss. NRS 176.033. Reasonably effective counsel would have explained this to the court, and there is a reasonable probability of a more favorable outcome had this been done. In particular, the unadjusted loss/restitution amount could have been reduced to $412,943.02, which then should further have been reduced by the

$58,529.84 Parks already returned, leaving an actual restitution award of no greater than $354,413.18.

The loss amount and restitution amount relied on by the sentencing court are incorrect. While it is likely the parties would debate the degree of incorrectness, the amount is somewhere between $58,529.84 that is agreed upon, or could be as great as almost half of the total.

The State tried to suggest below that these errors made no difference to the sentence imposed, but a legion of caselaw rejects that position in other matters. In federal court, there is no debate: errors about computation of restitution must result in an all-new sentencing proceeding. United States v. Washington, 172 F.3d 1116 (9th Cir. 1999) (On remand, unless expressly specified otherwise, sentence must be re-computed as part of a "new sentencing 'package'").

In other words, the sentencing process must begin "afresh." United States v. Hanson, 936 F.3d 876, 887 (9th Cir. 2019). This is so because "A defendant's substantial rights are affected when he may have been

required to pay more in restitution than he owes." United States v. Burns, 843 F.3d 679, 689 (7th Cir. 2016).

This Court has had limited opportunities to address this issue, but has in prior cases remanded restitution errors for resentencing. Buffington v. State, 110 Nev. 124, 127, 868 P.2d 643 (1994); Botts v. State, 109 Nev. 567, 854 P.2d 856 (1993).

Here, the restitution amount errors created a situation in which there was a reasonable probability of a more favorable outcome without the errors. The sentence cannot be divorced from the loss amount, because the State relied heavily on the amount of loss to justify its maximum sentencing recommendation. 2 AA 279 (citing "vast amount of exploitation that happened here"), discussion of losses to individual victims, 2 AA 272-274, see also 2 AA 227-229 (citing loss amount being "159 times the threshold" for Category B theft as a basis for sentence).

Counsel failed to challenge the restitution amount, several grounds existed to do so, and Ms. Parks was the one who paid the price for counsel's errors.

Failure to challenge State's improper arguments

Besides failing to challenge the restitution computation, defense counsel also declined to object to several improper sentencing arguments by the State.

First, defense counsel failed to respond to the State's argument at sentencing that Petitioner "expresses no remorse" because she "only" pleaded guilty by the Alford decision. The State advanced this improper theme several times. First, in its sentencing memorandum, the State argued:

> It is worth noting that Parks still has shown no remorse for any of her actions, and continues to portray herself as the victim in this case. Even after reviewing the mountain of evidence as noted above, Defendant's plea was only made pursuant to the *North Carolina v. Alford* 400 U.S. 25 (1970) decision. While Parks has acknowledged that the State could prove charges against her, she has refused thus far to admit her criminal culpability. Again, the fact that Parks has shown no remorse for her actions, after ruining the lives of countless victims and causing immeasurable strife in society, cries out for a severe punishment.

2 AA 228.

During sentencing, the State repeated these arguments: "Ms. Parks still has shown no remorse for her actions. Her plea in this case was pursuant to the Alford decisions. And she has refused still to admit criminal culpability." 2 AA 277, see also 2 AA 287 (linking co-defendant's Alford plea to failure to admit guilt).

The State's argument was improper under state law, yet defense counsel completely failed to object or respond to the same. It is well established in Nevada that the exercise of a criminal defendant's Constitutional rights cannot be held against them at the time of sentencing. Brown v. State, 113 Nev. 275, 291, 934 P.2d 235 (1997) (New sentencing hearing ordered where trial court considered exercise of Constitutional right to jury trial commensurate with "lack of remorse"); see also Brake v. State, 113 Nev. 579, 939 P.2d 1029 (1997).

Petitioner exercised her right to accept a plea bargain put forth by the State under the Supreme Court's decision in Alford. The exercise of that right was not equivalent to a lack of remorse and the State's argument to that effect was improper. The same went uncorrected and unchallenged by

defense counsel, and there is a reasonable probability of a more favorable sentence had counsel so objected. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (Punishing defendant for exercising a right under the law is "a due process violation of the most basic sort").

Second, the State argued in its sentencing memorandum that several specific individuals never "actually needed guardianship services." 2 AA 220. Those individuals and the evidence supporting their need for guardianship are discussed above. Specific individuals discussed by the State were all independently evaluated by licensed Nevada medical professions, who concluded the proposed wards required a guardianship. See 2 AA 400, 410 and 3 AA 418.

Further, as those documents show, Ms. Parks did not simply use the same physician over and over. Rather, with extremely rare exception, each ward was evaluated by a different physician. The independent medical judgment of these many providers supported the initial requests for guardianship, and there is no evidence this series of doctors would risk

their licenses to support Ms. Parks by making false claims in support of guardianship requests.

Third, trial counsel should have objected to the State's arguments about the amount of charges or the legislative history behind the elder exploitation statutes. There are two subcomponents to this issue. The first problem is that the State placed heavy emphasis on the original number of charges Ms. Parks faced, "over 200 felony charges in the original indictment." 2 AA 228. The State then argued that the reduction in charges in the plea agreement to six counts was all the benefit Ms. Parks was due. 2 AA 228.

This self-created argument ignores that the State exclusively enjoyed the privilege of deciding how to charge the case, and the State should not be allowed to reward itself for overcharging the case. As Justice Brennan once explained:

> Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and

> scope of a criminal prosecution, the potentialities for abuse . . . are simply intolerable. (Footnotes omitted.)

Ashe v. Swenson, 397 U.S. 436, 451-52 (1970) (Brennan, J., concurring).

Other courts have dealt with the issue much more bluntly. State v. Korum, 157 Wn.2d 614, 666 at n. 19, 141 P.3d 13 (Wash. 2006) ("The prosecutor should not overcharge to obtain a guilty plea."); State v. MacLeod, 141 N.H. 427, 434, 685 A.2d 473 (1996) ("Finally, our trial courts have both the authority and the obligation to curb the prosecution's broad discretion if 'overcharging' poses dangers of confusion, harassment, or other unfair prejudice"). The number of felonies charged simply bears no relation to how the court would or should determine Ms. Parks' sentence.

Fourth, with no evidentiary support at all the State proclaimed that "The fact that the Felony Theft statute allowed for punishment of up to four (4) to ten (10) years in prison, and that Exploitation allows for punishment of up to eight (8) to twenty (20) years in prison, per offense, is proof that the legislature intended for there to be a harsher punishment for serious thefts and exploitation. 2 AA 226.

As explored in the factual section above, the legislative history behind NRS 200.5099 provides no such historical basis for a harsher punishment as requested by the State. At best, the history suggests serious cases as discussed by the legislature are those involving violence. 3 AA 442. The State's own sentencing brief confirmed that even in the State's view, this was a case about maximizing profits, not the physical use of force. 2 AA 207.

There is a reasonable probability of a more favorable outcome had counsel objected to these improper arguments.

Failure to challenge lack of notice concerning victim speakers

The sentencing transcript reveals that no proper notice of victim speakers was ever provided to defense counsel. 2 AA 315. As noted above, while a general objection was lodged by counsel, no specific objection was made to any individual speaker, and perhaps based on the lack of notice of who would speak and what they would say, counsel performed zero preparation and made zero response to the speakers' statements.

There's no question counsel had a right to notice of who the victim speakers would be and what they would say. NRS 176.015(4), Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990). By failing to insist on advance notice, trial counsel was ineffective. Alternatively, counsel could have at least asked the trial court for a chance to respond to the victim speakers once the substance of their testimony was disclosed through presentation to the court. In total, allowing the victims to testify by surprise, with no response from counsel, was objectively unreasonable.

As a result, the court heard substantial testimony from multiple victim speakers which went far beyond what would have been authorized under the statute, with no meaningful rebuttal by trial counsel. The "Hitler," "Nazi" and other refences could easily have been prevented or responded to.

The court also heard the nine specific victim accounts detailed in the statement of facts. The problem is, much of the information provided by those speakers was objectively untrue. And it was not even that much work to demonstrate that fact – all counsel had to do was dive into the many

publicly filed guardianship cases to see that many speakers were themselves accused of abusing the wards. Contrary to several arguments, the need for a public guardian did not come from thin air, but from a need for someone to step in due to the fact those closest to the ward had a documented history of abuse.

This type of crucial information was no doubt mitigating, yet defense counsel failed to discover or present it. This error also caused deficient performance, without which there would have been a reasonable probability of a more favorable outcome.

Failure to challenge the reasonableness of the sentence

While the recommendation of the Department of Parole and Probation is not binding on the sentencing court, see Lloyd v. State, 94 Nev. 167, 170 (1978) (citing Collins v. State, 88 Nev. 168 (1972)), the recommendation is based on "the normal punishment given in other jurisdictions for similar offenses." Id. (citing NRS 176.145). And the presentence report, like all information presented at sentencing, cannot

contain impalpable or highly suspect material. Blankenship v. State, 132 Nev. 500, 375 P.3d 407 (2016).

As a result, if a sentencing judge were to sentence well beyond the recommendation of Parole and Probation, then the judge is sentencing well beyond what the normal punishment is for the same or similar crimes in other jurisdictions. Moreover, by disregarding a presentence report that contains accurate information in favor of other, inaccurate information, the ultimate sentence would rely on impalpable information in violation of Nevada law.

As discussed above, the trial court proclaimed it had "no idea" how Parole and Probation decided Parks was recommended for a 64-month sentence before parole eligibility. 2 AA 386. The court then imposed a minimum term of incarceration of 192 months, nearly three times what the PSI had recommended.

In addition, the 16 to 40-year sentence imposed by the trial court was unreasonable and constituted cruel and unusual punishment. Effective trial counsel would have challenged the sentence imposed by way of a motion

for reconsideration, a new trial, or by filing a direct appeal. A sentence of at least 16 years in prison shocks the conscience, because it is unreasonable and disproportionate to any other sentence imposed in Nevada for theft. Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246 (2004), overruled on other grounds by Knipes v. State, 124 Nev. 927, 192 P.3d 1178 (2008), see also Solem v. Helm, 463 U.S. 277 (1983).

A necessary component of this analysis is comparison of the offense to the same or similar crimes either within or outside the jurisdiction where the offense occurred. In re Lynch, 8 Cal.3d 410, 427, 503 P.2d 921 (1972). Courts must sentence defendants individually and consider the defendant's circumstances as well as the facts of the crime. Martinez v. State, 114 Nev. 735, 961 P.2d 143 (1998).

Effective counsel could have alerted the court that sentences imposed for similar crimes were far less severe than either the incarceration time sought by the State, or the actual sentence imposed.

As part of the post-conviction investigation, a survey of similar cases was conducted. While these are mainly theft cases from Nevada, related

cases from other jurisdictions are also included to ensure an adequate sample size. 4 AA 689-691. Doesn't take any particular mathematical skill to see that individuals who stole a lot more money than Ms. Parks received much shorter sentences. Several stole millions and received probation. The only person who received a longer minimum sentence stole some $11 million. 4 AA 689. Ms. Parks' sentence was extremely out-of-line with every other major Nevada theft case.

By the State's own words, this was "largely a billing fraud case." 1 AA 195. The sentences imposed was exceptional, and there is a reasonable probability it was based on the extensive improper and incorrect evidence submitted by the State and speakers at the time of sentencing.

The District Court's handling of this claim was deficient

In denying relief on Ground Two, the lower court found that it was not open to consideration of Parks' evidence. ("And having been the sentencing judge who sentenced her, I'm here to say had I known all of that stuff the result would not have been different in the sentence that she received"). 6 AA 1022.

This proclamation does not prove that Parks' claims lack merit, but demonstrates that the trial court had closed its mind to consideration of evidence, some of which is undisputed by the State. It violates Due Process to impose a sentence based on "misinformation or misreading of court records." Townsend v. Burke, 334 U.S. 736, 741 (1948).

The sentencing court's comments reveal that the court had a "closed mind" towards Petitioner's mitigating evidence. Cameron v. State, 968 P.2d 1169, 114 Nev. 1281 (1998); see also Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029 (1995). The sentencing court's position is that nothing would change its mind about the sentence imposed, not the fact many errors occurred or even the fact several of those errors are uncontested by the State.

Because the trial court improperly denied relief on Parks' claims, and closed its mind to the substantial additional evidence trial counsel failed to present, relief should be granted and the case remanded for resentencing before a different judge who is unfamiliar with the record of this case. See Brake, 113 Nev. at 585 (sentencing before a different judge required where

consideration of improperly admitted evidence prompted harshest possible sentence).

C. Parks's state or federal constitutional rights were violated when the trial court refused to grant relief on a claim that Parks was deprived of her direct appeal.

In Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) this Court noted that "an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction." Lozada at 354. If counsel fails to file an appeal after a convicted defendant makes a timely request, the defendant (at least previously) was entitled to the Lozada remedy, which consisted of filing a post-conviction petition with assistance of counsel in which the actual appellate claims could be raised. Id. Such a claim did not require any showing of merit as to the issues sought to be raised. Rather, it is enough to receive the relief contemplated by Lozada if a petitioner shows that he was deprived of his right to a direct appeal without his consent. Id. at 357.

The remedy contemplated by Lozada has been largely subsumed by recent revisions to the Nevada Rules of Appellate Procedure, although the

basis for obtaining relief remains generally the same. Now, under NRAP 4(c), an untimely notice of appeal may be filed if:

> (A) A post-conviction petition for a writ of habeas corpus has been timely and properly filed in accordance with the provisions of NRS 34.720 to 34.830, asserting a viable claim that the petitioner was unlawfully deprived of the right to a timely direct appeal from a judgment of conviction and sentence; and
>
> (B) The district court in which the petition is considered enters a written order containing:
>
> (i) specific findings of fact and conclusions of law finding that the petitioner has established a valid appeal-deprivation claim and is entitled to a direct appeal with the assistance of appointed or retained appellate counsel;
>
> (ii) if the petitioner is indigent, directions for the appointment of appellate counsel, other than counsel for the defense in the proceedings leading to the conviction, to represent the petitioner in the direct appeal from the conviction and sentence; and
>
> (iii) directions to the district court clerk to prepare and file—within 5 days of the entry of the district court's order—a notice of appeal from the judgment of conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms.

NRAP 4(c).

The question to be decided is whether Parks was in fact deprived of a direct appeal, and as to that issue, pre-existing Lozada-based decisions remain binding. This Court more recently discussed the contours of appeal deprivation claims that arise in the context of a guilty plea. Toston v. State,

127 Nev. 971, 267 P.3d 795 (2011). As explained, such claims are reviewed under the ineffectiveness standards in Strickland v. Washington, 466 U.S. 668 (1984). In particular, deficient performance can take the form of a failure to inform and consult the client about the right to appeal, or, failure to in fact file an appeal. Toston, 267 P.3d at 799.

As acknowledged in Toston, an attorney's duty to in fact file a direct appeal arises, irrespective of whether the conviction arose from a guilty plea or verdict following a trial, when the defendant actually informs counsel that he would like to appeal. Id. at 800, citing Lozada, 871 P.2d at 949 ("Assuming Lozada's trial counsel failed to perfect an appeal without Lozada's consent, Lozada presumably suffered prejudice because he was deprived of his right to appeal."); and citing Davis v. State, 115 Nev. 17, 974 P.2d 658, 660 (1999) ("[I]f the client does express a desire to appeal, counsel is obligated to file the notice of appeal on the client's behalf").

But there is a second way Toston requires the filing of a direct appeal and that is when the "client's desire to challenge the conviction or sentence can be reasonably inferred from the totality of the circumstances, focusing

on the information that counsel knew or should have known at the time." Id. at 979.

This Court then explained that when a client pleads guilty, relevant considerations include whether the defendant "received the sentence he bargained for," whether "certain issues were reserved for appeal," whether the defendant conveyed a "**desire to challenge his sentence within the period for filing an appeal**," or whether the defendant moved to withdraw the plea. Id. at 979-980 (emphasis added). See also Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) (citing example that stipulated sentence, followed at sentencing, probably shows a lack of desire to appeal).

Here, Parks expressed both a desire to appeal and dissatisfaction with her sentence. As for an explicit desire to appeal, the evidence shows counsel could not remember what was discussed right after sentencing, but Ms. Parks testified under oath she specifically requested an appeal and that counsel do "everything" possible to challenge the sentence. 6 AA 1056.

After the evidentiary hearing, the court found that Ms. Parks only "assumed" she asked her attorney to appeal. 6 AA 1080. That's not what

the record shows. Ms. Parks was clear that she and defense counsel discussed an appeal just after sentencing. 6 AA 1056. The "assumed" use of the word appeal was during the later visit at the jail. 6 AA 1060. The order disposing of the post-conviction petition neglects to discuss the fact Ms. Parks requested an appeal at the time of sentencing.

But Ms. Parks is entitled to relief under Toston's second prong because her own attorney repeatedly testified to her dissatisfaction with the sentence. And why wouldn't she be? She had rejected an eight-to-twenty-year deal on counsel's advice that a better result could be had under a right to argue deal. The imposed sentence was in fact almost as harsh as possible. A reasonable defendant in Ms. Parks' position would have zero incentive or reason to abandon the remedy of a direct appeal.

The record stands clear that during the time when an appeal could be filed, Ms. Parks confirmed to counsel in writing a desire to challenge her sentence. 2 AA 264. After the evidentiary hearing, the district court fixated on the fact that in her letter, Ms. Parks never mentioned the word appeal. 6 AA 1080. But Toston imposes no such requirement on her; the expression

of a desire to challenge the sentence in any way is enough to trigger the duty to file a notice of appeal. Toston, 267 P.3d at 801.

In Roe, the Supreme Court unambiguously held that where a criminal defendant is deprived of the right to a direct appeal, that defendant is "entitled to a new appeal without any further showing." Roe, 528 U.S. at 485, citing Rodriguez v. United States, 395 U.S. 327 (1969). These same requirements are repeated in this Court's decision in Toston. See Toston, 267 P.3d at 800.

As a result, counsel's belief that there were no grounds for an appeal is as irrelevant as it is mistaken. 6 AA 1038. It isn't Parks' fault that her lawyer failed to identify issues for appeal and thereby precluded himself from filing a notice of appeal. This brief touches on multiple issues that could have been (and still are) appropriate for review on direct review, such as the unreasonableness of the overall sentence, the fact the sentence was imposed based on improper arguments by the State and incorrect factual information, the fact restitution was improperly computed, the fact

speakers testified when no proper notice was provided, and a host of other issues.

At a minimum, there were strong arguments Parks could have asserted in a direct appeal that may well have led to a new sentencing proceeding. A new sentencing proceeding would qualify as a form of relief, so counsel's testimony that no appealable issues existed should be disregarded in its entirety.

In denying relief, the district court concluded that counsel did not fail to file a direct appeal on Parks' behalf. 6 AA 1080. The district court's decision was incorrect, because this Court's mandate in Toston governs the situation when, as here, a defendant has nothing to lose and something to gain by appealing, expresses dissatisfaction with the sentence, and requests relief from the sentence during the time when a notice of appeal could be filed. Relief should be granted and Parks should receive a belated direct appeal.

VIII. CONCLUSION

For all these reasons, Parks requests this Honorable Court grant her petition and order the State to re-offer the 8-20-year plea agreement, order a new sentencing proceeding before a judge unfamiliar with the record of this case, or order that Parks receive her right to an untimely direct appeal under the Rules of Appellate Procedure.

DATED this 7th day of September, 2021.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Appellant

RULE 28.2 ATTORNEY CERTIFICATE

1. 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, including 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 upon is 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.

2. I further 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 Microsoft Word 2016 in 14-point font of the Ebrima style.

3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 11,477 words.

DATED this 7th day of September, 2021.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 7, 2021. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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