IN THE SUPREME COURT OF THE STATE OF NEVADA

APRIL PARKS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 82876 District Court No. 8th D.A. 19-807564-W (Clark County)

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1. Respondent, the State of Nevada is exempt from filing a disclosure pursuant to Rule 26.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

IN THE SUPREME COURT OF THE STATE OF NEVADA

APRIL PARKS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 82876 District Court No. 8th JD A-19-807564-W (Clark County)

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STATEMENT OF JURISDICTION

Appellant April Parks (Parks) appeals from the district court's denial of her state habeas corpus petition. The clerk entered the trial court's order denying the petition on April 15, 2021. 6 AA 1076.[1] Parks filed her notice of appeal on May 4, 2021. 6 AA 1083; *see also*, NRAP 4(b)(1)(A), NRS 34.575(1).

ROUTING STATEMENT

Procedural rules presumptively assign this matter to the Nevada Court of Appeals, because Parks appeals the denial of her state habeas corpus petition challenging a judgment of conviction and sentence for offenses that are not category A felonies. NRAP 17(b)(3).

[1] Respondent refers to items in Appellant's Appendix by volume and page number, e.g., (_AA ___), and in Respondent's Appendix by page number (RA__).

ISSUE PRESENTED FOR REVIEW

Issue One: Trial counsel was not ineffective during Parks' entry of plea.

Issue Two: Trial counsel was not ineffective during sentencing.

Issue Three: Trial counsel was not ineffective for failing to file a notice of appeal.

STATEMENT OF THE FACTS AND HISTORY OF THE CASE

I. PARKS AND HER CODEFENDANTS PUT PROFITS OVER HER FIDUCIARY DUTY TO HER WARDS

April Parks owned A Private Professional Guardian, LLC. Although the company conducted legitimate guardianship activities, Parks and her co-defendants, Mark Simmons and Gary Neal Taylor, engaged in a pattern of conduct that exploited her elderly and/or vulnerable wards, by inflating billings and violating their fiduciary duty to conserve the estates of their wards.

Examples of some of the billings (taken from the State's Sentencing Memorandum, 2 AA 206) included: (1) billing multiple wards for a visit to a single facility housing multiple wards and billing all wards for the time, instead of prorating the visit among all wards; (2) billing a ward $90, for the purpose of passing along a Mother's Day message; (3) billing a ward $75 for depositing a $6.33 check; (4) billing a ward $150 for a visit consisting of "30 minutes of visiting with the ward who 'was not looking well'"—a visit that took place the day after the ward died; and (5) billing multiple wards for filing documents in person at the Family Court

(including while standing in line), while the company had a Wiznet E-filing account. 2 AA 207-08, 210-11.

Parks also diverted life insurance proceeds, gained guardianship over wards who had trustees, removed assets from trusts, and disregarded legitimate requests from wards to conserve assets by utilizing less costly alternatives. *Id*. at 213-21.

II. DISTRICT COURT PROCEEDINGS

As a result of her abandonment of her fiduciary and legal duties to her wards, in March of 2017, a Clark County grand jury indicted Parks and three co-defendants for 270 counts, including racketeering, exploitation of an older person, theft, offering a false instrument for filing or record, and perjury.[2] Parks retained Anthony Goldstein (Goldstein), an experienced criminal defense attorney, to represent her during these proceedings.

Pursuant to a guilty plea agreement filed in November of 2018, Parks entered an *Alford*[3] plea to 2 counts of exploitation of an older/vulnerable person, 2 counts of theft, and 1 count of perjury in case C-17-321808-1 (this case), as well as an additional charge in another case (C-18-329886). 1 AA 176. In the plea agreement, Parks waived her right to an appeal and made no express reservation of issues to raise on appeal. *Id*. at 180.

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[2] Not all counts in the indictment applied to all of Parks' co-defendants.

[3] *North Carolina v. Alford*, 400 U.S. 25 (1970).

The agreement also called for the court to run the sentences in the two cases concurrent. *Id*. at 177. However, at the time she entered her plea, Parks specifically rejected a stipulated sentence of 8-20 years permitting the parties to argue for any lawful sentence. 1 AA 177. By rejecting the stipulated sentence, Parks faced sentences of 2-20 years for Counts 1 and 2, 1-10 years for Counts 3 and 4, and a sentence of 1-4 years for Count 5, which could run concurrent or consecutive. 1 AA 178-79. Parks also obtained the possibility of a suspended sentence and probation. 1 AA 179.

The trial court specifically questions Parks about her rejection of the stipulated sentence. 1 AA 193. The court also confirmed that Parks understood that she waived her right to an appeal. 1 AA 195. The court found Parks plea to be knowing, intelligent, and voluntary. 1 AA 203. The district court sentenced Parks on a separate date in order to accommodate the victims who wished to address the court. 1 AA 204.

The parties submitted sentencing memorandums to the court. 2 AA 206 (State's memorandum); 2 AA 230 (Parks' memorandum). In Parks' sentencing memorandum, Goldstein focused on the fact that: (1) no allegations against Parks alleged physical abuse or neglect; (2) Parks was not involved in the billing; and, (3) that in one instance, Parks sought to correct neglect or abuse of one of her wards. *Id*.

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The parties appeared for sentencing. 2 AA 266. Parks personally addressed the court, stating that on the part of her and her company that "there was care and concern" and "these clients were well taken care of." 2 AA 293-94.

After the parties and victim speakers addressed the court, the court ordered restitution of $559, 205.32, to be paid jointly and severally with the co-defendants. *Id*. At 383. The court expressed shock at the actions of all the co-defendants. *Id*. At 383 (co-defendant Taylor), 384 (co-defendant Simmons). When addressing Parks, the court stated:

> Ms. Parks, I have to say there is no one in this room who is more culpable than you. And the things that I have heard today that you did to these people is just absolutely shocking that one can continue to go about their life and engage in these activities and watch these people suffer. And you said when you spoke, that you never intended to bring any harm to anyone. I cannot fathom how you think that the actions that occurred at the hands of you did not intend to bring any harm to anyone.

Id. at 386.

The court also rejected the recommendation in the presentence investigation report. *Id.* The court imposed an aggregated sentence of a minimum term of 16 to 40 years in this case, to run concurrent to the 6 to 15-year sentence imposed in C-18-329886. *Id.* at 387-88.

Parks and Goldstein met via a video visit a couple days after the sentencing hearing to discuss Parks' options. *See*, 6 AA 1034, 1036. Goldstein recalled

discussing Parks' options to challenge the length of her sentence (including a motion for modification and through habeas corpus proceedings). 6 AA 1037-38. Parks mailed a letter to Goldstein after the meeting, and Goldstein sent a response reminding Parks about the discussions that took place during the meeting. 4 AA 682, 683.

Parks did not appeal.

Less than a month after sentencing, the court conducted a hearing in the presence of counsel and adjusted the amount of restitution because the original judgment listed a victim twice. RA 22.

III. PARKS' STATE HABEAS CORPUS PROCEEDINGS

Parks filed a state habeas corpus petition in December of 2019. 1 AA 124. Parks also filed a supplemental petition. 1 AA 137. Parks presented three claims:

- Ground One: Trial counsel was ineffective for advising Parks to reject the stipulated sentence.
- Ground Two: Parks' trial counsel was ineffective at sentencing.
- Ground Three: Parks' counsel was ineffective for failing to file a notice of appeal.

1 AA 141, 145, 169.

Respondents filed an answer to Parks' petition, and Parks filed a reply. 4 AA 696 and 5 AA 837 (answers); 6 AA 1004 (reply).

On February 22. 2021, the parties presented argument on the petition. 6 AA 1011. After hearing argument, the court found that Parks failed to demonstrate counsel was ineffective with respect to Grounds One and Two. *Id*. at 1022-23. Addressing Parks' first claim, the trial court found that the plea canvass inquired about Parks' rejection of the stipulated sentence, which the plea agreement expressly rejected. *Id*. at 1022. Rejecting Parks' ineffective assistance claim at sentencing, the district court found that Parks failed to demonstrate that counsel performed deficiently at sentencing, and that Parks failed to also establish prejudice. *Id*. The court ordered an evidentiary hearing on Ground Three, Parks' allegations of deprivation of an appeal. *Id.* at 1023.

On March 18, 2021, the court conducted an evidentiary hearing on Ground Three. 6 AA 1024. After hearing testimony from Mr. Goldstein and Parks, the court took the matter under advisement. *Id*. at 1074.

The clerk filed the order denying the petition and entered the order three days later on April 15, 2021. 6 AA 1076. Parks filed a notice of appeal. *Id*. at 1083.

SUMMARY OF THE ARGUMENT

A defendant's guilty plea must be knowing, intelligent, and voluntary. A defendant has a right to the assistance of competent counsel. Parks' state habeas petition raised three grounds for relief, all of which Parks raises in her brief.

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In Ground One, Parks alleged that Goldstein performed deficiently by advising Parks to reject a more favorable plea deal (a stipulated sentence).

Effective counsel at the plea stage provides their client the tools they need to make an informed choice between alternative courses of action. Giving a client erroneous advice on a point of law at the plea stage may meet the standard for deficient performance. However, incorrectly predicting the outcome of a sentencing hearing does not rise to the level of deficient performance.

In her petition, Parks failed to point out what Goldstein specifically said that constituted "constitutionally deficient" advice. Furthermore, the record reflects that Parks and Goldstein discussed the plea offer provided by the prosecution and that Parks' decision to reject the stipulated sentence constituted her choice among the available options after being fully informed of all alternatives.

The district court correctly rejected this claim because Parks failed to satisfy her burden of showing Goldstein was deficient and that Parks suffered prejudice *because* of this alleged deficiency.

In her opening brief, Parks adds a new argument to Ground One. She links Goldstein's allegedly deficient advice to new allegations that Goldstein failed to prepare for sentencing. This Court should decline to consider this new "cumulative error" claim because Parks failed to present good cause for failing to raise the claim below.

In Ground Two, Parks alleged that Goldstein was ineffective during sentencing. The claim alleges that Goldstein failed to object to a lack of notice regarding victim impact witnesses. But the record repels Parks' allegations. Therefore, Parks cannot demonstrate deficient conduct.

In Ground Two, Parks also alleges that Goldstein failed to object to purportedly improper argument by the prosecution and improper comments by victim impact speakers. However, the district court found the sentence imposed by the court reflected the seriousness of the offenses, rather than any purportedly improper argument or comments presented at the sentencing hearing.

In Ground Two, Parks further alleges that Goldstein failed to object to an improper restitution amount. However, the record reflects that the district court adjusted the amount of restitution at a post-sentencing hearing. Also, to the extent that Parks alleges the restitution amount was improperly calculated, there is nothing in the record demonstrating that Parks notified Goldstein of a further need to adjust the amount of restitution owed.

In Ground Two, Parks finally alleges that Goldstein failed to object to a sentence that amounts to cruel and unusual punishment, supplying data that suggests the sentence is disproportionate. However, that supplemental data fails to take into account the fact that the district court pronounced its sentence based on the seriousness of Parks offenses. Likewise, Parks' data comparing her sentence to other

sentences (in Nevada and other jurisdictions) fails to take into account the number of Parks' victims or the age and vulnerability of Parks' victims. The sentence imposed in Parks' case is within the statutory range for her offenses. The minimum sentence imposed (16 years) is below the upper third of what the court could have imposed (25 and one-half years). The maximum term imposed (40 years) is also below two-thirds of the possible maximum sentence (64 years) for the offenses. The sentence imposed reflects the trial court's findings that the sentence imposed reflects the seriousness of the crimes and Parks' culpability compared to her co-defendants.

In Parks' final claim (Ground Three), challenges alleges that Goldstein's failure to file a notice of appeal. However, after hearing the testimony of both Parks and Goldstein, the district court concluded that Goldstein was not ineffective after finding that Goldstein met with Parks to discuss her options and Parks never expressly requested an appeal.

This Court should affirm.

ARGUMENT

I. THE RELEVANT LAW

A. The Standard of Review

Review of the denial of a habeas corpus petition presents a mixed question of law and fact. *See, Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). This Court gives deference to a district court's factual findings "so long as they are

supported by substantial evidence and are not clearly wrong." *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), *see also, Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). The Court reviews the district court's application of the law *de novo*. *See, Gonzales v. State*, 492 P.3d 556, 562 (Nev. 2021).[4]

B. Ineffective Assistance of Counsel In General

In order to establish a claim of ineffective assistance of counsel, a petitioner must demonstrate: (1) that counsel's conduct fell below an objective standard of reasonableness; and (2) actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 432–33, 683 P.2d 504, 505 (1984) (adopting the standard in *Strickland*). A reviewing court "may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (*citing Strickland*, 466 U.S. at 697).

C. Evaluating Counsel's Effectiveness During a Plea

The entry of a guilty plea by a defendant must be knowing, intelligent, and voluntary. *Molina v. State*, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004).

The United States Supreme Court found that the two-part test in Strickland applies to counsel's performance during plea bargaining. *Hill v. Lockhart*, 474 U.S.

[4] 137 Nev. Adv. Op. 40.

52, 58 (1985). “The first part of the inquiry is whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.” *Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2020), *citing Lockhart*, 474 U.S. at 56 (internal quotation marks omitted). A petitioner demonstrates prejudice by showing that “counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Lockhart, 474 U.S. at 59.

In 2012, the Court issued two opinions applying *Strickland* during the plea process. *Lafler v. Cooper*, 566 U.S. 156 (2012), *Missouri v. Frye*, 566 U.S. 134 (2012). In *Frye*, the Court found that defense counsel has a duty to communicate formal plea offers and that allowing a plea offer to expire without communicating the offer to the client constitutes deficient performance. 566 U.S. at 145. In *Lafler*, the Petitioner (Michigan) conceded ineffective assistance where counsel provided objectively deficient advice (as opposed to merely incorrect advice) when advising his client to reject the State’s plea offer. 566 U.S. at 166. But for the deficient advice, the petitioner would have accepted the plea offer and received a lighter sentence. 566 U.S. at 160-61.

The ultimate decision to accept or reject an offer belongs to the defendant. *See, Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring).

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D. Evidentiary Hearings

To obtain an evidentiary hearing, a defendant must present specific factual allegations that, if proven to be true, would entitle him to the relief he seeks. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "In instances where a defendant's claim is neither belied by the record, nor procedurally or doctrinally barred, the district court should conduct an evidentiary hearing." *Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

E. Appeal Deprivation Claims

In order to demonstrate deficient performance for failing to file a timely notice of appeal, this Court found there are "two separate, but related, components: counsel's duty to inform and consult with the client regarding the right to appeal and counsel's duty to file an appeal." *Toston v. State,* 127 Nev. 971, 977, 267 P.3d 795, 799 (2011).

Counsel does not have a constitutional duty to always inform his client of the right to an appeal when the conviction results from a guilty plea. *Id.,* (*citing Thomas v. State*, 115 Nev. 158, 150, 979 P.2d 222, 223 (1999)). In the guilty plea context, the attorney's duty arises when "the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the

right to a direct appeal." *Id.*

Under *Toston,* there exist two circumstances when counsel possesses a duty to file an appeal: (1) when the client requests an appeal; and (2) "when the defendant expresses dissatisfaction with his conviction." *Toston,* 127 Nev. at 978, 267 P.3d at 800, *citing Lozada v. State,* 110 Nev. 349, 354-57, 871 P.2d 944, 947-49 (1994). Failure to file an appeal in these cases constitutes deficient performance under a *Strickland* analysis. *Id*. In contrast, there is no duty to file an appeal if counsel consults with the defendant and no appeal is requested.

Addressing the same issue, the United States Supreme Court found that whether counsel's failure to file a notice of appeal constituted deficient behavior is best by first asking whether counsel "consulted with the defendant about an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). "Consulting" means discussing "the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Id*. The Court found counsel who consulted with his client about an appeal performs deficiently by "failing to follow the defendant's express instruction with respect to an appeal." *Id*.

II. PARKS' COUNSEL PERFORMED EFFECTIVELY DURING THE PLEA PROCESS

A. Parks' Claim

1.) Parks' petition in the district court

In Ground One, Parks presented a claim that Goldstein "advised Petitioner to

reject a more favorable plea deal and Petitioner was subsequently sentenced to a much longer period of incarceration." 1 AA 141.

In the argument supporting the claim, Parks alleged "The decision to reject the stipulated eight to twenty year sentence was the product of ineffective assistance of counsel. Petitioner received inaccurate and unprofessional advice concerning that offer and only rejected it on that basis." *Id*. at 143.

Now, after facing rejection of that claim in the district court, Parks presents new argument for the first time on appeal.

2.) The district court rejected Parks' claim without a hearing

After the parties presented argument on Ground One of Parks' petition, the district court found Parks failed to demonstrate deficient conduct or prejudice under Strickland regarding Goldstein's performance regarding the change of plea. 6 AA 1022. The court entered the following findings: (1) In the plea agreement, Parks specifically rejected the stipulated sentence of 8-20 years; (2) The court canvassed Parks on the rejection, as well as the fact that she could receive any legal sentence; and (3) sentencing was strictly up to the court. 6 AA 1022, 1079.

Parks never received an evidentiary hearing because "the record contains no evidence of constitutionally deficient advice by trial counsel that Parks relied on to her detriment. *Id*. at 1080 (*citing Lafler*, 566 U.S. at 164). Parks' petition never presented facts justifying an evidentiary hearing. *Hargrove*, 100 Nev. at 502, 686

P.2d 222.

The district court properly applied *Strickland* to Parks' Ground One claim. The district court found neither deficient conduct nor prejudice.

Now, Parks changes her presentation of Ground One in this Court.

B. Parks' brief presents a different claim to this Court

In her opening brief, Parks presents the same heading as presented in Ground One of her state court petition: Trial counsel was ineffective "by advising Parks to reject a more favorable plea deal and Parks was subsequently sentence to a much longer period of incarceration." OB at 30.

However, Parks abandons her losing argument from below and now argues:

> 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.

OB at 31-32.

This argument can now be read two ways: First, Parks asserts a "new" Ground One claim (asserting a cumulative error argument based upon alleged deficient advice and failure to perform adequately at sentencing). This claim is not properly before the Court. This new claim fundamentally changes Parks' Ground One claim, as explained below.

Second, Parks' claim can be read as "new argument." In other words, counsel provided strategic advice and did not follow through with the performance needed to ensure Parks received a successful outcome.

In either case, Parks' Ground 1 fails.

1.) Parks' "new" claim is not properly before this Court

Parks' claim before this Court is substantially different than the claim presented in the district court. In fact, the change in the claim alters the claim so substantially, that it changes the relief available were this Court to address the claim and reward relief.

In Parks' original claim in the district court, the remedy upon a finding of ineffective assistance of counsel for deficient advice during plea negotiations is reoffering the rejected plea agreement. *See, Lafler v. Cooper*, 566 U.S. 156, 174 (2012).

In Parks' claim—as argued in the opening brief—the appropriate remedy based upon a finding of ineffective assistance of counsel for failure to prepare for the sentencing hearing, would be a new sentencing hearing (instead of reoffering the rejected plea agreement). *See, Gonzales v. State*, 492 P.3d 556, 564 (Nev. 2021),[5] *citing Weaver v. Warden*, 107 Nev. 856, 859, 822 P.2d 112, 114 (1991).

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[5] 137 Nev. Adv. Op. 40.

In prior decisions of the Court, addressing post-conviction claims raised for the first instance on direct appeal, the Court requires a showing of cause and prejudice regarding the failure to raise the claim in the district court. *See McNelton v. State*, 115 Nev. 396, 415-17, 990 P.2d 1263, 1275-76 (1999), *citing to Hill v. State*, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

In her brief, Parks presents no cause or prejudice to overcome her failure to argue this claim in the district court in the first instance. Therefore, Respondent requests the Court to decline addresses Parks' new claim and instead affirm the district court denial of the claim as argued before that court.

2.) Parks' Ground One claim as same claim, but new argument

In her petition, Parks alleged:

> The decision to reject the stipulated eight to twenty year sentence was the product of ineffective assistance of counsel. Petitioner received inaccurate and unprofessional advice concerning that offer and only rejected it on that basis. Had the risks and benefits of that offer been fully and correctly explained to Petitioner, she would have accepted the original offer.

1 AA 143.

In her opening brief, Parks now argues:

> 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.

OB at 31-32.

Parks then asserts, what Goldstein should have said, or should have done at sentencing, moving beyond the allegation of advice to 'reject the stipulated sentence.' *Id*. at 32-36. Parks concludes that appropriate relief is to mandate a "re-offer" of the stipulated sentence.

However, for several reasons, Parks' fails to demonstrate either deficient conduct or prejudice under *Strickland*.

C. Despite the new argument Parks' claim still fails

The first reason this Court should affirm the district court is the same reason that Parks' claim failed below: Despite the new argument, the same glaring absence in Parks' state court petition, is still present here. Parks assumes, but never presents, evidence that Goldstein advised Parks to reject the plea.

1.) Parks presents no facts beyond conclusory statements establishing Goldstein provided deficient advice

Parks signed off on the plea agreement and advised the court during the plea colloquy that she affirmatively rejected the plea. 1 AA 176, 192-93.[6]

[6] Parks' argument that Parks was only advised that the State may argue for a higher sentence (OB at 32) is nothing but a red herring. Logically, would the State at sentencing argue for a lower sentence than they bargained for? As equally illogical, would the State argue for the same sentence that they bargained for?

When the parties argued the merits of Ground One before the district court, Parks failed to establish "factual allegations that would, if true," warranted an evidentiary hearing. *Hargrove*, 100 Nev. at 502, 686 P.2d 222. Parks failed to allege in the district court beyond conclusory statements—and what she continues to fail to allege in her brief, remains. First, Parks never presents any court with *actual advice,* Goldstein gave Parks. Second, Parks never explains *why* the advice allegedly given by Goldstein rose to a level of constitutionally deficient advice?

Absent any facts supporting Parks' claim that Goldstein provided constitutionally deficient advice, the district court denied Parks' Ground One claim without conducting an evidentiary hearing. 6 AA 1022. That court found Parks specifically rejected the stipulated sentence, and further found the court inquired into Parks' rejection of the stipulated sentence during the plea hearing. 6 AA 1022.

Parks' opening brief again presents no facts supporting the claim that Goldstein provided constitutionally deficient advice. OB 30-37. In *Lafler*, the attorney told his client that the State "would be unable to establish intent to murder." 566 U.S. at 161. Parks opening brief never states what Goldstein said that resulted in Parks' rejecting the stipulated sentence. OB 30-37.

Parks also complains that the State asked for a maximum sentence. *Id*. In a right to argue situation logic dictates the State argues for a high sentence, the defendant argues for a low sentence, and the court usually settles for something in the middle. It is no surprise that this happened in Parks' case.

In addition to presenting no facts establishing deficient conduct, Parks failed to demonstrate prejudice under *Strickland*, should the Court choose to address prejudice.

In order to demonstrate prejudice during plea proceedings, a petitioner "must show that there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (*citing Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Parks obviously cannot demonstrate prejudice in that manner. However, under *Lafler* she could demonstrate that both Parks would not reject the stipulated sentence *and* that the court would have accepted the plea offer. *Lafler*, 566 U.S. at 164.

While it is obvious that Parks in hindsight would accept the stipulated sentence, Parks presented no evidence or argument in her brief that the district court would have accepted the plea.

D. The District Court Did Not Err When Denying Park's Claim Because Parks Failed to Demonstrate Deficient Performance and Prejudice

The record supports this Court's affirming counsel's conduct was not constitutionally deficient.

The plea agreement signed by Parks specifically stated, "I reject a stipulated aggregate sentence of eight (8) to twenty (20) years concurrent to each other on this case and Case No. C329886, and understand the State may argue for more than that

stipulated sentence." 1 AA 177. The plea agreement also clearly stated the sentencing ranges for each charge, as well as the fact that any sentence imposed included the possibility of probation. *Id*. at 178-79.

Likewise, the court's plea canvass of Parks confirmed that Parks rejected the stipulated sentence and that Parks understood "the State may argue for more than that stipulated sentence." *Id*. at 193. The court also reviewed the sentence range for each charge, as well as the fact that the sentences permitted suspension of the sentences and probation. 1 AA 196-97. The court also asked, and Parks understood that sentencing was at the sole discretion of the court, and that whether the sentences "run consecutive or concurrent to each other" was also at the discretion of the court. *Id.* at 197.

The court found Parks' pleas knowing, intelligent, and voluntary. *Id*. at 203.

1.) Parks received effective assistance of counsel

In Ground One, Parks alleges Goldstein "advised Petitioner to reject a more favorable plea deal." 1 AA 141. However, Parks' pleading in the district court and the brief before this Court ignore the proverbial 'elephant in the room'—what did Goldstein advise Parks, and what made it "constitutionally deficient" advice. Absent an allegation that Goldstein gave Parks advice that fell below a constitutional standard, Parks cannot satisfy the deficient conduct prong of *Strickland*.

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The record reflects that reflect that Parks' plea "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Stevenson v. State*, 131 Nev. 598, 604-05, 354 P.3d 1277, 1281 (2015), *citing to Doe v. Woodford*, 508 F.3d 563, 570 (9th Cir. 2007).

Additionally, while Goldstein opined about the offers Parks received, the advice at worst amounted to an inaccurate prediction on the outcome of sentencing, as opposed to 'deficient advice' that violated the constitution.

2.) Examples of "constitutionally deficient advice"

In *Lafler*, the Court addressed a case involving constitutionally deficient advice. In that case, the State charged Respondent Anthony Cooper with charges including assault with intent to murder. 566 U.S. at 161. The prosecution's plea offer included an offer to dismiss some of the charges and a sentencing recommendation of 51 to 85 months. *Id*.

Cooper's attorney told him to reject the plea offer—including a less favorable offer extended before trial—explaining "that the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist." *Id*. The jury convicted Cooper and the court imposed a sentence of 185 to 360 months imprisonment. *Id*.

The Court in *Hill v. Lockhart* also addressed *Strickland* in the plea context, finding the attorney's advice to his client constitutionally deficient when he

informed the client that "he would become eligible for parole after serving one-third of his prison sentence." 474 U.S. 52, 55 (1985). In reality, petitioner was not parole eligible until serving one-half of his sentence because he was considered a repeat offender under state law. *Id*.[7]

3.) "Wrong strategic advice" differentiated from "constitutionally deficient" advice

Contrasting Parks' case with the petitioners in *Lafler* and *Lockhart*, Parks points to no specific advice offered by Goldstein that was constitutionally deficient. However, Parks failed to demonstrate that Goldstein's opinion constituted "constitutionally deficient advice."

An opinion about which of two options to choose (in the absence of any advice that actually is constitutionally defective), at best falls into the category of "wrong strategic advice."

The Ninth Circuit addressed the implications of constitutionally deficient advice from counsel. *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002). Discussing a Supreme Court case, the panel in *Turner* found the issue not whether "counsel's advice [was] right or wrong:" Instead, counsel must "give the defendant the tools he needs to make an intelligent decision." 281 F.3d at 881, *citing McMann v. Richardson*, 397 U.S. 759, 771 (1970).

[7] The Court denied relief because the petitioner failed to satisfy the prejudice prong of *Strickland*. *Id.* at 60.

Therefore, in order to demonstrate ineffective assistance, the petitioner must demonstrate that the attorney's advice "was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the [plea] offer." *Turner*, 281 F.3d at 880 (internal citation omitted).

The decision in *Turner* reads harmoniously with the Supreme Court's guidance to reviewing courts in *Strickland*; review of counsel's performance must be deferential, and "it is all too easy for a court" to engage in review by hindsight. 466 U.S. at 689. As in *Turner*, Parks does not allege that Goldstein failed to "inform [her] about the plea offer" or "affirmatively misled [her] about the law." 281 F.3d at 880.

That Parks chose incorrectly is not the question, wrong choices are made by litigants daily across the country. Instead, this Court must determine whether Goldstein gave Parks the information needed to make an informed choice. Counsel need not accurately predict outcomes, nor need they "'strongly recommend' the acceptance or rejection of a plea offer." *See, Turner*, 281 F.3d at 881.

Whether Goldstein gave Parks the information needed to make an informed choice in this case must be answered in the affirmative. Neither Parks' petition nor her brief alleges facts to the contrary.

Additionally, whether the Court views Ground One on appeal as stating a new "hybrid" cumulative error-type claim or merely views Parks presented a new

argument on appeal, the result is also the same: Parks failed to state that counsel provided specific, advice that was "so insufficient" that it impaired Parks' ability to make an informed choice among the alternatives. Instead, the record reflects that Parks made an erroneous decision and now seeks a do-over.

Parks' first claim fails to establish deficient conduct or prejudice under *Strickland*. The district court properly found that Parks' attorney performed adequately during her entry of plea.

III. PARKS CANNOT DEMONSTRATE COUNSEL PERFORMED DEFICIENTLY AND THAT COUNSEL'S PERFORMANCE RESULTED IN PREJUDICE DURING SENTENCING

A. Parks' Claim

Parks next alleges that trial counsel was ineffective at sentencing. OB at 37.

In her petition Parks' alleged counsel was ineffective for failing to object to the lack of notice regarding victim speakers and allegedly improper comments by the victim speakers. 1 AA 145, 153-59. Parks next alleged in the district court that counsel failed to object to improperly computed restitution. *Id*. at 160-64. Parks also alleged counsel was ineffective for failing to object to argument by the State or failing to challenge a purportedly inappropriate sentence. *Id.* at 146-52, 164-68.

B. The District Court Rejected Ground Two

Denying Ground Two, the district court found that Parks suffered no prejudice from the allegations that counsel failed to object because the sentence imposed by

the court addressed "the seriousness of the allegations against Parks, rather than any allegedly improper argument by the State or inappropriate comments by victims." *Id*. at 1080.

Furthermore, the court specifically rejected the sentences recommended by the PSI and Parks' sentencing memorandum "and imposed what the Court found was an appropriate sentence." *Id*.

In her brief before this Court, Parks alleges that the district court denied Ground Two with a "closed mind." OB at 53-54. Contrary to Parks assertion, and as discussed below, the record and the law repel Parks' claims.

C. Affirmance of the District Court's Rejection is Proper Because the Record Supports the District Court's Finding of No Prejudice

The record supports the district court's finding of no prejudice under *Strickland.*

1.) Alleged failure to object to notice of victim statements

Parks alleges that Goldstein failed to challenge the lack of notice concerning victim speakers. OB at 48-50. In support of her arguments, Parks cites NRS 176.015(3) and *Buschauer v. State*, 106 Nev. 890, 804 P.2d 1046 (1990).

Nevada law permits the victim to address the court at sentencing. NRS 176.015(3). Subsection (4) requires the prosecutor to provide notice to victims. In *Buschauer*, the Court held notice to a defendant is required *if the impact statement includes reference to specific prior acts of the defendant*. 106 Nev. at 894, 804 P.2d

at 1048. The Court also held that in instances where such prior bad acts evidence would be offered, due process required swearing in the witness, an opportunity for cross-examination, as well as notice regarding the prior bad acts. *Id*.

However, the state court record refutes the claim of ineffective assistance of counsel for failure to object to notice. As Parks concedes in her brief, counsel objected to the lack of notice. OB at 48 (citing 2 AA 315).

In order to prove ineffective assistance for failure to object, Parks must prove deficient performance by counsel, and that the deficient performance resulted in prejudice. *See, Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) (*citing Strickland*). In order to prove that counsel was ineffective for failing to object, Parks must of necessity prove that Goldstein failed to object to lack of notice of the victim speakers. However, Goldstein objected to the lack of notice. 2 AA 315. Since Goldstein did what Parks alleged he did not do, the record refutes Parks' allegation of ineffective assistance of counsel for failure to object to a lack of notice. There is no need to examine the prejudice prong regarding this claim. *Means*, 120 Nev. at 1011, 103 P.3d at 32.

The record supports the district court's rejection of this claim.

2.) Counsel's failure to object to comments of victim speakers

Parks next alleges that counsel was ineffective because Goldstein failed to object to comments made by victim speakers. OB at 49.

As an accommodation to the lack of specific notice of the victim speakers, the district court permitted the defense "the right to make the appropriate objections and I will rule on them at that time."

The sentencing hearing addressed the sentences for Parks and two co-defendants—each represented by their own counsel. 2 AA 267. In her brief, Parks alleges that "substantial testimony" went beyond what is authorized by the statute. OB at 49. While the argument section of Parks' brief cites two specific examples of inflammatory references (OB at 49), as well as citing in general to information which "was objectively untrue." Parks cannot satisfy her burden under *Strickland* of demonstrating counsel's ineffectiveness for failure to object. Assuming *arguendo* that Goldstein should have objected to comments by victim speakers, she cannot demonstrate prejudice.

The district court concluded that Parks cannot demonstrate prejudice because the court pronounced sentence based upon the seriousness of the charges, as opposed to any allegedly improper comments by victims. 6 AA 1080 and at 1022-23. A court need not address both prongs of the *Strickland* analysis if a petitioner failed to satisfy the first prong addressed by the court. *Means,* 120 Nev. at 1011, 103 P.3d at 32.

Parks failed to demonstrate counsel was ineffective for failing to object to allegedly improper comments from the victims who addressed the court at Parks' sentencing hearing.

3.) Parks cannot prove ineffective assistance of counsel for failing to object to allegedly improper argument by the prosecution at sentencing

For the same reason the district court denied Parks' allegation of ineffective assistance of counsel for failure to object to victim comments, so too must this Court affirm the district court's denial of Parks' allegations that Goldstein was ineffective for failing to object to argument by the prosecution.

In her brief, Parks alleges Goldstein failed to object to: (1) the prosecution's sentencing argument that Parks showed no remorse because she entered an *Alford* plea (OB at 43-45); (2) the prosecution's argument in the sentencing memorandum "that several individuals never 'actually needed guardianship services'" (*id*. at 45-46); (3) the prosecution's arguments about the number of charges or the legislative history behind the elder exploitation statutes (*id*. at 46-47); and (4) argument that the legislature intended harsher punishments for serious thefts and exploitation offenses because of the sentencing ranges for the crimes. *Id*. at 47-48.

Again, assuming arguendo that the prosecution's argument warranted an objection,[8] Parks fails to demonstrate prejudice under *Strickland*. The plea agreement permitted the State to argue, and the district court to consider at sentencing, "information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement." 1 AA 179.

[8] Respondents do not concede this fact.

The district court concluded that Parks failed to demonstrate prejudice because the court based its sentence on the allegations against Parks as opposed to improper argument.

Additionally, it is questionable whether the State's comments were inappropriate.

The legislative history for the elder abuse statutes reflects that intentionally obtaining money or property of an elderly person "through deception, intimidation or undue influence is a serious crime," and that higher penalties were available "for more serious cases." 3 AA 450. Logically, the facts supported an argument by the State that taking around a half million dollars from elderly and vulnerable victims through deception constituted a serious crime.

If the legislative history reflects that Parks plead to serious offenses, how can Parks argue that counsel should have objected to the State's argument that Parks committed serious crimes that deserved a sentence higher than what the State agreed to stipulate to in order to resolve the case?

Finally, an *Alford* plea permits a party to protest innocence, but requests the court treat a party as guilty. *See, State v. Gomes*, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996). Parks' brief argues that an Alford plea is not equivalent to a lack of remorse but fails to cite authority for the argument. OB at 44. In support of her claim of deficient conduct, Parks cites *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) on

page 45 of her brief. However, *Bordenkircher* prohibited the State from seeking a vindictive sentence against a defendant in a subsequent proceeding who successfully challenged a prior conviction and obtained a new trial. *Id*. at 362-63.

Additionally, the State presented their allegedly objectional argument before Parks' allocution. 2 AA 271 (State's argument); 2 AA 292 (Parks' allocution).

The district court did not need to consider deficient conduct because it rejected Parks' arguments that sought to establish prejudice. *Means*, 120 Nev. at 1011, 103 P.3d at 32; 6 AA 1080. However, should this Court review the performance of Goldstein at sentencing, he cannot be found to have performed deficiently for failure to object to the State's arguments. Those arguments constituted permissible comments upon the nature of Parks' offenses, her *Alford* plea, the victims' vulnerable natures, the amount of money stolen, and the view of the evidence presented before the Legislature that the offenses are serious in nature.

4.) Counsel's failure to challenge the amount of restitution

Parks alleges that Goldstein was ineffective for failing to challenge the restitution amounts. OB at 38. In the brief, Parks alleges that certain victims already received restitution and that restitution was ordered without identification of specific victims. *Id*.

The plea agreement reflects a total restitution amount that contains both a clerical error and an arithmetic error that transferred over to the original Judgment

of Conviction. The Amended Indictment, attached to the plea agreement, lists one victim twice. 1 AA 187 and 188 (listing William Flewellen twice as a victim, with the same amount of restitution in each case). This error transferred over to the Judgment of Conviction, which listed William Flewellen twice. 2 AA 259. The Amended Judgment of Conviction corrected this error. *See, id*. at 262; RA 22.

The arithmetic error in the plea agreement consists of an error in the total amount of restitution due. The amended information breaks down restitution due by count and victim. 1 AA 184-90. However, after taking out the double listing of William Flewellen, the total restitution due victims pursuant to the amended information is $412, 943.02. *Id.*

In her brief, Parks alleges that some nefarious scheme resulted in the difference between the itemized amount of restitution due each victim and the aggregated total. OB at 40.

While remand for a corrected or amended judgment of conviction to correct the restitution amount is appropriate, Parks' reliance on *Buffington v. State*, 110 Nev. 124, 868 P.2d 643 (1994), and *Botts v. State*, 109 Nev. 567, 854 P.2d 856 (1993), for a finding that a restitution error requires a completely new sentencing hearing, is misplaced.

In *Buffington*, the defendant initially appealed his judgment and conviction and sentence because the original Judgment of Conviction failed to comply with

Nevada law by setting forth restitution in a specific amount for "each victim of the offense." 110 Nev. at 125, 868 P.2d at 644. On appeal, the Court remanded "for resentencing 'to include a specific amount [of] restitution for each of appellant's victims.'" *Id*.

The district court then resentenced Buffington, entering an Amended Judgment, ordering restitution in specific amounts. *Id*. However, that hearing occurred eight days prior to remitter issuing from the Court, when the district court lacked jurisdiction to sentence. 110 Nev. at 125-26, 868 P.2d at 644.

Buffington appealed again, attacking the Amended Judgment and this Court remanded again for resentencing. *Id*. at 126, 128, 868 P.2d at 644-45.

In *Botts*, while the Court found the restitution amount failed to set forth restitution with specificity, the Court remanded for resentencing because of the fact that the district court entered a judgment containing illegal sentences. 109 Nev. at 568, 854 P.2d 857 (setting for alternative sentences of a flat 60 years and life with the possibility of parole after 20 years, when the statute set forth a sentence of life with the possibility of parole after 10 years).

The federal law cited by Parks also creates no mandatory resentencing for a Nevada sentence. OB at 41. Rather, the federal court uses the amount of restitution to potentially enhance a sentence under the federal guidelines. *See, United States v. Burns*, 843 F.3d 679, 689 (7th Cir. 2016) (loss number enhanced sentence 18 levels).

Parks stole an incredibly large amount of money from a large amount of incredibly vulnerable and elderly victims. The court stated:

> Ms. Parks, I have to say there is no one in this room who is more culpable than you. And the things that I have heard today that you did to these people is just absolutely shocking that one can continue to go about their life and engage in these activities and watch these people suffer. And you said when you spoke, that you never intended to bring any harm to anyone. I cannot fathom how you think that the actions that occurred at the hand of you did not intend to bring any harm to anyone.
>
> These people that have Scotch taped their shoes together, these people that are being charged for getting Christmas gifts, these people that don't have food to eat, how is that not bringing harm to them. And to hear from the people who actually are able to be present today is just absolutely shocking to me that you continued in this behavior. And you went to court and these documents were failed and at no point did anything occur to you until this investigation happened that this is absolutely not appropriate. The actions that you took in this case are just downright offensive.

2 AA 386.

The court imposed its sentence on Parks based upon the seriousness of the allegations, rather than alleged inappropriate argument. 6 AA 1080. Parks presents no argument that the prison sentence in her case was intertwined with restitution that necessitates an entirely new sentencing hearing to correct the aggregate restitution amount in the Amended Judgment of Conviction. See, NRS 176.565.

The State requests the Court reject Parks' claim that a new sentencing hearing

is necessitated when the district court can enter a corrected judgment to fix the arithmetic error regarding the aggregated amount of restitution.

5.) Counsel's failure to challenge the reasonableness of the sentence

Parks' final allegation against Goldstein alleges he failed to object to the "reasonableness of the sentence," which "constituted cruel and unusual punishment." OB at 50-53.

In her brief, Parks alleges "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. OB at 51-52. Parks continues by alleging "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." *Id*. at 52 (citations omitted).[9]

In Claim Two of her supplemental petition, Parks never alleged that Goldstein was ineffective for failing to file a motion for reconsideration, or a new trial (although Parks' Ground Three alleges a failure to file a direct appeal). 1 AA 164-68. Respondents request the Court reject Parks' arguments raised for the first time on appeal. *See*, II(A)(3) above; *see also, McNelton*, 115 Nev. at 415-17, 990 P.2d at 1275-76.

[9] Parks also presents contradictory claims, alleging that the Court must compare the sentence to same or similar crimes, but then states that "Courts must sentence defendants individually." *Id*.

This Court holds that "A sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (citations omitted); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (The Eighth Amendment does not require strict proportionality, it only forbids "extreme sentences that are 'grossly disproportionate' to the crime.").

While Parks attempts to offer comparisons to sentences rendered in other cases (OB at 52-53 (citing 4 AA 689-91)), Parks' comparisons fail to take into account the number of victims in her case, the age and vulnerability of her victims, the breach of her duty as the guardian for her victims, as well the fact that she acted under color of law when appointed by the courts to care for the assets of her wards.[10] The district court rejected Parks' presentation of this comparison information, finding that it would not have altered the sentence imposed by the Court.

In this case, Parks pled to 2 counts of exploitation of an older/vulnerable person (carrying a sentence of 2-20 years); 2 counts of theft (carrying a sentence of

[10] Parks also alleges that the prosecution abused it authority when charging the case. However, the information filed in this matter reflects that an organ independent of the prosecutors (the grand jury) found evidence sufficient to indict Parks.

1-10 years); and 1 count of perjury (carrying a sentence of 1-4) years.[11] Parks faced a maximum exposure of 64 years in prison if the court ran all sentences consecutive. If the court imposed the maximum minimum term, Parks faced just under 26 years in prison (307 months) before becoming eligible for parole.

The district court did not impose the maximum possible sentence. However, the sentence imposed reflected an appropriate sentence given the serious nature of her crimes (*see* 3 AA 450), the number of victims, the age and vulnerability of her victims), as well as the assets taken from her victims. The sentence imposed reflects a sentence about two-thirds of the maximum possible sentence, a reasonable sentence that takes into account all the relevant information about Parks' crimes.

The sentencing transcript reflects the district court's dismissal of the recommendation in the presentence investigation report, finding: (1) Parks was the most culpable of the co-defendants; (2) Parks' actions were shocking; (3) rejection of Parks' comment that she "never intended to bring any harm to anyone"; (4) finding Parks' actions "downright offensive." 2 AA 386.

The district court rejected Parks' claim that counsel was ineffective for failing to present comparative information, finding that the sentence imposed would not have changed even if counsel presented that information. 6 AA 1022, 1080.

[11] This does not take into account the sentence she faced in case number C329886.

Parks cannot demonstrate that counsel's failure to present comparative information regarding other theft sentences resulted in prejudice. The information presented failed to take into account key information such as the number and types of victims, attempting to gloss over the fact that Parks made victims out of some of the most vulnerable citizens of Nevada.

6.) Conclusion

Parks alleges the district court "was not open to consideration of Parks' evidence," focusing on a single quote of the court. OB at 53.

When rejecting Parks' claim after argument, the court found:

> This Court is not in any way bound by a recommendation from the Division of Parole and Probation. It is simply that, a recommendation. And they don't even include them anymore in the Presentence Investigation Reports because sentencing is strictly up to the Court. And this Court utilized its discretion and gave the sentence that I believe was deserving of those crimes.

6 AA 1022-23.

The court based its sentence upon the allegations against Parks, as opposed to allegedly improper argument or comments (and the failure to object to the argument/comments). *Id.* at 1080. The court's finding that Parks' arguments would have had no effect on the sentence imposed do not reflect a closed mind. Rather, the court's finding demonstrates that Parks failed to demonstrate prejudice under *Strickland*.

IV. PARKS NEVER REQUESTED AN APPEAL, THEREFORE SHE FAILED TO ESTABLISH COUNSEL WAS INEFFECTIVE

A. Parks' Claim

In her petition, Parks alleged that trial counsel was ineffective because counsel deprived her of her right to a direct appeal. 1 AA 169. In support of her claim, Parks attached exhibits to her petition including: (1) a January 21, 2019, letter from Parks to counsel requesting him to proceed on "a sentence modification" (4 AA 682); and (2) a response letter from counsel Anthony Goldstein to Parks reminding her of a discussion that occurred after the sentencing hearing, reminding Parks about the filing of a habeas corpus petition in order to obtain relief from her sentence. 4 AA 683.

After briefing and argument from the parties, the district court conducted an evidentiary hearing on this claim. 6 AA 1023.

B. The Evidentiary Hearing

At the March 18, 2021, evidentiary hearing, Anthony Goldstein and Parks testified. 6 AA 1024.

1.) Goldstein's testimony

Mr. Goldstein testified that he became a licensed attorney in Nevada in 2001, and at present practices exclusively in the area of criminal defense. 6 AA 1029.

After Parks' sentencing hearing, Goldstein testified that he spoke with Parks briefly in the courtroom, stating that he would visit her. *Id*. at 1033. Goldstein

testified that to the best of his memory, Parks did not ask for an appeal at that time "because that would have for sure raised a red flag in my head." *Id*. Goldstein explained the flag would have been raised "because that triggers my responsibility to do something, and I would have remembered if she had said something like that at the hearing like I want you to appeal." *Id.* at 1033-34. Goldstein emphasized that the flag would have been raised "especially, you know, moments after hearing the sentence." *Id*. at 1034.

Goldstein testified that to the best of his recollection, the subsequent meeting with Parks took place a couple days after sentencing. *Id*. at 1034-35. Goldstein first went through the sentence with Parks to "make sure she understood the length of the sentence and just ask her if she had any questions." *Id*. at 1035. Goldstein added "I commonly do that in a—after a sentencing like that," but then added that this was actually a unique situation with the number of people in the courtroom and the media attention. *Id*. Goldstein characterized Parks' demeanor as "shell-shocked" and that "she was surprised at the amount of time given, I think." *Id*.

During the meeting, Goldstein discussed a motion to modify sentence with Parks because of Parks' hope for a much lighter sentence. Goldstein described his conversation with Parks regarding her options and potential issues/problems, summing up that successfully challenging a sentence that was higher than hoped for was unlikely because "it wasn't an illegal sentence, it was just higher than expected

or hoped for." *Id.* at 1036.

When asked if Parks specifically asked for an appeal, Goldstein replied: "No, I mean, we talked about—I know we talked about modifying the sentence, but if she had discussed—if she had asked for an appeal, I mean, I have a duty to file it and I would have filed it." *Id*. at 1037.

Goldstein also commented on the viability of an appeal and his obligations as her attorney:

> There weren't grounds. I mean, I—being the—being her trial counsel and having—I'd been her attorney for quite some time at that point, I mean, I knew how the plea went down, I knew how many times I had visited her to discuss the deal. I visited her the—a day or two before sentencing—I think it was the actual day before—just to make sure if she had any—answer any last minute questions. So, to—in my head there weren't any legitimate legal grounds for appeal.
>
> And I understand that regardless of the existence of grounds, *if a defendant asks for an appeal, I have to file it*. There's no—it's not my decision, it's hers regardless of the existence of legal grounds, but I—*she definitely never asked for one or I would have filed it.*

Id. (emphasis added).

Goldstein also believed the plea agreement included a waiver of appellate rights, and without reviewing the plea transcript prior to the hearing, believed the plea agreement contained a waiver of Parks' appellate rights. *Id*. at 1038, 1043-44.

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Goldstein opined to Parks that "the only legitimate mechanism" for challenging her sentence consisted of filing a post-conviction habeas petition, although Goldstein also believed that no legitimate grounds existed for such a petition. *Id*.

Goldstein identified the letter from Parks, as well as his January 30th reply. *Id*. at 1039-40. Goldstein stated that during his conversation with Parks, he specifically used the phrase "sentence modification." *Id*. at 1040-41.

Goldstein added that during his conversation with Parks post-sentence, "if I had thought that she wanted me to file an appeal but didn't use the word appeal," he would have inquired further to ascertain her intent. *Id*. at 1043. Goldstein also stated that if Parks asked him to file a notice of appeal, he would have filed the notice of appeal despite Parks' waiver of her appellate rights, knowing that such an appeal may have been subject to a motion to dismiss by the prosecution. *Id*. at 1045.

Goldstein addressed his practice of resolving ambiguity regarding requests for an appeal, stating that he questions a defendant to resolve ambiguity. *Id*. at 1048-49. Goldstein also stated that he would not talk a client out of filing an appeal. *Id*. at 1050.

2.) Parks' testimony

Parks testified that at the sentencing hearing, she did not understand the sentence the court imposed. *Id.* at 1055. Parks stated that after the sentencing she

told Goldstein that she wanted to appeal. *Id*. at 1056. Parks stated that she did not express her feelings to Goldstein about the sentence because "I'm not a huge feeling person." *Id.* at 1057. Parks stated that her concern was being at home with her daughter. *Id*.

Parks confirmed that Goldstein visited with her to discuss options. *Id.* Parks stated that "We just discussed different things that could be done. I don't remember specifically terms used, but I know that he told me once I got to prison to contact him." *Id.* at 1059.

When asked by counsel whether she used the word "appeal" during the conversation, Parks only guessed at the possibility by responding "I would assume that I did." *Id.* at 1060. However, Parks confirmed Goldstein's testimony that they discussed the possibility of sentence modification. *Id*.

Parks wrote to Goldstein in order to get him moving "on whatever process he wanted—he would—we would like to move forward with." *Id*. at 1062. Parks stated that the letter from Goldstein contained the statutes regarding the post-conviction process and that they discussed that process, but she had no specific recollection of the term. *Id.* at 1063.

C. The District Court's Decision

The district court rejected Parks' claim that Goldstein was ineffective for failing to file a notice of appeal.

That court found a discussion took place after sentencing between Parks' and Goldstein in order to determine how to proceed. 6 AA 1080. The court found that Parks' written communication never requested an appeal and the response letter from Goldstein presented his summary of the discussion and further invited Parks to reach out if she had further questions. *Id.*

Based upon the testimony and the exhibits, the court found that "Goldstein complied with his constitutional duty to discuss [Park's] options after the imposition of sentence," and further found that Parks failed to satisfy her burden that Goldstein failed to file a notice of appeal on her behalf because Parks never expressly asked for an appeal. *Id*.

D. This Court Should Affirm the District Court

1.) The relevant federal law

In instances where a defendant "neither instructs counsel to file an appeal nor asks that an appeal not be taken," the Supreme Court found that determining whether counsel performed deficiently is best answered by "whether counsel in fact consulted with the defendant about an appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). Where counsel consults with his client, the Court found "Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id*. The prejudice from failure to take an appeal is the forfeiture of the appeal; therefore, the Court in *Flores-*

Ortega found that demonstrating prejudice under *Strickland* require a petitioner to show that, "but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." 528 U.S. at 484.

2.) The relevant state law

The Nevada Supreme Court discussed defense counsel's duty to inform clients about a direct appeal when the conviction stems from a guilty plea. *Toston v. State*, 127 Nev. 971, 267 P.3d 795 (2011).

The Court in *Toston* recognized its prior holding that counsel does not have a duty to inform the client or consult with the client when the conviction results from a guilty plea. *Id*. at 977, 267 P.3d at 799 (*citing to Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999)); *see also Flores–Ortega*, 528 U.S. at 479–80.

The Court stated:

> Although trial counsel is not constitutionally required to inform a defendant of the right to appeal when the conviction stems from a guilty plea absent the defendant's inquiry about the right to appeal or the existence of a direct appeal claim that has a reasonable likelihood of success, we clarify that trial counsel has a duty not to provide misinformation about the availability of a direct appeal. Accordingly, we hold that counsel's affirmative misinformation about the right to appeal from a judgment of conviction based on a guilty plea may fall below an objective standard of reasonableness and therefore be deficient.

Id. at 973-74, 267 P.3d at 797.

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The Court also recorgnized that a defendant can waive his right to an appeal. *Id.* at 977, 267 P.3d at 800 (*citing Cruzado v. State*, 110 Nev. 745, 879 P.2d 1195 (1994)), *overruled on other grounds by Lee v. State*, 115 Nev. 207, 985 P.2d 164 (1999).

3.) Counsel's duty

In *Toston,* the Court found that counsel possesses a duty to file an appeal on behalf of his client when (1) requested to do so, and (2) when the client "expresses dissatisfaction with his conviction." *Id.* at 978, 267 P.3d at 800. The Court noted that client dissatisfaction with the conviction "has the potential for mischief" because of the fact that "it is by no means unusual for a criminal defendant to express dissatisfaction after having been convicted and facing a prison term or a period of supervised release." *Id.*

The client bears the burden of indicating to his attorney a desire to pursue an appeal. *Id*. at 979, 267 P.3d at 801 (citations omitted).

In *Flores-Ortega*, the Court held that counsel has a duty to consult when there is reason to think the defendant would want to appeal or demonstrated to counsel an interest in appealing. 528 U.S. at 480. In plea situations, the reviewing court must consider factors such as whether the sentence complied with the bargain and whether the defendant reserved issues for appeal or waived appellate rights. *Id*.

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4.) Counsel conferred with Parks, fulfilling his duty under the law

The record from the evidentiary hearing reflects that Goldstein performed his duty under the law; conferring with Parks about how to proceed post-sentence. Both Parks and Goldstein testified that a video meeting occurred after the court sentenced Parks. 6 AA 1057 (Parks' testimony), 1036 (Goldstein's testimony).

Goldstein recognized his absolute duty to file an appeal if Parks so requested. *Id*. at 1037 ("if she had asked for an appeal, I mean, I have a duty to file it and I would have filed it"). Goldstein recognized his duty "regardless of the existence of grounds" for an appeal. *Id.* at 1037, 1045, 1050. Goldstein also recognized that Parks expressly waived her appeal in the plea agreement. *Id.* at 1038, *see* 1 AA 180.

Goldstein also never dissuaded Parks from filing an appeal. *Id.* at 1050. Goldstein stated that Parks never requested an appeal while in court, and if she had "that would have for sure raised a red flag in my head because that triggers my responsibility to do something." *Id*. at 1033.

Goldstein's advice after sentencing consisted of filing a post-conviction habeas petition. *Id*. Goldstein also recognized the need to obtain new counsel to raise claims of ineffective assistance of counsel. *Id*. Goldstein finally stated his opinion that a sentence modification was not viable. *Id*. at 1040-21.

After Goldstein met with Parks and sent his response letter to Parks, she never expressly asked Goldstein to file a notice of appeal. *Id*. at 1046.

Parks stated at the meeting with Goldstein, they discussed her options. *Id*. at 1059. Parks had no memory of "specific[ ] terms used," including whether she expressly asked Goldstein to file a Notice of Appeal. *Id*.

5.) Parks failed to demonstrate that she requested an appeal

"The decision to appeal rests with the defendant." *Flores-Ortega*, 528 U.S. at 479. In *Flores-Ortega,* the Court found that "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's *express instructions* with respect to an appeal." *Id*. at 478 (emphasis added).

In Parks case, she gave Goldstein no express instructions to file an appeal (which she waived and would have likely been dismissed had one been filed). Parks' agreed with counsel's testimony that all options were on the table. 6 AA 1059 ("We just discussed different things that could be done. I don't remember specifically terms used.").

Based upon her testimony, Parks desired the post-conviction option that presented the best option of getting relief from her sentence. *See,* 6 AA 1057 (wanting to be home with her daughter). In her counsel's opinion, a direct appeal offered no success: First, no viable grounds for an appeal existed that would achieve Parks' objective of shortening her otherwise legal sentence. *Id*. at 1037. Second, a

direct appeal was waived. Goldstein recognized that Parks expressly waived her right to appeal most claims in the plea agreement. *Id*. at 1038, *see* 1 AA 180.

Because Parks waived her right to an appeal, an appeal if taken and subsequently dismissed would have taken time—time Parks' desired to spend at home with her family rather than in prison. Even if this Court failed to dismiss Parks' appeal because she waived the right in her guilty plea, without viable claims to raise that would shorten the sentence, an appeal again would force Parks to spend time serving a sentence that she wanted to shorten.

After hearing testimony from Parks and Goldstein, the district court correctly found Goldstein's performance satisfied constitutional standards. After sentencing, Goldstein met with Parks to discuss options. Since Parks sought to challenge the length of the sentence imposed, Goldstein discussed Parks' options, including appeal, sentence modification, and a habeas corpus challenge. Goldstein then offered Parks his opinion. Parks never expressly requested an appeal.

Despite the slightly different analyses offered by this Court in *Tosten* and by the United States Supreme Court in *Flores-Ortega*, the result is the same: Goldstein consulted with Parks. That consultation included a discussion of Parks' options after sentencing. After that consultation, Parks never expressly asked Goldstein to file a direct appeal challenging her sentence. Respondents therefore request this Court affirm the district court's denial of Parks' Ground Three claim.

CONCLUSION

Based upon the argument and law presented herein, Respondent requests this Court affirm the district court's denial of Parks' state habeas corpus petition.

RESPECTFULLY SUBMITTED this 8th day of November, 2021.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28.2

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 Microsoft Word 2016, 14-point Times New Roman type style.

I further certify that 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 proportionately spaced, has a typeface of 14 points or more and contains 11,536 words.

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.

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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: November 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on November 8, 2021.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

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