

1
2
3 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

4 Electronically Filed
5 Feb 18 2022 07:22 p.m.
6 Elizabeth A. Brown
7 Clerk of Supreme Court

8 **LORENZO PINKNEY**

9 Appellant,

10 vs.

11 **THE STATE OF NEVADA,**

12 Respondent.
13

S.Ct. No. 83336

D.C. No. A-19-806862-W

14
15 **APPELLANT'S OPENING BRIEF**

16 **BETSY ALLEN, ESQ**
17 Nevada Bar No. 6878
18 Law Office of Betsy Allen
19 P.O. Box 46991
20 Las Vegas, NV 89115
21 (702) 386-9700
22 Attorney for Appellant

STEVEN B. WOLFSON, ESQ.
Nevada Bar No. 1565
Clark County District Attorney
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2500
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii-vi
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	2
ROUTING STATEMENT.....	2
STATEMENT OF THE CASE.....	3-4
STATEMENT OF FACTS	5-11
SUMMARY OF THE ARGUMENT	11-12
ARGUMENT	13-37
CONCLUSION	38
CERTIFICATE OF COMPLIANCE.....	39-40
CERTIFICATE OF SERVICE	41

TABLE OF AUTHORITIES

CASES:

	<u>PAGE</u>
<u>Bennet v. State</u> , 111 Nev. 1099, 901 P.2d 676 (1995)	16
<u>Boykin v. Alabama</u> , 395 U.S. 238 (1969)	18
<u>Burke v. State</u> , 110 Nev. 1366, 887 P.2d 267 (1994)	20
<u>Byford v. State</u> , 123 Nev. 67, 156 P.3d 691 (2007)	21
<u>Daniel v. Overton</u> , 845 F. Supp. 1170 (E.D. Mich. 1994)	20
<u>Davis v. State</u> , 107 Nev. 600, 817 P.2d 1169 (1991)	15
<u>Duhamel v. Collins</u> , 955 F. 2d 962 (5 th Cir. 1992)	20
<u>Hill v. Lockhart</u> , 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985)	19
<u>Jones v. Barnes</u> , 463 U.S. 745, 77 L.Ed. 987, 103 S. Ct. 3308 (1983)	20
<u>Kirksey v. State</u> , 112 Nev. 980, 923 P.2d 1102 (1996)	16,
17, 19	
<u>Leaks v. United States</u> , 841 F. Supp. 536 (SDNY1994)	20
<u>Lockhart v. Fretwell</u> , 506 U.S. 364, 113 S. Ct. 838 (1993)	15
<u>Lozada v. State</u> , 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)	15
<u>Mazzan v. State</u> , 105 Nev. 745, 783 P.2d 430 (1989)	17
<u>McConnell v. State</u> , 212 P.3d 307, 126 Adv. Rep. 24 (2009)	21

<u>Nollette v. State</u> , 118 Nev. 341, 46 P.3d 87 (2002)	18
<u>Nika v. State</u> , 198 P.3d 839, 124 Nev. Adv. Rep. 103 (2008)	21
<u>Olausen v. State</u> , 105 Nev. 110, 771 P.2d 583 (1989)	17
<u>Riley v. State</u> , 110 Nev. 638, 878 P.2d 272 (1994)	17
<u>Rouse v. State</u> , 91 Nev. 677, 541 P.2d 643 (1975)	18
<u>State v. Love</u> , 109 Nev. 1136, 865 P. 2d 322 (1993)	15
<u>Statz v. State</u> , 113 Nev. 987, 994 P.2d 813 (1997)	18
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052 (1984)	15,
16, 19, 20	
<u>Sullivan v. State</u> , 115 Nev. 383, 990 P.2d 813 (1999)	18
<u>Warden v. Lyons</u> , 110 Nev. 430, 683 P.2d 504 (1984)	19
<u>STATUTES & REGULATIONS</u>	<u>PAGE</u>
Nev. Rev. Stat. § 34.770	21

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 _____

3 LORENZO PINKNEY

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.

8

9

10 _____

S.Ct. No. 83336

D.C. No. A-19-806862-W

11 **STATEMENT OF JURISDICTION**

12 This Court has appellate jurisdiction over the instant matter pursuant to Nev.

13 Rev. Stat. § 177.015(3). The Appellant appeals from the Finding of Facts and

14 Conclusion of Law and Order filed on July 29, 2021. A timely Notice of Appeal was

15 filed on August 4, 2021.

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- 2
- 3 **I. TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING**
- 4 **APPELLANT TO PLEAD GUILTY IN THIS CASE.**
- 5 **II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE AN**
- 6 **APPEAL ON THE MOTION TO WITHDRAW GUILTY PLEA**
- 7 **III. THE DISTRICT COURT ERRED IN FAILING TO GRANT AN**
- 8 **EVIDENTIARY HEARIG IN THIS CASE.**

9 **ROUTING STATEMENT**

10

11 Appellant is appealing the Findings of Fact, Conclusions of Law and Order

12 based upon a Post-Conviction Writ of Habeas Corpus. Therefore, pursuant to

13 N.R.A.P. 17(b)(2)(A) and (B), this appeal is presumptively routed to the Court of

14 Appeals.

15

16 **STATEMENT OF THE CASE**

17

18 On or about November 8, 2017 an Indictment was filed charging Mr. Pinkney with

19 Counts 1 and 8: Conspiracy to Commit Robbery (NRS 199.480, 205.380); Counts 2

20 and 9: Burglary While in Possession of a Deadly Weapon (NRS 205.060); Counts 3,

21 10 and 14: Kidnapping with Use of a Deadly Weapon (NRS 200.310, 200.320,

22 193.165); Counts 4-7 and 11-12 and 15 Robbery with Use of a Deadly Weapon (NRS

23 200.380, 193.165) and Count 13: Unlawful Taking of a Motor Vehicle (NRS

24 205.2715). The Indictment also named codefendant Adrian Powell. (AA, 001-010)

25

26 Transcripts from the Grand Jury were filed on or about November 11, 2017.

27

28

1 (AA, 011-207) Counsel for Petitioner filed a Pre-Trial Writ of Habeas Corpus on or
2 about December 13, 2017. (AA, 2008-216) The Petition contested Counts 3, 10 and
3 14, Kidnapping with Use of Deadly Weapon. The Court dismissed Count 10 but
4 denied on the remaining two counts.
5

6 On or about July 30, 2018, trial commenced in District Court. However, during
7 the course of jury selection, Petitioner opted to enter into a guilty plea agreement,
8 wherein he plead guilty to an Amended Indictment, listing fourteen counts.¹ (AA,
9 217-231) Part of the agreement of the parties was the State retaining the full right to
10 argue, including for consecutive time between counts, but would not ask for life
11 sentences on any count. The State further agreed not to file any charges for
12 approximately ten (10) additional event numbers that the State represented would be
13 attributed to Petitioner and charges would be forthcoming. Finally, the agreements
14 were contingent for both Petitioner and co-defendant Powell.
15
16
17
18

19 On or about October 31, 2018, Petitioner appeared in court and requested a new
20 attorney in order to explore withdrawal of his plea. The Court granted the withdrawal
21 of his trial attorney, Benjamin Durham, Esq. On or about November 7, 2018, new
22 counsel was appointed.
23
24

25 ¹ Petitioner pled to all counts but the one that was dismissed by Court after the filing
26 of the Writ of Habeas Corpus. This included the two Kidnapping with Use of Deadly
27 Weapon counts.
28

1 On or about November 26, 2018, Lucas Gaffney, appointed counsel for
2 Petitioner filed a motion to address concerns surrounding Petitioner's competency.
3 As a result, the Court ordered Petitioner sent for an evaluation. Both evaluation
4 determined that Petitioner was competent and the case was returned to the originating
5 court for further proceedings.
6

7 A motion to withdraw plea was filed on January 30, 2019 with an evidentiary
8 hearing held on April 24, 2019. (AA, 253-276 and 277-296) The district court denied
9 the motion to withdraw the plea. Petitioner was sentenced on May 22, 2019 and a
10 judgment of conviction was filed on May 24, 2019. (AA, 321-324)
11

12 Petitioner was sentenced to an aggregate sentence of one hundred thirty-two
13 months minimum with six hundred months maximum (11-72 years) in prison.
14 Petitioner had 602 days credit.
15

16 On or about November 21, 2019, Petitioner filed a pro per Petition for Writ of
17 Habeas Corpus (post-conviction). On or about January 6, 2020, counsel was
18 appointed to file a Supplemental petition.
19

20 **STATEMENT OF FACTS**

21 **GRAND JURY TESTIMONY**

22 **Yenir Hessing**

23 Yenir testified that she was a shift lead a Walgreens, working graveyard. (AA,
24
25
26
27
28

1 pp. 016-018) She indicated that he was working on September 28, 2017, along with
2 our other people: Darlene, Kathy, Abrianna and Tiffany. (AA, 018-019)

3 She testified that around 4 a.m., as she was putting away merchandise on the
4 floor, a person approached her wearing a mask and pointing a gun at her stomach. He
5 pushed Yenir to the front of the store, in order to open the cash register. (AA, pp. 10)
6 She was opening the first of three registers when Tiffany walked into the situation.
7 The armed man called Tiffany over too.
8

9 She described the mask as something that covered his entire face. She
10 described seeing another male with a gun to the pharmacist's head. (AA, pp. 22-23)
11 She indicated that she opened all three of the registers up front and the armed man
12 took money from all three. The armed men then demanded to know where the safe
13 was and took her to the office. (AA, pp. 24-25) At this point, he demanded that she
14 take him to the safe, which was located in the back of the store, through two doors
15 with a code. (AA, pp. 25-26) Tiffany was also forced to the room with the safe.
16 (AA, pp. 26) She testified that she opened both safes and he cleaned out both of them.
17 (AA, pp. 27) She clarified that once in that room, they (she and Tiffany) were isolated
18 from the rest of the store. (AA, pp. 28) After he cleaned out both safes, she testified
19 that he ran out. (AA, pp. 28-29)
20

21 **Darlene Orat**
22

23 Ms. Orat testified that she is a pharmacist at the Walgreens on East
24
25
26
27
28

1 Bonanza, working on September 28, 2017 around 4 a.m. (AA, pp. 31) She testified
2 that she spotted someone out of the corner of her eye, he immediately jumped on the
3 counter and she attempted to run. (AA, pp. 32) She was only able to see his eyes, as
4 his face was fully covered in a black mask. (AA, pp. 33)

6 At some point, he pointed a gun at her head, grabbed the back of her shirt and
7 demanded to know where the Xanax was kept. (AA, pp. 34-35) She grabbed the
8 Xanax and began putting it in a bag he was carrying. (AA, pp. 36)

10 He then demanded she open the register, which she did. After she got it open,
11 she turned her back so she did not see what he was doing. Then, he kept saying
12 “loomis” to her, which she repeatedly told him she did not understand. (AA, pp. 37)
14 He finally said syrup, which she understood to mean the codeine cough syrup. She
15 pointed out where it was located and he grabbed that, as well. (AA, pp. 37-38)

17 Mr. Orat testified that he grabbed her dolphin necklace, at some point, but did
18 not remember to tell the police. (AA, pp. 38-39) She was, at this point, on the floor
19 and he ordered her to empty her pockets. He did not, however, take anything from
20 what she pulled out. (AA, pp. 39) She did not see anyone else. (AA, pp. 40)

22
23 **Jose Alfredo Chavarria**

24 Mr. Charvarria testified that he worked at Pepe’s Tacos on Fremont Street, and
25 was working there on September 28, 2017 at approximately 2 in the morning. (AA,
26 pp. 42-43) He was working in the kitchen area.

1 The only other employee was Myriam, the cashier. (AA, pp. 43) He was in the
2 back and turned around to see one person jump the counter. This person came
3 towards him with a gun. There were a total of two people. (AA, pp. 43-44) His face
4 was covered with a red thing, with two holes for the eyes and he had on gloves. (AA,
5 pp 44-45) He testified that he ran to the back of the store, where the freezer and his
6 co-worker were but the man with the gun followed him. The man then forced Mr.
7 Chavarria to the front of the store to open the register but he was not able to do so.
8 (AA, pp. 44-45) The second person went to the back to get his co-worker so she
9 could open the register. (AA, pp. 46-47) They took the money from both registers.
10 (AA, pp. 48)

11
12
13
14 **Selena Graciano**

15 Ms. Graciano, on September 28, 2017, was eating at Pepe's tacos with her
16 friend Antonio Vallejo, on Fremont Street. Around 2 a.m., two men came into the
17 store. (AA, pp. 51) She testified that they were black. One had a white face covering
18 and one had a red face covering. (AA, pp. 51) The one with the red face covering
19 eventually came over to her. Both had guns, she described them as small. (AA, pp.
20 51-52)

21 The two men immediately went to the register first, then upon noticing Ms.
22 Gaciano, headed towards her. She was told not to move and the other one went back
23 to get the money. (AA, pp. 52) The one that stayed with Ms. Graciano, pointed his
24
25
26
27
28

1 gun at her and grabbed her purse, then told her not to move. He then grabbed a
2 necklace off of her friend, Mr. Vallejo. (AA, pp.52-53) When the man grabbed her
3 purse, her phone slid out. Her friend grabbed it and hid it so it would be safe. (AA,
4 pp. 53)

5
6 Once the man took her purse, he went to the back and she did not know what
7 happened in the back. (AA, pp. 54)

8
9 **Myriam Gaspar**

10 Ms. Gaspar was working at Pepe's Tacos, located on Fremont Street, on
11 September 28, of 2017. She testified that two people came into the store, although she
12 did not see them come in. (AA, pp. 57) She was in the refrigerator, one of them took
13 her to the register and pulled a gun on her. (AA, 57)

14
15 She could not remember what anyone was wearing or what anyone looked like.
16 (AA, pp. 57-58) The only thing she really remembered was that one of the men had
17 her co-worker, Jose, kneeling on the floor with a gun on him. (AA, pp. 59)

18
19 One of the men ordered her to open the register, which she did, and he took the
20 money out of it. He was putting inside a dark sweater. (AA, pp 60) He did this with
21 the second register, as well. (AA, pp. 60-61)

22
23 **Raynetta Shine**

24
25 Ms. Shine testified that she knew Lorenzo Pinkney for a few months, admitting
26 that she had a personal relationship with him. (AA, pp. 63-64)

1 In the evening of September 27, 2017, into the early morning of the 28th,
2 Petitioner was at her home, watching TV. As she was getting ready to go to bed,
3 Adrian Powell showed up. (AA, pp. 64-65) At some point around 5 or 6 in the
4 morning (of the 28th), she realized her Chrysler 300 was missing from her home.
5
6 (AA, pp. 66-67)

7
8 Petitioner was no longer in the home. (AA, pp. 67)

9 Ms. Shine did call the police about her car. At some point, Petitioner called her
10 to tell her where her car was located. (AA, pp. 67-68) He told her it was near a
11 Walgreens at 4480 W. Charleston. (AA, pp. 68) Her car was located in the area of
12 Bonanza and Lamb. (AA, pp. 69)

13
14 She was angry that he took her car, as she had just purchased it. While on the
15 phone with Petitioner, he made some comment about the car being on a large rock.
16
17 (AA, pp. 70) She eventually went to that location and found her car wrecked on a
18 large rock, many police officers in the area and Petitioner. (AA, pp. 70-71)

19
20 As she was observing her car, she saw Petitioner go by the area in another car.
21 (AA, pp. 71)

22
23 **Tifnie Bobbitt**

24 Ms. Bobbitt, on September 28, 2017, worked at Walgreens on East Bonanza, as
25 a cashier and customer service representative. (AA, pp. 108) She testified that
26
27 sometime around 4 in the morning, while she was in the break room for lunch, she
28

1 heard someone swear and she saw a guy crouching and walking behind Yenir. (AA,
2 pp. 110) As the man did not see her, she punched the code into the inner office to
3 alert her other manager as to what she saw. (AA, pp. 110)
4

5 She went back to the break room and did not see or hear anything else, thus she
6 went back out to the floor of the store and that's when the man saw her and spoke to
7 her (AA, pp. 110-111)
8

9 She described him as wearing a red cloth on his face and a dark hoodie. (AA,
10 pp. 112) She did see his skin and described it as black. (AA, pp. 112) He had Yenir
11 empty the registers and then pushed them both toward the back, where the safes were.
12 (AA, pp. 112-113) She testified that they were forced into the back room. (AA, pp.
13 114) He forced Yenir to open the safe. He then exited to the locker area and took
14 money from a purse. (AA, pp. 115) She walked him walk out the door from a
15 window.
16
17

18 **Antonio Vallejo**

19

20 Mr. Vallejo was eating at Pepe's Tacos on September 28, 2017 with his
21 girlfriend, Selena Graciano. He testified that he was getting up to leave and he felt
22 something from behind set him down. (AA, pp. 120) He turned around and saw a
23 gun pointed at his head. At that point, the man grabbed his chain. (AA, pp. 120)
24

25 He described the gun as black and semi-automatic. (AA, pp. 120) He indicated
26 that after he grabbed his chain, the man grabbed at Selena's purse and the phone the
27
28

1 slid out. (AA, pp. 121) He described the man as wearing a black hoodie, a bandana
2 and gray shorts. He further said he was a light black male or dark Hispanic male.
3 (AA, pp. 121-122) He also said that there was another man in the store, he was in the
4 back and at the registers. (AA, pp. 122) As soon as they got the money out of the
5 registers, the men ran out and took off. (AA, pp. 122)

6 **Raymundo Cruz**

7
8
9 Mr. Cruz is a police officer with Las Vegas Metropolitan Police Department
10 (hereinafter referred to as LVMPD) He is in patrol and responded to a robbery at a
11 Walgreens on Bonanza on September 28, 2017 at approximately 4 or 5 in the
12 morning. (AA, pp. 126)

13
14 As he arrived at Walgreens, he saw a man walk out who fit the description of
15 one of the suspects. As he saw Officer Cruz, who drew his weapon, he took off
16 running and jumped into the backyard of the houses north of the Walgreens. (AA, pp.
17 127) He assisted with setting up a perimeter and had no other involvement. (AA, pp.
18 128)

19 **Kristina Thomas**

20
21
22 Ms. Thomas is a senior crime scene analyst with LVMPD, who testified that
23 she responded to a Walgreens on Bonanza around 7 am on the morning of September
24 28, 2017. She testified to items she collected along the east exterior side of
25 Walgreens. (AA, pp. 132)

1 Located there was a suitcase with various items in it. Included were a mylar
2 bag, sneakers, shorts, necklace and money. (AA, pp. 132) She also responded to the
3 housing development names Avery Park. Along the street, there was money strewn
4 about. (AA, pp. 133) She testified to all the pictures she took of the various items.

6 **Kathryn Aoyama**

7 Ms. Aoyama testified that she is a forensic scientist with LVMPD. (AA, pp.
8 139) She analyzed latent prints found on several bottles of medication. She found
9 that a left thumb print came back to Petitioner, as well as a palm print. (AA, pp. 142)

11 **Tullio Pandullo**

12 Mr. Pandullo is a detective with LVMPD, in the commercial robbery unit. He
13 was assigned to the robbery that occurred at the Walgreens on East Bonanza and the
14 Pepe's Tacos on Fremont. (AA, pp 144-145) He reviewed the surveillance in both
15 locations, from both events. (AA, pp 145) He then testified about the still photos
16 from the Walgreens that correlated with the video he viewed, specifically the suspects
17 entering the store. (AA, pp 146-147)

18 He indicated that he believed the incidents were related, due to similar clothing
19 and motive. He then testified that they became aware of a third scene, north of the
20 Walgreens, where a vehicle was located. (AA, pp 147-148)

21 Detective Pandullo testified to various photos taken of the Chrysler 300, which
22 was found north of the Walgreens on a street called Avery Park. (AA, pp 148) He
23
24
25
26
27
28

1 then testified to various photos taken by crime scene analysts of the items of
2 importance in the Walgreens. (AA, pp 148-151)

3 Detective Pandullo then testified that they became aware of another vehicle
4 being involved. (AA, pp 151-152) There were five people in the car, a number of
5 them males. They did a high risk traffic stop and removed all occupants of the vehicle.
6 (AA, pp 152-153) In the car, they identified Petitioner and Adrian Powell. (AA, pp
7 153-155)

10 **Kyle Toomer**

11 Detective Toomer is employed by LVMPD in the robbery section and was
12 assigned to events involving a robbery at Pepe's Tacos and Walgreens. (AA, pp 158-
13 159) He testified that he responded to the scene of a Chrysler 300 that had run up on
14 rocks and was not able to be driven. (AA, pp 159-160) Crime scene analysts were
15 called and latent prints were taken off the vehicle. (AA, pp 160)

16 Once Petitioner was identified as having left prints on the vehicle, he made
17 contact with Raynetta Shine. (AA, pp 161) He made contact with her at the scene, as
18 she walked up and stated that it was her car on the rocks. As she was giving a
19 statement, she looked up and pointed to a car driving by and said "that is them right
20 there." (AA, pp 162-163)

21 In the vehicle that was pointed out by Ms. Shine, there were a total of 5
22 occupants, including Petitioner. All five were interviewed by Detective Toomer.
23
24
25
26
27
28

1 (AA, pp 163-164) He ultimately arrested Petitioner. (AA, pp 164) He testified
2 regarding the clothing seen on the video and the clothing that was worn by Petitioner
3 when he was arrested. (AA, pp 164-165)
4

5 During the interview with Petitioner, he denied any involvement. (AA, pp 167)

6 **Kathryn Aoyoma**
7

8 She previously testified that she worked for LVMPD as a forensic scientist.
9 She testified that she processed latent prints from a Chrysler 300, through AFIS, and
10 matched a number of them to Petitioner. (AA, pp 171-172)
11
12

13 **SUMMARY OF THE ARGUMENT**
14

15 The district court erred in denying the post-conviction petition filed , which
16 alleged that Appellant's attorney failed to properly address and investigate the cases
17 that were used as leverage in order to push Mr. Pinkney into pleading guilty on the
18 first day of trial. Further, counsel failed to appeal the denial of the Motion to
19 Withdraw the Guilty Plea, wherein issues were raised regarding Appellant's mental
20 capacity in entering into the aforementioned guilty plea agreement.
21
22

23 Finally, the district court erred by failing to grant an evidentiary hearing
24 regarding the issues above.
25

26 ///

27 ///

ARGUMENT

I. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL PHASE.

To state a claim for ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness;
2. counsel's errors were so server that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984)). Once the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's error the result of the trial would probably have been different. Strickland, 466 U.S. at 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601-602, 817 P.2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838 (1993); Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668 104 S. Ct. 2052 (1984), established the standards for a court to determine when

1 counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S.
2 Constitution. Strickland laid out a two-pronged test to determine the merits of a
3 petitioner's claim of ineffective assistance of counsel.
4

5 First, the petitioner must show that counsel's performance was deficient. This
6 requires a showing that counsel made errors so serious that counsel was not
7 functioning as the counsel guaranteed by the Sixth Amendment. Second, the petitioner
8 must show that the deficient performance prejudiced the petitioner. This requires
9 showing that counsel's errors were so serious as to deprive the petitioner of a fair trial
10 whose result is reliable. Unless both showings can be made, it cannot be said that the
11 conviction resulted from a breakdown in the adversary process that renders the result
12 unreliable. Unless a defendant makes both showings, it cannot be said that the
13 conviction resulted from a breakdown in the adversary process that renders the result
14 unreliable. Unless a defendant makes both showings, it cannot be said that the
15 conviction resulted from a breakdown in the adversary process that renders the result
16 unreliable.
17

18 The Nevada Supreme Court has held, "claims of ineffective assistance of
19 counsel must be reviewed under the reasonably effective assistance standard
20 articulated by the U.S. Supreme Court in Strickland, thus requiring the petitioner to
21 show that counsel's assistance was deficient and that the deficiency prejudiced the
22 defense." See, Bennet v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995);
23 Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).
24
25

26 "The defendant carries the affirmative burden of establishing prejudice." Riley
27
28

1 v. State, 110 Nev, 638, 646, 878 P.2d 272, 278 (1994). In meeting the prejudice
2 requirement of an ineffective assistance of counsel claim, a petitioner must show a
3 reasonable probability that, but for counsel's error, the result of the trial would have
4 been different. Reasonable probability is probability sufficient to undermine the
5 confidence in the outcome. *See, Kirksey*, 112 Nev. at 980, 923 P.2d at 1102.
6 "Strategy or decisions regarding the conduct of a defendant's case are virtually
7 unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745,
8 783 P.2d 430 (1989); Olausen v. State, 105 Nev. 110, 771 P.2d 583 (1989).

9
10
11 Trial counsel for Petitioner advised him to plead guilty on the first day of trial.
12 Part of the inducement to plead guilty was numerous uncharged acts which were to
13 remain uncharged in exchange for Petitioner's plea of guilt to all the charges
14 contained in the Amended Indictment filed on July 30, 2018. (AA, pp.217-231) At
15 sentencing, however, Petitioner requested to withdraw his plea and alternate counsel
16 was appointed.

17
18
19 In the motion to withdraw the plea, filed by Petitioner's newly appointed
20 attorney, indicated that Petitioner had "mental health ailments" which prevented him
21 from understanding the consequences of his plea. However, he failed to address the
22 issues related to the inducement to the plea.

23
24
25 Petitioner was never given an opportunity to review the discovery or the
26 material related to all these "possible charges" that were being dismissed as a result of
27
28

1 his plea.

2 A “knowing plea” is one entered into with a FULL understanding of the nature
3 of the charge and all the consequences of the plea. Boykin v. Alabama, 395 U.S.
4 238(1969). There is no possibility this plea was knowing. How could Mr. Pinkney
5 have an “understanding” of the charges when his attorney did not even know? Add to
6 this the underlying mental health issues related to learning and his plea becomes
7 grossly unjust.
8

9
10 A plea agreement is construed according to what the defendant reasonably
11 understood when he entered the plea. Statz v. State, 113 Nev. 987, 993, 994 P.2d 813,
12 817 (1997); Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). The
13 defendant’s reasonable understanding is distinguishable from the mere subjective
14 belief of defendant as to any potential sentence, or hope of leniency, unsupported by a
15 promise from the State or an indication by the court. See Rouse v. State, 91 Nev. 677,
16 541 P.2d 643 (1975) There was no way he understood the breadth or gravity of a plea
17 when he was deprived the right to evaluate numerous potential cases that were made
18 part of the plea.
19
20
21

22
23 A defendant who enters into a guilty plea based upon advice of counsel may
24 refute the plea by demonstrating the ineffectiveness of counsel’s performance violated
25 his right to counsel guaranteed under the 6th Amendment to the United States
26 Constitution. Nollette v. State, 118 Nev. 341, 348-349, 46 P.3d 87, 92 (2002);
27
28

1 Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A defendant must
2 substantiate their claim of ineffective assistance of counsel by showing counsel's
3 performance fell below an objective standard of reasonableness, and a reasonable
4 probability exists that, but for counsel's erroneous advice, the defendant would not
5 have pled guilty. Id; Warden v. Lyons, 110 Nev. 430, 432, 683 P.2d 504, 505 (1984);
6 Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).
7

8
9 Mr. Pinkney was on the verge of trial when counsel suggested that he was
10 better off taking a deal, to plead to every single count, rather than take his chances at
11 trial. The only reason he entered into this agreement was due to the assurances that
12 the State would not pursue charge in approximately 8 other robberies. However, Mr.
13 Pinkney was never apprised of the actual evidence against him in these other
14 robberies. Had he been, there is no possibility he would have entered this plea. The
15 other robberies were lacking in any real evidence against him, or anyone, for that
16 matter. There is NO way the state could have taken those additional cases to trial,
17 thus it was not a "deal" that Mr. Pinkney entered into, it was pleading straight up to
18 every charge in exchange for absolutely NOTHING.
19
20
21
22

23 As a result, this matter should be reversed and remanded for a new trial.

24 **II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE**
25 **APPELLATE PHASE.**

26 The Nevada Supreme Court has held a defendant has a right to effective
27 assistance of appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980,
28

1 923 P.2d 1102 (1996).

2 The constitutional right to effective assistance of counsel extends to a direct
3 appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of
4 ineffective assistance of appellate counsel is reviewed under the “reasonably effective
5 assistance” test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,
6 (1984). Effective assistance of appellate counsel does not mean that appellate counsel
7 must raise every non-frivolous issue. See, Jones v. Barnes, 463 U.S. 745, 751-54, 77
8 L. Ed. 2d 987, 103 S. Ct. 3308 (1983). An attorney’s decision not to raise meritless
9 issues on appeal is not ineffective assistance of counsel. Daniel v. Overton, 845 F.
10 Supp. 1170, 1176 (E.D. Mich. 1994); Leaks v. United States, 841 F. Supp. 536, 541
11 (S.D.N.Y., 1994), aff’d 47 F. 3d 1157 (2nd Cir.) To establish prejudice, based on the
12 deficient assistance of appellate counsel, the defendant must show that the omitted
13 issue would have a reasonable probability of success on appeal. Duhamel v. Collins,
14 955 F. 2d 962, 967 (5th Cir., 1992); Heath, 941 F.2d at 1132. In making this
15 determination, a court must review the merits of the omitted claim. Heath, 941 F. 2d
16 at 1132.

17
18 In the instant case, appellate counsel failed to meet the standard for effective
19 assistance of counsel. But for appellate counsel, Petitioner would have received a
20 reversal on his direct appeal.

21
22 It was clear from both the record made at the evidentiary hearing and from the
23
24
25
26
27
28

1 record at the plea, that Petitioner was not entering into a knowing and voluntary plea.
2 Regardless, counsel did not file an appeal on behalf of Mr. Pinkney.

3 Finally, the district court refused to grant an evidentiary hearing on the issues
4 raised on this appeal, even though, as outlined above, issues of fact exist and need to
5 be fleshed out by testimony.
6

7 As a result, this matter must be reversed and remanded for a hearing on these
8 issues, at a minimum.
9

10 **III. THE DISTRICT COURT ERRED IN FAILING TO**
11 **GRANT AN EVIDENTIARY HEARING.**

12 In Nevada, a post-conviction habeas petitioner is entitled to a post-conviction
13 evidentiary hearing when he asserts claims supported by specific factual allegations
14 not belied by the record that, if true, would entitle him to relief. *McConnell v. State*,
15 212 P.3d 307, 313, 125 Nev. Adv. Rep. 24 (2009); See also *Byford v. State*, 123 Nev.
16 67, 68-69, 156 P.3d 691, 692 (2007); *Nika v. State*, 198 P.3d 839, 124 Nev. Adv. Rep.
17 103 (2008); Nev. Rev. Stat. Ann. § 34.770.
18

19 NRS 34.770 determines when a defendant is entitled to an evidentiary hearing,
20 and states:
21

- 22
- 23 1. The judge or justice, upon review of the return, answer and all
24 supporting documents which are filed, shall determine whether
25 an evidentiary hearing is required. A petitioner must not be
26 discharged or committed to the custody of a person other than the
27 respondent unless an evidentiary hearing is held.
 - 28 2. If the judge or justice determines that the petitioner is not
entitled to relief and an evidentiary hearing is not required, he

1 shall dismiss the petition without a hearing.

2 3. If the judge or justice determines that an evidentiary hearing is
3 required, he shall grant the writ and shall set a date for the
4 hearing.

5 There is no question that Petitioner raised specific factual allegations in the
6 petition. However, the district court refused to grant a hearing.

7
8 **CONCLUSION**

9 Based upon the arguments herein, *supra*, LORENZO PINKNEY'S convictions
10 should be REVERSED.

11
12
13 Dated this 18th day of February, 2022.

14 Respectfully submitted,

15
16 /s/ Betsy Allen

17 BETSY ALLEN, ESQ
18 Nevada State Bar No. 6878
19 P.O. Box 46991
20 Las Vegas, Nevada 89114
21 (702) 386-9700
22 betsyallenesq@yahoo.com
23 Counsel for Appellant
24
25
26
27
28

CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the formatting requirements of
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because:
5

6 **☒ This brief has been prepared in a proportionally spaced typeface using**
7 **Microsoft Word 2010 Edition in Times New Roman 14 point font; or**
8

9 **☐ This brief has been prepared in a monospaced typeface using [state name and**
10 **version of word-processing program] with [state number of characters per inch and**
11 **name of type style].**
12

13 2. This brief exceeds the with the page- or type-volume limitations of NRAP
14 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is
15 either:
16

17 **☒ Proportionately spaced, has a typeface of 14 points or more, and**
18 **contains 8,884 words; or**
19

20 **☐ Monospaced, has _____ or fewer characters per inch, and contains _____**
21 **words or _____ lines of text; or**
22

23 **☐ Does not exceed 30 pages.**

24 3. Finally, I hereby certify that I have read this appellate brief, and to the best of
25 my knowledge, information, and belief, it is not frivolous or interposed for any
26 improper purpose. I further certify that this brief complies with all applicable Nevada
27
28

1 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every
2 assertion in the brief regarding matters in the record to be supported by a reference to
3 the page and volume number, if any, of the transcript or appendix where the matter
4 relied on is to be found. I understand that I may be subject to sanctions in the event
5 that the accompanying brief is not in conformity with the requirements of the Nevada
6 Rules of Appellate Procedure.
7

8
9 DATED this 18th day of February, 2022.
10
11

12 /s/ Betsy Allen
13 BETSY ALLEN, ESQ
14 Nevada State Bar No. 6878
15 LAW OFFICE OF BETSY ALLEN
16 P.O. Box 46991
17 Las Vegas, Nevada 89114
18 (702)386-9700
19 betsyallenesq@yahoo.com
20 Counsel for Appellant
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on the 18th of February, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD, ESQ.
Nevada Attorney General

ALEXANDER G. CHEN, ESQ.
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

LORENZO PINKNEY
Inmate No: 1226941
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070-0650

/s/ BETSY ALLEN
BETSY ALLEN, ESQ