

IN THE SUPREME COURT OF THE STATE OF NEVADA

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RICHARD A. NEWSOME, JR., )

#1194269, )

Appellant, )

v. )

STATE OF NEVADA, )

Respondent. )

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**CASE NO.: 83475**

**E-FILE**

**REPLY TO RESPONDENT'S ANSWERING BRIEF**

**Appeal from Order Denying Petition for Post Conviction Relief**

**Eighth Judicial District Court, Clark County**

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## TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES.....	iv - v
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1 - 2
ARGUMENT.....	3 - 14
I. DEFENDANT’S PETITION SHOULD NOT BE PROCEDURALLY BARRED; .....	3
A. The Defendant’s Petition Should Not Have Been Time Barred as a Successive Petition under Nrs 34.726(1); .....	3
B. The Defendant’s Petition Should Not Have Been Barred by the “Law of the Case Doctrine”; .....	3
II. THE COURT ERRED BY NOT FINDING THAT DEFENDANT WAS PREJUDICED BY THE DENIAL OF HIS RIGHT TO CONFLICT FREE COUNSEL; .....	5
III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT’S HABEAS CORPUS PETITION BY FINDING DEFENSE COUNSEL WAS NOT INEFFECTIVE; ..	8

IV.	THE DISTRICT COURT ERRED WHEN IT RELIED ON THE LAW OF THE CASE DOCTRINE TO UPHOLD DEFENDANT’S GUILTY PLEA; .....	10
V.	THE DISTRICT COURT IMPROPERLY DENIED A NECESSARY EVIDENTIARY HEARING. THIS WRONGFUL DENIAL OF AN EVIDENTIARY HEARING RESULTED IN A FUNDA- MENTAL MISCARRIAGE OF JUSTICE IN THIS CASE; .....	12
VI.	CUMULATIVE ERROR REQUIRES REVERSAL; .....	13
	CONCLUSION .....	14
	CERTIFICATE OF COMPLIANCE .....	15
	CERTIFICATE OF SERVICE .....	16

...

...

...

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

### **Page(s)**

<i>Avery v. Prelesnik</i> , 548 F.3d 434 (6th Cir.2008) .....	8
<i>Derden v. McNeel</i> , 978 F.2d 1453, 1457 (5th Cir.1992) .....	14
<i>Fay v. Noia</i> , 372 U.S. 391 (1963) .....	3
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	3, 4, 6, 8,13
<i>United States v. Bell</i> , 367 F.3d 452 (2004) .....	14
<i>United States v. Delgado</i> , 631 F.3d 685 (5th Cir.2011) .....	3
<i>United States v. Rivera</i> , 906 F.2d 1462, 1471 (10th Cir.1990).....	13

### **NEVADA CASES**

<i>Glover v. State</i> , 82700-COA (2022) .....	6, 7, 8
<i>Marshall v. State</i> , 110 Nev. 1328, 1331 (1994) .....	12
<i>McNelton v. State</i> , 115 Nev. 396, 415-16 (1989) .....	13
<i>Mitchell v. State</i> , 122 Nev.1269 (2006) .....	4
<i>Mulder v. State</i> , 116 Nev. 1, 17 (2000) .....	14
<i>Rippo v. State</i> , 134 Nev. 411, 427-28 (2018) .....	11
<i>State v. Bennett</i> , 119 Nev. 589, 599 (2003) .....	12
<i>State v. Eighth Judicial Dist. Ct. ex rel. Cty. of Clark (Riker)</i> , 121 Nev. 225, 232-34 (2005) .....	4
<i>State v. Freese</i> , 116 Nev. 1097 (2000) .....	10
<i>State v. Love</i> , 109 Nev.1136, 1138 (1993) .....	8

## **NEVADA REVISED STATUTES**

NRS 34.726(1) .....	1, 3
---------------------	------

## **APPELLATE RULES**

NRAP 28(e)(1) .....	15
---------------------	----

NRAP 32(a)(4) .....	15
---------------------	----

NRAP 32(a)(5) .....	15
---------------------	----

NRAP 32(a)(6) .....	15
---------------------	----

NRAP 32(a)(7) .....	15
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NRAP 32(a)(7)(C) .....	15
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**REPLY TO RESPONDENT'S ANSWERING BRIEF**

**Appeal from Order Denying Petition for Post Conviction Relief  
Eighth Judicial District Court, Clark County**

**STATEMENT OF ISSUES**

- I. THE DEFENDANT'S PETITION SHOULD NOT BE PROCEDURALLY BARRED;
  - A. The Defendant's Petition Should Not Have Been Time Barred as a Successive Petition Under NRS 34.726(1);
  - B. The Defendant's Petition Should Not Have Been Barred by the "Law of the Case Doctrine";

- II. THE DISTRICT COURT ERRED BY NOT FINDING DEFENDANT WAS PREJUDICED BY HIS COUNSEL'S CLEAR CONFLICT OF INTEREST WITH THE CO-DEFENDANT WHOM HE ALSO REPRESENTED;
- III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FOUND DEFENSE COUNSEL WAS NOT INEFFECTIVE PRE- PLEA;
- IV. THE DISTRICT COURT ERRED WHEN IT WRONGLY UPHELD THE VALIDITY OF DEFENDANT'S GUILTY PLEA, RELYING ON THE DOCTRINE OF THE LAW OF THE CASE;
- V. THE DISTRICT COURT IMPROPERLY DENIED A NECESSARY EVIDENTIARY HEARING;
- VI. CUMULATIVE ERROR REQUIRES REVERSAL;

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## ARGUMENT

### I. The Defendant's Petition Should Not Have Been Time-Barred as a Successive Petition Under NRS 34.726(1).

The Defendant submits he has demonstrated that he had sufficient cause for he has demonstrated that he had sufficient cause for his delay in filing this Petition in his Opening Brief. Defendant stated the numerous equitable factors in his Opening Brief, particularly his mental status and the prejudice which resulted from his lack of a conflict free attorney to establish good cause. Because of these factors Defendant was denied even an opportunity to be heard on this Petition which deprived him of due process of law as his conviction resulted in a fundamental miscarriage of justice.

### B. The Defendant's Petition Should Not Have Been Barred by the "Law of the Case Doctrine."

The Defendant reargues that the issues raised in his habeas corpus petition are fundamentally different than the issues he raised at trial and on direct appeal because they were raised in the context of ineffective assistance of counsel under *Strickland v. Washington*. The purpose of habeas corpus relief is to correct errors of counsel that have prejudiced the Defendant. *See, Fay v. Noia*, 372 U. S. 391 (1963); *United States v. Delgado*, 631 F.3d 685 (5th Cir. 2011). Defendant therefore asks the Court to



consider this habeas Petition on the merits and find he was denied effective assistance of counsel under *Strickland* on the multiple issues he has raised in his Opening Brief. These issues have not previously been decided and should not be denied under the law of the case doctrine.

In Respondent's Answering Brief, the State argues that "[t]he law of a prior appeal is the law of the case in later proceedings in which the facts are substantially the same," . . . *State v. Eighth Judicial Dist. Ct. ex rel. Cty. of Clark (Riker)*, 121 Nev. 225, 232-33 (2005). (RAB, p. 31)

The Defendant directs the Court to the case of *Mitchell v. State*, 122 Nev. 1269 (2006), where the Nevada Supreme Court reversed *Mitchell's* conviction, expressly holding the 'law of the case' should not be applied in *Mitchell's* case. The Court there noted:

"However, we have held when the holding in a defendant's case is overruled in a subsequent case, the doctrine of the law of the case should not be applied because to do so would unfairly impose a legal application upon [the defendant] which we expressly overruled." *Id.* 1274, 1275.

(Emphasis added)

It is respectfully submitted it was fundamentally unfair to deny Defendant his right to habeas corpus relief in this case based upon the 'law of the case' doctrine.

II. The Court Erred by not Finding That the Defendant Was Prejudiced by the Denial of his Right to Conflict Free Counsel.

Despite Defendant's showing that defense counsel had a clear conflict of interest in this case, the State argued in Respondent's Answering Brief that Defendant cannot claim any relief for prejudicial ineffective assistance of counsel in this case. (RAB, p. 23-28) The State argued that the waiver of conflict, prepared by Defendant's conflicted counsel, was a valid, enforceable waiver. (RAB, p. 25-27).

The Defendant respectfully submits the State's argument that the waiver, signed by the Defendant, was a knowing, voluntary and intelligent waiver (RAB, p. 26) is much less persuasive than the Defendant's argument that his signed waiver was unintelligent and involuntary. The State actually argued that because the Defendant did not enter his plea of guilty until ten (10) months after signing the waiver of conflict, that somehow supports their argument that the Defendant was not prejudiced by any conflict.

It is respectfully submitted this delay instead strongly suggests the Defendant was reluctant to enter a negotiated plea in this case because of less than favorable terms negotiated by his conflicted counsel.

The State also argued Defendant failed to present any factual support for his

conflict of interest claim or provide a “cogent” explanation of how the joint representation adversely affected his counsel’s performance. That is incorrect as Defendant has alleged that he was affected directly by his counsel engaging in simultaneous negotiations for both Defendants with the State.

The results of counsel’s simultaneous negotiations was that the co-defendant, his mother, received a gross misdemeanor and probation while Defendant himself received a conviction of second degree murder and a lengthy sentence of ten (10) years to life. The State’s argument that Defendant was not prejudiced by the joint representation caused by the conflict of interest strains credibility.

This conflict violated basic legal ethics and it was not cured by the purported waiver. The joint representation in this case clearly led to violation(s) of *Strickland*’s requirement of zealous advocacy by the attorney for his client, Richard Allan Newsome, Jr. For all the reasons stated, the District Court erred by not finding defense counsel’s prejudicial conflict of interest in representing Richard Newsome, which violated his right to counsel and his due process rights to a fair resolution of his case. These errors require reversal of the Defendant’s conviction.

Defendant urges the Court to consider the recent case of *Glover v. State*, 82700-COA, decided February 3, 2022, where the Nevada Court of Appeals

recognized that a conflict of interest can result in prejudice to a criminal defendant that is sufficient to adversely affect the attorney's performance. The Court noted:

“Second, Glover argues his trial counsel, a deputy public defender, was ineffective because counsel had a conflict of interest as the public defender's office had previously represented the victim in other, unrelated cases. Glover asserted that the office may have had information concerning the victim that may have been helpful to Glover's defense.

“Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.” *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). A conflict of interest exists if “counsel ‘actively represented conflicting interests’ ” and the “conflict of interest adversely affected [the defendant's] lawyer's performance.” ” *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350(1980)). (Emphasis added)

...

Although the Court in *Glover* did not think the conflict of past representation of the victim was great enough that it adversely affected the lawyer's performance in

*Glover's* case, the facts are very much stronger in this case. There can be no doubt that the joint and concurrent representation of the co-defendant, who was actually the mother of the Defendant clearly must have "adversely affected" the lawyers' performance for Defendant, Richard Allan Newsome, Jr.

**III. The District Court Abused Its Discretion When It Denied Defendant's Habeas Corpus Petition by Finding Defense Counsel was Not Ineffective.**

The District Court in its Order denying Defendant's Petition not only denied the Petition on procedural grounds but also held that defense counsel had not been ineffective, citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984) and *State v. Love*, 109 Nev. at 1138. (See, *Findings of Fact*, p. 8)

The State in its Answering Brief argued defense counsel had met the minimal burden required by *Strickland* before the plea. (RAB, p. 28-31) Defendant respectfully disagrees with the State's interpretation of what the minimal burden was for the Defendant in this case. Defendant submits that defense counsel had a duty to do at least a reasonable investigation before the plea of guilty.

Consider the case of *Avery v. Prelesnik*, 548 F.3d 434 (6th Cir.2008), where the Sixth Circuit Court, affirming the district court's grant of a writ quoted *Strickland* saying:

“Avery argues that his trial counsel’s failure to investigate potential alibi witnesses in preparation for trial was deficient. Strickland instructs:

[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.”

The Court continued: . . .

“The State, nevertheless, argues that Lankford “had inadequate information on which to base an alibi defense, not through lack of investigation but because of inconsistent accounts of the events on the evening of the murder.” But the limitations on Lankford’s investigation rendered it impossible for him to have made a “strategic choice” not to have Damar Crimes or Darius Boyd testify because he had no idea what they would have said. There is no reason based on “professional judgment” why Lankford would not have pursued speaking to Damar Crimes. The district court correctly concluded that “Lankford was under a duty to reasonably investigate,

which entails, at the bare minimum, asking for Damar's phone number or address and reasonably attempting to contact him." *Id.* The district court also correctly observed, this does not mean that Lankford was under an obligation to actually track down Damar Crimes, only that he put in a reasonable effort to do so. For these reasons, we affirm the district court's decision that the Michigan Court of Appeals unreasonably applied *Strickland* in deferring to Lankford's decision to end his less than complete investigation." (Emphasis added)

Defendant urges that this Honorable Court find that he was so prejudiced by his counsel's inadequate pretrial preparation and investigation before his guilty plea that the case must be reversed.

**IV. The District Court Erred When It Relied on the Law of the Case Doctrine to Uphold Defendant's Guilty Plea.**

It is respectfully submitted the totality of evidence established Defendant's guilty plea was unknowing and involuntary. *State v. Freese*, 116 Nev. 1097 (2000). The State in Respondent's Answering Brief argued the District Court could not consider the validity of the Defendant's guilty plea because it was barred by the 'law of the case doctrine.' (RAB, p. 31-34) The State further argued there was no material defect in the plea canvas that invalidated the Defendant's plea. (RAB, p. 34).

Defendant respectfully submits the State is wrong with both of these arguments. As previously stated, the 'law of the case doctrine' only applies when the issues previously decided are identical or nearly identical. *See, Ripppo v. State*, 134 Nev. 411(2018). The facts of this case are clearly distinguishable from those cases where the 'law of the case doctrine' has been applied.

Defendant further submits the State's arguments concerning the efficacy of the Court's plea canvas in this case are not persuasive. While the State suggests that the standard plea canvas was adequate for the facts of this case, (RAB, p. 33-41) Defendant submits the Court overlooked the most critical and relevant factors in the totality of circumstances surrounding the validity of the Defendant's guilty plea.

The court did not ask any relevant questions of the Defendant's conflict of interest and how that affected the Defendant's advice from his counsel or his understanding of the negotiations. (RAB, p. 35-39) The State merely claims the standard generic questions to the Defendant were adequate to issues concerning the plea. (RAB, p. 40, 41) The lack of a detailed canvas on the most critical issue concerning the voluntariness of the plea was then exacerbated when the Court refused to hold an evidentiary hearing on the issues of possible conflict.



V. The District Court Improperly Denied a Necessary Evidentiary Hearing. This Wrongful Denial of an Evidentiary Hearing Resulted in a Fundamental Miscarriage of Justice In This Case.

It is respectfully submitted that the necessary facts for an accurate and just decision in this case required an evidentiary hearing. Defendant raised sufficient allegations of ineffective assistance in his Petition that it was necessary for a full evidentiary hearing.

Such an evidentiary hearing would have resolved critical questions such as whether the Petition should have been procedurally barred. It could have specifically determined whether there was an exception to the procedural bars argued by the State and also whether Defendant was so gravely prejudiced by any of his counsel's ineffectiveness that the case must be reversed. It would not have been merely a *pro forma* or meaningless hearing, simply to needlessly expand the record as the State suggests. *See, Marshall v. State*, 110 Nev. 1328, 1331 (1994) (RAB, p. 42). *See also, State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (RAB, p. 43)

The issue of whether the Writ should have been procedurally barred was the most critical issue and an evidentiary hearing was absolutely essential to establish Defendant's good cause or excuse for any purported waiver of his claims.

An evidentiary hearing would also have established the essential facts alleged in Defendant's Petition showing that he was prejudiced by his counsel. An evidentiary hearing, where the Defendant and Defendant's counsel could be questioned under oath, is necessary to determine accurately whether defense counsel had fulfilled counsel's duties under *Strickland* prior to Defendant's guilty plea or whether the Defendant was in any way influenced by his co-defendant (his mother) to plead guilty to a *package deal* in which both of the defendants were required to accept the plea bargain.

**VI. Cumulative Error Requires Reversal.**

The State argues Appellant's claim of cumulative error fails, arguing it is procedurally barred, citing *McNelson v. State*, 115 Nev. 396, 415-16 (1989). (RAB, p. 44). This procedural argument fails for the same reason the State's other procedural arguments failed. This is an appeal of the Post Conviction Petition, not a direct appeal.

The State then argued the cumulative error claim fails on the merits. (RAB, p. 44) The State wrongly alleges in their Response that the Court should not weigh cumulative error in a habeas corpus petition, citing a case from the Tenth Circuit, *United States v. Rivera*, 906 F.2d 1462, 1471 (10th Cir.1990). Defendant respectfully

submits that case is not controlling in Nevada and Defendant argues the Court should logically find that under Nevada law it should be clear that the greater amount of individual error that existed in this case created a greater likelihood the error was prejudicial. *Mulder v. State*, 116 Nev. 1, 17 (2000).

It is respectfully submitted that counsel for the State ignores or discounts the numerous errors of counsel Defendant raised in his Post Conviction Petition. Appellant raised numerous claims of ineffective assistance of counsel which likely prejudiced him and should have resulted in finding that his plea was invalid.

The Court should review the totality of the record to determine whether cumulative errors made the Defendant's plea fundamentally unfair. *United States v. Bell*, 367 F.3d 452 (2004); *Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir.1992). Such a review in this case will establish there was cumulative error that requires reversal of Defendant's conviction.

### **CONCLUSION**

Appellant has demonstrated that he did not receive effective assistance of counsel in this case. The District Court therefore erred when it denied his Post Conviction Petition for Habeas Corpus relief. The procedural issues raised by the State were insufficient to bar Defendant's Petition. Defendant's conviction should be

reversed and remanded to prevent a manifest injustice in this case.

**DATED** this 9th day of March, 2022.

Respectfully submitted,

//s// Terrence M. Jackson

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### **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this Reply to Respondent's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

2. I further certify that this brief does comply 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:

[ X ] Proportionately spaced, has a typeface of 14 points or more and contains 2,669 words, which is within the word limit.

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

that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of March, 2022.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

Counsel for Appellant, *Richard A. Newsome, Jr.*

### **CERTIFICATE OF SERVICE**

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 9th day of March, 2022, I served a copy of the foregoing: Reply to Respondent's Answering Brief as follows:

[X] Via Electronic Service (*eFlex*) to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Petitioner/Appellant as follows:

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