IN THE SUPREME COURT OF THE STATE OF NEVADA

TENNILLE WHITAKER,

Appellant,

vs.

WARDEN, JERRY HOWELL & THE STATE OF NEVADA,

Respondents.

SUPREME COURT No. 83049
Dist Ct. Case. DC-CV-20-69

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APPEAL FROM JUDGMENT OF THE HONORABLE
KRISTON HILL
FOURTH JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

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1. SUMMARY OF ARGUMENT

This is an appeal by TENNILLE WHITAKER, Appellant herein, as represented by KARLA K. BUTKO, from the denial of a first and timely petition for habeas corpus after entry of a nolo contendere plea. The charge that the plea entered to was four felony counts of violating NRS 201.540, Sexual Conduct Between School Employee or Volunteer and a Pupil, a Category C Felony.

Ms. Whitaker filed her Petition for Writ of Habeas Corpus (postconviction) and argued her claims under the straightforward allegation that counsel was ineffective under the 6th & 14th Amendments. Her claims included allegations that trial counsel, Byron Bergeron, provided ineffective assistance of counsel at the sentencing stage of the case. Mr. Bergeron admitted to the sentencing court that he was unprepared for the sentencing hearing. Mr. Bergeron did not object to the court's use of improper and suspect sentencing evidence nor did he seek recusal of

the Judge after the improper petition was provided to the sentencing court by the State. Mr. Bergeron did not seek a continuance of the sentencing hearing when it was clear that the courtroom was filled with angry, hostile citizens who were misbehaving in open court. The District Court denied the Petition for Writ of Habeas Corpus (postconviction) without access to an evidentiary hearing. Part of the court's reasoning for dismissal without access to an evidentiary hearing was reliance upon NRS 34.810(1)(a).

This Petition was not heard by Judge Nancy Porter, the sitting judge for the sentencing proceeding. This Petition was heard by the Honorable Kriston N. Hill. Judge Hill ruled that Petitioner failed to meet her burden of proof at the pleading stage to warrant a hearing and that trial counsel was not ineffective. 2 AA 290-301.

Each of trial counsel's failures fell below an objective standard of care, constituting ineffective assistance of counsel under *Strickland*. Ms. Whitaker's

postconviction action was dismissed in violation of standing law which entitled her to an evidentiary hearing under NRS 34.724; *Gonzales v. State, 137 Nev. Adv. Op. 40 dated July 29, 2021; Hargrove . State,* 100 Nev. 498, 686 P.2d 222 (1984) and *Weaver v. Warden*, 107 Nev. 856, 858, 822 P.2d 112, 114 (1991). The District Court abused its discretion and denied Ms. Whitaker's right to due process under the Fifth Amendment when it refused to allow her access to court and the opportunity to support her postconviction allegations. The District Court violated the 5th, 6th & 14th Amendments when it ruled that Ms. Whitaker's trial attorney was effective, without affording her the ability to litigate her postconviction claims.

II. JURISDICTION OF THE COURT

This Court has jurisdiction over the direct appeal from the denial of post-conviction relief under NRS 34.575(1). The District Court filed its Order denying post-conviction relief on April 27, 2021. 2AA 290. The notice of entry of order

was filed on April 28, 2021. 2AA 289. A timely notice of appeal from the denial of post-conviction relief was filed on May 27, 2021. 2AA 323.

III. ROUTING STATEMENT

This is an appeal from allegations raised in a first and timely petition for writ of habeas corpus (post-conviction) for a judgment and sentence imposed on four counts of violation of NRS 201.540, Sexual Conduct Between School Employee or Volunteer and a Pupil, a Category C Felony convictions.

NRAP 17 (b)(3) provides that jurisdiction should be set with the Court of Appeals.

IV. STATEMENT OF ISSUES

1. **THE DISTRICT COURT'S ORDER DISMISSING THE PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AS PROCEDURALLY BARRED UNDER NRS 34.810(1)(a) CONSTITUTED AN ABUSE OF DISCRETION. DISMISSAL**

VIOLATED THE DUE PROCESS RIGHTS OF PETITIONER UNDER THE FIFTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE UNDER THE SIXTH & FOURTEENTH AMENDMENTS. AN EVIDENTIARY HEARING WAS MANDATED.

2. **THE DISTRICT COURT VIOLATED NEVADA LAW. NRS 34.724 PROVIDES THE RIGHT TO POSTCONVICTION RELIEF UPON PROOF THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE SENTENCING STAGE OF THE CASE.**

3. **SENTENCING COUNSEL WAS INEFFECTIVE UNDER THE 6th & 14th AMENDMENTS WHEN SENTENCING COUNSEL FAILED TO OBJECT TO SUSPECT AND INADMISSIBLE NON VICTIM EVIDENCE THAT WAS OVERLY PREJUDICIAL.**

V. STATEMENT OF THE CASE

Ms. Whitaker was arrested and charged with four counts of Sexual Conduct Between School Employee or Volunteer and a Pupil, a Category C Felony as defined in NRS 201.540. AA 1-5. The charges alleged consensual sexual relations with four pupils, all over the age of consent, 16. AA 1-5.

Ms. Whitaker entered into a plea bargain with the State wherein she would enter a nolo contendre plea to four counts of violation of NRS 201.540, the State would cap any sentence recommendation at 4-12 years in prison but otherwise the Parties remained free to argue. Prior to the plea, the State filed with the Court a document entitled, "Offer of Proof with Respect to the Defendant Tennille Rae Whitaker's Proposed Plea of Nolo Contendere". This document was not signed by the Defendant or her counsel. AA 14-15. The document does not state facts sufficient to demonstrate guilt on all counts alleged.

On April 30, 2018, Ms. Whitaker entered a nolo contendere plea to the four counts in the criminal information. The District Court did not ask Ms. Whitaker or whether she admitted the facts as alleged in the Offer of Proof of the State. The District Court asked defense counsel, Byron Bergeron, to admit the facts but his response was that he found that improper but agreed that both he and his client wanted the plea to go forward. The plea was accepted by the court.

On the same date, defense counsel Bergeron filed into court a Psycho-Sexual Evaluation which was authored by Steven Ing., M.A., M.F.T. AA 19-39. The evaluation contained the Curriculum Vitae of Steven Ing as attached. AA 34-39. The recommendation of Steven Ing found that Ms. Whitaker was a low risk to reoffend even stating "Ms. Whitaker's risk to the community is as low as she could possibly score using the actuarial tables described below. AA 29, 31. The District Court did not object to the evaluation, nor did it order an evaluation under NRS 176.139 or NRS 176A.110. The State did not object to the evaluation of Steven Ing.

The case proceeded to sentencing on October 4, 2018, almost five months later. The Department of Parole & Probation authored a presentence report in which it objected to its own sentence recommendation selection scale and sought a deviation from the probation which Ms. Whitaker charted out to and instead

sought four consecutive prison terms of 12-36 months. See PSI and supporting documents.

Ms. Whitaker was sentenced to four consecutive prison terms of 24-60 months in prison. AA 220-221. The judgment of conviction entered on October 5, 2018. AA 219-224.A timely notice of appeal was filed on October 17, 2018. AA 225.

Ms. Whitaker appealed from her sentence. In Docket 77294, the Nevada Supreme Court ruled that trial counsel did not preserve the issues raised on appeal and affirmed the conviction and sentence. The only issue ruled upon by the Nevada Supreme Court in its Order of Affirmance was that the sentencing court did review a psychosexual report so it did not violate NRS 176.139.

Ms. Whitaker filed a Verified Petition for Writ of Habeas Corpus (postconviction). The allegations were clearly made and argued that she received

ineffective assistance of counsel at the sentencing stage of the case, in violation of the Sixth Amendment.

The District Court denied the Petition by written order. In its Order, the District Court ruled 1) NRS 34.810(1)(1) precluded review of the issues but then ruled upon the merits of the Petition when it went on to find that Petitioner failed to meet her burden of proof that counsel was ineffective at sentencing. The matter was dismissed without access to an evidentiary hearing at which the claims would have been supported by credible evidence.

Ms. Whitaker filed a motion for reconsideration under DCR 13(7), seeking the district court's review of the matter. Ms. Whitaker argued that the court failed to acknowledge the case of *Lofthouse v. State*, 136 Nev. Adv. Op. 44 (2020), holding that there are no individual victims under NRS 201.540. 2AA 302. Ms. Whitaker explained the need for an evidentiary hearing at which trial counsel would be expected to explain his failure to cross examine key witnesses, object to

inadmissible evidence, withdrawal of the objection to the upward deviation by Parole & Probation, and have Judge Porter explain her significant upward departure from both the plea bargain and the PSI. 2AA 268, 302-305.

The State opposed the motion for reconsideration and argued that NRCP 60(b) precluded review and relief from the original order denying postconviction relief. The State argued federal rules of civil procedure should rule the day and prevent the court from reconsidering its original dismissal. 2AA 309-310. The State further argued that application of NRCP 40(a)(2) should be a standard for review on habeas matters. The State argued that the term victim is exceptionally wide open. 2AA 312.

The district court ruled that NRCP 60 was controlling. The district court ruled that it was open law in Nevada whether multiple deficiencies by trial counsel can be aggregated for purposed of satisfying the prejudice prong of *Strickland*. The district court found that the students involved in this case were victims under NRS

176.015. The district court found that Petitioner "has not proven that trial counsel was deficient". 2AA 320. The district court denied the motion for reconsideration.2AA 321. This appeal follows that dismissal. 2AA 323.

VI: STATEMENT OF FACTS

The criminal information on the four counts alleged against Ms. Whitaker includes a time period on or between September 1, 2015 and June, 2017. Each of the counts in the criminal information alleged that Ms. Whitaker did as follows:

> Being over the age of 21, while employed at or volunteering at a public or private school, did engage in sexual conduct with a pupil, who was 16 years of age or older and had not received a high school diploma, a general educational development certificate or any equivalent document and: the student was attending the public or private school at which the Defendant was employed or volunteered ; or the student had contact with the Defendant in the course of the Defendant performing his or her duties as an employee or volunteer.
>
> AA 1-3.

Notably, the criminal information did not allege the ages of the pupils in question. AA 1-2. The criminal information did not allege the school at which

Ms. Whitaker taught or the school which the pupils attended. The memorandum of plea did not allege any basis in fact for the entry of a plea. AA6-10. The offer of proof of the State (in support of the nolo contendere plea) did not allege the age of the pupils, the location of the offense(s) or the location Ms. Whitaker taught or the location of the school the pupils attended.

The Department of Parole & Probation authored its presentence report on September 17, 2018. Ms. Whitaker should have received a recommendation of probation. At page 3, the Department acknowledged receipt of the Evaluation by Steven Ing and cited to it, demonstrating that Ms. Whitaker qualified for probation as she was not deemed a high risk to re-offend (low actually). PSI Page 3-4.

The Department of Parole & Probation prepared an Addendum to their report, to justify a prison recommendation rather than the probation which Ms. Whitaker qualified for under the scored recommendation which the Department normally uses. See Deviation Justification by Lt. Harp attached to PSI report and

the sentence recommendation selection scale thereto. The recommendation of the Department was the same at the State's cap of sentencing, in at 12-36 months in prison each count to be served consecutively for a total of 4-12 years in prison. AA 156-157.

At no time did Mr. Bergeron object to the upward adjustment by the Department of Parole & Probation.

A document dated May 7, 2018, was prepared by the Department of Parole & Probation. That document included a "Petition" signed by members of the community which was circulated and prepared by one of the victim's family members. That Petition was not served on Ms. Whitaker or her attorney until the morning of sentencing on October 4, 2018. The "Petition" is dated May 7, 2 018. Mr. Bergeron discussed the "Petition" during his sentencing argument. The "Petition" included suspect evidence and was an all out attack on both Ms. Whitaker and her husband. AA 78-84. The "Petition" was forwarded by the DA's

Office – ex parte– to the Court. AA 154. Mr. Bergeron failed to object to the ex parte contact and failed to seek recusal of the sentencing judge.

During the argument, Mr. Bergeron asked the Court if there was some type of "Petition" that had reached the Court. Judge Porter minimized this document by stating: "It was a letter that was signed by several people. And I recognize that the vast majority of those are not victims, as defined by the statute. AA 174. Mr. Bergeron did not seek to continue the hearing so that he could investigate the signatures on the citizen petition and determine whether they even knew Ms. Whitaker or any of the victims herein. That type of sentencing pressure is unfair to the sentencing court and Mr. Bergeron should have objected and move to recuse the judge as well as continue the sentencing hearing.

Improper victim impact evidence was admitted against Ms. Whitaker. Nevada law defines the term victim. Mr. Bergeron failed to object to the inadmissible sentencing evidence:

----- Tammy Myers. Ms. Myers began her letter by stating that she had young boys the same as the victims in the case but that her boys were not victims of a sexual crime at the hands of Ms. Whitaker. AA 100.

----- Thad Ballard, President of the Board of Trustees, Elko County School District. Mr. Ballard used his position of power in his letter to ask the court to impose the maximum time in prison. According to Mr. Ballard, "It is not possible for the Court to impose a sentence that is too harsh". AA 108. Mr. Ballard described the school district as a victim. Mr. Ballard believed the reputation of the entire community had been maligned by Ms. Whitaker. AA 108. Mr. Ballard

stated that every student in the school and every parent in the school was a victim. AA 107.

The sentencing hearing in this case was heated. The courtroom emotional level was high. At the onset, Judge Porter noted that there was quite a few people here, a lot more than normal and she warned the audience that the Bailiff will remove anyone not behaving. AA 137. Later in the proceeding, Judge Porter noted that: "You can see all these interested people here. We have a lot of people who are interested in this proceeding." AA 154.

Later in the proceeding, Judge Porter again admonished the crowd in the courtroom: "I'm going to advise the observers again to behave appropriately, or you will be removed."

Mr. Bergeron did not seek a continuance of the sentencing hearing in spite of admitting that he did not possess all necessary items for the hearing. Mr.

Bergeron told the Court that one victim impact letter was served on defense counsel by mailing it to Mr. Bergeron's office in Reno on October 1, 2018. The sentencing hearing was October 4, 2018, in Elko, Nevada. Mr. Bergeron was handed the letter in open court moments before the sentencing hearing. AA 155.

Mr. Bergeron explicitly admitted to the court that :

> "And there may be a lot I didn't do because this case just keeps cascading and cascading factually. The further we get away from the arraignment, waiving the Prelim, the second arraignment, and now the sentencing. And, quite frankly there's a lot I would like to do but the fact is I don't even think I can keep half of it straight today. And that's must me being particularly honest with the Court". 2AA 262.

While this statement alone is not enough to demonstrate Mr. Bergeron was unprepared, a review of the rest of the proceeding show that fact. Notably, the report of Steven Ing, M.A., M.F.T., was filed into court on the date of the plea.

That report was not updated for the sentencing court, even thought Ms. Whitaker remained in treatment sessions with Mr. Ing's office. The district court stated that it did not trust the low risk to re-offend conclusion authored by Mr. Ing as the district court thought his objectivity was compromised by his treatment plans with Ms. Whitaker. Mr. Bergeron took no efforts to have an additional psycho sexual evaluation completed. Mr. Bergeron did not take the time to have the treatment status of Ms. Whitaker updated for the sentencing court. Ms. Whitaker alleged that her mental health issues should have been investigated by counsel prior to sentencing and been the subject of mitigation evidence. Ms. Whitaker explained that B.H., on of the victims, forced himself upon her and that she could not resist him. Ms. Whitaker alleged that she would present expert testimony to show that

the impact of forced sexual activity on females leads to a variety of contradictory behaviors by females that mirror Ms. Whitaker's subsequent behavior.

Ms.Whitaker would also testify that because of the forced sexual contact, she was afraid to reveal the incident and the repercussion was that she was implicitly trapped into this behavior. 2AA 265.

Ms. Whitaker alleged that Mr. Bergeron suffered an injury was hospitalized just prior to the sentencing hearing date and that the lack of contact between herself and counsel had been ongoing.

In the Petition on file, Ms. Whitaker directly attacked Marsy's Law and questioned whether a victim impact statement can properly include the public's point of view about sentencing. 2AA 263. Mr. Bergeron did not litigate the

improper inclusion of the conscience of the community approach to sentencing found in this case. The Nevada Supreme Court ruled his failure to preserve the record on this subject caused the appeal of that issue to be lost.

The district court, due to counsel's failures, was left believing that Ms. Whitaker had not sought medical help. In reality, Ms. Whitaker sought medical help, met with her treating physician and had an MRI completed on her pituitary gland to deem out physical issues. Ms. Whitaker was never told by counsel or Mr. Ing to seek psychiatric help and medication for her mental health issues.

In the Petition on file, Ms. Whitaker alleged that Mr. Bergeron was ineffective when he failed to traverse victim impact evidence for its veracity. False allegations were admitted by the victim impact evidence of Ms. Hooper, whose

statement was suspect and highly prejudicial. Mr. Bergeron did not object to this victim impact evidence, nor did he attempt to correct the erroneous information being provided to the sentencing court. 2AA 271.

Perhaps the most devastating failure by trial counsel was his failure to demonstrate to the Court that Ms. Whitaker's husband stood by her, ready to relocate the family out of the Wells area to facilitate probation and treatment. No evidence was presented that Ms. Whitaker had stopped drinking alcohol, that she and her husband were strong in their marriage, able to relocate the family, and that she had been dutiful in counseling since the investigation began. 2AA 272.

The State's Answer to the Petition was to invoke NRS 34.810 (1)(a) and argue that the Petition should be summarily dismissed as Ms. Whitaker was not

attacking the entry of the no contest plea. 2AA 277-278. The State argued that Ms. Whitaker's petition failed to demonstrate prejudice or prove that her sentence would have been anything less than consecutive maximum terms in prison if counsel had been effective. 2AA 282.

The State entered into a plea bargain in this matter. According to the terms of that plea bargain, the State agreed to cap its argument for a sentence that did not exceed an aggregate sentence of 4-12 years. The State's argument at the sentencing hearing violated the spirit of this plea agreement. The State admitted that Ms. Whitaker qualified for probation under the normal sentence recommendation scales but argued for the deviation which recommended the same amount of time as the plea bargain cap of the State. AA 189.

Now, at the postconviction stage, the State argued that Ms. Whitaker

deserved every minute of an aggregate sentence of 8-20 years in prison. This is double the bottom end sentence the State is here to enforce under the plea bargain and 8 years higher than the top end of the plea bargain. 1AA 220-221.

Respondent argued that matters alleged in the Petition on file were not supported by the record. That is because a postconviction claim is raised and then supported by competent evidence at an evidentiary hearing. The Petition is a pleading document which alerts the court to the availability of additional evidence to be adduced at a hearing.

The District Court ruled against Ms. Whitaker on all allegations and did not provide Ms. Whitaker the ability to produce evidence at a hearing and prove her claims. Instead, the district court ruled that Ms. Whitaker failed to prove trial counsel deficient and failed to prove that her sentence would have been lesser if counsel had brought forth additional evidence as cited herein. 2AA 292-299.

ARGUMENT

1. THE DISTRICT COURT'S ORDER DISMISSING THE PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AS PROCEDURALLY BARRED UNDER NRS 34.810(1)(a) CONSTITUTED AN ABUSE OF DISCRETION. DISMISSAL VIOLATED THE DUE PROCESS RIGHTS OF PETITIONER UNDER THE FIFTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE UNDER THE SIXTH & FOURTEENTH AMENDMENTS. AN EVIDENTIARY HEARING WAS MANDATED.

Standard of Review:

NRS 34.810(1)(a) does not bar a defendant's claim that she received ineffective assistance of counsel at her sentencing hearing. *Gonzales v. State*, 137 Nev. Adv. Op. 40, decided July 29, 2021.

In *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993), this Court reviewed the issue of whether or not a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. This Court held that the

question is a mixed question of law in fact and is subject to independent review and reiterated the High Court's ruling in *Strickland v. Washington*, 466 U.S. 668 (1984).

The objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432–33, 683 P.2d 504, 505 (1984) (adopting the *Strickland* test in Nevada). Deference is given to the district court's factual findings regarding ineffective assistance of counsel but this Court reviews the district court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

A petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence. *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)) and *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).

A district court's findings of fact are entitled to deference and will not be disturbed on appeal if they are supported by substantial evidence and are not clearly wrong. *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006).

In *Hargrove* this Court stated that post-conviction claims must consist of more than "bare" allegations and that an evidentiary hearing is mandated only when a post-conviction petitioner asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief. *Hargrove* is the

cornerstone of post-conviction habeas review. *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984).

In *Weaver v. Warden*, 107 Nev. 856, 858, 822 P.2d 112, 114 (1991), the Nevada Supreme Court specifically ruled:

> "Post-conviction petition for writ of habeas corpus is appropriate vehicle for modifying sentence which is infirm for any reason."

This Court must proceed to review the reasonableness of the available sentence. *See United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006). The United States Supreme Court has concluded that sentencing is such a "critical stage" for purposes of the Sixth Amendment right to counsel. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

The defendant is entitled to the presence of counsel, and the effective

assistance of counsel, during any 'critical stage' of the proceedings. *United States v. Wade*, 388 U.S. 218, 226-27 (1967); see also U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (indicating the Sixth Amendment right to counsel is applicable to the states through the Fourteenth Amendment).

Argument:

Due process has never been, and perhaps never can be, precisely defined. Accordingly, exactly what procedure is required in any given case depends upon the circumstances. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, it is flexible and calls for such procedural protections as the particular situation demands. The most basic requirement of due process, however, is the opportunity to be heard "at a meaningful

time and in a meaningful manner". *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981), *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Access to court is a key right of due process. Access to presentation of witnesses and evidence in support of one's allegations is key to the protection provided by the Due Process Clause of the Fifth Amendment.

Access to court for an evidentiary hearing is paramount to protection of the right to due process under the law. For the court to rule summarily that nothing done by counsel could have prevented this woman from receiving the maximum possible sentence on each count, running consecutively, is unsupportable by this Court. Ms. Whitaker qualified for probation on this case. The PSI author had to seek an upward

deviation (which was based upon suspect reasoning) in order to seek a prison term. The plea bargain was half of the sentence imposed upon this woman. It was a combination of the unpreparedness of counsel and the suspect and inadmissible evidence presented to the court that caused this maximum sentence to be imposed. Trial counsel failed to adequately prepare for the sentencing hearing and failed to bring forth mitigation evidence.

The Petition filed in support of an evidentiary hearing and in support of the allegation that sentencing counsel was ineffective included information about Ms. Whitaker which showed the sentencing court the true picture of Ms. Whitaker, the fact setting at hand and Ms. Whitaker's steps to improve both herself, understand her mental health issue and demonstrates that the picture portrayed at the prior sentencing

hearing was erroneous. 2AA 254-308.

Trial counsel's failure to object to suspect and prejudicial sentencing evidence left the ability to appeal the issue in harm's way. Trial counsel's failure to object to Marsy's Law and the wide open approach taken by the sentencing court for the community view of what should happen to an individual defendant constituted ineffective assistance of counsel.

When a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of the proper sentence. *Wilson v. State*, 105 Nev. 110, 115, 771 P.2d 583, 586 (1989) (citing *Lockett v. Ohio*, 438 U.S. 586, 603 (1978)).

In *Johnson v. State*, 133 Nev. 571, 402 P.3d 1266 (2017), the Nevada

Supreme Court reviewed whether counsel was ineffective for failing to locate and investigate additional mitigation evidence. While this was a death penalty case, the legal authority provided demonstrates that counsel must be effective at sentencing and that the performance of counsel at sentencing is subjected to the *Strickland* analysis. This Court cited to *Strickland*:

> "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691."

This Court cited to *Kansas v. Carr*, 577 U.S. ___, ___, 136 S. Ct. 633, 642 (2016) to remind us that whether mitigation exists, however, is largely a judgment call. One cannot make that judgment if one does not investigate available mitigation evidence. The Court cannot deem evidence mitigating if defense counsel fails to provide it for review. The Court cannot deem evidence mitigating or not if

the Court does not hear the evidence at a duly set evidentiary hearing.

In *Rippo v. State*, 132 Nev. 95, 368 P.3d 729 (2016), the Nevada Supreme Court again reviewed whether trial counsel was effective at the sentencing stage of the case and investigation of mitigation evidence. The same occurred in *Burnside v. State*, 131 Nev. 371, 352 P.3d 627 (2015).

This sentence was in excess of that demanded by society on charges of this nature. The sentence disregarded the PSI recommendation and the plea bargain of the parties.

A substantively reasonable sentence is one that is "sufficient, but not greater than necessary" to accomplish § 3553(a)(2)'s sentencing goals. 18 U.S.C. § 3553(a); *see, e.g., United States v. Vasquez-Landaver*, 527 F.3d 798, 804-05 (9th Cir.

2008). This sentence was in excess of that needed for society's interests. See *United States v. Rita,* 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007).

The District Court abused its discretion when it refused to hold an evidentiary hearing at which Ms. Whitaker had access to court to prove her claims by a preponderance of the evidence. A review of the district court's order appears to insinuate that there is never going to be ineffective assistance of counsel at a sentencing hearing as the Petitioner will never be able to prove prejudice. Ms. Whitaker did not even have the chance to bring forth Judge Porter to see if the sentencing judge would have imposed a different sentence if she heard the mitigation evidence and if the suspect evidence was removed from her review.

2. THE DISTRICT COURT VIOLATED NEVADA LAW. NRS 34.724 PROVIDES THE RIGHT TO POSTCONVICTION RELIEF UPON PROOF THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE SENTENCING STAGE OF THE CASE.

Standard of Review:

This issue involves statutory interpretation, which is a question of law that the Court reviews de novo. *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 643, 650, 331 P.3d 905, 909 (2014). Where a statute is clear on its face, this court must give effect to the plain language without resorting to rules of statutory construction. *Jones v. Nev. State Bd. of Med. Exam'rs*, 131 Nev. 24, 342 P.3d 50, 52 (2015).

Argument:

NRS 34.724 provides: "Any person convicted of a crime and under

sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State",

Ms. Whitaker claimed that her sentence was imposed in violation of her right to the effective assistance of counsel under the 6th Amendment. The district court ruled summarily that sentencing counsel was effective. No hearing was granted at which Ms. Whitaker could prove her allegations by competent evidence. The pleading was not a bare or naked pleading. Direct problems with sentencing counsel's performance were duly noted. Since a new Judge has been appointed in this judicial district, Judge Porter could not review the file and indicate whether prejudice was found due to sentencing counsel's ineffective assistance of counsel.

Obviously, Judge Porter would be a necessary witness to the proceeding to determine why she imposed consecutive maximum sentences, in excess of the low risk to re-offend psychological rating, the PSI which netted probation but was the subject of an upward deviation to gain a prison term and in excess of the plea bargain of 4-12 years in prison. Yet, Judge Hill determined that sentencing counsel was effective and that Ms. Whitaker could not prove prejudice.

A Postconviction petitioner is entitled to evidentiary hearing when he asserts specific factual allegations that, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

An uninformed strategy is not a reasoned strategy. *Correll v. Ryan*, 539 F.3d 938, 949(9th Cir.2008), cert. denied sub nom. *Schriro v. Correll*, 555U.S. 1098, 129

S.Ct. 903, 173 L.Ed.2d 108 (2009). The Supreme Court's holding that the traditional deference owed to the strategic judgments of counsel is not justified where there was not an adequate investigation supporting those judgments, id. at 948-49 (quoting *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527) is on point herein.

This Court has ruled that a district court erred in entertaining appellant's motion for summary judgment (see N.R.C.P. 56) in the context of postconviction petition for writ of habeas corpus because: (1) NRS 34.820 provides for procedure in cases where petitioner has been sentenced to death; (2) NRS 34.770, 34.800 and 34.810 provide the manner in which district court decides postconviction petition for writ of habeas corpus; (3) these statutes do not provide for summary judgment as a method of determining the merits of postconviction petition for writ of habeas corpus; and (4) NRS 34.780 expressly limits the extent to which the general rules of civil procedure apply to proceedings involving petition for writ of habeas corpus. *Beets*

v. State, 110 Nev. 339, 871 P.2d 357 (1994), cited, *Means v. State*, 120 Nev. 1001, at 1019, 103 P.3d 25 (2004).

The District Court's reliance upon the Nevada Rules of Civil Procedure or the Federal Rule of Civil Procedure on the motion to dismiss or the motion for reconsideration cannot stand. The district court's legal obligations upon receipt of a postconviction action are clearly handled by Nevada statutory law and are not subject to dismissal by way of NRCP 60.

The Court "may look to general civil or criminal rules for guidance only when the statutes governing habeas proceedings have not addressed the issue presented". *Mazzan v. State*, 109 Nev. 1067, 1070, 863 P.2d 1035, 1036 (1993). In this case, we do not turn to the Nevada Rules of Civil Procedure because the habeas statutory scheme provides for the rules of the review process.

This Court should remand this matter to the district court for an evidentiary

hearing, at which Ms. Whitaker will put forth her witnesses and evidence to support her allegations made in the Petition.

3. SENTENCING COUNSEL WAS INEFFECTIVE UNDER THE 6th & 14th AMENDMENTS WHEN SENTENCING COUNSEL FAILED TO OBJECT TO SUSPECT AND INADMISSIBLE NON VICTIM EVIDENCE THAT WAS OVERLY PREJUDICIAL.

Standard of Review:

See prior authority for standard of review on ineffective assistance of counsel claims.

Argument:

Pursuant to the Nevada Code of Judicial Conduct, judges are required to manage the courtroom to limit, as much as possible, behavior such as racially charged comments, threats, and curses. See NCJC Canon 2, Rule 2.8 (stating that

"[a] judge shall require order and decorum in proceedings before the court" and that a judge shall require "dignified" and "courteous" behavior from those "subject to the judge's direction and control"). This decorum is to be maintained at all times, including during victim impact statements.

We know from the sentencing transcript that Judge Porter admonished the citizens who were present at the sentencing hearing to behave.

Sentencing counsel did not object to various items which constituted non-victim impact evidence. A document dated May 7, 2018, was prepared by the Department of Parole & Probation. That document included a "Petition" signed by members of the community which was circulated and prepared by one of the victim's family members. That Petition was not served on Ms. Whitaker or her attorney until the morning of sentencing on October 4, 2018. The "Petition" is

dated May 7, 2 018. Mr. Bergeron discussed the "Petition" during his sentencing argument. The "Petition" included suspect evidence and was an all out attack on both Ms. Whitaker and her husband. AA 78-84. The "Petition" was forwarded by the DA's Office to the Court. AA 154. That Petition does not seem to have been served upon sentencing counsel. For Mr. Bergeron to fail to react to this prejudicial petition, seek recusal of the court and seek a continuance fell below the standard of care of effective counsel.

The over 70 folks who illegibly signed the Petition were not investigated, nor brought to court to see if they had ever even met Ms. Whitaker. The sentencing court was biased by suspect and inadmissible sentencing evidence, mandating a new sentencing hearing before a court that has not been subjected to such prejudicial conduct.

NRS 176.015 provides discretion for the sentencing court to consider non-victim statements that constitue "reliable and relevant evidence". NRS 176.015(6).

This is different evidence than that considered by Marsy's Law. Marsy's Law guarantees each person who is the victim of a crime the constitutional right to be reasonably heard, upon request, at any public proceeding... in any court involving release or sentencing and the ability to provide information concerning the impact of the offense on the victim and the victim's family. Nev. Const. Art. 1, Section 8 (a)(1)(h)(and (j).

The 70+ persons who signed the Petition and Ms. Myers and Mr. Ballard were not victims at law. They do not meet the statutory definition of the term "victim". Marsy's Law is intended to protect victims who were directly and proximately harmed by the behavior of Ms. Whitaker in this case, not every member of the Wells community.

If we take the Petition approach to imposition of severe, harsh prison terms for an offender, should we take the Petition approach on cases where the victim was not an upstanding member of the community? Where would the line draw for

the sentencing court? Should the sentencing court on this case hear from every school board representative in the State? Is the State too narrow and should the commentary include scholars and others outside the state of Nevada?

With all due concern for protection of victim's rights, Ms. Whitaker had a right to be ready to proceed to sentencing. To walk into open court, discover a Petition signed by in excess of 70 unknown persons, letters from the school board and a "mom", and have counsel proceed to sentencing was below the standard of care. The PSI was delivered to Ms. Whitaker just hours prior to the sentencing hearing. That is when it was discovered that the Department of Parole & Probation were seeking an upward adjustment and prison time, rather than the probation terms that Ms. Whitaker qualified for under the formulas and psychosexual evaluation. Mr. Bergeron should have apologized to the court for the fact that he was unprepared for this hearing and sought a continuance.

The District Court's consideration of suspect evidence constituted an abuse

of discretion. The District Court's refusal to hear from Mr. Bergeron and see just how surprised he was and unprepared he was for the sabotage that occurred at this sentencing by dismissal of this Petition without access to a hearing violates the Fifth Amendment right to due process and the habeas statutory scheme. See *Hargrove,* Supra.

Non-victim evidence at sentencing must be reliable, relevant and admissible. NRS 176.015; *Wood v. State*, 111 Nev. 428, 892 P.2d 944 (1995). This evidence was inadmissible passion play evidence intended to prejudice the court against Ms. Whitaker. Trial counsel failed to meet the evidence.

Counsel notes that the case of *Arapicio v. State*, Docket 80072, is set for oral argument and will be under submission when this Opening Brief is filed. It is anticipated that this Court's decision in *Arapicio* will impact this appellate litigation.

Yet another alleged victim impact letter was filed with the court from

Tammy Myers. Ms. Myers began her letter by stating that she had young boys the same as the victims in the case but that her boys were not victims of a sexual crime at the hands of Ms. Whitaker. AA 100. Clearly, Ms. Myers was not a victim at law.

Another improperly delivered victim impact letter was provided to the Court by Thad Ballard, President of the Board of Trustees, Elko County School District. Mr. Ballard used his position of power in his letter to ask the court to impose the maximum time in prison. According to Mr. Ballard, "It is not possible for the Court to impose a sentence that is too harsh". AA 108. Mr. Ballard described the school district as a victim. Yet, this same school district did not suspend Ms Whitaker and place her on leave when the first allegation arose, nor did it conduct a timely investigation. Mr. Ballard believed the reputation of the entire

community had been maligned by Ms. Whitaker. AA 108. Mr. Ballard stated that every student in the school and every parent in the school was a victim. AA 107.

Now, because sentencing counsel failed to object to prejudicial and inadmissible Ms. Whitaker was forced to defend against the community and the conscience of the community. Sentencing matters are for the court to decide, not local politics.

The reality is that this case should be remanded for a new sentencing. Alternatively, an evidentiary hearing was warranted— at which Ms. Whitaker is able to controvert the 70+ people who wanted her sent to prison and at least know who they were and why they should have input into her sentencing hearing.

VIII. CONCLUSION

A review of the District Court's Order of Dismissal demonstrates that this Court cannot uphold the Order of dismissal. Ms. Whitaker met the pleading obligations under *Hargrove*. The claims were not repelled or belied by the record. A review of the totality of the circumstances demonstrates that, because counsel provided ineffective assistance of counsel under the 6th & 14th Amendments, Ms. Whitaker was sentenced to maximum consecutive prison terms. Either this Court should grant a new sentencing hearing or this Court should remand for an evidentiary hearing on the postconviction claims. The district court's application of Nevada procedural rules was improper when it was clear that the Nevada statutory scheme for postconviction review was controlling.

This Court needs to provide guidance on the habeas practice and what factors a court should review to determine whether an evidentiary hearing is granted. The State's approach to this stage of the case would require affidavits of testimony or depositions and expert opinions to be garnered prior to the filing stage of the habeas action. That is not the proper means with which to achieve a first and timely postconviction filing and a thorough first and timely hearing on the matters. Relief is warranted.

DATED this 15th day of September, 2021.

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does exceed 30 pages but meets the parameters of Word Count and Line Count.

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. The document was prepared in Word Perfect, Times New Roman. There are 49 typed pages, 7500 words in this brief and 693 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman with 2.45 line spacing.

DATED this 15th day of September, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X

E-Flex delivery system of the Nevada Supreme Court addressed as follows:

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DATED this 15th day of September, 2021.

Karla K Butko

KARLA K. BUTKO, Esq.