IN THE SUPREME COURT OF THE STATE OF NEVADA

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SHAN JONATHON KITTREDGE, #1202642, Appellant, v. STATE OF NEVADA, Respondent.	**CASE NO.: 83943** **E-FILE** D.C. Case: A-20-815382-W Dept.: **XXXII**

APPELLANT'S OPENING BRIEF

Appeal from the denial of a Post-Conviction Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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Docket 83943 Document 2022-13408

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAN JONATHAN KITTREDGE,	)	
#1202642,	)	**CASE NO.: 83943**
Appellant,	)	**E-FILE**
v.	)	D.C. Case: A-20-815382-W
STATE OF NEVADA,	)	Dept.: **XXXII**
	)	
Respondent.	)	
	)	

NRAP 26.1 DISCLOSURE

The undersigned counsel of record for SHAN JONATHON KITTREDGE, hereby certifies pursuant to NRAP 26.1(a) that there are no persons nor entities associated within my law practice and that I am a sole practitioner. Furthermore, there are no persons nor entities that have any interest or financial interest in Law Office of Terrence M. Jackson. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 27th day of April, 2022.

//s// Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

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Appeal from the denial of a Post-Conviction Writ of Habeas Corpus

Eighth Judicial District Court, Clark County

NATURE OF THE ACTION

This is an Appeal from denial of a Post-Conviction Writ of Habeas Corpus.

SPECIFICATION OF ERROR

1. The District Court erred by not finding defense counsel was ineffective under *Strickland* because he failed to do an adequate investigation and preparation preplea;

1. A. Counsel's failure to adequately investigate all the relevant facts preplea was ineffective assistance of counsel under *Strickland*;

1. B. Counsel's failure to seek a forensic competency evaluation of the Defendant preplea, including a neurological and psychological exam, was ineffective assistance under the particular circumstances of Defendant's case;

2. The District Court erred by not finding defense counsel should have filed meritorious motions which could have aided Defendant's case;

3. The District Court erred when it found that Defendant was competent to enter a valid plea of guilty;

4. Defendant's sentence of 18 to 45 years was excessively long and violated the cruel and unusual punishment clause of the Eighth Amendment;

5. Defendant was denied an adequate evidentiary hearing to establish essential facts at his post-conviction hearing;

6. The District Court erred in not finding the cumulative errors by counsel required reversal of the Defendant's conviction.

. . .

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SUMMARY OF THE ARGUMENT

The District Court erred when it denied Defendant's Post Conviction Petition for Habeas Corpus Relief. The Habeas Corpus Petition raised multiple issues alleging counsel's ineffective assistance under *Strickland v. Washington.*

During pretrial, counsel failed in his duty to adequately investigate and prepare preplea and file necessary motions preplea. *Strickland v. Washington,* 466 U.S. 668, *Id.* 686, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *Jackson v. Warden,* 91 Nev. 430 (1975). Counsel also failed to develop necessary expert testimony that would have shown that Defendant was incompetent, or even led to a viable defense. *See*, *People v. Frierson,* 599 P.2d 587 (Cal. 1979). Because of that lack of preparation, Defendant was deprived of his Sixth Amendment rights to counsel, and he was denied due process of law because his guilty plea was not a knowing, voluntary and intelligent plea. *See, Johnson v. Zerbst,* 304 U. S. 458 (1938).

Defendant's counsel should have sought a psychological and neurological examination of the Defendant before he pled guilty because of the serious head injury he had suffered. This failure by counsel extremely prejudiced the Defendant. The District Court therefore erred when it accepted the Defendant's guilty plea. (A.A. 174-

194) The District Court erred again when it denied Defendant's post-conviction Petition based upon his counsel's ineffectiveness and the Defendant's own lack of competency. (A.A. 285-286) The District Court also erred by not finding ineffective assistance under *Strickland* had led to an excessively long sentence of 18 to 45 years. (A.A. 299) This sentence was so grievously harsh it violated the Eighth Amendment's cruel and unusual punishment clause. *See, Solem v. Helm,* 463 U.S. 277 (1983). Finally, the cumulation of errors in this case mandated a reversal of the conviction and the sentence. *See, Mulder v. State,* 116 Nev. 1, 17 (2000).

JURISDICTIONAL STATEMENT

Defendant/Appellant claims jurisdiction pursuant to NRS 177.015(3). Defendant filed timely Notice of Appeal pursuant to statute on December 13, 2021, within the thirty (30) day time limit established by the Nevada Rules of Appellate Procedure 4(b). This is an appeal from the denial of post-conviction Writ of Habeas Corpus Petition.

ROUTING STATEMENT

This is an appeal on a Habeas Corpus Petition involving a class A felony, Sexual Assault. Pursuant to NRAP 17(b)(1), because this case involves the appeal of

an 'A' felony with a sentence of 18 to 45 years, it should be retained by the Supreme Court of Nevada.

STATEMENT OF LEGAL ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED BY NOT FINDING DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO DO AN ADEQUATE INVESTIGATION AND PREPARATION PREPLEA;

II. THE DISTRICT COURT ERRED IN NOT FINDING DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO FILE A MERITORIOUS MOTION TO SUPPRESS PREPLEA THAT COULD HAVE AIDED DEFENDANT'S CASE;

III. THE DISTRICT COURT ERRED WHEN IT FOUND THAT DEFENDANT WAS COMPETENT TO ENTER A VALID GUILTY PLEA. THIS ERROR BY THE DISTRICT COURT RESULTED PRIMARILY FROM DEFENSE COUNSEL'S INEFFECTIVENESS;

IV. DEFENSE COUNSEL WAS INEFFECTIVE BY URGING DEFENDANT TO PLEAD GUILTY TO AN EXCESSIVELY HARSH SENTENCE OF 18 TO 45 YEARS THAT WAS DISPROPORTIONATELY LONG AND VIOLATED

DEFENDANT'S RIGHTS UNDER THE EIGHTH AMENDMENT;

V. THE DISTRICT COURT ERRED IN DENYING DEFENDANT A NECESSARY EVIDENTIARY HEARING ON DISPUTED FACTS IN HIS POST-CONVICTION PETITION;

VI. THE ACCUMULATION OF ERRORS REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTION AND SENTENCE;

STATEMENT OF THE CASE

Defendant was charged in a Superceding Indictment on August 1, 2018. (A.A. 001-021) Defendant was arraigned and pled not guilty on August 2, 2018 and the case was then set for trial. (A.A. 022)

On March 18, 2019, pursuant to negotiations, Defendant entered a guilty plea to an Amended Superseding Indictment (A.A. 023-026), with a stipulated sentencing agreement. The signed Guilty Plea Memorandum was filed on March18, 2019. (A.A. 027-037) On May 8, 2019, the Defendant filed a Sentencing Memorandum. (A.A. 038-055) On May 16, 2019, Defendant was sentenced by District Court Judge to the "stipulated" sentence of eighteen (18) to forty-five (45) years. (A.A. 056-057) The Judgment of Conviction was filed on May 16, 2019. (A.A. 058-060)

On May 22 2020, Defendant filed a *Pro Per* Petition for Habeas Corpus. (A.A. 063-079) The State filed a Response on November 25, 2020. (A.A.198-211) Defendant then, through appointed counsel, filed a Supplemental Petition for Habeas Corpus on July 14, 2021. (A.A.219-257) On August 18, 2021, the State filed a Response to the Supplemental Petition. (A.A. 258-273) Defense counsel then filed a Reply on October 19, 2021. (A.A. 274-280)

Argument was heard on the post-conviction Petition in District Court on October 21, 2021. (A.A. 281-286) The District Court then issued Findings of Fact, Conclusions of Law and Order on December 1, 2021. (A.A. 287-303) Notice of Entry was filed on December 6, 2021. (A.A.304) On December 13, 2021, Defendant filed Notice of Appeal. (A.A. 305-306)

FACTUAL STATEMENT

The Defendant, without adequate assistance of counsel, entered an unusual guilty plea to a "stipulated" sentence of eighteen (18) to forty-five (45) years for the charges in the Amended Indictment. (A.A. 023-26) Defendant plead guilty to the multiple felony charges in the Amended Indictment with a lengthy stipulated sentence before defense counsel had done an adequate pretrial determination of his competency

and before counsel had done an adequate pretrial investigation of the case.

Both the defense counsel and the State knew the Defendant had received a serious injury to the head from a gunshot wound which occurred in June of 2018. Defense counsel did not however adequately investigate all the circumstances of the offense, or the Defendant's background, especially other factors that affected his competency such as his long history of drug abuse. Defense counsel never hired an expert, nor did he seek to have the Court commit his client, the Defendant, for a Court ordered competency evaluation.

On May 23, 2020, a post conviction Habeas Corpus Petition was filed by the Defendant challenging his counsel's actions and the Court's determination that he *was* competent. (A.A. 063-079) The Petition was summarily denied by the District Court without adequate evidentiary hearing with necessary expert testimony about Defendant's competency or with sufficient testimony about defense counsel's ineffectiveness. (A.A. 212) *See, Hatley v. State,* 100 Nev. 241 (1984)

After post conviction counsel filed Supplemental Petition to the Court of Habeas Corpus, after a brief hearing, the Court issued Findings of Fact, denying the Petition and finding Defendant was competent and that his plea was valid. The Court

found the was no ineffective assistance of counsel that led to an involuntary plea. (A.A. 287-301).

The failures by defense counsel and the District Court in this case mandate review of the Defendant's conviction and sentence because there existed a substantial probability Defendant was prejudiced by counsel's errors, and the District Court's wrongful determination that the Defendant was competent when he entered his "stipulated plea."

ARGUMENT

I. DEFENSE COUNSEL WAS INEFFECTIVE UNDER *STRICKLAND* BECAUSE HE DID NOT DO SUFFICIENT PRETRIAL PREPARATION AND INVESTIGATION PREPLEA.

Defense counsel in this case did not prepare or investigate adequately to render effective assistance of counsel. The most important aspect of the preplea investigation was consulting with the Defendant pretrial so counsel could be aware of any possible defense. It is respectfully submitted that counsel failed almost completely in this duty. Counsel did not spend more than a minimal amount of time with the Defendant.

The American Bar Association (ABA) Standards on the prosecutor and defense

function emphasize the crucial importance of investigation by criminal defense attorneys for their clients. *See,* ABA Standards 4:1:

> **4.1 Duty to Investigate:**
>
> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include effort to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty. (Emphasis added)

The importance of this standard has been recognized and cited by the Nevada Supreme Court for over forty years. *Jackson v. Warden,* 91 Nev. 430, 537 P.2d 473 (1975). Counsel, however, did not fulfill this elementary command to investigate and develop possible information that might assist his client. This is especially important before a defendant pleads guilty. This failure requires reversal of the conviction.

In *Strickland v Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two-pronged test for reversal based upon ineffective assistance of counsel. First, the defendant must show counsel's

performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, counsel must show that the deficient performance *prejudiced* the defense. This requires showing that counsel's errors are so serious as to have deprived defendant of a fair trial, or leads to a plea without a full review of the evidence. Unless the Defendant can show the ineffective assistance of counsel before his plea prejudiced him, it cannot be said there was a breakdown of the adversary process that renders the result unreliable. *Strickland* at 687. *Strickland* noted that:

> ...[j]udicial scrutiny of counsel performance must be highly deferential however, counsel must at a minimum conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Strickland, Id.* 691, 104 S.Ct. at 2066. (Emphasis added).

Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

> "To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, *Sanborn* must demonstrate that trial counsel's performance fell below an objective standard or reasonableness and that counsel's deficiencies were so severe that they rendered the jury's verdict unreliable. *See Strickland v Washington*, 466

> U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and *Strickland*, we hold that *Sanborn's* representation indeed fell below an objective standard of reasonableness.
>
> Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. *Id.* 403, 404 (Emphasis added)

Analogously, a plea will be found invalid if counsel did not do at least the minimum amount of investigation to determine if a viable defense(s) existed. It is respectfully submitted counsel must investigate enough so that he can at least determine that the State had sufficient evidence to likely be able to prove guilt beyond a reasonable doubt at trial before even suggesting a guilty plea to his client. Defense counsel's failure to do at least that minimal investigation before the plea requires reversal of the conviction.

II. THE DISTRICT COURT ERRED BY NOT FINDING DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MERITORIOUS MOTION TO SUPPRESS PREPLEA THAT COULD HAVE AIDED DEFENDANT'S CASE.

Defendant respectfully submits that besides not doing necessary factual investigation preplea, defense counsel failed his client by not filing a possibly meritorious Motion to Suppress preplea that would have tested the State's case. It is further submitted that the Defendant should have filed a Motion for an Evidentiary Hearing before any plea. *See, Kimmelman v. Morrison,* 477 U.S. 365, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986), which reversed for counsel's failure to file a meritorious motion to suppress.

In this case rather than file a Motion to Suppress the Defendant's inculpatory admissions, defense counsel simply urged the Defendant to plead guilty at the first opportunity to an unfavorable plea. The failure to do the necessary meritorious preplea motion to suppress before the plea was clearly prejudicial, not just because unfavorable evidence was not suppressed, but also because it destroyed any chance of the Defendant achieving a reasonably favorable plea negotiation.

Defendant submits this failure to prepare a potentially meritorious motion should be considered a reversible error under *Strickland.*

III. THE DISTRICT COURT ERRED WHEN IT FOUND DEFENDANT WAS COMPETENT TO STAND TRIAL OR TO ENTER A VALID PLEA OF GUILT.

It is respectfully submitted there was overwhelming evidence that there were substantial doubts as to the Defendant's competency when he pled guilty. There were multiple issues affecting Defendant's competency including a serious brain injury from the multiple gunshot wounds he received when he was apprehended. The facts suggest that Defendant, Shan Jonathan Kittredge, was likely still affected by the multiple gunshots when he entered his plea on March 18, 2019.

Defendant's history also showed substantial evidence Defendant was a long time user of heroin and other controlled substances which may have affected his competency. These facts were known to defense counsel and to the Court when the Defendant pled guilty.

Consider the plea canvas testimony taken on March 18, 2019:

. . .

THE COURT: All right, you've mentioned some serious mental health issues. *Do you feel that any of those issues is impacting on your ability to understand what's going on here today?*

THE DEFENDANT: *No, sir. No, sir.*

THE COURT: Do you feel they are impacting on your ability at all to understand what you are charged with and the nature of those charges?

THE DEFENDANT: No, not at all.

THE COURT: All right. Do you feel they impact upon your ability at all to understand the plea agreement you're entering into with the State?

THE DEFENDANT: No, sir.

THE COURT: And they don't affect your ability to read and understand, for instance: the amended superseding indictment or the plea agreement?

THE DEFENDANT: No, not in any way.

THE COURT: Okay. Do you feel you understand what's happening here today?

THE DEFENDANT: Yes, sir.

THE COURT: Tell me in your own words what's happening here today?

THE DEFENDANT: *We resolved a plea and went over my plea agreement; you're just making sure that I understand.*

(A.A. 178) (Emphasis added)

These questions in the Plea Canvas by the District Court show that the Court clearly was aware there was at least a significant possibility that the Defendant's injuries and mental problems may have affected the Defendant's competency. During the plea canvas, the Court had asked:

THE COURT: Okay. Have you ever been treated for any mental illness or addiction to narcotic drugs of any kind?

THE DEFENDANT: Yes.

THE COURT: Okay, what have you been treated for?

THE DEFENDANT: Schizophrenic manic, bipolar, anxiety, depression, and PTSD.

THE COURT: And you're not on any medications for those right now?

THE DEFENDANT: No, sir.

THE COURT: Okay. Do you feel those are relatively well controlled without any medication?

THE DEFENDANT: After committing these offenses, I'm trying to stay off drugs, even mental drugs, you know.

THE COURT: Okay.

THE DEFENDANT: So I'm maintaining.

(A.A. 177) (Emphasis added)

Even though Defendant had mentioned five or six different mental disorders (A.A.177), when he was asked by the Court whether any of those serious mental health issues actually impacted his ability to understand what was going on in Court, the Defendant answered "No, sir, No, sir." (A.A. 177-178)

The Court's next three question follow-up were not about any mental health issues, but concerned whether he understood the plea agreement and whether he understood what was happening today. (A.A.178)

Despite the fact there had been no recent professional medical findings regarding the Defendant's medical and mental health provided to the Court, the Court apparently presumed by his answers that the Defendant was competent. The questions and answers during the brief plea canvas were however not enough to establish competency. It is respectfully submitted the simple answers by Defendant to leading

questions during the plea hearing were insufficient to establish the Defendant's competency under the circumstances of his case.

There had been no effort by defense counsel to obtain any necessary preplea medical or psychological examination of the Defendant. Defense counsel never sought a neurological evaluation of Defendant, or even any medical evaluations of Mr. Kittredge. Counsel did not even seek an examination of the Defendant after the plea or before his sentencing to mitigate his sentence. *See, Ake v. Oklahoma,* 470 U.S. 68 (1985), which provides indigent counsel the resources for expert assistance upon an adequate showing of need. Because defense counsel did not take the important step to obtain an expert, despite the obvious need both preplea and after the plea, defense counsel was ineffective under *Strickland.*

Defense counsel had actually noted in the sentencing memo, which counsel had prepared, that the Defendant: ". . . just wasn't thinking at all" . . . (Emphasis added)

> "He was basically in a heroin fueled haze and the synapses that might have been firing weren't. It would be instructive perhaps to determine what, if any, effect Mr. Kittredge's long spanning drug abuse has had on his brain, but given the trauma he sustained due to multiple gunshots to the head that he suffered, counsel does not know that we will ever

know for sure." *See, Sentencing Memo,* (p. 8, l. 14-20) (Emphasis added) (A.A. 045)

. . .

In *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), the Supreme Court recognized that the test for competency is a pragmatic test that focuses on a defendant's ability to cooperate. It is not enough that a person is merely oriented to time and place and has some recollection of events . . . the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as, factual understanding of the proceedings against him. *Id.* 402. (Emphasis added)

In this case there exists substantial doubt Mr. Kittredge met the test for competency the United States Supreme Court has required since in *Dusky*. This fact should have clearly been evident to the District Court as well as the State. It is respectfully submitted that the Defendant's ability to answer the simple leading questions in the plea canvas was not a sufficient test of his competency or a showing that he could fully and with rationality, fully understand the process of entering a knowing, voluntary and intelligent plea.

Consider also the case of *Jacobs v. Horn,* 395 F.3d 92 (3rd Cir.2005), where the

Third Circuit held that *Jacobs'* counsel was ineffective because he failed to adequately investigate the defendant's mental health pretrial, and he thereby failed when raising a diminished capacity defense. Because ample evidence existed of *Jacobs* mental disorders, the court held that trial counsel's failure to investigate the mental health of the defendant was grounds for reversal. The *Jacobs* Court, in reversing the conviction, distinguished the Ninth Circuit case of *Hendricks v. Calderon,* 70 F.3d 1032, saying:

> "In *Hendricks*, counsel hired a psychiatrist who met with the defendant for about four and one-half hours and found no evidence to support a "mental defense." *Id.* at 1037. The psychiatrist posited that psychological testing might be useful and suggested that counsel consult a psychologist. A psychologist then interviewed the defendant for about fifteen hours, ran several psychological tests, reviewed records regarding the crime and the defendant's life history, and found no evidence to support a mental defense. Counsel relied on the experts' opinions and decided not to explore further or present a mental defense. *Id.* (Emphasis added)
>
> The Ninth Circuit ruled that *Hendricks'* attorneys had discharged their duty to seek out a psychiatric evaluation. *Id.* at 1038-39. The Ninth Circuit further ruled that counsel "fell within the broad range of presumptively acceptable conduct by hiring two mental health professionals to

> investigate potential mental defenses and then relying on their shared, unqualified conclusion that there was no basis for a mental defense." Id. 1039, *Horn,* Id. 103

. . .

Defendant's case, as *Jacobs'* case, is easily distinguishable from *Hendricks', supra.* It is respectfully submitted the lack of a comprehensive mental evaluation of Shan Kittredge by any qualified expert before he pled guilty requires reversal of Defendant's conviction.

IV. THE SENTENCE DEFENDANT RECEIVED WAS UNREASONABLY HARSH UNDER ALL THE FACTS AND CIRCUMSTANCES OF THE CASE BECAUSE THE SENTENCE WAS GROSSLY DISPROPORTIONATE. IT VIOLATED THE EIGHTH AMENDMENT OF THE CONSTITUTION.

Under all the facts and circumstances of this case, Defendant submits that his sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation. The sentence did not give adequate consideration to any mitigating circumstances in the Defendant's life. *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012).

"[T]he Eighth Amendment's protection against excessive or cruel and unusual

punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). In analyzing whether a sentence is cruel and unusual punishment, a court first makes "a threshold determination that the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91(1983). If the sentence is grossly disproportionate, the court then considers "the sentences imposed on other criminals in the same jurisdiction . . . and the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 291.

Defendant recognizes that in general a sentence imposed within statutory limits is not considered either excessive or cruel and unusual. *United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). However Defendant submits even a statutorily-condoned punishment may sometimes, in rare cases, exceed the limits of the Constitution. *See, Weems, supra* . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id.* 382 (Emphasis added)

Defendant submits the punishment he received in this case far exceeded a reasonable sentence. Since the sentence was grossly harsh and excessive, it was unconstitutional in violation of the Eighth Amendment's cruel and unusual punishment clause and should therefore be reversed.

Defendant directs the Court to consider carefully the recent decision in *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) where the Supreme Court recently held the juvenile may not be sentenced to life without parole. *See also, Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011(2010). It is respectfully submitted since the sentence the Defendant received of up to 45 years was the functional equivalent of life without parole, as such it violated the Eighth Amendment. In *Miller* the Supreme Court noted:

> The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper,* 543 U.S., at 560. That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. *Ibid.* (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). *Id.* (Emphasis added)

. . .

The Defendant does not deny he was convicted of serious felony charges in this case, however Defendant respectfully submits the length of his sentence was nevertheless overly harsh and grossly disproportionate. Defense counsel was ineffective under *Strickland v. Washington,* 466 U.S. 668 (1984), for urging Defendant to plead guilty to the stipulated sentence of 18 to 45 years without first doing an adequate review of all mitigating evidence and then adequately consulting with Defendant about all his possible options.

The most obvious mitigating circumstance in this case was the physical injuries Mr. Kittredge received when he was shot by LVMPD police when apprehended. Defendant submits a comprehensive review of Defendant's life history would have revealed untold serious psychological injuries he had received in his prior 38 years. By stipulating to an extremely lengthy sentence of 18 to 45 years, possibly the equivalent to a life sentence for an unhealthy 38 year old man, without even getting the benefit of a standard Probation and Parole report, counsel provided ineffective assistance that greatly prejudiced the Defendant. Because of the great prejudice to the Defendant of the extremely harsh sentence, the conviction and sentence should be reversed and remanded.

. . .

V. THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANT AN ADEQUATE EVIDENTIARY HEARING TO RESOLVE DISPUTED FACTS IN HIS POST CONVICTION PETITION.

In *Marshall v. State,* 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall's* conviction because he was denied an evidentiary hearing on post-conviction. The Court there stated:

> "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record." *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984). *Id.* 1331

Although the Court rejected many of *Marshall's* claims as meritless, it found the issue of insufficiency of the evidence presented to the grand jury supporting the possession or controlled substance charge to have merit and reversed those counts stating:

> "At most, the State presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons

> who frequented the apartment, possessed the cocaine and the marijuana the police found. Appellant counsel was ineffective for failing to raise this issue on appeal and counsel's failure prejudiced appellant. *Warden v. Lyons,* 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.,* 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief." *Id.* 1333 (Emphasis added)

An evidentiary hearing would have shown there was inadequate investigation and preparation by defense counsel. It is also respectfully submitted an evidentiary hearing would have shown that Defendant could have benefitted his case by establishing the claims of the State's expert were vastly overstated. The failure by counsel to hire an expert to challenge the State's experts, is one area of ineffectiveness that has led to reversal in many cases. An evidentiary hearing also would have shown that Defendant could have shown the value of a pretrial motions such as a Motion to Suppress Evidence.

VI. CUMULATIVE ERROR BY COUNSEL REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTION.

The District Court never held cumulative error required reversal. (A.A. 287-303) It is respectfully submitted however the numerous errors and deficiencies of

counsel in this case required reversal of the conviction. Even when considered separately, the multiple errors or omissions of counsel were of such a magnitude that they each require reversal. Certainly it is clear, when viewed cumulatively, the case for reversal is overwhelming. *Daniel v. State,* 119 Nev. 498. *See also, Sipsas v. State,* 102 Nev. at 123, 216 P.2d at 235 (1986), which stated: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial." (Emphasis added) *See also, Walker v. Fogliani,* 83 Nev. 154, 425 P.2d 794 (1967).

Prejudice to the Defendant resulted from the cumulative impact of the multiple deficiencies. *Cooper v. Fitzharris,* 586 F.2d 1325, 1333 (9th Cir. 1978) (*en banc*), cert. den., 440 U.S. 970, *Harris by and through Ramseyer v. Wood,* 61 F.3d 1432 (9th Cir.1995). The multiple errors of counsel in this case when cumulated together must require reversal. A quantitative analysis makes that clear. *See, VanCleave, Rachel A.,* "When is Error . . . Not an Error?" Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

The relevant factors for a court to consider in evaluating a claim of cumulative error are [1] whether the issue of guilt is close, [2] the quantity and character of the error, and [3] the gravity of the crime charged. *Mulder v. State,* 116 Nev. 1, 17, 992

P.2d 845, 854-55 (2000), citing *Leonard v. State,* 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See also, Big Pond v. State,* 101 Nev. 1, 692 P.2d 1228 (1985), *Daniel v. State,* 119 Nev. 498, 78 P.3d 890 (2003), *United States v. Dado,* 759 F.2d 550 (6th Cir.2014), *Mak v. Blodgett,* 970 F.2d 614 (9th Cir.1992), *Rodriguez v. Hake,* 928 F.2d 534 (2d Cir.1991).

The seriousness of the multiple charges required vigorous attorney advocacy pretrial and before the plea was entered. Failure to adequately prepare and investigate including the failure to file necessary motions preplea was clear error under *Strickland, supra,* and *Kimmelman v. Morrison,* 477 U.S. 365 (1986).

Defense counsel gravest error was not taking the necessary steps to ensure the Defendant was competent to enter a guilty plea. Counsel did not seek expert assistance to evaluate the Defendant for competency although there existed substantial reason to believe the prior gunshot injury as well as the Defendant's significant history of drug abuse may have seriously affected his competency. This error cannot be excused as harmless or insignificant as defense counsel had directly acknowledged his awareness of the Defendant's mental disabilities in his Sentencing Memo. (A. A. 038-046)

It is respectfully submitted the District Court erred when it found that the errors

alleged in Defendant's Petition were not prejudicial and therefore there was no accumulation of error. (A.A.299) Defendant has enumerated multiple errors which were highly prejudicial. Any one of the errors alleged may have been sufficient itself to change the result of the case.

CONCLUSION

The Defendant, Shan Jonathon Kittredge, was denied effective assistance of counsel. His counsel did not adequately investigate and prepare before urging the Defendant to plead guilty. His failure to file necessary pretrial motions to test the State's case was another significant *Strickland* error in such a serious case. The lack of necessary defense action preplea seriously prejudiced the Defendant who ended up with a lengthy sentence of 18 to 45 years.

It is respectfully submitted Defendant Kittredge has therefore met the difficult burden under *Strickland* to show that he received ineffectiveness of counsel and that he has been prejudiced by that ineffectiveness. The District Court's decision must be reversed and the Writ of Habeas Corpus be granted and the case be remanded to District Court for further proceedings.

DATED this 27th day of April, 2022.

. . .

Respectfully submitted,
//s// Terrence M. Jackson
Terrence M. Jackson, Esquire

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening 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 complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 5,279 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 27th day of April, 2022.

. . .

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esquire, am a person competent to serve papers and not a party to the above-entitled action and on the 27th day of April, 2022, I served a copy of the foregoing: Appellant's, Shan Jonathon Kittredge's, Opening Brief as well as Volumes 1 and 2 of the Appendix, 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 Nevada Attorney General and Petitioner/Appellant as follows:

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