IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

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

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STATEMENT OF ISSUES

I. COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE DEFENDANT WAS COMPETENT BEFORE ENTERING HIS GUILTY PLEA BY SEEKING A COURT ORDERED COMPETENCY EVALUATION;

II. COUNSEL WAS INEFFECTIVE FOR NOT FILING A MERITORIOUS PRETRIAL MOTION TO SUPPRESS;

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT RULING SUA SPONTE DEFENDANT WAS NOT COMPETENT TO STAND TRIAL;

IV. DEFENDANT'S SENTENCE WAS EXCESSIVE AND DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

V. THE DISTRICT COURT WRONGLY DENIED THE DEFENDANT A NECESSARY EVIDENTIARY HEARING ON HIS COMPETENCY.

VI. THE DISTRICT COURT ERRED FINDING THERE WAS NO CUMULATION OF ERROR WARRANTING REVERSAL.

ARGUMENT

I. COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE DEFENDANT WAS COMPETENT BEFORE ENTERING HIS GUILTY PLEA BY SEEKING A COURT ORDERED COMPETENCY EVALUATION.

The Defendant has a due process right to be fully competent before any trial or any guilty plea. *Drope v. Missouri,* 420 U. S. 162 (1975). The State of Nevada nevertheless argued that the serious doubts about Shan J. Kittredge's competency did not mandate a preplea competency evaluation. (Respondent's Answering Brief, hereinafter, RAB, p. 18-25)

In the haste to rush through a negotiated guilty plea, the defense counsel, the

prosecutor and the District Court Judge totally ignored Defendant's long-term history of mental illness and his likely incompetency and allowed or encouraged the Defendant to plead guilty. (A. A. 175-178)

It is respectfully submitted that defense counsel had a duty to carefully assess his client's ability to enter a knowing, voluntary and intelligent guilty plea. Counsel however was not a psychiatrist or a trained mental health professional capable of assessing competency. Neither was the prosecutor nor was the District Court Judge a mental health expert. Counsel, the prosecutor and the Judge however all had warning signs, or red flags, that the Defendant had serious issues that needed to be addressed. The brief preplea canvas by the court was not the solution to assessing the Defendant's competency, it is in fact revealed he may likely have been incompetent. (A. A. 175-178)

After having been told how to answer the questions by his attorney for the preplea canvas, the Defendant's answers to the preplea canvas were meaningless or certainly not dispositive of his competency. Nothing was developed during the plea canvas that established Defendant had a sufficient mental capacity to knowingly and intelligently enter his plea.

. . .

II. COUNSEL WAS INEFFECTIVE FOR NOT FILING A MERITORIOUS PRETRIAL MOTION TO SUPPRESS DEFENDANT'S INVOLUNTARY STATEMENTS.

The Defendant pled guilty to serious felony charges resulting in a lengthy sentence of 18 to 45 years. (A.A. 59-60) The State in Respondent's Answering Brief suggests that counsel cannot be considered ineffective for not seeking to get Defendant's inculpatory statements suppressed before Defendant agreed to plead guilty. (RAB, p. 30-31)

The State argued that by pleading to five felonies the Defendant got a better deal than he could have been expected to receive. (RAB, p. 31)

It is respectfully submitted that if the Defendant had won a Motion to Suppress his confession, or even filed a Motion to Suppress his confession, there is a reasonable possibility that Defendant would have received a better deal or a better result than he did.

The State also argued that Defendant does not state how a Motion to Suppress the confession would have been successful. (RAB, p. 30-31) The process is simple. Defense counsel needed to file a written motion alleging that Defendant made involuntary, inculpatory statements without an attorney when Defendant was

interrogated by police. Defense counsel then needed to show at an evidentiary hearing that the Defendant was intimidated, tricked, or manipulated into making statements against his will. *Miranda v. Arizona,* 384 U.S. 436 (1966). The failure of counsel to even attempt to challenge the voluntariness of Defendant's confession must be considered prejudicial error under *Strickland.*

III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT RULING SUA SPONTE THE DEFENDANT WAS NOT COMPETENT TO STAND TRIAL OR PLEAD GUILTY.

The trial court abused its discretion in finding Defendant competent to stand trial or to plead guilty. It is respectfully submitted allowing Defendant to plead guilty while incompetent violated his rights under NRS 178.400 which states:

> **178.400 Incompetent person cannot be tried or adjudged to punishment for public offense.**
>
> 1. A person may not be tried or adjudged to punishment for a public offense while he is incompetent.
> 2. For the purposes of this section, "incompetent" means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of

> the judgment thereafter. (CrPA 1911, § 535; RL 1912, § 7385; CL 1929, § 11183; 1981, p. 1656; 1995, ch. 637, § 23, p. 2458.) (Emphasis added).

. . .

It is respectfully submitted the totality of evidence in the record shows there existed such serious problems about competency at the time of trial so that the Judge should have sua sponte halted the proceedings. Because of the serious nature of the charges and Kittredge's lengthy record of prior mental health issues, it was a clear abuse of discretion by the District Court to have found that Defendant was competent when a reasonable doubt as to Defendant's competency existed. *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788 (1960). The District Court's discretion in this case was not unbridled. A formal competency hearing was constitutionally compelled because there was . . . "substantial evidence that a defendant may be mentally incompetent to stand trial." *Moore v. United States,* 464 F.2d 663, 666 (9th Cir.1972). The failure of the court to sua sponte order a competency hearing before trial and before plea must be considered reversible error under the totality of evidence in this case.

. . .

. . .

IV. DEFENDANT'S SENTENCING WAS EXCESSIVE AND DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

The State argued Defendant's sentence was not cruel and unusual. (RAB, p. 33, 34) What was cruel and unusual about Defendant's sentence was that his counsel stipulated to the Defendant's extraordinary lengthy sentence of 18 to 45 years despite the fact Defendant had extraordinary mitigating physical and psychological injuries which justified a much lower sentence.

What was unusual was not necessarily the length of the sentence, although considering the Defendant's age and health, it may be a life sentence, but the lack of any attempt by counsel to seek a lesser sentence. It is respectfully submitted that the State's assertion that because this was somehow a good negotiation tactic and a good result, therefore defense counsel's lack of zeal during sentencing is excusable is wrong.

V. THE DISTRICT COURT WRONGLY DENIED THE DEFENDANT A NECESSARY EVIDENTIARY HEARING ON HIS COMPETENCY.

The State cites *Mann v. State,* 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002) and *Marshall v. State,* 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994), for the

proposition that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary.

Defendant agrees with this tautology, which is a favorite of the prosecution, however the Defendant believes that the facts of this case certainly merited an evidentiary hearing on the issue of Defendant's competency and the other related issues raised in Defendant's Reply.

Defendant directs the Court to the decision in *Hatley v. State,* 100 Nev. 214, 678 P.2d 1160 (1984), where the Nevada Supreme Court in reversing the denial of a habeas corpus petition stated that if there were facts outside the record, which were true, that would entitle the Petitioner to relief, and it was therefore error to deny the Defendant an evidentiary hearing. *Id.* 216. *See also, Bolden v. State,* 99 Nev. 181, 183, 659 P.2d 886, 887 (1983), *and Doggett v. State,*91 Nev. 768, 542 P.2d 1066 (1975), which also held that evidentiary hearings were necessary. *Id.* 216 (Emphasis added)

Having alleged facts in this Petition, which if true required relief for the Defendant, a necessary evidentiary hearing should have been granted the Defendant. It was especially necessary to show that his plea was invalid because of his incompetency at the time of his plea.

VI. THE DISTRICT COURT ERRED IN FINDING THERE WAS NO CUMULATION OF ERROR WARRANTING REVERSAL.

The State suggests that the Nevada Supreme Court has not endorsed cumulative error in Habeas Corpus Petitions, citing decisions from *McConnell v. State,* 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). (RAB, p. 37) The Court in *McConnell* merely said:

> "*McConnell's* use of the cumulative error standard that this Court applies on direct appeal from a judgment of conviction. *See, e.g., Hernandez v. State,* 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) ("The cumulative effect of error may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually.") We are not convinced that is the correct standard, but assuming that it is, *McConnell* has not asserted any meritorious claims of error and therefore there is nothing to cumulate." *Id.* 259 (Emphasis added)

This could hardly be considered a statement from the Court that cumulative error analysis does not apply in habeas corpus proceedings.

The State's citation of *Middleton v. Roper,* 455 F.3d 838, 851 (5th Cir. 2000) that cumulative error claim(s) that apply in habeas corpus proceedings is not controlling as it is a case from another jurisdiction, the Fifth Circuit Court of Appeals.

Again reviewing the facts of this case, Defendant respectfully submits the multiple serious errors which occurred require a cumulative error analysis. Applying a cumulative error analysis will result in reversal in this case.

CONCLUSION

The Defendant, Shan Jonathon Kittredge, was denied effective assistance of counsel. His counsel did not adequately investigate and prepare the case before urging the Defendant to plead guilty. His failure to test the State's case by necessary motions was another significant *Strickland* error in such a serious case. The lack of necessary defense action(s) 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 remanded to District Court for further proceedings.

DATED the 11th day of July, 2022. Respectfully submitted,

//s// *Terrence M. Jackson*
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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 reply 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 either:

[**X**] Proportionately spaced, has a typeface of 14 points or more and contains 1,734 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 11th day of July, 2022.

Respectfully submitted,

/s/ Terrence M. Jackson

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Nevada Bar No. 000854

Counsel for Appellant, *Shan J. Kittredge*

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., and am a person competent to serve papers and not a party to the above-entitled action and on the 11th day of July, 2022, I served a copy of the foregoing: Appellant, Shan Jonathon Kittredge's Reply Brief, as follows:

[**X**] Via Electronic Service 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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