

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

2 SEAN MICHAEL MCKENDRICK,)

3 Appellant,)

4) vs.)

5 THE STATE OF NEVADA,)

6 Respondent.)

7 CASE NO. 82532

8 Electronically Filed
9 Oct 21 2021 01:30 p.m.
10 Elizabeth A. Brown
11 Clerk of Supreme Court

12 **Appeal**

13 **From the Eighth Judicial District Court**

14 **The Honorable JACQUELINE BLUTH, District Judge**

15 **APPELLANTS' OPENING BRIEF**

16
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1 **TABLE OF AUTHORITIES**

2 CASES

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6 *Strickland v. Washington*, 466 U.S. 668 (1984).....8
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12 *Toomey v Bunnell*, 898 F.2d 741, 744 n. 2 (9th Cir.), cert. denied, 111 S.Ct. 390
13 (1990;.....13
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15 *Jung v U.S.*, 988 F.2d 120 (9th Cir., 1993).....13
16
17 *Bell v Cone*, 535 U.S. 685, 152 L ED 2d 914 (2002).....13
18
19 *Freese v. State*, 13 P.3d 442 (2000).....11

20 **JURISDICTIONAL STATEMENT**

21 Appellants (also referred to as “Petitioners”), appeals the District Court’s
22 Denial of his Writ of Habeas Corpus.

23 **ROUTING STATEMENT**

24
25 The Appellant filed his notice of appeal in Clark County District Court on
26 February 24, 2021. This case was then transferred to the Nevada Supreme Court
27

1 under this instant case number. The Case Appeal statement was filed on February
2 23, 2021, in Supreme Court.

3 4 **STATEMENT OF ISSUES PRESENTED**

- 5 1. Denial of the Writ of Habeas Corpus based upon District Court's ruling
6 that Counsel was not ineffective for choosing not investigate petitioner's
7 mental health and any mitigation at sentencing or object to the state filing
8 its intent to seek habitual criminal treatment.
9

10 11 **STANDARD OF APPELLATE REVIEW**

12
13 Generally, this Court reviews the constitutionality of a statute or ordinance *de*
14 *novo*. *Flamingo Paradise gaming, LLC. V. Chanos*, 125 Nev. 502, 509, 2167 P.3d
15 546, 551 (2009).
16

17 18 **STATEMENT OF FACTS**

19 On October 29, 2020, Petitioner filed a Writ of Habeas Corpus (Post-
20 Conviction) in the Clark County District Court. The Writ was based on the
21 following four elements:
22

- 23 1. Counsel failed to maintain adequate communication with Petitioner and to
24 investigate or interview any witnesses.
25
26 2. Counsel failed to investigate Petitioner's mental health and any mitigation
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28

1 at sentencing.

2 3. Counsel failed to object to the state filing its intent to seek habitual criminal
3 treatment; and

4
5 4. Counsel failed to file a motion to withdraw plea or file a direct appeal.

6 **THE DISTRICT COURT'S SUMMARY AND WRITTEN ORDER**

7 The Fifth Eighth Court of the State of Nevada, in and for Clark County
8
9 issued a written Order after hearing arguments on the Habeas Petitioner's Writ of
10 Habeas Corpus (Post Conviction) on January 18, 2021. The Court issued a
11 written opinion denying the Writ; stating as follows.

12
13 Claims regarding counsel's communication and investigation are
14 outside the scope of a habeas petition where the petitioner pleaded guilty
15 because they do not claim that the plea was not knowingly and voluntarily
16 entered or that counsel's advice to plea was bad.

17
18 The Court then pointed out in its written findings that the Petitioner's claim
19 that he only plead guilty because of counsel's ineffectiveness was belied by the
20 record.
21

22 The Court also noted in their findings that Petitioner failed to show support
23 from the record that he attempted or wanted to withdraw his guilty plea when the
24 State filed the intent to seek habitual treatment.
25

26 The District Court's ruling failed to consider the argument that this client
27
28

1 was not a habitual offender, and this could have greatly affected the sentencing
2 phase after his plea. Petitioner's entire basis for his writ is ineffective assistance of
3 counsel and this habitual offender argument was never made by his counsel.
4
5 Counsel owed a duty to Petitioner to not only explain the consequences of the
6 habitual offender status, but to argue against it to reduce sentencing.

7 8 **LEGAL ARGUMENT**

9 The benchmark case for ineffective assistance of counsel is *Strickland v.*
10 *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In
11
12 *Strickland*, the Supreme Court of the United States held that to warrant reversal, a
13 lawyer's conduct must have fell below an objective standard of reasonableness.
14 The Supreme Court acknowledged the existence of a wide range of reasonable
15 assistance and that all courts should take every effort to eliminate the distorting
16 effects of hindsight.
17

18
19 In order to win a claim for ineffective assistance of counsel, the individual must
20 prove two things: The attorney's performance fell below an objective standard of
21 reasonableness, and the attorney's performance gives rise to a reasonable probability
22 that if counsel had performed adequately, the result would have been different. *Id.*;
23 *United States v. Cronin*, 466 U.S. 648 (1984). Courts begin by presuming that a
24 defense attorney acted competently, so the burden is on the individual to prove that the
25 attorney's actions were subpar. *Id.* In general, a Nevada court will consider that a
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1 defense attorney was competent if his/her actions were reasonable and within
2 professional standards. *Freese v. State*, 13 P.3d 442 (2000).

3
4 The second prong to prevailing on an ineffective assistance of counsel claim is
5 showing that there is a reasonable probability that the court proceedings would have
6 ended differently *but for* the defense attorney's deficient performance. In other words,
7 the attorney's incompetence caused "actual prejudice." *Strickland v. Washington*, 466
8 U.S. 668 (1984).

9
10 The Supreme Court of Nevada discussed *Strickland* in *Sanborn v. State* in
11 *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (Nev., 1991). In *Sanborn*, the
12 Nevada Supreme Court held that a moving party must demonstrate that his or her
13 lawyer's performance fell below an objective standard of reasonableness, and that
14 counsel's deficiencies were so severe that they rendered the jury's verdict
15 unreliable.

16
17 In *Sanborn*, the defendant's conviction was reversed. Evidence considered
18 on appeal was that Sanborn's counsel did not adequately perform pretrial
19 investigation, failed to pursue evidence supportive of a claim of self-defense, and
20 failed to explore allegations of the victim's propensity towards violence. The
21 Supreme Court of Nevada held that Sanborn's lawyer "was not functioning as the
22 'counsel' guaranteed the defendant by the Sixth Amendment" the test discussed in
23 *Sanborn* was that had counsel been effective, "the outcome may very well have
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1 been different.” Although *Sanborn* involved a jury trial, *Strickland* involved a
2 guilty plea.

3 In the present case, the record is clear that Sean’s attorney threw in the
4 proverbial towel and did not argue against habitual offender status. As such, the
5 instant case qualifies for relief under *Sanborn* and *Strickland*.
6

7 On the same day that *Strickland* was published by the Supreme Court of the
8 United States, the Supreme Court also established an exception to the deficient
9 and prejudicial performance standard by holding that certain circumstances in a
10 criminal trial are so likely to prejudice and accused that no actual showing of
11 prejudice need be made; ineffective assistance in **presumed**. *United States v.*
12 *Chronic*, 466 U.S. 648 (1984).
13

14 In *Chronic*, the Supreme Court identified two circumstances as being
15 presumably prejudicial; one of these situations is counsel “entirely failing to
16 subject the prosecution’s case to meaningful adversarial testing.” In the present
17 case, Attorney Gibson entirely failed to subject the prosecution’s assertion that
18 Duane had used drugs, despite the fact that such an admission exposed Duane to
19 decades of incarceration.
20
21

22 Prejudice can be presumed only “where there has been an actual breakdown
23 in the adversarial process at trial.” *Toomey v Bunnell*, 898 F.2d 741, 744 n. 2 (9th
24 Cir.), cert. denied, 111 S.Ct. 390 (1990); *Jung v U.S.*, 988 F.2d 120 (9th Cir.,
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1 1993). In *Toomey*, the defendant alleged his counsel was ineffective for failing to
2 challenge a warrantless search of the car, which was lawful in California. In the
3 present case Duane's Counsel simply left unchallenged suspect drug test.

4 Sean anticipates that the State will allege that no actual prejudice was
5 suffered, and that the Judge would not have allowed him to withdraw the plea.
6 The State will also likely argue that the attorney made a strategy decision to
7 accept responsibility and try for mercy. Both these arguments fail. First, in *Cronic*,
8 prejudice is presumed when an attorney fails to engage in adversarial activity. The
9 Attorney did not have to choose between asking for mercy and challenging the
10 habitual offender status; both options were available. Even if the Attorney made a
11 "strategic decision," the decision was so poor as to raise the presumption of
12 ineffective counsel set forth in *Cronic, supra*.

13 In *Bell v Cone*, 535 U.S. 685, 152 L ED 2d 914 (2002) the Supreme Court
14 of the United States discussed *Strickland* and *Cronic*. In *Bell*, the defendant was
15 sentenced to death for the murder of an elderly couple. The defendant in *Bell*
16 sought habeas relief which was declined; however, the dictum in *Bell* is relevant
17 here.

18 *Cronic* holds that relief from ineffective assistance of counsel is appropriate
19 in three circumstances, the first being absence of counsel, another being when
20 counsel is called to render assistance that he or she is unable to provide. The
21

1 relevant prong in Cronic is “counsel entirely fails to subject the prosecution’s case
2 to meaningful adversarial testing.” In the present case, Sean’s Counsel failed to
3 challenge the State’s allegations of habitual offender. Habeas relief was denied in
4 Bell because the defendant alleged there was no meaningful objection to the
5 prosecution’s recitation of the gruesome facts of the murder; however, there was
6 some objections made, just not enough to merit the defendant’s satisfaction.
7 Cronic requires a complete failure to test the prosecution’s case trigger a
8 presumption of ineffective assistance of counsel which is what happened in the
9 instant case.
10
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13 This case centers on whether or not the decision by then counsel for Petition
14 to forgo putting on an evidentiary hearing on at Petitioner’s sentencing and
15 choosing rather to pursue an option of admitting the habitual offender status post
16 plea and asking the Court to ignore the relevant, bidding portions of the plea
17 agreement was a reasonable strategic decision or ineffective assistance of counsel
18 under Strickland and its progeny.
19
20

21 Counsel appears to have been under the belief that he was required to
22 choose between putting on evidence to dispute the validity of the status or arguing
23 for mercy from the judge at sentencing. However, it is respectfully maintained
24 that the two strategies were not mutually exclusive. Everything that counsel
25 argued at sentencing could have been argued after putting on evidence to try and
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1 throw some doubt on the validity of the habitual offender status. Obviously,
2 Sean's habitual offender status was contested and in need of testimony and an
3 adversarial hearing.
4

5 **CONCLUSION**

6 Based on the forgoing, Appellant respectfully request that this honorable
7 Court either overturn the District Court's decision and grant the Petition for Writ of
8 Habeas Corpus or remand it back for further proceedings.
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CERTIFICATION PURSUANT TO NEV. R. APP. P. 28.2

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

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 14 in Times New Roman with a font size of 14; or

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

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 either:

☐ Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

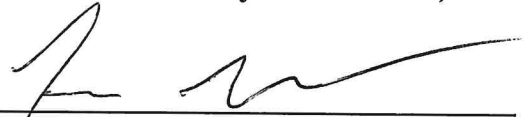
☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☒ Does not exceed 30 pages.


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

1 or appendix where the matter relied on is to be found. I understand that I may be
2 subject to sanctions in the event that the accompanying brief is not in conformity
3 with the requirements of the Nevada Rules of Appellate Procedure.

4 **Dated this 21st day of October, 2021.**

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