

FILED

2022 FEB -8 PM 1:24

MICHAEL LASHER, ESQ
Nevada Bar No. 13805
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Michaellasher2@gmail.com
Attorney for Petitioner

TANYA SCHWINT
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
Electronically Filed
Jan 14 2022 02:32 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Notice of Appeal to the Supreme Court from a
Judgment or Order of the District Court

No. 21-CV-00291

Dept. No. II

IN THE THIRD JUDICIAL DISTRICT COURT IN THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

STATE OF NEVADA, plaintiff,)

vs.)

ERIC DEAN WERRE, defendant)

NOTICE OF APPEAL

Notice is hereby given that Eric Dean Werre, defendant above named, hereby appeals to the Supreme Court of Nevada from the order denying his petition for post-conviction relief (habeas) entered in this action on the 26th day of January, 2022.

Dated: February 2, 2022.

By:
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Appellant

PROOF OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on the 2nd day of February, 2022, I served a true and correct copy of the foregoing

Notice of Appeal

on the parties listed below via one or more of the methods of service described below
VIA U.S. MAIL


Eric Werre, 1233467
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070

Third Judicial District
Hon. Leon Aberasturi
911 Harvey Way
Yerington, NV 89447

Aaron Ford, Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 2, 2022 at Las Vegas, Nevada.

By: 
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Petitioner

FILED

2022 FEB -8 PM 1:24

MICHAEL LASHER, ESQ
Nevada Bar No. 13805
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Michaellasher2@gmail.com
Attorney for Petitioner

TANYA SOTIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Tanya Sotirine

No. 21-CV-00291

Dept. No. II

**IN THE THIRD JUDICIAL DISTRICT COURT IN THE STATE OF NEVADA IN
AND FOR THE COUNTY OF LYON**

STATE OF NEVADA, plaintiff,

vs.


ERIC DEAN WERRE, defendant

CASE APPEAL STATEMENT

1. Name of appellant: Eric Dean Werre
2. Judge Issuing Order Appealed From: Hon. Leon Aberasturi
3. Counsel for sole appellant, Werre:
Michael Lasher
827 Kenny Way
Las Vegas, NV 89107
Michaellasher2@gmail.com
4. Counsel for respondent Lyon County District Attorney:
Aaron Ford, Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701
5. All counsel are licensed to practice in Nevada.
6. Appellant was represented by retained counsel, Michael Lasher, below.

7. Appellant is represented by retained counsel on appeal.
8. N/A.
9. On February 25, 2020, an indictment was filed.
10. Werre plead guilty to Trafficking in Schedule I Substances between 14 and 28 grams (NRS 453.3385(1)(b)); Principal to Burglary, Gaining Possession of Firearm (NRS 205.060, 205.060(4), 195.020); Principal to Stolen Firearm (NRS 205.275, 205.275(2)(c), 195.020); and Principal to Possession of Stolen Firearm (NRS 205.275, 205.275(2)(c), 195.020)
11. N/A
12. N/A
13. N/A

Dated: February 2, 2022.



By:
MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869

PROOF OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on the 2nd day of February, 2022, I served a true and correct copy of the foregoing

CASE APPEAL STATEMENT

on the parties listed below VIA U.S. MAIL

Eric Werre, 1233467
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070

Third Judicial District
Hon. Leon Aberasturi
911 Harvey Way
Yerington, NV 89447

Aaron Ford, Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 2, 2022 at Las Vegas, Nevada.



By:

MICHAEL LASHER, ESQ.
Nevada Bar No. 13805
Michael Lasher LLC
827 Kenny Way
Las Vegas, Nevada 89107
(510) 507-2869
Attorney for Petitioner

DISTRICT COURT CIVIL COVER SHEET

Lyon

County, Nevada

Case No.

21-CV-00291

(Assigned by Clerk's Office)

Dept II

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Defendant(s) (name/address/phone):

Eric Werre, 1233467

William Hutchins, Warden

Southern Desert Correctional Center

Southern Desert Correctional Center

P.O. Box 208, Indian Springs, NV 89070

Attorney (name/address/phone):

Attorney (name/address/phone):

Michael Lasher, LLC

Lyon County District Attorney

827 Kenny Way

31 South Main Street

Las Vegas, NV 89107 (510) 507-2869

Yerrington, NV 89447

II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

<p>Real Property</p> <p>Landlord/Tenant</p> <p><input type="checkbox"/> Unlawful Detainer</p> <p><input type="checkbox"/> Other Landlord/Tenant</p> <p>Title to Property</p> <p><input type="checkbox"/> Judicial Foreclosure</p> <p><input type="checkbox"/> Other Title to Property</p> <p>Other Real Property</p> <p><input type="checkbox"/> Condemnation/Eminent Domain</p> <p><input type="checkbox"/> Other Real Property</p>	<p>Negligence</p> <p><input type="checkbox"/> Auto</p> <p><input type="checkbox"/> Premises Liability</p> <p><input type="checkbox"/> Other Negligence</p> <p>Malpractice</p> <p><input type="checkbox"/> Medical/Dental</p> <p><input type="checkbox"/> Legal</p> <p><input type="checkbox"/> Accounting</p> <p><input type="checkbox"/> Other Malpractice</p>	<p>Torts</p> <p>Other Torts</p> <p><input type="checkbox"/> Product Liability</p> <p><input type="checkbox"/> Intentional Misconduct</p> <p><input type="checkbox"/> Employment Tort</p> <p><input type="checkbox"/> Insurance Tort</p> <p><input type="checkbox"/> Other Tort</p>
<p>Probate</p> <p>Probate (select case type and estate value)</p> <p><input type="checkbox"/> Summary Administration</p> <p><input type="checkbox"/> General Administration</p> <p><input type="checkbox"/> Special Administration</p> <p><input type="checkbox"/> Set Aside <input checked="" type="checkbox"/> Surviving Spouse</p> <p><input type="checkbox"/> Trust/Conservatorship</p> <p><input type="checkbox"/> Other Probate</p> <p>Estate Value</p> <p><input type="checkbox"/> Greater than \$300,000</p> <p><input type="checkbox"/> \$200,000-\$300,000</p> <p><input type="checkbox"/> \$100,001-\$199,999</p> <p><input type="checkbox"/> \$25,001-\$100,000</p> <p><input type="checkbox"/> \$20,001-\$25,000</p> <p><input type="checkbox"/> \$2,501-20,000</p> <p><input type="checkbox"/> \$2,500 or less</p>	<p>Construction Defect & Contract</p> <p>Construction Defect</p> <p><input type="checkbox"/> Chapter 40</p> <p><input type="checkbox"/> Other Construction Defect</p> <p>Contract Case</p> <p><input type="checkbox"/> Uniform Commercial Code</p> <p><input type="checkbox"/> Building and Construction</p> <p><input type="checkbox"/> Insurance Carrier</p> <p><input type="checkbox"/> Commercial Instrument</p> <p><input type="checkbox"/> Collection of Accounts</p> <p><input type="checkbox"/> Employment Contract</p> <p><input type="checkbox"/> Other Contract</p>	<p>Judicial Review/Appeal</p> <p>Judicial Review</p> <p><input type="checkbox"/> Foreclosure Mediation Case</p> <p><input type="checkbox"/> Petition to Seal Records</p> <p><input type="checkbox"/> Mental Competency</p> <p>Nevada State Agency Appeal</p> <p><input type="checkbox"/> Department of Motor Vehicle</p> <p><input type="checkbox"/> Worker's Compensation</p> <p><input type="checkbox"/> Other Nevada State Agency</p> <p>Appeal Other</p> <p><input type="checkbox"/> Appeal from Lower Court</p> <p><input type="checkbox"/> Other Judicial Review/Appeal</p>
<p>Civil Writ</p> <p>Civil Writ</p> <p><input checked="" type="checkbox"/> Writ of Habeas Corpus</p> <p><input type="checkbox"/> Writ of Mandamus</p> <p><input type="checkbox"/> Writ of Quo Warrant</p> <p><input type="checkbox"/> Writ of Prohibition</p> <p><input type="checkbox"/> Other Civil Writ</p>		<p>Other Civil Filing</p> <p>Other Civil Filing</p> <p><input type="checkbox"/> Compromise of Minor's Claim</p> <p><input type="checkbox"/> Foreign Judgment</p> <p><input type="checkbox"/> Other Civil Matters</p>

Business Court filings should be filed using the Business Court civil coversheet.

March 12, 2021

Date

Signature of initiating party or representative

See other side for family-related case filings.

Case No.: 21-CV-00291
Dept. No.: II

FILED

2022 JAN 26 AM 9:17

TANYA JOE HINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Affirmation pursuant to NRS 239B.030,
the undersigned affirms that the preceding
document does not contain the social
security of any person.

Andrea Andersen

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

* * * * *

ERIC WERRE,

Petitioner,

v.

WILLIAM HUTCHING, WARDEN,
Southern Desert Correctional Center; STATE
OF NEVADA,

Respondent.

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS (POST-
CONVICTION)**

On February 14, 2020, the Petitioner, Eric Were, was charged by way of Amended Criminal Complaint for one (1) count of PRINCIPAL TO TRAFFICKING IN A CONTROLLED SUBSTANCE OVER 28 GRAMS, one (1) count of PRINCIPAL TO POSSESSION OF STOLEN VEHICLE WITH A VALUE MORE THAN \$3,500.00, fourteen (14) counts of PRINCIPAL TO POSSESSION OF STOLEN FIREARM, sixteen (16) counts of EX FELON POSSESSION OF A FIREARM, one (1) count of PRINCIPAL TO POSSESSION OF SHORT-BARRELED RIFLE OR SHOTGUN, one (1) count of POSSESSION OF A CONTROLLED SUBSTANCE, one (1) count of PRINCIPAL TO COMMIT BURGLARY, for a total of thirty-five (35) felony counts including one (1) Category A felony, thirty-two (32) Category B felonies, one (1) Category D felony, and one (1) Category E felony.

1 On March 2, 2020, represented by counsel, Aaron Mouritsen, Esq., Petitioner entered into
2 a guilty plea agreement to which he would plea to an Information that contained one (1) count of
3 PRINCIPAL TO TRAFFICKING IN A CONTROLLED SUBSTANCE OVER 14 GRAMS BUT
4 LESS THAN 28 GRAMS, one (1) count of PRINCIPAL TO BURGLARY GAINING
5 POSSESSION OF A FIREARM AND/OR DEADLY WEAPON, and two (2) counts of
6 PRINCIPAL TO POSSESSION OF A STOLEN FIREARM, all of which were Category B
7 felonies. The State was free to argue with the exception that they would recommend the weapons
8 counts to run concurrently. The Plea Agreement was accepted by the Court after the Petitioner
9 was canvassed.
10

11 The Pre-Sentencing Investigation indicated that the Petitioner had six previous felonies on
12 his record which spanned from 2006 to present. The Division of Parole and Probation
13 recommended 36 to 120 months for both Counts I and II (principal trafficking and principal
14 burglary) to run consecutively to each other. The Division of Parole and Probation recommended
15 16 to 72 months for both Counts III and IV. Count III was recommended to run consecutively to
16 Count II and Count IV to run concurrently with Count III. The Division recommended a minimum
17 aggregate term of 88 months to a maximum aggregate of 312 months.
18

19 A Judgment of Conviction was entered on April 28, 2020. Petitioner was sentenced as follows:
20

21 **COUNT I** (trafficking in a controlled substance) to a MAXIMUM of ONE
22 HUNDRED EIGHTY (180) MONTHS WITH A MINIMUM parole eligibility of
23 SEVENTY-TWO (72) MONTHS;

24 **COUNT II** (burglary gaining possession of a firearm and/or deadly weapon) to a
25 MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS WITH A MINIMUM
26 parole eligibility of SEVENTY-TWO (72) MONTHS, CONSECUTIVE to
27 COUNT I;
28

1 A criminal defendant is entitled to effective assistance of counsel during the plea
2 negotiation process. A defendant who pleads guilty upon the advice of counsel may attack the
3 validity of the guilty plea by showing that he received ineffective assistance of counsel under the
4 Sixth Amendment to the United States Constitution. *Nollette v State*, 118 Nev. 341, 348 (2002).

5 A District Court reviews claims of ineffective assistance of trial counsel under *Strickland*
6 *v. Washington*, 466 U.S. 668, 686-87 (1984); *see also Kirksey v. State*, 112 Nev. 980, 987, 923
7 P.2d 1102, 1107 (1996). A good discussion of effective assistance of counsel in the plea
8 negotiation process is contained in *Gonzales v. State*, 136 Nev. Adv. Op., 476 P.3rd 84, 90
9 (2020). The Court of Appeals held:

10 Because counsel must be effective during the plea negotiation process, *Missouri*
11 *v. Frye*, 566 U.S. 134, 144, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012), the test for
12 deficiency focuses on the course of counsel's legal action that preceded the plea to
13 determine whether counsel's advice, or failure to give advice, regarding
14 the plea "was within the range of competence demanded of attorneys in criminal
15 cases," *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203
16 (1985) (quoting *McMann*, 397 U.S. at 771, 90 S.Ct. 1441); *see, e.g., Frye*, 566
17 U.S. at 145, 132 S.Ct. 1399 (holding counsel was deficient for allowing
18 a plea "offer to expire without advising the defendant or allowing him to consider
19 it"); *Tollett*, 411 U.S. at 267-68, 93 S.Ct. 1602 (describing attorney competence
20 when conviction is the result of a guilty plea). Because the deficiency being
21 evaluated is the advice rendered by counsel, claims relating to constitutional
22 deprivations occurring prior to entry of the plea are only pertinent in the context
23 of evaluating counsel's advice. *See Tollett*, 411 U.S. at 266, 93 S.Ct. 1602 ("The
24 focus of federal habeas inquiry is the nature of the advice and the voluntariness of
25 the plea, not the existence as such of an antecedent constitutional infirmity.").
26 And when evaluating whether counsel's advice was objectively reasonable, the
27 court should "look beyond the plea canvass to the entire record." *Rubio v.*
28 *State*, 124 Nev. 1032, 1040, 194 P.3d 1224, 1229 (2008).

29 "[T]he ... 'prejudice,' requirement, on the other hand, focuses on whether
30 counsel's constitutionally ineffective performance affected the outcome of
31 the plea process." *Hill*, 474 U.S. at 59, 106 S.Ct. 366. That is, it focuses on
32 whether counsel's deficient performance affected the petitioner's acceptance or
33 rejection of the guilty plea offer. For example, where a petitioner claims that
34 counsel's improper advice "led him to accept a plea offer as opposed to
35 proceeding to trial, the [petitioner] will have to show 'a reasonable probability
36 that, but for counsel's errors, he would not have pleaded guilty and would have
37 insisted on going to trial.'" *Frye*, 566 U.S. at 148, 132 S.Ct.
38 1399 (quoting *Hill*, 474 U.S. at 59, 106 S.Ct. 366). Or where a petitioner claims
39 that counsel's improper advice led him or her to reject an earlier, more
40 favorable plea offer, the petitioner will have to show a reasonable probability that

1 “he would have accepted the offer to plead pursuant to the terms earlier proposed”
2 and that, if it was within their discretion, neither the prosecution nor the trial court
3 would have prevented the offer's acceptance. *Id.*

4 As discussed above, to fall within the scope of NRS 34.810(1)(a), an ineffective-
5 assistance claim must challenge events that affected the validity of the guilty plea.
6 The familiar standard for whether a petitioner is entitled to an evidentiary hearing
7 on an ineffective-assistance claim provides a useful framework for determining
8 whether an ineffective-assistance claim is sufficiently pleaded to come within the
9 scope of claims permitted by NRS 34.810(1)(a). To come within the scope, a
10 petitioner must raise claims supported by specific factual allegations that are not
11 belied by the record and, if true, would entitle him or her to relief. *See Hargrove*
12 *v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Thus, a petitioner must
13 allege specific facts demonstrating both that counsel's advice (or failure to give
14 advice) regarding the guilty plea was objectively unreasonable and that the
15 deficiency affected the outcome of the plea negotiation process. Any claim that
16 does not satisfy this standard is outside the scope of permitted claims and must be
17 dismissed. *Cf. Rippo*, 134 Nev. at 426, 423 P.3d at 1100 (concluding a petitioner
18 who has not satisfied the *Hargrove* standard is not entitled to relief).

19 Because events occurring after the entry of the plea cannot have affected either
20 counsel's advice regarding entering the guilty plea or the outcome of
21 the plea negotiation process, ineffective-assistance claims relating to post-
22 plea proceedings necessarily fall outside the scope of claims permitted by NRS
23 34.810(1)(a).

24 **B. Ineffective Assistance of Counsel at Sentencing and During Discovery**

25 Effective assistance of counsel at sentencing and during discovery does not equate to
26 perfect assistance of counsel. *See Nollette*, 118 Nev. at 349 (2002). Under *Strickland*, to prevail
27 on a claim of ineffective assistance of trial counsel, a defendant must establish two elements: (1)
28 counsel's performance was deficient, and (2) “the deficient performance prejudiced the defense.”
Id., 112 Nev. at 987, 923 P.2d at 1107.

To prove deficient performance, a Petitioner must show counsel's performance fell below
an objective standard of reasonableness. *Id.* Counsel's performance is measured by an objective
standard of reasonableness which takes into consideration prevailing professional norms and the
totality of the circumstances. *Strickland*, 466 U.S. at 688; accord, *Homick v. State*, 112 Nev. 304,
913 P.2d 1280 (1996). For a claim of ineffective assistance of counsel based on the failure to hire
an investigator, a Petitioner must show that it was objectively unreasonable in not hiring an

1 investigator by presenting what evidence a more thorough investigation would have uncovered.
2 *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). For a claim of ineffective
3 assistance of counsel at sentencing, Petitioner must also show the deficiency amounted to
4 objective unreasonable assistance of counsel. *Gonzales v. State*, 492 P.3d 556, 565 (Nev. 2021).
5 Additionally, Petitioner must also establish prejudice by showing that it is likely sentence would
6 have been different but for the counsel's unreasonable assistance. *Id.*, 492 P.3d at 563.

7 Both prongs of *Strickland* must be alleged with specificity. *See Chappel v. State*, 137
8 Nev. Adv. Op. 83 (2021). To satisfy the requirement of specificity, a petitioner arguing good
9 cause and prejudice in an ineffective assistance of counsel must specifically plead in the petition
10 and explain how the performance was objective unreasonable and how the counsel's acts or
11 omission prejudiced the petitioner. *Id.*

12 The court's view of counsel's performance must be highly deferential, with every effort
13 being taken to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 691. In
14 making a fair assessment of counsel's performance, the reviewing court must reconstruct the
15 circumstances of counsel's challenged conduct and evaluate that challenged act or omission from
16 counsel's perspective at the time, while remaining perfectly mindful that counsel is "strongly
17 presumed to have rendered adequate assistance and made all significant decisions in the exercise
18 of reasonable professional judgment." *Id.* at 689-90. Accordingly, trial counsel's strategic and
19 tactical decisions will be "virtually unchallengeable absent extraordinary circumstances."
20 *Doleman v. State*, 112 Nev. 843, 848 (1996) (quoting *Howard v. State*, 106 Nev. 713, 722
21 (1990)).

22 A Petitioner must demonstrate the facts underlying a claim of ineffective assistance of
23 counsel by a preponderance of the evidence, and a district court's factual findings regarding a
24 claim of ineffective assistance of counsel are entitled to deference on appeal. *Riley v. State*, 110
25 Nev. 638, 647 (1994). Habeas claims must consist of more than bare allegations. *Hargrove v.*
26 *State*, 100 Nev. 498 (1984). Prejudice must be shown that likely sentence would have been less.

27 C. Cruel and Unusual Punishment

28

1 The Eighth Amendment prohibits imposition of a sentence that is grossly
2 disproportionate to the severity of the crime. *Rummel v. Estelle*, 445 U.S. 263, 271, 100 S. Ct.
3 1133, 1138 (1980). But "outside the context of capital punishment, successful challenges to the
4 proportionality of particular sentences have been exceedingly rare." *Id.*, at 272. Regardless of its
5 severity, a sentence that is "within the statutory limits is not 'cruel and unusual punishment
6 unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably
7 disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475,
8 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22
9 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836
10 (1991) (plurality opinion) (explaining that "[t]he Eighth Amendment does not require strict
11 proportionality between crime and sentence[;] . . . it forbids only extreme sentences that are
12 'grossly disproportionate' to the crime" (citation omitted)).

13 **D. Retroactive Statutes**

14 Absent clear legislative intent to make a statute retroactive, Nevada courts will interpret it
15 as having only a prospective effect. *Nevada Power Co. v. Metropolitan Dev. Co.*, 104 Nev. 684,
16 686, 765 P.2d 1162, 1163 (1988).

17 **III. FINDING OF FACT**

18 At the Evidentiary Hearing on January 4, 2022, The Court heard sworn testimonies from
19 Petitioner, Aaron Mouritsen, Esq., and Ms. Atkins. The Petitioner, through Mr. Lasher, advised
20 the Court that he understood that, by having Mr. Mouritsen testify, he waived any attorney-client
21 privilege. The Court made the following finding of fact:

- 22 1. Mr. Mouritsen's testimony was credible.
- 23 2. Mr. Mouritsen knew before negotiating the plea deal for Petitioner that Petitioner was
24 in Nevada for a job interview.
- 25 3. The crime was investigated by local and federal law enforcement agencies due to the
26 large multitude of weapons that were stolen and then sold in another State. As a result
27 of the investigations, Mr. Mouritsen received detailed investigation reports in
28 discovery.

- 1 4. Mr. Mouritsen knew that a co-defendant had agreed to cooperate and testify against
2 the Petitioner.
- 3 5. Mr. Mouritsen had previous experience negotiating plea agreements with the Lyon
4 County District Attorney. He engaged in several rounds of negotiations and was able
5 to secure an agreement that would avoid having the Petitioner plea to a Category A
6 felony. The plea agreement also reduced the number of B felony counts from 32
7 charges to two.
- 8 6. At the arraignment, this Court canvassed Petitioner about whether he talked with Mr.
9 Mouritsen about possible defenses and whether or not he understands the pros, cons,
10 and the consequences of taking the plea deal. He answered that he understood that the
11 Court was not bound by the agreement and could sentence the Petitioner within the
12 parameters allowed by law.
- 13 7. The Court heard the testimony of two victims who described how the break in and
14 theft of weapons impacted their lives and business.
- 15 8. The PSI recommended a minimum aggregate sentence of eighty eight (88) months to
16 a maximum aggregate sentence of three hundred twelve (312) months.
- 17 9. The State argued for a minimum aggregate sentence of one hundred eighty (180)
18 months to a maximum aggregate sentence of four hundred eighty (480) months.
- 19 10. The Petitioner's attorney argued for a minimum aggregate sentence of thirty six (36)
20 months to a maximum aggregate sentence of one hundred twenty (120) months.
- 21 11. The Court sentenced the Petitioner to an aggregated minimum sentence of one-
22 hundred-forty-four (144) months to an aggregated maximum sentence of three-
23 hundred-sixty (360) months.
- 24 12. At sentencing, his Defense attorney referred the Court to follow the recommendations
25 contained in the Presentence Investigation Report with the exception of running all
26 counts concurrent.
- 27
- 28

1 13. Mr. Mouritsen made strategic decisions as to how to argue during sentencing before
2 the Court. The Petitioner's criminal history, lack of family support, and the nature of
3 the charges were all factored into the decision on how to argue at sentencing.

4 14. Petitioner elected to not testify at the Evidentiary Hearing.

6 ANALYSIS

- 7 1. **Ground One:** Was Counsel ineffective under the Sixth Amendment by failing to
8 properly advise Petitioner of his defenses, failing to investigate properly, failing to
9 properly negotiate a plea, failing to adequately argue at sentencing, and failing to
10 mitigate at sentencing?

11 A. Failing to Adequately Negotiate a Plea Bargain.

12 The Petitioner has the burden of proving that his trial counsel's performance was
13 ineffective under the *Strickland* standard. Petitioner argues that another attorney in another
14 jurisdiction had negotiated a more favorable plea for his client, thus Mr. Mouritsen's
15 performance at the plea negotiation was deficient.

16 The comparison of the result that another counsel achieved in another case in another
17 jurisdiction presented by the Petitioner provides no guidance to this Court as to whether the
18 performance of this attorney fell below the standard required under *Strickland*. As the United
19 States Supreme Court in *Strickland* stated, "There are countless ways to provide effective
20 assistance in any given case. Even the best criminal defense attorneys would not defend a
21 particular client in the same way." 466 U.S. at 689. Additionally, the Second Judicial District's
22 case Petitioner mentioned was charged and sentenced under a revised statute with a different
23 penalty guideline. This makes the comparison Petitioner made between the two cases even more
24 difficult to apply to the instant matter.

25 While the specificity requirement imposed by *Chappel* seems to be satisfied, Petitioner
26 only points out an example of specific performance he wanted his counsel's performance to be,
27 not how his counsel's performance failed to meet the reasonableness standard. Effective
28 assistance of counsel is not synonymous with perfect assistance of counsel. *See Nollette v. State*,

1 118 Nev. 341, 349, 46 P.3d 87, 92 (2002). In order to claim that Mr. Mouritsen's performance
2 was deficient, Petitioner was required to establish that Mr. Mouritsen's performance was not
3 reasonable.

4 The facts established that the Petitioner had six previous felony convictions. The State
5 originally planned to bring thirty-five charges against him. The charges included a Category A
6 felony. The plea agreement left the Petitioner exposed to four felonies, none of which were a
7 Category A felony. The Petitioner no longer had to face the possibility of a life sentence and had
8 the chance to get out of prison in less than ten years. From the standpoint of reducing the
9 Petitioner's exposure at sentencing, the plea agreement results were more than reasonable.

10 The Court cannot find that the advice given to accept the plea agreement was
11 unreasonable because the attorney did not discuss the possibility the State would have trouble
12 introducing a co-conspirator's testimony. As discussed in more detail below, the Court cannot
13 find that the advice given was unreasonable because the attorney did not discuss possible legal
14 arguments existed regarding how Nevada designated methamphetamine in drug schedules.

15 **B. Failing to Adequately Investigate.**

16 Petitioner argued at the Evidentiary Hearing that Mr. Mouritsen's performance was
17 ineffective because he did not hire an investigation during discovery. The investigative agencies
18 in this case included a federal agency that had more resources than a typical rural county
19 sheriff's department. Mr. Mouritsen testified credibly that, based on his professional judgment,
20 nothing more could be gain from hiring an investigator. Petitioner presented no cognizable
21 evidence that an investigation would have produced additional evidence that Mr. Mouritsen was
22 not aware of after reviewing the discovery. The Court heard no testimony that the Petitioner
23 provided additional leads to investigate. Additionally, general allegations that the failure to hire
24 an investigator equates to ineffective assistance of counsel does not meet the specificity standard
25 under *Chappel*.

26 **C. Failing to Adequately Argue at Sentencing.**

27 Petitioner argues that Mr. Mouritsen was ineffective because he failed to marshal strong
28 arguments for the sentence recommended by the PSI. Petitioner first argues that Mr. Mouritsen's

1 performance was ineffective as Mr. Mouritsen did not insist that the new possession drug statute
2 be applied retroactively to Petitioner's case. The second argument states that Mr. Mouritsen
3 failed to argue that Petitioner's culpability was minimal compared to that of Ms. Atkins.

4 Again, *Strickland* requires this Court to view Mr. Mouritsen's performance at sentencing
5 with a high deference, with every effort being taken to eliminate the distorting effects of
6 hindsight. In making a fair assessment of Mr. Mouritsen's performance, this Court must
7 reconstruct the circumstances of counsel's challenged conduct and evaluate that challenged act
8 or omission from counsel's perspective at the time, while remaining perfectly mindful that
9 counsel is "strongly presumed to have rendered adequate assistance and made all significant
10 decisions in the exercise of reasonable professional judgment." Also, trial counsel's strategic and
11 tactical decisions will be "virtually unchallengeable absent extraordinary circumstances."

12 Mr. Mouritsen testified credibly that, at sentencing, based on his own professional
13 judgment, his goal was to present a credible recommendation before the sentencing judge. Mr.
14 Mouritsen's decisions for not seeking retroactive application of the law and not to argue that
15 Petitioner's culpability was minimal were made as he did not want to prejudice the Petitioner by
16 arguing unreasonably before the sentencing judge.

17 This Court can find no indication in the language of the new statute that it was intended
18 to be applied retroactively. Arguing for retroactive applicability without any support in law could
19 be found unreasonable to a court. Arguing that the Petitioner was less culpable in a case
20 involving large quantities of methamphetamines and the sale of stolen weapons to other
21 criminals could have backfired as well.

22 The PSI presented that the Petitioner was observed living in the house where a large
23 amount of controlled substances were found. The Court heard evidence concerning the amount
24 of weapons stolen, involvement of a drug cartel, and criminal buyers of the stolen firearms in this
25 case. All that evidence added together with the fact Petitioner was previously convicted of six
26 felonies, leads the Court to conclude that Mr. Mouritsen's professional opinion that it was
27 unreasonable to argue Petitioner was "simply at the wrong place at the wrong time" was
28 reasonable. The PSI had already presented a good basis for a lower sentence.

1 Because *Strickland* requires this Court to view Mr. Mouritsen's action with a high
2 deference. The Court finds that Mr. Mouritsen was not ineffective at sentencing. A claim of
3 ineffective assistance under *Strickland* must be viewed without the luxury of hindsight. The
4 Court cannot find that Mr. Mouritsen's performance, taking into account of the circumstances
5 and counsel's perspective at the time of sentencing, was ineffective.

6 **D. Failing to Mitigate.**

7 Petitioner argues that Mr. Mouritsen was ineffective because he failed his duty to present
8 sufficient mitigating evidence at sentencing. Petitioner argued that Mr. Mouritsen should have
9 provided more than just an email note from Petitioner's father that stated Petitioner will have
10 work after release. Also, Petitioner argues that Mr. Mouritsen should have argued that Petitioner
11 had no prior conviction for burglary or gun charges and Petitioner's presence at Ms. Atkin's
12 constituted an unlucky circumstance.

13 Mr. Mouritsen testified credibly at the Evidentiary Hearing that he did contact
14 Petitioner's father. The Petitioner's father chose not to come to court to testify. The best Mr.
15 Mouritsen could obtain from the Petitioner's father was an email letter. Mr. Mouritsen presented
16 to the Court his only mitigating evidence. The law enforcement observations of the Petitioner,
17 again, a six time felon, living at Ms. Atkin's house for a period of time would provide credibility
18 problems for any argument that suggested he was only "at the wrong place at the wrong time."

19 In addition to prevailing under the first prong under *Strickland*, Petitioner must also
20 establish prejudice occurred from the ineffective assistance. Even if the Court accepts
21 Petitioner's argument that Mr. Mouritsen's performance was deficient because he failed to
22 provide more than just an email from Petitioner's father at sentencing and he failed to argue that
23 Petitioner was just "in the wrong place at the wrong time," Petitioner did not successfully
24 demonstrate how that prejudiced him.

25 Based upon the Petitioner's six previous felonies alone, the chance of Petitioner being
26 granted probation for four more felonies was virtually zero. The seriousness of Petitioner's
27 crimes and the involvement of drug cartels provided the Court with further reason to sentence
28 higher within the range of sentencing.

1 The sentencing judge sentenced Petitioner within the range of his discretion with two
2 concurrent sentences for two felonies. This Court see no prejudices against the Petitioner based
3 on Mr. Mouritsen's alleged "deficiency" at sentencing in this case. Petitioner failed to establish
4 ineffective assistance of counsel because Mr. Mouritsen's failure to mitigate Petitioner's
5 sentence.

6 **E. Failing to Adequately Advise of Defenses.**

7 Petitioner argues that Mr. Mouritsen was ineffective because Mr. Mouritsen failed to
8 advise Petitioner of his possible defenses and strengths of the case based on multiple reasons.
9 First, Petitioner claims that Mr. Mouritsen failed to inform him about the mandatory minimum
10 sentence. Second, Petitioner claims that Mr. Mouritsen failed to inform him that Ms. Atkin's
11 statements against him must be corroborated before they could be used against him. Third,
12 Petitioner claims that Mr. Mouritsen failed to advise him of potential defenses concerning the
13 classification of methamphetamine such as the listing of methamphetamine as Schedule I
14 controlled substance. Petitioner claims, his plea was not made knowingly, voluntarily, and
15 intelligently. However, the record and Mr. Mouritsen's testimony at the Evidentiary Hearing
16 negate these claims.

17 Mr. Mouritsen's testimony indicated that he did discuss possible defenses with Petitioner.
18 At first, Mr. Mouritsen stated that at the onset of the case he thought he could argue that
19 Petitioner was not as culpable as others in the criminal acts, and that the Petitioner was "at the
20 wrong place at the wrong time." However, after Mr. Mouritsen learned that another co-defendant
21 would give testimony about Petitioner's deep involvement in the crimes, he discussed the upside
22 of taking the plea deal with Petitioner. He also worked to get Petitioner a favorable plea deal,
23 evidenced by the multiple discussions that Mr. Mouritsen had with the District Attorney.

24 Regarding the corroboration of other Defendants' statements, Mr. Mouritsen's testimony
25 stated that he understood the State would have to corroborate a co-conspirator's testimony but
26 that the level of corroboration needed was not insurmountable. It was his professional opinion
27 that it was likely that these statements would be corroborated and introduced at trial against the
28 Petitioner. The Petitioner presented no evidence or legal argument that the State would not have

1 been able to meet the requirement of corroboration. *Walker v. State*, 116 Nev. 670, 676 (2000).
2 No prejudice was demonstrated against Petitioner on this point.

3 As to challenging how the State of Nevada has classified the scheduling of
4 methamphetamine, Mr. Mouritsen's testimony indicated that he had no knowledge of this
5 argument. However, the Petitioner did not present any evidence that such an argument has been
6 accepted by any court and that the Petitioner would have prevailed.

7 This Court canvassed Petitioner prior to accepting the plea agreement. The Court
8 specifically questioned the Petitioner as to whether he discussed his legal defenses. The
9 Petitioner stated that he understood the range of penalties and that the Court could sentence him
10 within those ranges. The Petitioner stated he discussed with Mr. Mouritsen possible defenses and
11 discussed the consequences of taking the plea deal. The record and Mr. Mouritsen's testimony
12 belies Petitioner's allegations that he did not enter into the plea agreement knowingly,
13 voluntarily, and intelligently. Petitioner did not on the record state that he would not have accept
14 the plea deal but for counsel's advice.

15 In summary, none of the evidence set forth in the hearing establishes that Mr. Mouritsen
16 was ineffective in his counseling of Petitioner under *Strickland* standard. Petitioner showed
17 neither deficiency in performance nor prejudice as the result of the alleged deficient
18 performance. The Court finds that Mr. Mouritsen's performance was not ineffective.

19 2. **Ground Two: Was Petitioner's Thirty-Year Sentence Violate the Eighth Amendment**
20 **in Light of the Overhaul of Nevada's Criminal Codes?**

21 Petitioner argues that his thirty-year sentence, in light of the statutory change in
22 possession and trafficking of controlled substance law, is cruel and unusual punishment.
23 Petitioner's main argument is that the Court should not look at the statute in effect at the time of
24 the commission of the crimes but the new statute and penalty guideline that passed after the
25 commission of the crimes. However, the Court rejects this argument.

26 In order for a statute to be applicable retroactively, the statute in question must indicate a
27 clear legislative intent to make a statute retroactive. See *Nevada Power Co. v. Metropolitan Dev.*
28 *Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988). The new statutes stated that:

NRS 453.3385: Trafficking in controlled substances: Flunitrazepam, gamma-hydroxybutyrate and schedule I or II substances, except marijuana. [Effective July 1, 2020.]

1. Except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, a person who knowingly or intentionally sells, manufactures, delivers or brings into this State or who is knowingly or intentionally in actual or constructive possession of flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance which is listed in schedule I or II, except marijuana, or any mixture which contains any such controlled substance, unless a greater penalty is provided pursuant to NRS 453.322, if the quantity involved:
 - (a) Is 100 grams or more, but less than 400 grams, is guilty of low-level trafficking and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years and by a fine of not more than \$100,000.
 - (b) Is 400 grams or more, is guilty of high-level trafficking and shall be punished for a category A felony by imprisonment in the state prison:
 - (1) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
 - (2) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served, and by a fine of not more than \$500,000.
2. As used in this section, "marijuana" does not include concentrated cannabis.

And,

NRS 453.336 Unlawful possession not for purpose of sale: Prohibition; penalties; exception. [Effective July 1, 2020.]

1. Except as otherwise provided in subsection 5, a person shall not knowingly or intentionally possess a controlled substance, unless the substance was obtained directly from, or pursuant to, a prescription or order of a physician, physician assistant licensed pursuant to chapter 630 or 633 of NRS, dentist, podiatric physician, optometrist, advanced practice registered nurse or veterinarian while acting in the course of his or her professional practice, or except as otherwise authorized by the provisions of NRS 453.005 to 453.552, inclusive.
2. Except as otherwise provided in subsections 3 and 4 and in NRS 453.3363, and unless a greater penalty is provided in NRS 212.160, 453.3385 or 453.339, a person who violates this section:
 - (a) For a first or second offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is less than 28 grams, is guilty of possession of a controlled substance and shall be punished for a category E felony as provided in NRS 193.130. In accordance with NRS 176.211, the court shall defer judgment upon the consent of the person.
 - (b) For a third or subsequent offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is less than 28 grams, or if the offender has previously been convicted two or more times in the aggregate of any violation of the law of the United States or of any state,

- territory or district relating to a controlled substance, is guilty of possession of a controlled substance and shall be punished for a category D felony as provided in NRS 193.130, and may be further punished by a fine of not more than \$20,000.
- (c) If the controlled substance is listed in schedule I or II and the quantity possessed is 14 grams or more, but less than 28 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is 28 grams or more, but less than 200 grams, is guilty of low-level possession of a controlled substance and shall be punished for a category C felony as provided in NRS 193.130.
- (d) If the controlled substance is listed in schedule I or II and the quantity possessed is 28 grams or more, but less than 42 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is 200 grams or more, is guilty of mid-level possession of a controlled substance and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years and by a fine of not more than \$50,000.
- (e) If the controlled substance is listed in schedule I or II and the quantity possessed is 42 grams or more, but less than 100 grams, is guilty of high-level possession of a controlled substance and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years and by a fine of not more than \$50,000.
3. Unless a greater penalty is provided in NRS 212.160, 453.337 or 453.3385, a person who is convicted of the possession of flunitrazepam or gamma-hydroxybutyrate, or any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.
4. Unless a greater penalty is provided pursuant to NRS 212.160, a person who is convicted of the possession of 1 ounce or less of marijuana:
- (a) For the first offense, is guilty of a misdemeanor and shall be:
- (1) Punished by a fine of not more than \$600; or
- (2) Assigned to a program of treatment and rehabilitation pursuant to NRS 176A.230 if the court determines that the person is eligible to participate in such a program.
- (b) For the second offense, is guilty of a misdemeanor and shall be:
- (1) Punished by a fine of not more than \$1,000; or
- (2) Assigned to a program of treatment and rehabilitation pursuant to NRS 176A.230 if the court determines that the person is eligible to participate in such a program.
- (c) For the third offense, is guilty of a gross misdemeanor and shall be punished as provided in NRS 193.140.
- (d) For a fourth or subsequent offense, is guilty of a category E felony and shall be punished as provided in NRS 193.130.
5. It is not a violation of this section if a person possesses a trace amount of a controlled substance and that trace amount is in or on a hypodermic device obtained from a sterile hypodermic device program pursuant to NRS 439.985 to 439.994, inclusive.

- 1 6. The court may grant probation to or suspend the sentence of a person convicted of
2 violating this section.
3 7. As used in this section:
4 (a) "Controlled substance" includes flunitrazepam, gamma-hydroxybutyrate and each
5 substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate
6 precursor.
7 (b) "Marijuana" does not include concentrated cannabis.
8 (c) "Sterile hypodermic device program" has the meaning ascribed to it in NRS
9 439.986.

10 There is no clear legislative intent to retroactively apply the statute. The Court interprets the
11 amended statute as having only a prospective effect.

12 Under Nevada law, a sentence within the guidelines is not cruel and unusual punishment
13 as long as the statute fixing punishment is not unconstitutional nor the sentence is so
14 unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112
15 Nev. 472, 475, 915 P.2d 282, 284 (1996). The sentence also was not so unreasonably
16 disproportionate to the offense as to shock the conscience. This matter involved a planned theft
17 of weapons to raise cash for drug addicts. The consequences of the Petitioner's crimes could be
18 severe and life threatening.

19 Furthermore, the sentencing judge did demonstrate leniency. He did not accept the
20 State's recommendation. The Court ran the weapon counts concurrent. The Court finds that
21 Petitioner's aggregated minimum sentence of one hundred forty four months (144) to an
22 aggregated maximum sentence of three hundred sixty (360) is not cruel and unusual.

23 3. **Ground Three: Should Petitioner's Conviction be Reversed Because of the**
24 **Cumulation of Error?**

25 The Court finds that based upon the evidence presented the Petitioner has not met his
26 burden of proof. The Court concludes that his counsel was not ineffective. The Petitioner's
27 sentence was legal. No accumulation of error exists. Based upon the Court's findings and
28 conclusions above, the Court finds that the Petitioner cannot succeed on this ground.

 Based on the above and good cause appearing, **IT IS HEREBY ORDERED** Petitioner's

///

///

Petition for Writ of Habeas Corpus is **DENIED**.

Dated this 25th day of January 2022.



Hon. LEON A. ABERASTURI
DISTRICT COURT JUDGE

Certificate of Mailing

I hereby certify that I, Quoc Thai, am an employee of the Third Judicial District Court, and that on this date pursuant to NRCP 5(b), a true copy of the foregoing document was mailed at Yerington, Nevada addressed to:

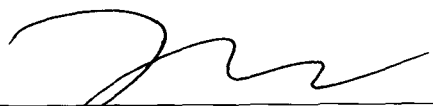
Lyon County District Attorney
Deposited in the TJDC Mailbox

William Hutching, Warden
Southern Desert Correctional Center
20825 Cold Creek Rd,
Las Vegas, NV 89166

Aaron Ford, Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

Michael Lasher, Esq.
827 Kenny Way
Las Vegas, NV 891007

DATED: This 25th day of January, 2021.



Employee

FILED

Case No. 21-CV-00291
Dept. No. II

2022 JAN 26 AM 9:16

TANYA S. DINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

The Undersigned hereby affirms that this document does
Not contain the Social Security number of any person

Andrea Andersen

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

* * *

ERIC WERRE,

Petitioner,

v.

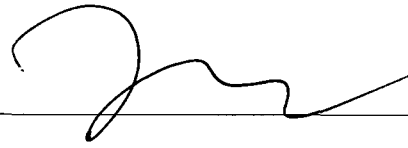
WILLIAM HUTCHING, WARDEN
Southern Desert Correctional Center, STATE
OF NEVADA

Respondent.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 25th day of January, 2021, the court entered an
ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) in
this matter, a true and correct copy of which is attached to this notice.

Dated: This 25th day of January, 2022.

By 
Quoc Thai

Case No.: 21-CV-00291
Dept. No.: II

FILED

2022 JAN 26 AM 9:17

TANYA JOE HINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT

Affirmation pursuant to NRS 239B.030,
the undersigned affirms that the preceding
document does not contain the social
security of any person.

Andrea Andersen

**IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON**

* * * * *

ERIC WERRE,

Petitioner,

v.

WILLIAM HUTCHING, WARDEN,
Southern Desert Correctional Center; STATE
OF NEVADA,

Respondent.

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS (POST-
CONVICTION)**

On February 14, 2020, the Petitioner, Eric Were, was charged by way of Amended Criminal Complaint for one (1) count of PRINCIPAL TO TRAFFICKING IN A CONTROLLED SUBSTANCE OVER 28 GRAMS, one (1) count of PRINCIPAL TO POSSESSION OF STOLEN VEHICLE WITH A VALUE MORE THAN \$3,500.00, fourteen (14) counts of PRINCIPAL TO POSSESSION OF STOLEN FIREARM, sixteen (16) counts of EX FELON POSSESSION OF A FIREARM, one (1) count of PRINCIPAL TO POSSESSION OF SHORT-BARRELED RIFLE OR SHOTGUN, one (1) count of POSSESSION OF A CONTROLLED SUBSTANCE, one (1) count of PRINCIPAL TO COMMIT BURGLARY, for a total of thirty-five (35) felony counts including one (1) Category A felony, thirty-two (32) Category B felonies, one (1) Category D felony, and one (1) Category E felony.

1 On March 2, 2020, represented by counsel, Aaron Mouritsen, Esq., Petitioner entered into
2 a guilty plea agreement to which he would plea to an Information that contained one (1) count of
3 PRINCIPAL TO TRAFFICKING IN A CONTROLLED SUBSTANCE OVER 14 GRAMS BUT
4 LESS THAN 28 GRAMS, one (1) count of PRINCIPAL TO BURGLARY GAINING
5 POSSESSION OF A FIREARM AND/OR DEADLY WEAPON, and two (2) counts of
6 PRINCIPAL TO POSSESSION OF A STOLEN FIREARM, all of which were Category B
7 felonies. The State was free to argue with the exception that they would recommend the weapons
8 counts to run concurrently. The Plea Agreement was accepted by the Court after the Petitioner
9 was canvassed.
10

11 The Pre-Sentencing Investigation indicated that the Petitioner had six previous felonies on
12 his record which spanned from 2006 to present. The Division of Parole and Probation
13 recommended 36 to 120 months for both Counts I and II (principal trafficking and principal
14 burglary) to run consecutively to each other. The Division of Parole and Probation recommended
15 16 to 72 months for both Counts III and IV. Count III was recommended to run consecutively to
16 Count II and Count IV to run concurrently with Count III. The Division recommended a minimum
17 aggregate term of 88 months to a maximum aggregate of 312 months.
18

19 A Judgment of Conviction was entered on April 28, 2020. Petitioner was sentenced as follows:
20

21 **COUNT I** (trafficking in a controlled substance) to a MAXIMUM of ONE
22 HUNDRED EIGHTY (180) MONTHS WITH A MINIMUM parole eligibility of
23 SEVENTY-TWO (72) MONTHS;

24 **COUNT II** (burglary gaining possession of a firearm and/or deadly weapon) to a
25 MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS WITH A MINIMUM
26 parole eligibility of SEVENTY-TWO (72) MONTHS, CONSECUTIVE to
27 COUNT I;
28

COUNT III (possession of stolen firearm) to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS WITH A MINIMUM parole eligibility of SEVENTY-TWO (36) MONTHS, CONCURRENT to COUNT I and II;

COUNT IV (possession of stolen firearm) to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS WITH A MINIMUM parole eligibility of SEVENTY-TWO (36) MONTHS, CONCURRENT to COUNT I and II.

In total, the Petitioner was sentenced by the Court to an aggregated minimum sentence of one-hundred-forty-four (144) months to an aggregated maximum sentence of three-hundred-sixty (360) months.

Petitioner, through his counsel Michael Lasher, Esq., filed a Petition for Writ of Habeas Corpus (Post Conviction) on March 16, 2021. On March 22, 2021, the State filed State's Answer to Petition for Writ of Habeas Corpus (Post Conviction). On April 2, 2021, Petitioner filed a Reply to State's Answer to Petition for Writ of Habeas Corpus (Post Conviction). On January 4, 2022, the Court held an Evidentiary Hearing on the matter.

I. ARGUMENTS PRESENTED

Petitioner argues that his conviction was not just on three grounds.

1. Counsel was ineffective under the Sixth Amendment by failing to properly advise Petitioner of his defenses, failing to investigate properly, failing to properly negotiate a plea, failing to adequately argue at sentencing, and failing to mitigate at sentencing.
2. Petitioner's thirty-year sentence violates the Eight Amendment in light of the overhaul of Nevada's Criminal Codes.
3. Petitioner's sentence should be reversed due to cumulative error.

II. FINDINGS OF LAW

A. Ineffective Assistance of Counsel in the Plea Negotiation Process

1 A criminal defendant is entitled to effective assistance of counsel during the plea
2 negotiation process. A defendant who pleads guilty upon the advice of counsel may attack the
3 validity of the guilty plea by showing that he received ineffective assistance of counsel under the
4 Sixth Amendment to the United States Constitution. *Nollette v State*, 118 Nev. 341, 348 (2002).

5 A District Court reviews claims of ineffective assistance of trial counsel under *Strickland*
6 *v. Washington*, 466 U.S. 668, 686-87 (1984); *see also Kirksey v. State*, 112 Nev. 980, 987, 923
7 P.2d 1102, 1107 (1996). A good discussion of effective assistance of counsel in the plea
8 negotiation process is contained in *Gonzales v. State*, 136 Nev. Adv. Op., 476 P.3rd 84, 90
9 (2020). The Court of Appeals held:

10 Because counsel must be effective during the plea negotiation process, *Missouri*
11 *v. Frye*, 566 U.S. 134, 144, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012), the test for
12 deficiency focuses on the course of counsel's legal action that preceded the plea to
13 determine whether counsel's advice, or failure to give advice, regarding
14 the plea "was within the range of competence demanded of attorneys in criminal
15 cases," *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203
16 (1985) (quoting *McMann*, 397 U.S. at 771, 90 S.Ct. 1441); *see, e.g., Frye*, 566
17 U.S. at 145, 132 S.Ct. 1399 (holding counsel was deficient for allowing
18 a plea "offer to expire without advising the defendant or allowing him to consider
19 it"); *Tollett*, 411 U.S. at 267-68, 93 S.Ct. 1602 (describing attorney competence
20 when conviction is the result of a guilty plea). Because the deficiency being
21 evaluated is the advice rendered by counsel, claims relating to constitutional
22 deprivations occurring prior to entry of the plea are only pertinent in the context
23 of evaluating counsel's advice. *See Tollett*, 411 U.S. at 266, 93 S.Ct. 1602 ("The
24 focus of federal habeas inquiry is the nature of the advice and the voluntariness of
25 the plea, not the existence as such of an antecedent constitutional infirmity.").
26 And when evaluating whether counsel's advice was objectively reasonable, the
27 court should "look beyond the plea canvass to the entire record." *Rubio v.*
28 *State*, 124 Nev. 1032, 1040, 194 P.3d 1224, 1229 (2008).

29 "[T]he ... 'prejudice,' requirement, on the other hand, focuses on whether
30 counsel's constitutionally ineffective performance affected the outcome of
31 the plea process." *Hill*, 474 U.S. at 59, 106 S.Ct. 366. That is, it focuses on
32 whether counsel's deficient performance affected the petitioner's acceptance or
33 rejection of the guilty plea offer. For example, where a petitioner claims that
34 counsel's improper advice "led him to accept a plea offer as opposed to
35 proceeding to trial, the [petitioner] will have to show 'a reasonable probability
36 that, but for counsel's errors, he would not have pleaded guilty and would have
37 insisted on going to trial.' " *Frye*, 566 U.S. at 148, 132 S.Ct.
38 1399 (quoting *Hill*, 474 U.S. at 59, 106 S.Ct. 366). Or where a petitioner claims
39 that counsel's improper advice led him or her to reject an earlier, more
40 favorable plea offer, the petitioner will have to show a reasonable probability that

1 “he would have accepted the offer to plead pursuant to the terms earlier proposed”
2 and that, if it was within their discretion, neither the prosecution nor the trial court
3 would have prevented the offer's acceptance. *Id.*

4 As discussed above, to fall within the scope of NRS 34.810(1)(a), an ineffective-
5 assistance claim must challenge events that affected the validity of the guilty plea.
6 The familiar standard for whether a petitioner is entitled to an evidentiary hearing
7 on an ineffective-assistance claim provides a useful framework for determining
8 whether an ineffective-assistance claim is sufficiently pleaded to come within the
9 scope of claims permitted by NRS 34.810(1)(a). To come within the scope, a
10 petitioner must raise claims supported by specific factual allegations that are not
11 belied by the record and, if true, would entitle him or her to relief. *See Hargrove*
12 *v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Thus, a petitioner must
13 allege specific facts demonstrating both that counsel's advice (or failure to give
14 advice) regarding the guilty plea was objectively unreasonable and that the
15 deficiency affected the outcome of the plea negotiation process. Any claim that
16 does not satisfy this standard is outside the scope of permitted claims and must be
17 dismissed. *Cf. Rippo*, 134 Nev. at 426, 423 P.3d at 1100 (concluding a petitioner
18 who has not satisfied the *Hargrove* standard is not entitled to relief).

19 Because events occurring after the entry of the plea cannot have affected either
20 counsel's advice regarding entering the guilty plea or the outcome of
21 the plea negotiation process, ineffective-assistance claims relating to post-
22 plea proceedings necessarily fall outside the scope of claims permitted by NRS
23 34.810(1)(a).

24 **B. Ineffective Assistance of Counsel at Sentencing and During Discovery**

25 Effective assistance of counsel at sentencing and during discovery does not equate to
26 perfect assistance of counsel. *See Nollette*, 118 Nev. at 349 (2002). Under *Strickland*, to prevail
27 on a claim of ineffective assistance of trial counsel, a defendant must establish two elements: (1)
28 counsel's performance was deficient, and (2) “the deficient performance prejudiced the defense.”
Id., 112 Nev. at 987, 923 P.2d at 1107.

To prove deficient performance, a Petitioner must show counsel's performance fell below
an objective standard of reasonableness. *Id.* Counsel's performance is measured by an objective
standard of reasonableness which takes into consideration prevailing professional norms and the
totality of the circumstances. *Strickland*, 466 U.S. at 688; accord, *Homick v. State*, 112 Nev. 304,
913 P.2d 1280 (1996). For a claim of ineffective assistance of counsel based on the failure to hire
an investigator, a Petitioner must show that it was objectively unreasonable in not hiring an

investigator by presenting what evidence a more thorough investigation would have uncovered. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). For a claim of ineffective assistance of counsel at sentencing, Petitioner must also show the deficiency amounted to objective unreasonable assistance of counsel. *Gonzales v. State*, 492 P.3d 556, 565 (Nev. 2021). Additionally, Petitioner must also establish prejudice by showing that it is likely sentence would have been different but for the counsel's unreasonable assistance. *Id.*, 492 P.3d at 563.

Both prongs of *Strickland* must be alleged with specificity. *See Chappel v. State*, 137 Nev. Adv. Op. 83 (2021). To satisfy the requirement of specificity, a petitioner arguing good cause and prejudice in an ineffective assistance of counsel must specifically plead in the petition and explain how the performance was objective unreasonable and how the counsel's acts or omission prejudiced the petitioner. *Id.*

The court's view of counsel's performance must be highly deferential, with every effort being taken to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689, 691. In making a fair assessment of counsel's performance, the reviewing court must reconstruct the circumstances of counsel's challenged conduct and evaluate that challenged act or omission from counsel's perspective at the time, while remaining perfectly mindful that counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. Accordingly, trial counsel's strategic and tactical decisions will be "virtually unchallengeable absent extraordinary circumstances." *Doleman v. State*, 112 Nev. 843, 848 (1996) (quoting *Howard v. State*, 106 Nev. 713, 722 (1990)).

A Petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and a district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on appeal. *Riley v. State*, 110 Nev. 638, 647 (1994). Habeas claims must consist of more than bare allegations. *Hargrove v. State*, 100 Nev. 498 (1984). Prejudice must be shown that likely sentence would have been less.

C. Cruel and Unusual Punishment

1 The Eighth Amendment prohibits imposition of a sentence that is grossly
2 disproportionate to the severity of the crime. *Rummel v. Estelle*, 445 U.S. 263, 271, 100 S. Ct.
3 1133, 1138 (1980). But "outside the context of capital punishment, successful challenges to the
4 proportionality of particular sentences have been exceedingly rare." *Id.*, at 272. Regardless of its
5 severity, a sentence that is "within the statutory limits is not 'cruel and unusual punishment
6 unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably
7 disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475,
8 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22
9 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836
10 (1991) (plurality opinion) (explaining that "[t]he Eighth Amendment does not require strict
11 proportionality between crime and sentence[;] . . . it forbids only extreme sentences that are
12 'grossly disproportionate' to the crime" (citation omitted)).

13 **D. Retroactive Statutes**

14 Absent clear legislative intent to make a statute retroactive, Nevada courts will interpret it
15 as having only a prospective effect. *Nevada Power Co. v. Metropolitan Dev. Co.*, 104 Nev. 684,
16 686, 765 P.2d 1162, 1163 (1988).

17 **III. FINDING OF FACT**

18 At the Evidentiary Hearing on January 4, 2022, The Court heard sworn testimonies from
19 Petitioner, Aaron Mouritsen, Esq., and Ms. Atkins. The Petitioner, through Mr. Lasher, advised
20 the Court that he understood that, by having Mr. Mouritsen testify, he waived any attorney-client
21 privilege. The Court made the following finding of fact:

- 22 1. Mr. Mouritsen's testimony was credible.
- 23 2. Mr. Mouritsen knew before negotiating the plea deal for Petitioner that Petitioner was
24 in Nevada for a job interview.
- 25 3. The crime was investigated by local and federal law enforcement agencies due to the
26 large multitude of weapons that were stolen and then sold in another State. As a result
27 of the investigations, Mr. Mouritsen received detailed investigation reports in
28 discovery.

- 1 4. Mr. Mouritsen knew that a co-defendant had agreed to cooperate and testify against
2 the Petitioner.
- 3 5. Mr. Mouritsen had previous experience negotiating plea agreements with the Lyon
4 County District Attorney. He engaged in several rounds of negotiations and was able
5 to secure an agreement that would avoid having the Petitioner plea to a Category A
6 felony. The plea agreement also reduced the number of B felony counts from 32
7 charges to two.
- 8 6. At the arraignment, this Court canvassed Petitioner about whether he talked with Mr.
9 Mouritsen about possible defenses and whether or not he understands the pros, cons,
10 and the consequences of taking the plea deal. He answered that he understood that the
11 Court was not bound by the agreement and could sentence the Petitioner within the
12 parameters allowed by law.
- 13 7. The Court heard the testimony of two victims who described how the break in and
14 theft of weapons impacted their lives and business.
- 15 8. The PSI recommended a minimum aggregate sentence of eighty eight (88) months to
16 a maximum aggregate sentence of three hundred twelve (312) months.
- 17 9. The State argued for a minimum aggregate sentence of one hundred eighty (180)
18 months to a maximum aggregate sentence of four hundred eighty (480) months.
- 19 10. The Petitioner's attorney argued for a minimum aggregate sentence of thirty six (36)
20 months to a maximum aggregate sentence of one hundred twenty (120) months.
- 21 11. The Court sentenced the Petitioner to an aggregated minimum sentence of one-
22 hundred-forty-four (144) months to an aggregated maximum sentence of three-
23 hundred-sixty (360) months.
- 24 12. At sentencing, his Defense attorney referred the Court to follow the recommendations
25 contained in the Presentence Investigation Report with the exception of running all
26 counts concurrent.
- 27
28

1 13. Mr. Mouritsen made strategic decisions as to how to argue during sentencing before
2 the Court. The Petitioner's criminal history, lack of family support, and the nature of
3 the charges were all factored into the decision on how to argue at sentencing.

4 14. Petitioner elected to not testify at the Evidentiary Hearing.

6 ANALYSIS

- 7 1. **Ground One: Was Counsel ineffective under the Sixth Amendment by failing to**
8 **properly advise Petitioner of his defenses, failing to investigate properly, failing to**
9 **properly negotiate a plea, failing to adequately argue at sentencing, and failing to**
10 **mitigate at sentencing?**

11 A. Failing to Adequately Negotiate a Plea Bargain.

12 The Petitioner has the burden of proving that his trial counsel's performance was
13 ineffective under the *Strickland* standard. Petitioner argues that another attorney in another
14 jurisdiction had negotiated a more favorable plea for his client, thus Mr. Mouritsen's
15 performance at the plea negotiation was deficient.

16 The comparison of the result that another counsel achieved in another case in another
17 jurisdiction presented by the Petitioner provides no guidance to this Court as to whether the
18 performance of this attorney fell below the standard required under *Strickland*. As the United
19 States Supreme Court in *Strickland* stated, "There are countless ways to provide effective
20 assistance in any given case. Even the best criminal defense attorneys would not defend a
21 particular client in the same way." 466 U.S. at 689. Additionally, the Second Judicial District's
22 case Petitioner mentioned was charged and sentenced under a revised statute with a different
23 penalty guideline. This makes the comparison Petitioner made between the two cases even more
24 difficult to apply to the instant matter.

25 While the specificity requirement imposed by *Chappel* seems to be satisfied, Petitioner
26 only points out an example of specific performance he wanted his counsel's performance to be,
27 not how his counsel's performance failed to meet the reasonableness standard. Effective
28 assistance of counsel is not synonymous with perfect assistance of counsel. *See Nollette v. State*,

1 118 Nev. 341, 349, 46 P.3d 87, 92 (2002). In order to claim that Mr. Mouritsen's performance
2 was deficient, Petitioner was required to establish that Mr. Mouritsen's performance was not
3 reasonable.

4 The facts established that the Petitioner had six previous felony convictions. The State
5 originally planned to bring thirty-five charges against him. The charges included a Category A
6 felony. The plea agreement left the Petitioner exposed to four felonies, none of which were a
7 Category A felony. The Petitioner no longer had to face the possibility of a life sentence and had
8 the chance to get out of prison in less than ten years. From the standpoint of reducing the
9 Petitioner's exposure at sentencing, the plea agreement results were more than reasonable.

10 The Court cannot find that the advice given to accept the plea agreement was
11 unreasonable because the attorney did not discuss the possibility the State would have trouble
12 introducing a co-conspirator's testimony. As discussed in more detail below, the Court cannot
13 find that the advice given was unreasonable because the attorney did not discuss possible legal
14 arguments existed regarding how Nevada designated methamphetamine in drug schedules.

15 **B. Failing to Adequately Investigate.**

16 Petitioner argued at the Evidentiary Hearing that Mr. Mouritsen's performance was
17 ineffective because he did not hire an investigation during discovery. The investigative agencies
18 in this case included a federal agency that had more resources than a typical rural county
19 sheriff's department. Mr. Mouritsen testified credibly that, based on his professional judgment,
20 nothing more could be gain from hiring an investigator. Petitioner presented no cognizable
21 evidence that an investigation would have produced additional evidence that Mr. Mouritsen was
22 not aware of after reviewing the discovery. The Court heard no testimony that the Petitioner
23 provided additional leads to investigate. Additionally, general allegations that the failure to hire
24 an investigator equates to ineffective assistance of counsel does not meet the specificity standard
25 under *Chappel*.

26 **C. Failing to Adequately Argue at Sentencing.**

27 Petitioner argues that Mr. Mouritsen was ineffective because he failed to marshal strong
28 arguments for the sentence recommended by the PSI. Petitioner first argues that Mr. Mouritsen's

1 performance was ineffective as Mr. Mouritsen did not insist that the new possession drug statute
2 be applied retroactively to Petitioner's case. The second argument states that Mr. Mouritsen
3 failed to argue that Petitioner's culpability was minimal compared to that of Ms. Atkins.

4 Again, *Strickland* requires this Court to view Mr. Mouritsen's performance at sentencing
5 with a high deference, with every effort being taken to eliminate the distorting effects of
6 hindsight. In making a fair assessment of Mr. Mouritsen's performance, this Court must
7 reconstruct the circumstances of counsel's challenged conduct and evaluate that challenged act
8 or omission from counsel's perspective at the time, while remaining perfectly mindful that
9 counsel is "strongly presumed to have rendered adequate assistance and made all significant
10 decisions in the exercise of reasonable professional judgment." Also, trial counsel's strategic and
11 tactical decisions will be "virtually unchallengeable absent extraordinary circumstances."

12 Mr. Mouritsen testified credibly that, at sentencing, based on his own professional
13 judgment, his goal was to present a credible recommendation before the sentencing judge. Mr.
14 Mouritsen's decisions for not seeking retroactive application of the law and not to argue that
15 Petitioner's culpability was minimal were made as he did not want to prejudice the Petitioner by
16 arguing unreasonably before the sentencing judge.

17 This Court can find no indication in the language of the new statute that it was intended
18 to be applied retroactively. Arguing for retroactive applicability without any support in law could
19 be found unreasonable to a court. Arguing that the Petitioner was less culpable in a case
20 involving large quantities of methamphetamines and the sale of stolen weapons to other
21 criminals could have backfired as well.

22 The PSI presented that the Petitioner was observed living in the house where a large
23 amount of controlled substances were found. The Court heard evidence concerning the amount
24 of weapons stolen, involvement of a drug cartel, and criminal buyers of the stolen firearms in this
25 case. All that evidence added together with the fact Petitioner was previously convicted of six
26 felonies, leads the Court to conclude that Mr. Mouritsen's professional opinion that it was
27 unreasonable to argue Petitioner was "simply at the wrong place at the wrong time" was
28 reasonable. The PSI had already presented a good basis for a lower sentence.

1 Because *Strickland* requires this Court to view Mr. Mouritsen's action with a high
2 deference. The Court finds that Mr. Mouritsen was not ineffective at sentencing. A claim of
3 ineffective assistance under *Strickland* must be viewed without the luxury of hindsight. The
4 Court cannot find that Mr. Mouritsen's performance, taking into account of the circumstances
5 and counsel's perspective at the time of sentencing, was ineffective.

6 **D. Failing to Mitigate.**

7 Petitioner argues that Mr. Mouritsen was ineffective because he failed his duty to present
8 sufficient mitigating evidence at sentencing. Petitioner argued that Mr. Mouritsen should have
9 provided more than just an email note from Petitioner's father that stated Petitioner will have
10 work after release. Also, Petitioner argues that Mr. Mouritsen should have argued that Petitioner
11 had no prior conviction for burglary or gun charges and Petitioner's presence at Ms. Atkin's
12 constituted an unlucky circumstance.

13 Mr. Mouritsen testified credibly at the Evidentiary Hearing that he did contact
14 Petitioner's father. The Petitioner's father chose not to come to court to testify. The best Mr.
15 Mouritsen could obtain from the Petitioner's father was an email letter. Mr. Mouritsen presented
16 to the Court his only mitigating evidence. The law enforcement observations of the Petitioner,
17 again, a six time felon, living at Ms. Atkin's house for a period of time would provide credibility
18 problems for any argument that suggested he was only "at the wrong place at the wrong time."

19 In addition to prevailing under the first prong under *Strickland*, Petitioner must also
20 establish prejudice occurred from the ineffective assistance. Even if the Court accepts
21 Petitioner's argument that Mr. Mouritsen's performance was deficient because he failed to
22 provide more than just an email from Petitioner's father at sentencing and he failed to argue that
23 Petitioner was just "in the wrong place at the wrong time," Petitioner did not successfully
24 demonstrate how that prejudiced him.

25 Based upon the Petitioner's six previous felonies alone, the chance of Petitioner being
26 granted probation for four more felonies was virtually zero. The seriousness of Petitioner's
27 crimes and the involvement of drug cartels provided the Court with further reason to sentence
28 higher within the range of sentencing.

1 The sentencing judge sentenced Petitioner within the range of his discretion with two
2 concurrent sentences for two felonies. This Court see no prejudices against the Petitioner based
3 on Mr. Mouritsen's alleged "deficiency" at sentencing in this case. Petitioner failed to establish
4 ineffective assistance of counsel because Mr. Mouritsen's failure to mitigate Petitioner's
5 sentence.

6 **E. Failing to Adequately Advise of Defenses.**

7 Petitioner argues that Mr. Mouritsen was ineffective because Mr. Mouritsen failed to
8 advise Petitioner of his possible defenses and strengths of the case based on multiple reasons.
9 First, Petitioner claims that Mr. Mouritsen failed to inform him about the mandatory minimum
10 sentence. Second, Petitioner claims that Mr. Mouritsen failed to inform him that Ms. Atkin's
11 statements against him must be corroborated before they could be used against him. Third,
12 Petitioner claims that Mr. Mouritsen failed to advise him of potential defenses concerning the
13 classification of methamphetamine such as the listing of methamphetamine as Schedule I
14 controlled substance. Petitioner claims, his plea was not made knowingly, voluntarily, and
15 intelligently. However, the record and Mr. Mouritsen's testimony at the Evidentiary Hearing
16 negate these claims.

17 Mr. Mouritsen's testimony indicated that he did discuss possible defenses with Petitioner.
18 At first, Mr. Mouritsen stated that at the onset of the case he thought he could argue that
19 Petitioner was not as culpable as others in the criminal acts, and that the Petitioner was "at the
20 wrong place at the wrong time." However, after Mr. Mouritsen learned that another co-defendant
21 would give testimony about Petitioner's deep involvement in the crimes, he discussed the upside
22 of taking the plea deal with Petitioner. He also worked to get Petitioner a favorable plea deal,
23 evidenced by the multiple discussions that Mr. Mouritsen had with the District Attorney.

24 Regarding the corroboration of other Defendants' statements, Mr. Mouritsen's testimony
25 stated that he understood the State would have to corroborate a co-conspirator's testimony but
26 that the level of corroboration needed was not insurmountable. It was his professional opinion
27 that it was likely that these statements would be corroborated and introduced at trial against the
28 Petitioner. The Petitioner presented no evidence or legal argument that the State would not have

1 been able to meet the requirement of corroboration. *Walker v. State*, 116 Nev. 670, 676 (2000).
2 No prejudice was demonstrated against Petitioner on this point.

3 As to challenging how the State of Nevada has classified the scheduling of
4 methamphetamine, Mr. Mouritsen's testimony indicated that he had no knowledge of this
5 argument. However, the Petitioner did not present any evidence that such an argument has been
6 accepted by any court and that the Petitioner would have prevailed.

7 This Court canvassed Petitioner prior to accepting the plea agreement. The Court
8 specifically questioned the Petitioner as to whether he discussed his legal defenses. The
9 Petitioner stated that he understood the range of penalties and that the Court could sentence him
10 within those ranges. The Petitioner stated he discussed with Mr. Mouritsen possible defenses and
11 discussed the consequences of taking the plea deal. The record and Mr. Mouritsen's testimony
12 belies Petitioner's allegations that he did not enter into the plea agreement knowingly,
13 voluntarily, and intelligently. Petitioner did not on the record state that he would not have accept
14 the plea deal but for counsel's advice.

15 In summary, none of the evidence set forth in the hearing establishes that Mr. Mouritsen
16 was ineffective in his counseling of Petitioner under *Strickland* standard. Petitioner showed
17 neither deficiency in performance nor prejudice as the result of the alleged deficient
18 performance. The Court finds that Mr. Mouritsen's performance was not ineffective.

19 2. **Ground Two: Was Petitioner's Thirty-Year Sentence Violate the Eighth Amendment**
20 **in Light of the Overhaul of Nevada's Criminal Codes?**

21 Petitioner argues that his thirty-year sentence, in light of the statutory change in
22 possession and trafficking of controlled substance law, is cruel and unusual punishment.
23 Petitioner's main argument is that the Court should not look at the statute in effect at the time of
24 the commission of the crimes but the new statute and penalty guideline that passed after the
25 commission of the crimes. However, the Court rejects this argument.

26 In order for a statute to be applicable retroactively, the statute in question must indicate a
27 clear legislative intent to make a statute retroactive. See *Nevada Power Co. v. Metropolitan Dev.*
28 *Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988). The new statutes stated that:

NRS 453.3385: Trafficking in controlled substances: Flunitrazepam, gamma-hydroxybutyrate and schedule I or II substances, except marijuana. [Effective July 1, 2020.]

1. Except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, a person who knowingly or intentionally sells, manufactures, delivers or brings into this State or who is knowingly or intentionally in actual or constructive possession of flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance which is listed in schedule I or II, except marijuana, or any mixture which contains any such controlled substance, unless a greater penalty is provided pursuant to NRS 453.322, if the quantity involved:
 - (a) Is 100 grams or more, but less than 400 grams, is guilty of low-level trafficking and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years and by a fine of not more than \$100,000.
 - (b) Is 400 grams or more, is guilty of high-level trafficking and shall be punished for a category A felony by imprisonment in the state prison:
 - (1) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
 - (2) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served, and by a fine of not more than \$500,000.
2. As used in this section, "marijuana" does not include concentrated cannabis.

And,

NRS 453.336 Unlawful possession not for purpose of sale: Prohibition; penalties; exception. [Effective July 1, 2020.]

1. Except as otherwise provided in subsection 5, a person shall not knowingly or intentionally possess a controlled substance, unless the substance was obtained directly from, or pursuant to, a prescription or order of a physician, physician assistant licensed pursuant to chapter 630 or 633 of NRS, dentist, podiatric physician, optometrist, advanced practice registered nurse or veterinarian while acting in the course of his or her professional practice, or except as otherwise authorized by the provisions of NRS 453.005 to 453.552, inclusive.
2. Except as otherwise provided in subsections 3 and 4 and in NRS 453.3363, and unless a greater penalty is provided in NRS 212.160, 453.3385 or 453.339, a person who violates this section:
 - (a) For a first or second offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is less than 28 grams, is guilty of possession of a controlled substance and shall be punished for a category E felony as provided in NRS 193.130. In accordance with NRS 176.211, the court shall defer judgment upon the consent of the person.
 - (b) For a third or subsequent offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is less than 28 grams, or if the offender has previously been convicted two or more times in the aggregate of any violation of the law of the United States or of any state,

- territory or district relating to a controlled substance, is guilty of possession of a controlled substance and shall be punished for a category D felony as provided in NRS 193.130, and may be further punished by a fine of not more than \$20,000.
- (c) If the controlled substance is listed in schedule I or II and the quantity possessed is 14 grams or more, but less than 28 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is 28 grams or more, but less than 200 grams, is guilty of low-level possession of a controlled substance and shall be punished for a category C felony as provided in NRS 193.130.
- (d) If the controlled substance is listed in schedule I or II and the quantity possessed is 28 grams or more, but less than 42 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is 200 grams or more, is guilty of mid-level possession of a controlled substance and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years and by a fine of not more than \$50,000.
- (e) If the controlled substance is listed in schedule I or II and the quantity possessed is 42 grams or more, but less than 100 grams, is guilty of high-level possession of a controlled substance and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years and by a fine of not more than \$50,000.
3. Unless a greater penalty is provided in NRS 212.160, 453.337 or 453.3385, a person who is convicted of the possession of flunitrazepam or gamma-hydroxybutyrate, or any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.
4. Unless a greater penalty is provided pursuant to NRS 212.160, a person who is convicted of the possession of 1 ounce or less of marijuana:
- (a) For the first offense, is guilty of a misdemeanor and shall be:
- (1) Punished by a fine of not more than \$600; or
- (2) Assigned to a program of treatment and rehabilitation pursuant to NRS 176A.230 if the court determines that the person is eligible to participate in such a program.
- (b) For the second offense, is guilty of a misdemeanor and shall be:
- (1) Punished by a fine of not more than \$1,000; or
- (2) Assigned to a program of treatment and rehabilitation pursuant to NRS 176A.230 if the court determines that the person is eligible to participate in such a program.
- (c) For the third offense, is guilty of a gross misdemeanor and shall be punished as provided in NRS 193.140.
- (d) For a fourth or subsequent offense, is guilty of a category E felony and shall be punished as provided in NRS 193.130.
5. It is not a violation of this section if a person possesses a trace amount of a controlled substance and that trace amount is in or on a hypodermic device obtained from a sterile hypodermic device program pursuant to NRS 439.985 to 439.994, inclusive.

- 1 6. The court may grant probation to or suspend the sentence of a person convicted of
2 violating this section.
3 7. As used in this section:
4 (a) "Controlled substance" includes flunitrazepam, gamma-hydroxybutyrate and each
5 substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate
6 precursor.
7 (b) "Marijuana" does not include concentrated cannabis.
8 (c) "Sterile hypodermic device program" has the meaning ascribed to it in NRS
9 439.986.

10 There is no clear legislative intent to retroactively apply the statute. The Court interprets the
11 amended statute as having only a prospective effect.

12 Under Nevada law, a sentence within the guidelines is not cruel and unusual punishment
13 as long as the statute fixing punishment is not unconstitutional nor the sentence is so
14 unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112
15 Nev. 472, 475, 915 P.2d 282, 284 (1996). The sentence also was not so unreasonably
16 disproportionate to the offense as to shock the conscience. This matter involved a planned theft
17 of weapons to raise cash for drug addicts. The consequences of the Petitioner's crimes could be
18 severe and life threatening.

19 Furthermore, the sentencing judge did demonstrate leniency. He did not accept the
20 State's recommendation. The Court ran the weapon counts concurrent. The Court finds that
21 Petitioner's aggregated minimum sentence of one hundred forty four months (144) to an
22 aggregated maximum sentence of three hundred sixty (360) is not cruel and unusual.

23 3. **Ground Three: Should Petitioner's Conviction be Reversed Because of the**
24 **Cumulation of Error?**

25 The Court finds that based upon the evidence presented the Petitioner has not met his
26 burden of proof. The Court concludes that his counsel was not ineffective. The Petitioner's
27 sentence was legal. No accumulation of error exists. Based upon the Court's findings and
28 conclusions above, the Court finds that the Petitioner cannot succeed on this ground.

 Based on the above and good cause appearing, **IT IS HEREBY ORDERED** Petitioner's

///

///

Petition for Writ of Habeas Corpus is **DENIED**.

Dated this 25th day of January 2022.



Hon. LEON A. ABERASTURI
DISTRICT COURT JUDGE

Certificate of Mailing

I hereby certify that I, Quoc Thai, am an employee of the Third Judicial District Court, and that on this date pursuant to NRCP 5(b), a true copy of the foregoing document was mailed at Yerington, Nevada addressed to:


Lyon County District Attorney
Deposited in the TJDC Mailbox

William Hutching, Warden
Southern Desert Correctional Center
20825 Cold Creek Rd,
Las Vegas, NV 89166

Aaron Ford, Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

Michael Lasher, Esq.
827 Kenny Way
Las Vegas, NV 891007

DATED: This 25th day of January, 2021.



Employee

Case Summary

ERIC DEAN WERRE, WILLIAM HUTCHINGS - WARDEN, SOUTHERN DESERT CORRECTIONAL CENTER, THE STATE OF NEVADA ~ WRIT OF HABEAS CORPUS POST CONVICTION

Court: 21-CV-00291

Agency: Third Judicial District Court

CaseID: 21-285
Type: Writ of Habeas Corpus
Status: Closed
Age: 332 days Active Age: 316 days
Received Date: 3/16/2021
Status Date: 1/26/2022

Case Attributes

Other: Criminal Case: 20-CR-00234

Name Attributes

For: ERIC DEAN WERRE

RESTITUTION OWED: Do not collect any court fees

Involvements

Primary Involvements

[HUTCHINGS, WILLIAM - WARDEN](#) Respondent
[SOUTHERN DESERT CORRECTIONAL CENTER](#) Respondent
[THE STATE OF NEVADA](#) Respondent
[WERRE, ERIC DEAN](#) Petitioner

Other Involvements

[Lasher, Michael Esq.](#) Petitioner's Attorney
Third Judicial District Court (21-CV-00291)
[Aberasturi, Leon A. - LAA](#) Dept II - TJDC
Lyon County District Attorney
[Lyon County District Attorney - LCDACR](#) District Attorney

2. NRCP ~ RELATED PARTY

[HUTCHINGS, WILLIAM - WARDEN](#) Respondent
Disposition: Summary Judgment Dispo Date: 1/26/2022
Lead/Active: False

3. NRCP ~ RELATED PARTY

[SOUTHERN DESERT CORRECTIONAL CENTER](#) Respondent
Disposition: Summary Judgment Dispo Date: 1/26/2022
Lead/Active: False

4. NRCP ~ RELATED PARTY

[THE STATE OF NEVADA](#) Respondent
Disposition: Summary Judgment Dispo Date: 1/26/2022
Lead/Active: False

Writ of Habeas Corpus

1. NRS 34.720 ~ WRIT OF HABEAS CORPUS POST CONVICTION

[WERRE, ERIC DEAN](#) Petitioner
Disposition: Summary Judgment Dispo Date: 1/26/2022
Lead/Active: True

Case Status History

3/16/2021 8:00:00 AM | Open
1/26/2022 8:48:00 AM | Closed

Documents

3/16/2021 Civil Cover Sheet.pdf - Filed
3/16/2021 Petition for Writ of Habeas Corpus (Post-Conviction).pdf - Filed
3/16/2021 Petitioner's Appendix.pdf - Sealed
SEALED
3/16/2021 Petitioner's Appendix - Redacted.pdf - Filed
3/17/2021 Order (to Respond to Petition for Writ of Habeas Corpus).pdf - Filed
3/22/2021 Answer to Petition for Writ of Habeas Corpus(Post Conviction).pdf - Filed
4/2/2021 Reply to State's Answer to Petition for Writ of Habeas Corpus.pdf - Filed

Case Summary

6/11/2021 Order for Production of Inmate.pdf - Filed
6/11/2021 Order Setting Hearing.pdf - Filed
6/11/2021 Order for Production of Inmate - Duplicate.pdf - Filed
6/11/2021 Order Setting Hearing (9-7-21) - Duplicate.pdf - Filed
9/13/2021 Order Setting Hearing - 01-04-22.pdf - Filed
9/14/2021 Order for Production of Inmate - 1-4-2022.pdf - Filed
9/16/2021 Motion for an Order to Show Cause Why Respondent Should Not be Held in Contempt.pdf - Filed
Notes: for Failure to Comply With Order for Productions of Inmate
10/8/2021 (Amended) Motion for an Order to Show Cause Why Respondent Should Not be Held in Contempt.pdf - Filed
Notes: for Failure to Comply with Order for Production of Inmate
11/5/2021 Order to Show Cause (1-4-22).pdf - Filed
12/16/2021 AG Austin Barnum- Zoom invite - 1_4_22 - 9_30 a.m_21-CV-00291 Werre.pdf - For Court Use Only
12/20/2021 Response to Order to Show Cause.pdf - Filed
12/30/2021 Amended Order for Production of Inmate.pdf - Filed
12/30/2021 Order Denying Motion for Order to Show Cause on Failure to Produce Inmate.pdf - Filed
1/10/2022 Return to Sender- Amended Order for Production- Eric Were.pdf - For Court Use Only
SEALED
1/17/2022 Transcript Writ of Habeas Corpus 1-4-22.pdf - Filed
1/26/2022 Order Denying Petition for Writ of Habeas Corpus (Post-Conviction).pdf - Filed
2/3/2022 Notice of Entry of Order (Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)).pdf - Filed
2/8/2022 Notice of Appeal.pdf - Filed
2/8/2022 Case Appeal Statement.pdf - Filed

Events

9/7/2021 9:30:00 AM | Habeas Corpus Hearing | Dept II, Crtrm A 21-CV-00291 | Court Room A
[Thomas, Kathy Dep. Clerk - KTHOMAS](#)
[Aberasturi, Leon A. - LAA \(Dept II - TJDC\)](#)
[Staff - STAFF](#)
[Rye, Stephen B. D.A. - X004800](#)
[lawclerk2 - LAW2](#)
[Lasher, Michael Esq. \(Petitioner's Attorney\)](#)
Notes: Petition of Writ. The prison failed to transport the Petitioner from Southern Desert Correctional Center. Michael Lasher appearing on behalf Mr. Werre asked that an Order to Show cause be issued on the Prison.
The Court's Judicial Assistant will contact counsel to reschedule the hearing for half day. Mr. Lasher to prepare an Order to Show cause. OSC hearing may be by zoom.
1/4/2022 9:30:00 AM | Habeas Corpus Hearing | 21-CV-00291 Dept II OTSC | Court Room A
[Thomas, Kathy Dep. Clerk - KTHOMAS](#)
[Aberasturi, Leon A. - LAA \(Dept II - TJDC\)](#)
[Staff - STAFF](#)
[Rye, Stephen B. D.A. - X004800](#)
[Geurts, Patrick Bailiff - X004896](#)
[Clerk - CLERK](#)
[Lasher, Michael Esq. \(Petitioner's Attorney\)](#)
Notes: Defendant appearing in person, in the custody of the Nevada State prison with his court appointed attorney, Michael Lasher. The rule of exclusion was invoked. Court heard opening statements from Michael Lasher and Steve Rye. The following witnesses were sworn and testified: Chandy Savin, Eric Werre, and Aaron Mouritsen.
Court will take judicial notice of documents filed in 20-CR-00234 .
After a short recess, court heard closing arguments from counsel. Court took matter under submission. Court will have the decision within 2 weeks.

Tasks

3/16/2021 8:23:39 AM | Review | Completed
[Aberasturi, Leon A. - LAA \(Dept II - TJDC\)](#)
[Clerk - CLERK](#)
Add 'Clerk' to Signature and Review tasks
Notes: Will file order to respond--LA
5/7/2021 8:30:00 AM | Review | Completed
[Gilmore, Debbie Jud. Asst - DGILMORE](#)
[Aberasturi, Leon A. - LAA \(Dept II - TJDC\)](#)
[Clerk - CLERK](#)
[Carlisle, Deborah - DEBCR](#)
Notes: 5-12 on judges desk for signature 5-11 emailed atty's with dates dc Debbie- contact attys set for one day. Set three-four months out-no rush- LA Judge, Reply filed

Case Event Tree (Events with Relationships)

