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SUPREME COURT OF NEVADA

ERIC DEAN WERRE, Appellant, vs. CHARLES DANIELS, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS FOR THE STATE OF NEVADA Respondent .	Case No.: 84234

Appellant's Appendix

Volume 2

PWHC
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DISTRICT COURT

LYON COUNTY, NEVADA

ERIC DEAN WERRE Petitioner, v. WILLIAM HUTCHINGS, WARDEN, Southern Desert Correctional Center; STATE OF NEVADA Respondents.	Case No: 20-CR-00234 Hon. Leon Aberasturi Dept. II

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW Petitioner, ERIC WERRE, by and through his counsel of record, MICHAEL LASHER, ESQ, and respectfully submits this Post-Conviction Petition for Writ of Habeas Corpus on file herein.

This Petition is made and based upon all the following Points and Authorities, the papers and pleadings on file herein, the exhibits attached hereto, and any oral argument required by the Court at the time set for the hearing of this matter. Petitioner hereby incorporates all facts, exhibits, declarations, and claims of constitutional violations alleged elsewhere in this petition as if fully set forth herein and further incorporates the allegations in each claim into every other claim. The facts that support these claims, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for necessary investigation and experts and an evidentiary hearing are described below.

DATED this 12th day of March, 2021.

By: _____

MICHAEL LASHER, ESQ.
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CLAIM I

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER THE SIXTH AMENDMENT BY FAILING TO PROPERLY ADVISE WERRE OF HIS DEFENSES, FAILING TO PROPERLY NEGOTIATE A PLEA, AND FAILING TO ADEQUATELY ARGUE AT SENTENCING

An information against Eric Werre was filed on February 25, 2020. Petitioner's Appendix page 2 (hereafter in the format "PA 2"). Less than a week later, appointed counsel entered a guilty plea agreement. PA 23. Counsel conducted no investigation into factual or legal defenses in this short time. As such, counsel rendered ineffective assistance by failing to properly negotiate a plea, failing to make adequate arguments at sentencing, failing to present mitigation, and failing to properly advise Werre of his defenses.

Legal Framework

To satisfy *Strickland's* two-prong inquiry, counsel's representation must fall "below an objective standard of reasonableness" and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Constitutional deficiency is

necessarily linked to the legal community's practice and expectations: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Nevada's jurisprudence is in accord. *See, e.g., Lozada v. State*, 110 Nev. 349, 353 (1994); *Davis v. State*, 107 Nev. 600, 601-02 (1991); *Bennett v. State*, 111 Nev. 1099, 1108 (1995); *Kirksey v. State*, 112 Nev. 980, 987 (1996). Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The United States Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill* [*v. Lockhart*], 474 U.S. [52], at 57, 106 S.Ct. 366 [1985]; see also *Richardson*, 397 U.S., at 770–771, 90 S.Ct. 1441." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Counsel is obligated to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50–51 (1995). *Brown v. State*, 110 Nev 846, 849 (1994) held that "a properly zealous advocate must do all he can to defend is client."

Factual Background

On March 2, 2020, Werre entered guilty pleas, less than a week after the information was filed on February 25, 2020. PA 23; PA 2. The District Court told Werre that his exposure on Count I was two to 15 years and the sentence was non-probationable. The District Court further advised that the exposure on Count II was also two to 15 years and one to ten years on both Counts III and IV. PA 11 – 13.

The PSI recommended 36 to 120 months for both Counts I and II, without specifying whether they should run concurrent or consecutive. The PSI also recommended 16 to 72 months for both Counts III and IV and that "the State will recommend that two counts of Possession of a Stolen Firearm be run concurrent to each other." PA 39.

At sentencing on April 20, 2020, defense counsel asked for a sentence closer to what was specified in the PSI. Specifically, defense counsel asked the court to impose 36 to 120 months in Count I, "36 on Count II, 36 months required 20 months to run concurrent rather than consecutive to Count I. On Count III, 16 to 72 months as laid out on the PSI to run concurrent instead of consecutive to Counts I and II. And 16 to 72 months on Count IV to run concurrent instead of consecutive to

Counts I, II, III, IV." PA 65. Defense counsel argued that it would "victimize the victim" to impose a lengthy sentence on Werre because the sooner he was released the sooner he can begin working and paying restitution. PA 66. Defense counsel also argued that Werre has a good support network, that of his father and fiancée. PA 66. Once Werre is released, they will get him a job and keep him out of trouble. PA 67. Finally, defense counsel argued that the sentences should run concurrently because they were all part of a common scheme or plan. "Your honor, Count II specifically applies to the burglary or the inference in order to steal the firearms. When the burglary occurred, it was to steal the firearms as laid out in Counts III and IV being part of the same act as laid out in Counts II. And all that comes together to provide the cash to the Defendant, the Defendants for the controlled substances that became the basis for Count 1." PA 67. Defense counsel informed the District Court that Werre plans to enroll in drug treatment programs in prison and upon his release. PA 67.

On April 20, 2020, Werre was sentenced as follows:

> **COUNT 1** (trafficking in a controlled substance) to a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS;

COUNT 2 (principle to burglary) to a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS with a MINIMUM parole eligibility of SEVENTY-TWO (72) MONTHS, CONSECUTIVE to COUNT 1;
COUNT 3 (possession of a stolen firearm) to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS, CONCURRENT to COUNTS 1 AND 2;
COUNT 4 (principle to possession of a stolen firearm) to a MAXIMUM of ONE HUNDRED TWENTY (120) MONTHS with a MINIMUM parole eligibility of THIRTY-SIX (36) MONTHS, CONCURRENT to COUNTS 1 AND 2

As such, Werre's aggregate total sentence was one-hundred-forty-four months (12 years) to three-hundred-sixty months (30 years). PA 73 et seq.

AB 236 extensively restructured crimes and penalties in Nevada. After July 1, 2020, trafficking requires a minimum of 100 grams of a Schedule I or Schedule II substance. Today, less than 100 grams is mere possession, with 14 to 28 grams a Category C felony with exposure of one to five years. All possession offenses (except of GHB) are now probation eligible. As well, burglary is now divided by type of structure, with an outbuilding defined as a Category D felony and a commercial building a Category C felony. Property offenses now have a graduated penalty structure for increasing values, with loss of up to $25,000 defined as a Category C felony.

Analysis

Failing to adequately negotiate a plea bargain

Trial counsel rendered ineffective assistance in failing to adequately negotiate a plea bargain. In light of the impending extensive changes in crimes and penalties, trail counsel should have negotiated a better plea. Other attorneys did exactly this. Attorney Orrin Johnson negotiated a plea more in line with AB 236 for his client Justin Manley (Second Judicial District Case No. CR20-2115.) Werre's counsel should have done the same. *Brown v. State*, 110 Nev 846, 849 (1994) held that "a properly zealous advocate must do all he can to defend is client."

Had counsel adequately negotiated a plea in line with the ameliorative changes wrought by AB 236, it is reasonably probable that Werre would have achieved a better result.

Failing to adequately argue at sentencing

Trial counsel rendered ineffective assistance in failing to marshal strong arguments for the sentence recommended in the PSI. As a result, Werre's minimum parole eligibility on Count 1 alone was three years beyond that recommended in the PSI. Specifically, defense counsel totally failed to mention AB 236 and the sentence Werre could have received had the crime been committed after July 1, 2020, a mere

six months after the events forming the basis of the allegations. After July 1, 2020, Werre could not have even been charged with trafficking, as alleged in Count 1. He would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of probation and not mandatory prison. Furthermore, after July 1, 2020, the Count 2 burglary charge arguable would be classified as a Category D felony because the structure entered was an outbuilding. A Category D felony carries a sentence of one to four years. NRS 193.130. Yet Werre was sentenced to 6 to 15 years on Count II. Again, his minimum sentence is two years more than the maximum sentence under the current schema.

Yet defense counsel did not mention at sentencing any of the ameliorative changes wrought by AB 236. Nor did counsel argue that as a matter of equity and as mandated by the Eighth Amendment's prohibition on cruel and unusual punishment (see below) that the far-ranging, impending changes to Nevada's criminal law and penalties required a lesser sentence, which would also happen to be closer in line with the recommendations in the PSI.

Defense counsel also failed to argue that Werre's culpability was minimal compared to that of Atkins. There was no DNA or other physical evidence tying Werre to the burglary of the gun storage facility. There was no evidence, such as Werre's possession of keys, indicating that he had access to the master bedroom in Atkins' residence at 2920 West Fir Street, where the majority of the firearms and methamphetamine was located and which was locked to prevent Atkins' kids from having access. Furthermore, when Werre was arrested he had only a 2.5 gross gram baggie of methamphetamine on his person, which is an amount consistent with personal use. PA 36. Finally, when Werre's father's house in California was searched, no incriminating evidence was found.

In contrast, there was substantial evidence of Atkins' culpability, which gave her a motive to lie to the police in hopes of a lesser sentence.[1] For instance, Atkins lived very close to gun storage facility and her home was the repository for all of the stolen weapons and the methamphetamine. Her DNA was found inside of the gun storage

[1] In fact, Atkins, clearly the mastermind of the crimes, was never even sent to prison, while Werre's minimum parole eligibility is still eleven years in the future.

facility. As well, police recovered a sheet of paper in Atkins' handwriting indicating the stolen guns which she had already sold and at which price. Plus, she had thousands of dollars of cash and numerous firearms on her person when arrested. PA 35 – 38. As such, there was little evidence of Werre's criminality and significant evidence of Atkins' culpability, which should have been argued by defense counsel at Werre's sentencing.

It is reasonably probable that had defense counsel adequately argued at sentencing, Werre would have received the sentence recommended in the PSI.

Failing To Present Mitigation

Trial counsel has a duty to present mitigation at sentencing. *Brown v State*, 110 Nev 846, 851 (1994): "However, when a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of the proper sentence. *Wilson v. State*, 105 Nev. 110, 115, 771 P.2d 583, 586 (1989) (citing *Lockett v. Ohio*, 438 U.S. 586, 603, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)). See also, *Weaver v. Warden, Nevada State Prison*, 107 Nev. 856, 858-59 (1991)

(ineffective for counsel to fail to present evidence of PTSD at sentencing); *Peters v. State*, 130 Nev. 1229 (2014) (assuming without deciding that there is a duty to present mitigation in a non-capital case); *Greenberg v. State*, 124 Nev. 1471 (2008) (same). See also, *Porter v. McCollum*, 558 U.S. 30 (2009) (ineffective assistance for failure to present psychosocial history records which indicate trauma).

In the instant case, trial counsel merely presented one emailed note from Werre's father, which stated that Werre will have work upon his release, that they have discussed drug rehabilitation, and that Werre will have a healthy environment to live in upon his release. PA 45.

Trial counsel should have also argued that Werre has no convictions for burglary or gun charges, indicating that he was at the wrong place at the wrong time. That is, Werre was present at Atkins' home merely to purchase narcotics for personal use, consistent with the 2.5 grams found upon his person at arrest. Werre was simply not a gun and drug runner and should not have been sentenced accordingly.

Had defense counsel performed adequately, it is reasonably probable that the court would had sentenced Werre in line with Parole and Probation's recommendation in the PSI.

Failing to Adequately Advise of Defenses

Trial counsel also failed to advise Werre of his possible defenses and strengths of his case, such that his decision to plead guilty was not made knowingly, voluntarily, and intelligently. In a slightly different context, *Banka v. State*, 476 P.3d 1191 (2020) held that a plea was not knowing, voluntary, and intelligent when the defendant was not informed of a mandatory minimum fine.

In this case, trial counsel failed to advise Werre that Atkins' statements must be corroborated before they were used against him and that there was little or no evidence of corroboration in this case. "A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." NRS 175.291(1).

Yet there was no corroboration which would have allowed the introduction of Atkins' statements. There was no DNA or other

evidence tying Werre to the burglary of the gun storage facility. There was no evidence, such as Werre's possession of keys, that he had access to the master bedroom in Atkins' residence at 2920 West Fir Street, where the majority of the firearms and methamphetamine was located and which was locked to prevent Atkins' kids from having access. Furthermore, when Werre was arrested he had only a 2.5 gross gram baggie of methamphetamine on his person, which is an amount consistent with personal use. PA 36. Finally, when Werre's father's house in California was searched, no incriminating evidence was found. Thus, there was no evidence to corroborate Atkins' statements against Werre, such that they could not have been used against him at trial. And without her statement, there was little remaining evidence connecting Werre to the more serious crimes.

In contrast, there was substantial evidence of Atkins' culpability, which gave her a motive to lie to the police in hopes of a lesser sentence.[2] For instance, Atkins lived very close to gun storage facility and her home was the repository for all of the stolen weapons and the

[2] In fact, Atkins, the mastermind of he crimes, has already served her sentence and is out of custody, while Werre's minimum parole eligibility is still eleven years in the future.

methamphetamine. Her DNA was found inside of the gun storage facility. As well, police recovered a sheet of paper in Atkins' handwriting indicating the stolen guns which she had already sold and at which price. Plus, she had thousands of dollars of cash and numerous firearms on her person when arrested. PA 35 – 38. As such, there was little evidence of Werre's criminality and significant evidence of Atkins' culpability, all of which could have been presented at trial.

Defense counsel also failed to advise Werre of other potential defenses concerning the classification of methamphetamine. In Nevada, methamphetamine can be either Schedule I or Schedule II, depending on its provenance. Compare NAC 453.510(7) (Schedule I if "street" meth) with 453.520(4)(c) (Schedule II if produced in a DEA-certified lab).[3] If Nevada allows a bifurcated classification of methamphetamine, then the State must prove as an element of the crime that the substance possessed by a defendant is "street," and not medical grade, methamphetamine to support a conviction of trafficking in a Schedule I substance. See *Figueroa-Beltran v. United States*, 136 Nev. Adv. Op.

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[3] Only Nevada and Oregon have this bifurcated scheme. The federal government and the other 48 states classify methamphetamine as Schedule II because it has medically approved uses. See 6 AA 464, chart of the classification schemes of all jurisdictions.

45 (2020), which held that "a substance's identity is an element of the crime in the requirement that the State must be able to establish the identity of the drug and because the drug's identity may impact the applicable sentence." As such, the jury must be instructed to make factual findings regarding the type of methamphetamine at issue and prosecutors must prove beyond a reasonable doubt that the substance is in fact Schedule I for the more severe penalties to apply.

Trial counsel could have also advised Werre of other pre-trial motions that could have attacked Nevada's listing of methamphetamine as Schedule I. The Supremacy Clause of the United States Constitution compels that methamphetamine be classified as Schedule II because the federal Controlled Substances Act so classifies it. See 21 U.S.C.A. § 812. Methamphetamine is not classified as Schedule I because it is used to treat certain medical conditions, such as obesity and ADHD. The federal Controlled Substances Act expressly provides:

> No provision of [the Act] shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision ... and that State law so that the two cannot consistently stand together.*

21 U.S.C. § 903 (emphasis added).

Federal law preempts state law if there is a conflict between state and federal regulation. *United States v. 4,432 Mastercases of Cigarettes, More or Less*, 448 F.3d 1168, 1189 (9th Cir. 2006).

In the instant case, there is a positive conflict between the controlling federal law and the minority position articulated by the Lyon County District Attorney so that the two cannot consistently stand together. 21 U.S.C. § 903. Under the Supremacy Clause, the federal classification is controlling. *Rolf Jensen v. District Court*, 128 Nev. 441, 445 (2012) explains that "Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives." In other words, an obstacle can amount to a direct conflict.

Defense counsel should have advised Werre that a pre-trial motion could have argued that the Supremacy Clause compels that methamphetamine be classified as Schedule II in Nevada, which would have drastically reduced his sentence. A pre-trial motion could have

argued that since the State always charges meth as Schedule I, Nevada's schema is a de facto direct conflict with federal law. Furthermore, Nevada's bifurcated scheme poses an obstacle to Congress's objectives because it curtails people without health care from self-treating their ADHD and obesity, the medically indicated uses of methamphetamine. See https://americanaddictioncenters.org/adult-addiction-treatment-programs/self-medicating. That the NAC violates the Supremacy Clause is shown by the fact that only Nevada and Oregon have two classifications for methamphetamine, depending on the circumstances of its manufacture. Thus, 48 of the 50 states recognize that the federal classification is controlling. In fact, the majority of the state statutes explicitly refer to the federal statute. Methamphetamine thus must be classified as Schedule II because this is consistent with the federal Controlled Substances Act, 21 U.S.C.A. § 812.

In sum, trial counsel rendered ineffective assistance in failing to advise Werre of the strength of his case and possible defenses prior to his guilty plea a mere week after the information was filed. These

omissions rendered Werre's plea not knowing, voluntary, and intelligent.

Had trial counsel been competent and so informed Werre, it is reasonably probably that he would not have plead guilty and would have had a better result at trial.

In the alternative, Werre's guilty plea should be set aside. NRS 176.165 allows the withdrawal of a guilty plea in certain circumstances. "To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea."

In the instant case, it is a manifest injustice that Werre was sentenced to 12 to 30 years while the mastermind never spent one day in state prison. It is a manifest injustice that had the crimes been a mere six months later, Werre's maximum sentence would have been a fraction of what he now faces. Werre was sentenced to 12 to 30 years. Yet six months later, he would have faced only three to ten years: Count I's exposure is currently one to five years and Count II's exposure is one to four years; if run consecutively, this amounts two to nine years. Counts III and IV's exposure remains three to ten years, which the

District Court ran concurrent to Counts I and II. His convictions must be set aside.

CLAIM II

WERRE'S THIRTY YEAR SENTENCE VIOLATES THE EIGHTH AMENDMENT IN LIGHT OF THE OVERHAUL OF NEVADA'S CRIMINAL CODES

In light of the far-reaching ameliorative changes to crime and punishment wrought by AB 236, Werre's punishment violates the Eighth Amendment's requirement that a punishment be in line with society's evolving standards of decency. Werre was arrested a mere six months before July 1, 2020, at which date he could not have been charged with trafficking, as alleged in Count 1. He would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of probation and not mandatory prison. Yet Werre was sentenced to 6 to 15 years on Count I. As such, his minimum sentence is even more than the maximum under the current schema. Furthermore, after July 1, 2020, the Count 2 burglary charge may be classified as a Category D felony because the structure entered was an outbuilding. A Category D felony carries a sentence of one to four

years. NRS 193.130. Yet Werre was sentenced to 6 to 15 years on Count II. Again, his minimum sentence is two years more than the maximum sentence under the current schema.

The Eighth Amendment ban on cruel and unusual punishment "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense. [Citation.]'" *Roper v. Simmons*, 543 U.S. 551, 560 (2005), quoting *Weems v. United States,* 217 U.S. 349, 367 (1910). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Ibid.*; see *Timbs v. Indiana* __ U.S. __, __; 139 S.Ct. 682, 687 (2019) [Cruel and Unusual Punishment Clause of the Eighth Amendment applies to the states].)

In *Roper*, the United States Supreme Court banned the execution of individuals under 18 years old at the time of their crimes under the Eighth Amendment's prohibition of cruel and unusual punishment. *Roper, supra,* 543 U.S. at pp. 560-561. The Court emphasized that a national consensus had formed in opposition to the execution of juveniles and those states that permitted the practice administered it infrequently. *Id.* at pp. 564-565. And in prohibiting the death penalty

for the intellectually disabled, the Court stated, "[T]he standard of extreme cruelty . . . itself remains the same, but its applicability must change as the basic mores of society change." *Atkins v. Virginia*, 536 U.S. 304, 311, fn.7 (2002), citing *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion.) "[E]volving standards of decency," in turn, are measured by reference to whether a "national consensus" supports a categorical prohibition on a given punishment. *Atkins, supra,* 536 U.S. at pp. 312-314. To ascertain whether or not such a consensus exists, the Court considers "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper, supra,* 543 U.S. at p. 563.

In Nevada, the legislature saw fit to overhaul crime and punishment, effective a mere six months after Werre's arrest. This indicates objective indicia of Nevada's evolving standards of decency, as expressed in its own legislative enactments. Werre was sentenced to 12 to 30 years. Yet six months later, he would have faced only three to ten years: Count I's exposure is currently one to five years and Count II's exposure is one to four years; if run consecutively, this amounts two to nine years. Counts III and IV's exposure remains three to ten years,

which the District Court ran concurrent to Counts I and II. In sum, a mere six months later, Werre's maximum sentence would have been even less than the minimum that he now faces. Such a sentence violates the Eighth Amendment.

CUMULATIVE ERROR

In *Dechant v. State*, 10 P.3d 108, 116 Nev. 918 (2000), this Court reversed the murder conviction based upon the cumulative effect of the errors at trial. In *Dechant*, this Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction." *Id.* at 113 citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the error and 3) the gravity of the crime charged. *Id.* Based on the foregoing, Werre requests that this Court reverse his convictions.

REQUEST FOR EVIDENTIARY HEARING PURSUANT TO NRS 34.770

NRS 34.770 determines when a petitioner is entitled to an evidentiary hearing:

1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. *Marshall v. State*, 110 Nev. 1328 (1994); *Mann v. State*, 118 Nev. 351, 356 (2002). A petitioner is entitled to an evidentiary hearing if his or her petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. *Marshall, supra*, 110 Nev. at 1331; *See also Hargrove v. State*, 100 Nev. 498, 503 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing

on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Mann, supra*, 118 Nev. at 354. The District Court cannot rely on affidavits submitted with a response or answer in determining whether the factual allegations are belied by the record. *Id.* at 354-56. Additionally, the District Court cannot make credibility determinations without an evidentiary hearing. *Id.* at 256 (rejecting suggestion that district court can resolved a factual dispute without an evidentiary hearing and noting that "by observing the witnesses' demeanors during an evidentiary hearing, the district court will be better able to judge credibility").

Here, Werre has alleged that trial counsel was ineffective in his handling of the plea and sentencing. As such, there are issues of both credibility and fact and so may not be determined by the district court without an evidentiary hearing. *Mann, supra*, 118 Nev. at 354-56. While the State may claim that all decisions made by counsel were strategic in nature and therefore virtually unquestionable, that is unclear from the record before the Court at this time. Finally, Werre has alleged factual allegations, which if true, would entitle him to relief

and these allegations are not belied by the record. Therefore, Werre is entitled to relief or an evidentiary hearing under NRS 34.770.

By: _____

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Attorney for Petitioner

Verification

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

Dated March 12, 2021.

By: _____
MICHAEL LASHER, ESQ.
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(510) 507-2869
Attorney for Petitioner

PROOF OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on the 12th day of March, 2021, I served a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** 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 Corr. Center
P.O. Box 208
Indian Springs, NV 89070

Second Judicial District Court
911 Harvey Way #4
Yerrington, NV 89447

Lyon County District Attorney
31 South Main Street
Yerrington, NV 89447

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

Executed on March 12, 2021 at Las Vegas, Nevada

By: _____
MICHAEL LASHER, ESQ.
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Attorney for Petitioner

30 days

Court says post hearing
P+P no longer makes sentence recommendation

1 guilty

* Not my argument

Atty did everything

No req for investigation in every case

* But Δ told atty meth not his

Triggering the duty

Meth ~~2.3 g~~

guns sold to Mexican cartel

(1) Not asking for Δ to go scott free

AB 236 → Retro - not my argument *
active

*

Prejudice → *Disagree w/ recategorization *
* Consider in calculus * → (Not signif)

80g = Cat. B

Not my arg.

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DISTRICT COURT

LYON COUNTY, NEVADA

ERIC DEAN WERRE Petitioner, v. WILLIAM HUTCHINGS, WARDEN, Southern Desert Correctional Center; STATE OF NEVADA Respondents.	)	Case No: 20-CR-00234 Hon. Leon Aberasturi Dept. II

REPLY TO STATE'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

The State's Answer either misapprehends Werre's claims or fails to meaningfully address them, instead repeatedly relying on non sequiturs.

CLAIM I

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER THE SIXTH AMENDMENT BY FAILING TO PROPERLY ADVISE WERRE OF HIS DEFENSES, FAILING TO PROPERLY NEGOTIATE A PLEA, AND FAILING TO ADEQUATELY ARGUE AT SENTENCING

Failing to adequately negotiate a plea bargain

Regarding Claim 1 that trial counsel rendered ineffective assistance concerning negotiation of the plea bargain, the State dismisses the citation to a Washoe County plea in Case No. CR20-2115 as "not precedent" and as speculative because of the fact-based nature of individual plea negotiations. State's Answer at page 4. Werre acknowledges that every case is different. Yet he cited the Washoe case to demonstrate his counsel's breach of Prong 1 of *Strickland,* the standard of care requirement that defense attorneys act with reasonable competence. The Washoe County attorney negotiated a plea in light of the impending extensive changes in crimes and penalties and Werre's counsel should have done the same. *Brown v. State*, 110 Nev 846, 849 (1994) held that "a properly zealous advocate must do all he can to defend is client."

The State repeatedly and with great emphasis argues that AB 236 is not retroactive. Answer at pages 4, 8 to 10. The State argues, "AB 236 is not retroactive. Negotiating a plea more in line with AB 236 would not have occurred." Answer at page 4. Yet this is not Werre's point; nor do any of his arguments depend on the act's retroactivity. Werre's point is that his attorney should have argued that as a matter of equity, the plea and sentence should have been more in line with the bill's ameliorative changes and thus in line with the PSI's recommendations.

Failure to adequately argue at sentencing

Trial counsel rendered ineffective assistance in failing to marshal strong arguments for the sentence recommended in the PSI. The PSI recommended 36 to 120 months for both Counts I and II, without specifying whether they should run concurrent or consecutive. The PSI also recommended 16 to 72 months for both Counts III and IV and that "the State will recommend that two counts of Possession of a Stolen Firearm be run concurrent to each other." PA 39. Yet in the end, Werre's aggregate total sentence was one-hundred-forty-four months (12 years) to three-hundred-sixty months (30 years). PA 73 et seq.

The State argues that, "Trial Counsel understood that AB 236 was not current law at the time and would not be retroactively applied to the current case." Again, the State misses the point. Trial counsel did not even mention, let alone argue, that as a matter of equity and because of the impending ameliorative changes in Nevada law, Werre should be sentenced in line with the PSI recommendation. As a result of counsel's failure to even mention AB 236, Werre's minimum parole eligibility on Count 1 alone was three years beyond that recommended in the PSI. Trial counsel should have at least informed the court that after July 1, 2020, a mere six months after the events forming the basis of the allegations, Werre could not have even been charged with trafficking, as alleged in Count 1. He would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of probation and not mandatory prison.

Finally, the State does not address Werre's argument that at sentencing counsel did not argue that while Atkins, clearly the mastermind of the crimes, was never even sent to prison, Werre's minimum parole eligibility is still eleven years in the future. Nor does

the State address that defense counsel also failed to argue that Werre's culpability was minimal compared to that of Atkins. There was no DNA or other physical evidence tying Werre to the burglary of the gun storage facility. There was no evidence, such as Werre's possession of keys, indicating that he had access to the master bedroom in Atkins' residence at 2920 West Fir Street, where the majority of the firearms and methamphetamine was located and which was locked to prevent Atkins' kids from having access. Furthermore, when Werre was arrested he had only a 2.5 gross gram baggie of methamphetamine on his person, which is an amount consistent with personal use. PA 36.

In contrast, there was substantial evidence of Atkins' culpability, which gave her a motive to lie to the police in hopes of a lesser sentence. For instance, Atkins lived very close to gun storage facility, where her DNA was found, and her home was the repository for all of the stolen weapons and the methamphetamine. As well, police recovered a sheet of paper in Atkins' handwriting indicating the stolen guns which she had already sold and at which price. Plus, she had thousands of dollars of cash and numerous firearms on her person when arrested. PA 35 – 38. As such, there was little evidence of Werre's criminality and significant

evidence of Atkins' culpability, which should have been argued by defense counsel at Werre's sentencing for a sentence in line with the PSI.

Failing to Adequately Advise of Defenses

Trial counsel also failed to advise Werre of his possible defenses and strengths of his case, such that his decision to plead guilty was not made knowingly, voluntarily, and intelligently. In this case, trial counsel failed to advise Werre that Atkins' statements must be corroborated before they were used against him and that there was little or no evidence of corroboration in this case. NRS 175.291(1).

The State's response is a non sequitur. "The Petitioner was fully canvassed by this Court at the arraignment. The Petitioner confirmed that he had spoken to his attorney, understood his rights, understood his legal defenses, penalties associated with the crimes, and the allegations surrounding the crimes." Answer at page 7. Yet the fact remains that trial counsel did not inform Werre of the requirement in NRS 175.291(1). During the plea colloquy, Werre answered as he did because he did not know what he did not know: that Atkin's statement

required corroboration before it could be used against him at trial. Had Werre known this, he would not have plead guilty.

Similarly, in arguing that there was not a manifest injustice that suffices for Werre to withdraw his guilty plea pursuant to NRS 176.165, the State posits a similar non sequitur: "Here, the Court made a previous finding that the Defendant's plea was freely, voluntary, and intelligently (sic). (Exhibit, pg. 20, ln 5-9)." Answer at page 8. Again, Werre did not know what he did not know at sentencing because his counsel never informed him of the requirements of NRS 175.291(1). In the instant case, it is a manifest injustice that Werre was sentenced to 12 to 30 years while the mastermind never spent one day in state prison. It is a manifest injustice that had the crimes been a mere six months later, Werre's maximum sentence would have been a fraction of what he now faces. Werre was sentenced to 12 to 30 years. Yet six months later, he would have faced only three to ten years: Count I's exposure is currently one to five years and Count II's exposure is one to four years; if run consecutively, this amounts two to nine years. Counts III and IV's exposure remains three to ten years, which the District

Court ran concurrent to Counts I and II. His convictions must be set aside.

CLAIM II

WERRE'S THIRTY YEAR SENTENCE VIOLATES THE EIGHTH AMENDMENT IN LIGHT OF THE OVERHAUL OF NEVADA'S CRIMINAL CODES

In light of the far-reaching ameliorative changes to crime and punishment wrought by AB 236, Werre's punishment violates the Eighth Amendment's requirement that a punishment be in line with society's evolving standards of decency. Werre was arrested a mere six months before July 1, 2020, at which date he could not have been charged with trafficking, as alleged in Count 1. He would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of probation and not mandatory prison. Yet Werre was sentenced to 6 to 15 years on Count I. As such, his minimum sentence is even more than the maximum under the current schema.

Again, the State misses the point, arguing that "Petitioner was sentenced within the range permitted by the legislature and AB 236 did not retroactively alter sentences." Answer at page 8. Werre's point is

that the Eighth Amendment ban on cruel and unusual punishment "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense. [Citation.]'" *Roper v. Simmons*, 543 U.S. 551, 560 (2005). In prohibiting the death penalty for the intellectually disabled, the Court stated, "[T]he standard of extreme cruelty . . . itself remains the same, but its applicability must change as the basic mores of society change." *Atkins v. Virginia*, 536 U.S. 304, 311, fn.7 (2002), citing *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion.) "[E]volving standards of decency," in turn, are measured by reference to whether a "national consensus" supports a categorical prohibition on a given punishment. *Atkins, supra*, 536 U.S. at pp. 312-314. To ascertain whether or not such a consensus exists, the Court considers "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper, supra*, 543 U.S. at p. 563. Nevada saw fit to overhaul crime and punishment, effective a mere six months after Werre's arrest. This indicates objective indicia of Nevada's evolving standards of decency, as expressed in its own legislative enactments.

As such, the State's reliance on *State v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 564, 567 (2008) is misplaced. Answer at page 9. This is because Werre concedes that AB 236 is not retroactive by the terms of the statute. Yet Werre's point is that under the Eighth Amendment, Werre's sentence is unconstitutional in light of AB 236's extensive ameliorative changes in Nevada's criminal law. In fact, the State's extensive quotation of the legislative debate proves Werre's point. "**Assemblyman Yeager**: We would not be going back and looking at prior sentences. Although, *from a fairness perspective*, we may want to do that as a Legislature (emphasis added)." Answer at page 9.

Similarly, the State's argument that Werre was sentenced within the constitutional limits provided by the legislature, and the cases cited therefore (Answer at pages 10 to 11), misses the mark. This is because the United States Supreme Court, whose jurisprudence trumps that of Nevada Courts, has held that the Eighth Amendment looks to evolving standards of decency to measure whether a sentence is cruel and unusual. *Atkins*, *supra*, 536 U.S. at pp. 312-314. Here, because Nevada

saw fit to overhaul crime and punishment, Werre's sentence violates the Eighth Amendment.

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

Verification

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

Dated March 30, 2021.

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

PROOF OF SERVICE

IT IS HEREBY CERTIFIED by the undersigned that on the 30th day of March, 2021, I served a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** 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 Corr. Center
P.O. Box 208
Indian Springs, NV 89070

Second Judicial District Court
911 Harvey Way #4
Yerrington, NV 89447

Lyon County District Attorney
31 South Main Street
Yerrington, NV 89447

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

Executed on March 30, 2021 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

CASE NO. 21-CV-00291

DEPT. II

THE THIRD JUDICIAL DISTRICT COURT - THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

THE HONORABLE LEON A. ABERASTURI, DISTRICT JUDGE,

PRESIDING

ERIC DEAN WERRE,

PETITIONER,

v.

WILLIAM HUTCHINGS, WARDEN,
SOUTHERN DESERT CORRECTIONAL CENTER,
AND
THE STATE OF NEVADA
RESPONDENTS.
_____ /

TRANSCRIPT OF PROCEEDINGS

WRIT OF HABEAS CORPUS

JANUARY 4, 2022

COURTHOUSE

YERINGTON, NEVADA

REPORTED BY: KATHY TERHUNE, CCR #209

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APPEARANCES:

FOR THE STATE: STEPHEN B. RYE
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Courthouse
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PETITIONER PRESENT IN COURT.

FOR THE PETITIONER: MICHAEL LASHER, ESQ.
827 Kenny Way
Las Vegas, NV 89107

NO OTHER APPEARANCES.

* * * * *

TRANSCRIPT OF PROCEEDINGS

THE COURT: All right. So, we're going to go on the record in 21-CV-00291.

Is it Werre?

THE PETITIONER: Werre.

THE COURT: Werre.

All right. Versus State.

And how many witnesses are we going to be dealing with today?

MR. RYE: Three, Your Honor.

THE COURT: Three.

And how about for the State?

MR. LASHER: Possibly one, Your Honor.

THE COURT: One.

MR. LASHER: I'm including in my estimate that one you're anticipating.

MR. RYE: Yes.

THE COURT: All right. What I'll do is I'll swear the witnesses in as they come in. So, make sure before they get on the stand, I remember to swear them in.

MR. LASHER: Sure.

THE COURT: All right. Are we going to invoke

the Rule of Exclusion?

MR. LASHER: Yes, I would like that, Your Honor.

THE COURT: Okay. All right.

So, if the witnesses would remain outside. Or witness.

All right. Let's do a short opening as to what is the Court going to hear today.

MR. LASHER: Your Honor, Mike Lasher on behalf of Eric Werre.

So, we're here on a PCR, and we're going to hear the testimony, I'm anticipating, of three witnesses. A civilian witness, Ms. Atkins, is outside, mastermind of this case that has brought us here. And I'm going to briefly question her about Mr. Werre's limited, limited role in everything. I'd like Mr. Werre to testify as well, and I anticipate that Mr. Mouritsen will testify.

You know, there might be a question as to whether the State should call him or myself. You know, whether he'll be designated an adverse witness, I'm not quite sure. You know, we could maybe determine that as the questioning goes along.

THE COURT: Okay.

MR. LASHER: And, you know, fundamentally, I'm going to argue to the Court that you were not provided with everything you needed prior to sentencing. Such that there wasn't a strong argument that Probation and Parole's recommendations were not hewed to.

THE COURT: Okay. All right.

And then from the State, what am I going to hear from the State, Mr. Rye?

MR. RYE: Your Honor, from the State, through cross-examination of primarily Mr. Mouritsen, you will hear that Mr. Mouritsen provided constitutionally adequate representation to Mr. Werre throughout these proceedings, that he discussed the defenses available to the defendant, that he discussed -- that he negotiated a plea that was beneficial to the defendant, that he made a sufficient argument at sentencing, that he conferred throughout this case with Mr. Werre and Mr. Werre's father, that he's familiar with the facts of this case, the investigation and provided constitutionally adequate representation.

You will also hear from the State that Mr. Werre cannot establish prejudice for any of these claims. That regardless, even if the Court found that some claim had merit, he was not prejudiced by that

claim. So, that will be the State's position today.

THE COURT: All right. And then, Mr. Lasher, have you spoken with your client as to the attorney/client privilege he had with Mr. Mouritsen, and does he understand that if Mr. Mouritsen takes the stand, that the attorney/client privilege will be waived as to Mr. Mouritsen?

MR. LASHER: You know, I don't think we did discuss that.

THE COURT: Okay.

MR. LASHER: I can just briefly right now.

THE COURT: Okay. Go ahead. And then if you need more time, that's fine. I think this is the only matter I have all day, so.

MR. LASHER: No, I think it's -- I -- yeah, I thinks it's fairly straightforward. So --

THE CLERK: Should we recess?

THE COURT: Yeah, I was told -- what I'm going to do is I'm going to take a short recess. I'll be back in five minutes.

MR. LASHER: Okay.

(Recess.)

THE COURT: Let's go back on the record 21-CV-00291.

So, Mr. Werre, you understand if Mr. Mouritsen testifies in this matter that the privileges you had regarding your communications are no longer in effect?

THE PETITIONER: I do.

MR. LASHER: Your Honor, I would just, you know, like to put on the record that, you know, that waiver will only be for the topics that are covered in here.

THE COURT: Right.

MR. LASHER: Yeah.

THE COURT: Okay. All right.

So, who did we want to call as the first witness?

MR. LASHER: Ms. Atkins is present and will be very, very brief. So, I figured we'd call her as our first witness.

THE COURT: Okay. All right. Ms. Atkins, if you'd come forward. And we'll have you sworn in. Raise your right hand.

(Witness sworn.)

All right. So, Ms. Atkins, if you'd make your way to the witness stand.

///

///

CHANDY SABIN,

called as a witness herein by the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MR. LASHER:

Q Thank you, Ms. Atkins for being here.

THE COURT: All right. Let me just -- would you state your full name for the record?

THE WITNESS: My full legal name now is Chandy Dorlynn Sabin.

THE COURT: All right. Spell the first name.

THE WITNESS: C-H-A-N-D-Y.

THE COURT: And spell the last name.

THE WITNESS: S-A-B-I-N.

THE COURT: All right. And could you briefly explain the change in name?

THE WITNESS: There hasn't been a change of name, but when we all got in trouble together, you guys had me under the wrong name.

THE COURT: Okay. All right. And I just need you to -- I don't need you to bury your head in the microphone, but I'm getting old and my hearing's not as

great. So, stay if you can just --

THE WITNESS: Okay.

THE COURT: -- stay as close as you can to the microphone.

THE WITNESS: Okay.

THE COURT: And go ahead with your first question, Mr. Lasher.

MR. LASHER: Great.

BY MR. LASHER:

Q So, let me just clarify, ma'am. I should refer to you as Ms. Sabin?

A Sabin.

Q Sabin. Okay, great.

So, Ms. Sabin, you live at 2920 West First Street; is that correct?

A Yes, sir.

Q And that was in the year 2020?

A Yes, sir.

Q Great. And do you know the gentleman seated here to my right?

A Yes.

Q That's Mr. Werre?

A Yes.

Q Great. Did he come to visit you from

California in 2020?

A Yes.

Q Did he have a job interview?

A Yes.

Q And did he have a car when he came to see you?

A No. We picked him up and took him to the job interview.

Q Okay. Great.

So, he was dependant on you for rides?

A Yes, primarily.

Q Okay. And did you have any luck -- well, let me -- let me rephrase this.

Did Mr. Werre have access to any locked boxes within your home?

A No.

Q And he did not have any possessory interests in any of those locked boxes or the contents?

A No.

Q And did you ever see him sell any firearms?

A No, not directly.

MR. LASHER: That's all I have at this point.

THE COURT: All right, Mr. Rye.

///

///

CROSS-EXAMINATION

BY MR. RYE:

Q Now, when you say, "not directly," what do you mean by that?

A I never watched any -- Eric sell -- like, have a firearm in his hand and sell it to anybody, no. Never witnessed that.

Q So, you weren't with him 24/7?

A No.

Q And he was staying at your house for a period of time, correct?

A Well, like the attorney said, he came down for a job interview. He'd been there for probably, I don't know, a couple of days when we got in trouble.

MR. RYE: I don't have any other questions.

THE COURT: Did you have any follow-up on that?

MR. LASHER: Nothing further, Your Honor.

THE COURT: All right. Is this witness subject to recall?

MR. LASHER: I don't think so.

THE COURT: Okay. I need to know because I'm going to let her go if --

MR. LASHER: Yeah, she's not subject to recall.

THE COURT: Okay. All right.

So, ma'am, you're free to go. Thank you very much.

THE WITNESS: Okay. Thank you.

THE COURT: All right, next witness.

MR. LASHER: I'll call Mr. Werre.

THE COURT: All right, Mr. Werre, if you'd stand up, we'll swear you in.

(Witness sworn.)

THE COURT: All right. So, sir, if you would, make your way to the witness stand.

All right. And, sir, now, would you state your full name for the record?

THE WITNESS: Eric Dean Werre.

THE COURT: And spell the first name.

THE WITNESS: E-R-I-C.

THE COURT: And spell the last name.

THE WITNESS: W-E-R-R-E.

THE COURT: All right. And sir, you have a soft voice. I need you to raise the volume, all right?

THE WITNESS: All right.

THE COURT: All right. Go ahead, Mr. Lasher, with your first question.

MR. LASHER: Thank you.

///

ERIC WERRE,

called as a witness herein by the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASHER:

Q Morning, Mr. Werre.

I'm going to, you know, ask about the events that brought us to your plea. How much time elapsed between your arrest and your plea?

A It was about a month and a half.

Q And during that time how many times did you meet with your attorney?

A I met with him, I believe, it was twice and then once on a video visit.

Q Okay. Where were you located when the video visit happened?

A I was located in F pod. Or no, the trustee pod. Whatever which one that was.

Q Oh, okay. You we're working as a trustee?

A Yeah.

Q And how long did the first visit last, would you say?

A Maybe ten minutes.

Q And then the second?

A About the same.

Q And what about the video visit?

A It was a standard about 15 minute visit.

Q Okay. And did you have a meeting in the court hallway?

A Every time -- every time we came to court while I was shackled next to other inmates, we briefly talked about, you know, what was going to happen or whatever.

Q And you were shackled to other inmates?

A Shackled right next to other inmates, yes.

Q So, you didn't really have any privacy?

A No.

Q Did your attorney go through any of the discovery with you?

A No. He handed me the discovery, and then later on came with the flash drive with mine and her name on it, but said he had nothing to open it with.

Q And just so the record is clear, "her name" you're referring to who?

A Ms. Sabin.

Q Okay. And so, it was on a flash drive. Did he bring in a computer?

A No, he just had his -- I guess, his tablet with him.

Q And what is your understanding as to what was on that flash drive?

A He just said that there was a statement from Chandy against me, but he couldn't open it. He had nothing to open it with.

Q He didn't have a means to open it?

A Right.

Q Uh-hum. And in these visits that you had, did the -- did your attorney explain to you any investigation that he had done?

A No.

Q Did he tell you that Ms. Sabin's statement needed to be corroborated prior to being used against you?

A No, he didn't.

Q Had you known that, how would that have affected your actions?

A I would've not -- I would've not plead to any deal.

Q Did your attorney ever mention to you any upcoming changes in the law?

A No. I brought up the AB236 to him. He said

that it did not apply to me at all.

Q Uh-hum. And what's your understanding of AB236?

A That it reforms drug laws, burglary laws, a few other different ones.

Q Uh-hum. And were you ever shown any surveillance videos in this case?

A No, I haven't.

Q What did your attorney tell you about that surveillance video?

A He told me that somebody was sitting on a mountain, and they had us on video watching the whole thing. And that I was -- I was basically -- I was -- that I couldn't argue it.

Q So, this was a really strong piece of evidence against you in his estimation?

A Yeah, that's what he said.

Q Uh-hum. But, you never saw the video yourself?

A No.

Q Did -- strike that.

So, on these -- on these visits that you had it sounds like there were, besides the times you were shackled to in-person one, the one on video, did you tell your attorney that you came to town for a job

interview?

A I don't think it -- I don't think it came up.

Q Okay. Well, did you tell him that the 2.3 grams of meth that you possessed was the -- was the only meth that you had?

A I mean, I thought that was obvious, you know, because that was what was in my pocket.

Q Yeah.

A You know?

Q Did you say that the meth in the house was not yours to your attorney?

A I believe so, I did.

Q Did you tell him you didn't have access to any of those substances in there?

A Yes.

Q And did you tell him you did not have a lot of money on your person --

A Yes.

Q -- when you were arrested?

MR. LASHER: Court's indulgence for one minute? I have nothing further at the moment.

THE COURT: All right, Mr. Rye?

MR. RYE: Thank you, Your Honor. If I can have just a moment?

CROSS-EXAMINATION

BY MR. RYE:

Q Good afternoon, Mr. Werre. Good morning.

A How are you doing?

Q My name is Stephen Rye. I'm the district attorney on this case today.

A All right.

Q Now, just briefly discussing your background, the Presentence Investigation Report indicates you have six prior felonies; is that accurate?

A Probably close, yeah.

Q Okay. And so, would it be fair to say that you've been in the criminal justice system for many years of your life?

A Yeah.

Q When did you first get in trouble?

A 21, 22, I believe.

Q And how old are you now?

A 35.

Q Okay. And so, during the course of those troubles you had a felony conviction for drugs?

A For possession of drugs, yes.

Q Okay. A conviction for possession of stolen property?

A Yeah.

Q Actually, a couple of convictions for possession of stolen property, correct?

A Yeah, probably.

Q And grand theft, money, labor, property?

A Yeah. That got -- that got dismissed though.

Q Okay. But, you were sentenced to 16 months prison in one of those cases for stolen property?

A Yeah.

Q In California?

A Yeah.

Q You were granted probation several times?

A Yes.

Q All right. Now, in each of those cases you were represented by counsel, correct?

A Most of them I had a paid lawyer.

Q Okay, a paid lawyer. But an attorney --

A Yeah. Yes.

Q -- that represented you?

A Yes.

Q Yes. And then you also in most of those cases you plead guilty?

A No contest.

Q Okay. So, you entered a plea in those six

prior felony convictions?

A Yeah.

Q Okay.

A Yes.

Q Sorry. Just so she can pick up what you're --

A Yeah.

Q -- saying, if you can answer, thank you.

And you work worked through the proceedings from meeting with your attorney in those cases?

A Yeah. You know, those other case -- those other cases, my attorney had my best interest -- best interests at heart. That's what I felt.

Q Okay. And so, you discussed the case with them, but you, during those six prior cases, you understood the process, correct?

A Right. And they met -- they met with me more than just once or twice. You know, they met with me several times.

Q Fair enough. But you, during that process, you understood the plea process?

A Yeah.

Q The sentencing process?

A Yeah. And it's also different out here than it is in California.

Q Understood, but generally kind of the same sort of things, correct?

A I mean, I guess, yeah.

Q Okay. Now, with the case of Mr. Mouritsen, you said you met with him a couple of times --

A Yeah.

Q -- at the jail?

And how would you describe those visits?

A Once -- I mean -- I mean, the first time, it was -- it was -- it was all right. You know? I had hard a hard time getting my discovery. Once I got my discovery and I read it, he came back again, and he kind of -- when I got -- when I got add booked on the -- on the remaining charges because when I first got arrested, my charges weren't what they were.

Q Uh-hum.

A They were the possession, and they were motorcycle, and I think that was it. You know? The month and a half later when I got add booked on all the rest of the charges, that's when he came at with -- came at me with a plea after I got add booked probably a week later.

Q Okay. So, you got arrested on some charges, the traffic stop or something like that?

A No, I was -- I was at a -- I was at a residence.

Q At the house?

A Yeah.

Q Okay. And I think the other co-defendants were stopped in a traffic stop, correct?

A Yeah.

Q And so, you got booked on those charges, and then the investigation progressed?

A They -- yeah, they add booked me on several other charges. And then after them -- after I got add booked on them charges, a week later came at me with a plea. Said that, you know, if I don't take this, you know, if I take it to trial, that'll mean a life sentence. But, I don't -- you know, now that I see what I see now, I don't see how when there's no -- you know, what I had on my person, what I was in possession of was not even close to what he threatened me -- or what he told me I was facing.

Q Okay. Now, you signed the Guilty Plea Agreement in this case, correct?

A Yes.

Q And you had a chance to review that?

A Just in court, yeah.

Q Okay. And you told the court during the plea process that you had a chance to review the plea agreement, correct?

A I believe so, yeah.

Q And you also told the court that you had a chance to discuss all the defenses available to you with your attorney, correct?

A That I was aware of at that time, yeah.

Q And you were satisfied with the representation of your attorney?

A Because he said that I was going to look at the minimum of whatever -- of my sentence structure. I wasn't familiar with the sentence structure, so after I got sentenced and I was like well, you know, 2 to 15 isn't what you said I was going to get. You know, because California, whatever you say it is, that's what it is. There's no -- there's no indifferent -- or indeterminant sentence. I wasn't aware of that until after I got sentenced and I got what you got.

Q Okay. And -- but you did discuss the terms of the plea agreement with your attorney?

A Briefly.

Q Okay. And then at no time during the course of the proceedings, either in the Justice Court, which

would have been downstairs, I guess, or in the District Court here, did you express any concern to the judge, either judge, with your attorney's representation; isn't that correct?

A I didn't, no.

Q Pardon me?

A I don't think I did.

Q Okay. Now, you talked a little bit about surveillance video. You said your attorney told you something about a surveillance video?

A Yeah, he said that there was a -- somebody was up on the hill behind her house. They had some surveillance. And yeah, he said that if I chose to go to trial, I was looking at a life sentence.

Q And because the amount of methamphetamine that was found in the house, correct?

A I believe so.

Q Okay. Because there was a significant amount of methamphetamine in the house?

A I guess, yeah.

Q Okay. Now, and you were also charged with possession of stolen firearms, correct?

A Yes.

Q In fact, numerous counts when you were

initially charged; isn't that true?

A Initially. After -- yeah, when I got add booked, yes, that's -- it was quite a few of them.

Q Right.

A But, my initial charges were not -- were not no firearms or nothing.

Q Right, but when you got -- the amended charges were filed --

A Right.

Q -- you had numerous counts --

A Several, yes.

Q -- right? In fact, 43 charges were filed against you, does that sound about right?

A They weren't all firearms. It was -- I think that was just probably around the grand total, yeah.

Q Okay. And then your plea agreement was you plead to four charges; is that right?

A I believe so, yeah.

Q Okay. Now, what did you do after the sentencing in this case?

A After the sentencing?

Q Right. Did you -- you didn't file an appeal, correct?

A Not right away, no. I -- when I got to the