

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

Electronically Filed
Feb 17 2022 01:45 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT OF NEVADA

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

Appellant's Appendix

Volume 4

FILED

2022 JAN 26 AM 9:17

JANUARY 26, 2022
COURT ADMINISTRATION
THIRD JUDICIAL DISTRICT

ANDREA ANDERSEN

Case No.: 21-CV-00291

Dept. No.: II

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

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

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

7
8 In total, the Petitioner was sentenced by the Court to an aggregated minimum sentence of one-
9 hundred-forty-four (144) months to an aggregated maximum sentence of three-hundred-sixty
10 (360) months.

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

17 **I. ARGUMENTS PRESENTED**

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

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

25 **II. FINDINGS OF LAW**

26 **A. Ineffective Assistance of Counsel in the Plea Negotiation Process**

27
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.3d 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).

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

29 To prove deficient performance, a Petitioner must show counsel's performance fell below
30 an objective standard of reasonableness. *Id.* Counsel's performance is measured by an objective
31 standard of reasonableness which takes into consideration prevailing professional norms and the
32 totality of the circumstances. *Strickland*, 466 U.S. at 688; accord, *Homick v. State*, 112 Nev. 304,
33 913 P.2d 1280 (1996). For a claim of ineffective assistance of counsel based on the failure to hire
34 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:

- 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

///

///

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

2
3 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

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

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

No. 20-CR-00224

Dept. No. II


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

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