IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALLEN MACK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent,

CASE NO.: 83165

ON APPEAL FROM THE FIFTH JUDICAL DISTRICT COURT IN AND FOR THE COUNTY OF NYE, THE HONORABLE KIMBERLY WANKER, PRESIDING

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

The Trial Court erred when it Denied Appellant's Writ of Habeas Corpus (Post-Conviction) and the Supplemental Points and Authorities in Support of Post-Conviction after an Evidentiary Hearing. These issues were substantial and constitutional in nature. There were six (6) instances of ineffective assistance of counsel in violation of Strickland that warrant a new trial.

STATEMENT OF FACTS

On 04/15/2013, a Criminal Complaint was filed in Justice Court (Appx. 0001),

On 04/15/2013, a Media Request Allowing Electronic Equipment in the Courtroom was filed in Justice Court (Appx. 0005),

On 04/25/2013, an Affidavit and Application for Appointment of Counsel was filed in Justice Court (Appx. 0006),

On 04/30/2013, a Media Request Allowing Electronic Equipment in the Courtroom was filed in Justice Court (Appx. 0008),

On 05/08/2013, a Preliminary Hearing was held in Justice Court (Appx. 0009),

On 05/08/2013, a Media Request Allowing Electronic Equipment in the Courtroom was filed in Justice Court (Appx. 0132),

On 05/13/2013, a Bindover Order was filed in Justice Court (Appx. 0133),

On 05/16/2013, an Information was filed in District Court (Appx. 0135),

On 05/17/2013, an Arraignment Hearing was held in District Court (Appx. 0140),

On 05/22/2013, an Order for Secondary Setting of Jury Trial was filed in District Court (Appx. 0166),

On 09/20/2013, a Motion for O/R Release Hearing was held in District Court (Appx. 0169),

On 10/18/2013, a Motion for Psych Hearing was held in District Court (Appx. 0182)

On 10/23/2013, a Motions Hearing was held in District Court (Appx. 0188)

On 11/26/2013, an Amended Information was filed in District Court (Appx. 0238

On 12/03/2013, a Guilty Plea Agreement was filed in District Court (Appx. 0241),

On 12/04/2013, a Change of Plea Hearing was held in District Court (Appx. 0250),

On 12/05/2013, a Second Amended Information was filed in District Court (Appx. 0254),

On 12/06/2013, a Change of Plea Hearing was held in District Court (Appx. 0257),

On 03/21/2014, a Sentencing Hearing was held in District Court (Appx. 0285),

On 03/25/2014, a Judgment of Conviction was filed in District Court (Appx. 0305),

On 02/19/2015, a Notice of Appeal was filed in District Court (Appx. 0309),

On 02/19/2015, an Affidavit was filed in District Court (Appx. 0311),

On 02/19/2015, a Motion for the Appointment of Counsel and Request for Evidentiary Hearing was filed in District Court (Appx. 0312),

On 02/19/2015, a Case Appeal Statement was filed in District Court (Appx. 0316),

On 02/19/2015, a Petition for Writ of Habeas Corpus (Post-Conviction) was filed in District Court (Appx. 0318),

On 02/23/2015, an Order Appointing David Neely, Esq. was filed in District Court (Appx. 0348),

On 02/25/2015, a Motion to Amend Notice of Appeal was filed in District Court. (Appx. 0350),

On 02/25/2015, an Amended Notice of Appeal was filed in District Court (Appx. 0351),

On 02/27/2015, an Order Dismissing Appeal was filed in District Court (Appx. 0353),

On 04/07/2015, a Stipulation and Order for Extension of Time to File Supplemental was filed in District Court (Appx. 0355),

On 05/12/2015, an Answer and Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction) was filed in District Court (Appx. 0357),

On 08/25/2015, an Order was filed in District Court (Appx. 0368),

On 09/22/2015, an Amended Petition for Writ of Habeas Corpus (Post-Conviction) was filed in District Court (Appx. 0370),

On 05/04/2016, a Petitioner's Opposition and Reply to State's Answer and Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction) was filed in District Court (Appx. 0383),

On 11/27/2017, an Order for Hearing on Writ of Habeas Corpus was filed in District Court (Appx. 0398),

On 01/26/2018, an Order to Transport Prisoner to Court Hearing was filed in District Court (Appx. 0400),

On 07/23/2018, an Order for Hearing on Writ of Habeas Corpus was filed in District Court (Appx. 0402),

On 08/02/2018, an Ex Parte Application for Order to Transport Prisoner to Court for Evidentiary Hearing was held in District Court (Appx. 0404),

On 08/06/2018, an Order to Transport Prisoner to Court for Evidentiary Hearing was filed in District Court (Appx. 0407),

On 08/29/2018, a Writ of Habeas Corpus Hearing was held in District Court (Appx. 0409),

On 06/24/2021, an Order Denying Writ of Habeas Corpus was filed in District Court (Appx. 0474),

On 07/02/2021, a Case Appeal Statement was filed in District Court (Appx. 0495),

On 07/07/2021, a Notice of Appeal was filed in District Court (Appx. 0498),

On 07/12/2021, a Request for Transcript of Proceedings was filed in District Court (Appx. 0500),

ARGUMENT

1. STANDARD UPON REVIEW OF PETITION

NRS 34.770 sets forth the standard for this Court's review of the instant Petition and supporting documentation. NRS 34.770 states:

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.

Whereas here, the Petition sets forth specific allegations in the Petition or accompanying brief which if true, would entitle the petitioner to an evidentiary hearing unless those claims are repelled by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222, (1984); Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). As stated in Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992):

The question in this case is not whether appellant proved his counsel was ineffective, but whether appellant made allegations which entitled him to an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981).

2. INEFFECTIVENESS OF COUNSEL UNDER STRICKLAND

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. Denied, 471 U.S. 1004 (1985). The Petitioner must show that his counsel's performance was deficient, and that the deficient performance resulted in prejudice. Warden v. Lyons, 100 Nev. 430,432, 683 P.2d 504, 505 (1984) An analysis does not require that both prongs be addressed if the showing of either is insufficient. In order to show prejudice, the petitioner must show "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different". Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome". Id. It is the petitioner's burden to establish both prongs.

In Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 8 L. Ed.2d 674 (1984), the United States Supreme Court reaffirmed the, "Actual or

constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice". The United States Supreme Court reaffirmed this ruling in Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300, (1988).

The Nevada Supreme Court held in Sanborn v. State, 107 Nev. 399, 812 P.2d 1279, 1283 (1991) that:

Focusing on counsel's performance as a whole, and with due regard for the presumption of effective assistance accorded counsel by this court and Strickland, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness. Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegation's of the victim's propensity towards violence. Thus, "he was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment". Strickland, 466 U.S.at 687, 105 S.Ct. at 2064.

In a post-conviction habeas petition, we evaluate claims of ineffective assistance of counsel under the test established in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). In that 1984 decision, the United States Supreme Court created a fair, workable and, as it turns out, durable standard that replaced Nevada's traditional "farce and sham test". Strickland dictates that our evaluation begins with the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. 2052 (1984). The Court

further explained that the "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy. "Id. Within the context of this strong presumption, the petitioner must demonstrate that his counsel's performance was deficient, falling below an objective standard of reasonableness, and that counsel's performance deficient performance prejudiced the defense. Id at 687. To establish prejudice based on counsel's deficient performance, a petitioner must show that, but for counsels errors, there is a reasonable probability that the outcome would be different .Id at 694. A court may evaluate the questions of deficient performance and prejudice in either order and need not consider both issues if the defendant fails to make a sufficient on one. Id at 697. Yet the claim that ineffective assistance of counsel prejudiced the petitioner is distinct from it's factual nucleus. Means v. State, 120 Nev. 1001, 103 P3d 25, 32, (2004).

Choosing consistency with federal authority, we now hold that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective assistance claim by a preponderance of the evidence. Therefore, when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations which form the basis of his claim of ineffective assistance by a preponderance of the evidence. Next, as stated in Strickland, the petitioner must establish that those facts show counsel's performance fell below an objective standard of reasonableness, and finally the petitioner must establish prejudice by

showing a reasonable probability that, but for counsel's deficient performance, the outcome would have been different, Means v. State, 120 Nev. 25, 103 P.3d 25,33, (2004).

Here, as in Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994), the Petitioner alleged acts which, if true, entitle him to relief as ineffective assistance of counsel. The facts of this case demonstrate clearly that a different outcome would have resulted if counsel had been effective.

Counsel's constitutionally defective performance affected the outcome of the plea process.

In United States v. Arvantis, 902 F. 2d 489, 494-495 (7th Cir. III, 1990), the Supreme Court stated:

To establish prejudice in the guilty plea context, a defendant must show that 'counsel's' constitutional performance affected the outcome of the plea process. In other words, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial'. Hill v. Lockhart, 474 U.S. 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by court's reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the

determination whether the error "prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of the trial. Hill, 474 U.S. 59, 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985).

(A) The Trial Court erred when it failed to find that Trial Counsel's failure to Conduct an effective investigation prior to the entry of the Appellant's guilty plea was ineffective assistance of counsel pursuant to Strickland.

The Trial Court stated in it's Order, " Trial Counsels investigator failed to conduct am effective investigation of the case prior to Mack entering an Alford Guilty Plea. The Court notes that at the time she arraigned Mack on December 6, 2013, the Court addressed with Mack a letter written to the Court by Mack dated November 19, 2013, wherein Mack complained that his attorney, Thomas Gibson, and the investigator had not met with him. (Appx. 0476)

The Court: Now I have received a letter from you that was dated November 19, 2013, that you - that was addressed to Mr. Gibson that you had sent me indicating you were concerned because - with the representation because he had not met with you, and Mr. Zane, the investigator, had not met with you. Do you still have concerns regarding Mr. Gibson and Mr. Zane? (Appx. 0476)

The Defendant: No, I do not.

The Court: And at this point are you satisfied with the representation that's been provided to you by Mr. Gibson?

The Defendant: Yes, Your Honor.

Mr. Gibson: Your Honor, may I clarify something? Mark Henry is our investigator.

The Court: I'm sorry, Mark Henry, I apologize. This said Mark and I assumed it was Mr. Zane.

Mr. Gibson: No, Henry.

The Court: So Mr. Henry, okay. And at this point as of today. December 6th, 2013, those concerns that you set forth in your November 19th letter have all been resolved, is that right?

The Defendant: Yes. Your Honor.

Mr. Gibson: Your Honor, for the record Mr. Henry and I have met with Mr. Mack. I met with him on multiple occasions since that letter, and Mr. Henry did at least one meeting with him and was working on the case up until the time we decided to reach this agreement.

The Court: Okay. Thank you, Mr. Gibson, I appreciate that.

Now do you think you've had enough time to discuss all the various aspects of this case with Mr. Gibson? (Appx. 0476-0477)

The Defendant: Yes.

Thus, by Mack's own admissions, there is no merit to his claim that the investigator Mark Henry failed to properly investigate Mack's claims. (Appx. 0477)

Trial Counsel retained an investigator but his investigator failed to conduct an effective investigation of the Appellant's case. The investigator never interviewed the alleged victim's husband's from her 4 previous marriages as to the mental capacity of the alleged victim. The investigator never interviewed any of the friends or acquaintances of the alleged victim as to the mental capacity of the alleged victim. The investigator interviewed the Petitioner's daughter as to her thoughts as to the mental capacity of her aunt. The mental capacity of the alleged victim was never properly investigated to show that the alleged victim was "not a person with mental illness." as alleged in Count I and Count VII in the Information. The investigator never attempted to track down any of the alleged victim's history of mental illness. The likelihood of the Appellant having a defense that would work at trial is highly unlikely with respect to Counts IV and Count VII and Count V and Count VIII.

At the Evidentiary Hearing, Trial Counsel was asked, "And did you hire an investigator in the matter?" Trial Counsel responded, "I did not." He was then asked, "And wasn't the alleged victim's mental capacity an issue in the case?" Trial Counsel responded, "Yes." He was then asked, "And at the preliminary hearing, I think you raised that issue with - with the alleged victim?" Trial

Counsel responded, "I did." He was then asked, "And I think you also raised that issue with Susan Kallaher from the State of Nevada's rehabilitation services?" Trial Counsel responded, "That, I don't - I don't recall." He was then asked, "So at the time you didn't have your investigator interview any of the alleged victim's four ex-husbands as to her mental capacity?" Trial Counsel responded, "I did not." He was then asked, "And - so you didn't have an investigator, so I take it you didn't interview any of the alleged victim's friends or acquaintances as to her mental capacity?" Trial Counsel responded, "No." He was then asked. "And both of you and – like we spoke earlier, both of you and Mr. Gensler, who was representing the co-defendant, cross-examined Susal Kallaher for the State?" Trial Counsel responded. "I don't recall that. But it - it's been a while." He was then asked, "And during the preliminary hearing when - I don't know if you recall, Mr. Gensler had Ms. Kallaher admit that the alleged victim had a long history of creating lies, fabrications and stories?" Trial Counsel responded, "Yes, I remember that." He was then asked, "And you didn't follow up with an investigator yourself on any - upon any of those allegations?" Trial Counsel responded, "No." (Appx. 0415-0416)

In the Supreme Court case of Sanborn v. State, 107 Nev. 399, 81 P.2d 1279, 1283, the Court held, "Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and Strickland, we hold that Sanborn's representation indeed fell below

an objective standard of reasonableness. Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

This was an example of the poor pre-trial investigation, or the lack thereof, done by the defense prior to trial that led their client to plead guilty. Counsel must prepare the case at all levels, including preliminary matters in Justice Court. Sanborn v. State, 107 Nev. 856, 822 P.2d 11 (1991). Counsel's performance fell below an objective standard of reasonableness, and his errors were so severe that it caused the Appellant to plead Guilty in the instant case in violation of Strickland since there was a reasonable probability that he would have chosen to go to trial if there had been an effective investigation conducted.

(B) The District Court erred when it failed to find that Trial Counsel caused the Appellant to enter a guilty plea while suffering the effects of a stroke was ineffective assistance of counsel pursuant to Strickland.

The District Court stated in it's Order, " Trial counsel caused Mack to enter a guilty plea while suffering the effects a stroke." Mack claims he pled Guilty Pursuant to Alford under the effects of a stroke. The Court thoroughly canvassed Mack at the December 6, 2013 arraignment. (Appx. 0478)

The Court asked Mack if he was capable of moving forward on December 6, 2013 and also inquired as to whether Mack needed a continuance. (Appx. 478)

The Court: You've been provided a copy of the second amended Information wherein you've been charged with attempted sexual assault. It's a violation of Nevada Revised Statute 200.336 and Nevada Revised Statute 193.330. It's a category B felony. Do you understand the nature of the charge set forth in the second amended information.?

The Defendant: Yes, ma'am.

The Court: And have you had the opportunity to discuss this charge with your attorney, Mr. Gibson?

The Defendant: Yes.

The Court: As to the charge set forth in the second amended Information, how do you plead?

The Defendant: Guilty as offered.

Mr. Gibson: Under Alford.

The Defendant: Guilty under Alford.

The Court: Okay. Alford versus North Carolina is a U.S. Supreme Court decision from 1970 that is essentially - it's a guilty plea but what you're saying is the State can prove _ you're not necessarily admitting that you're guilty, you're saying that the State has sufficient evidence and can prove the allegations set forth

in the Information beyond a reasonable doubt if the case went to trial. So I want to be sure you understand that and that's the plea you want to enter.

The Defendant: Yes.

The Court: Okay. And if you don't Mr. Mack, it's fine. We're happy to provide you with a trial. It's really up to you. I don't want anyone ever in my courtroom to feel pressured, that they've been pressured.

The Defendant: No. I understand, your Honor.

The Court: into some type of plea agreement. Before I can accept your Alford plea, I want to be certain that the pleas has been knowingly, freely and voluntarily entered into, and, in addition the guilty plea agreement that you signed, that you signed it knowing the terms and conditions of that, knowing and understanding the terms and conditions of that agreement and knowing that you knowingly, freely, and voluntarily entered into that agreement, so I am going to ask you some questions.(Appx. 0478-0479)

Later, in the same canvas the Court told Mack:

The Court: And do you agree that the State has sufficient evidence to prove the charges against you beyond a reasonable doubt to those facts as stated?

The Defendant: Well, I don't know if they have.

The Court: You know, Mr. Mack, if you don't know, and like I said, if you don't want to take this plea, that's fine. I've got it set for trial actually, and I can

also reset it for trial. So it's really up to you. I don't want you in any way to feel pressured into this plea.

The Defendant: Yeah, I understand that, your Honor, I agree. Some 20 pages later in the arraignment transcript, the Court again advised Mack:

The Court: Here's your opportunity, Mr. Mack, if you'd like to change your mind. And if you truly feel you don't want to enter this plea. I'm fine with that. I'm happy to set it for trial. What I want to be certain is that you want to enter the - you enter the plea that you want to enter, that you don't feel pressured or otherwise forced in any way to enter a plea. While we do have it set on calendar next week, I'm even happy to continue the trial if you would like that, if you decide that you want to go to trial, okay?

The Defendant: Yes.

The Court: So I'm going to ask you now, here's going to be the moment of truth, it's your kind of last and final chance to enter your plea here. Based upon my questions and our discussion here this morning, what is your plea to the charge in the second amended Information of attempted sexual assault, a category B felony?

The Defendant: What is my plea? Guilty. I'm sorry, your Honor.

The Court: Okay. And that guilty plea will be entered pursuant to Alford; is that right?

The Defendant: Yes. Based upon the numerous opportunities the Court provided to Mack to continue the proceedings or change his mind, the Court finds that Mack's assertion that trial counsel made him enter a plea under the effects of a stroke to be without any merit." (Appx. 0481-0482)

At the Evidentiary Hearing, Trial Counsel was asked, "Okay. On - looks like on December the 4th an arraignment was held, but it was canceled due to an illness Mr. Mack had suffered?" Trial Counsel responded, "I can't - I couldn't hear you." He was then asked, "There was an arraignment on 12-4 in the District Court here, but it was canceled?" Trial Counsel responded, I have no independent recollection of that." He was then asked, "Okay. So if I were- if I told you that it was canceled because Mr. Mack had been taken to the hospital due to a stroke, would you remember that?" Trial Counsel responded, "I do remember him having some medical issues." He was then asked, "Okay. And then two days later on 12-6, if you remember another arraignment was held where Mr. Mack pled guilty to the Count 1 of attempted sexual assault?" Trial Counsel responded, "Yes." He was then asked, "Were you aware that Mr. Mack had just been released from the hospital, a result of a stroke, and was in recovery?" Trial Counsel responded, "I recall he was released from the hospital and had medical issues. To the extent what it was, I don't remember." He was then asked, "And did Mr. Mack ask you to continue the arraignment?" Trial Counsel responded, "I don't remember that." He was then asked,"Mr. Mack alleges that you told him to take the deal?" Trial

Counsel responded, "I'm sorry." He was then asked, "Mr. Mack alleges that you told him to take the deal?" Trial Counsel responded, "I don't remember the specific language between us two, bit I do recall that after reading - after the preliminary hearing and reading the discovery on file. And then there was another witness, I believe, and I can't recall - another alleged victim was going to materialize or - I got information on that. And based on the totality, I told him the best option - and this is my - I'm paraphrasing, but the best option - and this is my - I'm paraphrasing, but the best option was to try to minimize his exposure rather than run the risk of getting, you know, a greater sentence." He was then asked, "Thank you. And after - after you heard he had been ill, had a stroke, you didn't ask for a competency evaluation as a result of his stroke?" Trial Counsel responded, "He was communicating with me, so I saw no reason for it. And based on my history with the - with Lake's Crossing and they would find even people that are absolutely raving blithering lunatics to be competent, it doesn't - I only play that card when it's absolutely necessary." He was then asked, "I understand. And it appears that Mr. Mack's arraignment, that the - actually, the District Court said that she understood he had been under the weather during the arraignment; do you remember the Court -?" Trial Counsel responded, "I don't remember that." And I think, if you remember, the Court asked - he asked the Court if he could sit down and she agreed?" Trial Counsel responded, "I don't recall that." He was

then asked, "And do you recall she allowed him to sit during the proceedings?" Trial Counsel responded, "Same answer." (Appx. 418-419)

Trial Counsel knew that the Appellant had just been released from the hospital as the result of a stroke he suffered while in the jail but still went forward with the Arraignment and subsequent Guilty Plea pursuant to Alford when he was aware that his client had just been released from the hospital as the result of a stroke and was still in recovery. Appellant was not of sound mind at the time of the entry of his plea and Trial Counsel should not have allowed his client to plead Guilty pursuant to Alford. Petitioner requested a continuance but was told by Trial Counsel to take the deal. Trial Counsel had a duty to request a Mental Competency Evaluation after the Appellant suffered a stroke to ensure that at the time of entry of plea he was of sound mind.

Counsel's performance fell below an objective standard of reasonableness, and his errors were so severe that it caused the Appellant to plead Guilty in the instant case in violation of Strickland since there was a reasonable probability that he would have chosen to go to trial if he had a chance to consider his options after the effects of the stroke had passed.

(C) The Trial Court erred when it failed to find that Trial Counsel's failure to inform the Appellant of the consequences of being a Tier III Sex Offender prior to entry of his guilty plea pursuant to Alford was ineffective assistance of counsel pursuant to Strickland.

The Trial Court stated in it's Order, "Trial Counsel failed to advise Mack of the consequences of being a Tier III sex offender prior to the entry of his Alford Guilty Plea.

Mack claims that he had ineffective assistance of counsel because his attorney, Thomas Gibson, Esq., failed to advise him of the consequences of being a Tier III sex offender prior to entry of the Alford guilty plea. The written Guilty Plea executed by Mack, and the transcript of the arraignment do not support Mack's assertion. First, the written Guilty Plea Agreement contains the following language:

CONSEQUENCES OF SEX OFFENSE

"I agree to plead guilty to a sex offense, and I will be considered a Tier III offender. As a result I understand that I AM subject to sex offender register requirements as provided for in NRS 179D.450, and that I AM also subject to the lifetime supervision requirements of NRS 176.0931." (Appx. 0482)

"Mr. Mack, his attorney, and the Deputy District Attorney all placed their initials next to this provision. The reason for this, is that originally, the parties believed it was a Tier II offense. At the arraignment, the following occurred:

Mr. Gibson: Judge, we have a little housekeeping matter.

The Court: Sure.

Mr. Gibson: We have interlineated that the third "I" to make it a Tier III from II.

The Court: Okay.

The Court: Do you have the executed guilty plea agreement?

Mr. Gibson: Right here in front of me.

The Court: And Mr. Mack initialed that clause, that change?

Mr. Gibson: Your Honor, I suggest that both counsel also initial too –

The Court: Yes.

Mr. Gibson: -showing we're all in agreement.

The Court then did an extensive canvass of Mack regarding the registration and supervision requirements for as a sex offender.

The Court: Now I want to cover some things with you about that guilty plea agreement. Do you understand that as a result of your plea, the maximum is 20 years in the Nevada Department of Corrections?

The Defendant: Yes.

The Court: And I want to be sure that because this is a sex offense, do you understand that you will be required to undergo a psychosexual evaluation?

The Defendant: I didn't know that but yes.

The Court: But do you understand that will now I'm telling you - And I want to be sure that because this is a sex offense, do you understand that you will be required to undergo a psychosexual evaluation?

The Defendant: Yes.

The Court: That you will be at some point required to undergo a psychosexual evaluation?

The Defendant: Uh-huh.

The Court: Because this is a sex offense, do you understand that you're going to have to have certain sex offender registration requirements and the supervision requirements will be lifetime, they will be lifetime requirements? Do you understand that?

The Defendant: Yes, now.

The Court: Okay. And has Mr. Gibson talked to you about the registration and the supervision requirements that you're going to be required to follow pursuant to the Nevada Revised Statutes by entering this plea?

The Defendant: He told me that I had to register but I don't know the details of the requirements, the procedure.

The Court: Would you like - would you like Mr. Gibson to go through the requirements with you?

The Defendant: Yeah. I don't have the details. I mean. I know I saw it that I have to register.

Mr. Gibson: We discussed this yesterday. Remember we talked about the 48-hour requirement and that you're required to whenever you change residences?

The Defendant: Yeah, I knew the residence but, I mean, not all when and...

The Court: Do you understand that within 48 hours of entering this plea you're going to be required to register with the Nye County Sheriff's Office as a sex offender?

The Defendant: 48 hours of this plea, register?

The Court: Right.

The Defendant: Yes.

The Court: Okay.

The Defendant: I am.

The Court: Do you understand that as a result of entering this plea that you will have - you will be subject to lifetime supervision by parole and probation? Do you understand that?

The Defendant: No, I didn't know that, but that's...

The Court: Okay. Knowing that

The Defendant: Okay.

The Court: Now, I'm telling you that you will be required to be subject to lifetime supervision by parole and probation, do you still want to enter your Alford plea?

The Defendant: I guess.

The Court: Okay. And do you understand that if you fail to register when you're required to do so, that you can be subject to a separate category D felony?

The Defendant: A separate what, ma'am?

The Court: Category D felony for failing to register.

The Defendant: Yes.

The Court: "Okay. All right. I also want to be sure that you understand that you may be subject to community notification provisions designed to reach members of the public likely to encounter you. And knowing that do you still want to enter this Alford plea?"

Based upon the forgoing discussion at his arraignment. Mack cannot, in good faith, claim he was unaware of the tier III registration and supervision requirements." (Appx. 0488)

At the Evidentiary Hearing, Trial Counsel was asked the following, "Okay. May I ask you, when you discussed the plea memorandum with Mr. Mack, you told him at that point he was going to be a Tier II sex offender? Trial Counsel responded, "We were given information at the time that - whatever I told him it was, I,II or III. And then later on they changed the law, or the law was changed, and it was retroactive. And there's - but that's true. Trial Counsel was asked, "You were wrong about the Tier level, weren't you? Trial Counsel responded, "Yes" Trial Counsel was asked, "And, in fact, he was subject to Tier III registration, wasn't he? Trial Counsel responded, "I found out after the fact, yes. I mean, after we had already entered our plea. Trial Counsel was asked, "And you had to amend the plea memorandum to reflect Tier III, didn't you. Trial Counsel responded, "That did - again, up to that point, though, we were thought - we were

- I was - we were going under the assumption it was going to be II". Trial Counsel was asked, "When you talked to him in the jail, you told him he was going to be Tier II after he took the plea." Trial Counsel responded, "That was my understanding." Trial Counsel was then asked, "And was - and Mr. Mack was surprised to find out he was going to be a Tier III, wasn't he? Trial Counsel responded, "He was disappointed. I don't know how surprised he was."(Appx. 0420)

Trial Counsel failed to advise the Appellant what it meant to be a Tier III Sex Offender prior to entry of his plea of guilty pursuant to Alford. Appellant was originally told that he would be a Tier II Sex Offender prior to discovering at the Arraignment that he was going to be a Tier III Sex Offender. Appellant would not have entered a plea of Guilty to an offense that required Tier III Sex Offender status if he had understood the consequences.

Counsel's performance fell below an objective standard of reasonableness, and their errors were so severe that it caused their client to plead guilty pursuant to Alford in violation of Strickland since there was a reasonable probability he would have chosen to go trial if he knew he would be a Tier III Sex Offender

(D) The Trial Court erred when it failed to find that Trial Counsel's failure to review the facts of his case and discuss any defenses prior to entry of the plea of guilty pursuant to Alford was ineffective assistance of counsel pursuant to Strickland.

The Trial Court stated in it's Order, "Trial counsel failed to review the facts of the case and discuss any defenses with Mack. Mack claims that his trial counsel was ineffective for failing to discuss the facts of the case or the defenses with him. Yet, this assertion by Mack is unsupported by the record of the arraignment in this case. As set forth in detail in Section 1, above, Mack indicated he had enough time to discuss all the aspects of his case with Mr. Gibson, his attorney by the time of his arraignment on December 6, 2013. The bald assertion by Mack is contradicted by the record of the proceedings in this case." (Appx. 0488)

At the Evidentiary Hearing, Trial Counsel was asked the following, "Did you review the facts of the case with Mr. Mack?" Trial Counsel responded, "Oh, yeah." He was then asked, "And did you discuss any defenses that were available to him?" Trial Counsel responded, "Yes." He was then asked, "And approximately how many times did you visit him in the jail?" Trial Counsel responded, "I don't know. I don't remember. More than one, I know that. And more than a few." He was then asked, "Did you give Mr. Mack an ultimatum of take it or leave it in the jail after discussing his plea bargain?" Trial Counsel responded, "That's not my style. I don't recall doing that. I don't think I did that." (Appx. 0421)

Trial Counsel failed to review the facts of the case with Appellant and never discussed any defenses that Appellant may have had based on the facts of his case.

The Appellant spent the entire time he was being prosecuted in the above-entitled matter in the Nye County Jail in Pahrump. Trial Counsel rarely visited the Appellant and when he did visit he failed to discuss the facts of the case or any defenses. Appellant was given an ultimatum of take it or leave it in the jail prior to his entry of plea and opted to take it because he had no knowledge of the facts of the case of if any defenses existed.

Counsel's performance fell below an objective standard of reasonableness, and their errors were so severe that it caused their client to plead guilty in violation of Strickland since there was a reasonable probability that he would have chosen to go to trial if he knew the facts of the case and if a defense was available.

(E) The Trial Court erred when it failed to find that Trial Counsel's failure to inform the Appellant of the consequences of pleading guilty pursuant to Alford to Attempted Sexual Assault was ineffective assistance of counsel pursuant to Strickland.

The Trial Court stated in it's Order, "Trial Counsel failed to inform Mack of the consequences of pleading guilty (pursuant to Alford) to attempted sexual assault. Mack claims his counsel was ineffective for failing to inform of the consequences of pleading guilty pursuant to Alford. Once again, one only needs to look at the transcript of Mack's December 6, 2013, arraignment to find that there is no support for Mack's argument. Not only did the Court advise Mack of the maximum possible sentence that could be imposed in this case., the Court also

advised Mack of the registration and supervision requirements of being a Tier III sex offender. The Guilty Plea Agreement signed by Mack also outlines the consequences of his Alford guilty plea. Mack's argument is without merit." (Appx. 0488)

At the Evidentiary Hearing, Trial Counsel was asked the following, "And did you discuss the range of punishments that was possible pursuant to his guilty plea with Mr. Mack? Trial Counsel responded, "Yes." He was then asked, And did you discuss the 40 percent rule with Mr. Mack? Trial Counsel responded, "I don't recall if I discussed the 40 percent rule." He was then asked, "Did you tell Mr. Mack he'd be facing a maximum sentence of 20 years and a minimum sentence of 8 years prior to entering his plea?" Trial Counsel responded, If that were the parameters. Again, I don't have everything in front of me. But if that was what was in the plea agreement, then I would have gone over that with him in detail." He was then asked, "Did you inform Mr. Mack that he would only be facing a minimum 2 year sentence? Trial Counsel responded, "No." (Appx. 0421)

Prior to the entry of a plea of Guilty pursuant to Alford, you can be sentenced to a maximum sentence of 20 years with a minimum term of 8 years. Appellant understood that he would only have to serve a minimum 2 years before he was allowed parole and Trial Counsel never informed him of the 40% Rule that governs Sentencing in Nevada. Trial Counsel had a duty to inform his client that he could serve 8 years before being eligible for parole and a maximum 20 years.

Counsel's performance fell below an objective standard of reasonableness, and their errors were so severe it caused their client to plead Guilty in violation of Strickland since there was a reasonable probability he would have chosen to go to trial if he knew he would have to serve 8 years before being eligible for parole.

(F) The Trial Court erred when it failed to find that Trial Counsel had a conflict of interest during his representation of the Appellant which he never disclosed to his client was ineffective assistance of counsel.

The Trial Court stated in it's Order, "Mack alleges that some sort of conflict of interest existed between Nye County and Mr. Gibson because Mr. Gibson had a public defender contract and the contract was changing so that somehow prejudiced or affected Mack's case. There is no evidence that that was in fact the case, and nothing has been offered to support Mack's unsubstantiated claim."

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra 446 U.S., at 346, 90 S. Ct.,at 1717. From the counsel's function as assistant to the defendant derive the over arching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama,

287 U.S., at 68-69, 53 S.Ct., at 63-64, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g. Fed Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts in interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S.Ct. 2052, 8 L.Ed. 2d 674 (1984).

At the Evidentiary Hearing, Trial Counsel was asked the following, " So prior to your contract as an individual contractor, your prior firm Gibson & Kuehn had the public defender contract, didn't it?" Trial Counsel responded, "Yes." He

was then asked, "And your prior firm, Gibson & Kuehn began to kind of break apart due to Mr. Kuehn's legal and ethical issues?" Trial Counsel responded, "Yes." He was then asked, "And it was a result of he Fellini case, which is a case everybody heard about, the cow getting hit and he got in a lot of trouble with the State bar." Trial Counsel responded, "Yeah. I think he was disbarred, actually." He was then asked, "He actually became disbarred. And had it become apparent that your - Mr. Kuehn could lose his license at one point?" Trial Counsel responded, "Repeat?" He was then asked, "Did it become apparent to you when you were still his partner that he could lose his license?" Trial Counsel responded, "It - that was an issue. I felt that based on the circumstances, that he - he could lose his license, at the very minimum being suspended. And Mr. Ernest disagreed with me. He said Harry would just get a slap on the wrist based on his research. And Harry ran with that." He was then asked, "And did you consider dissolving your law firm?" Trial Counsel responded, "Did I what?" He was then asked," Consider dissolving Gibson & Kuehn?" Trial Counsel responded, "It's no longer in existence." He was then asked, "So it actually did dissolve?" Trial Counsel responded, "No, we actually haven't closed it up yet, because there's still - I haven't there's tax issues and other things that were - it's in the process. But -." He was then asked, "That's not relevant. We're not going to get into that." Trial Counsel, "It's a slow - it's a slow death." He was then asked, "I understand. Now, did you approach the then DA, Brian Kunzi, about taking over the public defender

contract you had?" Trial Counsel responded, "I think, if I recall, Mr. Ernest and Mr. Kuehn explained to me that they had been in conversations with Mr. Kunzi about this - then new Humboldt plan that they wanted to get into. And we were told - well yes." He was then asked, "Okay what was your understanding of the offer Mr. Kunzi made to you? I know you just referred it as a Humboldt-?" Trial Counsel responded, "Take it or leave it, if we - if we agreed to go along with - and opt out of our contract early and take - and submit to the Humboldt plan, that we would be given a contract by the county that he - wasn't guaranteed, but he would be urging the county commissioners to approve this plan. And that we would be the first three contracts that would be approved. If we - if I - any one of us did not agree with it, then there would be no promises." He was then asked, "Was it a take it or leave it kind of deal?" Trial Counsel responded, "Absolutely. That's how I took it." He was then asked, "And was your understanding that if you fought him you wouldn't get a contract? Trial Counsel responded, "My understanding if I fought him, that is a possibility I wouldn't have gotten the contract. Because I was led to believe he had great influence over the commissioners." He was then asked, "Who drafted the contracts?" Trial Counsel responded, "Kunzi." He was then asked, "And who sent the contracts out?" Trial Counsel responded, "Who sent it out?" He was then asked, "Yeah. Did you receive the contracts from Mr. Kunzi?" Trial Counsel responded, "I got a copy of it, yes." He was then asked, Okay. And did Mr. Kunzi represent you at the commissioners meeting when they heard the

pitch for the contracts?" Trial Counsel responded, "That's my recollection." (Appx. 0425)

The Court asked the following, "I've got a question on that. You said represent. Did Mr. - was Mr. Kunzi retained as your counsel? That's the allegation." Trial Counsel responded, "never". The Court continues, "that's the question. Maybe you need to clarify Mr. Neely. Because you're saying that he - that Mr. Kunzi represented. And in the legal context, legal representation is he would act as counsel for Mr. Kuehn and Mr. Gibson. Is that what you're asking?" (Appx. 0425)

Appellant's Counsel replied, "Let me put it - let me rephrase it." (Appx. 0425)

Trial Counsel was then asked, "So when you went to the commissioners' meeting, Mr. Kunzi was there, he put forward the idea of the Humboldt plan.?" Trial Counsel responded, "He - yes, he was the one who was there representing the county commission - or the - he was the DA who represents the commission, and he was the one that was speaking to the commissioners. Now, I don't remember if he got up and spoke in front of them in detail, but I believe most of the bargaining was done behind closed doors." He was then asked, "Okay. And was it - was it Mr. Kunzi who was really the driving force behind the Humboldt plan?" Trial Counsel responded, Yes." He was then asked, "And was it your understanding that it would be Pam Webster was going to be the supervisor of the

public defenders?" Trial Counsel responded, "No." He was then asked, "Did you - was it your understanding that the plan that he put forth would probably save the county half a million dollars?" Trial Counsel responded, "Something like that, yeah." He was then asked, "That would be because they would not be using any of the other conflict lawyers?" Trial Counsel responded, "That's my understanding". He was then asked, "Yeah. And would you - was it your understanding the desire was to eliminate the expense of paying separate lawyers" Trial Counsel responded, "Yes." He would then asked, "And did you ultimately lose your job as a contract public defender?" Trial Counsel responded, "Yes. Well, it wasn't renewed. I didn't lose it, it - yeah, they didn't renew it." He was then asked, "Was it over insurance?" Trial Counsel responded, "No." He was then asked, "I think." Trial Counsel responded, "No, but if you want to ask a follow up question." He was then asked, "What was it over?" Trial Counsel responded, "I was accused of not having insurance. And I - and I showed my proof of insurance. And they said, oh, this is just a - I believe a rider or a proof that I had insurance. But they wanted - then Pam asked for the policy, which I didn't have handy and I had to order it and get it. And then I went over to her office, dropped it on her desk and said, There it is, knock yourself out. Politely." He was then asked, "Did you feel set up in the way your contract -." Trial Counsel responded, "Oh. yes. Yes." He was then asked, "ended? And who do you think was setting you up? Trial Counsel responded, "Well, my understanding - my belief is - set when you say "set up."

please be more specific. What do you mean by that? He was then asked, "Do you feel like, you know, that fix was in that you would lose your contract after one year?" Trial Counsel responded, There were - there was another issue that came up before - I mean right after the insurance. And that was the retention of files. Which belonged to the former firm of Gensler, Ernest. And Harry Kuehn chartered - whatever Harry was going under at that time. Those are all old files, that they were not public defender files that we were maintaining. Those were old other independent files. And I got a frantic call from Pam Webster demanding I go pick them up in Tonopah. And I got a call from the State Bar and Brian Kunzi. And I had to - said the same thing to all three of those entities. "Not my files, not my problem. Talk to Ernest or Kuehn or Gensler." And so that was all - that was another rift that we had. Because they, for some reason, presumed it was going to be my problem. And then - but then Ernest actually went and picked all those files up in Tonopah later. They were being stored up there by Bob Bruschetta in one of his buildings. He was then asked, "Mr. Gibson, who do you think was the - was the ultimate boss on the contract attorneys at that - when you were working there? Who had hiring and firing - did Mr. Kunzi have the ability to get you fired if he wanted?" Trial Counsel responded, "Do I know or do I suspect?" He was then asked, "Do you suspect?" Trial Counsel responded, "I suspect that Mr. Kunzi had control over the situation, and that Pam Webster pretty much did whatever he wanted her to do. And I - and Kunzi had a history of when he decided that

someone needed to leave, he slowly built up a file in order to get rid of them, as evidenced by some of the attorneys. But what he did with - with me was, he started that deal with the no insurance and then with the then with the - with the maintaining files. Neither one of those had anything to do with me, but I know they were using that as their" (Appx. 0428-0429)

Trial Counsel had negotiated the terms of his contract to perform public defender services in Nye County with the Nye County District Attorney. In fact, Trial Counsel negotiated the termination of his previous contract that his firm, Gibson and Kuehn, had in effect as the Nye County Public Defender with the Nye County District Attorney. The Nye County District Attorney represented Trial Counsel at two (2) separate hearings before the Nye County Board of Commissioners as an advocate and as Trial Counsel in his bid to be awarded a contract as Public Defender after termination of his firm's contract as the Nye County Public Defender. After being awarded a contract to perform public defender services, the Nye County District Attorney assumed control of the public defender contracts and was Trial Counsel's supervisor.

Trial Counsel never disclosed this relationship to Appellant during his representation. Petitioner had a right to counsel that was independent of the District Attorney who was prosecuting him. In Cuyler v. Sullivan, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest which is present in this case.

In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Trial Counsel has breached his duty of loyalty by negotiating his contract to perform public defender services with the Nye County District Attorney and by working under the supervision of the Nye County District Attorney after that contract was obtained.

Prejudice is presumed only if the Appellant demonstrates that counsel "actively represented conflicting interests" which is present since Trial Counsel owed his continued employment to serving the interests of the Nye County District Attorney. This actual conflict of interest adversely affected his lawyer's performance since the Appellant received representation from Trial Counsel that the Nye County District Attorney felt he was entitled to, not what he deserved.

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). There was not an adversarial system present in Nye County at this time and as a result there were no just results.

CONCLUSIONS AND RELIEF SOUGHT

In conclusion, the District Court erred when it denied the Appellant's Writ of Habeas Corpus (Post-Conviction) and the Supplemental Points and Authorities in Support of Post-Conviction Writ after an Evidentiary Hearing. This brief

contains six (6) incidents of ineffective assistance of counsel that violate the standards of Strickland that deserve a new trial.

ROUTING STATEMENT

Appellant believes that the case should be assigned to the Court of Appeals pursuant to NRAP 17, there being no issue warranting retaining the case.

CERTIFICATE OF COUNSEL UNDER NRAP 28A

I hereby certify that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the Brief regarding matters in the record be supported by a reference to the page and volume number of the appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I hereby certify that this Appellant's Opening Brief complies with the formatting requirements of Rule 32(a)(4)-(6) because this Appellant's Opening Brief has been prepared using Microsoft Word 2016 in Times New Roman 14. I further certify that this Appellant's Opening Brief complies with the page

limitations stated in Rule 32(a)(7) by being less than 30 pages in length and is less than 14,000 words.

SUBMITTED this 22nd day of October, 2021.

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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I am an agent or employee of the above attorney, and that on the 2nd day of November, 2021, I served the above and foregoing **APPELLANT'S OPENING BRIEF** by depositing a copy in the United States mails, postage prepaid, addressed to the f or parties at their last known addresses as indicated below:

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