

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

3 Electronically Filed
4 Oct 21 2021 08:52 p.m.
5 Elizabeth A. Brown
6 Clerk of Supreme Court

6 CRYSTAL YVONNE AUSTIN,

CASE NO.: 83345

7 Appellant,

8 vs.

9 THE STATE OF NEVADA,

10 Respondent,

11 **ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND**
12 **FOR THE COUNTY OF NYE, THE HONORABLE ROBERT LANE,**
13 **PRESIDING**

14 **APPELLANT'S OPENING BRIEF**

16 David H. Neely III, Esq.
17 NV. Bar No. 3891
18 3520 E. Tropicana Ave., Suite D-1
19 Las Vegas, Nevada 89121
Attorney for Appellant

Aaron Ford, Esq.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
Attorneys for Respondent

20 Chris Arabia, Esq.
21 Nye County District Attorney
22 P.O. Box 39
23 Pahrump, Nevada 89041
24

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

STATEMENT OF THE ISSUES..... 4

STATEMENT OF THE CASE..... 3

STATEMENT OF FACTS 3

ARGUMENT 3

CONCLUSIONS AND RELIEF SOUGHT 24

ROUTING STATEMENT..... 24

CERTIFICATE OF COUNSEL UNDER NRAP 28A..... 24

CERTIFICATE OF SERVICE BY MAIL 26

1 **INDEX OF CASES AND AUTHORITIES**

2
3 **CASES**

4 Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992).....10

5 Gonzales v. State, 136 Nev. Adv. Op. 60, 476 P. 3d 84, 90 (Nev. App. 2020) 16, 23

6 Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981)10

7 Hargrove v. State, 100 Nev. 498, 686 P.2d 222, (1984)..... 9, 10, 20

8 Kirksey v. State, 112 Nev. 980, 992, 923 P.2d 1102, 1110 (1996).....20

9 Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994)..... 10, 14

10 Means v. State, 120 Nev. 1001, 103 P3d 25, 32, (2004) 13, 14, 20

11 Sanborn v. State, 107 Nev. 399, 812 P.2d 1279, 1283 (1991) 11, 12, 16, 22

12 Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) 10, 11, 20

13
14
15 **NEVADA REVISED STATUTES**

16 NRS 34.7709

17 NRS 34.81023

18
19 **OTHER AUTHORITIES**

20 Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001)19

21 Hill v. Lockhart, 474 U.S. 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).... 14, 15, 20

22 Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300, (1988).....11

1 Strickland v. Washington, 466 U.S. 668 (1984).. 2, 3, 10, 11, 12, 13, 15, 16, 17, 18,

2 19, 20, 23, 25, 26

3 United States v. Arvantis, 902 F. 2d 489, 494-495 (7th Cir. III, 1990).....14

4
5 //

6 //

7 //

8 //

9 //

10 //

11 //

12 //

13 //

14 //

15 //

16 //

17 //

18 //

19 //

20 //

21 //

22 //

23 //

24 //

1 On 01/29/2018, a Cont'd Arraignment Hearing was held in District Court
2 (Appx. 0036),

3 On 03/15/2018, an Order for Competency Evaluation was filed in District
4 Court (Appx. 0041),

5 On 03/15/2018, an Order on Stipulation for Continuance was filed in District
6 Court (Appx. 0044),

7 On 03/15/2018, a Stipulation for Continuance was filed in District Court
8 (Appx. 0045),

9 On 05/14/2018, a Status Check Re: Competency Evaluation was held in
10 District Court (Appx. 0046),

11 On 06/16/2018, an Order for Competency Evaluation was filed in District
12 Court (Appx. 0049),

13 On 06/18/2018, an Order for Third Competency Evaluation was filed in
14 District Court (Appx. 0052),

15 On 07/16/2018, a Cont'd Status Check was held in District Court (Appx.
16 0055),

17 On 08/27/2018, a Status Check Setting Trial Dates was filed in District
18 Court (Appx. 0061),

19 On 08/31/2018, an Order Setting Jury Trial was filed in District Court
20 (Appx. 0065),

1 On 09/19/2018, a Notice of Witnesses was filed in District Court (Appx.
2 0067),

3 On 09/19/2018, a Request for Disclosure was filed in District Court (Appx.
4 0070),

5 On 09/19/2018, a Request to Admit Declaration(s) at Trial was filed in
6 District Court (Appx. 0072),

7 On 09/19/2018, a State's Notice of Expert Witness(es) was filed in District
8 Court (Appx. 0077),

9 On 12/03/2018, a Calendar Call was held in District Court (Appx. 0084),

10 On 01/14/2019, Cont'd Status Check was held in District Court (Appx.
11 0087),

12 On 02/11/2019, a Status Check was held in District Court (Appx. 0090),

13 On 02/14/2019, an Order Setting Jury Trial was filed in District Court
14 (Appx. 0093),

15 On 05/24/2019, a Motion to Compel Production of Discovery and Brady
16 Material was filed in District Court (Appx. 0095),

17 On 05/24/2019, a Motion to Exclude Blood Test Results was filed in District
18 Court (Appx. 0123),

19 On 06/11/2019, an Opposition to Motion to Exclude Blood Results was filed
20 in District Court (Appx. 0139),

21 On 06/20/2019, a Court Order was filed in District Court (Appx. 0154),
22
23
24

1 On 06/24/2019, a Calendar Call was held in District Court (Appx. 0157),

2 On 06/25/2019, a Venire was filed in District Court (Appx. 0160),

3 On 07/15/2019, a Guilt Plea Agreement was filed in District Court (Appx.
4 0169),

5 On 07/15/2019, an Arraignment/Change of Plea Hearing was held in District
6 Court (Appx. 0181),

7 On 09/16/2019, a Stipulation to Continue was filed in District Court (Appx.
8 0190),

9 On 09/18/2019, an Order to Continue was filed in District Court (Appx.
10 0191),

11 On 10/28/2019, a Cont'd Sentencing Hearing was held in District Court
12 (Appx. 0192),

13 On 12/02/19, a Cont'd Sentencing Hearing was held in District Court (Appx.
14 0202),

15 On 01/13/2020, a Motion to Reconsider Sentence was filed in District Court
16 (Appx. 0206),

17 On 01/13/2020, a Sentencing Hearing was held in District Court
18 (Appx. 0211),

19 On 01/14/2020, a Judgment of Conviction was filed in District Court (Appx.
20 0233),

1 On 01/23/2020, an Opposition to Motion to Reconsider Sentence was filed
2 in District Court (Appx. 0237),

3 On 02/24/2020, a Hearing on Motion to Reconsider Sentence was held in
4 District Court (Appx. 0240),

5 On 02/26/2020, an Order was filed in District Court (Appx. 0244),

6 On 06/08/2020, a Motion to Withdraw Counsel was filed in District Court
7 (Appx. 0249),

8 On 06/08/2020, a Request for Records was filed in District Court (Appx.
9 0252),

10 On 06/08/2020, a Request for Submission of Motion was filed in District
11 Court (Appx. 0253),

12 On 06/10/2020, an Order to Proceed in Forma Pauperis was filed in District
13 Court (Appx. 0255),

14 On 06/10/2020, an Order to Withdraw Counsel was filed in District Court
15 (Appx. 0257),

16 On 07/17/2020, an Affidavit was filed in District Court (Appx. 0258),

17 On 07/17/2020, a Motion for Appointment of Counsel was filed in District
18 Court (Appx. 0262),

19 On 07/17/2020, a Petition for Writ of Habeas Corpus was filed in District
20 Court (Appx. 0264),

1 07/17/2020, a Request for Submission of Motion was filed in District Court
2 (Appx. 0275),

3 On 07/31/2020, an Order Appointing Counsel was filed in District Court
4 (Appx. 0277),

5 On 07/31/2020, an Order to Proceed in Forma Pauperis was filed in District
6 Court (Appx. 0279),

7 On 10/23/2020, a Petitioner's Supplemental Points and Authorities in
8 Support of Post-Conviction Writ was filed in District Court (Appx. 0281),

9 On 10/28/2020, an Order for State Response was filed in District Court
10 (Appx. 0294),

11 On 12/16/2020, an Order to Continue was filed in District Court (Appx.
12 0296),

13 On 01/11/2021, a Motion to Dismiss and Answer to Petition for Writ of
14 Habeas Corpus (Post-Conviction) was filed in District Court (Appx. 0297),

15 On 01/12/21, a Certificate of Service was filed in District Court (Appx.
16 0303),

17 On 02/17/2021, a Petitioner's Reply to Motion to Dismiss Petitioner for Writ
18 of Habeas Corpus (Post-Conviction) was filed in District Court (Appx. 0304),

19 On 08/04/2021, a Court Order was filed in District Court (Appx. 0310),

20 On 08/06/2021, a Case Appeal Statement was filed in District Court (Appx.
21 0320),

1 On 08/06/2021, a Notice of Appeal was filed in District Court (Appx. 0323),

2 On 08/12/2021, a Request for No Transcript Proceedings was filed in
3 District Court (Appx. 0325)

4 **ARGUMENT**

5 **1. STANDARD UPON REVIEW OF PETITION**

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

8 1. The judge or justice, upon review of the return, answer and all supporting
9 documents which are filed, shall determine whether an evidentiary hearing is
10 required. A petitioner must not be discharged or committed to the custody of a
11 person other than the respondent unless an evidentiary hearing is held.

12 2. If the judge or justice determines that the petitioner is not entitled to relief
13 and an evidentiary hearing is not required, he shall dismiss the petition without a
14 hearing.

15 3. If the judge or justice determines that an evidentiary hearing is required,
16 he shall grant the writ and shall set a date for the hearing.

17 Whereas here, the Petition sets forth specific allegations in the Petition or
18 accompanying brief which if true, would entitle the petitioner to an evidentiary
19 hearing unless those claims are repelled by the record. Hargrove v. State, 100 Nev.
20 498, 686 P.2d 222, (1984); Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994).
21 As stated in Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992):
22
23
24

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

6 **2. INEFFECTIVENESS OF COUNSEL UNDER STRICKLAND**

7 To state a claim of ineffective assistance of counsel that is sufficient to
8 invalidate a judgment of conviction, a defendant must demonstrate that counsel's
9 performance fell below an objective standard of reasonableness, and that counsel's
10 errors were so severe that they rendered the jury's verdict unreliable. Strickland v.
11 Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504
12 (1984), cert. Denied, 471 U.S. 1004 (1985). The Petitioner must show that his
13 counsel's performance was deficient, and that the deficient performance resulted in
14 prejudice. Warden v. Lyons, 100 Nev. 430,432, 683 P.2d 504, 505 (1984). An
15 analysis does not require that both prongs be addressed if the showing of either is
16 insufficient. In order to show prejudice, the petitioner must show "reasonable
17 probability that, but for counsel's errors, the result of the proceeding would have
18 been different". Strickland, 466 U.S. at 694. "A reasonable probability is a
19 probability sufficient to undermine confidence in the outcome". Id. It is the
20 petitioner's burden to establish both prongs.

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

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

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

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

14 In a post-conviction habeas petition, we evaluate claims of ineffective
15 assistance of counsel under the test established in Strickland v. Washington, 466
16 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In that 1984 decision, the
17 United States Supreme Court created a fair, workable and, as it turns out, durable
18 standard that replaced Nevada’s traditional “farce and sham test”. Strickland
19 dictates that our evaluation begins with the “strong presumption that counsel’s
20 conduct falls within the wide range of reasonable professional assistance”.
21 Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. 2052 (1984). The Court
22
23
24

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

16 Choosing consistency with federal authority, we now hold that a habeas
17 corpus petitioner must prove the disputed factual allegations underlying his
18 ineffective assistance claim by a preponderance of the evidence. Therefore, when a
19 petitioner alleges ineffective assistance of counsel, he must establish the factual
20 allegations which form the basis of his claim of ineffective assistance by a
21 preponderance of the evidence. Next, as stated in Strickland, the petitioner must
22 establish that those facts show counsel’s performance fell below an objective
23 standard of reasonableness, and finally the petitioner must establish prejudice by
24

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

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

8 Counsel’s constitutionally defective performance affected the outcome of
9 the plea process.

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

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

18 The United States Supreme Court in Hill, 474 U.S. 58, stated that, “the two
19 part Strickland v. Washington test applies to challenges to guilty pleas on
20 ineffective assistance of counsel. In the context of guilty pleas, the first half of the
21 Strickland v. Washington test is nothing more than a restatement of the standard of
22
23
24

1 attorney competence already set forth. The second, or prejudice requirement, on
2 the other hand, focuses on whether counsel’s constitutionally ineffective
3 performance affected the outcome of the plea process. In other words, in order to
4 satisfy the prejudice requirement, the defendant must show that there is a
5 reasonable probability that, but for counsel’s errors, he would have insisted on
6 going to trial.
7

8 In many guilty plea cases, the ‘prejudice’ inquiry will closely resemble the
9 inquiry engaged in by court’s reviewing ineffective assistance challenges to
10 convictions obtained through a trial. For example, where the alleged error of
11 counsel is a failure to investigate or discover potentially exculpatory evidence, the
12 determination whether the error “prejudiced’ the defendant by causing him to plead
13 guilty rather than go to trial will depend on the likelihood that discovery of the
14 evidence would have led counsel to change his recommendation as to the plea.
15 This assessment, in turn, will depend in large part on a prediction whether the
16 evidence likely would have changed the outcome of the trial. Hill, 474 U.S. 59,
17 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985).
18

19 (A) The District Court erred when it failed to find that Trial Counsel’s
20 failure to inform the Trial Court that the PSI used at her sentencing contained
21 errors which resulted in a longer sentence imposed upon the Petitioner was
22 ineffective assistance of counsel pursuant to Strickland.
23
24

1 The District Court stated in it's Order, "Petitioner's First Ground of
2 Ineffective Assistance of Counsel: Petitioner's first ground argues ineffective
3 assistance when her trial counsel failed to inform the Court that the PSI used at her
4 sentencing contained errors which resulted in a longer sentence imposed upon
5 Petitioner. (Appx. 0315)

6
7 After review of the pleadings, the Court finds that this ground is not
8 perceivably related to a challenge of entering the guilty plea and it must be
9 dismissed pursuant to NRS 34.810(1)(a) and the logic of Gonzales. (Appx. 0315)

10 In the Supreme Court case of Sanborn v. State, 107 Nev. 399, 81 P.2d 1279,
11 1283, the Court held, "Focusing on counsel's performance as a whole, and with
12 due regard for the strong presumption of effective assistance accorded counsel by
13 this court and Strickland, we hold that Sanborn's representation indeed fell below
14 an objective standard of reasonableness. Trial counsel did not adequately perform
15 pretrial investigation, failed to pursue evidence supportive of a claim of self-
16 defense, and failed to explore allegations of the victim's propensity towards
17 violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant
18 by the Sixth Amendment," Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

19
20
21 In Petitioner's own words, "Ineffective Counsel. I withdraw Daniel Martinez
22 due to cumulative errors on my PSI on my plea deal. The Justice Court Judge
23 Sullivan would not allow me to pay tickets (It was put on plea deal) However, it
24 was added to my PSI as unpaid tickets. I had none failure to appear. I brought a

1 doctors note which Judge Sullivan accepted and that was added to my PSI stated I
2 did not comply, 3 years and 7 months of random urine analysis, which I never was
3 dirty or did not pay. DA Vitto added a 2012 DUI that did not exist. He stated 2009,
4 2012. 2012 were DUI's. I had 2 DUI's in 2008. Both DUI's were to be through the
5 Diversion Program. I was an Honorable Discharge Oct. 2012 and Dec 2012 was
6 the conclusion of the Nye County case since I completed the program.”(Appx.
7 0288)

9 “The word ‘altercation’ keeps me from doing house arrest on the 305
10 program, 185 program. I never was allowed to the PNP with my attorney. I did not
11 know about the simple battery. I was told to squash your 2 traffic tickets the
12 malicious prosecution for telling the accounts of an event at Saddle West to the
13 best of my knowledge was going to bite me I had to sign the plea deal. So I did.
14 Unknown to me the “simple battery” was hidden in there to be dropped. It was
15 dropped. But, doing 4 years with the word ‘altercation’ being the nail in my
16 coffin.” (Appx. 0288)

18 “I was never given the report to review for errors. I received the report on
19 1/13/2020 as I was being handcuffed. I noticed many errors. I contacted Mr.
20 Martinez. He said no errors. You do not like it fire me. So I fired him.” (Appx.
21 0288)

23 “It states I would be allowed to review my PSI with my attorney. I was not
24 allowed. A letter of lies from Mrs. Cox, false testimony and errors on my PSI.

1 Resulted in my over the plea deal agreement. If my life is determined from a PSI.
2 Should it not be correct. I asked Daniel Martinez. I wrote to him on 2 occasions.
3 Sent me an away letter stating I was right and I should fire him. So I did.”(Appx.
4 0289)

5
6 Trial Counsel failed to adequately prepare for Sentencing and that failure
7 caused his client to receive a more severe sentence than what was agreed to in the
8 Guilty Plea Agreement. Trial Counsel had a duty to inform the Trial Court that the
9 PSI contained errors and have them corrected before going forward at Sentencing.

10 Counsel’s performance fell below an objective standard of reasonableness,
11 and his errors were so severe that it caused the Appellant to plead Guilty in the
12 instant case in violation of Strickland since there was a reasonable probability that
13 she would have chosen to go to trial if she had knew that Trial Counsel would fail
14 to adequately prepare for Sentencing.
15

16 (B) The District Court erred when it failed to find that Trial Counsel’s
17 failure to retain an investigator prior to entry of the guilty plea to investigate
18 Appellant’s case and to interview witnesses was ineffective assistance of counsel
19 pursuant to Strickland.
20

21 The District Court stated in it’s Order, “Petitioner’s second ground argues
22 that trial counsel failed to retain an investigator prior to entry of the guilty plea to
23 investigate Petitioner’s case and to interview witnesses.” (Appx. 0316)
24

1 “The Ninth Circuit acknowledged in Bragg v. Galaza, 242 F.3d 1082, 1088
2 (9th Cir. 2001), a claim of ineffective assistance of counsel for failing to investigate
3 requires proof of what the attorney would have discovered through further
4 investigation before a Petitioner can satisfy the Strickland standard. Bragg, at
5 1088. (Appx. 0316)
6

7 “To prove ineffective assistance of counsel, a petitioner must demonstrate
8 counsel’s performance was deficient in that it fell below an objective standard of
9 reasonableness and resulting prejudice such that there is a reasonable probability,
10 but for counsel’s errors, the outcome of the proceedings would have been different.
11 Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100
12 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). An
13 attorney must reasonably investigate in preparing for trial or reasonably decide not
14 to. Strickland, 466 U.S. at 691; Kirksey v. State, 112 Nev. 980, 992, 923 P.2d
15 1102, 1110 (1996). To demonstrate prejudice regarding the decision to enter a
16 guilty plea, a petitioner must demonstrate a reasonable probability, but for
17 counsel’s errors, petitioner would not have pleaded guilty and would have insisted
18 on going to trial. Hill v. Lockhart, 474 U.S 52, 58-59 (1985); Kirksey v. State, 112
19 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must
20 be shown, Strickland, 466 U.S. at 687, and the petitioner must demonstrate the
21 underlying facts by a preponderance of the evidence, Means v. State, 120 Nev.
22 1001, 1012, 103 P.3d 25, 33 (2004). To warrant an evidentiary hearing, a petitioner
23
24

1 must raise claims supported by specific allegations not belied by the record, and if
2 true, would entitle him to relief. See Hargrove v. State, 100 Nev. 498, 502-3, 686
3 P.2d 222, 225 (1984). (Appx. 0316-0317)

4 “Petitioner’s second argument appears to largely focus upon an investigation
5 being an invaluable resource. Petitioner alleges that an investigator could have
6 interviewed witnesses who saw the alleged altercation between the Petitioner and
7 Ms. Cox prior to her arrest and the Petitioner’s driving pattern at the time of the
8 alleged incident; that an investigation of the time of her alleged driving prior to the
9 blood draw would have been an invaluable resource in preparation of the Motion to
10 Exclude the Blood results; and that an investigator would have assisted Trial
11 Counsel into the allegations that as a result of the accident, Ms. Cox’s mother
12 suffered an injury that caused her death.”(Appx. 0317)

13 “Petitioner’s arguments regarding the hiring of an investigator are bare,
14 largely speculative, and she has not raised specific allegations as to what, if any,
15 evidence that an investigator would have found that could have changed the
16 outcome of the case.” (Appx. 0317)

17 “Further, even if Counsel’s actions fell below the objective standard of
18 reasonableness, the Petitioner has not established that she suffered prejudice.
19 While Petitioner claims an investigator would have been a valuable resource,
20 nothing is offered as to how any discovered facts would have affected the outcome
21 of the Motion to Exclude Blood Test Results. Further, to the extent the Petitioner
22
23
24

1 concentrates on the reliability of Ms. Cox as a witness and an investigator would
2 have Petitioner's recollection to be more accurate than Ms. Cox, the Petitioner
3 plead to Driving Under the Influence of Alcohol, With Prior Felony DUI
4 Conviction, which was supported by the record and the outcome of the Motion to
5 Exclude Blood Test Results. The Motion itself did not turn upon Ms. Cox's
6 testimony." (Appx. 0317-0318)
7

8 "As such, because the Petitioner's claims are bare and she cannot show that
9 she suffered prejudice, this claim must be dismissed." (Appx. 0318)

10 Trial Counsel failed to request fees for appointment of an investigator to
11 investigate the facts and circumstances that led to the Petitioner's arrest on Count I:
12 DUI Alcohol with Prior Felony Conviction, in violation of 484C.110(1)(d). An
13 investigator would have been an invaluable resource to interview witnesses who saw
14 the alleged altercation between the Petitioner and Ms. Cox prior to her arrest and
15 the Petitioner's driving pattern at the time of the alleged incident. In addition, an
16 investigation of the time of her alleged driving prior to the blood draw would have
17 been an invaluable resource in preparation of the Motion to Exclude the Blood
18 results.
19

20
21 Finally, an investigator would have assisted Trial Counsel into the
22 allegations that as a result of the accident, Ms. Cox's mother suffered an injury that
23 caused her death.
24

1 Counsel did not adequately perform pretrial investigation pursuant to
2 Sanborn v. State, 107 Nev. 856, 822 P.2d 11 (1991). Thus, he was “not functioning
3 as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland,
4 466 U.S. at 687, 104 S. Ct. at 2064.

5
6 Counsel’s performance fell below an objective standard of reasonableness,
7 and his errors were so severe that it caused the Appellant to plead Guilty in the
8 instant case in violation of Strickland since there was a reasonable probability that
9 she would have chosen to go to trial if a proper investigation had been conducted.

10 (C) The Trial Court erred when it failed to find that Trial Counsel’s failure
11 to impeach the testimony of the victim witness, Ms. Cox, at the Sentencing and as
12 a result Appellant received a harsher sentence due to the ineffective assistance of
13 counsel pursuant to Strickland.

14
15 The Trial Court stated in it’s Order, ”Petitioner’s Third Ground of
16 Ineffective Assistance of Counsel; Petitioner’s third ground argues that trial
17 counsel failed to impeach the testimony of the victim witness, Ms. Cox, at the
18 sentencing and as a result Petitioner received a harsher sentence due to his
19 ineffective assistance of counsel. (Appx. 0315)

20
21 After review of the pleadings, this Court finds that this ground is not
22 perceivably related to a challenge of entering the guilty plea and it must be
23 dismissed pursuant to NRS 34.810(1)(a) and the logic of Gonzales.(Appx. 0316)
24

1 In the Appellant's own words, "I signed a 2 to 5 plea deal. However, I was
2 double sentenced due to Ms. Cox's lies. If you read through the testimony she (Ms.
3 Cox) said I was out 4 years. I should be sentenced 4 years. This was all done
4 before Mr. Martinez and the DA could (address) Ms. Cox on her dramatization of
5 things that did not exist. (Appx. 0290)
6

7 "Ms. Cox was allowed Oct. 28, 2019 to read a 'story' of her unfactual
8 accounts. To which Judge Lane allowed to be submitted to PNP. Ms. Cox was
9 trying to get restitution and blame me for the death of her mother all the while not
10 involved in the wreck." (Appx. 0290-0291)
11

12 "Ms. Cox under oath. I was maliciously prosecuted by Ms. Cox. Ms. Cox
13 submitted receipts for 4 new tires. Her mother's medical proved no injuries, her
14 service dog - no proof no receipts nor were they listed as being involved. Ms.
15 Cox's mother wrote a statement submitted 1 year later which claimed I had open
16 container on the floorboard. A complete lie. Malicious prosecution. That's what
17 Nye County charged me with when making a police statement to the best of my
18 knowledge."(Appx. 0291)
19

20 "Ms. Cox stalled my case for 4 years trying to pin the blame of her mother's
21 death, which was I'm sure natural causes 2 years after June 1, 2016."(Appx.)

22 "DA Vitto told Ms. Cox she was stretching the truth. But the 'story' was
23 already incorporated in my report. PNP Pahump started it, Clark County finished
24 my report."(Appx. 0291)

1 “Ms. Cox is a fraud and a liar. Ms. Cox submitted receipts for 4 new tires?
2 She claims a ditch. She claims trees, her car was a sports car type (4 door KIA
3 Optima) is no sports car. Not involved in a wreck. Merely a Golddigger.” (Appx.
4 0291)

5 “With Ms. Cox perjuring herself, malicious prosecuting me with her
6 personal vendetta of me, stalking my residence all last year, manipulation of the
7 truth, the letter of lies, her trying to blame a natural COD of her mother on me.
8 Trying to snow over the Judge controlling the courtroom telling the Judge what my
9 sentence should be. Meanwhile, Mr. Martinez let her do whatever with no
10 objection. Told me all victims have a right to speak. I said she is no victim. Mr.
11 Martinez told me to shut up.” (Appx. 0291)

12 “
13 “The DA is the only one who basically called Ms. Cox a liar. But damage
14 was done.” (Appx. 0292)

15 Trial Counsel had a duty to defend his client at the Sentencing by objecting
16 to testimony that included falsehoods from Ms. Cox, the victim witness. Thus, he
17 was “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth
18 Amendment.” Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

19 Counsel’s performance fell below an objective standard of reasonableness,
20 and their errors were so severe that it caused their client to plead guilty in violation
21 of Strickland since there was a reasonable probability she would have chosen to go
22
23
24

1 trial if she knew she would be sentenced without her Trial Counsel defending her
2 by objecting to falsehoods uttered by the victim witness.

3 **CONCLUSIONS AND RELIEF SOUGH**

4 In conclusion, the District Court erred when it denied the Appellant’s Writ
5 of Habeas Corpus (Post-Conviction) and the Supplemental Points and Authorities
6 in Support of Post-Conviction Writ without an Evidentiary Hearing. This brief
7 contains three (3) incidents of ineffective assistance of counsel that violate the
8 standards of Strickland that deserve a new trial.
9

10 **ROUTING STATEMENT**

11 Appellant believes that the case should be assigned to the Court of Appeals
12 pursuant to NRAP 17, there being no issue warranting retaining the case.
13

14 **CERTIFICATE OF COUNSEL UNDER NRAP 28A**

15 I hereby certify that I have read this Appellant’s Opening Brief, and to the
16 best of my knowledge, information, and belief, it is not frivolous or interposed for
17 any improper purpose, such as to harass or to cause unnecessary delay or needless
18 increase in the cost of litigation. I further certify that this Brief complies with all
19 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which
20 requires every assertion in the Brief regarding matters in the record be supported
21 by a reference to the page and volume number of the appendix where the matter
22 relied on is to be found. I understand that I may be subject to sanctions in the event
23
24

1 that the accompanying Brief is not in conformity with the requirements of the
2 Nevada Rules of Appellate Procedure.

3 I hereby certify that this Appellant's Opening Brief complies with the
4 formatting requirements of Rule 32(a)(4)-(6) because this Appellant's Opening
5 Brief has been prepared using Microsoft Word 2016 in Times New Roman 14. I
6 further certify that this Appellant's Opening Brief complies with the page
7 limitations stated in Rule 32(a)(7) by being less than 30 pages in length and is less
8 than 14,000 words.
9

10 **SUBMITTED** this 2 day of October, 2021.

11
12
13 
14 DAVID H. NEELY III
15 NV. Bar No. 003891
16 3520 E. Tropicana Ave., Suite D-1
17 Las Vegas, Nevada 89121
18 Attorney for Appellant
19
20
21
22
23
24

