

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. NEWSOME, JR.,)

#1194269,)

Appellant,)

v.)

STATE OF NEVADA,)

Respondent.)

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CASE NO.: 83475 Elizabeth A. Brown
Clerk of Supreme Court

E-FILE

D.C. Case: C-17-321043-1

Dept.: IX

APPELLANT'S OPENING BRIEF

**Appeal from the denial of a Post Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 000854
Law Office of Terrence M. Jackson
624 South 9th Street
Las Vegas, Nevada 89101
(702) 386-0001
Terry.jackson.esq@gmail.com

STEVEN B. WOLFSON
Nevada Bar No. 001565
Clark County District Attorney
200 E. Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2750
Steven.Wolfson@clarkcountynvda.com

AARON D. FORD
Nevada Bar No. 007704
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

...

Counsel for Appellant

Counsel for Respondent

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_____)	

NRAP 26.1 DISCLOSURE

The undersigned counsel of record for RICHARD ALLAN NEWSOME, JR., hereby certifies pursuant to NRAP 26.1(a) that there are no persons nor entities associated within my law practice and that I am a sole practitioner. Furthermore, there are no persons nor entities that have any interest or financial interest in Law Office of Terrence M. Jackson. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 20th day of January, 2022.

//s// Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

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APPELLANT'S OPENING BRIEF

Appeal from the denial of a Post Conviction Petition for Writ of Habeas Corpus.

Eighth Judicial District Court, Clark County

NATURE OF THE ACTION

This is an Appeal from the denial of Defendant's Post Conviction Petition for Writ of Habeas Corpus.

SPECIFICATION OF ERROR

1. Whether the District Court erred in finding the Defendant's Post Conviction Petition should be procedurally barred;

...

A. Whether the Defendant demonstrated sufficient good cause and prejudice to overcome any procedural bars;

B. Whether applying procedural bars in this case resulted in a fundamental miscarriage of justice;

2. Whether the District Court erred when it did not find defense counsel had a prejudicial conflict of interest in simultaneous representing the Defendant and his mother;

3. Whether the District Court erred in not finding defense counsel was ineffective under *Strickland* for failing to do an adequate investigation and preparation before Defendant pled guilty;

4. Whether the District Court erred by finding the plea canvas was sufficient in itself to establish Defendant's guilty plea was valid as a knowing, voluntary and intelligent plea;

5. Whether the District Court erred in denying Defendant an evidentiary hearing to show ineffective assistance of counsel and to show Defendant had good cause to overcome all procedural bars to habeas corpus relief;

6. Whether the accumulation of Error in this case requires reversal of Defendant's conviction.

SUMMARY OF THE ARGUMENT

The Defendant was represented by attorneys John Momot and Yi Len Zheng who also represented the Defendant's co-defendant, Tiana Douglas, who was the Defendant's mother. The facts show a clear and prejudicial conflict of interest because of this dual representation by counsel. The purported waiver of any conflict by the Defendant was not an intelligent or voluntary waiver.

The District Court erred by not recognizing the obvious conflict of interest. The District Court also clearly erred in finding that Defendant's petition should be procedurally barred under NRS 34.726 as untimely, and as successive, NRS 34.810. Defendant however demonstrated sufficient good cause and prejudice to overcome any procedural bars raised by the State. *See*, NRS 34.726.

When the District Court erred by applying procedural bars in this case, Defendant was so gravely prejudiced that it resulted in a "fundamental miscarriage of justice." *See, Pellegrini v. State*, 117 Nev. 860 (2001) and *Bejarano v. State*, 131 Nev. ___, 146 P.3d 265 (2006). His attorney's conflict of interest prevented him from showing actual innocence to the second degree murder charge.

The District Court should have recognized the obvious conflict of interest of defense counsel representing both Defendant and co-defendant, his mother, was so

prejudicial that Defendant could not receive effective assistance of counsel or due process. The Court should have found that the purported 'waiver' of the conflict was invalid because the Defendant was not sophisticated enough to understand the legal problems which would arise from the joint legal defense with his mother and with the same attorneys representing each of them. The Court at the plea hearing did not even attempt to do any canvas about the risks and difficulties inherent in the dual legal representation by Mr. Momot. (A.A. 130-135)

When the Defendant and his mother pled guilty, the District Court also failed to scrutinize the negotiation(s) and failed to scrutinize carefully whether the Defendant's guilty plea was valid. The guilty plea canvas was woefully inadequate because of the unique circumstances the conflict created and therefore did not protect the Defendant from an unintelligent and involuntary plea.

The District Court then wrongfully ignored these errors which were addressed in the Defendant's Habeas Corpus Petition and then even denied a necessary evidentiary hearing on the conflict of interest question and on the issues surrounding defense counsel's pretrial investigation and preparation. (A.A. 237)

JURISDICTIONAL STATEMENT

Defendant/Appellant claims jurisdiction pursuant to NRS 177.015(3).

Defendant filed timely Notice of Appeal pursuant to statute on September 2, 2021, within the thirty (30) day time limit established by the Nevada Rules of Appellate Procedure 4(b). This is an appeal from the denial of a post-conviction Writ of Habeas Corpus.

ROUTING STATEMENT

This is an appeal on a post-conviction Petition involving a class A felony, second degree murder with use of a deadly weapon. Pursuant to NRAP 17(b)(1), because this case involves a class A felony, which resulted in a sentence of ten years to life imprisonment, it should be retained by the Nevada Supreme Court.

STATEMENT OF LEGAL ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE DISTRICT COURT ERRED IN FINDING DEFENDANT'S PETITION SHOULD HAVE BEEN PROCEDURALLY BARRED;**
 - A. Whether Defendant can demonstrate good cause and prejudice for any delay in filing his Petition;
 - B. Whether applying procedural bars in this case resulted in a fundamental miscarriage of justice;
- II. WHETHER THE DISTRICT COURT ERRED IN NOT FINDING THE SIMULTANEOUS REPRESENTATION BY DEFENSE COUNSEL OF THE**

DEFENDANT AND CO-DEFENDANT, WHO WAS THE DEFENDANT'S MOTHER, LED TO PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE DEFENDANT;

- III. WHETHER THE DISTRICT COURT ERRED BY NOT FINDING DEFENSE COUNSEL WERE INEFFECTIVE PREPLEA BECAUSE THEY HAD NOT ADEQUATELY INVESTIGATED AND PREPARED AS REQUIRED BY *STRICKLAND* v. *WASHINGTON*;
- IV. WHETHER THE DISTRICT COURT'S PLEA CANVAS WAS ADEQUATE TO ESTABLISH DEFENDANT'S PLEA OF GUILTY WAS FREELY, VOLUNTARILY AND INTELLIGENTLY MADE AND NOT TAINTED OR INFLUENCED BY HIS ATTORNEYS' CONFLICT OF INTEREST;
- V. WHETHER THE DISTRICT COURT ERRED BY DENYING THE DEFENDANT AN ADEQUATE EVIDENTIARY HEARING TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL AND TO SHOW HIS PETITION SHOULD NOT BE BARRED;
- VI. WHETHER THE ACCUMULATION OF ERROR REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

...

STATEMENT OF THE CASE

On February 2, 2017, Defendant Richard Newsome, Jr. (hereinafter “Defendant”) was charged with the following: Count 1 - Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165); Count 2 - Assault With Use of a Deadly Weapon (Category B Felony - NRS 200.471). (A.A. 03, 04s)

On December 14, 2017, Defendant pled guilty to one count of Second-Degree Murder With Use of a Deadly Weapon. (A.A. 129-135) His co-defendant, Tianna Michelle Douglas, pled guilty on the same day to gross misdemeanor charges of accessory to murder. (A.A. 135-139)

On February 8, 2018, Defendant received a sentence of 10 years to life in the Nevada Department of Corrections. (A.A. 126-128) The Judgment of Conviction was filed on March 5, 2018. (A.A. 101-102) The co-defendant, Tianna Michelle Douglas, was sentenced to a term of 364 days in jail. (A.A. 102, 127)

On February 1, 2019, Defendant filed a Petition for Writ of Habeas Corpus (“First Petition”), Supplemental Petition for Writ of Habeas Corpus (“Supplement”), Motion for Appointment of Counsel (“Motion”), and Request for an Evidentiary Hearing (“Request”). On May 1, 2019, the State filed a response to Defendant’s First

Petition, Supplement, Motion, and Request. On May 28, 2019, this Court denied Defendant's First Petition, Supplement, Motion, and Request for an Evidentiary Hearing. The Findings of Fact, Conclusions of Law and Order were filed on June 26, 2019. On July 13, 2020, the Nevada Court of Appeals affirmed the district court's denial of Defendant's First Petition. *Newsome v. State*, No. 79044-COA (Order of Affirmance, July 13, 2020) (A.A. 145-147) Remittitur issued on August 10, 2020. (A.A. 149)

After a second Habeas Petition had been denied, on March 9, 2021, Defendant filed a Motion to Correct Illegal Sentence. (A.A.150-156) On March 31, 2021, Terrence M. Jackson, Esq., confirmed as counsel. (A.A.157) On April 20, 2021, the State filed its Opposition to Defendant's Motion to Correct Illegal Sentence. (A.A.158-163) On June 2, 2021, Defendant filed Supplemental Points and Authorities in Support of Writ of Habeas Corpus for Post Conviction Relief ("Third Habeas Petition"). (A.A. 164-181) The State filed a Response to the Writ on July 7, 2021. (A.A. 182-205)

On July 23, 2021, Defendant filed a Reply to the State's Response. (A.A. 206-210) After a hearing on August 4, 2021, the District Court denied Defendant's Petition for Habeas Corpus, issuing Findings of Fact, Conclusions of Law and Order,

on August 20, 2021. (A.A. 211-224) On September 2, 2021, Defendant filed Notice of Appeal. (A.A. 226-227)

FACTUAL STATEMENT

The Defendant, Richard A. Newsome, was arrested and charged with murder with the use of a deadly weapon and assault with a deadly weapon with substantial bodily harm. He pled guilty to the charge of second degree murder on December 14, 2017.

A competent defense investigation could have established that there existed a viable defense to both charges in the Grand Jury Indictment, because of the Defendant's lack of the necessary intent to commit second degree murder and the other crimes in the original Indictment.

Defendant believes the facts show that there was a reasonable doubt as to his guilt to the charge of second degree murder. However, despite the facts which may have shown a reasonable doubt as to Defendant's guilt, counsel for Defendant, John J. Momot and Yi Lin Zheng, persuaded Defendant to plead guilty to a negotiated plea of second degree murder. Defendant entered this plea of guilty, while he was not fully aware of his rights, including his right to a jury trial. (A.A. 129-135) He did not know how he could assert his Sixth Amendment rights by going to trial because of lack of

competent, conflict free advice.

Defendant was sentenced on February 8, 2018, to a term of life with a minimum of ten years plus a consecutive term of 240 months with minimum parole in ten years. (A.A. 100-101, 126) The co-defendant, Tianna Michelle Douglas, aka Tianna Michelle Thomas, was the Defendant's mother. She also entered a negotiated plea in this case to a lesser charge, i.e., accessory to murder, a gross misdemeanor. She was also represented by the same counsel as the Defendant, John J. Momot and Yi Lin Zheng. She was sentenced to 364 days in jail. (A.A. 102)

These facts show that the representation of the Defendant and the co-defendant on these serious charges, under these circumstances, created an actual and substantial conflict of interest for attorneys John J. Momot and Yi Lin Zheng. This conflict caused them to render ineffective assistance of counsel for Defendant, Richard A. Newsome, Jr.

Although there was a purported Waiver of Actual or Potential Conflict of Interest, filed on February 16, 2017, (A.A. 11-13), it is respectfully submitted this purported waiver it was not a valid or a knowing and intelligent waiver because of the fact that the Defendant, Richard A. Newsome, Jr., did not have independent legal advice. He did not fully understand the waiver or understand the consequences of the

waiver. Defendant could not understand how the waiver might affect his future rights.

ARGUMENT

I. THE DISTRICT COURT ERRED BY WRONGFULLY DISMISSING DEFENDANT’S PETITION ON THE GROUND IT WAS PROCEDURALLY BARRED.

A. Whether the Defendant Demonstrated Good Cause and Prejudice Sufficient to Overcome Any Procedural Bars.

At the Evidentiary Hearing Defendant argued that although his Petition was filed beyond the statutory time bar of NRS 34.726, it was filed within a “reasonable time” after the basis for the claim became evident. (A.A. 164-181) In *Rippo v. State*, 122 Nev. 1086, 368 P.3d 729 (2016), the Nevada Supreme Court discussing procedural bars and the need for finality in criminal cases stated the circumstances of when procedural default would be excused, saying: . . .

Rippo’s petition was not filed within that time period. To excuse the delay in filing the petition, *Rippo* had to demonstrate good cause for the delay. NRS 34.726(1). A showing of good cause for the delay has two components: (1) that the delay was not the petitioner’s fault and (2) that “dismissal of the petition as untimely will unduly prejudice the petitioner.” *Id.*

The first component of the cause standard under NRS 34.726(1) requires a showing that “an impediment external to the defense” prevented the petitioner from filing the petition within the time constraints provided by the statute. *Clem*, 119 Nev. at 621, 81 P.3d at 525; *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. “A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default.” *Clem*, 119 Nev. at 621, 81 P.3d at 525; *see also Hathaway*, 119 Nev. at 252, 71 P.3d at 506. (Emphasis added)

...

Defendant respectfully submits that in this case, as opposed to *Rippo*, he could demonstrate good cause for any delay. His delay in this case was not intentional. It resulted principally from his lack of legal sophistication and his inability to obtain counsel immediately after conviction.

Other equitable factors in this case clearly outweigh the State’s interests in finality and the protection against “stale” claims. In this case the Defendant’s conviction is fundamentally unfair and ‘manifestly unjust’ and therefore must be set aside. The hearing established numerous impediments which existed that prevented Defendant Richard Newsome from completing a timely habeas petition, including his initial lack of post-conviction counsel and his lack of legal sophistication.

Most importantly, the issue of Defendant’s factual innocence is the most

important exception to the procedural bar of NRS 34.726.1. *See, Boyd v. Thompson*, 147 F.3d 1124 (9th Cir.1998). This narrow exception to the procedural bar is reserved for extraordinary cases. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992); *Murray v. Carrier*, 477 U.S. 478 (1986).

Defendant respectfully claims his case was one of those extraordinary cases where a narrow exception to procedural bars was necessary to ensure that justice is done. Defendant submits he established enough equitable factors also existed which precluded his Petition in this case from being time barred. Especially important was the conflict of interest his attorneys had in representing the Defendant while also representing the co-defendant. This conflict of interest was a due process violation that must be addressed.

...

B. The District Court Erred by not Finding That Applying Procedural Bars Would Result in a Fundamental Miscarriage of Justice.

The Court ignored all the equities which compelled considering the merits of his Habeas Petition. It is respectfully submitted even though Defendant's Petition was untimely, procedurally barring his Petition in this case resulted in a fundamental miscarriage of justice.

NRS 34.726(1) provides that a post-conviction habeas petition challenging the validity of a judgment of conviction must be filed within one year after this court issues the remittitur from a timely direct appeal. NRS 34.810(1)(b) provides that a post-conviction habeas petition must be dismissed where the defendant's conviction was the result of a trial and his claims could have been raised either before the trial court, on direct appeal in a previous petition, or in any other proceeding. And NRS 34.810(2) provides that a *second or successive petition must be dismissed* if the defendant fails to allege new or different grounds and the prior petition was decided on its merits or if the defendant's failure to assert those grounds in the prior petition constituted an "abuse of the writ."

However, procedure default will be excused if the petitioner established both good cause for the default and prejudice. NRS 34.726(1), NRS 38.810(3). Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not necessarily available. *Harris v. Warden*, 114 Nev. 956, 959, 964 P.2d 785, 787.

Even absent a showing of good cause, this court will consider a claim if the petitioner can demonstrate that applying procedural bars would result in a fundamental miscarriage of justice. *Bejarano v. State*, 131 Nev. ___, 146 P.3d 265, 270 (Nev. 2006). See, *State v. Bennett*, 119

Nev. 589, 597-98, 81 P.2d 1, 7 (2003), *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). (Emphasis added)

...

What could be more fundamental than having a deeply conflicted counsel in a murder case? Would the Defendant have entered the plea of guilty he did if he had counsel who was representing only him, not him and his mother? This Writ should not be barred by strict procedural rules because in this case the harm of the prior attorney's failure to provide conflict free representation must be litigated.

II. THE DISTRICT COURT ERRED BY NOT FINDING THE DUAL, SIMULTANEOUS REPRESENTATION BY COUNSEL OF THE DEFENDANT AND THE CODEFENDANT, HIS MOTHER, WAS IMPROPER AND CREATED A GRAVE CONFLICT WHICH SEVERELY PREJUDICED DEFENDANT'S SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.

It is respectfully submitted the dual representation by counsel of the Defendant and his co-defendant, Tianna M. Douglas, violated his Fifth Amendment right to due process of law. *Townsend v. Sain*, 372 U.S. 293 (1963)

Defendant submits the law is clear that when the defense counsel has a conflict

of interest when representing the Defendant, it is very difficult for the Defendant to receive effective assistance of counsel. Many cases have recognized that an actual conflict, such as existed in this case, will create such a prejudice to the Defendant that it mandates reversal. *See, Cuyler v. Sullivan*, 446 U.S. 335 (1980); *see also, Glasser v. United States*, 315 U.S. 60 (1942).

The mere fact there was a purported waiver of the conflict by the Defendant in this case, which was signed by the Defendant, is irrelevant. It is respectfully submitted the purported “waiver of actual/potential conflict,” signed February 16, 2017, was not valid. (A.A. 11-13) It was prepared by attorney John Momot. It was not a document that should be considered sufficient by itself to establish that the Defendant’s actual consent to waive the inherent conflict of interest of joint representation. It is clear it was not a knowing, voluntary, or intelligent waiver of the conflict of interest. *See, Armstrong v. Warden*, 90 Nev. 5, 518 P.2d 147 (1974).

A review of the totality of the facts and circumstances establish that the Defendant must have felt extraordinary pressure to agree with his own mother’s choice of an attorney. He was only seventeen years old. His mother, Tianna Michelle Douglas, aka Tianna Michelle Thomas, who he loved dearly, was his co-defendant. It is apparent that she obviously wanted him, the Defendant, to go along with her

choice of attorney. She also wanted him to go along with the plea bargain that defense counsel arranged for both of his clients.

The Defendant was therefore in an impossible dilemma which was created by his counsel. Rather than scrupulously protect his client's right to have a counsel that was not burdened by an enormous conflict, the defense counsel instead arranged to have the Defendant sign a "waiver of actual/potential conflict."

The constitution scrupulously protects the due process of defendants and protects a defendant's Sixth Amendment right to counsel. The law has long held that the State has the burden of establishing that any waiver of a fundamental right, such as the right to conflict free representation in a multi-defendant case. This right is inherent in the Sixth Amendment right to counsel.

In the case of *People v. Castro*, 657 P.2d 932 (1983), the court noted:

" . . . As in the case of other constitutional rights, an accused may waive his rights to conflict-free representation. The burden of affirmatively demonstrating a waiver of such a fundamental rights rests upon the prosecution and will not be presumed from a silent record."

See, e.g., Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962);

Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). *Id.* 944 (Emphasis added)

...

Defendant urges this Court to find the State did not show that the purported waiver of conflict in this case was valid. This Court should find that the Defendant did not receive effective assistance of counsel because his attorney could not effectively represent both defendants in this serious felony case. The Court must further find that the Defendant was gravely prejudiced by the conflict of interest of his attorney. This case must therefore be reversed.

III. THE DISTRICT COURT ERRED BY NOT FINDING DEFENSE COUNSEL WAS INEFFECTIVE UNDER *STRICKLAND* FOR FAILING TO DO THE NECESSARY INVESTIGATION AND PREPARATION PREPLEA.

A. Defense Counsel was Ineffective Under *Strickland* for Failing to do All Necessary Investigation Preplea.

A fundamental command of *Strickland v. Washington*, 466 U.S. 668 (1984), is that counsel do an adequate investigation and pretrial preparation before any plea. It is respectfully submitted that defense counsel's investigation was inadequate in this case. An adequate investigation would have required counsel to do a full

investigation to determine any viable defenses and a full investigation of all available mitigation.

Defense counsel in this case however did not make a comprehensive effort to locate all necessary witnesses who could have established any possible defenses or mitigating evidence. An adequate evidentiary hearing would have showed that there existed possible defense witness(es) who could have established Defendant was not an accessory to murder because he could not have formed the necessary intent to commit the crime. It is apparent counsel did not do any factual or legal research to fully develop a defense that the Defendant lacked the intent to commit the crime, an essential element of the charge. This defense could have been established as a basis for reasonable doubt.

The American Bar Association (ABA) Standards on the Prosecution and Defense function emphasize the crucial importance of investigation by criminal defense attorneys for their clients pretrial. *See*, ABA Standards 4.1:

4.1 Duty to Investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include effort to secure information in the possession of the

prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty. (Emphasis added)

...

The importance of this Standard has been recognized and has been cited by the Nevada Supreme Court for over 45 years. *See, Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473 (1975). Counsel, however, did not fulfill this elementary command to investigate and develop possible information that might assist his client. This failure requires reversal of the conviction.

In *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two pronged test for reversal based upon ineffective assistance of counsel. First, the defendant must show counsel's *performance was deficient*. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, counsel must show that the deficient performance *prejudiced* the defense. This requires showing that counsel errors are so serious as to have deprived defendant of a fair trial, that is a trial where the result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted in a breakdown of the adversary process that renders the

result unreliable. *Strickland* at 687.

Strickland noted that:

...[j]udicial scrutiny of counsel performance must be highly deferential however, counsel must at a minimum conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Strickland*, *Id.* 691, 104 S.Ct. at 2066. (Emphasis added).

Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, Sanborn must demonstrate that trial counsel's performance fell below an objective standard or reasonableness and that counsel's deficiencies were so severe that they rendered the jury's verdict unreliable. *See Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). 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 and failed to pursue evidence supportive of innocence or evidence

which would establish a reasonable doubt. He failed to establish 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. (Emphasis added)

...

B. Defense Counsel Did Not Investigate the Use of Experts to Support His Defense Claim That the State Could Not Prove the Defendant Acted with Criminal Intent.

It is respectfully submitted that in this case competent counsel under *Strickland*, should have retained expert witness(es) in psychology or psychiatry to carefully evaluate the Defendant's state of mind or his ability to form the criminal intent to commit accessory to murder. It is respectfully submitted this lack of action by counsel prior to trial is the type of “complete failure to investigate” condemned by many courts since *Strickland*. See also, *Sanborn v. State*, 107 Nev. 399 (1991).

In *United States v. Gray*, 878 F.2d 702 (3rd Cir.1989), the Court found counsel ineffective for failure to adequately investigate, stating:

“Ineffective assistance is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he had not yet

obtained the facts on which such a decision could be made.” (Emphasis added) *See, Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2065-67; *see also Debango*, 780 F.2d at 85 (“the failure to investigate potentially corroborating witnesses ... can hardly be considered a tactical decision”); *Sullivan*, 819 F.2d at 1389; *Nealy*, 764 F.2d at 1178; *Crisp*, 743 F.2d at 584.

“Such is the situation presented in this case. Counsel offered no strategic justification for his failure to make any effort to investigate the case, and indeed he could have offered no such rationale. As he admitted, he did not go to the scene of the incident to interview potential witnesses, even though, as the police officers testified, there were as many as 25 witnesses including many persons who would have been easily located, such as the bartender and people who came out of their houses to observe the disturbance.” *Id.* 711 (Emphasis added)

...

See also, United States v. Burrows, 872 F.2d 915, 918 (9th Cir.1989) and *Deutscher v. Whitney*, 884 F.2d 1152, 1160 (9th Cir. 1989). And consider the case of *People v. Frierson*, 599 P.2d 587 (Cal.1979), where the court reversed for ineffective assistance of counsel, finding that counsel’s failure to develop expert testimony to support a diminished capacity or lack of specific intent defense was prejudicial error.

The Court stated:

“In the present case, despite his admitted awareness of the possibility of developing a successful diminished capacity defense, trial counsel neglected either to seek or obtain an expert appraisal of defendant’s mental condition or of the effect of the drug PCP upon his physical or mental condition. Although, unlike *Saunders*, counsel here did attempt to assert a diminished capacity defense, nevertheless, it was doomed to failure in the absence of evidence supporting it.” *Id.* 598, 599. (Emphasis added)

...

An expert review of all the police forensic evidence should have been done in this case. Investigation into the alleged victim’s background was also essential. Defendant in this case urges this Honorable Court to reverse his conviction, as this Court has done before when counsel failed in his duty to protect his client’s right to a fair trial. The plea of guilty in this case was premature.

Counsel’s failure to pursue and adequately develop a viable defense raising the defense that he lacked specific intent necessary to commit the crime of second degree murder was objectively unreasonable representation under *Strickland* which requires reversal. The United States Supreme Court in *Strickland* has noted that:

... [j]udicial scrutiny of counsel performance must be highly deferential, however, counsel must at a minimum conduct a reasonable investigation enabling him to make

informed decisions about how best to represent his client.

Strickland, Id. 691, 104 S.Ct. at 2066. (Emphasis added)

...

It is respectfully submitted defense counsel was ineffective because a comprehensive investigation would have developed witnesses who could have supported the defense theory of the case that Defendant acted without criminal intent.

C. Defense Counsel Did Not Spend Adequate Time with the Defendant So That Counsel Could Fully Understand All the Facts and Circumstances of the Case.

Defendant alleged in his Motion to Correct Illegal Sentence he did not fully understand his plea. (A.A. 152) An evidentiary hearing would have shown that counsel did not fully explain all the consequences of the guilty plea to the Defendant before the Defendant pled guilty on December 14, 2017. The Defendant without adequate consultation, then waived important rights. Counsel convinced Defendant to plead guilty and to waive all his constitutional rights without discussing the case fully. The District Court however erred in denying the Defendant an evidentiary hearing which would have led to a granting of his Petition. (A.A. 222)

Courts have a duty to reverse a conviction and allow withdrawal of the guilty plea because of ineffective assistance of counsel. Counsel's ineffectiveness led to incorrect advice to the Defendant concerning all the circumstances of his case.

Defendant asks this Honorable Court to review carefully the totality of circumstances of the Defendant's plea in this case, which will show that the Defendant received inadequate advice before he pled guilty. *See, State v. Freese*, 116 Nev. 1097 (2000), *McConnell v. State*, 125 Nev. 243 (2009).

In *State v. Plotner*, 235 P.3d 413 (Kan.2000), the court recognized that in evaluating whether a defendant can demonstrate the "good cause" sufficient to withdraw a guilty plea, the trial court should consider several factors including: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated or unfairly taken advantage of; (3) whether or not the plea was understandingly made. (Emphasis added)

In this case, as in others where pleas have been withdrawn because of incompetent or ineffective counsel, the Defendant was prejudiced by his counsel's lack of effectiveness preplea. Counsel's incompetence in this case should be presumed because counsel did not spend enough time with the Defendant before the plea. The lack of time Defendant spent with his counsel clearly suggests that his plea was not valid because it could not have been intelligently entered. *State v. Arnold*, 914 P.2d 762 (Wash.1996).

In *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, L.Ed.2d 196 (1963), the

Supreme Court impliedly established the right to counsel at the time of entering a guilty plea. The plea negotiation process also has been recognized as a critical stage of the criminal process at which a Defendant is entitled to counsel.

The competent advice of counsel is a 'significant' fact in determining the voluntariness of a plea. *Patton v. Warden*, 91 Nev. 1, 2, 30 P.2d 107, 108 (1975). The plea that the Defendant entered in this case was not however the product of competent or effective advice of counsel based upon the necessary pretrial preparation and adequate investigation which is mandated by *Strickland v. Washington*, 466 U.S. 668 (1984). Merely having an attorney, standing beside you, totally mute at the plea hearing, wearing a good suit and tie, while the judge goes through a routine canvas, telling you the constitutional rights you are giving away forever, should not satisfy the effective assistance of counsel demands of *Strickland*.

In *Strickland*, the United States Supreme Court expressly stated that: counsel must do . . . at least . . . 'a minimal investigation preplea.' *Id.* 691. It is respectfully submitted the preplea investigation in this case was totally inadequate under all the facts and circumstances of this case. There are therefore more than adequate grounds to reverse the conviction and set aside the guilty plea based upon *Strickland's* commands for effective assistance of counsel.

IV. THE DISTRICT COURT ERRED BY UPHOLDING DEFENDANT'S PLEA AS VALID.

Defendant respectfully submits the District Court wrongly denied his Post Conviction Petition, holding that his guilty plea was valid. (A.A. 220-222) The District Court wrongly decided she could not even consider this issue(s) because it was barred by the "law of the case." (A.A. 220) This was error.

Defendant in his Habeas Petition has argued that he pled guilty because of counsel's ineffectiveness under *Strickland*. Counsel's ineffectiveness was a different issue than previously raised and therefore consideration by the District Court should not have been denied because of the doctrine of the "law of the case."

The Court then suggested the plea was also invalid because Defendant's claims for relief "were vague and speculative." (A.A. 222) Defendant respectfully submits he raised substantive claims in this Habeas Corpus Petition challenging the validity of his plea.

At the plea hearing on December 14, 2017, Defendant Richard A. Newsome, Jr., merely made the standard perfunctory, conclusory affirmations of his guilt as well as the conclusive affirmations that he understood his rights. It is respectfully submitted a review of the transcript of the plea hearing clearly does not establish that

Defendant fully understood all of his rights and the Defendant's conclusory responses to leading questions at the plea canvas does not establish his plea was valid.(A.A. 130-135)

In *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir.1998) the court held that the Defendant's mere guilty plea, including his waiver of presenting mitigating evidence, was not itself enough evidence of a knowing, voluntary and intelligent waiver, despite the conclusory affirmation in the plea canvas that the Defendant understood his rights. In this case, as in *Wilkins, supra*, it is respectfully submitted there is insufficient evidence that Defendant fully understood all the rights he was waiving.

The Court should consider that in this case, as in the *Wilkins* case, that such an unsophisticated defendant as the Defendant could easily correctly answer the simple leading questions of the guilty plea canvas without a full understanding of the rights he was giving up or what duties his attorney may have failed to perform. Even when a valid defense may have existed, the Defendant, without full understanding of his rights, pled guilty.

The District Court should have looked at the totality of circumstances to determine whether in this case the Defendant's plea was actually a knowing, voluntary and intelligent waiver of all his rights. See *State v. Freese, supra*,

McConnell v. State, supra. It should be noted that the recitation of facts stated at the end of the plea were conclusory and discussed few details of what happened. (See *Plea Hearing*, A.A. 130-135)

There was no mention in the plea canvas of whether counsel had specifically discussed whether Defendant was under any duress or felt any familial pressure, nor was there any discussion of whether defense counsel had discussed specific intent as a possible defense. Defendant was never on the record questioned directly about any influence his mother may have had upon his plea. This was the central factor that was deliberately omitted by defense counsel, the prosecutor or the court. By ignoring this critical dynamic during the plea canvas, when the co-defendant was so intimately related to the Defendant, there was a likelihood of a fundamental error in the plea canvas which requires reversal of the conviction, or at the very minimum, a full evidentiary hearing of the voluntariness of the plea.

The Defendant's alleged waiver of his right to trial should have been strictly scrutinized in this case where there existed substantial doubts as to whether Defendant received effective assistance of conflict free counsel.

...

...

V. THE DISTRICT COURT'S DENIAL OF AN ADEQUATE EVIDENTIARY HEARING ON CONTESTED FACTS CONSTITUTES REVERSIBLE ERROR.

The District Court erred when it denied Defendant an evidentiary hearing. (A.A. 237) An adequate evidentiary hearing would have established that counsel was also shown that the Defendant was prejudiced because he had viable defenses to the crimes in the Indictment. Also, an evidentiary hearing would have clearly shown the Defendant's plea was invalid because counsel's representation was clearly tainted by his joint representation of the co-defendant.

An adequate evidentiary hearing would also have shown that counsel did not adequately investigate and prepare for a defense of this case. He did not even do the minimal investigation *Strickland* requires. (*Strickland*, *Id.* 391) It is respectfully submitted that Nevada law also required an evidentiary hearing in this case to determine the validity of the purported "waiver of conflict of interest."

In *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall's* conviction because he was denied an evidentiary hearing in a post-conviction case. The Court in *Marshall* stated: . . .

...

“When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record.” *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). *Id.* 1331 (Emphasis added)

“At most, the state presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons who frequented the apartment, possessed the cocaine and the marijuana the police found. Appellate counsel was ineffective for failing to raise this issue on appeal and counsel’s failure prejudiced appellant. *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.*, 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief.”

“Because the record on appeal establishes that appellant was improperly convicted of the possession charges, we reverse appellant’s judgment of conviction on these charges and we vacate the sentences imposed with respect to those convictions.” *Id.* 1333 (Emphasis added)

...

Defendant also directs the Court to the case of *Hatley v. State*, 100 Nev. 214,

678 P.2d 1160 (1984), where the Supreme Court reversed and remanded for an evidentiary hearing because the defendant had alleged facts in his petition, which, if true, would entitle him to relief. *Id.* 216 (Emphasis added)

An adequate evidentiary hearing in this case would have shown conclusively there were more than sufficient facts to show the cause and prejudice necessary to prevent this Petition from being procedurally barred and would have shown that the Petition should have been granted because counsel was ineffective under *Strickland v. Washington*. Under the totality of circumstances in this case, the District Court erred when it denied Defendant an adequate evidentiary hearing. The conviction must be reversed.

VI. CUMULATIVE ERROR BY COUNSEL REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTION.

It is respectfully submitted the numerous errors and deficiencies of counsel in this case require reversal of the conviction. Even when considered separately, the error or omissions of counsel preplea were of such a magnitude that they require reversal.

Certainly it is clear, when viewed cumulatively, the case for reversal is overwhelming. *Daniel v. State*, 119 Nev. 498 (2003), *see also*, *Sipsas v. State*, 102

Nev. at 123, 216 P.2d at 235 (1986), which stated: “The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial.” (Emphasis added) *See also, Walker v. Fogliani*, 83 Nev. 154, 425 P.2d 794 (1967)

Prejudice to the Defendant resulted from the cumulative impact of the multiple deficiencies. *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (*en banc*), cert. den., 440 U.S. 970, *Harris by and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir. 1995) The multiple errors of counsel in this case when cumulated together must require reversal. A quantitative analysis makes that clear. *See, VanCleave, Rachel A., “When is Error . . . Not an Error?”*, Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

The relevant factors for a court to consider in evaluating a a claim of cumulative error are [1] whether the issue of guilt is close, [2] the quantity and character of the error, and [3] the gravity of the crime charged. *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State*, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See also, Big Pond v. State*, 101 Nev. 1, 692 P.2d 1228 (1985), *Daniel v. State*, 119 Nev. 498, 78 P.3d 890 (2003), *United States v. Dado*, 759 F.2d 550 (6th Cir. 2014), *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), *Rodriguez v. Hake*, 928 F.2d 534 (2d Cir. 1991).

The seriousness of the charges in this case required vigorous attorney advocacy preplea. The failure to provide conflict free representation was a fundamental error under *Strickland, supra*. That conflict may have prevented defense counsel from zealously representing the Defendant during plea negotiations.

It is therefore respectfully submitted the cumulative errors which occurred during this case must result in the reversal of the District Court's decision to deny the Writ of Habeas Corpus.

CONCLUSION

The District Court erred in denying Defendant's Post Conviction Petition. Defendant was not guilty of the crimes charged. He nevertheless pled guilty to the felony charge of second degree murder because he was under extraordinary psychological duress. He was represented by the same attorney who represented his mother, Tianna Michelle Douglas, aka Tianna Michelle Thomas, who was herself facing serious consequences if she was convicted. Defendant was obviously very concerned about his mother's fate when he pled guilty, maybe even more so than about his own case. His plea of guilty, while represented by a lawyer who had actual and substantial conflict could not have been a a knowing, voluntary or intelligent guilty plea. Defendant certainly did not fully understand his rights. Most certainly he

did not fully understand the purported ‘waiver’ he had signed. Defendant needed a conflict free attorney, who was well prepared, and who had fully investigated all the facts, and who also was willing to engage in a difficult trial. He did not get that.

Instead, Defendant received ineffective assistance from his counsel, a counsel conflicted by dual representation, who persuaded him to plead guilty while also persuading his mother to plead guilty to a lesser charge. It is respectfully submitted that because of his counsel’s conflict and counsel’s resulting ineffectiveness preplea, Defendant’s conviction must be reversed and this Court remand the case with such further action as this Honorable Court deems necessary.

It has been held that: . . . “if counsel entirely fails to subject the prosecution to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that made the adversary process itself presumptively unreliable.” *United States v. Cronin*, 466 U.S. 648, 656-59, 104 S.Ct. 2039, 2045-47, 80 L.Ed.2d 657 (1984). (Emphasis added)

In this case, as in *Cronin*, because of the overwhelming conflict, counsel never subjected the State’s case against Defendant to meaningful testing or scrutiny, merely urging the Defendant to plead guilty. Reversal is mandated by all the facts and law.

DATED this 20th day of January, 2022.

Respectfully submitted,

//s// Terrence M. Jackson

Terrence M. Jackson, Esquire

Counsel for Petitioner/Defendant *Richard A. Newsome, Jr.*

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 7,223 words, which is within the word limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or 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.

DATED this 20th day of January, 2022.

Respectfully submitted,

/s/ Terrence M. Jackson
Terrence M. Jackson, Esquire
terry.jackson.esq@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 20th day of January, 2022, I served a copy of the foregoing: Appellant Richard Allan Newsome's Opening Brief as well as Volume 1 of the Appendix and Index as follows:

[X] Via Electronic Service (*eFlex*) to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Nevada Attorney General and Petitioner/Appellant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountynvda.com

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

ALEXANDER G. CHEN
Chief Deputy District Attorney
motions@clarkcountynvda.com

RICHARD A. NEWSOME, JR.
ID# 1194269
H. D. S. P. - P. O. Box 650
Indian Springs, NV 89070-0650

By: /s/ Ila C. Wills
Assistant to Terrence M. Jackson, Esq.