IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 84234

ERIC DEAN WERRE

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Appeal From Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)
Third Judicial District, ~~Clark~~ Lyon County
The Honorable Leon A. Aberasturi

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Michael Lasher

Michael Lasher, Esq.
Attorney for ERIC WERRE

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the instant matter pursuant to NRS §177.015(3). Werre appeals from the District Court's denial of his Petition for Writ of Habeas Corpus (Postconviction), which was entered on January 26, 2022. Volume 4 Appellant's Appendix page 197 (hereinafter in format 4 AA 197). Pursuant to NRAP 4(b)(2), Werre filed a notice of appeal on February 2, 2022. 4 AA 209.

I. ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because Mr. Werre was convicted of a Category B felony. NRAP 17(b)(2)(A).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Are the vast changes to criminal sentences wrought by AB 236 relevant to an Eight Amendment challenge, despite not being retroactive?

2. Did the District Court abuse its discretion in finding that trial counsel rendered effective assistance?

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On February 25, 2020, an indictment was filed against Werre. 1 AA 15. Less than a week later, he plead guilty to Trafficking in Schedule I Substances between 14 and 28 grams (NRS 453.3385(1)(b)); Principal to Burglary, Gaining Possession of Firearm (NRS 205.060, 205.060(4), 195.020); Principal to Stolen Firearm (NRS 205.275, 205.275(2)(c), 195.020); and Principal to Possession of Stolen Firearm (NRS 205.275, 205.275(2)(c), 195.020). He received an Aggregate Sentence of THREE HUNDRED AND SIXTY (360) MONTHS MAXIMUM with a MINIMUM PAROLE ELIGIBILITY OF ONE HUNDRED FOURTY-FOUR (144) MONTHS. 1 AA 48.

STATEMENT OF FACTS

Werre traveled to a job interview and stayed with his friend, Chandy Sabin (aka Atkins), and her boyfriend in Silver Springs, NV. While there, she robbed a gun storage facility. When police searched her residence, large amounts of methamphetamine were found. Upon Sabin's arrest, she was found to have numerous firearms and large

amounts of cash. A subsequent search revealed a pay-owe sheet for guns she had stolen but then sold. Upon Werre's arrest, only 2.5 grams of methamphetamine was found; he did not have much cash on his person. 1 AA 60 to 64. Werre did not have access to the methamphetamine found in Sabin's home. 2 AA 124.

Argument I

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

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

The Eighth Amendment ban on cruel and unusual punishment "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense. [Citation.]'" *Roper v. Simmons*, 543 U.S. 551, 560 (2005), quoting *Weems v. United States,* 217 U.S. 349, 367 (1910). "By protecting even those convicted of

heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Ibid.*; see *Timbs v. Indiana* __ U.S. __, __; 139 S.Ct. 682, 687 (2019) [Cruel and Unusual Punishment Clause of the Eighth Amendment applies to the states].)

In *Roper*, the United States Supreme Court banned the execution of individuals under 18 years old at the time of their crimes via the Eighth Amendment's prohibition of cruel and unusual punishment. *Roper*, *supra*, 543 U.S. at pp. 560-561. The Court emphasized that a national consensus had formed in opposition to the execution of juveniles and those states that permitted the practice administered it infrequently. *Id.* at pp. 564-565. And in prohibiting the death penalty for the intellectually disabled, the Court stated, "[T]he standard of extreme cruelty . . . itself remains the same, but its applicability must change as the basic mores of society change." *Atkins v. Virginia*, 536 U.S. 304, 311, fn.7 (2002), citing *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion.) To ascertain whether or not such a consensus exists, the Court considers "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, *supra*, 543 U.S. at p. 563.

In Nevada, the legislature saw fit to overhaul crime and punishment, effective a mere six months after Werre's arrest. This amounts to objective indicia of Nevada's evolving standards of decency, as expressed in its own legislative enactments. Werre was sentenced to 12 to 30 years. Yet six months later, he would have faced only three to ten years: Count I's exposure is currently one to five years and Count II's exposure is one to four years; if run consecutively, this amounts two to nine years. Counts III and IV's exposure remains three to ten years, which the District Court ran concurrent to Counts I and II. In sum, a mere six months later, Werre's maximum sentence would have been even less than the minimum that he would now face. Such a sentence violates the Eighth Amendment.

Yet the District Court entirely discounted the ameliorative changes wrought by AB 236, finding the statute to be irrelevant because it was not retroactive. "Petitioner's main argument is that the Court should not look at the statute in effect at the time of the commission of the crimes but the new statute and penalty guideline that passed after the commission of the crimes. However, the Court rejects this argument." 4 AA 211. The Court further concluded that AB 236 was

not retroactive under *Nevada Power Co. v. Metropolitan Dev. Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988). 4 AA 211, 213. The Court erred. It also misapprehended Werre's argument.

First, Werre never argued that he was entitled to be sentenced under AB 236. 2 AA 78 et seq; 3 AA 192. Werre instead argued that the fact that Nevada overhauled crime and punishment must be considered in the Eighth Amendment analysis. Tellingly, the District Court never addressed Werre's citations to United States Supreme Court authority mandating the consideration of the new statute when considering evolving standards of decency. Instead, the District Court merely cited *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 286 (1996) for the proposition that "Under Nevada law, a sentence within the guidelines is not cruel and unusual punishment as long as the statute fixing punishment is not unconstitutional nor the sentence is so unreasonably disproportionate to the offense as to shock the conscience." 4 AA 213.

Yet Werre was and is clearly challenging his sentence as unconstitutional under the Eighth Amendment, rendering *Blume*

inapt.[1] That AB 236 is not retroactive is irrelevant to Werre's argument. What is relevant is Nevada's overhaul of crime and punishment, indicating that under Eighth Amendment evolving standards of decency, Werre's thirty-year sentence is unconstitutional when his sentence would now be ten years at most.

ARGUMENT II

THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE

Ineffective Assistance for Failure to Investigate

The District Court abused its discretion in finding that trial counsel rendered effective assistance, despite the fact that trial counsel was presented with triggering facts requiring further investigation. Trial counsel has a duty to investigate when presented with triggering facts. *Howard v. State*, 2014 WL 3784121 *2 (unpublished disposition, Nevada Supreme Court No. 57469, July 30, 2014), citing *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (acknowledging counsel's obligation to "make reasonable investigations

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[1] Werre's thirty-year sentence also shocks the conscience given his criminal history (six prior convictions with only one sixteen-month prison term) and his culpability relative to the mastermind, who was merely sentenced to probation.

or to make a reasonable decision that makes particular investigations unnecessary"). See also, *Dawson v. State*, 108 Nev. 112, 117: "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable."

At the evidentiary hearing, Werre testified that he told his attorney that the methamphetamine at 2920 West Fir Street was not his and that he did not have access to those substances.. 2 AA 131. The attorney testified that he did not retain an investigator because he felt that there was no need. 3 AA 147-48. This amounted to ineffective assistance.

Yet had the attorney hired an investigator, he would have learned that Werre was innocent of the trafficking charge, which carried a significant sentence. Chandy Dorlynn Sabin (aka Chandy Atkins) testified that Werre came to briefly stay with her 2920 West Fir Street in Silver Spring because he had a job interview. He did not have a car and was dependent on her for rides. He did not have access to any of the locked boxes in her home, in which the methamphetamine was stored. Ms. Sabin also never saw Werre sell any firearms. 2 AA 124. Clearly, Werre was prejudiced by the failure to investigate, because this

information could have been used to negotiate with the prosecutor a lesser sentence or to argue at sentencing for one in line with Probation and Parole's recommendation.

In finding no ineffective assistance, the District Court entirely ignored the foregoing record. "Petitioner presented no cognizable evidence that an investigation would have produced additional evidence that Mr. Mouritsen was not aware of after reviewing the discovery. The Court heard no testimony that the Petitioner provided additional leads to investigate. Additionally, general allegations that the failure to hire an investigator equates to ineffective assistance of counsel does not meet the specificity standard of *Chappel*." 4 AA 207. The District Court's conclusion is belied by the foregoing record and so amounts to an abuse of discretion.

Ineffective Assistance at Sentencing

Trial counsel did not argue at sentencing that Probation and Parole's recommended sentence should be followed because in a mere six months, Werre's sentence would be significantly less. This amounted to ineffective assistance, especially because counsel was on

notice. Werre told Mouritsen about AB 236 but he said it did not apply to Werre. 2 AA 129-30.

There could have been no strategic reason to fail to argue that Were should be sentenced in accord with Probation's recommendation because of AB 236's upcoming changes. Any statement to the contrary is a post hoc rationalization, as evidenced by Mouritsen's testimony that the Probation and Parole's recommendation was absurd. 3 AA 166, 177, 181.

Furthermore, the District Court misconstrued Werre's claim, framing it as ineffective assistance for failing to argue that AB 236 was retroactive, which the Court concluded would have backfired as an unreasonable strategy. 4 AA 208. Yet Werre's argument was that it was ineffective for trial counsel to fail to argue at sentencing that the Probation and Parole recommendation should be followed in light of the upcoming, massive legislative sentencing revisions. That the District Court misconstrued Werre's argument amounted to an abuse of discretion.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting and type style requirements of NRAP 32 and 40B because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14-point font: or

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32 and 40B because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

[X] Not in excess of 4,667 words; or

[ ] Not in excess of 10 pages.

3. Finally, I hereby certify that I have read this Petition for Review, 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.

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CERTIFICATE OF ELECTRONIC SERVICE AND MAILING

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 16, 2022.

United States Mail Service of the

APPELLANT'S OPENING BRIEF

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