No. 83734

IN THE NEVADA SUPREME COURT

Deshaun James Lewis,

Appellant,

v.

State of Nevada,

Respondent.

Appeal from a Findings of Fact, Conclusions of Law and Order Denying a Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court
The Honorable Monica Trujillo, District Court Judge
District Court Criminal Case No. C-17-325725-1
District Court Civil Case No. A-21-838960-W

Appellant's Opening Brief

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I. JURISDICTIONAL STATEMENT

This is an appeal from a district court order denying the Appellant's petition for writ of habeas corpus (post-conviction). 1 App. 166. Notice of entry of the findings of fact, conclusions of law and order was filed on November 17, 2021. *Id.* at 171. A timely notice of appeal was filed on December 13, 2021. *Id.* at 177. This Court has jurisdiction to hear this appeal pursuant to NRS 34.575(1) and NRAP 22, which provide that this Court may hear appeals from the district court's denial of a petition for a writ of habeas corpus.

II. ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals because it is a post-conviction appeal not pertaining to a conviction for a category A felony. *See* NRAP 17(b)(3).

III. STATEMENT OF THE ISSUES

The district court erred in denying Appellant Deshaun Lewis' petition for writ of habeas corpus without an evidentiary hearing. Lewis raised claims in his petition that warrant relief or, in the alternative, an opportunity to expand the record. Counsel was ineffective for failing to

adequately prepare Lewis for the possibility of a prison sentence, thereby rendering his guilty plea unknowing and involuntary.

IV. STATEMENT OF THE CASE

On August 16, 2017, the State of Nevada charged Lewis by way of Information with two counts of child abuse, neglect, or endangerment with substantial bodily harm and one count of child abuse, neglect, or endangerment. 1 App. 110–11. On November 13, 2019, Lewis entered into a Guilty Plea Agreement whereby one count of child abuse, neglect, or endangerment resulting in substantial bodily harm would be dropped. *Id.* at 113. On August 10, 2020, the district court sentenced Lewis to 6 to 15 years as to count 1, and 28 to 72 months as to count 2, to run concurrent. *Id.* at 131–32.

Lewis filed a timely petition for writ of habeas corpus (post-conviction). *Id.* at 133. The State filed a response to that petition. *Id.* at 142. The district court issued a Findings of Fact, Conclusions of Law and Order denying the petition without the benefit of an evidentiary hearing. *Id.* at 166–69. Lewis filed a timely Notice of Appeal. *Id.* at 177.

V. STATEMENT OF THE FACTS

Dr. Sandra Cetl testified at the preliminary hearing in this matter that she reviewed the medical records for a five-year-old child named M.C. who was admitted to University Medical Center on October 2, 2016, with an injury to their pancreas, a fractured left leg, and a contused lung. 1 App. 5–7. Cheryl Kegley, a child abuse specialist with the Las Vegas Metropolitan Police Department, was tasked with investigating those injuries. *Id.* at 35, 67. She interviewed Lewis at UMC the day M.C. was admitted. *Id.* at 68. Lewis indicated he had been caring for M.C. since November of 2015, and that he had used a belt to punish M.C. *Id.* at 68–70. Lewis also stated that he would punch M.C. in the chest. *Id.* at 71. Lewis denied injuring M.C.'s leg, which he said happened while M.C. was playing soccer at the park. *Id.* at 71–72.

VI. SUMMARY OF THE ARGUMENT

The district court erred when it denied Lewis' petition for writ of habeas corpus without an evidentiary hearing. He presented assignments of error that were clear, or at the least, warranted an evidentiary hearing.

VII. ARGUMENT

A. This Court applies a de novo standard of review.

A post-conviction petition for writ of habeas corpus constitutes a mixed question of law and fact; accordingly, the factual findings of the lower court are given deference, but the lower court's application of the law to those facts is reviewed de novo. *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012) (relying on *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002); *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005)).

B. Lewis was denied the effective assistance of counsel.

Lewis was denied his right to the effective assistance of counsel when counsel assured Lewis that he had an "eighty-five percent chance" to get probation when that was obviously not the case. *See* 1 App. 131–32, 137, 168. This implicated Lewis' rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as his rights under Article 1, sections three, six, and eight of the Nevada Constitution.

To establish a claim of ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was beneath "an

objective standard of reasonableness," and (2) that, but for counsel's deficiency, a different result would have been had at trial. *Strickland v. Washington,* 466 U.S. 668, 688 (1984); *Rubio v. State*, 12 Nev. 1032, 1039–40, 194 P.3d 1224, 1229 (2008). A reasonable probability is one that undermines confidence in the outcome. *Strickland*, 466 U.S. at 694. "Effectiveness" means performance "within the range of competence demanded of attorneys in criminal cases." *Jackson v. Warden,* 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)).

The right to effective assistance of counsel extends to the plea-bargaining process; the standard is the same as that outlined in *Strickland*. *Lafler v. Cooper,* 566 U.S. 156, 162–63 (2012). A defendant must show that the outcome of the plea process would have been different had counsel been effective. *Missouri v. Frye*, 566 U.S. 134, 147 (2012); *Lafler,* 566 U.S. at 162–63. When a plea is accepted, the defendant must show that, but for counsel's ineffectiveness, he would not have accepted the plea. *Hill v. Lockhart,* 474 U.S. 52, 56 (1985).

In this case, Lewis was prepared to testify that prior counsel assured Lewis that he would receive probation when he entered into his

guilty plea agreement. 1 App. 137–38, 161–64. Without Lewis' full understanding of the range of consequences possible when entering into his plea, it cannot be said that Lewis received the effective assistance of counsel. But for counsel's erroneous representations, Lewis would not have entered into this negotiation, as evidenced by the two years of supposed litigation between preliminary hearing and the plea in this matter. *See id.* at 1, 113. Based on this, a writ should have issued and Lewis' conviction should have been vacated. Alternatively, Lewis would ask this Court to remand with instructions to conduct an evidentiary hearing at which he can present testimony in support of this claim. *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

C. Lewis' guilty plea was not made knowingly, intelligently, or voluntarily.

Lewis' plea in this case runs afoul of his right to due process under the Fifth Amendment to the United States Constitution and Article I, section eight of the Nevada Constitution. When Lewis entered his guilty plea, he did so without a full understanding of the consequences thereof, as trial counsel overbore Lewis's free will vis-à-vis pressuring him into accepting a negotiation that he did not feel was in his best interests. *See*

1 App. 1, 113; *but see* 1 App. 125–26 (guilty plea canvass). For that reason, Lewis' plea is constitutionally infirm and his conviction should have been vacated.

Although a guilty plea is presumptively valid, *Wilson v. State*, 99 Nev. 362, 373, 664 P.2d 328, 334 (1983) (quoting *Wynn v. State*, 96 Nev. 673, 675, 615 P.2d 946, 947 (1980)), a reviewing court must assess whether the plea was entered into "voluntarily, knowingly, and intelligently," *Rubio v. State*, 124 Nev. 1032, 1038, 194 P.3d 1224, 1228 (2008); *Molina v. State*, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *McCarthy v. United States*, 394 U.S. 459, 466–67 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The reviewing court must look at the totality of the circumstances in determining whether a guilty plea was so entered, and whether permitting the withdrawal of a guilty plea is necessary to prevent a manifest injustice. *Rubio*, 124 Nev. at 1038, 194 P.3d at 1228.

Lewis entered into a guilty plea agreement unknowingly, unintelligently, and involuntarily when he did so without a full understanding of what that plea entailed. Counsel overrode Lewis' intentions to go to trial and pressured Lewis into taking a deal in this

matter, as evidenced by the length of time spent on this case—not litigating, certainly, as counsel filed no substantive motions or oppositions—and counsel's assurances that Lewis would receive probation. 1 App. 137–38, 161–64; *see also supra* part VII(B). Based on this, this Court should reverse the decision of the district court, a writ should issue and Lewis' conviction should be vacated. In the alternative, Mr. Lewis would ask the Court to remand this matter for an evidentiary hearing at which Lewis can present testimony in support of this ground. *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

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VIII. CONCLUSION

Lewis respectfully submits that the district court erred when it denied his petition. For that reason, he would ask this Court to reverse the decision of the district court and remand this case with instructions to issue a writ of habeas corpus or, in the alternative, to conduct an evidentiary hearing.

DATED this 3rd of May, 2022.

Respectfully submitted,

JoNell Thomas
Clark County Special Public Defender

/s/ Julian Gregory
Julian Gregory
Deputy Special Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14 point font.

2. I further certify that this brief does comply 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 contains 1545 words.

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 3rd of May, 2022.

Respectfully submitted,

JoNell Thomas
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/s/ Julian Gregory
Julian Gregory
Deputy Special Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, a copy of the Opening Brief (and appendix) was served as follows:

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