IN THE SUPREME COURT OF THE STATE OF NEVADA

Docket No. 85398

EDWARD HONABACH,

Petitioner-Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from an Order Denying Post-Conviction Relief
Eighth Judicial District Court, Clark County
The Honorable Linda Marie Bell, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned certifies that Edward Honabach is the true name of a natural person, and that no corporation is involved in this litigation. Mr. Honabach was represented by Bob Beckett at trial, and later by Travis Akin on direct appeal. Mr. Akin filed a shell PCR petition and then withdrew, and Mr. Honabach was then pro se in the district court post-conviction proceedings before the undersigned was appointed to represent him.

/s Jim Hoffman
Attorney for Edward Honabach

ROUTING/JURISDICTIONAL STATEMENT

This is an appeal from a final order denying Mr. Honabach's petition for post-conviction relief, and so the appellate courts have jurisdiction under NRS 34.575. This is a post-conviction petition involving an A felony, and as such is not presumptively assigned to either the Supreme Court or the Court of Appeals under NRAP 17.

STATEMENT OF THE ISSUES

1. Whether appellate counsel was ineffective in violation of the US and Nevada Constitutions for reasons including his withdrawal of the appeal without Mr. Honabach's consent.

2. Whether trial counsel was ineffective in violation of the US and Nevada Constitutions for reasons including his failure to review discovery or properly argue sentencing.

STATEMENT OF THE FACTS

Along with three co-defendants, Edward Honabach was charged in 2016 with various offenses related to the attempted murder of Jose Ortiz-Salazar. Appellant's Appendix ["PCR"] 1. Before trial, the State negotiated a plea agreement with Edward and the other defendants, where each agreed to plead to one count of kidnapping with substantial bodily harm. PCR 11. The district court then sentenced Mr. Honabach (along with the other defendants) to life without parole. PCR 109-10.

Mr. Honabach filed a timely direct appeal. However, his appellate counsel withdrew the appeal, stating that he had explained the situation to Mr. Honabach and that Mr. Honabach consented to withdrawing the appeal. PCR 118.' However, Edward had not actually consented or even been aware of the withdrawal. PCR 124. This Court ordered appellate counsel to respond to the letter, and appellate counsel did, filing a copy of a letter that he had allegedly sent to Edward (after the withdrawal). PCR 127-29. The Court then reaffirmed its dismissal of the appeal, notwithstanding Edward's follow-up letter disputing the assertion that he had received any such letter. PCR 131-135.

Meanwhile, appellate counsel filed a shell petition for post-conviction relief and then withdrew from the case. PCR 21. The district court denied it without appointing counsel. PCR 29. However, this Court reversed the denial and

remanded the case to the district court. PCR 33. The undersigned was appointed and filed an amended petition on Mr. Honabach's behalf. PCR 38. After an evidentiary hearing, the amended petition was also denied. PCR 163; 182. A notice of appeal was timely filed, PCR 191, and this appeal follows.

SUMMARY OF THE ARGUMENT

Edward Honabach's right to effective assistance of counsel under the US and Nevada Constitutions was violated in a number of ways. Most egregiously, his appellate counsel withdrew his appeal without his consent. There were also a number of prejudicial errors by both trial and appellate counsel. Mr. Honabach therefore requests that this Court grant relief.

ARGUMENT

The Sixth Amendment to the US Constitution guarantees the right to counsel. "[T]he right to counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The application of this right is governed by *Strickland v. Washington*, 466 U.S. 668 (1984).

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that his trial counsel's performance "fell below an objective standard

of reasonableness" at the time of trial and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. In other words, there are two prongs of the Strickland test: deficient performance and prejudice.

In order to obtain relief, petitioner need only demonstrate the underlying facts by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Denial of post-conviction relief presents a mixed question of law and fact, which this Court reviews independently. *Foster v. State*, 111 P.3d 1083, 1086 (Nev. 2005).

I. Appellate Counsel Was Ineffective in Withdrawing Edward's Appeal Without His Consent.

A. Factual Background

After he was convicted and sentenced, Edward filed a timely pro se notice of appeal. Travis Akin was appointed as his appellate counsel. However, Akin then filed a notice of withdrawal of appeal with this Court in August 2019. In conformance with the Nevada Rules of Appellate Procedure, the withdrawal recited that Mr. Akin "explained and informed Edward Honabach of the legal consequences" of the withdrawal and that "Having so been informed, Edward Honabach hereby consents to a voluntary dismissal of the above-mentioned

appeal."[1] PCR 118. Shortly thereafter, this Court dismissed the appeal. PCR 121.

In January 2020, Mr. Honabach wrote a letter to the Court, stating "I have not heard from him [Akin] in about 7 or 8 months, he has not answerd any of my letters or phone calls." Edward then obtained his docket sheet from the court "and found out that my lawyer has canceled my direct appeal without my knowledge or consent. I was never notified by my lawyer or the court of this either befor or after this was done." He also expressed confusion about whether Akin was even still his lawyer. PCR 124.

After receiving this letter, the Court ordered Mr. Akin to respond to it. Order, PCR 127. Akin then filed a letter with the court dated February 14, 2020, stating "I did dismiss your Supreme Court appeal for the reasons that we spoke about at High Desert State Prison." PCR 129. The Court then filed an order reaffirming its dismissal, on the grounds that "Whether appellant was advised of

[1] Mr. Akin did not explain the basis for the withdrawal of the appeal, but it was presumably due to the fact that Edward's guilty plea contained the following waiver: "The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34." PCR 15.

the consequences and agreed to the withdrawal of his appeal involves claims of ineffective assistance of counsel that must be raised in the district court in the first instance and requires factual determinations that need to be resolved through an evidentiary hearing." PCR 131.

Mr. Honabach wrote again to the Supreme Court stating that even though Akin's February letter was nominally addressed to him, "I never reseved any letter" from Mr. Akin, and that "I have writen several letters to Mr. Akin with know response." He again asked the Court whether Akin was still his attorney, and asked the court for a copy of the February letter. PCR 134. In response, the Supreme Court again reaffirmed the dismissal. PCR 136.

Mr. Honabach reiterated these same facts in a declaration pursuant to the amended PCR petition in district court. "As far as Mr. Akin, he withdrew my appeal without my consent. He said that I consented to do this, but I never did. In addition, I never received a letter from him, even though he told the Supreme Court he sent me one. I wanted to file an appeal and am upset that the appeal was withdrawn." PCR 194.

The district court held an evidentiary hearing to evaluate Mr. Honabach's statements. At it, he largely repeated the assertions that he had made in the declaration. He stated that he did not want Akin to dismiss the appeal, and was not even aware that the appeal had been dismissed until he received the notice

from this Court. PCR 172-73. He also confirmed that he and Akin had explicitly discussed withdrawing the appeal at High Desert State Prison, as Akin's letter described. However, Edward testified that he had told Akin, in explicit terms, "not to do it [withdraw the appeal] unless he has a letter from me explicitly stating that I wanted to." PCR 173.

In denying the petition, the district court found that "Mr. Honabach failed to demonstrate that counsel should have known he wanted an appeal and that withdrawing the appeal itself was deficient." PCR 186. The court based its findings on the fact that "Mr. Akins communicated with Mr. Honabach via letter about the dismissal of the appeal," as well as the fact that the plea agreement did not reserve any issues for appeal. *Id.* The district court also stated that Mr. Honabach's testimony consisted of "naked allegations" under *Hargrove* and so did not entitle him to relief. *Id.*

B. Legal Background

"Counsel must file an appeal when a convicted defendant's desire to challenge the conviction is reasonably inferable from the totality of the circumstances." *Burns v. State*, 455 P.3d 840 (Nev. 2020). "Counsel's duty to file a notice of appeal when one is requested is not affected by the perceived merits of the defendant's claims on appeal." *Id.* Even where a defendant explicitly waives his right to appeal, appellate counsel is still required to prosecute the appeal

anyway if that is what the defendant wants. *Garza v. Idaho*, 139 S. Ct. 738, 742, 203 L.Ed.2d 77 (2019); *see also Toston v. State*, 267 P.3d 795, 127 Nev. Adv. Op. 87 (Nev. 2011). Failure to file an appeal when requested is error under *Strickland*, and prejudice is presumed. *Garza*, 139 S. Ct. at 742; *Lozada v. State*, 110 Nev. 349, 354-57, 871 P.2d 944, 947-49 (Nev. 1994).

In *Mitchell v. State*, 381 P.3d 642 (Nev. 2012) the Court voluntarily dismissed an appeal based on not just counsel's statement that the appeal waiver foreclosed it, but also a "Consent to Voluntary Dismissal" that was signed by the defendant. This is not something that the Court has actually required in the past, but it is a simple, effective way to verify that the defendant actually consents that was not present in Mr. Honabach's case.

C. Analysis

This Court's precedent states the applicable doctrine here clearly. Where a defendant wants to appeal, their attorney is required to appeal. Even if there is an appeal waiver, even if an attorney thinks an appeal would be unwise, the defendant retains the ultimate decision about whether or not to pursue the matter.[2] If an attorney fails to appeal, prejudice is presumed according to both the Nevada and U.S. Supreme Courts. Thus, there is only a factual question remaining of

[2] *See also* Nevada Rules of Professional Conduct 1.2(a): "[A] lawyer shall abide by a client's decision concerning the objectives of representation[.]""

whether or not Edward's desire to challenge the conviction was reasonably inferable from the totality of the circumstances or not.

The evidence is uncontroverted that Edward wanted to maintain his appeal. Most probative in this regard is the fact that Edward himself filed the initial notice of appeal pro se – from the moment he was convicted, Mr. Honabach was manifesting the explicit desire to appeal. He has repeatedly maintained that he wanted to appeal, whether pursuant to the instant petition or in his multiple letters to this Court. And when the Court ordered Akin to respond to these allegations, he did so by pointing to a letter which he stated that he sent *after* withdrawing the appeal, in which he references a conversation that happened at some unspecified point in time, without saying whether that conversation happened before or after the withdrawal. The letter also simply states that "we spoke about" the dismissal, which does not actually establish that Edward consented to the dismissal.

The district court's holding improperly ignores all of this. The lower court improperly relied on Honabach's appeal waiver as a ground for denying relief, even though the existence of an appeal waiver cannot preclude relief under *Garza* and *Toston*. The lower court also incorrectly cited Akin's statement as a ground for denying relief, even though nothing in that statement actually contradicted Mr. Honabach's testimony that he had told Akin that he wanted to appeal. And the district court was also incorrect to call Edward's testimony "naked allegations"

under *Hargrove* – he provided a specific time and place where he told Akin that he wanted to appeal (the conversation at the prison) and even described the specific language that he used (no withdrawal of appeal unless Edward approved it in writing. Again, the record is uncontroverted and supported by multiple specific lines of evidence that Edward explicitly told Akin that he wanted the appeal to go forward. The district court's ruling on this point was simply incorrect.

Finally, Mr. Akin has previously been the subject of a reprimand from the State Bar. The reprimand was due to the fact that Akin had three other cases before this Court (in 2020, just a few months after Mr. Honabach's) where he failed to file any briefs. Despite this Court's imposition of sanctions, for whatever reason he could not get his work done and so the Court removed him as counsel in the other cases. PCR 138. It is not a leap of logic to suggest that if Mr. Akin failed in his duty to represent other appellants before the Supreme Court, he failed to do so in the instant case as well. The inference here is that he withdrew Mr. Honabach's appeal for the same reason that he never filed briefs in the other cases. The withdrawal was not because Akin was unaware of Edward's desire to continue the appeal; it was because he was unable to diligently perform his duties. This was a violation of Edward's rights under the US and Nevada Constitutions, and so the Court should reverse on this ground.

II. Trial Counsel Failed to Review Discovery Before Advising Edward to Accept the Plea Offer.

As Mr. Honabach stated in his declaration, "I never got to see the discovery in my case. I was especially concerned about seeing the statements of my co-defendants and other witnesses. I found out right before sentencing that [trial counsel] Mr. Beckett hadn't seen most of the discovery either. He told me that he had talked to the lawyers for the other defendants and that was good enough." PCR 194.

At the evidentiary hearing, he echoed this statement, saying that he had repeatedly asked Beckett about the discovery but understood from speaking to the investigator that Beckett hadn't reviewed the materials himself. PCR 170-71. In its order denying the petition, the district court held that failure to review discovery would be prejudicial error but that Edward's testimony, by itself, was a "bare" allegation under *Hargrove* which did not constitute sufficient evidence to establish ineffective assistance of counsel. PCR 187-88

The right to effective assistance of counsel extends to the plea bargaining process. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). To show prejudice where a plea bargain has been accepted, defendants must demonstrate a reasonable probability that they would have gone to trial absent counsel's errors. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

"Counsel has a duty to make reasonable investigations." *Strickland v. Washington,* 466 U.S. 668, 691 (1984). "Although trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006).

"Because an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, counsel have a duty to supply criminal defendants with necessary and accurate information." *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (internal citations and quotations omitted). Failure to review discovery before advising a client as to a plea offer falls well outside prevailing professional norms and is therefore error under *Strickland*. *Williams v. Washington*, 59 F.3d 673, 680-81 (7th Cir. 1995).

In the instant case, trial counsel's failure to review all of the discovery before advising Mr. Honabach to accept the plea was erroneous. It was additionally prejudicial – as Edward stated in his declaration, he did not want to take the deal in the first place and only did so on the advice of his trial counsel. He would not have done so if he were aware that counsel had failed to review all the discovery. This establishes prejudice. Mr. Honabach's constitutional rights were violated, and this Court should therefore reverse his conviction on this ground.

III. Trial Counsel Failed to Adequately Prepare for Sentencing.

At sentencing, a substantial disparity was revealed between the amount of preparation that Edward's lawyer did and the preparation that the other defendants' counsel engaged in. For instance, counsel for codefendant Angel Castro submitted a sentencing memorandum asking the Court for leniency, along with a substantial number of letters from Mr. Castro's family. PCR 92-97.

By contrast, Mr. Honabach's counsel did not submit a sentencing memorandum (although the State did) and only submitted one letter, from Edward's parents. PCR 91, 171-72, 193. Trial counsel also failed to prepare Edward to speak at his sentencing, despite his repeated requests that he do so. *Id.* The district court denied this claim on the logic that two of Mr. Honabach's codefendants also did not submit a sentencing memorandum and that they received the same sentence as Mr. Honabach, as did the one who had actually submitted a sentencing memorandum. The district court also noted that Edward's trial counsel "presented testimony" about mitigating factors, including Mr. Honabach's history of substance issues and his attempts to better himself in prison. PCR 188-89.

This was prejudicial error under *Strickland*. Failing to prepare for sentencing was deficient performance below the standard expected of a lawyer, as demonstrated by the co-defendant's counsel. It was also prejudicial, as there was a reasonable probability of a different result if counsel had done a better job of

presenting mitigation evidence to the Court. The district court's logic in holding otherwise was flawed – a defense attorney's argument is not "testimony" that can be properly relied upon by a factfinder. A defendant's mitigating factors are unique to them, and not fungible with their codefendants who may or may not have effective counsel themselves. Trial counsel's actions constituted ineffective assistance of counsel and so the Court should reverse on this ground.

IV. Trial Counsel's Errors Cumulated to Create Prejudice.

Even if no one error is sufficient to constitute a violation justifying reversal, cumulative error can take on constitutional dimensions. *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 93 S. Ct. 1038, 1043 (1973); *Lawes v. State*, 373 P.3d 935, 935 (Nev. 2011). This also applies to ineffective assistance of counsel. "Where no single error or omission of counsel, standing alone, significantly impairs the defense, the district court may nonetheless find unfairness and thus, prejudice emanating from the totality of counsel's errors and omissions." *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979). Taken separately or together, trial counsel's errors constitute prejudice and therefore ineffective assistance of counsel.

V. Mr. Honabach's Guilty Plea Was Not Voluntary in Violation of the Fifth Amendment.

As Edward has repeatedly stated, he did not actually want to accept the plea deal. He did so because he felt pressured into taking the deal by his counsel, as well as the condition of the offer that all four codefendants would have to plead guilty in order for the offer to go into effect. PCR 11, 168-70, 194. In addition, his decision to plead was based on the advice of counsel who had not adequately reviewed the discovery materials. *Id.*

To be constitutionally valid under the Fifth Amendment, a guilty plea must be entered knowingly, willingly, and understandingly. *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1971). A plea is only voluntary if counsel's advice in giving the plea was effective – ineffective assistance of counsel vitiates the plea. *Hill v. Lockhart*, 474 U.S. 52, 56-60, 106 S. Ct. 366, 370 (1985). District court determinations of whether a plea is valid are reviewed for abuse of discretion. *Bryant v. State*, 721 P.2d 364, 367 (Nev. 1986).

Edward's plea was not voluntary, as he was pressured into it. In addition, as discussed above counsel's failure to review the discovery was ineffective assistance of counsel which rendered the plea involuntary. This was a violation of Mr. Honabach's Fifth Amendment rights and so the Court should grant relief on this claim.

CONCLUSION

Edward Honabach's lawyer withdrew his appeal against Mr. Honabach's express wishes. Additionally, his plea was involuntary and his conviction marred by ineffective assistance of trial counsel. Given this, he respectfully asks the Court to grant a new appeal, a new trial, or such other relief as the Court believes proper.

Dated this 23rd day of January, 2023.

/s/ Jim Hoffman

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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:

[**X**] This brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** in **Times New Roman 14**.

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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 23rd day of January, 2023

/s/ Jim Hoffman

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Jim Hoffman, Esq.