IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

ADRIAN POWELL,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

S. Ct. No. 85955

D.C. NO.: A-21-839265-W

APPELANT'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 and must be disclosed.

1. Attorney of Record: Colleen Savage
2. Publicly-held Companies Associated: None
3. Law Firm(s) Appearing in the Court(s) Below: Sgro & Roger

DATED this 30th day of May, 2023.

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the instant matter pursuant to Nev. Rev. Stat. § 177.015(3). The Appellant appeals from the Finding of Facts and Conclusion of Law and Order filed on December 19, 2022. A timely Notice of Appeal was filed on January 11, 2023.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. INEFFECTIVE ASSISTANCE OF COUNSEL
II. CUMULATIVE ERROR

ROUTING STATEMENT

Appellant is appealing the Findings of Fact, Conclusions of Law and Order based upon a Post-Conviction Writ of Habeas Corpus. Therefore, pursuant to N.R.A.P. 17(b)(2)(B), this appeal is presumptively routed to the Court of Appeals.

STATEMENT OF THE CASE

On November 8, 2017, an Indictment was returned in the District Court charging Defendants Larenzo Pinkey, and Adrian Powell with two (2) counts of Conspiracy To Commit Robbery (Category B Felony - NRS 200.380, 199.480), two (2) counts of Burglary While In Possession Of A Deadly Weapon (Category B Felony - NRS 205.060), three (3) counts of First Degree Kidnapping With Use Of A Deadly Weapon (Category A Felony - NRS 200.310, 200.320, 193.165), seven (7) counts of Robbery With Use Of A Deadly Weapon (Category B Felony - NRS 200.380, 193.165) and one (1) count of Unlawful Taking Of Vehicle (Gross Misdemeanor - NRS 205.2715). (Exhibit "A" at 1-8). All charges stemmed from robberies that occurred at a Pepe's Tacos restaurant and a Walgreens store in Las Vegas, Nevada on September 28, 2017. *Id.*

On November 13, 2017, the defendant Mr. Powell was arraigned on the aforementioned charges in the Eighth Judicial District Court. Michael Kane Esq. was appointed on the case, and subsequently Roy Nelson Esq. was appointed to assist Mr. Kane. (*See* Joint Appendix; Volume II, at APP000427 - APP000436). Over the course of the next eight months, Mr. Kane met with Mr. Powell approximately two times. (JA, II; APP000437). Mr. Nelson allegedly met with Mr. Powell once with Mr. Kane. (JA, II; APP000437 - APP000438). The case ultimately proceeded to jury trial on July 30, 2018. Voir Dire commenced on Monday, July 30, 2018. (JA, II; APP000428). Court concluded for the day, and the parties returned the following day to resume jury selection. (JA, II; APP000431). That morning, negotiations commenced, and Mr. Kane was shown a whiteboard with various other robberies that the State claimed to be pursuing. *Id.* Upon information and belief Mr. Nelson was not present during this negotiation period. The State threatened to charge Mr. Powell with these charges unless the plea deal was taken. (JA, II;. at APP000443 - APP000444). The State also offered to take life sentence off the table. *Id.*

Mr. Powell agreed to plead guilty pursuant to the Guilty Plea Agreement after Mr. Kane advised Mr. Powell to take the deal after stating that he would spend the rest of his life in prison if he did not. (JA, II; APP000322-APP000327).

Mr. Powell pled guilty, the jury was discharged, and a sentencing date was set. On October 31, 2018, prior to sentencing, Mr. Powell expressed concerns regarding his counsel and the guilty plea agreement, and his current counsel, Michael Kane was withdrawn and Monique McNeil, Esq. was appointed. On January 14, 2019, Petitioner filed a Motion to Withdraw Guilty Plea, requesting an evidentiary hearing. (*Id*.). On February 5, 2019, the State filed its Opposition. (JA, II; APP000335- APP000356). On February 27 2019, the District Court denied Petitioner's motion without conducting an evidentiary hearing.

On May 22, 2019, Petitioner was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – twelve (12) to forty-eight (48) months; as to Count 2 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 1; as to Count 3 – five (5) to fifteen (15) years with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 2; as to Count 4 – thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 3; as to Count 5 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 4; as to Count 6 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent

with Count 5; as to Count 7 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 6; as to Count 8 – twelve (12) to forty-eight (48) months concurrent with Count 7; as to Count 9 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 8; as to Count 10 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 7; as to Count 11 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 10; as to Count 13 - five (5) to fifteen (15) years with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon consecutive to Count 3; and as to Count 14 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 11, with six hundred two (602) days credit for time served. The aggregate total sentence was five hundred fifty-two (552) months maximum with a minimum parole eligibility of one hundred ninety-two (192) months. (JA, II; APP000410- APP000413). The Judgment of Conviction was filed on May 24, 2019. *Id.*

The Defendant filed a direct appeal to the Nevada Supreme Court challenging only the Court's denial of his Motion to Withdraw his Guilty Plea on

June 14, 2019. The Nevada Supreme Court reversed and remanded to the district court to conduct an evidentiary hearing on May 11, 2020. (JA, II; APP000416 - APP000419). Remittitur was issued on June 5, 2020. (JA, II; APP000421).

The Court conducted an Evidentiary Hearing on August 13, 2020, at which only Mr. Kane was called as a witness to testify. (JA, II; APP000423- APP000459). Mr. Nelson was not requested to appear by Ms. McNeil. *Id.* Following the testimony, the Court found the Petitioner was not entitled to relief. (JA, II; APP000454- APP000459). The Court found there was no ineffective assistance of counsel and no grounds or fair and just reason to withdraw Petitioner's plea. *Id.* The Findings of Fact, Conclusions of Law and Order was filed on March 4, 2021. (JA, II; APP000481). Ms. McNeil failed to file a Petition for Writ of Habeas Corpus (Post Conviction) and failed to counsel Petitioner on his ability to do so.

On August 10, 2021, Ms. McNeil filed a declaration stating that she failed to file a timely Petition for Writ of Habeas Corpus (Post Conviction). (JA, III; APP000498- APP000499). On August 10, 2021, Petitioner filed the pro se Petition for Writ of Habeas Corpus (Post-Conviction). (JA, III; APP000501-APP000521). On September 9th, 2021, the state filed a Response to the Writ of Habeas Corpus (Post Conviction).

On October 14, 2021, Mr. Powell filed a Motion to Dismiss Ms. McNeil as counsel. (JA, III; APP000557- APP0005563). District Court granted the Motion to Dismiss Ms. McNeil on November 29, 2021. (JA, III; APP000566). Undersigned counsel, Colleen Savage, Esq. was subsequently appointed on January 26, 2022.

STATEMENT OF FACTS

Adrian Powell and Larenzo Pinkey were arrested on September 28, 2017. (JA, I; APP000199- APP000200). The following is a summary of the victims' testimony from the Grand Jury presentation, as well as a summary of the forensic evidence and the circumstantial evidence that may have been presented at trial.

A. Testimony of Jose Chavarria

Jose Alfredo Chavarria Valenzuela was working as a cook at Pepe's Tacos located at 2490 Fremont Street, Las Vegas, Nevada on September 28, 2017. (JA, I; APP000032- APP000033). At approximately 2:40 AM, Chavarria was in kitchen area when two men entered the restaurant. (JA, I; APP000035. Chavarria ran toward the back refrigerator where his co-worker was located, when one of the men jumped the counter, followed Chavarria and pointed a gun at him. *Id.* The man allegedly pointed his gun at Chavarria and Chavarria jumped on the ground. It is alleged that Chavarria was directed from the back of the store to the front cash registers who was unable to open the till because he did not have the

correct password. (JA, I; APP000036). The second man then retrieved Chavarria's coworker to assist Chavarria in opening the cash registers. (JA, I; APP000037). One of the men then took Chavarria to the second cash register, where he was either thrown to the ground or ordered to his knees, Chavarria's testimony is unclear. *Id*. The men then took the money from the cash registers but did not take any property from Chavarria. (JA, I; APP000037 - APP000038).

Testimony of Yenir Hessing

Yenir Hessing works as the shift lead at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada. (JA, I; at APP00007). On September 28, 2017, Hessing was working the graveyard shift with four other Walgreens employees when, at approximately 4:05 AM, two masked gunmen entered the store. (JA, I; APP00008 – APP00010).

Hessing was stocking the shelves in the food aisle when one of the men allegedly pointed a gun at her, demanding she move to the front of the store where he told her to open the three cash registers, which Hessing did. *Id.* At that moment, another Walgreens employee, Tifnie Bobbitt returned from lunch and was ordered toward the office located at the back of the store. (JA, I; APP00010).

Upon reaching the back office, Hessing entered the code and Hessing and Bobbitt were ordered in. (JA, I; APP00015 – APP00016). In the office, it is alleged that the man began hitting Hessing in the ribs with the gun and

demanding that she open the safe. (JA, I; APP00017). Hessing opened the first of two safes and the man grabbed everything. *Id.* The man then demanded Hessing open the second safe, which she did. *Id.* The gunman grabbed the contents from the second safe and fled. *Id.*

SUMMARY OF THE ARGUMENT

Mr. Powell's legal representation has continuously and spectacularly failed to meet the reasonable standard expected and guaranteed to him by the Sixth Amendment. These errors prejudiced his defense in literally every stage of the case, from pre-trial litigation, to negotiating the plea agreement, and even during post-conviction proceedings. Not only was Mr. Powell subjected to ineffective assistance by his trial counsel, but he was failed by the attorney who was appointed to remedy trial counsel's prior errors. Trial counsel undermined Mr. Powell's defense during their pre-litigation representation by failing to challenge unconstitutionally permitted charges by not challenging anything via motion practice. Counsel also failed to properly investigate alibi witnesses and failed to reveal the conflict of interest that prevented Mr. Powell from receiving effective assistance of counsel.

Michael C. Kane, Esq. was Mr. Powell's appointed counsel up to the entry of the guilty plea agreement. Supposedly, he has tried approximately twenty (20) civil cases. (JA, II; APP00446). Recognizing his own lack of experience, Mr.

Kane added Roy Nelson, a criminal trial lawyer, as first chair. (JA, II; APP00436, APP00445). Apparently, unbeknownst to Mr. Kane, Mr. Nelson was suffering from documented substance abuse issues which were impacting his ability to perform his duties as an attorney. (JA, III; APP00621, APP00678; IV; APP000679). Mr. Kane was representing a client facing three life sentences and an additional one hundred and fifty years in prison on fifteen (15) charges having never tried a criminal case. (JA, I; APP000201 – APP000210). On top of all of that, the horrific loss of his newly born twins during this same period of time. (JA, II; APP00446). Prior to trial, Mr. Kane only visited Mr. Powell "two to three times" with Mr. Nelson only attending one of those visits. (JA, II; APP00439 – APP000431). Not surprisingly, then, pretrial investigation and motion practice was virtually nonexistent. This created an untenable, powerless, and unfair position for Mr. Powell.

Amazingly, Mr. Powell suffered from the fact that both of his lawyers were dealing with substantial personal ordeals and tragedies that placed Mr. Powell in the untenable position of having to rely upon them for key decisions, including entry of plea. (JA, II; at APP00456 – APP000458; JA, III; APP000621 – APP000678; and JA, IV; APP000679). At the time originally set for sentencing hearing, Mr. Powell expressed concern regarding his guilty plea agreement and his reliance on counsel which prompted the court to dismiss trial counsel and

appoint Ms. McNeil. While Ms. McNeil filed the motion to withdraw the guilty plea for Mr. Powell, her subsequent representation was plagued with missed deadlines. (JA, II; APP00322 – APP000334; and JA, III; APP000498 – APP000499). The combined effect of the ineffective assistance of counsel, the trial court's refusal to grant motion to withdraw guilty plea agreement, and the unconstitutionality of the dual criminal liability of the charges were contrary to clearly established Nevada Law and resulted in decisions all to the detriment of Mr. Powell. Mr. Powell now respectfully requests that this Court grant this Petition for Writ of Habeas Corpus for the purposes set forth herein.

LEGAL ARGUMENT

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment right to counsel has been recognized by the United States Supreme Court which includes the right to "the effective assistance of counsel" during criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) *(citing McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970)). When measuring any claim of ineffectiveness, the standard is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the proceeding cannot be relied on as having produced a just result." *Paine v. State*, 110 Nev. 609, 620, 877 P.2d 1025, 1031

(1994) *(Overruled on other grounds by Leslie v. Warden*, 118 Nev. 773, 59 P.3d 440 (2002)).

As the Second Circuit Court of Appeals held, the proper standard for attorney performance is that of reasonably effective assistance. *See Trapnell v. United States*, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in *McMann v. Richardson*, supra, 397 U.S., at 770, 771, 90 S.Ct., at 1448, 1449, that a guilty plea cannot be attacked when based on inadequate legal advice unless trial counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." *See also Cuvier v. Sullivan*, supra, 446 U.S., at 344, 100 S.Ct., at 1716.

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. In order to establish that representation fell below an objective standard of reasonableness, defendants must meet the factors set forth within the *Strickland* test*:*

- "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.

- Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

A. PRE-LITIGATION INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Powell experienced prejudice from the onset when he was first appointed trial counsel. Defendants have an incredible reliance on their counsel not only during trial, but through the entire process of litigation. Defense counsel has the responsibility to defend against extraneous charges and engage in pretrial motion practice, which is an objective standard for competent, effective representation. Instead, Mr. Powell was left helpless as his counsel entirely failed to engage in any pretrial motion practice challenging the probable cause for any of these charges which deprived him of a fair trial and prejudiced the defense from the start. Mr. Powell's inability to challenge any charges prior to trial, combined with inexperienced, distracted counsel left him vulnerable to the adversarial process.

a. Trial Counsel Failed to Object to Fatally Flawed Complaint.

The State's Indictment charged Mr. Powell with three counts of First-Degree Kidnapping in relation to the alleged robbery victims. (JA, I; APP00201 – APP000210). Each of these charges carried a potential life sentence, which was the harshest punishment contained in the charging document. *Id.* Trial counsel

failed to engage in any pretrial motion practice to contest these charges, despite longstanding Nevada law giving a defendant the right to prevent dual criminal liability when kidnapping charges overlap with robbery charges. Had trial counsel been successful in dismissing the Kidnapping Charges during pretrial motion practice, it would have changed the entire dynamic of plea negotiations, and, ultimately, Mr. Powell's decision to plead guilty.

The ability to attack the kidnapping charges was available from the start of this case. Under Nevada law, the test found in *Mendoza* differentiated the movement that was incidental to robbery as opposed to kidnapping where the movement (1) substantially increase the risk of harm; and (2) substantially exceeds that required to complete the associated crime. *Mendoza v. State*, 122 Nev. 267, 274-75, 130 P.3d 176, 180-81 (2006).

In the instant matter, Grand Jury testimony revealed that the robbery victims were only moved as a means for the suspects to carry out the robbery. The intent of the suspects in each robbery was to steal money from both locations via cash register and safe. In Mr. Chavarria's case, this could not be accomplished due to Mr. Chavarria being unable to open the cash register resulting in him ending up on the ground. (JA, I; APP00037). In Ms. Hessing's case, this could not be accomplished without Ms. Hessing opening the cash registers in the front of the store or the safe in the office. In other words, all

movement of the victims that took place was incidental and necessary in order to commit the robberies. (JA, I; at APP0007 – APP00017).

So long as the kidnapping is incidental to the robbery, defense counsel can attack the kidnapping charges prior to trial. *Sheriff, Clark County v. Medberrv*, 96 Nev. 202, 204, 606 P. 2d 181, 182 (1980); *Langford v. State*, 95 Nev. 631, 638-639, 600 P.2d 231, 236-37 (1979). This is a case where the grounds are clear. Counsel's failure to attack the kidnapping counts left three life sentences on the table, which turned out to be one of the main sources of leverage the State used to coerce Powell into signing the plea agreement. (JA, I; at APP000443). Had trial counsel filed a pretrial Writ of Habeas Corpus Mr. Powell would have had the opportunity to argue for dismissal of the kidnapping charges. However, because there was not a pretrial Writ of Habeas Corpus filed, and the joinder filed by trial counsel was dismissed as untimely, it placed Mr. Powell at a significant disadvantage when it came time to negotiate a plea deal. Mr. Powell was prejudiced by this deficient performance because there existed a reasonable probability that some, if not all, of the kidnapping charges would have been dismissed. Had these charges been dismissed, there is a significant probability that Powell would have rejected the State's offer and insisted on going to trial

Not only did trial counsel fail to submit a Pretrial Petition for Writ of Habeas Corpus on Mr. Powell's behalf, trial counsel failed to file a single pretrial

motion. Mr. Powell's counsel did not contest a single piece of evidence with pretrial motion practice. Notably, there was not one motion pertaining to suppression of evidence, jury questionnaires, voir dire methodologies, nor opening statements. The record is wholly deficient, making it nearly impossible for Mr. Powell to create a defense on the spot at trial.

A. INEFFECTIVE ASSITANCE OF COUNSEL AT THE PRETRIAL AND TRIAL STAGE

a. A Conflict of Interest Developed Between Defense Counsel and the Client During the Case.

The Nevada Supreme Court held that when the defense counsel has based his recommendations on a plea bargain and tactical decision upon factors that would further his own personal ambitions as opposed to his client's best interests, it was that conduct which "fell below an objective standard of reasonableness" and resulted in "prejudice" to his client. *Larson v. State*, 104 Nev. 691, 694, 766 P.2d 261, 263 (1988).

Here, Mr. Powell's constitutional right to effective assistance of counsel was severely impacted by the personal circumstances each of his trial counsel were experiencing during their representation which resulted in prejudice to Mr. Powell and ultimately created a conflict of interest. Specifically, Mr. Nelson was referred to the Nevada Bar for professional misconduct, which impacted his ability to practice law resulting in his removal from multiple cases. (JA, IV;

APP000679). Details surrounding Mr. Roy's circumstances are well documented in his case currently postured before the Nevada Supreme Court, Case No. 84369; In Re: Discipline of Roy L. Nelson, III. Due to the personal struggles Mr. Nelson was facing, he could not possibly act in the best interest of Mr. Powell as lead trial counsel, and thus his representation fell below an objective standard of reasonableness as set forth in *Larson*.

Like Mr. Nelson, trial counsel Kane was also preoccupied with a personal situation which impacted his ability to perform his duties as an attorney. Tragically, while representing Mr. Powell, Mr. Kane experienced a terrible family tragedy which forced him to work from home from March 2017 to May 2017. (JA, II; APP000446). Trial preparation during the last few months leading up to trial is of incredible importance and time is extremely valuable to be able to adequately prepare for trial. Trial preparation includes, amongst many others, meeting clients, reviewing evidence, devising a trial strategy, and discussing theories of the case, all of which are necessary to sufficiently prepare for trial. Unfortunately, Mr. Kane's personal circumstances and lack of criminal experience rendered him incapable of adequately preparing for a complex trial as in the instant matter, resulting in Mr. Powell receiving ineffective assistance of counsel. Mr. Kane conceded to his lack of experience, stating under oath that he brought Mr. Nelson on to Mr. Powell's case to act as the "first chair" specifically

due to his lack of criminal experience.

> Q. Mr. Kane, how many criminal jury trials have you done? At the time --
>
> A. That would have been my first criminal jury trial.
>
> …
>
> Q. And so you said you brought Roy Nelson on. Was Roy going to be considered first chair or second chair?
>
> A He was going to be considered first chair, I believe. I was planning on doing the voir dire. I was going to do at least one witness.
>
> (JA, II; APP000444).

Mr. Kane further conceded he was only able to visit Mr. Powell approximately two times prior to the commencement of his trial, only one of which Mr. Nelson allegedly attended. (JA, II; APP000440). It is unimaginable for even the most experienced criminal defense attorneys to adequately prepare for trial after only two visits with a client. There is no time to completely review the evidence, create a defense strategy, and discuss the potential consequences of trial in just a few hours. As such, Mr. Kane and Mr. Nelson's personal circumstances created a situation where both parties could be reasonably understood as distracted resulting in deficient performance as counsel to Mr. Powell.

While this situation is different from the representation in *Larson*, where the attorney made recommendations based on his personal ambitions which led to prejudice, here we have two attorneys, facing substantial personal crises over the

course of Mr. Powell's case, and when faced with the first opportunity to take a Plea Agreement regardless of the merit, defense counsel advised their client to take the erroneous deal. (JA, II; APP000442). Mr. Kane and Mr. Nelson's personal struggles restricted their ability to adequately prepare, permitting only a nominal approach to Mr. Powell's case. Trial counsel failed to advise Mr. Powell about the potential consequences of accepting the plea deal. Further, trial counsel failed to challenge the State when threatened with additional uncharged crimes where no discovery had been reviewed which revealed a pattern of making recommendations and tactical decisions based on personal motives as opposed to Mr. Powell's best interest. But for the prejudiced advice from Mr. Kane and Mr. Nelson, it is reasonable that the proceeding would have been different.

b. TRIAL COUNSEL FAILED TO THOROUGHLY INVESTIGATE MR. POWELL'S ALIBI AND ALIBI WITNESSES

When a defense attorney fails to conduct an adequate investigation, he denies his client his Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *also see Warner v. State*, 102 Nev. 635, 638, 729 P.2d 1359, 1361 (1986).

Under Strickland, the defense counsel has a duty "to make every reasonable investigation or to make a reasonable decision that makes particular

investigations unnecessary." 466 U.S. 668. The trial counsel, at a minimum, must conduct a reasonable investigation enabling him to make informed decisions regarding how to best represent his client. *Phillips v. Woodford*, 267 F.3d 966, 978 (9th Cir. 2002). Pretrial investigation is a critical area in any criminal case and failure to accomplish that investigation has been held to constitute ineffective assistance of counsel. This Court has stated "[i]t is still recognized that a primary requirement is that counsel... conduct careful factual and legal investigations and inquires with a view toward developing matters of defense in order that they make informed decisions on his client's behalf both at the pleading stage... and at trial." *Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473-474 (1975).

The Federal Courts also hold that pretrial investigation and preparation for trial are a key to effective representation of counsel. *U.S. v. Tucker*, 716 F.2d 576 (1983). When the deficiencies in counsel's performance can be found to be severe and cannot be characterized as the product of strategic judgment, ineffectiveness may be clear. *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989). Thus, the courts of appeals agree that failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness. *Id.*

In *Warner v. State*, 102 Nev. 635, 729 P.2d 1359 (1986), this Court found that trial counsel was ineffective when counsel had failed to conduct an adequate

pretrial investigation, failed to properly utilize the full-time investigator employed by the public defender, and failed to prepare for the testimony of defense witnesses. *See also, Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991). "At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir.1984), *cert, denied*, 469 U.S. 1226, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985). Ineffectiveness 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 s/he has not yet obtained the facts on which such a decision could be made. *See Strickland*, 466 U.S. at 690-91.

The Eighth Circuit Court of Appeals held that when counsel did not investigate his client's alibi prior to trial that satisfied the requirement of the Strickland test for ineffective counsel. *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991). The Sixth Circuit Court of Appeals also held that when the previous counsel failed to interview the alibi witnesses prior to trial that was found to be unreasonable thus satisfying the Strickland test. *Clark v. Redman*, 911 F.2d 731 (6th Cir. 1990).

As stated above, a failure to investigate qualifies as a deficiency of trial counsel under *Strickland*. Trial counsel did not conduct any pretrial investigation

for Powell's alibi, despite his insistence that he had an alibi and provided contact information for alibi witnesses. (JA, II; APP000331 – APP000334). To prove prejudice, Powell must present a "reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* Virtually no investigation was done to substantiate Powell's alibi prior to trial counsel's advice to accept the State's plea deal. Powell was facing numerous serious felony charges and several life sentences, yet nothing was done to potentially exonerate Powell of any guilt by providing a clear alibi. Powell provided contact information for an alibi witness, in this case his fiancé. Despite Mr. Powell's request to investigate this alibi neither his trial counsel, nor anyone acting on their behalf reached out to this witness to discuss anything alibi related at any point during their representation. (JA, II; APP000439). As such, there is sufficient information available to support the notion that if the case had been thoroughly investigated and adequately prepared for trial, and if the legal representation had been competent, the result would have been different.

B. INEFFECTIVE ASSISTANCE OF COUNSEL - GUILTY PLEA AGREEMENT AND MOTION TO WITHDRAW

a. Counsel Misrepresented to his Client the Terms of the Plea Deal

It has long been the law that a plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent. *Brady v. United States*, 397 U.S. 742, 748, 25 L.Ed.2d 747, 90 S.Ct. 1463 (1970). This standard connotes a two-part test.

The first prong of this test requires that the plea be intelligent. The United States Supreme Court has held that:

> A plea does not qualify as intelligent unless a criminal defendant first receives real notice of a true nature of a charge against him, the first and most universally recognized requirement of due process. *Bousley v. United States*, 523 U.S. 614, 618, 118 S.Ct. 1604 (1998) (internal citation omitted).

Second, a plea must be voluntary. The voluntary prong is addressed as follows:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including *10 unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). *Brady v. United States*, 397 U.S. 742, 755.

A "knowing" plea is one entered into with a full understanding of the nature of the charge and all the consequences for the plea. *Boykin v. Alabama*, 395 US 238 (1969). A plea agreement is construed according to what the defendant reasonable understood when he entered the plea. *Statz v. State* 113 Nev. 987, 993, 944 P.2d 813, 817 (1997); *Sulivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). The defendant's reasonable understanding is

distinguishable from the mere subjective belief of defendant as to any potential sentence, or hope of leniency, unsupported by a promise from the state or an indication by the court. *See Rouse v. State*, 91 Nev. 677, 541 P. 2d 643 (1975)

A defendant who enters a guilty plea based on the advice of counsel may refute the guilty plea by demonstrating the ineffectiveness of counsel's performance violated the defendant's right to counsel guaranteed under the sixth amendment to the US constitution. *Nollete v. State*, 118 Nev. 341, 348-349, 46 P.3d 87, 92 (2002); *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) A defendant must substantiate their claim of ineffective assistance of counsel by showing counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's erroneous advice, the defendant would not have pled guilty. *Id.*; *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985).

Mr. Powell asserts that his plea was signed involuntarily because of the misrepresentations made by his counsel during plea negotiations. These misrepresentations included unfulfilled and unfulfillable promises of a sentence that guaranteed nine to fifteen years in prison. (JA, II; APP000322-APP000324). His attorney could not promise something that is left to the court's discretion, and the actual sentencing decision was significantly different from what counsel had

promised. Mr. Powell's counsel also failed to investigate or request discovery on the undocumented charges that could result in an additional three hundred years of prison for Mr. Powell prior to advising him to agree to the offered Plea Deal. (JA, II; APP000430 – APP000433). At no point would Mr. Powell have had a reasonable understanding of these threatened charges prior to signing the Guilty Plea Agreement. This is clearly due to Mr. Powell's attorney's ineffective assistance of counsel and erroneous advice. These promises and failures to effectively communicate the nature of the deal fully implicate the Brady rule and invalidate the plea deal. Had Mr. Powell known that there was a possibility that these additional charges were bare and naked, and had he known that the sentence communicated to him was not guaranteed then he would not have pleaded guilty and would have insisted on going to trial. Therefore, Mr. Powell is entitled to relief by way of this appeal challenging his Writ of Habeas Corpus. (JA, III; APP000586 – APP000678).

b. Counsel Failed to ask the State to Provide Discovery on Alleged new Criminal Cases That Influenced Guilty Plea.

The Supreme Court held that to succeed in the second prong of the Strickland test when arguing that ineffective assistance was erroneous plea advice, the defendant must prove that they would have entered a different plea but for counsel's performance. *Hill 474 U.S. 52, at 368.* When the deficiencies in

counsel's performance can be found to be severe and cannot be characterized as the product of strategic judgment, ineffectiveness may be clear. *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989). Thus, the courts of appeals agree that failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness. *Id.*

The Nevada Supreme Court has held that for a valid plea to stand, the Defendant must understand the elements of offense to which the plea was entered or made factual statements to court which constitute admission to offence pled to. *State v. Love*, 109 Nev. 1136, 1137, 865 P.2d 322, 329 (1993). When determining if trail counsel was effective, the court determines whether counsel made a "sufficient inquiry into the information pertinent to his client's case." *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). And then whether counsel made a "reasonable strategy decision on how to proceed with his client's case." *Id.* While trial counsel is not required to exhaust all avenues of defense, that is only relevant when "counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome" *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

In this case, Mr. Kane and Mr. Nelson clearly failed to obtain discovery and understand the probability of the charges actually being filed against Mr. Powell, and thus failed to effectively construct a reasonable strategy for their

client which led to clear prejudice by Mr. Powell accepting the Guilty Plea Agreement. Under Strickland, the first prong is the attorney's performance must be proven to be deficient. This can be shown by trial counsel's erroneous advice to Mr. Powell to accept a Guilty Plea Agreement with the State where a significant component of that agreement was based on the State agreeing to not charge Mr. Powell with ten additional robbery charges. (JA, II; APP000430 - APP000431). Not only had trial counsel never reviewed the discovery from those new cases; the only alleged evidence they were presented with were photos on a police white board. *Id*. Even if other factors were included in the negotiation of the Guilty Plea Agreement, such as taking life sentence off the table from the previously charged crimes, the threat of ten additional robbery charges which could amount to a maximum of 150 years in prison which amounts to an additional life sentence on top of the previous charges. *Id*. Mr. Powell was placed in the untenable position where, not only did he face three life sentences from the original charges being brought against him, but he was faced with the possibility of being sentenced to an additional three hundred years for crimes in which he had no ability to review or even understand. *Id*. Mr. Powell relied on the representation appointed to him to understand and represent him within a range of competence guaranteed to him by the sixth amendment, and to reasonably advise him on this new and objectively significant change in his case. The

response of Mr. Powell's legal counsel was not to delay the trial for review of these new charges being threatened by the State that clearly changed the dynamic of the entire case, or even to request the discovery from these new cases, but to advise their client to blindly accept the State's deal. *Id*. This advice clearly shows a lack of baseline competency expected of an attorney advising a client of a deal with life altering consequences.

Under Strickland, the second prong requires a reasonable probability that Mr. Powell would have, but for counsels' unprofessional errors, resulted in a different result during the Plea Agreement Negotiation. It is apparent that these new allegations would not only prejudice Mr. Powell subjectively but would prejudice an objectively reasonable person in Mr. Powell's position as well. The threat of an additional three hundred years of imprisonment combined with the danger of the unknown is clearly a factor that could affected Mr. Powell's decision to take a plea deal. While these new allegations may or may not have been able to have been brought by the State, Mr. Powell was in no position to understand or be able to understand these new charges. This type of erroneous advice by trial counsel, which not only shows a clear and obvious lack of understanding of these new potential charges being brought against Mr. Powell, but a total lack of meaningful assistance. The ineffective assistance of Mr. Powell's counsel plainly falls below the objective standard of reasonableness

required from counsel, and the reasonable probability of Mr. Powell not pleading guilty but for counsel's erroneous advice plainly exists.

C. INEFFECTIVE ASSITANCE OF COUNSEL THROUGHOUT COLLATERAL PROCEEDINGS.

Unfortunately, the ineffective assistance of counsel did not stop after the imposition of Mr. Powell's sentence. Following the judgment of conviction filed on May 24, 2019, Ms. McNeil failed to file a direct appeal which challenged both the district court's denial of the Motion to Withdraw the Guilty Plea, in addition to challenging the overall Judgment of Conviction producing a procedural default. Furthermore, Ms. McNeil wholly failed to file, or even advise Mr. Powell of his ability to file a Writ of Habeas Corpus within one year after entry of the March 4, 2021 Findings of Fact and Conclusions of Law. Ms. McNeil admitted to this shortcoming in a sworn declaration dated August 10, 2021. (JA, III; APP000498 – APP000499).

A counsel's ineffectiveness can be found when they failed to properly "preserve a claim for state-court review" but "only if that ineffectiveness itself constitutes an independent constitutional claim." *Edwards v. Carpenter*, 529 U.S. 446, 447, 120 S. Ct. 1587, 1589, 146 L. Ed. 2d 518 (2000). Ms. McNeil's performance continuously fell below the objective standard of reasonableness. First, Ms. McNeil failed to challenge the Judgement of Conviction in its entirety when she filed the June 14, 2019 Notice of Appeal, wherein she only challenged

the district court's denial of the Motion to Withdraw the Guilty Plea Agreement. (JA, II; APP000322). Failure to challenge the overall judgment forever waived Mr. Powell's ability to do so on direct appeal to the Nevada Supreme Court. Despite this, the Nevada Supreme Court remanded the case for the purpose of conducting an evidentiary hearing on Mr. Powell's Motion to Withdraw the Guilty Plea Agreement. (JA, II; APP000416). At the hearing, Ms. McNeil failed to call relevant witnesses including "lead trial counsel" Roy Nelson who had been under scrutiny with the Nevada Bar for suspected substance abuse and overall ineffective assistance. (JA, II; APP000423 – APP000424). Instead, Ms. McNeil only requested to examine one of Mr. Powell's former attorneys, Michael Kane. *Id.* Incredibly, Ms. McNeil waived the opportunity to examine Mr. Nelson, under oath, failing to obtain testimony regarding Mr. Nelson's preparation, counseling of Mr. Powell and overall trial strategy. The Motion to Withdraw Guilty Plea Agreement was entirely based on ineffective council and the fact that only one of Mr. Powell's attorneys was called for examination by Ms. McNeil clearly prevents Mr. Powell being able to reasonably defend his claim properly especially when considering the aforementioned issues Roy Nelson was facing.

Following the May 24, 2019, Judgment of Conviction, McNeil again failed to provide effective counsel to Mr. Powell by failing to file a direct appeal to the Nevada Supreme Court challenging not only the district court's denial of the

Motion to Withdraw the Guilty Plea, but the overall Judgment of Conviction, which led to the waiver of this claim. Furthermore, following the March 4, 2021, Findings of Fact in Conclusions of Law, Ms. McNeil failed to file a Petition for Writ of Habeas Corpus in a timely fashion, nor did she advise Mr. Powell of his ability to challenge this ruling altogether. The details of this error can be seen in the sworn declaration drafted by Ms. McNeil and filed on Mr. Powell's behalf where she plainly states that she miscalculated the date which led to Mr. Powell missing the date to appeal the court's decision based on her error. (JA, III; APP000498 – APP000499). Ms. McNeil has not only failed to advise Mr. Powell on the timeliness on two important deadlines, but that failure has thereby waived any remedy Mr. Powell could have received by appealing the district court's decision denying his Motion to Withdraw his Guilty Plea Agreement. This has prejudiced Mr. Powell's ability to adequately challenge his conviction. But for Ms. McNeil's ineffective counsel, the result of the proceeding would reasonably been different.

D. THE DISTRICT COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING.

In Nevada, a post-conviction habeas petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *McConnell v. State,* 212 P.3d 307, 313, 125 Nev. Adv. Rep. 24 (2009); *See*

also *Byford v. State*, 123 Nev. 67, 68-69, 156 P.3d 691, 692 (2007).

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing, and states:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

There is no question that Mr. Powell raised specific factual allegations in the petition. However, the district court refused to grant a hearing.

IV. CUMULATIVE ERROR.

Cumulative error warrants habeas relief where the errors have "so infected the proceedings with unfairness as to make the resulting conviction a denial of due process." *Donnelly v DeChristaforo*, 416 U.S. 637, 643 94 S.Ct 1868, 4. L.Ed. 2d 431 (1974). When errors of Constitutional magnitude are involved, reversal is warranted where those combined errors have created prejudice for the defendant. *United States v. Wallace,* 848 F.2d 1464, 1475 (9th Cir. 1988). Even if an error does not, on its own, rise to the level of a Constitutional violation, a combination of errors renders a trial fundamentally unfair in violation of the Sixth Amendment to the United States Constitution.

See e.g., Lundy v. Campbell, 888 F.2d 467, 472073 (6th Cir. 1989), *cert. denied,* 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990); *Walker v. Engle,* 703 F.2d 959, 963 (6th Cir. 1983), *cert. denied,* 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983); *United States v. Necoechea,* 986 F.2d 1273, 1282 (9th Cir. 1993); *United States v. Glover,* 83 F.2d 429 (9th Cir. 1996); *United States v. McPherson,* 108 F.3d 1387 (9th Cir. 1997); *Big Pond v. State,* 101 Nev. 1 (1985). Habeas relief is available for cumulative error when the errors, combined, have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly,* 416 U.S. at 643, 94 S.Ct. at 1871.

In Mr. Powell's case, the inadequacies and critical failures of trial counsel and appellate counsel so infected Mr. Powell's litigation with unfairness that he was denied due process of the law as required by the Fifth and Fourteenth Amendments of the United States Constitution. Additionally, the failures of trial and appellate counsel, combined with the violation of Mr. Powell's right against Dual Criminal Liability resulted in cumulative errors, the effect of which resulted in a Guilty Plea Agreement that was "so infected ... with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643, 94 S.Ct. at 1868. Upon review, this Court should find this cumulative error warrants granting this appeal.

CONCLUSION

Based upon the arguments set forth herein, Adrian Powell's convictions should be reversed, and this matter remanded to the lower court.

DATED this 30th day of May 2023.

Respectfully Submitted:

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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 Edition in Times New Roman 14 point font; or

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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 30th day of May, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on the 30th of May, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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