l. Trial counsel was ineffective for failing to preserve and present the issue of the improper production of photographs and notes of Janeen Mutch/Harvey Gruber. X AA 164-168.

On February 20, 2004, the Court conducted an "Ex Parte Hearing Outside the Presence of the State." The court held the hearing to determine if the attorney client/attorney work product privilege existed as to the testimony and actions of those two attorneys. Specifically, on December 20, 2000, Janeen Mutch was instructed by Mr. Centofanti's counsel at the time, Harvey Gruber, to go to the scene of the underlying incident, interview witnesses, and take photographs of the scene. Counsel for Mutch turned over some of this documentation to the State. While the district court ruled that Mutch's testimony was covered by privilege, trial counsel was still ineffective for failing to determine or distinguish notes and photographs that were previously improperly turned over to the State. Trial counsel never filed a motion to strike or motion in limine to prevent the State from using that information. This was particularly prejudicial, because one of the photographs taken was used by the State in their argument to the jury.

m. Trial counsel was ineffective for failing to interview and secure crucial defense witness testimony. X AA 168-175.

Upon Mr. Centofanti's arrest on December 20, 2000, various co-workers kept in contact with Mr. Centofanti. Mr. Centofanti wanted to have those witnesses interviewed immediately and told his counsel. Counsel informed Mr. Centofanti that it was not necessary to interview "friendly" witnesses. However, upon his release, those

"friendly" witnesses ceased contact with Mr. Centofanti. Trial counsel's failure to interview these witnesses was ineffective, and ultimately prejudicial, because their favorable testimony was tainted by media coverage and other inflammatory actions made by Virginia's family and friends. The U.S. Supreme Court held in *Kimmelman v. Morrison*, 477 U.S. 385 (1986), that the "Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution and the reliability of the adversarial testing process."

n. Trial counsel was ineffective in failing to properly handle the issues pertaining to the guardianship proceedings. X AA 175-181.

After Mr. Centofanti's arrest and subsequent release on bail, there was a contentious guardianship proceeding. Mr. Centofanti was subpoenaed to take a deposition. Additionally, the State requested that Mr. Centofanti consent to a psychological evaluation. During this litigation over custody of his child, Mr. Centofanti told his trial counsel that the guardianship proceedings were crucial to his criminal theory of defense, and defense counsel should utilize the discovery procedures in the guardianship proceedings to obtain interviews and deposition testimony of potential witnesses in the criminal matter. Additionally, at some point in this litigation, the guardian ad litem turned her file over to the State, which the State subsequently used in a response to a writ.

Therefore, trial counsel was ineffective, because adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide.

o. Trial Counsel was ineffective for failing to utilize Virginia's criminal history. X AA 199-203.

Trial counsel obtained Virginia's criminal history. However, trial counsel was ineffective in failing to preparing for the State's case, in which the State sought to neutralize this evidence.

p. Trial counsel was ineffective for failing to investigate defense experts' opinions prior to presentation of that evidence. X AA 214, X AA 224-228.

Several experts were hired by the defense to support the theory of defense in the area of forensic pathology, ballistics, blood spatter, shootings, and psychology. It was important to make sure that the defense experts all worked in concert to fully and effectively support the theory of the defense. Specifically, Dr. John Eisele prepared a report which stated "it would be hard to present the underlying events as self-defense." This report was known to trial counsel. Mr. Centofanti was not informed of this report or Dr. Eisele's findings. Given the theory of defense and this known report, trial counsel referred to Dr. Eisele in his opening statements, and also called him to testify at the trial.

q. Trial counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial, including, Emeline Eisenman. X AA 237-244.

Emeline Eisenman is Virginia's mother. Trial counsel never subpoenaed her to testify at trial. However, it was clear from pretrial hearings that her testimony was important, as she attempted to influence the outcome of the investigation in the testimony of other State's witnesses. Additionally, trial counsel told the jury that Eisenman would testify to Virginia's history of violence, and drug and alcohol abuse. Again, however, trial counsel was ineffective, because trial counsel referenced a witness that he did not have under subpoena to call as a witness.

r. Trial counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial, including Ricardo Dominguez' Grandmother. X AA 248.

Prior to trial, the defense became aware that Richardo Dominguez' grandmother would testify that Virginia was a "very violent person." Trial counsel was aware of her location in San Diego, California. Once again, however, trial counsel failed to subpoena her to testify at trial.

s. Trial counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial, including Michael Stephenson. X AA 249.

Michael Stephenson was Mr. Centofanti's co-worker. Stephenson made a statement to the police during the course of their investigation, and could have provided testimony favorable to the defense regarding circumstances that occurred in

December 2000. Again, this testimony was necessary to the presentation of the defense theory of the case. However, trial counsel failed to subpoena this witness.

t. Trial counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial, including Mr. Centofanti's neighbors. X AA 249-250.

Trial counsel never contacted or interviewed Mr. Centofanti's neighbors. It is clear that, as they were Mr. Centofanti's closest neighbors, they were interviewed by the police. However, trial counsel never followed up with these witnesses.

u. Trial counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial, including Dr. Calixco and/or Nurse Kruger. X AA 250.

On December 4, 2000, Mr. Centofanti took his child to the Pueblo Medical Center after receiving a call that his child was sick. Trial counsel was aware of this incident and the fact that the State believed that this incident was "made up." If these witnesses had been called by trial counsel, it would have corroborated the theory of defense. These witnesses were not subpoenaed by trial counsel.

v. Trial counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial, including Lisa DeMeo. X AA 250; XI AA 1.

Lisa DeMeo was an expert retained by the defense. However, trial counsel failed to secure her attendance at trial despite claiming to the jury during opening statements that she would testify as to the blood spatter.

w. Trial counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial, including Amanda Pearson. XI AA 1.

Amanda Pearson had gone on a few dates with Mr. Centofanti in December of 2000. She had even met his son and parents. If called by the defense, Pearson would have been able to refute the testimony of Sara Smith, a State's witness. Specifically, Pearson would be able to testify as to his character and demeanor during December of 2000.

x. Trial counsel was ineffective for failing to object to jury misconduct. XI AA 4-5.

Trial counsel failed to object to a juror who wore a t-shirt which read "Do you know what a murderer looks like?" Additionally, trial counsel failed to observe or object to two jurors who were sleeping intermittently during trial.

y. Trial counsel was ineffective for failing to file appropriate pre-trial motions in limine to preclude the State from using terms such as "murderer," "victim," "crime scene," "assassination," "assassination shots," and "mafia hit man." XI AA 5.

Trial counsel's failure to object or prevent this type of terminology was prejudicial and inflammatory.

z. Trial counsel was ineffective for failing to properly handle the issue of the testimony of Francisco "Quito" Sanchez. XI AA 11-27.

Francisco "Quito" Sanchez was Virginia' child from a previous relationship who was living with Mr. Centofanti at the time of the December 5, 2000, incident. He was nine (9) years old at the time. Quito testified at a pretrial evidentiary hearing. On

the date of the hearing, the State provided for the first time the transcripts of several previous interviews with Quito. Trial counsel failed to object to the State's untimely disclosure of the reports and their improper comments. During the nearly three years leading up to trial, Quito's story regarding the events surrounding the case changed frequently. Trial counsel was not prepared to cross exam Quito, and it was clear that counsel was not familiar with the inconsistencies between Quito's various statements.

aa. Trial counsel was ineffective for failing to properly handle the issue of the testimony of Tricia Miller. XI AA 31-42.

Tricia Miller was Virginia's former co-worker. She testified that she was Virginia's friend, and claimed to have been with her on December 1, 2000, and December 4, 2000, when Virginia failed to return home. Miller also claimed that she was to meet Virginia for dinner on the night of December 20, 2000, the night of the incident. She was a critical witness for the State. She testified that Virginia was "scared" of Mr. Centofanti, and, therefore, had to lease an apartment in someone else's name. During her trial testimony Miller provided irrelevant hearsay testimony that went without objection by trial counsel. Additionally, there was previous testimony and statements that could have been used to impeach her trial testimony that trial counsel failed to present on cross examination. Additionally, there were allegations of misconduct by Tricia Miller that were not properly addressed in the trial court. While they were brought to the attention of the court, trial counsel should have moved for a full evidentiary hearing on the matter, outside the presence of the jury.

bb. Trial counsel was ineffective for failing to object to the admission of hearsay statements allegedly made by Virginia Centofanti to the responding officers and to Mark Smith on December 5, 2000. XI AA 49-52.

While trial counsel brought a pretrial motion before the court, which the court denied, trial counsel was ineffective in that he failed to contemporaneously object to the hearsay statements throughout the trial. This was a clear violation of Mr. Centofanti's rights under the confrontation clause and under the case law of the United States Supreme Court, including *Crawford v. Washington*, 541 U.S. 36 (2004).

cc. Trial Counsel was ineffective for failing to request a *Petrocelli* hearing or request that the state not be allowed to argue or present evidence of a "smear campaign" by Mr. Centofanti, pursuant to a pretrial ruling. XI AA 56.

In December 2001, the trial court ruled that it would not allow any evidence of a so-called "smear campaign" by Mr. Centofanti against Virginia prior to December 20, 2000, as evidence of pre-mediation in the State's case-in-chief. Trial counsel was ineffective because he did not object to the State's violation of the court order when the State specifically referred to Mr. Centofanti's "smear campaign".

dd. Trial counsel was ineffective in the preparation and handling of State's witness Sara Smith and failure to object to the State's failure to comply with Nevada Discovery statutes and the case law under *Brady*. XI AA 75.

On the date of her trial testimony, the State for the first time provided transcripts of previous interview with Sara Smith. Despite being provided with this statement on the day of her testimony, trial counsel failed to object to the testimony of

this State's witness, as a violation of Nevada discovery statutes and *Brady*. Furthermore, it was evident that trial counsel was unprepared to point out the inconsistencies in, or impeach entirely, Smith's testimony.

ee. Trial counsel was ineffective in the preparation and handling of State's witness, Adrienne Atwood, and his failure to object to the State's failure to comply with Nevada discovery statutes and case law under *Brady*. XI AA 77-79.

The State did not interview Atwood until March 14, 2003, more than three years after the alleged incident on December 20, 2000. Additionally, the State did not turn over Atwood's statement to the defense until the day of trial. Again, however, trial counsel was unprepared, and failed to object. This testimony was prejudicial and the district court should have conducted a hearing outside the presence of the jury to determine if its probative value substantially outweighed the danger of unfair prejudice. However, there was no hearing regarding Atwood's testimony, and trial counsel was, therefore, ineffective.

ff. Trial counsel was ineffective on the issue of the admissibility of the testimony of Sgt. David Winslow. XI AA 80-83.

Sgt. Winslow was one of the officers that responded to the domestic violence incident on December 5, 2000. The District Court ruled that he would not be permitted to testify regarding his observations on December 5, 2000, and December 6, 2000. However, during its opening statements, the State did just that. However, trial counsel failed to object to this violation.

gg. Trial counsel was ineffective on the issue of the Fifth Amendment violation regarding the testimony about Mr. Centofanti's post-arrest silence on December 20, 2000. XI AA 96-101.

Trial counsel failed to object testimony and statements relating to Mr. Centofanti's attempt to communicate with counsel while at the scene of the underlying incident on December 20, 2000. Additionally, one of the State's witnesses provided testimony that was not previously provided to Mr. Centofanti prior to trial in violation of discovery statutes and *Brady*. Again, trial counsel failed to object to the State's violation of the discovery rules.

hh. Trial counsel was ineffective on the issue of the admissibility of the testimony and records of Mark Smith. XI AA 101-105.

Mark Smith was a counselor that Mr. Centofanti contacted on December 5, 2000, through an employee assistance help line. An issue arose with regard to whether Smith's testimony or records were protected by privilege. The trial court conducted a hearing during trial, and trial counsel made no attempt to file a motion in limine regarding this issue. Additionally, during this hearing, outside the presence of the jury, the witness, Mark Smith, was present. It was clear that the State had previously discussed the details of this confidential communication with Mark Smith. And, again, trial counsel was ineffective by failing to object to, and failing to prepare to cross examine this witness.

ii. Trial counsel was ineffective on the issue of the admissibility of Mr. Centofanti's employment records and evidence of Mr. Centofanti's alleged firing for violation of a fire-arms policy. XI AA 107-113.

After Mr. Centofanti's arrest, he was fired from his employer, Travelers' Insurance. Because Nevada is an at-will state, Mr. Centofanti did not question his termination. However, at trial, the State improperly introduced evidence that Mr. Centofanti was terminated because he brought a firearm to work. Additionally, the State was allowed to introduce Mr. Centofanti's personnel file. These allegations should have been subject to a *Petrocelli* hearing prior to their admission at time of trial. However, trial counsel failed to lodge a contemporaneous objection. Additionally trial counsel was ineffective, because it failed to request a mistrial, or curative instruction, after the State presented this testimony to the jury.

jj. Trial counsel was ineffective for failing to make himself available during the seven day period in which to file a motion for new trial. XI AA 137.

The jury returned its verdict on April 16, 2004. Immediately after the verdict, Mr. Centofanti attempted to discuss his options regarding penalty hearing with trial counsel. Instead, trial counsel failed to contact Mr. Centofanti until May 5, 2004, well beyond the time period for filing a motion for a new trial.

III. THE CUMULATIVE EFFECT OF THE ERRORS WHICH OCCURRED AT TRAIL RASIED ON DIRECT APPEAL AND IN THIS PETITION VIOLATED MR. CENTOFANTI'S RIGHTS UNDER THE FEDERAL CONSTITUTION

The District Court did not address in its Order ground seven, cumulative error. XII AA 119-124. The Nevada Supreme Court has held under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial." *Sipsas v. State*, 102 Nev. 119, 716 P.2d 231 (1986)); *see also Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining whether error is harmless or prejudicial include whether "'the issue of innocence and guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" *Big Pond*, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." *People v. Rivers*, 727 P.2d 394, 401 (Colo.App. 1986); *see also People v. Jones*, 665 P.2d. 127, 131 (Colo.App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial." *Witherow v. State*, 104 Nev. 721, 724, 765 P.3d 1153, 1156 (1988). And, it must be said "without reservation that the verdict would have been the same in the absence of error." *Id.*

The United States Supreme Court has also address cumulative error. The Court has allowed for the possibility that a single error may suffice "if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478 (1986). See

also, *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986). Multiple errors, even if harmless individually, may entitle a petitioner to habeas relief if their cumulative effect prejudiced the defendant. *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992), cert. denied, 507 U.S. 951 (1993). See also, *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc) (holding that "prejudice may result from the cumulative impact of multiple deficiencies.")

Prejudice under *Strickland* may result from the cumulative deficiencies in counsel's performance. *See*, *Harris* by and through *Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995).

Where several specific errors on the part of defense counsel are found, it is the duty of the court to make findings as to prejudice, although this finding may be either cumulative or may focus on one discreet blunder in itself prejudicial. *Ewing v. Williams*, 596 F.2d 392 (9th Cir. 1979). Where no single error or omission of counsel, standing alone, significantly impairs the defense, the court may nonetheless find unfairness and thus prejudice emanating from the totality of counsel's errors and omissions. *Id.* See also, *United States v. Tucker*, 716 F.2d 572 (9th Cir. 1983) (primary inquiry is whether counsel's incompetence impaired his defense, not whether defendant would have been convicted in spite of those errors).

Mr. Centofanti has clearly established that trial counsel committed numerous

prejudicial errors during the trial and through his failure to prepare adequately. Therefore, these errors both individually and in total wholly denied Mr. Centofanti a fair trial. Since it cannot be said that the verdict would have been the same in the absence of error, Mr. Centofanti is entitled to a new trial.

These errors of ineffective assistance of counsel are not errors that "had an isolated trivial effect." *Strickland*, 466 U.S. at 695-696. Several of the errors pointed out, individually, were egregious and standing along would be sufficient to warrant a new trial as it is clear that at various points in the proceedings, Mr. Centofanti's Fifth, Sixth, and Fourteenth Amendment rights were violated thereby denying him due process and a fair trial.

IV. THE DISTRICT COURT ERRED IN FINDING TRIAL COUNSEL WAS EFFECTIVE IN NOT PRESENTING A DIMINISHED CAPACITY DEFENSE AT TRIAL

The denial of this Ground by the District Court violated Mr. Centofanti's Fifth, Sixth, and Fourteenth Amendment Rights to Effective Assistance of Counsel.

In her May 9, 2011 Order, the District Court stated, "there is no showing of what evidence would have been relied on for this proposed [Diminished Capacity] defense that would have a probability of a different outcome." XII AA 121. Additionally, the district court's ruling that "this type of defense would have also required defendant to testify as he did in his trial" was erroneous. XII AA 121.

The diminished capacity defense requires a showing of mental illness that is partially responsible for a defendant's conduct. It may be considered in evaluating whether or not the prosecution has proven each element of an offense beyond a reasonable doubt; for example, in determining whether a killing is first or second degree murder or manslaughter or some other argument regarding diminished capacity. *See Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001).

Second, in the case of *Saranchak v. Beard*, the U.S. District Court in Pennsylvania found "it is the testimony of a medical expert that is necessary and required to overcome evidence of specific intent for purposes of a diminished capacity defense, not the testimony of the defendant..." 538 F.Supp.23 847 (2008) at 877. As John Lukens testified, the presentation of this type of defense in this case would not even necessarily expose the Defendant to an evaluation by the State, XIII AA 65-66, but even an evaluation would not require a defendant to testify at trial.

Therefore, the district court's denial of these claims, those being the decision to present Mr. Centofanti's testimony and that it would have been necessary even if a diminished capacity defense was presented, was an unreasonable determination of fact and contrary to and/or an unreasonable application of *Strickland* as to the ineffectiveness of counsel as to those issues.

At the July 30, 2010, evidentiary hearing, defense expert John Lukens was questioned extensively and repeatedly about the defense of diminished capacity, and

its application and use in this case. He defined diminished capacity as, "[t]he difference between first and second degree murder primarily...avoid the conviction for first-degree murder and convince the jury that this was second degree murder...without the required premeditation and planning." XII AA 83.

He was further asked if anything in the record would support diminished capacity. Lukens testified that the issue of diminished capacity was implicated throughout the discovery, the Petition, Memorandum of Points and Authorities, and Reply. At the 2004 pretrial hearing to determine the admissibility of the testimony of Janeen Mutch, who was present at the scene on December 20, 2000, Mutch testified that Mr. Centofanti "was probably in some kind of shock, or he didn't seem responsive in any way to anybody." II AA 53.

There was additional evidence regarding Mr. Centofanti's catatonia. Specifically, the responding officer, who took Mr. Centofanti in custody, a former paramedic, wrote in her report that Mr. Centofanti was catatonic. During the trial, Detective Tom Towsen similarly testified as to Mr. Centofanti's catatonia:

> Q. And according to this question you somehow came to realize that the validity of his catatonia, according to Mr. Peterson, was an important issue in this case?
>
> A. It was an issue in the case, yes.

II AA 53.

> Q. So, at what point in time were you made aware of that issue in this case?

A. From very early on, that he may possibly go that direction.

Q. It was at that point, that you became aware of that she [Responding Officer Tiffany Gogian] said he was catatonic, in her observations; is that right?

A. I was aware that evening [December 20, 2000] that she had made the comment.

II AA 53.

Both the State and defense spent an extensive amount of time questioning Officer Tiffany Gogian on the issue of Mr. Centofanti's demeanor on the night of December 20, 2000. By way of background, Officer Gogian put in her report that Mr. Centofanti appeared "catatonic." This became relevant to the litigation for several reasons: (1) Officer Gogian had been a paramedic prior to becoming a police officer; and (2) the entire trial was delayed by the State's attempts to have Mr. Centofanti subjected to a pretrial psychological examination to explore this and other "state of mind" issues.

Officer Gogian repeated the observations contained in her report with regards to this "catatonic" state. These observations were repeated, and confirmed by, other witnesses who present on the night of December 20, 2000, including, but not limited to, Mark and Marilee Wright, Alfred and Camille Centofanti, and Janeen Mutch, as well as the officer who booked Mr. Centofanti into the jail. Additionally, the State raised the subject of Mr. Centofanti's catatonia during direct examination of Officer

Gogian by the State:

Q. What was the Defendant's demeanor like?

A. Pretty much sitting there, staring off as though he really wasn't there. I described it as like a catatonic state.

Q. Did the Defendant say anything to you?

A. No.

Q. What did you do next?

A. At that point I asked him to stand up. Again he just was pretty much sitting there staring.

II AA 67.

The issue was explored further during cross-examination:

Q. [Y]ou've had experience of treating people who have truly been diagnosed as catatonic?

A. Yes.

Q. Tell us – the tell the jury what that means.

A. Catatonia is pretty much a state of like a stupor, somebody with no facial expression, almost kind of like a dead pan type facial expression. There's nothing there. They stare as though they are just not, you know. They are just staring off as though there's nothing else going on. Pretty much a stuporous state is the best I can describe.

Q. By stuporous state you mean by in terms of actually absorbing information or seeing things or being able to respond to spoken words or things like that, it's just not coming. There's no ability to respond?

A. Correct.

...

Q. Have you treated people and brought people to hospitals where they have been treated for this?

A. Not necessarily knowing what that's what – I've seen people in different levels of shock. I have dealt with people that had appeared in the same demeanor and that's why –

Q. You have?

A. Yes. The best – I guess I reverted back to my paramedic training when I described him as catatonic.

II AA 73.

Defense counsel attempted to further clarify this point. II AA 35. He then elicited testimony from Officer Gogian regarding her difficulty in getting Mr. Centofanti up from a seated position and into custody. II AA 74. During her testimony, Officer Gogian indicated Mr. Centofanti was "sitting there. I said I need you to stand up. There was really no response from him at all ..." II AA 75. "I remember it was a little bit difficult, because it wasn't as though there was any real dialogue between us." II AA 75.

Officer Gogian's testimony was supported by the testimony of Mark Wright.

Q. Describe if you would for the jury the way that Chip looked?

A. Chip was staring straight ahead. I mean his eyes, he

was just like –

Q. You have your eyes wide open?

A. He had his eyes wide open, white as a ghost, looking straight ahead like he was just looking right through you. There was no reaction, no anything. He was like in a catatonic state. To move him you actually had to kind of physically pull him along. He wouldn't come on his own. It's like you had to kind of pull him along.

Q. Have you ever seen anything like that before?

A. No.

Q. Did you think it was real?

A. Absolutely.

II AA 44-45.

Mark Wright went on to describe Defendant's encounter with the arresting officer in greater detail.

A. … [H]e was still standing there and she was trying to kick his feet apart. I don't know why, but she was trying to get his feet spread and she was kicking the crap out of him. She was really wailing on his legs to get him to move. He was solidly planted. I mean, it was -- believe me, if somebody is kicking me that hard I'm moving my legs.

Q. It made an impression on you?

A. Yeah. I was standing right there watching the whole thing in the doorway.

Q. Did she finally get his legs apart?

A. Yes.

Q. Did she finally get him handcuffed?

A. Yes.

Q. Did his demeanor change at any point that you saw?

A. Never, never changed.

Q. You talk about his eyes being wide.
Did you ever see him blink?

A. I never saw him blink. It was looking straight ahead.
It was kind of eerie.

III AA 50-51.

Robbie Dahn, the crime scene analyst who photographed Mr. Centofanti when he was taken into custody, was asked the following:

Q. And are you aware the Corrections Officer Talure indicated, filled out a report, to Mr. Centofanti's inability to understand things and to write things and so forth.

A. No.

III AA 206.

Q. Were you aware he was put on suicide watch when he got to the jail?

A. No.

Q. Were you aware that the jail personnel had evaluated him as being in a state of shock?

A. No.

III AA 207.

Mr. Centofanti was told prior to trial that his defense would be dependent upon the testimony of a psychologist and psychiatrist who would assist the defense's presentation at trial. Counsel had related to Mr. Centofanti that experts would testify regarding a number of psychological issues, which would explain both the catatonia and memory loss. Additionally, these experts were to address the topic of battered spouse syndrome pursuant to *Boykins v. State*, 116 Nev. 171, 995 P.2d 474 (2000), as there were at least two predicate instances of abuse, namely the events of December 1, 2000, and December 5, 2000, leading up to the underlying incident on December 20, 2000.

Counsel abandoned this defense at trial, and not before it. When it came time for trial, none of this evidence or testimony from the experts was presented or received by the jury, despite an incredible amount of time spent by both the State and defense addressing it in the presentation of facts. Defense counsel's failure to present the battered spouse syndrome through the use of experts, *see* NRS 48.061, and failing to offer an appropriate jury instruction, deprived Mr. Centofanti of due process of law and a fair trial, and deprived him of his ability to present his theory of defense. *See Williams v. State*, 97 Nev. 1, 620 P.2d 1263 (1981).

Abandonment of a defense has been held to constitute ineffective assistance of

counsel. In *United States v. Swanson*, 943 F.2d 1070, 1072 (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit held that when trial counsel abandoned petitioner's only defense, it deprived petitioner of effective assistance of counsel and due process, thus, no showing of prejudice was necessary. In *Deluca v. Lord*, 77 F.3d 578 (3rd Cir. 1996) the United States Court of Appeals for the Third Circuit held when trial counsel abandoned defense of extreme emotional disturbance at an early stage for no reason, it constituted ineffective assistance of counsel.

Furthermore, in the case of *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998), the Ninth Circuit held the failure to adequately investigate or introduce relevant evidence of a defendant's mental state undermined confidence in a defendant's murder conviction. The defendant claimed that adequate pretrial preparation and investigation would have produced a different result: conviction of either second degree murder or voluntary manslaughter. The Ninth Circuit noted that this would suffice for a showing of prejudice:

> In this case there are factors present that suggest that the failure to present psychiatric testimony may have been especially prejudicial. The only evidence presented in Turner's defense was his own trial testimony, rendering his credibility a central issue.

Id. at 457-58.

The potential importance of a mental state defense to Mr. Centofanti's trial was obvious. If the defense succeeded, he would have been convicted only of

manslaughter and would have received a substantially lower sentence. Moreover, it offered the only realistic defense to the likelihood of a conviction for murder in the first degree. The defense prepared by counsel did not offer any significant likelihood of acquittal. Defense counsel's failure to prepare, develop, or present facts and evidence prevented Mr. Centofanti from supporting his theory of the case. This prejudiced Mr. Centofanti in that the State ultimately undermined not only Mr. Centofanti's theory of the case, but his credibility as a witness. Since the presentation of the defense in this matter largely rested on Mr. Centofanti's credibility, it cannot be said that the failure on this issue did not affect the outcome of the trial. Defense counsel's performance with respect to this issue was constitutionally deficient under the *Strickland* standard.

The diminished capacity defense was obvious from the record. You can imagine the sigh of relief the prosecutor made when he said in closing argument "no experts came in here and testified as to the issue of catatonia."

The denial of this claim was an unreasonable application of the facts and contrary to *Strickland.* Trial counsel was ineffective, because trial counsel failed to pursue the diminished capacity defense at trial. Moreover, it was objectively unreasonable for defense counsel to proceed with the non-viable defense of self-defense in light of the facts, state of the law, and evidence known to counsel before trial.

Therefore, the lower court's ruling was in error. Accordingly, this Court should REVERSE the lower court's ruling and REMAND the matter for a new trial, or whatever relief this Court deems appropriate.

V. THE DISTRICT COURT ERRED IN FINDING NO PREJUDICE REGARDING THE SELECTION OF THE DEFENSE OF SELF-DEFENSE AND THE SELF-DEFENSE CANVASS THAT OCCURRED PRIOR TO TRIAL

The district court's denial of this Ground violated Mr. Centofanti's Fifth, Sixth, and Fourteenth Amendment rights to Due Process, Effective Assistance of Counsel, a Fair Trial, and Fundamental Fairness. Mr. Centofanti extensively proved prejudice at the evidentiary hearing of on July 30, 2010. In its Order of May 9, 2011, the Court found the following:

> While the Court agrees that it was very difficult to try to establish self-defense under the applicable legal standard in this case, counsel also argued for second degree murder or manslaughter as well. XII AA 199-124.

This statement by the Court in denying the writ is clearly an unreasonable application of the facts and contrary to the U.S. Supreme Court's holding in *Strickland.* It was both ineffective and prejudicial to have proceeded to trial with the defense of self-defense in this case.

The analysis should start with trial counsel's unfounded and false assertion at his deposition that self-defense was a viable defense in this case. The defense was neither factually or legally viable in the instant matter.

During defense expert John Lukens' testimony, he testified as follows:

> Q. Do you think that [self-defense] would have been a viable defense?
>
> A. Never.

XIII AA 40.

> The physical evidence was so absolutely overwhelmingly inconsistent with self-defense.

XIII AA 40.

> The defense of self-defense was absolutely not viable.

XIII AA 42.

> Eisel [the defense forensic pathologist] submitted a report as the expert retained by the defense that, in essence, was contradictory to that defense.

XIII AA 38.

> Why would you put Dr. Eisel on the stand when he has issued a report contradictory to the theory of the defense?

XIII AA 38-39.

> The defense ballistics expert "could not contest that the headshots were last" (the State's theory of the case).

XIII AA 52.

> Q. With state coroner Dr. Sims' report regarding the lethality of each of the three shots to the head would you have put on a self-defense case?
>
> A. No.

XIII AA 53-53.

> Q. Based upon the performance of Mr. Bloom, do you think that Mr. Centofanti got a fair trial?
>
> A. He never had a chance at a viable defense.
>
> Q. Were the defense witnesses put on -- reasonable choices to bolster the self-defense, even if self-defense had been viable?
>
> A. No.

XIII AA 60.

> The self-defense defense had no chance; zero.

XIII AA 63.

> Once you admit that you are the shooter and put forth self-defense you are now boxed in pretty much tactically to taking the witness stand. Absolutely. I'll bet the District Attorney was salivating over that.

XIII AA 98.

What is further apparent from a review of the trial court proceedings that were provided to the district court in the post-conviction petition is that the prosecutor, prospective jurors, and even Judge Mosley indicated, throughout the case, the absurdity of using a defense of self defense. IX AA 181; VI AA 36; 42-43; 66-67; VIII AA 26.

In the district court's Order Denying Petition for Writ of Habeas Corpus, the court stated that it was "concerned about the self-defense canvas at the hearing on

March 12, 2004." XII AA 119-124 . The district court erred in not finding this self-defense canvass was not ineffective. In this case, despite a previous written objection to the State's request that the district court canvass Mr. Centofanti before the commencement of the trial on March 12, 2004, trail counsel nevertheless inappropriately allowed the district court to canvass Mr. Centofanti regarding his decision to use self-defense as a defense at trial. This removed the requirement that the State had to prove the elements of the crime in the State's case-in-chief, and essentially shifted the burden of proof to Mr. Centofanti. Further, this deprived Mr.Centofanti of his ability to modify his defense theory to conform to the proof as the State's case unfolded. The prosecutors were salivating at the prospect that Mr. Centofanti would use such an incredible defense in light of the evidence available. The court canvassed Mr. Centofanti as follows:

> THE COURT: Simply stated, so that I'm clear in my mind and we understand what we're talking about, simply stated, when a defense is proffered of self-defense it in essence says "Yes, I shot the person, but I was justified, under the circumstances." Do you understand?
>
> THE DEFENDANT: Yes.
>
> THE COURT: That's the way you want to go with this, Mr. Centofanti?
>
> THE DEFENDANT: On the advice of counsel that's what I'm prepared to do.

IX AA 190.

Based on the facts of this case, trial counsel should have known that self-defense was not a viable theory of defense. The various special public defenders, who were assigned to act as local counsel, should have known this as well. Therefore, the ill-advised choice to use self-defense as a defense at trial denied Mr. Centofanti the effective assistance of counsel under *Strickland* and the Sixth Amendment to the United States Constitution. The clear choice in defending this case was to strongly direct the jury to a lesser included offense or diminished capacity. Emphasizing self-defense merely served to alienate the jury from the onset of the trial. But for the poor choice to use self-defense, the jury could have been firmly directed to choose a lesser degree of murder or manslaughter and very likely would have done so. This was prejudicial to Mr. Centofanti under *Strickland* and the Sixth Amendment as the cumulative effect of the failure to investigate a viable defense and present a viable defense at trial, denied Mr. Centofanti a fair trial under the Fifth, Sixth, and Fourteenth Amendments rights to due process, a fair trial, the effective assistance of counsel, and guarantees of and fundamental fairness.

Thus, the district court's ruling was in error. Accordingly, this Court should REVERSE the district court's ruling and REMAND the matter for a new trial, or whatever relief this Court deems appropriate.

VI. THE DISTRICT COURT ERRED IN FINDING NO PREJUDICE REGARDING TRIAL COUNSEL LYING ABOUT LT. STEVE FRANKS

The denial of this Ground by the district court was a violation of Mr.

Centofanti's Fifth, Sixth, and Fourteenth Amendment Rights to due process, a fair trial, effective assistance of counsel, and guarantees of fundamental fairness. In her Order of May 9, 2011, denying Mr. Centofanti's post-conviction petition, the district court found the following:

> There is no showing of prejudice from failing to have [Lt. Franks] testify or from mentioning [Lt. Steve Franks'] anticipated testimony in the opening.

XII AA 122.

The district court failed to properly consider the impact of failing to have Lt. Franks testify had on Mr. Centofanti's decision to consent to the canvass at the March 12, 2004, hearing. Moreover, Mr. Centofanti testified to a version of facts prepared and presented by his counsel that were to be explained by Lt. Franks' testimony. However, as Lt. Franks himself testified, he was never an expert for the defense.

As defense expert John Lukens testified at the evidentiary hearing:

> Q. Would it be a reasonable trial tactic and a reasonable tactic under any circumstances to lie to a jury about a witness you never had under subpoena and never had spoken to and then give them a reason why he's not there, would that be a reasonable tactic?
>
> A. That's just – that's absurd.

XIII AA 93.

He further testified, "I'm stumbling because I'm speechless that an attorney would do that." XIII AA 93.

Lt. Franks was never called as a witness by the defense. No other expert witness had the experience or expertise to testify in this area, or would have had the impact on the jury of being an active member of the very same organization who investigated the crime for which Mr. Centofanti was charged and subjected to trial. This was not a question of merely cumulative testimony or an area that could be covered by another expert. Instead, Lt. Franks' testimony was critical to the defense on the issue of premeditation. By defense counsel's failure to secure testimony from Lt. Franks, this information was not presented in any form to the jury.

The district court's denial of this ground was contrary to and, an unreasonable application of, *Strickland*, and an unreasonable determination of the facts, as counsel's failure, omissions and lies denied Mr. Centofanti his Sixth Amendment right to counsel and his Fifth and Fourteenth Amendment rights to due process, a fair trial, and a guarantee of fundamental fairness.

Thus, the lower court's ruling was in error. Accordingly, this Court should REVERSE the lower court's ruling and REMAND the matter for a new trial, or whatever relief this Court deems appropriate.

VII. THE DISTRICT COURT ERRED IN FINDING NO PREJUDICE REGARDING TRIAL COUNSEL LYING ABOUT DR. SCOTT SESSIONS

The denial of this Ground by the district court was a violation of Mr. Centofanti's Fifth, Sixth, and Fourteenth Amendment rights to due process, a fair

trial, effective assistance of counsel, and a guarantee of fundamental fairness. In her May 9, 2011, Order, Judge Cadish found the following:

> [T]his Court does not find a probability that the result would have been different if not for this issue [these misleading statements by counsel regarding corroboration in the medical records].

XII AA 124.

One of the most egregious and prejudicial errors made by trial counsel involves the facts and circumstances surrounding Virginia's 1999 plastic surgery. As the district court found:

> Defendant testified at trial that he had been told by the victim's plastic surgeon, Dr. Sessions, that the victim had a hole in her nose septum from drug use. At a pretrial hearing, the State objected to this anticipated testimony because there had been no medical records showing this nose condition. At the hearing, counsel represented as an officer of the Court, the Court said he would allow the Defendant's testimony in this regard since there was a basis for the allegation.

XII AA 122.

Trial counsel called Mr. Centofanti to the stand and elicited testimony regarding the plastic surgery. Trial counsel knew, or should have known, that the assertion made in his opening statement and elicited through testimony from Mr. Centofanti while on the stand, would appear to be false based upon his pretrial investigation or a review of the medical records that he himself turned over the prosecution.

Compounding the problem was trial counsel's extensive pretrial preparation of Mr. Centofanti on this particular issue, and eliciting of testimony which set Mr.Centofanti up for the most damaging cross-examination of the trial and closing argument by the prosecutor. Trial counsel failed to interview any doctor involved in the surgery or the records associated therefrom. Furthermore, trial counsel failed to perform any follow-up investigation or take any steps to counter this issue and rehabilitate Mr. Centofanti as a witness.

In *Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997), the Ninth Circuit held "counsel had not adequately investigated the case, not adequately conferred with his client, not adequately investigated defense, and had encouraged client to testify falsely." *Id.* at 836. The Court further held the failure of the attorney to adequately investigate and confer with his client made the client appear to be a liar to the jury and was both ineffective and prejudicial. *Id.* at 836.

Trial counsel failed to investigate the plastic surgery issue and his own expert's opinions on self-defense before proceeding to trial. Trial counsel's failures undermined Mr. Centofanti's testimony and the defense of self-defense. These failures constitute deficient representation, and resulted in overwhelming prejudice to Mr. Centofanti. Therefore, trial counsel's failures amount to ineffective assistance of counsel.

At issue was whether as a result of Virginia's rhinoplasty (nose job) the

surgeons performing the surgery, Dr. Scott Sessions and a Dr. Richard Escajeda, informed Mr. Centofanti that they had discovered a hole in the Virginia's septum, and that was most likely the result of illegal drug use. Mr. Centofanti testified that the information he learned as a result of Virginia's plastic surgery supported his fears regarding Virginia's drug use. Thus, Virginia's drug use was linked to the defense of self-defense. Consequently, the truth of Mr. Centofanti's testimony in this regard was central to his defense.

Dr. Sessions was called as a witness on April 14, 2004.

> Q. Sir, I want to read you a quote from some testimony from the defendant and ask you a question about that. This is from the transcript of proceedings earlier in this case. Quote: "So we went ahead and she went ahead to get that surgery," talking about the nose job.
> [DDA Peterson went on to quote defendant's testimony regarding the plastic surgery and the drug use, supra.]
> Sir, did you ever diagnose Gina Centofanti with having a hole in her nose from drug use?
>
> A. Absolutely not.
>
> V AA 197.
>
> Q. When you actually performed the rhinoplasty, did you discover such damage to that nose?
>
> A. No.
>
> Q. Did you ever speak those words that I just quoted from the defendant to Chip Centofanti?
>
> A. No, I did not.

V AA 198.

Q. Did you believe that the Gina Centofanti you knew in 1999 to be a scary gang member?

A. Absolutely not.

Q. What did you think of Gina?

A. She was just the opposite.

MR. BLOOM: Objection, Your Honor. I thought the Court was not going to allow this cheerleading or this vouching and so forth. I think we're moving into that area. The Court has restricted us from going into it. Now we're not talking anything about his expertise, just as a person he observed. And that way, Your Honor, I don't believe it's appropriate.

THE COURT: Before you respond, I don't want to get into the item. What we're doing here is, I understand it's the nature of rebuttal, but we're opening up a whole new segment of vouching for people.

...

I don't want to open the door about afraid. I don't want to open it so I'll disallow it. Next question please.

V AA 198.

Q. Did you ever observe the Gina Centofanti you knew in 1999, did you ever get the impression that she was affiliated with gangs--

THE COURT: Disallowed. Next question.

V AA 198.

The district court failed to reasonably apply the facts, law and evidence

presented to her in the pleadings, at the deposition, the evidentiary hearing, and the trial court records regarding trial counsel's failure to adequately investigate or gather Dr. Sessions records.

This was an unreasonable determination of the facts and the law under *Strickland*, as the trial counsel's actions were ineffective and prejudicial in violation of Mr. Centofanti's Sixth Amendment rights.

As best summarized by defense expert John Lukens:

> Medical records were obtained by him and supplied to the DA and those medical records belied his statement to the jury if he had bothered to read those records. (Transcript, p. 49, ll. 12-14.)
>
> Q. Was it reasonable to have your client take the stand and talk about the hole in her nose and talk about the drug use when you have absolute proof that there was no hole in the nose and no drug use? Is that a reasonable trial tactic?
>
> A. It's absurd.
>
> Q. Did it help the defendant?
>
> A. No. As a matter of fact, it wasn't even neutral. It was incredibly harmful to the defense.
>
> Q. Would the word devastating cover it?
>
> A. Absolutely.

XIII AA 50.

> Q. And finally, was it a reasonable tactical decision to not contact Dr. Sessions prior to or after having your

client testify?

A. It's inexplicable as to why that wasn't done.

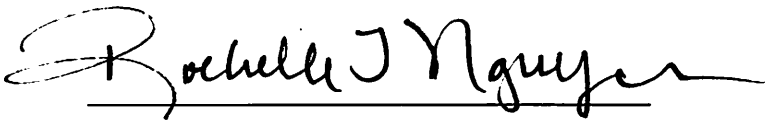
XIII AA 59.

CONCLUSION

Under *Strickland*'s prejudice prong "[a] reasonable probability is one sufficient to undermine the confidence in the outcome" but is "less than the preponderance more-likely-than-not standard." *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007) (internal citations omitted). Prejudice is clear from the record of the proceedings.

Thus, the District Court Order Denying Petition for Writ of Habeas Corpus should be REVERSED and REMANDED for a new trial. Alternatively, at a very minimum, the Court should remand this matter back to the District Court and allow Mr. Centofanti to file a Supplemental Petition for Writ of Habeas Corpus where he is able to assert ineffective assistance of counsel claims against counsel that represented him post-jury verdict (Motion for New Trial and Sentencing) and during his direct appeal.

Dated this 23rd day of January, 2012.



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CERTIFICATE OF COMPLIANCE

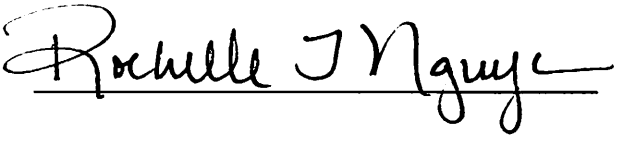
I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e),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

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(4) and the type style requirements of NRAP 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in size 14 font Times New Roman.

///

Although this brief does not comply with the page- or type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 15,793 words, I have filed contemporaneously with this brief a motion to exceed page limit or type-volume limitation pursuant to NRAP 32(a)(7)(D).

Dated this 23rd day of January, 2012.



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CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby declares that on January 23, 2012, an electronic copy of the foregoing APPELLANT'S OPENING BRIEF was sent via the master transmission list with the Nevada Supreme Court to the following:

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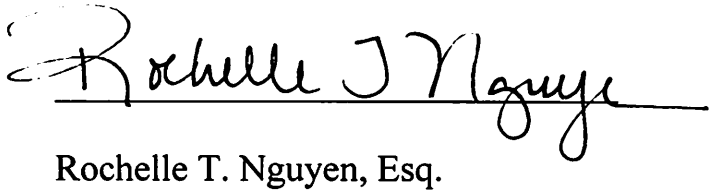

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI III)
)
Appellant,)
)
vs.)
)
E.K. McDANIEL, WARDEN,)
ELY STATE PRISON)
)
Respondent.)
_____)

DOCKET NUMBER: 58562

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI III Appellant, vs. E.K. McDANIEL, WARDEN, ELY STATE PRISON Respondent.	DOCKET NUMBER: 58562

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the present appeal pursuant to N.R.S 34.575(1). This appeal arises from the District Court's denial of the Petitioner, Alfred P. Centofanti's Petition for Writ of Habeas Corpus (Post-Conviction) which resulted in the filing of Order Denying Petition for Writ of Habeas Corpus on May 9, 2011, and the Notice of Entry of Order on June 6, 2011. XII Appellant's Appendix 119-124 (hereinafter referenced "[Volume Number] AA [Page Number]"); XIV AA 47-53.

STATEMENT OF ISSUES

Mr. Centofani's trial (post-jury verdict), appeal, and post-conviction counsel were ineffective, because counsel actively represented conflicting interests that adversely affected counsel's performance, resulting in the presumption of prejudice, in violation of the Sixth, and Fourteenth Amendments to the United States Constitution.

Mr. Centofanti was denied his Federal Constitutional rights to due process and fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, by the ineffective assistance of counsel that he received during the course of his case.

Mr. Centofanti was denied his Federal Constitutional rights to due process and fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, by the cumulative effect of the errors that counsel caused at trial raised on direct appeal and in this Petition.

The District Court erred in finding trial counsel was effective in not presenting a diminished capacity defense at trial.

The District Court erred in finding no prejudice regarding the selection of the defense of self-defense.

The District Court erred in finding no prejudice regarding trial counsel lying about Lt. Steve Franks.

The District Court erred in finding no prejudice regarding trial counsel lying about Dr. Scott Sessions.

STATEMENT OF CASE AND STATEMENT OF FACTS

Mr. Centofanti was arrested on December 20, 2000, and charged by way of an Indictment on January 10, 2001, with Murder with Use of a Deadly Weapon. 1 AA 55-57. The State alleged that Mr. Centofanti shot his wife Virginia Centofanti. Immediately after his arrest, Mr. Centofanti informed his trial counsel (Harvey Gruber, Steve Wolfson, Pete Christianson, Jr., Daniel Albregts, and Allen Bloom) of possible exculpatory evidence and defense witness testimony that should be secured. None of his trial counsel sought to secure this evidence or the statements.

On January 17, 2001, in District Court, where he entered a plea of not guilty and waived his right to a speedy trial. I AA 2. The trial was scheduled for July 9, 2001. The trial was continued when Mr. Centofanti's choice of counsel, Daniel J. Albregts, was disqualified on October 1, 2001. I AA 13-14. At that time, Allen Bloom and Gloria Navarro substituted in as counsel of record. I AA 13.

Jury trial ultimately began on March 22, 2004, and concluded on April 16, 2004, with the jury returning a guilty verdict on the charge of First Degree Murder with Use of a Deadly Weapon. VI AA 3. A Penalty hearing was scheduled for April 20, 2004. After the jury returned a verdict, Mr. Centofanti dismissed attorneys Bloom and Navarro. At that time, he hired Carmine J. Colucci to represent him. Mr. Colucci was hired to file any necessary post-trial motions, the direct appeal, and Petition for Writ of Habeas Corpus (post-conviction). At no time, did Mr. Colucci counsel Mr.

Centofanti about the obvious and inherent conflict of interest, nor did Mr. Colucci obtain a written waiver of any conflict from Mr. Centofanti.

On June 28, 2004, Mr. Centofanti, through his attorney, Mr. Colcucci, filed a Motion for a New Trial. VIII AA 65-105. This Motion was denied on August 26, 2004. VIII AA 226-227. A Writ was filed with the Nevada Supreme Court and the matter was again stayed until February 16, 2005, when the Writ was denied.

On March 9, 2005, Mr. Centofanti was adjudged guilty of the charge and sentenced to two consecutive terms of Life without the Possibility of Parole, with 374 days credit for time served. The Judgment of Conviction was filed on March 11, 2005. VIII AA 228-229. The timely Notice of Appeal was filed on March 24, 2005. VIII AA 220-231.

On December 27, 2006, the Nevada Supreme Court affirmed the conviction. IX AA 133-142. The remittitur issued March 27, 2007. IX AA 152.

On February 29, 2008, Mr. Centofanti filed a timely Petition for Writ of Habeas Corpus (post-conviction). X AA 1-250; XI AA 1-143. An evidentiary hearing, deposition testimony, and limited argument on the Petition was heard and reviewed by the District Court. XV AA 1-250; XVI AA 1-81; XIII AA 1-168; XIII AA 169-206. The District Court issued its Order and Finding of Facts on May 9, 2011. XII AA 119-124. On May 19, 2011, Mr. Centofanti filed a pro per Notice of Motion and Motion for Consideration, Withdrawal, and Appointment for Alternative Counsel, Stay of

Proceedings, and Other Relief. XIV AA 14-26. In his pro per Motion, Mr. Centofanti first requested the Court to review the conflict of interest that existed when Mr. Colucci was privately retained and then later accepted court-appointment to represent Mr. Centofanti, not only at sentencing, but during the direct appeal and then during post-conviction proceedings. Mr. Centofanti retained Mr. Colucci to represent him after the jury in his case returned a verdict of guilty to the charge of First Degree Murder with use of a Deadly Weapon. Mr. Colucci agreed to represent Mr. Centofanti in all post verdict proceedings. Mr. Colucci filed a Motion for a New Trial in District Court after the verdict. He also represented him at sentencing. Mr. Colucci also represented Mr. Centofanti on his direct appeal. Mr. Colucci finally represented as paid, and later court-appointed counsel Mr. Centofanti when he filed a Petition for Writ of Habeas Corpus (Post-Conviction), at a corresponding deposition, as well as an evidentiary hearing on the Petition. Mr. Centofanti's Pro Per Motion was ultimately denied in an Order filed on August 5, 2011. XIV AA 54-55. Mr. Centofanti's pro per filing obviously gave the District Court concern, as undersigned counsel was appointed by District Court on June 1, 2011 to review Mr. Centofanti's file regarding a waiver and conflict. XVI AA 83. Because Mr. Centofanti was not present when undersigned counsel was appointed to represent him, and given the need to preserve his appellate rights, Mr. Centofanti filed a timely Pro Per Notice of Appeal on June

13, 2011. XVI AA 84-88. Because the Notice of Appeal was filed, the District Court lost jurisdiction to address any issues that it initially appointed counsel to investigate.

Mr. Centofanti filed a Motion to Remand on the conflict issue on July 26, 2011, with the Nevada Supreme Court. XVI AA 89-94. The Opposition to the Appellant's Motion was filed on August 2, 2011. XVI AA 95-98. The Nevada Supreme Court denied this Motion on November 18, 2011. XVI AA 99.

This timely appeal follows.

SUMMARY OF ARGUMENT

Mr. Centofanti retained Mr. Colucci to represent him after the jury in his case returned a verdict of guilty to the charge of First Degree Murder with use of a Deadly Weapon. Mr. Colucci agreed to represent Mr. Centofanti in all post verdict proceedings. There was clearly a conflict when Mr. Colucci represented Mr. Centofanti with his Petition for Writ of Habeas Corpus. There was neither a written waiver, nor meaningful canvass regarding conflict conducted by the District Court in this case. This obvious conflict and interference with Mr. Centofanti's habeas rights is evident from the fact that Mr. Colucci failed to raise a single issue in the Petition with respect to his own ineffectiveness as counsel during the course of his representation. This conflict, resulting in a presumption of prejudice, was in violation of Mr. Centofanti's Federal Constitutional Rights and Nevada case law, and the District Court erred in not finding such.

Mr. Centofanti also received ineffective assistance of counsel from his other trial counsel, Allen Bloom. After the District Court reviewed the Petition, disposition testimony, evidentiary hearing testimony and received argument, the District Court erroneously denied the Petition for Writ of Habeas Corpus. This appeal stems from this erroneous denial. In this case, the District Court issued a short Order denying the Petition. However, the district court failed to even address thirty-two (32) of the thirty-six (36) issues that Mr. Centofanti raised in his Petition, and failed completely to address the issue of cumulative error. The District Court's failure provided Mr. Centofanti notice as to the District Court's reasons for the denial.

In denying Mr. Centofanti's Petition , the District Court specifically addressed four (4) issues raised in the Petition. With respect to those grounds that were denied, the District Court also erred. The District Court should have found that trial counsel was ineffective for not presenting a diminished capacity defense at trial. The testimony elicited at the evidentiary hearing indicated that this defense was apparent, and if used, the result at trial would have been different.

Additionally, the District Court erred in finding no prejudice regarding the selection of the defense of self-defense. Furthermore, trial counsel was ineffective for failing to fully litigate prior to trial the issue regarding the forced canvass of Mr. Centofanti by the State with respect to self-defense.

Finally, the District Court also erred in finding that no prejudice existed and that trial counsel was not ineffective for failing to retain the services of an expert Lt. Steve Franks.

ARGUMENT

I. MR. CENTOFANTI'S, TRIAL (POST-JURY VERDICT), APPEAL AND POST-CONVICTION COUNSEL WERE INEFFECTIVE, BECAUSE COUNSEL ACTIVELY REPRESENTED CONFLICTING INTERESTS THAT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE, RESULTING IN THE PRESUMPTION OF PREJUDICE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Sixth Amendment to the Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend VI. "'[T]he right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). The Sixth Amendment right to counsel attaches when "judicial proceedings have been initiated" against the defendant. *Coleman v. State*, 109 Nev. 1, 4, 846 P.2d 276, 278 (1993) (citing *Brewer v. Williams*, 430 U.S. 387, 398 (1977)). Attorneys appointed to represent defendants should be competent. *Ex parte Kramer*, 61 Nev. 174, 207, 122 P.2d 862, 876 (1942). The ineffective assistance of counsel denies a defendant of due process. *Id.*

Ineffective assistance claims present mixed questions of law and fact, and this Court exercises independent review. *Ennis v. State*, 122 Nev. 694, 137 P.3d 1095, 1102 n.44 (2006) (citing *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001)). A district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong. *Ennis*, 122 Nev. 694, 137 P.3d at 1102 n.44 (citing *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994)).

In Nevada, the appropriate vehicle for review of whether counsel was effective is a post-conviction relief proceeding. *McKague v. Warden*, 112 Nev. 159, 164 n.4, 912 P.2d 255, 258 n.4 (1996). However, while ineffective assistance claims are ordinarily heard during post-conviction proceedings following direct appeal, this Court has considered claims relating to conflicts of interest on direct appeal. *Hayes v. State*, 106 Nev. 543, 556, 797 P.2d 962, 970 (1990), *overruled on other grounds by Ryan v. Dist. Court*, 123 Nev. 419, 429 n.23, 168 P.3d 703, 710 n.23 (2007). In order to assert a claim for ineffective assistance of counsel, a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-pronged test enunciated in *Strickland*. 466 U.S. at 687; *see State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under *Strickland*, the defendant must show that his counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable probability that the result of the

proceedings would have been different. 466 U.S. at 697. "A court may evaluate the questions of deficient performance and prejudice in either order and need not consider both issues if the defendant fails to make a sufficient showing on one." *Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) (citing *Strickland*, 466 U.S. at 689). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003); *see Ennis,* 122 Nev. 694, 137 P.3d at1102 n.44.

"In order to avoid the distorting effects of hindsight," a reviewing court begins the evaluation of an ineffective assistance of counsel claim "with a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Ennis*, 122 Nev. 694, 137 P.3d at 1102 (quoting *Strickland*, 466 U.S. at 689). A petitioner must prove the "factual allegations underlying his ineffective assistance of counsel claim by a preponderance of the evidence." *Id.* at 1012, 103 P.3d at 33. The benchmark for assessing claims of ineffective assistance of counsel is "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Numes v. Mueller*, 350 F.3d 1045, 1051 (9th Cir. 2003) (quoting *Strickland*, 466 U.S. at 686).

a. MR. CENTOFANTI'S TRIAL (POST-JURY VERDICT), APPELLATE AND POST-CONVICITON COUNSEL WAS INEFFECTIVE BECAUSE COUNSEL ACTIVELY REPRESENTED CONFLICTING INTERESTS THAT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE

Mr. Centofanti's appellate and post-conviction counsel actively represented conflicting interests that adversely affected his performance, because, by virtue of representing Mr. Centofanti at these stages, counsel was forced to balance his duty of loyalty to Mr. Centofanti with a strong disincentive to prove his own ineffectiveness.

The Sixth Amendment guarantees a criminal defendant the right to conflict-free representation. *Coleman*, 109 Nev. at 3, 846 P.2d at 277 (citing *Clark v. State*, 108 Nev. 324, 831 P.2d 1374 (1992)). When counsel is burdened by an actual conflict of interest, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692. The Court of Appeals for the Ninth Circuit has noted "an attorney is 'not inclined to seek out and assert his own prior ineffectiveness.'" *United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996) (quoting *Abbamonte v. United States*, 160 F.3d 922, 925 (2nd Cir. 1998)).

Similarly, Nevada Rule of Professional Conduct 1.7(a) prohibits lawyers from representing a client if the representation involves a concurrent conflict of interest. Nev. R. Prof. Conduct 1.7(a). Under Rule 1.7(a)(2), a "concurrent conflict of interest" exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a personal interest of the

lawyer." Nev. R. Prof. Conduct 1.7(a)(2). Pursuant to Rule 1.7(b)(4), the attorney must also secure the informed consent of each affected client in writing before engaging in the dual representation. Nev. R. Prof. Conduct 1.7(b)(4).

Where a defendant claims error based on counsel's conflict of interest, he must show that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Leonard v. State*, 117 Nev. 53, 63, 17 P.3d 397, 404 (2001) (quoting *Strickland*, 466 U.S. 668, 692). "'Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.'" *Clark*, 108 Nev. at 326, 831 P.2d at 1380 (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). A defendant who establishes an actual conflict "'need only show that some effect on counsel's handling of particular aspects of the trial was likely.'" *Del Muro*, 87 F.3d at 1080 (quoting *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992)).

Where counsel faces a conflict of interest, a defendant may continue to be represented by that attorney if he makes a voluntary, knowing, and understanding waiver of conflict-free representation. *Kabase v. Dist. Court*, 96 Nev. 471, 473, 611 P.2d 194, 195 (1980). The United States Supreme Court has stated that a valid waiver of a fundamental constitutional right ordinarily requires "'an intentional

relinquishment or abandonment of a known right or privilege.'" *Gallego v. State*, 117 Nev. 348, 368, 23 P.3d 227, 241 (2001), *overruled on other grounds by Nunnery v. State*, 127 Nev. Adv. Rep. 69, *45-*46 n.12, 263 P.3d 235 (2011) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Thus, when a criminal defendant offers to waive objections to a conflict, the district judge "'should fully explain ... the nature of the conflict, the disabilities which it may place on counsel in his conduct of the defense, and the nature of the potential claims which appellants will be waiving.'" *Kabase*, 96 Nev. at 473, 611 P.2d at 195-96 (citing *United States v. Armedo-Sarmiento*, 524 F.2d 591, 593 (2d Cir. 1975), *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975), and *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir. 1979)). However, "[c]ourts should indulge every reasonable presumption against waiver and should not presume acquiescence in the loss of fundamental rights." *Gallego*, 117 Nev. at 368, 23 P.3d at 241.

When a defendant knowingly, intelligently, and voluntarily waives her right to conflict-free representation, the waiver is binding on the defendant throughout trial, on appeal, and in habeas proceedings. *Ryan*, 123 Nev. at 430, 168 P.3d at 711 (citing *Gomez v. Ahitow*, 29 F.3d 1128, 1135-36 (7th Cir. 1994) (holding that where the defendant knowingly and intelligently waives the right to conflict-free counsel, the waiver precludes claims of ineffective assistance of counsel based on the conflict)). In *Ryan*, the Nevada Supreme Court considered whether the district court abused its

discretion when it refused to substitute in counsel as defendant's counsel of choice. *Id.* at 421, 168 P.3d at 705. The defendant and her husband were accused of murdering their roommate, stuffing her body in the trunk of their vehicle, and setting the vehicle on fire to cover up the alleged crimes. *Id.* The defendant sought to have an attorney represent her at trial whose law partner already represented her codefendant. *Id.*

The law firm drafted a conflict-waiver letter which both defendants signed. *Ryan*, 123 Nev. at 423, 168 P.3d at 706. The conflict-waiver letter stated, in pertinent part, the following:

> (1) neither defendant has implicated the other in the crimes charged; (2) after a thorough review of discovery and lengthy discussions with multiple counsel, neither defendant intends to plead guilty or cooperate with the State; (3) a joint defense agreement has been prepared to be executed by both defendants and both attorneys; (4) either defendant's decision to cooperate with the State might change the firm's ability to continue representation; (5) in the event of a serious conflict or disagreement, the firm would be required to withdraw and represent neither defendant; and (6) the firm's withdrawal would be 'inconvenient and potentially adverse to each [defendant],' but the defendants understood that the 'present benefits of dual representation outweigh this contingent problem.'

Id.

The district court held several hearings on the defendant's motion for substitution. *Ryan*, 123 Nev. at 423, 168 P.3d at 706. Additionally, the district court appointed advisory counsel to speak with the defendant about the ramifications of dual representation. *Id.* Moreover, the district court canvassed both defendants regarding the ramifications of dual representation. *Id.* at 424, 168 P.3d at 706.

Ultimately, however, the district court ruled that there was "an actual or serious potential conflict inherent in the dual representation, and issued a written order denying [the defendant's] request for substitution of counsel." *Id.* at 425, 168 P.3d at 707. Consequently, the defendant filed a petition for a writ of mandamus challenging the district court's order denying the defendant's motion to substitute counsel. *Id.* at 421, 168 P.3d at 705.

This Court reasoned that a district court "has broad discretion to balance a non-indigent criminal defendant's right to choose her own counsel against the administration of justice." *Ryan*, 123 Nev. at 428, 168 P.3d at 709. Therefore, this Court concluded that a district court must honor a criminal defendant's voluntary, knowing, and intelligent waiver of conflict-free representation so long as the conflicted representation will not interfere with the administration of justice. *Id.* at 422-23, 168 P.3d at 705. Additionally, this Court concluded that before engaging in dual representation, the attorney must advise the criminal defendant of his right to consult with independent counsel to review the potential conflicts of interest posed by the representation. *Id.* at 422, 168 P.3d at 705. And, if the defendant chooses not to seek independent counsel, then the defendant must expressly waive his right to do so before the defendant's waiver of conflict-free representation can be valid. *Id.* Ultimately, this Court granted the defendant's petition, and issued a writ directing the district court to canvass both defendants to determine whether they knowingly,

intelligently, and voluntarily waived their right to conflict-free representation. *Id.* at 421, 168 P.3d at 705.

In *Middleton v. Warden*, the Nevada Supreme Court considered whether a district court erred in denying a defendant's post-conviction petition for a writ of habeas corpus. 120 Nev. 664, 664, 98 P.3d 694, 695 (2004). The defendant was convicted of two counts of first-degree murder, and sentenced to death. *Id.* at 665, 98 P.3d at 695. This Court affirmed the defendant's murder convictions and death sentences on direct appeal. *Id.* The defendant filed a post-conviction habeas corpus petition in the district court. *Id.* The district court appointed public defenders to represent the defendant. *Id.* Later, the district court removed the public defenders as the defendant's counsel due to a perceived conflict of interest. *Id.* The district court subsequently appointed private attorneys to represent the defendant. *Id.* The district court denied the defendant's post-conviction petition for a writ of habeas corpus. *Id.* The defendant sought review of the district court's order denying his petition. *Id.* at 664, 98 P.3d at 695. One of the private attorneys appointed by the district court represented the defendant on appeal to this Court. *Id.* at 665, 98 P.3d at 695.

This Court found that the defendant's appointed private attorney had "repeatedly violated [the Nevada Supreme Court's] orders and procedural deadlines," and "the work product he ultimately submitted was wholly substandard and unacceptable." *Id.* Therefore, this Court removed the appointed private attorney as

counsel, vacated the district court order denying the defendant's habeas corpus petition, and remanded with an instruction to the district court to appoint new post-conviction counsel to represent the defendant. *Id.* at 669, 98 P.3d at 698. More importantly, however, in remanding the case to the district court, the Nevada Supreme Court noted, "[b]ecause the [public defender] represented [the defendant] in his direct appeal and because post-conviction claims respecting that representation may again be presented below, the [public defender] should not be appointed as [the defendant's] new post-conviction counsel." *Id.* at 665 n.3, 98 P.3d at 695 n.3.

In *Del Muro*, the United States Court of Appeals for the Ninth Circuit considered whether a federal district court erroneously denied a defendant's request for the appointment of substitute counsel. 87 F.3d at 1080. The government charged the defendant under federal law with falsely claiming to be a United States citizen. *Id.* A jury found the defendant guilty, and he was sentenced to a term of imprisonment. *Id.* The defendant filed a motion for new trial, claiming trial counsel had rendered ineffective assistance by failing to interview or subpoena witnesses suggested by the defendant. *Id.* The defendant requested that the federal district court appoint substitute counsel to present the motion on his behalf. *Id.* The federal district court denied the defendant's request. *Id.* The federal district court held an evidentiary hearing on the motion at which it reviewed declarations and heard live testimony of the potential witnesses. *Id.* The federal district court required trial counsel to examine the potential

trial witness who testified, and argue that counsel's own failure to investigate and call this witness and two others prejudiced the defendant's case. *Id.* The federal district court denied the motion on the ground that the witness' testimony would not have affected the outcome of the trial. *Id.* On appeal, the defendant argued that the federal district court created an inherent conflict of interest by forcing trial counsel to prove his own ineffectiveness, and thereby deprived the defendant of his Sixth Amendment right to effective assistance of counsel. *Id.*

The Ninth Circuit found that "[t]here was an actual, irreconcilable conflict between [the defendant] and his trial counsel at the hearing on the motion for new trial." *Del Muro*, 87 F.3d at 1080. Specifically, the Court found that, "[w]hen [the defendant's] allegedly incompetent trial attorney was compelled to produce new evidence and examine witnesses to prove his services to the defendant were ineffective, he was burdened with a strong disincentive to engage in vigorous argument and examination, or to communicate candidly with his client." *Id.* Thus, this conflict was "likely to affect counsel's performance." *Id.* Therefore, the Ninth Circuit vacated the sentence and remanded the case to the federal district court to conduct a hearing on the defendant's motion for a new trial with the defendant represented by appointed substitute counsel. *Id.* at 1081.

Here, Mr. Centofanti's appellate and post-conviction counsel was ineffective, because counsel actively represented conflicting interests that affected his

performance. Specifically, attorney Carmine Colucci represented Mr. Centofanti during all post-jury verdict proceedings in the District Court (sentencing and motion for a new trial), the appellate level and post-conviction stages of the instant case. As this Court is well aware, the appropriate vehicle for reviewing claims of ineffective assistance of counsel is a timely post-conviction petition for writ of habeas corpus. A Petitioner for Writ of Habeas Corpus is the only means of assigning error to the ineffective assistance of both trial and appellate counsel. However, in this case, Mr. Colucci actively represented a conflicting interest, because he represented Mr. Centofanti at both of these stages of the case. It is ridiculous to assume that Mr. Colucci brought claims of his own ineffectiveness to the attention of the district court for the purposes of Mr. Centofani's post-conviction petition for writ of habeas corpus. More importantly, however, even a cursory inspection of Mr. Centofanti's post-conviction petition reveals that Mr. Colucci failed to assign any error resulting from his ineffective representation of Mr. Centofanti at the post-jury verdict (sentencing and motion for a new trial) and appellate stage.

In the instant matter, Mr. Centofanti never made a voluntary, knowing, or understanding waiver of his right to conflict-free representation. Unlike *Ryan*, in which this Court acknowledged a defendant's ability to waive the right to conflict-free counsel, Mr. Colucci never drafted a conflict waiver letter, nor did Mr. Centofanti ever sign such a waiver. Furthermore, unlike *Ryan*, the district court never held a

hearing regarding the waiver at issue. Additionally, unlike *Ryan*, the district court never appointed advisory counsel to speak with Mr. Centofanti about the ramifications of his counsel's active conflict of interest. Moreover, unlike *Ryan*, the district court never canvassed Mr. Centofanti regarding the ramifications of a waiver of his right to conflict-free representation. Instead, the district court merely asked Mr. Centofanti at the conclusion of the evidentiary hearing on his post-conviction petition whether he discussed potential conflicts of interest that Mr. Colucci had as counsel on Mr. Centofanti's direct appeal. Thus, the Court cursory "canvass" of Mr. Centofanti did not even address the actual, active conflict of interest arising from Mr. Colucci's representation of Mr. Centofanti on both the direct appeal and the post-conviction petition.

Here, the district court's canvass fails to comport with the minimum requirements for a conflict waiver established by this Court in *Kabase*. Specifically, the district court failed to fully explain the nature of the conflict to the defendant. Moreover, the district court failed to explain the disabilities which the conflict placed on counsel in his conduct of the defense. Furthermore, the district court failed to explain the nature of the potential claims that Mr. Centofani was purportedly waiving. For example, it is clear from the record that Mr. Centofanti did not understand that the district court had already dismissed the first five claims contained in his post-conviction petition, because, arguably, they should have been raised on direct appeal.

Appellate counsel's failure to raise these assignments of error on direct appeal raised the issue of ineffective assistance of counsel. However, because Mr. Colucci served as counsel for post-jury verdict (sentencing and motion for a new trial), appellate counsel, and post-conviction counsel, Mr. Colucci had no incentive to implicate his own ineffective conduct. Instead, Mr. Centofanti asserts only that he discussed the disqualification issue with Mr. Colucci, and that this issue was barred by the state of the then-existing case law. XIII AA 163. More disturbingly, however, this purported waiver took place at the conclusion of the district court's evidentiary hearing on Mr. Centofanti's post-conviction petition, and not when the district court initially dismissed the first five claims contained in the petition.

Therefore, Mr. Centofanti's appellate and post-conviction counsel actively represented conflicting interests that adversely affected his performance, because, by virtue of representing Mr. Centofanti at these stages, counsel was forced to balance his duty of loyalty to Mr. Centofanti with a strong disincentive to prove his own ineffectiveness.

b. <u>MR. CENTOFANTI NEED NOT DEMONSTRATE PREJUDICE, BECAUSE A PRESUMPTION OF PREJUDICE ARISES WHEN AN ACTUAL CONFLICT OF INTEREST ADVERSELY AFFECTS COUNSEL'S PERFORMANCE</u>

"[I]n certain limited instances, a defendant is relieved of the responsibility of establishing the prejudicial effect of his counsel's actions." *Clark*, 108 Nev. at 326, 831 P.2d at 1376. A presumption of prejudice arises when an actual conflict of interest

adversely affects counsel's performance. *Nika v. State*, 120 Nev. 600, 97 P.3d 1140 (2004) (citing *Clark*, 108 Nev. at 326, 831 P.2d at 1376); *see also Strickland*, 466 U.S. at 692 ("Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest."); *Coleman*, 109 Nev. at 3-4, 846 P.2d at 277-278 (citing *Holloway v. Arkansas*, 435 U.S. 475 (1978) and *Clark*, 108 Nev. at 326, 831 P.2d at 1376). "'To hold otherwise would engage a reviewing court in unreliable and misguided speculation as to the amount of prejudice suffered by a particular defendant. An accused's constitutional right to effective representation of counsel is too precious to allow such imprecise calculations.'" *Coleman*, 109 Nev. at 3, 846 P.2d at 277 (quoting *United States v. Alvarez*, 580 F.2d 1251, 1259 (5th Cir. 1978)).

There is no need for a hearing prior to this Court's review where the issue is one of ineffective assistance of counsel, and counsel's actions are improper per se. *Jones v. State*, 110 Nev. 730, 737, 877 P.2d 1052, 1056 (1994). In *Jones*, the State charged a defendant with murder with use of a deadly weapon for the death of the victim, his girlfriend. At trial, the defendant testified that he did not kill the victim. *Id.* at 735, 877 P.2d at 1055. However, during closing argument, defense counsel conceded that he thought "the evidence shows beyond a reasonable doubt that the

defendant did kill [the victim]," but argued that the defendant was guilty of only second-degree murder. *Id.* at 736, 877 P.2d at 1055-56. A jury convicted the defendant of first-degree murder with use of a deadly weapon. *Id.* at 731, 877 P.2d at 1052. The defendant appealed his conviction and sentence. *Id.* When canvassed by the district court on the subject following the guilt phase, the defendant indicated that he did not consent to trial counsel's argument that the defendant was guilty of second-degree murder. *Id.* at 736, 877 P.2d at 1056.

On appeal, the defendant contended that defense counsel's concession of guilt without the defendant's consent, and in contravention of his own testimony, was improper per se. *Jones*, 110 Nev. at 737, 877 P.2d at 1056. Thus, the defendant claimed, reversal was mandated "irrespective of any strategic or tactical motives for the concessions that may be disclosed at an evidentiary hearing." *Id.* This Court elected to address this issue on direct appeal, and determined that prejudice may be presumed "where defense counsel improperly concedes his client's guilt." *Id.* at 738, 877 P.2d at 1057. Ultimately, the Court reversed the defendant's conviction and remanded the case for a new trial. *Id.* at 739, 877 P.2d at 1057.

In the instant matter, Mr. Centofanti need not establish the prejudicial effect of Mr. Colucci's actions, because, under this Court's holding in *Jones*, Mr. Colucci's active conflict of interest is improper per se. Specifically, in the instant matter, Mr. Colucci represented Mr. Centofanti at the appellate and post-conviction stages. Post-

conviction is the vehicle by which a court measures the question of whether counsel rendered ineffective assistance. Mr. Colucci had little incentive to highlight his ineffectiveness to the district court in Mr. Centofanti's post-conviction petition. Therefore, Mr. Colucci's active conflict of interest amounts to prejudice per se, and Mr. Centofanti is relieved of his burden of demonstrating any prejudice resulting from Mr. Colucci's conflict of interest.

c. ALTERNATIVELY, SHOULD THIS COURT NOT PRESUME PREJUDICE FROM COUNSEL'S CONFLICT OF INTEREST, MR. CENTOFANTI WAS PREJUDICED BY APPELLATE AND POST-CONVICTION COUNSEL'S ACTUAL CONFLICT OF INTEREST WHEN THE DISTRICT COURT DISMISSED THE FIRST FIVE ASSIGNMENTS OF ERROR, BECAUSE THEY COULD HAVE BEEN RAISED ON DIRECT APPEAL

In the instant matter, Mr. Centofanti was prejudiced by Mr. Colucci's ineffective assistance of counsel, because Mr. Colucci failed to raise at least the first five grounds contained in Mr. Centofanti's post-conviction petition on direct appeal. The district court dismissed these grounds, because they could have been raised on direct appeal, but Mr. Colucci failed to raise them. XII AA 119-124. Effective appellate counsel would have raised these issues on direct appeal. Therefore, the post-conviction petition is prima facie evidence of Mr. Colucci's ineffective assistance.

The denial of these grounds by the district court violated Mr. Centofanti's Fifth, Sixth, and Fourteenth Amendment rights to Counsel, Due Process, Fair Hearing, to Remain Silent, and Fundamental Fairness. In the district court's May 9, 2011 Order,

the district court stated that all other claims of ineffective assistance of counsel were previously dismissed. XII AA 119-124. This is contrary to the district court minutes from December 2, 2009, which reflect that "COURT ORDERED, ALL CLAIMS DISMISSED EXCEPT for the claim as to ineffective assistance of counsel which is to be scheduled for an evidentiary hearing." XVI AA 82. The failure of the district court to consider claims not reasonably available to Mr. Centofanti at direct appeal, or were otherwise properly before the district court for decision on the merits, further denied Mr. Centofanti's federal Constitutional rights as set forth above and in grounds one through five of the petition.

d. MR. CENTOFANTI'S TRIAL (POST-JURY VERDICT), APPELLATE AND POST-CONVICITON COUNSEL WAS INEFFECTIVE BECAUSE COUNSEL ACTIVELY REPRESENTED CONFLICTING INTEREST THAT ADVERSELY AFFECTED COUNSEL'S PERFORMANCE BY ACCEPTING MONEY TO REPRESENT HIM IN CONFLICTING PROCEEDINGS WITHOUT ADVISING CLIENT OF THOSE CONFLICTS

Attorney Colucci's conflict of interest violated Mr. Centofanti's Fifth, Sixth, and Fourteenth Amendment rights to Due Process, a Fair Hearing, and Fundamental Fairness. Attorney Colucci was hired to represent Mr. Centofanti in 2004 before his conviction was filed. VI AA 13-14. The scope of representation contemplated that Mr. Colucci would represent Mr. Centofanti at sentencing, in arguing a Motion for New Trial, on direct appeal, and in all habeas matters (State and Federal). At no time did Mr. Colucci ever advise Mr. Centofanti of any potential conflict of interest that may

arise, even after accepting substantial payments. It is further problematic that the majority of Mr. Centofanti's contact with Mr. Colucci throughout the course of their attorney-client relationship involved discussions regarding the payment of attorney's fees as the only or primary issue of Mr. Colucci's concern. Mr. Centofanti's constitutional rights to conflict-free counsel also arose as to the issue of attorney's fees owed, and that this monetary conflict interfered with Mr. Centofanti's ability to present all of the issues of the writ at the deposition, evidentiary hearing and in the actual writ and supplement filed in this case.

II. MR. CENTOFANTI WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BY THE INEFFECTIVE ASSISTANCE OF COUNSEL THAT HE RECEIVED DURING THE COURSE OF HIS CASE

The district court issued a five page written Order Denying Petition for Writ of Habeas Corpus. XII AA 119-124. This Order was filed in the district court on May 9, 2011. In that Order, the district court addressed only four (4) issues with any specificity. This is particularly important because Mr. Centofanti raised and addressed more than thirty-six (36) specific instances of ineffective assistance of counsel in his post-conviction petition for writ of habeas corpus, which itself was three hundred and thirty-one (331) pages in length. X AA 1-250; XII AA 1-143. The district court simply stated at the end of the Order Denying the Petition that it had reviewed all other arguments and similarly found that the required prejudice had not been

demonstrated. XII AA 119-124. The district court did not provide a single finding of fact with respect to these other instances of ineffective assistance of counsel. Moreover, the district court did not provide any reasoned conclusion of law for each specific alleged instance. The district court's vague denial of Mr. Centofanti's ineffective assistance of counsel claims was error. Accordingly, this Court should REVERSE the district court's ruling and REMAND this matter to the district court for a new trial. In this case, the denial of Mr. Centofanti's ineffective assistance claims were contrary to and/or involved an unreasonable application of clearly established federal law as established by the United States Supreme Court in *Strictland,* and, further, was based upon an unreasonable determination of the facts presented and incorporated herein.

As contained in Mr. Centofanti's post-conviction petition "Ground Six," the district court did not make any finding of fact or conclusion of law with respect to the following assertions of ineffective assistance of counsel:

> a. Mr. Centofanti's Trial Attorney, Daniel J. Albregts, was ineffective in failing to object to the canvass of Mr. Centofanti at the hearing of the motion to revoke bail. X AA 131.

Mr. Centofanti's trial attorney, Daniel J. Albregts, was ineffective in failing to object, and to preserve for review on direct appeal, the issue of the improper canvass conducted at the hearing on the motion to revoke bail. This was a violation of Mr. Centofanti's Fifth and Fourteenth Amendment rights to remain silent. Albregt's

failing caused extreme prejudice to Mr. Centofanti, and, specifically, lead to the erroneous removal of Mr. Centofanti's choice of counsel, Daniel J. Albregts.

b. Mr. Centofanti's trial attorneys, Daniel J. Albregts and Alan Bloom, were ineffective in that they failed to file a writ of mandamus to the Nevada Supreme Court to challenge the district court's ruling disqualifying Mr. Centofanti's attorney of choice, Daniel J. Albregts. X AA 131-132.

Neither trial attorney challenged the district court's ruling. This disqualification was a clear violation of Mr. Centofanti's Fifth Amendment right to remain silent, Sixth amendment right to counsel of choice, and United States Supreme Court precedent as established in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

c. Mr. Centofanti's attorneys, Albregts and Bloom, were ineffective for failing to obtain a ruling on the motion in limine to exclude the evidence of the San Diego real estate action from being allowed into evidence at trial. X AA 131.

In this case, both attorneys failed to object or make a record regarding the district court's failure to rule on the proposed defense motion in limine regarding the introduction of any evidence of the San Diego real estate transaction. Here if this Motion had been filed and granted, the issue of the disqualification of attorney Daniel J. Albregts would have been avoided.

d. Trial counsel was ineffective for failing to create a record at the close of trial when the State did not call attorney Daniel J. Albregts. X AA 131-132.

Attorney Bloom was ineffective for failing to object to the State's prosecutorial misconduct in not calling Daniel J. Albregts as a witness. Additionally, it was ineffective not to seek to have Daniel J. Albregts reinstated as counsel.

e. Trial counsel was ineffective for failing to properly handle the evidentiary issues pertaining to the December 1, 2000 incident. X AA 137-138.

On December 1, 2000, Mr. Centofanti and his wife, Virginia, had a dispute. The dispute involved Virginia's drinking, driving while intoxicated, and staying out late, while Mr. Centofanti cared for their children. Trial counsel was ineffective for failing to fully investigate this incident, collect supporting evidence related to this incident, and properly incorporate this incident into the theory of defense in this case. If trial counsel had been effective, the evidence collected, along with any pertinent testimony, would have been crucial to support the credibility of Mr. Centofanti's version of events. However, because trial counsel failed to collect or properly present supporting evidence, the State was able to easily discredit Mr. Centofanti at trial.

f. Trial counsel was ineffective for failing to properly handle the evidentiary issues pertaining to the December 5, 2000, incident. X AA 139-141.

On December 4, 2000, Virginia contacted Mr. Centofanti and asked him to pick up their child, Nicholas, from daycare as he was sick. Mr. Centofanti picked him up

and took him to the doctor. He attempted to contact Virginia, but never heard from her. Virginia finally returned home the next day. Her return lead to an incident where Virginia was arrested for hitting Mr. Centofanti over the head with a picture frame. In this case, trial counsel did not fully prepare this incident for use in the trial or to support the theory of defense. If trial counsel had been effective with pretrial preparation and investigation, it would have, at a minimum, produced a conviction of a lesser degree of homicide, and that would suffice for a showing of prejudice.

g. Trial counsel was ineffective for failing to properly handle the evidentiary issues pertaining to the December 20, 2000, incident. X AA 143-151.

During the collection of evidence by Las Vegas Metropolitan Police Department on December 20, 2000, they failed to collect Virginia's purse, its contents (including her palm pilot, keys, vehicle, and its contents). Mr. Centofanti met with several attorneys, including Harvey Gruber, Steve Wolfson, and Peter Christianson about the urgency in securing these items and the data included in them. When he finally met with attorney Dan Albregts, Mr. Centofanti was told the items were gone. Finally, he discussed the issue with attorney Allen Bloom, who filed a Motion to Dismiss. However, attorney Bloom was ineffective, because he failed to properly research the appropriate legal issues in the motion. Additionally, trial counsel failed to obtain a ruling on the Motion until the trial was already underway. Trial counsel failed to request an evidentiary hearing prior to trial to fully litigate this issue.

h. Trial counsel was ineffective for failing to properly handle the evidentiary issues pertaining to the state failing to take into evidence the bloody exercise bike. X AA 151-156.

Again, during the collection of evidence, the police failed to collect an exercise bike that had unknown blood spatter on it. This later became the focal point of expert analysis and presentation to the jury as to how the shooting occurred. Despite this crucial piece of evidence not being properly collected in this case, trial counsel failed to file any pretrial motions regarding the proper preservation of evidence. Additionally, trial counsel failed to retain an expert to examine the blood splatter on the exercise bike.

i. Trial counsel was ineffective for failing to properly handle and process the missing shell casings. X AA 157-159.

Finally, during the collection of evidence, the police failed to collect all of the shell casings in this case. Nearly three months after "securing" the scene, Mr. Centofanti recovered two additional shell casings. Mr. Centofanti told his multiple attorneys about the shell casings that he recovered. He was instructed to keep them in an envelope, and it was not until nearly nine (9) months later that he was advised to turn them over to the police. Trial counsel was ineffective for failing to properly investigate, document, or process these shell casings when Mr. Centofanti discovered them.

j. Trial counsel was ineffective for failing to preserve and present the issue of the cremation order. X AA 160-162.

While Mr. Centofanti was in custody, he was approached without the assistance of counsel, despite his request, and told to sign a cremation order. He signed this order under duress and in violation of his Fifth Amendment right, and informed all of his retained counsel after the incident. His trial counsel did not pursue this to determine the extent to which Mr. Centofanti was prejudiced. However, it is clear that, because of the cremation, any additional forensic testing or examination would be impossible, and trial counsel was ineffective for failing to pursue this issue.

k. Trial counsel was ineffective for failing to preserve and present the issue of the invalid search warrant. X AA 162-164.

In October 2001, Mr. Centofanti filed a "Request for an Order to Produce Cassette Tape." This request arose from a telephonic search warrant that law enforcement sought on December 20, 2000. This tape was neither located nor produced. A request/motion was later denied, however, trial counsel was ineffective for not pursuing the denial further, as well as for failing to follow up on documentation that the State indicated it would turn over, but ultimately never did. Prejudice exists in this case, because if decided in favor of Mr. Centofanti, it would have allowed the defense counsel to seek to exclude all evidence obtained on December 20, 2000, arising from that search warrant.