

APPENDIX

TABLE OF CONTENTS

1. Judgment of the Eighth Circuit Court of Appeals denying certificate of appealability
2. Memorandum and order by the U.S. District Court of Nebraska denying habeas relief and certificate of appealability
3. Opinion of the Nebraska Court of Appeals affirming the State District Court's order denying postconviction relief
4. Order by the State District Court from December 2, 2016 denying post-conviction relief
5. Order by the State District Court from May 10, 2017 denying postconviction relief
6. Order by the Eighth Circuit Court of Appeals denying petition for rehearing
7. Neb.Rev.Stat. §60-6,197.06
8. Information charging Appellant with a Class III felony motor vehicle homicide
9. Part of bill of exceptions from plea colloquy showing district court's advisement of the nature of the charge and the statement of the factual basis
10. Grounds one, two, and three of motion titled "Second Amended Motion For Postconviction Relief"
11. Replacement Brief of Appellant for Nebraska Court of Appeals
12. Petitioner's Response Brief for petition for writ of habeas corpus in U.S. District Court for the District of Nebraska
13. Petition for rehearing by Appellant in the Eight Circuit Court of Appeals

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

No: 20-1233

---

RaySean D. Barber

Plaintiff - Appellant

v.

Todd Wasmer

Defendant - Appellee

---

Appeal from U.S. District Court for the District of Nebraska - Omaha  
(8:18-cv-00571-RGK)

---

**JUDGMENT**

Before BENTON, WOLLMAN, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

May 13, 2020

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

RAYSEAN D. BARBER,

Petitioner,

vs.

BRAD HANSEN,

Respondent.

8:18CV571

**MEMORANDUM  
AND ORDER**

This matter is before the court on Petitioner RaySean D. Barber's ("Petitioner" or "Barber") Petition for Writ of Habeas Corpus. (Filing No. 1.) For the reasons that follow, Petitioner's habeas petition is denied and dismissed with prejudice.

**I. CLAIMS**

Summarized and condensed, and as set forth in the court's initial review order (filing no. 7), Barber asserted the following claims that were potentially cognizable in this court:

- |              |  |
|--------------|--|
| Claim One:   | Trial counsel was ineffective for failing to object to the insufficient information filed by the State.  |
| Claim Two:   | Trial counsel was ineffective for failing to object to the insufficient advisement of the nature of the charge by the trial court at the plea hearing. |
| Claim Three: | Trial counsel was ineffective for failing to object to the factual basis for the plea.   |

(Filing No. 7 at CM/ECF p. 1.)

## II. BACKGROUND

### A. Conviction and Sentence

The court states the facts as they were recited by the Nebraska Court of Appeals in *State v. Barber*, 26 Neb. App. 339, 918 N.W.2d 359 (2018), *review denied* (Nov. 15, 2018). (Filing No. 11-3.) See *Bucklew v. Luebbers*, 436 F.3d 1010, 1013 (8th Cir. 2006) (utilizing state court's recitation of facts on review of federal habeas petition).

On April 15, 2013, Barber was charged by information with one count of motor vehicle homicide in the death of Betty Warren. The information alleged:

On or about 3 February 2013, in Douglas County, Nebraska, . . . BARBER did then and there unintentionally cause the death of . . . WARREN while engaged in the unlawful operation of a motor vehicle, and while in violation of section 60-6,196 or 60-6,197.06, in violation of Neb. Rev. Stat. § 28-306(1)&(3)(b) a Class III Felony.

A plea hearing was held on June 24, 2013. Barber's attorney informed the court that Barber wished to withdraw his previous plea of not guilty and enter a plea of no contest to the charge, and Barber pled no contest. The bill of exceptions reflects that during the plea colloquy, the court advised Barber that the State was required to prove that he intentionally caused the death of the victim, when the State actually had to prove that he unintentionally caused the death of the victim.

The following factual basis was presented in support of the charge:

On February 3rd, 2013, here in Douglas County, Nebraska, [Barber] was observed by witnesses traveling southbound on Saddle Creek Road in excess of the speed limit. [Barber] approached the area of Saddle Creek and Poppleton Streets, where he was traveling approximately 98 miles per hour in a 35-miles-per-hour zone. [Barber] hit a curb, allowing him to lose control of his vehicle. He

struck another car being driven by . . . Warren. . . . Warren was pronounced dead. An autopsy conducted by the Douglas County Coroner revealed that she died of internal injuries attributable to this car accident.

The police suspected that [Barber] was under the influence of a controlled substance and/or alcohol. His blood was tested, by virtue of him being transported for medical treatment, where he had a blood alcohol content of a .146.

All these events occurred here in Douglas County, Nebraska.

The district court found beyond a reasonable doubt that Barber understood the nature of the charge against him and the plea was made freely, knowingly, intelligently, and voluntarily, and that there was a factual basis to support the plea. The court accepted Barber's plea and found him guilty.

A sentencing hearing was held on October 1, 2013. After statements from the attorneys and Barber, the court sentenced Barber to 20 to 20 years' imprisonment.

## **B. Direct Appeal**

Barber appealed his sentence to the Nebraska Court of Appeals on October 8, 2013. (Filing No. 11-1 at CM/ECF p. 2.) Barber was represented both at trial and on direct appeal by the same attorney. On direct appeal, the sole assignment of error was that the district court erred by imposing an excessive sentence. (Filing No. 11-4.) On January 23, 2014, the Nebraska Court of Appeals summarily affirmed Barber's conviction and sentence. (Filing No. 11-1 at CM/ECF p. 2; Filing No. 11-5.) The Nebraska Supreme Court denied Barber's petition for further review on March 12, 2014. (Filing No. 11-1 at CM/ECF p. 2; Filing No. 11-6.)

### C. Postconviction Action

Barber filed his first pro se motion for postconviction relief on February 27, 2015. (Filing No. 11-12 at CM/ECF pp. 10-17.) He amended his motion several times. (Filing No. 11-12 at CM/ECF pp. 99, 202, 208.) The final amended motion for postconviction relief was filed on October 17, 2016. (Filing No. 11-12 at CM/ECF pp. 208-30.) In it, he alleged that (1) the trial court abused its discretion in failing to properly advise him of the nature of the charge; (2) the State's factual basis failed to make a distinct allegation of each essential element of the charge; and (3) trial counsel was ineffective in several respects, including for failing to move to dismiss the information, as it was insufficient and could not be used to convict him of the charged crime. (Filing No. 11-12 at CM/ECF pp. 214-30.)

At a preliminary hearing on the postconviction motion on February 16, 2016, the State's attorney indicated that she had spoken to the court reporter and that, based on the court reporter's notes, the bill of exceptions contained an error in the advisement regarding the elements of the charged offense. (Filing No. 11-14 at CM/ECF pp. 39-45.) Another preliminary hearing was held on June 28, 2016, and the court determined that an evidentiary hearing should be held. (Filing No. 11-14 at CM/ECF pp. 51-73.)

On August 12, 2016, the State called the court reporter to testify. (Filing No. 11-14 at CM/ECF pp. 73, 86-100.) The court reporter testified that the bill of exceptions contained a mistake. (Filing No. 11-14 at CM/ECF pp. 89-92.) She reviewed the section in question and found that there was a "mistranslate in the steno notes." (Filing No. 11-14 at CM/ECF p. 89.) The "steno notes" are the official record, and when they were edited, she mistakenly "took off the 'un' that was clearly in [her] notes." (Filing No. 11-14 at CM/ECF p. 90.) The prefix "should have attached to intentionally." (Filing No. 11-14 at CM/ECF p. 90.) The court reporter checked her "backup audio which [was] synced with [her] steno notes" and found the court "clearly stated the word 'unintentionally' rather than

“intentionally” at that point in the plea colloquy. (Filing No. 11-14 at CM/ECF p. 113.)

On December 2, 2016, the district court overruled Barber’s postconviction motion on the issue of whether he was properly advised at the time he entered his plea. (Filing No. 11-12 at CM/ECF pp. 232-34.) The district court wrote:

First, the Court Reporter’s notes and the audio recording demonstrate that [Barber] was correctly advised of the elements necessary to convict him and [Barber] suffered no prejudice.

Second, in order to prevail, even if arguendo, [Barber] was advised that the State would have to prove [Barber] “intentionally” caused Ms. Warren’s death, [Barber] must show that the error would have resulted in a different outcome. Put another way, [Barber] would have to demonstrate but for the error, he would not have pled no contest to the charge. There is no evidence of this.

(Filing No. 11-12 at CM/ECF pp. 233-34.) The district court then stated that it would proceed with Barber’s remaining claims for postconviction relief, noting that the State had indicated that it planned on filing a motion to dismiss as to those claims. (Filing No. 11-12 at CM/ECF p. 234.) Barber did not appeal from this order. (Filing No. 11-3 at CM/ECF p. 5.)

The district court held a hearing on the State’s motion to dismiss, and Barber was given the opportunity to respond to the State’s motion in writing. (Filing No. 11-12 at CM/ECF pp. 244-50.) On May 10, 2017, the district court overruled Barber’s October 17, 2016 amended motion for postconviction relief in all respects. (Filing No. 11-12 at CM/ECF pp. 250-53.)

Barber appealed to the Nebraska Court of Appeals, arguing, as relevant here, that the state district court erred in failing to find that trial counsel was ineffective for failing to object to (1) the information, (2) the trial court’s improper advisement of the nature of the charge at the plea hearing, and (3) the factual basis for the plea.

The Nebraska Court of Appeals rejected Barber's claims and affirmed the judgment of the district court in a published opinion dated September 25, 2018. *Barber*, 26 Neb. App. 339, 918 N.W.2d 359 (filing no. 11-3). The Nebraska Supreme Court denied Barber's petition for further review, and the mandate was issued on December 6, 2018. (Filing No. 11-2 at CM/ECF p. 3.)

#### **D. Habeas Petition**

Barber timely filed his Petition in this court on December 10, 2018. (Filing No. 1.) In response to the Petition, Respondent filed an Answer (filing no. 12), a Brief (filing no. 13), and the relevant state court records (filing no. 11). Respondent argues that the claims are without merit. Barber filed a brief in response to Respondent's Answer and Brief. (Filing No. 14.) Respondent filed a Notice of Submission indicating that he would not be filing a reply brief. (Filing No. 15.) This matter is now fully submitted for disposition.

### **III. OVERVIEW OF APPLICABLE LAW**

A couple strands of federal habeas law intertwine in this case. They are (1) the deference that is owed to the state courts when a federal court reviews the factual or legal conclusions set forth in an opinion of a state court, and (2) the standard for evaluating a claim of ineffective assistance of counsel. The court elaborates upon those concepts next so that it may apply them later in a summary fashion as it reviews Barber's claims.

#### **A. Deferential Standard Under 28 U.S.C. § 2254(d)**

When a state court has adjudicated a habeas petitioner's claim on the merits, there is a very limited and extremely deferential standard of review both as to the law and the facts. *See 28 U.S.C. § 2254(d)*. Section 2254(d)(1) states that a federal court may grant a writ of habeas corpus if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). As explained by the Supreme Court in Williams v. Taylor, 529 U.S. 362 (2000), a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts the Supreme Court’s prior holdings or if it reaches a different result from one of that Court’s cases despite confronting indistinguishable facts. Id. at 405-06. Further, “it is not enough for [the court] to conclude that, in [its] independent judgment, [it] would have applied federal law differently from the state court; the state court’s application must have been objectively unreasonable.” Rousan v. Roper, 436 F.3d 951, 956 (8th Cir. 2006).

With regard to the deference owed to factual findings of a state court’s decision, section 2254(d)(2) states that a federal court may grant a writ of habeas corpus if a state court proceeding “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). Additionally, a federal court must presume that a factual determination made by the state court is correct, unless the petitioner “rebut[s] the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

As the Supreme Court noted, “[i]f this standard is difficult to meet, that is because it was meant to be.” Harrington v. Richter, 562 U.S. 86, 102 (2011). The deference due state court decisions “preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [Supreme Court] precedents.” Id.

However, this high degree of deference only applies where a claim has been adjudicated on the merits by the state court. See Brown v. Luebbers, 371 F.3d 458, 460 (8th Cir. 2004) (“[A]s the language of the statute makes clear, there is a condition precedent that must be satisfied before we can apply the deferential AEDPA [Antiterrorism and Effective Death Penalty Act] standard to [the petitioner’s] claim. The claim must have been ‘adjudicated on the merits’ in state court.”).

The Eighth Circuit clarified what it means for a claim to be adjudicated on the merits, finding that:

AEDPA's requirement that a petitioner's claim be adjudicated on the merits by a state court is not an entitlement to a well-articulated or even a correct decision by a state court. Accordingly, the postconviction trial court's discussion of counsel's performance—combined with its express determination that the ineffective-assistance claim as a whole lacked merit—plainly suffices as an adjudication on the merits under AEDPA.

*Worthington v. Roper*, 631 F.3d 487, 496-97 (8th Cir. 2011) (internal quotation marks and citations omitted).

The court also determined that a federal court reviewing a habeas claim under AEDPA must "look through" the state court opinions and "apply AEDPA review to the 'last reasoned decision' of the state courts." *Id.* at 497. A district court should do "so regardless of whether the affirmance was reasoned as to some issues or was a summary denial of all claims." *Id.*

## **B. The Especially Deferential *Strickland* Standard**

When a petitioner asserts an ineffective assistance of counsel claim, the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984), must be applied. The standard is very hard for offenders to satisfy.

*Strickland* requires that the petitioner demonstrate both that his counsel's performance was deficient, and that such deficient performance prejudiced the petitioner's defense. *Id.* at 687. The first prong of the *Strickland* test requires that the petitioner demonstrate that his attorney failed to provide reasonably effective assistance. *Id.* at 687-88. In conducting such a review, the courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

The second prong requires the petitioner to demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id. at 694*. And when a petitioner’s conviction is the result of a plea, in order for the petitioner to show prejudice, he must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty or no contest and would have insisted on going to trial. See *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Thomas v. United States*, 27 F.3d 321, 325 (8th Cir. 1994). Further, as set forth in *Strickland*, counsel’s “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable” in a later habeas corpus action. *Strickland*, 466 at 690.

Additionally, the Supreme Court has emphasized that the deference due the state courts applies with special vigor to decisions involving ineffective assistance of counsel claims. *Knowles v. Mirzayance*, 556 U.S. 111 (2009). In *Knowles*, the Justices stressed that under the *Strickland* standard, the state courts have a great deal of “latitude” and “leeway,” which presents a “substantially higher threshold” for a federal habeas petitioner to overcome. As stated in *Knowles*:

The question is not whether a federal court believes the state court’s determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold. And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.

*Id. at 123* (internal quotation marks and citations omitted).

#### IV. DISCUSSION

Before the Nebraska Court of Appeals addressed the merits of each ineffective assistance of counsel claim, it set forth the proper legal standard under *Strickland*. (Filing No. 11-3 at CM/ECF pp. 6, 8.)

#### A. Claim One

In Claim One, Barber contends that trial counsel was ineffective for failing to object to the insufficient information filed by the State. He asserts that trial counsel should have objected to the information because it failed “to allege that the proximate cause of the death of Betty Warren was Barber’s operation of a motor vehicle in violation of § 60-6,196 or § 60-6,197.06.” (Filing No. 1 at CM/ECF p. 6.)

The Nebraska Court of Appeals considered and rejected this claim in its opinion affirming the state district court’s denial of postconviction relief. The court wrote:

A review of the information shows that the State sufficiently charged the crime of motor vehicle homicide under § 28-306. The information alleged that Barber “did then and there unintentionally cause the death of . . . WARREN while engaged in the unlawful operation of a motor vehicle, and while in violation of section 60-6,196 or 60-6,197.06, in violation of Neb. Rev. Stat. § 28-306(1)&(3)(b) a Class III Felony.” Even if an objection had been made, it would properly have been overruled, and even if the issue had been preserved and raised on appeal, it would not have resulted in a reversal of Barber’s conviction. Defense counsel is not ineffective for failing to raise an argument that has no merit. See State v. Burries, 297 Neb. 367, 900 N.W.2d 483 (2017).

(Filing No. 11-3 at CM/ECF p. 9.)

Under state law, a charging document need only use the language of the statute defining the crime. State v. Hubbard, 673 N.W.2d 567, 575 (Neb. 2004); State v. Bowen, 505 N.W.2d 682, 688 (Neb. 1993). The same is true as a matter of federal constitutional law. Under federal law, a charging document is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an

acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974). “It is generally sufficient that [a charging document] set forth the offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.’” *Id.* (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)). “Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.” *Id.* at 117-18 (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)).

Barber provides no support whatsoever—nor does the record provide any such support—for his bare allegations that trial counsel was ineffective for failing to challenge an insufficient information. The information specifically identified Neb. Rev. Stat. § 28-306 as the section under which Barber was charged and accurately paraphrased the language of the statute, including the causation element. (Filing No. 11-11 at CM/ECF p. 4.) Barber has failed to show he lacked sufficient notice of the charge against him. Also, the language of the information is specific enough that Barber’s conviction would preclude any prosecutions for the same offense. Thus, the information is sufficient under federal law. The Nebraska Court of Appeals’ decision that the information sufficiently charged the crime of motor vehicle homicide under Neb. Rev. Stat. § 28-306, and that trial counsel was not ineffective for failing to raise a meritless objection to the information, cannot be said to be contrary to or an unreasonable application of *Strickland* or other federal law. The court finds, therefore, that Claim One is without merit and that habeas relief on its basis should be denied.

## B. Claim Two

In Claim Two, Barber argues that trial counsel was ineffective for failing to object to the insufficient advisement of the nature of the charge by the trial court at

the plea hearing. After conducting an evidentiary hearing, the state district court rejected this claim, finding that “the Court Reporter’s notes and the audio recording demonstrate that [Barber] was correctly advised of the elements necessary to convict him and [Barber] suffered no prejudice.” (Filing No. 11-12 at CM/ECF pp. 233-34.) The Nebraska Court of Appeals affirmed the state district court’s rejection of this claim, writing as follows:

Even though the bill of exceptions contained an error, the record shows that the court properly advised Barber regarding the nature of the charge during the plea colloquy. Because Barber was properly advised, we cannot find trial counsel was deficient because she did not object to the advisement during the plea colloquy.

(Filing No. 11-3 at CM/ECF p. 9.)

Barber has failed to rebut, by clear and convincing evidence, any of the Nebraska state courts’ factual findings. The record clearly establishes that the bill of exceptions contained an error and that Barber was in fact properly advised regarding the nature of the charge of motor vehicle homicide under Neb. Rev. Stat. § 28-306 during the plea colloquy. In addition, Barber has not established that the Nebraska state courts’ decisions were contrary to, or involved an unreasonable application of, clearly established federal law, or that the Nebraska state courts reached decisions that were based on unreasonable determinations of the facts in light of the evidence. As such, Barber is not entitled to habeas relief on Claim Two.

### **C. Claim Three**

Last, Barber asserts that trial counsel was ineffective for failing to object to the factual basis for the plea. He claims that the factual basis was insufficient to support his conviction “because it failed to establish that the proximate cause element as required by the charge existed beyond a reasonable doubt.” (Filing No. 1 at CM/ECF p. 13.)

The Nebraska Court of Appeals rejected this claim on the merits. The court wrote:

From our review of the record, the State provided an adequate factual basis with regard to causation. Section 28-306(1) provides that a person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide. The State asserted that Barber was driving in excess of the speed limit and had a blood alcohol content of .146, which exceeds the statutory limit for a person in actual physical control of a motor vehicle. See Neb. Rev. Stat. § 60-6,196(1) (Reissue 2010). The State asserted that Barber struck a curb, lost control of his vehicle, and struck Warren's vehicle. The State asserted that the autopsy revealed that Warren died as a result of the injuries which were attributable to the accident. These facts adequately alleged causation. Defense counsel is not ineffective for failing to raise an argument that has no merit. See State v. Burries, supra.

(Filing No. 11-3 at CM/ECF p. 9.)

Under federal law, there must be a sufficient factual basis upon which to base a plea before a plea is accepted. North Carolina v. Alford, 400 U.S. 25, 37-38 (1970). Here, in accepting Barber's plea, the trial court found beyond a reasonable doubt that Barber understood the nature of the charge against him and that his plea was made freely, knowingly, intelligently, and voluntarily, and that there was a factual basis to support the plea. As such, federal constitutional requirements were met. See McCarthy v. United States, 394 U.S. 459, 467 (1969). Upon considering the issue of Claim Three, the Nebraska Court of Appeals concluded, and the court agrees, that the record demonstrated an adequate factual basis for Barber's plea, including the causation element, and that trial counsel was thus not ineffective for failing to object to the adequacy of the factual basis. Barber has failed to rebut, by clear and convincing evidence, the Nebraska Court of Appeals' factual findings. Applying the deferential standards required by both Strickland and by § 2254(d), the court finds nothing to indicate that the Nebraska Court of Appeals' ruling was

contrary to, or involved an unreasonable application of, clearly established Federal law, or that the Nebraska Court of Appeals reached a decision that was based on an unreasonable determination of the facts in light of the evidence. Therefore, Barber is not entitled to habeas relief on Claim Three.

#### **V. CERTIFICATE OF APPEALABILITY**

A petitioner cannot appeal an adverse ruling on his petition for writ of habeas corpus under § 2254 unless he is granted a certificate of appealability. 28 U.S.C. § 2253(c)(1); 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b)(1). The standards for certificates (1) where the district court reaches the merits or (2) where the district court rules on procedural grounds are set forth in Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). The court has applied the appropriate standard and determined that Barber is not entitled to a certificate of appealability.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus (filings no. 1) is denied and dismissed with prejudice. No certificate of appealability has been or will be issued. Judgment will be issued by separate document.

Dated this 26<sup>th</sup> day of November, 2019.

BY THE COURT:

*s/ Richard G. Kopf*  
Senior United States District Judge

OPINION OF THE NEBRASKA COURT OF APPEALS

(Designated for Permanent Publication)

Case Title

STATE OF NEBRASKA, APPELLEE,  
v.  
RAYSEAN D. BARBER, APPELLANT.

Case Caption

STATE v. BARBER

Filed September 25, 2018. No. A-17-610.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge.  
Affirmed.

A. Michael Bianchi for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

STATE v. BARBER

Filed September 25, 2018. No. A-17-610.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
5. \_\_\_\_: \_\_\_\_\_. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
6. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
7. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2016) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
8. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
9. **Postconviction: Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.
10. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
11. **Right to Counsel: Plea Bargains.** The plea-bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.
12. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defendant.

13. \_\_\_\_: \_\_\_\_\_. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.

14. **Trial: Effectiveness of Counsel: Presumptions: Appeal and Error.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.

15. **Effectiveness of Counsel: Proof.** To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

16. **Postconviction: Effectiveness of Counsel: Proof.** The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.

17. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.

18. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.

19. **Effectiveness of Counsel.** Defense counsel is not ineffective for failing to raise an argument that has no merit.

20. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.

PIRTLE, RIEDMANN, and WELCH, Judges.

PIRTLE, Judge.

## I. INTRODUCTION

This is a postconviction appeal following a plea-based conviction for motor vehicle homicide. RaySean D. Barber was sentenced to 20 to 20 years' imprisonment, and his conviction and sentence were summarily affirmed on direct appeal.

A hearing was held because a mistake appeared in the bill of exceptions. On December 2, 2016, the district court overruled the first claim in Barber's second amended motion for postconviction relief. On May 10, 2017, the district court overruled the remaining claims in Barber's second amended motion for postconviction relief. Barber now appeals the May 10 order. We affirm.

## II. BACKGROUND

### 1. PLEA HEARING AND DIRECT APPEAL.

On April 15, 2013, Barber was charged by information with one count of motor vehicle homicide in the death of Betty Warren. The information alleged:

On or about 3 February 2013, in Douglas County, Nebraska, . . . BARBER did then and there unintentionally cause the death of . . . WARREN while engaged in the unlawful operation of a motor vehicle, and while in violation of section 60-6,196 or 60-6,197.06, in violation of Neb. Rev. Stat. §28-306(1)&(3)(b) a Class III Felony.

A plea hearing was held on June 24, 2013. Barber's attorney informed the court that Barber wished to withdraw his previous plea of not guilty and enter a plea of no contest to the charge, and Barber pled no contest. The bill of exceptions reflects that during the plea colloquy, the court advised Barber that the State was required to prove that he *intentionally* caused the death of the victim, when the State actually had to prove that he *unintentionally* caused the death of the victim.

The following factual basis was presented in support of the charge:

On February 3rd, 2013, here in Douglas County, Nebraska, [Barber] was observed by witnesses traveling southbound on Saddle Creek Road in excess of the speed limit. [Barber] approached the area of Saddle Creek and Poppleton Streets, where he was traveling approximately 98 miles per hour in a 35-miles-per-hour zone. [Barber] hit a curb, allowing him to lose control of his vehicle. He struck another car being driven by . . . Warren. . . . Warren was pronounced dead. An autopsy conducted by the Douglas County Coroner revealed that she died of internal injuries attributable to this car accident.

The police suspected that [Barber] was under the influence of a controlled substance and/or alcohol. His blood was tested, by virtue of him being transported for medical treatment, where he had a blood alcohol content of a .146.

All these events occurred here in Douglas County, Nebraska.

The district court found beyond a reasonable doubt that Barber understood the nature of the charge against him and the plea was made freely, knowingly, intelligently, and voluntarily,

and that there was a factual basis to support the plea. The court accepted Barber's plea and found him guilty.

A sentencing hearing was held on October 1, 2013. After statements from the attorneys and Barber, the court sentenced Barber to 20 to 20 years' imprisonment.

On direct appeal, the sole assignment of error was that the district court erred by imposing an excessive sentence. This court summarily affirmed Barber's conviction and sentence. See *State v. Barber*, 21 Neb. App. xli (No. A-13-866, Jan. 23, 2014).

## 2. POSTCONVICTION PROCEEDINGS

After his conviction and sentence, Barber filed his first motion for postconviction relief on February 27, 2015. He amended his motion a number of times.

The most recent amended motion for postconviction relief, titled "Second Amended Motion for Post-Conviction Relief," was filed on October 17, 2016. In it, he alleges: (1) The trial court abused its discretion in failing to properly advise him of the nature of the charge; (2) "Plaintiff erred where he failed to make a distinct allegation of each essential element of the charge in the factual basis"; (3) trial counsel was ineffective for failing to move to dismiss the information, as it was insufficient and could not be used to convict him of the charged crime; (4) trial counsel was ineffective for failing to recuse herself; (5) trial counsel was ineffective for "making remarks against [Barber] which prejudiced the sentencing proceeding"; (6) trial counsel was ineffective for failing to bring an apology letter to the court and making certain statements with regard to the letter; and (7) trial counsel was ineffective for failing to review the presentence investigation report with Barber.

At a preliminary hearing on February 16, 2016, the State's attorney indicated that she had spoken to the court reporter and that, based on the court reporter's notes, the bill of exceptions contained an error in the advisement regarding the elements of the charged offense. Another preliminary hearing was held on June 28, and the court determined that an evidentiary hearing should be held.

On August 12, 2016, the State called the court reporter to testify. The court reporter testified that the bill of exceptions contained a mistake. She reviewed the section in question and found that there was a "mistranslate in the steno notes." The "steno notes" are the official record, and when they were edited, she mistakenly "took off the 'un' that was clearly in [her] notes." The prefix "should have attached to intentionally." The court reporter checked her "backup audio which [was] synced with [her] steno notes" and found the court "clearly stated the word 'unintentionally' rather than 'intentionally'" at that point in the plea colloquy.

On December 2, 2016, the district court overruled Barber's postconviction motion on the issue of whether he was properly advised at the time he entered his plea. Barber did not appeal from this order.

The district court held a hearing on the State's motion to dismiss, and Barber was given the opportunity to respond to the State's motion in writing. On May 10, 2017, the district court overruled Barber's October 17, 2016, amended motion for postconviction relief in all respects. Barber filed a notice of appeal from the May 10, 2017, hearing on June 9.

### III. ASSIGNMENTS OF ERROR

Barber assigns that the district court erred in denying him due process of law because he was improperly advised regarding the elements of the charged crime and in granting the State a hearing to amend the record, but failing to award him an evidentiary hearing on the remaining claims in his motion for postconviction relief. He assigns that the district court erred in accepting his no contest plea without a sufficient factual basis to support it. He asserts the district court erred in failing to find that trial counsel was ineffective with regard to “various matters occurring at Barber’s plea hearing and in relation to Barber’s sentencing.”

### IV. STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court’s decision. *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014). Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[3-5] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *Id.*, citing *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* With regard to the questions of counsel’s performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court’s decision. *State v. Thorpe, supra*.

### V. ANALYSIS

#### 1. JURISDICTION

[6,7] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Alfredson, supra*. The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2016) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

In *State v. Silvers, supra*, Thomas Silvers sought postconviction relief on two theories: double jeopardy and ineffective assistance of counsel. The district court filed an order which allowed the State 30 days to show cause or request a hearing regarding the double jeopardy issue and which denied the ineffective assistance of counsel claim. Silvers appealed from that order. In the opinion, the Nebraska Supreme Court began by stating: “Because the district court left the issue of double jeopardy open to further proceedings and Silvers filed his appeal during that timeframe, we must first consider whether there is a final appealable order.” *Id.* at 708, 587 N.W.2d at 331. The Supreme Court found that the order from which Silvers appealed “clearly

affected a substantial right," *id.*, and determined that a postconviction action should be considered a "special proceeding" within the context of § 25-1902. Therefore, the Supreme Court found the order of the district court denying Silvers' claim for postconviction relief on the ineffective assistance of counsel claim was appealable under § 25-1902.

In this case, the district court entered two separate orders denying Barber's postconviction claims. The first order was issued on December 2, 2016, and the court addressed Barber's claim that he was not properly advised by the court in the plea dialogue of the elements of the offense for which he was convicted. In the December 2 order, the court found that there was an error in the transcription of the bill of exceptions and that the court reporter's notes and the tape recording of the dialogue establish the court properly advised Barber of the elements of the charged offense. Therefore, the district court found: "[Barber's] Motion for Postconviction Relief on this claim must fail." The court overruled Barber's motion for postconviction relief on this issue. The second order, entered on May 10, 2017, denied the remaining claims without an evidentiary hearing.

Following the reasoning set forth in *State v. Silvers, supra*, the December 2, 2016, order denying postconviction relief on Barber's first claim was an order which affected a substantial right in a special proceeding. Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, a notice of appeal must be filed within 30 days after the entry of such judgment, decree, or final order. Barber's notice of appeal, filed on June 9, 2017, is therefore untimely with respect to the December 2, 2016, order. Barber's right to appeal the December 2 order is time barred. Accordingly, our jurisdiction extends only to the assignments of error related to the postconviction claims which were denied in the May 10, 2017, order, as to which the appeal is timely.

## 2. INSUFFICIENT FACTUAL BASIS

Barber alleges the district court erred and denied him due process of law when it denied his claim that the plea was "infirm as a result of an insufficient factual basis to support it." Brief for appellant at 19.

First, Barber argues that the factual basis was insufficient because he was not properly advised of the elements of the crime because the bill of exceptions reflected that the word "intentionally" was used in the place of the word "unintentionally." The court determined that Barber was properly advised, because the official record shows that the word "unintentionally" was used, even though it was not reflected in the bill of exceptions. Barber did not appeal from the December 2, 2016, order, and therefore, this issue is time barred.

Further, Barber asserts the State "neglected to mention anything about causation in the factual basis." Brief for appellant at 20. Thus, he argues, "[T]he court accepted a guilty plea without an adequate factual basis as to how . . . Warren actually died." *Id.* at 20-21.

[8] A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). Barber's claim that the factual basis was insufficient with regard to causation could have been raised on direct appeal,

therefore this claim is procedurally barred. See *id.* See, also, *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

### 3. INEFFECTIVE ASSISTANCE OF COUNSEL

[9,10] Normally, a voluntary guilty plea waives all defenses to a criminal charge. *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). However, in a postconviction proceeding brought by a defendant because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *Id.*

[11] Barber asserts that the district court erred by failing to determine that his counsel was ineffective in several respects. The plea-bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies. *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014). As in any other ineffective assistance of counsel claim, we begin by reviewing Barber's allegations under the two-part framework of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[12-14] To prevail on a claim of ineffective assistance of counsel under *Strickland*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defendant. *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013). To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *Id.* In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. McGuire*, 299 Neb. 762, 910 N.W.2d 144 (2018).

[15,16] To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Vanderpool*, *supra*. The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim. *Id.*

[17,18] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Thorpe*, *supra*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id.* Thus, in a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*, citing *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

#### (a) Failure to Object

Barber asserts that trial counsel was ineffective for failing to object to the information. He asserts trial counsel should have objected to the information because it "fail[ed] to allege that the proximate cause of the death of [Warren] was [Barber's] operating a motor vehicle in

violation of §60-6,196 or §60-6,197.06.” He asserts that trial counsel should have objected when the court improperly advised him of the nature of the charge and that the State alleged insufficient information within the factual basis. Finally, he asserts counsel should have moved to dismiss the information because it did not satisfy the requirements of Neb. Rev. Stat. § 28-306(1) and (3)(b) (Cum. Supp. 2014).

[19] A review of the information shows that the State sufficiently charged the crime of motor vehicle homicide under § 28-306. The information alleged that Barber “did then and there unintentionally cause the death of . . . WARREN while engaged in the unlawful operation of a motor vehicle, and while in violation of section 60-6,196 or 60-6,197.06, in violation of Neb. Rev. Stat. §28-306(1)&(3)(b) a Class III Felony.” Even if an objection had been made, it would properly have been overruled, and even if the issue had been preserved and raised on appeal, it would not have resulted in a reversal of Barber’s conviction. Defense counsel is not ineffective for failing to raise an argument that has no merit. See *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

Even though the bill of exceptions contained an error, the record shows that the court properly advised Barber regarding the nature of the charge during the plea colloquy. Because Barber was properly advised, we cannot find trial counsel was deficient because she did not object to the advisement during the plea colloquy.

Barber asserts that the factual basis was insufficient to support his conviction. This issue was addressed in the December 2, 2016, order, from which Barber did not appeal. If this issue had been preserved, we find that Barber cannot show that *but for* counsel’s failure to object, there is a reasonable probability that the outcome would have been different.

From our review of the record, the State provided an adequate factual basis with regard to causation. Section 28-306(1) provides that a person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide. The State asserted that Barber was driving in excess of the speed limit and had a blood alcohol content of .146, which exceeds the statutory limit for a person in actual physical control of a motor vehicle. See Neb. Rev. Stat. § 60-6,196(1) (Reissue 2010). The State asserted that Barber struck a curb, lost control of his vehicle, and struck Warren’s vehicle. The State asserted that the autopsy revealed that Warren died as a result of the injuries which were attributable to the accident. These facts adequately alleged causation. Defense counsel is not ineffective for failing to raise an argument that has no merit. See *State v. Burries, supra*.

For these reasons, we find the district court did not err in denying postconviction relief on this issue without an evidentiary hearing.

#### (b) Failure to Recuse Herself

In his motion for postconviction relief, Barber asserted that his counsel should have recused herself due to a conflict of interest. This issue was not addressed in his brief on appeal. Accordingly, we will not address this issue. See *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016) (alleged error must be both specifically assigned and specifically argued in brief of party asserting error to be considered by appellate court).

(c) Ineffectiveness at Sentencing Hearing

In his motion for postconviction relief, Barber asserted that trial counsel made remarks at sentencing which were prejudicial. On appeal, Barber argues “counsel also proved ineffective at and in relation to sentencing.” Brief for appellant at 25. He then refers to statements the district court made before pronouncing Barber’s sentence. He also argues that counsel “made a number of comments” at sentencing which “hardly cast [him] in a more positive light.” Brief for appellant at 27. He argues that counsel’s performance did not rise to the level of a criminal defense attorney with ordinary training and skill in criminal law. However, Barber does not specifically assign and specifically argue which of trial counsel’s statements were inappropriate or how he was prejudiced.

In his motion for postconviction relief, Barber also asserted that trial counsel was ineffective for failing to bring a letter to the court at the time of sentencing, an error which he asserted caused a number of issues for him at sentencing. On appeal, he asserts “counsel failed to bring an apology letter to the sentencing that Barber had provided her.” *Id.* He suggests that he may have been “better off” handling the sentencing hearing on his own, *id.*, but he does not go into detail regarding the contents of the letter or how it may have helped him.

[20] An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Henry, supra.* Because neither of these arguments with regard to counsel’s performance at sentencing were specifically assigned and specifically argued, we do not reach the merits of these issues.

(d) Failure to Review Presentence  
Investigation Report

Barber asserts trial counsel was ineffective for failing to review the presentence investigation report with him. Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2014) provides, in part, that a court “may permit inspection of the [presentence investigation] report or examination of parts thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender.” The plain language of the statute does not require an attorney to review the presentence investigation report with a defendant.

Barber asserts that counsel’s failure to review the contents of the presentence investigation report with him prejudiced him “[f]or no other inference can be drawn by the district court’s comments on the subject at sentencing and the maximum sentence it handed down.” Brief for appellant at 27. Barber appears to argue that the court “truly had used the word ‘intentionally,’ ” *id.* at 26, and that he was sentenced more harshly as a result. In other portions of his argument Barber argues that if trial counsel had “challenged” the court, *id.*, the court would have been on notice that Barber lacked the intent to commit this crime, that he lacked criminal history and education, and that he has been affected by injuries as a result of the crash on February 3, 2013.

The issue in the bill of exceptions was addressed in the December 2, 2016, order, from which Barber did not appeal. The information contains the word “unintentionally,” and the official record kept by the court reporter indicates the court used the correct word at the plea hearing. There is no indication that the court needed to be “challenged” or reminded of the

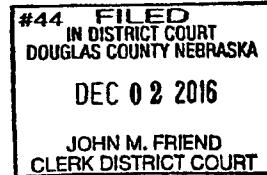
information contained in the presentence investigation report. Further, the record shows that “[i]n crafting an appropriate sentence,” the court weighed the appropriate factors and the decision was most affected by Barber’s blood alcohol content and the speed at which he was traveling when he lost control of the vehicle. Barber cannot show that he was prejudiced by counsel’s alleged failure to review the contents of the presentence investigation report with him prior to the sentencing hearing. Thus, we find the court did not err in denying postconviction relief on this issue, without an evidentiary hearing.

#### VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA  
STATE OF NEBRASKA, ) C.R. #13-1138  
Plaintiff, )  
vs. )  
RAYSEAN D. BARBER, ) ORDER  
Defendant. )



A hearing was held on August 12, 2016 on Defendant Raysean Barber's Motion for Postconviction Relief. The State appeared through Deputy Douglas County Attorney, Katie Benson. Defendant appeared pro se, with standby counsel, Michael Bianchi. The Court gave leave to the parties to submit written argument but none were received from either party.

Defendant was charged with Motor Vehicle Homicide, a Class III Felony, in the February 3, 2013 death of Betty Warren.

On June 24, 2013 Defendant entered a plea of no contest to the charge and the Court accepted his plea and found Defendant guilty. On October 1, 2013, the Court sentenced Defendant to 20 years to 20 years with credit for 195 days served.

Defendant appealed and the Nebraska Court of Appeals affirmed the conviction and sentence without opinion on March 25, 2014.

Defendant filed his first Motion for Postconviction Relief (the Motion) on February 27, 2015. The Court appointed Mr. Bianchi as counsel for Defendant. Since the first Motion several additional Motions for Postconviction Relief were filed. Then, Defendant requested new counsel be appointed as Defendant basically felt that Mr. Bianchi was not properly representing him. The Court held a hearing, allowed Defendant to state on the record why he was requesting new counsel and the Court found the basis for his request to be insufficient to appoint new counsel. The Court advised Defendant that he could proceed with Mr. Bianchi as his counsel or proceed without counsel, though the



Court would then appoint Mr. Bianchi as standby counsel. After considering his options, Defendant chose to proceed pro se with Mr. Bianchi as standby counsel.

In his Motion, Defendant raises several issues but the only issue involved in this hearing is the dialogue held between the Court and Defendant at the entry of his plea on June 24, 2013 and whether any alleged error in that dialogue requires that his plea and conviction be set aside. The Court granted Defendant's request for an evidentiary hearing on this issue.

According to the Bill of Exceptions (BOE) the Court advised Defendant that in order to convict Defendant the State would have to "prove that (Defendant) "did then and there intentionally cause the death of Betty Warren" (emphasis added). (BOE 8:22 – 9:1-5).

Defendant argues that the statute under which he was convicted of Motor Vehicle Homicide provides that the State must prove Defendant "did then and there unintentionally cause the death of Betty Warren" (emphasis added). Neb. Rev. Stat. Sec. 28-306(1) & (3).

At the hearing on August 12, 2016, the Official Court Reporter who prepared the record at the plea hearing on June 24, 2013, Julie Hurley testified. Ms. Hurley testified that she had reviewed her notes and the audio recording of the plea dialogue and determined that she had made an error when she prepared the BOE for Defendant's appeal. She explained that her official notes indicate, and the audio recording confirms, that she mistakenly prepared the BOE to state "intentionally" when the Court actually stated "unintentionally".

Defendant's Motion for Postconviction Relief on this claim must fail. First, the Court Reporter's notes and the audio recording demonstrate that Defendant was correctly advised of the elements necessary to convict him and Defendant suffered no prejudice.

Second, in order to prevail, even if arguendo, Defendant was advised that the State would have to prove Defendant "intentionally" caused Ms. Warren's death, Defendant must show that the error would have resulted in a different outcome. Put another way, Defendant would have to demonstrate but for the error, he would not have pled no contest to the charge. There is no evidence of this.

The Court overrules Defendant's Motion for Postconviction Relief on this issue. The Court has allowed Defendant to file a Third Amended Motion for Post Relief Conviction which contains this identical issue. To the extent that the Third Amended Motion for Postconviction Relief raises this issue, the result would be the same.

At this point, the Court will proceed on the remaining issues filed in Defendant's Third Amended Motion for Postconviction Relief. The State has advised that it intends to file a Motion to Dismiss as to the remaining issues raised in that pleading.

DATED THIS 2 DAY OF DECEMBER, 2016

BY THE COURT:

J RUSSELL DERR  
DISTRICT COURT JUDGE



## OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,

CR13-1138

)

Plaintiff,

)

vs.

)

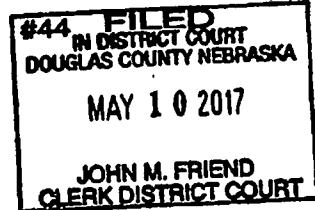
RAYSEAN D. BARBER,

)

Defendant.

)

## O R D E R



An evidentiary hearing was held on February 3, 2017 on Defendant Raysean D. Barber's Motion for Postconviction Relief. The State appeared through Deputy Douglas County Attorney, Katie Benson. Defendant appeared telephonically, pro se, with standby counsel, Michael Bianchi.

At the start of the hearing, Defendant requested that Mr. Bianchi be reappointed as his counsel and the Court sustained the request.

Defendant was charged with Motor Vehicle Homicide, a Class III Felony, in the February 3, 2013 death of Betty Warren.

On June 24, 2013 Defendant entered a plea of no contest to the charge and the Court accepted his plea and found Defendant guilty. On October 1, 2013, the Court sentenced Defendant to 20 years to 20 years with credit for 195 days served.

Defendant appealed and the Nebraska Court of Appeals affirmed the conviction and sentence without opinion on March 25, 2014.

Defendant filed his first Motion for Postconviction Relief on February 27, 2015. The Court appointed Mr. Bianchi as counsel for Defendant. Since the February 27, 2015 Motion was filed, Defendant has filed several additional Motions for Postconviction Relief, the most recent of which was filed on October 17, 2016. On December 2, 2016, the Court entered an Order on one of the issues presented by Defendant. The issue addressed in that Order was whether Defendant was properly advised by the Court in the plea dialogue of the elements of the offense for which he was convicted. The Court

found that Defendant was properly advised and that the error was in the transcription of the Bill of Exceptions and that the Court Reporter's notes and the tape recording of the dialogue establish that the Court properly advised Defendant of the elements of the charged offense.

The purpose of the hearing held on February 3, 2017 was to address the remaining issues in Defendant's October 17, 2016 Motion for Postconviction Relief.

The State argues that Defendant has pled only conclusions of fact or law and the records and files in this case affirmatively show that Defendant is entitled to no relief and that an evidentiary hearing need not be held.

The Court has already addressed and rejected Defendant's first claim for relief, i.e., that the Court did not properly advise Defendant of the elements of the charge to which he pled no contest. The Order of December 2, 2016 is incorporated into this Order as if fully set out herein.

Prior to addressing each remaining claim individually, the Court will first address the general issue of prejudice. Defendant fails to set forth any facts relating to prejudice, i.e., that but for the errors of counsel, he would have insisted on going to trial. Although Defendant does not specifically set out any allegations with regard to prejudice, the Court notes that the Nebraska Supreme Court has held that even "self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present sufficient facts showing a reasonable probability that he or she would have insisted on going to trial." State v. Yos-Chiquil, 281 Neb. 618 (2011).

Section I, II and III of Defendant's Motion for Postconviction Relief all raise essentially the same issue relating to the plea dialogue. For the reasons set out in the Order of December 2, 2016, the Court denies the relief requested by Defendant.

Section IV raises an issue of a "conflict" with his counsel. Defendant does not state how this might have affected his defense nor how it could have changed the outcome of his plea of no contest. "A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance

of counsel." State v. Sandoval, 280 Neb. 309 (2010). Defendant's allegations clearly do not rise to the level of an actual conflict and are at best speculative. Defendant has failed to state sufficient claims relating to the deficiency of counsel to warrant an evidentiary hearing.

Section V raises the issue of comments by his counsel that resulted in prejudice at the sentencing. Section VI raises the issue of his counsel failing to bring Defendant's letter to the Court at the time of sentencing and for "using a line from the letter she told him not to use to make a point of her own". With regard to these two allegations, Defendant simply complains and disagrees with several statements made by his counsel during her sentencing argument. Defendant, however, does not make any allegations as to how a different sentence would have resulted had counsel not made such statements. The Bill of Exceptions of the sentencing shows the Court's concern at sentencing was not on trial counsel's argument, but rather, the fact that Defendant's BAC was almost twice the legal limit and he was driving 98 miles per hour in a 35 mile per hour zone. (BOE 23:18-24:15). Defendant's allegations are insufficient to show any argument by counsel was deficient or affected the outcome of the sentencing. See e.g., State v. Casares, 291 Neb. 150 (2015) (rejecting defendant's multiple arguments that trial counsel was ineffective during sentencing by finding the defendant failed to show how the outcome of the sentencing would be different but for the ineffectiveness of counsel by making statements such as, "[a]dditional examples of inconsistent statement or lies would not, with any reasonable likelihood, have convinced the sentencing court to impose a different sentence.").

Neb.Rev.Stat. § 60-6,197.06

(1) Unless otherwise provided by law pursuant to an ignition interlock permit, any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to section 28-306, section 60-698, subdivision (4), (5), (6), (7), (8), (9), or (10) of section 60-6,197 as such subdivisions existed prior to July 16, 2004, shall be guilty of a Class IV felony, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01. Such revocation and order shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked.

(2) If such person has had a conviction under this section or under subsection (6) of section 60-6,196 or subsection (7) of section 60-6,197, as such subsections existed prior to July 16, 2004, and operates a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to such conviction, such person shall be guilty of a Class IIA felony, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for an additional period of fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01. Such revocation and order shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked.

Justice # ZK1066251  
Data # 1420891

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA

CR# 13 1138

Plaintiff,

ASSIGNED TO Derr

vs.

INFORMATION

RAYSEAN D BARBER,

Defendant.

a.k.a.: RAGSEAN BARBER

D.O.B. 29 March 1989.

ADDRESS: 5401 N 24TH ST

OMAHA, NE 68110

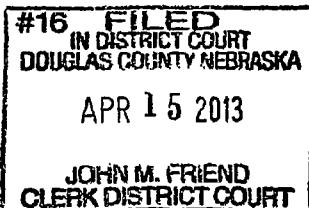
DR. LIC.: H13104208 NE

AR# K1066251

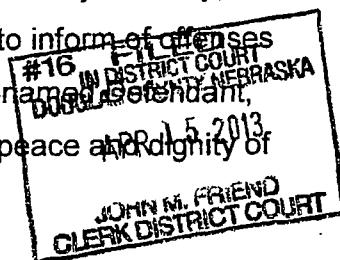
RB# Q53920

CMS# K1066251 Z

LR



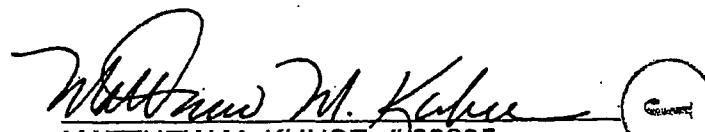
COMES NOW the undersigned County Attorney or Deputy County Attorney, of Douglas County, Nebraska, on 15 April 2013, empowered by law to inform of offenses committed in Douglas County, and hereby informs that the above-named defendant, contrary to the form of the statutes in such cases and against the peace and dignity of the State of Nebraska, violated the laws of the State, to-wit:



**COUNT 1: MOTOR VEHICLE HOMICIDE Class III Felony**

On or about 3 February 2013, in Douglas County, Nebraska, RAYSEAN D BARBER did then and there unintentionally cause the death of BETTY WARREN while engaged in the unlawful operation of a motor vehicle, and while in violation of section 60-6,196 or 60-6,197.06, in violation of Neb. Rev. Stat. §28-306(1)&(3)(b) a Class III Felony. 10212

contrary to the statutes of the State of Nebraska.

  
MATTHEW M. KUHSE, # 22235  
County Attorney/Deputy County Attorney



00001

1 Do you understand that?

2 THE DEFENDANT: Yeah.

3 THE COURT: Do you further understand that  
4 you are presumed to be innocent as a matter of law  
5 until such time as the State would prove you guilty  
6 beyond a reasonable doubt? Do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: Do you understand that if you  
9 were to have a trial in this case and if you were  
10 convicted of the charge, you would have the right to  
11 appeal that conviction to the Nebraska Court of  
12 Appeals and/or the Nebraska Supreme Court? Do you  
13 understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you understand that you have  
16 the right to be represented by an attorney at all  
17 stages of this criminal proceeding, including trial  
18 and appeal; and, if you cannot afford an attorney  
19 now or any later time, one would be appointed for  
20 you at no cost to you. Do you understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Do you understand the charge to  
23 which you are pleading no contest is the charge of  
24 motor vehicle homicide. In order to convict you of  
25 this charge, the State would have to prove that: On

1 or about the 3rd day of February 2013, here in  
2 Douglas County, Nebraska, you did then and there  
3 intentionally cause the death of Betty Warren while  
4 engaged in the unlawful operation of a motor vehicle  
5 and while in violation of §60-6196 or 60-6197.06,  
6 and this is a Class III felony. Do you understand  
7 that?

8 THE DEFENDANT: Yes.

9 THE COURT: All right. Do you understand  
10 that by pleading no contest, I will treat that the  
11 same as a plea of guilt for purposes of sentencing?  
12 Do you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: Do you understand the maximum  
15 possible sentence for this offense is up to 20 years  
16 in prison, a \$25,000 fine, or both; minimum period  
17 of incarceration is zero. Do you understand that --  
18 -- is one year, I'm sorry. Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: And do you understand the Court  
21 in its discretion can sentence you to a lesser term  
22 than the maximum or you could be considered for  
23 probation. You must understand, however, I do not  
24 promise you any specific sentence at this time  
25 because I do not yet know what the sentence will be.

GROUND FOR RELIEF

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO PROPERLY ADVISE DEFENDANT OF THE NATURE OF THE CHARGE.

1. At the plea proceedings the Court advised, improperly, Defendant of the nature of the charge when it stated that in order to convict Defendant of the charge the State Would have to prove that Defendant intentionally caused the death of the victim ( Paragraphs of Fact 8(i)) whereas the statute requires that the cause of death be unintentional (Paragraphs of Fact 9(i)), and failed to state that the proximate cause of death was Defendant's alleged driving in violation of §60-6,196 or §60-6,197.06. (Paragraphs of Fact 9(ii)).

a.) Defendant's plea of "no contest" was therefore not made knowingly, voluntarily, intelligently, and understandingly. Defendant did not have a factual understanding of the charge against him. Judgment of conviction is therefore void or voidable.

b. Furthermore, judgment of conviction was deemed unlawful because such a reconstruction of the charge was such that the information or nature of the charge as advised by the court was insufficient and thus did not satisfy the requirements of the charge.

4. To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either

in the language of the statute or its equivalent. (State v. Miller, 5 Neb.App.635:(HN6))

3. In this case, in order for the conviction to have been valid with respect to the Courts advisment of the nature of the crime,'the Court would have had to advise Defendant of the Nature of the crime approximately as follows:

i.) Do you understand that the charge to which you are pleading no contest is the charge of motor vehicle homicide? In order to convict you of this crime the State would have to prove that: On or about the third day of February 2013, here in Douglas County, Nebraska, you did then and there unintentionally cause the death of Betty warren whild engaged in the unlawful operation of a motor vehicle, and that the proximate cause of the death of Betty Warren was your operating a motor vehicle in violation of §60-6,196 or §60-6,197.06. And this is a class III felony.

4. Defendant's conviction was based on an inaccurate information and thus is invalid to such a degree that the error is deemed fatal and, therefore; the judgment of conviction must be vacated, and Defendant freed from imprisonment.

WHEREFORE, Defendant pray that this Honorable Court will vacate judgment of conviction,

II. PLAINTIFF ERRED WHERE HE FAILED TO MAKE A DISTINCT ALLEGATION OF EACH ESSENTIAL ELEMENT OF THE CHARGE IN ITS STATEMENT OF FACTUAL BASIS.

1. While making the statement of the factual basis in this case, Plaintiff alleged that Defendant struck a curb, allowing him to lose control of his car, and thereafter struck the victim's vehicle while going 98 mph on a 35 mile an hour road. And that his blood alcohol level was shown as .146. (13:8-12), (13:-19-20)

a. The statutory requirement of the crime charged is "that the cause of death must be unintentional and the proximate cause of death the operation of a motor vehicle while in violation of §60-6,196 or §60-6,197.06 (Neb.Rev.Stat. §28-306(1)& (3) (b).

b. What Plaintiffs allegation suggested is that Defendant wanted to lose control of his car (i.e. allowing him to lose control of his car (13:9-11)), that he was speeding, that he struck the victim's car, and that he was over the B.A.L. allowed by the state of Nebraska for people to drive while under. Plaintiff never stated in any way that the cause of death was unintentional or that the proximate cause of death was Defendant's driving in of one of the aforementioned lesser offenses.

2. Plaintiff thus alleged an insufficient information, and thus the judgment of conviction and sentence is void or voidable under the Due Process Clause of the 14th Amendment of the U.S. Constitution and must be vacated as law requires.

3. In *State v. Cooms*, 170 Neb, 298, the court noted that Neb. Const. Art. I § 11 gave defendant the right to demand the nature and cause of accusation. Due process, the court added, required that defendant be given sufficient notice of the charge in order to allow him to prepare a defense. The court said that to meet these requirements, the information was to state each fact that was an essential element of the crime charged so that defendant was not required to go beyond the information to learn the nature of the charge against him.

4. In this case, the proximate cause of death is an essential element of the crime pursuant to Neb. Rev. Stat. § 28-306(1) & (3)(b). And that the death was caused unintentionally is an essential element pursuant to Neb. Rev. Stat. § 28-306(1) & (3)(b) as the proximate cause of death being Defendant's alleged driving in violations of § 60-6,196 or § 60-6,197.06 supports that the death was caused unintentionally. Where Plaintiff failed to allege that each essential element of the crime had been committed within his statement of the factual basis, Plaintiff failed to allege that the crime had been committed. Where the Plaintiff fails to allege that a crime had been committed in accordance to the statutory language of the crime charged, Defendant could not be convicted of the crime charged as the information is insufficient to charge such a crime. The judgement of conviction is therefore void or voidable and must be vacated.

WHEREFORE, Defendant pray that this Honorable Court orders the judgment of conviction and sentence vacated.

III. TRIAL COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE INFORMATION PROVIDED BY THE STATE AS IT WAS INSUFFICIENT AND COULD NOT BE USED TO CONVICT DEFENDANT OF THE CHARGED CRIME.

1. There were 30 points at which Counsel could and should have moved to dismiss the information:

i. When Plaintiff filed an insufficient information, failing to allege that the proximate cause of the death of the victim was Defendant's operating a motor vehicle in violation of §60-6,196 or §60-6,197.06 (Paragraphs of Fact 1); and

ii. at the plea colloquy, when Plaintiff alleged an insufficient information through its failure to object to or correct the improper advisement of the nature of the charge by the Court to Defendant (Paragraphs of Fact 8(i) and/or when the Plaintiff alleged insufficient information within the factual basis (13:3-20).

a.) Because Counsel did not move to dismiss the information provided by Plaintiff on the basis that it did not satisfy the requirements pursuant to Neb.Rev.Stat. §28-306 (1) & (3)(b), Defendant was unlawfully convicted of the charge and sentenced to a term of 20 to 20 years imprisonment.

WHEREFORE, Defendant pray that this Honorable Court will order the judgment of conviction and sentence vacated.

IN THE COURT OF APPEALS  
FOR THE STATE OF NEBRASKA

CASE NO. A 17-610

STATE OF NEBRASKA,

APPELLEE,

v.

RAYSEAN D. BARBER,

APPELLANT.

REPLACEMENT BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA,  
HONORABLE J. RUSSELL DERR, PRESIDING.

PREPARED AND SUBMITTED BY:

A. Michael Bianchi, #19009  
2712 South 87<sup>th</sup> Avenue  
Omaha, Nebraska 68124  
(402) 346-6700  
[mike@bianchidefends.com](mailto:mike@bianchidefends.com)  
Attorney for Appellant

## TABLE OF CONTENTS

1. Jurisdictional Statement.....	1
2. Statement of the Case.....	1
3. Issues Tried in the District Court.....	1
4. How the Issues Were Resolved in the District Court.....	2
5. Scope of Review .....	2
6. Assignments of Error.....	2
7. Propositions of Law.....	3
8. Statement of Facts.....	6
9. Summary of Argument.....	8
10. Argument.....	10
11. Conclusion.....	27

## AUTHORITIES CITED

### CASE CITED

<i>State v. Buckman</i> , 259 Neb. 924, 613 N.W. 2d 463, (2000) .....	6, 21, 24
<i>State v. Curnyn</i> , 202 Neb. 138, 274 N.W. 2d 157, 160 (1979) .....	4, 5, 13, 14
<i>State v. Dyer</i> , 245 Neb. 385, N.W. 2d 316 (1994) .....	4, 11, 12
<i>State v. Glover</i> , 278 Neb. 795, 774 N.W. 2d 248 (2009) .....	2, 3, 24
<i>State v. Hayes</i> , 253 Neb. 467, 471-72, 570 N.W. 2d 823, 827 (1997) .....	4, 13
<i>State v. McMahon</i> , 213 Neb. 899, 331 N.W. 2d 818-19 .....	14
<i>State v. Mindrup</i> , 221 Neb. 773, 380 N.W. 2d 637 (1986) .....	13
<i>State v. Torres</i> , 295 Neb. 830, 838-40, N.W. 2d 814 N.W. 2d 191, 200-01 (2017) .....	24
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	2, 3
<i>State v. Wilkinson</i> , 293 Neb. 876, 881, 881 N.W. 2d 850, 855 (2016) .....	5, 19

### STATUTES CITED

Neb. Rev. Stat. §25-1911 (Reissue 2008) .....	1
Neb. S. Ct. R. App. P. §2-105 .....	4, 11, 12, 15
Neb. Rev. Stat 28-306 .....	5, 19
Neb. Rev. Stat. §29-2261 .....	26

### OTHER AUTHORITIES CITED

Neb. Const. art. I, § 23 .....	1
--------------------------------	---

## JURISDICTIONAL STATEMENT

Article I, §23 of the Nebraska Constitution and Neb. Rev. Stat. §25-1911 (Reissue 2016), together, confer appellate jurisdiction on this Court of any judgment rendered or final order made by the district court. The District Court of Douglas County entered judgment denying postconviction relief in this matter on the 10<sup>th</sup> day of May, 2017. Appellant perfected his appeal to this Court on June 8, 2017.

## STATEMENT OF THE CASE

1. NATURE OF THE CASE: This is a postconviction action in which Appellant Raysean D. Barber (“Barber”) appeals the denial of postconviction relief of the District Court of Douglas County in relation to Barber’s conviction and sentence for felony Motor Vehicle Homicide.

2. ISSUES TRIED IN THE DISTRICT COURT: In the district court Barber alleged that (1) he was deprived due process of law when (a) the district court improperly advised Barber during Barber’s plea hearing of the elements of felony Motor Vehicle Homicide; (b) the district court failed to ensure that there was proper factual basis for the plea (specifically as it relates to proximate cause for the homicide) and that (2) his trial counsel was constitutionally ineffective for (a) failing to object and/or otherwise allowing the trial court to improperly advise Barber of the elements of the charge of felony Motor Vehicle Homicide; (b) failing to object to or challenge the lack of a factual basis of Barber’s plea; (c) failing to recuse herself despite a conflict of interests alleged by Barber; (d) making improper remarks which prejudiced Barber at sentencing; and (e) failing to go over with Barber a PSI that contained false and prejudicial information about Barber.

It should also be noted that the State raised the issue of amendment of the record in regard to whether the Court properly advised Barber of the elements of felony Motor Vehicle Homicide. The court allowed a hearing on this issue.

3. HOW THE ISSUES WERE RESOLVED IN THE DISTRICT COURT: The district court granted the State's apparent motion and found that Barber was properly advised of all the correct elements of felony Motor Vehicle Homicide. The court then denied Barber's claim of due process deprivation on the basis of an improper advisement of the elements of Motor Vehicle Homicide at the time of the plea. The district court later overruled all of Barber's other postconviction claims.

4. SCOPE OF REVIEW:

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Glover*, 278 Neb. 795, N.W. 2d 248 (2009) A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Glover*, 278 Neb. 795, N.W. 2d 248 (2009) When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*. *State v. Glover*, 278 Neb. 795, N.W. 2d 248 (2009) An appellate court reviews such legal determinations independently of the lower court's decision. *State v. Glover*, 278 Neb. 795, N.W. 2d 248 (2009)

ASSIGNMENTS OF ERROR

1. The trial court committed clear error and denied Barber due process of law when it mistakenly advised Barber of the elements of the crime of felony Motor Vehicle Homicide.

2. The trial court committed clear error when it granted the State a hearing to amend the record but otherwise failed to award Barber an evidentiary hearing all of which was contrary to Nebraska law.

3. The trial court erred and denied Barber due process of law when it accepted Barber's no contest plea without a sufficient factual basis to support it.

4. The trial court committed clear error when it failed to find Barber's trial counsel ineffective in regard to various matters occurring at Barber's plea hearing and in relation to Barber's sentencing.

#### PROPOSITIONS OF LAW

1. A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Glover*, 278 Neb. 795, N.W. 2d 248 (2009).

2. A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Glover*, 278 Neb. 795, N.W. 2d 248 (2009).

3. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*. *State v. Glover*, 278 Neb. 795, N.W. 2d 248 (2009).

4. An appellate court reviews such legal determinations independently of the lower court's decision. *State v. Glover*, 278 Neb. 795, N.W. 2d 248 (2009).

5. The parties in the case may amend the bill of exceptions by written agreement to be attached to the bill of exceptions at any time prior to the time the case is submitted to the Supreme Court. Proposed amendments not agreed to by all the parties to the case shall be heard

and decided by the district court after such notice as the court shall direct. The order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. Neb. S. Ct. R. App. P. §2-105(5).

6. When filed with the clerk of the district court such bill of exceptions becomes the official bill of exceptions in the case and shall not be altered or marked in any fashion or be disassembled by any person. Neb. S. Ct. R. of App. P. §2-105(3)(d).

7. The record of a trial court, when properly certified to an appellate court, imports absolute verity; (if the record is incorrect, any correction must be made in the district court). *State v. Dyer*, 245 Neb. 385, N.W. 2d 316 (1994).

8. To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, 1. The court must inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and examine the defendant to determine that he or she understands the foregoing. 2. Additionally, the record must establish that there is a factual basis for the plea; and the defendant knew the range of penalties for the crime with which he or she is charged. *State v. Hayes*, 253 Neb. 467 570 N.W. 2d 823 (1997).

9. A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record. *State v. Hayes*, 253 Neb. 467, 570 N.W. 2d 823 (1997).

10. Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea. *State v. Curnyn*, 202 Neb. 135, 274 N.W. 2d 157 (1979).

11. The constitutional requirement for acceptance of guilty pleas is that the plea be voluntary and intelligent and the determination of that fact be reliably determined. *State v. Curnyn*, 202 Neb. 135, 274 N.W. 2d 157 (1979).

12. A plea of no contest is equivalent to a plea of guilty. *State v. Wilkinson*, 293 Neb. 876, 881 N.W. 2d 850 (2016).

13. To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged. *State v. Wilkinson*, 293 Neb. 876, 881 N.W. 2d 850 (2016).

14. When a court accepts a defendant's plea of guilty or no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel. *State v. Wilkinson*, 293 Neb. 876, 881 N.W. 2d 850 (2016).

15. A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily. *State v. Wilkinson*, 293 Neb. 876, 881 N.W. 2d 850 (2016).

16. To ascertain whether the State's factual basis was sufficient, an appellate court must identify the elements of the statute under which Wilkinson was convicted and determine whether the factual basis meets those elements. *State v. Wilkinson*, 293 Neb. 876, 881 N.W. 2d 850 (2016).

17. A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide ... If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06, motor vehicle homicide is a Class III felony. Neb. Rev. Stat 28-306.

18. When a motion for postconviction relief properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should be denied when the records and files of the court affirmatively show that the defendant is entitled to no relief. *State v. Buckman*, 259 Neb. 924, 613 N.W. 2d 463 (2000).

#### STATEMENT OF FACTS

##### **Substantive Facts**

Shortly after midnight on February 3, 2013, Raysean Barber drove his Cadillac Deville southbound on Saddle Creek Road in Omaha, Nebraska. (PSI, p.3) Near the intersection of Poppleton Street and Saddle Creek Road and while apparently driving in excess of the speed limit, Barber collided with another car driven by Betty Warren. (First BOE 13:2-11) (Note: As this is a postconviction action, the original bill of exceptions used on direct appeal shall be referred to as "First BOE" and the bill of exceptions generated in the postconviction proceedings shall be referred to as "Second BOE".) Warren was pronounced dead. (First BOE 13:11) An autopsy conducted by the Douglas County coroner revealed that Warren died of internal injuries attributable to the car accident. (First BOE 13:12-14) Barber himself was knocked unconscious and remained comatose for several days. (T221) Several hours after the accident, law enforcement seized a sample of Barber's blood which yielded a blood alcohol content of .146 (First BOE 13:15-19; PSI, p.4) It should be noted that Barber had no criminal history other than a traffic violations, none of which included an alcohol-related offense. (First BOE 16:18-21; PSI, p. 6-8)

##### **Plea and Sentencing**

Barber filed no pretrial motions and, on the apparent advice of counsel, opted to change his plea. (First BOE 4:12-20) He entered a no contest plea and was found guilty. (First BOE 14:16-

15:2) During the plea hearing, the following colloquy, in part, took place between Barber and the court:

THE COURT: Do you understand the charge to which you are pleading no contest is the charge of motor vehicle homicide? In order to convict you of this charge, the State would have to prove that: On or about the 3<sup>rd</sup> day of February 2013, here in Douglas County, Nebraska, you did then and there intentionally cause the death of Betty Warren while engaged in the unlawful operation of a motor vehicle and while in violation of §60-6193 or §60-6197.06, and this is a Class III felony. Do you understand that?

THE DEFENDANT: Yes.

The trial court then ordered a presentence investigation (PSI). (First BOE 15:5-4)

At some point, Barber provided his counsel with an apology letter to be read at sentencing. (T207,224) Counsel did not discuss the contents of the PSI report with Barber. (T226) At sentencing, Barber's apology letter could not be located, Barber's lawyer attempted to express to the court the gist of the letter. (Second BOE 17:5-9) The trial court sentenced Barber to the maximum possible term – twenty (20) to twenty (20) years imprisonment. (First BOE 24:16-25:1) Barber then appealed the sentence. His trial counsel remained as Barber's counsel on direct appeal. The sentence was summarily affirmed, by this Court. Barber's subsequent Petition for Further Review to the Nebraska Supreme Court was denied.

#### **Postconviction Proceedings**

Barber initiated postconviction proceedings and requested the appointment of counsel on March 3, 2015. (T2,4) The trial court appointed the undersigned counsel (different from Barber's trial and direct appeal counsel). (T17) On October 15, 2015, Barber dismissed the undersigned

counsel, but the trial court directed the undersigned counsel to serve Barber in a standby capacity. (Second BOE 11:22-13:2)

Barber twice amended his postconviction motion. Ultimately, he petitioned for postconviction relief based on (1) a denial of due process of law based on an errant advisement of the elements of the crime to which Barber pled no contest; (2) a denial of due process as a result of an insufficient factual basis to support the no contest plea. Additionally, Barber asserted that he was denied effective assistance of counsel as a result of: (1) trial counsel's failure to object to an infirm Information; (2) failure of trial counsel to object to the errant advisement given by the trial court; (3) failure of trial counsel to recuse herself because of a conflict of interest preventing her from representing Barber; and (4) failure of trial counsel to properly represent Barber prior to and at sentencing for losing Barber's apology letter, failing to review and discuss the PSI with Barber and making untrue statements at sentencing.

Put succinctly, when counsel for the State got wind of Barber's allegation that the Court had improperly advised Barber at the time of the plea, counsel sought, obtained and later tried to introduce an affidavit of the court reporter present at the time of Barber's plea. (Second BOE 40:5-42:2) Barber objected to the use of an affidavit and the court conducted a brief evidentiary hearing on that issue alone. (T230-32) Later, the court denied Barber's claim on the issue and, apparently or implicitly, amended the record on the point. (T206)

Barber then resubmitted a second amended petition for postconviction relief. The district court at Barber's request then re-appointed the undersigned counsel as Barber's attorney. (Second BOE 104:11-25) The district court denied all remaining claims of Barber's Second Amended Petition. (T248). Barber now appeals.

## SUMMARY OF THE ARGUMENT

Barber raises four matters in this appeal. First, at the time Barber entered his no contest plea, the court told Barber that the crime of Motor Vehicle Homicide had to be committed “intentionally” as opposed to “unintentionally”. As a result, Barber submits that he was denied due process of law and that he was improperly advised of the nature of the crime to which he pled no contest. Upon discovering Barber’s postconviction claim in this regard, the State investigated the matter and, based on the results of its investigation, sought to correct this record. The State wanted to introduce evidence in the form an affidavit of the court reporter that the court had used the correct terminology and that the court reporter had made an error. Barber submits that the record, under current Nebraska Supreme Court rule, can not be corrected. Alternatively, to the extent that the record may still be corrected, the process involved here was unfair in that it deprived Barber of appropriate motion, notice and proper preparation with regard to his opportunity to be heard at the hearing. The court also deprived Barber of the use of counsel at the hearing. Barber now challenges the court’s apparent amendment of the record and the court’s denial of Barber’s due process claim on this subject. Barber submits that his plea must be declared void and his conviction vacated. Alternatively, he submits that the matter should be remanded for further proceedings to include a full evidentiary hearing on his most recent postconviction motion.

Barber also submits that the court accepted his plea of no contest despite an insufficient factual basis provided to it by the state. Barber submits that this insufficient factual basis constitutes a denial of due process of law thus rendering the plea void.

Barber also complains that his trial level counsel and direct appeal counsel (who are one in the same) were ineffective. Specifically, Barber complains that trial counsel failed to correct the court in its description of the elements of the charge of Motor Vehicle Homicide, failed to ensure

there was a proper factual basis (and really failed to investigate the case altogether), failed to go over the PSI with Barber, lost a letter that Barber had provided to her and wholly failed to properly represent Barber at sentencing. Counsel's failure in these regards and particularly at sentencing allowed the district court to be unchallenged in its sentencing Barber to a maximum term of twenty (20) to twenty (20) years imprisonment.

## ARGUMENT

1. THE DISTRICT COURT COMMITTED CLEAR ERROR AND DENIED BARBER DUE PROCESS OF LAW WHEN IT IMPROPERLY EXPLAINED TO BARBER THE ELEMENTS OF THE CRIME OF FELONY MOTOR VEHICLE HOMICIDE. ALTERNATIVELY, THE DISTRICT COURT COMMITTED CLEAR ERROR WHEN IT ORDERED AN AMENDMENT TO THE RECORD WITH REGARD TO ITS ADVISEMENT TO BARBER OF THE ELEMENTS OF THE CRIME AND OTHERWISE FAILED TO AWARD BARBER AN EVIDENTIARY HEARING.

As alluded to in the Statement of Facts, the postconviction proceedings at the district court level, for one reason or another, were somewhat entangled and, thus, difficult to follow. But, simply put, Barber now complains that the process by which he entered his no contest plea was infirm because of an improper advisement of the elements of the offense by the trial court. The errant advisement compromised Barber's right to due process of law. At the time of the plea, the trial court indicated that the crime of Motor Vehicle Homicide had to be committed "intentionally". This is substantiated by the record that was produced for this Court on direct appeal. It was the same record used when Barber petitioned unsuccessfully to the Nebraska Supreme Court for further review. Barber now asserts that the law does not afford the State or the trial court the ability to correct the record as was done here. Alternatively, Barber submits that to

the extent that the record could have been corrected, the procedure implemented by the district court here was infirm as to Barber on several levels.

A. CORRECTION OF THE RECORD WAS IMPROPER AND BARBER'S PLEA WAS INFIRM.

Barber complains on this appeal is that his plea was infirm and, to the extent it might not have been, the record was improperly corrected. Neb. S. Ct. R. App. P. §2-105(5) provides as follows:

Amendments to the Bill of Exceptions. The parties in the case may amend the bill of exceptions by written agreement to be attached to the bill of exceptions at any time prior to the time the case is submitted to the Supreme Court. Proposed amendments not agreed to by all the parties to the case shall be heard and decided by the district court after such notice as the court shall direct. The order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. Hearings with respect to proposed amendments to a bill of exceptions may be held at chambers anywhere in the state. If the judge shall have ceased to hold office, or shall be prevented by disability from holding the hearing, or shall be absent from the state, such proposed amendments shall be heard by the successor judge, or by another district judge in the district, or by a district judge in an adjoining judicial district.

Reference is made not once but twice that an amendment to the bill of exceptions can only be done "prior to the time a case is submitted to the Supreme Court." Thus, once a case has already been submitted for review to the Nebraska Supreme Court any further amendment thereto is barred. Indeed, "when filed with the clerk of the district court such bill of exceptions becomes

the official bill of exceptions in the case and shall not be altered or marked in any fashion or be disassembled by any person". Neb. S. Ct. R. of App. P. §2-105(3)(d). Moreover, the record of a trial court, when properly certified to an appellate court, imports absolute verity; (if the record is incorrect, any correction must be made in the district court). *State v. Dyer*, 245 Neb. 385, 404, 513 N.W. 2d 316, 328 (1994). Clearly, the rule expressed in *Dyer*, when viewed together with the Supreme Court's rules allows for only one conclusion on the subject: that the bill of exceptions may only be amended prior to submission of the case to the Nebraska Supreme Court. Here, that was done on Barber's direct appeal. Thus, because Barber's case was submitted to the Nebraska Supreme Court on his direct appeal, no further amendment thereto can be made. This interpretation is sound in that ensures the completion of a case. To allow a record to be corrected after resolution of the matter by the State's highest court is tantamount to a resurrection, a concept not all accept but viewed only miraculously nonetheless. Thus, wishful as it may be, the State should be foreclosed from amending the record here.

Examination of the original bill of exceptions shows that the court used the word "intentionally" instead of "unintentionally" when describing Motor Vehicle Homicide.

To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, 1. The court must inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and examine the defendant to determine that he or she understands the foregoing. 2. Additionally, the record must establish that there is a factual basis for the plea; and the defendant knew the range of penalties for the crime with which he or she is charged.

*State v. Hayes*, 253 Neb. 467, 471-72, 570 N.W. 2d 823, 827 (1997) “A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.” *Id.*

Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.

*State v. Curnyn*, 202 Neb. 135, 138, 274 N.W. 2d 157, 160 (1979). Moreover, “the constitutional requirement for acceptance of guilty pleas is that the plea be voluntary and intelligent and the determination of that fact be reliably determined.” *Id.*, 202 Neb. at 140, 274 N.W. 2d at 160. A proper explanation of the nature of the charge goes to the very heart of the intelligence necessary to enter a plea. In simple terms, a Defendant has to know what he is being accused of and to which he is pleading. *Cf. Curnyn*, 202 Neb. at 140, 274 N.W. 2d at 161 (where in regard the penalties of the crime to which a defendant pleads the Supreme Court said, “it is difficult to conceive how a guilty plea can be voluntary and intelligent unless or until the Defendant is informed or is made aware of the possible penalties to which he may be subjected by making such a plea.”).

In *State v. Mindrup*, 221 Neb. 773, 380 N.W. 2d 637 (1986), a defendant pled guilty to third offense drunk driving by filing a “Petition to Enter Plea of Guilty,” which Mindrup’s attorney prepared and somehow persuaded the trial court to accept. The plea petition recited that Mindrup understood the nature of the charges brought against her but did not itemize the elements of the offense. On appeal, Mindrup complained, among other things, that the county judge did not advise Mindrup of the elements of the offense. But because the record revealed that Mindrup, through her attorney, waived the reading of the complaint which set forth the offense in the words of the applicable statute, Mindrup was precluded from thereafter complaining that her plea was ignorantly made.

In the instant case, Barber is not now complaining that he was not explained the elements of Motor Vehicle Homicide, but that the elements were not explained to him properly. An improper explanation may be worse than no explanation at all. At least with no explanation, there can be some reliance on the fact that a criminal defendant had an attorney with him (more on Barber's ineffective trial attorney later). And unlike the defendant in *Mindrup*, there is no indication in the record that Barber had read his charge or waived his reading of it. When the trial court included a *mens rea* element to the offense, it only served to confuse the situation. Not to be forgotten in this matter is that Barber is an uneducated man who had been involved in a major car accident just a few months earlier. That accident rendered him comatose for a number of days. If anything, the Court should have been particularly careful in its dialogue with Barber to ensure that it was accurate and even simple to ensure Barber's proper understanding of this process. But that did not happen here. In fact, there was no discussion of Barber's accident and/or injuries during the plea hearing. As a result, Barber was not afforded proper due process of law and his conviction must be declared void and vacated. The matter should then be remanded back to the Douglas County District Court for further proceedings. Alternatively, the matter should be remanded back to the Douglas County District Court to allow Barber to withdraw his no contest plea and thereafter consider his options. This remedy falls in line with that which the Nebraska Supreme Court used in *State v. Curnyn*, 202 Neb. at 140-41, 274 N.W. 2d at 161; *see also State v. McMahon*, 213 Neb. 897, 331 N.W. 2d 818 (1983).

B. ALTERNATIVELY, THE PROCEDURE USED BY THE COURT TO AMEND THE RECORD WITH REGARD TO ITS ADVISEMENT TO BARBER OF THE ELEMENTS OF THE CRIME WAS IMPROPER AND DID NOT COMPORT WITH NEBRASKA LAW..

When counsel for the State determined from Barber's amended postconviction motion that there was a problem in the court's explanation of Motor Vehicle Homicide, she took matters into her own hands. Apparently, by counsel's own admission, she contacted the court reporter to inquire as to what might have been said on the record and, somehow, without filing a motion, asked for a hearing on the matter. After conducting her investigation and arranging with the court for a hearing, the State's counsel prepared an affidavit that was ultimately signed by the court reporter on this case. The record reflects difficulty on the part of said counsel in getting that affidavit and its attachments to Barber and his standby counsel. Thus, there already are procedural concerns in the postconviction process.

Neb. S. Ct. R. App. §2-105(5), in pertinent part, states: “[p]roposed amendments not agreed to by all parties to the case shall be heard and decided by the district court after such notice as the court shall direct.” While Barber submits that the record in this case can not be amended, to the extent that it can, the “procedure” that was followed here was problematic at best. The State did not file a motion seeking to amend the record. There is no indication in the record that the district court directed any particular notice be made of the issue. Third, as the record amply indicates, notice of the hearing and a copy of the court reporter's affidavit were never presented to Barber or his standby counsel prior to the hearing that was conducted. Yet somehow, a hearing was arranged. The Nebraska Postconviction Act does not allow the State to file a motion to correct the record. That is because any corrections to the record have to be done before the case is submitted to the Nebraska Supreme Court. Postconviction matters, by their statutory definition, are conducted after a case has been submitted and decided by the Nebraska Supreme Court, presumably in the State's favor. Thus, the failure to provide adequate notice, failure to provide Barber and his standby counsel with a copy of the petition, failure to adhere to Neb. S. Ct. R. App. §2-105(5), failure to

adhere to the procedures of the Nebraska Postconviction Act all rendered the process by which the court amended the record to being an unfair process. It denied Barber requisite procedural due process of law.

In addition, Barber was present in court on the day of the hearing to amend the record only with standby counsel who was directed not to speak. Barber is not a lawyer and has not been legally trained. Indeed, the record reflects that he has not even obtained a high school diploma or its equivalent. He had standby counsel with him at the hearing, but the court shackled standby counsel by precluding standby counsel from effectively acting as Barber's counsel. Apparently, the court determined that Barber had to act as his own lawyer because he had made that request earlier to do so. But this was clearly a man who was in no position to properly question the court reporter or produce any other evidence on the matter. In addition, it is not as if such a matter comes before a court all the time. The undersigned counsel has been practicing criminal law for twenty-eight (28) years and has never run into an occasion where a prosecutor sought to amend a record after a case was disposed of on direct appeal. That is because the rules don't allow for it. But if a court permits a record to be amended in a postconviction situation such as Barber's, it has to be done fairly. That process should require the State to produce a formal motion to do so and provide a copy of that motion in advance of the hearing to Barber and his standby counsel. The process should then require the state to produce in advance of the hearing a copy of the affidavit or any other exhibits that it might wish to introduce. The Court should also further inquire about whether Barber requires counsel or at least remind him of what the rules of the hearing will be. And if stand by counsel is present, the court should expand counsel's role. For no person, let alone a person in Barber's position should be required to proceed at this type of hearing when counsel is present and available.

But by allowing the procedure to play out the way it did, the district court effectively denied due process of law and an opportunity to be heard. An already skeptical but uneducated man was then forced to grapple with a situation that is confusing at best. It is not how our criminal justice system is supposed to work. The rights that are extended to defendants by way of our state and federal constitutions are sacrosanct and can not be abridged or overborn as they were in this case. As a result, if Barber's conviction isn't voided and vacated the matter must at least be remanded back to the district court for a new hearing. On that matter, the case should be directed to be heard by a different district court judge. It is worth noting that in one of his early postconviction proceedings Barber asked the district judge in this matter to recuse himself because of what was said by the court and recorded by the court reporter at the time of Barber's plea. At the January 14, 2016 hearing on the matter the following discussion took place between the court and Barber:

THE DEFENDANT: And also that the cause of death had to be – the State had to prove that the cause of death was intoxication (sic). That was uh – this is uh

THE COURT: Right. Right. Well, if I – I may have said "unintentionally" and our court reporter took it down and intentionally, but, you know, it doesn't really matter. And I'm not –

THE DEFENDANT: I mean, it does matter because – I mean, it does matter because of the State – the State had alleged by – and failed to object that they could prove that I intentionally caused the death of the victim, which was not the – which is contrary to law.

THE COURT: All right. And now why should I recuse myself over that?

THE DEFENDANT: Well I mean – well, I have to debate myself over that – I mean, about that. I'm not a hundred percent sure on that but this – last time we spoke at the status hearing you said – I spoke about this at the – and I believe you said, well, I advised you of the information and all that stuff, which you actually did not according to the record.

THE COURT: All right. What's the other reason, if any?

THE DEFENDANT: Well, if – it's basically – my interpretation of law shows that it may have been because of some type of bias or – and, also, you are a witness to your own actions in this – you will be a witness to your own actions in this proceeding so, therefore you can not be a judge and a witness to your own actions.

THE COURT: All right. Well, I'm going to overrule this motion.

(Second BOE, 21:2-22:11)

It does not take any level of cleverness to figure out the appearance of impropriety by the court in failing to recuse itself from a hearing or consideration on the matter involving that court's own court reporter and whether the record was taken down properly. After all, what harm actually is done by having the trial judge recuse himself and direct that the matter be heard by a different judge? Any appearance of impropriety is removed by the process. But the trial judge, almost cavalierly, refused to even consider Barber's plea and denied the motion. Thus, on remand the matter should be redirected to a different judge for further proceedings on this issue.

Finally, to ensure fairness, Barber should be afforded a full evidentiary hearing on his claims. If the district court is willing to extend favor to the State in granting it a hearing, due

process requires that Barber be afforded an evidentiary hearing as well. This is particularly true when the court's on record reflects infirmities as have been pointed out herein.

2. THE DISTRICT COURT ERRED AND DENIED BARBER DUE PROCESS OF LAW WHEN IT DENIED BARBER'S CLAIM THAT THE PLEA WHICH BARBER ENTERED WAS INFIRM AS A RESULT OF AN INSUFFICIENT FACTUAL BASIS TO SUPPORT IT.

"A plea of no contest is equivalent to a plea of guilty." *State v. Wilkinson*, 293 Neb. 876, 881, 881 N.W. 2d 850, 855 (2016). "To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged. *Id.* "When a court accepts a defendant's plea of guilty or no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel." *Id.* "A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily." *Id.*

To ascertain whether the State's factual basis was sufficient, an appellate court must identify the elements of the statute under which a defendant was convicted and determine whether the factual basis meets those elements. *Id.* 293 Neb. at 881-82, 881 N.W. 2d at 855.

The version of Neb. Rev. Stat 28-306 in effect at the time Barber allegedly committed his offense provided, in relevant part, as follows:

A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide ... If the proximate cause of the death of another is the operation of a motor vehicle in

violation of section 60-6,196 or 60-6,197.06, motor vehicle homicide is a Class III felony ...

Thus, the court must have received a factual basis to show that (1) Barber caused the death of another person; (2) unintentionally; (3) while operating a motor vehicle; (4) committing some law violation in the process thereof; (5) that the decedent's death was proximately caused by Barber's operation of a motor vehicle in violation of applicable drunk driving laws.

The factual basis provided by the State's counsel was as follows:

On February 3, 2013, here in Douglas County, Nebraska the defendant was observed by witnesses traveling southbound on Saddle Creek Road in excess of the speed limit. The Defendant approached the area of Saddle Creek and Poppleton Streets where he was travelling approximately 98 mph in a 35 mph zone. The Defendant hit a curb, allowing him to lose control of his vehicle. He hit another vehicle being driven by Betty Warren. Betty Warren was pronounced dead. An autopsy conducted by the Douglas County Coroner revealed that she died of internal injuries attributable to this car accident.

The police suspected that the Defendant was under the influence of a controlled substance and/or alcohol. His blood was tested, by virtue of him being transported for medical treatment where he had a blood alcohol content of .146.

All of these events occurred here in Douglas County, Nebraska.

(First BOE, 13:1-21)

Setting aside for the time being the issue of the Court's word "intentionally" as opposed to "unintentionally" (where an extensive argument is made about that earlier in this brief), counsel for the State neglected to mention anything about causation in the factual basis. Thus, the court

accepted a guilty plea without an adequate factual basis as to how Ms. Warren actually died. Perhaps the factual basis was compromised by the court's infirm advisement where, apparently reading the Information, the court stated that the state would have to prove that:

...on or about the 3<sup>rd</sup> day of February, 2013 in Douglas County, Nebraska you did then and there intentionally cause the death of Betty Warren while engaged in the unlawful operation of a motor vehicle and while in violation of §60-6196 or 6§0-6197.06, and this is a Class III felony.

In fact, to properly advise Barber of what the State would have to prove, all the Court had to do was read the statute. There, the words proximate cause are used. But in the record before this Court, there is no mention of the word proximate. When this is added to the Court's mistake regarding the *mens rea* element, it is hardly the case that Defendant entered a plea understandingly and voluntarily. *See Wilkinson.*

The absence of a sufficient factual basis to support Barber's plea invalidates Barber's conviction. Admittedly, when a motion for postconviction relief properly alleges an infringement of a defendant's constitutional rights, an evidentiary hearing should be denied when the records and files of the court affirmatively show that he defendant is entitled to no relief. *State v. Buckman*, 259 Neb. 924, 930, 613 N.W. 2d 463, 471 (2000). But here, in Barber's case, the record and files of the court **do** affirmatively show that he is entitled to relief. The record of Barber's plea is defective on several levels. There is concern regarding the court's advisement to Barber of the elements of Motor Vehicle Homicide. Second, there is no clear indication of causation in the factual basis. And, despite these problems, the district court still denied Barber an evidentiary hearing.

It may be argued by the State that Barber should be procedurally precluded from raising the claim that there was an insufficient factual basis to support the plea. After all, that same record about which he now complains, was available to everybody in this case during his direct appeal. But other facts can't be ignored from consideration on this matter. Barber had the same counsel on direct appeal as he had at the time of plea and sentencing. It is simply not reasonable to expect that the issue of insufficient factual basis and due process would be raised by the lawyer who counseled Barber on it in the first place. Moreover, Barber is an uneducated man having recently recovered from a severe car accident. Thus, it is unfair to hamstring Barber with the burden of explaining why this matter was not raised on direct appeal.

It is also worth noting that the trial court effectively gave no findings in support of its decision to overrule Barber's claim that the plea was unsupported by sufficient factual basis. The Court entered two (2) orders with regard to Barber's Second Amended Postconviction Motion. The first only dealt with the "intentional" versus "unintentional" error. In its second order where the district court overruled Barber's remaining claims, it simply stated

Sections I, II and III of Defendant's Motion for Postconviction Relief all raise essentially the same issue in regard to the plea dialogue. For the reasons set out in the order of December 2, 2016, the court denies the relief requested by Defendant.

District Court Order, May 10, 2017, p. 2.

In fact, Barber raised an additional qualm with regard to the plea, namely that the factual basis was insufficient, particularly as it related to the requirement of proximate causation with regard to Ms. Warren's death. But the court never even addressed the matter. Thus, at a minimum, the matter should be remanded for further proceedings directing the court to re-examine and

express findings and conclusions of law regarding the issue. Because of other concerns raised by Barber in this brief, it is suggested that the matter be remanded to a different district judge.

3. THE DISTRICT COURT ERRED WHEN IT DENIED BARBER'S POSTCONVICTION MOTION BECAUSE BARBER WAS DENIED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL.

Nebraska's postconviction act allows a prisoner to petition a court to vacate or set aside his or her conviction "on the ground that there was a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defen[s]e." The right to counsel has been interpreted to include the right to effective counsel. Under the standard established by the U.S. Supreme Court in *Strickland v. Washington*, claims of ineffective assistance of counsel by criminal defendants are evaluated using a two-prong analysis: first, whether counsel's performance was deficient and, second, whether the deficient performance was of such a serious nature so as to deprive the defendant of a fair trial. A court may address the two elements of this test, deficient performance and prejudice, in either order. To show that the performance of a prisoner's counsel was deficient, it must be shown that "counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law To establish the prejudice element of the *Strickland v. Washington* test, a defendant must show that the counsel's deficient performance was of such gravity to "render the result of the trial

unreliable or the proceeding fundamentally unfair." This prejudice is shown by establishing that but for the deficient performance of counsel, there is a "reasonable probability" that the outcome of the case would have been different.

When reviewing claims of alleged ineffective assistance of counsel, an appellate court affords trial counsel due deference to formulate trial strategy and tactics. There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.

*State v. Torres*, 295 Neb. 830, 838-40, N.W. 2d 814 N.W. 2d 191, 200-01 (2017).

"Normally, a voluntary guilty plea waives all defenses to a criminal charge, but in a postconviction action brought by a defendant convicted as a result of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel." *State v. Glover*, 278 Neb. 795, 774 N.W. 2d 248 (2009). A plea of no contest is equivalent to a plea of guilty. *State v. Buckman*, 259 Neb. 924, 930 613 N.W. 2d 463, 471 (2000). "When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty." *See Glover*.

None of the aforementioned plea infirmities (the Court's mistaken advisement using "intentionally" instead of "unintentionally"; insufficient factual basis) were ever objected to by Barber's counsel. Barber had been involved in a serious car accident which left him comatose for several days. The record is replete with the fact that he remembered very little from the night in question. He is also an individual who has never secured a high school diploma. Under these circumstances - with this defendant in particular - defense counsel had to be aware and on guard. She had to make sure that the plea was entered properly. That would require that the court and

parties say everything properly and that a factual basis be pronounced. But that did not happen here. To stand as Barber's counsel and seemingly not pay adequate attention to the plea process to ensure that words were stated correctly and that a factual basis was properly rendered effectively made Barber's plea counsel-less. This record would have basically been the same had Barber's counsel not even been there. (Barber's trial counsel, at least from the record we have, challenged nothing **before** Barber opted to change his plea. There is nothing showing a challenge to the State's acquisition of Barber's blood test results; no psychological or psychiatric evaluation of Barber to question Barber's competency or that would otherwise have been able to be used at sentencing; no accident reconstruction investigation including an investigation into the Omaha Police's estimate of Barber's speed of 98 miles per hour – something any Omaha native knows is virtually impossible to do on Saddle Creek Road.)

Barber's counsel also proved ineffective at and in relation to sentencing. First, at the time of sentencing, the district court judge before pronouncing sentence stated:

THE COURT: Okay.

Well, counsel has heard this from me before: In crafting an appropriate sentence, especially when the range of sentence can be so wide, obviously, the legislature in enacting the statute left a lot of discretion in the Court's hands and I have to weigh a number of factors here. Not only was the defendant probably close to twice the legal limit, the number I have here is .146, even more disturbing, in a way, is you're doing 98 miles an hour in a 35 mile-per-hour zone. And if it wasn't -- I will say that if it wasn't Ms. Warren who was hit, someone was going to be, and I driving 98 miles an hour in a city street at midnight at .146 that's more than just bad judgment. That's more than just a mistake. And in crafting the sentence, you I – I don't know

what could -- what factors could really be more serious than driving 98, intoxicated, and hitting someone, head-on, who dies. I mean, I --I tried to think of a factual scenario that would be worse than that and I can't. This is -- in terms of this type of offense, this is about -- this is as serious, I think, as I've ever seen.

(First BOE 23:17-24:15)

The inference from these remarks is that the court truly thought that Barber was behaving in the most reprehensible of ways. The court expressed that it could not have thought of a situation contemplated by the legislature that was worse when the legislature enabled this law. These comments also further ratify the idea that the court truly had used the word "intentionally" during the plea advisement as well. Had Barber's trial counsel challenged these remarks, the district court would have been on notice of that it was ignoring other pertinent factors (Barber's lack of intent, lack of other criminal history, lack of education, Barber's injuries, etc.) and may have even been mistaken in the level of blame it was placing on Barber (again, this goes back to the intent argument).

Additionally, the court reiterated its thoughts on the matter in its order denying Barber's postconviction claim when it stated: "[t]he Bill of Exceptions of the sentencing shows the Court's concern at sentencing was not on trial counsel's argument but rather, the fact that Defendant's BAC was almost twice the legal limit and he was driving 98 miles per hour in a 35 mile per hour zone." (T250) (citation omitted).

There is also no indication that counsel went over the PSI with Barber. While this is not necessarily required, see Neb. Rev. Stat. §29-2261(6) (Reissue 2016), the aforementioned circumstances concerning Barber and this situation certainly justify and ethically require that counsel should have gone over the PSI with Barber. Barber is a somewhat uneducated man who

went through a major car accident. He was rendered comatose for several days. No mental health evaluation had been conducted. He had no recollection of the events that led to the crash. Counsel should have discussed the contents of the PSI with her client. Failing to do so was substandard in comparison to that of a typical criminal defense attorney. Moreover, counsel's performance prejudiced Barber. For no other inference can be drawn by the district court's comments on the subject at sentencing and the maximum sentence it handed down.

Finally, counsel failed to bring an apology letter to the sentencing that Barber had provided her and made a number of comments at Barber's sentencing which hardly cast Barber in a more positive light. In fact, many were not true and only corroborate the fact that counsel didn't properly prepare for sentencing or even defend the case. Barber might have been better off handling the sentencing on his own. Counsel's performance at sentencing did not rise to the level of a criminal defense attorney with ordinarily training and skill in criminal law. Counsel failed to challenge and correct the court. This failure on the part of Barber's counsel unabatedly allowed the court sentence Barber to the maximum term possible. As a result, the district court's decision denying Barber's postconviction claim for ineffective assistance of counsel and Barber's conviction should be vacated and the matter remanded for further proceedings.

#### CONCLUSION

Barber's plea should be declared void and his conviction vacated and the matter remanded back to district court for a new trial or further proceedings. In the alternative, Barber's case should be remanded to district court for further proceedings including an evidentiary hearing on Barber's postconviction claims. To the extent the record in this matter was amended, the matter should be remanded back for further proceedings to ensure due process is afforded Barber. Any remand of

the matter without vacating Barber's plea and conviction should be directed to a different district court judge.

RESPECTFULLY SUBMITTED:

BY: /s/ A. Michael Bianchi

A. MICHAEL BIANCHI, #19009  
2712 South 87<sup>th</sup> Avenue  
Omaha, Nebraska 68124  
(402) 346-6700  
[mike@bianchidefends.com](mailto:mike@bianchidefends.com)  
Attorney for Appellant



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

RAYSEAN BARBER, ) 8:18CV571  
Petitioner, ) PETITIONER'S RESPONSE BRIEF  
v. )  
BRAD HANSEN, )  
Respondent. )

This brief is submitted in accordance with this Court's memorandum and order of January 10, 2019. (filing no. 7)

**Statement of Facts and Procedural History**

**I. Charge, Plea, and Sentencing**

On April 15, 2019, the Deputy County Attorney for Douglas County, Nebraska, Matthew M. Khuse #22235, filed an information in the District Court of Douglas County, Nebraska, that was assigned to Judge Russell Derr. This information alleged that on or about February 3, 2013, in Douglas County, Nebraska, RaySean D. Barber (Barber) did then and there unintentionally cause the death of Betty Warren (Ms. Warren) while engaged in the unlawful operation of a motor vehicle, and while in violation of Neb.Rev.Stat. §60-6,196 or §60-6,197.06. (Doc. #11-11 at CM/ECF p.4)

The State alleged that Barber thereby committed a Class III Felony motor vehicle homicide pursuant to Neb.Rev.Stat. §28-306 (1) & (3)(b).(ID)

Neb.Rev.Stat. §28-306(3)(b), which is a Class III Felony

motor vehicle homicide, states as follows: If the proximate cause of the death of another is the operation of a motor vehicle in violation of §60-6,197 or 60-6,197.06, motor vehicle homicide is a Class III Felony.

Nebraska state courts have made clear that one commits a motor vehicle homicide by driving under the influence (d.u.i.) if he or she causes the death of another as a direct result of the fact that he or she was not able to operate a motor vehicle in a prudent and cautious manner to some appreciable degree due to alcohol consumption. In order to allege that such was the case in an information or complaint, the prosecution may use the language prescribed in subdivision (3)(b) of the section at issue, or use language that is equivalent to the language of said subdivision of said section.

The information filed by the State in this case doesn't use the language prescribed in said subdivision of said section, but rather uses language prescribed in subdivision (1) of said section in addition to an allegation that Barber was in violation of §60-6,196 or §60-6,197.06, which are the lesser included offenses of subdivision (3)(b) of said section. Such an allegation does not particularly include the essential element of proximate cause as required by subdivision (3)(b) of said section. Therefore, the prosecution did not allege that Barber committed the crime that was charged.

Barber was then appointed trial counsel, who was Leslie Cavanaugh (trial counsel) of the Douglas County Public Defender's Office, by the trial court. Trial counsel plead not guilty on

behalf of Barber and requested the discovery, which the trial court sustained on April 16, 2013. (Doc #11-11 at CM/ECF p.6).

There was a plea hearing held on June 24, 2013. At this hearing, the trial court advised Barber of, among other things, the nature of the charge using the language prescribed in the information. The bill of exceptions (BOE) shows that the trial court used the word "intentionally" where the statute requires that the trial court use the word "unintentionally". (Doc #11-13 at CM/ECF pp. 8,9).

After the trial court's advisement, the prosecution made a statement of the facts of the case so as to support a plea of no contest by Barber. The prosecution alleged that "On February 3, 2013, here in Douglas County, Nebraska, the defendant was observed by witnesses traveling southbound on Saddle Creek Road in excess of the speed limit. The defendant approached the area of Saddle creek and Poppletton Streets, where he was traveling approximately 98 miles per hour in a 35 mile-per-hour zone. The defendant hit a curb, allowing him to lose control of his vehicle. He struck another car being driven by Betty Warren. Betty Warren was pronounced dead. An autopsy conducted by the Douglas County Coroner revealed that she died of internal injuries attributable to this car accident.

"The police suspected that the defendant was under the influence of a controlled substance and/or alcohol. His blood was tested, by virtue of him being transported for medical treatment, where he had a blood alcohol content of .146.

"All of these events occurred here in Douglas County, Neb-

raska." (Doc. #11-13 at CM/ECF p.13)

At sentencing, the trial court made a statement. In this statement, the trial court stated that Barber's driving in such a manner "was more than just bad judgment. That was more than just a mistake." (id at CM/ECF p.24)

The prosecutor also made a statement at sentencing. In this statement, the prosecutor stated that Barber's speeding was intentional. (id at CM/ECF p.20)

## **II. Direct Appeal**

Barber, through trial counsel, filed a direct appeal, alleging that the trial court abused its discretion by imposing an excessive sentence. (Doc. #11-1 at CM/ECF pp. 1, 4). On January 23, 2014, the Nebraska Court of Appeals affirmed Barber's sentence by sustaining the State's motion for summary affirmance. (id at CM/ECF p. 2). Barber's request for further review was denied by the Nebraska Supreme Court on March 12, 2014 (id).

## **III. Postconviction Proceedings**

On February 27, 2015, Barber filed a timely motion for postconviction relief pursuant to Neb.Rev.Stat. §29-3001 et. seq. Barber thereafter filed several amended motions. (Doc.11-12 at CM/ECF pp. 10, 99, 202, 208). The final amended motion, titled "Second Amended Motion for Postconviction Relief", which was filed by Barber, made several allegations, including, but not limited to: (1) the trial court erred in failing to advise Barber of the nature of the charge; particularly, that the trial court

Barber of the nature of the crime by using the word "intentionally" rather than "unitnentionally" based on Ms. Hurley's testimony. (Doc. #11-12 at CM/ECF pp. 232-234). But the trial court did not address the part of this claim respecting the proximate cause element. The trial court then stated that it would proceed with Barber's remaining claims for postconviction relief and that the State indicated that it planned on filing a motion to dismiss in that regard. (id at CM/ECF p. 234). Barber did not appeal the December 2, Order. (Doc. #11-13 at CM/ECF p. 5)

Following a hearing on the State's motion to dismiss, the trial court overruled the remaining postconviction claims in a written order filed May 10, 2017. (Doc #11-12 at CM/ECF pp. 250-253). The trial court found that sections one, two, and three of Barber's motion for postconviction relief all had to do with whether the trial court used the word "intentionally" in its advisement of the nature of the charge despite the distinction of the claims of said sections. (id at CM/ECF p. 251)

Barber appealed, and the Nebraska Court of appeals affirmed the trial court's denial of postconviction relief in a public opinion. State v. Barber, 918 N.W.2d 359 (Neb.App.2018). Regarding the three ineffective assistance of counsel claims that Barber reasserts in his habeas petition, the Court of Appeals found all three claims to be without merit. (id at 368-369). The Nebraska Supreme Court denied Barber's petition for further review, and the mandate issued on December 6, 2018. (Doc. #11-2 at CM/ECF p. 3)

used the word "intentionally" where it should have used the word "unintentionally" and when it omitted the essential element of "proximate cause", (2) the State's factual basis failed to make a distinct allegation of each essential element of the charge; particularly, the factual basis failed to establish that the proximate cause element existed and that it indicated that Barber caused the death intentionally, and (3) trial counsel was ineffective for failing to object to the information, as it failed to allege the proximate cause element required by the charge; for failing to object to the trial court's advisement of the charge; and for failing to object to the insufficient factual basis. (id at CM/ECF pp. 214-218)

At the preliminary hearing on the postconviction motion, the State's attorney, Katie Benson (Ms. Benson), indicated that she had spoken with the court reporter, who is Julie L. Hurley (Ms. Hurley), and that, based on Ms. Hurley's notes, the bill of exceptions was wrong; according to Ms. Hurley, the trial court had in fact said "unintentionally", not "intentionally" during its advisement of the nature of the charge at the plea colloquy. (Doc. #11-14 at CM/ECF pp. 34-35). The trial court ultimately ordered an evidentiary hearing on that issue. (id at CM/ECF pp. 68-73)

At the evidentiary hearing, Ms. Benson called Ms. Hurley to testify. (id at CM/ECF pp. 86-100). Ms. Hurley testified that she made a mistake and that she misspelled the word.

On December 2, 2016, the trial court overruled Barber's postconviction motion on the issue of whether it misadvised

#### **IV. Petitioner's Habeas Claims**

This Court previously found that Barber raised the following three claims in his habeas petition:

1.) Trial counsel was ineffective for failing to object to the insufficient information filed by the State.

2.) Trial counsel was ineffective for failing to object to the insufficient advisement of the nature of the charge by the trial court at the plea hearing.

3.) Trial counsel ineffective for failing to object to the factual basis for the plea.

(Doc. #7 at CM/ECF p. 1)

#### **Argument**

Barber submits that each of his claims are with substantial merit.

#### **I. Applicable Law**

##### **A. Due Process and its Requirement for Informations**

Generally, to charge defendant with commission of a criminal offense, information or complaint must allege each statutorily essential element of crime charged, expressed in words of statute which prohibits conduct charged as crime, or in language equivalent to statutory terms defining crime charged. *State v. Van*, 268 Neb. 814 (2004) (Headnote 13); U.S.C.A. Const. Amend. 5, 6, 14.

Function of information is two fold: with reasonable certainty, an information must inform accused of crime charged so that accused may prepare defense to prosecution and, if convicted

ed be able to plead judgment of conviction on such charge as to bar later prosecution for same offense. (id at headnote 12)

**B. Due Process and its Requirement for Voluntary Guilty Pleas Respecting Trial Court's Advisement and Factual Basis.**

In order to support finding that plea of guilty or nolo contendre has been entered freely, intelligently, voluntarily, and understandingly, trial court must inform defendant concerning nature of charge, right to assistance of counsel, right to confront witnesses against defendant, right to jury trial and privilege against self-incrimination, and trial court must establish that there is a factual basis for plea and that defendant knew range of penalties for crime with which he or she is charged.

State v. Irish, 223 Neb. 814 (1986) (headnote 4); U.S.C.A. Const. Amend. 5, 6, 14.

**C. Ineffective Assistance of Counsel**

**i. Presumption of Ineffectiveness**

If trial counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights which makes adversary process itself unreliable. U.S. v. Cronic, 466 U.S. 648 (1984) (headnote 13).

**ii. Ineffective Assistance of Counsel Regarding Plea of Guilty Using Strickland.**

In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with Strickland, to show that counsel's performance was deficient, that is, counsel's perform-

ance did not equal that of an ordinary lawyer with ordinary training and skill in criminal law, and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Armendariz*, 289 Neb. 896 (2015) (headnote 6); U.S.C.A. Const. Amend. 6.

In order to satisfy "prejudice" requirement of standard for evaluating claims of ineffective assistance of counsel under *Strickland v. Washington*, defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985) (headnote 3); U.S.C.A. Const. Amend. 6.

#### **D. Motor Vehicle Homicide a Class III Felony**

If the proximate cause of the death of another is the operation of a motor vehicle in violation of §60-6,196 or §60-6,197.06, motor vehicle homicide is a Class III Felony.

#### **E. Proximate Cause of Death as Established in State Court Determinations.**

Conduct is the cause of the event if the event in question would not have occurred but for that conduct, conduct is not a cause of an event if that event would have occurred without such conduct. *State v. William* 231 Neb. 84 (1989) (Syllabus by the Court 2)

An act or an omission to an act is the proximate cause of death when it substantially and materially contributes in a natural and continuous sequence, unbroken by an efficient intervening cause, to the resulting death. It is the cause without

which death would not have occurred and the predominating cause, the substantial factor, from which death follows as a natural, direct, and immediate consequence. (id at syllabus by the Court 3)

Proximate cause exists in motor vehicle homicide case if death was a foreseeable consequence of illegal conduct underlying charge. State. v. Back, 241 Neb. 301 (1992).

**F. Driving Under the Influence as Established in State Court Determinations Respecting Motor Vehicle Homicide Cases.**

As used in statute providing for motor vehicle homicide by driving while intoxicated, "under the influence of alcoholic liquors" means after the ingestion of alcohol in an amount sufficient to impair in any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner. State v. Batts, 233 Neb. 776 (1989) (headnote 1)

**G. Driving Over Thirty-Five Miles-Per-Hour Over the Speed Limit.**

Any person who operates a vehicle in violation of any maximum speed limit established for any highway or freeway is guilty of a traffic infraction and upon conviction shall be fined: Three hundred dollars for traveling over thirty-five miles-per-hour over the authorized speed limit. §60-682.01(f)

**H. Determinations by State Court Respecting DUI Motor Vehicle Homicide Cases.**

Although there was evidence that the automobile Batts was driving was malfunctioning and that the street surface was slippery, the district court could have reasonably concluded that

Batts lost control of his car as a result of being under the influence of alcohol. *State v. Batts*, 223 Neb. 776 (1989)

Motor vehicle homicide conviction was supported by evidence that, at the time of accident, defendant was operating motor vehicle while under the influence of alcohol and that defendant's condition was contributing proximate cause of accident and death. *State v. Back*, 241 Neb. 301 (1992)

#### **I. State Court's Statute Interpretation Standard.**

When interpreting a statute, effect must be given, if possible, to all the several parts of a statute, no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *State v. Clemens*, 300 Neb. 601 (2018) (headnote 1)

Statutory language is to be given its plain and ordinary meaning. *id* at headnote 9

An appellate Court, when interpreting a statute, must look at the statutes purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id* at headnote 12

Specific statutory provisions relating to a particular subject control over general statutory provisions. *Gray v. NDCS*, 26 Neb.App. 660 (2018)

#### **II. Argument**

##### **A. Claim One**

###### **Trial Counsel Ineffective for Failing to Object to the Insufficient Information Filed by the State.**

In his second amended motion for postconviction relief and in his appellate brief, Barber claimed that the information filed by the State was insufficient in that it omitted the essential element of proximate cause and that trial counsel was ineffective for not objecting to the information on that basis.

The Court of Appeals acknowledged that Barber was making said claim in its opinion.

However, the Court of Appeals neglected to address the proximate cause element or even assert that the information did essentially allege that the proximate cause element was committed just by using the language prescribed in Neb.Rev.Stat. §28-306(1).

Said Court asserted that the information was sufficient because it alleged, essentially, that Barber unintentionally caused the death of Ms. Warren while engaged in the unlawful operation of a motor vehicle, and while in violation of §60-6,196 or §60-6,197.06 -- and that it satisfied §28-306(1) & (3)(b).

However, the information fails to include a distinct allegation of the essential element of proximate cause of death, and thus fails to satisfy subdivision (3)(b) of said section, which is the crime with which Barber had been charged.

The proximate cause element was essential and should have been included in the information because said element indicates that death was a foreseeable consequence of Barber's driving in violation of §60-6,196. But simply alleging that Barber was in violation of said statute when he unintentionally caused the death of another was not the same as to allege that said violation affected Barber's driving ability in such an appreci-

able degree as to cause the accident and resulting death.

By not including the proximate cause element in its information the State did not actually allege that the charge had been committed. And, thus, the State didn't provide Barber with an opportunity to adequately defend himself. Therefore, Barber's Due Process right had been violated along with his right to be informed of the nature and cause of the accusation.

Trial counsel thus had an opportunity and, indeed, an obligation to object to this information on said basis so that the information could be amended or so that the issue could be preserved for appeal.

Furthermore, the Court of Appeals should not have used the Strickland standard for this issue because that an information is sufficient is in and of itself a fundamental constitutional requirement. So, when trial counsel failed to object to the insufficient information Barber was presumably harmed by such failure; trial counsel has essentially aided the prosecution in denying Barber a fair opportunity to defend himself. Accordingly, it is established that trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing with respect to this issue.

#### **B. Claim Two**

**Trial Counsel Ineffective for Failing to Object to the Trial Court's Insufficient Advisement of the Nature of the Charge at the Plea Hearing.**

In his second amended motion for postconviction relief and

in his appellate brief, Barber claimed that the trial court's advisement of the nature of the charged at the plea hearing was insufficient in that it included the word "intentionally" where it should have included the word "unintentionally", and that it omitted the essential element of "proximate cause", and also that trial counsel was ineffective for failing to object to said advisement on said basis.

The Court of Appeals addressed the part of this issue regarding the word "intentionally" and "unintentionally", but failed to address the part of this issue regarding the omission of the proximate cause element.

Because of the importance of said element as explained in claim one, the trial court should have included said element in its advisement of the nature of the charge; and also because the State cannot prove guilt without establishing that said element exists beyond a reasonable doubt.

Furthermore, the record establishes, therefore, that Barber did not understand the real nature of the accusation, and thereby establishes that his plea was not freely, intelligently, voluntarily, or understandingly made.

Trial counsel thus had an opportunity and, indeed, an obligation to object to this advisement on said basis so that the advisement could be amended or so the issue could be preserved for appeal.

Furthermore, the Court of Appeals used the wrong Strickland standard because Barber plead no contest, which is equivalent to a

guilty plea.

Additionally, Barber believes that using the Strickland standard for this issue was unreasonable in that a sufficient advisement of the nature of the charge is in and of itself a fundamental constitutional requirement. So, when trial counsel failed to object to the insufficient advisement, Barber was presumably harmed by such failure; trial counsel has essentially aided the trial court, who was apparently aiding the prosecution, in denying Barber a fair opportunity to defend himself. Accordingly, it is established that trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing with respect to this issue.

Furthermore, the failure by the Court of Appeals to address this full issue renders its determination of the facts unreasonable in light of the evidence presented in its court.

### C. Claim Three

#### **Trial Counsel Ineffective for Failing to Object to the Insufficient Factual Basis for the Plea.**

In his second amended motion for postconviction relief and in his appellate brief, Barber claimed that the factual basis was insufficient in that it failed to establish that the proximate cause element existed beyond a reasonable doubt, and that trial counsel was ineffective for failing to object to the factual basis on said basis.

The Court of Appeals determined that the factual basis was sufficient as it established that Barber drove in violation of the

the speed limit statute and the d.u.i. statute at the time that he unintentionally caused the death of Ms. Warren; thus satisfying Neb.Rev.Stat. §28-306(1).

But if this Court will look at Neb.Rev.Stat. §28-306(3)(b), which is the crime with which Barber had been charged, it will see that a Class III Felony motor vehicle homicide requires specifically that the proximate cause of the death of another be the operation of a motor vehicle in violation of §60-6,196 or §60-6,-197.06.

Driving in violation of the speed limit statute is not an element of this crime. And, thus, the only reason why driving in violation of the speed limit statute could be considered in this charge is if Barber was reasonably believed to be speeding as a result of not being able to drive the speed limit due to impairment from alcohol.

But the Court of Appeals didn't even determine that such was the case. In fact, the Court of Appeals didn't even consider Neb.Rev.Stat. §28-306(3)(b), it only considered §28-306(1), which doesn't include elements that are specifically required under subdivision (3)(b) of said section, and which is simply a general statutory provision of motor vehicle homicide.

Had the Court of appeals considered subdivision (3)(b) of said section, it could have only determined that the trial court did not properly find that the factual basis was sufficient to support the plea, as (1) the trial court admitted at sentencing that Barber's conduct of driving in such a manner was "more than just bad judgment. That was more than just a mistake"; (2) that

the State wasn't even looking to prove that Barber's speeding had to do with impaired judgment, but rather, that Barber intentionally sped his car in such a manner that ultimately caused this accident, and that he was intoxicated, in violation of the law, when it happened; and (3) that the reasoning by the trial court and the State -- although reasonable, given that speeding in such a manner on a street such as Saddle Creek indicates the intent to speed and not the impaired ability to drive the speed limit due to alcohol consumption; and given that speeding was reasonably the factor without which death would not have occurred -- was contrary to what the legislators created this subdivision to prevent.

And, thus, it would have found that had trial counsel objected to the factual basis on the basis that it failed to establish that the proximate cause of the death of Ms. Warren was Barber's operation of a motor vehicle in violation of §60-6,196 in light of the facts stated above, the trial court would have reasonably sustained a motion to acquit. Or, had trial counsel made said objection the issue would have been preserved for appeal, granted the motion was overruled by the trial court.

Furthermore, the Court of Appeals used the wrong standard under Strickland because Barber plead no contest, which is equivalent to a guilty plea.

Additionally, Barber believes that using the Strickland standard for this issue was unreasonable because a sufficient factual basis is in and of itself a fundamental constitutional requirement. So, when trial counsel failed to object to the in-

sufficient factual basis, Barber was presumably harmed by such failure; trial counsel had essentially aided the trial court, who was apparently aiding the prosecution, in gaining a wrongful conviction. Accordingly, it is established that trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing with respect to this issue.

#### Conclusion

Wherefore, premisis considered, Barber maintains his prayer for a writ of habeas corpus.

Respectfully Submitted:

Raysean D. Barber 78889

RAYSEAN D. BARBER

P.O. Box 900

Tecumseh, NE 68450

Petitioner, Pro Se.

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

---

NO: 20-1233

---

RaySean D. Barber

Plaintiff - Appellant

v.

Todd Wasmer

Defendant - Appellee

---

Appeal from U.S. District Court for the District of Nebraska - Omaha

8:18CV00571 - RGK

---

PETITION FOR REHEARING

Submitted By:

RaySean D. Barber

P.O. Box 22800

Lincoln, NE 68542

Appellant, Pro Se.

Table of Authorities

Cases Cited	Page(s)
Hamling v. United States, 418 U.S. 87, 117 (1974).....	2
Hoffman v. State, 162 Neb. 806, 77 N.W.2d 592 (1956).....	6
State v. Back, 241 Neb. 301, 488 N.W.2d 26 (1992).....	5 & 6
State v. Batts, 223 Neb. 776, 448 N.W.2d 136 (1989).....	6
State v. Ring, 223 Neb. 720, 447 N.W.2d 908 (1989).....	6
State v. Sommers, 201 Neb. 909, 272 N.W.2d 367 (1978).....	6
State v. William, 231 Neb. 84, 435 N.W.2d 174 (1989).....	6
Strickland v. Washington, 466 U.S. 608 (1984).....	1 & 5
United States v. Carll, 105 U.S. 611, 612 (1982).....	2
U.S. v. Cheney, 571 F.3d 764 (2009).....	4
U.S. v. Cronic, 466 U.S. 648 (1984).....	1 & 6
U.S. v. Gamble, 327 F.3d 662 (2003).....	4
U.S. v. Johnson, 715 F.3d 1094 (2013).....	4
U.S. v. Rea, 300 F.3d 952 (2002) .....	4 & 6
Williams v. Taylor, 529 U.S. 362 (2000) .....	1
Statutes Cited	
Neb.Rev.Stat. §28-306 (1) & (3)(b) (Reissue 2015) .....	2
Neb.Rev.Stat. §28-306 (2) & (3)(a).....	5

I.

THE COURT BELOW OVERLOOKED OR MISAPPREHENDED THE MEANING OF THE REQUIREMENT OF THE PROXIMATE CAUSE ELEMENT, AND THUS CONCLUDED WRONGLY RESPECTING THE FACTS AND LAW OF CLAIM ONE OF APPELLANTS RESPONSE BRIEF; THE COURT ALSO IMPROPERLY APPLIED STRICKLAND V. WASHINGTON TO SAID CLAIM.

The court below held that the "two pronged standard of Strickland v. Washington, 466 U.S. 668 (1984) must be applied" when a petitioner asserts an ineffective assistance of counsel claim. However, the U.S. Supreme Court explained in Willams v. Taylor, 529 U.S. 362 (2000) that a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts the Supreme Court's prior holdings or if it reaches a different result from one of that Court's cases despite confronting indistinguishable facts. The Court did not hold that the state court was limited to using the prior holding of Strickland v. Washington. Thus, contrary to the lower court's holding, the two pronged standard of Strickland v. Washington doesn't always have to be applied..

Appellant applied a prior U.S. Supreme Court holding in U.S. v. Cronic, 466 U.S. 648 (1984), which explained that trial counsel is presumed ineffective if counsel entirely failes to subject the prosecutions case to meaningful adversarial testing. (Filing no. 14 at CM/ECF p. 8(C)(i).)

In Claim One, Appellant claimed that the information was insufficient in that it failed to include a distinct allegation of the proximate cause element, and that trial counsel was ineffective for failing to object to that information. (Filing no. 14 at CM/ECF p. 12-13.) Appellant explained the requirements for informations as determined by the state Supreme Court, and as required by the Due Process Clause. (Filing no. 14 at CM/ECF p. 7-8.) Appellant

thereafter showed how the phrase "proximate cause of death" is interpreted by the state court. (Filing no. 14 at CM/ECF p. 9-10.) Appellant further explained that the information failed to indicate that death was a foreseeable consequence of his driving under the influence where it omitted a distinct allegation of the proximate cause element as required by the Due Process Clause. (Filing no. 14 at CM/ECF p. 12-13.)

Furthermore, Appellant claimed that where there is a fundamental requirement that an information make a distinct allegation of each essential element of a crime charged in order to actually charge the crime, trial counsel has an obligation to object to an information if, in fact, said information fails to do so. This would afford the defendant an opportunity to defend himself.

(Filing no. 14 at CM/ECF p. 13.)

The lower court found, quoting Hamling v. United States, 418 U.S. 87 (1974), which quoted United States v. Carli, 105 U.S. 611, 612 (1882), that "It is generally sufficient that [a charging document] set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" If this Court will notice the aforementioned claim set forth by Appellant, it should find that Appellant had established that the words used in the information did not of themselves fully, directly, and expressly, without any ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. This is because Neb. Rev. Stat. § 28-306(1) on its own does not indicate words that would mean the same as the phrase "proximate cause of death", and the information only paraphrased subsection (1) of said statute while including the lesser included offenses set forth in subsection (3)(b) of said statute and while omitting the "proximate cause"

element also set forth in subsection (3)(b) of said statute.

II.

THE COURT BELOW OVERLOOKED OR MISAPPREHENDED APPELLANT'S ARGUMENT REGARDING THE PROXIMATE CAUSE ELEMENT BEING OMITTED FROM THE TRIAL COURT'S ADVISEMENT TO APPELLANT OF THE NATURE OF THE CRIME.

Regarding Claim Two of Appellant's habeas response brief, Appellant sought to gain relief from a claim regarding the trial court's advisement of the nature of the offense. (Filing no. 14 at CM/ECF p. 13-15.) In his motion for postconviction relief, appellant asserted two things in regard to this claim: (1) That the district court used the word "intentionally" where the word "unintentionally" should have been used, and (2) that the district court omitted the proximate cause element from its advisement of the nature of the charge. (Filing no. 11-12 at CM/ECF p. 214.) In his habeas, Appellant dropped the claim regarding the word "intentionally" and expanded on the court's omission of the proximate cause element. Appellant briefly stated that for the reasons that the proximate cause element should have been alleged within the information (due process) the trial court should have included said element in its advisement of the nature of the charge. However, the lower court seems to ignore this issue although it is plainly expressed in Appellant's brief. (Filing no. 14 at CM/ECF p. 13-15.) No where in his brief does Appellant argue against the trial court's alleged error regarding the word "intentionally." But the lower court dismissed this claim on the basis of the mix up with said word. (Filing no. 16-1 at CM/ECF p. 11-12.)

Furthermore, Appellant argued that a court must properly advise a defendant of the nature of an offense as a fundamental requirement of the Due Process

Clause. So, instead of using Strickland, Cronic should have been applied. In light of the evidence brought forth by appellant in state court, and given that the state court of Appeals failed to even address this issue its determination of the facts were unreasonable.

### III.

#### THE COURT BELOW OVERLOOKED OR MISAPPREHENDED APPELLANT'S ARGUMENT REGARDING WHETHER THE PROXIMATE CAUSE ELEMENT WAS ESTABLISHED IN THE FACTUAL BASIS.

In Claim Three of Appellant's habeas, the lower court asserted that the "federal constitutional requirements were met" when the trial court "found beyond a reasonable doubt that Barber understood the nature of the charge against him and that his plea was made freely, knowingly, intelligently, and voluntarily, and that there was a factual basis to support the plea." (Filing no. 16-1 at CM/ECF p. 13.) A factual basis supporting a guilty plea exists where there is sufficient evidence to allow the district court to be subjectively satisfied that the defendant committed the offense. See U.S. v Rea, 300 F.3d 952 (2002), see also U.S. v. Gamble, 327 F.3d 662 (2003), U.S. v. Cheney, 571 F.3d 764 (2009), and U.S. v. Johnson, 715 F.3d 1094 (2013).

The lower court also asserted that..."the record demonstrated an adequate factual basis for Barber's plea, including the causation element.... (Filing no. 16-1 at CM/ECF p. 13.) But contrary to this assertion, Appellant argued that the factual basis did not demonstrate that the proximate cause of the death of the victim was Appellant's driving under the influence of alcohol.

Appellant Claimed that the factual basis failed to establish that the proximate cause element as required by the charge existed beyond a reasonable

doubt. Appellant argued in his response brief essentially that because he was speeding so fast and the trial court believed the speed to be intentional, then given the meaning of proximate cause of death as set forth by the state supreme court as shown in appellant's response brief (Filing no. 14 at CM/ECF p. 9-10), no reasonable trier of fact should be able to conclude that the proximate cause of the victim's death was Appellant's driving under the influence as defined by the state supreme court and shown in Appellant's response brief. (Filing no. 14 at CM/ECF p. 10.) Given the meaning of proximate cause of death in conjunction with driving under the influence of alcohol, one's ability to operate a motor vehicle in a prudent and cautious manner must be so impaired by alcohol that the death of another was caused in order for the proximate cause of the death of another to be one's driving under the influence. (See State v. Back, 241 Neb. 301, 488 N.W.2d 26 (1992).)

So, if Appellant was speeding 98 mph on Saddle Creek and Poppleton Streets, which is a 35 mph zone, intentionally, than although his blood alcohol content was over the legal limit he was not driving under the influence for purposes of motor vehicle homicide. (Filing no. 14 at CM/ECF p. 10.) For, Appellant was able to drive his vehicle in a manner which would have not caused the accident, but he decided to drive in a manner which, according to the trial court, "was more than just bad judgment, was more than just a mistake." (Filing no. 11-13 at CM/ECF p. 24.)

Appellant argued that speeding is not an element of the crime of a class III felony motor vehicle homicide. (Filing no. 14 at CM/ECF p. 16.) If one is speeding or driving recklessly and thereby causes the death of another motor vehicle homicide is either a class I misdemeanor or a class III(a) felony. (see Neb.Rev.Stat. §28-306(2) & (3)(a).)

Furthermore, Appellant argued that Strickland v. Washington should not

have been applied to conclude this issue. Instead, U.S. v. Cronic should have been applied because, if there is an insufficient factual basis then one should not object and take the case to trial, instead, an acquittal must have been moved for by trial counsel. (Filing no. 14 at CM/ECF p. 17.) The U.S. Supreme Court in U.S. v. Rea, 300 F.3d 952 (2002) held that "When reviewing court determines that there is insufficient evidence to support a conviction, then it has decided as a matter of law that the case should not have been submitted to a jury, and that no jury could have properly returned a guilty verdict, as such the only just remedy is direction for judgment of acquittal." Thus, when the trial court believed in the case at hand that the evidence indicated that Appellant drove his car 98 mph on purpose and not as a result of impaired judgment or his impaired ability to operate his vehicle in a prudent and cautious manner due to alcohol consumption, and where the law requires that the death of another be caused as a result of the impaired ability to operate a motor vehicle in a prudent and cautious manner in order to establish guilt of the offense of a class III felony motor vehicle homicide. (See State v. Back, Supra, see also State v. Batts, 223 Neb. 776, 448 N.W.2d 136 (1989), Hoffman v. State, 162 Neb. 806, 77 N.W.2d 592 (1956), State v. William, 201 Neb. 84, 435 N.W.2d 174 (1989), State v. Sommers, 201 Neb. 909, 272 N.W.2d 367 (1978); and State v. Ring, 223 Neb. 720, 447 N.W.2d 908 (1989)), and where clearly but for the fact that Appellant was speeding 98 mph on said streets the death of the victim would not have occurred, the evidence was insufficient in that it admitted evidence contrary to a showing of guilt and, thus, no jury could have properly returned a guilty verdict; as such the only just remedy is direction for judgment of acquittal.

Submitted by:

RaySean D. Barber 78885

RaySean D. Barber