IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR GOMEZ, JR.,	)	
#1200302,	)	**CASE NO.: 76487**
Appellant,	)	**E-FILE**
	)	D.C. Case: C-16-316959-1
v.	)	Dept.: XXI
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

Appeal from a Judgement of Conviction
Eighth Judicial District Court, Clark County

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#1200302,	)	**CASE NO.: 76487**
Appellant,	)	**E-FILE**
v.	)	D.C. Case: C-16-316959-1
STATE OF NEVADA,	)	Dept.: XXI
	)	
Respondent.	)	
	)	

NRAP 26.1 DISCLOSURE

The undersigned counsel of record for OSCAR GOMEZ, JR., hereby certifies pursuant to NRAP 26.1(a) that there are no persons nor entities associated withy my law practice and that I am a sole practitioner. Furthermore, there are no persons nor entities that have any interest or financial interest in Law Office of Terrence M. Jackson. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 7th day of December, 2018.

Attorney of Record For Oscar Gomez, Jr.

//s// *Terrence M. Jackson*

TERRENCE M. JACKSON, ESQ.

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APPELLANT'S OPENING BRIEF

Appeal from a Judgment of Conviction

Eighth Judicial District Court, Clark County

NATURE OF THE ACTION

This is an Appeal from a Judgment of Conviction after a guilty plea in the Eighth Judicial District Court.

. . .

SPECIFICATION OF ERROR

1. The District Court erred by not finding Counsel rendered ineffective assistance of counsel under *Strickland* pre-plea.

2. The District Court erred by not finding Counsel was ineffective at sentencing.

3. The District Court erred at sentencing by not stating adequate reasons on the record for giving the Defendant a weapon enhancement pursuant to NRS 193.165(1).

4. The Defendant's sentence of life with parole eligibility after a minimum of ten years plus a consecutive 240 months with a minimum parole eligibility after 90 months was excessively harsh and disproportionate in violation of the Eighth Amendment.

5. The accumulation of error rendered Defendant's Judgment of Conviction and Sentence invalid.

SUMMARY OF THE ARGUMENT

The Defendant pled guilty to a serious felony charge without adequate and effective assistance of counsel pre-plea. Counsel for the Defendant spent only minimal time with Gomez, explaining to him his options, and discussing possible

defenses and making sure Gomez fully understood all his constitutional rights under the Sixth Amendment before Gomez pled guilty. This failure to adequately investigate and prepare pre-plea and to effectively counsel Gomez before he waived his fundamental Sixth Amendment rights was ineffective assistance of counsel. *See, LaFler v. Cooper,* 566 U.S. 156, 132 S.Ct. 1376 (2012). Counsel was also ineffective at the sentencing by not adequately investigating and preparing all necessary mitigating evidence. At this critical phase of the case, counsel's lack of diligence was ineffectiveness under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

The District Court committed reversible error at sentencing by failing to follow the dictates of NRS 193.165(1) which requires the District Court to state on the record at sentencing the factors the judge considered in determining the length of the penalty enhancement under NRS 193.165(1). *Mendoza-Lobos v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

Defendant submits that the aggregate sentence imposed of life plus 240 months was unduly harsh and disproportionate and violated the Eighth Amendment's prohibition against cruel and unusual punishment for the facts of this case. The accumulation of errors in this case violated the Defendant's right to a fair sentence and mandates reversal. *Mulder v. State,* 116 Nev. 1, 992 P.3d 845 (2000).

JURISDICTIONAL STATEMENT

Defendant/Appellant Oscar Gomez, Jr., claims jurisdiction pursuant to N.R.S. 177.015(3) after a Judgment of Conviction following a plea of guilty in Eighth Judicial District Court. The Defendant filed timely Notice of Appeal on July 18, 2018 within the thirty day time limit established by Nevada Rules of Appellate Procedure 4b. (A.A. 030-31)

ROUTING STATEMENT

This is a direct appeal following a Judgment of Conviction after a guilty plea. Pursuant to NRAP 17(b), this case should be assigned to the Court of Appeals.

LEGAL ISSUES PRESENTED FOR REVIEW

I. WHETHER DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND* PRE-PLEA WHICH RENDERED HIS PLEA OF GUILTY INVALID;

A. WHETHER IT IS FUNDAMENTAL THAT A GUILTY PLEA MUST BE THE PRODUCT OF A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF RIGHTS;

B. WHETHER DEFENDANT'S PLEA WAS NOT VOLUNTARY BECAUSE

OF THE INEFFECTIVE ASSISTANCE OF HIS COUNSEL. ANY PURPORTED 'WAIVER' OF DEFENDANT'S APPELLATE RIGHTS WAS ALSO INVALID BECAUSE IT WAS PART OF A CONTRACT OF ADHESION AND VOID FOR PUBLIC POLICY;

II. WHETHER THE DISTRICT COURT ERRED BY FAILING TO COMPLY WITH NRS 193.165(1) BY ENUMERATING ON THE RECORD THE SPECIFIC FACTORS WHICH THE JUDGE USED IN DETERMINING THE ENHANCEMENT TO THE SENTENCE;

III. WHETHER THE DEFENDANT'S SENTENCE OF LIFE IN PRISON PLUS A CONSECUTIVE SENTENCE OF 240 MONTHS FOR THE WEAPON ENHANCEMENT WAS A CRUEL AND UNUSUAL AND DISPROPORTIONATE SENTENCE UNDER THE EIGHTH AMENDMENT;

IV. WHETHER THE ACCUMULATION OF ERROR REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

STATEMENT OF THE CASE

A criminal complaint was filed on June 25, 2016, charging murder and accessory to murder. (A.A. 01-02) A preliminary hearing was held August 2, 2016.

(A.A. 05-019) Defendant was bound over from Justice Court on August 2, 2016. An Information was filed on August 3, 2016, charging first degree murder with a deadly weapon. (A.A. 03-04) Defendant was arraigned in District Court on August 4, 2016, and trial was initially set for October 10, 2016.

At calendar call on October 6, 2016, the jury trial was vacated and reset to March 13, 2017. The trial set for March 13, 2017 was vacated and reset to May 30, 2017. On May 19, 2017, Defendant filed a Motion to Suppress. The May 30, 2017 trial date was vacated and reset several more times. Until the calendar call on April 19, 2018, when the Defendant entered a Plea of Guilty pursuant to Plea Memo to second degree murder, (A.A. 022-27) (A.A. 062-76) sentencing occurred June 14, 2018. (A.A. 090-108)

Defendant was sentenced to a life sentence plus a consecutive 240 months for the weapon enhancement. (A.A. 090-108) On June 22, 2018, a Judgment of Conviction was filed. (A.A. 028-29) On July 18, 2018, Defendant filed a timely Notice of Appeal. (A.A. 030-31)

On November 15, 2018, Defendant filed Motion to Stay Appellate Proceedings and Remand to District Court to Withdraw Guilty Plea. (A.A. 109-113) The Court

entered an Order denying that Motion on November 26, 2018. (A.A. 114-15)

FACTUAL STATEMENT

The Defendant was charged by Information with the charge of first degree murder with a deadly weapon. (A.A. 03-04) The Information alleged that on or about June 24, 2016, the Defendant killed Shawn Manymules with the use of a deadly weapon by shooting him in the body in a wilful, deliberate and premeditated manner. (A.A. 03-04)

The Defendant, Oscar Gomez, Jr., was convicted by plea of guilty of the crime of second degree murder on April 19, 2018. (A.A. 062-76) He was sentenced to life imprisonment plus an additional 240 months consecutive for weapons enhancement for a total aggregate sentence of life plus 240 months. (A.A. 090-108) He will not be eligible for parole for at least 18 years.

The aggregate sentence Defendant received of life plus 240 months was greater than necessary to achieve the goals of sentencing. The facts demonstrate this was a case of mutual combat and the Defendant's sentence was so disproportionate as to shock the conscience and violate the Eighth Amendment ban on cruel and unusual punishments.

ARGUMENT

I. THE DEFENDANT'S PLEA OF GUILTY IS INVALID BECAUSE DEFENSE COUNSEL WAS INEFFECTIVE UNDER *STRICKLAND* FOR FAILING TO ADEQUATELY EXPLAIN THE FULL CONSEQUENCES OF THE PLEA OF GUILTY TO THE DEFENDANT.

A. IT IS FUNDAMENTAL THAT A GUILTY PLEA MUST BE THE PRODUCT OF A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF RIGHTS. *Johnson v. Zerbst,* 304 U.S. 458 (1938)

It is respectfully submitted that it is abundantly clear from the entire record Defendant did *not* enter a knowing, voluntary and intelligent plea of guilty. An evidentiary hearing would have established that Oscar Gomez, Jr., did not fully understand the consequences of his plea of guilty nor did he understand fully his right to trial by jury, nor did he fully understand in the waivers contained in the plea memo. Mr. Gomez did not have adequate time to consult with Ms. Levy. This is evidenced by the transcript which shows he was unprepared at the plea hearing. (A.A. 066-68), (A.A. 073-75) Most troubling was Gomez's failure to acknowledge his actions were unintentional. (A.A. 074-75)

The record reflects he pled guilty under pressure as the offer was going to expire. (A.A. 063) The plea was likely a hasty, ill advised and poorly understood plea and the court erred by not engaging in a more adequate canvas with the Defendant to make sure he fully understood his rights. This plea was therefore not the product of a rational, intelligent and informed decision by the Defendant and as such it was not valid.

B. NOT ONLY WAS DEFENDANT'S PLEA INVOLUNTARY BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE PURPORTED 'WAIVER' OF DEFENDANT'S APPELLATE RIGHTS IN THE WRITTEN PLEA MEMORANDUM WAS ALSO INVALID BECAUSE IT WAS PART OF A CONTRACT OF ADHESION AND VOID FOR PUBLIC POLICY.

Pursuant to the plea memorandum when the Defendant accepted the negotiation to plead guilty in this case, the Defendant signed a 'waiver' of appellate rights. The waiver read:

> 6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS

> 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34. (Emphasis added)

. . .

It should be noted Defendant was never specifically questioned by the court about this waiver clause in the plea memo. (A.A. 062-76) The plea canvas did not address the appellate waiver of rights nor did the Defendant initial the specific waiver clause. (A.A. 022-27).

It is respectfully submitted that any attempt to enforce this purported waiver of appellate rights would be inherently unfair because this waiver, attached to the plea memorandum, was a one-sided contract of adhesion. In *United States v. Raynor,* 989 F.Supp. 43 (D. D. C. 1997), the District Court noted:

> "The waiver sought by the government in this case contrasts with every other waiver provision typically included in a plea agreement. Every other right that normally is relinquished is a known, well-defined right,

> and the *quid pro quo* is understandable. For example, when a defendant gives up the right to trial in favor of a plea, he or she knows that there will no longer be twelve jurors sitting in judgment, that there will no longer be live testimony and the right to confront witnesses, and that there will be no speedy and public trial. The defendant also understands that he or she is giving up the privilege against self-incrimination because the defendant must acknowledge guilt before the plea can be accepted. Moreover, when a defendant waives the right to a trial by jury in exchange for a plea to fewer counts, or a lesser offense, the defendant not only gives up any advantages that may come with a jury trial but also is relieved of the uncertainties that may result from exercising the right to trial." Id. 44

. . .

The Court in *Raynor* continued, citing *United States v. Johnson,* 992 F.Supp.2d 437 (D. D. C. 1997):

> ". . . [T]he waiver could only be regarded as knowing if it was assumed that the appeal rights need not stand regardless of the grossness of the error of the sentencing court or the court's intent and purpose." Id. 439, Id. 47 (Emphasis added)

. . .

Public policy concerns to protect defendants rights to appeal also require that any waiver be strictly construed and meet stringent criteria. *See, United States v. Teeter,* 257 F.3d 14 (1st Cir.2001); and *United States v. Black,* 201 F.3d 1296 (10th Cir. 2000).

For these reasons Defendant submits he has the right to appeal his conviction and sentence which violate the United States Constitution. To deny him that right would create a "miscarriage of justice." *United States v. Andis,* 333 F.3d 886 (8th Cir.2003), *see also, United States v. Hernandez,* 242 F.3d 110 (2d Cir.2001)

II. THE DISTRICT COURT ERRED BY FAILING TO COMPLY WITH NRS 193.165(1) BY ENUMERATING ON THE RECORD THE SPECIFIC FACTORS WHICH THE JUDGE USED IN DETERMINING THE ENHANCEMENT TO THE SENTENCE.

The District Court never gave the specific reasons for the Defendant's sentence enhancement that complied with NRS 193.165(1). The court not only gave an exceedingly harsh sentence in this case, but the court's failure to state its rationale for the sentencing enhancement was error. The court ignored the command of amended statute NRS 193.165(1) which states:

> **NRS 193.165(1)** . . . persons using a deadly weapon in the commission of a crime shall, in addition to the punishment for that crime, be sentenced to a term in prison between 1 and 20 years. In determining the length of the additional penalty, the district court must consider: "(a) [t]he facts and circumstances of the crime; (b) [t]he criminal history of the person; (c) [t]he impact of the crime on any victim; (d) [a]ny mitigating factors presented by the person; and (e) [a]ny other relevant information." NRS 193.165(1).
>
> "The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed." *Id*. (Emphasis added)
>
> . . .

See, Mendoza-Lobos v. State, 125 Nev. 634, 218 P.3d 501 (2009).

A review of the sentencing transcript shows the district judge did not state adequately any of the factors NRS 193.165(1) requires. (A.A. 090-108) The court's violation of NRS 193.165(1) in this case left a less than adequate record for the appellate court to review the sentencing. The Nevada Supreme Court has clearly emphasized the importance of the district court providing an adequate record for appeal. *See, Mendoza-Lobos v. State*, *supra,* which stated:

> "However, in this instance, we elect to abide by the legislative mandate contained in NRS 193.165(1) because it serves the laudable goal of ensuring that there is a considered relationship between the circumstances in which the weapon was used - including the defendant's history - and the length of the enhancement sentence, as opposed to automatically doubling the sentence for the underlying offence, and facilitates review of the enhancement. *Id*. 641, 642 (Emphasis added).

. . .

This error was particularly significant in this case because of the lengthy enhancement the Defendant received of 240 months. (A.A. 028-29) For these reasons the sentence must be reversed.

III. DEFENDANT'S SENTENCE OF LIFE IN PRISON PLUS A CONSECUTIVE SENTENCE OF 240 MONTHS FOR THE WEAPON ENHANCEMENT WAS A CRUEL AND UNUSUAL AND DISPROPORTIONATE SENTENCE UNDER THE EIGHTH AMENDMENT.

Defendant Oscar Gomez, Jr. received an aggregate sentence of life with a parole eligibility of ten years plus a consecutive enhancement of 240 months with parole eligibility in 96 months. (A.A. 028-29) Therefore, absent any pardon, or appeal

reducing his sentence, Defendant Oscar Gomez, Jr. will be imprisoned for a minimum of 18 years and most likely will serve over 20 years. Under all the facts and circumstances of this case, Defendant submits that this sentence was unnecessarily long and unnecessarily harsh for a second degree murder charge because it removed almost any meaningful possibility of rehabilitation. The lengthy sentence gave no consideration to any mitigating circumstances in the Defendant's background or in meaningful consideration of the particular facts of the case which involved mutual combat.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). In analyzing whether a sentence is cruel and unusual punishment, a court first makes "a threshold determination that the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91(1983). If the sentence is grossly disproportionate, the court then considers "the sentences imposed on other criminals in the same jurisdiction . . . and the sentences imposed for commission of

the same crime in other jurisdictions." *Id*. at 291.

Defendant recognizes that in general a sentence imposed within statutory limits is not considered either excessive or cruel and unusual. *United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). However Defendant submits even a statutorily-condoned punishment may sometimes, in rare cases, exceed the limits of the Constitution. *See, Weems, supra* . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id*. 382 (Emphasis added)

Defendant submits the punishment he received in this case far exceeded the length of a reasonable sentence for a second degree murder conviction. As the sentence was grossly harsh and excessive, it was unconstitutional in violation of the Eighth Amendment's cruel and unusual punishment clause and should therefore be reversed.

VI. THE ACCUMULATION OF ERROR REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

The Defendant was charged with the serious felony charge of murder with a deadly weapon. Every error made by the Court in this case seriously prejudiced the

Defendant and each error alone may have been sufficient to require reversal.

Defendant submits when the errors are viewed cumulatively, the case for reversal is overwhelming. *Daniel v. State*, 119 Nev. 498, *see also, Sipsas v. State*, 102 Nev. at 125, 216 P.2d at 235, stating: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial." *See also, Cooper v. Fitzharris,* 586 F.2d 1325, 1333 (9th Cir.1978) (*En Banc*), cert. den., 440 U.S. 970, stating: "Prejudice may result from the cumulative impact of multiple deficiencies." *See, Harris by and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir.1995).

The multiple errors of the Court in this case when cumulated together require reversal. A quantitative analysis makes that clear. *See, Van Cleave, Rachel, When is Error Not an Error?* Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

Relevant factors to consider in evaluating a claim of cumulative error are: [1] whether the issue of guilty is close, [2] the quantity and character of the error, and [3] the gravity of the crime charged. *Mulder v. State,* 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000), citing *Leonard v. State,* 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). *See* also, *Big Pond v. State,* 101 Nev. 1, 692 P.2d 1228 (1985); *Daniel v.*

State, 119 Nev. 498, 78 P.3d 890 (2003). (Emphasis added)

The cumulative errors of the Court in this case include whether the District Court coyly ignored the ineffective assistance of defense counsel which led to an invalid plea of guilty.

Whether the District Court erred at sentencing by not stating an adequate reason on the record for its decision to give the Defendant a 240 month weapon enhancement pursuant to NRS 193.165(1). Whether the District Court erred at sentencing by giving the Defendant an excessively harsh and disproportionately long aggregate sentence of imprisonment under the Eighth Amendment.

These were all weighty errors that under the authority of *Mulder* should be cumulative.

CONCLUSION

Wherefore, for the above stated reasons and all prior pleadings, Defendant respectfully submits his Judgment of Conviction be reversed and his case be remanded for new sentencing or for such further relief as this Honorable Court deems necessary.

DATED this 7th day of December, 2018.

Respectfully submitted,
//s// *Terrence M. Jackson*
Counsel for Appellant, *Oscar Gomez, Jr.*

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 3,145 words, which is within the word limit, and this brief is within the 30 page limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of December, 2018.

Respectfully submitted,
/s/ Terrence M. Jackson
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Counsel for Appellant, *Oscar Gomez, Jr.*

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 7th day of December, 2018, I served a copy of the foregoing: Appellant's, Opening Brief as well as Volume I of the Appendix, as follows:

[X] Via Electronic Service to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Petitioner/Appellant as follows:

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