IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR GOMEZ, JR.,	)	
#1200302,	)	
Appellant,	)	**CASE NO.: 76487**
	)	
v.	)	**E-FILE**
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

REPLY TO RESPONDENT'S ANSWERING BRIEF

Appeal from a Judgment of Conviction (Guilty Plea)
Eighth Judicial District Court, Clark County

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STATEMENT OF ISSUES

I. WHETHER APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE PROPERLY RAISED ON DIRECT APPEAL.

II. WHETHER THE DEFENDANT'S GUILTY PLEA WAS INVALID BECAUSE IT WAS NOT A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF SIXTH AMENDMENT RIGHTS BASED ON THE ADVICE OF COMPETENT COUNSEL.

III. WHETHER THE FORM WAIVER OF APPELLATE RIGHTS ATTACHED TO THE GUILTY PLEA AGREEMENT WAS VOID FOR PUBLIC POLICY REASONS.

IV. WHETHER THE DISTRICT COURT'S FAILURE TO STATE THE FACTORS OF NRS 193.105(1), WHICH STATE THE REASONS FOR THE SENTENCING ENHANCEMENT, WAS PLAIN ERROR REQUIRING REVERSAL.

V. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED THE DEFENDANT TO AN UNNECESSARILY HARSH SENTENCE IN VIOLATION OF THE EIGHTH AMENDMENT.

ARGUMENT

I. THE COURT MAY CONSIDER APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE IN THIS CASE AS THEY GO TO THE VALIDITY OF THE CONVICTION.

Defendant submits counsel's ineffectiveness in this case led directly to his invalid guilty plea and negated his conviction. The State in Respondent's Answering Brief cites *Corbin v. State,* 111 Nev. 378, 381, 892 P.2d 580 (1995), *Pellegrini v. State,* 117 Nev. 860, 882-83, 34 P.3d 5129, 534 (2001), and *Franklin v. State,* 110

Nev. 750, 752, 877 P.2d 1058, 1059 (1994), for the proposition that claims of ineffective assistance must first be raised in Petition for Post Conviction relief. (RAB p. 5)

The Supreme Court however has merely said that a more appropriate vehicle for presenting a claim of ineffective assistance of counsel is a Post Conviction Petition which allows a full evidentiary hearing. *Gibbons v. State,* 97 Nev. 520 at 523 (1984). In *Pellegrini v. State, supra,* the Court actually recognized there were some cases in which an ineffective assistance claim could be brought on direct appeal. The Court there in dicta stated:

> "Following these determinations, we have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary." (*Id*. 883) (Emphasis added)

. . .

While it is clear that the Supreme Court has stated a strong preference for proceeding by Post Conviction Petition relief in ineffective assistance of counsel cases, it has not totally barred direct appeals on that issue. There was sufficient evidence on the record in this case to establish ineffectiveness of counsel. While an evidentiary hearing during a post conviction procedure may have been preferable, it

was not necessary to establish ineffective assistance in this case. The Court therefore should properly consider the merits of this claim on appeal.

II. APPELLANT'S PLEA OF GUILTY WAS INVALID BECAUSE IT WAS NOT A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF DEFENDANT'S SIXTH AMENDMENT RIGHT TO TRIAL BASED ON THE ADVICE OF COMPETENT COUNSEL.

Appellant reasserts all of his prior pleadings and argues that he has met his burden to show his plea was invalid. Defendant has established that his plea was not knowing, voluntary or intelligently entered. (A.A. 66-68), (A.A. 73-75), (A.A. 74-75) Therefore, he should be allowed the drastic remedy of overturning his conviction and setting aside the invalid plea previously entered.

Defendant submits the plea transcript alone shows that his counsel was "ineffective in adequately preparing him to adequately answer the important questions to show his plea was knowing, intelligent and voluntary."

NRS 34.810, which requires the dismissal of most Post Conviction Petitions made after a guilty plea, makes a clear exception when the Defendant can establish his plea was involuntary or unknowingly entered or made without effective assistance of counsel. NRS 34.810(1)(a)

To gain the withdrawal of his plea, NRS 34.810 requires that the Defendant must also demonstrate both that he has been prejudiced and the State of Nevada will not be prejudiced by a retrial (unless the Defendant/Petitioner can show a fundamental miscarriage of justice.) The State in this case has not alleged a retrial is impossible, or even difficult. Therefore, it is respectfully submitted that Defendant can establish he meets the conditions of NRS 34.800 and NRS 34.810 and his plea was invalid and his conviction must be reversed and his case remanded for a new trial.

III. THE FORM WAIVER OF APPEAL RIGHTS ATTACHED TO THE GUILTY PLEA MEMO WAS VOID FOR PUBLIC POLICY REASONS.

The Court has a duty to protect a Defendant's constitutional right to trial as well as his complementary right to appeal any improper conviction.

The State argued because some Courts have upheld similar form appellate waivers, *see United States v. Hare,* 269 F.3d 859 (7th Cir. 2001); *United States v. McClure,* 338 F.3d 848 (8th Cir.2003); *United States v. Difeaux,* 163 F.3d 725 (2nd Cir.1998), this Court should also uphold the form waiver of appeal in this case. (RAB pg. 11)

Defendant urges the Court to not follow the authority of those cases but instead

hold that the Defendant had a right to direct appeal in this case. Defendant submits this is true especially because during the District Court's plea canvas, the Court never even mentioned the effect of the form written waiver of appeal (A.A. 062-76). This Court should not therefore presume that the Defendant "knowingly" waived his appellate rights. When there are significant legal issues that should be resolved, public policy should favor granting appeal on contested legal issues unless it is unmistakably clear the effect of any appellate waiver was fully understood.

Defendant submits the Court should consider the case of *Berger v. United States,* 295 U.S. 78 (1935) where the United States Supreme Court noted that the prosecutor's role transcends that of an adversary, saying that he:

> ". . . is the representative not of an ordinary party to a controversy but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case <u>but that justice shall be done</u>." <u>*Id*</u>. 85 (Emphasis added)

. . .

The government does not need to play hardball in every case, raising every minor technicality that may be available. The duty of the government is instead to seek justice. Justice in this case requires that Oscar Gomez, Jr., be given the right to raise the legitimate issues of ineffective assistance of counsel which led to an invalid

guilty plea and other issues regarding his sentencing which led to an overly harsh sentence on direct appeal. To deny him these rights on appeal, merely because he signed a form waiver of appeal attached to his plea memo, would be a miscarriage of justice.

Defendant strongly urges that for the public policy reasons stated in this appeal, the appeal should be considered on the merits.

IV. THE DISTRICT COURT'S FAILURE TO STATE ITS REASONS FOR SENTENCING ENHANCEMENT AS REQUIRED BY NRS 193.105(1) WAS PREJUDICIAL ERROR THAT REQUIRES REVERSAL OF THE SENTENCE.

The purpose of NRS 193.105(1) is clear. It was obviously written to protect defendants from receiving excessive or disproportionate sentences that were not justified by the facts. If the legislature believed that every sentence should be enhanced to the maximum every time a weapon was used, the legislature could have expressly stated that was the appropriate punishment. Instead, the legislature required in each case the District Court to use its discretion in deciding whether a case merited a sentencing enhancement for weapons use. NRS 193.105(1) states that the Court must state the factors upon which the Court relied to determine if an enhancement

was warranted. The legislature also clearly wanted the District Court to state its reason for any enhancement so there would be an adequate record on appeal so an appellate court could adequately review any sentence where that discretion was invoked by the District Court.

Since the District Court did not follow the statute here, it must be presumed the Defendant was prejudiced. Either the Court could not justify the enhancement, or the Court did not understand its duty under the law. Either way the likelihood of prejudice is high and the sentence imposed should be reversed.

V. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED THE DEFENDANT.

The Defendant was sentenced to life imprisonment plus a consecutive 240 months for the weapon enhancement. The State claims since this was within statutory guidelines it was not an abuse of discretion, *see Randell v. State,* 109 Nev. 5 (1993), or a cruel and unusual punishment. *See also, Deveroux v. State,* 96 Nev. 388 (1980) and *Glegola v. State,*110 Nev. 344 (1994) (RAB p. 18).

Defendant respectfully submits his sentence of life plus 240 months was nevertheless excessively harsh, in violation of the Eighth Amendment's cruel and unusual punishment clause and it was disproportionate. Even though the Defendant

pled guilty, his sentence was not reduced at all. He received the maximum possible sentence for the crimes to which he pled guilty. The Court stated no reason for giving the maximum consecutive 240 month enhancement for use of a weapon.

Defendant submits even though he was convicted of serious charges, there was nothing to justify the maximum sentences he received on each count. (A.A. p. 97) Probation and Parole actually recommended he receive less that the maximum sentence based upon his minimal prior arrest history. (A.A. p. 91) Defendant respectfully submits his sentence was so disproportionate and excessive the Court should exercise its supervisory power and the sentence should be reversed for an abuse of discretion.

CONCLUSION

Wherefore, based on all the arguments in the prior pleadings as well as the arguments in this Reply Brief, the Defendant respectfully requests this Honorable Court reverse his conviction and or grant such further relief as the Court finds just.

DATED this 18th day of January, 2019.

Respectfully submitted,

//s// *Terrence M. Jackson*

Terrence M. Jackson, Esquire

Counsel for Appellant, *Oscar Gomez, Jr.*

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply to Respondent's Answering 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 1,586 words, which is within the word limit, and the brief is within the 15 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 18th day of January, 2019.

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 18th day of January, 2019, I served a copy of the foregoing: Appellant's Reply to Respondent's Answering Brief 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 Attorney General of Nevada and Petitioner/Appellant as follows:

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