IN THE SUPREME COURT OF THE STATE OF NEVADA

TONEY A. WHITE, III,	)	
#1214172,	)	
Appellant,	)	**CASE NO.: 78483**
	)	D.C. Case: C-16-313216-2
v.	)	Dept.: **XII**
	)	
STATE OF NEVADA,	)	**E-FILE**
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

Appeal from a Denial of Post Conviction Relief
Eighth Judicial District Court, Clark County

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Appellant,	)	**E-FILED**
v.	)	D.C. Case: C-16-313216-2
STATE OF NEVADA,	)	Dept.: **XII**
	)	
Respondent.	)	
	)	

NRAP 26.1 DISCLOSURE

The undersigned counsel of record for TONEY A. WHITE, 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 19th day of September, 2019.

Attorney of Record For Toney A. White, III

//s// *Terrence M. Jackson*

TERRENCE M. JACKSON, ESQ.

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APPELLANT'S OPENING BRIEF

Appeal from a Denial of Post Conviction Relief

Eighth Judicial District Court, Clark County

NATURE OF THE ACTION

This is an Appeal from the Denial of Post Conviction Relief in District Court.

. . .

SPECIFICATION OF ERROR

1. The District Court erred in denying Defendant his constitutional right to represent himself by refusing to even canvass him on his written request.

2. The District Court erred in denying the Defendant's Motion to Withdraw his Plea of Guilty because counsel failed to adequately investigate and prepare preplea and the resulting plea was unknowing and involuntary.

3. The District Court erred in denying Defendant's Motion to Withdraw his Plea based upon the Defendant's mental status.

4. The District Court erred because it did not find that the Defendant's guilty plea was invalid because it was not supported by sufficient facts which would have proved beyond a reasonable doubt all necessary elements of the offense.

5. The District Court erred by not finding Defendant received an excessively harsh and disproportionate sentence in violation of the Eighth Amendment.

6. The District Court erred by not finding the accumulation of error denied Defendant his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and that requires reversal of his conviction and sentence.

SUMMARY OF THE ARGUMENT

Toney White expressed dissatisfaction with his Court appointed counsel. He filed a motion requesting withdrawal of his guilty plea and at that time he also requested that alternative counsel be appointed for him or alternatively to represent himself *pro per*. (A.A. 52-62) Although the request for alternative counsel was granted, because the Court never even addressed Defendant's written request to represent himself, the Court erred.

The Court while granting Defendant another counsel, never even canvassed Defendant on his request to represent himself under *Faretta v. California,* 423 U.S. 806 (1975). At the February 6, 2018 hearing the Court totally ignored the Defendant's prior request for self representation. (A.A. 657-663) This was error. *People v. Bigelow,* 691 P.2d 994 (1984).

A long line of cases support the absolute right of a defendant to represent himself absent very specific exceptions. None of those exceptions applied in this case. The denial of self representation rights is a structural error requiring reversal. *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006).

The Defendant's resulting guilty plea by an ineffective counsel, was not a

knowing, voluntary and intelligent plea. His counsel did not properly prepare Defendant for the plea, nor did counsel adequately prepare, or investigate, the facts before the plea. Defendant submits there was also a substantial likelihood that Defendant's waiver of constitutional rights was not valid because his mental status was likely affected by recent changes in his medication dosages which had been altered just before his trial started. (A.A. 5, 14, 15)

Finally, the Defendant submits the plea was invalid because the State could not have proved the elements of the offenses of kidnapping beyond a reasonable doubt under *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979) and *Langford v. State,* 95 Nev.631, 600 P.2d 231(1979). Therefore there was insufficient evidence of guilt to support the plea of guilt to the kidnapping charge in Counts 3 and 4.

The sentence of twenty years to life was excessively harsh and disproportionate in violation of the Eighth Amendment's cruel and unusual punishment clause. The case of *Solem v. Helm,* 463 U.S. 277 (1983) requires a court at sentencing to carefully balance the gravity of the offense with the harshness of the penalty. The District Court in this case did not however do the weighty balancing the Supreme Court requires in *Solem v. Helm*.

The Supreme Court in *Solem v. Helm* recognized that it is incumbent on a judge to carefully weigh sentences imposed upon other similarly situated defendants so the judge can then determine if a sentence may be too harsh or is disproportionate. A weighing of all the factors as required by an Eighth Amendment proportionality analysis strongly suggests that Defendant's lengthy sentence in this case was unduly harsh and should therefore be reduced.

While each of these errors alone should result in the reversal of the conviction or sentence, it is respectfully submitted that the totality or cumulation of errors in this case requires reversal. This is especially true in the instant offenses because of the seriousness of the offense. *Mulder v. State,* 116 Nev. 1, 992 P.2d 845 (2000)

JURISDICTIONAL STATEMENT

Defendant/Appellant claims jurisdiction pursuant to NRS 177.015(3). This is an appeal from the denial of a timely filed Writ of Habeas Corpus for Post-Conviction Relief. The Defendant filed a timely Notice of Appeal on March 28, 2019, within the thirty (30) day time limit established by Nevada Rules of Appellant Procedure 4(b). (A.A. 116)

Defendant requested stay of appellate proceedings (A.A. 548-617) but that request

was denied August 22, 2019. (A.A. 618) Defendant filed a Motion for Certification and Request for Remand on August 30, 2019, (A.A. 619-623) and awaits the District Court decision on that Motion. Defendant, pursuant to NRAP 12, has requested to stay appellate proceedings so that the results of the second Motion to Withdraw Plea could be incorporated into this Appeal. Such a stay is necessary so counsel can fully raise the "mental status" issue concerning the validity of his plea. (See Issue III)

ROUTING STATEMENT

This is a direct appeal of the denial of a post-conviction Petition for Writ of Habeas Corpus that is a class A felony. Pursuant to NRAP 17(b)(1) it should be retained by the Nevada Supreme Court.

LEGAL ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN DENYING DEFENDANT HIS CONSTITUTIONAL RIGHT TO SELF REPRESENTATION UNDER *FARETTA* BY FAILING TO EVEN CANVASS HIM ON HIS WRITTEN REQUEST FOR SELF-REPRESENTATION.

II. WHETHER THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S REQUEST TO WITHDRAW HIS PLEA OF GUILTY

BECAUSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE PREPLEA RESULTING IN AN UNKNOWING PLEA.

III. WHETHER THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S PLEA BASED UPON HIS MENTAL STATUS.

IV. WHETHER DEFENDANT'S PLEA OF GUILTY WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE OF GUILT UNDER *JACKSON v. VIRGINIA* OR *IN RE WINSHIP*.

V. WHETHER DEFENDANT RECEIVED AN EXCESSIVELY HARSH AGGREGATE SENTENCE OF LIFE WITH A MINIMUM PAROLE ELIGIBILITY OF TWENTY YEARS. THIS VIOLATED THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

VI. WHETHER THE ACCUMULATION OF ERRORS REQUIRES REVERSAL OF THE DEFENDANT'S CONVICTION.

STATEMENT OF THE CASE

Defendant was indicted on March 9, 2016. (A.A. a-f) He was initially arraigned and entered a not guilty plea on March 17, 2016. On May 18, 2016, Defendant filed a Motion to Recuse Counsel and Appoint Alternative Counsel or alternatively to

represent himself. (A.A. 52-62) On December 28, 2016, Defendant again refiled a Motion to Remove Counsel and Proceed in *Pro Per.*

On October 19, 2017, Defendant entered a plea of guilty. (A.A. 63-75) On January 9, 2018, the Defendant filed a Motion to Withdraw Plea of Guilt and he also moved for appointment of new counsel or to represent himself *pro per*. (A.A. 52-62) The Court however never canvassed him concerning his *pro per* representation request when the Court granted Defendant's request for new counsel on February 6, 2018. (A.A. 657-663)

After many hearings, (A.A. 668-666), (A.A. 667-669), (A.A. 670-675), (A.A. 676-686), the Court had granted the Defendant withdrawal of his first guilty plea (A.A. 688) and reset the trial which then began February 19, 2019. (A.A. 133) On February 21, 2019, two days after it started, the Defendant pled guilty again. (A.A. 486-509) At that time the Defendant pled guilty to all charges without any negotiations or reductions in the charges. (A.A. 490) Defendant was sentenced on March 19, 2019, to an aggregate sentence of life with a minimum parole eligibility of twenty years. (A.A. 131-132)

The Judgment of Conviction was filed March 27, 2019. (A.A. 113-115) On

March 28, 2019, Defendant filed Notice of Appeal *pro per*. (A.A. 116) On July 26, 2019, new counsel, having been appointed on May 9, 2019. (A.A. 120) Defendant through counsel filed a second Motion to Withdraw Guilty Plea Requesting Hearing with Exhibits A, B and C. On July 26, 2019, (A.A. 513-547) Defendant through counsel, filed a Motion to Stay Appellate Proceedings with Exhibits. (A.A. 548-617) That Order was denied on August 22, 2019. (A.A. 618) The Defendant filed a Motion for Certification and Request for Remand on August 30, 2019. (A.A. 619-623)

This request was calendared for September 24, 2019, and is pending at the time this Opening Brief was filed on September 17, 2019. Appellant urges the Court to be able to file a supplement to this brief, incorporating the decision of the District Court on Motion to Withdraw Guilty Plea being heard September 24, 2019.

FACTUAL STATEMENT

The Defendant entered an invalid plea of guilty after he had initially pled guilty and had his plea withdrawn. This second plea of guilty was invalid because of his counsel's errors in failing to adequately investigate and prepare and because of the Defendant's mental status at the time he pled guilty.

The Court erred in denying the Defendant his constitutional right to self

representation by failing to even canvass him on this right, even after Defendant had requested to represent himself by written Motion. (A.A. 657-663)

The plea of guilty was also inherently flawed because there was an insufficient showing on the record of adequate facts to establish the elements of first degree kidnapping.

Defendant received ineffective assistance of counsel at sentencing and received twenty years to life which was excessively harsh and disproportionate under the Eighth Amendment. (A.A. 131, 32)

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF UNDER THE *FARETTA* DECISION WITHOUT CONDUCTING A FULL CANVASS OF THE DEFENDANT.

The Defendant had respectfully requested that he be allowed to represent himself. (A.A. 52-62) This request was made in a written Motion by the Defendant, which asserted his fundamental Sixth Amendment right to self representation. That request was however denied by the Court when it simply ignored the Defendant's

request for *pro per* representation at the evidentiary hearing on February 6, 2018. (A.A. 657-663)

This refusal by the District Court to even canvass the Defendant on his request for self representation was reversible error. The case law is almost unanimous that a defendant has an absolute right to represent himself in a criminal proceeding absent some unusual exceptions. *Jackson v. Ylst,* 921 F.2d 882 (9th Cir.1990); *People v. Phillips,* 169 C.A. 3rd 632 (1985). *See, People v. Morgan,* 161 Cal.Rptr. 101 C.A. 3rd, 523 (1980), holding denial proper when motion untimely. *See also, People v. Hill,* 150 Cal.Rptr. 628 87 C.A. 3rd 125 (1978). The right to self representation may also be denied if the defendant does not have the mental capacity to make a knowing and voluntary waiver or if the defendant is disruptive in court*, People v. Manson,* 139 Cal. Rptr. 275, 71 C.A. 3rd 1 (1977). Clearly, none of these exceptions to *Faretta* applied in this case and the denial of self representation was therefore reversible error.

Merely appointing another counsel, as the Court did, without first canvassing the Defendant on his *Faretta* rights was error. *Faretta* notes: . . . "forcing a lawyer on an unwilling defendant is contrary to his basic right to defend himself <u>if he truly wants to do so</u>." <u>*Id*</u>. 317 (Emphasis added) *Faretta* also recognized the right to

counsel is 'personal' stating . . . "The Sixth Amendment does not provide merely that a defense shall be made for the accused, it grants the accused personally not counsel. *Id*. 319 (Emphasis added)

It is important to note that a defendant need not show actual prejudice to establish a *Faretta* violation, such an error is structural error, not subject to harmless error review. *See, McKaskle,* 465 U.S. at 177 n.8 (harmless error analysis is inapplicable to deprivation of the self representation right, because "[the right is either respected or denied; it cannot be harmless]," *United States v. Gonzalez-Lopez,* 548 U.S. 140, 150 (2006) (choice of counsel is structural); *see also McCoy v. Louisiana*, 584 U.S. ___ (2018).

The facts are undisputed and the Court must therefore reverse the conviction of the Defendant. *United States v. Smith,* 780 F.2d 810 (9th Cir.1986)

II. THE TRIAL COURT ERRED BY NOT FINDING COUNSEL HAD FAILED TO ADEQUATELY INVESTIGATE AND PREPARE PRE-PLEA.

The American Bar Association (ABA) Standards on the Prosecution and Defense function emphasizes the crucial importance of investigation by criminal

defense attorneys for their clients. *See,* ABA Standards 4.1 states *inter alia*:

> **4.1 Duty to Investigate.**
>
> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include effort to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty. (Emphasis added)

. . .

The two-part test applicable for a claim of ineffectiveness of counsel is that set forth in *Strickland v Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> First, the defendant must show counsel's *performance was deficient*. . . . Second, counsel must show that the deficient performance *prejudiced* the defense. . . .
>
> Concerning the first requirement, the Supreme Court has explained that the accused "must show that counsel's representation fell below an objective standard of reasonableness." *Id*. at 688. The Court has also explained that, in meeting the second requirement, the accused can

> establish prejudice by showing that the attorney's deficient performance "actually had an adverse effect on the defense," that is, that the attorney's performance was sufficiently poor that it "undermines confidence in the outcome." Id. at 693-94.

In this case, counsel failed by not being aware of his client's extensive medical history of mental health problems. It appears counsel was not aware that Defendant had been recently removed from his anti-psychotic medicines. Counsel apparently did no exploration of a mental health defense. He was not ready at the plea hearing.

The United States Supreme Court in *Strickland* noted that:

> . . . [j]udicial scrutiny of counsel performance must be highly deferential, however, counsel must at a minimum conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Strickland, Id*. 691, 104 S.Ct. at 2066. (Emphasis added)

. . .

Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in *Sanborn v. State,* 107 Nev. 399, 812 P.2d 1279 (1991) stated:

> To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, Sanborn must demonstrate that trial counsel's performance fell below an objective standard or reasonableness and that

> counsel's deficiencies were so severe that they rendered the jury's verdict unreliable. *See Strickland v Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and *Strickland*, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness. Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

. . .

Although it cannot be certain what further investigation would have yielded, performing no investigation in such a serious case cannot be justified. Here, as in *Sanborn,* Defendant submits the evidentiary hearing showed counsel could have developed strong evidence to show the Defendant was not guilty of all the offenses charged because he may not have had sufficient criminal intent to commit the crimes charged.

In *United States v. Gray,* 878 U.S. 702 (3rd Cir.1989), the Court found counsel ineffective for failure to adequately investigate, stating:

> "Ineffective assistance is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he had not yet obtained the facts on which such a decision could be made." *See Strickland,* 466 U.S. at 690-91, 104 S.Ct. at 2065-67; *see also Debango,* 780 F.2d at 85 ("the failure to investigate potentially corroborating witnesses . . . can hardly be considered a tactical decision"); *Sullivan,* 819 F.2d at 1389; *Nealy,* 764 F.2d at 1178; *Crisp,* 743 F.2d at 584.
>
> "Such is the situation presented in this case. Counsel offered no strategic justification for his failure to make any effort to investigate the case, and indeed he could have offered no such rationale. As he admitted, he did not go to the scene of the incident to interview potential witnesses, even though, as the police officers testified, there were as many as 25 witnesses including many persons who would have been easily located, such as the bartender and people who came out of their houses to observe the disturbance." *Id*. 711 *See also, United States v. Burrows,* 872 F.2d 915, 918 (9th Cir.1989) and *Deutscher v. Whitney,* 884 F.2d 1152, 1160 (9th Cir.1989), (quoting *Spano v. New York,* 360 U.S.

315, 326 (1959)) (Douglas, J., concurring). (Emphasis added)

Because of counsel's inadequacy under *Strickland,* in both investigating and in counseling the Defendant before the guilty plea, the guilty plea should have been found invalid.

III. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT HIS MOTION TO WITHDRAW HIS GUILTY PLEA BASED UPON INVOLUNTARINESS BASED UPON HIS MENTAL STATUS.

Substantial evidence in the record reflects Defendant had a long history of mental instability. (A.A. 507, 508). See also Exhibits to Defendant's Second Motion to Withdraw Guilty Plea, which established that his regular prescription medication was suspended just before trial and that during his plea, he was not taking his usual medications. (A.A. 521-22), (A.A. 523-24)

It is respectfully submitted the change in his medications, which occurred so soon before his plea of guilty, rendered him incompetent to fully understand his plea. Any plea of guilty must be a knowing, voluntary and intelligent waiver of constitutional rights. *Boykin v. Alabama,* 395 U.S. 238 (1969); *McMann v. Richardson,* 397 U.S. 759 (1970). It seems likely that neither Defendant's counsel,

the prosecutor, nor the Court were aware of Toney White's significant medical problems when he hastily entered his guilty plea mid-trial. (A.A. 507-08) It is respectfully submitted that allowing the plea to go forward while knowing his medical condition would likely have been malpractice by Defendant's counsel.

It is respectfully submitted that taking into account Mr. White's long history of psychiatric disorders and resultant use of anti-psychotic medication that trial counsel however should have been aware of Defendant's status at the time of his plea. (A.A. 507-08) This apparent lack of awareness was ineffectiveness under *Strickland.* The District Court should correct this error at the Motion hearing on September 24, 2019. Defendant urges the Court to allow supplementing the record to include the record of the September 24, 2019 hearing on Motion to Withdraw his plea of guilty. This is error that can only be cured by withdrawal of the plea because it was invalid.

IV. THE DISTRICT COURT ERRED BECAUSE IT DID NOT FIND THE DEFENDANT'S GUILTY PLEA WAS INVALID BECAUSE IT WAS NOT SUPPORTED BY SUFFICIENT FACTS WHICH WOULD PROVE BEYOND A REASONABLE DOUBT ALL THE NECESSARY ELEMENTS OF THE OFFENSE.

The standard of proof for any criminal conviction must be proof beyond a reasonable doubt. *See, In re Winship*, 397 U.S. 358, 90 S.Ct. 1065 (1970), *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979).

The Defendant submits that his plea of guilty to kidnapping, counts 3 and 4 was flawed because the element of the kidnapping charges could not be proved beyond a reasonable doubt. The plea was therefore invalid because there was not a sufficient factual basis for his guilt to these charges.

Adequate legal research and factual investigation pre-plea would have established that there was insufficient evidence to establish the necessary elements of first degree kidnapping. *Langford v. State,* 95 Nev. 631, 600 P.2d 231 (1979).

It is respectfully submitted that when a plea of guilty is not supported by sufficient factual evidence, that insufficiency or flaw in the plea cannot be waived. In this case, Defendant submits that any such implied waiver of the factual basis of the plea, i.e., the admission of guilt, was unknowing or unintelligent or involuntary waiver was not a valid waiver. Courts are to indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst,* 304 U.S.458, 464 (1938).

Even if the Court chooses to uphold the Defendant's conviction on all other counts of the indictment finding the plea was valid, it is respectfully submitted the kidnapping charges must be dismissed and then the other charges should be remanded for re-sentencing. *See, Lipsitz v. State,* 135 Nev. Adv. Op. 17 (2019), which, although upholding reversal on one count of a criminal conviction for insufficiency of evidence, remanded to District Court for re-sentencing.

V. THE DISTRICT COURT ERRED BY NOT FINDING DEFENDANT RECEIVED AN EXCESSIVELY HARSH AND DISPROPORTIONATE SENTENCE IN VIOLATION OF THE EIGHTH AMENDMENT. COUNSEL WAS INEFFECTIVE IN CHALLENGING THIS CRUEL AND UNUSUAL PUNISHMENT DEFENDANT RECEIVED.

Defendant received a sentence of twenty years to life. It is respectfully submitted the unnecessary length of this sentence made it cruel and unusual punishment because it removed any meaningful opportunity for rehabilitation or reentry into society. Defendant will be an elderly man when he is released, if ever, from prison.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual

punishments follows from the basic 'precept of justice and 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 any

reasonable sentence. As the sentence was grossly harsh and excessive, it was unconstitutional in violation of the Eighth Amendment's cruel and unusual punishment clause.

The United States unfortunately leads the world's industrialized nations in per capita prison population. It has long been believed by many observers of our criminal justice system that the system is too harsh. Even Supreme Court Judges have noted "our prisons are overcrowded," J. Kennedy before the American Bar Association. *See, State v. Kong,* 315 P.3d 720 (2013).

This Court should, after reviewing all the facts, find that even if the conviction is affirmed, the case should be remanded for a new sentence that is substantially reduced which does not violate the Eight Amendment.

VI. THE DISTRICT COURT ERRED BY NOT FINDING THE ACCUMULATION OF ERROR DENIED DEFENDANT CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

The numerous errors and deficiencies of counsel in this case require reversal of the conviction. It can be argued that even considered separately, the errors or

omissions of counsel were of such a magnitude that they each require reversal. But it is clear, when viewed cumulatively, the case for reversal is overwhelming. *Daniel v. State,* 119 Nev. 498, *see also, Sipsas v. State,* 102 Nev. at 123, 216 P.2d at 235 (1986), stating: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial."

Prejudice may result from the cumulative impact of multiple deficiencies. *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (*En Banc*), cert. denied, 440 U.S. 970, *Harris by and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir. 1995).

The multiple errors of counsel 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 guilt 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).

In the instant case each of the three factors in *Mulder*, *supra,* suggest cumulative error analysis should apply. There was a substantial reason to doubt the Defendant's guilt. (Issue IV) The quality and quantity of each of the alleged errors was significant. It is respectfully submitted each error alone could result in reversal. The third factor, the gravity of the crimes charged (Class A felony) is great and therefore cumulative error requires reversal.

CONCLUSION

Defendant was denied his absolute right to self representation when the Court did not even canvassd Defendant about his written request for self representation. Even though the Court appointed another counsel, under the circumstances of this case, that was still an error under *Faretta*. That error requires reversal.

The Defendant was entitled to vigorous and competent advocacy prior to his guilty plea. Toney A. White was charged with very serious felony charges. The case of *Strickland v. Washington* requires an attorney before plea to do effective research and preparation and to provide competent advice before a plea. That was not done in

this case, therefore Defendant's plea was invalid and his case should be reversed.

The plea in this case was also likely involuntary and unknowing because the Defendant was most likely not fully competent because of a recent medication change. He felt stressed and pressured before making his hasty plea.

Almost immediately after he pled he attempted to withdraw his plea. Even though he had previously entered a plea and then was allowed to withdraw the first plea, the second plea was nevertheless involuntary. Defendant was still suffering from long term mental disabilities that precluded him from a rational and competent understanding of his plea. Counsel was clearly ineffective under *Strickland* because he was not more diligent in checking the Defendant's medical status before he entered his plea. A simple review of the Defendant's jail records would have alerted counsel to the change in Defendant's medical status.

Defendant's past behavior and past history should have alerted defense counsel to the need for great circumspection in advising the court about the Defendant's medical history.

Counsel's ineffectiveness was also demonstrated by his failure to recognize the Defendant's guilty plea to kidnapping was not supported by sufficient facts under

Jackson v. Virginia. Finally the Defendant's sentence was excessively harsh and disproportionate in violation of the Eighth Amendment.

DATED this 19th day of September, 2019.

Respectfully submitted,

/s/ *Terrence M. Jackson*

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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 4,648 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 19th day of September, 2019.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

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 19th day of September, 2019, I served a copy of the foregoing: Appellant's Opening Brief as well as Volume 1-3 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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