IN THE SUPREME COURT OF THE STATE OF NEVADA

DENZEL DORSEY,	)	
#5899606,	)	**CASE NO.: 79845**
Appellant,	)	**E-FILE**
	)	D.C. Case: C-17-323324-1
v.	)	Dept.: **XV**
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

This is an Appeal from a Judgment of Conviction After a Guilty Plea
Eighth Judicial District Court, Clark County

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for DENZEL DORSEY, hereby certifies pursuant to NRAP 26.1(a) that there are no persons nor entities associated within 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 10th day of June, 2020.

//s// *Terrence M. Jackson*
TERRENCE M. JACKSON, ESQ.
Attorney for Appellant Denzel Dorsey

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APPELLANT'S OPENING BRIEF

This is an Appeal from a Judgment of Conviction After a Guilty Plea

Eighth Judicial District Court, Clark County

NATURE OF THE ACTION

This is an Appeal from a Judgment of Conviction after a Guilty Plea.

SPECIFICATION OF ERROR

1. The District Court erred when it found that Defendant was not entitled to withdraw his guilty plea;

A. Defendant was not sufficiently mentally competent to enter a knowing,

voluntary and intelligent plea of guilty;

2. Material misstatements or defects in the written Plea Memorandum provided a justification for the Defendant to withdraw his plea;

3. The Guilty Plea Agreement, which required Stipulation in advance to habitual criminal status for future violations, was unconstitutional under Nevada law and violated due process;

4. The District Court erred when it sentenced the Defendant to an overly harsh and disproportionate sentence in violation of the Eighth Amendment;

5. The accumulation of error requires reversal of the Defendant's conviction and sentence.

STATEMENT OF THE CASE

Defendant was arrested for Attempt Invasion of the Home and Malicious Destruction of Property on November 28, 2016. (A.A. 04) Defendant was arraigned in Justice Court on December 19, 2016, and a preliminary hearing was scheduled for February 15, 2017. Because Defendant's attorney had to withdraw due to a conflict, the preliminary hearing was continued to March 30, 2017. (A.A. 7-51)

In December of 2017 an arrest warrant for Defendant was issued in case

number 16FH2022X for Invasion of the Home and two counts of Burglary and Possession of Stolen Property. Defendant was booked on the warrant in the beginning of January, 2018.

Defendant was bound over on the Amended Criminal Complaint (A.A.1-2), charging invasion of the home, a felony, after a preliminary hearing on May 2, 2017. (A.A. 51) The State then filed an Information on May 9, 2017. (A.A. 3-4) A Notice of Intent to Seek Punishment as a Habitual Criminal under NRS 207.010(1) was also filed on May 9, 2017. (A.A. 5-6)

After the Defendant pled not guilty and waived his speedy trial right, the trial was initially set for September 11, 2017. On November 29, 2017, Defendant's counsel moved to withdraw due to a conflict and the case was continued for a status check until December 12, 2017. (A.A. 52-54) On December 12, the case was continued again to January 9, 2018, to see if new counsel would confirm. After several continuations new counsel was appointed.

On March 13, 2018, Defendant entered a guilty plea to the charge of Invasion of the Home, NRS 205.067. (A.A. 55-65, 83-92) On that date, March 13, 2018, Defendant signed a guilty plea agreement which stated *inter alia* :

> The State will retain the right to argue. Additionally, the State agrees not to seek habitual criminal treatment. Further, the State will not oppose dismissal of Count 2 and Case no. 17F21598X after rendition of sentence. The State will not oppose standard bail after entry of plea. However, if I fail to go to the Division of Parole and Probation, fail to appear at any future court date or am arrested for any new offenses, I will stipulate to habitual criminal treatment, to the fact that I have the requisite priors and to a sentence of sixty (60) to one hundred fifty (150) months in the Nevada Department of Corrections. Additionally, I agree to pay full restitution including for cases and counts dismissed. *See, GPA at 1-2.* (A.A. 55) (Emphasis added)

. . .

The Guilty Plea Agreement, signed by the Defendant, had been filed in open court on March 9, 2018. (A.A. 55-64) Pursuant to the terms of the agreement, Defendant was then released on standard bail on March 13, 2018. (A.A. 89) A sentencing date was scheduled for July 17, 2018 and the Defendant was admonished by the court to appear for sentencing. (A.A. 65)

On April 26, 2019, Defendant filed a Motion to Place on Calendar to Address Custody Status and Hold.(A.A. 66-69) Defendant had been on parole in California at the time he committed the crimes in this case and 17F21598X; therefore, a hold had

been placed on him when he was arrested on the latter case. In that motion, Defendant asked to be remanded and for his sentencing date to be moved to a sooner date. The motion was heard on May 8, 2018, at which time the Court rescheduled Defendant's sentencing to June 5, 2018; however, Defendant was not remanded. (A.A. 70)

The case was continued at the request of the Defendant to June 5, 2018. (A.A. 71) On June 6, 2018, Defendant filed in *pro per* a Motion to Dismiss Counsel (A.A. 72-75) and a Motion to Withdraw Plea. (A.A. 76-81) On June 12, 2018, the court granted Defendant's Motion to Dismiss Counsel and then set another status check for confirmation of counsel for June 28, 2018. (A.A. 82) On June 28, 2018, all matters were continued to July 17, 2018. (A.A. 93) On July 3, 2018, the State filed an Opposition to Defendant's *pro per* Motion to Withdraw Plea. (A.A. 94-103)

On July 17, 2018, after Defendant had been arrested in California for the offense of Receiving Stolen Property, because Defendant failed to appear as scheduled, a bench warrant was issued in the instant case. Defendant's Motion to Withdraw his Plea was then taken off calendar. (A.A. 104)

On July 24, 2018, a Motion to Quash Bench Warrant was filed by Defendant's newly retained counsel which stated that Defendant was presently incarcerated in California, but would make all future court dates. The court denied Defendant's

Motion to Quash Without Prejudice on July 31, 2018, finding the bench warrant should remain in place to ensure Defendant's appearance in court pending resolution of his California case. (A.A. 105)

On November 8, 2018, Defendant appeared in custody on the bench warrant return and counsel requested thirty (30) days to determine the status of Defendant's California case. When the State objected, the court then set a sentencing date for November 27, 2018. (A.A. 106) On November 27, 2018, a newly retained counsel for the Defendant requested Defendant's case be continued until December 13, 2018. (A.A. 107) On December 13, 2018, defense counsel requested another continuance because he had filed a Motion for Expert Services (Investigator) pursuant to *Widdis.* (A.A. 127)

The Motion for Expert Services was then granted by the Court on January 9, 2019. (A.A. 129) On January 17, 2019, the court confirmed the investigator would only be working on information related to a motion to withdraw guilty plea and the sentencing date was rescheduled by the court for February 19, 2019. (A.A. 130)

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On February 15, 2019, Defendant filed a Motion to Withdraw Guilty Plea with

Exhibits. (A.A. 131-199) On February 19, 2019, the sentencing date was continued to March 26, 2019, to allow the State time to file an opposition to Defendant's motion. That date was later changed by the parties and the Court to April 4, 2019.(A.A. 200) On February 21, 2019, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. (A.A. 201-203) On February 21, 2019, Defendant filed a Supplemental Exhibit in Support of Defendant's Motion to Withdraw Guilty Plea. (A.A. 204-209) Defendant's Motion to Withdraw and sentencing date was then reset. (A.A.210) The State then filed an Opposition to Defendant's Motion to Withdraw Guilty Plea with Exhibits on March 19, 2019. (A.A. 211-276) Defendant filed a Reply to State's Opposition to Defendant's Motion to Withdraw Guilty Plea with Exhibits on March 28, 2019. (A.A. 277-292)

Evidentiary hearings on Defendant's Motion to Withdraw his plea were held on May 28, 2019 and July 11, 2019. (A.A. 295), (A.A. 302-338) The State filed Motion to Remand on June 11, 2019. (A.A. 296-301) The Court issued an Order, denying Defendant's Motion to Withdraw Plea on August 6, 2019. (A.A. 339-351) On August 7, 2019, the Court issued Notice of Entry of Order. (A.A. 352)

Defendant then filed a Sentencing Memorandum on September 23, 2019. (A.A. 353-370) The Probation and Parole filed a Supplemental PSI September 23, 2019, the

State then filed a Response to Defendant's Sentencing Memorandum on October 1, 2019. (A.A. 371-378)

Defendant was then sentenced on October 3, 2019 to sixty (60) to one hundred fifty (150) months. (A.A. 379, 384-85)

On October 4, 2019, defense counsel filed a Motion to Withdraw. (A.A. 380-82) The Judgment of Conviction was filed October 9, 2019. (A.A. 384) On October 15, 2019, Defendant filed Notice of Appeal. (A.A. 385-86) On October 22, 2019, the Court granted Defendant's Motion to Withdraw Counsel. (A.A. 387)

SUMMARY OF THE ARGUMENT

The Defendant pled guilty to a Class B felony, invasion of the home, NRS 205.067, on March 13, 2018. The State agreed to dismiss the other pending count and the State agreed NOT to seek habitual criminal treatment unless the Defendant failed to appear at future court appearances or unless he was even merely arrested for any new offense. (A.A. 083-092)

The plea agreement required the Defendant to remain totally arrest free and not miss a single court date, or the Defendant would be required to stipulate to habitual criminal treatment. (A.A. 55) It is respectfully submitted that it was obvious, or it

should have been obvious to defense counsel, that the Defendant's pending California case might have likely impacted his future appearances. The District Attorney also knew of this fact and the court should have been aware of this as well.

The Defendant was nonetheless released at the time of entry of plea. Defendant was almost immediately then taken into custody again and then compelled by the plea to stipulate to being a habitual criminal after a California arrest resulted in his custody being revoked. (A.A. 353-370) This certainly could not have been unexpected.

Defendant however most certainly did not fully understand the totality of the negotiations when he pled guilty. He immediately filed a Motion to Withdraw his plea of guilty on February 15, 2019. (A.A. 131-199) Defendant alleged in his *pro per* motion that he did not fully understand the consequences of the guilty plea. (A.A. 78) He alleged his counsel was ineffective for misleading him. (A.A. 077-78) He also alleged his counsel's lack of pre-plea investigation.(A.A. 77) He made no reference to his own prior difficulties with the criminal justice system including previous revocations of probation and parole or substance abuse problems. (*See,* PSI, p. 3-5) Counsel should have been aware of these issues but there was a real concern about his capacity to fully understand the guilty plea memorandum and the complex negotiation it entailed.

The written Plea Memorandum also incorrectly stated the actual sentence the Defendant would be facing was sixty (60) to one hundred twenty (120) months if he was treated as an habitual criminal. (A.A. 55) Since the written plea memorandum incorrectly stated he would be facing sixty (60) to only one hundred twenty (120) months, when he was actually facing sixty (60) to one hundred fifty (150) months, (*See, pg. 1 of the Guilty Plea Agreement*), (A.A.55), the document misled the Defendant as to the possible maximum punishment he was facing. (A.A.55)

Counsel should have been aware of Defendant's significant substance abuse issues and his prior revocations of probation and parole prior to his plea of guilty. (*See,* PSI, p. 3-5) These difficulties were not adequately addressed by the court, or his counsel, before the plea. His counsel was ineffective in effectively advising Defendant of the most important consequences of his plea including the agreed stipulated sentence and therefore it is respectfully submitted that his Motion to Withdraw his plea should have been granted. *See,* 10 ALR 4th 8, Defense Counsel's Representation Affecting Guilty Plea.

Despite the Defendant's assertions in his Writ that his plea was not a knowing and intelligent plea, and the actual misstatements in the written Guilty Plea Agreement, the District Court nevertheless entered on Order denying Defendant's

Motion to Withdraw his guilty plea on August 6, 2019. (A.A. 339-351) Notice of Entry of Order was filed August 7, 2019. (A.A. 352) Defendant filed a Sentencing Memorandum September 23, 2019. (A.A. 353-370) The State filed a Response to Defendant's Sentencing Memorandum on October 1, 2019. (A.A. 371-378)

The court then sentenced Defendant on October 3, 2019 to a term of sixty (60) to one hundred fifty (150) months. (A.A. 379) When adjudicating him an habitual criminal, the court did not find any prosecutorial overreaching by the State in the drafting or the implementing of the plea memo which required a stipulation to habitual criminal status. (A.A. 379)

Defendant submits that the written Guilty Plea Agreement, which was prepared by the prosecution, was a contract of adhesion which wrongly compelled Defendant to stipulate to habitual criminal treatment. (A.A. 55) This unnecessary stipulation to give up the due process right to even contest potential habitual criminal treatment was unjust. Defendant submits the terms of the plea agreement constituted a gross overreaching by the prosecution, resulting in a violation of due process that should not have been enforced.

The Nevada Supreme Court has previously ruled that a Defendant may not

stipulate to his status as an habitual criminal or the constitutionality of his prior convictions. *McAnulty v. State,* 108 Nev. 179, 826 P.2d 567 (1992); *see also, Staley v. State,* 106 Nev. 75, 78 (1990). Furthermore it is always within the discretion of the district court to not sentence a defendant as an habitual criminal. *French v. State,* 98 Nev. 235, 645 P.2d 440 (1982). It is respectfully submitted the district court abused its discretion in this case.

The sentence given Mr. Dorsey under the habitual criminal statute was excessively harsh and excessive and therefore violated the Eighth Amendment's cruel and unusual punishment clause. *Weems v. United States,* 217 U.S. 349 (1910). *Weems* requires that a court should make a threshold determination as to whether or not the sentence imposed was 'grossly disproportionate' to the offense committed. It is respectfully submitted under all the facts and circumstances in this case, the court erred in sentencing the Defendant to the overly harsh and excessive sentence he received.

JURISDICTIONAL STATEMENT

Appellant claims jurisdiction pursuant to NRS 177.015(3). This is an appeal of the Judgment after Sentencing following a guilty plea in the Eighth Judicial

District Court. Appellant filed a timely Notice of Appeal on October 15, 2019, within the 30 day time limit established by Nevada Rules of Appellate Procedure 4(b).

ROUTING STATEMENT

This is a direct appeal from a judgment of conviction that challenges the validity of the guilty plea and the sentence imposed. Therefore, according to NRAP 17(b), this case should be assigned to the Nevada Court of Appeals.

FACTUAL STATEMENT

Defendant, Denzel Dorsey, pled guilty on March 13, 2018, to a charge of invasion of the home NRS 205.067. The plea negotiation required that he agree to stipulate to habitual criminal treatment under NRS 207.010(1) at sentencing and stipulate to a sentence of sixty (60) to one hundred twenty (120) months if he was arrested or he failed to make any court appearances while awaiting sentencing.

A few days before his original sentencing date he was arrested on July 11, 2018, in California for the charge of receiving stolen property. He therefore missed a required court appearance on July 17, 2018. He moved to withdraw his guilty plea soon after that arrest alleging he did not fully understand his rights (A.A. 76-81) Defense counsel then filed a Motion requesting an evidentiary hearing. (A.A. 131,

199) The defense then filed Supplementary Exhibits in support of the Motion. (A.A. 204-210)

The evidentiary hearing for the Petition for Writ of Habeas Corpus was heard on May 28, 2019. At that hearing the Defendant presented two witnesses, who testified as alibi witnesses of Dorsey. (A.A. 345) The Court in its Order denied Defendant's Petition on August 6, 2019, finding both of the Defendant's witnesses lacking in credibility. (A.A. 336-351)

When Defendant was sentenced on October 3, 2019, he was forced to stipulate to habitual criminal status. (A.A. 358, 379) He then received a sentence of sixty (60) to one hundred fifty (150) months. (A.A. 384-385) That sentence was greater than the sentence the plea agreement called for of sixty (60) to one hundred twenty (120) months. (A.A. 55) He was not however allowed to argue against that sentence or to withdraw his plea. (A.A.351, 379) He appeals the denial of his Motion to Withdraw Plea and the validity of the compelled, stipulated sentence. (A.A. 385)

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LEGAL ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY;

A. WHETHER THE DISTRICT COURT ERRED WHEN DENYING THE DEFENDANT HIS MOTION TO WITHDRAW HIS GUILTY PLEA. IT DID NOT CONSIDER THE TOTALITY OF CIRCUMSTANCES AFFECTING THE VOLUNTARINESS OR INTELLIGENCE OF HIS PLEA RIGHTS;

II. WHETHER MATERIAL MISSTATEMENTS IN THE GUILTY PLEA MEMO CONCERNING PUNISHMENT PROVIDED JUSTIFICATION FOR THE DEFENDANT TO WITHDRAW HIS GUILTY PLEA OR TO MODIFY HIS SENTENCE;

III. WHETHER THE AGREEMENT TO STIPULATE IN ADVANCE TO HABITUAL CRIMINAL TREATMENT, AS REQUIRED BY THE PLEA MEMORANDUM, WAS UNCONSTITUTIONAL IN VIOLATION OF DUE PROCESS AND NEVADA LAW;

IV. WHETHER THE DISTRICT COURT ERRED IN SENTENCING DEFENDANT TO A SENTENCE OF 60 TO 150 MONTHS UNDER THE HABITUAL CRIMINAL ACT;

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

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT FINDING COUNSEL HAD FAILED TO ADEQUATELY INVESTIGATE DORSEY'S COMPETENCY TO PLEAD GUILTY.

Defendant submits when the District Court entered its Order on August 6, 2019, denying Defendant's Motion to Withdraw his plea, it completely ignored the importance of defense pre-plea investigation and therefore erred.

The American Bar Association (ABA) Standards on the prosecutor and defense function emphasize the crucial importance of investigation by criminal defense attorneys for their clients. The ABA Standard 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 ineffective assistance 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, the defendant 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. (Emphasis added)

In this case counsel failed by not adequately investigating his client's competency before his plea.

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. (Emphasis added)

Although it cannot be certain what a competent 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 established Defendant did not sufficiently understand the negotiations so he could competently enter his plea. Defendant was not examined by an expert pre-plea although, because of past problems, there should have been major doubts about his full competency or understanding.

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

A. THE DISTRICT COURT ERRED WHEN DENYING THE DEFENDANT HIS MOTION TO WITHDRAW HIS GUILTY PLEA. IT DID NOT CONSIDER THE TOTALITY OF CIRCUMSTANCES AFFECTING THE VOLUNTARINESS OR INTELLIGENCE OF 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). Substantial evidence in the record reflects Defendant Dorsey may have had a lengthy history of substance abuse which could have affected his mental stability. (*See,* PSI, p. 3)

It is respectfully submitted that counsel knew or should have known of these significant problems of his client. Even a casual investigation or a competent forensic interview of the Defendant should have developed the Defendant's past history of problems with law enforcement. Nevertheless prior probations and paroless had been revoked in the past for his violations. (*See,* PSI, p. 3-5) Once counsel was aware of Defendant's past history, counsel would then have a duty to be extra cautious in protecting Defendant's rights to ensure that any negotiation and resulting plea was completely and competently explained so that Defendant fully understood all of the consequences of his plea. The potential stipulation to habitual criminal treatment should have been a red flag to defense counsel, especially considering Defendant's history of revocations.

Defendant directs the court's attention to the case of *Sailer v. Gunn,* 387 F.Supp. 1376 (D.C. Cal. 1972), as follows:

> Where, in accepting defendant's guilty plea, prosecuting attorney asked defendant only a few perfunctory questions about his intentions in pleading and his knowledge of sentencing process, and no attempt was made to probe his volition and understanding in making plea, and where, after court accepted plea without holding competency hearing, it had access before sentencing to information raising substantial questions about defendant's mental stability and capabilities, court erred in failing to allow plea to be withdrawn or at least hold hearing on plea voluntariness. *Sailer v. Gunn,* 387 F.Supp. 1367, *reversed,* 548 F.2d 271 (D.C. Cal. 1972) (Emphasis added)

Compare *People v. Wharton,* 809 P.2d 290, 53 C.3d 522 (Cal.1991), where the defendant had been judged competent by experts in pretrial hearings. In this case, unlike *Wharton*, *supra,* counsel did not provide necessary expert assistance pre-plea to protect Defendant's rights to enter a plea freely and understandingly.

Especially troubling in this case was the contingent aspect of the negotiations. The negotiations, which required that the Defendant remain both totally arrest free, also required that he miss no court dates for any reason whatsoever. Based upon Defendant's history it was extremely likely he would eventually have to stipulate to being an habitual criminal. The breaking of any part of the plea agreement would lead to very severe consequences for the Defendant.

The record is unclear whether counsel even discussed the pending California case with Defendant and explained to him how it would impact the Defendant's ability to make his pending court date.

Current Nevada case law recognizes that the district court must consider the totality of circumstances in determining the voluntariness of a guilty plea. *Freese v. State,* 116 Nev. 1097, 13 P.3d 442 (2000), *McCollum v. State,* 125 Nev. 243, 212 P.3d 307 (2009), *Bryant v. State,* 102 Nev. 288, 721 P.2d 721 (1956). The court in this case erred because it ignored Defendant's history and how it may have affected his understanding when considering the voluntariness of his plea. Defendant's subjective understanding should have been the key factor in evaluating the voluntariness of his plea. The court merely considered the defense argument that he was factually innocent and concluded that the defense witnesses Davey Dorsey [his brother] and Takiya Clemons [his girlfriend] were not sufficiently credible, wrongly assuming they were biased because of their family relationship to Denzel Dorsey. (A.A.345) It is respectfully submitted the court's failure to consider the totality of circumstances and the entire record, including Defendant's actual understanding of the plea when considering Defendant's Motion to Withdraw his plea was error. *See, Mitchell v. State,* 109 Nev. 137, 848 P.2d 1060 ((1993) (A.A. 339-351)

II. MATERIAL MISSTATEMENTS IN THE GUILTY PLEA MEMO CONCERNING PUNISHMENT PROVIDE JUSTIFICATION FOR THE DEFENDANT TO WITHDRAW HIS PLEA OF GUILTY OR MODIFY HIS SENTENCE;

The guilty plea memo was factually inaccurate in at least one material respect. The written plea memo understated the possible punishment the Defendant could receive. The plea memo stated incorrectly that he was facing a sentence of sixty (60) months to one hundred twenty (120) months. The actual sentencing range was sixty (60) months to one hundred fifty (150) months. He was in fact sentenced pursuant to the habitual criminal statute to the sentence of sixty (60) months to one hundred fifty (150) months. (A.A. 376), (A.A. 384-86)

It is respectfully submitted the thirty (30) additional months he received resulted from the error of both counsel for the defense, the prosecutor, as well as the error of the court prior to the plea. This error should have been corrected by the court or defense counsel or the prosecutor before the plea. The Defendant was clearly prejudiced because of this error since he received an additional thirty (30) months. It is therefore respectfully submitted his plea was invalid. Alternatively, his sentence should be modified. *See, Staley v. State, supra, Id*. 79. *See also, State v. District*

Court, 100 Nev. 90, 677 P.2d 1044 (1984), where the court held that although the usual rule is to not allow suspension or modification of a sentence after a defendant begins serving the sentence, when a court has made "a mistake in rendering a judgment which works to the extreme detriment of the defendant," the court has the authority to modify a sentence to protect the defendant's due process rights. Id. 95. *See also, Warden v. Peters,* 83 Nev. 298, 301, 429 P.2d 549, 551 (1967).

III. THE GUILTY PLEA AGREEMENT WHICH REQUIRED STIPULATION IN ADVANCE TO HABITUAL CRIMINAL STATUS FOR FUTURE VIOLATIONS VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONAL UNDER NEVADA LAW.

Defendant submits he should not have had to stipulate in advance to possible habitual criminal treatment. The stipulation to potential habitual criminal treatment should not have been enforced because it violated due process and Nevada law.

The Nevada Supreme Court has previously ruled that a defendant may not be required to stipulate to his status as an habitual criminal under NRS 207.010(1), or the constitutional validity of any prior conviction(s). *McAnulty v. State,* 108 Nev. 179, 826 P.2d 567 (1992). *See also, Staley v. State,* 106 Nev. 75, 787 P.2d 396 (1990).

It is respectfully submitted the contingent plea agreement, which Defendant was required to sign, which required stipulation in advance of habitual criminal treatment, was also contrary to law and unconstitutional. As the court stated in *McAnulty, supra*: "The constitutional validity of prior convictions is a legal status to which a defendant may not stipulate. No matter what the plea bargain, the district court must make its own determination as to the constitutional validity of a prior conviction." *Id*. 181 (Emphasis added)

The State in this case should not have been able to use its extraordinary power in negotiations to compel a defendant in advance to forego his right to contest at sentencing the substantial increase in his sentence which would result from the stipulated enhancement to habitual criminal status under NRS 207.010(1). This court should reverse the Judgment of Conviction because the plea agreement should not have been enforced.

IV. THE COURT ERRED IN SENTENCING DEFENDANT TO AN OVERLY HARSH AND LENGTHY SENTENCE IN VIOLATION OF THE EIGHTH AMENDMENT.

The Court sentenced Defendant to a sentence of sixty (60) to one hundred fifty

(150) months. This sentence resulted from a stipulated sentence as part of a coercive plea deal. The District Court wrongly enforced the stipulated sentence and then sentenced the Defendant as an habitual criminal. Whether or not the plea memo itself was proper or improper, it is respectfully submitted that the sentence imposed was overly harsh and disproportionate in violation of the Eighth Amendment.

It has been held that habitual criminal treatment is not to be applied automatically. The district courts are required to exercise appropriate discretion. *See, French v. State,* 98 Nev. 235, 645 P.2d 440 (1982). The *French* case held that the district court should exercise its discretion when appropriate to dismiss habitual criminal allegations when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or interests of justice. *See, Dotson v. State,* 80 Nev. 42, 389 P.2d 77 (1964) *Id*. 237 (Emphasis added)

In *Kennedy v. Louisiana,* 554 U.S. 407, 128 S.Ct. 2541(2008), the Supreme Court noted:

"[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.' " *See, 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 sentence imposed on other criminals in the same jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions." *Id*. at 291.

Applying these principles of Eighth Amendment law to the instant case, Defendant respectfully submits the sentence the Defendant received in this case of 60 to 150 months was excessive and disproportionate and it should therefore be reversed. The District Court wrongly exercised its discretion in this case to sentence Defendant as an habitual criminal and the resulting sentence was excessive and grossly disproportionate.

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V. THE ACCUMULATION OF ERRORS IN THIS CASE VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL.

The numerous errors that occurred in this case require reversal of the conviction and sentence. It can be argued that even considered separately, the errors of the court 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, 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). *See* also, *Mak v. Blodgett,* 670 F.2d 614 (9th Cir.1991).

The court in this case erred by not adequately determining Defendant's competency to enter a guilty plea. It is respectfully submitted the Defendant did not knowingly, willingly or intelligently waive his right to trial. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). The court abused its discretion in upholding the State's allegation of habitual criminal enhancement. The unfairly structured plea agreement in which the Defendant had to agree in advance to stipulate to habitual criminal treatment under certain potential future events was a overreaching contract of adhesion that should not have been enforced as it violated due process and Nevada law. The court's sentence of sixty (60) to one hundred fifty (150) months under the habitual statute therefore violated the Defendant's rights under the due process clause

and under the Eighth Amendment of the United States Constitution. The multitude of errors by the court requires reversal of Defendant's conviction and sentence.

. . .

CONCLUSION

It is respectively submitted the Appellant in this case did not receive his full Sixth Amendment rights because his Counsel was ineffective prior to his plea of guilty and was also ineffective in challenging the State's subsequent actions at sentencing. The trial court should have recognized Defendant did not receive effective assistance of counsel. The court should have recognized that Defendant did not enter a knowing, voluntary and intelligent plea of guilty.

The State of Nevada filed a habitual criminal allegation after the Court denied Defendant's Motion to Withdraw his plea. The wrongly required stipulated sentence violated due process and was contrary to Nevada law and it also violated the Eighth Amendment's cruel and unusual punishment clause.

The accumulation of errors in this case was so prejudicial that the Defendant's conviction and sentence must be reversed.

. . .

For the reasons stated the trial court erred in denying the Defendant's petition for Writ of Habeas Corpus and the Defendant's conviction should be reversed and his case remanded for appropriate relief including reduction of his sentence.

DATED this 10th day of June, 2020.

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 5,781 words, which is within the word 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 10th day of June, 2020.

Respectfully submitted,

/s/ Terrence M. Jackson
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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 10th day of June, 2020, I served a copy of the foregoing: Appellant's, Opening Brief as well as Volumes I and II of the Appendix with Index, as follows:

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

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