IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER E. PIGEON, #90582, Appellant,	)	**CASE NO.: 83232**
	)	**E-FILE**
	)	D.C. Case: C-13-290261-1
v.	)	Dept.: **IX**
STATE OF NEVADA, Respondent.	)	

APPELLANT'S OPENING BRIEF

Appeal from the denial of Motion to Modify Sentence and Supplemental Points and Authorities Challenging the Wrongful Imposition of an Habitual Criminal Sentence of Life without Parole
Eighth Judicial District Court, Clark County

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Appellant,	)	**E-FILE**
v.	)	D.C. Case: C-13-290261-1
STATE OF NEVADA,	)	Dept.: **IX**
	)	
Respondent.	)	
	)	

NRAP 26.1 DISCLOSURE

The undersigned counsel of record for CHRISTOPHER EDWARD PIGEON, 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 19th day of October, 2021.

//s// *Terrence M. Jackson*

TERRENCE M. JACKSON, ESQ.

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NATURE OF THE ACTION

This is an Appeal from the denial of Defendant's Motion to Modify his Sentence, seeking to Vacate or Modify the Statutory Enhancement as an Habitual Criminal and the sentence of Life Without Parole.

SPECIFICATION OF ERROR

1. The District Court abused its discretion in sentencing Defendant as an habitual criminal to life without the possibility of parole under NRS 207.012.(1)(b);

2. The Defendant's sentence of life without parole was so excessively harsh and disproportionate that it violated the Eighth Amendment's Cruel and Unusual Punishment clause;

3. The District Court erred when it granted Defendant's Motion for self-representation under *Faretta v. California.* Defendant was gravely prejudiced because he could not competently represent himself due to his substantial disabilities;

4. The Accumulation of Error in this case requires reversal of Defendant's sentence as an habitual criminal of Life without Parole.

SUMMARY OF THE ARGUMENT

The Defendant was convicted of all eight (8) counts of the Amended Indictment. (A.A. 67-72) The Defendant received the most harsh sentence possible, that is life without any possibility of parole. That life without parole sentence resulted from the District Court abusing its discretion when it sentenced the Defendant as an habitual criminal. *Arajakis v. State,* 108 Nev. 976, 983, 843 P.2d 800, 805 (1992), *see*

also, *French v. State,* 98 Nev. 235, 645 P.2d 440 (1982)

It is respectfully submitted that the Court erred by sentencing the Defendant as an habitual criminal to life without parole. This was not merely was an abuse of the Court's discretion, it was also clearly a sentence that was grossly disproportionate in violation of the Eighth Amendment because it was a cruel and unusual sentence.

The Eighth Amendment has been held to reflect the "evolving standards of human decency." *Trop v. Dulles,* 356 U. S. 86 (1958) It is respectfully submitted that the life without parole sentence given Defendant in this case was a step backward, not in anyway a sentence conforming with the 'evolving standards of decency,' the United States Supreme Court alluded to in *Trop v. Dulles, supra.*

It is respectfully submitted it appears the Defendant clearly aggravated the Court by his actions during the sentencing proceeding while he represented himself after invoking his *Faretta* rights. (A.A.145-170) Consider also the Defendant's attempts to repeatedly interrupt the Court during the second sentencing. (A.A. 311-313) Appellant submits that although *Faretta* rights have been considered a fundamental right, they must be limited in certain cases. Substantial case law now has limited what was before considered a defendant's absolute right to self representation

under *Faretta.* Consider, for example, cases such as *Indiana v. Edwards,* 554 U. S. 164 (2008); *People v. Teron,* 568 P.2d 773 (1979).

It is respectfully submitted that in this case the Court erred because it failed to screen Mr. Pigeon with an adequate canvas, including his mental issues, before allowing him to represent himself. The hasty decision of the Court to grant Mr. Pigeon the right to represent himself should be considered prejudicial error. This was a complex case and the Defendant's clear mental disabilities prevented him from being able to represent himself. Defendant was also clearly prejudiced because his mental disabilities greatly impacted his ability to effectively represent himself during sentencing.

In recent case such as *United States v. Martin,* 363 F.3d 25 (1st Cir. 2004) and *United States v. Slate,* 971 F.2d 621 (10th Cir. 1992), the Courts have reversed when self-representation was wrongly granted because the defendant was not found to have had the mental capacity to have exercised his *Faretta* rights.

A review of the record in this case establishes that the District Court erred in this case in granting Mr. Pigeon his right to self-representation and that he was gravely prejudiced thereby. A Court always must walk a narrow tightrope in deciding

whether a defendant should be denied his *Faretta* rights. This was a case however in which the facts compelled the Court to deny the Defendant's request to represent himself. The Defendant's diminished mental capacity precluded self representation.

The accumulation of errors in this case requires reversal as all the factors for cumulative error are present. *Mulder v. State,* 116 Nev. 1, 17 (2000). *Mulder* emphasizes three factors: (1) whether the issue of guilt was close; (2) the quantity and character of the error; (3) the gravity of the crime charged. *Id*. 17

JURISDICTIONAL STATEMENT

Defendant/Appellant claims jurisdiction pursuant to NRS 177.015(3). Defendant filed timely Notice of Appeal pursuant to statute on July 14, 2021, within the thirty (30) day time limit established by the Nevada Rules of Appellate Procedure 4(b). This is an appeal from the denial of Defendant's Motion to Modify Sentence with Supplemental Points and Authorities by challenging the wrongful imposition of a habitual criminal sentence of life without parole.

ROUTING STATEMENT

This is an appeal on a conviction by jury verdict including four Category B felonies. Pursuant to NRAP 17(b)(2), because this case involves the conviction of

multiple category 'B' felonies, which resulted in a life sentence without parole, it should be decided by the Supreme Court of Nevada.

STATEMENT OF LEGAL ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN SENTENCING DEFENDANT AS AN HABITUAL CRIMINAL TO LIFE WITHOUT THE POSSIBILITY OF PAROLE;

II. THE DEFENDANT'S SENTENCE OF LIFE WITHOUT PAROLE WAS SO EXCESSIVELY HARSH AND DISPROPORTIONATE THAT IT VIOLATED THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE;

III. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SELF REPRESENTATION UNDER *FARETTA v. CALIFORNIA,* 422 U. S. 806 (1957), BECAUSE THE FACTS OF THIS CASE SHOWED DEFENDANT WAS NOT COMPETENT TO REPRESENT HIMSELF;

IV. THE ACCUMULATION OF ERROR REQUIRES REVERSAL OF THE JUDGMENT OF CONVICTION.

STATEMENT OF THE CASE

On June 5, 2013, Defendant/ Appellant Christopher Pigeon was charged by way of Indictment with Counts 1 and 2 - Prohibited Acts by a Sex Offender (Category D Felony - NRS 179D.470; 179D.550; 179D.460); Count 3 - Attempt First Degree Kidnapping (Category B Felony - NRS 193.330; 200.320); Count 4 - Aggravated Stalking (Category B Felony -NRS 200.575); Count 5 - Luring Children with Intent to Engage in Sexual Conduct (Category B Felony - NRS 201.560); Count 6 - Burglary (Category B Felony - NRS 205.060); Count 7 - Open or Gross Lewdness (Category D Felony - NRS 201.210); and Count 8 - Unlawful Contact with a Child (Gross Misdemeanor - NRS 207.260). (A.A. 01-06)

On July 31, 2014, the State filed Notice of Intent to Seek Punishment as a Habitual Criminal. (A.A. 65,66)

On August 4, 2014, the State filed an Amended Indictment charging Defendant with Count 1 - Attempt First Degree Kidnapping; Count 2 - Aggravated Stalking; Count 3 - Luring Children with the Intent to Engage in Sexual Conduct; Count 4 - Burglary; Count 5 - Open or Gross Lewdness; Count 6 - Unlawful Conduct with a Child; and Counts 7 and 8 - Prohibited Acts by a Sex Offender. (A.A. 67-72)

On August 4, 2014, Defendant's jury trial began. On August 5, 2014, a jury found Defendant guilty of all counts. (A.A. 75,76)

On December 10, 2014, the District Court sentenced Defendant as a large habitual criminal to Counts 1, 2, 3, 4, 5, 7, and 8 to life without the possibility of parole and as to Count 6-364 days in the Clark County Detention Center. (A.A. 167) Defendant's Judgment of Conviction was filed on December 23, 2014. (A.A. 82,83)

On December 1, 2017, the Nevada Supreme Court affirmed in part and reversed in part Petitioner's Judgment of Conviction. The Court, while affirming Counts 6 and 7, concluded that there was insufficient evidence in Count 5, Count 2, Count 3, Count 1, Count 4 and Count 8. (A.A. 236-251) Remittitur issued on January 4, 2018. (A.A. 252,253)

On May 9, 2018, Defendant was resentenced to life without parole. (A.A. 255, 256) On May 29, 2018, an Amended Judgment of Conviction was filed resentencing Petitioner in Count 6 to credit for times served, and in Count 7 - life without the possibility of parole. (A.A. 261-263)

On May 29, 2018, Petitioner filed a Motion to Withdraw Counsel. (A.A. 264, 265) On June 20, 2018, the District Court denied Petitioner's Motion to Withdraw

Counsel because Petitioner was representing himself and there was no counsel to withdraw and this Motion was moot. (A.A. 266)

On May 27, 2020, Defendant filed a Motion to Vacate or Reduce Habitual Sentence ("Motion to Vacate"). (A.A. 269-272) On June 17, 2020, the District Court appointed counsel and Terrence M. Jackson confirmed as counsel on June 24, 2020. (A.A.275) On November 20, 2020, Defendant/Petitioner filed a Motion and Supplemental Points and Authorities to Vacate Habitual Criminal Sentence or Modify Sentence ("Motion to Modify"). (A.A. 276-285) On January 19, 2021, the State filed an Opposition to Petitioner's Motion to Modify. (A.A. 288-298) On January 28, 2021, Petitioner filed a Reply to the State's Opposition to Petitioner's Motion to Modify. (A.A.295-298) On April 12, 2021, after a hearing, the District Court denied Petitioner's Motion to Modify. An Order reflecting that decision was filed on July 2, 2021. (A.A. 299-301)

On May 24, 2021, Petitioner filed a *Pro Per* Petition for Writ of Habeas Corpus (or Supplement to Original Motion) ("Petition"). (A.A.298.a-k) On July 14, 2021, Defendant, through counsel, Terrence M. Jackson, filed Notice of Appeal of the Court's Order denying Defendant's Motion to Vacate or Reduce Habitual Criminal Sentence. (A.A. 302-303)

FACTUAL STATEMENT

Defendant/ Appellant Christopher Edward Pigeon was convicted of all eight (8) counts of an Amended Indictment charging attempt First Degree Kidnapping, Aggravated Stalking, Luring Children with Intent to Engage in Sexual Conduct, Burglary, Open or Gross Lewdness, Unlawful Conduct with a Child, and Two (2) Counts of Prohibited Acts by a Sex Offender after a two (2) day trial on August 5, 2014. (A.A. 75,76)

Four (4) months later, on December 10, 2014, the district court sentenced Pigeon as a large habitual criminal to a sentence of life without parole. (A.A. 167) The Judgment of Conviction was then filed on December 23, 2014. (A.A. 82,83) On December 1, 2017, the Nevada Supreme Court affirmed in part and reversed in part, finding insufficient evidence on five (5) counts. (A.A. 236-251) Although five (5) counts were dismissed by the action of the Supreme Court, the District Court did not then substantially alter the aggregate sentence of the Defendant. On resentencing Defendant May 28, 2018, he again received habitual criminal sentencing for Counts Six (6) and Seven (7), with a life without parole sentence. (A.A. 255, 256)

Defendant then sought to vacate or reduce his Habitual Criminal Sentence,

alleging that it was unconstitutional, in violation of the Eighth and Fourteenth Amendments and was also a grossly disproportionate punishment. (A.A. 269-272) The Defendant, through counsel, filed Supplemental Points and Authorities to modify his sentence. (A.A. 276-285). The State then argued the Defendant's Motion to Vacate or Modify his sentence was procedurally barred by the law of the case doctrine and it was also time barred under NRS 34.726. (A.A. 290, 291)

After a short hearing on April 12, 2021, (A.A.304-319), the District Court issued an Order denying Defendant's Motion to Modify his Sentence on July 2, 2021. (A.A. 299-301)

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED DEFENDANT AS AN HABITUAL CRIMINAL UNDER NRS 207.018(2).

The record establishes the District Court did not do the appropriate weighing of all the necessary sentencing facts and circumstances before imposing Defendant's sentence as an habitual criminal under NRS 207.018 (2). (A.A. 145-170) The Court then again ignored the commands of Nevada case law and statutory demands to carefully and thoroughly review the necessity for an habitual criminal sentence when

the Court denied Defendant's subsequent Motion to vacate the habitual criminal sentence or modify the sentence filed on November 20, 2020. (A.A. 276-285)

The facts show the District Court merely applied the habitual criminal statute automatically without using the necessary discretion required by the law. Consider such cases as *Walker v. Deeds,* 50 F.3d 670 (9th Cir.1995) and *Arajakis v. State,* 108 Nev. 976, 843 P.2d 800 (1992), as well as *French v. State,* 98 Nev. 235 (1982), where the Supreme Court recognized that the imposition of habitual criminal enhancement should not be automatic, but instead should be carefully considered by the District Court. The District Court is required to carefully evaluate the minimal statutory requirements as well as all other mitigating factors in deciding the sentence. Discretion is essential.

In counsel's Supplemental Points and Authorities, he directed the District Court to consider numerous cases in which other courts felt compelled to consider mitigating evidence in a defendant's background before the sentencing. Especially relevant in many of the cases cited was the mental status of the defendant at the time of the crime.

Despite the substantial amount of medical evidence and legal authority which

counsel provided the Court showing mitigation of the Defendant's actions in this case, the District Court nevertheless gave Defendant the harshest possible punishment. It is respectfully submitted this extremely harsh sentence was an abuse of the Court's discretion in this case.

Many cases have recognized that the mental illness of a defendant should be considered a mitigating factor at sentencing. *See, for example, United States v. Ruklick,* 919 F.2d 95, 97 (8th Cir.1990), granting a downward departure for the defendant's longstanding schizophrenic disorders. *See also, United States v. Philibert,* 947 F.2d 1467, 1471 (11th Cir.1988). Consider also the case of *Perry v. Lynaugh,* 492 U.S. 302, 322 (1989), where the United States Supreme Court recognized that mental retardation rendered a defendant less culpable. *See also, United States v. Cantu,* 12 F.3d 1506 (9th Cir.1993), as well as *United States v. Herbert,* 902 F.Supp. 827 (N.D. Ill. 1995) and *United States v. Frazier,* 979 F.2d 1227 (7th Cir.1992), and *United States v. Glick,* 946 F.2d 335 (4th Cir.1991), all recognizing that a defendant's diminished mental capacity or status should be considered a mitigating factor in the court's sentencing decision.

The Defendant's bizarre actions during his sentencings clearly made evident his medical and psychological problems. (A.A.145-170, 311-313) The Court however

ignored any possible mitigation these medical issues may have raised when sentencing Defendant. Despite the fact that the record clearly showed Defendant was at most marginally competent, he had actually been declared incompetent and sent to Lakes Crossing for many months before trial started (A.A.171-192). He was apparently not given any consideration because of his marginal competency by the Court or for his psychological problems at sentencing. When the Court later considered Defendant's Motion for Modification of Sentence, the Court then apparently ignored all the Defendant's serious medical/psychological issues and how they affected him. The Court also failed to consider how Defendant's medical/psychological problems would have aggravated his lifelong prison sentence, granting him no mitigation in the sentence. (A.A. 165-167)

Defendant directs the Court's attention to the decisions of courts which have considered that a sentence reduction is appropriate when a defendant is suffering from medical conditions not easily treated in custody such as chronic pain or other illness. *See, for example, United States v. Martin,* 363 F.3d 25 (1st Cir.2004), *United States v. Lara,* 905 F.2d 599 (2nd Cir.1990), *United States v. Slate,* 971 F.2d 621 (10th Cir.1992). Defendant submits the District Court should have also weighed these factors and the totality of mitigating circumstances which included the Defendant's

physical health problems before sentencing him. The Court clearly abused its discretion when it sentenced Defendant to life without parole as an habitual criminal. It is respectfully submitted this was clearly an extraordinary abuse of discretion that mandates reversal.

II. THE SENTENCE OF LIFE WITHOUT PAROLE WAS SO EXCESSIVELY HARSH AND DISPROPORTIONATE THAT IT VIOLATED THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

The general rule gives great freedom to the Courts at sentencing.

> [T]he legislature, within constitutional limits, is empowered to define crimes and determine punishments, and the courts are not to encroach upon that domain lightly. . . . Thus, it is frequently stated that a sentence of imprisonment which is within the limits of a valid statute, regardless of its severity, is normally not considered cruel and unusual punishment in the constitutional sense.
>
> *Schmidt v. State,* 94 Nev. 665, 668, 584 P.2d 695, 697 (1978) (citations omitted); *see also Harmelin v. Michigan,* 501 U.S. 957, 111 S. Ct. 2680 (1991) (Emphasis added)

. . .

. . .

Defendant however respectfully argues that his case was outside the general rule for several reasons and that the District Court Judge erred when it found that a life without parole sentence was the appropriate sentence in this case. (A.A. 255) Merely because the punishment was just within the outer limits of the statutory framework it should not totally insulate the punishment from Eighth Amendment scrutiny.

The Defendant submits his sentence was so disproportionate that it amounted to cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment to the United States Constitution, as well as Article 1, Section 6 of the Nevada Constitution, prohibits the imposition of cruel and unusual punishment. In *Robinson v. California,* 370 U.S. 360, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962), the Supreme Court held that the Eighth Amendment's ban on cruel and unusual punishment was held applicable to the States through the Fourteenth Amendment. The Nevada Supreme Court has stated that " [a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.' " *Allred v. State,* 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting *Blume v. State,* 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting

Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

It is respectfully submitted that the cases Defendant has cited on disproportionate punishment directly apply to his case. Even though Defendant's sentence of life without parole is technically within statutory guidelines, because of the "shocking" facts of the case, Defendant submits his sentence nevertheless violates the Eighth Amendment's cruel and unusual punishment clause.

The cruel and unusual punishment clause of the Eighth Amendment always prohibits sentences that are overly harsh and excessive and which are 'shocking to the conscience.' Reviewing the totality of facts and circumstances of this case Defendant submits that his sentence must be found to be excessive and grossly disproportionate and therefore in violation of the Eighth Amendment.

Consider the case of *United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005), where the court recognized a sentence was so excessive so as to exceed the limits of the Constitution. *Citing, Weems,* 217 U.S. at 382:

> "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. However, the 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. 2641, 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. (Emphasis added)

. . .

There are other cases where sentences have been held to be unconstitutionally cruel and unusual, notwithstanding the existence of an underlying statute which made the sentence not unconstitutional on its face. *See, Workman v. Commonwealth,* 429 S.W. 2d 374 (Ky.1968); *Faulkner v. State,* 445 P.2d 815 (1968); *Cox v. State,*181 N.E. 469, 470-72 (1932).

Again as the Court in *Weems, supra*, noted:

> "The Eighth Amendment is progressive, and does

> not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice." *Id*. 351 (Emphasis added)

. . .

Defendant respectfully submits that unfortunately there has as yet been little progressivity with reform of prison sentences in the last one hundred and ten years. We are still waiting for the "humane justice" the Supreme Court was concerned about in 1910. Unfortunately, the United States of America leads the free world in the percentage of its citizens who are incarcerated. This Honorable Court should apply the progressive principles enunciated one hundred years ago in *Weems* and find that a sentence of life without parole for the Defendant in this case is excessively harsh and cruel and unusual punishment, violating the Eighth Amendment.

Although the expression "cruel and unusual," as used when the Eighth Amendment to the Constitution of the United States as originally formulated, was directed against barbarous forms of punishment which could be characterized as torture, modern courts now have applied it to punishment involving sentences of such duration that they shock the conscience of reasonable persons or outrage the moral sense of the community, in light of the developing concepts of decency. *See,*

Boerngen v. United States, 326 F.2d 326 (5th Cir.1964); *Green v. Teets,* 244 F.2d 401 (9th Cir.1957); *Jordan v. Fitzharris,* 257 F.Supp. 674 (N.D. Cal.1966); *Workman v. Commonwealth, supra; Cannon v. Gladden,* 203 Or. 629, 281 P.2d 233 (1955); *Cox v. State, supra.*

It is respectfully submitted the sentence Defendant received of life in prison without ever getting a chance of parole is a sentence that is 'shocking to the conscience.' The sentence should therefore be reversed or modified to at least allow the possibility of eventual release from prison on parole.

III. THE DISTRICT COURT ERRED WHEN IT WRONGLY GRANTED DEFENDANT'S REQUEST FOR SELF REPRESENTATION UNDER *FARETTA v. CALIFORNIA*, 422 U.S. 806 (1957), BECAUSE THE FACTS OF THIS CASE SHOWED THE DEFENDANT WAS NOT COMPETENT TO REPRESENT HIMSELF.

In this case, the Court wrongly granted Defendant's *Faretta* request and he was unable to adequately present mitigating evidence of his mental problems.(A.A. 133-143) The District Court should have recognized that because of his long stay in the Lake's Crossing Mental Facility, his competency was doubtful. (A.A.171-192)

Competency to waive *Faretta* rights should be strictly construed especially in such a serious case as this case in which the Defendant was facing the possibility of life without parole. Because there had been a clear breakdown of communication between Defendant and his court-appointed counsel, the remedy should not have been to put Defendant in a position where he felt he must represent himself. On April 23, 2014, the District Court finally granted Defendant's Motion to Withdraw Counsel and found the Defendant competent to represent himself. (A.A.55) Defendant had previously filed numerous Motions to Withdraw Counsel which were all rejected. (A.A. 60, 61), (A.A. 264, 265), (A.A. 286, 287)

It is respectfully submitted the Court had a strong duty to attempt to work more diligently with the Defendant and try harder to find an alternate counsel to work with the Defendant. *See, Nguyen v. State,* 262 F.3d 998 (9th Cir.2001), where the Ninth Circuit Court of Appeals noted:

> "[t]he District Judge focused exclusively on the attorney's competence and refused to consider the relationship between *Nguyen* and his attorney. Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense. *United States v. Musa,* 220 F.3d 1096, 1102 (9th Cir.2000) (cert. den., *Musa v. U.S.,* 531 U.S. 999, 121 S.Ct. 498, 148

> L.Ed.2d 469 (2000)). Similarly, a defendant is denied his Sixth Amendment right to counsel when he is "forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate." *Brown v. Craven,* 424 F.2d 1166, 1169 (9th Cir.1970).
>
> There is no question, in this case, that there was a complete breakdown in the attorney-client relationship. By the time of trial, the defense attorney had acknowledged to the Court that *Nguyen* "just won't talk to me anymore." In light of the conflict, *Nguyen* could not confer with his counsel about trial strategy or additional evidence, or even receive explanations of the proceedings. In essence, he was "left to fend for himself," *United States v. Gonzalez,* 113 F.3d 1026, 1029 (9th Cir.1997), in violation of his Sixth Amendment right to counsel. *Id*. 1003, 04 (Emphasis added)

In this case it is apparent Defendant Pigeon had great difficulties with appointed counsel. Just as the defendant *Nguyen*, he had expressly evidenced great dissatisfaction with his counsel in the numerous Motions to Withdraw he filed which were summarily denied. (A.A.60,61), (A.A.264,265), (A.A.286,287) He chose self representation after the District Court denied his Motions to Withdraw Counsel multiple times.

Defendant directs the Court to the ABA Standards on the function of the Trial Judge § 6.6:

6.6 The defendant's election to represent himself at trial.

A defendant should be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that he :

(i) has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(ii) possesses the intelligence and capacity to appreciate the consequences of this decision; and

(iii) comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.

(Emphasis added)

The Defendant submits the District Court in this case did not adequately consider the Defendant's intelligence, capacity or ability to fully comprehend the totality of facts necessary for his defense. This was error.

The Commentary to the above mentioned ABA Standards notes:

> Most defendants who seek to appear *pro se* do so in ignorance of the value of counsel and of their own inadequacies, or out of paranoid distrust of appointed counsel. More sophisticated motives may include the hope that the absence of counsel may afford a basis for reversal of a conviction regarded as inevitable, or a desire to ventilate societal hostility through the dramatic vehicle of a disorderly trial. *See generally* Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245 (1964). None of these sources of the desire to dispense with counsel outweighs the rights of co-defendants, or the interest of the public in a just and orderly trial. Nor do they require the court to disregard the long term interest of the accused in having his guilt or lack of guilt fairly determined. Thus, the judge should feel no reluctance in strongly discouraging attempted waivers of counsel and should fully and carefully explain the value of counsel and the correlative disadvantages of a *pro se* defense. (Emphasis added)

The Supreme Court has emphasized the *Faretta* rights are not absolute but are contingent upon mental competency. *Indiana v. Edwards,* 554 U.S. 164, 128 S.Ct. 2374, 171 L.Ed.2d 345 (2008). The District Court in this case knew, or should have

known, that Defendant Pigeon had been suffering from mental health disabilities. (A.A.191,192)

Before granting defendant leave to represent himself, the trial court should therefore have again determined "whether the defendant had the mental capacity to waive his constitutional right to counsel with realization of the probable risks and consequences of his action." *See also, People v. Teron,* 568 P.3d 773 (1979); *Curry v. Superior Court,* 75 Cal. App. 3d 221, 226, 141 Cal. Rptr. 884, 857 (1977); *People v. Zatko,* 80 Cal. App. 3d 534, 544-45, 145 Cal. Rptr. 43 (1978); Sultan and Tillis, *Mental Competency in Criminal Proceedings,* 28 Hastings L. J. 1053, 1065-69 (1977).

It has been held that the mere competency to stand trial does not always equate with capacity to waive counsel. In *Government of Virgin Islands v. Niles,* 295 F.Supp. 267 (1969), the court held that even though the defendant was competent to stand trial, he could not waive counsel, stating:

> "As for defendant's competency to waive counsel, the court is of the opinion that one who may be suffering from paranoid delusions should not be entrusted with the sole conduct of his defense. . . . A judge can make certain that an accused's professed waiver of counsel is

> understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances . . . . " *Id*. 273 (Emphasis added)

It is respectfully submitted that the District Court was too quick to allow Pigeon to represent himself. The District Court knew, or should have known, that Defendant Christopher Edward Pigeon was at best marginally competent and that the failure to provide him with alternate counsel would gravely prejudice him.

Consider the case of *Commonwealth v. Tyler,* 360 A.2d 617 (PA. 1976), where the court reversed a conviction because defendant proceeded to represent himself *pro se* when denied his appointment for new counsel, stating:

> "The trial court forced appellant in the instant case to either accept court appointed counsel with whom an irreconcilable difference as to the manner in which the trial should be conducted had arisen, a difference which was corroborated by counsel or to represent himself. In so doing, the court presented appellant with the same "Hobson's choice" given to the appellant in *Commonwealth v. Barnette, supra,* and such action does not comport with the constitutional standards required to be met before a court may accept an alleged waiver of one's constitutional right to representation by counsel." *Id*. 620 (Emphasis added)

Similarly, in the case of *United States v. Silkwood,* 893 F.2d 248 (10th Cir.1989), the court found the defendant's waiver was coerced because when he informed the court of his dissatisfaction with counsel, the court did nothing to cure his dissatisfaction. The court in reversing stated:

> "Since the Supreme Court held in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1957), that a criminal defendant has the right to appear *pro se* if he voluntarily, knowingly, and intelligently waives his Sixth Amendment right to counsel, this court has addressed on several occasions the inquiry which a trial court must make to ensure that the waiver meets these standards. *See, United States v. Gipson,* 693 F.2d 109 (10th Cir.1982), *cert. den.,* 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d 455 (1983); *United States v. Padilla,* 819 F.2d 952 (10th Cir. 1987); *Sanchez v. Mondragon,* 858 F.2d 1462 (10th Cir.1988). For the waiver to be voluntary, the trial court must inquire into the reasons for the defendant's dissatisfaction with his counsel to ensure that the defendant is not exercising a choice between incompetent or unprepared counsel and appearing *pro se*. *Sanchez,* 858 F.2d at 1465. For a waiver to be knowing and intelligent, the trial court must conduct a "'penetrating and comprehensive examination'" into the defendant's "'apprehension of the nature of the charges, the statutory

> offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.' " *Padilla,* 819 F.2d at 956-57 (quoting *Von Moltke v. Gillies,* 332 U.S. 708, 723-24, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948)). (Emphasis added)

. . .

It is well established that sentencing is a critical stage of the criminal process. *Mempa v. Rhay,* 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 359 (1967). It is therefore respectfully submitted that the Defendant was therefore entitled to competent counsel during that stage of the proceeding under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A critical stage in the proceeding is one where "the accused requires the use of counsel in coping with the legal problems or assistance in meeting his adversary and the substantial rights of the accused may be affected." *Rhay, Id*. 134, 35 (Emphasis added)

For all of these reasons it was prejudicial error to allow Defendant Pigeon to represent himself at sentencing. This error mandates a reversal and a new sentencing hearing with counsel.

IV. THE ACCUMULATION OF ERRORS IN THIS CASE REQUIRES REVERSAL OF DEFENDANT'S SENTENCE AS AN HABITUAL CRIMINAL WITH LIFE WITHOUT PAROLE.

The numerous errors in this case require reversal of the conviction. It can be argued that even considered separately, the errors or omissions of the Court or of counsel were of such a magnitude that they each require reversal. It is clear that 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), which stated: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial." It is well settled that greater prejudice results from the cumulative impact of the multiple deficiencies. *Cooper v. Fitzharris,* 586 F.2d 1325, 1333 (9th Cir. 1978) (*en banc*), cert. den., 440 U.S. 970, *Harris by and through Ramseyer v. Wood,* 61 F.3d 1432 (9th Cir.1995).

It is respectfully submitted that in this case the multiple errors of counsel, when cumulated together must require reversal of the sentence. A quantitative analysis makes that clear. *See, VanCleave, Rachel A.,* "When is Error . . . Not an Error?" Habeas Corpus and Cumulative Error, 46 Baylor Law Review 59, 60 (1993).

The relevant factors for a court 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. *See, 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 this case the issue of the validity of the sentencing enhancement and the resulting sentence was close. The quantity and character of the Court and counsel's errors during the sentencing was great and the gravity of the charges and the magnitude of Defendant's sentence was the highest possible as the Defendant Pigeon received a life without sentence.

Applying the guidelines of *Mulder v. State, supra,* the doctrine of accumulated error should be applied and reversal of Defendant's improper and excessive sentence must follow.

CONCLUSION

The Defendant received a cruel and unusual sentence of Life Without Parole. It is respectfully submitted this resulted because the District Court abused its discretion when the District Judge sentenced Defendant as an habitual criminal. The Court clearly did not take into account the Defendant's serious mental deficiencies

which should have weighed very heavily as mitigating circumstances.

The sentence of Life Without Parole was an excessively harsh and disproportionate sentence that should be reversed because it violated the Eighth Amendment's constitutional prohibition against cruel and unusual punishment. This sentence should also be reversed because the District Court erred when it had wrongly granted the Defendant's *Faretta* Motion.

It was error to grant Defendant's *Faretta* motion under the facts of this case because of the Defendant's dubious mental capacity. His ability to represent himself was very questionable. Defendant was extremely prejudiced by his inept attempt at self-representation during the sentencing proceeding. He was unable to effectively argue for a reduced sentence or even present evidence for himself. He only succeeded in antagonizing the Judge, which then resulted in the maximum possible sentence.

Defendant urges this Honorable Court to consider all the mitigating circumstances and remand the case, finding that the District Court erred in sentencing the Defendant. The Court should find that Defendant Pigeon was prejudiced by the District Court granting the *Faretta* motion. This error was so prejudicial that the Defendant's case must be reversed and remanded for a new sentencing with counsel.

DATED this 19th day of October, 2021.

Respectfully submitted,
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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 6,015 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 19th day of October, 2021.

Respectfully submitted,
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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 19th day of October, 2021, I served a copy of the foregoing: Appellant Christopher Pigeon's Opening Brief as well as Volumes 1 & 2 of the Appendix and 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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