

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER E. PIGEON,)
#90582,)
Appellant,)

Electronically Filed
Dec 01 2021 12:27 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

) **CASE NO.: 83232**

v.)

) **E-FILE**

STATE OF NEVADA,)
Respondent.)

REPLY TO RESPONDENT'S ANSWERING 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**

TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 000854
Law Office of Terrence M. Jackson
624 South 9th Street
Las Vegas, Nevada 89101
(702) 386-0001
Terry.jackson.esq@gmail.com

STEVEN B. WOLFSON
Nevada Bar No. 001565
Clark County District Attorney
200 E. Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2750
Steven.Wolfson@clarkcountynyda.com

AARON D. FORD
Nevada Bar No. 007704
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

...
Counsel for Appellant

Counsel for Respondent

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STATEMENT OF ISSUES

- I. THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANT'S
MOTION TO MODIFY HIS SENTENCE;
- II. DEFENDANT'S INADEQUATE REPRESENTATION OF HIMSELF AT
SENTENCING SHOULD HAVE BEEN CONSIDERED AS GROUNDS TO
MODIFY HIS SENTENCE;

**III. CUMULATIVE ERROR REQUIRES REVERSAL OF THE DEFENDANT'S
CONVICTION.**

ARGUMENT

**I. The District Court Erred When it Denied Defendant's Motion to Modify
his Sentence.**

The State in Respondent's Answering Brief cited dicta from *State v. Husney*, 100 Nev. 90, 97 (1984), that not every mistake or error during sentencing gives rise to a due process violation. (Respondent's Answering Brief, hereafter RAB, pg. 13). Defendant however, was not arguing that a specific fact influenced the wrongful sentence in this case.

What Defendant has argued is that the District Court abused its discretion when the Court sentenced Defendant to a sentence of life without parole. It is respectfully submitted the Court did not adequately consider the totality of factors necessary for a just sentence, considering the fact that the Defendant incompetently represented himself.

Despite the State's argument in its Respondent's Answering Brief that Defendant could not appeal the Court's abuse of discretion at sentencing in this case. (RAB, pg. 13, 14) Defendant submits this argument by the State is contrary to the

decision of *Walker v. Deeds*, 50 F.3d 670 (9th Cir. 1995), which held that habitual criminal determination is not automatic. The Court found that Nevada law created a liberty interest in sentencing procedures protected by the *Due Process Clause* of the Fourteenth Amendment.

II. Defendant's Inadequate Representation of Himself was Relevant to his Motion to Modify his Sentence.

It is respectfully submitted that Respondent's Answering Brief mistakenly argues that Appellant cannot argue that one of the factors relevant to his Sentencing Modification Motion was his lack of competent counsel to effectively argue any important mitigating circumstances.

Respondent asserts this claim must be barred by the 'law of the case doctrine' citing *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). (RAB, pg. 17) Appellant submits the 'law of the case doctrine' should not be applied to these particular facts, because although Defendant previously argued the *Faretta* violation(s) on appeal in case number 67083, he was not specifically arguing his (Defendant's) lack of competence, but argued instead the Court seemed prejudiced or biased against the Defendant at sentencing. (A.A., pg. 295,327,329) The prosecutor had a tremendous advantage over Pigeon at sentencing, filing a lengthy sentencing

memo. (A.A., pg. 244-282)

The United States Supreme Court has recognized the power of the State and the duty of the prosecutor not to take advantage of less skilled defendant(s). In *Berger v. United States*, 295 U.S. 78 (1935), in which the court stated:

“A prosecutor’s duty is to do justice. Although a prosecutor may strike hard blows, he is not at liberty to strike foul ones.” *Id.* at 88 (Emphasis added)

More recently, in *State v. Cornell*, 878 P.2d 1352 (Ariz.1994), the Court recognized the heightened ethical duty of prosecutors in cases where a defendant is acting in *propria personia* stating:

Moreover, we are concerned that this conduct, and the conduct discussed in the previous section, evinced an attitude by the prosecutor that he could take advantage of the fact that defendant was representing himself. It is true that a defendant acting in *propria personia* is subject to the same rules as an attorney. *Faretta*, 442 U.S. at 834 n. 46, 95 S.Ct. at 2541, n. 46; *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir.1984); *cert. den.*, 469 U.S. 1165, 105 S.Ct. 926, 83 L.Ed.2d 938 (1985). It is also true, however, that a defendant’s invocation of the right to self-representation does not signal playtime for prosecutors. Prosecutors have a duty to do more than convict defendants. They have a duty to see that defendants get a

fair trial. See, e.g., *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 241, 836 P.2d 445, 454 (Ct. App.1992) (Lankford, J., concurring); *State v. Steen*, 623 A.2d 146, 148 (Me.1993); *State v. Gaudette*, 431 A.2d 31, 34 (Me.1981); see also, Ariz. R. Sup. Ct. 42, ER3.8, comment (“a prosecutor has the responsibility of a minister of justice and not simply that of an advocate”). *Id.* at 1369 (Emphasis added)

...

In this case, the Defendant did not have the legal ability to competently contest the prosecutor’s claims in the State’s lengthy sentence memorandum. (A.A., pg. 244-282)

III. The Cumulative Error Requires Reversal of Appellant’s Conviction.

The State of Nevada argued Appellant’s cumulative error claim is inappropriately raised and without merit, citing *McNelson v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999) and *Hill v. State*, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998). (RAB, pg. 21)

Defendant submits his claim for cumulative error was properly raised on appeal and is meritorious. Defendant respectfully directs this Honorable Court consider such cases as *United States v. Dado*, 759 F.3d 550 (6th Cir. 2014), *cert. den.*, 135 S.Ct. 510 (2014), *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) and *Rodriguez v. Hake*, 928 F.2d 534 (2d Cir. 1991). In each of these cases, the Courts applied the principle of

cumulative error.

By applying the Nevada Supreme Court standards of cumulative error, as articulated by the State in *Mulder v. State*, 116 Nev. 1 (2006), the Defendant submits cumulative error should apply in this case. Defendant submits that (1) the issue of Defendant's guilt was close, (2) there were significant errors, and (3) the gravity of the crime was certainly great. (Emphasis added) It is respectfully submitted the District Court therefore erred by finding against Defendant's claim for cumulative error(s).

CONCLUSION

Therefore, it is respectfully submitted the Court abused its discretion by giving the Defendant such a lengthy sentence. This sentence violated the Eighth Amendment.s Defendant had a right to seek modification of that sentence and it was especially important that he had an attorney to assist him with such a Motion. There were clearly substantial grounds to find that cumulative error led to the excessive and unjust sentence in this case. Therefore, reversal is mandated.

DATED this 1st day of December, 2021.

Respectfully submitted,

//s// Terrence M. Jackson
Terrence M. Jackson, Esquire

terry.jackson.esq@gmail.com

Counsel for Appellant, *Christopher E. Pigeon*

CERTIFICATE OF COMPLIANCE

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

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

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

[X] Proportionately spaced, has a typeface of 14 points or more and contains 1,026 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 1st day of December, 2021.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

Counsel for Appellant, *Christopher E. Pigeon*

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 1st day of December, 2021, I served a copy of the foregoing: *Christopher E. Pigeon's* Reply to Respondent's Answering Brief 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 Petitioner/Appellant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

KAREN MISHLER
Chief Deputy District Attorney - Criminal
karen.mishler@clarkcountyda.com

Christopher E. Pigeon
ID # 90582
H. D. S. P. - Box 650
Indian Springs, NV 89070-0650

By: /s/ Ila C. Wills

Assistant to Terrence M. Jackson, Esq.