

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVIN MARVELL TONEY,

#1187296,

Appellant,

v.

STATE OF NEVADA,

Respondent.

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Electronically Filed
Nov 09 2021 11:27 a.m.

CASE NO.: 83246

Elizabeth A. Brown
Clerk of Supreme Court

E-FILE

D.C. Case: A-20-821088-W

Dept.: **XXVIII**

APPELLANT'S OPENING BRIEF

**Appeal from the denial of a Post Conviction Writ of Habeas Corpus
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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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for DAVIN MARVELL TONEY, 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 9th day of November, 2021.

//s// Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

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Appeal from the denial of a Post-Conviction Writ of Habeas Corpus

Eighth Judicial District Court, Clark County

NATURE OF THE ACTION

This is an Appeal from denial of a Post-Conviction Writ of Habeas Corpus.

SPECIFICATION OF ERROR

1. Whether the District Court erred when it found Defendant's Post-Conviction Petition was procedurally barred because the Petition was untimely and there was no good cause for the Petition;

2. Whether the District Court erred when it wrongly found defense counsel was not ineffective for failing to challenge the use of a weapon enhancement to the Defendant's sentence under NRS 193.165 for him merely using a toy gun;
3. Whether the District Court erred when it found the Defendant's plea was a knowing, voluntary and intelligent plea of guilty;
4. Whether the District Court erred when it denied Defendant an adequate evidentiary hearing on Defendant's Post-Conviction Habeas Corpus Petition;
5. Whether Cumulative Error requires reversal of Defendant's conviction.

SUMMARY OF THE ARGUMENT

Not having any meritorious legal arguments to challenge the substance of the Defendant's Petition for Habeas Corpus, the State instead raised the issue of procedural bars to the Defendant's Petition. The State's argument that Defendant's Petition was procedurally barred under NRS 34.726 however must fail because Defendant can demonstrate both good cause and prejudice to overcome any procedural bars in this case. *See, United States v. Davis*, 588 U.S. __ (2019). *See also, Harris v. State*, 133 Nev. 682, 407 P.3d 348 (2017) and *State v. Huebler*, 128 Nev. Adv. Op. 19, 275 P.3d 91, (2012). Defendant respectfully submits barring his Petition

would result in a fundamental miscarriage of justice. *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006).

The District Court also clearly erred when it enhanced Defendant's sentence under NRS 193.165 for use of a weapon because the so called weapon in this case was merely a pellet gun. The Nevada Supreme Court has held that a toy gun is not a weapon and therefore the District Court should not have in this case enhanced the Defendant's sentence. *See, for example*, the case of *McIntyre v. State*, 104 Nev. 622, 764 P.2d 482 (1988). *See also*, *Bias v. State*, 105 Nev. 869, 784 P.2d 963 (1989), where the Nevada Supreme Court, citing the earlier case of *McIntyre, supra*, stated: . . . "Here, as in *McIntyre*, the toy gun did not warrant *per se* deadly status because it was not a firearm. *Id.* 871 (Emphasis added) The Supreme Court in *Bias, supra*, expressly declined an invitation to overrule the *McIntyre* decision. *Id.* 871.

The District Court also erred when it found the Defendant's guilty plea was knowing, voluntary and intelligently entered. The Court also wrongly concluded that the Defendant's plea in this case was the product of effective assistance of counsel. Counsel, under *Strickland*, must do an adequate investigation and preparation preplea. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In this case counsel clearly failed in his duty to adequately investigate and prepare the

Defendant's case preplea. Counsel also did not adequately prepare his client before the plea hearing and he was therefore ineffective under *Strickland, supra*.

The ineffectiveness of defense counsel in this case led to the invalid plea that should not have been allowed by the Court. The District Court then erred by denying Defendant/Petitioner the right to an adequate evidentiary hearing on his Writ of Habeas Corpus. *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994). An evidentiary hearing was the only way to have resolved the disputed facts in Defendant's petition. *Hatley v. State*, 100 Nev. 214 (1984). *Id.* 217

Finally, the Court ignored the cumulative error doctrine by failing to reverse Defendant's conviction and sentence despite multiple errors. *See, Daniel v. State*, 119 Nev. 498 (2003), *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.1978) (*en banc*) *cert. den.*, 440 U.S. 970, and *Harris by and through Ramseyer v. Wood*, 61 F.3d 1432 (9th Cir.1995). This error requires reversal.

JURISDICTIONAL STATEMENT

Defendant/Appellant claims jurisdiction pursuant to NRS 177.015(3). Defendant filed timely Notice of Appeal pursuant to statute on July 15, 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 Post Conviction Petition for Writ of Habeas Corpus.

ROUTING STATEMENT

This is an appeal of a post-conviction Petition involving two class B felonies, burglary with use of a weapon, NRS 205.060.4, and robbery with use of a weapon, NRS 200.380. Pursuant to NRAP 17(b)(1), because this is an appeal of a judgment based upon a guilty plea, it is presumptively assigned to the Court of Appeals. However, because Defendant was convicted of two serious B level felonies, for which he received substantial prison time, and as this appeal raises a significant legal issue of statewide importance concerning sentencing enhancement, the Supreme Court should retain jurisdiction. NRAP 17(a)(12).

STATEMENT OF LEGAL ISSUES PRESENTED FOR REVIEW

- I. THE DISTRICT COURT ERRED WHEN IT FOUND DEFENDANT'S POST CONVICTION PETITION WAS PROCEDURALLY BARRED AS UNTIMELY;
- II. THE DISTRICT COURT ERRED WHEN IT WRONGLY ENHANCED THE DEFENDANT'S SENTENCE FOR USE OF A DEADLY WEAPON;

- III. THE DISTRICT COURT ERRED FINDING DEFENDANT'S GUILTY PLEA WAS VALID AS A KNOWING, VOLUNTARY AND INTELLIGENT PLEA;**
- IV. THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANT AN ADEQUATE EVIDENTIARY HEARING ON THE DISPUTED ALLEGATIONS IN HIS POST CONVICTION PETITION;**
- VI. THE ACCUMULATION OF ERROR REQUIRES REVERSAL OF THE JUDGMENT OF CONVICTION.**

STATEMENT OF THE CASE

On April 28, 2017, Defendant/Appellant Davin M. Toney was charged with a thirteen count Information. (A.A. 01-6) Defendant was arraigned on May 1, 2017, and a jury trial was set. On August 23, 2017, Defendant entered a plea of guilty to an Amended Information of two counts of robbery with use of a deadly weapon and two counts of burglary in possession of a deadly weapon. (A.A. 08-10)

On October 18, 2017, the Defendant was sentenced to an aggregate sentence of eight to thirty-five years. (96 to 420 months) (A.A. 22-23) On October 30, 2017, Judgment of Conviction was entered. (A.A. 24-25) On September 14, 2020,

Defendant filed a *Pro Per* Petition for Post Conviction Relief. (A.A. 26-47) On October 14, 2020, counsel Terrence M. Jackson was appointed to represent Defendant. (A.A. 48) On January 26, 2021, counsel filed Supplemental Points and Authorities. (A.A. 49-62) On April 19, 2021, the State filed a Respondent's Answering Brief. (A.A. 76-104) On May 13, 2021, Defendant filed Reply to State's Response. (A.A. 105-108) On June 21, 2021, the Court heard argument on the Defendant's Petition for Writ of Habeas Corpus. (A.A. 109), (A.A. 143-150) On July 8, 2021, the Court issued Findings of Fact, Conclusions of Law and Order. (A.A. 110-139) On July 15, 2021, the Court filed Notice of Entry of Findings of Fact, Conclusions of Law and Order. (A.A. 140) On July 15, 2021, Defendant filed Notice of Appeal. (A.A. 141-142)

FACTUAL STATEMENT

Defendant was charged with multiple counts of robbery with use of a deadly weapon and multiple counts of burglary with possession of a deadly weapon. Without adequate research or investigation, defense counsel counseled Defendant to pled guilty to two counts of robbery with use of a deadly weapon and two counts of burglary with use of a deadly weapon on August 23, 2017. (A.A. 8-10), (A.A. 63-75)

Defendant entered a plea of guilt to the crime of burglary with a weapon and robbery with a weapon even though the Defendant merely had a BB gun or pellet gun, not a statutorily defined weapon under NRS 193.165. (A.A. 69, 73) Defendant received the enhancement for use of a deadly weapon under NRS 193.165 for each of the four counts to which he pled guilty. His aggregate sentence, because of the multiple enhancements, was eight years to thirty-five years. (A.A. 22-23) Defendant submits the multiple enhancements, of questionable legal validity, wrongly enhanced his sentence.

Defendant filed a *Pro Per* Writ for Post-Conviction Relief after he had realized that on September 14, 2020, his sentence was contrary to law. (A.A. 26-47) The District Court however refused an adequate evidentiary hearing, finding the Defendant's Petition should be denied because it was untimely, as it had been filed beyond the one year statutory deadline. (A.A. 109) The Court, when it denied the Petition, did not find that there had been ineffective assistance of counsel (A.A. 127-131) nor any other ground that was a good cause or excuse for Defendant's untimely filing of the Petition. (A.A. 120-138)

...

SARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT FOUND THAT DEFENDANT'S POST CONVICTION PETITION FOR HABEAS CORPUS WAS PROCEDURALLY BARRED BECAUSE OF TIME DELAY UNDER NRS 34.726 OR LATCHES.

The District Court in its Findings of Fact, Conclusions of Law and Order found that Defendant's Petition for Habeas Corpus Relief was procedurally barred because of statutory time delay and latches. (A.A. 118-120) The Court wrongly found there was no good cause sufficient to overcome the procedural time bar of NRS 34.726. (A.A. 120-138)

Defendant had filed his *Pro Per* Petition for Habeas Corpus Relief on September 14, 2020. (A.A. 26-47) This was outside the one year statutory time constraint for habeas petitions which states that post-conviction habeas corpus petitions should be filed within one year after entry of the Judgment of Conviction: . . . "unless there is good cause shown for delay." Good cause for delay exists if Petitioner demonstrates to the satisfaction of the Court that:

- (a.) That the delay is not the fault of the petitioner; and

(b.) That dismissal of the petition as untimely will unduly prejudice the petitioner.

2. The execution of a sentence must not be stayed for the period provided in subsection 1 solely because a petition may be filed within that period.

A stay of sentence must not be granted unless:

(a.) A petition is actually filed; and

(b.) The petitioner establishes a compelling basis for the stay.

(Added to NRS by 1991.75; A 2013.1736) (Emphasis added)

Defendant in this case submits his Petition should not be procedurally barred for several important reasons:

(1) He had ineffective assistance of counsel. Defense counsel was grossly ineffective because he did not advise Defendant of the correct law before his plea was entered, but instead totally misled him concerning what was the actual law. Defendant actually pled guilty to a charge that was not true, that is because he pled to a weapon enhancements that were not valid. *See, Harris v. State*, 133 Nev. 682, 407 P.3d 348 (2017).

(2) The State's misconduct, or error, in improperly pleading Defendant's case

provides good cause for Defendant's delay in filing this Petition;

(3) Defendant was not deliberately dilatory in filing his Petition. Defendant filed his *Pro Per* Petition as soon as he became aware of the recent controlling United States Supreme Court case of *United States v. Davis*, 588 U.S. v. ____ (2019). Defendant believes the *Davis* case is relevant to his due process rights which were violated by his guilty plea in this case.

(4) Finally, a principle reason for not barring this Petition is that the State is not in anyway prejudiced. If however, the Court bars the Petition, the State will then benefit by its wrongdoing by its wrongful pleading of the enhancement. The law regarding deadly weapon enhancements under NRS 193.165 has been clear for thirty years. Because the State has not been prejudiced, this Petition should not be barred.

Therefore, there exists no question of laches in this case. There was no uncertainty of the law at the time of Defendant's plea. The State was represented by experienced prosecutors who knew the law, or at the very least they had constructive knowledge of the case law of deadly weapons enhancement, when they pled the charges and when Defendant entered his plea. The Defendant's plea, which included the deadly weapon enhancement, was not valid because the enhancement was not

legally correct.

The State of Nevada should be as anxious as the Defendant is to correct the grave injustice to the Defendant resulting from their error which occurred because of the State's mistake, or intentional error, in wrongly pleading the deadly weapon enhancement for use of a BB gun, or a pellet gun, in all four counts of the Amended Information. *See, Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003).

The Court should therefore not bar this Appeal on procedural grounds that the Post Conviction Petition was untimely. The unfair pleading error must be corrected. Justice cannot be accomplished without allowing this Post Conviction Petition. The purpose of procedural rules such as NRS 34.786 and the related doctrine of laches is to protect the State from any unfairness that might have resulted from a lengthy delay in filing the Post-Conviction Petition. The procedural default statute however cannot be used to cause injustice to a Defendant in a case such as this where errors occurred which wrongfully doubled the Defendant's sentence contrary to the law. This Petition must therefore not be barred because all the equities favor the Defendant.

The Defendant could demonstrate good cause which prevented him from filing

the Petition earlier. It is clear that the Defendant did not file the Petition earlier because he was indigent and unschooled in the law and also because he had grossly ineffective assistance of counsel. His counsel, apparently unaware of the law, wrongly persuaded him to plead guilty to the charges which included the wrongful weapon enhancement. This doubled his actual punishment.

Defendant has acted diligently to correct this error. As a layman, when he learned of the legal basis for this Petition, he immediately filed a *Pro Per* Writ of Habeas Corpus. (A.A. 26-47) Furthermore, it is respectfully submitted the State is not prejudiced by the late filing of Defendant's Petition in this case. In fact the State benefits because the wrongful enhancement of the Defendant's conviction can now be corrected. The law is clear that when 'factual innocence' of a crime or even the innocence of an enhancement is at issue, as in this case, the Court should not impose any procedural bar to prohibit necessary post conviction relief. The Nevada Supreme Court has stated that:

"... Even absent a showing of good cause, the Supreme Court will consider a claim if the petitioner can demonstrate that applying procedural bars would result in a fundamental miscarriage of justice." *Bejarano v. State*, 122Nev. 1066, 146 P.3d 265, 270 (2006), *See, State v.*

Bennett, 119 Nev. 589, 597-98, 81 P.2d 1, 7 (2003), *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002).
(Emphasis added)

Defendant submits that he was clearly factually innocent of the weapon enhancement. The State knew or should have known, when it wrote the initial pleadings that he was not, and could not be considered, anything other than factually innocent of a weapon's enhancement in this case.

It is respectfully submitted that under all the facts of this case, it would be a fundamental miscarriage of justice if this Court upheld the District Court's ruling, finding the Defendant's Petition for Writ of Habeas Corpus should be procedurally barred in this case.

II. THE DISTRICT COURT ERRED WHEN IT FOUND THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE WRONGFUL WEAPON'S ENHANCEMENT UNDER NRS 193.165 BASED UPON THE FACT THE WEAPON WAS A BB OR PELLET GUN.

It is respectfully submitted the Court erred when it denied Defendant's Habeas Petition, holding counsel was not ineffective for not challenging the weapon enhancement in this case. The alleged weapon used was a BB gun or pellet gun, (A.A.

69, 73), not a qualifying firearm under NRS 193.165. *Strickland* requires counsel do an adequate preplea investigation and preparation in order to ensure a defendant's rights are protected. It is respectfully submitted counsel's actions in this case in which counsel allowed the Defendant to plead guilty to the weapon(s) enhancement in the Information. Defense counsel was ineffective for not recognizing that the pellet gun in this case was not a deadly weapon subject to enhancement under NRS 193.165. By not recognizing there was insufficient evidence for a deadly weapon enhancement in Counts 1, 2, 3, and 4, the plea Defendant entered was invalid and Defendant was greatly prejudiced by a much longer sentence. (A.A. 22, 23)

Instead of urging a plea of guilty to the Amended Information with the weapon enhancements, the defense counsel should have moved to strike the weapon enhancements. Despite the grievous error of the Clark County District Attorney, who wrongfully pled all counts of the original Complaint with a deadly weapon enhancement, defense counsel did nothing. The Defendant, unfortunately, because of the mistake of law, pled guilty to four counts with the use or possession of a deadly weapon enhancement, a pellet gun. (A.A. 8-10), (A.A. 69, 73) There is no disputing that the alleged 'weapon' in the Amended Information was actually a pellet gun, analogous to a 'toy gun', not an actual firearm, as NRS 202.253 defines a "

'firearm' which is: . . . "a weapon with a caliber of .177 inches or greater from which a projectile may be propelled by means of explosive, spring, gas, air or other such force." "

The pellet gun that was used in these offenses was therefore clearly not a firearm under Nevada law. The facts and the case law make that abundantly clear.

The Nevada Supreme Court has previously clearly decided that a toy gun is not a deadly weapon. The Court has many times reversed cases when holding that the weapon's enhancements, under NRS 193.165, for a firearm or other deadly weapon in the commission of a crime does not apply to a toy gun.

Over thirty years ago, in the case of *McIntyre v. State*, 104 Nev. 622, 764 P.2d 482 (1988), the Supreme Court reversed the defendant's sentencing enhancement for the use of a toy gun in *McIntyre's* case stating:

"NRS 193.165 requires that a criminal's sentence be enhanced when he or she 'uses a firearm or other deadly weapon . . . in the commission of a crime.'" We have previously determined that in statutorily distinguishing firearms from "other deadly weapons," the legislature, for purposes of sentence enhancement, attributed to firearms a *per se* deadly status; proof of a firearm's deadly capabilities is not required. *Stalley v. State*, 91 Nev. 671,

541 P.2d 658 (1975). We have applied this rationale in cases involving blank guns, *Anderson v. State*, 96 Nev. 633, 614 P.2d 540 (1980), and firearms which are, in fact, inoperable. *Allen v. State*, 96 Nev. 334, 609 P.2d 321 (1980).

However, because McIntyre's toy gun is not a firearm, it does not partake of a firearm's per se deadly status. Proof of a toy gun's actual deadly capabilities is necessary before NRS 193.165 can apply. In this case, no evidence suggests that McIntyre could have used his toy gun as a bludgeon or in some other way to inflict death or great bodily harm, prospects that the enhancement provision was designed to deter. Absent such evidence, the enhanced sentences for use of a deadly weapon cannot stand." See, *People v. Skelton*, 414 N.E.2d 455, 458 (Ill. 1980); *State v. Allen*, 343 S.E.2d 893 (N.C. 1986); *Pena Cortex v. State*, 732 S.W.2d 713 (Texas 1987). *Id.* 623, 624 (Emphasis added)

The Court then again reaffirmed the decision that a toy gun is not a deadly weapon in the case of *Bias v. State*, 105 Nev. 869, 784 P.2d 963 (1989), stating:

"In McIntyre, we held that absent proof of deadly capabilities, the use of a toy gun cannot support an enhanced sentence for the commission of a crime "with the use of a deadly weapon." *Id.* at 623, 764 P.2d at 483. Here, as in McIntyre, the toy gun did not warrant per se deadly

status because it was not a firearm. Moreover, there was no evidence that appellant used or could have used the toy gun in a deadly manner. Even the trial judge noted at sentencing that she did not think the gun could be used as a blunt instrument because it was very light and “just a little plastic thing.” (Emphasis added)

...

It is undisputed that the Defendant, Davin Marvell Toney, as in *McIntyre* and *Bias, supra*, did not use or did not possess any deadly weapon or firearm in this case. The only evidence presented against Davin Toney was that he possessed a pellet gun or BB gun. (A.A. 69, A.A. 73) This pellet gun did not qualify as a deadly weapon under the statute *or* under the Nevada case law. *See*, NRS 193.165 defining deadly weapons: ...

“5: As used in this section, “deadly weapon” means:

(a.) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

(b.) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death;
(Emphasis added)

or

(c.) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350. (1973, p. 1593; 1975, p. 720; 1979, p. 225; 1981, p. 2050; 1991, ch. 403, § 6, p. 1059; 1995, ch.455, §1, p. 1431)

The 'weapon' in Toney's case could not have been used to stab or bludgeon anyone. *See McIntyre, Id.* 624. Based upon all the facts and law, this case must therefore be reversed for prejudicial error in wrongly enhancing Defendant's sentence. The enhancement under NRS 193.165 was wrongly applied in this case. This mistake in applying the weapon's enhancement was prejudicial error that doubled the Defendant's sentence which should be reversed.

III. THE DISTRICT COURT ERRED WHEN IT FOUND THAT THE DEFENDANT'S GUILTY PLEA WAS A KNOWING, VOLUNTARY AND INTELLIGENT PLEA, RESULTING FROM EFFECTIVE ASSISTANCE OF COUNSEL.

It is respectfully submitted Defendant's guilty plea was not a knowing, voluntary and intelligent plea. The Court had a duty to consider the totality of circumstances to determine whether the plea was voluntarily and intelligently made.

In *Freese v. State*, 116 Nev. 1097, 13 P.3d 442 (2000), the Nevada Court held that a district court must look to the “totality of circumstances, not talismanic utterances” in determining the validity of a plea of guilt. *Id.* 1104. *See also, McConnell v. State*, 125 Nev. 243, 212 P.3d 307 (2009).

The effectiveness of defense counsel preplea was a critically important circumstance the Court needed to evaluate carefully before determining the validity of Defendant’s plea. It is respectfully submitted that the District Court erred when it found Defendant received reasonably effective assistance of counsel and that his plea was therefore knowing, voluntary and intelligent. The District Judge erred when it denied Defendant’s Habeas Corpus Petition because Defendant did not receive the necessary assistance of counsel preplea to give him the full legal rights he was entitled to under the Sixth Amendment. Defendant submits his guilty plea was the product of ineffective assistance of counsel because he was ill informed and misadvised and he therefore entered an unknowing, unintelligent and therefore involuntary plea. (A.A. 64-75)

The District Court ignored Defendant’s testimony presented at the evidentiary hearing, showing lack of any preplea investigation by counsel and also the evidence of Defendant’s lack of a full understanding of possible defense when the Court

denied Defendant's Post-Conviction Petition on July 8, 2021. (A.A. 109), (A.A. 110-138) This was error that requires reversal.

Defendant directs this court to the American Bar Association (ABA) Standards on the Prosecution and Defense function, ABA Standard 4.1 *Duty to Investigate*, which emphasizes the crucial importance of investigation by criminal defense attorneys for their clients.

ABA Standard 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 importance of this Standard has been recognized and cited by the Nevada Supreme Court for over forty years. *Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473 (1975). Counsel ignored this standard and did not fulfill this elementary command to investigate and develop possible information that might have assisted his client.

Assisting the client in investigation is one of the most important tasks of defense counsel. Failure of counsel to do this task effectively undercut the validity of a defendant's plea and therefore requires reversal of the conviction.

In *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two pronged test for reversal based upon ineffective assistance of counsel. First, the defendant must show counsel's *performance was deficient*. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, counsel must show that the deficient performance *prejudiced* the defense. This requires showing that counsel errors were so serious as to have deprived defendant of a fair trial, that is a trial where the result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted in a breakdown of the adversary process that renders the result unreliable. *Strickland*, *Id.* 687. The District Court wrongly concluded Defendant was not prejudiced by the lack of effective investigation, discounting the Defendant's allegations.

Strickland noted that:

...[j]udicial scrutiny of counsel's 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 and failed to pursue evidence supportive of innocence or evidence which would establish a reasonable doubt. He failed to establish 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)

...

Counsel's performance in this case was also objectively unreasonable. In this case his incompetent counsel did not adequately evaluate possible defenses available to Defendant. The District Court refused Defendant's request for an evidentiary hearing to show that he had inadequate contact with his counsel preplea and that his counsel did not effectively and competently prepare Defendant's case before the plea of guilty. (A.A. 127-128, 136)

The plea hearing shows counsel never effectively or competently explained why the sentencing enhancement was applicable in Defendant's case. (A.A. 64-74) This failure was a major deficiency in counsel's representation which mandates reversal. A plea must be a knowing, voluntary and intelligent waiver of rights. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). Because counsel did not give a complete and thorough explanation of the substance of the plea negotiations to the Defendant, including all his constitutional rights and all the legal consequences of the

plea, counsel was clearly ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984).

Defendant was greatly prejudiced by his counsel's failures and justice therefore requires his guilty plea be set aside. There are many reasons for courts to set aside guilty pleas. The mere fact the court may have gone through the standard plea canvas is sufficient to establish a plea was voluntary. There is substantial case law that courts must consider the 'totality of circumstances' to determine the validity of a plea and found that a plea is invalid despite a technically valid plea canvas. *See, Freese v. State*, 116 Nev. 1097, 13 P.3d 442 (2000); *McConnell v. State*, 125 Nev. 243, 212 P.3d 307 (2009).

In this case, it is respectfully submitted under the totality of circumstances, counsel was ineffective under *Strickland v. Washington, supra*. Defendant also directs the Court to such cases as *Bustos v. White*, 521 F.3d 321 (4th Cir.2018); *Premo v. Moore*, 562 U.S. 115 (2011); *Raysor v. United States*, 647 F.3d 491 (2d Cir.2011); *Smith v. Mahoney*, 611 F.3d 978 (9th Cir.2010); *United States v. Mooney*, 497 F.3d 397 (4th Cir.2007); *Dando v. Yukins*, 461 F.3d 791 (6th Cir.2006); *United States v. Keller*, 902 F.2d 1391 (9th Cir.1990); *Iaea v. Sunn*, 800 F.2d 861 (9th Cir.1986); and *Fields v. Gibson*, 277 F.3d 1203 (10th Cir.2002), in which guilty pleas were

overturned because of the ineffectiveness of counsel. Defendant submits the facts in this case are equally compelling for setting aside the Defendant's guilty plea, as the above cases cited. The Defendant therefore respectfully urges this Court to grant his *Writ of Habeas Corpus*.

Defendant Davin Toney never received an adequate, intelligent explanation of all the rights of a defendant including receiving informed advice on the strength of both the prosecution's case and any possible defenses which the Defendant may have had. (A.A. 68, 69) *See, Von Moltke v. Gillies*, 332 U.S. 708 (1948); *Libretti v. United States*, 516 U.S. 29 (1995). Because of counsel's failure to adequately assist Defendant preplea, the plea in this case must be considered to have been both unknowing and unintelligent and therefore invalid. The record shows that in this case counsel did not adequately advise the Defendant of his constitutional and statutory rights. Defendant submits these omissions by counsel amounted to grossly ineffective assistance of counsel and rendered his plea invalid which requires reversal of the conviction.

IV. DEFENDANT WAS WRONGLY DENIED AN ADEQUATE EVIDENTIARY HEARING TO SHOW HIS COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

An evidentiary hearing would have established defense counsel was ineffective under *Strickland* in numerous ways. An evidentiary hearing would also have established that Defendant pled guilty on the erroneous advice of counsel to the deadly weapon enhancement even though the alleged ‘deadly weapon’ was merely a pellet gun and not a firearm requiring sentencing enhancement.

An evidentiary hearing was necessary to show that counsel did not adequately research the law or facts before urging the Defendant to plead guilty and admit his use of a deadly weapon which resulted in a lengthy sentencing enhancement under NRS 193.165.5, even though there was no legal evidence of the use or possession of a deadly weapon.

In *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall’s* conviction because he was denied an evidentiary hearing on post-conviction. The Court there stated:

“When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record.” *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). *Id.* 1331

Although the court rejected many of *Marshall's* claims as meritless, it found the issue of insufficiency of the evidence presented to the grand jury supporting the possession or controlled substance charge to have merit and reversed those counts stating:

“At most, the state presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons who frequented the apartment, possessed the cocaine and the marijuana the police found. Appellate counsel was ineffective for failing to raise this issue on appeal and counsel's failure prejudiced appellant. *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.*, 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief.”

“Because the record on appeal establishes that appellant was improperly convicted of the possession charges, we reverse appellant's judgment of conviction on these charges and we vacate the sentences imposed with respect to those convictions.” *Id.* 1333 (Emphasis added)

...

...

Similarly, in *Hatley v. State*, 100 Nev. 214, 678 P.2d 1160 (1984), the Supreme Court reversed and remanded for an evidentiary hearing because the defendant had alleged facts in his petition, which, if true, would entitle him to relief. *Id.* 216 (Emphasis added) The evidentiary hearing would have also shown conclusively there were facts to show Defendant had good cause for any delay in filing this Petition. An evidentiary hearing would have clearly shown the substantial prejudice to the Defendant clearly outweighed any prejudice to the State.

v. CUMULATIVE ERROR REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

The numerous errors and deficiencies of counsel in this case require reversal of the conviction. It can be argued that even considered separately, the errors or omissions of counsel were of such a magnitude that they each require reversal. But it is clear, when viewed cumulatively, the case for reversal is overwhelming. *Daniel v. State*, 119 Nev. 498 (2003). *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).

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).

The defense counsel in this case were ineffective pretrial by not adequately investigating the facts and researching the legal issues which were most important to the Defendant's defense. Defense counsel's failure to fully understand all the facts and the law led to defense counsel misadvising the Defendant preplea concerning the plea. This led directly to an un unnecessarily harsh aggregate sentence of 96 to 420 months because of counsel's misadvice about the deadly weapon enhancement.

CONCLUSION

The District Court erred when it upheld the use of a deadly weapon sentencing enhancement. This was error because the Defendant's attorney had wrongly urged the Defendant to plead guilty to the weapon enhancement of which he was factually innocent. This was grievously ineffective assistance of counsel that seriously prejudiced the Defendant. Such ineffectiveness under *Strickland* must be found to be reversible error.

The law has long been clear that Mr. Toney should not have been found guilty of the weapon enhancements under NRS 193.165 for his use of a pellet gun in this case. If the Defendant's attorney had done even a minimal preplea review of the case law, he would have realized the State could not prove the sentencing enhancement. He did not do the necessary preplea preparation. That ineffective assistance of counsel so prejudiced Mr. Toney that his conviction must be reversed. The case should therefore be remanded, striking the enhancement of his sentence and for such other remedies as this Honorable Court deems just.

DATED this 9th day of November, 2021.

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

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 **6,115** 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 9th day of November, 2021.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 9th day of November, 2021, I served a copy of the foregoing: Appellant Davin M. Toney's Opening Brief as well as Volume 1 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:

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

ALEXANDER G. CHEN
Chief Deputy District Attorney
alexander.chen@clarkcountyda.com

DAVIN M. TONEY
ID# 1187296
S. D. C. C. - P. O. Box 208
Indian Springs, Nevada 89070-0208

By: /s/ Ila C. Wills
Assistant to Terrence M. Jackson, Esq.