SUPREME COURT OF NEVADA

83690

Oscar Gomez, Appellant,

vs.

The State of Nevada, Respondent.

Appeal of Denial of Post-Conviction Relief

Eighth Judicial District Court

Appendix to Appellant's Opening Brief, Volume 1

Jim Hoffman, Esq.

PO Box 231246

Las Vegas, NV 89105

(702) 483-1816

Attorney for Appellant Carlos Eleisa

Index to Appendix

Page numbers for this appendix are prefixed with "PCR" before the number.

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

FILED
2016 JUN 28 A 10:41
JUSTICE COURT
LAS VEGAS NEVADA
BY DC
DEPUTY

THE STATE OF NEVADA,

Plaintiff,

-vs-

OSCAR GOMEZ, JR., aka,
Oscar Gomez #5990519,
GUSTAVO ERNESTO DELACRUZ, aka,
Gustavo Ernesto Delacruzcortez
#2738189,

Defendants.

CASE NO: 16F10719A-B

DEPT NO: 12

CRIMINAL COMPLAINT

The Defendants above named having committed the crimes of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001) and ACCESSORY TO MURDER (Category C Felony - NRS 195.030, 195.040, 200.010, 200.030 - NOC 53090), in the manner following, to-wit: That the said Defendants, on or about the 24th day of June, 2016, at and within the County of Clark, State of Nevada,

COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

Defendant OSCAR GOMEZ, JR., aka, Oscar Gomez did willfully, unlawfully, feloniously and with malice aforethought, kill SHAWN MANYMULES, a human being, with use of a deadly weapon, to-wit: a handgun, by shooting at and into the body of the said SHAWN MANYMULES with said handgun, the said killing having been willful, deliberate and premeditated.

COUNT 2 - ACCESSORY TO MURDER

Defendant GUSTAVO ERNESTO DELACRUZ, aka, Gustavo Ernesto Delacruzcortez did willfully, unlawfully, and feloniously, after the commission of a Murder, a felony, harbor and/or conceal OSCAR GOMEZ, JR., aka, Oscar Gomez, with the intent that OSCAR GOMEZ, JR., aka, Oscar Gomez might avoid or escape arrest, trial, conviction, and/or punishment, having knowledge that OSCAR GOMEZ, JR., aka, Oscar Gomez had committed the Murder and/or was liable to arrest therefore.

16F10719A
CRM
Criminal Complaint
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All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

06/28/16

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LVMPD EV# 1606243862
(TK12)

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CLERK OF THE COURT

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
BINU G. PALAL
Deputy District Attorney
Nevada Bar #010178
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

I.A. 8/4/16
10:00 AM
M. LEVY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

OSCAR GOMEZ, JR. aka Oscar Gomez, #5990519

Defendant.

CASE NO: C-16-316959-1

DEPT NO: XXI

INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That OSCAR GOMEZ, JR. aka Oscar Gomez, the Defendant(s) above named, having committed the crime of **MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001)**, on or about the 24th day of June, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did willfully, unlawfully, feloniously and with malice aforethought, kill SHAWN MANYMULES, a human being, with use of a deadly weapon, to-wit: a handgun, by shooting

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at and into the body of the said SHAWN MANYMULES with said handgun, the said killing having been willful, deliberate and premeditated.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
BINU G. PALAL
Deputy District Attorney
Nevada Bar #010178

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
COLEMAN, JONATHAN	C/O DISTRICT ATTORNEY'S OFFICE
CUSTODIAN OF RECORDS	CCDC
CUSTODIAN OF RECORDS	LVMPD COMMUNICATIONS
CUSTODIAN OF RECORDS	LVMPD RECORDS
DELACRUZ, GUSTAVO	5100 E. TROPICANA AVE., LVN 89122
GAVIN, DR. LISA	CLARK COUNTY CORONER'S OFFICE
JAMES, LUCINDA	C/O DISTRICT ATTORNEY'S OFFICE
MOGG, C.	LVMPD P#5096
RAFALOVICH, MARCO or Designee	CCDA INVESTIGATOR

16F10719A/llm/GANG
LVMPD EV#1606243862
(TK12)

4-7-18
9:30

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

APR 19 2018

BY, _____
JILL M CHAMBERS, DEPUTY

GPA
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ERIKA MENDOZA
Chief Deputy District Attorney
Nevada Bar #012520
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

OSCAR GOMEZ,JR., aka, Oscar Gomez, #5990519

Defendant.

CASE NO: C-16-316959-1

DEPT NO: XXI

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty to: MURDER (SECOND DEGREE) WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010. 200.030.2, 193.165 - NOC 50011), as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty is based upon the plea agreement in this case which is as follows:

The State will retain the full right to argue.

I agree to the forfeiture of any and all weapons or any interest in any weapons seized and/or impounded in connection with the instant case and/or any other case negotiated in whole or in part in conjunction with this plea agreement.

I understand and agree that, if I fail to interview with the Department of Parole and Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges including reckless driving or DUI, but excluding minor traffic violations, the State will have the

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unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without the possibility of parole, life with the possibility of parole after ten (10) years, or a definite twenty-five (25) year term with the possibility of parole after ten (10) years.

Otherwise I am entitled to receive the benefits of these negotiations as stated in this plea agreement.

CONSEQUENCES OF THE PLEA

I understand that by pleading guilty I admit the facts which support all the elements of the offense(s) to which I now plead as set forth in Exhibit "1".

I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada State Prison for Life with the possibility of parole with eligibility for parole beginning at ten (10) years; OR a definite term of twenty-five (25) years with eligibility for parole beginning at ten (10) years, plus a consecutive one (1) to twenty (20) for the deadly weapon enhancement. I understand that the law requires me to pay an Administrative Assessment Fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I understand that I am not eligible for probation for the offense to which I am pleading guilty.

I understand that I must submit to blood and/or saliva tests under the Direction of the Division of Parole and Probation to determine genetic markers and/or secretor status.

I understand that if I am pleading guilty to charges of Burglary, Invasion of the Home, Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled Substance, or Gaming Crimes, for which I have prior felony conviction(s), I will not be eligible for probation and may receive a higher sentencing range.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the offense(s) to which I am pleading guilty was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that if I am not a United States citizen, any criminal conviction will likely result in serious negative immigration consequences including but not limited to:

1. The removal from the United States through deportation;
2. An inability to reenter the United States;
3. The inability to gain United States citizenship or legal residency;
4. An inability to renew and/or retain any legal residency status; and/or
5. An indeterminate term of confinement, with the United States Federal Government based on my conviction and immigration status.

Regardless of what I have been told by any attorney, no one can promise me that this conviction will not result in negative immigration consequences and/or impact my ability to become a United States citizen and/or a legal resident.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing.

Unless the District Attorney has specifically agreed otherwise, the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense(s) charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 19th day of April, 2018.

OSCAR GOMEZ,JR., aka, Oscar Gomez
Defendant

AGREED TO BY:

ERIKA MENDOZA
Chief Deputy District Attorney
Nevada Bar #012520

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which guilty pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:

   a. The removal from the United States through deportation;

   b. An inability to reenter the United States;

   c. The inability to gain United States citizenship or legal residency;

   d. An inability to renew and/or retain any legal residency status; and/or

   e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

   Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

5. To the best of my knowledge and belief, the Defendant:

   a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement,

   b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily, and

   c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

Dated: This 19th day of April, 2018.

ATTORNEY FOR DEFENDANT

cmj/L2

AINF
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ERIKA MENDOZA
Chief Deputy District Attorney
Nevada Bar #012520
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

OSCAR GOMEZ, JR., aka, Oscar Gomez, #5990519

Defendant.

CASE NO. C-16-316959-1

DEPT NO. XXI

AMENDED

INFORMATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That OSCAR GOMEZ, JR., aka, Oscar Gomez, the Defendant(s) above named, having committed the crime of MURDER (SECOND DEGREE) WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010. 200.030.2, 193.165 - NOC 50011), on or about the 24th day of June, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did willfully, unlawfully, feloniously, and with malice aforethought,

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///

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kill SHAWN MANYMULES, a human being, with use of a deadly weapon, to wit: a handgun, by shooting at and into the body of the said SHAWN MANYMULES with said handgun.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
ERIKA MENDOZA
Chief Deputy District Attorney
Nevada Bar #012520

DA#16F10719X /cmj/L2
LVMPD EV#1606243862
(TK12)

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. OSCAR GOMEZ, JR., aka OSCAR GOMEZ, Defendant.	CASE#: C316959-1 DEPT. XXI

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

THURSDAY, APRIL 19, 2018

RECORDER'S TRANSCRIPT OF HEARING:
CALENDAR CALL

APPEARANCES:

For the State: BINU PALAL, ESQ.
ERIKA MENDOZA, ESQ.
Chief Deputy District Attorneys

For the Defendants:
Oscar Gomez: MONTI J. LEVY, ESQ.
RUSSELL E. MARSH, ESQ.

RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER

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PCR 13

Las Vegas, Nevada, Thursday, April 19, 2018

[Hearing began at 9:38 a.m.]

THE COURT: Next up is State versus Oscar Gomez and -- well we'll start with Oscar Gomez. You need to stand up.

Since there's on three people I know who you are, but if it was a full group we would need you to stand up so I -- we could make sure we see that you're here.

All right. This is the time set for calendar call. I'm assuming both sides are announcing ready.

MS. LEVY: Your Honor, Monti Levy along with Russell Marsh from my office --

MR. MARSH: Good morning.

MS. LEVY: -- appearing with Mr. Gomez. My understanding after talking with Mr. Gomez at this time he is willing to accept the offer.

THE COURT: All right. And the offer is?

MR. PALAL: Second degree murder with use of a deadly weapon. The State retains the right to argue. The offer was going to expire today so if -- we don't have a GPA, because we were not expecting this, so --

THE COURT: Right.

MR. PALAL: -- is there a way that we can get a GPA done and --

THE COURT: Well --

MR. PALAL: -- take a plea today?

MS. LEVY: We have no problem waiting.

THE COURT: Well --

MR. PALAL: I know the Court's -- I imagine the reason why this calendar is the way it is, is because maybe the Court has something else today.

THE COURT: Right. Because it's the District Judge's Conference.

MR. PALAL: Just, yeah, right.

THE COURT: So that's why I'm only doing the calendar calls.

MR. PALAL: Okay.

MS. LEVY: Okay.

THE COURT: How long would it take you to get a Guilty Plea Agreement?

MR. PALAL: Thirty minutes.

THE COURT: Okay. We're moving this to Monday. If for some reason Mr. Gomez does not accept the negotiation and enter his plea of guilty on Monday at 9:00 a.m. then we won't have a jury -- we won't call a jury for that day because that's -- all those people that would have to come in unnecessarily. We will begin trial in that case Tuesday at 11:00 a.m.

MS. LEVY: Is that in this department?

THE COURT: Yes.

MS. LEVY: Oh, okay.

THE COURT: It's in this department. So again, Monday they're going to bring you in here. You can plead guilty or not plead

guilty.

DEFENDANT GOMEZ: Yes.

THE COURT: If you don't plead guilty, like I said, I don't want to order 65 people for Monday. So we would have to pass it over for Tuesday. Yes?

MR. PALAL: Your Honor, the issue for us obviously -- is this Court's aware having tried cases, is you know, we have to -- if we're relying on this case being dealt. We have to still have all the work done over the weekend to get --

THE COURT: Well here's the thing, Mr. Palal.

MR. PALAL: If you can give me 15 minutes I'll get it if I have to type it myself. I'll get one done in 15 minutes.

THE COURT: Why don't you just email one to us and we'll print it out and you can go in the back and make the changes?

MR. PALAL: Okay.

THE COURT: That would be faster than you running across the street --

MS. MENDOZA: Well we can just go to the 9th floor.

THE COURT: Oh.

MR. PALAL: Yes, that's -- Ms. Mendoza has given me that idea.

THE COURT: All right. Otherwise if he doesn't -- and it's up to you, Mr. Gomez. The Court's not trying to convince you to take the deal or not take the deal. I'm completely indifferent to whether you take it or not. If you don't take the deal that's fine, we'll start Monday at 9:00

a.m. All right.

So what is she doing?

MR. PALAL: She's getting the GPA ready. She says she --

THE COURT: All right.

So, Mr. Gomez, is that your desire to enter a plea of guilty to second degree murder with use of a deadly weapon here today?

DEFENDANT GOMEZ: I'm have to say yes.

THE COURT: I'm sorry.

DEFENDANT GOMEZ: I'm have to say yes.

MS. LEVY: He said he's going to have to say yes.

THE COURT: Okay. It's up to you, I mean.

MS. LEVY: Canvass.

THE COURT: We can -- the Court's available, your lawyers are ready.

MS. LEVY: We're ready.

THE COURT: The State is ready, so we can proceed to trial on Monday. It's entirely up to you if you want to accept the negotiation or take your chances at trial.

MS. LEVY: And, Your Honor, if I could just for the record. And Mr. Gomez understands that it -- our advice to him was to take it. We're not certainly coercing him or anything else.

THE COURT: Right.

MS. LEVY: But --

MR. MARSH: No.

MS. LEVY: -- after -- we've had so many discussions about

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the same offer and I believe that his desire based on our recommendation would be to take it. So I'm sure the Court will canvass him on that.

He seems unsure because he's shaky, he's a young kid. So --

THE COURT: Right.

MS. LEVY: -- he just might need a few minutes to go through the Guilty Plea Agreement --

THE COURT: Right.

MS. LEVY: -- and enter that plea.

THE COURT: And, I mean, obviously nobody wants to plead guilty to second degree murder. And its full right to argue, is that right?

MR. PALAL: That's right.

THE COURT: And state the penalty --

MR. PALAL: With a deadly weapon, yeah.

THE COURT: -- state the range of penalty on the record, please.

MR. PALAL: Yes, Your Honor. It would be either 10 to 25 or 10 to life on the underlying sentence with a consecutive 2 to 20 for the deadly weapon enhancement.

MS. LEVY: One to 20.

MR. PALAL: One to 20.

THE COURT: So --

MS. LEVY: One to 20 on the weapon enhancement.

THE COURT: One to 20?

They keep changing everything all the time.

MS. LEVY: I believe it's 1 to 20.

THE COURT: So you understand it's up to the Court. The least amount of time the very least amount of time I could give you on the bottom end is 11 years. Do you understand that?

DEFENDANT GOMEZ: I -- I understand.

THE COURT: The most amount of time I could give you on the bottom end is 18 years. Do you understand that?

DEFENDANT GOMEZ: I understand.

THE COURT: And I could give you -- the most amount of time on the top end I could give you is life plus 20 years. All right.

DEFENDANT GOMEZ: Okay.

THE COURT: The least amount of time I could give you on the bottom end is 25 years plus 30 months.

DEFENDANT GOMEZ: Okay.

THE COURT: Do you understand that?

DEFENDANT GOMEZ: Yes.

THE COURT: That's the least amount of time.

Now Mr. Palal can argue for the maximum time, which is a 10 to life and a consecutive 8 to 20. And obviously your lawyers are going to argue for the least amount of time. And then it' going to be up to me to look at everything and determine what, in my opinion, a fair sentence is. Do you understand that?

DEFENDANT GOMEZ: I understand.

THE COURT: So you understand that those are the ranges?

DEFENDANT GOMEZ: Yes.

THE COURT: All right. And obviously it's not an easy thing to look at a plea where the least -- the best you're going to do is 11 years. That's the very best you can do. You understand that?

DEFENDANT GOMEZ: I understand.

THE COURT: And there's no guarantee of that. All right.

MS. LEVY: And he understands because we went through the penalties also if we were to go to trial and it was a first degree with use of a deadly weapon.

THE COURT: Right.

MS. LEVY: It's significantly more than --

THE COURT: Right.

MS. LEVY: -- it's double on the underlying charge.

THE COURT: Right. Well --

MR. MARSH: At least.

THE COURT: Right. Well and then in that case Mr. Palal knows that was their intent, to seek life without the possibility of parole.

MR. PALAL: That would be our intent.

THE COURT: And he -- and you the penalty phase hadn't been waived, so that would be up to the jury.

MS. LEVY: He did sign one today --

THE COURT: Oh.

MS. LEVY: -- that we were going to enter if --

THE COURT: Okay.

MS. LEVY: -- so we still -- we have that if, you know.

THE COURT: All right. Do you have any questions for me so

far --

DEFENDANT GOMEZ: No questions.

THE COURT: -- about the plea or about anything?

DEFENDANT GOMEZ: No.

THE COURT: All right. And we'll go over this in more detail in a Guilty Plea Agreement is, but you had a full and ample opportunity to discuss your plea of guilty and the charge of second degree murder with use of a deadly weapon that you're going to be pleading guilty to. Is that right?

DEFENDANT GOMEZ: That's right.

THE COURT: Okay. And did your lawyers answer all your questions to your satisfaction?

DEFENDANT GOMEZ: They did.

THE COURT: Okay. Do you feel like Ms. Levy and her co-counsel have spent enough time with you explaining the discovery and going over the evidence and everything like that in this case?

DEFENDANT GOMEZ: Yeah.

THE COURT: Okay.

MS. LEVY: And also my investigator who's here, Mr. Retke has spent --

THE COURT: I thought he looked familiar.

MS. LEVY: Yes, yes.

THE COURT: All right.

MS. LEVY: Mr. Retke and I went over there numerous times, yes.

THE COURT: Okay.

MR. PALAL: Thank you, Your Honor.

[Colloquy between the State and Defense counsel]

THE COURT: So we're just --

MR. PALAL: I appreciate your patience, Your Honor, --

MS. LEVY: Thank you, Your Honor.

MR. PALAL: -- we'll have one up shortly.

THE COURT: What's that?

MR. PALAL: I appreciate your patience; we'll have a GPA up very shortly.

[Hearing trailed at 9:46 a.m.]

[Hearing resumed at 10:09 a.m.]

MS. LEVY: Your Honor, may I approach the Clerk?

THE COURT: Sure.

MS. LEVY: Or do you want to go on the record first, either way.

THE COURT: Oh. We're on the record, right?

THE COURT RECORDER: Yes.

THE COURT: All right. And for the record an Amended Information has been filed in open court this morning charging the crime of second degree murder with use of a deadly weapon. And a written Plea of Guilty has also been filed in open court this morning.

Mr. Gomez the Court is in possession of a written Plea of Guilty which was signed by you. Is this your signature here on page 5 of the written Plea of Guilty?

DEFENDANT GOMEZ: Yes, it is.

THE COURT: All right. Before the Court may accept your plea of guilty the Court must be satisfied that your plea is freely and voluntarily given. Are you making this plea freely and voluntarily?

DEFENDANT GOMEZ: Yes.

THE COURT: Other than what's contained in the written Plea of Guilty, have any promises or threats been made to induce you or to get you to plead guilty in this case?

DEFENDANT GOMEZ: No.

THE COURT: All right. Before you signed the written Plea of Guilty did you read it?

DEFENDANT GOMEZ: Yes, I did.

THE COURT: Did you understand everything contained in the written Plea of Guilty?

DEFENDANT GOMEZ: Yes, I did.

THE COURT: Did you also read the Amended Information that's been filed and is attached as an Exhibit to your written Plea of Guilty charging you with the felony crime of second degree murder with use of a deadly weapon?

DEFENDANT GOMEZ: Yes.

THE COURT: And do you understand what's set forth in that charging document?

DEFENDANT GOMEZ: I understand.

THE COURT: All right. Did you have a full and ample opportunity to discuss your plea of guilty as well as the charge to which

you are pleading guilty with your attorneys?

DEFENDANT GOMEZ: I did.

THE COURT: All right. And we've already discussed that your counsel, Ms. Levy, has answered all your questions to your satisfaction, is that right?

DEFENDANT GOMEZ: That's right.

THE COURT: All right. And is it your desire today to waive and give up your right to go to trial next week and plead guilty to the amended charge of second degree murder with use of a deadly weapon?

DEFENDANT GOMEZ: Yes.

THE COURT: All right. Now before I proceed with your plea do you have any questions you would like to ask me the Court?

DEFENDANT GOMEZ: No, no questions.

THE COURT: All right. Let's turn to the charging document. Tell me in your own words what you did on or about June 24th, 2016, here in Clark County, Nevada that causes you to plead guilty to second degree murder with use of a deadly weapon.

DEFENDANT GOMEZ: Can you repeat that? I didn't understand you.

THE COURT: Oh, I'm sorry. I may have lost my train of thought.

Tell me in your own words what you did here in Clark County, Nevada, on the date of June 24th, 2016, that causes you to plead guilty to the felony crime of murder in the second degree with use of a deadly

weapon. What did you do?

DEFENDANT GOMEZ: I shot Many. I shot Manymules, Manymules.

THE COURT: That was an individual by the name of Shawn Manymules, is that right?

DEFENDANT GOMEZ: That's right.

THE COURT: All right. And you shot into his body with a handgun, is that true?

DEFENDANT GOMEZ: That's true.

THE COURT: And do you acknowledge that as a result of you shooting him he passed -- he died?

DEFENDANT GOMEZ: Yes.

THE COURT: Is that true?

DEFENDANT GOMEZ: Yes.

THE COURT: And that was from the gunshot wound or was it a single wound?

MS. LEVY: Yes.

MR. PALAL: Yes, Your Honor.

THE COURT: That was as a result of the gunshot wound, is that true?

DEFENDANT GOMEZ: That's true.

THE COURT: And do you acknowledge that at the time you did it, you did it on purpose and with malice of forethought?

DEFENDANT GOMEZ: Not on purpose.

THE COURT: You did it intentionally, right? You shot --

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DEFENDANT GOMEZ: Not --

THE COURT: -- at him intentionally?

DEFENDANT GOMEZ: -- intentionally, it was the heat of the moment.

THE COURT: I'm sorry?

DEFENDANT GOMEZ: It was -- at the moment it was, a how do you say it, like passion. I was -- it was in the moment. I was in the moment.

THE COURT: All right. Well heat of passion killing is -- is different -- you were mad at him, but you acknowledge that it wasn't of a --

DEFENDANT GOMEZ: It wasn't intentional.

MS. LEVY: Court's indulgence.

THE COURT: Well you intentionally shot him, true? I mean, you intentionally pointed your gun at him and shot into his body, is that right?

DEFENDANT GOMEZ: You could say that, yeah.

THE COURT: I'm sorry?

DEFENDANT GOMEZ: Yeah.

THE COURT: Okay. And you knew as the result of you shooting into his body it was likely that he would either sustain serious bodily injury or possibly die, isn't that right?

DEFENDANT GOMEZ: Yes.

THE COURT: All right. State would you like the Defendant to acknowledge anything else?

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MR. PALAL: No, Your Honor. That's fine.

THE COURT: All right. Is that acceptable with the State?

MR. PALAL: Yes, Your Honor.

THE COURT: All right. So Mr. Gomez, the Court finds that your plea of guilty has been freely and voluntarily given. Your plea is hereby accepted and the matter is referred to the Department of Parole and Probation. And we'll give you an in custody sentencing date.

THE CLERK: June 7th, 9:30.

MS. LEVY: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. MARSH: Thank you.

MR. PALAL: Thank you.

[Hearing concluded at 10:14 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Gail M. Reiger

Gail M. Reiger
Court Recorder/Transcriber

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Electronically Filed
9/21/2018 4:46 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. OSCAR GOMEZ, Defendant.	CASE NO. C-16-316959-1 DEPT. NO. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

THURSDAY, JUNE 14, 2018

RECORDER'S TRANSCRIPT RE:
SENTENCING

APPEARANCES:

For the State: BINU G. PALAL, ESQ.
Chief Deputy District Attorney

For the Defendant: MONTI J. LEVY, ESQ..

RECORDED BY: SUSAN SCHOFIELD, COURT RECORDER

PCR 28

LAS VEGAS, NEVADA, THURSDAY, JUNE 14, 2018, 10:23 A.M.

[Hearing began at 10:23 A.M.]

THE COURT: All right. State versus Oscar Gomez.

Mr. Gomez is present in custody with Ms. Levy. We have Mr. Palal for the State. This is the time for the rendition of sentence. Are both sides ready to go forward?

MR. PALAL: Yes, Your Honor.

MS. LEVY: Yes, Your Honor.

THE COURT: And I received notification for five speakers.

MR. PALAL: Yes. I did – two or three are actually speaking today.

THE COURT: All right. And I'm assuming pursuant to statute you would like to go last?

MR. PALAL: That's correct.

THE COURT: All right. State, you have retained the right to argue?

MR. PALAL: Yes, Your Honor. We, or what the State's going to be asking for, State's going to be asking for the maximum sentence, the 10-to-Life with a consecutive 8-to-20.

Parole and Probation recommends 10 to Life. They recommend less time for the mandatory or for the consecutive portion for use of a firearm.

Your Honor, a little bit about the case. I know you've read the PSI, but a little bit about the case was is that, you know, none of this had to happen. Shawn and his friend, Johnathan Coleman, were actually coming off the shift from Wendy's where they worked together. They hung out, their – they had smoked some weed, they had drank some alcohol and go into the Mini Mart to buy some more alcohol. Then during that time when they're at the Mini Mart, the defendant and his co-

defendants are already at the Mini Mart.

They don't know each other. There's no reason for them to interact. The – Johnathan and Shawn go into the Mini Mart and while they're shopping, the defendant and his co-defendant, they check out, and they decide to wait for Shawn and Johnathan outside the Mini Mart. And there was no dispute about that (unintelligible).

Then you have Shawn, or you have Shawn and Johnathan come out and the defendant and his co-defendant confront the two. No dispute about that. What Johnathan says happens is the defendant says, where are you from, it's not your turf.

Then the, not this defendant but the co-defendant and the victim in this case get into a fight. They get into a fist fight, fist fight lasts about two to three minutes. During this time on video this defendant is seen holding a firearm. The fist fight takes about two to three minutes, somebody from the Mini Mart says, hey, we're going to call the police.

So the fist fight breaks up, Shawn and Johnathan go on their way, the other, the co-defendant who is part of the fist fight, goes to his vehicle, and at that point this whole thing should be over. There should be nothing else, a five minute tour of the Mini Mart. Not – it started by the defendants but even then, all we leave with is a couple guys and some booze.

But rather than leave it there, the defendant follows Johnathan, follows Shawn, as they're walking off carrying the bags from the store with the gun and points it at Shawn. Shawn said, put the gun down we can fight. Then Shawn kind of just got up by, if you want to fight, we can fight. Defendant says, I'm not that stupid.

The defendant, while pointing a firearm at Shawn, tells Shawn, where are you going? Shawn at this point says to your mom's house. The way to try and keep – 'cause he was ready. If you want to fight, we can fight. But this defendant decided that he didn't want to, like, he – not only was he going to pursue these two, but he was going to pursue them in a manner where he didn't have to fight, he just took the quick but eternal decision to take Shawn Manymules' life. He shoots Shawn in the chest and then runs off.

Your Honor, you know, I – you do this for a while, you've seen a lot of cases. I don't know if I've seen something so pointless where after the fight he has somebody just chasing them that don't know each other, there was no reason for it, just somebody trying to pretend to be tough and in doing so, takes somebody else's life.

Your Honor, I think the facts in this case are worthy of the maximum, the 18-to-Life. He's the only person with a firearm in this situation, he knows he's the only person with a firearm in this situation, and decided to shoot Shawn dead center back, and Shawn died at the scene.

Your Honor, obviously we have victim speakers here. They can tell you much more about who Shawn was as a person. But what I will say is that somebody who isn't here, Johnathan Coleman, who was the friend that was with him. I've had an opportunity to meet with him a number of times. Obviously, this has affected him deeply as well.

He, as anyone could imagine, you're standing next to your friend gets shot right in front of you, that always has a deep impact on your life, and he wanted me to communicate to the Court about the deep impact it had on him psychologically, having to watch his friend die in front him for no reason whatsoever.

Your Honor, given this callus, callus taking of life, 18-to-life is the appropriate sentence. With that, I'll just reserve the [ ].

THE COURT: All right, thank you.

Mr. Gomez, your lawyer, Ms. Levy, will have an opportunity to speak on your behalf, but what if anything would you like to say to the Court before the Court pronounces sentence against you? And I would note that I did get a number of letters from family members in support of the defendant, and I have to keep those. Mr. Gomez.

THE DEFENDANT: I'd like to apologize to the family. I don't know how you guys feel 'cause I never lost a loved one before. I'm sorry for it. That night I was under the influence of drugs and alcohol, just watching a fight break out between a friend and somebody you don't know and seeing your friend get beat on, you know, I just reacted and I shouldn't of went down like that. I'm sorry for it. That night shouldn't have happened.

To this day I pray and ask some forgiveness. I hope one day you guys can forgive me. Your Honor.

THE COURT: All right, thank you. Ms. Levy.

MS. LEVY: Thank you, Your Honor.

Your Honor, Mr. Gomez is truly remorseful to the Court, to Shawn's family, to his own family. There's two families, entire families in the courtroom today that are broken and they're never going to be the same.

Oscar's family is here. The entire half of the courtroom over there is here for Oscar and they're completely supportive of him, and they don't understand what happened because this is not the Oscar that they know. One split second in a 20-year-old, his mind, who was under the influence of drugs and alcohol have

changed lives forever.

Mr. Gomez, prior to this, 20 years old, no record whatsoever other than a misdemeanor. It was marijuana. I think he actually pled to an CT – ITS. That's it. His entire criminal history, nothing juvenile, nothing anywhere else. He was 20 years old at the time, heavily under the influence of drugs and alcohol. He admitted to the police during his statement he had taken several Xaney bars, Xanax, and was drinking alcohol.

And I think the only thing factually that I would dispute with what Mr. Palal stated was the fist fight that Oscar witnessed with his friend and Shawn. It was more like five minutes. It's all on video, it's a very lengthy fist fight, and Oscar's witnessing his friend get beat up.

After that, Oscar made a horrible decision. He did go around the corner. He's admitted to Your Honor when he entered his plea that he pulled the trigger one time. It was one shot. It wasn't multiple shots. Mr. Coleman was standing right there, didn't shoot him, and was one split second decision, and then he got scared and ran.

That one-second decision is not indicative of Mr. Gomez' entire life. I know the Court read the letters and am hoping that this Court got a better sense of who Mr. Gomez is.

He came from a loving home, a loving family, but it was a broken family, and Mr. Gomez spent his childhood travelling between California and Las Vegas, never really getting roots, never growing up with the same side of the family. Half the family's with the father, half the family's with the mother. There's half-siblings, step-siblings, and he never really had groups, school friends, whatnot. He would go to school in one state for six months and in the other state the rest of the year, and

he never really found himself.

The letters talk about this. Mr. Gomez was essentially raised by his older sister, Maria. Mr. Gomez' mother had suffered from some mental illness and she attempted to kill herself, and Mr. Gomez blamed himself for that, blamed himself for the family splitting up, and he never got over that.

And that one second when Shawn state's, going to your mom's house, something just clicked in Mr. Gomez. And there's no excuse for it whatsoever and he understands it, and he's completely remorseful, he takes full responsibility. That one-second decision has changed his life, Shawn's family's life, his family's life, forever.

I do want to address something with regards to the PSI, the recommendation. And if the Court looks at the scoring sheet. They have a little scoring sheet where it has the checkmarks in boxes, and I was trying to understand this. I've had some conversations with Parole & Probation, the PSI writer as well as the supervisor over there with regard to this.

You've got a 20-year-old kid, no prior history other than a misdemeanor offense. I want to talk about some of the individual scores which I will in a minute, but if you look at the sheet overall, every single A felony has only one option, and it's a life. Now that's what is in the statute, and if the Court looks at – does the Court have the one with the graph? It says page 2 of 2 on the bottom?

THE COURT: It says page what?

MS. LEVY: It says on the bottom here, page 2 of 2. It's the one that –

THE COURT: Is this what you're talking about by graph? Yes.

MS. LEVY: Okay. So if you look at the bottom, it starts out with the E and D felonies and it goes all the way down to B felonies. All the A felonies are just

on the bottom row. So even if Mr. Gomez scored in the very low end, low range, the recommendation would be life with possibility of parole after – it says 20. So this sheet and these recommendations, they don't even reflect the sentences for a second degree murder. Same with a kidnapping and all the other A felonies, everything's just life.

THE COURT: Right.

MS. LEVY: So at what point does Probation and Parole say, well, somebody who's charged with a category A felony is someone who would be appropriate for this 10-to 25. They never would recommend it so – according to their scoresheet.

With regard to why they have him in the medium-high range, which that – the only thing that affects it because everything's going to be life, all they're going to recommend is 10-to-life. But the only thing that changes is the sentence on the deadly weapon enhancement, and I'm not sure why it's medium-high, so I went back to the scoresheet and I had some conversations with Probation and Parole, and I don't understand why the highest sentence you can get on the low range is 49 points.

So when you go to the death and the fact that a weapon was used, you have to subtract 14 from there. So right off the bat, anyone charged with a second degree murder with use of a deadly weapon is never going to score the low range. But even if they would, the recommendation's always going to be 10-to-life.

They have listed for criminal pattern he's given zero points for same type or increased severity. Mr. Gomez has one misdemeanor offense prior to this. Nothing else, no other arrests, nothing.

They also have, and I didn't understand until I went to the Probation

Success Probability form that I printed a copy for Your Honor as well as for the State.

THE COURT: Okay.

MS. LEVY: Can I approach?

THE COURT: Yes.

MS. LEVY: When you look at this form – so when you look at this form, it has what the options are, and when you go to where it has financial crime in packages. The bottom on the first page where it has present offense, type of offense, and then the psychological or medical crime impact, and that's where we get the death minus 10, and then it has financial crime impact. And they have given Mr. Gomez zero instead of successive, but this wasn't a financial crime. There's nothing taken from the victim, it's not a financial crime, and Probation and Parole would only say, oh, it has to do with restitution which is the funeral expenses. So I'm not sure why he's given zero points for that.

Then when you go down to employment, it has almost nonexistent. Now I would ask the Court to refer back to Page 2 of the PSI, employment status, defendant has been unemployed since 2016, time of arrest. He was employed at the time of his arrest. In fact, the State had gotten, like, pay stubs and whatnot in the search warrant.

Mr. Gomez had prior work experience as being a tile layer for Classic Flooring from 2015 to 2016. He had worked for a full year for the tile company at 20 years old. So he started when he was 19 years old. Number of months employed full time in 12 months prior to commission of instant offense. Twelve.

You've got a 20-year-old kid who's been employed at the same employer for 12 months and they give him zero points and said he has an almost

non-existent work history. Employability, they gave him one for could be developed instead of two. He is employable, he was employed.

Family situation he's given two points for moderately supportive. The Court has received the letters and reviewed them. His family's all here in the courtroom. He has a constructive support of family, so he should be given an additional point there for the three points which is on page 2 of the paper that I brought up to Your Honor.

And then attitude towards supervision, it has pre-sentence adjustment, attitude toward supervision, and they put indifferent. I was there with Mr. Gomez in the detention center while he was interviewed by the PSI writer, and there were no contact rooms available, we're yelling between the glass because the phone wasn't working. There was nothing –

THE COURT: It's kind of irrelevant anyway because he can't be supervised for this, so.

MS. LEVY: Correct, he can't get supervision, so I don't understand. When I contacted Parole and Probation they said, well, that's what they come up with, that's so they –

THE COURT: Just so you know, I don't, I mean, I don't really understand these – what they, you know, how they score these. That's what I meant, and I don't really put a lot of weight into it.

MS. LEVY: Well, it's just –

THE COURT: And for what it's worth, I mean, I think it's a guideline, but --

MS. LEVY: What concerns me is we have a 20-year-old kid with no prior criminal history. At what point does this offense – any murder is egregious.

But the Legislature has provided for 10 to 25 or 10 to life. Probation and Parole has indicated by their own graph, they're never going to recommend a 10-to-25.

Mr. Gomez has accepted responsibility, has no prior criminal history, has a completely supportive family who is going to be there for him. He is someone who is – should be given a minimum sentence which obviously isn't a very minimal sentence. Still, 10 to 25 years plus a mandatory consecutive for the weapon.

Mr. Gomez is not someone who is deserving of the maximum sentence as the State stated. He's not a career criminal, he has no other violence in his history, he is not someone who is deserving of the maximum sentence, Your Honor. He was a 20-year-old kid who really, really screwed up, and he understands that. He accepts responsibility, and there's no words that will ever make it better for Shawn's family or make it better for Oscar's family, but he is truly and deeply sorry and remorseful, and I believe that later in life when he is given the opportunity to be released on parole, his family is going to be there to make sure that he's on the right track.

He's a young kid. He loves his animals. I'm sure the Court saw the letters. His dog was his baby. His family is waiting for him, they want him to do his time, they understand the severity of this offense that he needs to do his time, but let's not let another life completely be ruined for a one split-second decision.

Thank you.

THE COURT: All right, thank you. We'll hear from the speakers.

MR. PALAL: Yes, Your Honor, the first speaker is John Grady.

JOHN GRADY

Having been called as a victim speaker and being first duly sworn, testified as follows:

THE CLERK: Thank you. Please have a seat and state and spell both your first and last name for the record.

THE SPEAKER: John Grady, J-O-H-N G-R-A-D-Y.

THE COURT: And, sir, what would you like to say today?

THE SPEAKER: I just want to talk about Shawn and how this situation has affected our family. We – he was really close to his nephews and his siblings. They all hung out a lot together.

We had to bury him on his favorite nephew's birthday. The kid's ten years old. For the rest of his life he's got to remember his best buddy was buried on his birthday.

Shawn loved his family. He was always there supporting his grandkids, or his nephews and nieces. He was always loved and he always had a smile on his face, and he made the decision to focus on his family. When he worked, he sent money to his grand – to his nephews and nieces.

He was always happy. I just want to express how that is going to affect him for the rest of his life. He's always got to remember that his best uncle, his favorite uncle, his best friend, they lived together for most of the kid's life Simeonshaw (phonetic) and he's got to remember that.

This, as our attorney was saying, there was no reason for this. It's really hard. I had a speech prepared but it's hard to focus on it. We deal with it every day. His mother was – he was close with his mother. He had just barely moved out of the house. He'd only been out of the house for about five months, working on his own, taking care of his own thing.

He never got to meet his other nephew. He was supposed to – the night that this happened he was supposed to move in with his cousin and meet his

nephew and he'll never get a chance to do that.

What happened prior to that, prior to this night, I don't think has any effect on anything. What happened at that time, Shawn had a hard life. Shawn's father died before he was born. He was from a broken family as well but he didn't choose to do – he didn't carry weapons, he just stood up for himself and he shouldn't have been punished for that.

It just wasn't fair, and my wife has some things to say. I guess I – really, all I got to say is that there was no – senseless. Senseless, that's why I believe the maximum is absolutely – no reason whatsoever, and we're going to pay for it for the rest of our life. He's never going to have any kids, he's never going to get married, and his mother deserves some restitution, some kind of something.

I guess that's all I have to say.

THE COURT: Any questions?

Sir, thank you for coming in today and speaking.

THE SPEAKER: I did it for Shawn.

THE COURT: And my bailiff will escort you.

MR. PALAL: Our second victim speaker, second of three, Your Honor, will be Stephanie James.

STEPHANIE JAMES

Having been called as a victim speaker and being first duly sworn, testified as follows:

THE CLERK: Please have a seat. State and spell both your first and last names.

THE SPEAKER: Stephanie James. S-T-E-P-H-A-N-I-E J-A-M-E-S.

THE COURT: All right, thank you.

THE SPEAKER: Hi. My name is Stephanie. I wasn't gonna speak today.

THE COURT: And just take your time.

THE SPEAKER: I'm Shawn's older sister. I was his only sister, no other siblings. My brother and I were very, very close. As my father said, came from a broken home. Shawn's father passed away. My mom wasn't the greatest person in the world. I took care of my brother as well. Can't do that no more.

If they come into Vegas with me, joyful as they see it on commercials, TV, very nice to come here. Can't do that; once you hit into Vegas, just cry.

I can't see my brother. I can't call him. I saw so much. My father explained he was close with his nephews and his nieces which are my kids. My son's seven on the second, very close with him. Didn't even see it but I had to spend his birthday seeing his uncle buried from a distance, couldn't come.

My daughter's birthday yesterday, can't celebrate because we had to come here. This affected not only us but our little ones, the future, the upcoming future. And to be knowing my brother, just seeing him not get the full maximum sentence would totally break my kids' heart because that's the future and they will see is that okay to do that? I could just get away with it then. We're trying not to have our kids see that.

I cry every time and to see our mother. My mother feel this way, heartbroken every single day. I can't – I'm her only daughter, I'm trying to help her, pray with her, bring her to home, back home to San Juan, to get her strength. It's hard to see your mother break down like that. Very, very hard and I can't seem to know when she'll ever forgive. I can't.

My brother came from a loving, loving family. Not just us here, there's a

lot of us as you can see. All of it's very painful. Grandmas, two great-grandmas, grandfathers, all very traditional on our side, of our Native American side, and we can't do that because he's missing.

They have a chance to come and see him, they have a chance to see him. I can't. We can't see my brother again. We cannot bring him back. I would ask you to see – had to see from our side because I would hate for another family to come in to feel what we're feeling if he's to get released – him go do the same thing if someone says one little – one thing about his mother. Yeah, someone say something bad about my mother but I would think before it. You hurt your mother so bad like that you would think he wants to say you'll be by your mother's side. My brother did that.

As a man, as a grown man, he wanted to leave and make himself a living out there. My mother letting him go, she regrets that still to this day. To this day, she regrets sending him out here due to this one reason, my brother working. He was a good guy, very loving guy.

I ask you, please, from the bottom of my heart, give us this at least this comfort in us to what we could now have peace in our hearts to where we know this individual won't do this to another, so we don't have to see or hear another family go through this, I ask you.

THE COURT: Thank you for coming in. Obviously, it's very difficult.

THE SPEAKER: Thank you.

THE COURT: Thank you for bringing this in.

MR. PALAL: And, Your Honor, the State's last witness is Shawn's mother, Lucinda James.

THE COURT: All right. Ms. James. And, ma'am, just remain standing

and face that lady right there.

LUCINDA JAMES

Having been called as a victim speaker and being first duly sworn, testified as follows:

THE CLERK: Please have a seat and state and spell your first and last names.

THE SPEAKER: Lucinda James, L-U-C-I-N-D-A J-A-M-E-S.

THE COURT: All right. Thank you, ma'am. Just take your time. Did you prepare a statement that you'd like to read today?

THE SPEAKER: Good morning, Your Honor. [Speaking Native American], that means good morning in my language.

THE COURT: Is that Navajo?

THE SPEAKER: Yes, it's Navajo, Native American, Northern Arizona.

I made this collage so you can have a glimpse through how my son was to us. I don't have very good picture of him when he was in high school. He never liked to get his picture taken.

Sorry.

THE COURT: Just take your time. Would you like some water? And just take your time.

THE SPEAKER: We all miss Shawn so much. From the bottom of our hearts, there's not a day that cry for him, especially this month. This is horrible for me what happened to my son.

Like what my daughter said, when we come to Vegas, this is sad for me. This is not a fun city for us. I'm now supposed to be taking medication. I quit taking medication because I couldn't react to it. I'm still taking counseling in

Albuquerque, New Mexico. I'm not supposed to do that.

Shawn's murder, life has been surreal. We repeatedly relive the events of his murder as we look for answers. How did this take place? Why? Did he suffer? No answer is enough. Shawn's murder involves more than his death. The dimension of cruelness and loss has compound our sorrows and lost acute feeling of adjustment. I trust in hopelessness.

Shawn was a full-blooded Native American Indian from Navajo Reservation. He was born in Chinle, Arizona. I'm Lucinda James, the mother. My husband's deceased, Darrell Manymules. He had a sister, only sister he had, Stephanie James Shaeza (phonetic), and is my baby. He has grandparents, Kio and Pricillas Gott. This one is my mom. My father's deceased, [Unintelligible] James, and grandparents on his father's side, [unintelligible].

Shawn's education was taking place in Pinon, Arizona, and Flagstaff, Arizona, and Las Vegas, Nevada. I played two roles as a parent. He had a lot of respect and love for me [unintelligible]. I have no control over it.

A man came out and a gentleman came out from him. He wanted to be on his own. That's what lead him back to Las Vegas. He had plans with his cousin, Russell and his family, but that didn't happen. His life was cut short for no reason at all.

Your Honor, look at me. Part of me died that day when my son died. Here on earth I'm suffering to find the day I see my baby again. I'm not supposed to bury my son. Nobody should bury their son. [Unintelligible] I don't want anybody, parents, to have to know what I'm going through.

His trade was in construction. [Unintelligible] This was very hard to put this together. I took me at least almost a month to put this together, taking out

pictures, and have so much baby pictures. Shawn was full of was funny. He always tries to scare people. He popped up out of nowhere, teasing my step-father a lot. [Unintelligible] I remember Shawn did this, Shawn said this, remember this, they're forever gone, Your Honor. We can't have no more birthday parties, no more family events to share. They say the opportunity [unintelligible] families and friends are broken forever.

THE COURT: Just take your time, it's all right.

THE SPEAKER: I wanted to come up here as a mother and speak for him, try to show Shawn through this book, my baby. I'm a constant level of weeping. I try to stay strong and continue with my life but I feel guilty because he's not here. I feel guilty not having this is mine here. I hope you understand what I'm trying to say. I had everything here. But, Your Honor, [unintelligible]. He's a danger to society. I don't want anybody to go through this of what I'm going through.

We travelled a long ways to be here. I had a Navajo Tribe person that was supposed to represent me from our tribe. He didn't show because it was – court was cancelled. But most of all, our family members –

THE COURT: Oh, I guess Mr. Palal had a conflict, I'm sorry.

THE SPEAKER: -- most of my main family are here. Some of the family didn't show. I like to wear this shirt today. Thank you, Your Honor.

THE COURT: Thank you for coming in and for bringing this. And Kenny, Officer Hawkes, will help you back to your seat.

Is that it for the speakers? And I see there are a number of other family members. All right.

All right, Mr. Gomez, by virtue of your plea of guilty, you are hereby adjudged guilty of the felony crime of murder in the second degree with use of a

deadly weapon.

In addition to the $25 administrative assessment, the $150 DNA analysis fee, the fact that you must submit to a test for genetic markers, and the $3 administrative assessment, on the murder, you're sentenced to life with the possibility of parole beginning after a minimum of ten years has been served. I think it's important to have a life tail given the completely senseless and really inexplicable to me nature of this crime.

You're also sentenced for the weapons enhancement to a consecutive term of 96 months on the minimum, and 240 months on the maximum, and you're entitled to –

MR. PALAL: Seven Hundred Six—

THE COURT: How many?

MR. PALAL: Seven Hundred Sixteen.

THE COURT: Seven Hundred and Sixteen days of credit for time served. You are also ordered to pay restitution in the amount of $18,800.00. And, Mr. Palal, that's payable to whom? Lucinda James, and that should be reflected in the JOC. All right, thank you.

[Hearing concluded at 11:09 A.M.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual proceedings in the above-entitled case to the best of my ability.

_____
SUSAN SCHOFIELD
Court Recorder/Transcriber

JOCP

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

OSCAR GOMEZ, JR. aka
Oscar Gomez
#5990519

Defendant.

CASE NO. C-16-316959-1

DEPT. NO. XXI

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime of MURDER (SECOND DEGREE) WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030.2, 193.165; thereafter, on the 14th day of June, 2018, the Defendant was present in court for sentencing with counsel MONTI LEVY, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense and, in addition to the $25.00 Administrative Assessment Fee, $18,800.00 Restitution to Lucina James and $150.00 DNA Analysis Fee including testing to determine genetic markers plus $3.00 DNA Collection Fee, the Defendant is sentenced to the Nevada Department of Corrections (NDC) as follows: LIFE with the Eligibility for parole after serving a MINIMUM of TEN (10) YEARS plus a CONSECUTIVE term of a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM parole eligibility of NINETY-SIX (96) MONTHS for the Use of a Deadly Weapon; with SEVEN HUNDRED SIXTEEN (716) DAYS credit for time served.

DATED this 18th day of June, 2018.

VALERIE P. ADAIR
DISTRICT COURT JUDGE

NOASC
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com
Counsel for Oscar Gomez, Jr.

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. OSCAR GOMEZ, JR., #1200302, Defendant.	District Case No.: C-16-316959-1 Dept.: XXI **NOTICE OF APPEAL**

NOTICE is hereby given that the Defendant, OSCAR GOMEZ, JR., by and through his attorney, TERRENCE M. JACKSON, ESQ., hereby appeals to the Nevada Supreme Court, from the Judgment of Conviction, file-stamped June 22, 2018.

Defendant, OSCAR GOMEZ, JR., further states he is indigent and requests that the filing fees be waived.

Respectfully submitted this 17th day of JULY, 2018.

/s/ Terrence M. Jackson
Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com

Counsel for Oscar Gomez, Jr.

CERTIFICATE OF SERVICE

I hereby certify I am an assistant to Terrence M. Jackson, Esq., not a party to this action, and on the 17th day of July, 2018, I served a true, correct and e-filed stamped copy of the foregoing: Defendant, Oscar Gomez's, NOTICE OF APPEAL as follows:

[X] Via Odyssey eFile and Serve to the Eighth Judicial District Court;

[X] Via the NSC Drop Box on the 1st floor of the Nevada Court of Appeals, located at 408 E. Clark Avenue in Las Vegas, Nevada;

[X] and by United States first class mail to the Nevada Attorney General and the Defendant as follows:

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

STEVEN S. OWENS
Chief Deputy D.A. - Criminal
APPELLATE DIVISION
steven.owens@clarkcountyda.com

OSCAR GOMEZ JR.
ID# 1200302
HDSP - PO BOX 650
Indian Springs, NV 89070-0650

ADAM P. LAXALT
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

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

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OSCAR GOMEZ, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76487-COA

FILED

MAY 15 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Oscar Gomez, Jr., appeals from a judgment of conviction entered pursuant to a guilty plea of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

First, Gomez argues the district court erred by failing to state on the record that it had considered the factors required by NRS 193.165(1) before imposing the sentence for the deadly weapon enhancement. Because Gomez did not preserve this claim of error for appellate review, he would not be entitled to relief absent demonstration of plain error. *See Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009) (applying plain-error review to alleged sentencing errors). "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights." *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks, brackets, and citation omitted).

Here, the record reveals the district court failed to state on the record that it considered the information described in NRS 193.165(1) paragraphs (a) to (e) in deciding the appropriate penalty for Gomez' use of a deadly weapon. However, the record also reveals the district court was aware of the facts and circumstances of Gomez' crime, his criminal history, his mitigation evidence, and the victim-impact evidence. *See* NRS 193.165(1). Therefore, Gomez has not shown the error was prejudicial, *see Mendoza-Lobos*, 125 Nev. at 644, 218 P.3d at 508; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) ("[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice."), and we conclude he is not entitled to relief.

Second, Gomez argues his sentence is cruel and unusual because it is unnecessarily long and removed the meaningful possibility of rehabilitation. Gomez also asserts the district court did not consider his background and the facts of the case when imposing sentence. Regardless of its severity, "[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.'" *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)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

Gomez' sentence of life with the possibility of parole in 10 years for the primary offense plus a consecutive term of 96 to 240 months for the deadly weapon enhancement is within the parameters provided by the

relevant statutes, *see* NRS 193.165(1); NRS 200.030(5)(a), and Gomez does not allege that those statutes are unconstitutional. We conclude the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment.

Third, Gomez argues it was improper for the written plea agreement to contain a waiver of his appellate rights and that such a waiver goes against public policy. Gomez' claim lacks merit because the Nevada Supreme Court has stated that "[a] knowing and voluntary waiver of the right to appeal made pursuant to a plea bargain is valid and enforceable." *See Cruzado v. State*, 110 Nev. 745, 747, 879 P.2d 1195, 1195 (1994), *overruled on other grounds by Lee v. State*, 115 Nev. 207, 210, 985 P.2d 164, 166 (1999). Therefore, Gomez is not entitled to relief.

Fourth, Gomez argues his trial-level counsel was ineffective for failing to properly explain the consequences he faced by entering a guilty plea and for failing to ensure he understood the waiver of his rights. Claims of ineffective assistance of counsel "may not be raised on direct appeal, unless there has already been an evidentiary hearing." *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Because there has not been an evidentiary hearing concerning Gomez' ineffective-assistance-of-counsel claims, they are not appropriately raised on direct appeal and we decline to consider them.

Fifth, Gomez argues his guilty plea is invalid because he did not fully understand the consequences of his plea or the rights he waived when entering his plea. A criminal defendant may not challenge the validity of a guilty plea on direct appeal, unless the error clearly appears from the record or rests purely on legal grounds. *See O'Guinn v. State*, 118 Nev. 849, 851, 59 P.3d 488, 489 (2002). The issues involved with Gomez' challenges to the

validity of his plea do not clearly appear from the record and do not rest on purely legal grounds. We therefore decline to address Gomez' claims in the first instance on direct appeal. *See id.* at 851-52, 59 P.3d at 489-90.

Sixth, Gomez argues he is entitled to relief due to cumulative error. Gomez failed to demonstrate there were multiple errors which could have been cumulated, *see United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."). Therefore, Gomez is not entitled to relief. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Valerie Adair, District Judge
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

Original

Oscar Gomez #1200302
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

Electronically Filed
05/14/2020
CLERK OF THE COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

Oscar Gomez
Petitioner,

vs.

State of Nevada
Respondent(s).

A-20-815035-W
Dept. XXI

Case No. C-16-316959-1
Dept. No. XXI
Docket

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

Failure to raise all grounds I this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claim must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and who you are presently restrained of your liberty: S.D.C.C.

2. Name the location of court which entered the judgment of conviction under attack: 8th Jud. Dist. Court, Clark County, NV.

3. Date of judgment of conviction: June 22, 2018

4. Case number: C-16-316959

5. (a) Length of sentence: 10 to Life cs 8-20 year

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion:

Yes ____ No X If "Yes", list crime, case number and sentence being served at this time: ____

7. Nature of offense involved in conviction being challenged: Second Degree Murder With Use of a Deadly Weapon

8. What was your plea? (Check one)

(a) Not guilty ___

(b) Guilty XX

(c) Nolo contendere ___

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: ___ See Memorandum of Points and Authorities

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury N/A

(b) Judge without a jury ___

11. Did you testify at trial? Yes ___ No N/A

12. Did you appeal from the judgment of conviction?

Yes XX No ___

13. If you did appeal, answer the following:

(a) Name of court: Nv. Court of Appeals

(b) Case number or citation: No. 76487-COA

(c) Result: Order of Affirmance

(d) Date of appeal: May 15, 2019 – Remittitur July 1, 2019

(Attach copy of order or decision, if available).

14.) If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ___ No N/A

16. If your answer to No 15 was "Yes", give the following information:

(a) (1) Name of court: _____.

(2) Nature of proceedings: _____

N/A

_____.

(3) Grounds raised : _____

_____

_____.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: N/A.

(6) Date of result: _____.

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: _____.

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: _____.

(2) Nature of proceeding: _____.

(3) Grounds raised: N/A.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____.

(6) Date of result: _____.

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: N/A.

(c) As to any third or subsequent additional application or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes ____ No ____

Citation or date of decision: N/A

(2) Second petition, application or motion?

Yes ____ No ____

Citation or date of decision: N/A

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You may relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ____

N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: ____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ____

N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). N/A

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). This petition is timely pursuant to NRS 34.726

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ____ No XX

If "Yes", state what court and the case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Monti Levi – Plea Terrence Jackson Direct Appeal

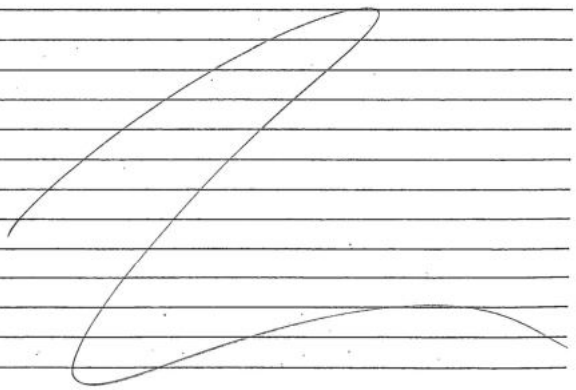
22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ____ No XX If "Yes", specify where and when it is to be served, if you know: ____

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: See: Memorandum Of Points and Authorities In Support of Writ of Habeas Corpus (Post-Conviction)

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law):



WHEREFORE, Mr. Gomez, prays that the court grant Petitioner relief to which he may be entitled in this proceeding.

EXECUTED at S.D.C.C.

on the ___ day of _____, 2020.

Signature of Petitioner
Oscar Gomez #1200302

VERIFICATION

Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true and correct of his own personal knowledge, except as to those matters based on information and belief, and to those matters, he believes them to be true.

Signature of Petitioner
Oscar Gomez #1200302

N/A
Atttorney for Petitioner

CERTFICATE OF SERVICE BY MAILING

I, Oscar Gomez, hereby certify, pursuant to NRCP 5(b), that on this ___ day of _____, 2020, I mailed a true and correct copy of the foregoing, "_____ Writ of Habeas Corpus (Post-Conviction) ____" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Steve Wolfson
Dist. Attorney
200 Lewis Ave
LV. NV. 89155

CC:FILE

DATED: this ___ day of _____, 2020.

Oscar Gomez #1200302
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Writ of Habeas Corpus
(Title of Document)

filed in District Court Case number C-16-316959-1

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

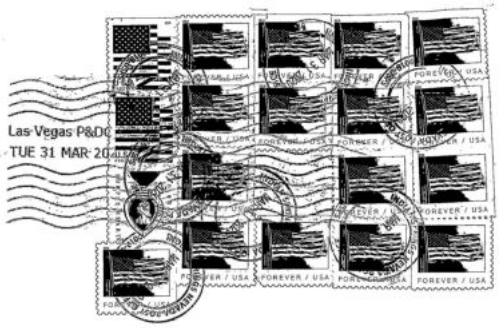
B. For the administration of a public program or for an application for a federal or state grant.

_____ 1 / 2020
Signature Date

Oscar Gomez
Print Name

Pro Se
Title

Oscar Gomez #1200302
S.D.C.C.
P.O. Box 208
Indian Springs, Nv.
89070



Clerk Of The Court, 3rd Floor
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nv. 89155

Legal Mail
Confidential

PCR 65

Original

District Court
Clark County, Nevada

Electronically Filed
05/14/2020
CLERK OF THE COURT

A-20-815035-W
Dept. XXI

Oscar Gomez, Jr.
Petitioner, Case No. C-16-316959-1

Vs.

Dept. No. XXI

State Of Nevada,
Respondent(s)

Memorandum Of Points And Authorities
In Support Of
Writ Of Habeas Corpus (Post-Conviction)

Comes Now, Oscar Gomez, Jr, Petitioner, in proper person under Haines v. Kerner, 92 S.ct. 594, 596 (1972) (Pro Se pleadings are held to a less stringent standard than pleadings drafted by attorneys) and submits the instant Memorandum of Points and Authorities.

This Memorandum is submitted to the Court to assist the Court in reaching a fair and just decision in considering the constitutionality of the asserted claims.

//// RECEIVED
//// APR - 3 2020
CLERK OF THE COURT

1

Points And Authorities

Procedural History

On June 28, 2016, the State charged Oscar Gomez, Jr. (Mr. Gomez) with one count of Murder with Use of a Deadly Weapon.

On August 2, 2016, a Preliminary Hearing was held in Justice Court and Mr. Gomez was bound over, and by way of Information, charged with Murder with Use of a Deadly Weapon, on August 3, 2016.

On April 19, 2018, Mr. Gomez, pursuant to plea negotiations, entered a guilty plea to an Amended Information charging Second Degree Murder with Use of a Deadly Weapon.

On June 14, 2018, Mr. Gomez was sentenced to a term of 10 year to Life. With the Possibility of Parole plus a consecutive term of 8 to 20 year for use of a deadly weapon. Mr. Gomez was given 716 days credit for time served.

The Judgment of Convictions was filed on June 22, 2018.

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On July 17, 2018, Mr. Gomez filed his Notice of Appeal.

On May 15, 2019, the Court of Appeals of The State of Nevada, issued its Order of Affirmance. (No. 76487-COA) The Remittitur was filed with the clerk on July 01, 2019.

Statement Of The Facts

According to reports, on June 24, 2016, Mr. Gomez and co-defendant, Gustavo Delacruz arrived at a local food mart to make a purchase. When the victim and his friend entered the store, they passed Mr. Gomez and Mr. Delacruz as they were exiting. As the victim and his friend exited the store they were confronted by Mr. Gomez and Mr. Delacruz.

Mr. Gomez and Mr. Delacruz allegedly remarked: "You're not from around here, this is our town." An exchange of words were made and Mr. Gomez allegedly pulled out a semiautomatic pistol from the waist of his pants. The victim's

friend instructed Mr. Gomez to put away the guns and "fight like a man."

The victim and Mr. Delacruz started fist fighting in the parking lot in front of the local food mart, while Mr. Gomez walked around the area of the fight with his hand on his gun. Both the victim and Mr. Delacruz sustained injuries from the fight.

The fight ended and Mr. Delacruz got into his vehicle and started to pull out of the parking lot. Mr. Gomez allegedly continued to exchange words with the victim as they were walking away from the parking lot with Mr. Gomez walking behind them asking them where they were going. When the victim responded, "to your mom's house," Mr. Gomez allegedly pointed the gun at the victim.

The victim told him to put the gun down and fight, to which Mr. Gomez responded, "I'm not that stupid". The victim told Mr. Gomez to put the gun down because he was not going to use it, at which time Mr. Gomez fired one shot into the victim's chest.

Standard of Review

Nevada Courts presumes guilty pleas to be valid, with the defendant bearing the burden to prove that "the plea was not entered knowingly, voluntarily and intelligently." Rubio v. State, 194 P.3d 1224, 1228 (Nev. 2008).

To determine the validity of the guilty plea, "we require the district court to look beyond the plea canvass to the entire record and the totality of the circumstances." Crawford v. State, 30 P.3d 1123 (Nev. 2001). In other words, a district court may not simply review the plea canvass in a vacuum, conclude that it indicates that the defendant understood what he was doing, and use that conclusion as the sole basis for denying a motion to withdraw a guilty plea. Mitchell v. State, 848 P.2d 1060, 1062 (Nev. 1993).

A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through

ineffective assistance of counsel. See Molina v. State, 87 P.3d 533 (Nev. 2004); U.S. v. Signori, 844 F.2d 635, 638 (9th Cir. 1988). Nevada applies the Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), two-prong test to determine if counsel has provided effective assistance. Molina, 87 P.3d at 537, being: (1) deficient performance and, (2) prejudice. Id.

Deficient performance is shown when counsel's representation "fell below an objective standard of reasonableness, and Prejudice is shown when there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Avery v. State, 129 P.3d 664, 669 (Nev. 2006); Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366 (1985), and Kirksey v. State, 923 P.2d 1102, 1107 (Nev. 1996) (adopting the Hill standard for prejudice where the conviction is the result of a guilty plea).

Our courts recognized that district courts should conduct an evidentiary hearing

for colorable claims of ineffective assistance of counsel based upon specific factual allegations and evidence not belied by the record that if true, would entitle him to relief. Berry v. State, 363 P.3d 1148 (Nev. 2015); Mann v. State, 46 P.3d 1228, 1230 (Nev. 2002), see also, Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985)(concluding that the defendant was entitled to an evidentiary hearing to determine whether counsel was ineffective based on the specific factual allegations presented in his sworn affidavit).

Mr. Gomez, in challenging the validity of his guilty plea and conviction based on counsel's ineffective assistance, is entitled to the application of the appropriate law of the above-referenced standard in reviewing his claims.

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Legal Arguments

Ground One

Mr. Gomez's Plea Was Not Knowingly And Voluntarily Entered Based On Ineffective Assistance Of Counsel In Failing To Investigate Case, In Violation Of The Sixth And Fourteenth Amendment

In Molina v. State, 87 P.3d 533 (Nev. 2004), the Court held:

"A defendant who pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that he received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution."

Id. at 537.

The question as to whether a plea is knowingly and voluntarily entered will turn on the facts and circumstances

of each particular case, Taylor v. Warden, 607 P.2d 587 (Nev. 1980), and the district court has the duty to review the entire record (beyond the plea canvass and GPA) and determine whether the plea was valid under the totality of the circumstances. Crawford v. State, 30 P.3d 1123, 1126 (Nev. 2001).

In the context of a guilty plea, a defendant must demonstrate deficient performance in establishing ineffective assistance of counsel under the standard of Strickland v. Washington, 104 S.Ct. 2052 (1984), followed by prejudice to the defense.

A defendant demonstrating prejudice must show there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Molina, 87 P.3d at 537, See also Hill v. Lockhart, ___ U.S. ___, 106 S.Ct. 3016 (1985).

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Deficient Performance

A. Failure To Investigate

In Jackson v. Warden, 537 P.2d 437 (Nev. 1975), the Court held:

"It is the duty of the lawyer to conduct prompt investigations of the circumstances of the case and explore all avenues . . . to secure information in the possession of the prosecution. . . . The duty to investigate exist regardless of the accused's admissions . . . or the accused's desire to plead guilty."

Id. at 439.

Mr. Gomez asserts his plea is not knowingly and voluntarily entered based on ineffective assistance of counsel in failing to conduct a proper investigation of the case and locate witnesses to interview in preparation for trial, in violation of the Sixth Amendment to

the U.S. Constitution.

Trial counsel was ineffective in failing to conduct any form of an investigation of the case prior to the Preliminary Hearing to include challenging the photo line-up identification as being impermissibly suggestive; failing to thoroughly investigate the case for an alternate suspect as the video footage displayed another individual walking away from the immediate area at the time of the shooting, and failed to file the appropriate motion to exclude unrelated and inadmissible evidence in the case. (Exh. A)

I. Alternate Suspect

In the instant case, there was some video footage evidence of another person being present at the exact time of the shooting to cast doubt as to Mr. Gomez being the actual suspect in the death of the victim, and trial counsel was clearly ineffective in failing to persue this lead

and develop the evidence into a viable defense for Mr. Gomez's trial. See Jones v. Wood, 207 F.3d 557 (9th Cir. 2000)(trial counsel ineffective in failing to investigate alternate suspect where evidence tended to connect alternative suspect to crime).

II. Photo Line-Up

In the instant, Mr. Gomez was positively identified as the suspect by way of a photo line-up. However, the photographs used in the photo array were highly prejudicial as they were not remotely close in resembling Mr. Gomez, thus, allowing his photograph to stand-out to create an identification that was impermissible and suggestive, and trial counsel was ineffective in failing to challenge the photo line-up in preparation for trial. See Thomas v. Varner, 428 F.3d 491 (3rd Cir. 2005)(ineffective assistance of counsel in failing to challenge witness identifica-

tion, as impermissible and suggestive).

III. Inadmissible Evidence.

In the instant case, the detectives, in searching Mr. Gomez's residence, impounded a box for shell casings as evidence related to the shooting. As there were no shell casings found at the crime scene, and the actual bullet was not available for comparison, trial counsel should have, and was ineffective in failing to file the appropriate pre-trial motion in limine to exclude evidence, as such evidence was not related to the crime. See Moody v. U.S., 376 F.2d 525 (9th Cir. 1967); U.S. v. Green, 648 F.2d 587 (9th Cir. 1981)(admission into evidence of weapons, or pictures of weapons, which are not directly related to the crime and to which proper objection is made, is prejudicial and reversible).

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Here, counsel's failure to properly investigate the case to its fullest potential prior to inducing Mr. Gomez into accepting a plea offer amounts to representation that "fell below an objective standard of reasonableness" demonstrating deficient performance under Strickland, 104 S.ct. 2052. (Exh. A)

B. Failure To Interview Witnesses

In Powell v. Alabama, 53 S.ct. 55 (1932), the Court held:

"Only through pretrial preparations can the defendant be assured that facts will be discovered which will disclose a potential defense to counsel.

Without knowledgable trial preparations, defense counsel cannot reliably exercise legal judgment and therefore, cannot render reasonable effective assistance to his client."

Id. at

In the instant case, trial counsel was well aware of an eyewitness who witnessed the shooting and provide authorities with a voluntary statement that contained a discription of the alleged shooter which was extremely inconsistent from what Mr. Gomez was wearing on the day in question. For instance, while Mr. Gomez was seen in the store video footage as wearing a Tank-Top while this female eyewitness described the alleged suspect as wearing a T-Shirt, which is very distinctive attire. (Exh. A)

As this witness was critical to the case and Mr. Gomez's defense, trial counsel was ineffective in failing to make contact with the witness to secure critical information in preparation of trial, rendering ineffective assistance of counsel. See U.S v. Armontrout, 900 F.2d 127 (8th Cir. 1990)(holding trial counsel ineffective in failing to contact potential witnesses which would have supported the defense.)

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Without doubt, counsel's representation "fell below an objective standard of reasonableness", demonstrating deficient performance under Strickland, 104 S.ct. 2052, to violate the Sixth Amendment

Prejudicial Effect

The prejudicial effect is astronomical and irreparable to the worst degree. As the lack of an investigation in preparation for trial, left Mr. Gomez with the impression that no defense existed and was induced into accepting a plea offer and pleading guilty believing he would be released on parole after 10 years.

Without question, there exist a "reasonable probability" that but for counsel's errors, Mr. Gomez would have never pled guilty and would have insisted on going to trial to prove his innocence. Hill v. Lockhart, 106 S.ct. 366 (1985).

Accordingly, Mr. Gomez's guilty plea must be vacated.

Relief is warranted

Ground Two

Mr. Gomez's Plea Was Not Knowingly And Voluntarily Entered Based On Ineffective Assistance Of Counsel In Failing To Review The Guilty Plea Agreement With Him So That He Understood The Possible Range Of Punishment, In Violation Of The Sixth And Fourteenth Amendment

A guilty plea is knowing and voluntary if the defendant "has a full understanding of both the nature of the charges, [possible range of punishment] and the direct consequences arising from a plea of guilty" Little v. Warden, 34 P.3d 540, 543 (Nev. 2001). To determine the validity of the guilty plea, the district court is required to look beyond the plea canvass to the entire record and the totality of the circumstances. Rubio v. State, 194 P.3d 1224, 1228 (Nev. 2008).

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The Strickland, two-prong test is applied to determine if counsel has provided effective assistance, Larson v. State, 760 P.2d 2161, 2162 (Nev. 1988), being: (1) deficient performance, and (2) prejudice, whereas, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Avery v. State, 129 P.3d 1664, 1669 (Nev. 2006).

In the instant case, Mr. Gomez's plea was not knowingly and voluntarily entered based on trial counsel's ineffective assistance in failing to review the GPA with him to ensure he understood the possible range of punishment, in violation of the Sixth and Fourteenth Amendment and standars announced in Strickland, 104 S.ct. 2052 (1984).

Several days prior to the April 19, 2018, calendar call, trial counsel had a visit with Mr. Gomez at CCDC, wherein, his counsel conveyed a plea offer requiring him to plead guilty to Second Degree Murder with Use of a Deadly Weapon. Counsel did not have a copy of the

written Guilty Plea Agreement (GPA) to review and discuss with Mr. Gomez.

However, when Mr. Gomez questioned counsel about "how much time he would be getting, counsel neglected to explain the concept of "concurrent and consecutive" sentences in relation to the weapon enhancement and merely explained that he would be facing a sentence of 10 years to Life and an 8 to 20 year sentence "together" to make him eligible for release on parole after serving 10 years.[1] (Exh. A)

On April 19, 2018, at Calendar Call, trial counsel provided Mr. Gomez with a copy of the GPA and told him to read it, as she walked away telling him she would be right back. Mr. Gomez, flicking from page to page, had no idea and understanding of the legal significance of the document

1. On April 19, 2018, at Calendar Call, counsel also informed and reassured Mr. Gomez's family the with Mr. Gomez pleading guilty, he would be eligible for release from prison on parole after 10 years. (Exh's B and C)

With counsel's return, she did not thoroughly discuss the GPA with Mr. Gomez, specifically, the range of punishment of receiving consecutive sentences for the offense, but yet, took the short five minutes to explain the plea canvass process of the judge asking him questions and that he should say "Yes" and "NO". (Exh. A)

Mr. Gomez, believing all sentence will be "together", and eligible for release on parole after 10 years, entered his guilty plea with "Yes" and "NO" answers to the court's questions as instructed by his attorney.

In Rubio v. State, 194 P.3d 1224 (Nev. 2008), the Court addressed an ineffective assistance of counsel claim regarding counsel's failure to review the guilty plea agreement with her while she met with the interpreter to ensure she understood the terms of the agreement.

In reversing the district court's denial of the post-conviction motion to withdraw guilty plea and remanding for an evidentiary

hearing, on her allegations that counsel essentially abandoned her to the interpreter to discuss the plea agreement, the court concluded counsel was ineffective. Id. at 1234.

In the instant case, similar to Rubio, Mr. Gomez entered into a guilty plea agreement filed in open court. While the GPA was written in English, his lack of an understanding of the document was equal to it being written in Spanish.

Counsel, in handing Mr. Gomez the GPA and telling him to "read it", as she walked away, was an abandonment to leave him to having to make sense of the document for himself. Upon her return to Mr. Gomez, the GPA was not thoroughly discussed and left him to believe his sentence would be "together" as counsel represented to him and his family. Thus, feeling as if he was rushed into signing the plea agreement. (Exh. D)

When considering counsel's affirmative

misrepresentation of Mr. Gomez's sentences being all "together" to make him eligible for release on parole after 10 years, and totality of the circumstances, counsel's representation "fell below an objective standard of reasonableness" to demonstrate deficient performance (i.e. ineffective assistance) under Strickland, 104 S.ct. 2052, to render the guilty plea as not being knowing and voluntarily entered. See Bryant v. State, 721 P.2d 364, 367 (Nev. 1986).

Wherefore, there is a "reasonable probability" that, but for counsel's errors, Mr. Gomez would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 106 S.ct. 366 (1985); Kirksey v. State, 923 P.2d 1102, 1107 (Nev. 1996).

As Mr. Gomez's conviction is a product of a constitutional violation, the court must reverse and remand the case to allow the withdrawl of his guilty plea.

Relief is warranted

Ground Three

Mr. Gomez's Plea Was Not Knowingly And Voluntarily Entered As It Was A Product Of Coercion By Counsel's Ineffective Assistance, In Violation Of The Sixth And Fourteenth Amendment

"A guilty plea is not voluntary and must be stricken if that free will is overborne by the prosecution or by the accused's lawyer." Edwards v. Garrison, 529 F.2d 1374, 1380 (4th Cir. 1976), and the question as to whether a plea is voluntarily entered will turn on the facts and circumstances of each particular case. Taylor v. Warden, 607 P.2d 587 (Nev. 1980). Consequently, the focus of the voluntariness inquiry is upon the frame of mind of the defendant at the time he pleads guilty. Id. at 588.

Whereas, if at the time a defendant decides to plead guilty under the belief from a threat of being charged with a greater offense and penalty should he proceed to

trial, or if a defendant pleads guilty under duress and pressure from an outside force (i.e., lawyer, prosecution or government), then the plea is a product of coercion and is not made with an intelligent appreciation of the choice between the course of action available to him. See U.S. v. Cruz, 977 F.2d 732 (2nd Cir. 1992), U.S. v. Shorter, 54 F.3d 1248 (7th Cir. 1995).

Mr. Gomez's guilty plea was not knowingly and voluntarily entered as it was a product of coercion by trial counsel's actions, or lack thereof, amounting to ineffective assistance in violation of the Sixth Amendment under the United States Constitution.

Mr. Gomez, prior to entering his guilty plea, requested of trial counsel to conduct investigations into his case in preparation for a defense at trial to include: the investigation of an alternate suspect to the shooting; the investigation of contacting and interviewing an eyewitness to the incident; the investigation into the

victim's background for potential evidence of a propensity for violence, and to exclude irrelevant and unrelated evidence from the case, which went ignored by counsel. (Exh. A)

Without conducting an investigation for a defense for trial and the trial date fast approaching, counsel began to apply pressure against Mr. Gomez to accept a plea offer. Several days prior to the April 19, 2018, calendar call, trial counsel made a visit with Mr. Gomez at CCDC and during the visit counsel conveyed a plea offer requiring him to plead guilty to Second Degree Murder with Use of a Deadly Weapon.

While counsel did not have a copy of the proposed Guilty Plea Agreement, she informed Mr. Gomez that by pleading guilty he would be facing a sentence of 10 years to Life and an 8 to 20 year sentence "together" to make him eligible for release on parole after serving 10 years. (Exh. A)

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When Mr. Gomez questioned trial counsel about the lack of an investigation into his case and defense for his trial, counsel became frustrated and told Mr. Gomez that if a jury convicted him on first degree murder with use of a deadly weapon, he would spend the rest of his life in prison and never see his family again in the "free world." (Exh. A)

Mr. Gomez, under the subjective belief that there existed no defense to his case; the threat of facing the rest of his life in prison; and counsel's assurance of being released on parole after 10 years, was the driving force that induced him into accepting and pleading guilty to the charge of second degree murder with use of a deadly weapon.

Generally, "a guilty plea is void if it was 'induced by promise or threats which deprive it of the character of a voluntary act.'" Machibroda v. U.S., 82 S.ct. 510, 513 (1962); Sanchez v. U.S., 50 F.3d 1448, 1454 (9th Cir. 1995).

In the instant case, on April 19, 2018, prior to Mr. Gomez's case being called by the court for calender call, trial counsel gathered Mr. Gomez's family together and reassured them that with Mr. Gomez pleading guilty to second degree murder with use of a deadly weapon, he would be eligible for release after serving 10 years. (Exh's B and C)

Therefore, when considering the totality of the circumstances, Mr. Gomez's attorny's actions, or lack thereof, had such an impact on him that he lacked the actual and true capacity to enter a plea that was knowingly, voluntarily and intelligently. Hill v. Lockhart, 106 S.ct. 3166, 3170 (1985). Bacon v. Lee, 316 F.3d 1459 (9th Cir. 1994).

As trial counsel's actions, or lack thereof, comport to nothing more than a blatant demonstration of ineffective assistance of counsel that has ultimately rendered the guilty plea as not being knowingly, voluntarily and intelligently entered in violation of the Sixth

and Fourteenth Amendment, there exist a "reasonable probability" that but for such errors, Mr Gomez would not have pleaded guilty and insisted on going to trial. Molina, 87 P.3d at 533. Mr. Gomez's plea was a product of coercion in direct connection with trial counsel's ineffective assistance and, thus, was not knowingly, voluntarily and intelligently entered. And, as the plea violates the Sixth and Fourteenth Amendment to the Nevada and U.S. Constitution, the remedy commands the withdrawl of plea and remand for trial or the re-negotiation of the case.

Relief is warranted

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Ground Four

Trial Counsel Was Ineffective In Failing To File Motion To Withdraw Guilty Plea As Requested By Mr. Gomez, In Violation Of The Sixth And Fourteenth Amendment

The claim of ineffective assistance of counsel is reviewed under the "reasonably effective assistance" test set-forth in Strickland v. Washington, ___ U.S. ___, 104 Sct. 2052 (1984), adopted by Nevada in Warden v. Lyons, 683 P.2d 504 (Nev. 1984).

Under Strickland, a petitioner must demonstrate (1) counsel's deficient performance, and (2) prejudice to the defense. Id. 104 S.Ct. 2052.

Deficient Performance

Counsel was ineffective in failing to file pretrial motion to withdraw guilty plea as requested by Mr. Gomez, in

violation of the Sixth Amendment and Strickland standard.

Mr. Gomez, in open-court, was provided with the written Guilty Plea Agreement (GPA), which his counsel rushed him through in approximately five minutes and leaving him to believe his sentences would be all together and he would be eligible for release on parole after 10 years. Mr. Gomez entered a guilty plea. (Exh. A and B/C)

Shortly thereafter, when reading the GPA in its entirety and discussing his concerns with his fellow-inmates, Mr. Gomez learned his sentences could not be run together and that he could do 18 years or more before being released on parole. Frustrated and upset that counsel had lied to him and his family about being eligible for release after 10 years, Mr. Gomez, in discussing the matter with his attorney and expressing his dissatisfaction with her having lied to him, he requested of counsel to file a motion to withdraw the guilty

plea. (Exh. A)

Counsel, in her attempt to clarify her exposed deception and calm his frustration, she told Mr. Gomez it was not possible to take back a guilty plea once he admitted he committed the crime. Mr. Gomez, not believing what counsel was telling him, requested of counsel to still file the motion. (Exh. A)

Counsel refused to file the motion to withdraw guilty plea.

In Molina v. State, 87 P.3d 533 (Nev. 2004), the court noted that pursuant to NRS 176.165, a defendant may move to withdraw a guilty plea before the imposition of sentence and went on to state:

"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason' if it is 'fair and just." (citations omitted)

Id. at 537

In the instant case, as NRS 176.165 provides for Mr. Gomez the right, a right exclusively reserved for a defendant to exercise, to file a presentence motion to withdraw his guilty plea, counsel was ineffective in advising Mr. Gomez it was not possible to "take back a guilty plea once he admitted he committed the crime" and ineffective in failing to file the motion to withdraw the guilty plea, in violation of the Sixth Amendment to the U.S. Constitution.

In U.S. v. Moore, 159 F.3d 1154 (9th Cir. 1998), the court reasoned that a defendant has a right to conflict free representation under the Sixth Amendment. Id. at 1157. To show a Sixth Amendment violation, it must be demonstrated "that an actual conflict of interest adversely affected his lawyers performance." Id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)). Once an actual conflict of interest is shown, a defendant need

only show "that some effect on counsel's handling of particular aspects of the [case] was likely." Id. at 1157.

In Lopez v. Scully, 58 F.3d 38 (2nd Cir. 1995), the defendant, prior to sentencing, filed a pro se motion to withdraw guilty plea alleging his attorney coerced him into pleading guilty. When the motion was filed, the attorney had an actual conflict of interest, because to argue in favor of the motion would require counsel to admit serious ethical violations and subject him to liability for malpractice. Id. at 41.

In Winkler v. Keane, 7 F.3d 304, 307 (2nd Cir. 1993), the court held:

"An attorney has an actual ... conflict of interest when, during the course of the representation, the attorney and defendant's interest 'diverge with respect to a material factual or legal issue or to a course of action.'"

Id. at 307

In the instant case, counsel's lies of that Mr. Gomez not being able to "take back [his] guilty plea" and the refusal to file the motion to withdraw guilty plea, prior to sentencing, created an actual conflict of interest as thier interest diverged with respect to a material factual and legal issue to a course of action. In Winkler, 7 F.3d at 307-308.

Furthermore, counsel was well aware that the filing of the motion to withdraw guilty plea would force her to expose the coercive tactics and deception she applied upon Mr. Gomez and his family to induce him to plead guilty, which would create an actual conflict of interest, because she could not argue in favor of the motion and defend her egregious conduct at the same time. See U.S. v. Swartz 975 F.2d 1708 (4th Cir. 1992) (noting that, upon a showing of an actual conflict of interest adversely affecting counsel's performance, a defendant is entitled to a new hearing).

Without question, counsel's actions, or lack thereof, demonstrate deficient performance that "fell below an objective standard of reasonableness" in accordance with Strickland, 104 S.Ct 2052 (1984).

Prejudicial Effect

The prejudicial effect is astronomical and irreparable as Mr. Gomez was denied his statutory right to seek the withdrawal of his guilty plea based on trial counsel's ineffective assistance.

When considering the totality of the circumstances, there exist a "reasonable probability" that but for counsel's errors, the court would have appointed a new counsel to file the ineffective assistance of counsel claims against Ms. Levy, and the court granting the motion when applying the "fair and just" standard.

Counsel's actions violates the U.S. Constitution, warranting reversal of conviction.

Relief is warranted

Request For Evidentiary Hearing

In Berry v. State, 363 P.3d 1148 (Nev. 2015), relying upon Mann v. State, 46 P.3d 1228, 1230 (Nev. 2002), held:

"This court has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that if true, would entitle him to relief."

Id. 363 P.3d at 1155, see also Hathaway v. State, 71 P.3d 503, 508 (Nev. 2003) (reversing and remanding for an evidentiary hearing on the petitioner's allegations because she had "raised a claim supported by specific facts in sworn affidavit not belied by the record").

Mr. Gomez's petition for writ of habeas corpus (post-conviction) relief challenges the validity of the guilty plea and conviction based on claims of

ineffective assistance of counsel, which are supported by specific factual allegations within his sworn affidavit (Exh. A), petition and additional evidence which is not belied by the record that if true, would entitle him to relief. Hathaway, 71 P.3d at 508.

Mr. Gomez's sworn affidavit and additional evidence creates a factual dispute which are not belied by the record which the district court must conduct an evidentiary hearing on to resolve such disputes. See Vaittanscourt v. Warden, 529 P.2d 204 (Nev. 1974)("... it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing").

As the district court, in determing the validity of a guilty plea, is required to look beyond the technical sufficiency of a plea canvass to the entire record and totality of the circumstances, Rubio v. State, 194 P.3d 1224, 1229 (Nev. 2008), Mr. Gomez's underlying claims of ineffective assistance of counsel

warrant an evidentiary hearing. See Downs-Morgan, 765 F.2d 1534.

Wherefore, when considering the totality of the circumstances and evidence presented in support of his petition, Mr. Gomez is entitled to an evidentiary hearing to resolve the factual disputes created within the record.

Additionally, with good cause appearing the district court must appoint counsel and conduct an evidentiary hearing.

Relief is warranted

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Conclusion

Wherefore, Mr. Gomez prays this Court will grant the petition in its entirety and permit the withdrawl of the guilty plea accordingly.

In the alternative, appoint counsel to secure additional discovery in support of the claims and conduct an evidentiary hearing on the claims. Grant any other relief deemed appropriate in these proceedings.

Dated this ___ day of Feb 2020

Oscar Gomez #1200302
P.O. Box 208
Indian Springs, Nv.
89070

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CERTFICATE OF SERVICE BY MAILING

I, Oscar Gomez, hereby certify, pursuant to NRCP 5(b), that on this ___ day of _____, 2020, I mailed a true and correct copy of the foregoing, "_____ Memorandum of Points & Authorities" by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Steve Wolfson
Dist. Attorney
200 Lewis Ave
LV. Nv. 89155

CC:FILE

DATED: this ___ day of Feb, 2020

Oscar Gomez #1200302
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:


Exhibit A
A

Original

Affidavit Of Oscar Gomez

State of Nevada)
) ss
County of Clark)

I, Oscar Gomez, after being duly sworn, depose and states the following:

1. That I am the Defendant/Petitioner in Case No. C-16-316959-1, of the Eighth Judicial District Court, Clark County, Nevada.

2. That I am 18 years of age or over and competent to testify to the contents of this affidavit. However, as I am unlearned in the art of law and have a limited highschool education, I had the assistance of an inmate Legal Assistant in preparing this affidavit and my Writ of Habeas Corpus (Post-Conviction) Petition.

3. That due to the nature of the charges I stand convicted of, the complexities of the laws, my inability to comprehend the habeas corpus proceedings and indigency to retain private counsel, I request of the court to appoint me counsel

in the habeas corpus proceedings.

4. That on or about June 28, 2016, I was charged with Murder with Use of a Deadly Weapon and shortly thereafter, attorney Monti Levy was appointed to represent me in my criminal case.

From the time of Ms. Levy's appointment, I made numerous request for her to investigate my case to include the finding of the other individual in the video footage evidence, to challenge the unrelated evidence of the single bullet impounded at my residence, and to contact and interview the female eye-witness who described the shooter's clothes as being inconsistent with what I was wearing.

Ms. Levy refused to follow up on any of the information I requested of her to investigate.

5. That prior to the Calendar Call of April 19, 2018, Ms. Levy made a visit with me at CCDC and told me about a plea deal of me pleading guilty to Second Degree Murder with Use of a Deadly

Weapon. She did not have a copy of the Guilty Plea Agreement to discuss the full details of the agreement.

When I questioned Ms. Levy about how much time I would be getting, she did not explain the concept of "concurrent and consecutive" sentences and merely told me I would be facing a sentence of 10 to Life and an 8 to 20 year sentence "together" to make me eligible for release on parole after serving 10 years.

6. That on April 19, 2018, at Calendar Call, I received a copy of the Guilty Plea Agreement in open-court and Ms. Levy handed it to me and told me to read it, as she walked away telling me she would be right back.

I began to flicking through the pages from page to page with absolutely no idea or understanding of the significance of the papers in my hand. When Ms. Levy returned, she did not discuss the GPA with me, specifically, the range of punishment of receiving consecutive

sentences for the offense, but yet, took about five (5) minutes to explain the plea canvass process of the judge asking me questions and that I should answer with a "Yes" and "No".

Believing my sentence will be "together" and that I would be eligible for release on parole after 10 years, I entered my guilty plea with "Yes" and "No" answers to the court's questions as instructed by Ms. Levy.

I honestly felt as if I was being rushed to take the plea offer; rushed in reading the GPA with Ms. Levy in open court.

7. That I believe my guilty plea was coerced by Ms. Levy's lack of an investigation of my case and her threats of me never seeing my family again if I went to trial.

I eventually pled guilty under the belief and Ms. Levy's assurance of being released on parole after 10 years as my sentences would run "together".

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8. That after pleading guilty and having the opportunity to read the GPA in its entirety and discussing it with a few inmates, I learned that my sentences could not be run together and that I could serve 18 years or more before being released on parole.

Upset that Ms. Levy had actually lied to me and my family about being released after 10 years, I contacted Ms. Levy about the matter and asked of her to file a motion to withdraw my guilty plea.

Unfortunately, Ms. Levy refused to file the motion to withdraw my guilty plea.

9. That but for Ms. Levy's errors, I would not have pleaded guilty and would have insisted on going to trial.

10. That any facts and and information not mentioned in this affidavit are not deemed waived, as additional facts may come to light after this affidavit is signed.

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11. That the contents of this affidavit are true and accurate to the best of my personal knowledge.

12. That this affidavit is executed under the penalty of perjury pursuant to NRS 208.165

Dated this 6th day of Jan 2020

Oscar Gomez #1200302
P.O. Box 208
Indian Springs, Nv.
89070

B

Exhibit B

B

January 31, 2020

District Court Judge
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nv. 89155

RE: Gomez v. State, Case No. C-16-316959-1
Habeas Corpus / Post-Conviction

Dear Presiding Judge,

I submit the instant declaration to the district court for consideration of Oscar Gomez's post-conviction petition.

My son was represented by attorney Monti Levy in his case and throughout her representation she failed to keep me informed on the status, investigation and progress of the case, despite my son having instructed Ms. Levy to inform me of the status of the case.

When ever we, (my daughter and I) would call Ms. Levy's office, we would never receive information as to the status of the case. The only time Ms. Levy would make contact with me and our

family was to let us know my son needed clothes to go to court and one time she made contact to tell us to write letters to the judge about how my son's life was growing up to show the judge what he experienced in his lifestyle.

I finally seen Ms. Levy at my son's court appearance and when the hearing concluded, Ms. Levy called our family in a room and she told us that she has done all that she could do for the case and that it would be best if he accepted the district attorney's plea offer.

Ms. Levy, in explaining the plea offer, she told us that my son would receive a sentence of 10 years to life and would be eligible for release on parole to come home after 10 years.

I don't believe Ms. Levy represented my son to the best of her ability and to the cases full potential to provide my son with a viable defense for trial.

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I hope this information will be of some assistance to my son's case, and I appreciate your positive consideration to the instant declaration.

Sincerely,

Laura E. Olivas
P.O. Box 293745
Phelan CA. 92329

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
Subscribed and sworn to (or affirmed) before me on this 01 day of February, 2020, by Laura E. Olivas, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

A. CAZARES OLIVO
COMM. # 2187003
NOTARY PUBLIC • CALIFORNIA
SAN BERNARDINO COUNTY
Comm. Expires MARCH 18, 2021

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Exhibit C

December 29, 2020

To Whom It May Concern:

As the time has passed since my brother's conviction, the separation has caused great stress on my family. Seeing what the separation has caused continues to break me every day as I feel the void of what was once the presence of my brother. As I write this letter, I can't help but to think of the time it all happened. As much as it pains me to reflect on such a horrid time, I strongly believe there is more that could have been done in my brother's defense. Playing back every memory of when it all happened, one thing that vividly presents itself in my head is the rude encounter I had with his defense attorney. At such a vulnerable stage in my life with my brother's situation and my pregnancy, I was belittled by Ms. Levy's remarks. My first encounter with Ms. Levy was far from professional. Her initial reaction when meeting me was surprised yet disgusted by the fact that I was pregnant at "such a young age." Her specific words were, "Aren't you a little too young to be pregnant?" Hearing those words made me realize the lack of proficiency in this highly respected attorney. Realizing this made me doubt her capability of even helping or defending my brother. In connection to my experience, I can also say that her communication with my family lacked concistency. As a result, the information that was relayed to my family from what was discussed between her and my brother did not add up. His understanding, as was ours, was that he would be sentenced for ten years plus and added two for gun enhancement charges; which would then grant him eligibility for parole. Not until he was sentenced, did we find out that was not the case. The lack of communication and explanation on behalf of Ms. Levy robbed my brother of a fighting chance which metaphorically speaking costed him his life. He was given no time to seek advice from his loved ones to guide him into making a clear cognitive decision. I strongly believe my brother was scared into agreeing to something that ended up hurting him.

Thank you,
Isabel Gomez

D

Exhibit D

D

Hi this is Oscar Gomez. Just letting you know I have been transfered to Arizona.

I have been thinking long and hard and came to the decision to withdrawl my plea agreement deal. I feel like I could have recieved a manslaughter charge.

In court when I signed the deal I had only less than 5 minutes to go through the plea agreement. I felt [redacted] presured to sign the deal. That day only two people in court, me and somebody else. My attorney was telling me to [redacted] hurry and make my decision because we were going to be called next. she said "Hurry this is your last chance" "your life is on the line". I didnt know what to do she scared me saying that. So i signed which now I regret.
So can you please file a motion for me to withdraw plea.

Thank you.
Oscar Gomez
#1200302

Oscar Gomez

Please stamp & file & return to inmate Original

Oscar Gomez #1200802
P.O. Box 208
Indian Springs
Nv. 89070

IN THE 8th DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

Oscar Gomez,
Petitioner,

vs.

State of Nevada
Warden; State of Nevada,
Respondents.

CASE NUMBER: C-16-316959-1

Dept. No. XXI

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

COMES NOW, Mr. Gomez the Petitioner, in proper person, and moves this Court for its order allowing the appointment of counsel for Petitioner and for an evidentiary hearing. This motion is made and based in the interest of justice.

Pursuant to NRS 34.750(1):

> A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petitioner is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
>
> (a) The issues presented are difficult;
>
> (b) The petitioner is unable to comprehend the proceedings, or

Please stamp & file & return to inmate Original

Oscar Gomez #1200302
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

IN THE 8th JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF Clark

Oscar Gomez
Petitioner,

vs.

State of Nevada

Respondent(s).

Case No. C-16-316959-1
Dept. No. XX1
Docket

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

Please stamp & file & return to inmate Original

District Court
Clark County, Nevada

Oscar Gomez, Jr.
Petitioner, Case No. C-16-316959-1

vs.

Dept. No. XXI

State Of Nevada,
Respondent(s)

Memorandum Of Points And Authorities
In Support Of
Writ Of Habeas Corpus (Post-Conviction)

Comes Now, Oscar Gomez, Jr, Petitioner, in proper person under Haines v. Kerner, 92 S.ct. 594, 596 (1972) (Pro Se pleadings are held to a less stringent standard than pleadings drafted by attorneys) and submits the instant Memorandum of Points and Authorities.

This Memorandum is submitted to the Court to assist the Court in reaching a fair and just decision in considering the constitutionality of the asserted claims.

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RECEIVED
APR - 3 2020
CLERK OF THE COURT

Please stamp & file & return to Inmate Original

Affidavit Of Oscar Gomez

State of Nevada)
) ss
County of Clark)

I, Oscar Gomez, after being duly sworn, depose and states the following:

1. That I am the Defendant/Petitioner in Case No. C-16-316959-1, of the Eighth Judicial District Court, Clark County, Nevada.

2. That I am 18 years of age or over and competent to testify to the contents of this affidavit. However, as I am unlearned in the art of law and have a limited highschool education, I had the assistance of an inmate Legal Assistant in preparing this affidavit and my Writ of Habeas Corpus (Post-Conviction) Petition.

3. That due to the nature of the charges I stand convicted of, the complexities of the law, my inability to comprehend the habeas corpus proceedings and indigency to retain private counsel, I request of the court to appoint me counsel

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #06528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

OSCAR GOMEZ, JR., aka Oscar Gomez, #5990519

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-815035-W

DEPT NO: XXI

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) and MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

DATE OF HEARING: JULY 14, 2020
TIME OF HEARING: 3:30 PM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition for Writ Of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel and Request for Evidentiary Hearing.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On August 3, 2016, OSCAR GOMEZ, JR. (hereinafter "Petitioner") was charged by way of Information with one count of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165) for actions committed on or about June 24, 2016.

On April 19, 2018, Petitioner accepted negotiations in the underlying case and, pursuant to a Guilty Plea Agreement ("GPA"), Petitioner pled guilty to MURDER (SECOND DEGREE) WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030.2, 193.165). In so doing, Petitioner acknowledged:

> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
> …
> I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.
> …
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

GPA at 4-5. Petitioner was also canvassed by the Court regarding the voluntariness of Petitioner's plea, during which Petitioner affirmed:

> THE COURT: …you had a full and ample opportunity to discuss your plea of guilty and the charge of second degree murder with use of a deadly weapon that you're going to be pleading to. Is that right?
>
> DEFENDANT GOMEZ: That's right.
>
> THE COURT: Okay. And did your lawyers answer all your questions to your satisfaction?
>
> DEFENDANT GOMEZ: They did.
>
> THE COURT: Okay. Do you feel like [your lawyers] have spent enough time with you explaining the discovery and going over the evidence and everything like that in this case?
>
> DEFENDANT GOMEZ: Yeah.

Recorder's Transcript of Hearing: April 19, 2018 ("RT 4/19/18"), at 9. The Court further asked:

> THE COURT: …Did you have a full and ample opportunity to discuss your plea of guilty as well as the charge to which you are pleading guilty with your attorneys?
>
> DEFENDANT GOMEZ: I did.
>
> THE COURT: All right. And we've already discussed that your counsel, Ms. Levy, has answered all your questions to your satisfaction, is that right?
>
> DEFENDANT GOMEZ: That's right.
>
> …
>
> THE COURT: All right. Now before I proceed with your plea do you have any questions you would like to ask me the Court?
>
> DEFENDANT GOMEZ: No, no questions.

Id. at 11-12. Following its canvass of Petitioner, the Court found that his guilty plea was freely and voluntarily entered, and referred the matter to the Division of Parole and Probation for the preparation of a Presentence Investigation Report ("PSI"). Id. at 15.

On June 14, 2018, Petitioner was adjudicated guilty of Murder (Second Degree) With Use of a Deadly Weapon and was sentenced to ten (10) years to LIFE in the Nevada Department of Corrections, with a consecutive term of ninety-six (96) to two hundred forty (240) months for the use of a deadly weapon. Petitioner received 716 days credit for time served. The Judgment of Conviction was filed on June 22, 2018.

On July 26, 2018, Petitioner filed a Notice of Appeal in the underlying case. On May 15, 2019, the Nevada Court of Appeals affirmed Petitioner's Judgment of Conviction. Remittitur issued on July 1, 2019.

On May 5, 2019, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner subsequently filed a Motion for Appointment of Counsel and Request for Evidentiary Hearing on May 14, 2019.

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STATEMENT OF FACTS

The court, in sentencing Petitioner, relied on the following summary of facts:

> Officers were assigned to investigate the crime of murder with a weapon. Officers determined on June 24, 2016, Oscar Gomez, aka Oscar Gomez Jr., the defendant and co-defendant, Gustavo Ernesto Delacruz, aka Gustavo Ernesto Delacruzcortez arrived at a local food mart to make a purchase. When the victim and his friend entered the store, they passed Mr. Gomez and Mr. Delacruz as they were exiting. As the victim and his friend exited the store they were confronted by Mr. Gomez and Mr. Delacruz. Thereafter, Mr. Gomez and Mr. Delacruz remarked "You're not from around here, this is our town." The exchange continued as Mr. Gomez pulled out a semiautomatic pistol from the waist of his pants. The victim's friend instructed Mr. Gomez to put away the gun and "fight like a man." The victim and Mr. Delacruz started fist fighting in the parking lot in front of the local food mart, while the defendant walked around the area of the fight with his hand on his gun. Both the victim and Mr. Delacruz sustained injuries as a result of punching each other in the face.
>
> The fight ended and Mr. Delacruz got into his vehicle and started to pull out of the parking lot. Mr. Gomez and the victim continued to exchange more words. The victim and his friend were walking away from the parking lot while Mr. Gomez continued to walk behind them, asking them where they were going. When the victim responded, "to your mom's house," Mr. Gomez pulled his gun and pointed it the victim. The victim told him to put the gun down and fight, to which Mr. Gomez responded "I'm not that stupid." The victim told Mr. Gomez to put the gun down because he was not going to use it, at which point Mr. Gomez fired one shot into the victim's chest, fleeing the scene toward Mr. Delacruz's vehicle. The victim's friend then ran to the store and asked to have 911 called because his friend had been shot. The victim was transported to a local hospital where he was pronounced dead.
>
> Video surveillance and paychecks that had been cashed at the food mart led officers to the defendant as being the offender.

PSI at 4.

ARGUMENT

I. PETITIONER FAILS TO DEMONSTRATE HE IS ENTITLED TO HABEAS RELIEF

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is

the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under Strickland, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The Court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Further, a defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). A

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defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 1617 (1983).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]…Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a

reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068). This portion of the test is slightly modified when the convictions occurs due to a guilty plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988 (1996). For a guilty plea, a defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Kirksey, 112 Nev. at 998 (quoting Hill, 474 U.S. at 59).

Nevada precedent reflects "that where a guilty plea is not coerced and the defendant [is] competently represented by counsel at the time it [is] entered, the subsequent conviction is not open to collateral attack and any errors are superseded by the plea of guilty." Powell v. Sheriff, Clark County, 85 Nev. 684, 687, 462 P.2d 756, 758 (1969) (citing Hall v. Warden, 83 Nev. 446, 434 P.2d 425 (1967)). In Woods v. State, the Nevada Supreme Court determined that a defendant lacked standing to challenge the validity of a plea agreement because he had "voluntarily entered into the plea agreement and accepted its attendant benefits." 114 Nev. 468, 477, 958 P.2d 91, 96 (1998).

Furthermore, the Nevada Supreme Court has explained:

> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollet v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). Indeed, entry of a guilty plea "waive[s] all constitutional claims based on events occurring prior to the entry of the plea[], except those involving voluntariness of the plea[] [itself]." Lyons, 100 Nev. at 431, 683 P.2d 505; see also, Kirksey, 112 Nev. at 999, 923 P.2d at 1114 ("Where the defendant has pleaded guilty, the only

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claims that may be raised thereafter are those involving the voluntariness of the plea itself and the effectiveness of counsel.").

Petitioner alleges four grounds for relief, each based upon trial counsel's alleged ineffectiveness. Petitioner fails to demonstrate that any of these grounds warrant relief, as each is belied by the record.

A. GROUND ONE: Invalid guilty plea due to counsel's failure to investigate

Petitioner first asserts that his guilty plea could not have been knowingly and voluntarily entered, due to counsel's ineffectiveness for failing to investigate and interview witnesses. Petition at 10-16. Petitioner specifically alleges that counsel should have investigated an alternative suspect, should have challenged the photo lineup used to identify Petitioner, and should have challenged evidence that was allegedly inadmissible. Id.

Petitioner, in executing the GPA, specifically asserted, "I have discussed with my attorney *any possible defenses, defense strategies and circumstances which might be in my favor*" and "I am satisfied with the services provided by my attorney." GPA at 4, 5 (emphasis added). Additionally, the Court specifically inquired as to counsel's efforts in discovery:

> THE COURT: Okay. Do you feel like [your lawyers] have spent enough time with you explaining the discovery and going over the evidence and everything like that in this case?
>
> DEFENDANT GOMEZ: Yeah.

RT 4/19/18 at 9. Therefore, Petitioner's allegations that he was unhappy with counsel's investigation and explanation of the evidence in the case are expressly belied by the record. As such, Petitioner's first claim is ripe only for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225.

Moreover, Petitioner fails to specifically assert what a better investigation would have yielded, instead relying on vague references to preparation for trial. Petition at 11-13. Petitioner's failure to raise specific assertions leaves his claim bare and naked and suitable only for summary denial. Hargrove. 100 Nev. at 502, 686 P.2d at 225; NRS 34.735(6). Furthermore, Petitioner's failure to indicate what a sufficient investigation would have

produced leaves his claim deficient as specifically expressed in Molina. 120 Nev. at 192, 87 P.3d at 538.

Petitioner makes the vague assertion that, had counsel investigated an alternative suspect, counsel could have "develop[ed] the evidence into a viable defense." Petition at 11-12. However, Petitioner fails to acknowledge that it was squarely within counsel's purview to determine which defenses to develop. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Furthermore, Petitioner overlooks that, in the face of overwhelming evidence of guilt, counsel may have made the strategic determination that it might "disserve [Petitioner's] interests [] by attempting a useless charade." Cronic, 466 U.S. at 657 n.19, 104 S. Ct. at 2046 n.19; Ford, 105 Nev. at 852, 784 P.2d at 952 (after investigation of the evidence, defense counsel "reasonably believed that his only defense was the insanity defense and did not want to detract from it by asserting a *meritless defense*." (Emphasis added)); Dawson, 108 Nev. at 117, 825 P.2d at 596 ("Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable.").

In any event, the decision to enter a guilty plea was solely Petitioner's choice to make. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Because Petitioner made his own decision to enter a guilty plea, and because he affirmed that counsel had addressed all of his concerns, Petitioner has waived these issues. Webb, 91 Nev. at 470, 538 P.2d at 165.

Because Petitioner fails to meet his burden for claiming ineffectiveness, and because the decision to plead guilty was Petitioner's alone, Petitioner's claim should be denied.

B. GROUND TWO: Invalid guilty plea due to counsel's failure to explain GPA

Petitioner's second ground alleges that his counsel effectively "abandoned" him without explaining the terms of the GPA. Petition at 18. Petitioner further alleges that counsel assured him that he would be eligible for release after ten years in prison. Id. at 19. Both assertions are belied by the record and therefore cannot warrant relief.

Petitioner, in executing the GPA, affirmed that he was signing the same "after consultation with [his] attorney," and that "[his] attorney has answered all [his] questions regarding the guilty plea agreement and its consequences to [Petitioner's] satisfaction." GPA

at 5. The Court also canvassed Petitioner before accepting his guilty plea, and the following exchange occurred:

> THE COURT: All right. Before you signed the written Plea of Guilty did you read it?
>
> DEFENDANT GOMEZ: Yes, I did.
>
> THE COURT: Did you understand everything contained in the written Plea of Guilty?
>
> DEFENDANT GOMEZ: Yes, I did.
>
> THE COURT: Did you also read the Amended Information that's been filed and is attached as an Exhibit to your written Plea of Guilty charging you with the felony crime of second degree murder with use of a deadly weapon?
>
> DEFENDANT GOMEZ: Yes.
>
> THE COURT: And do you understand what's set forth in that charging document?
>
> DEFENDANT GOMEZ: I understand.
>
> THE COURT: All right. Did you have a full and ample opportunity to discuss your plea of guilty as well as the charge to which you are pleading guilty with your attorneys?
>
> DEFENDANT GOMEZ: I did.
>
> THE COURT: All right. And we've already discussed that your counsel, Ms. Levy, has answered all your questions to your satisfaction, is that right?
>
> DEFENDANT GOMEZ: That's right.

RT 4/19/18 at 11-12. Thus, Petitioner's allegations that he did not understand, and that his counsel did not explain the GPA to him are clearly belied by the record. As a result, this claim should be denied in its entirety. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Furthermore, Petitioner cannot demonstrate any prejudice from counsel's alleged deficient performance, as Petitioner himself represented that he had no questions about the guilty plea or its implications:

> THE COURT: All right. Do you have any questions for me so far --
>
> DEFENDANT GOMEZ: No questions.
>
> THE COURT: -- about the plea or about anything?
>
> DEFENDANT GOMEZ: No.
>
> …
>
> THE COURT: All right. Now before I proceed with your plea do you have any questions you would like to ask me the Court?

DEFENDANT GOMEZ: No, no questions.

RT 4/19/18 at 8-9, 12. As such, Petitioner's claim is further belied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Petitioner's claims about his potential sentence are equally belied, as the GPA and plea transcript both reflect that Petitioner was aware of the potential range of punishment. Petitioner acknowledged, by signing the GPA:

> I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada State Prison for Life with the possibility of parole with eligibility for parole beginning at ten (10) years; OR a definite term of twenty-five (25) years with eligibility for parole beginning at ten (10) years, *plus a consecutive* one (1) to twenty (20) for the deadly weapon enhancement.

GPA at 2 (emphasis added). Petitioner also acknowledged, "I have not been promised or guaranteed any particular sentence by anyone." Id. at 3. The Court also engaged Petitioner in a discussion about the potential sentence before accepting Petitioner's guilty plea:

> THE COURT: …The least amount of time I could give you on the bottom end is 11 years. Do you understand that?
>
> DEFENDANT GOMEZ: I -- I understand.
>
> …
>
> THE COURT: …Now Mr. Palal can argue for the maximum time, which is a 10 to life and a consecutive 8 to 20. And obviously your lawyers are going to argue for the least amount of time. And then it' [sic] going to be up to me to look at everything and determine what, in my opinion, a fair sentence is. Do you understand that?
>
> DEFENDANT GOMEZ: I understand.
>
> THE COURT: So you understand that those are the ranges?
>
> DEFENDANT GOMEZ: Yes.
>
> THE COURT: All right. And obviously it's not an easy thing to look at a plea where the least -- *the best you're going to do is 11 years*. That's the very best you can do. You understand that?
>
> DEFENDANT GOMEZ: I understand.

RT 4/19/18 at 7-8 (emphasis added). Because Petitioner represented to the Court orally, and because he affirmed by signing the GPA, that he was aware of the potential range of

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punishments, Petitioner's argument that counsel guaranteed a ten-year sentence is belied by the record and must be summarily denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Because Petitioner's arguments are belied by the record, Petitioner's second claim should be denied.

C. GROUND THREE: Invalid guilty plea due to coercion

Petitioner's third claim alleges that his guilty plea "was a produce of coercion by trial counsel's actions, or lack thereof." Petition at 24. Petitioner's third claim must fail because Petitioner's own assertion undermines his claim, and because his arguments are otherwise belied by the record.

As a preliminary matter, Petitioner appears to be arguing that counsel coerced Petitioner into pleading guilty by failing to properly investigate or prepare for trial. Petition at 24-25. However, *Black's Law Dictionary* defines "coerce" and "coercion" both in a way that precludes their application to Petitioner's argued scenario: "coerce" is defined as "[t]o compel by force or threat," and "coercion" is defined as "compulsion of a free agent by physical, moral or economic force or threat of physical force." *Black's Law Dictionary* (11th Ed. 2019). Thus, it is clear that the *lack* of action cannot suffice to constitute coercion.

Furthermore, as stated above, Petitioner's claims regarding counsel's investigation and counsel's alleged promise of a ten-year term of imprisonment are both belied by the record and cannot provide grounds for relief. See, Section I(A), (B), *supra.*; Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner's other allegations regarding counsel's conduct are merely supported by self-serving affidavits and fail to demonstrate that Petitioner did not enter his plea freely and voluntarily, especially given Petitioner's conduct during the plea hearing and his signing of the GPA. See GPA at 5 ("I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion…").

Because Petitioner appears to undermine his own claim with his assertions, and because those assertions are individually belied by the record, Petitioner's claim should be denied.

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D. GROUND FOUR: Ineffective Assistance of Counsel for failing to file Motion to Withdraw Guilty Plea

Petitioner finally claims that counsel was ineffective for failing to file a presentence Motion to Withdraw Guilty Plea. Petition at 30-31. However, Petitioner asserts a right not present in Nevada statutes, and mistakes counsel's responsibilities.

Petitioner first recycles his assertion that counsel misled him about his potential punishment. Petition at 30-31. However, as discussed *supra*., this argument is belied by the record. Petitioner goes on to allege that this "deception" led counsel to mislead Petitioner again, telling Petitioner "it was not possible to take back a guilty plea." Id. at 31. Petitioner's assertion is supporting only by a self-serving affidavit, and is insufficient to warrant relief.

Petitioner next asserts that he had a "right" to file for withdrawal of his guilty plea, which right was violated by counsel's failure to file such a motion. Petition at 32. Petitioner cites to NRS 176.165 in support of this "right"; however, that statute does not contain any language conferring any such "right" on defendants who have pled guilty. Instead, that statute provides guidelines restricting when such motions may be filed, and when post-sentencing motions may be granted. See, NRS 176.165. Therefore, Petitioner had no statutory, much less constitutional, "right" to such a motion.

Indeed, the record reflects that Petitioner's plea was freely and voluntarily entered, as supported by the Court's canvass of Petitioner as well as Petitioner's execution of the GPA. Therefore, any motion to withdraw guilty plea would have been meritless, and counsel cannot be deemed ineffective for failing to file the requested motion. Ennis, 122 Nev. at 706, 137 P.3d at 1103 (it is not ineffective for counsel to decline to make futile arguments).

Finally, to the extent that Petitioner represents that he had concerns about counsel's interests and effectiveness, Petitioner fails to demonstrate any support for that position in the record. Petitioner did not raise any concerns about counsel's investigation or advice when accepting the guilty plea – he instead acknowledged counsel's advice and effectiveness when asked by the Court. See generally, RT 4/19/18. Likewise, Petitioner did not raise any issues about counsel's explanation of the GPA when the Court canvassed Petitioner on his acceptance

thereof. Id. Even after Petitioner allegedly learned that counsel had misled him, Petitioner did not mention any issues at the sentencing hearing – he simply apologized for his crimes and stood silent. See, RT 6/14/18 at 5.

Because Petitioner fails to demonstrate counsel's ineffectiveness, Petitioner's fourth claim should be denied.

II. PETITIONER IS NOT ENTITLED TO APPOINTED COUNSEL

The Sixth Amendment to the U.S. Constitution provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed, "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." The McKague Court specifically held that, excepting NRS 34.820(1)(a) (entitling petitioners under a sentence of death to appointed counsel), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts discretion to appoint post-conviction counsel in limited scenarios. Specifically:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the *court may appoint counsel at the time the court orders the filing of an answer and a return*. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

NRS 34.750 (emphasis added). Under that statute, courts clearly have discretion to appoint counsel to assist in post-conviction proceedings in certain situations.

The issues raised by Petitioner are repetitive and are not difficult. Furthermore, Petitioner's organization and citation to certain legal authorities demonstrates that Petitioner

is able to comprehend the proceedings and is able to formulate his own claims and arguments. Finally, Petitioner does not assert, much less demonstrate, that any further discovery is necessary to rule on the claims asserted in the instant Petition. Therefore, pursuant to NRS 34.750, this does not qualify as any of the limited scenarios in which it would be proper for this Court to exercise its discretion to appoint counsel.

Because Petitioner's claims are easily adjudicated, and because Petitioner fails to state adequate grounds for appointment of counsel, this Court should decline to appoint counsel in this case.

III. PETITIONER HAS NOT DEMONSTRATED THE NEED FOR AN EVIDENTIARY HEARING

Petitioner requests that this Court afford him an evidentiary hearing "to resolve the factual disputes created within the record." Petition at 38. He also includes, as part of his Motion for Appointment of Counsel, the assertion that "the issues in this case are complex and require an evidentiary hearing." Motion at 2. However, as stated in Section II, *supra.*, the issues are not complex. Furthermore, the factual disputes to which Petitioner refers are *not* created within the record, but are a creation of the self-serving affidavits included as exhibits to the instant Petition, and are instead belied by the record of Petitioner's underlying case.

The Nevada Supreme Court has held that no evidentiary hearing is necessary when a petition can be resolved without expanding the record. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A petitioner is entitled to an evidentiary hearing when his petition is supported by specific factual allegations which, if true, would entitle petitioner to relief unless those allegations are belied by the record. Id. at 1321, 885 P.2d at 605; see also, Hargrove, 100 Nev. at 503, 686 P.2d at 225 ("A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). The Nevada Supreme Court has further specified that it is improper to conduct an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of…the trial judge' and

consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Here, Petitioner freely and voluntarily pled guilty, and any assertion to the contrary is belied and repelled by the record. Marshall, 110 Nev. at 1321, 885 P.2d at 605; Hargrove, 100 Nev. at 503, 686 P.2d at 225. Both the GPA and the Court's canvass of Petitioner reveal that he understood the plea agreement and the potential sentence. GPA at 2; RT 4/19/18 at 6-8. They also reflect that Petitioner was satisfied with counsel's performance through the acceptance of the plea. Id. at 5; RT 4/19/18 at 11-12. There is nothing in the record to support Petitioner's current assertions to the contrary; instead, the record repels Petitioner's current claims. See Section I, *supra*.

Because Petitioner's claims are easily dispensed without expanding the record, and because his factual assertions are belied by the record, this Court should decline to conduct an evidentiary hearing.

CONCLUSION

For the forgoing reasons, the State respectfully requests that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and the accompanying Motion for Appointment of Counsel and Request for Evidentiary Hearing all be DENIED in their entireties.

DATED this 23rd day of June, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY /s/ JONATHAN VANBOSKERCK
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #06528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 23rd day of June, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

OSCAR GOMEZ, BAC#1200302
HIGH DESERT STATE PRISON
22010 COLD CREEK ROAD
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89070

BY /s/ L.M.
Secretary for the District Attorney's Office

JV/jj/lm/GU

Oscar Ramez Jr. #1200302
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

FILED
SEP 14 2020
CLERK OF COURT

PP
PA

IN THE Eighth JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

A-20-815035-W
Dept. 21

Oscar Ramez Jr.,
Petitioner,

vs.

William Hutchings (warden),
Respondent(s).

Case No. C-16-316459-1
Dept. No. XXI
Docket

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

RECEIVED
SEP - 8 2020
CLERK OF THE COURT

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

Failure to raise all grounds I this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claim must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and who you are presently restrained of your liberty: S.D.C.C.

2. Name the location of court which entered the judgment of conviction under attack: 8th Jud. Dist. Court, Clark County, NV.

3. Date of judgment of conviction: June 22, 2018

4. Case number: C-16-316959

5. (a) Length of sentence: 10 to life CS 8-20 years

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion:

Yes ____ No X If "Yes", list crime, case number and sentence being served at this time: ____

7. Nature of offense involved in conviction being challenged:

Second Degree Murder with use of a Deadly Weapon

8. What was your plea? (Check one)

(a) Not guilty ___

(b) Guilty X

(c) Nolo contendere ___

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: ___

pled guilty to second degree murder with the use of a deadly weapon and sentenced to 10 to life cs 8-20 years.

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury N/A

(b) Judge without a jury ___

11. Did you testify at trial? Yes ___ No N/A

12. Did you appeal from the judgment of conviction?

Yes X No ___

13. If you did appeal, answer the following:

(a) Name of court: Nv. Court of appeals

(b) Case number or citation: No. 76487-COA

(c) Result: order of Affirmance

(d) Date of appeal: May 15, 2019 – Remittitur July 1, 2019

(Attach copy of order or decision, if available).

14.) If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ___ No N/A

16. If your answer to No 15 was "Yes", give the following information:

(a) (1) Name of court: _____.

(2) Nature of proceedings: _____

N/A

_____.

(3) Grounds raised : _____

_____

_____.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: N/A.

(6) Date of result: _____.

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: _____.

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: _____.

(2) Nature of proceeding: _____.

(3) Grounds raised: N/A.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____.

(6) Date of result: _____.

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: N/A.

(c) As to any third or subsequent additional application or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes ___ No ___

Citation or date of decision: N/A

(2) Second petition, application or motion?

Yes ___ No ___

Citation or date of decision: N/A

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You may relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ___

N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: ___

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ___

N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). N/A

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). This petition is timely pursuant to NRS 34.726 also with Newly discovered evidence and rulings (U.S. supreme court ruling No. 18-431) petitioner is exempt from timel bar.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes XX No ~~XX~~

If "Yes", state what court and the case number: A-20-815035-W

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Monti Lesh - Plea

Terrence Jackson Direct appeal

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ___ No X If "Yes", specify where and when it is to be served, if you know: ___

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: Petitioner's constitutional rights are being violated due to being free from ex post facto law under (Article 1, sec. 10 U.S. const.), while violating petitioners 14th Amendment rights to due process.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Petitioner was sentenced to an deadly weapon enhancement of (96) to (240) months for count 1 for a total of 8 to 30 years in the Nevada Department of Corrections. April 17, 2019 it was argued to the U.S. Supreme Court vs. Davis No. 18-431) and decided on June 24, 2019 that under 18 U.S.C. Section 924(c) that anyone who was charged with a heightened criminal penalty for using, carrying, or possessing a firearm "in connection with any" crime of violence or drug trafficking crime" be deemed unconstitutionally vague. In our constitutional order, a vague law is no law at all. Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. See Dimaya, 584 U.S. Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the demands of them. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); see Collins v. Kentucky, 234 U.S. 634, 638 (1914). Vague laws also undermine the constitution's separation of powers and the democratic self governance it aims to protect. Petitioner is entitled to the issuance of this writ of habeas corpus to compel the respondents to perform an act which the law especially enjoins as a duty. Any other remedy is insufficient or unable to address this issue. The respondents ex post facto application of (U.S. vs. Davis case no. 18-431) and failure to vacate this sentence as outlined in (U.S. vs. Davis No. 18-431) violates the petitioners constitutional Rights to be free from ex post facto law under (Article 1, sec. 10 U.S. const.) and his 14th Amendment rights to due process. As such in order to protect the petitioners from further deprivation, the deadly weapon enhancement should be vacated.

23. (b) GROUND TWO: Petitioners 14th Amendment rights are being violated. (Article IV. Sec. 2 privileges and Immunities) (Article XIV. Sec. 1 equal protection of the laws) Violation of 9th Amendment XI. Violation of (Article VI of the U.S. Const.)

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): According to Blacks Law Dictionary "Privilege" is defined "A special legal right exemption or immunity granted to a person or class of person; an exception to a duty. (U.S. Const. Article IV. Sec. 2. cl. 1) states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The 14th Amendment Sec. 1 states that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The 9th Amendment states that "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." for the ruling in (U.S. vs Davis case no 12-431) not to apply to petitioner are clear violations of his constitutional rights. The supremacy clause says, the clause in Article VI of the U.S. constitution declaring that all laws made in furtherance of the constitution and all treaties made under the authority of the U.S. are the "supreme law of the land" and enjoy legal superiority over any conflicting provision of a state Const. or laws (see Carter v. Carter Coal Co. (1936) 298 US 238, 80 Led 1160, 56 Sct 855, motion gc sub nom Helvering v. Carter (1936 US) 17 AF TR 1344. Supremacy of constitution as law is declared without qualification and is absolute) also see (Federal Constitution is supreme law of the land, and upon state court, equally with court of union, rest obligation to guard and enforce every right secured by Constitution Dixon v. State (1946) 224 Ind 337, 67 NE 2d 138) See (federal laws are as much laws of land in any state as state laws are, Claflin v. Houseman (1876) 93 US 130, 3 otto 130, 23 L Ed 833.)

23. (c) GROUND THREE: Petitioners 5th Amendment rights have been violated and petitioners right to have enhancement vacated under U.S.C. sec. 2244(b)(2) rule 28 has been violated, due to the recent ruling in (U.S. vs. Davis no. 18-431)

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

The 5th Amendment states "no person shall be subject for the same offence to be twice put in jeopardy of life or limb without due process of law." Petitioner was charged and sentenced to second degree murder with the use of a deadly weapon and was consecutively sentenced to additional time for a deadly weapon, see Taylor v. U.S. 495 U.S. 575 (1990), and Nijhawan v. Holder, 557 U.S. 29 (2009). Under Rule 28 of FRAP U.S.C. Sec. 2244(b)(2) states that (A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the supreme court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. This ruling (U.S. vs. Davis no. 18-431) has not been applied to Mr. Gomez, this violation of the petitioners rights must occur immediately. Petitioner is being deprived of receiving a ruling that vacates the deadly weapon enhancement which will substantially lessen the time spent on the prison sentence, this deprivation is preventing the petitioner from the opportunity for a early parole possibility, and programs that would further lessen time spent; petitioner has been subjected unlawfully to the ex post facto application of the ruling in (U.S. vs Davis no. 18-431) by the court; and due to the constitutional deprivations, petitioner is entitled to fair and just compensation. Petitioner orders that appropriate compensation is to be paid for the Constitutional deprivations suffered in accordance with NRS. 34.270.

WHEREFORE, Oscar Gomez Jr., prays that the court grant writ of Habeas Corpus relief to which he may be entitled in this proceeding.

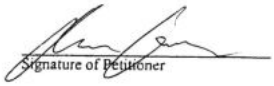
EXECUTED at Southern Desert Correctional Center

on the 24th day of August, 2020.

Signature of Petitioner

VERIFICATION

Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true and correct of his own personal knowledge, except as to those matters based on information and belief, and to those matters, he believes them to be true.



Signature of Petitioner

Atttorney for Petitioner

CERTIFICATE OF SERVICE BY MAILING

I, Oscar Gomez Jr., hereby certify, pursuant to NRCP 5(b), that on this 24th day of August, 2020, I mailed a true and correct copy of the foregoing, "Writ of Habeas Corpus"

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Nevada office of the Attorney General
555 Washington Ave. #3900
Las Vegas, Nevada 89101

Steven D. Grierson
Clerk of the Court
200 Lewis Avenue 3rd floor
Las Vegas, Nevada 89155-1160

CC:FILE

DATED: this 24th day of August, 2020.

Oscar Gomez Jr. #1200302
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

12

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

writ of Habeas Corpus (post conviction)
(Title of Document)

filed in District Court Case number C-16-316959-1

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Signature _____ Date 8/24/20

Oscar Gomez Jr.
Print Name

_____
Title

A

Exhibit A

(J.O.C)

A

Electronically Filed
6/22/2018 7:20 AM
Steven D. Grierson
CLERK OF THE COURT

JOCP

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

OSCAR GOMEZ, JR. aka
Oscar Gomez
#5990519

Defendant.

CASE NO. C-16-316959-1

DEPT. NO. XXI

JUDGMENT OF CONVICTION

(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime of MURDER (SECOND DEGREE) WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.010, 200.030.2, 193.165; thereafter, on the 14th day of June, 2018, the Defendant was present in court for sentencing with counsel MONTI LEVY, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense and, in addition to the $25.00 Administrative Assessment Fee, $18,800.00 Restitution to Lucina James and $150.00 DNA Analysis Fee including testing to determine genetic markers plus $3.00 DNA Collection Fee, the Defendant is sentenced to the Nevada Department of Corrections (NDC) as follows: LIFE with the Eligibility for parole after serving a MINIMUM of TEN (10) YEARS plus a CONSECUTIVE term of a MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM parole eligibility of NINETY-SIX (96) MONTHS for the Use of a Deadly Weapon; with SEVEN HUNDRED SIXTEEN (716) DAYS credit for time served.

DATED this 18th day of June, 2018.

VALERIE P. ADAIR
DISTRICT COURT JUDGE

Oscar Gomez Jr.
#1200302
SDCC
P.O. Box #208
Indian Springs, NV 89070

Steven D. Grierson
Clerk of the Court
200 Lewis Avenue 3rd Flr
Las Vegas, NV 89155-116

Electronically Filed
3/30/2022 10:22 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

OSCAR GOMEZ, Plaintiff(s), vs. STATE OF NEVADA, Defendant(s).	CASE NO. A-20-815035-W DEPT. NO. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURTJUDGE

TUESDAY, SEPTEMBER 22, 2020

RECORDER'S TRANSCRIPT OF HEARING RE:
PETITION FOR WRIT OF HABEAS CORPUS; MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

APPEARANCES VIA BLUEJEANS:

For the Plaintiff(s): Not present

For the Defendant(s): ECKLEY KEACH, ESQ.

RECORDED BY: ROBIN PAGE, COURT RECORDER

Las Vegas, Nevada; Tuesday, September 22, 2020

* * * * * *

[Proceeding commenced at 1:56 p.m.]

THE COURT: Page 1. This is just going to be decided on the briefs.

The Court rejects all of the arguments and the motion for appointment of counsel, but is considering the possibility of an evidentiary hearing on the sole issue of whether or not the concurrent versus consecutive time was adequately discussed with him by his attorney. So I'm going to take that issue under advisement and issue a minute order on Monday either denying the writ outright or setting an evidentiary hearing on that limited issue.

[Proceeding concluded at 1:57 p.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Robin Page
Court Recorder/Transcriber

Electronically Filed
02/04/2021
CLERK OF THE COURT

Oscar Gomez Jr., #1200302
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

Oscar Gomez Jr.,
Petitioner,
vs.
State of Nevada, et al
Warden Hutchings, Williams et al.
Respondent(s).

A-20-815035-W
Case No. C-16-316959-1
Dept. No. XXI
Docket
Hearing Requested
Jury Demands

ORIGINAL

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

RECEIVED
JAN 25 2021
CLERK OF THE COURT

Failure to raise all grounds I this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claim must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and who you are presently restrained of your liberty: S.D.C.C.

2. Name the location of court which entered the judgment of conviction under attack: 8th Jud. Dist. Court, Clark County, NV.

3. Date of judgment of conviction: June 22, 2018

4. Case number: C-16-316959

5. (a) Length of sentence: 10 to Life cs 8-20 year

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion:

Yes ___ No X If "Yes", list crime, case number and sentence being served at this time: ___

7. Nature of offense involved in conviction being challenged:

Second Degree Murder with Use of a Deadly Weapon

8. What was your plea? (Check one)

(a) Not guilty ___

(b) Guilty X

(c) Nolo contendere ___

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: ___

Pled guilty to Second Degree Murder with the Use of a deadly Weapon and sentenced to 10 to Life cs 8-20 years.

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury N/A

(b) Judge without a jury ___

11. Did you testify at trial? Yes ___ No N/A

12. Did you appeal from the judgment of conviction?

Yes X No ___

13. If you did appeal, answer the following:

(a) Name of court: NV. Court of Appeals

(b) Case number or citation: NO. 76487-COA

(c) Result: Order of Affirmance

(d) Date of appeal: May 15, 2019 - Remittitur July 1, 2019

(Attach copy of order or decision, if available).

14.) If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ___ No N/A

16. If your answer to No 15 was "Yes", give the following information:

(a) (1) Name of court: _____.

(2) Nature of proceedings: _____

N/A

_____.

(3) Grounds raised : _____

_____

_____.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: N/A.

(6) Date of result: _____.

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: _____.

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: _____.

(2) Nature of proceeding: _____.

(3) Grounds raised: N/A.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ____ No ____

(5) Result: _____.

(6) Date of result: _____.

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: N/A.

(c) As to any third or subsequent additional application or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes ___ No ___

Citation or date of decision: N/A

(2) Second petition, application or motion?

Yes ___ No ___

Citation or date of decision: N/A

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You may relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ___

N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: ___

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ___

N/A

18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). N/A

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). This petition is timely pursuant to NRS 34.726. Also in violation of Slaatte v. The State of Nevada. Petitioner is exempt from timed bar.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes X No ___

If "Yes", state what court and the case number: A-20-815035-W

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Monti Levy - Plea

Terrence Jackson - Direct appeal

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ___ No X If "Yes", specify where and when it is to be served, if you know: ___

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: 14th Amendment Violation Equal Protection Due Process of Law 5th Amendment Due Process of Law the above are Both Violations of the US Constitution

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

SEE: INTRODUCTION

* Newly Discovered *

Ground # 1 Through #3

Violations of NRS 176.105 (1)(c) NRS 177.015 (c) NRS. 176.033 (1)(c)

SEE Page # GROUND # (1) ONE

Introduction

NRS 176.105 (1)(c) NRS 177.015 (3) NRS 176.033 (1)(c)

NRS 176.033 (1)(c) requires the district court to set "an amount of restitution" when it determines that restitution is appropriate as part of a sentence. When the District Court determines that restitution is appropriate as part of a sentence it must include the amount and "terms" of the restitution in the "Judgment of Conviction" NRS 176.105 (1)(c) the "Judgment of Conviction" must set forth....

Any terms of imprisonment [898 P.2d 177] the amount and terms of any fine, restitution or administrative assessments. Consistent with these statutory requirements this court has held that the District Court is not allowed [139 Nev. 221] " Toward awarding restitution in uncertain terms "Botts V. State 109 Nev. 567, 569, 854 P.2d 856 857 (1993)" In cases where a District Court has violated this proscription, this Court historically has remanded for District Court to set an amount of restitution. E.g.

Washington V. State, 112 Nev. 1067, 1075, 922 P.2d 547, 551-52 (1996)
Smith V. State, 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996)
Roe V. State, 112 Nev. 733, 736, 917 P.2d 959, 960-61 (1996)
Botts, 109 Nev. at 569, 854 P.2d at 857

None of our prior decision addressed whether the Judgment was final given its failure to comply with NRS 176.105(1), If such a judgment is not appealable as a final judgment. SEE: NRS 177.015 (3)

7-A

Introduction

We lack jurisdiction over any Appeal See: Castillo V. State 106 Nev. 349, 352, 792, P.2d 1133 1135 (1990) explaining that Court has jurisdiction only when Statute or Court rule provides for appeal our relent decision in Whitehead V. State 128 Nev. 259, 285 P.3d 1053 (2012) is controlling. In that case we consider whether a "Judgment of Conviction" that imposed restitution but did not Specify the amount of restitution was Sufficient to trigger the one (1) year period under NRS 34.726 for filing a post conviction petition for a Writ of Hebeas Corpus. Id at 263 285 P.3d at 1055

Based on the requirement in NRS 176.105 (1)(c) that the amount of restitution be included in the "Judgment of Conviction" if the Court imposes restitution, we conclude that a "Judgment of Conviction" that imposes a Restitution obligation but does not "specify" its terms is not a "Final Judgment" and therefore it does not trigger the one year period for filing a Hebeas petition. Id given our decision in Whitehead that such a judgment is not a Final Judgment.

See: Jon Robert Slaotte V. The State of Nevada 129. Nev. 219; 248 P.3d 1178; (2013) Lexis 39; 129. Nev. Adv. Rep. 23 # 60799 (April 18 2013)

7-B

Ground #1 Unconstitutional J.O.C.

My J.O.C. doesn't instruct terms, the Judgment of Conviction must clearly instruct the form of punishment with sentencing structure and method or form of restitution payment procedures and process a general payment structure arrangement a remedy must be set available in Sentencing J.O.C. if not the J.O.C. is null and void unenforceable and issuer could never become time barred because the clock for procedurally barred and time bar never starts without a complete sentencing ordered by Sentencing Courts as restitution is found. The defendant is hereby adjudged guilty of said offense and in addition to the $25.00 Administrative Assessment and $150.00 DNA Analysis Fee including testing for genetic markers the defendant is sentenced also to, this is an illegal sentence in violation of NRS 176.105 Subsection (c), NRS 176.185 (1)(b), NRS 176.A-100 as found in Miller v. Hayes 95 Nev. 937.604 P.2d 117 (1979)

There's no restitution Commitment issued rendering the J.O.C. null and void and causing the defendant never to start his sentence, sentence is not final and therefore in violation of NRS 177.015 (3) Manuel Revuelta v. The State of Nevada 86 Nev. 334, 467 P.2d (1970) Nev. Lexis 492 No. 6100 (March 26, 1970)

September 15, 1969 district judge signed and caused to be filed a J.O.C. against Revuelta without passing terms, there's no penal sentence nor term of payment amount of any fine, restitution or administrative assessment in reference to NRS 176.105 found in the incomplete as also in J.O.C. #C-16-316959-1 . Smith v. State of Nevada

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Ground #1

An incomplete J.O.C. entered against Smith is and was incomplete because it did not contain any Sentence Structure for payment of Administrative Assessment of $250.00 nor any payment structure for $150.00 DNA Analysis against NRS 176.105, the source of NRS 176.105 is rule 32(b) Fr. Crim. P.18 USCA in Sanders V. Johnson 165 Fed 736 (9th Cir 1948) Where the written judgment failed to include all matters prescribed by the Rule 32(b) Fr. Crim. P.18 USCA that court said the enactment of Rule 32(b) had for the purpose the prescribing of a uniform practice. For the guidance (86 Wis. 227) of trial courts in pronouncing judgment so that by following its provision confusion such as exist in this case #C-16-316959-1 would not result, however it is the process actually employed which determines the legality of a conviction and not a failure to make written evidence of it in the judgment in the event of failure to make such written evidence recourse to all the records of the Courts may be had and where all legal essentials are there by to appeal Habeas Corpus will not lie in case #C-16-316959-1 the legal essential of a full complete penal Sentence is missing before us and the record expressly reveals that it was purposely excluded from the written judgment of Conviction. The Failure to exclude the penal sentence in the written J.O.C. rendered it incomplete at the time it was offered in evidence and the court Should act correctly, by denying the respondents request to deny this Writ on the basis of judgment. The petitioner has found that the judgment is incomplete and as the records reflect the Courts must affirm with the correct ruling, trial court Signed incomplete and put in effect a incomplete null an Void (J.O.C. a review of the records will indicate and Concur the respondant could never use harmless error, however this

Ground #1

Sentence will never expire. As due to a incomplete J.O.C. petitioner will never expire the terms of the sentence as found in Boley v. State supra Said there is substantial evidence of guilt and conclude the error we shall review the point with great care NRS 176.105. A judgment of conviction shall set forth the plea, the verdict or finding and the adjudication and sentence if the defendant is found not guilty or for any reason is entitled to discharge from judgment the court shall enter accordingly the judgment shall be signed by the judge and entered by the clerk with regards to technical error. Here Gomez and State only agreed upon a Voluntary and knowing plea Gomez only expressly waived any defects associated with the minimum and maximum term of his sentence as the record reflects therefor Gomez's J.O.C. is unconstitutional and has no legal existence, is without any validity and any sentence would be null and void and could be questioned by any private suitor in any action or proceeding it would be a misnomer to term to uphold an incomplete sentence which the term of this sentence cannot exist without authority of a finalized commitment issued by sentencing judge rendering the J.O.C. Valid on the power within a J.O.C. Cannot exist with only part of the sentence handed down. There now no authority of law and the entire sentence is without authority. This J.O.C. is unconstitutional and cannot support any sentence for such an act is no law it confers no judicial rights, imposes no duties, affords no protection, furnishes no shield and gives no authority it is in legal contemplation and is to be regarded as never having been possessed of any legal force or effect and is always to be treated as though it never existed upon review of the record the court must reverse, remand and Vacate. Following the rules of Nevada Constitution and fully comply

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Ground #1

With the Double Jeopardy Clause of Article #1 section #8 Nevada Constitution, a district Court may correct an illegal Sentence when necessary to the Sentence into Complement with the pertinent Statute only when there is no other means to correct the illegal Sentence. Miranda v. State 114 Nev. 385.956 P.2d 1377 114 Nev. Adv. Rep. 49 (1998) The Court cannot increase the Severity of the Sentence in Double Jeopardy nor can the Court retry the defendant which would be a Violation of the 5th U.S. Amendment Double Jeopardy Clause, District Court cannot Validly change the Sentence in which would also be a Double Jeopardy Violation of the 5th Amendment. The entire unconstitutional J.O.C. must be Vacated as J.O.C. #C-16-316959-1 doesn't conform to the Statutes in effect at the time of petitioner's offense, petitioner must be released from Current Confinement due to the Courts failure to follow the Validity of the Statutes in effect at the time of J.O.C. Signing June 18th 2018 C-16-316959-1 any other prison time is unconstitutional. It is the process actually employed which determines the legality of a Conviction the Courts must make written evidence and recourse to all records of the Courts and relief must be granted by mode of Habeas Corpus.

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23. (b) GROUND TWO: Violations of the US Constitution 6th Amendment: Effective Asst. of Counsle

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

See: GROUND # 2 Page # 13

Ground #2 Ineffective Assistance of Counsel
In Violation of the 6th Amendment

By and through the research of the records the record will reflect that assigned counsel Monti Levy Esq was ineffective by never filing a direct appeal nor did he inform ~~Mr. Osorio Gomez~~ that a direct appeal of the Courts decision, through due diligence Counsel should have known my J.O.C. was incomplete and sentence was therefore unenforceable. Counsel Monti Levy Esq should have been but was unfamiliar with NRS 176.105(1)(c) NRS 176.105 subsection (2) NRS 176.A.100, also Counsel gave defendant the wrong information concerning his sentence and the structure of his sentencing guidelines. Counsel never presented any of the above mentioned facts showing bias and prejudice towards ~~Mr. Osorio Gomez~~ in Case # C-16-316959-1 allowing the courts to enforce a erroneous plea agreement unfavorable to the defendant.

23. (c) GROUND THREE: In violation of the U.S. Constitution 8th Amendment Cruel and Unusual Punishment: In Violation of Nev. Constitution, Article 1 #1 Sec #8 "Prolonging the Sentence Unconstitutionally" legally this sentence might end!

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

See: Ground #3 8th Amendment violation in violation of U.S. Constitution, and Nevada Constitution Legally Sentence # C-16-316959-1 will never End Due To Incomplete "Judgment of Conviction" which unconstitutionally Prolongs Petitioner Sentence Found in # C-16-316959-1

See Ground three #(3) Found on Page #15 #16 #17

Ground #3 8th Amendment Violation

Signed original JOC. #C-16-316959-1 fails for some reason to completely instruct defendant with payment methods in which Gomez is also sentenced to Administrative Assessment of $25.00 and $150.00 DNA Analysis fee including testing of genetic markers. Gomez's JOC. doesn't include required methods (Facts) that cannot be found in the original J.O.C. nor (can any) complaint relate back to an original pleading that is missing a sentencing relevant fact thus the majority approach has allowed the sentencing court in this case to accomplish exactly what the guidelines forbid: Impose an incomplete never ending Sentence that will one day become additional punishment for defendant that should be under clear "knock and announce" statute. Here petitioner reasonably expected to believe a court order is true and correct but here with "plain error" in #C-16-316959-1 the plea agreement waiver of petitioner's rights are therefore unenforceable. See. Buchanan 59. F3d. at 914-16

Here in petitioner plea agreement the courts are expected to know the law and sentencing requirements they hand down but the court didn't fully inform petitioner of these unfavorable non-disclosed sentencing stipulation found in JOC. #C-16-316959-1 during discussion on this issue will the District Court order?, As in "Buchanan" and delay the facts in order for Buchanan to file a motion for modification to the plea agreement that permitted both parties to argue for down-ward departure and or plain departure which resulted in consecutive prison terms. SEE: United States V. Buchanan 59 F3d 904 (9th Cir 1995) What really went on here in #C-16-316959-1 almost (3) three years ago was petitioner plea agreement is and was a product of ineffective assistance of Counsel, these are the facts no matter what we do here today.

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Ground #3

Gomez can prove beyond doubt ineffective assistance of counsel during Sentencing and direct appeal. Petitioner here argues that there was no waiver and not a Knowing and Voluntary part of the order of J.O.C. that must clearly instruct the form of punishment and the method or form of restitution payment or administrative assessment and additional Sentencing to DNA analysis including testing genetic markers, there was no canvass regarding the J.O.C. and additional Sentencing restitution, Administrative Assesments and DNA testing which would have unveiled "plain error." If canvassed which the District Court need not warn a defendant specifically that he has waived his rights when the Courts is in compliance during colloquial so long as the records indicates a Knowing and voluntary waiver. United States V. Desantiago Martinez 38. F3d. 394-94 (9th Cir 1992) Here there is a direct conflict between a trial judges unambiguous oral pronouncement of sentence and the erroneous in written judgment the oral pronouncement must control. The Courts reasoning is the defendant must be held to his face and then a written order must make final and correct all oral pronouncements also known as a judgment of conviction imposing the full and correct sentence or the defendant can never legally start the term, Therefore the defendant here has no reasonable expectation of the sentence imposed and any further instructions found in the "Common Scheme or Sentencing plain" found in the J.O.C. in order to prevent multiple punishments for substantially identical offense conduct this part provides rules for grouping offenses together. Conviction on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the sentencing guidelines

Ground #3

in essence counts that are grouped together are treated as constituting a single offense for purpose of the guidelines NRS 176.105 subsection(c) NRS 176.185(1)(c) NRS 176.A.100

#1) It is clear that the District Court erroed in separating the Sentencing Conviction and punishment for substantially identical offense conduct, the courts must reverse and vacate due to plain error.

#2) And allowing Criminal Coercion in Case #C-16-316959-1 never investigates plaintiffs claims.

Closing Argument

I believe that my civil rights have been violated under the 14th Amendment rights to Due Process and Equal Protection. On 6-14-18 O. Gomez said Judge Valerie P. Adair signed J.O.C # C-16-316959-1 and on 6-22-2018 filed the incomplete null and Void J.O.C. into effect in violation of NRS 176.105 subsection (c) NRS 176.185(1)(c) NRS 176.A.100 in violation of the U.S. Constitution 14th Amendment Due Process and Equal Protection Clauses. This incomplete #1) J.O.C. includes Administrative Assessment Fee of $ 25.00, #2) $ 18,800.00 Restitution to Lucina James, #3) a $150.00 DNA Analysis Fee including testing to determine genetic markers and #4) a $ 3.00 DNA Collection Fee as part of the Sentence in # C-16-316959-1 and hereby adjudged guilty of said offense. In addition: with said Judge Valerie P. Adair hands down a incomplete unenforceable J.O.C. without a payment structure for restitution of Sentence which as the J.O.C. reads Administrative Assessment Fee, Restitution, DNA Analysis Fee and DNA Collection Fee are part of the Sentence but without instructions or orders for payment of the Sentence.

Now comes plaintiff: Oscar Gomez Jr requesting the Courts allow ... Collateral attack on Judgment of Conviction #C-16-316959-1 [Inside and Outside] proceedings in which the said Judgment was rendered with the main purpose being to.... impeach and overturn the unconstitutional judgment of Conviction #C-16-316959-1 which is now Thorough Due Diligence found to be unconstitutionally signed [redacted] and found [Adrift] floating without constitutional direction filed. 6-22-2018

SEE: Exhibit # 1
Judgment of Conviction
C-16-316959-1

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18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). N/A

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). This petition is timely pursuant to ARS 34.726 also with Newly discovered evidence and rulings (U.S. Supreme court ruling No. 18-9314) petitioner is exempt from timed bar.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes XX No ~~XX~~

If "Yes", state what court and the case number: A-20-815035-W

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Monti Lexi - Plea
Terrence Jackson Direct appeal

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ___ No X If "Yes", specify where and when it is to be served, if you know: ___

GROUND #4

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND FOUR Petitioner's constitutional rights are being violated due to being free from ex post facto law under (Article 1, sec. 10 U.S. Const.), while violating Petitioners 14th Amendment rights to due process.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Petioner was sentenced to an deadly weapon enhancement of (96) to (240) months for count 1 for a total of 8 to 20 years in the Nevada Department of Corrections. April 17, 2019 it was argued to the U.S. Supreme Court vs. Davis No. 18-431) and decided on June 24, 2019 that under 18 U.S.C. Section 924(c) that anyone who was charged with a heightened criminal penalty for using, carrying, or possessing a firearm in connection with any "crime of violence or drug trafficking crime" be deemed unconstitutionally vague. In our constitutional order, a vague law is no law at all. Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. See Dimaya, 584 U.S. Vague laws contravene the "first essential of due process of law" that statues must give people "of common intelligence" fair notice of what the demands of them. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); see Collins v. Kentucky 234 U.S. 634, 638 (1914). Vague laws also undermine the constitution's separation of powers and the democratic self governance it aims to protect. Petitioner is entitled to the issuance of this writ of habeas corpus to compel the respondents to perform an act which the law especially enjoins as a duty. Any other remedy is insufficient or unable to address this issue. The respondents ex post facto application of (U.S. vs. Davis case no. 18-431) and failure to vacate this sentence as outlined in (U.S. vs. Davis No. 18-431) violates the petitioners constitutional rights to be free from ex post facto law under (Article 1, sec. 10 U.S. Const.) and his 14th Amendment rights to due process. As such in order to protect the petitioners from futher deprivation, the deadly weapon enhancement should be vacated.

Ground # 5

23. (b) GROUND FIVE Petitioners 14th Amendment rights are being violated. (Article IV. Sec. 2 privilege and Immunities) (Article XIV Sec. 1 equal protection of the laws) Violation of 9th Amendment XI. Violation of (Article VI of the U.S. Const.)

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): According to Blacks Law Dictionary "Privilege" is defined "A special legal right exemption or immunity granted to a person or class of person; an exception to a duty. (U.S. const. Article IV. Sec 2. cl. 1) States that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The 14th Amendment Sec. 1 states that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". The 9th Amendment states that "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people"; for the ruling in (U.S. vs Lou's case no 18-431) not to apply to petitioner are clear violations of his constitutional rights. The supremacy clause says, the clause in Article VI of the U.S. Constitution declaring that all laws made in furtherance of the constitution and all treaties made under the authority of the U.S. are the "supreme law of the land" and enjoy legal superiority over any conflicting provision of a state const. or law (see Carter v. Carter Coal Co. (1936) 298 US 238, 80 Led 1160, 56 Sct 855, motion gr sub nom Helvering v. Carter (1936 US) 17 AFTR 1344. Supremacy of constitution as law is declared without qualification and is absolute.) also see (Federal constitution is supreme law of the land, and upon state court, Equally with court of union, rest obligation to guard and enforce every right secured by Constitution Dixon v. State (1946) 224 Ind 327, 67 NE 2d 138) See (federal law are as much law of land in any state as state laws are, Clafin v. Houseman (1876) 93 US 130, 3 otto 130, 23 L Ed 833.)

GROUND # 6

23. (c) GROUND SIX : Petitioners 5th Amendment rights have been violated and Petitioners right to have enhancement vacated under U.S.C. sec. 2244 (b)(2) rule 28 has been violated, due to the recent ruling in (U.S. vs. Davis no. 18-431)

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law):

The 5th Amendment states "no person shall be subject for the same offence to be twice put in jeopardy of life or limb without due process of law." Petitioner was charged and sentenced to Second degree murder with the use of a deadly weapon and was consecutively sentenced to additional time for a deadly weapon, see Taylor v. U.S. 495 U.S. 575 (1990), and Alleyne v. Holder, 507 U.S. 29 (2009). Under Rule 28 of FRAP U.S.C. Sec. 2244 (b)(2) states that (A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the supreme court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. This ruling (U.S. vs. Davis no. 18-431) has not been applied to Mr. Gomez, this violation of the petitioners rights must cease immediately. Petitioner is being deprived of receiving a ruling that vacates the deadly weapon enhancement which will substantially lessen the time spent on the prison sentence, this deprivation is preventing the petitioner from the opportunity for a early parole possibility, and programs that would further lessen time spent; petitioner has been subjected unlawfully to the ex post facto application of the ruling in (U.S. vs Davis no. 18-431) by the court; and due to the constitutional deprivations, petitioner is entitled to fair and just compensation. Petitioner orders that appropriate compensation is to be paid for the Constitutional deprivations suffered in accordance with NRS. 34.270.

WHEREFORE, Oscar Gomez Jr., prays that the court grant writ of Habeas Corpus relief to which he may be entitled in this proceeding.

EXECUTED at Southern Desert Correctional Center

on the 20th day of January, 2021

Signature of Petitioner

VERIFICATION

Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true and correct of his own personal knowledge, except as to those matters based on information and belief, and to those matters, he believes them to be true.

Signature of Petitioner

Atttorney for Petitioner

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Writ of Habeas Corpus
(Title of Document)

filed in District Court Case number A-20-815035-W
C-16-316959-1

X Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Signature

1/20/2021
Date

Oscar Gomez
Print Name

Pro-SE
Title

CERTFICATE OF SERVICE BY MAILING

I, Oscar Gomez, hereby certify, pursuant to NRCP 5(b), that on this 20th day of January, 2021, I mailed a true and correct copy of the foregoing, "Writ of Habeas Corpus #C-16-316959-1 Newly Discovered by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Steven D Grierson Clerk of the Court
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155-1160

CC:FILE

DATED: this 20th day of January, 2021.

Oscar Gomez Jr. #1200302
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

Electronically Filed
3/29/2022 4:15 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

OSCAR GOMEZ, Plaintiff, vs. THE STATE OF NEVADA, Defendant.	CASE NO. A-20-815035-W DEPT. NO. IX

BEFORE THE HONORABLE CRISTINA D. SILVA, DISTRICT COURT JUDGE

FRIDAY, FEBRUARY 12, 2021

RECORDER'S TRANSCRIPT OF HEARING:
STATUS CHECK RE: SETTING OF EVIDENTIARY HEARING

APPEARANCES:

For the Plaintiff:	Pro Per
For the State:	CHRISTOPHER S. HAMNER, ESQ. Chief Deputy District Attorney

RECORDED BY: GINA VILLANI, COURT RECORDER

Las Vegas, Nevada; Friday, August 20, 2021

[Hearing commenced at 2:06 p.m.]

THE COURT: We'll call page 1, A815035, State of Nevada versus Oscar Gomez.

All right. Good afternoon, Mr. Gomez, how are you?

THE DEFENDANT: Good.

And you?

THE COURT: I'm doing well. Thank you.

All right. Is anyone present on behalf of the State?

All right. I don't hear anyone being present.

So, Mr. Gomez, I'm glad to see you here today. I wasn't sure if you would be present in light of all of the kind of back-and-forths that are going on.

I am a little bit at a loss for -- for the status of your particular case. I'm going to guess that COVID plays a big role in --

THE DEFENDANT: Yes.

THE COURT: -- part of the confusion.

So I see that there was a petition for writ of habeas corpus and a request for an evidentiary hearing that was addressed back in September of 2020, and then there was a petition for writ of habeas corpus, another one filed.

And so my question for you is what happened back in the September hearing?

THE DEFENDANT: They never came and picked me up.

THE COURT: Mm-hmm.

THE DEFENDANT: From Southern Desert and that happened twice and I'm here now.

THE COURT: Mm-hmm.

THE DEFENDANT: And last month on the 22nd I sent another petition in to join all those and there was a -- there was a third one also.

THE COURT: All right.

So those -- I'm going to explain this to you as best I can. We're not going to -- I'm going to strike those because -- original petitions are still pending. So there was no need to join them, right, because they're still there, they're still active. And so I'm going to strike the motions for joinder, they -- there's no need for them to be there.

We can still address the petition and the response and your request for counsel and your request for an evidentiary hearing without that being -- without those motions for joinder.

So I just want to confer with you because that's how I read the history as well. At no time did the judge address your original petition; is that correct?

THE DEFENDANT: Correct.

THE COURT: All right.

So I don't know if anyone is present on behalf of the State or if I could have someone stand in on behalf of the State.

MR. HAMNER: Your Honor, it's Christopher Hamner. I was just overhearing it. I can stand in for the State.

Can I at least just get his full name.

THE COURT: Sure.

His full name is Oscar Gomez; the case number is A-20-815035-W.

MR. HAMNER: And just one other clarification point, are these -- are these post-conviction petitions?

THE COURT: They are.

Your office has filed a response. It was filed back in 2020, specifically in June of 2020, and so that's on the docket.

What I'm confused about, Mr. Hamner, is that on September 22nd of 2020, it indicates that the matter was taken under advisement, and then it says it was completed or it was due in November. At least on the information I'm finding on this side of Odyssey. And I don't see a decision. And I -- it's possible maybe I missed it, but I'm not seeing a decision from Judge Adair.

And so my inclination is to --

MR. HAMNER: So your notes are reflecting Judge Adair was going to take it under advisement, issue a written order, but no order was written?

THE COURT: Best I can tell.

MR. HAMNER: Okay.

I will double check on my end with someone in the post-conviction appellate department about the status of where the case is or was. And I can reach out or have them reach out and confirm that, you know, if there really -- we were all waiting on the decision and

nothing came. Well, that's where we're at. But I will check on my end.

THE COURT: All right.

And so just so we're clear, on October 13th of 2020, a minute order was issued regarding the writ. The minutes reflect that an evidentiary hearing would be scheduled on the sole issue as to whether or not counsel informed the defendant that he faced consecutive time for the deadly weapon enhancement. And then it was supposed to be set for hearing and then he was never transported or I don't know exactly what happened.

The other concern is that at no time was -- at least that I can tell -- an attorney or the -- the question as to whether or not he should have an attorney was ever addressed.

So, Mr. Gomez, I'm going to turn back to you. Was an attorney ever -- did anyone talk to you about ever getting an attorney appointed for you?

THE DEFENDANT: No.

THE COURT: Okay. All right.

So I think that would be helpful because Judge Adair did decide that there needed to be an evidentiary hearing to address that one question. And so I think you need an attorney to do that. I think it will be helpful for you.

So I am going to appoint an attorney for you and I'm going to need to figure out who that's going to be, which means I'm going to have to set this for status again. Once we get you an attorney we'll be able to set it for hearing. We can have that hearing hopefully in short order and

then we make a decision on this petition.

Okay?

THE DEFENDANT: Okay.

THE COURT: So, State, how much time do you need to get another transport order set up?

MR. HAMNER: I think it probably takes a couple of weeks. I would think a minimum two, maybe three.

THE COURT: All right.

So I'm going to set this for status regarding appointment of counsel on Friday, March 5th, at 1:30 p.m.

I'm going to ask the State to prepare an order to have the defendant transported so he can figure out who his attorney is going to be and then we can schedule an evidentiary hearing at that time.

MR. HAMNER: Okay, Your Honor.

THE COURT: All right.

Mr. Gomez, do you -- does that make sense to you?

THE DEFENDANT: Yes. Thank you.

THE COURT: All right.

I'm sorry that -- it appears with COVID and everything else you kind of got lost in the shuffle but we're going to -- we're on it now and we'll get this taken care of.

We'll see you then.

THE DEFENDANT: Thank you.

THE COURT: Take care.

MR. HAMNER: Thank you, Your Honor.

THE COURT: Thank you.

[Hearing concluded at 2:12 p.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Gina Villani

Gina Villani
Court Recorder/Transcriber
District Court Dept. IX

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

OSCAR GOMEZ, JR., aka Oscar Gomez, #5990519

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-815035-X
C-16-316959-1

DEPT NO: IX

STATE'S RESPONSE TO DEFENDANT'S "ORIGINAL" PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: April 7, 2021
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition for Writ Of Habeas Corpus (Post-Conviction).

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On August 3, 2016, OSCAR GOMEZ, JR. (hereinafter "Petitioner") was charged by way of Information with one count of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165) for actions committed on or about June 24, 2016.

On April 19, 2018, Petitioner accepted negotiations in the underlying case and, pursuant to a Guilty Plea Agreement ("GPA"), Petitioner pled guilty to MURDER (SECOND DEGREE) WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030.2, 193.165). In so doing, Petitioner acknowledged:

> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
> …
> I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.
> …
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

GPA at 4-5. Petitioner was also canvassed by the Court regarding the voluntariness of Petitioner's plea, during which Petitioner affirmed:

> THE COURT: …you had a full and ample opportunity to discuss your plea of guilty and the charge of second degree murder with use of a deadly weapon that you're going to be pleading to. Is that right?
>
> DEFENDANT GOMEZ: That's right.
>
> THE COURT: Okay. And did your lawyers answer all your questions to your satisfaction?
>
> DEFENDANT GOMEZ: They did.
>
> THE COURT: Okay. Do you feel like [your lawyers] have spent enough time with you explaining the discovery and going over the evidence and everything like that in this case?
>
> DEFENDANT GOMEZ: Yeah.

Recorder's Transcript of Hearing: April 19, 2018 ("RT 4/19/18"), at 9. The Court further asked:

> THE COURT: …Did you have a full and ample opportunity to discuss your plea of guilty as well as the charge to which you are pleading guilty with your attorneys?
>
> DEFENDANT GOMEZ: I did.
>
> THE COURT: All right. And we've already discussed that your counsel, Ms. Levy, has answered all your questions to your satisfaction, is that right?
>
> DEFENDANT GOMEZ: That's right.
>
> …
>
> THE COURT: All right. Now before I proceed with your plea do you have any questions you would like to ask me the Court?
>
> DEFENDANT GOMEZ: No, no questions.

Id. at 11-12. Following its canvass of Petitioner, the Court found that his guilty plea was freely and voluntarily entered, and referred the matter to the Division of Parole and Probation for the preparation of a Presentence Investigation Report ("PSI"). Id. at 15.

On June 14, 2018, Petitioner was adjudicated guilty of Murder (Second Degree) With Use of a Deadly Weapon and was sentenced to ten (10) years to LIFE in the Nevada Department of Corrections, with a consecutive term of ninety-six (96) to two hundred forty (240) months for the use of a deadly weapon. Petitioner received 716 days credit for time served. The Judgment of Conviction was filed on June 22, 2018.

On July 18, 2018, Petitioner filed a Notice of Appeal in the underlying case. On May 15, 2019, the Nevada Court of Appeals affirmed Petitioner's Judgment of Conviction. Remittitur issued on June 20, 2019.

On May 14, 2020, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner contemporaneously filed a Motion for Appointment of Counsel and Request for Evidentiary Hearing. On June 23, 2020, the State filed its Response to Petitioner's pleadings.

On September 22, 2020, the Court considered the matter on the briefings, and stated that it rejected all of Petitioner's arguments, except for the argument about whether counsel

adequately discussed concurrent or consecutive prison time with Petitioner. Thereafter, on October 13, 2020, the Court issued a Minute Order, scheduling an evidentiary hearing "on the sole issue of whether counsel informed [Petitioner] that he faced consecutive time for the deadly weapon enhancement."

On February 4, 2021, Petitioner filed the instant "Original" Petition for Writ of Habeas Corpus (Post-Conviction) (his "Supplement"). For the purposes of this Response, the State is construing Petitioner's instant Petition as a supplemental pleading to the Petition that he filed on May 14, 2020, as denoted by the abbreviation above. Petitioner also filed a "Motion to Join" on that date.[1]

On March 5, 2021, the Court granted Petitioner's request for counsel, and Mr. James Hoffman, Esq. confirmed as counsel.

STATEMENT OF FACTS

The court, in sentencing Petitioner, relied on the following summary of facts:

> Officers were assigned to investigate the crime of murder with a weapon. Officers determined on June 24, 2016, Oscar Gomez, aka Oscar Gomez Jr., the defendant and co-defendant, Gustavo Ernesto Delacruz, aka Gustavo Ernesto Delacruzcortez arrived at a local food mart to make a purchase. When the victim and his friend entered the store, they passed Mr. Gomez and Mr. Delacruz as they were exiting. As the victim and his friend exited the store they were confronted by Mr. Gomez and Mr. Delacruz. Thereafter, Mr. Gomez and Mr. Delacruz remarked "You're not from around here, this is our town." The exchange continued as Mr. Gomez pulled out a semiautomatic pistol from the waist of his pants. The victim's friend instructed Mr. Gomez to put away the gun and "fight like a man." The victim and Mr. Delacruz started fist fighting in the parking lot in front of the local food mart, while the defendant walked around the area of the fight with his hand on his gun. Both the victim and Mr. Delacruz sustained injuries as a result of punching each other in the face.
>
> The fight ended and Mr. Delacruz got into his vehicle and started to pull out of the parking lot. Mr. Gomez and the victim continued to exchange more words. The victim and his friend were walking away from the parking lot while Mr. Gomez continued to walk behind them, asking them where they were going. When the victim responded, "to your mom's house," Mr. Gomez pulled his gun and pointed it the victim. The victim told him to put the gun down and fight, to which Mr. Gomez responded "I'm not that stupid." The victim told Mr. Gomez to put the gun down because he was not going to use it, at which point Mr. Gomez fired one shot into the victim's chest, fleeing the scene toward Mr. Delacruz's vehicle. The victim's friend then ran to the store and asked to have

[1] Petitioner's "Motion to Join" appears simply to be a request that his Supplement be considered with his May, 2020, Petition. The State, therefore, takes no position on any merits of that pleading.

911 called because his friend had been shot. The victim was transported to a local hospital where he was pronounced dead.

Video surveillance and paychecks that had been cashed at the food mart led officers to the defendant as being the offender.

PSI at 4.

ARGUMENT

I. PETITIONER'S CLAIM AGAINST HIS JUDGMENT OF CONVICTION DOES NOT WARRANT RELIEF

Pursuant to NRS 34.810(1):

The court *shall* dismiss a petition if the court determines that:

> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntary or unknowingly or that the plea was entered without effective assistance of counsel.

(Emphasis added). The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…[A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 100 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Petitioner's Supplement alleges that he has "newly discovered" certain violations of NRS 176.105([1])(c), 177.015(3), and 176.033([1])(c).[2] See Supplement at 7-A. The substance of Petitioner's claims reveals that Petitioner is not challenging the validity of his plea, nor the effectiveness of plea counsel. See generally, id. Therefore, pursuant to NRS 34.810(1)(a),

[2] The State recognizes that NRS 176.033 has since been amended, but at the time of Petitioner's Judgment of Conviction, that statute included the subsection referenced in Petitioner's Supplement.

Petitioner's claims are waived, or are otherwise outside the cognizable scope of habeas review. Moreover, any errors in the drafting of Petitioner's Judgment of Conviction could have been raised on direct appeal; therefore, Petitioner's failure to raise them thus amounts to a further waiver thereof. Franklin, 100 Nev. at 752, 877 P.2d at 1059. Petitioner does not recognize his procedural default, much less allege good cause and prejudice to overcome the same. See generally, Supplement. Therefore, pursuant to Evans, this Court *must* dismiss Petitioner's Supplement. 117 Nev. at 646-47, 29 P.3d at 523.

Even if Petitioner could overcome his procedural defaults, it would be of no moment, as Petitioner's claim is without merit. Petitioner's Judgment of Conviction is *not* defective; instead, it complies with the requirements of each of the statutes Petitioner lists.

NRS 176.033(1)(c) requires, in pertinent part, that courts "set an amount of restitution for each victim of the offense…" In Petitioner's Judgment of Conviction, the Court set forth clearly restitution in the amount of $18,800.00 to Lucina James. Judgment of Conviction at 2. Therefore, any attempt by Petitioner to claim deficiency under that subsection must fail.

NRS 176.105(1)(c) likewise requires courts to include "the amount and terms of any fine, restitution, or administrative assessment…" As set forth above, the Judgment of Conviction set forth the amount of restitution, and to whom restitution was due. Judgment of Conviction at 2. Therefore, the Court followed its obligations under this subsection. To the extent that Petitioner relies on Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012), to suggest that other "terms" are required in judgments of conviction, Petitioner's argument is belied by the text of that decision. See Supplement at "7-A" – "7-B"; see also Whitehead at 262-63, 285 P.3d at 1055 (interpreting NRS 176.105(1) to require only "that restitution, if appropriate, be included in the judgment of conviction and in a specific dollar amount").

NRS 177.015(3) allows a defendant to appeal "only…from a final judgment or verdict." As Petitioner has already filed, briefed, and had considered by an appellate court, a direct appeal from his Judgment of Conviction, it is unclear exactly how Petitioner seeks to show that his Judgment of Conviction would not be considered "final" for the purposes of appeal or

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habeas review. Indeed, given the record of Petitioner's direct appeal, any attempt at such a showing would be belied by the record, and could not entitle Petitioner to relief.

Moreover, Petitioner engages in what can only be deemed speculation concerning the potential implications of Petitioner's allegedly-deficient Judgment of Conviction. See Supplement at 8-11. However, while Petitioner provides certain references to case law, Petitioner's allegations that his "term will never expire" or that he is facing "double jeopardy" due to the allegedly-deficient Judgment of Conviction are unfounded. Indeed, Petitioner's own citation to Miller v. Hayes, 95 Nev. 927, 604 P.2d 117 (1979), is helpful. See id. at 8. The Miller Court concisely explained that a defendant begins to serve his sentence after a judgment of conviction is signed by the judge and entered by the clerk. 95 Nev. at 929, 604 P.2d at 118. As Petitioner's Judgment of Conviction was signed by the Court on June 18, 2018, and was entered by the Clerk of the Court on June 22, 2018, Petitioner can rest assured that he has begun serving his sentence in the underlying case.

Finally, in all of Petitioner's pleading, Petitioner fails to provide legal authority supporting the notion that an error in his Judgment of Conviction requires vacating his conviction. See Supplement at 8-11. Instead, Petitioner's position is belied by NRS 176.565, which provides that errors "arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." Therefore, in the event that any terms or required elements of Petitioner's Judgment of Conviction were found deficient or omitted, this Court may simply cure such error by an amendment to Petitioner's Judgment of Conviction.

Because Petitioner waived his claim, and because the claim itself is without merit, the State respectfully requests that this Court dismiss Petitioner's claim, or otherwise deny the same in its entirety.

II. PETITIONER FAILS TO MEET HIS BURDEN ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his

defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S.Ct. at 2063-64; see also Love, 109 Nev. at 1138, 865 P.2d at 323. Under Strickland, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

The Court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Regarding appellate counsel, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments…in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]…Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

Petitioner's second claim in his Supplement alleges that plea counsel was ineffective for never filing a direct appeal of Petitioner's Judgment of Conviction, and was further ineffective for failing to challenge the terms of restitution on direct appeal. See Supplement at 12-13. However, Petitioner cannot demonstrate prejudice on his claim; therefore, Petitioner cannot meet his burden under Strickland.

The record shows that, on July 18, 2018, Mr. Terrence M. Jackson, Esq. filed a Notice of Appeal on behalf of Petitioner. Petitioner does not provide any legal authority for the proposition that he was entitled to have any particular attorney file his direct appeal. See Supplement at 12-13. Therefore, Petitioner cannot demonstrate that he was prejudiced, because a direct appeal was, indeed, filed on Petitioner's behalf.

Furthermore, Petitioner cannot demonstrate prejudice regarding his derivative claim that appellate counsel was ineffective for failing to challenge the terms of restitution in Petitioner's Judgment of Conviction. As set forth fully, *supra*., Petitioner's contentions against the order of restitution are without merit; therefore, Petitioner cannot demonstrate that such a

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claim had any reasonable likelihood of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. As such, Petitioner cannot meet his burden under Strickland.

Because Petitioner cannot demonstrate prejudice on his claim of ineffective assistance of appellate counsel, the State respectfully requests that this Court deny Petitioner's second claim in its entirety.

III. PETITIONER'S CLAIM OF CRUEL AND UNUSUAL PUNISHMENT HAS ALREADY BEEN REJECTED ON DIRECT APPEAL

Petitioner's third claim in his Supplement alleges that he is subject to "cruel and unusual punishment," seemingly due to Petitioner's misapprehensions about the alleged errors – and their purported implications – in his Judgment of Conviction. See Supplement at 14-17.

Petitioner does not allege that this claim affects the validity of his guilty plea, and he does not claim that it implicates plea counsel's performance. See Supplement at 14-17. Therefore, this claim is outside the scope of habeas proceedings pursuant to NRS 34.810(1)(a), and is otherwise waived for Petitioner's failure to raise it on direct appeal. Franklin, 100 Nev. at 752, 877 P.2d at 1059. As such, the State respectfully submits that this claim is suitable only for dismissal, which is mandatory under Evans. 117 Nev. at 646-47, 29 P.3d at 523.

Furthermore, to the extent Petitioner is challenging the Court's sentencing determination, Petition raised a claim of cruel and unusual punishment on direct appeal, which was rejected by the Nevada Court of Appeals. Specifically, the Nevada Court of Appeals reasoned:

> …Regardless of its severity, "[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.'" *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)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crimes and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).
>
> Gomez' sentence of life with the possibility of parole in 10 years for the primary offense plus a consecutive term of 96 to 240 months for the deadly weapon enhancement is within the parameters provided by the relevant statutes…and Gomez does not allege that those statutes are unconstitutional. We conclude the sentence imposed is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment.

See Order of Affirmance, filed on May 15, 2019 (Docket No. 76487-COA), at 2-3. Petitioner does not allege any new facts or circumstances that would change the Court of Appeals' reasoning. See Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)) ("The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same."); see also Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)) (under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition). To the extent that Petitioner has adjusted or modified his "cruel and unusual punishment" claim, the Nevada Supreme Court has rejected such attempts at evading the law of the case doctrine. See Hall, 91 Nev. at 316, 535 P.2d at 799 ("The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings."). In any event, this Court cannot overrule the Nevada Court of Appeals. NEV. CONST. Art. VI § 6.

In sum, it appears that Petitioner simply derives his claim of "cruel and unusual punishment" from his earlier unsubstantiated allegations and theories about missing "terms" from his Judgment of Conviction. As that claim itself lacked merit (see Section I, *supra*.), Petitioner's derivative claim cannot entitle Petitioner to relief.

Because Petitioner's claim is outside the scope of habeas review, was waived by Petitioner's failure to raise it on direct appeal, is likely subject to the law of the case doctrine, or substantively lacks merit, the State respectfully requests that this Court deny Petitioner's claim in its entirety.

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CONCLUSION

For the forgoing reasons, the State respectfully requests that Petitioner's "Original" Petition for Writ of Habeas Corpus (Post-Conviction) be DENIED in its entirety.

DATED this 23rd day of March, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY */s/ KAREN MISHLER*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 23rd day of March, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

OSCAR GOMEZ, JR., BAC#1200302
SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NEVADA 89070

BY /s/ L.M.
Secretary for the District Attorney's Office

16F10719A/KM/jj/lm/GU

A-20-815035-W Oscar Gomez, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

April 07, 2021 11:00 AM All Pending Motions

HEARD BY: Silva, Cristina D. COURTROOM: RJC Courtroom 11B

COURT CLERK: Schlitz, Kory

RECORDER: Villani, Gina

REPORTER:

PARTIES PRESENT:

Binu G. Palal **Attorney for Defendant**

James I. Hoffman **Attorney for Plaintiff**

JOURNAL ENTRIES

PETITION FOR WRIT OF HABEAS CORPUS... PLAINTIFF'S MOTION TO JOIN...

Defendant not present and in custody in the Nevada Department of Corrections.

COURT STATED since the documents were filed Pro Per they are considered rouge documents. Mr. Hoffman informed the Court the Defendant filed the Petitions before he was appointed as counsel of record, adding he was going to submit on the pleadings, and not have any oral argument. Mr. Palal stated he did file a response that addressed both Petitions, and parties are ready to have a hearing. Mr. Hoffman informed the Court the Defendant's mother and sister may want to testify during the hearing, and he is ready to proceed. COURT ORDERED, Evidentiary Hearing set for April 27, 2021 STANDS. Mr. Palal informed the Court they filed a transport order when the hearing was set. COURT SO NOTED.

NDC

4/27/2021 1:30 P.M. EVIDENTIARY HEARING

Electronically Filed
11/23/2021 12:00 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

OSCAR GOMEZ, Plaintiff, vs. STATE OF NEVADA, Defendant.	CASE NO. A-20-815035-W DEPT. NO. IX

BEFORE THE HONORABLE CRISTINA D. SILVA, DISTRICT COURT JUDGE

FRIDAY, AUGUST 20, 2021

RECORDER'S TRANSCRIPT OF HEARING RE:
EVIDENTIARY HEARING

APPEARANCES:

For the Plaintiff: JAMES I. HOFFMAN, ESQ.

For the State: BINU G. PALAL, ESQ.
Chief Deputy District Attorney

RECORDED BY: GINA VILLANI, COURT RECORDER

WITNESS INDEX

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Las Vegas, Nevada; Friday, August 20, 2021

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[Proceeding commenced at 11:15 a.m.]

THE COURT: This is case A-20-815035-W; this is Oscar Gomez versus the State of Nevada. We're here for an evidentiary hearing on Mr. Gomez's pending petition for writ of habeas corpus. We had reset this. We had some challenges getting Mr. Gomez, but like I said, I'm glad to see you this morning, so that's good news.

I understand that there are some witnesses in the courtroom; is that correct?

MR. HOFFMAN: Yes, Your Honor.

THE COURT: All right. And who's present on behalf of the State?

MR. PALAL: Binu Palal, 10178, on behalf of the State.

THE COURT: All right. And good morning to you and I see Ms. Levy is also present on BlueJeans.

So we are here for a limited scope of an evidentiary hearing in regard to whether or not Mr. Gomez understood the consequences of his plea. Specifically, whether he was informed that he faced consecutive time for the deadly weapon enhancement or not. So we can go ahead and get started.

Does either party wish to invoke the exclusionary rule?

MR. PALAL: Yes, Your Honor, the State would be asking to invoke the exclusionary rule.

THE COURT: All right. Well, with that being said, then I'm

going to ask the witnesses that are present in the courtroom, the ones who are going to testify, to go ahead and step out at this time. You're not allowed to communicate with each other about your testimony until the conclusion of the hearing and then we'll bring you in one at a time. Because Ms. Levy is on BlueJeans, it's a little harder to exclude her from the proceedings.

MS. LEVY: I can log off until -- Mr. Palal can text me and I can log back on if the Court would like.

THE COURT: I think that's fine.

Now, this is the Defendant's motion. But I am assuming, Mr. Palal, that you actually subpoenaed Ms. Levy; is that correct? Or did Mr. Hoffman?

MR. PALAL: I had requested that Ms. Levy attend the hearing.

THE COURT: Oh, that's what I figured. Okay.

So we're going to kind of do things out of order just so that we can get her testimony and then go back to the Defense witnesses.

So, Mr. Palal, I'm going to have you start with your questions of Ms. Levy that way we can --

MR. HOFFMAN: I'm sorry to interrupt, Your Honor.

THE COURT: Yes.

MR. HOFFMAN: I'm also going to be questioning Mr. Gomez. Maybe it would be better to start with him so he could be present for the rest of it after he testifies.

THE COURT: He can stay the whole time.

MR. HOFFMAN: Okay.

THE COURT: Yeah, so it's not an issue.

MR. HOFFMAN: Okay. That's fine then.

THE COURT: Yeah, Yeah, okay. All right.

So then let's go ahead and get started.

Mr. Palal, are you ready?

MR. PALAL: Yes, Your Honor.

THE COURT: And, Ms. Levy, are you ready?

MS. LEVY: Yes, Your Honor.

THE COURT: All right. Great.

Well, let's swear you in. If you could raise your right hand, my Clerk will swear you in.

MONTI LEVY

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: Thank you. If you could state and spell your name for the record, please.

THE WITNESS: Monti Levy, M-O-N-T-I, Levy, L-E-V-Y.

THE COURT: All right. Thank you again.

MR. PALAL: May I proceed, Your Honor?

THE COURT: When you're ready, you may proceed, yes, thank you.

DIRECT EXAMINATION

BY MR. PALAL:

Q Ms. Levy, how are you employed?

A I'm an attorney.

Q And how long have you been an attorney?

A Almost 19 years.

Q And in the scope of being an attorney, how long have you practiced criminal law?

A Almost the entire 19 years. There was a short period of time where I did not practice criminal defense, but for the -- I would say 18 years criminal defense.

Q Now in 2016, were you taking appointments to murder cases?

A Yes.

Q And were you appointed to defend one Oscar Gomez?

A Yes.

Q And was that approximately late June or early July of 2016?

A I don't recall the month, but it -- sometime in 2016. I would -- if that's what you're saying it was I would trust that you're accurate.

Q When you are appointed to represent somebody, do you make an effort to visit them in order to go over the charges or his trial -- or preliminary hearing strategy before preliminary hearing?

A Generally, yes. I don't recall if I visited Mr. Gomez in person prior to the preliminary hearing, but I would assume that I would have. I don't have my visitation records or anything on me, so I would assume that I would have.

Q Okay. It's fair to say that you visited the Defendant?

A Yes.

Q And then do you recall that a preliminary hearing was held in

this matter?

A Yes.

Q And then did you --

A It was very shortly after. I think we didn't -- it was a short setting of the preliminary hearing. We didn't have all of everything yet, but, yes.

Q And, Ms. Levy, fair to say that Mr. Gomez was bound over to District Court on the charge of an open murder?

A Yes.

Q After Mr. Gomez was bound up, did you go and visit him to discuss his case?

A Multiple times.

Q When you say multiple times, do you mean two times, three times, ten times, twenty times?

A Over 20 times in this case prior -- between the time I was appointed and the time of sentencing -- at one time, I think I looked up my records. It's -- it was over 25 times that I personally visited at the jail, Mr. Gomez, always with someone else, either another attorney from my office or with my investigator.

Q And who was your investigator?

A It was Craig Retke.

Q Now, I want to direct your attention to October of 2017. Did --

THE COURT: Okay. Hold on real quick.

Mr. Palal, this is Judge Silva, I'm sorry. We're getting a really strange feedback from you and I don't know why that is.

MS. LEVY: From me?

MR. PALAL: From me?

THE COURT: It's actually coming from Mr. Palal. I don't know if you want to --

MR. PALAL: I can log onto my phone instead of logging onto --

THE COURT: I think I --

MR. PALAL: -- right now on my office [audio distortion] --

THE COURT: -- I think I need you to do that because we're getting a strange -- we're getting a strange feed -- it's from him, right? Yeah, I think it is, yeah. So if you don't mind, we're going to take a quick pause in the proceedings. If you could sign back on and disconnect your office connection, we'll try that way.

[Pause in proceedings]

THE COURT: All right.

We see you, Mr. Palal.

MR. PALAL: I'm back on my cell phone. Is that better?

THE COURT: That seems to be better, so let's hope that continues. All right. And I'm sorry I interrupted you.

MR. PALAL: Okay.

THE COURT: You can continue.

MR. PALAL: Sure, Your Honor. Thank you.

BY MR. PALAL:

Q So, Ms. Levy, I'm going to direct your attention to October 17th of 2017. I had sent you some transcripts of proceedings, have you

reviewed them?

A I did prior to the last time we were set, but I have not looked at them since that time.

Q Okay. Well, let me ask you this, do you remember at that hearing that an offer was put on record by the State of a second with use, right to argue?

A Yes.

Q And do you remember indicating that you had received that offer earlier and that you had talked to Mr. Gomez about that?

A Yes.

Q And is that true, did you -- had you in fact talked to Mr. Gomez about the offer of a second with use?

A Multiple times.

Q When you spoke to him about the offer, did you talk to him about the sentencing ranges?

A Yes, multiple times.

Q And how did you explain what the sentencing range was on a second degree murder with use of a deadly weapon?

A So even prior to the offer, I went over with Mr. Gomez multiple times at the jail what he was facing. If he was convicted of a first degree with a deadly weapon, second degree with a deadly weapon, voluntary manslaughter, and I went through the whole range and I would write it down for him.

And I would go through, you know, that the minimum that you can get is always on a first would be 21 years because you would have

20 on bottom, plus the enhancement, which was 1 to 20 years. I explained to him he could get life without, I didn't think he would get life without. But even if he got life without, it would also include the deadly weapon enhancement for an additional 1 to 20 years, so it was mandatory consecutive.

So I wrote it down for him, I left those papers with him many times. Every time I would have someone with me, we would go through it. I would ask him if he understood -- if he understood the 40 percent rule. I knew he had not been to prison before, so I explained to him what it meant that the bottom number had, you know, couldn't be more than 40 percent of the top. And I would tell him, you know, this means, you know, if you got a weapon enhancement, if you got 4, it would have to be a 4 to 10 consecutive to whatever it was.

So I went through it with him multiple times. I wrote it down for him, and I explained to him what the, you know, sentencing ranges were for a first, second, and manslaughter. And then with the offer, I did the same thing once we got the offer.

Q Okay. So if [audio distortion].

A I'm sorry. You cut out for a second.

MR. PALAL: Am I getting more feedback?

THE COURT: Yeah.

MS. LEVY: No, you just cut out for a second.

THE COURT: Well, in the courtroom, you are getting more feedback.

So, Mr. Palal, it might be helpful to -- let's try --

MR. PALAL: I can -- if we could [audio distortion] five minutes, I could walk over.

THE COURT: I think that's probably a good idea, we're getting some significant feedback. So we're going to sit tight, we'll let you come on over.

MR. PALAL: All right. Thank you, Your Honor.

THE COURT: Ms. Levy, I apologize. Thank you.

Everyone, we'll just be in recess until Mr. Palal is able to come join us in the courtroom.

[Proceedings trailed at 11:26 a.m.]

[Proceedings resumed at 11:34 a.m.]

THE COURT: All right. We'll go back on the record. Mr. Palal has joined us in the courtroom and we took a quick recess to let him come over; we were having some technical difficulties, so we'll resume. Present is still Mr. Gomez, via video feed from CCDC, his counsel, Mr. Hoffman, Ms. Levy is presently in the middle of testimony and Mr. Palal is present on behalf of the State.

When you're ready you can resume.

MR. PALAL: Thank you, Your Honor.

Does the Court mind if I question from the table?

THE COURT: It's perfectly fine.

MR. PALAL: Okay.

BY MR. PALAL:

Q All right. So, Ms. Levy, I believe where we left off was I was asking you about whether or not you had spoken to Mr. Gomez about

the ranges of punishment. And so part of the time we were talking about was prior to the offer that was conveyed in October of 2017, you had stated that you had talked to him about the various ranges that comes with a murder charge; is that correct?

A Yes.

Q And that you had written down for him the possible consecutive natures with the weapon enhancements and the various charges -- the various sentencing ranges that comes with each degree of murder; is that correct?

A Yes. So I explained to him, you know, if we had gone to trial and he was convicted of any of the theories of murder that the jury would also find the deadly weapon enhancement because they would be instructed that a firearm is a deadly weapon and that -- oh, sorry -- that --

THE COURT: Ms. Levy, it sounds like we're having some --

MS. LEVY: I'm sorry [audio distortion].

THE COURT: Now the technical issues have transferred over to you. I'm confident this is a BlueJeans issue and not an issue with the parties as we've had various issues throughout the last couple of months.

So, Ms. Levy, do you have another device you could try and sign in on or is that the only device that you have?

MS. LEVY: I can sign in on either my desktop computer or my phone. Either way, I'll go downstairs and try my desktop and if that doesn't work, then I can try my phone.

THE COURT: All right. If you don't mind doing that, I appreciate it. We'll again be in recess until we can resolve these technical issues.

MS. LEVY: All right. It shouldn't take very long. Let me just log off.

THE COURT: Thank you.

[Proceedings trailed at 11:36 a.m.]

[Proceedings resumed at 11:40 a.m.]

MS. LEVY: I can't hear anything on this.

THE COURT: We can hear you.

MS. LEVY: Okay. Now, I can hear you. Sorry. All right. I don't use this computer very often, so I wasn't sure if it was set up, okay.

THE COURT: That seems to be okay, so let's continue.

BY MR. PALAL:

Q All right. So, Ms. Levy, sounds like we were talking about -- before getting the offer and you were explaining to Mr. Gomez the possible outcomes if he went to trial; is that correct?

A Yes. And I was saying that with the deadly weapon enhancement if we were to go to trial on -- and if he was convicted on any of the theories of murder that the jury would be instructed that a firearm is a deadly weapon. And since the decedent had died from gunshot wounds, that the jury would necessarily find that the deadly weapon enhancement was proper and that he would have a consecutive sentence if he was convicted of first, second, manslaughter, any of those would have that 1 to 20.

Manslaughter, obviously, would be a 1 to 10, but on either first or second it would be a 1 to 20 consecutive sentence. And I explained to him that the least you could get on that is 12 to 30 months; consecutive to the underlying charge and that the most would 8 to 20. And I went through all the various, you know, he could get a 3 to 8, 4 to 10. And Mr. Retke and I went through that with him multiple times before I received any offer after his [audio distortion].

Q Okay. And now so now I want to just direct your attention, specifically, to after October 2017, when you had received the second degree murder with use of a deadly weapon offer. Did you go over that offer with Mr. Gomez, specifically?

A Yes.

Q And did you go over with him the sentencing ranges on that offer, specifically?

A Yes, multiple times.

Q And when you say multiple times, can you give us some idea of what that means?

A I don't know specifically how many times from receiving the offer 'til he accepted it, but at the time, Mr. Gomez was not interested in accepting it. So I was still going over all of the various penalties that he could get if we went to trial. I mean, he took the deal. I believe it was calendar call we were announcing ready, so it was explained to him this is what the offer is. If you don't accept that, we go to trial, then this is what you're facing. We can argue for, you know, down to voluntary.

And I just want to make sure -- obviously, I was filing the

petition. I just want to make sure that attorney-client privilege is waived, so that I can get into specifics.

MR. PALAL: Your Honor, I imagine with the petition having been filed, Mr. Gomez has necessarily waived his attorney-client privilege with the communications with Ms. Levy.

THE COURT: And that's a good question or a good point. So I just want to -- that's a good point, thank you, Mr. Palal.

Let me start with Mr. Hoffman. Have you discussed with your client waving attorney-client privilege and the necessity of doing so in order to proceed here today?

MR. HOFFMAN: I did discuss that, Your Honor. That was going to be my first question when I questioned him.

THE COURT: Understood. All right. So let me just actually turn over to Mr. Gomez.

Mr. Gomez, can you hear me okay?

THE DEFENDANT: Yes.

THE COURT: All right. So as a -- we'll call it a collateral consequence of filing this petition for writ of habeas corpus, there are going to be conversations that would qualify, or potentially qualify, as attorney-client privileged information. But in order to fully complete the record and to address the allegations set forth in your petition, you would have to waive your right to the -- to that attorney-client privilege so we could ask additional questions of Ms. Levy.

Are you willing to do that today?

THE DEFENDANT: Yes, I waive my right.

THE COURT: And do you have any questions about waiving your right to do so?

THE DEFENDANT: No.

THE COURT: And are you waiving your right after discussing waiving your right with your current attorney, Mr. Hoffman, and having him answer all your questions?

THE DEFENDANT: I mean, I didn't discuss this with me -- I mean, he didn't discuss this with me. I remember him sending me a letter telling me that this is what I essentially have to do --

THE COURT: Okay.

THE DEFENDANT: -- for getting the -- to go forward.

THE COURT: All right. And do you have any questions about waiving that right here today?

THE DEFENDANT: No, I don't.

THE COURT: No, okay. All right.

Anything else that you would like me to ask, Mr. Palal?

MR. PALAL: No.

THE COURT: And, Mr. Hoffman?

MR. HOFFMAN: No, Your Honor.

THE COURT: Okay. All right. Thank you very much.

You may proceed, Mr. Palal.

BY MR. PALAL:

Q All right. So, Ms. Levy, it sounds like you were going to -- oh, let me just form of the question. So did -- when you spoke to Mr. Gomez about the offer, did he express to you that he understood the ranges of

sentencing?

A Yes.

Q And did he ask you any questions regarding the ranges of sentencing?

A I don't recall, specifically. But, I mean, I explained to him. I was saying the 40 percent rule and I, you know, would quiz him. I would say, okay, so, you know, if you got four on the bottom for the deadly weapon enhancement, what would you get, you know, on the top and so what would your total sentence be? And I would ask him multiple times, because he had never been in prison before. So I wanted to make sure that he understood the risks, you know, of going to trial, what he was potentially facing versus what the offer was.

So I didn't -- but I went over the offer with him. It wasn't like I just went over the second with use of a deadly weapon, I went over still all the ranges, you know, if you don't accept it, this is what you're facing, if you do accept it, this is what you're facing. And I explained to him, you know, with the acceptance of responsibility that we have a better argument for a lower on the deadly weapon enhancement versus [audio distortion].

Q And I don't think we heard that last part of your sentence.

A I said that, you know, he would have a better argument to get a lower sentence on the deadly weapon enhancement versus what he ultimately got because he did get ultimately maxed out on the weapon enhancement.

Q All right. Now, it's fair to say that -- well, I guess, you

mentioned calendar call where Defendant ultimately took the plea. Is that fair to say it's around April of 2018?

A I don't remember the specific date, but I -- I mean, I want to say that calendar call was continued to the end of the week. I mean, it was like right before the weekend and we were going to be preparing for trial from my recollection is when he ultimately decided that [audio distortion].

Q Okay.

A So I don't remember the date.

THE COURT: I believe --

MS. LEVY: Or even the day of the week.

THE COURT: So for some reason we're losing you on the very last word of your sentences.

MS. LEVY: Oh.

THE COURT: So you're saying you believed he pled guilty right before calendar call or right around that time; is that correct?

MS. LEVY: No, I think that the calendar call was continued towards the end. It was like the end of the week because I know it was close to the weekend when we were preparing. We were going to be going to trial the next week, so I don't remember the day of the week, but I -- I seem to recall it was close to it was going to be the weekend and we were going to be preparing for trial. It was like a last second.

THE COURT: Understood. All right. And we can hear you much better now. Thank you for getting a little closer, I appreciate it.

BY MR. PALAL:

Q And if, Ms. Levy, if I represented to you that Judge Adair held her calendar calls on Thursdays before the Monday of trial, would you have any reason to disagree with me?

A I -- no, I don't. I just don't recall, specifically, but I would trust that that's accurate.

Q All right. And so now going in, you said you were preparing for trial before calendar call. And part of that I imagine was reviewing the evidence and preparing cross examinations and other things associated with trial; is that fair?

A Yes.

Q Was part of your preparation also reviewing with Mr. Gomez again what the offer was and the cost in benefits associated with taking the offer versus going to the trial?

A Yes. And I think that's what I was initially going to get into before I brought up attorney-client privilege. I will -- I -- you know, there was a couple of different ways that we could argue at trial and I -- in my estimation, what I believe would be the better argument would be to argue for a voluntary, based on things that Mr. Gomez told me and having a member of his family testify. And he wasn't interested in going that route.

Q Okay.

A But, I mean, that's when I was talking to him about, you know, if we argued for a voluntary, this is what you're facing versus, you know, this is what I would be asking for, voluntary with use versus the murder.

But that would necessarily require a certain person from his family to testify about something that Mr. Gomez ultimately decided he did not want to get into.

Q And do you recall who -- what member of his family would have had to have testified?

A It would have been his mother and his -- one of his sisters, but primarily his mother. Mr. Gomez had relayed some information to me with regard to his mother that -- so when this altercation happened, there was a question -- what the evidence showed was that one of the witnesses said -- or that Mr. Gomez had stated to the decedent, hey, where are you going. And he turned around and something -- and said something to the -- like, your mama's house or your mothers, something about his mother. And Mr. Gomez told me that that's when he snapped.

Because he said that his mother had been suicidal and that triggered something into him -- in him. And that he didn't want to get into that had we gone to trial. And that's something that we had discussed, potentially arguing that it would have been a voluntary-type situation because of what happened with his mom.

Q All right. And leading -- so leading up to trial, you're talking about trial strategy, you're talking about maybe seeking a -- arguing for a lesser charge to be convicted of by a jury trial and you're talking about the offer.

Now, I'm going to talk specifically about the April 19th, 2018 calendar call. Do you recall -- well, I know you don't recall the actual date, but do you recall that calendar call?

A Yes.

Q Okay. When you went to the calendar call, were you planning on announcing ready for trial?

A Yes. And I believe, if I recall correctly, I had someone -- a co-counsel from my office, Russ Marsh, who was going to do the case with me and I want to say he was he was there with me at the court appearance. I can't say a hundred percent with certainty, but I believe when I reviewed the transcripts, I thought that he was there as well.

Q And why -- how did you get to the point where you had to alert the Court that Mr. Gomez actually wanted to take the now six month outstanding offer from the State?

A I don't specifically recall the offer being outstanding for six months. I -- I think that there had been a continuance of the trial. I think the offer was made and then there was [audio distortion]. I'm not sure exactly of the timeframe, but I don't remember. I think we were getting ready to announce ready and then Mr. Gomez said that he would take it, the offer.

Q And had you -- and up until that point where Mr. Gomez had said he was going to take the offer, it's fair to say, and I know I belabored this a little bit, but had you explained to him the full consequences of taking the offer?

A Yes.

Q And including the range --

A Many times.

Q -- including the range for the underlying second degree

murder?

A Yes, many times.

Q And including the --

A I think -- I'm sorry. Go ahead.

Q Okay. I'm sorry. And including the range for the consecutive, mandatory consecutive time for the deadly weapon enhancement?

A Yes, multiple times.

Q And in your mind, from your observation, did Mr. Gomez seem -- seem to understand the offer?

A Yes, he absolutely understood the offer.

Q And what makes you say with such certainty that Mr. Gomez absolutely understood the offer?

A Because we had gone over it, like I said, many, many times. I quizzed him on what the 40 percent rule was and the mandatory consecutive. I wrote it down for him. Mr. Retke and I, Mr. Marsh and I, Mariteresa from my office, all of us had gone over with him the range of penalties for a first with use, a second with use, voluntary with use, multiple, multiple times. So he understood the offer.

At one point I think -- I don't recall if it was the prior trial setting, but Mr. Gomez wanted to counteroffer with a voluntary with use and I think we did counteroffer and you said, no, and the offer was what it was. It wasn't getting any better. We were ready to go to trial and then he decided he wanted to take it, but he absolutely understood and I know that. I went over it -- I was about to say before, in this case, more times than I have with any other defendant in my 19 years of practice.

Q I'm sorry, so you said you went over with -- this offer with this Defendant more than any other defendant that you had ever done in your career?

A Not specifically the offer, but the range of penalties that he was facing in the case, the range of penalties on a murder [audio distortion] what he was facing. I went over that with Mr. Gomez more than I've gone over it with any other client of mine in my 19 years of practice.

Q All right. And then the last area I want to go into is you were obviously at the entry of plea; is that correct?

A Yes.

Q And you obviously were there for Judge Adair's canvasing of the -- of your client?

A Yes.

Q Did you observe or have any communication with your client that made it seem to you that the Defendant did not understand Judge Adair's canvasing of him?

A No, he understood. And in fact during -- that was a long proceeding, I don't -- I don't know if we have time to get into all of that, but we had to take a break in the proceeding so that you could get the plea agreement.

And Mr. Gomez had been going back and forth as to whether or not he wanted to accept the offer. He wanted to talk to you. You came over to the box with me and we had a conversation with Mr. Gomez, where you said, look, I'm -- if we go to trial, I'm arguing -- or,

you know, or on the deal, we're -- I'm going to argue for 18 to life and you'll be able to -- your attorney will be able to argue for 11. And we had that specific conversation and it was always you could get up to 18 on the bottom or you could get as low as 11 on the bottom. It was never a question as to whether or not the weapon enhancement was going to be consecutive to the murder charge.

Q All right.

MR. PALAL: Your Honor, State will pass the witness.

THE COURT: All right. Thank you for that.

Mr. Hoffman, cross-examination.

MR. HOFFMAN: Thank you.

Do you mind if I also stay seated?

THE COURT: That's perfectly fine.

MR. HOFFMAN: Thank you.

MS. LEVY: I can -- I'm having a hard time hearing Mr. Hoffman, can he move the mic closer to him?

THE COURT: There we go. He's moving it closer. How's that? Let's give it a little test. Can you hear him now? Mr. Hoffman.

MR. HOFFMAN: Is this better? Can you hear me now?

MS. LEVY: A little bit, it still sounds lower than Mr. Palal's, but it's okay, I'll --

THE COURT: There we go, let's try again.

MR. HOFFMAN: How about now? Is this better?

MS. LEVY: Yeah, I can hear you.

MR. HOFFMAN: Okay.

CROSS-EXAMINATION

BY MR. HOFFMAN:

Q Okay. So my first area of questioning, I guess, you said you've been practicing for 19 years; is that correct? 18 in criminal defense?

A So I've been a licensed attorney since October of 2002. I started working in criminal defense in May 2002. I was a law clerk while I was waiting to pass the bar, but that was for criminal defense attorney John Momot, so that was my first job out of law school. So, yeah, when I say 19 years, I mean including that time, so May would have been 19 years. But there was a short period of time; it was just under a year, where I did not practice in criminal defense. But other than that my practice has primarily -- I'm also a short trial judge, I'm also an arbitrator, so I do other things, but my practice primarily is criminal defense.

Q Okay. How many cases where someone was charged with murder would you say you've done in your career?

A Probably close to 20.

Q Okay.

A I could probably list them out, but I would say around 20-ish. When I worked John Momot, we had several there as well, so I mean, it would be -- I would say at least 20.

Q Okay. The approximation is fine, thanks. So you earlier described your process of going and explaining the offer and all that. Do you follow that same process in all of these cases where a client is charged with murder?

A I always explain the different penalties that they're facing, yes. But I was talking, you know, specifically in this case, I wasn't talking about, like, in general my practice; I was talking about specifically this case because I know in this case I went over it multiple times. But, yes, generally speaking I -- my practice is the same to go through the penalties of a first, a second, and voluntary manslaughter and if it's [audio distortion].

Q Okay. So that kind of leads into the next question that I was going to ask. So do you have a better recall of this case than most of your cases would you say? Would you say you have about the same? How do you describe that?

A A better recall only in certain senses. I mean, I know, you know, I went to visit Mr. Gomez more than I had visited anyone else. I know that I went through the -- you know, the penalties and the 40 percent rule with him more than other people because like I said Mr. Gomez hadn't been through the prison system before and wouldn't necessarily know these things.

Whereas, if I, you know, if I'm representing an eight time convicted felon who's been to prison multiple times, they understand certain things like the 40 percent rule and where you get good time off, where you don't get good time off and things like that. So that's why I have a better recollection of certain things in this case because I know that I went over those things with Mr. Gomez more than I would with someone else.

Q Okay. Thank you, so then the other line of questioning. Would

you say that you had a good relationship or a bad relationship with Mr. Gomez and also with his family?

A Well, his family --

MR. PALAL: Your Honor, if I may --

MS. LEVY: -- I fairly recall them yell at me all the time, so I don't know --

MR. PALAL: If -- if --

MS. LEVY: -- that that would a relation -- I didn't have --

MR. PALAL: Your Honor, I'm sorry --

MS. LEVY: I'm sorry.

MR. PALAL: If I --

THE COURT: Hold on, I believe Mr. Palal has an objection. Yes, sir.

MR. PALAL: Your Honor, given the scope of this hearing, I'm going to object to relevance as to the relationship between Ms. Levy and Defendant's family. I don't know how that goes into whether or not the Defendant understood the sentencing ranges of second degree murder.

THE COURT: I understand that, I'm going to give him a little bit of leeway, and so that's overruled and we'll see where this is going.

You may continue.

MR. HOFFMAN: Thank you.

BY MR. HOFFMAN:

Q So I'm sorry, continue with what you were saying, Ms. Levy.

A I don't think I had a positive relationship with his family because they called and yelled at me all the time. Mr. Gomez, we would

have a good relationship at some points and then the [audio distortion] would have moods where he was not [audio distortion] when he would talk to me, he refused visits with me and my investigator. So, I mean, it wasn't like hunky-dory, but I mean, I represented him.

Q Okay.

A I don't think we had a conflict of any kind.

Q Okay. So then focusing in -- so you would say it felt like it was difficult to deal with Mr. Gomez's family; is that fair to say?

A It was very difficult to deal with his family, yes.

Q Were there ever heated comments that they made toward you or you made toward them?

A I never made any heated comments towards them. They would call and any time they called, I would put them on speaker phone and I would call someone else from my office in to be there and Mr. Retke heard it. Anytime I called them, I would make sure someone else was there because they yelled at me all the time and I wanted to make sure there was someone else there to witness it.

Q Okay. Then did you ever make any specific comments to Isabel Gomez, who is one of Mr. Gomez's sisters about her pregnancy at her age.

MR. PALAL: Your Honor, I mean --

MS. LEVY: No.

MR. PALAL: -- I understand you're giving -- objection. I understand there's some leeway going to the relevance, but I think this is getting really far field about --

THE COURT: All right.

So, Mr. Hoffman, where are we going with this in terms of the understanding of the scope and consequences of the plea to include the deadly weapon enhancement?

MR. HOFFMAN: So Mr. Gomez's testimony about these conversations of explaining the plea differ in a number of particulars from Ms. Levy's. And so basically my argument is going to be that there was a lot of, like, personal conflict between Ms. Levy and Mr. Gomez's family. And that, sort of, made her get sloppy, get sort of tired of it, done with it. So it's laying the groundwork for the existence of that personal conflict, basically.

THE COURT: All right. I think at this point, the personal conflict has been established and Ms. Levy has addressed that or testified in regards to that. So unless there's something specifically on point that would go to the understanding of the consequences of the plea, we probably could move forward.

So I'm going to sustain the objection. If you have something specific you want to ask, I'm okay with that.

MR. HOFFMAN: Okay. No, I think I'm done.

THE COURT: Okay.

Is that the extent of your cross-examination?

MR. HOFFMAN: Yes, Your Honor.

THE COURT: All right. No problem.

Mr. Palal, any follow up or redirect?

MR. PALAL: Just very briefly.

REDIRECT EXAMINATION

BY MR. PALAL:

Q Ms. Levy, did the relationship you had with Mr. Gomez's family affect your ability to convey the legal sentences in this case at all to Mr. Gomez?

A No.

MR. PALAL: That's all. Nothing further, Your Honor.

THE COURT: Anything else, all right. Thank you very much.

I have a question, Ms. Levy, on the day of the change of plea, how would you describe your ability to communicate with Mr. Gomez at that time?

MS. LEVY: It was fine. I didn't have any problems communicating with him.

THE COURT: And were there any personal --

[Simultaneously speaking]

MS. LEVY: Sorry.

THE COURT: -- or any personality conflicts that would have impacted your ability to convey or to relay the consequences of the plea at that time?

MS. LEVY: No.

THE COURT: All right.

Any follow-up questions based on my questions, Mr. Hoffman?

MR. HOFFMAN: No, Your Honor.

THE COURT: Mr. Palal.

MR. PALAL: No, Your Honor.

THE COURT: Okay. All right.

Thank you, Ms. Levy.

May we release this witness at this time?

MR. PALAL: Yes, Your Honor.

MR. HOFFMAN: Yes, Your Honor.

THE COURT: All right.

Ms. Levy, you're released. You're obviously no longer subject to the exclusionary rule, you may stay if you like, but you're also free to disconnect. We'll just go ahead and mute you.

MS. LEVY: Okay. I'll disconnect. Thank you.

THE COURT: Thank you. Take care. All right.

So we took the witnesses a little bit out of order because of the BlueJeans setup, so with that we'll turn -- let me just -- since we're out of order anyway.

Mr. Palal, do you have any more witnesses to call?

MR. PALAL: No, Your Honor.

THE COURT: All right. Thank you for that.

So then I'm going to turn to Mr. Hoffman and you may call your first witness.

MR. HOFFMAN: I would call Oscar Gomez as my first witness, Your Honor.

THE COURT: All right. No problem.

So good afternoon, again, Mr. Gomez, we're going to go ahead and swear you in and you have any problems understanding or hearing, just let us know, okay.

THE DEFENDANT: Yes.

THE COURT: If you could raise your right hand for us. I know it's a little difficult, we can see it raised there, thank you. Go ahead. My Clerk's going to swear you in.

OSCAR GOMEZ

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: Thank you. If you could state and spell your name for the record.

THE WITNESS: Oscar Gomez, O-S-C-A-R, G-O-M-E-Z.

THE COURT: All right. Thank you, Mr. Gomez.

And Mr. Hoffman, when you're ready, begin questioning the witness.

MR. HOFFMAN: Thank you, Your Honor.

And can you hear me okay?

THE DEFENDANT: I can hear you perfectly.

MR. HOFFMAN: Okay, good.

DIRECT EXAMINATION

BY MR. HOFFMAN:

Q So you were incarcerated before trial; is that correct?

A Yes.

Q And Ms. Levy was your lawyer. Did she come visit you?

A Yes, she did multiple times.

Q Multiple times, okay. And did she talk to you about your possible sentences when she visited you?

A She did. I would say -- I mean, plenty of times she came to visit me. I mean, we did discuss the possible -- the possible, I mean, sentence structures that -- what I was being charged with.

Q Okay. And did she discuss a range of sentences with you?

A Yes, she did. She mentioned first degree, but she told me don't worry about that because I didn't fall under that so she discussed the second degree and discussed different ranges of the charges on that.

Q Okay. And how did she -- how did she describe the possible sentences that you could get? Let's just focus on the second degree.

A She just -- she told me that I would be facing 10 to 25 or 10 to life and then the enhancement. She did tell me it was going to be either 1 to 20, but she didn't tell me if they were going to run together or apart. She never really discussed the concurrent or consecutive to me that well. I didn't really understand it.

Q Okay. So she discussed that you would get a sentence for the prison -- or the sentence for murder and then a sentence for the enhancement, but she didn't run them together? I just want to make clear.

A She didn't discuss or really explain to me the consecutive or the concurrent. So I didn't know if they were going to be run together or separate, I didn't really understand.

Q Okay.

A Not until like -- not until I took the deal.

Q Okay. So when -- based on those conversations, when did

you think you would get out if you took the deal?

A She told me I was just going to do the 10 and be eligible to go to the street for my family, so I kind of figured both of them would run together.

Q Okay. Were those the words she used? Do you remember the specific words she used?

A She told me that I was young and that I would be out in my early 30s and that I'll just do 10 and be eligible to go out on the streets. Those were the exact same words.

Q Okay. And then -- so she told you verbally about the plea, but you didn't see the plea in writing until the day of the calendar call. Is that accurate?

A Yes, that's correct.

Q Okay. How did you feel about the deal? What was your attitude towards the deal?

A I mean, I felt -- I felt positive at one point because of what she told me about just doing the 10 and going home. You know, I've kind of -- I mean, that's the only reason why I took the deal.

Q Okay. Okay. I want to ask now, what was your -- so had you ever been in prison before? Had you ever been charged with a felony?

A No.

Q Had you ever had any involvement with the criminal justice system?

A Previously for a misdemeanor.

Q Okay. What was that? Don't go too far into it, but what was

that misdemeanor about?

A It was just a misdemeanor marijuana charge.

Q Okay. And when was that, roughly?

A I would say -- I'd just turned 18, so I would say around '12 and '13, I believe, or '14.

Q Okay. And then how old were you when you were charged with this, the murder.

A I was 20.

Q 20.

A 20 years old.

Q Okay. What was your level of education at the time?

A Not so good, I dropped out at 9th -- at 9th grade. I enrolled again and I dropped out at 11th grade, but, I mean, I didn't really go to school. I didn't really -- I didn't understand it, so I dropped out again. And for being in 11th grade, I only had three credits. And out here in Las Vegas, you would need -- I would have to need like six, seven credits a year and -- but when I was in 11th grade, I only had three.

Q Okay.

A So I didn't really do that good.

Q Okay. And -- so going back to the conversations that Ms. Levy had with you in jail; did she quiz you about the sentence structure?

A No, she never quizzed me. She never quizzed me once.

Q Did she do anything -- sorry, I'm jumping around here. Okay. Did you have a conversation at the calendar call with Mr. Palal?

A I did. I remember asking him if he was willing to go down to a voluntary manslaughter and he told me he wasn't willing to do that. And I believe that's -- that was the only conversation I remember having with him that day?

Q So did you discuss the second degree murder sentence at all?

A No, he didn't -- I only asked him if he was willing to go down from that? He said no. That was the only time in the two years that I was in the county that I had ever spoken to Mr. Palal.

Q Okay.

MR. HOFFMAN: I have nothing further on direct, Your Honor.

THE COURT: All right. Thank you for that.

Cross-examination.

MR. PALAL: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PALAL:

Q Okay. So, Mr. Gomez, I want to understand what you're saying. You -- you're saying that -- I think I wrote it down. The only reason you took the deal is because you thought you were going to get 10 years; is that correct?

A Well, yes, exactly.

Q Okay. 10 years.

Now, do you remember that day in court the Judge asking you questions about the plea?

A Yes.

Q And were you -- okay. And do you recall her telling to you --

so that the least amount of time, the very least amount of time, I could give you on the bottom end is 11 years, do you understand that? Do you remember her saying that to you?

A I believe so.

Q Okay. And do you remember you responding saying, I understand?

A Yes.

Q And then do you also remember the Court telling you the most amount of time I could give you on the bottom is 18 years, do you understand that? Do you remember the Court asking you that?

A I don't remember. I mean, I'd have to hear the recording.

Q Okay. And do you remember if you -- do you remember telling the Court I understand?

A I believe so.

MR. PALAL: The State has no further questions for this witness.

THE COURT: All right. Any redirect examination?

MR. HOFFMAN: Yeah.

REDIRECT EXAMINATION

BY MR. HOFFMAN:

Q So when the Judge asked you about that statement, why did -- you said you understood. Did --

THE COURT: Which statement, Mr. Hoffman?

MR. HOFFMAN: The statement about the 11 years on the bottom.

THE COURT: Okay.

MR. HOFFMAN: I apologize.

THE COURT: Just for clarity purposes. There were two statements. Go ahead.

MR. HOFFMAN: Thank you.

BY MR. HOFFMAN:

Q You said you understood. Did you understand?

A In my head, I understood that -- I mean, I was believing what Ms. Monti Levy told me about the 10 years.

Q But the judge said 11.

A But that's all I --

Q So why -- how did you reconcile --

A I was --

Q -- that difference in your head, I guess.

A I didn't really know what was really going on. I mean, I was a bit confused that day, everything happened so fast. She told me in court to make my mind up, you know, this is my last chance. And that if I didn't decide then, that, you know, I could spend the rest of my life in prison and I got scared and I guess that's it. I was confused about what was going on during the rest of the proceeding.

Q Okay. So you felt pressured?

A I did.

Q Okay.

MR. HOFFMAN: No further questions, Your Honor.

THE COURT: All right. Any further or re-cross examination?

MR. PALAL: No, Your Honor.

THE COURT: All right. Thank you for that.

Mr. Hoffman, you may go ahead and call your next witness.

MR. HOFFMAN: Okay. I'd like to call Laura Olivas, I think.

THE COURT: Laura Olivas.

MR. HOFFMAN: Yes.

THE COURT: All right. No problem.

Good morning -- or, actually, good afternoon.

THE WITNESS: Good afternoon.

THE COURT: Go ahead and come on up here.

LAURA OLIVAS

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: Thank you. Please be seated. If you could state and spell your name for the record.

THE WITNESS: My name is Laura Olivas. L-A-U-R-A, O-L-I-V-A-S.

THE COURT: All right. Good afternoon, again.

Mr. Hoffman, you may begin your direct examination.

MR. HOFFMAN: Okay.

DIRECT EXAMINATION

BY MR. HOFFMAN:

Q Ms. Olivas, how are you related to Oscar Gomez?

A I'm his mom.

Q You're his mom. Were you involved in speaking with his

lawyer about his criminal charge of murder?

A Since the first day, yes, I was.

Q Since the first day. All right. Did you ever speak to her about what sentence he might be facing?

A She never brought it up because I used to always ask her what was -- what was going on his case and she would say, we don't have nothing -- nothing yet, nothing yet until he was sentenced here. That's when she brought up that the sentencing, it was 10 years and from 10 years that he could get probation and then he was still young and that's all she said that day.

Q Okay. And by sentence, what do you -- do you mean the date where he --

A That he was -- the trial was done right there and then, the last day.

Q Okay. Would that have been around April 2018?

A Well, I don't remember the year, but yeah, it was the last sentence when he was sentenced. I just remember when he used to -- she used to call me and say just have your son take the deal, take the deal. And I go, well, you know, it's not up to me, it's my son's decision, so.

Q But -- so did she tell you what the deal was before that day in court?

A Never. She never mentioned what the deal was. She just used to say just have him take the deal.

Q Okay. Did you know what the deal was? Did Mr. Gomez talk