

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVIN MARVELL TONEY,
#1187296,
Appellant,

v.

STATE OF NEVADA,
Respondent.

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CASE NO.: 83246

E-FILE

REPLY TO RESPONDENT'S ANSWERING BRIEF

**Appeal from the denial of a Post Conviction Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

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

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

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

...

...

Counsel for Appellant

Counsel for Respondent

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

Eighth Judicial District Court, Clark County

STATEMENT OF ISSUES

- I.** DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT HAVE BEEN PROCEDURALLY BARRED;
- II.** THE DISTRICT COURT ERRED WHEN IT FOUND THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO EVEN ATTEMPT TO CHALLENGE THE INVALID WEAPONS ENHANCEMENT USED BY THE STATE;

- III. THE DISTRICT COURT ERRED BY FINDING THAT DEFENDANT'S GUILTY PLEA WAS NOT A KNOWING, VOLUNTARY AND INTELLIGENT PLEA AND THEREFORE WAS NOT CONSTITUTIONALLY VALID;
- IV. THE DISTRICT COURT ERRED WHEN IT DENIED AN EVIDENTIARY HEARING ON DISPUTED ISSUES OF FACT IN DEFENDANT'S POST CONVICTION PETITION;
- V. THE CUMULATION OF ERRORS REQUIRES REVERSAL OF DEFENDANT'S CONVICTION.

ARGUMENT

- I. Defendant's Petition for Writ of Habeas Corpus Should Not Have Been Procedurally Barred under NRS 34.726(1).

The State's argument that Defendant's Petition was time barred or otherwise procedurally barred should fail. Defendant established that there existed the requisite *good cause* to excuse the delay in filing his Petition. The State in their Response attempted to argue Defendant could not show a good excuse or justification for the delay in filing said Petition. (RAB p. 17-20)

Defendant submits the principle reason for excusing any delay, or finding good

cause for a delay in this case is that justice and fundamental fairness requires excusal of any procedural bar because the Defendant was manifestly not guilty of the alleged enhancement of use of a deadly weapon. The State, knowing the Defendant should not have received the lengthy enhancement to his sentence which he received, nevertheless argued that Defendant should not be eligible for any exception to the procedural time bar in this case. (RAB p. 19)

The State, citing *Pellegrini v. State*, 117 Nev. 869-70 (2001), also suggested the Defendant's excuse, or good cause, must fail because the excuse was not raised within a 'reasonable time.' (RAB p.19) Defendant submits it was clearly "reasonable" for the Defendant to wait until after there was case law, i.e., *United States v. Davis*, 588 U.S. __ (2019), which supported his Petition, and then timely filed the Petition for Habeas Corpus in this case. There was therefore no unreasonable delay in Defendant filing this post conviction Petition after the *Davis* case was decided. The Defendant urges this Court to consider the totality of the facts and circumstances in this case and find that applying procedural bars to prohibit a necessary Writ of Habeas Corpus in this case would result in a fundamental miscarriage of justice. *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265, 270 (2006)

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II. The District Court Erred by Finding Defense Counsel Was Not Ineffective for Failing to Challenge the Use of an Invalid Weapon's Enhancement by the State.

The District Court wrongly denied Defendant's Habeas Petition when it rejected Defendant's arguments showing of defense counsel's ineffectiveness. The District Court, in the Findings of Fact, Conclusions of Law and Order, stated that the Defendant's Petition was procedurally barred, saying: . . .

"Petitioner cannot demonstrate prejudice as he stipulated to sentence for his use of a deadly weapon when he entered his plea, which was knowingly, intelligently and voluntarily entered (citing GPA filed August 23, 2017). Therefore, Petitioner's claim is denied." (A.A. 18)

. . .

The Court however had wrongly relied on the State's mistaken arguments. Despite all the State's protestations otherwise, the pellet gun that Defendant had possession of was not a deadly weapon that subjected the Defendant to a sentencing enhancement under NRS 193.165. (RAB p. 20-27) The Defendant could not stipulate to an untrue fact, or stipulate to a lengthier sentence than the law provides or allows. The State simply chose to ignore both statutory law, NRS 202.253 and substantial case law, i.e., *McIntyre v. State*, 104 Nev. 622, 264P.2d 482 (1988), and *Bias v. State*,

105 Nev. 869, 784, 963 (1989).

The State cited a badly reasoned case, *Manning v. State*, 107 Nev. 337 (1991), for the proposition that a BB gun with ‘a caliber of .177 inches,’ by definition is a firearm. In *Manning*, defense counsel however stipulated that the caliber of the BB gun was .177 inches. The Court therefore reasoned, pursuant to NRS 202.253, which defines what is a firearm, it was unnecessary for the State to establish the BB gun used by the appellant had deadly capabilities. *Id.* 339

Defendant submits the decision in *Manning, supra*, was bad law and should be overruled as it is inconsistent with many other Nevada cases that only apply a weapon enhancement, when there has been a significant additional criminal actions, or evidence which raises the possibility of harm.

To extend the ruling in *Manning, supra*, to the facts of Defendant’s case would totally eviscerate this Court’s better reasoned holdings in cases such as *McIntyre v. State, supra*, and *Bias v. State, supra*. Even if there was some doubt as to how the District Court might have determined any defense challenge to the State’s weapon enhancement allegations in this case, it is respectfully submitted that zealous advocacy commanded by *Strickland* required at least an effort by counsel to make a pretrial challenge to the weapon enhancement allegation in the pleadings.

This failure to do necessary legal research and preparation to challenge this improper enhancement was prejudicial error under *Strickland* that requires reversal.

III. The District Court Erred When Finding that the Defendant's Guilty Plea was Not a Knowing, Voluntary and Intelligent Plea and Therefore Not Invalid.

In the Finding of Facts, Conclusions of Law and Order, the Court wrongly affirmed the guilty plea, ignoring any concerns about the Defendant's knowledge or intelligence concerning the elements of the crime or about his right to competent counsel.

The State in Respondent's Answering Brief (hereinafter, RAB), also ignored any possibility of problems with the Defendant's legal representation or his full and complete understanding of the law. (RAB p. 20-27) The State, potentially recognizing errors of defense counsel argued: . . . "Effective counsel does not mean errorless counsel." *Means v. State*, 120 Nev. 1001 (2004) (RAB p. 21) The State then argued that in order to show ineffective assistance of counsel based upon bad advice prior to a guilty plea: . . . "A defendant must show 'gross error' on the part of counsel." *Turner v. Calderon*, 281 F.3d 880 (9th Cir.2002) (RAB p. 25) (Emphasis added)

The State continued stating: . . . "A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel, and the burden is on the

Defendant to show the plea was not voluntarily entered.” *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d at 368; *Wingfield v. State*, 91 Nev. 336, 337, 535 P.2d 1295 (1975); *Jezierski v. State*, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). (RAB p. 25)

Defendant submits his plea was neither voluntarily or intelligently made because neither he, nor his attorney, apparently, understood fully whether a deadly weapon enhancement should be applied against the Defendant in this case. Counsel clearly erred and committed a “gross error” in allowing Defendant to plead guilty to an invalid enhancement that greatly increased his sentence.

Defendant directs this Court to consider the language of the Nevada Supreme Court in *Bryant v. State, supra*: . . .

“Nevertheless we emphasize that a court reviewing the validity of a guilty plea should not hesitate to look at the entire record whenever necessary to determine whether a plea was entered knowingly and intelligently in light of all the facts and circumstances of the particular case. *Id.* 276

A review of the brief plea canvas by the court (A.A.21, 22) is insufficient to establish by itself his plea was knowing, intelligent and voluntary. The State’s claim that the record established Appellant was aware of the law is untrue. The record only establishes that defendant could

barely answer leading questions from the court
during the standard plea canvas. (A.A. 21, 22)

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IV. The District Court Erred When it Denied the Defendant an Adequate Evidentiary Hearing to Resolve Disputed Facts in this Case.

The State of Nevada in Respondent's Answering Brief claimed that the District Court did not abuse its discretion when it denied Appellant an evidentiary hearing on his Post Conviction Petition. (RAB p. 48-51) The State of Nevada in their Response actually attempted to cite *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994), to support their argument even though *Marshall* requires that a defendant be given an evidentiary hearing when he has alleged factual allegations not repelled by the record. *Id.* 609 (Emphasis added)

In this case Defendant has made numerous and specific allegations of error involving ineffective assistance of counsel. Although the State seeks to dispute, or challenge the Defendant's allegations, none of the allegations have yet been refuted by the record. Rather than try to refute the allegations in the Defendant's Petition in court, the State objected to any evidentiary hearing at all in this case. The State instead has chosen to rely on a "strong presumption" in favor of defense counsel acting reasonably and not with "sheer neglect." (RAB p. 50) *Id.* *Yarborough v.*

Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003).

Defendant respectfully submits “sheer neglect” (the State’s words) is a fair and accurate characterization of defense counsel’s action(s) in this case. Sheer neglect could have been easily shown with an evidentiary hearing.

V. The Cumulation of Errors Requires Reversal of Defendant’s Conviction.

The State in Respondent’s Answering Brief first claims given the ‘issue’ of cumulative error is a new issue or new claim of the Defendant which the Court should not consider for the first time on appeal. *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992); *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). (RAB p. 51)

These cases are not however applicable to Defendant’s case because considering the effect of the cumulation of errors is not the same thing as considering a new issue or claim on appeal. The State clearly misunderstood the doctrine of the cumulation of errors.

The State then argued that in this case, any cumulation of error was meritless, citing *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000), and *Ennis v. State*, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), for the proposition that any errors which occurred at trial were minimal in quantity and character. (RAB p. 53)

The State then suggested Nevada has a different standard for evaluating cumulative error in ineffective assistance of counsel cases, citing *McConnell v. State*, 125 Nev. 243, 250, 212 P.3d 307, 318 n. 17 (2009). (RAB p. 53) The State argued: “There was no errors in this case let alone cumulative error.” (RAB p. 53) This was incorrect. Counsel for the State simply chose to ignore the numerous errors of defense counsel raised by Petitioner in his Post Conviction Petition for Habeas Corpus.

Furthermore, each of the errors raised in Defendant’s Petition prejudiced the Defendant. It is respectfully submitted it is only logical that the greater number of individual errors, or failures by defense counsel which occurred, the more clearly was the ultimate issue in this case of whether or not Defendant was denied effective assistance of counsel as required by the Sixth Amendment.

It must be found that the accumulation of each of the individual errors of counsel yielded much stronger evidence of the violation of both prongs of *Strickland*, i.e., the showing that counsel was both ineffective and also that the ineffectiveness prejudiced the Defendant. *Strickland, Id.* 691

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CONCLUSION

For all the reasons raised in all prior pleadings, including the Opening Brief and in this Reply Brief, Defendant submits his counsel was ineffective under *Strickland* because he did not provide him effective assistance of counsel and Defendant was prejudiced thereby.

Defendant submits therefore his Petition for Writ of Habeas Corpus should have been granted and Defendant submits that his conviction should therefore be reversed.

DATED this 25th day of January, 2022.

Respectfully submitted,

//s// Terrence M. Jackson

Terrence M. Jackson, Esquire

terry.jackson.esq@gmail.com

Counsel for Appellant, *Davin Marvell Toney*

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CERTIFICATE OF COMPLIANCE

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

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

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

[X] Proportionately spaced, has a typeface of 14 points or more and contains 1,964 words, which is within the word limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of January, 2022.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQ.

Counsel for Appellant, *Davin M. Toney*

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 25th day of January, 2022, I served a copy of the foregoing: *Davin Marvell Toney's Reply to Respondent's Answering Brief* as follows:

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

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

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

TALEEN PANDUKHT
Chief Deputy District Attorney - Criminal
motions@clarkcountynvda.com

Davin M. Toney
ID # 1187296
S. D. C. C. - Box 208
Indian Springs, NV 89070-0208

By: /s/ Ila C. Wills

Assistant to Terrence M. Jackson, Esq.