

SUPREME COURT OF NEVADA

83690

Electronically Filed
May 09 2022 11:06 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 2

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1 to you about the deal?

2 A He didn't really. It was like it was between them what the deal
3 was for him to take.

4 Q Okay, so --

5 A Go to court or take the deal, but I don't remember the -- if you
6 know, no years, no nothing.

7 Q So you didn't know that until this day in court?

8 A Yes.

9 Q And how did you find out about it? Did Ms. Levy talk to you
10 about it then?

11 A When the judge announced that it was 10 years.

12 Q When the judge announced 10 years.

13 A Yes.

14 Q That was your understanding.

15 A Yes, that was my understanding and after when she took us to
16 the back room and told us, you know, this is what a 10 years -- when he
17 done his 10 years then you can -- he can go for probation. He's still
18 young like she used to say.

19 Q And who is this she in that sentence?

20 A Ms. Levy.

21 Q Ms. Levy. Thank you. So she told you that day --

22 A Mm-hmm.

23 Q -- 10 years and then probation?

24 A Yes.

25 Q What did you understand about the weapon enhancement?

1 A The weapon enhancement never -- I didn't never thought or
2 anything about it because it wasn't mentioned to me that he was going
3 to be charged more years for that.

4 Q Okay. And then how would you describe your relationship
5 with Ms. Levy? Was it -- was there a lot of conflict? Excuse me.

6 A Well, since the first day when I met her, I did ask her about the
7 situation of how my son's case was or how was it going? And I asked
8 her what do you think his -- how is it? Is it really bad or if I could get
9 another attorney that would help her -- would help him. So that's when
10 we were sitting in the table and she just like threw her card -- her card at
11 -- on top of the table and threw it in the top of the table. And she said,
12 well, where I work we defended Mayweather and we got him out through
13 what his problems were?

14 So since then I thought she, you know, that tension that she
15 didn't like me saying that -- that conversation what I told her. And every
16 time that I would call her and ask about how the situation in my son's
17 case was, it was like it's the same, it's the same. That's the only thing I
18 would hear from her.

19 Q Okay. So you would say it was not a good relationship?

20 A Not really.

21 Q Okay.

22 MR. HOFFMAN: All right. I have nothing further.

23 THE COURT: All right. Thank you very much.

24 Cross-examination?

25 MR. PALAL: No, Your Honor.

1 THE COURT: All right. Then -- I have no questions for you.
2 May we release this witness at this time?

3 MR. HOFFMAN: Yes.

4 THE COURT: All right. Thank you for being present. You
5 may step down and you're welcome to stay in the courtroom now that
6 you've already testified.

7 THE WITNESS: Okay. Can I add something? Is that okay or
8 no?

9 THE COURT: Maybe. I'll hear the question.

10 THE WITNESS: On another case -- well, that -- the same
11 thing is she had called me and told me that my son was gonna get
12 deported because he wasn't born here, that he was from Guatemala.

13 THE COURT: Okay. So I'm going to stop you there. There's
14 no question pending.

15 THE WITNESS: Oh, okay.

16 THE COURT: And that would be additional evidence being
17 received outside of the record.

18 THE WITNESS: Okay. Okay. It's fine.

19 THE COURT: Okay. So that's why I wanted to know what the
20 question was, but I can't consider that, okay.

21 THE WITNESS: Okay.

22 THE COURT: All right. You may step down.

23 THE WITNESS: Thank you.

24 THE COURT: Thank you very much.

25 Mr. Hoffman, you may call your next witness.

1 MR. HOFFMAN: Next, I would like to call Isabel Gomez.

2 THE COURT: Isabel Gomez. Thank you.

3 Good afternoon. Come on up, you're going to come up right
4 up to this chair here and if you can remain standing.

5 **ISABEL GOMEZ**

6 [having been called as a witness and being first duly sworn, testified as
7 follows:]

8 THE WITNESS: I do.

9 THE CLERK: Thank you. Please be seated. If you could
10 state and spell your name for the record, please.

11 THE WITNESS: Isabel Gomez.

12 THE COURT: And spell your name for us.

13 THE WITNESS: I-S-A-B-E-L, and then Gomez, G-O-M-E-Z.

14 THE COURT: All right. Thank you. And good afternoon,
15 again, just make sure you're speaking into that microphone and if we
16 have any questions, we'll follow up with you.

17 Mr. Hoffman, when you're ready.

18 MR. HOFFMAN: Thank you.

19 **DIRECT EXAMINATION**

20 BY MR. HOFFMAN:

21 Q So how are you related to Oscar Gomez?

22 A He's my brother.

23 Q He's your brother. And did you ever speak to his attorney
24 about his criminal case?

25 A No, that was mainly my mother and my sister.

1 Q Okay. Did you speak with her on the day that he was -- pled
2 guilty?

3 A Yes.

4 Q You did. Could you tell us about that -- well, did that
5 conversation involve the deal, the sentence structure?

6 A No. It was about my pregnancy.

7 Q It was about your pregnancy?

8 A Correct.

9 Q What -- was it a -- was it a professional comment to make?

10 A No, it was not.

11 Q Wasn't -- so did she tell you how long your brother was going
12 to do in prison?

13 A She said the max he would be doing is about 10 years and
14 then for the gun enhancement at least 2 to 4 years.

15 Q Okay. So she said there was a -- there was two separate
16 sentences?

17 A Correct.

18 Q Did she say that they would run together or separately?

19 A That I don't recall.

20 Q Okay.

21 MR. HOFFMAN: That's all I have, Your Honor. I'm done.

22 THE COURT: All right. Thank you very much.

23 Mr. Palal, cross-examination?

24 MR. PALAL: Yes.

25

1 **CROSS-EXAMINATION**

2 BY MR. PALAL:

3 Q So your understanding of the sentence that your brother was
4 going to get was that there was a 10 year sentence; is that right?

5 A Mm-hmm.

6 Q Is that a yes?

7 A Correct.

8 Q Okay.

9 A Sorry.

10 Q And then -- that's okay.

11 THE COURT: Thank you.

12 BY MR. PALAL:

13 Q And then there was a possible added time for the gun
14 enhancement?

15 A Correct.

16 Q Okay. In fact, you wrote a letter to try and help your brother
17 as part of his petition. Do you remember doing that?

18 A Correct.

19 MR. PALAL: In fact, Your Honor, it's already, I imagine, part
20 of the record because it's an attachment to the Defendant's petition, but
21 I want to mark it if that's okay.

22 THE COURT: That's fine. So this will be --

23 MR. HOFFMAN: Which -- C?

24 MR. PALAL: Exhibit C.

25 MR. HOFFMAN: Okay, thank you.

1 THE COURT: -- State's Exhibit 1 for purposes of the
2 evidentiary hearing. And I'm sorry, what was the exhibit number for the
3 attachment, it's C?

4 MR. PALAL: C.

5 THE COURT: C, that's right, okay, thank you.

6 MR. PALAL: And may I approach, Your Honor?

7 THE COURT: You may.

8 BY MR. PALAL:

9 Q And I wrote Exhibit C, but that's not you that wrote it, right?
10 That's not you.

11 A No.

12 Q Okay. But this is your letter; is that right?

13 A Correct.

14 Q All right. And I just want to go it over with you. You said his
15 understanding, as was ours, is that he would be sentenced for 10 years,
16 plus an added two for gun enhancement charges.

17 A Correct.

18 Q And is that what your understanding was?

19 A Correct.

20 Q And you say that it was his understanding and yours. When
21 you're saying his, you're talking about your brother?

22 A Correct.

23 Q How did you know what his understanding was?

24 A We -- when he's talking -- when we'd speak over the phone,
25 he does say the same thing we agreed on. That he was max 10 years,

1 plus the two for the gun enhancement.

2 Q Okay. So he was -- when he talked to you, he was aware that
3 the gun enhancement was consecutive? With plus -- the gun -- he had
4 to serve some time for the gun enhancement.

5 A Well, the -- we took it as it was included with the 10 because
6 she said it as a max of 12 years, 10 to 12 years.

7 Q Okay, so you took it as it would be part of the sentence, but it
8 was more than going to be -- it was going to be more than 10 years.

9 A Correct.

10 Q And that's what he was -- and you got that understanding from
11 your brother; is that right?

12 A Mm-hmm.

13 Q Is that a yes?

14 A Correct, yes, sorry.

15 Q Because you didn't talk to Ms. Levy and you really didn't talk
16 about any types of sentencing?

17 A No, I didn't.

18 MR. PALAL: State has nothing further.

19 THE COURT: All right. Thank you.

20 Mr. Hoffman, any redirect examination?

21 MR. HOFFMAN: Yeah, just a little bit.

22 **REDIRECT EXAMINATION**

23 BY MR. HOFFMAN:

24 Q I just want to make sure I have this clear. So Ms. Levy -- your
25 -- or, sorry, your understanding from your brother was that there was this

1 10 year sentence, 10 years plus sentence, for the murder and this 2
2 years plus sentence for the gun enhancement charges?

3 A Correct.

4 Q And you understood that those were to go one after the other
5 or together?

6 A That I'm not too sure, we -- I took it as, you know, as together.

7 Q Okay. So it wasn't really clear to you?

8 A Correct, no.

9 Q Did it seem like it was clear to him?

10 A It sounded like he was sure of what she was sentencing him
11 with.

12 Q Okay. But he didn't use any words like consecutive, he didn't
13 clearly express to you that it was going to be one after the other?

14 A No.

15 Q Okay.

16 MR. HOFFMAN: No further questions.

17 THE COURT: All right. And any recross based on the follow
18 up questions?

19 MR. PALAL: No, Your Honor. But before I submit, I would
20 like to move State's Exhibit 1 into evidence.

21 THE COURT: Any objection, Mr. Hoffman?

22 MR. HOFFMAN: What's that one again?

23 MR. PALAL: It's the letter. It's the Exhibit C from the petition.

24 MR. HOFFMAN: Oh, okay, Exhibit C. Yeah, no objection.

25 THE COURT: All right. This will be so admitted. And of

1 course it is also part of the petition, so I can consider it in my decision
2 here today.

3 **[STATE'S EXHIBIT 1 ADMITTED]**

4 THE COURT: Thank you, Ms. Gomez; I have no questions for
5 you. You may step down and you're welcome to stay in the courtroom
6 now that you have finished testifying.

7 THE WITNESS: Thank you.

8 THE COURT: Do you have another witness to call?

9 MR. HOFFMAN: Yes. Maria Gomez.

10 THE COURT: Maria Gomez. All right.

11 **MARIA GOMEZ**

12 [having been called as a witness and being first duly sworn, testified as
13 follows:]

14 THE CLERK: Thank you. Please be seated. If you could
15 state and spell your name for the record, please.

16 THE WITNESS: Question? He called me by Gomez. Does it
17 matter my license because my license is different?

18 THE COURT: Do you go by Gomez?

19 THE WITNESS: Well, I'm in the process of changing that, so,
20 yeah.

21 THE COURT: Okay. That's fine. You can give both names,
22 it's no problem. Maria is that common spelling?

23 THE WITNESS: Maria Castro.

24 THE COURT: Castro.

25 THE WITNESS: And it's Maria Gomez.

1 THE COURT: C-A-S-T-R-O?

2 THE WITNESS: Yes.

3 THE COURT: All right. And/or Gomez.

4 THE WITNESS: Yes.

5 THE COURT: That's fine. No problem.

6 So when you're ready, Mr. Hoffman, you may begin your
7 examination.

8 MR. HOFFMAN: Thank you.

9 **DIRECT EXAMINATION**

10 BY MR. HOFFMAN:

11 Q So what is your relationship with Oscar Gomez?

12 A I'm his older sister.

13 Q His older sister. Did you speak to his lawyer, Monti Levi about
14 his case?

15 A Yes.

16 Q Were you one of the primary people speaking to her about the
17 case?

18 A Yes.

19 Q Did you ever discuss potential sentences he would receive?

20 A Yes.

21 Q Okay. What was the content of those discussions?

22 A She said it was going to be 10 to 25, possibility of parole at
23 10. For the gun charges, she said 2 to 4 years. The maximum he would
24 do was 12 years, 12 to 14 years.

25 Q Okay. So were those --

1 THE COURT: I'm sorry. 12 to what?

2 THE WITNESS: 12 to 14 years.

3 THE COURT: 14. Okay.

4 I'm sorry to interrupt you. Go ahead.

5 MR. HOFFMAN: Oh, no, it's fine.

6 BY MR. HOFFMAN:

7 Q So were those 12 to 14 years, that's what she told you?

8 A Yeah, she said --

9 Q Were those specific words she used?

10 A Yeah, she said the max he would do would be 12 to 14
11 because he's still young.

12 Q Okay. So you're -- what was your understanding of when he
13 would get out?

14 A To me it was the 10 to 25 and maybe possibility of parole at
15 10.

16 Q Okay. Okay. So you viewed as just one kind of lump sentence;
17 is that fair?

18 A Yeah.

19 Q Did you understand that it was two different sentences?

20 A No. Well, you see the thing there was the gun enhancement,
21 they told me there was no evidence, so I didn't see why that would be
22 added to the sentence.

23 Q So then did you think that the 12 to 14 was just for the murder
24 charge?

25 A No. With the guns -- the gun enhancement if --

1 Q With the gun enhancement.

2 A Yes.

3 Q Okay.

4 A If there was that charge.

5 Q Okay.

6 THE COURT: I'm sorry. I want to make sure I have a clear
7 record here. So you said there was no evidence, but someone told you
8 that?

9 THE WITNESS: Her detective, her in --

10 THE COURT: Oh, her investigator.

11 THE WITNESS: -- investigator.

12 THE COURT: And when you're saying her, you mean Monti
13 Levy?

14 THE WITNESS: Okay. Thank you.

15 Go ahead, Mr. Hoffman.

16 BY MR. HOFFMAN:

17 Q Okay. Without going into specific examples, would you say
18 that your family had a good relationship with Ms. Levy or a difficult
19 relationship?

20 A Difficult.

21 Q Difficult. Okay.

22 MR. HOFFMAN: I have no further questions.

23 THE COURT: All right. Cross-examination.

24 MR. PALAL: Yes, Your Honor.

25

1 **CROSS-EXAMINATION**

2 BY MR. PALAL:

3 Q Ma'am, do you prefer Ms. Gomez or Ms. Castro?

4 A Ms. Gomez is fine.

5 Q Okay. Ms. Gomez, I just want to understand a little bit of what
6 you're saying. So your understanding was your brother was going to
7 plead guilty to second degree murder; is that fair?

8 A The second degree murder she didn't mention that to me.

9 Q Okay. So you didn't know exactly what he was pleading to?

10 A Yeah, because to her -- well, she had told me it was first
11 degree murder.

12 Q Okay.

13 A So that was my understanding.

14 Q Okay. So she had told you first degree murder?

15 A Mm-hmm.

16 Q Is that a yes?

17 A Yes. Sorry.

18 Q And your understanding was when the plea was done, he
19 would have to do 10 years, 10 to 25 years; is that right?

20 A Yes.

21 Q Okay. And then he would have to do an additional 2 or 4
22 years?

23 A Yes.

24 Q So he would probably -- he'd be up for parole around 12 or 14
25 years.

1 A No, that's what I didn't understand.

2 Q Oh, so you didn't understand exactly how it was all going to
3 work?

4 A No, not -- after the 10 years, no, because she said the parole
5 would be at 10.

6 Q Okay.

7 A So that's where I got confused and she didn't explain the rest.

8 Q Okay. So you didn't understand, but you did think he -- like
9 there was the additional 2 or 4 years?

10 A Yes.

11 Q Okay. And that's -- and then you had some questions about
12 the gun enhancement because you didn't think there -- you were told
13 there wasn't any evidence of a gun.

14 A Yes.

15 Q Okay.

16 MR. PALAL: All right. That's all I have, thank you.

17 THE COURT: All right. Thank you.

18 Any redirect examination?

19 MR. HOFFMAN: No, thank you.

20 THE COURT: All right. Thank you very much.

21 I don't have any questions for you, so you may step down.

22 And you're welcome to stay in the courtroom as you have now testified.

23 Mr. Hoffman, do you have any additional witnesses to call?

24 MR. HOFFMAN: No, Your Honor.

25 THE COURT: All right. Well, I'll briefly -- I've read all the

1 briefing and I've heard the evidence here today. I'll hear brief argument.
2 I'll start with Mr. Hoffman. This is your motion.

3 MR. HOFFMAN: Yes, Your Honor. So basically the theory
4 that we have here is that Ms. Levy did a good job in most respects. Like
5 she said, she's been doing this for a long time, but I -- there were some
6 areas where they disagreed about what the conversation was and what
7 happened. And our argument is that part of this was due to she's just
8 filling in the blanks of her memory with how she usually does it; she
9 usually does a good job, so she remembered doing a good job this time.

10 Part of it also I think they had a very difficult relationship with
11 Mr. Gomez's family, there were some comments that Ms. Levy made
12 that, you know, were eluded to and referenced in the letter. That's the
13 State's Exhibit 1/Exhibit C. And so the other, kind of, point I would make
14 is that I think Ms. Levy was sort of very eager to be done with this and
15 just, sort of, didn't cross all of her T's and dot all of her I's in explaining
16 the offer to Mr. Gomez.

17 And, specifically, it was this question of was it consecutive, was
18 it concurrent, how did he understand that? Like she said she had to
19 explain it to him a lot of times, he had never been in the prison system
20 before; he didn't have a good education. He -- she should have done a
21 better job of making sure that he understood the difference between
22 consecutive and concurrent. I know that's sort of a fine point in what was
23 otherwise mostly good work from her, but I think it was unfortunately a
24 very crucial point that he did not have get.

25 And so that is ineffective assistance of counsel and I'd ask the

1 Court to vacate on that basis.

2 THE COURT: Let me ask you this question, Mr. Hoffman,
3 understanding the arguments and then the theory that you're advancing.
4 How do I rectify that theory with the record of the discussions and the
5 actual plea itself that explains the consequences of the plea?

6 MR. HOFFMAN: So I think like Mr. Gomez said, he felt very
7 pressured, he felt like he had to rush through it. He, you know, -- the
8 Judge asked him 20 or 30 questions and he just had to say, yes, I
9 understand to each of them. I would argue that that wasn't really a
10 situation that would produce actual understanding on his point. You can
11 see if you look at the record that, like, literally Mr. Palal had to run up
12 and get a copy of the guilty plea agreement and then he had, you know,
13 like, I think he just didn't have a lot of time to process it and actually
14 understand it.

15 THE COURT: Okay. All right. Anything else you would like
16 to argue?

17 MR. HOFFMAN: No, Your Honor.

18 THE COURT: Thank you.

19 Mr. Palal.

20 MR. PALAL: Yes, Your Honor, I'm not going to belabor the
21 point, but there's a few points I would like to make. I think what the
22 transcripts reflect is October 17th of 2017; an offer was made, put on the
23 record, second with use -- second degree murder with use of a deadly
24 weapon. So while there's this implication, you know, some kind of rush
25 to understand this deal, this isn't a situation where the deal changed,

1 which sometimes this Court I'm sure has seen. You're at calendar call,
2 there's some tweaks to a deal in order to get a deal down prior to trial.

3 In this instance, the offer on October 17th, 2017, was the same
4 offer on April 19th, 2018. So we're talking about six months with the
5 same offer standing. So I don't think it's plausible to say that there was
6 no time to consider what the deal was. I mean, there may have been
7 pressure because, hey, look, we're two days before trial and ultimately
8 you have to make a decision, but that decision wasn't brought to him on
9 that day, that decision was six months in the making.

10 This Court already mentioned reading the transcript. My
11 interpretation of the transcript is very early on Judge Adair -- so before
12 the GPA even arrives, Judge Adair canvases the Defendant on what the
13 ranges of possibilities are. That's -- what I reference was on page seven
14 of the April 19th, 2018 transcript, is where she goes over the time ranges
15 and is specific, right, in terms a person can understand. The least
16 amount of time I can give you on the bottom end is 11 years; the most
17 amount of time I could give you on the top end is 18 years. He indicates
18 he understands. And this is very early in the canvas, so this isn't after
19 having waived all his constitutional rights, all the pro-formal language
20 that this Court has to go through every time it enters a plea.

21 And then -- so then -- and that hearing gets trailed and that on
22 page ten you'll see, the hearing gets trailed at 9:46 a.m. and it's
23 resumed at 10:09 a.m. And that was, as defense counsel appropriately
24 brings up, was the time that we were typing up the GPA, but the
25 understanding of the sentence structure was discussed prior to that.

1 And then he has another out, right, because then he's -- after
2 the canvas is given about the sentence structure, there's 25 minutes.
3 He can decide not to sign the GPA at that point, he can decide during
4 the canvas, subsequent canvas, and say I'm not pleading guilty. So it's
5 not -- these questions didn't have -- didn't happen consecutively.
6 There's a 25 minute break where he could have just said, no, I'm feeling
7 pressure or, no, I don't want this deal.

8 The last thing I want to talk about is what happened today,
9 which is -- I understand defense counsel's argument that Ms. Levy is
10 filling in the blanks because what her normal practice is versus what
11 happened specifically here. And in some instances, in these types of
12 hearings, that's true. But Ms. Levy appeared to have -- the record I think
13 will reflect that Ms. Levy had a very specific recollection of this client
14 because of, as Mr. Hoffman brings up, his lack of criminal history that
15 she -- Ms. Levy said, she thought it was very important to review the
16 sentencing ranges of him and she said in her words, it's the most she's
17 gone over sentencing ranges with any client in her 19 years of
18 experience. So that phrasing, I think, belies any notion that this is filling
19 in the blanks, to -- I think clearly to that is an independent recollection.

20 And the very last thing I'll bring up, Your Honor, is that while
21 Mr. Gomez sits here and says, you know, he was -- has absolute
22 certainty that there was 10 years on the bottom, even his own witnesses
23 lack that certainty, right. So I don't think there's any -- the record shows
24 that there's no certainty when it comes to that. In fact the opposite,
25 Ms. Levy says it's the opposite. The other witnesses say, no, we do not

1 indicate that 10 years was a certainty on the bottom, quite the contrary.

2 Now, the range may not be exactly 18, but certainly it's clear
3 that there was an understanding that it's beyond that. So unless this
4 Court has any further inquiry for the State, I'll submit.

5 THE COURT: I don't. I don't have any inquiry at this time.
6 So I would like to consider the testimony presented here today and,
7 again, go back and review the information provided through the petition.

8 So the family understands, I read, I prepare, I then go back
9 and re-read before I make any decision on matters such as this and then
10 I'll issue a minute order with my decision. I'm going to place this on my
11 chamber's calendar -- actually, no -- yeah, I'm going to set this on for my
12 -- actually, I'll set it on a regular Friday calendar.

13 Mr. Hoffman, if Mr. Gomez wants to be transported for
14 purposes of that decision, he's welcome to or I can waive his presence
15 for purposes of a decision and that'll be on Friday, September --
16 actually, I have another decision due on the ninth. So I'm going to issue
17 my decision on or -- actually, on September 17th, 1:30 p.m. This will be
18 set for decision.

19 Again, Mr. Gomez can be brought down or he can -- his
20 presence can be waived and I'll pronounce my decision on the record
21 and Mr. Hoffman can advise the family or they're welcome to come as
22 well. And you'll also have the option of attending via BlueJeans, which
23 is the online system that the attorney testified to as well. So you'll have
24 some options. All right.

25 Anything else we need to address this afternoon?

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MR. PALAL: Nothing from the State, Your Honor.

THE COURT: Okay. All right. Thank you, all, very much.
Take care and safe travels to the family.

Mr. Gomez, you take care, all right.

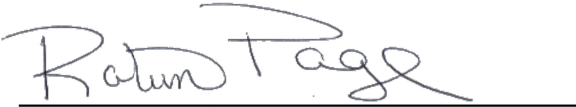
THE DEFENDANT: Thank you.

THE COURT: Thank you.

[Proceeding concluded at 12:46 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. Please note: Technical glitches in the BlueJeans audio/video, which resulted in distortion and/or audio cutting out completely were experienced and are reflected in the transcript.



Robin Page
Court Recorder/Transcriber

Writ of Habeas Corpus

COURT MINUTES

September 17, 2021

A-20-815035-W Oscar Gomez, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

September 17, 2021 01:30 PM Decision

HEARD BY: Silva, Cristina D. COURTROOM: RJC Courtroom 11B

COURT CLERK: Schlitz, Kory

RECORDER: Villani, Gina

REPORTER:

PARTIES PRESENT:

James I. Hoffman

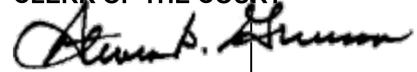
Attorney for Plaintiff

JOURNAL ENTRIES

Defendant not present and in custody in the Nevada Department of Corrections; Deputy District Attorney Michelle Fleck present on behalf of the State.

COURT ORDERED, Defendant's presence WAIVED as he requested not to be transported for the hearing. COURT STATED a hearing was conducted regarding the Petition for Writ of Habeas Corpus, and the Court heard testimony in regards to whether the Defendant understood the terms of his negotiations, specifically the consecutive time to follow the second with use, and consecutive time with regards to the deadly weapon enhancement. COURT FURTHER STATED there was testimony from his prior attorney Monti Levy who testified she visited the Defendant over twenty times, discussed the sentence with the Defendant multiple times, and discussed sentencing ranges, adding she testified she wrote down the sentencing ranges in order to explain the consequences of the plea, and the explanation of the deadly weapon, and the consequences of the enhancement. COURT ADDITIONALLY STATED there was representations there was not a good relationship between Ms. Levy and the Defendant's family, however it did not impact her conveyance of offer; adding testimony was heard from Defendant, who testified Ms. Levy did not explain what the deadly weapon enhancement meant, and what it could run consecutive or concurrent, adding the sentence was no explained to Defendant. COURT ORDERED, Post Conviction Petition for Writ of Habeas Corpus DENIED, and FINDS Ms. Levy's testimony to be credible, that the sentence and the consequences of the sentence were explained to the Defendant, not only prior to change of plea, however by Mr. Palal as well in terms of how the sentences would run. Mr. Hoffman stated the Defendant filed three Post Conviction Petitions and requested the Court include their rulings on the other aspects of the Petition when they prepare the order, not just regarding the evidentiary hearing.

NDC



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ATTORNEY FOR OSCAR GOMEZ

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

OSCAR GOMEZ,

Defendant

Case No.: A-20-815035-W
(C-16-316959-1)

Department IX

NOTICE OF APPEAL

Notice is hereby given that OSCAR GOMEZ, by and through his
counsel JIM HOFFMAN, appeals the denial of his PCR petitions orally announced
but not yet reduced to writing by the District Court on September 17, 2021.

DATED: October 21, 2021

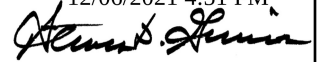
/s/ Jim Hoffman

JIM HOFFMAN, ESQ.

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DATED: October 21, 2021

JIM HOFFMAN, ESQ.


CLERK OF THE COURT

1 DECN
Judge Cristina D. Silva
2 Eighth Judicial District Court
Department IX
3 Regional Justice Center
200 Lewis Avenue
4 Las Vegas, Nevada 89155

5 EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

6 OSCAR GOMEZ,

7 Petitioner,

8 -vs-

9 STATE OF NEVADA,

10 Respondent.

CASE NO: A-20-815035-W

DEPT NO: IX

11
12 DECISION

13 On September 17, 2021, the Court orally pronounced its decision denying Omar Gomez's
14 Post-Conviction Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities ¹
15 (hereinafter referred to generally as the "Petition"). The Court hereby issues this written Order
16 reflecting the Court's decision.

17 I. Summary of Facts and Relevant Procedural History

18 As a threshold matter, the Court adopts the summary of facts set forth in the Pre-Sentence
19 Investigation report. *See* PSR at 4.

20 On April 19, 2018, Petitioner pleaded guilty pursuant to a plea agreement to Murder (Second
21 Degree) With Use of a Deadly Weapon. The State of Nevada retained the full right to argue at
22 sentencing. *See* Guilty Plea Agreement ("GPA") at 1. The GPA set forth the potential penalties the
23 Petitioner could face as a consequence of his plea. *Id.* at 2. The Defendant was sentenced on July 14,

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25 ¹ Mr. Gomez filed the Memorandum of Points and Authorities as a supplement to his Post-Conviction Petition for Writ of Habeas Corpus

1 2018. During sentencing, the State of Nevada asked for the maximum potential sentence, this is 10 –
2 life followed by another 8 – 20 for the deadly weapon enhancement. *See* Jul. 14, 2018 Sentencing
3 Transcript at 2.

4 On June 14, 2018, Petitioner filed a Notice of Appeal in the underlying case. On May 15, 2019,
5 the Nevada Court of Appeals affirmed Petitioner's Judgement of Conviction. Remittur issued on
6 June 20, 2019.²

7 On May 14, 2020, Petitioner filed, pro per, a post-conviction writ of habeas corpus. In sum,
8 Petitioner set forth four grounds for post-conviction relief. First, he argued that his guilty plea was
9 invalid due to counsel's failure to investigate the case. *See generally* PWHC at 8. Second, Mr. Gomez
10 argues that his guilty plea is invalid due to counsel's failure to fully explain his guilty plea
11 agreement. *Id.* at 10. Third, Petitioner argued his guilty plea was the product of coercion at the
12 hands of his attorney's actions, or lack thereof. *Id.* at 24. Fourth and related to the second ground set
13 forth above, Petitioner finally claims that counsel was ineffective for failing to file a presentence
14 Motion to Withdraw Guilty Plea. *Id.* at 30-31. The Petition requested an evidentiary hearing to
15 address the allegations set forth therein.

16 On October 13, 2020, Judge Valerie Adair issued a minute order advising an evidentiary
17 hearing would be scheduled on the sole issue of whether counsel failed to inform Mr. Gomez that he
18 faced consecutive time for the deadly weapon enhancement. A review of the docket reveals due to
19 transport and remote appearance issues, an evidentiary hearing on that issue did not occur in 2020.
20 This Court appointed counsel to assist Mr. Gomez in March of 2021. ³ There were several attempts
21 to schedule the evidentiary hearing throughout 2021, but factors including the Petitioner's desire to
22 appear in-person for the hearing, caused additional delay. On August 20, 2021, the Court held the
23 evidentiary hearing. Mr. Gomez was present for the hearing via BlueJeans video-conferencing from
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25 ² *See Gomez v. State* Case No. 76487.

26 ³ This Court was reassigned this matter following Judge Adair's retirement in January of 2021.

1 the Clark County Detention Center for the hearing. The Court heard testimony from Mr. Gomez,
2 Mr. Gomez's former attorney, Monti Levy, Mr. Gomez's mother, and Mr. Gomez's sister. The
3 following is a summary of the testimony from the evidentiary hearing.

4 **a. Monti Levy's Testimony**

5 Monti Levy has been an attorney for almost 19 years. Transcript (hereinafter "T.") at 7; 26.
6 She has spent almost her entire career practicing criminal law. *Id.* Ms. Levy was appointed to Mr.
7 Gomez's case sometime in 2016. *Id.* She met with the petitioner numerous times during the time she
8 represented him, noting she visited with the Petitioner over 20 times between the time she was
9 appointed to time Gomez was sentenced. T. at 8. She recalled numerous meetings during which she
10 met with the Petitioner either with investigator or with another attorney from her office. *Id.* Ms.
11 Levy noted she met with the Petitioner more times that she had with any other defendant during
12 her career. T. at 23-24. During the course of her representation, she received plea offers from the
13 State, which she conveyed to the Petitioner. *See generally* T. at 10-13. She specifically testified
14 regarding reviewing an offer within after October of 2017, during which she went over potential
15 sentencing ranges, including the 40% rule, and that she would quiz the Petitioner to make sure he
16 understood the potential consequences of accepting the offer. T. at 10-11; 18; 22-23; 27. Ms. Levy also
17 testified she discussed the potential defenses with Petitioner, the "best" argument they could
18 present if the matter proceeded to trial, and the possible outcomes if convicted at trial. *See generally*
19 T. at 14-18; 20-22. To the best of Ms. Levy's recollection, she was prepared to announce ready for
20 trial at calendar call, but Petitioner changed his mind and accepted the State's offer. T. at 19. Ms.
21 Levy testified that the Petitioner "absolutely understood" the terms of the plea agreement. T. at 23-
22 24. Ms. Levy testified Mr. Gomez has been going back and forth on whether or not to accept the
23 State's offer. T. at 24-25. She further testified that she and the prosecutor discussed the terms of the
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1 plea with the Defendant in open court. T. at 25. Last, she noted that there was never a question
2 about consecutive time. *Id.*

3 **b. Oscar Gomez's Testimony**

4 Mr. Gomez testified on his own behalf during the evidentiary hearing. Mr. Gomez agreed
5 that Ms. Levy had met with him multiple times and that they had discussed a range of sentences. T.
6 at 33-34. He testified that they discussed the potential sentence range for a plea to and 2 degree
7 murder with use a deadly woman charge, noting it was either a 10 – 25 year sentence, or 10 to life. T.
8 at 34. He also testified he knew there was an enhancement for the deadly weapon enhancement. T.
9 at 34. Mr. Gomez's testified Ms. Levy did not explain that the weapon's enhancement court run
10 consecutive or concurrent. T. at 34. He further testified he that he would just have to do 10 years and
11 then he would be eligible for "to go out on the streets." T. at 35. Petitioner recalled talking to the
12 prosecutor about the offer in his case, and that he asked the prosecutor if he was willing to go down
13 in terms of the offer, to which the prosecutor declined. T. at 37. Mr. Gomez denied that Ms. Levy
14 ever quizzed him about sentencing ranges. T. at 36-37. Petitioner stated that he had a sentence of "10
15 years" in his head. T. at 39. He also testified he recalled that he could get 11 years at the bottom of his
16 sentence. T. at 38. Towards the end of his testimony, he stated he really did not know what was
17 going on. *Id.*

18 **c. Laura Olivas' Testimony**

19 Laura Olivas is the Petitioner's mother. T. at 40. Ms. Olivas testified she was involved in
20 speaking with Mr. Gomez's attorney since the first day. T. at 41. Ms. Olivas testified that prior to
21 sentencing Ms. Levy never brought up what sort of sentence Mr. Gomez might be facing. *Id.*
22 According to Ms. Olivas the first time she brought up a potential sentence as at sentencing. *Id.* Ms.
23 Olivas thought Mr. Gomez testified would be sentenced to a term of 10 years and then he would
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1 receive probation.⁴ T. at 41; 42. She admitted that Mr. Gomez did not discuss the terms of the plea
2 agreement with her. T. at 42. Ms. Gomez further testified that the weapons enhancement was not
3 discussed with her. T. at 43.

4 d Isabel Gomez's Testimony

5 Isabel Gomez is Petitioner's sister. T. at 45. Isabel testified she did not speak with Ms. Levy
6 until the day of sentencing. *Id.* She further testified Ms. Levy told her Oscar would receive a "max"
7 sentence of 10 years and at least 2 to 4 years for the gun enhancement. T. at 45. Isabel agreed that
8 Ms. Levy conveyed two separate sentences. *Id.* She could not recall if Ms. Levy explained whether
9 the time would run consecutively or concurrently. *Id.* During cross-examination, Isabel agreed Ms.
10 Levy explained there would be a minimum of a 10 year sentence with possible additional time for
11 the gun enhancement. T. at 47. The State of Nevada introduced a letter written by Isabel that
12 discussed Mr. Gomez's potential sentence. T. at 48; *see also* State's Exhibit C. The letter explained it
13 was her understanding that Mr. Gomez would be sentenced to 10 years, plus an added two years for
14 gun enhancement charges. *Id.* Isabel testified both she and Mr. Gomez believed he would be
15 sentenced to 10 years followed by an additional two years in prison. T. at 48-49.

16 e. Maria Gomez's Testimony

17 Ms. Gomez, who also goes by Ms. Castro, is the Petitioner's older sister. T. at 52. Maria
18 testified that she was one of the primary persons who spoke with Ms. Levy about Petitioner's case.
19 *Id.* Maria also testified that she and Ms. Levy did discuss potential sentences Mr. Gomez could
20 receive. *Id.* One potential was "10 – 25, possibility of parole at 10" and for the gun charges Ms. Levy
21 told her he could receive "2 to 4 years." *Id.* She further testified that the maximum Petitioner could
22 receive was "12-14 years." *Id.*; T. at 53. Maria stated that understood to sentence would be 10 to 25
23 years with the possibility of parole. T. at 53. When asked about the possibility of a second sentence
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25 ⁴ The Court interprets the use of the word "probation" to mean parole.
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1 for the gun enhancement, Maria testified she was told there was no evidence about the
2 enhancement so she did not why that would be added to his sentence. *Id.* During cross-examination,
3 Maria testified it was her understanding that his plea would require him to do 10 to 25 years, and
4 then an additional 2-4 years. *Id.* at 54. She also testified she did not understand that he would up for
5 parole around 12 or 14 years. *Id.* at 55-56.

6 III. Applicable Law

7 A claim of ineffective assistance of counsel presents a mixed question of law and fact.
8 *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d
9 1102, 1107 (1996). To establish that counsel's assistance was ineffective, a petitioner must satisfy a
10 two-part test. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Warden v. Lyons*, 100 Nev. 430, 683 P.2d
11 504 (1984) (adopting the two-part test). First, a petitioner must demonstrate that his trial or
12 appellate counsel's performance was deficient. Specifically, a petitioner must show that counsel's
13 petition fell below an objective standard of reasonableness. Second, the petitioner must show
14 prejudice as a result of that deficient performance. Both parts of the test do not need to be
15 considered if an insufficient showing is made on either one. *Strickland*, 466 U.S. at 697, 104 S. Ct. at
16 2069.

17 Where the claim involves trial counsel, prejudice is demonstrated by showing that, but for
18 trial counsel's errors, there is a reasonable probability that the result of the proceedings would have
19 been different. *Id.* at 694; *See Love*, 109 Nev. at 1139, 865 P.2d at 323. A "reasonable probability" is a
20 probability sufficient to undermine confidence in the outcome of trial. *Id.* at 687-89, 694; *see also*
21 *Dawson v. State*, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). There is a strong presumption that
22 counsel's performance was reasonable and fell within "the wide range of reasonable professional
23 assistance." *See United States v. Aguirre*, 912 F.2d 555, 560 (2nd Cir. 1990), citing *Strickland*, 466 U.S. at
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1 689. The defendant carries the affirmative burden of establishing prejudice. *Strickland v. Washington*,
2 466 U.S. 668, 693, 104 S.Ct. 2052, 2067–68 (1984).

3 Nevada applies the “reasonably effective assistance” standard articulated in *Strickland v.*
4 *Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), to determine whether a defendant received effective
5 assistance of counsel. *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Specifically, a
6 defendant who challenges the adequacy of counsel’s representation must prove that he was denied
7 reasonably effective assistance by satisfying a two-pronged test. *Strickland*, 466 U.S. at 686–87, 104
8 S.Ct. at 2063–64; *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

9 Under the *Strickland* test, the defendant must first show that his counsel’s representation fell
10 below an objective standard of reasonableness. Then, the defendant must show that but for
11 counsel’s errors, there is a reasonable probability that the result of the proceedings would have been
12 different. *Strickland*, 466 U.S. at 687–88, 104 S.Ct. at 2065. Counsel cannot be deemed ineffective for
13 failing to make futile objections, file futile motions, or for failing to make futile arguments. *Ennis v.*
14 *State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Moreover, this Court “need not consider both
15 prongs of the test if the defendant makes an insufficient showing on either one.” *Molina v. State*, 120
16 Nev. 185, 190, 87 P.3d 533, 537 (2004).

17 In considering whether trial counsel was effective, the Court must determine whether
18 counsel made a “sufficient inquiry into the information . . . pertinent to his client’s case.” *Doleman v.*
19 *State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (citing *Strickland*, 466 U.S. at 690–91, 104 S.Ct. at
20 2066). Then, the Court will consider whether counsel made “a reasonable strategic decision on how
21 to proceed with his client’s case.” *Id.* Counsel’s strategic decision is a “tactical” decision and will be
22 “virtually unchallengeable absent extraordinary circumstances.” *Id.*; see also *Howard v. State*, 106 Nev.
23 713, 722, 800 P.2d 175, 180 (1990); *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

1 Even if a defendant can demonstrate that his counsel's representation fell below an objective
2 standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability
3 that, but for counsel's errors, the result of the trial would have been different. *McNelson v. State*, 115
4 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "The defendant carries the affirmative burden of
5 establishing prejudice." *Riley v. State*, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994). "A reasonable
6 probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S.
7 at 694, 104 S.Ct. at 2068. "[O]verwhelming evidence of guilt is relevant to the question of whether a
8 client had ineffective counsel." *Ford v. State*, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) (citing
9 *Strickland*, 466 U.S. at 697, 10 S.Ct. at 2069).

10 Importantly, when raising a *Strickland* claim, the defendant bears the burden to demonstrate
11 the underlying facts by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d
12 25, 33 (2004). Moreover, claims asserted in a petition for post-conviction relief must be supported
13 with specific factual allegations, which if true, would entitle the petitioner to relief. *Hargrove v. State*,
14 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" or "naked" allegations are not sufficient, nor are
15 those belied and repelled by the record. *Id.*

17 Additionally, in reference to appellate counsel, there is a strong presumption that appellate
18 counsel's performance was reasonable and fell within "the wide range of reasonable professional
19 assistance." See *United States v. Aguirre*, 912 F.2d 555, 560 (2nd Cir. 1990); citing *Strickland*, 466 U.S. at
20 689, 104 S.Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-
21 prong test set forth by *Strickland*. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order
22 to satisfy *Strickland*'s second prong, the defendant must show that the omitted issue would have
23 had a reasonable probability of success on appeal. *Id.*

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1 IV. Analysis

2 Mr. Gomez fails to demonstrate that trial counsel's representation fell below an objective
3 standard of reasonableness. Ms. Levy testified that she discussed the various offers in this case to
4 Mr. Gomez multiple times. T. at 10. Further, she testified during the time she represented him she
5 would review potential sentencing ranges with him. *Id.* She testified that she explained the
6 definition of a deadly weapon as it applied to the case against Mr. Gomez, and the fact a deadly
7 weapon enhancement carried a consecutive sentence. *Id.* at 11. Not only did she explain the offer he
8 ultimately accepted, which included the consecutive time for the deadly weapon enhancement, she
9 testified other persons from her law office also explained the offer to him. *Id.* According to Ms.
10 Levy, there was no question that Mr. Gomez understood the terms of the plea and the consequences
11 thereof.

12 Ms. Levy's testimony is supported by witnesses Mr. Gomez called during the evidentiary
13 hearing. Isabel and Maria Gomez both testified that the sentence for the murder charge would be at
14 least 10 years, and both testified they understood there was a gun enhancement of at least two years.
15 *Id.* at 19. The understanding that there would be an enhancement for gun was evidenced further by
16 the letter written by Isabel. That letter, dated December 29, 2020, states that wrote it was Mr.
17 Gomez well as his family's understanding that "he would be sentenced to ten years plus and [sic]
18 added two for gun enhancement charges; which would then grant him eligibility for parole." See
19 PWHC at Exhibit C.

20 The testimony of Ms. Levy, and Maria and Isabel Gomez, together undermines Mr. Gomez's
21 argument that he did not understand the terms of the plea, to include the consecutive time for the
22 deadly weapon enhancement. In fact, in a letter dated December 29, 2020, Isabel Gomez wrote it
23 was Mr. Gomez and his family's understanding "that he would be sentenced to ten years plus and
24 [sic] added two for gun enhancement charges; which would then grant him eligibility for parole."
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1 See PWHC at Exhibit C. Moreover, during Gomez's change of plea hearing, the Court specifically
2 advised him that the least amount of time he could be sentenced to at the bottom of the sentencing
3 range was 11 years:

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

6 STATE: That's right.

7 THE COURT: And state the penalty –

8 STATE : With a deadly weapon, yeah.

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

11 STATE: Yes, Your Honor. It would be either 10 to 25 or
12 10 to life on the underlying sentence with a consecutive 2 to 20 for the
13 deadly weapon enhancement.

14 MS. LEVY: One to 20.

15 STATE: One to 20.

16 THE COURT: So --

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

18 THE COURT: One to 20? They keep changing everything all the time.

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

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

23 DEFENDANT GOMEZ: I -- I understand.

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

26 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.

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

3 DEFENDANT GOMEZ: Okay.

4 THE COURT: Do you understand that?

5 DEFENDANT GOMEZ: Yes.

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

9 DEFENDANT GOMEZ: I understand.

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

11 DEFENDANT GOMEZ: Yes.

12 Transcript of Change of Plea at 6-8.

13 The evidence before the Court also demonstrates that trial counsel adequately and
14 reasonably investigated the case and discussed the potential outcomes with the Petitioner. "Where
15 counsel and the client in a criminal case clearly understand the evidence and the permutations of
16 proof and outcome, counsel is not required to unnecessarily exhaust all available public or private
17 resources." *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). However, an attorney must
18 reasonably investigate in preparing for trial or reasonably decide not to. *Strickland*, 466 U.S. at 691;
19 *Kirksey v. State*, 112 Nev. 980, 992, 923 P.2d 1102, 1110 (1996) (emphasis added). Defense counsel's
20 "particular decision not to investigate must be directly assessed for reasonableness in all the
21 circumstances." *Strickland*, 466 U.S. at 691. *Dawson v. State*, 108 Nev. at 117, 825 P.2d at 596 ("Strategic
22 choices made by counsel after thoroughly investigating the plausible options are almost
23 unchallengeable.").
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1 As a threshold matter, Mr. Gomez stated that Ms. Levy answered all of his questions
2 sufficiently, and that she and her co-counsel spent sufficient time reviewing the case and discovery
3 with him.

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

6 DEFENDANT GOMEZ: They did.

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

9 DEFENDANT GOMEZ: Yeah.

10 T. at 10.

11 Further, in the guilty plea agreement (“GPA”) he signed, Mr. Gomez acknowledged that he
12 “discussed with my attorney any possible defenses, defense strategies and circumstances which
13 might be in my favor” and that he was “satisfied with the services provided by my attorney.” GPA at
14 4, 5. During the evidentiary hearing, Ms. Levy also testified that she discussed the potential defenses
15 that could be raised if the case proceeded to trial. But in the Petition, Mr. Gomez admits that he was
16 present during the shooting itself, and the shooting was on video. It calls into question the need to
17 investigate an “alternate suspect,” and Mr. Gomez provides no explanation how the investigation
18 into an alternate suspect would have been successful.⁵ Mr. Gomez fails to explain how challenging
19 the photo line-up would have changed the outcome of this case given he was identified and
20 captured on video committing the murder. PWHC at 12.

21 There is no evidence to support Mr. Gomez’s claims that he was coerced into accepting the
22 plea or that his attorney abandoned him during the time he decided to enter into the GPA. Mr.
23 Gomez acknowledged that he was entering into the guilty plea both freely and voluntarily, and after

24 ⁵ Mr. Gomez did not raise this issue on appeal and is now considered waived for the purposes of this petition. *See Bolden*
25 *v. State*, 99 Nev. 181, 659 P.2d 886 (1983) (“a claim that could have been raised on direct appeal from a judgment of
26 conviction, but was not, is considered waived for purposes of a subsequent proceeding for post-conviction relief”);

1 consultation with his attorney, during the plea hearing and when signing of the GPA. *See* GPA at 5.
2 (“I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting
3 under duress or coercion...”); T. at 11. Further, Mr. Gomez entered into the plea after discussing the
4 GPA and other matters with his counsel on several occasions, and after he had time to consider
5 whether or not to accept it and to discuss potential defenses at the calendar call on April 19, 2018.

6 Finally, Mr. Gomez alleges that his counsel was ineffective for failing to file a motion to
7 withdraw his guilty plea. There is no evidence that he requested Ms. Levy to file motion before
8 sentencing in this case. At most, Mr. Gomez’s provided evidence that he made such a request after
9 he was sentenced. In an undated and unaddressed letter, Mr. Gomez wrote he wanted to withdraw
10 his plea. Mr. Gomez claims this letter was mailed to Ms. Levy. The Court approaches this letter
11 with extreme caution for a number of reasons. First, it is not dated or signed. And second, it is
12 unclear is how Mr. Gomez has a copy of this handwritten letter if it was mailed to Ms. Levy. Even if
13 the Court accepts the representations in the suspect letter as true, it would not support his
14 allegations that Ms. Levy was ineffective at the time he took the plea. The letter was allegedly
15 mailed *after* sentencing because it states he had been transferred to Arizona. The letter reflects regret
16 for entering into the plea, as well as bare, naked allegations he was hurried into doing so. This
17 suspect letter is insufficient to warrant relief. *See Hargrove v. State*, 100 Nev. 502, 686 P.2d 222, 225
18 (1984) (“bare” and “naked,” and are insufficient to warrant relief, as are those claims belied and
19 repelled by the record).

20 Finally, Mr. Gomez alleges that trial counsel was ineffective for never filing a direct appeal of
21 his Judgment of Conviction and was further ineffective for failing to challenge the terms of
22 restitution on direct appeal. *See* Memorandum of Points and Authorities at 12-13. On July 18, 2018,
23 appellate counsel filed a Notice of Appeal on behalf of Mr. Gomez. Mr. Gomez did not provide any
24 legal authority for the proposition that he was entitled to have any particular attorney file his direct
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1 appeal. *Id.* at 12-13. Therefore, Mr. Gomez cannot demonstrate he was prejudiced by trial counsel's
2 failure to file a notice of appeal on his behalf. Mr. Gomez's claim that appellate counsel was
3 ineffective for failing to challenge the terms of restitution in Mr. Gomez's Judgment of Conviction
4 also fails. Mr. Gomez cites no applicable authority to support his arguments that there is an error
5 with his judgment of conviction that warrant the relief he is seeking.

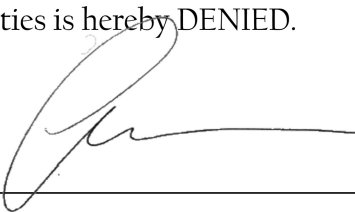
6 Related to his arguments regarding the alleged defects in his judgment of conviction, this
7 Court denies Mr. Gomez's requested relief based on his claim that he is subject to cruel and unusual
8 punishment based on the aforementioned defects. The Nevada Court of Appeals already addressed
9 Mr. Gomez's sentencing on direct appeal, noting he did not demonstrate his sentence was cruel and
10 unusual. See *Order of Affirmance*, filed May 15, 2019 (Dkt. No. 76487-COA) at 2-3. Further, this
11 allegation seems unrelated to trial counsel's performance, and therefore, falls outside the scope of
12 habeas proceedings. See NRS 34.810(1)(a).

13 Accordingly, Mr. Gomez did not demonstrate that the aforementioned claims had a
14 reasonable likelihood of success if it had been appealed. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. As
15 such, Petitioner did not meet his burden under *Strickland*.

16 **V. Conclusion**

17 Therefore, for the reasons set forth Omar Gomez's Post-Conviction Petition for Writ of
18 Habeas Corpus and Memorandum of Points and Authorities is hereby DENIED.

Dated this 6th day of December, 2021

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EC

22 **48A E35 EC78 9910**
23 **Cristina D. Silva**
24 **District Court Judge**

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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5
6 Oscar Gomez, Plaintiff(s)

CASE NO: A-20-815035-W

7 vs.

DEPT. NO. Department 9

8 State of Nevada, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Decision was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/6/2021

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