

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

Docket No. 86247

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Elizabeth A. Brown  
Clerk of Supreme Court

**OSCAR GOMEZ,**

**Petitioner-Appellant,**

**vs.**

**THE STATE OF NEVADA,**

**Respondent.**

Appeal from an Order Denying Post-Conviction Relief  
Eighth Judicial District Court, Clark County  
The Honorable Carli Kierny, District Judge

**APPELLANT'S REPLY BRIEF**

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## **ARGUMENT**

As discussed in the Opening Brief [“AOB”], Oscar Gomez’ constitutional rights were violated by the ineffective assistance of his trial counsel. Most notably, counsel failed to adequately explain the sentence structure that Oscar faced. She also prejudicially erred in failing to investigate, file pretrial motions, and file a motion to withdraw the plea that was requested by Oscar. In its Answering Brief [“Answer”] the State opposes these arguments. However, the State’s opposition rests on a number of flawed premises. Mr. Gomez respectfully asks the Court to overturn the district court’s findings and grant relief.

First, as discussed in the AOB, Oscar’s trial attorney did not explain his sentencing structure so that he could understand it. Specifically, she told him and his family that his sentences (for second degree murder and a deadly weapon enhancement) would run “together.” Oscar, a 22 year-old high school dropout who had no prior criminal history other than a marijuana misdemeanor, was not well-placed to parse this statement, or to infer that “together” meant “consecutive” instead of “concurrent.” If he had known about this difference he would not have pled guilty; failure to explain it so that he understood was ineffective assistance of counsel. AOB 4-9.

The State’s Answering Brief argues against this proposition. For instance, the State cites to Oscar’s sister Isabel, who testified that trial counsel told her the

sentence was “ten years, plus an additional sentence of two years.” Answer 19, *citing* Appellant’s Appendix [“PCR”] 253-54. The State also cites to Oscar’s other sister Maria, who testified that she believed his sentence would be 12 to 14 years. Answer 20, *citing* PCR 258-59.

These are both accurate statements of the sisters’ testimony, but they are not complete. While Isabel was testifying, the following colloquy took place:

Q I just want to make sure I have this clear. So Ms. Levy -- your -- or, sorry, your understanding from your brother was that there was this 10 year sentence, 10 years plus sentence, for the murder and this 2 years plus sentence for the gun enhancement charges?

A Correct.

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

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

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

A Correct, no. PCR 256-57.

Similarly, while Maria was testifying the following colloquy took place:

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

A Yeah, she said --

Q Were those specific words she used?

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

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

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

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

A Yeah. PCR 260.

Both sisters understood that there were two different sentences (as did Oscar). But Isabel testified that it wasn’t really clear to her whether the sentences

were consecutive or concurrent, and Maria explicitly testified that she believed Oscar's minimum sentence would be 10 years. This accords with the testimony of Oscar himself, and of his mother. The testimony of the sisters is evidence in support of Oscar's version of the conversations that he had with his counsel.

The AOB makes a number of other arguments, which the State also responds to in faulty ways. For instance, trial counsel failed to investigate a witness who identified Oscar as the shooter, while claiming that he was wearing a tank top (although he was actually wearing a sleeved shirt). AOB 11-12. The State responds that this inconsistency was too minor to constitute prejudice; it also argues that Oscar admitted to his counsel that he was the shooter, so again no prejudice could have existed. Answer 22-25.

The State fails to note the additional inconsistency in the witness' testimony – his police statement said the shooter was right-handed, but at the preliminary hearing he testified that the shooter was left-handed. Respondent's Appendix 10. These were only the inconsistencies that were immediately apparent from the initial proceedings; more could have been developed with further investigation. And the witness was not only an eyewitness but the friend of the deceased, who would have been central to the prosecution's case at trial; impeaching him would have been helpful and the failure to do so was prejudicial. Finally, even if Oscar privately admitted to his attorney that he was the shooter, that admission was not in

evidence before the court. Even knowing that Oscar was actually the shooter, effective counsel could have still pursued avenues to create reasonable doubt which were not actually pursued. The failure to do so was ineffective assistance of counsel.

The AOB also argues that counsel was ineffective in failing to move to suppress a shell casing found at Oscar's home, as well as failing to move to suppress an unduly suggestive lineup. AOB 11-12. The State's Answer totally ignores the lineup issue. As far as the shell casing, the State simultaneously argues that the shell casing would not have been suppressed because it was "highly likely" to be found relevant, and also that defense counsel did not need to suppress it because she could have just argued that the casing was not at all relevant to the jury. Answer 26-29.

This is contradictory – if the shell casing were obviously relevant, then it would be a foolish strategic choice for defense counsel to try and argue its irrelevance to the jury, or vice versa. The prejudice Mr. Gomez would have faced at trial is illustrated by the State's argument here – the shell casing (which was recovered at Oscar's house, miles away from the shooting, with no indication it came from the gun at issue) would have been improperly used by the State to try and smear Oscar as dangerous and guilty. Counsel should have knocked this bad evidence out at the beginning of the case, so that Oscar could make a fully

informed judgment about his options. Failure to suppress this evidence was ineffective assistance of counsel.

Finally, the AOB argues that trial counsel should have filed the motion to withdraw his plea that Oscar requested. AOB 13. The State's Answer asserts that there is no explanation of how the motion would have been meritorious, and further notes that the letter is unsigned, undated, and unaddressed, and therefore casts doubt on whether it was actually written or sent to counsel. Answer 29-30.

The motion to withdraw the plea would have been based on the grounds previously asserted in the instant petition and briefing. Oscar did not actually understand his sentencing exposure, and wanted to take the plea back once he learned what he was really facing. And while the State is correct that the letter was unsigned, undated, and unaddressed, it also concludes with Oscar asking "can you please file a motion for me to withdraw plea?" PCR 120. This supports the argument that the letter was written to his lawyer, the person who would have the ability to actually file a motion on his behalf. The failure to do so was ineffective assistance of counsel.

### **CONCLUSION**

Oscar Gomez did not want to plead guilty and did not sufficiently understand his sentencing structure. This rendered his plea involuntary and

constituted ineffective assistance of counsel in violation of his rights under the US and Nevada Constitutions. Given this, he respectfully asks the Court to vacate his conviction and remand for further proceedings.

Dated this 8<sup>th</sup> day of September, 2023

*/s/ Jim Hoffman*

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### **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface 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 **Microsoft Word 2010 in Times New Roman 14.**

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

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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 September 8, 2023

*/s/ Jim Hoffman*

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Jim Hoffman, Esq.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a copy of the foregoing Reply Brief to all persons registered for Electronic Filing or parties to the case, on September 8, 2023.

*/s/ Jim Hoffman*

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Jim Hoffman, Esq.