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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this case pursuant to NRAP 4(b) and NRS 177.015(3).

II. ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court under NRAP 17(a)(13) as it involves questions of first impression involving the United States Constitution or Nevada Constitutions due to the unique nature of the facts in this case, i.e.:

- the State signed a Guilty Plea Agreement, hereinafter “GPA,” with Appellant and then acted either negligently or in bad faith to prevent Appellant from performing that agreement;
- the district court did not allow Appellant to show a valid reason for nonperformance of the GPA;
- the district court failed to conduct any inquiry or investigation into the conflict of interest between Appellant and his attorney, letting a conflicted attorney represent Appellant through the sentencing hearing, rather than appointing independent counsel.

Furthermore, under NRAP 17(a)(14), this case raises matters of public importance in that the manner in which the State impedes the performance of a

criminal defendant under a GPA to the detriment of victims and their restitution. Thus, this case is raising “as a principle issue a question of statewide public importance...” and provides the Supreme Court with jurisdiction.

Given NRAP 17, jurisdiction over this case should be retained by the Nevada Supreme Court.

III. STATEMENT OF THE ISSUES

A. DID THE DISTRICT COURT ERR BY FAILING TO HOLD AN EVIDENTIARY HEARING OR INQUIRE INTO THE NATURE AND MATERIALITY OF THE ALLEGED BREACH OF THE GUILTY PLEA AGREEMENT?

B. DID THE DISTRICT COURT ERR BY DENYING APPELLANT’S MOTION TO WITHDRAW COUNSEL DUE TO AN UNWAIVEABLE CONCURRENT CONFLICT OF INTEREST?

IV. STATEMENT OF THE CASE

Appellant made the mistake of buying encumbered properties and selling them as-is to prospective buyers, *caveat emptor*. (See Appellant's Appendix, hereinafter "AA," at 122.) For that, Appellant was facing over a dozen criminal charges and accepted a plea to one of them and agreed to pay everything back. (Compare AA at 15-38 (Criminal Complaint), with AA at 97-99 (Information).)

After Appellant entered the GPA, the question of whether Appellant would receive probation depended on the payment of restitution to the accusers, unconflicted counsel, and a sober or dispassionate evaluation of the law and facts by the judge. However, Appellant was prevented from paying restitution by the State, had counsel with an unwaivable conflict of interest, and a judge that did not apply the proper law to this case.

Appellant was making good faith efforts to pay the restitution, but due to factors outside of his control, i.e., the actions of his codefendant, and factors within the control of the State, their placing a lien on the real property and failing to serve the civil complaint on Appellant such that he could stipulate to the taking of

the property by the State, Appellant was prevented from paying the restitution. Therefore, Appellant did not breach the GPA and the State should not have had the right to argue.

Although Appellant is entitled to unconflicted counsel and cannot waive this type of conflict, i.e., the clients are pointing the finger at the other for the failure to pay the restitution, the court permitted counsel to continue representing both based on a mistake of law. Appellant's counsel raised this issue before the court, but the court relied on the fact that they pay the restitution jointly and severally as a resolution of the conflict, without taking into account that Appellant needed a lawyer that could fully probe and offer the nature of the cofedendant's to the court for its consideration, i.e., why the codefendant was ordered to have no contact with Appellant and how that affected their ability to sell the property, etc. The court should have stayed the proceedings and at least evaluated the nature of the conflict and its impact on a full-throated defense of Appellant.

The key to Appellant getting a fair hearing commensurate with his actual culpability depended on his ability to pay restitution, neutralizing the testimony of the victims that could have been made whole. The court should have stayed the proceedings to allow Appellant to finish selling the property, making the victims whole and allowing Appellant a good faith chance at staying out of prison. However, Appellant was denied a fair sentencing hearing under the Due Process

Clause of the Fifth and Fourteenth Amendments to the United States Constitution before a neutral magistrate where the judge became angry, the State to breach the terms of the GPA, and Appellant complied in good faith with the terms of the GPA..

Appellant seeks to have a new sentencing hearing before a different judge in which he is permitted to continue to make good faith efforts, with the help of the State, to sell the property and distribute the funds to the victims.

V. FACTS AND PROCEDURAL HISTORY

Appellant made a huge mistake and took responsibility for selling the properties, but added that he “didn’t explain it correctly, I guess, what we were selling. We did transfer title to them. We did sell them the properties. It wasn’t as if we just took their money and ran and –.” (AA at 122.) Appellant essentially sold the properties as is and did not tell them that they were encumbered, as opposed to misrepresenting them as unencumbered. (See id.)

A. Civil Complaint for Forfeiture, A-16-744347-C

This case started in September, 2016, with a District Court Civil Complaint for Forfeiture of money and property, AA at 1-10, and Notice of Lis Pendens. (AA at 11-12.) The action was *in rem* and the State did not make Appellant a party to the lawsuit. (See AA at 2, 3.) The State acknowledged that Appellant,

along with Jessica Garcia, 1024 Santa Helena Trust and/or Parcelnomics, LLC, may have an ownership interest in the contested property. (Id. at 3.) According to the Civil Complaint, a search warrant had issued on Sep. 2, 2016 authorizing the seizure of \$6,616.04 from an account ending in 5085, and \$150,489.13 from an account ending in 9635. (Id. at 3.) The State failed to serve the Civil Complaint on Appellant or any interested party. (See id. at 142 (Order for Dismissal, A-16-744347-C) (Sep. 7, 2017). The State moved the court, ex parte, to reopen the case and that was granted. (See id. at 145-148 (Ex Parte Motion and Order Reopening Case and Staying Proceedings).)

B. Criminal Complaint, Indictment and Guilty Plea Agreement

The first Criminal Complaint was filed Sep. 30, 2016, AA 15-38, alleging fourteen counts of criminal conduct ranging from theft to racketeering, and 14 counts of criminal forfeiture. (AA at 15-38.) Appellant waived his right to a preliminary hearing on April 11, 2017, AA at 79-83, an Information was filed on April 18, 2017, charging one count of Multiple Transactions Involving Fraud or Deceit in Course of Enterprise or Occupation, NRS 205.377, AA at 97-99 and filed a GPA on April 24, 2017. (AA at 88-102.)

The GPA set forth eleven victims that were owed restitution totaling \$694,420, excluding anything already recovered which would be forfeited to the State. (AA at 88-89.) Appellant was required to pay restitution in full prior to sentencing, jointly and severally with codefendant Jessica Garcia. (AA at 89.) The State would not oppose probation and a suspended sentence of 36 to 90 months in prison if the restitution was paid, but would regain the right to argue if not. (AA at 89.) The \$157,105.17 the State seized was to be applied to the restitution balance. (AA at 89.) Appellant also agreed to execute and file a lien in favor of the State of Nevada, Office of the Attorney General in the amount of \$600,314.83 against the home located at 1024 Santa Helena Ave., Henderson, NV 89002, with the proceeds of the sale to be applied against the restitution requirements. (AA at 89-90.)

The GPA Appellant signed waived the right to appeal except based on “reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.” (AA at 92.) Attached to the GPA was a Conflict-of-Interest Waiver, signed by Appellant and his attorney and a copy of “Rule 1.7. Conflict of Interest: Current Clients.” (AA 100-102.)

C. Sentencing Hearing

At the first setting for the sentencing hearing on August 17, 2017 the State argued to the court for a sentence of imprisonment of 60 to 180 months in prison. (AA at 120.) The State never explained to the court that the right to argue was predicated on the failure of Appellant to pay restitution. (Id.) The facts according to the State was that Appellant and his codefendant bought encumbered properties and then fraudulently sold them to the victims by misrepresenting them as unencumbered. (AA at 120.) The State also argued that Appellant had done nothing until a week before sentencing and that the property is valued at \$580,000 but on the market for 1.2 million dollars. (See AA at 120-121.)

a. Conflict of Interest

At the beginning of the sentencing hearing, Mr. Weiner, then-attorney for Appellant and his codefendant Jessica Garcia, raised a conflict of interest issue at a bench conference and on the record:

The – well, as an initial matter, Your Honor, just to address what we discussed at the bench, the ongoing conflict waivers – the dispute between [the codefendants] began after the change of plea but before sentencing. If you want to put on the record, I contacted the bar ethics hotline. They recommended that I withdraw based on what’s going on here. I did. I will make that motion. I do undersand that the Court’s

going to insist that we go forward today and that's certainly the Court's right to do but –

The Court: Well, is the conflict the fact that your client thought that Ms. Garcia was going to pay this off? Is that the conflict?

Mr. Wiener: Well, no, it wasn't that they were paying it off. They were supposed to be working together. Then they had a no contact order so they couldn't. So they're now basically pointing at each other saying this is – she's saying this is his fault, he's saying that's her fault. That's an antagonistic defense. I mean I should not be –

The Court: Well, it's – that related – it's not a defense to the case –

Mr. Weiner: Well—

The Court: - because if it says why –

Mr. Weiner: - in terms of sentencing.

The Court: -- restitution wasn't paid and this is joint and several which means if one –

Mr. Weiner: Correct.

The Court: doesn't pay the other owes the full amount. ...

(AA at 124-1125.)

b. Appellant's Good Faith Efforts to Pay Restitution

With respect to Appellant's good faith efforts to pay restitution, there was no dispute that Appellant had recorded a lien in the State's favor for over \$600,000. (AA at 121.) Appellant had relied on his codefendant to work on selling the property at first, but had since intervened, the home was valued by the assessor at over one-million dollars. (Id.) Further, codefendant Jessica Garcia was subject to a domestic violence no contact order with respect to Appellant and that was the cause for the delay. (AA at 121-122, 124.) Appellant had even presented the State with a

letter from the real estate agent showing that the property had been actively marketed. (AA at 126.)

c. Victim Impact Statements and Court's Reaction

The victim impact statements were powerful and moving given the absence of the restitution. For example, Irene Segura testified that the money taken was for her orphaned grandson's college fund. (AA at 128.) Ms. Segura explained to the court that twelve years ago she gave a victim impact statement at the sentencing of the murderers of her son and the father of her grandson. (AA at 128.) The money was saved for her grandson's college fund because she "scrimped and saved and cut back on every possible expense" she could think of including dining out, vacations and getting a new car. (AA at 129.)

It is apparent from the transcript that the Court became angry with Appellant. The court informed a representative from the Department of Parole and Probation, "P &P," that the program they use to make recommendation was "broken," that Appellant had time to sell the house but they "stabbed [the victims] in the back and I'm not standing for it." (AA at 137-138.) The court then pronounced the sentence against codefendant Garcia for whom he issued a no bail bench warrant for failing to appear, "if she's here within a week she may get the similar sentence. If

she's out and about and trying to avoid prosecution that's going to tell me she's not taking this serious and I'm going to max her out. I'm not mad –

Mr. Weiner: Understood, Your honor.

The Court: -- at you, Counsel. You did your job. You got 11 felonies down to 1 so I mean you should be commended because you did a good job for them but these people need to pay the price.

(AA at 138-139.)

The Court entered a Judgment of Conviction, AA at 140-141, sentencing Appellant to 72-180 months in prison with zero days credit for time served. (AA at 141.) This appeal follows.

VI. SUMMARY OF THE ARGUMENT

A. The District Court Erred by Permitting the State to Breach the Plea Agreement without Holding an Evidentiary Hearing under *Gamble v. State*, 95 Nev. 904 (1979), etc., to Determine Blame for the Breach

B. The District Court Erred by Denying Motion to Withdraw Counsel with an Unwaivable Conflict under *Clark v. State*, 108 Nev. 324 (1992)

VII. ARGUMENT

A. The District Court Erred by Permitting the State to Breach the Plea Agreement without Holding an Evidentiary Hearing under *Gamble v. State*, 95 Nev. 904 (1979), etc., to Determine Blame for the Breach

The State and Appellant entered into an agreement which contained the following clauses:

6. Should I, Jack Leal, pay restitution in full at or before the time I am sentenced in the present case, the State will not oppose the imposition of a term or probation not to exceed a term of five years, with a suspended 36-to-90 month term of imprisonment;

7. Should I, Jack Leal, fail to pay restitution in full at or before the time I am sentenced in the present case, the State will retain the right to argue for the imposition of imprisonment.

(AA at 89:18-22.) At the first sentencing hearing, the State argued for imprisonment, falsely accusing Appellant of doing nothing to pay the restitution when in fact Appellant had been trying to sell a piece of property that the State had already tied up the property in civil litigation. See supra.

This Court held in Gamble v. State, 95 Nev. 905 (1979) and Villalpando v. State, 107 Nev. 465 (1991), held that an evidentiary hearing is required where the State alleges a defendant breached the agreement unless the defendant is “obviously to blame” for the breach of the agreement. See Sparks v. State, 121 Nev. 107, 111

(2005) (citations omitted). “When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea bargain.” See Sparks v. State, 121 Nev. 107, 110 (2005) (citations omitted).

In Sparks, the defendant entered into a guilty plea agreement that gave the State the full right to argue if he either committed a new criminal offense or failed to appear at his sentencing hearing. Id. The defendant in Sparks did not offer a reason for the apparent breach of the agreement, instead argued that the clause was unenforceable; the Supreme Court of Nevada disagreed and affirmed the judgment of conviction.

Here and unlike in Sparks, Appellant made good faith efforts to pay the restitution before the imposition of sentence, gave reasons why the sale of the property had not been completed to that end and rebutted the State’s claim that Appellant was not asking a good faith asking price for the home valued at seven figures. (See, generally, AA at 118-139.) Appellant complied with all the terms as best as he could and was hindered by his co-defendant and the actions of the State, i.e., requiring the placement of the lien on the property and the initiation of the lawsuit. (Id.)

The State’s actions in this case are particularly troubling. To both require the sale of a property to pay restitution and at the same time require that a lien be placed

on the same property is akin to requiring a defendant to appear at a sentencing hearing while blockading them in their home.

The case should be remanded for an evidentiary hearing to determine whether Appellant is to blame for the failure to pay the restitution and whether that constitutes a material breach. The State could have given Appellant more time, removed the lien or offered to allow Appellant to transfer title under the civil case that the State had started and noticed a lis pendens. Instead, the State misrepresented to the court the reasons for failing to pay the restitution and insisted on imposing a prison sentence. (Compare AA at 121 (“And the house is on the market. It’s valued about [sic] \$580,000. That’s what the last recorder entry notes and they have it on the market for 1.2 million dollars. Now they dropped it to one million dollars. There’s no real effort to make restitution in this case.”), and AA at 122 (“Defense counsel sent me the title assessment just yesterday and it shows a bunch of liens on this property.”), with AA at 125 (“We have a print out from the Clark County Assessor’s website for the 2017-2018 year that values the property at \$1,032,044.00), and AA at 122 (“There’s two Republic garbage -- Republic Waste [indiscernable] for \$256.00 each. I have a copy of it right here from Fidelity Title.”) The lower court, perhaps blinded by its anger, (see AA at 139 “I’m not mad --... at you Counsel. You did your job. ... These people need to pay the price.”), did not meticulously hold the State to

its end of the bargain and require them to make a showing that Appellant's good faith efforts were insufficient under the letter or spirit of the guilty plea agreement.

B. The District Court Erred by Denying Motion to Withdraw Counsel with an Unwaivable Conflict under Clark v. State, 108 Nev. 324 (1992)

Counsel for Appellant moved the court to withdraw based on a conflict of interest at the sentencing hearing. (AA at 124.) At the time, counsel for Appellant was also counsel for his codefendant. (Id.) Given that Appellant and his codefendant were accused as coconspirators in a fraudulent scheme, it is not apparent how such a conflict could have been waived in the first place, much less at sentencing after Appellant's codefendant failed to cooperate to pay the restitution and had a been involved in a domestic violence incident with Appellant.

Nevada Rules of Professional Conduct, Rule 1.7, provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client;
or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

NRPC 1.7 (2006).

Here, under NRPC 1.7(a), the conflict of interest clearly existed prior to and through sentencing. The concurrent conflict of interest existed from the inception of the case because there was a “significant risk the representation” of Appellant would be materially limited by the lawyer’s responsibilities to Appellant’s codefendant, i.e., Appellant and Appellant’s codefendant could at trial point the finger at the other as to who misrepresented unencumbered status of the properties that were sold.

Whether the waiver was proper prior to sentencing turns on the actual defenses of the parties, but by the time Appellant was sentenced, the conflict had ripened into an unwaivable conflict under NRPC 1.7(b)(3). At sentencing, Appellant and his codefendant had been required to pay restitution, but it was not paid due to Appellant’s codefendant’s malfeasance and domestic violence restraining order against her. In order to explain why he could not pay restitution, Appellant needed zealous counsel to point out that the failure was due to circumstances outside of his control including the actions of his codefendant. However, he did not have unconflicted counsel and zealous representation.

At sentencing, counsel for Appellant and his codefendant, was in an awkward place. He could not throw Appellant’s codefendant under the proverbial bus by, for

instance, showing the court evidence of that codefendant's domestic violence against Appellant. Counsel was told by bar counsel to move to withdraw but the court ignored the mandate of bar counsel and substituted its own flawed judgment for that of experienced ethics professionals. This was an abuse of discretion. See Wilmes v. Reno Mun. Ct., 59 P.3d 1197, 118 Nev. 831 (2002) (district attorney representing municipal court in mandamus action not an abuse of discretion).

Every defendant has the constitutional right to assistance of counsel unhindered by conflicting interests. U.S. Const. Amend. VI; Hollaway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978); Clark v. State, 108 Nev. 324, 326 (1992). In Clark, the Court found that where an actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant. Id. (citations omitted). The Clark, the court found that the lower court erred by requiring the appellant to show he was prejudiced by his lawyer's conflict of interest.

The court abused its discretion by denying Appellant's motion to withdraw due to a conflict of interest. The case should be remanded for a new sentencing hearing with either a reasonable time to close the sale of the million dollar home, or to permit the State to seize the property and sell it for restitution per their civil complaint for forfeiture.

VIII. CONCLUSION

For the foregoing reasons, the convictions of Appellant must be vacated and the case remanded for further proceedings.

Dated: February 1, 2018

By:

/s/ Lester M. Paredes III, Esq.
Lester M. Paredes III, Esq.
Nevada Bar Number 11236
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all applicable rules of the Nevada Rules of Appellate Procedure, particularly NRAP 28(e), which requires every assertion in the brief regarding matters of record to be supported by a reference in the page of the transcript or appendix where the matter relied on is to be found.

Dated this 1st day of February, 2018.

By:

/s/ Lester M. Paredes III, Esq.
Lester M. Paredes III, Esq.
Nevada Bar Number 11236
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK LEAL,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

S. CT. CASE NO.: 74050
DIST. CT. CASE NO.: C322564

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Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

ADAM P. LAXALT, ESQ.
NEVADA ATTORNEY GENERAL
Nevada Bar #12426
100 North Carson St.
Carson City, Nevada 89701-4717

STEVE WOLFSON, ESQ.
CLARK COUNTY, NEVADA
Nevada Bar #1565
STEVEN S. OWENS, ESQ.
Nevada Bar #4352
Chief Deputy District Attorney
200 S. Third St.
Las Vegas, NV 89155
Counsel for Respondent

LESTER M. PAREDES, ESQ.
Nevada Bar #11236
600 S Eighth St.
Las Vegas, NV89101

/s/ Lester M. Paredes III, Esq.
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK LEAL,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

S. CT. CASE NO.:74050

DIST. CT. CASE NO.: C322664

NRAP 26.1(a) DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Attorney of record for Appellant: Lester M. Paredes III, Esq.

Corporation: No publicly held company associated with this corporation

///

Law Firm(s) appearing in District Court: Mueller Hinds & Associates, Chtd.

Dated this 1st day of February, 2018,

By:

/s/ Lester M. Paredes III, Esq.

Lester M. Paredes III, Esq.

Nevada Bar Number 11236

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellant's Fast Track Statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), has been prepared in a proportionately spaced typeface using Times New Roman in font size 14, and the body of the brief contains 4,162 words.

I further certify that I have read this Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure. Dated this 1st day of February, 2018.

By:

/s/ Lester M. Paredes III, Esq. _____

Lester M. Paredes III, Esq.
Nevada Bar Number 11236

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **APPELLANT'S OPENING BRIEF** was made this 1st of February, 2018, upon the appropriate parties hereto by electronic filing using the ECF system which will send a notice of electronic filing to the following and/or by facsimile transmission to:

ADAM P. LAXALT, ESQ.
Nevada Attorney General
Nevada Bar #12426
100 North Carson Street
Carson City, Nevada 89701
Adam.Laxalt@ag.nv.gov
(702) 486-3768-Fax
Counsel for Respondent

By:

/s/ Lester M. Paredes III, Esq.
Lester M. Paredes III, Esq.
Nevada Bar Number 11236

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