

Case No. 74050

IN THE SUPREME COURT OF THE STATE OF NEVADA

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JACK LEAL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

On Appeal from the Eighth Judicial
District Court of the State of Nevada
Case No. C322664

RESPONDENT'S ANSWERING BRIEF

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JURISDICTION

The Nevada Supreme Court and Nevada Court of Appeals have jurisdiction under Section 4 of Article 6 of the Nevada Constitution and NRS 177.015(3).

This is a direct appeal from a judgment of conviction and sentence. The district court sentenced Appellant Jack Leal (“Leal”) on August 17, 2017. The district court entered a written judgment of conviction on August 23, 2017. On September 22, 2017, Leal filed this appeal.

ROUTING STATEMENT

Because this is a direct appeal from a judgment of conviction and sentence, it is presumptively assigned to the Court of Appeals under NRAP 17(b)(1).

STATEMENT OF ISSUES

Whether the district court properly sentenced Leal because Leal obviously breached the guilty plea agreement and the State expressly retained the right to argue for a term of imprisonment?

Whether the district court correctly proceeded with sentencing because no conflict of interest existed, and even if it did, Leal forever waived it?

STATEMENT OF CASE

Appellant Jack Leal (“Leal”) entered into a plea bargain with the State wherein he agreed to plead guilty to one count of Multiple Transactions Involving Fraud or Deceit in Course of Enterprise or Occupation, and to be jointly and

severally liable for paying \$757,420 in “restitution in full at or before the time [Leal is] sentenced...” Appellant’s Appendix (AA) at 89-90. In exchange, the State agreed to dismiss one count of Racketeering and twelve counts of Theft in the Amount of \$3,500 or more and not oppose probation. AA 89-90. In the event that Leal failed to pay the restitution in full at or before his sentencing, the State expressly retained the right to argue for a term of imprisonment. AA 89.

Leal signed two conflict-of-interest waivers prior to his sentencing, consenting to dual representation of himself and his co-defendant, Jennifer Garcia (“Garcia”). AA 82, 100-102.

At the time set for sentencing, Leal and Garcia failed to pay full restitution as agreed in the Guilty Plea Agreement (GPA). AA 122. Leal’s attorney claimed a conflict of interest arose between Leal and Garcia after the initial arraignment, but before sentencing due to a no contact order that prevented Leal and Garcia from “working together.” AA 124. Recognizing that Leal and Garcia had executed two conflict-of-interest waivers, the district court proceeded with sentencing. AA 119. Due to Leal’s blatant breach of the GPA, Respondent-Appellee (“the State”) argued for a term of imprisonment for a maximum of one hundred eighty (180) months and a minimum of sixty (60) months with no objection by Leal or his attorney. AA 120. The district court sentenced Leal to a maximum of one hundred eighty (180) months

with a minimum parole eligibility of seventy-two (72) months in the Nevada Department of Corrections with zero days for time served. AA 140.

Because Leal breached the GPA by showing up to his sentencing without having paid the restitution in full, there was no need for the district court to investigate and examine an alleged breach by the State when Leal and his attorney did not object to the State arguing for a term of imprisonment and when Leal himself had already indisputably breached the plea agreement. In addition, the district court correctly proceeded with sentencing. While Leal's attorney claimed a conflict of interest arose between Leal and Garcia, no such conflict actually existed because the two co-defendants had agreed to be jointly and severally liable for the restitution. Even if a conflict of interest existed, Leal and Garcia forever waived any beforehand.

STATEMENT OF FACTS

I. Complaint for Forfeiture and Notice of *Lis Pendens*

On September 30, 2016, Respondent-Appellee, the State of Nevada ("the State") filed an *in rem* action requesting the forfeiture of \$6,616.04 and \$150,489.13 from two Bank of America accounts opened under the name of Parcelnomics, LLC, and real property located at 1024 Santa Helena Avenue, Henderson, Nevada 89002 ("the Henderson property") purchased by Jessica Garcia ("Garcia") and transferred to 1024 Santa Helena Trust. AA 2-10. The State also filed a Notice of *Lis Pendens* on September 30, 2015. AA 11-12. As alleged in the Complaint for Forfeiture, Leal

and Garcia, the managing members of Parcelnomics, falsely advertised, represented, and sold encumbered real property to victims and used the proceeds to purchase the Henderson property. AA 2-10.

II. Criminal Complaint

On November 29, 2016, the State filed a Criminal Complaint against Leal, Parcelnomics, and Garcia charging all three defendants with one (1) count of Racketeering, a category B felony, twelve (12) counts of Theft in the Amount of \$3,500 or more, a category B Felony, and one (1) count of Multiple Transactions Involving Fraud or Deceit in Course of Enterprise or Occupation, a category B felony. AA 15-38. The State alleged that on or about March 1, 2015, through March 31, 2016, Leal and Garcia, as managing members of Parcelnomics, solicited prospective purchasers for several properties in Nevada (“the real properties”) on Zillow.com, Craigslist.org, and eBay.com. AA 15-38.

The State also alleged that Leal and Garcia, as managing members of Parcelnomics, knowingly and falsely represented that the titles for the real properties were not encumbered by liens or other security interests. AA 15-38. The State further alleged that Leal and Garcia, as managing members of Parcelnomics, unlawfully obtained \$886,800.00 from the sale of the real properties encumbered with liens and/or other security interests from their victims. AA 15-38. The Complaint alleged that upon conviction of the offenses charged, the State requested forfeiture of the

real and personal property derived from the unlawful acts. AA 15-38. The State filed an Amended Criminal Complaint on December 27, 2016 clarifying the forfeiture amounts requested from the real and personal property derived from the unlawful acts. AA 40-62. The State took no action on the Complaint for Forfeiture due to the pending criminal proceedings against Leal and Garcia. AA 146.

III. First Conflict-of-Interest Waiver

On April 11, 2017, Leal unconditionally waived his right to a preliminary hearing and filed an Unconditional Waiver of Preliminary Hearing and Conflict-of-Interest Waiver. AA 79-83. In the Conflict-of-Interest Waiver, Jason G. Weiner, Esq. (“Attorney Weiner”) disclosed that a conflict of interest may arise due to his dual representation of Leal and Garcia. AA 82. Despite this known risk, Leal “knowingly, intelligently, and voluntarily consent[ed] to dual representation...and [he] hereby waive[d] any right to later file an appeal or claim ineffective assistance of counsel based on a conflict-of-interest arising out of this dual representation.” AA 82.

At Leal’s initial arraignment, on April 20, 2017, Attorney Weiner requested a continuance and informed the hearing master the he was representing both defendants and had just filed conflict waivers in the justice court. AA 86. Upon inquiry from the hearing master, Leal confirmed that he waived conflicts for Attorney Weiner to represent him and Garcia. AA 86.

IV. Guilty Plea Agreement

On April 24, 2017, Leal appeared for his continued initial arraignment. AA 103-12. Leal executed a GPA in which he entered a plea of guilty to one (1) count of Multiple Transactions Involving Fraud or Deceit in the Course of an Enterprise or Occupation, in exchange for a dismissal of one (1) count of Racketeering, twelve (12) counts in the Criminal Complaint, and the State's agreement to not oppose probation. AA 88-93. Leal also agreed to pay restitution in the amount of \$757,420 to the eleven victims "at or before the time [he] [is] sentenced in the present case." AA 88-89. Leal agreed that he and Garcia were jointly and severally responsible for the restitution. AA 89. Leal further agreed that he would execute and file in the Clark County Recorder's Office a lien agreement and lien in favor of the State of Nevada, Office of the Attorney General, in the amount of \$600,314.83 against the Henderson property, with the proceeds of the sale from the Henderson property to be applied to any restitution owed. AA 89-90.

In the GPA, Leal acknowledged that should he "fail to pay restitution in full at or before the time [he] [is] sentenced in the present case, the State will retain the right to argue for the imposition of a term of imprisonment." AA 89. Leal also acknowledged that he understood the victims would be allowed to make impact statements at his sentencing. AA 90. Leal further acknowledged that despite any

recommendations made by the State or his own attorney, the district court “is not obligated to accept the recommendation.” AA 91.

V. Second Conflict-of-Interest Waiver

Leal executed a second Conflict-of-Interest Waiver that the district court filed with the GPA. AA 100-02. In the second Conflict-of-Interest Waiver, Leal acknowledged that Attorney Weiner advised him of his right “to consult with independent counsel to review the potential conflict of interest posed by dual representation and the consequences of waiving the right to conflict free representation.” AA 100. Leal also acknowledged that if he chose not to seek advice of independent counsel, then he expressly waived his right to do so. AA 100. Leal further expressly waived his right to withdraw his guilty plea or to a mistrial as a result of his attorney’s potential and actual conflict of interest depriving him of his right to effective assistance of counsel arising from the dual representation. AA 100. Leal acknowledged that the “waiver of conflict is binding through trial, on appeal, and in habeas proceedings.” AA 100. In spite of the known risk to dual representation, Leal “knowingly, intelligently, and voluntarily” consented to dual representation of his attorney with his co-defendant. AA 101.

The hearing master acknowledged on the record that waiver was “in front of [her] where Mr. Jack Leal is agreeing that Mr. Weiner can also represent the co-defendant, and that there’s not a conflict of interest. Correct sir?” AA 111. Leal

replied “[c]orrect.” AA 111. During the plea canvass, the hearing master thoroughly canvassed Leal. AA 104-12. The hearing master reiterated the terms of the GPA, including the term where Leal agreed to be jointly and severally responsible for paying back the restitution in full with Garcia in the amount of \$757,420 at or before sentencing. AA 105. The hearing master also reiterated to Leal that should he fail to pay the restitution in full before his sentencing, the State expressly retained the right to argue for the imposition of a term of imprisonment. AA 105. After the hearing master thoroughly canvassed Leal, Leal entered a plea of guilty to one (1) count of Multiple Transactions Involving Fraud, a category B felony. AA 103-12. The hearing master accepted Leal’s plea as freely and voluntarily entered and set the matter for sentencing for the furthest date out—to allow Leal time to sell the Henderson property to pay restitution. AA 111-12. As Attorney Weiner explained, “if it’s not sold there is a penalty to my clients in terms of the State having RTA meaning the right to argue for imprisonment.” AA 112.

VI. Sentencing

At the time set for sentencing, Leal and Garcia had not paid any restitution. AA 122. As a result, the State argued for a term of imprisonment and recommended sixty (60) to one hundred eighty (180) months based on eleven (11) victims and the three quarters of a million dollars stolen. AA 120. The State also argued that Leal had two prior felonies, one for forgery and one for theft by deception and possession

of a fraudulent ID. AA 120. The State further argued that Leal had done little to nothing to make restitution in the case when he had from April to August, the time between his initial arraignment and sentencing, to sell the Henderson property to pay the restitution. AA 120. According to the State, the first time Leal did anything was a week before his sentencing; and thus, Leal did nothing for four months. AA 121. Leal stated that he had issues with Garcia and a no contact order deterred contact for the past sixty (60) days, which caused the delay. AA 121. According to Leal, Garcia was in charge of the property sale and he assumed she was selling the house. AA 121. Upon questioning by the district court, Leal explained that he transferred the title to the house from the trust to himself because Garcia had “nothing done to this point,” and claimed “[t]he restitution – I mean there should be no issue with it. I have a copy of the title policy I’ve got. No liens; the property’s free and clear.” AA 121-22. Due to Leal’s representation that the Henderson property had “no liens,” the State pointed out that the house had two liens. AA 121-22. Leal also claimed that he “had no idea [the restitution] wasn’t taken care of or paid” and “[a]s far as the situation that happened, we were under the assumption that – we didn’t explain it correctly,...what we were selling.” AA 122. When the district court asked where the \$750,000.00 went, Leal stated that it went into purchasing the Henderson property he just put on the market. AA 122-23.

In regards to the alleged conflict of interest, Attorney Weiner stated that the

dispute between Leal and Garcia “began after the change of plea but before sentencing.” AA 124. Attorney Weiner also stated that he had contacted the bar ethics hotline who recommended he withdraw. AA 124. Attorney Weiner further stated that he would “make that motion.” AA 124. The district court asked Attorney Weiner what the purported conflict of interest was between Leal and Garcia. AA 124. Attorney Weiner explained that “[t]hey 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.” AA 124. AA 124-25. The district court explained that “it’s not a defense to the case...because if it says why the...restitution wasn’t paid and this is joint and several which means if one...doesn’t pay the other owes the full amount...” AA 124-25.

VII. Victim Impact Statements

Since the State filed a Notice of Intent to Present Victim Impact Statements on August 11, 2017, three (3) of the victims spoke at Leal’s sentencing, Irene Segura (“Segura”), Luis Palafox for Lena Palafox (“Palafox”), and LoryLee Plancarte (“Plancarte”). AA 114-15, 128-36. Segura stated that Leal and Garcia stole her grandson’s college fund by scamming them with two worthless properties. AA 129. Palafox stated that his wife paid \$60,000.00 for one property, but now they are renting property and living check to check. AA 132-33. Plancarte spoke and stated

that she “was told her property was free and clear from a bankruptcy sale” and found out when they went to refinance that there was a mortgage on the property. AA 135. Plancarte also stated that she had not seen any restitution. AA 136. Attorney Weiner responded to the victim impact statements. AA 137-39. Despite the State’s request, the district court sentenced Leal to imprisonment for a maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months, with zero (0) days credit for time served. AA 140-41.

SUMMARY OF ARGUMENT

The district court properly sentenced Leal after he failed to pay the restitution in full at or before his sentencing. Because Leal is obviously to blame for the breach of the GPA, an evidentiary hearing to determine blameworthiness is unnecessary. *Villalpando v. State*, 107 Nev. 465, 468, 814 P.2d 78, 80 (1991). In order for the State to not oppose probation, Leal needed to pay the restitution in full at or before his sentencing. AA 89. While Leal may have needed to sell the Henderson property to obtain the money to pay full restitution, the GPA did not require Leal to sell the Henderson property to pay the restitution. AA 89-90. Instead, the GPA allowed for any proceeds from the sale of the Henderson property to be applied to any restitution owed. AA 90. As such, the language in the GPA clearly left the means of paying restitution to Leal’s discretion. AA 89. Rather than take the four (4) months between his initial arraignment and sentencing to sell the real property, Leal waited six (6)

days before sentencing to start the process of putting the Henderson property on the market to pay the restitution already past due. As it was obvious Leal was to blame for the breach of the GPA, the State was released from its promise to not oppose probation. As the State argued for a term of imprisonment in accordance with the terms of the GPA, without objection by Leal or his counsel, the Court should find that the district court did not commit plain error at sentencing.

Additionally, the district court did not abuse its discretion in proceeding with Leal's sentencing because no conflict of interest existed. While Leal claims that the district court erred in denying Attorney Weiner's motion to withdraw as counsel, EDCR 7.40(b)(2) requires counsel of record to withdraw by written motion. The record reflects that a bench conference occurred prior to Leal's sentencing where Attorney Weiner may have made an oral motion to withdraw as counsel, but the record later contradicts this allegation for Attorney Weiner informed the district court that "[he] did. [He] will make that motion" effectively indicating that he would file a motion to withdraw as counsel in the future. AA 124.

Nonetheless, no conflict of interest existed to warrant withdrawal of counsel because Leal and Garcia agreed to be jointly and severally liable for restitution. AA 89. As the district court indicated, the fact that Leal and Garcia are going to blame each other for the unpaid restitution does not create a conflict of interest since both agreed to pay the restitution in full. AA 125. Even if there was a conflict of interest,

Leal knowingly, intelligently, and voluntarily embraced a potentially conflicted dual representation. *Ryan v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 419, 430, 168 P.3d 703, 710 (2007). Leal signed a conflict-of-interest waiver in the justice court and a conflict-of-interest waiver in district court at his initial arraignment wherein he waived any actual or potential conflict from the dual representation of him and Garcia. AA 79-83; 100-102. As a result, Leal forever waived any actual or potential conflict of interest at his initial arraignment.

Based on the foregoing, the judgment of conviction should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews unpreserved breach-of-plea allegations for plain error. The defendant's failure to object to the prosecutor's comments at sentencing "may be considered as evidence of the defendant's understanding of the terms of a plea agreement." *Sullivan v. State*, 115 Nev. 383, 387 n. 3, 990 P.2d 1258, 1260 n. 3 (1999); *see also Puckett v. United States*, 556 U.S. 129, 143 (2009) (holding unpreserved breach-of-plea-allegations are subject to plain-error review).

Additionally, this Court reviews a district court's denial of a defendant's request to substitute counsel for an abuse of discretion. *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004).

II. The District Court Properly Sentenced Leal Because Leal Obviously Breached the Guilty Plea Agreement, and the State Retained the Right to Argue for Imprisonment.

The district court properly sentenced Leal because Leal clearly violated the GPA. Contract principles apply when analyzing a written plea agreement. If a defendant breaches the plea agreement first, the appropriate remedy pursuant to the terms of the plea agreement is that the State may argue for imprisonment. *See State v. Crockett*, 110 Nev. 838, 842-45, 877 P.2d 1077, 1078-81 (1994) (applying contract principles in analyzing a written plea agreement); *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) (“[W]hen a contract is clear on its face, it will be construed from the written language and enforced as written.”) (citations omitted). When, as here, the defendant is obviously to blame for the breach of the GPA, an evidentiary hearing to determine blameworthiness is unnecessary. *Villalpando v. State*, 107 Nev. 465, 468, 814 P.2d 78, 80 (1991).

In this case, the State did not breach the GPA.¹ The State was no longer required to not oppose probation when Leal failed to pay the restitution in full at or

¹ 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. *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting *Kluttz v. Warden*, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)). “In practice, it is the criminal defendant, not the State, who actually controls whether the State will be allowed to argue for a particular sentence.” *Sparks v. State*, 121 Nev. 107, 113, 110 P.3d 486, 489 (2005). If the defendant claims the State improperly breached the plea agreement, the appropriate remedy would be

before his sentencing. In the GPA, Leal expressly agreed and understood that as a condition to the State not opposing probation, he had a duty to pay the restitution of seven hundred fifty-seven thousand four hundred twenty dollars (\$757,420) in full at or before his sentencing. AA 88-89. Leal also agreed and understood that he and Garcia were jointly and severally responsible for paying the restitution. AA 89. Leal acknowledged these terms in the GPA and during the plea canvass. AA 88-99, 103-12. Leal also twice acknowledged and agreed that if he did not pay the restitution in full at or before his sentencing, the State retained the right to argue for a term of imprisonment. AA 104-06. At the time set for sentencing, Leal and Garcia had not paid the restitution. AA 122-23. As such, Leal's blatant and obvious breach of the GPA released the State from its obligation of not opposing probation. Thus, the State properly argued for a term of imprisonment in accordance with the terms of the GPA without any objection by Attorney Weiner or Leal.

In *Sparks*, a case Leal attempts to distinguish, the defendant, while on probation for a theft offense, was arrested and charged with two counts of drug related offenses. *Id.* at 109, 110 P.3d at 487. At his initial appearance, the defendant agreed to waive his right to a preliminary hearing and agreed to a plea bargain where he would enter a plea of guilty to the reduced drug charge and the State would agree

specific performance of the agreement. *Citti v. State*, 107 Nev. 89, 92-93, 807 P.2d 724, 727 (1991).

to make no recommendation at sentencing. *Id.*, 110 P.3d at 487. The written plea agreement also contained a FTA clause that released the State from its promise to recommend or refrain from recommending a particular sentence if the defendant failed to appear for a scheduled sentencing or committed an additional criminal offense prior to sentencing. *Id.*, 110 P.3d at 487. After the defendant failed to appear for his scheduled sentencing and was arrested on additional charges, the State asserted its right under the FTA clause and argued that the sentence imposed should run consecutive to the defendant's sentence for the theft offense. *Id.*, 110 P.3d at 487. On appeal, the defendant in *Sparks* argued that 1) the FTA clause was not valid because it deviated from the standard form agreement set forth in NRS 174.063; 2) the FTA clause is void under Nevada law because it contravenes the court's holdings in *Gamble v. State* and *Villalpando v. State*; 3) the FTA clause is void because it is an unconscionable contractual provision surreptitiously included in the agreement by the State without his consent; and 4) the FTA provision is unconscionable because it gives the State the unilateral right to withdraw. *Id.* at 109-13, 110 P.3d at 487-90. The Nevada Supreme Court concluded that the FTA clause in the plea agreement was lawful and enforceable. *Id.*, 110 P.3d at 490. The Nevada Supreme Court also concluded that the State did not breach the plea agreement in arguing for consecutive sentences after the defendant violated the FTA clause and affirmed the judgment of conviction. *Id.*, 110 P.3d at 490.

Like the defendant in *Sparks*, Leal is obviously to blame for breaching the GPA. At sentencing, Leal had not paid the restitution in full.² AA 122. Because Leal agreed that he and Garcia were jointly and severally responsible for paying the restitution in full, Leal should have ensured that the restitution had been paid in full at or before his sentencing rather than “assume” Garcia had paid it. AA 89. As the terms of the GPA did not require the sale of the Henderson property to pay the restitution, Leal could have paid the restitution through any lawful means.³ AA 88-99. Although Leal contends that he could not sell the Henderson property because of the State’s *Lis Pendens*, this contention fails because Leal was still able to transfer title to himself and list it on the market six (6) days before his sentencing even with the *Lis Pendens*. AA 121-22. The Henderson property also had two liens from Republic Waste. AA 122-23. If Leal did not have the funds to pay the restitution in full without selling the Henderson property, the time to object to this specific term

² The GPA required payment in full not partial payment at or before sentencing. AA 88-89. Nonetheless, Leal’s contentions that he made “good faith efforts” to pay the restitution in full are belied by his own actions and statements at sentencing in addition to the victim impact statements of Segura, Palafox, and Plancarte. AA 128-36. Leal waited six (6) days before his sentencing when he had four (4) months between his initial arraignment and sentencing to transfer title and list the Henderson property for sale to pay the restitution. AA 122.

³ Leal’s contention that the State misrepresented the worth of the Henderson property at sentencing to undermine Leal’s efforts to pay the restitution is misguided. The State had information, outside of the record, that appraised the Henderson property for significantly less than the listing price.

was before he signed the GPA and entered his guilty plea.⁴ *Id.* at 112, 110 P.3d at 489 (“[W]e note that the proper time for [the defendant] to object to a particular term in the written plea agreement was prior to signing the agreement and entering his guilty plea in the district court.”). Leal and Attorney Weiner also did not object to the State’s recommendation of a term of imprisonment. Further, Leal acknowledged in the GPA and during the plea canvass that the district court determines the sentence within the limits prescribed by statute and is not obligated to accept any recommendation. AA 91, 108. In exercising that discretion, the district court actually sentenced Leal to imprisonment for a maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months when the State argued for less. AA 120, 140-41. Thus, the Court, like in *Sparks*, should find that the State did not breach the GPA and affirm the judgment of conviction.

Conversely, in *Gamble*, the defendant appealed the district court’s denial of his petition for writ of habeas corpus (post-conviction) after the prosecutor had not kept his promise in the plea bargain rendering his plea involuntary. *Gamble*, 95 Nev. at 905-06, 604 P.2d at 337. The defendant agreed to stipulate to the revocation of his probation and enter a plea of guilty to a new offense in exchange for the State

⁴ To the extent Leal’s arguments are construed as to mean the State made Leal’s performance impossible, the defense of impossibility does not apply to unforeseen contingencies that the promisor should have foreseen and provided for in the contract. *See Nebaco, Inc. v. Riverview Realty Co.*, 87 Nev. 55, 58, 482 P.2d 305, 307 (1971).

agreeing not to file more charges and recommend that the sentences for his probation revocation and new offense run concurrently. *Id.*, 604 P.2d at 337. The district court canvassed the defendant who entered a plea of guilty to the new offense. *Id.*, 604 P.2d at 337. A month later, the district court held a probation revocation hearing, revoked the defendant's probation, and sentenced the defendant to a ten-year prison term. *Id.* at 337. A different public defender and prosecutor appeared at the probation revocation and neither made any reference to the plea negotiations. *Id.* at 337. At his sentencing hearing, the parties did not understand why the probation revocation hearing occurred and the district court continued the sentencing. *Id.*, 604 P.2d at 337. A month later, at the continued sentencing hearing, the prosecutor represented that the defendant "refused" to stipulate to the revocation of his probation and recommended the maximum sentence on the new offense to run consecutive to the defendant's sentence imposed as a result of his probation revocation. *Id.* at 337. The district court imposed a sentence based on the prosecution's recommendation. *Id.* at 337. On appeal, the Nevada Supreme Court stated that "there is not the slightest indication that appellant was ever presented with a stipulation to revoke his probation by the prosecution, nor that one was requested by the prosecution of either of appellant's defense counsel. *Id.*, 604 P.2d at 337. The Nevada Supreme Court reversed and remanded to the district court for an evidentiary hearing to determine whether the breach of the plea bargain occurred because the defendant refused to

stipulate to the probation revocation or because of the prosecutions' miscommunication. *Id.* at 909, 604 P.2d at 338.

Similarly, in *Villalpando*, the defendant appealed his sentencing after the prosecution recommended a prison sentence rather than probation after the defendant failed to appear for his sentencing. 107 Nev. at 465-66, 814 P.2d at 78-9. On appeal, the Nevada Supreme determined that the defendant's appearance at his sentencing became an implied condition of the plea agreement based on the judge's warning that the defendant's appearance at sentencing was a condition of the plea agreement. *Id.*, 814 P.2d at 78-9. The Nevada Supreme Court applying *Gamble* determined that the defendant's failure to appear at his sentencing caused the breakdown of the plea agreement and because the defendant was obviously to blame an evidentiary hearing to determine blameworthiness was unnecessary. *Id.* at 468, 814 P.2d at 80. Due to the defendant's blameworthiness, the Nevada Supreme Court did not permit the defendant to withdraw his plea. *Id.*, 814 P.2d at 78-9. Instead, the Nevada Supreme Court found that if the defendant is to remain bound by his guilty plea, so too is the prosecution to remain bound by its promise to recommend probation. *Id.*, 814 P.2d at 80. The Nevada Supreme Court reversed and remanded the case to the district court for specific performance. *Id.*, 814 P.2d at 78-9.

Unlike the defendant in *Gamble*, it is abundantly clear that Leal is to blame for the breach of the GPA because Leal showed up to his sentencing without having

paid the restitution in full, which Leal expressly agreed and understood that he had a duty pay in order to obtain the benefit of the bargain. AA 122. Thus, the district court did need to conduct an evidentiary hearing. Also, unlike in *Gamble* and *Villalpando*, where counsel failed to put in writing the stipulation to revoke probation and the requirement that the defendant appear at sentencing to receive the benefit of the plea negotiations, the GPA expressly and specifically advised Leal that if he showed up to his sentencing without having paid the restitution in full, the State retained the right to argue for a term of imprisonment. AA 88-99, 103-12. Leal acknowledged these terms during the plea canvass and in the GPA. AA 88-99, 103-12. Accordingly, unlike the defendants in *Gamble* and *Villalpando*, the record reflects Leal knew, as a condition of his plea, that he had a joint and several responsibility to pay the restitution in full at or before his sentencing to obtain the benefit of the State not opposing probation. Thus, the Court, unlike in *Gamble* and *Villalpando*, should affirm the judgment of conviction.

III. The District Court Correctly Proceeded with Sentencing Because No Conflict of Interest Existed, and Even if It Did, Leal Forever Waived It.

Contrary to Leal's assertions, the record does not clearly reflect that Attorney Weiner moved to withdraw as counsel of record for Leal. AA 124. According to the record, Attorney Weiner stated that Bar Counsel instructed him to withdraw and "[h]e did. [He] will make that motion" effectively indicating that he would file a motion to withdraw in the future. AA 124.

Eighth Judicial District Court Rule 7.40 provides, in pertinent part, as follows:

(b) Counsel in any case may be changed *only*:

(2) When no attorney has been retained to replace the attorney withdrawing, by order of the court, granted upon *written* motion, and

(i) If the application is made by the attorney, the attorney must include in an affidavit the address, or last known address, at which the client may be served with notice of further proceedings taken in the case in the event the application for withdrawal is granted, and the telephone number, or last known telephone number, at which the client may be reached and the attorney must serve a copy of the application upon the client and all other parties to the action or their attorneys, or

...

(c) No application for withdrawal or substitution may be granted if a delay of the trial or of the hearing of any other matter in the case would result.

EDCR 7.40. [Emphasis added].

Even assuming Attorney Weiner made an oral motion to withdraw during the bench conference, his request fails to comply with EDCR 7.40(b)(2). Thus, the district court did not err in proceeding with sentencing because Attorney Weiner failed to move to withdraw in accordance with EDCR 7.40(b)(2).

Even if Attorney Weiner had moved to withdraw in accordance with EDCR 7.40(b)(2), there was no conflict of interest to warrant withdrawal. The district court's denial of a motion to withdraw as counsel is reviewed for an abuse of discretion. *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004) (reviewing the district court's denial of a motion for substitution of counsel for abuse of

discretion). In reviewing a denial of a motion to substitute counsel, the three factors considered by the Nevada Supreme Court are: (1) the extent of the conflict between the defendant and his or her counsel, (2) the timeliness of the motion and the extent to which it will result in inconvenience or delay, and (3) the adequacy of the court's inquiry into the defendant's complaints. *Id.*, 102 P.3d at 576 (quoting *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

Here, the mere fact that Leal and Garcia did not pay the restitution prior to sentencing did not create a conflict of interest. At sentencing, Attorney Weiner argued that a conflict of interest arose between Garcia and Leal because they were supposed to be "working together" and now they are pointing at each other with her "saying this is his fault, he's saying that's her fault." AA 124. In the GPA, Leal agreed to be jointly and severally liable for the restitution with Garcia. AA 89. "Under the common law, liability was joint and several where two or more tortfeasors caused injury through their combined or concurrent tortious conduct...Thus, any one of several tortfeasors whose compoment contributed to a plaintiff's injuries could be tapped for the *entire* amount of damages." *Buck by Buck v. Greyhound Lines, Inc.*, 105 Nev. 756, 763, 783 P.2d 437, 441 (1989) (citing Prosser, *Law of Torts*, 5th Ed. (1984), p. 328). [Emphasis added]. The record also reflects that Leal never personally objected to Attorney Weiner's continued representation. Accordingly, Leal agreed that he owed the entire amount of

restitution at or before his sentencing even if Garcia did not pay any of the restitution. Based on the foregoing, the district court did not abuse its discretion because (1) the record does not clearly reflect that Attorney Weiner moved to withdraw; (2) even if he did, it was at the time of the sentencing and no conflict of interest existed; and (3) the district court sufficiently inquired into the alleged conflict. Under the factors considered in *Young*, the Court should find the district court did not abuse its discretion and affirm the judgment of conviction.

Even assuming a conflict of interest existed, Leal knowingly, intelligently, and voluntarily forever waived conflict-free representation prior to his sentencing. Nevada Rule of Professional Conduct 1.7 prohibits lawyers from engaging in dual representation if the representation involves a concurrent conflict of interest or a significant risk that the dual representation will materially limit the lawyer's ability to represent one or both clients. *Ryan v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 419, 430, 168 P.3d 703, 710 (2007). However, there is no per se rule against dual representation. *Id.* at 426, 168 P.3d at 708 (citing *Holloway*, 435 U.S. at 482-83). Even if a concurrent conflict of interest exists, a lawyer may represent a client if each affected client gives informed consent in writing. *Id.*, 168 P.3d at 710 (citing RPC 1.7(b)(4)). If the defendant knowingly, intelligently, and voluntarily waives the right to conflict-free representation, the conflict of interest is

forever waived and binding on the defendant throughout trial, on appeal, and in habeas proceedings. *Id.* at 428-29, 168 P.3d at 709-10.

In *Ryan*, a non-indigent defendant filed a writ of mandamus after the district court denied her request for substitution of counsel with an attorney whose partner was representing her codefendant. *Id.* at 422, 168 P.3d at 705. Both defendants were accused of murdering their roommate, stuffing her body in the trunk of their Jaguar, and setting the car on fire to cover up the alleged crimes. *Id.*, 168 P.3d at 705. The Nevada Supreme Court concluded that the district court must honor a criminal defendant's voluntary, knowing, and intelligent waiver of conflict-free representation so long as the conflicted representation will not interfere with the administration of justice. *Id.*, 168 P.3d at 705. The Nevada Supreme Court also concluded that for a waiver of conflict-free representation to be effective, the defendant must specifically waive the right to a mistrial as a result of her attorney's potential or actual conflict of interest depriving her of the right to effective assistance of counsel arising from the dual representation. *Id.*, 168 P.3d at 705. The Nevada Supreme Court also concluded that before engaging in dual representation, the attorney must advise the criminal defendant of her right to consult with independent counsel to review the potential conflicts of interest posed by the dual representation and if so chooses not to do so, then the defendant must expressly waive her right to do so before the defendant's waiver of conflict-free representation can be valid. *Id.*,

168 P.3d at 705. The Nevada Supreme Court granted the defendant's petition and issued a writ directing the district court to canvass both defendants to determine whether they knowingly, intelligently, and voluntarily waive their right to conflict-free representation. *Id.*, 168 P.3d at 705.

As indicated by the court in *Ryan*, Leal signed two conflict-of-interest waivers before his sentencing to show that he knowingly, intelligently, and voluntarily waived his right to conflict-free representation. AA 79-83; 100-102. In the second conflict-of-interest waiver, Leal expressly waived his right to a mistrial due to an actual or potential conflict of interest depriving him of the right to effective assistance of counsel arising from the dual representation as instructed by the court in *Ryan*. AA 100. Also, as instructed by the court in *Ryan*, the second conflict-of-interest waiver provided that Leal's attorney advised him of his right to consult with independent counsel to review the potential conflicts of interest posed by the dual representation and if he chose not to do so, then Leal expressly waived his right to do so. AA 100. Leal further acknowledged that the waiver of conflict was binding throughout trial, on appeal, and in habeas proceedings. AA 100. As the second conflict-of-interest waiver incorporated the language mandated by the Nevada Supreme Court in *Ryan*, any actual or potential conflict that arose at sentencing was forever waived beforehand. Thus, any actual or potential conflict that occurred after Leal's initial arraignment but before his sentencing had been forever waived.

Accordingly, the Court should find that the conflict-of-interest waivers establish that Leal knowingly, intelligently, and voluntarily forever waived his right to conflict-free representation and affirm the judgment of conviction.

Leal relies on *Clark v. State*, 108 Nev. 324, 831 P.2d 1374 (1992) to support his argument that the district court abused its discretion by denying Attorney Weiner's alleged motion to withdraw due to a conflict of interest. However, *Clark* is factually and legally distinguishable from the instant case. In *Clark*, the defendant filed a petition for writ of habeas corpus (post-conviction) alleging that his trial counsel deprived him of his constitutional right to the effective assistance of counsel. 108 Nev. at 325, 831 P.2d at 1375. Trial counsel agreed to represent the defendant for \$10,000.00 at his first-degree murder trial. *Id.*, 831 P.2d at 1375. The defendant and trial counsel agreed that the fee would come from the proceeds of a personal injury settlement handled by trial counsel's firm on behalf of the defendant. *Id.*, 831 P.2d at 1375. When an overlooked medical lien for \$4,785.05 resulted in the lien holder filing a complaint against the defendant and the trial counsel's firm, trial counsel filed a cross-claim against the defendant and obtained a default judgment in the amount of \$5,600.00. *Id.*, 831 P.2d at 1375. After the district court held a hearing to address trial counsel's actions and the technical conflict of interest, the district court denied relief and found no resultant prejudice to the defendant. *Id.* at 326, 831 P.2d at 1376. The Nevada Supreme Court conclusively presumed prejudice to the

defendant under the specific facts of the case, and reversed the decision of the district court and vacated the defendant's conviction. *Id.* at 327, 831 P.2d at 1377.

Unlike the actual conflict between the defendant and trial counsel in *Clark*, the alleged conflict with Leal stemmed from Attorney Weiner's representation of Leal and Garcia, between co-defendants, which makes the facts of this case more analogous to *Ryan*. Also, unlike the defendant in *Clark*, Leal signed two conflict-of-interest waivers wherein he knowingly, intelligently, and voluntarily waived his right to conflict-free representation. AA 79-83; 100-102. Further, unlike the defendant's claim of ineffective assistance of counsel in *Clark*, Leal expressly waived his right to withdraw his guilty plea due to Attorney Weiner's potential or actual conflict of interest deriving him of his right to effective assistance of counsel in the second conflict-of-interest waiver and acknowledged his understanding that the terms of the waiver would be binding throughout trial, on appeal, and in habeas proceedings. AA 100; *See also Ryan*, 123 Nev. at 710, 168 P.3d at 429 (“[T]he defendant cannot subsequently seek a mistrial arising out of the conflict that he waived and ‘cannot [subsequently] be heard to complain that the conflict he waived resulted in ineffective assistance of counsel.’”) (quoting *Gomez v. Ahitow*, 29 F.3d 1128, 1135 (7th Cir. 1994)). The record reflects that Attorney Weiner argued on behalf of Leal at his sentencing despite the alleged conflict of interest. AA 124-28,

137-39. Thus, the Court should find this case legally and factually distinguishable from *Clark* and affirm the judgment of conviction.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the judgment of conviction.

RESPECTFULLY SUBMITTED this 19th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 14 pt. Times New Roman type style.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 7,087 words.

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: March 19, 2018.

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