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I. Introduction

Appellant's Opening Brief, hereinafter "AOB," asserted two main areas that require relief – 1) the failure by the district court to determine who was at fault for the alleged breach of the guilty plea agreement and 2) the failure to appoint independent and unconflicted counsel to represent Appellant.

Briefly, Appellant signed a GPA and a conflict waiver to allow his attorney to simultaneously represent Appellant and his codefendant. A subsequent event caused by Appellant's codefendant created a no-contact order between Appellant and the codefendant. At sentencing, Appellant's attorney raised the conflict issue with the judge who ruled that the joint and several language of the guilty plea agreement with respect to restitution nullified any conflict of interest and proceeded to sentence Appellant to prison.

This reply brief proceeds to address the State's arguments made in Respondent's Answering Brief.

II. Appellant was Not "Obviously" At Fault for Failing to Pay Restitution

The State appears to acknowledge that a no-contact order prevented Appellant from working with his codefendant, RAB 2, 9, yet repeatedly and without basis

asserts that Appellant is "obviously to blame" for the failure to pay restitution. (See e.g., RAB 17.) The State cites Villalpando v. State, 107 Nev. 465 (1991), RAB 11, 14, for the proposition that because Appellant was "obviously to blame" for the breach of the agreement, an evidentiary hearing is unnecessary.

However, the State does not address whether the fact that Appellant's codefendant was subject to a no-contact order in the argument section of RAB. (Compare RAB 2, 9 (acknowledging the assertion of a no-contact order between Appellant and codefendant), with RAB 13-29 (argument section of Respondents Answering Brief omits any reference to the no-contact order).)

Appearing for court is an individual responsibility that can be squarely placed on the shoulders of a defendant. Paying restitution on a tight schedule where the State, by filing a lis pendens, and the codefendant, by causing a no-contact order to issue, clearly interfered with the ability to sell the property and thus should relieve Appellant of the burden of the alleged breach of the agreement.

The State has conceded that a GPA is analyzed under contract principles. (See RAB 14 (citing State v. Crockett, 110 Nev. 838, 842-45 (1994) (applying contract principles in analyzing a written plea agreement); Canafora v. Coast Hotels & Casinos, Inc., 121 Nev. 771 776 (2005).) To analyze the alleged breach in this case, the question is whether the failure to pay the restitution at the first sentencing hearing was a breach of the contract. However, "the time for performance under a contract

is not considered of the essence unless the contract expressly so provides or the circumstances of the contract so imply." Mayfield v. Koroghilu, 124 Nev. 343 (2008). Here, there is no such clause and the circumstances imply that making the victims whole is the point of the contract, not sending Appellant to prison, thus more time for performance was warranted and appropriate.

Appellant was not in material breach, certainly was not at fault for any breach and should have been allowed additional time to pay the restitution given the obstacles the State and his codefendant placed in his way.

III. There was Conflict of Interest, Counsel Moved to Withdraw, and the Conflict was Not Waiveable

The State is right about one thing: "the mere fact that Leal and Garcia did not pay the restitution prior to sentencing did not create a conflict of interest." (RAB 23.) The conflict of interest arose after the entry of the guilty plea agreement but before sentencing in that a judge ordered Appellant's codefendant to have no contact with Appellant which prevented Appellant from selling the property for restitution. At this point, the lawyer representing both cannot be a zealous advocate for either client because he can either protect one client at the expense of the other, or advocate for one client at the expense of another. Here, a zealous advocate would have brought to court the evidence showing that his other client, Appellant's codefendant, was at fault for the no-contact order issuing and for failing to get the house sold.

The State asserts at RAB 12 "the district court did not abuse its discretion in proceedings with sentencing because no conflict of interest existed." The reasoning is that no conflict of interest existed because Appellant and his codefendant "agreed to be jointly and severally liable for restitution." (RAB 12.) This is gibberish gobbledygook. The agreement to pay something jointly and severally with another codefendant does not relieve the court of ensuring zealous advocacy and effective assistance of counsel under the Sixth Amendment. Cf. Strickland v. Washington, 466 U.S. 668 (1984).

Although the State asserts that "the record does not reflect that [Appellant's attorney] moved to withdraw…" (RAB 24.) However, that assertion is belied by the record:

> [Mr. Weiner:] The – well, as an initial matter, Your Honor, just to address what we discussed at the bench, the ongoing conflict waivers – the dispute between them 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 understand that the Court's going to insist that we go forward today and that's certainly the Court's right to but--

(AA 124 (emphasis added.) The motion was made and the court overruled the motion.

Finally, the State argues in the alternative that even if there was a conflict of interest, the State argues that it was waived. (RAB 13.) The State makes a broad and sweeping proclamation – that a defendant can "knowingly, intelligently, and voluntarily forever [waive] conflict-free representation prior to sentencing." (RAB

24.) In doing so the State reads out of the rules the prohibition on concurrent and unwaiveable conflicts of interest. "Even if a concurrent conflict of interest exists, a lawyer may represent a client if each affected client gives informed consent in writing." (RAB 24 (citations omitted).) Of course, this is simply not true and the argument can only be made because State omits from its analysis NRPC 1.7(b)(3) as argued in AOB. (See AOB 17-18.)

IV. Conclusion

The Court should reverse and remand the case for a new sentencing hearing.

Dated this 19th day of April, 2018,

By:

/s/ Lester M. Paredes III, Esq.
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IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK LEAL,
Appellant,
vs.

STATE OF NEVADA,
Respondent.

S. CT. CASE NO.: 74050

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APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK LEAL, Appellant, vs. STATE OF NEVADA, Respondent.	S. CT. CASE NO.: 74050 **APPELLANT'S 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.

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Corporation: No publicly held company associated with this corporation.

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

Dated this 19th day of April, 2018

By:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellant's Reply Brief 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 the font size of 14 and the body of the brief contains 1,107 words.

I further certify that I have read this Appellant's Reply 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 19th day of April, 2018

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **APPELLANT'S REPLY BRIEF** was made this 19th of April, 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:

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