

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

GENE ANTHONY ALLEN AKA )  
ABDULIA USEF ALI, )  
Appellant, )  
v. )  
THE STATE OF NEVADA, )  
Respondent. )

**ORIGINAL**

Case No. 41274 **FILED**

**JAN 08 2004**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *S. Young*  
DEPUTY CLERK

**RESPONDENT'S ANSWERING BRIEF**

**Appeal From Judgment of Conviction  
Eighth Judicial District Court, Clark County**

WILLIAM J. TAYLOR, ESQ.  
Nevada Bar #5521  
723 South Third Street  
Las Vegas, Nevada 89101  
(702) 380-4199

DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
Clark County Courthouse  
200 South Third Street, Suite 701  
Post Office Box 552212  
Las Vegas, Nevada 89155-2212  
(702) 455-4711  
State of Nevada

BRIAN SANDOVAL  
Nevada Attorney General  
Nevada Bar No. 003805  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(775) 684-1265

**RECEIVED**  
JAN 08 2004  
CLERK OF SUPREME COURT  
By \_\_\_\_\_  
DEPUTY CLERK

Counsel for Appellant  
**MAILED ON**  
*Express*

Counsel for Respondent

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2  
3  
4  
5 GENE ANTHONY ALLEN AKA )  
6 ABDULIA USEF ALI, )

7 Appellant, )

8 v. )

9 THE STATE OF NEVADA, )

10 Respondent. )

Case No. 41274

11 RESPONDENT'S ANSWERING BRIEF

12  
13 **Appeal From Judgment of Conviction**  
14 **Eighth Judicial District Court, Clark County**

15 WILLIAM J. TAYLOR, ESQ.  
16 Nevada Bar #5521  
17 723 South Third Street  
18 Las Vegas, Nevada 89101  
19 (702) 380-4199

DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
Clark County Courthouse  
200 South Third Street, Suite 701  
Post Office Box 552212  
Las Vegas, Nevada 89155-2212  
(702) 455-4711  
State of Nevada

BRIAN SANDOVAL  
Nevada Attorney General  
Nevada Bar No. 003805  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(775) 684-1265

20  
21  
22  
23  
24  
25  
26  
27  
28 Counsel for Appellant

Counsel for Respondent

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2  
3  
4  
5 GENE ANTHONY ALLEN AKA )  
6 ABDULIA USEF ALI, )  
7 Appellant, )  
8 v. )  
9 THE STATE OF NEVADA, )  
10 Respondent. )

Case No. 41274

11 RESPONDENT'S ANSWERING BRIEF

12 **Appeal From Judgment of Conviction**  
13 **Eighth Judicial District Court, Clark County**

14  
15 WILLIAM J. TAYLOR, ESQ.  
16 Nevada Bar #5521  
17 723 South Third Street  
18 Las Vegas, Nevada 89101  
19 (702) 380-4199

DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
Clark County Courthouse  
200 South Third Street, Suite 701  
Post Office Box 552212  
Las Vegas, Nevada 89155-2212  
(702) 455-4711  
State of Nevada

BRIAN SANDOVAL  
Nevada Attorney General  
Nevada Bar No. 003805  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(775) 684-1265

20  
21  
22  
23  
24  
25  
26  
27  
28 Counsel for Appellant

Counsel for Respondent

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF THE CASE ..... 1

STATEMENT OF THE FACTS ..... 3

ARGUMENT ..... 4

    I. THE COURT LACKS JURISDICTION TO HEAR  
    DEFENDANT’S APPEAL UNDER NRAP 4(b)(1)..... 4

    II. DISTRICT COURT DID NOT ERR IN DENYING  
    DEFENDANT’S MOTION TO WITHDRAW GUILTY PLEA..... 5

    III. DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE  
    OF COUNSEL IN ENTRY OF HIS GUILTY PLEA..... 8

        A Defense Counsel Did Not Fail To Obtain Discovery Before  
        Trial ..... 9

        B Dismissed Counts Were Not Used By The Court In  
        Defendant’s Sentencing..... 10

CONCLUSION ..... 13

CERTIFICATE OF COMPLIANCE ..... 14

**TABLE OF AUTHORITIES**

Page Number:

**Cases**

1

2

3

4 *Baal v. State,*  
106 Nev. 69, 787 P.2d 391 (1990)..... 5, 6, 8

5

6 *Barajas v. State,*  
115 Nev. 440, 991 p.2d 474 (1999)..... 6

7

8 *Bryant v. State,*  
102 Nev. at 271, 721 P.2d 367 (1986)..... 5, 6

9

10 *Cooper v. Fitzharris,*  
551 F.2d 1162 (9th Cir. 1977) ..... 9

11

12 *Doleman v. State,*  
112 Nev. 843, 921 P.2d 278 (1996)..... 8

13

14 *Donovan v. State,*  
94 Nev. 671, 584 P.2d 708 (1978)..... 9

15

16 *Ford v. State,*  
105 Nev. 850, 784 P.2d 951 (1989)..... 8

17

18 *Freese v. State,*  
116 Nev. 1097, 13 P.3d 442 (2000)..... 5

19

20 *Homick v State,*  
112 Nev. 304, 913 P.2d 1280 (1996)..... 9

21

22 *Hudson v. State,*  
117 Nev. 387, 22 P.3d 1154 (2001)..... 5

23

24 *Lenz v. State,*  
97 Nev. 65, 624 P.2d 15 (1981)..... 9

25

26 *Lundy v. Warden,*  
89 Nev. 419, 514 P.2d 212 (1973)..... 6, 9

27

28 *State v. Love,*  
109 Nev. 1136, 865 P.2d 322 (1993)..... 8

*Strickland v. Washington,*  
466 U.S. 668, 104 S.Ct. 2052 (1984)..... 8, 9, 12

*Williams v. State,*  
103 Nev. 227, 737 P.2d 508 (1987)..... 5

*Woods v. State,*  
114 Nev. 468, 958 P.2d 91 (1998)..... 5

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Wynn v. State*,  
96 Nev. 673, 615 P.2d 946 (1980)..... 6

**Nevada Revised Statutes**

176.165 ..... 5

**Other Authorities**

NRAP 28(e) ..... 14

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2  
3  
4  
5 GENE ANTHONY ALLEN AKA )  
6 ABDULIA USEF ALI, )

7 Appellant, )

8 v. )

9 THE STATE OF NEVADA, )

10 Respondent. )

Case No. 41274

11 **RESPONDENT'S ANSWERING BRIEF**

12 **Appeal from Judgment of Conviction**  
13 **Eighth Judicial Court, Clark County**

14 **STATEMENT OF THE ISSUES**

- 15  
16 1. **Whether District Court Erred In Denying Defendant's Motion To**  
17 **Withdraw His Plea Of Guilt Prior To Sentencing.**  
18 2. **Whether Defendant Was Denied Effective Assistance Of Counsel In The**  
19 **Entry Of His Guilty Plea**

20 **STATEMENT OF THE CASE**

21 On August 13, 2001, Defendant Allen was charged by Information with sixteen  
22 counts of SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF  
23 AGE and three counts of LEWDNESS WITH A CHILD UNDER THE AGE OF  
24 FOURTEEN.

25 On September 16, 2002, the Court held a *Petrocelli* hearing and granted the  
26 State's motion to admit evidence of Defendant's previous sexual abuse of two young  
27 girls as being more probative than prejudicial and as going to Defendant's intent.  
28

1 (Respondent's Appendix (RA), at 048-49). The jury trial began immediately  
2 following the hearing.

3 On September 18, 2002, after the jury had been impaneled, opening statements  
4 given, and at least one witness had testified, the Court adjourned the proceedings early  
5 so it could resolve a dispute involving the contents of a video tape. (AA, at 37). Soon  
6 thereafter, the State and defense counsel began negotiating a possible resolution to the  
7 case, and at 5:37 PM, the court went back on record where Defendant agreed to a  
8 negotiated deal. (AA, at 66, 89).<sup>1</sup> Defendant pled guilty to Count I – Sexual Assault  
9 With a Minor Under Sixteen Years of Age; and Count II – Lewdness With a Child  
10 Under the Age of 14. (AA, at 66-74, 89-99).

11 On December 5, 2002, Defendant indicated to the Court that he wished to  
12 withdraw his plea and proceed in Proper Person. (RA, at 81). The court conducted a  
13 *Faretta* canvass to determine if the defendant could represent himself on his motion to  
14 withdraw his guilty plea. (*Id.*). The court determined that Defendant could represent  
15 himself, Defendant's trial counsel was allowed to withdraw and attorney Jennifer  
16 Bolton was appointed as standby counsel. (*Id.*). Ms. Bolton was confirmed as stand-  
17 by counsel on December 9, 2002. (*Id.*).

18 On December 30, 2003, the State filed its Opposition to Defendant's Motion to  
19 Withdraw Guilty Plea. (AA, at 76).

20 On January 22, 2003, the court entertained and denied Defendant's Motion to  
21 Withdraw Guilty Plea. (RA, at 52-57, 60). Defendant petitioned the court to withdraw  
22 his stand-by counsel. (*Id.*, at 56). The court continued this and all other motions. (*Id.*  
23 at 59).

24 On February 6, 2003, Defendant orally addressed the court regarding his  
25 Motion to Withdraw Guilty Plea and the State responded by reminding the court that  
26 the Motion to Withdraw Guilty Plea had been denied on January 22<sup>nd</sup>. (RA, at 65-66).  
27

28 <sup>1</sup> The State's copy of Appellant's Appendix has pages 066-075 identical to pages 089-100, and thus,  
both are cited by the State.



1 Thus, the court did not address the Motion to Withdraw Guilty Plea but did grant  
2 Defendant's motion for transcripts since Defendant was proceeding in Proper Person.  
3 (*Id.*, at 67).

4 On April 1, 2003, Defendant again addressed the court seeking to have his  
5 guilty plea withdrawn. (Ra, at 71-72). Again, the State reminded the court that  
6 Defendant's motion had been denied previously. (*Id.*). The court refused to entertain  
7 the motion and instructed Defendant to "save it for post-conviction". (*Id.*). The court  
8 then sentenced Defendant. (*Id.*, at 73-74).

9 Defendant was sentenced to Count I – to a MAXIMUM of TWENTY (20)  
10 years and a MINIMUM of FIVE (5) years in the Nevada Department of Corrections  
11 (NDC); Count II – to a MAXIMUM of LIFE in the Nevada Department of  
12 Corrections with a MINIMUM parole eligibility after TEN (10) YEARS. Count II to  
13 run CONCURRENT with Count I, with 634 days Credit for Time Served. (*Id.*). The  
14 court ordered a SPECIAL SENTENCE OF LIFETIME SUPERVISION imposed to  
15 commence upon release from any term of probation, parole or imprisonment. (*Id.*).

16 Following sentencing, the court instructed the clerk that all Defendant's Pro Per  
17 motions were denied. (*Id.*, at 74). Finally, the court instructed Defendant's stand-by  
18 counsel that their appointment was concluded. (*Id.*, at 75).

### 19 STATEMENT OF THE FACTS

20 Defendant Allen was charged with numerous counts of sexual assault of a  
21 minor under 14 years of age, and lewdness with a child under 14, stemming from his  
22 repeated sexual molestation of his step-daughter, Janna Taylor. (Rt, 09/17/02, at 64-  
23 74). Starting on her eighth birthday, and continuing until she was approximately  
24 eleven years old, Janna Taylor was sexually molested by Defendant. (AA, at 85).  
25 Defendant repeatedly went into Janna's bed and inserted his penis into her mouth,  
26 vagina, and anus. (*Id.*, at 85-87). This abuse ended only when Janna moved to  
27 Colorado, and there, Janna revealed the abuse to relatives. (*Id.*, at 88-93). She was  
28 examined by Dr. Monica Kneusel, who noted that Janna did not have a hymen, which

1 was consistent with Janna having been sexually penetrated on numerous occasions.  
2 (*Id.*, at 96). Janna was so traumatized, angry and despondent that she eventually  
3 became a ward of the state and received professional counseling. (*Id.*, at 82, 100).  
4 Defendant was eventually arrested after Colorado detectives contacted the Las Vegas  
5 Metropolitan Police Department. (*Id.*, at 97-100).

6 Defendant had previously molested two other young girls. Esther Smith, a nine  
7 year old girl, was molested by defendant in 1992. (*Id.*, at 101-02). In that case,  
8 Defendant kissed Esther and fondled her vagina. (*Id.*).

9 In 1993, Defendant was staying at the residence of the family of Brandy  
10 Deshazer, an eleven year old girl. (*Id.*, at 102). One evening, Brandy was awakened  
11 and found Defendant touching her legs and moving his hand toward her genital area.  
12 (*Id.*, at 103). She jumped out of bed and told her parents, who immediately called the  
13 police. (*Id.*).

14 In the instant case, Defendant pled guilty pursuant to plea negotiations at the  
15 end of the first day of testimony at his trial. (AA, at 66, 89).

## 16 ARGUMENT

### 17 I

#### 18 **THE COURT LACKS JURISDICTION TO HEAR** 19 **DEFENDANT'S APPEAL UNDER NRAP 4(b)(1)**

20 NRAP 4 states in pertinent part:

21 (b) *Appeals in criminal cases*

22 (1) In a criminal case, the notice of appeal by a defendant shall be filed in  
23 the district court within thirty (30) days after entry of judgment or order  
24 appealed from. A notice of appeal filed after the announcement of a  
25 decision, sentence or order **but before entry of judgment or order** shall  
26 be treated as filed after such entry and on the day thereof.

27 (Emphasis added).

28 Defendant couches his appeal as an appeal from judgment of conviction, but it  
is not. It is an appeal from the denial of his Motion to Withdraw Guilty Plea.  
(Appellant's Opening Brief, at 6; Notice of Appeal, filed 04/14/03).

1 On January 22, 2003, the court entertained and denied Defendant's Motion to  
2 Withdraw Guilty Plea. (RA, at 52-57, 60). But, the court has not yet executed an  
3 order memorializing its denial of Defendant's Motion to Withdraw Guilty Plea.<sup>2</sup>  
4 Therefore, under NRAP 4, Defendant's appeal is premature, with jurisdiction not  
5 vesting in this Court until the order is entered.

6 II

7 **DISTRICT COURT DID NOT ERR IN DENYING**  
8 **DEFENDANT'S MOTION TO WITHDRAW GUILTY**  
9 **PLEA**

10 Under NRS 176.165, a guilty plea may be withdrawn after sentencing only to  
11 correct a manifest injustice. *Baal v. State*, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990).  
12 *Baal* interpreted this provision to mean that manifest injustice cannot exist if a plea  
13 was **freely and voluntarily entered**. *Baal*, 106 Nev. at 72, 787 P.2d at 394.  
(Emphasis added).

14 Whether the guilty plea was knowingly and voluntarily entered, is determined  
15 by a review of the entire record, the totality of the facts and circumstances  
16 surrounding the defendant's plea. *Bryant v. State*, 102 Nev. at 271, 721 P.2d 367  
17 (1986).; *see also Hudson v. State*, 117 Nev. 387, 22 P.3d 1154, 1160 (2001); *Freese v.*  
18 *State*, 116 Nev. 1097, 1104, 13 P.3d 442, 447 (2000); *Woods v. State*, 114 Nev. 468,  
19 958 P.2d 91 (1998). A proper review looks to the record to examine the oral canvass,  
20 the plea agreement and the circumstances surrounding the execution of the agreement.  
21 *Freese*, 116 Nev. at 1106, 13 P.3d at 448.

22 Where the trial court sufficiently canvassed the defendant, determining that the  
23 defendant entered into the agreement knowingly and intelligently, the guilty plea was  
24 properly accepted. *Baal*, 106 Nev. at 72, 787 P.2d at 394; *see also Williams v. State*,  
25 103 Nev. 227, 230, 737 P.2d 508, 510 (1987), *citing Bryant v. State*, 192 Nev. 258,  
26 721 P.2d 364 (1986). And, where the defendant has expressed on the record that his  
27

28 <sup>2</sup> The State can find no evidence that an order was ever executed and filed regarding the denial of  
Defendant's Motion to Withdraw Guilty Plea.

1 plea is voluntary, he may not ordinarily repudiate that statement. *Lundy v. Warden*, 89  
2 Nev. 419, 422, 514 P.2d 212, 213-14 (1973).

3 Furthermore, *Baal* held “[a] guilty plea is presumptively valid and the burden is  
4 upon appellant to show that the denial of a motion to withdraw the plea constituted a  
5 clear abuse of discretion”. *Baal*, 106 Nev. at 72, 787 P.2d at 394; citing *Wynn v. State*,  
6 96 Nev. 673, 675, 615 P.2d 946, 947 (1980). Absent a clear showing of abuse of  
7 discretion, this Court will not overturn a lower court’s decision regarding the  
8 withdrawal of a plea. *Barajas v. State*, 115 Nev. 440, 442, 991 p.2d 474, 476 (1999);  
9 citing *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

10 Defendant alleges the district court erred in denying his Motion to Withdraw  
11 Guilty Plea. (Appellant’s Opening Brief, at 8-11). He alleges that he misunderstood  
12 the evidence against him. (*Id.*, at 10). He asserts that he was not “wholly aware” of  
13 the plea agreement when he entered his plea. (*Id.*, at 9). Defendant asserts that his  
14 plea is invalid because it was “the product of coercion by his attorneys”. (*Id.*, at 10).

15 However, these allegations are not supported by the record as it reflects that the  
16 court was cautious and thorough with what Defendant believed and understood before  
17 it accepted his plea. (AA, at 66-74, 89-99). Also, nothing in the record would indicate  
18 any type of coercion by his attorneys. In fact, the record indicates that defense  
19 counsel made efforts to ensure Defendant understood and agreed to the entire  
20 proceeding.

21 The record reads in pertinent part:

22 . . .

23 THE COURT: Now, did you read this guilty plea  
24 agreement before you signed it?

25 THE DEFENDANT: Yes, I did, sir.

26 THE COURT: Did you understand it before you signed it?

27 THE DEFENDANT: Yes, I did, sir.

28 THE COURT: Do you think signing it is in your best interest?

1 THE DEFENDANT: Yes, sir.  
2 THE COURT: Did you sign it freely and voluntarily?  
3 THE DEFENDANT: Yes, sir.

4 . . .  
5 (AA, at 67, 92)

6 The record proves that Defendant was thoroughly canvassed by the court with  
7 Defendant expressing his understanding of the agreement and his willingness to enter  
8 into the agreement. (AA, at 66-74, 89-99). He expressed to the court that he believed  
9 the plea agreement was in his best interest. (AA, at 67, 92). He stated that he read and  
10 understood the agreement before he signed it, and that he freely and voluntarily signed  
11 it. (*Id.*).

12 The court made sure that Defendant understood that the agreement was binding  
13 on the court, and that probation was not an option under the agreement. (*Id.*, at 70-71,  
14 94-95). The court also made sure that Defendant understood that he would be subject  
15 to registering as a sex offender and to lifetime parole supervision. (*Id.*, at 72, 97).

16 Defendant admitted in open court that he committed the crimes and was guilty  
17 as charged. (*Id.*, at 73, 98). The court then stated that it found Defendant's plea  
18 "freely and voluntarily made", and therefore, accepted his guilty plea. (*Id.*, at 74, 99).

19 On January 22, 2003, the court entertained Defendant's Motion to Withdraw  
20 Guilty Plea. (RA, at 52-57). The State opposed this motion by showing that  
21 Defendant did not receive ineffective assistance of counsel; his plea was not coerced;  
22 he did understand the nature and consequences of his plea; and he did understand  
23 what his sentence would be under the plea. (AA, at 78-87). At this hearing,  
24 Defendant's stand-by counsel reviewed, and attached a copy for the court's review,  
25 the transcript of the plea canvass. (RA, at 54-55). Defense counsel stated to the court  
26 that he could not see "any reason legally or factually to challenge the guilty plea".  
27 (*Id.*, at 4). The court determined that Defendant's plea was valid and denied  
28 Defendant's motion. (*Id.*, at 57, 60).

1 Certainly, the record shows Defendant's guilty plea was valid. Defendant failed  
2 to show that his guilty plea was not made knowingly and voluntarily. Defendant  
3 never offered evidence to overcome the *Baal* presumption of the validity of the plea.  
4 Furthermore, Defendant failed to show that the court abused its discretion by denying  
5 his motion. Clearly, the court did not err, or abuse its discretion, in denying  
6 Defendant's motion.

7 **III**

8 **DEFENDANT WAS NOT DENIED EFFECTIVE**  
9 **ASSISTANCE OF COUNSEL IN ENTRY OF HIS**  
10 **GUILTY PLEA**

11 Defendant's burden to establish ineffective assistance of counsel is proving that  
12 he was denied "reasonably effective assistance" of counsel by satisfying the  
13 two-prong test of *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052,  
14 2063-2064 (1984); *see State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).  
15 Under this test, Defendant must show first that counsel's representation fell below an  
16 objective standard of reasonableness, and second, that but for counsel's errors, there is  
17 a reasonable probability that the result of the proceedings would have been different.  
18 *See Strickland*, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068. Defendant must  
19 identify the acts or omissions of counsel that are the result of a lack of reasonable  
20 professional judgment. *Strickland*, at 690, 2066.

21 In considering whether Defendant's counsel has met this standard, the court  
22 should first determine whether counsel made a "sufficient inquiry into the  
23 information... pertinent to his client's case". *Doleman v. State*, 112 Nev. 843, 846,  
24 921 P.2d 278, 280 (1996); *citing Strickland*, 466 U.S. at 690-691, 104 S.Ct. at 2066.  
25 Once this decision is made, the court should consider whether counsel made "a  
26 reasonable strategy decision on how to proceed with his client's case". *Doleman*, 112  
27 Nev. at 846, 921 P.2d at 280; *see also Ford v. State*, 105 Nev. 850, 784 P.2d 951  
28 (1989); *citing Strickland*, 466 U.S. at 690-691, 104 S.Ct. at 2066. Counsel's strategy  
decision is a "tactical" decision and will be "virtually unchallengeable absent

1 extraordinary circumstances". *Doleman*, 112 Nev. at 846, 921 P.2d at 280; *see also*  
2 *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066 (counsel strongly presumed to have  
3 made all decisions in the exercise of reasonable, professional judgment).

4 In analyzing counsel's performance, the court begins with the presumption that  
5 counsel offered effective assistance and then must determine whether Defendant has  
6 demonstrated, by "strong and convincing proof," that counsel was ineffective. *Homick*  
7 *v State*, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996); *citing Lenz v. State*, 97 Nev.  
8 65, 66, 624 P.2d 15, 16 (1981); *see also Lundy v. Warden, Nevada State Prison*, 89  
9 Nev. 419, 422, 514 P.2d 212, 214 (1973).

10 The role of a court, in considering allegations of ineffective assistance of  
11 counsel, is "not to pass upon the merits of the action not taken but to determine  
12 whether, under the particular facts and circumstances of the case, trial counsel failed  
13 to render reasonably effective assistance". *Donovan v. State*, 94 Nev. 671, 675, 584  
14 P.2d 708, 711 (1978); *citing Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir.  
15 1977). In essence, the court must "judge the reasonableness of counsel's challenged  
16 conduct on the facts of the particular case, viewed as of the time of counsel's  
17 conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

18 Defendant makes two claims of ineffective assistance by alleging: 1) his  
19 defense counsel, Mr. Jeffery Banks and Mr. Stephen Immerman, failed to obtain  
20 discovery before trial; and 2) that court appointed counsel, Mr. Gregory Denué, failed  
21 to inform him that the numerous dismissed counts could be used by the court at  
22 sentencing.<sup>3</sup> (Appellant's Opening Brief, at 13-14).

23  
24  
25 **A. Defense Counsel Did Not Fail To Obtain Discovery Before Trial.**

26  
27  
28 <sup>3</sup> The State cannot find any references to Mr. Denué's appointment as trial defense counsel for Defendant in the record.

1 An examination of the totality of the circumstances reveals that defense counsel  
2 obviously obtained discovery prior to trial. Counsel filed at least six pretrial motions.  
3 (SA, at 77-80). These motions included an opposition to the State's motion to admit  
4 evidence of defendant's prior bad acts; a motion to dismiss certain counts in the  
5 information; a motion to preclude the State from referring to victim Janna Taylor as a  
6 "victim" at trial; a motion to conduct a psychological examination of the victim; a  
7 motion for discovery; and a motion to preclude the State from asking the defendant  
8 about a witness's veracity. (*Id.*). Furthermore, defense counsel secured an out of state  
9 expert witness to mitigate the impact of the State's medical evidence in this case.  
10 (AA, at 12). Clearly, defense counsels' preparations before trial proved that they were  
11 very familiar with all discovery before the trial began, and sought, via motion for  
12 discovery, any discoverable evidence that they may not have had at that time. (SA, at  
13 77).

14 **B. Dismissed Counts Were Not Used By The Court In Defendant's Sentencing**

15 Defendant alleges that he was misled and did not understand the circumstances  
16 surrounding the sentencing he would receive under the plea agreement. This  
17 allegation is also belied by the record where it reads in part:

18 . . .  
19 THE COURT: And, do you understand that the State and the  
20 defense stipulate and agree that on Count I you will receive a  
21 20-year sentence with a minimum of five years until parole  
22 eligibility begins, and on Count II, you will receive a life prison  
23 sentence with a minimum of ten years until parole eligibility  
24 begins?

25 Now, the parties further agree that you will not receive  
26 probation on Count II, and that Count I and II will run  
27 concurrently. Do you understand?

28 THE DEFENDANT: Yes, sir.



1 THE COURT: That means the same time. So if I calculate this  
2 correctly, you will become eligible for parole on both counts  
3 when a minimum of ten years has been...

4 MR. BANKS: That's correct, Judge....

5 . . .

6 MR. IMMERMANN: Your Honor, if I could make that one point  
7 real clear. If, for some reason, this Court does not want to  
8 follow the recommendation and take these two counts and run  
9 them concurrently, he's allowed to withdraw and go to trial.

10 THE DEFENDANT: Yeah. Concurrent.

11 THE COURT: Absolutely.  
12 Now let me explain to you what you were facing before you  
13 entered this plea. Okay?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Before that you were, as to Count I, you could  
16 have been sentenced to a period of life with parole eligibility  
17 beginning at 20 years or for a definite term of 20 years with  
18 parole eligibility beginning after five years. Do you understand  
19 that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you understand that as to Count II, you would be  
22 sentenced to life with the possibility of parole after ten years have  
23 been served? No discretion there.

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you understand that, sir? Do you agree with  
26 that?

27 THE DEFENDANT: Yeah. We don't have to read all of that, sir. I  
28 really do understand. And, I really do understand.

1 THE COURT: So you do understand that you are not eligible for  
2 probation for Count I?

3 . . .

4 MS. WECKERLY: Actually, he's not eligible for probation on  
5 Count I or Count II because he is stipulating to prison on Count II.

6 THE COURT: Well, I was getting to that. You're not eligible for  
7 probation on Count II and I....

8 THE DEFENDANT: Probation?

9 THE COURT: Right.

10 MR. BANKS: You're not eligible.

11 THE DEFENDANT: Right.

12 . . .

13 (AA, at 68-71, 93-95).

14 Defendant's claim that he did not understand the sentence that he agreed to is  
15 clearly contradicted by the record. He specifically stated, and repeated, that he  
16 understood the sentencing consequences of his plea agreement.

17 Defendant's claim that his counsel was ineffective by failing to inform him that  
18 the numerous dismissed counts could be used by the court at sentencing is clearly  
19 erroneous. The record reflects that the court only sentenced Defendant on the two  
20 counts in the plea agreement to which he pled guilty; with no dismissed counts being  
21 considered by the court. (RA, at 73-74). His counsel interrupted the court to clarify  
22 and explain the sentencing to Defendant so that Defendant had a thorough  
23 understanding of the consequences of his plea. (*See supra*).

24 Defendant clearly fails to establish ineffective assistance of counsel under the  
25 *Strickland* standard. Defendant failed to show by "strong and convincing proof" that  
26 his counsel exhibited a lack of professional representation which fell below an  
27 objective standard of reasonableness. Defendant also failed to show, that even if  
28 counsel committed error, that there is a reasonable probability that the result of the

1 proceedings would have been different. Therefore, Defendant's appeal should be  
2 dismissed.

3 **CONCLUSION**

4 Because Defendant's appeal is premature and fails to vest jurisdiction in this  
5 Court, it should be dismissed. On the merits, Defendant's appeal is not supported by  
6 the record. The Defendant failed to show that the district court committed error in  
7 denying Defendant's Motion to Withdraw Guilty Plea, and failed to show that defense  
8 counsel offered ineffective assistance. Therefore, the decision of the district court  
9 should be affirmed and the Defendant's appeal should be DISMISSED.

10 Dated this 7th day of January 2004.

11 Respectfully submitted,

12 DAVID ROGER  
13 Clark County District Attorney  
14 Nevada Bar # 002781

15  
16  
17 BY

  
18 JAMES TUFTELAND  
19 Chief Deputy District Attorney  
20 Nevada Bar #000439

21 Office of the Clark County District Attorney  
22 Clark County Courthouse  
23 200 South Third Street, Suite 701  
24 Post Office Box 552212  
25 Las Vegas, Nevada 89155-2212  
26 (702) 455-4711  
27  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF MAILING**

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on January 7, 2004.

William Taylor  
723 South Third Street  
Las Vegas, Nevada 89101

  
\_\_\_\_\_  
Employee, Clark County  
District Attorney's Office