

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

2
3 JAVIER RIGHETTI,

4 Petitioner,

5 v.

6
7 THE EIGHTH JUDICIAL DISTRICT COURT
8 OF THE STATE OF NEVADA, COUNTY OF
9 CLARK, THE HONORABLE MICHELLE
 LEAVITT DISTRICT COURT JUDGE,

10 Respondent,

11 THE STATE OF NEVADA,

12 Real Party in Interest.
13

) No. — Electronically Filed
) (District Ct. No. 1276713)
) Jun 17 2016 08:54 a.m.
) Tracie K. Lindeman
) Clerk of Supreme Court

14 **PETITION FOR WRIT OF PROHIBITION/MANDAMUS**

15
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JAVIER RIGHETTI,) No. _____
(District Ct. No. C276713)
Petitioner,)
v.)
THE EIGHTH JUDICIAL DISTRICT COURT)
OF THE STATE OF NEVADA, COUNTY OF)
CLARK, THE HONORABLE MICHELLE)
LEAVITT DISTRICT COURT JUDGE,)
Respondent,)
THE STATE OF NEVADA,)
Real Party in Interest.)

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COMES NOW the Petitioner, JAVIER RIGHETTI, by and through his attorney, Deputy Public Defender CHRISTY L. CRAIG, and respectfully petitions this Honorable Court to direct the trial court to reinstate the Defendant's plea of guilty.

This Petition is based upon the Memorandum of Points and Authorities; the Indictment; the Notice of Intent to Seek the Death Penalty; the Plea Transcript – February 11, 2016; Petitioner’s Motion to Strike Aggravating Circumstances and Evidence in Aggravation; State’s Opposition to Defendant’s Motion to Strike Aggravating Circumstances and Evidence in Aggravation; Transcript – February 25, 2016; State’s Motion to Reject the Defendant’s Guilty Plea to the Murder Count Entirely, or in the Alternative, to Set the Murder Count for Trial on the Theory of Willful, Deliberate, and Premeditated Murder; Petitioner’s Opposition to State’s Motion to Reject the Defendant’s Guilty Plea; and Transcript – March 17, 2016.

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DATED this 16th day of June, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Christy L. Craig
CHRISTY L. CRAIG, #6262
Deputy Public Defender

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6. That the State filed on Opposition to the Motion to Strike Aggravators on February 23, 2016.

7. That at argument on the Motion to Strike Aggravators on February 25, 2016, the District Court asked that the State file a written pleading should it request a rejection of Petitioner's guilty plea after its previous acceptance and adjudication.

8. That on March 2, 2016, the State filed a Motion to Reject the Defendant's Guilty Plea to the Murder Count Entirely on in the Alternative to Set the Murder Count for Trial on the Theory of Willful, Deliberate, and Premeditated Murder. Petitioner filed an Opposition on March 11, 2016.

7. That on March 17, 2016, the District Court rescinded its previous acceptance of the Petitioner's plea of guilty to Count 10.

8. That on March 17, 2016, the District Court asked that the State prepare an order commensurate with its ruling. No such order was filed.

9. The instant writ follows.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief. NRS 53.045.

/s/ Christy L. Craig
CHRISTY L. CRAIG, #6262

SUBSCRIBED and SWORN to before me
This 16th day of June, 2016.

/s/ Carrie M. Connolly Cert. No: 94-2602-1-Exp 10/11/17
NOTARY PUBLIC in and for said
County and State

1 **POINTS AND AUTHORITIES**

2 **I.**

3 **STATEMENT OF THE ISSUES**

4 Does the District Court have the ability to reject a defendant's plea of guilty without
5 negotiations, on State's motion, after the defendant's plea was accepted by the court, and the
6 defendant having been adjudicated?
7

8 As an issue of first impression, can the district court withdraw a valid guilty plea, over a
9 defendant's objection, when, for one charge, the defendant pleaded guilty to two of the three
10 theories of liability?

11 **STATEMENT OF FACTS**

12 **A. Factual Background.**

13 Petitioner is charged by way of an Indictment. The Indictment alleges that the Petitioner
14 committed the following offenses on March 8, 2011 related to victim M.K.:

15 COUNT 1: Attempted Robbery

16 COUNT 2: Battery with Intent to Commit Sexual Assault by Strangulation

17 COUNT 3: First Degree Kidnapping

18 COUNT 4: Attempted Sexual Assault with a Child Under Sixteen Years of Age

19 COUNT 5: Sexual Assault with a Child Under Sixteen Years of Age

20 Additionally, the Indictment alleges that the Petitioner committed the following offenses
21 on September 2, 2011 related to victim A.O:

22 COUNT 6: Robbery with Use of a Deadly Weapon

23 COUNT 7: First Degree Kidnapping with Use of a Deadly Weapon

24 COUNT 8: Sexual Assault with a Child Under Sixteen Years of Age with Use of a Deadly
25 Weapon.

26 COUNT 9: Sexual Assault with a Child Under Sixteen Years of Age with Use of a Deadly
27 Weapon.

28 COUNT 10: Murder with Use of a Deadly Weapon

See Exhibit A – Indictment.

1 Trial is set for October 3, 2016. The State filed a Notice of Intent to Seek Death Penalty
2 on October 14, 2011, listing 14 aggravators. The State alleged the following aggravating
3 circumstances:

4 1. The murder was committed by a person who, at any time before a penalty hearing is
5 conducted, is or has been convicted of a felony involving the use or threat of violence to the
6 person of another to wit: taking a cell phone from M.K. on March 8, 2011.

7 2. The murder was committed by a person who, at any time before a penalty hearing is
8 conducted, is or has been convicted of a felony involving the use or threat of violence to the
9 person of another to wit: a battery with intent to commit sexual assault against M.K. on March 8,
10 2011.

11 3. The murder was committed by a person who, at any time before a penalty hearing is
12 conducted, is or has been convicted of a felony involving the use or threat of violence to the
13 person of another to wit: kidnapping of M.K. on March 8, 2011.

14 4. The murder was committed by a person who, at any time before a penalty hearing is
15 conducted, is or has been convicted of a felony involving the use or threat of violence to the
16 person of another to wit: attempted sexual assault of M.K. on March 8, 2011.

17 5. The murder was committed by a person who, at any time before a penalty hearing is
18 conducted, is or has been convicted of a felony involving the use or threat of violence to the
19 person of another to wit: sexual assault of M.K. on March 8, 2011.

20 6. The murder was committed while the person was engaged, alone or with others, in the
21 commission of or flight after committing any robbery and the person charged killed the person
22 murdered or knew or had reason to know that life would be taken or lethal force used to wit:
23 taking a cell phone from A.O. on September 2, 2011.

24 7. The murder was committed while the person was engaged, alone or with others, in the
25 commission of or flight after committing any kidnapping in the first degree and the person
26 charged killed the person murdered or knew or had reason to know that life would be taken or
27 lethal force used to wit: A.O. on September 2, 2011.
28

1 8. The person subjected or attempted to subject the victim of the murder to nonconsensual
2 sexual penetration immediately before, during or immediately after the commission of the
3 murder to wit: by placing his penis in the mouth of A.O. on September 2, 2011.

4 9. The murder was committed by a person who, at any time before a penalty hearing is
5 conducted, is or has been convicted of a felony involving the use or threat of violence to the
6 person of another to wit: sexually assaulting by placing his penis in the mouth of A.O. on
7 September 2, 2011.

8 10. The person subjected or attempted to subject the victim of the murder to nonconsensual
9 sexual penetration immediately before, during or immediately after the commission of the
10 murder to wit: attempted sexual assault by trying to place his penis in the genital opening of
11 A.O. on September 2, 2011.

12 11. The murder was committed by a person who, at any time before a penalty hearing is
13 conducted, is or has been convicted of a felony involving the use or threat of violence to the
14 person of another to wit: attempted sexual assault by placing his penis in the genital opening of
15 A.O. on September 2, 2011.

16 12. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from
17 custody.

18 13. The murder involved torture or the mutilation of the victim to wit: stabbing and/or
19 carving the letters "LV" into the body of A.O.

20 14. The murder involved torture or the mutilation of the victim to wit: by partially burning
21 the body of A.O.

22 See Exhibit B – Noticed of Intent to Seek Death Penalty.

23 On February 11, 2016 Petitioner pled guilty to all of the charges in the Indictment. With
24 regard to Count 10, Murder with Use of a Deadly Weapon, Petitioner pled guilty to the state's
25 theory that it was perpetrated by means of torture; and/or committed during the perpetration or
26 attempted perpetration of robbery and/or kidnapping and/or sexual assault. He did not plead
27 guilty to willful, deliberate and premeditated murder theory.
28

1 **1. Plea Canvas**

2 On February 11, 2016 Petitioner pled guilty to all of the charges in the Indictment. The
3 State had offered no negotiations; as a result, there was no written guilty plea.

4 The court was careful and thorough in its colloquy with the Petitioner to ensure that he
5 understood the consequences of the plea as well as the nature of the offenses. The court first
6 noted that Javier wanted to plead guilty to the Indictment. Exhibit C – Transcript of
7 Proceedings: February 11, 2016 at 5:7-11. The court noted awareness of the lengthy
8 discussions between defense counsel and Petitioner regarding this decision. The court asked
9 defense counsel to make a record. Id. at 5-6. The court confirmed Petitioner's age and his
10 ability to read, write and understand English. Id. at 6. The court accepted a plea of guilty to all
11 10 counts in the indictment. Id. at 7-13. The court asked Petitioner if he was entering the plea
12 "freely and voluntarily" and if he had "threatened or coerced into entering the plea."

13 The court made a determination that Petitioner was aware that the State had offered him
14 no negotiations in return for his plea. Id. at 5:10-12. The court listed all of the potential
15 sentences and elicited the help of the state for accuracy. Id. at 7-13. The court was clear the
16 state would still seek the death penalty and that a jury would decide if death was an appropriate
17 penalty. Petitioner indicated his understanding and acceptance of the consequences of a plea of
18 guilty to first degree murder, Count 10. Id. at 12-13.

19 The court continued with the standard guilty plea colloquy. The court confirmed that
20 Petitioner understood that he was giving up his trial rights including the right to a speedy and
21 public trial; requiring the state to prove each and every element beyond a reasonable doubt and
22 the right to testify; to remain silent; to have others come in and testify for him; to be confronted
23 by the witnesses against him and cross examine them; and to appeal any conviction and to be
24 represented by counsel at all the critical stages of the proceedings. Id. at 14:13-19; 15:4-8. The
25 court ensured that Petitioner understood and discussed with his attorney what the State would
26 have to prove at trial, and that he understood that information and had the opportunity to discuss
27 any defenses. Id. at 14-15. The court further noted that Petitioner retained certain of these rights
28 for the penalty phase, but noted the "presumption of innocence is gone." Id. at 15:13-15.

1 The court informed Petitioner that before acceptance of the "guilty plea, we have to go
2 through each and every count and you're going to have to tell me what you did that makes you
3 guilty of each count." Id. at 15: 23-25. Defense counsel was careful to make a record that
4 Petitioner understood that with this guilty plea he loses the right to appeal with regard to
5 anything that would have happened during the trial, he retains the right to appeal anything that
6 happens during the penalty phase and any post-conviction relief claims. The court questioned
7 Petitioner who acknowledged his awareness of that issue. Id. at 23:1-18.

8 The court proceeded to elicit a factual basis for each count of the Indictment.

9 With regard to Count 10, First Degree Murder with Use of a Deadly Weapon, Petitioner
10 pled guilty to the State's theories that (1) the murder was perpetrated by means of torture and/or
11 (2) committed during the perpetration or attempted perpetration of robbery and/or kidnapping
12 and/or sexual assault. Petitioner did not plead guilty to willful, deliberate and premeditated
13 murder theory.

14 Court: As to Count 10, murder with use of a deadly weapon. On
15 September 2, 2011, in Clark County, Nevada, What did you do
16 that makes you guilty of that offense?

17 Petitioner: Well, during the course of the kidnapping, sexual assault and
18 robbery, I stabbed A.O.¹ causing her death.

19 Court: And you did that - - that act was willful, deliberate and
20 premeditated - - it's the other theory - - okay, it was perpetrated by
21 means of torture, and/or committed during the perpetration or
22 attempted perpetration of robbery and/or kidnapping and/or sexual
23 assault?

24 Petitioner: Yes, Your Honor.

25 Court: Okay. And you - - used the deadly weapon, a knife; is that correct?

26 Petitioner: Yes.

27 Court: Is that State satisfied with that?

28 State: Yes, Judge.

¹ Transcript reflects victim's true name. Initials provided for privacy reasons.

1 Exhibit C at 22:3-17.

2 Lastly, the court asked Javier if he was pleading guilty “today because you are in truth
3 and in fact guilty of these offenses.” Id. at 23:19-21. The court asked if the State was satisfied.
4 The State replied yes. Id. at 24:15-16.

5 In fact, the State was so satisfied with the plea that it requested -- initially over defense
6 objection, that Petitioner be adjudicated immediately. The State insisted that the court formally
7 find Petitioner guilty of the crimes and convict him on the spot. The State insisted that “prior to
8 us starting penalty phase he needs to be adjudicated of all 10 counts.” Id. at 24:16-20. The
9 court proceeded as follows:

10 Court: Anybody have an objection to me adjudicating him
11 today?

12 Counsel: I do not.
13 ,

14 State: Not from the State.

15 ...

16 Court: Okay. Mr. Righetti, at this time I am going to
17 accept your pleas, make a finding you’ve entered
18 into them freely and voluntarily, that you
19 understand the nature of the charges and the
20 consequences of your plea, and pursuant to your
21 plea entered here today I am going to adjudicate
22 you. Any legal cause or reason why judgment
23 should not be pronounced against you at this time?

24 ...

25 Petitioner: No, Your Honor.

26 Court: No? By virtue of your pleas entered in this matter,
27 I hereby adjudicate you guilty of Count 1,
28 attempted robbery; Count 2, battery with intent to
 commit sexual assault by strangulation; Count 3,
 first degree kidnapping; Count 4, attempted sexual
 assault with a child under 16 years of age; Count 5,
 sexual assault with a child under 16 years of age;
 Count 6, robbery with use of a deadly weapon;
 Count 7, first degree kidnapping with use of a
 deadly weapon; Count 8, sexual assault with a child
 under 16 years of age with use of a deadly weapon;
 Count 9, sexual assault with a child under 16 years

1 of age with use of a deadly weapon; and Count 10,
2 murder with use of a deadly weapon.

3 Exhibit C at 25:19-21; 25:1-26-4; 26:6-18 (emphasis added).
4

5 **2. Defense Motion to Strike Aggravating Circumstances**

6 On February 16, 2016, the Petitioner filed a Motion to Strike Aggravating Circumstances
7 and Evidence in Aggravation. See Exhibit D. On February 23, 2016, the State filed its
8 Opposition. See Exhibit E. Defense counsel requested that the court strike aggravating
9 circumstances 6-11, applying McConnell and finding that the State cannot use the same
10 underlying felony both to invoke the felony-murder rule in a murder prosecution, and as an
11 aggravating circumstance under NRS 200.033 and/or that the state may not use one act to
12 support two different aggravators. Significantly, if the Court agreed with the defense position,
13 prosecutors would still have no less than ten aggravators with which to pursue a death sentence.

14 On February 25, 2016, during defense's oral argument on the defense Motion to Strike,
15 the State suddenly became aware of the fact that Petitioner's plea to the felony-murder liability
16 theory of First Degree Murder (Count 10) obviated the government's ability to proceed on the
17 felony-murder aggravators. Desperate, the State claimed that the Court as well as the litigants
18 were "confused" during the plea canvass. Moreover, the state did not understand the factual
19 basis for the plea. Frantic to avoid prosecuting a penalty hearing with only ten aggravators,
20 prosecutors argued that (1) prosecutors heard a sufficient factual basis from which the court
21 could divine a guilty plea to premeditation/deliberation; (2) prosecutors simply did not "catch
22 it," i.e., the absence of the premeditation/deliberation language; and/or (3) defense counsel was
23 sneaky, unethical, and/or tricky by "thinking two steps ahead" while prosecutors were busy
24 looking at papers (and thereby suffered hearing deficits). Accordingly, the State claimed they
25 did not object to the plea canvass as they thought Petitioner adequately pled guilty to a
26 premeditation and deliberation theory, despite evidence to the contrary.

27 Defense counsel noted that, indeed, Petitioner did not provide a factual basis to the
28 premeditation and deliberation theory – by design. As defense counsel explained:

1 ...I would like to say, that prior to doing this, I read Wilson (Wilson v. State, 267
2 P.3d 58, 62-63 (2011)). I mean, I read the law. I paid attention to what the
3 Nevada Supreme Court said about these kinds of pleas with regard to McConnell.
4 (McConnell v. State, 120 Nev. 1043 (2004)). It's not like it is a secret. It's in the
5 books. Doing what the court says has to be appropriate in order to take
6 advantage of McConnell is not a trick. It is not inappropriate. It's what lawyers
7 do.

8 Exhibit F Transcript of Proceedings: February 25, 2016 at 28:22-29.1. Defense counsel
9 added that, with regard to the issue of pleading guilty to two of the three theories for first
10 degree murder, Count 10, she was prepared to defend Petitioner's right to plead as he
11 did:

12 ... He pled guilty. There is nothing in the law that says he has to plead to all
13 three theories. I interrupted the court.. yes... because I did not want him to
14 plead guilty to premeditation and deliberation. That was my intent. He didn't
15 plead guilty to premeditation and deliberation. What he said was I killed her
16 during the course of a kidnapping, sexual assault and robbery. The court
17 understood me. The court said ...so you're not pleading to that theory...or,
18 okay, not that theory and I nodded yes. I did not have to say anything else.
19 If you had asked me more questions or had not been sure, we would have talked
20 about it right at the time. If Mr. Pesci wanted to ask some questions... I was
21 prepared to argue it at the time. But I didn't have to. Because the court
22 accepted his plea of guilty to count 10 pursuant to two of the state's theories.
23 The state did not object, and they accepted the basis for the plea.

24 Id. at 22:12-25.

25 The State failed to timely object to the plea and instead accepted the plea, insisting the
26 court immediately adjudicate Petitioner so it could take advantage of guilty pleas as convictions
27 in penalty phase. Id. at 24:16-20.

28 **3. State's Motion to Reject Petitioner's Guilty Plea to the Murder Count**

29 On March 2, 2016 the State filed a Motion to Reject the Defendant's Guilty Plea to the
30 Murder Count Entirely or in the Alternative to Set the Murder Count for Trial on the Theory of
31 Willful, Deliberate, and Premeditated Murder. See Exhibit G. The Motion was void of any
32 precedent which permitted the State to seek rejection of the guilty plea after it was accepted by
33 the Court, and Petitioner was adjudicated.

1 Petitioner filed an Opposition which stressed that the plea was properly accepted by the
2 Court; jeopardy had attached, thus a rejection of the plea would constitute a violation of the
3 Double Jeopardy Clause of the United States Constitution; and most importantly, the State
4 lacked a basis to reject a presumptively valid plea.

5 **4. Court's Rejection of Petitioner's Guilty Plea**

6 On March 17, 2016 oral argument was heard on the State's motion. See Exhibit I. The
7 Court ruled as follows:

8 Okay. At this time I'm going to reject the guilty plea, make a
9 finding you do have a statutory right to plead guilty, but you don't
10 have a statutory right to plead guilty and carve out a theory that
11 the State has alleged and limit the State in their penalty hearing.
12 So I'm going to reject the plea.

13 ...
14 I'm not going to make a finding – I'm not going to make a finding
15 of fraud. I'm going to make a finding pursuant to NRS 174.035(1)
16 that the Court can reject the plea.

17 ...
18 Again, there's a right to plead guilty. There's no constitutional
19 right. The only right that gives you the right to plead guilty is a
20 statutory right. And there's nothing in the statute that allows you
21 to plead guilty and carve out a theory and limit the State in a
22 penalty phase to the type of evidence that they can put on.

23 Exhibit I at 26:12-15; 26:24-27:1; 27:5-9.

24 The State was asked to prepare an order commensurate with above findings. Id. at 30:9-
25 15. Despite being directed to prepare the order, as of the writing of this petition, no order has
26 been proffered to the Petitioner for review and no order has been filed with the Court. Petitioner
27 now files the instant petition for extraordinary relief asking this Court to direct the District Court
28 to re-instate Petitioner's plea.

29 **ARGUMENT**

30 **I. WHY WRIT OF MANDAMUS IS THE APPROPRIATE REMEDY IN**
31 **THIS CASE.**

32 A writ of mandamus may issue to "...compel the performance of an act which the law
33 requires as a duty resulting from an office or where discretion has been manifestly abused or
34 exercised arbitrarily or capriciously." Redeker v. Eighth Judicial District Court, 122 Nev. 164,

1 167 (2006), Savage v. Third Judicial District Court, 200 P.3d 77, 81 (2009); NRS 34.160.
2 Additionally, this Court may exercise its discretion to "...grant mandamus relief where an
3 important issue of law requires clarification." Redeker at 167. Mandamus is an extraordinary
4 remedy, and "...does not issue where the petitioner has a plain, speedy, and adequate remedy in
5 the ordinary course of law." Id., also see NRS 34.170. Furthermore, this Court has exercised its
6 discretion to grant extraordinary relief where "...an important issue of law needs clarification
7 and public policy is served by this Court's invocation of its original jurisdiction..." Business
8 Computer Rentals v. State Treas., 114 Nev. 63, 67 (1998).

9 Here, Petitioner does not have a plain, speedy and adequate remedy in the ordinary
10 course of law. Petitioner's plea was properly accepted by the Court; the State lacked a basis to
11 seek rejection of a presumptively valid plea; and jeopardy had attached, thus a rejection of the
12 plea would constitute a violation of the Double Jeopardy Clause of the United States
13 Constitution. Now, Petitioner is forced to go to trial and face four additional aggravators
14 despite a legal and valid plea of guilty. Intervention by this Court at this time is essential as the
15 District Court's ruling was a belated abuse of discretion which prohibits Petitioner from
16 proceeding in his chosen means of defense and mitigation.

17 **II. THE PLEA WAS PROPERLY ACCEPTED BY THE DISTRICT COURT.**

18 A defendant is free to enter a plea of guilty without negotiations. U.S. v. Hare, 269 F.3d
19 859, 868 (2001). The Nevada Supreme Court ("NSC") has stated clearly that a trial court is
20 obligated to consider a seriously proffered plea. NRS 174.035; Sandy v State, 113 Nev. 435
21 (1997). A colloquy between the judge and the defendant is a constitutional mandate to ensure
22 that a court has sufficient information to conclude that a defendant understands the
23 consequences of a plea as well as the nature of the offenses; only then can a court determine that
24 the defendant has freely, voluntarily, and knowingly decided to plead guilty. State v. Freese,
25 2000, 13 P.3d 442, 116 Nev. 1097.

26
27 In Nevada, an guilty plea is presumptively valid. Typically, defendants rather than the
28 state seek to withdraw a guilty plea. Generally, the burden is on moving party to show that the

1 plea was not voluntarily entered. Jerzierski v. State, 107 Nev. 395, 397, 812 P2d 355, 356
2 (1991), Wingfield v. State, 91 Nev. 336, 337, 535P.2d 1295, 1295 (1975).

3 The United States Supreme Court requires only “that the record affirmatively disclose
4 that a defendant who pleads guilty entered his plea understandingly and voluntarily.” Brady v.
5 United States, 397 U.S. 742, 747-48, 90 S.Ct. 1463, 1470 (1970). After the plea has been
6 accepted, the burden shifts to Defendant to establish that his plea was not entered knowingly and
7 intelligently. “[G]uilty pleas are presumptively valid, especially when entered on advice of
8 counsel, and a defendant has a heavy burden to show the district court that he did not enter his
9 plea knowingly, intelligently, or voluntarily.” Molina v. State, 120 Nev. 185, 190, 87 P.3d 533,
10 537 (2004).

11 In the instant case, the court conducted a thorough colloquy with Petitioner including an
12 understanding waiver of constitutional rights and privileges; absence of coercion by threat or
13 promise of leniency; and understanding of consequences of the plea and range of punishments
14 and an understanding of the charge, i.e., elements of the offense. The court more than met the
15 requirements of Brady, that the plea was entered knowingly and intelligently with an
16 understanding of the consequences. As a result, Petitioner’s plea is presumptively valid.

17 “Where a guilty plea is accepted the record should affirmatively show that certain
18 minimal requirements are met; generally, such requirements are an understanding waiver of
19 constitutional rights and privileges, absence of coercion by threat or promise of leniency,
20 understanding of consequences of the plea and range of punishments and an understanding of
21 the charge, i.e., elements of the offense.” NRS 174.035(1); Hanley v. State, 1981, 624 P.2d
22 1387, 97 Nev. 130.

23 The court conducted a thorough and careful colloquy with Petitioner covering his
24 understanding of the plea, the nature of the charges, the consequences and penalties. The court
25 accepted the plea. The State accepted the plea. The court adjudicated the Petitioner.
26 Petitioner’s guilty plea was presumptively valid and may not be vacated.
27
28

1 **III. THE DISTRICT COURT'S SUBSEQUENT REJECTION OF THE PLEA**
2 **WAS A BELATED ABUSE OF DISCRETION.**

3 Pursuant to NRS 174.035(1) a court may reject a plea, at the time of the plea, but must
4 provide a reasoned explanation for the exercise of discretion. Sparks v State, 104 Nev. 316,
5 322-323 (1988). In the instant case, the plea was accepted by the court and by the district
6 attorney. Once the plea is accepted by the court, without objection by the state, the time for the
7 court to "exercise discretion" has passed.

8 The District Court, in subsequently rejecting the plea on March 17, 2016 ruled as
9 follows:

10 Okay. At this time I'm going to reject the guilty plea, make a
11 finding you do have a statutory right to plead guilty, but you don't
12 have a statutory right to plead guilty and carve out a theory that
13 the State has alleged and limit the State in their penalty hearing.
14 So I'm going to reject the plea.

15 Exhibit I at 26:12-15.

16 Without an order delineating the exact findings of the court, it is assumed that the court's
17 ruling is based on the State's inability to proceed with aggravators absent rejection of the plea.
18 Without addressing the validity of the accepted plea and adjudication, the court belatedly reject
19 the plea. What is absent from the court's ruling is an explanation of everything said in direct
20 contravention by the court on February 25, 2016:

21 COURT: So when I took the factual basis...cause I agree he pled straight up
22 to the indictment.. but when I took the factual basis, I mean it was
23 pretty clear he was not going to give me a factual basis for the
24 premeditated and deliberate theory cause I specifically said "not
25 that theory?" He pled, he gave me a factual basis to adjudicate
26 him, no doubt. He gave me the felony-murder factual basis.
27 Exhibit F at 10:15-19.

28 COURT: I said something about theory. But it was pretty clear to me he
had to give me a factual basis for one or more theories. And he
only gave me a factual basis for the felony-murder and nobody
asked me to get a factual basis for the premeditated, deliberate
willful. Id. at 11"4-7.

COURT: ... I know exactly what is going on. I know exactly what she was
doing. She was getting him to plead to the felony-murder so she

1 could move to strike your aggravators. It's not a secret. Id. at
2 20:18-23.

3 COURT: I did. I said all three, premeditated, deliberate, willful. I said all
4 three. She cut me off and said he wasn't--my understanding was
5 that he wasn't pleading to that theory. Id. at 26:19-20, 22-23.

6 On February 25, 2016 the court assured the parties that when it was conducting the plea
7 canvass that it knew exactly what was going on. The court was aware that the Petitioner did not
8 provide a premeditated and deliberate factual basis. The court knew that the Petitioner was
9 positioning himself to file a motion seeking to strike aggravators. The court knew that it was
10 interrupted by defense counsel. The court nonetheless *accepted* the plea. The court completely
11 reversed itself in rejecting the plea almost a month later. Why? Because despite knowing
12 exactly what was happening; accepting the plea; adjudicating the Petitioner; and failing to
13 articulate any learned reason for a reversal in thought, the court, pursuant to statute, says it can.

14 The court ignored the threshold issue of the presumptively valid guilty plea and the law
15 surrounding the necessary grounds to withdraw or vacate a valid plea. As discussed above,
16 "[G]uilty pleas are presumptively valid, especially when entered on advice of counsel, and a
17 defendant has a heavy burden to show the district court that he did not enter his plea knowingly,
18 intelligently, or voluntarily." Molina v. State, 120 New. 185, 190, 87 P.3d 533, 537 (2004).

19 The court's reasoning is void of anything either legal or factual which supports a change
20 from accepting a plea and then rejecting that same plea. This is the very definition of an abuse
21 of discretion and therefore warrants this Court's intervention.

22
23 **IV. THE STATE LACKED ANY BASIS FOR SEEKING THE REJECTION**
24 **OF THE VALIDLY ACCEPTED GUILTY PLEA.**

25 The State provided no legal basis for the rejection of a validly accepted guilty plea.
26 Regardless, the prejudice to the State is minimal at best. Instead of having the ability to proceed
27 with fourteen aggravating circumstances in a death case penalty phase, had the District Court not
28 subsequently rejected the guilty plea, the State would have had to live with ten. As discussed
below, the State's reasons for seeking a rejection of the plea in this case have no basis in law. It

1 is therefore not surprising that the District Court failed to incorporate any of them in its decision
2 to reject the plea.

3 *A. "She was thinking two steps ahead"*

4 The NSC in McConnell and explained by Wilson v. State, 267 P.3d 58, 62-63 (2011) that
5 the state cannot use the same underlying felony both to invoke the felony-murder rule in a
6 murder prosecution, and as an aggravating circumstance under NRS 200.033. In Wilson, unlike
7 the instant case, the defendant pled guilty to both premeditation and deliberation and felony-
8 murder theory. As a result of pleading guilty to both theories, the NSC found that Wilson was
9 not entitled to relief noting the "use of a felony aggravator is not precluded where the defendant
10 has pleaded guilty to first-degree murder based on premeditation and deliberation and felony-
11 murder." Id. at 63.

12 In the instant case, the State bitterly complained that the defense was thinking about the
13 law and mindful of the law at the time of the plea. In other words, the State complained about
14 lawyering. The State repeatedly admonished the court to "see what is going on here" (Exhibit F
15 at 9:20-21) and "she [defense counsel] determined that this was how this was all going to play
16 out" (Id. at 22:6-8) and "that she [defense counsel] was going to try and get out of first degree
17 murder and she interrupts you [the court] right at that time and then we get this motion." Id. at
18 22:7-9. In their pleading the state repeatedly complains that defense counsel intentionally
19 "interrupted the court during the canvass." Exhibit G - State's Motion To Reject The
20 Defendant's Guilty Plea at 9:8-10.

21 The defense was alert to the NSC admonitions in Wilson and McConnell and carefully
22 prepared for the guilty plea to maintain the grounds necessary for a McConnell motion. Defense
23 counsel was attentive to the requirements of Strickland v. Washington, 466 U.S. 668, 687, 104
24 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and ADKT 411; 2-10 which imposes a duty on capital
25 defenders to:

26
27 (a) Counsel at every stage of the case, exercising professional judgment in accordance
28 with these standards, should:

- 1.) Consider all legal claims potentially available;

- 2) Thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
 - 3) evaluate each potential claim in light of:
 - (A) the unique characteristics of death penalty law and practice; and
 - (B) the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence;
 - (C) the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and
 - (D) any other professionally appropriate risks and benefits to the assertion of the claim.
- (b) Counsel who decide to assert a particular legal claims should:
1. Present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction: and
 2. Ensure that a full record is made of all legal proceedings in connection with the claim.

Defense counsel had a duty to consider all legal claims available to Petitioner with an eye towards the "near certainty" of post-conviction review. Failing to consider the admonitions of Wilson and McConnell and failing to put Petitioner in a position to attempt to strike 4 of the 14 aggravators would risk a finding of ineffective assistance of counsel and violate ADKT 411. Defense counsel absolutely, deliberately and intentionally took steps intended to preserve the McConnell issue.

The state's failure to recognize and/or understand the significance of the law in Wilson and McConnell is not valid grounds to vacate the plea. Defense counsel "*thinking two steps ahead*" of the State is not grounds to vacate the plea. The State's failure to either pay attention and/or understand the legal significance of Petitioner's felony-murder allocution and/or the colloquy with the court is not legal grounds to vacate a valid guilty plea.

B. "It is more than suspicious"

It is clear that the State believes that the defense was trying to hide the plea from the court or employing trickery. The State complained over and over again that:

"it is more than suspicious that she [defense counsel] cuts you off right at that moment." Exhibit F at 21:23-24 (emphasis added).

1
2 "This was . . . premeditated and deliberate . . . that's exactly what happened with
3 Ms. Craig. When she determined that this was how this was all going to play
out." Id. at 22:6-8.

4 "I hope the court can see what is going here. As you just said, she cut you off as
5 you were reading the plea." Id. at 9:20-22.

6 "And now to come in here after the fact, interrupt you during the plea, interrupt
7 you during the plea, right at that crucial point..." Id. at 13:15-16.

8 "And then, sneaky comes in after the fact and asks to get rid of the aggravators
9 based upon that." Id. at 13:22-23.

10 "This is trickery. This is an effort to try to trick the parties involved to try and get
11 a benefit for him. That is not appropriate." Id. at 19:14-15.

12 "I mean, I just hope the court sees what is going on here." Id. at 20:16-17.

13
14 "There was a misrepresentation to the court..." Id. at 25:9.

15
16 Petitioner pled guilty in open court, on the record. The plea was not a behind the
17 scenes, back room deal. It occurred in open court, with the full participation of the State.
18 The court did a lengthy, by the book, colloquy with Javier. See Exhibit C. The State
19 participated, providing the penalties for the court during the colloquy. Id. at 9-11.
20 Despite the State's repeated complaints impugning defense counsel's integrity, the
21 record is clear. There was no trickery, nothing sneaky, and no misrepresentations to the
22 court. Petitioner's allocution was out loud, on the record and unmistakably felony-
23 murder theory and not premeditation and deliberation theory.

24 Likewise, the court's colloquy with Petitioner was out loud, in open court, on the
25 record and unmistakably felony-murder theory and not premeditation and deliberation
26 theory.

27 Petitioner pled guilty to each count individually, giving a factual basis for each
28 count. The court then read each count, one by one, directly from the Indictment to which
the defendant acknowledged the facts. For example:

1 Court: As to Count 6, robbery with use of a deadly weapon, son
2 September, 2nd, 2011, in Clark County, Nevada, what did you do
3 to Ms. A.O. that makes you guilty of that offense?

4 Defendant: "I took her cell phone against her will."

5 Court: You took it against her will and by means of force or violence or
6 fear of injury to and without her consent; is that correct?

7 Defendant: Yes, Your Honor.

8 Court: And when you did that, did you use a knife, a deadly weapon?
9

10 Defendant: Yes, Your Honor.

11 Exhibit C at 19:4-13.
12

13 The colloquy between the court and Petitioner was the same for all 10 counts.
14 One by one. In open court. On the record. The State was present for the entire canvas.
15 Despite the State's claim that the guilty plea was the product of trickery, the court clearly
16 understood each plea of guilty to each count, including first degree murder, count 10.

17 The court accepted the felony-murder theory allocution to first degree murder,
18 count 10. Ultimately the court accepted the entire plea canvas including a plea of guilty
19 to first degree murder in count 10. During the arguments on defense's Motion to Strike
20 argument, the court repeatedly indicated awareness and understanding of the nature of
21 the plea to first degree murder, count 10.

22 The State's complaint that the plea was "suspicious" and "sneaky" or an out and
23 out misrepresentation by the defense, is belied by the record. The plea was taken in open
24 court. The court accepted the plea in open court, on the record.

25 Interestingly, the State accepted the plea, in open court, on the record. Finally,
26 the State insisted that the court adjudicate Petitioner based on the plea. The State simply
27 was either not paying attention to the actual words of Petitioner's felony-murder
28 allocution and guilty plea and/or did not understand the legal significance of both the
allocution and the plea. Neither amounts to a basis to vacate the plea.

1 There is no question that the court not only accepted the guilty plea to first degree
2 murder, count 10, but the court was aware of the nature of the allocution.

3 COURT: So when I took the factual basis – because I agree, he pled straight up
4 to the Indictment, but when I took the factual basis, I mean, it was
5 pretty clear he wasn't going to give me a factual basis for the
6 premeditated and deliberate theory because I specifically said, "Not
7 that theory." Exhibit F at 10:15-19.

8 The colloquy between the court and Petitioner was public, recorded and
9 thorough. On the basis of that recorded public colloquy, the court concluded that
10 Petitioner understood the consequences of his plea as well as the nature of the offenses;
11 and determined that the he had freely, voluntarily, and knowingly pled guilty. The court
12 conducted a thorough and careful colloquy with Petitioner covering his understanding of
13 the plea, the nature of the charges, the consequences and penalties meeting the legal
14 requirements for a valid guilty plea.

15 The State acknowledged a failure to pay attention by promising to be "a little bit
16 more diligent in seeing if something is being snuck past the goalie, so to speak." Id. at
17 31:9-10 (presumably, the prosecutor is the "goalie" in this scenario). Again, however,
18 the State's failure to either pay attention and/or understand the legal significance of the
19 allocution and/or the colloquy is not legal grounds to vacate the guilty plea.

20 ***C. "I did not understand her to be avoiding that and I did not, and that is on me"***²

21 Despite the Hail Mary claims that the defense was sneaky and tricky and somehow
22 pulled the wool over the unseeing eyes of the court, the State grudgingly acknowledges the
23 actual truth; that they simply were not paying attention and/or did not realize the legal
24 significance of either the allocution and/or plea. The latter is the more likely explanation in light
25 of the fact that the state asked for permission to file another motion in response to the defense's
26 Motion to Strike the Aggravators because they did not understand the factual and legal basis of
27 the argument.
28

² Exhibit F at 23:15.

1 The State says over and over that they did not understand and/or did not hear the factual
2 basis of the plea to first degree murder, count 10. The State's admitted failure to either pay
3 attention and/or understand the legal significance of the allocution and/or the colloquy is not
4 legal grounds to vacate the guilty plea.

5 **D. "He gave me the felony-murder factual basis."**

6 Petitioner pled guilty to first degree murder perpetrated by means of torture and/or
7 mutilation and/or committed during the course of a robbery, first degree kidnapping and a sexual
8 assault. Javier told the court that "during the course of the kidnapping, sexual assault and
9 robbery, I stabbed [A.O.] causing her death." Exhibit C at 22. As the court pointed out, this
10 allocution was "the felony-murder factual basis." Exhibit F at 10:24-25.

11 There is no question that the State failed to notice/pay attention to/understand the legal
12 significance of the allocution. The court noticed and paid attention to the allocution pointing
13 out "but when I took the factual basis, I mean it was pretty clear he was not going to give me a
14 factual basis for the premeditated and deliberate theory." Id. at 10:17-19. The court understood
15 the legal significance of both the plea and the allocution asking the State why they did not voice
16 an objection at the time. "Why didn't you have him pled to the premeditated and deliberate
17 theory?" Id. at 10:10-11. The court went on to explain "*he only gave me a factual basis for the*
18 *felony-murder* and nobody asked me to get a factual basis for the premeditated, deliberate
19 willful." Id. at 11:4-7 (emphasis added).

20 The allocution provided the factual basis for felony-murder theory only. As the court
21 clearly noted, the State failed to object. The State's failure to pay attention and/or to understand
22 the legal significance of the felony-murder allocution is a fault of its own making. The defense
23 did not hide the allocution. Petitioner did not whisper. The factual basis provided to the court
24 was done out loud, captured by the courtroom audio-visual equipment, and transcribed by a
25 court reporter in open court. The failure to object is the State's failure and cannot be blamed on
26 the defense. The State's admitted failure to either pay attention or understand the legal
27 significance of the allocution and/or the colloquy is not legal grounds to vacate the guilty plea.
28

1 ***E. “maybe there’s no law that says that he doesn’t have to”³***

2 There is no law or rule in the state of Nevada that requires a defendant to plead guilty to
3 each and every one of the state’s theories contained in a murder charge. Each theory in count
4 10, by itself, supports the charge. A defendant who pleads guilty to each and every count in an
5 Indictment, has no legal duty to plead to every theory. The State had every right to object at the
6 time of plea, but failed to do so. The state’s failure to timely object either because they were not
7 paying attention and/or did not understand the legal consequences of the allocution and/or plea
8 is not grounds to vacate the guilty plea.

9 Petitioner pled guilty to First Degree Murder, count 10, admitting two of the state’s
10 theories, felony-murder and torture and mutilation. He pled guilty without any negotiations
11 from the State. He pled guilty to each and every count contained in the Indictment. He did not
12 plead guilty to one of the state’s three theories in count 10, that is the premeditation and
13 deliberation theory. The court acknowledged that Petitioner had to provide a “factual basis for
14 one of more of the theories.” The court received Petitioner’s allocution finding that “he pled, he
15 gave me a factual basis to adjudicate him, no doubt. He gave me the felony-murder factual
16 basis.” Id. at 10:21-22.

17 If unsatisfied with the allocution and/or the guilty plea, the State had a duty to timely
18 object. If the State was unsatisfied with the felony-murder allocution, they should have timely
19 objected. If the State was unsatisfied with the factual basis of the plea, they should have timely
20 objected. If the State’s position was that Petitioner had to plead to all of the state’s theories,
21 they should have timely objected. They did not. The reason(s) for the failure are irrelevant.
22 The lack of timely objection(s) precludes any subsequent request for review of and/or relief from
23 the plea.

24 ***F. “that is why I didn’t say anything...”***

25 The State has several alternative and competing explanations for their failure to timely
26 object and for ultimately accepting the plea. The State’s myriad of explanations fall short of
27 actually clarifying their failure to timely object. Interestingly, the State conflates Petitioner’s
28

³ Exhibit F at 21:13.

1 felony-murder allocution and the court's reading of the Indictment language for first degree
2 murder, count 10 and Petitioner's plea of guilty to that reading. To this end, prosecutors claim
3 that, despite Petitioner's actual allocution and the court's understanding of the felony-murder
4 allocution, what the state "understood was that he willfully, premeditatedly and deliberately did
5 it because he said he I stabbed her, I stabbed her multiple times."⁴ Exhibit F at 19:2-4. The State
6 claims that they expected Petitioner to plead to all of the counts and went forward on that
7 assumption. Id. at 23:4-5; 19:1-2. This, the prosecutor now claims, "...is why I didn't say
8 anything." Id. at 27:17. The prosecutor further claims that, because he thought the court was
9 simply listing out the various theories, "...that it's the other theory-meaning that's the first
10 theory, torture is the second theory and felony-murder is the third theory." Id. at 27:11-17.

11 Of course, the record belies this. As set forth (repeatedly) above, the court clearly and
12 explicitly heard the felony-murder allocution. The court also clearly heard the plea and
13 understood "that he wasn't pleading" to premeditation and deliberation.

14 Alternatively, the prosecutor claims: "I did not understand her [defense counsel] to be
15 avoiding that and I did not, and that is on me." Id. at 23:15-16. The prosecutor explained that:
16 "I was looking at the pleadings myself. I was looking down at times. I had no understanding
17 that this defendant was saying he did not willfully, deliberate and premeditatedly do it." Id. at
18 31:1-5.

19 It is not clear how having his head down, looking at the pleadings, interfered with the
20 prosecutor's ability to *hear* Petitioner lay out a felony-murder allocution. The felony-murder
21 allocution certainly triggered an understanding by the court. "I know exactly what is going on.
22 I know exactly what she was doing. She was getting him to plead to the felony-murder so she
23 could move to strike your aggravators." Id. at 20:18-23.

24 As proffered as another alternate explanation, the prosecutor argued there was no a
25 "meeting of the minds. There is not an understanding." Id. at 14:24-25. A "meeting of the
26 minds" between the state and the defendant is not required when a defendant is pleading guilty
27 without a negotiation. When a defendant is pleading guilty, without negotiations, without a
28

⁴ Actual felony-murder allocution "well, during the course of a kidnapping, sexual assault, and robbery, I stabbed A.O. causing her death." Exhibit C at 22: 6-7.

1 guilty plea agreement, and is pleading guilty to all of the charges, the only “meeting of the
2 minds” required is between the Judge accepting the plea and the defendant. The Judge is
3 required to ensure that the defendant who pleads guilty entered his plea understandingly and
4 voluntarily and that there is a factual basis to support that plea.

5 The court clearly understood the plea, the factual basis for the plea and that Petitioner
6 was not pleading to the premeditation and deliberation theory. The court accepted the plea. The
7 State accepted the plea. The “misunderstanding” occurred when the State realized the legal
8 consequence of the plea weeks later.

9 All of the State’s explanations suffer from the same fatal defect. Simply put, the State
10 failed to timely object as a result of either a failure to pay attention and/or a failure to understand
11 the legal significance of the allocution and/or the colloquy. The State has offered no legal
12 grounds upon which the court may vacate the plea.

13 **G. “I heard him. I heard him say I stabbed her repeatedly...”**

14 Sadly, the state did not hear Petitioner say he “stabbed her repeatedly.” Exhibit F at
15 12:21. What Petitioner actually said was “during the course of the kidnapping, sexual assault
16 and robbery, I stabbed [A.O.] causing her death.” Exhibit C at 22:6-8. As the court noted, this
17 allocution provided a factual basis for felony-murder. The State argued that a ‘factual rendition
18 of stabbing her repeatedly” provides the basis for the court to find that he was pleading guilty to
19 the theory of premediated and deliberate.

20 First, the only factual basis provided to the court was that of felony-murder. Petitioner
21 never said “I stabbed her repeatedly.” Without a factual basis to support it, the court may not
22 and did not accept a plea pursuant to the premeditation and deliberation theory.

23 Second, a guilty plea must be knowing, intelligent and voluntary and provide a factual
24 basis at the time of the plea in order for the court to accept it. At the time of the plea, Petitioner
25 did not provide a factual basis to support a plea to the premeditation and deliberation theory;
26 therefore the court did not accept a plea to that theory. The State may not ask the court to “look
27 back” and search for a few (ultimately nonexistent) words to manufacture a factual basis that did
28 not exist at the time of the plea.

1 Third, the State should have timely objected. The court would have heard arguments and
2 ruled on the issue at the time of the plea. The State failed to do so and may not now,
3 retroactively, ask the court to fix the error.

4 **V. THE STATE RELIES ON INAPPLICABLE AND DISTINGUISHABLE**
5 **PRECEDENT.**

6 In its prior pleadings, the State has ignored the threshold issue of the presumptively valid
7 guilty plea and the law surrounding the necessary grounds to withdraw or vacate a valid plea.
8 Instead the State cites to Jefferson v State, 108 Nev. 953(1992) where the court rejected a plea at
9 the time of the plea. Interestingly, in Jefferson the State properly objected at the time of the
10 plea. Jefferson was charged with two separate counts, and attempted to plead guilty to only one
11 count. The State timely objected. The court refused to take the plea. Jefferson appealed. The
12 NSC held that without a plea agreement, the defendant was unable to plead guilty to the count of
13 his choice.

14 Jefferson is obviously distinguishable and provides no relief for the State. In the instant
15 case, unlike Jefferson, Petitioner pled guilty to each and every count, including first degree
16 murder, count 10. Unlike Jefferson, the State did not timely object to the plea. Unlike
17 Jefferson, the court found a factual basis to accept the plea. Unlike Jefferson, the State accepted
18 the plea and Petitioner was adjudicated guilty. Jefferson is silent as to the issue of theories
19 within a count.

20
21 A trial court may properly reject a unilateral guilty plea to a lesser charge that would
22 preclude prosecution for a greater charge. Jefferson, at 954. In this case, Petitioner pled guilty to
23 each and every charge and as a result is facing the death penalty. Nothing about Petitioner's
24 accepted and valid plea could possibly preclude prosecution for a greater charge. There is no
25 greater charge than first degree murder. There is no greater penalty than death.

26 It is clear that for a valid plea, the defendant is required to provide a factual basis for one
27 or more of the alleged theories. The question of whether a defendant must plead to each and
28 every theory in the indictment is a matter upon which the NSC has not issued a ruling.

1 The State has also cited to a Washington State case, State v. Bowerman, 115 Wash.2d
2 794 (1990) as what it claims is persuasive authority on this issue. Bowerman is non-binding and
3 distinguishable. Bowerman was not arraigned on a fourth amended information that included a
4 felony-murder charge in addition to a pre-existing aggravated murder charge based on the same
5 or similar facts. Id. at 798. Bowerman asserted that had she been arraigned on that information,
6 she could have pled guilty to the felony-murder allegation thereby foreclosing any trial on the
7 aggravated murder charge. Id. The court held that even if she had attempted to plead guilty, she
8 would not be able to avoid facing the aggravated murder charge by virtue of admitting to the
9 felony-murder. Id. The State likens this case to the instant one.

10 However, Petitioner's case is very different. First, Petitioner pled guilty. This was not a
11 hypothetical maneuver. The Petitioner pled guilty to two of the three theories under Count 10 of
12 the Indictment. Secondly, the plea was accepted. Third, the State indicated it was satisfied with
13 the plea. Fourth, the Petitioner was adjudicated. Fifth, Bowerman addressed the State of
14 Washington's statutory scheme. Sixth, Petitioner's plea was presumptively valid. Seventh, it is
15 unknown if the Washington prosecutor would have paid attention to the law or the canvas and
16 object contemporaneously.

17 There is no law or precedent in the State of Nevada which required the Petitioner to enter
18 a plea of guilty to all theories delineated in Count 10. There is no law or precedent which
19 permitted the District Court to belatedly reject the Petitioner's plea.

20 **V. JEOPARDY ATTACHED UPON ACCEPTANCE OF PETITIONER'S**
21 **GUILTY PLEA.**

22 Jeopardy⁵ attaches when the court accepts a plea of guilty. U.S. v. Vaughan, 715 F.2d
23 1373, 1378 n. 2 (9th Cir.1983); accord U.S. v. Aliotta, 199 F.3d 78, 83 (2d Cir.1999) (stating
24 that, "[a]s a general rule, jeopardy attaches in a criminal case at the time the district court
25 accepts the defendant's guilty plea"). See also U.S. v. Faber, 57 F.3d 873 (1995). Accordingly,
26
27

28 ⁵ The double jeopardy clause assures that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The object of the double jeopardy clause is to protect a defendant who has once been convicted and punished or acquitted for a particular crime from the risk of further punishment by being tried or sentenced anew for the same offense

1 once the court accepted Petitioner's guilty plea, jeopardy attached and his guilty plea cannot be
2 vacated.

3 Other jurisdictions have uniformly held that courts do not have the authority to vacate a
4 defendant's guilty plea over his objection. E.g., State v. De Nistor, 143 Ariz. 407, 694 P.2d 237,
5 242 (1985) (holding that the court may not *sua sponte* vacate the acceptance of a guilty plea and
6 set the issue for trial because such an action would violate the defendant's double-jeopardy
7 rights); People v. Hardin, 67 A.D.2d 12, 16, 414 N.Y.S.2d 320 (1979) (stating that, in the
8 absence of fraud, the court has no power to set aside a plea without the defendant's consent);
9 Commonwealth v. Kotz, 411 Pa.Super. 319, 601 A.2d 811, 814-15 (1992) (holding that
10 "[a]bsent [] an application/motion by the defendant [to withdraw his guilty plea,] a guilty plea,
11 which is spoken of in terms of a verdict of guilty, may not be removed by a trial court *sua*
12 *sponte*"); Perkins v. Court of Appeals For the Third Supreme Judicial District of Texas, 738
13 S.W.2d 276, 283 (Tex.Cr.App.1987) (holding that once the district court accepted the plea of
14 guilty and approved the plea bargain agreement, he had no power to vacate the defendant's plea
15 over his objection).

17 The Ninth Circuit Court of Appeals considered the authority of a district court to vacate a
18 defendant's guilty plea over his objection in U.S. v. Patterson, 381 F.3d 859 (9th Cir.2004). In
19 Patterson, the district court accepted a guilty plea but reserved rights regarding the sentence.
20 The Ninth Circuit noted that upon acceptance of the guilty plea, jeopardy attached.
21 Accordingly, the Patterson Court held that the trial court was "not free to vacate the plea either
22 on the government's motion or *sua sponte*". The Court noted: "The district court here clearly
23 accepted Patterson's plea; when it did so, jeopardy attached. Cf. U.S. v. Velasco-Heredia, 319
24 F.3d 1080, 1086-87 (9th Cir.2003) (stating that the government had lost its opportunity to prove
25 that the defendant was responsible for more than 100 kilograms of marijuana where the
26 defendant was found guilty of conspiring to distribute an unspecified quantity of marijuana,
27 because "the Fifth Amendment to our Constitution does not permit [the defendant] to be tried
28 twice for the same offense")." See also Com.v. Dean-Ganek, 461 Mass 305 (2012).

1 While double jeopardy can be waived by the defendant, a court is on much shakier
2 ground finding the Fifth Amendment protections lost when the only action is by the prosecution
3 or the court. Ricketts v. Adamson, 483 U.S. 1, 11, 23-26 (1987). Citing United States v. Dinitz,
4 424 U.S. 600, 609 (1976), Justice Brennan noted: “the important consideration, for purposes of
5 the Double Jeopardy Clause, is that the defendant retain primary control over the course to be
6 followed in the event of [prejudicial prosecutorial or judicial] error. Id. (Brennan, J.,
7 dissenting).

8 In the instant case, the court accepted a valid plea. The State accepted the factual basis
9 for the plea and offered no objection to the plea canvas. At the State’s insistence, the court
10 adjudicated Petitioner. As such, Jeopardy attached. Under the authority cited above, the court
11 may not, via motion of the government or *sua sponte*, vacate the plea. Doing so would amount
12 to a violation of the Double Jeopardy Clause and, thus, must be denied.

13 **VI. PETITIONER WAS ADJUDICATED.**

14 After the thorough and careful plea canvas the court adjudicated Petitioner, i.e., found
15 him guilty of -- and convicted him of -- the crime. Even where a plea colloquy is incomplete
16 and the government subsequently objects and seeks to strike the plea on this basis, double
17 jeopardy forbids the striking of a plea once the defendant is adjudicated guilty:
18

19 After a district court accepts a guilty plea, jeopardy attaches, and the court has no
20 authority to vacate the defendant's plea. United States v. Patterson, 381 F.3d 859,
21 864 (9th Cir.2004); Ellis, 356 F.3d at 1203, 1208. To determine whether the
22 district court has accepted a plea, we consider both explicit and implicit indicia of
23 acceptance, including: (1) whether the district court completed the Rule 11 plea
24 colloquy and expressly accepted the plea, see In re Gallaher, 548 F.3d 713, 716--
25 17 (9th Cir.2008); Patterson, 381 F.3d at 863--64; Ellis, 356 F.3d at 1204; (2)
26 whether the district court's records reflect that the plea was accepted, see Ellis,
27 356 F.3d at 1204; and (3) whether the court ordered and reviewed a presentence
28 report after the plea hearing, see Fed.R.Crim.P. 32(e)(1); Ellis, 356 F.3d at 1204.

United States v. Ramos-Tadeo, 475 F. App'x 651, 652 (9th Cir. 2012).

In the instant case, all records manifest both explicit and implicit indicia of acceptance,
including the Court’s statements from the bench and the court minutes. The court adjudicated
Petitioner guilty of the offenses to which he pled. The State’s tardy protestation that the plea

1 was incomplete does not amount to a basis to strike the plea where jeopardy has attached and the
2 defendant has been adjudicated.

3
4 **CONCLUSION**

5 Based upon the foregoing, Petitioner respectfully requests that this Court issue a Writ of
6 Mandamus and/or Prohibition directing the District Court to accept Petitioner's valid plea of
7 guilty.

8
9 DATED this 16th day of June, 2016.

10 PHILIP J. KOHN

11 CLARK COUNTY PUBLIC DEFENDER

12 By /s/ Christy L. Craig
13 CHRISTY L. CRAIG, #6262
14 Deputy Public Defender
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ADAM LAXALT
STEVEN B. WOLFSON

CHRISTY CRAIG
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District Court, Department XII
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32