IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVIER RIGHETTI,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MICHELLE LEAVITT DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party In Interest.

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CASE NO: 70591

ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Real Party In Interest, by STEVEN B. WOLFSON, District Attorney, through his Deputy, CHRIS BURTON, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed September 21, 2016, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 11th day of October, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Chris Burton*
CHRIS BURTON
Deputy District Attorney
Nevada Bar #012940
Attorney for Respondent

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On October 7, 2011, the State filed an Indictment charging Javier Righetti with: Count 1 – Attempted Robbery; Count 2 – Battery with Intent to Commit Sexual Assault; Count 3 – First Degree Kidnapping; Count 4 – Attempted Sexual Assault with a Child Under Sixteen Years of Age; Count 5 – Attempted Sexual Assault with a Child Under Sixteen 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 Sixteen Years of Age with Use of a Deadly Weapon; Count 9 – Sexual Assault with a Child Under Sixteen Years of Age with Use of a Deadly Weapon; Count 10 – Murder with Use of a Deadly Weapon. 1 Petitioner's Appendix ("PA") 1-6. On October 14, 2011, the State filed a Notice of Intent to Seek Death Penalty. 1 PA 7-16.

On January 22, 2016, Righetti filed a Motion to Change Plea. Respondent's Appendix ("RA") 66-72. On February 11, 2016, Righetti's Motion was heard and he pleaded guilty to the charges as contained in the Indictment. 1 PA 17-47.

On February 16, 2016, Righetti filed a Motion to Strike Aggravating Circumstances and Evidence in Aggravation. 1 PA 48-89. The State filed an Opposition on February 23, 2016. 1 PA 90-93. This Motion is still pending.

On March 2, 2016, the State filed a Motion to Reject 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. 1 PA 152-65. Righetti filed an Opposition on March 11, 2016. 1 PA 166-2 PA 309. On March 17, 2016, the State's Motion was granted. 2 PA 310-40. Defendant's Petition for Writ of Mandamus/Prohibition followed. The State now answers as follows.

STATEMENT OF FACTS

In March 2011, M.K. was a fifteen year old student attending Arbor View High School. RA 5. On March 8, 2011, M.K. left her home and walked to meet her friends. RA 5, 8. The friends planned to meet near a tunnel that ran under the Oran Gragson Veterans Memorial Freeway and along Grand Teton Drive in Las Vegas, Nevada. RA 5. In order to get to the meeting spot, M.K. walked through the underground tunnel. Id. As she was walking, she was also texting on her cellular telephone. RA 6. As M.K. got close to the exit of the tunnel, Righetti approached her and asked to use her phone. Id. M.K. told him "no" and continued walking to meet her friends. Id. Just as M.K. neared the exit of the tunnel, Righetti grabbed her from behind by wrapping his arm around her neck. Id. M.K., believing Righetti was robbing her, threw her phone to the ground and began screaming for her friend. Id. Righetti told M.K. to "shut up" and started squeezing her neck harder. Id. He then told her he had a knife, and, with his hands around her neck, pushed her toward the

opposite end of the tunnel. RA 7. As Righetti was pushing M.K., she fell to the ground, where Righetti continued choking her until she passed out. Id.

At some point, M.K. regained consciousness and found herself laying shoeless on the ground in a dark part of the tunnel. Id. Righetti was not next to her when she awoke, but immediately came back to her once he realized she had regained consciousness. Id. He then removed his penis from his pants, grabbed the back of her head, and forced his penis inside her mouth. RA 8. Within a few moments, M.K.'s friends started yelling her name from outside the tunnel. Id. Righetti then pulled his pants back on and told M.K. that if she screamed he would use his knife to hurt her and her friends. Id. He then made M.K. stand up and walk further into the tunnel to a ladder which led to a manhole covering. Id. There, he forced M.K. to climb the ladder and open the covering. RA 9. M.K. tried to do as Righetti said, however the covering was too heavy and she could not open it. Id. She then climbed back down and begged Righetti to let her leave. Id. She swore she would calmly leave the tunnel and would not tell her friends what he had done to her. Id. Righetti ultimately let her go and fled further into the tunnel. Id.

M.K. left the tunnel and contacted law enforcement. Id. While she disclosed that she had been attacked, she did not disclose the fact that Righetti forced his penis inside her mouth. Id. On September 6, 2011, M.K. met with law enforcement for a

second time. Id. On that date, M.K. was presented with a photographic lineup and identified Righetti as the person who attacked her. RA 10.

Just six months later, on September 2, 2011, fifteen-year-old A.O. was walking in the same tunnel which ran under the Oran Gragson Veterans Memorial Freeway. RA 24. A.O., like M.K., was a student at Arbor View High School but had not attended school that day as she was feeling sick. RA 12, 24. Instead, she stayed alone at her house located at 8124 Satin Carnation Lane, Las Vegas, Nevada. RA 12. At 5:07 PM, A.O. texted her mother to tell her that she needed to get a text book from a friend and that she would be away from the house and wasn't sure when she would return. RA 14. A.O.'s mother responded to the text by calling her daughter and telling her that she would drive her to get the book later that evening. Id. However, A.O. wanted to start her homework as soon as possible and told her mom she wanted to walk to get the book. RA 14-15. At approximately 6:58 PM, A.O. texted her mother telling her that she was walking down Grand Teton Drive, that her phone was about to lose battery power, and that she would be home within the half hour. RA 15. Approximately thirty minutes later, A.O.'s mom texted her daughter to ask if she was home yet. Id. A.O. never responded to the text message. Id.

Once A.O.'s mother returned to her house, she saw that A.O. still was not home. Id. She immediately started calling A.O.'s friends to ask if they had seen her. Id. She then began driving around the neighborhood in hopes of locating her

daughter. Id. She eventually contacted law enforcement and reported A.O. missing. RA 17. On September 3, 2011, A.O.'s mother was contacted and informed that a body had been found off of Grand Teton Drive. RA 18. The body was identified as fifteen-year-old A.O. Id.

Once the body of A.O. was found, Las Vegas Metropolitan Police Department Homicide Detective Dan Long responded to the scene and found A.O. lying on her back, naked from the waist down, with her legs spread open. RA 19-21. A.O. had over 80 stab wounds to different areas of her body, including her face, neck, arms, legs, and abdomen. RA 35. A.O.'s body showed obvious signs of being burned as there was charring on her face, upper chest, hands, thighs and pubic region. RA 20. Additionally, the body smelled of gasoline. RA 21. An autopsy determined the cause of death as multiple stab wounds and the manner of death to be homicide. RA 33.

By the morning of September 5, 2011, Righetti was the primary suspect in the murder of A.O. RA 22. At approximately 8:00 AM, Detective Long apprehended Righetti and transported him to the homicide office. RA 23. En route, Righetti told Detective Long that he wanted to tell him everything. Id. Once at homicide, Righetti was Mirandized and he indicated he understood his rights both verbally and by signing the waiver of rights card. Id.

Righetti told Detective Long that he saw a little girl with a phone walking in the tunnel and thought she was an easy target. RA 24. He said he followed her and

right before he caught up to her, he decided he was going to also rape her. RA 24-25. Righetti then knocked her to the ground, and forced her into a wash in the desert off of Grand Teton Drive. Id. There, he used a knife to force her to give him her cell phone. RA 27. He then made her undress. RA 25. Righetti admitted that he wanted to rape A.O. vaginally but did not have an erection. Id. He then forced his penis into A.O.'s mouth and told her to suck on him. Id. She performed oral sex on him until he obtained an erection. Id. At that point, Righetti vaginally raped A.O. until he ejaculated inside of her. Id. He then took the knife he used to force her from the tunnel to the desert and began stabbing her in her face, neck and thighs. RA 26. He then carved an LV for Las Vegas in her side while she was still alive "to be a thug." Id. Righetti said he then used the knife to stab her in her stomach and chest, ultimately executing her by slamming the knife into her heart. Id.

After Righetti raped and murdered A.O., he ran through a residential area, cleaning off his bloody body in a backyard pool. Id. He then went home and put the bloody clothes, shoes and knife into a black bag. Id. He then showered, changed clothes, and called his friend to come and help him. Id. Ortiz's friend picked him up and took him to get gasoline and matches. RA 27. Righetti's friend then dropped him off on the west side of Oso Blanca near Grand Teton Drive. Id. Righetti then covered A.O.'s body in gasoline, lit her on fire, and ran from the scene to his house. Id. Once back at his house, Righetti put the gas can into the black bag and hid the

bag in the attic space above his bathroom. Id. Officers subsequently recovered the black bag and contents from the attic during a search warrant. Id.

Throughout the course of the interview, Righetti further confessed to the rape of M.K. RA 28. He said that he had some knowledge of who M.K. was the day he saw her in the tunnel and knew that she had a boyfriend who was involved in UFC fighting. Id. He said he first grabbed M.K. by putting her in a chokehold. RA 29. He then choked her to the point of unconsciousness, removed her pants, and attempted to vaginally rape her. Id. He admitted that he could not obtain an erection and that M.K. regained consciousness while he was attempting to penetrate her. Id. He said that she told him she was a virgin and begged him not to rape her. Id. He said that M.K.'s friends were calling for her from outside the tunnel, so he forced her to move deeper inside the tunnel. Id. There, he climbed a ladder to escape through a manhole and M.K. ran away screaming for her friends. Id.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO CONSIDER THE PENDING WRIT

This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). This court may issue a writ of prohibition to arrest the proceedings of any

tribunal exercising judicial functions in excess of its jurisdiction. NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d 1336, 1338 (1989). A writ of mandamus is an extraordinary remedy and, therefore, the decision to entertain a petition for the writ lies within this Court's sound discretion. Gonzalez v. Eighth Judicial Dist. Ct., 129 Nev. Adv. Rep. 22, 298 p.3d 448, 449-50 (2013).

This Court can entertain a Petition for Writ of Prohibition/Mandamus when a petitioner alleges he will be twice tried for the same offense in violation of double jeopardy. A defendant subjected to two criminal trials for the same offense arguably would not have an adequate remedy in the ordinary appellate course because his right to not be tried twice for the same offense would already be violated and the issue moot by the time he appealed his second conviction. However, as demonstrated infra, the State contends that Righetti is not at such a risk and his Petition should be denied.

II. RIGHETTI PLEADED GUILTY TO ALL CHARGES AND ALL THEORIES

Righetti's argument is based on the flawed premise that he can unilaterally, without notice and without concession from the State, amend a charging document during the course of pleading guilty to the crimes alleged against him. The State has

the sole discretion to file criminal charges. NRS 173.045. The State may allege, within a single count, that the defendant committed the charged offense by one or more various means. NRS 173.075. The State also has the sole discretion to move to amend a charging document, although a defendant can object on the ground the amendment unfairly prejudices him. NRS 173.095; see also, Parsons v. District Court, 110 Nev. 1239, 1244, 885 P.2d 1316 (1994) (finding a court cannot amend a charging document but can only "permit" such amendment at the request of the State) overruled in part, on other grounds, by, Parsons v. State, 116 Nev. 928, 10 P.3d 836 (2000).

Because a defendant cannot amend a charging document, when a defendant pleads guilty, he necessarily admits to all of the discrete facts described in the charging document as well as the substantive crime itself. United States v. Broce, 488 U.S. 563, 569-70, 109 S. Ct. 757, 762-63 (1989); see also, United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502, 515 (4th Cir. 2005) (holding that, when a defendant pleads guilty, he necessarily admits all material facts underlying the criminal charge); United States v. Still, 102 F.3d 118, 124 (5th Cir. 1996) (same); United States v. Kelsey, 15 F.3d 152, 153 (10th Cir. 1994) (same); United States v. Tolson, 988 F.2d 1494, 1501 (7th Cir. 1993) (same); United States v. Parker, 874 F.2d 174, 178 (3d Cir. 1989) (same); O'Leary v. united States, 856 F.2d 1142, 1143 (8th Cir. 1988) (same). Similarly, a defendant who pleads guilty to

a charge alleging multiple alternative theories necessarily pleads guilty to all theories alleged. State v. Bowerman, 115 Wash. 2d 794, 799, 802 P.2d 116, 119 (1990).

In Bowerman, the defendant was charged with Murder under the theory the murder was premeditated as well as the alternative theory that the murder occurred during the course of a felony. Id. at 796-97, 802 P.2d at 118. On appeal, the defendant contended she should have been allowed to plead guilty to the charge solely under the felony murder theory. Id. at 799, 802 P.2d at 119. The Supreme Court of Washington found the defendant had a statutory right to plead guilty, but it did not include a right to plead guilty to just one alternative means of committing the crime charged. Id. Instead, the Court held: "The statutory right to plead guilty is a right to plead guilty to the information *as charged*." Id. (emphasis in original); see also, State v. Rodriguez, 804 N.W.2d 844, 853-54 (Iowa 2011) (finding a defendant's plea of guilt included an admission of guilt under all theories included in the charging document despite the fact that one alternative theory was not mentioned in the factual basis for his plea); State v. Brett, 126 Wash. 2d 136, 155-57, 892 P.2d 29, 39-40 (1995) (finding a defendant did not have a right to plead guilty to murder solely under the alternative theory of felony murder and rejecting the defendant's claim that such prohibition precluded him from showing a penalty phase jury that he had "accepted responsibility"); State v. Meyer, 353 N.C. 92, 101-02, 540 S.E.2d 1, 6-7 (2000) (finding a defendant's plea of guilty to a charged

offense means he pleads guilty upon all charged theories and obviates the question as to which theory he is guilty of committing the charged offense). These courts have persuasively reasoned that a defendant who wishes to challenge a theory or some of the facts forming the basis for the charge cannot do so by selectively pleading guilty to certain facts or theories but instead must proceed to trial. See, e.g., Broce, 488 U.S. at 571, 109 S. Ct. at 763 ("Respondents had the opportunity, instead of entering their guilty pleas, to challenge the theory of the indictment and to attempt to show the existence of only one conspiracy in a trial-type proceeding. They chose not to, and hence relinquished that entitlement."). Courts have also noted that, to hold contrary would provide defendants with the ability to force a plea agreement against the State's wishes any time it charged more than one theory and undermine the prosecutor's charging discretion. Bowerman, 115 Wash. 2d at 800, 802 P.2d at 120.

In the State's Indictment, filed October 7, 2011, the State charged Righetti with one count of murder as follows:

> The Defendant did, on or about September 2, 2011, then and there willfully, feloniously, without authority of law, and with malice aforethought, kill [A.O.], a human being, by stabbing at and into the body of the said [A.O.], with use of a deadly weapon, to-wit: a knife, during the commission of the crime, said killing having been (1) willful, deliberate and premeditated; and/or (2) perpetrated by means of torture; and/or (3) committed during the perpetration or attempted perpetration of robbery and/or kidnapping and/or sexual assault.

1 PA 5. Seven days later, the State filed a Notice of Intent to Seek Death Penalty in which it alleged various aggravating factors, including: 1) The murder was committed while the person was engaged, alone or with others, in the commission of or flight after committing any robbery and the person charged killed the person murdered or knew or had reason to know that life would be taken or lethal force used (Aggravator 6); 2) The murder was committed while the person was engaged, alone or with others, in the commission of or flight after committing and kidnapping in the first degree and the person charged killed the person murdered or knew or had reason to know that life would be taken or lethal force used (Aggravator 7); and 3) The person subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder (Aggravators 8 and 10). 1 PA 10-13.

On January 22, 2016, Righetti filed a Motion to Change Plea. RA 66-72. In it, Righetti's counsel affirmed by sworn declaration "That Javier Righetti wishes to change his plea from not guilty to guilty," and "Mr. Righetti is electing to plead guilty to the criminal complaint and move directly to the penalty phase of his trial."[1] RA 67-68. Righetti's counsel further advised that Righetti understood that if the matter pursued to trial, the State "would be required to present witnesses for each

[1] Reference to a "criminal complaint" is obviously a misnomer as the only charging document pending against Righetti at the time the Motion was filed was the Indictment.

element of each offense," and that, by pleading guilty as charged, there would not be guilt phase trial and the matter would proceed directly to penalty phase. Id. Righetti's motion also included a declaration signed by Righetti. RA 70-72. In his sworn declaration, Righetti affirmed "I have decided to plead guilty to the criminal complaint in my case thereby bypassing the guilt phase of my trial and moving directly to the penalty phase." RA 70. Righetti also acknowledged that, "[i]n the event I plead guilty to the criminal complaint, the jury will begin with the penalty phase deciding from the same variety of possible punishments." Id. Finally, similar to Righetti's counsel's signed declaration, Righetti concluded by affirming "it is my desire to plead guilty to the criminal charges against me and to proceed directly to the penalty phase of the trial." RA 72.

On February 11, 2016, Righetti's Motion to Change Plea was heard. 1 PA 17, 21-42. The Court began the canvass:

> THE COURT: Mr. Righetti, it's my understanding you want to plead guilty to the indictment today, is that true?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay, and you're just – you understand you're pleading straight up guilty with no negotiation from the State of Nevada?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And that's what you want to do today?
>
> THE DEFENDANT: Yes.

> THE COURT: And you're entering into this today after lengthy discussion with your attorney; is that correct?
>
> THE DEFENDANT: Yes, Your Honor.

1 PA 21. Righetti's attorney then made a record that the decision to plead guilty to the Indictment was the result of extensive discussions and consideration by Righetti and that it was Righetti's wish to plead guilty because "he has not wanted to put the family of the victim or his family frankly through the pain that comes with going to trial and he has been willing all along to accept responsibility for what happened in this case and that's why we've decided to take this step today[.]" 1 PA 21-22.

Righetti confirmed he had received a copy of the Indictment filed in the case and then pleaded guilty to the crimes as charged in the Indictment. 1 PA 22-24. Specifically, Righetti pleaded guilty as charged to Count 10, Murder with Use of a Deadly Weapon. 1 PA 24. The Court then canvassed Righetti again about his change of plea:

> THE COURT: Okay, you understand you're entering into this plea without the benefit of negotiations from the State of Nevada?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay. Do you understand you are pleading straight up to the charges that were alleged against you in the original indictment?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay, and that the State has not entered into any negotiations with you whatsoever?

THE DEFENDANT: Yes, Your Honor.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, I – Your Honor.

1 PA 24.

The District Court subsequently proceeded to canvass Righetti as to the factual basis for his guilty plea on each of the counts. 1 PA 31-42. Concerning Count 10, the following occurred:

> THE COURT: As to Count 10, murder with use of a deadly weapon, on September 2nd, 2011, in Clark County, Nevada, what did you do that makes you guilty of that offense?
>
> THE DEFENDANT: Well, during the course of the kidnapping, sexual assault, and robbery, I stabbed [A.O.] causing her death.
>
> THE COURT: And you did that – that act was willful deliberate, and premeditated – it's the other theory – okay, it was perpetrated by means of torture, and/or committed during the perpetration or attempt to perpetration [sic] of robbery and/or kidnapping, and/or sexual assault?
>
> THE DEFENDANT: Yes, Your Honor.

1 PA 38. The State then confirmed the factual basis and Righetti's plea was accepted and he was adjudicated guilty of the charges. 1 PA 41-42. Righetti's counsel later admitted that, while the State was looking down at the pleadings and listening to the canvass, she silently shook her head back and forth when the District Court asked Righetti if his murder of A.O. was willful, deliberate and premeditated. 2 PA 261-62.

Righetti now claims he only pleaded guilty to Count 10 under two of the State's charged theories: 1) that the murder was perpetrated by means of torture; and 2) that the murder was committed during the perpetration or attempted perpetration of robbery and/or kidnapping and/or sexual assault. Therefore, Righetti continues, because he did not plead to premediated, willful and deliberate murder, the State cannot allege as aggravating circumstances the felonies supporting a felony murder theory. However, this claim is without merit. Righetti was charged with Open Murder under three alternative theories. PA 5. The State never moved to amend or alter the original Indictment and Righetti never moved to strike any part of the Indictment. When Righetti filed his Motion to Change Plea, he and his attorney expressed three separate times a desire to plead guilty to all of the counts as charged in the Indictment without any concessions from the State. RA 68, 70, 72. During the plea colloquy, Righetti affirmed he had received a copy of the Indictment and stated numerous times he wished to plead guilty to the Indictment and was doing so without any concessions from the State. Because Righetti pleaded guilty to Count 10 as it was charged in the Indictment, and because Count 10 alleged three legal theories, Righetti's guilty plea necessarily encompassed all three of the charged legal theories, his factual basis notwithstanding.[2] To hold contrary would allow a defendant to amend a charging document with no notice to the State through a silent shake of the

[2] The validity of Righetti's guilty plea will be addressed infra.

head during a plea canvass.

Righetti attempts to turn his limited statutory right to plead guilty on its head by arguing there is no law ***prohibiting*** him from pleading guilty under a select theory. However, as Righetti does not have a constitutional right to plead guilty, there is no need for a law limiting his right to plead guilty. Instead, Righetti's right to plead guilty is provided by statute. NRS 174.035(1). Thus, he must show that the applicable statutory authority ***permits*** his plea. Further, NRS 174.015 allows for entry of one of four statutorily permitted pleas at arraignment and only to the charging document that has been filed pursuant to NRS 173. Thus, Righetti can plead guilty, pursuant to statute, to the crimes only as charged.

In support of his claim, Righetti erroneously relies upon this Court's precedent in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), and Wilson v. State, 127 Nev. Adv. Rep. 68, 267 P.3d 58 (2011). In Wilson, the defendant claimed he pleaded guilty to First Degree Murder solely under a theory of felony murder and, therefore, the State was improperly permitted to allege aggravators during his capital penalty hearing in violation of McConnell. 267 P.3d at 61-62. This Court rejected this argument, finding it belied by the record. Id.

Righetti now attempts to claim Wilson stands for the proposition that a defendant ***can*** plead guilty to First Degree Murder solely under a theory of felony murder without any concession from the State. However, such a negative implication

is not required by Wilson and runs contrary to statutory and case authority. Wilson can only be read to stand for the proposition that claims belied by the record are not entitled to relief. There is no evidence within the Wilson case that, if the defendant had hypothetically articulated a factual basis supporting only felony murder, the related aggravators would have been struck. See Resnick v. Nevada Gaming Comm'n, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988) (finding a claim non-justiciable because it was based on hypothetical and conjectural facts). Further, as noted supra, the State has the sole discretion to file and amend charging documents. NRS 173.045, 173.095. To allow a defendant to plead guilty without any concession from the State but unilaterally omit facts and theories from the charging document would give a defendant the power to amend. Because Righetti does not have the power to amend the charging document he chose to plead guilty to, his guilty plea necessarily includes an admission to all charged facts and theories underlying each offense. If Righetti wished to dispute the allegation that his murder of A.O. was premediated, willful, and deliberate, he could have pursued trial and required the State to present its evidence "as to each element of each offense." However, he chose not to do so and instead opted to plead guilty ***as charged***.

Further, Righetti contends Bowerman is distinguishable for various reasons, including that it "addressed the State of Washington's statutory scheme." Petition for Writ of Prohibition/Mandamus, p. 28. However, the Washington statute

permitting a defendant to plead guilty at issue in Bowerman is identical in relevant respect to the law in Nevada. Compare NRS 174.035 ("A defendant may plead not guilty, guilty, guilty but mentally ill or, with the consent of the court, nolo contendere.") with CrR 4.2(a) ("A defendant may plead not guilty, not guilty by reason of insanity, or guilty."). Furthermore, as noted supra, Washington is certainly not alone in finding a guilty plea necessarily includes an admission of guilt to all charged facts and theories. Thus, this Court should find that Righetti's guilty plea necessarily included an admission of guilt under all charged theories.[3]

[3] Because Righetti's plea necessarily included all charged theories, in the event this Court finds Righetti's plea was proper, it should nonetheless instruct the District Court to deny the pending Motion to Strike Aggravating Circumstances. Further, even if this Court finds Righetti's guilty plea proper ***and*** that he had the ability to unilaterally and silently strike the charged theory of premeditated, willful and deliberate murder, it should nonetheless instruct the District Court to deny his Motion to Strike Aggravating Circumstances. During the plea canvass, Righetti affirmed he committed felony murder and torture murder. 1 PA 38. Righetti has acknowledged through counsel a number of times throughout the record that he pleaded guilty under both a felony murder theory and a torture murder theory. See, e.g., 1 PA 52, 54, 102, 105; 2 PA 172-73. Righetti seems to think that, absent a finding of premeditated, willful and deliberate murder, underlying felonies used to support felony murder cannot be asserted as aggravators. Righetti misreads NRS 200.030, which states, "Murder of the first degree is murder which is perpetrated by means of poison, lying in wait ***or torture***, ***or by any other kind of willful, deliberate and premeditated killing***. Thus, by way of his plea to torture murder, Righetti admitted to being a first degree murderer completely independent of felony murder. As such, the aggravators he seeks to strike were actually solidified as viable aggravators by way of his plea to First Degree Murder by way of torture. McConnell does not ***require*** a conviction for premeditated, willful and deliberate murder in order to allege underlying felonies as aggravators. Instead, McConnell only ***prohibits*** the use of underlying felonies if a guilty verdict is based on a finding of felony murder. McConnell, 120 Nev. at 1069, 102 P.3d at 624. The McConnell Court

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING RIGHETTI'S GUILTY PLEA AS IT WAS UNKNOWING

NRS 174.035(1) permits a defendant to plead guilty but the court may refuse to accept such a plea. Per statute, a district court can decline to accept a guilty plea to all or some of the charges included in a charging document. Jefferson v. State, 108 Nev. 953, 954, 840 P.2d 1234, 1235 (1992). In Jefferson, the defendant was charged with one count of Robbery and one count of Larceny from a person as to the same victim. Id. The defendant attempted to tender a guilty plea to the lesser offense of larceny from a person but the district court rejected that plea. Id. This Court held that the district court's rejection was not an abuse of discretion. Id. A

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advised the State that, if it wished to allege underlying felonies that would support felony murder as aggravating circumstances, it should issue the jury a special verdict form so that the Court can be assured the jury reached a unanimous guilty verdict under a theory other than felony murder. Id.; see also, Bejarano v. State, 122 Nev. 1066, 1079, 146 P.3d 265, 274 (2006) (finding McConnell applies "where the defendant was charged with alternative theories of first-degree murder and a special verdict from failed to specify which theory or theories the jury relied upon to convict"). There is no such inability to determine if the jury relied on felony murder because Righetti established beyond a doubt by way of his plea to first degree murder that he committed the crime by way of torture. Thus, the concerns this Court had in McConnell are completely eliminated by Righetti's plea. Righetti pleaded guilty to First Degree Murder under two alternative theories: felony murder and torture murder. This Court can therefore be assured that, even under Righetti's argument, his conviction for murder does not rely, in whole or in part, on felony murder alone. Therefore, the State can assert the underlying felonies supporting the felony murder theory as aggravators. See also NRS 200.030(1)(a); Hernandez v. State, 118 Nev. 513, 532-33, 50 P.3d 1100, 1113 (2002) (finding evidence of multiple injuries caused by the defendant beating, stabbing, and strangling the victim sufficient evidence to support a conviction for first degree murder by torture).

district court's discretion to reject a plea can be based solely on the public interest of the State. Schoels v. State, 114 Nev. 981, 984, 966 P.2d 735 (1998).

A guilty plea must be entered knowingly and voluntarily. Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973). In order for a guilty plea to be knowing, the totality of the record must demonstrate that the defendant understood the nature of the offense and the consequence of his plea. Woods v. State, 114 Nev. 468, 475-76, 958 P.2d 91 (1998); Du Bose v. State, 100 Nev. 339, 340, 682 P.2d 195 (1984). A court will look beyond the factual basis to determine whether a defendant understood the nature of the offense. Hurd v. State, 114 Nev. 182, 184-88, 953 P.2d 270, 271-74 (1998); see also, Gonzales v. State, 96 Nev. 562, 564, 613 P.2d 410 (1980). If alternative theories are charged, the record must demonstrate an understanding of those theories. See Standen v. State, 99 Nev. 76, 78, 657 P.2d 1159 (1983); Hanley v. State, 97 Nev. 130, 134, 624 P.2d 1387 (1981). If a district court determines that a guilty plea is unknowing or involuntary, it must reject or vacate it, even if a defendant nevertheless wishes to plead guilty. Sturrock v. State, 95 Nev. 938, 941, 604 P.2d 341 (1979); State v. Beal, 446 A.2d 405, 409 (Maine 1982) (holding that a court has inherent authority to set aside on its own initiative an unknowing or involuntary plea); People v. Hancasky, 410 Ill. 148, 154-55 101 N.E.2d 575 (1951) (holding a court may set aside a guilty plea on its own motion and without the consent of a defendant if it finds good cause to doubt the truth of the

plea or where it is obvious the defendant has been misinformed as to his rights).

As stated supra, in Righetti's Motion to Strike, he contended his guilty plea prohibited the State from asserting the underlying felonies as aggravators because he did not plead guilty to premeditated, willful and deliberate murder. 1 PA 53-55. The State filed an Opposition, arguing that Righetti's guilty plea included all charged theories alleged in the Indictment. 1 PA 91-92. During argument on Righetti's Motion, he contended his factual basis supported only felony murder and murder by torture and, therefore, he pleaded guilty to First Degree Murder under only those theories. 1 PA 102. The State argued it was improper for counsel to intervene with a nonverbal shake of her head during the canvass in an attempt to tailor Righetti's guilty plea and omit a charged theory. 1 PA 106-07. The State also contended that, if the District Court found there was an insufficient factual basis to support a plea of guilty to the charge as contained in the Indictment, it could vacate the plea and place the parties in the exact same position as they were. 1 PA 104. The State also noted it was disingenuous for Righetti to claim a desire to "accept responsibility" by the filing of a motion and the plea canvass only to then attempt to unilaterally strike language from the charging document. 1 PA 106-07. The Court agreed that Righetti did not provide a factual basis for premeditated, willful, and deliberate murder and permitted the parties to further brief proposed rejection of his plea. 1 PA 104.

The State thereafter filed a 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. 1 PA 152-65. In it, the State contended Righetti's plea could be rejected under NRS 174.035 and Jefferson. 1 PA 157-60. The State noted the uncandid way in which Righetti represented to the State and the District Court he wished to plead to the charges as included in the Indictment but then, at the direction of counsel, attempted to receive what would amount to an acquittal of premeditated, willful and deliberate murder without having to go to trial and meet the evidence against him—and all by way of non-verbal communication. 1 PA 159-60. Righetti filed an Opposition wherein he contended there was no authority allowing for the rejection of his plea because it had already been accepted. 2 PA 177. Responding to the State's claims of disingenuousness and lack of candor, Righetti's counsel acknowledged she intentionally interrupted the District Court's canvass with a silent shake of her head and contended the State's inability to notice the same or the problematic factual basis was its own problem and precluded review. 2 PA 177-82, 183-85.

At oral argument on the State's Motion, the District Court stated Righetti should have put the State on notice in its Motion to Change Plea that he only intended to plead guilty to Count 10 under two of the three charged theories. 2 PA 329. The District Court also noted that, although it was aware at the time of the plea canvass that Righetti's counsel did not want Righetti to plead guilty to premeditated, willful

and deliberate murder, it was not until the subsequent motion was filed that it understood why. 2 PA 330. Ultimately, the District Court rejected the guilty plea, and made a finding that "you do have a statutory right to plead guilty, but you don't have a statutory right to plead guilty and carve out a theory that the State has alleged and limit the State in their penalty hearing." 2 PA 335. The District Court further noted that finding the State was placed on notice based on Righetti's counsel's nonverbal communication during the plea canvass would impose an unfair burden. 2 PA 337.

Here, the district court was free to exercise its discretion in rejecting Righetti's guilty plea. In fact, Righetti implicitly acknowledges this, but nevertheless contends that the prosecutor's request and the district court's rejection came "too late." Petition for Writ of Mandamus/Prohibition, p. 16-17. However, Righetti provides no authority to support his proposition that rejection of a guilty plea must be exclusively exercised at the time it is offered. To the contrary, various courts have held that acceptance of a guilty plea can be rescinded prior to sentencing. See, e.g., Beal, 446 A.2d at 409. The subsequent motions and oral arguments of counsel made clear that, when Righetti pleaded guilty to Count 10, he believed he could omit the theory of premediated, willful and deliberate. See, e.g., 1 PA 101-02, 2 PA 324-25. As is made clear supra, however, Righetti could not legally enter such a plea, as he pleaded to the charges as they appeared in the Indictment. Thus, the State's Motion to Reject

was filed in an effort to avoid a subsequent claim of ineffective assistance of counsel and to vacate an unknowing plea. Further, the District Court properly heard the State's Motion and vacated Righetti's plea given that it was based on a legally incorrect understanding of the charges. See Finger v. State, 117 Nev. 548, 577-78, 27 P.3d 66 (2001) (finding a defendant's plea unknowing because it was made under an inaccurate understanding of the applicable law); Gonzales v. State, 96 Nev. 562, 564, 613 P.2d 410 (1980) ("If, upon examination by the court after entering a plea of guilty, the accused states facts which indicate a misunderstanding of an essential element of the crime, a plea of guilty should not be accepted, and if made, should be withdrawn."). As even Righetti acknowledges in his Petition: "The Judge is required to ensure that the defendant who pleads guilty entered his plea understandingly and voluntarily and that there is a factual basis to support that plea." Petition for Writ of Prohibition/Mandamus, p. 26. Here, once the District Court realized by the subsequent filing of the Motion to Strike that Righetti did not enter his plea knowingly, it was required to vacate that plea.[4]

[4] The State notes it was not Righetti's factual basis itself that made his plea invalid as this Court will look beyond the oral factual basis to determine whether a defendant understands the nature of the charges to which he is pleading guilty. See Hurd v. State, 114 Nev. 182, 184-88, 935 P.2d 270, 271-74 (1998). Further this Court and other courts have upheld guilty pleas when they were entered with a factual basis supporting more than one alternative theory of prosecution and one of the theories is subsequently invalidated. See, e.g., Hanley, 97 Nev. at 135-36, 624 P.2d 1387; United States v. Riascos-Suarez, 73 F.3d 616, 622-24 (6th Cir. 1996); United States v. Damico, 99 F.3d 1431, 1434-35 (7th Cir. 1996); United States v. Rivas, 85 F.3d

Righetti repeatedly argues the State could not request his plea be vacated because the prosecutor failed to object at the time of his canvass. However, this argument is flawed for several reasons. First, it rises from a false premise. Specifically, Righetti's argument implies that he ***could*** plead guilty to only two of the three charged theories so long as the State did not contemporaneously object and the District Court accepted the plea. However, as demonstrated supra, no such plea could be entered and when Righetti pleaded guilty to the Indictment, he pleaded guilty to all charged facts and theories. Second, this argument ignores the fact that the full basis for the State's objection to Righetti's plea was not known at the time of his canvass. It is true that the State was present at the time of Righetti's incomplete factual basis. However, what was unknown and unknowable to the State at the time was that Righetti offered such an incomplete factual basis in the incorrect belief that he could strike portions of the Indictment in his guilty plea. The State learned that information only when Righetti filed his Motion to Strike Aggravating Circumstances, after the plea was entered. At that time, it became clear to the State

193, 195-96 (5th Cir. 1996). However, what the record shows is that Righetti, based on the incorrect legal advice he received from counsel, entered his guilty plea believing he could select a theory or theories in a way that would preclude the State from asserting certain aggravators against him. Such a misconception of the law causes Righetti's guilty plea to be unknowing. See Wilson v. State, 99 Nev. 362, 371, 664 P.2d 328 (1983) (considering a defendant's claim that he unknowingly entered his guilty plea because he did so as part of a "secret plan" devised by counsel to eliminate his exposure to the death penalty but ultimately rejecting the claim based on the factual record).

that Righetti believed he could plead "straight up" but excise portions of the Information and moved to reject the plea. Similarly, although the District Court knew at the time of the plea, based on the nonverbal shaking of the head by Righetti's counsel, that Righetti was not going to provide a factual basis for premeditated, deliberate and willful murder, it was not until the subsequent filing of the Motion to Strike when the Court realized the plea was not knowingly entered. See 2 PA 330. Finally, even as Righetti makes this argument, he also notes that there was no need for the State to be in agreement with his plea as it was entered without any type of negotiation or concession by the State. See Petition for Writ of Prohibition/Mandamus, p. 25-26 ("A 'meeting of the minds' between the state and the defendant is not required when a defendant is pleading guilty without a negotiation."). Righetti cannot have it both ways. Either he can argue the State knowingly agreed to his guilty plea to only two of the three charged theories (which is certainly not supported by the record) or he can argue there was no need for the State to have a "meeting of the minds" (which means the State is not estopped from challenging the guilty plea when subsequent information comes to light).

IV. PRINCIPLES OF DOUBLE JEOPARDY DID NOT PROHIBIT THE DISTRICT COURT FROM REJECTING RIGHETTI'S UNKNOWING PLEA OR THE STATE MOVING FORWARD TO TRIAL

Righetti next contends that the Double Jeopardy Clause prohibits the District Court from rejecting or vacating his plea and the State from proceeding to trial on

Count 10 under all three theories. The Double Jeopardy Clause protects against three distinct abuses: "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." Jackson v. State, 128 Nev. Adv. Rep. 55, 291 P.3d 1274, 1278 (2012) (*citing* North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072 (1969)). In the context of a guilty plea, multiple courts have held jeopardy attaches when a defendant has been substantively sentenced. See, United States v. Santiago Soto, 825 F.2d 616, 618-20 (1st Cir. 1987); United States v. Combs, 634 F.2d 1295, 1298 (10th Cir. 1980); United States v. Sanchez, 609 F.2d 761 (5th Cir. 1980); State v. Angel, 132 N.M. 501, 503, 51 P.3d 1155 (2002); People v. Massie, 19 Cal. 4th 550, 563-64, 967 P.2d 29, 37-38 (1998) (collecting cases); see also, Ricketts v. Adamson, 483 U.S. 1, 8, 107 S. Ct. 2680 (1987) ("We may assume that jeopardy attached at least when respondent was sentenced in December 1978, on his plea of guilty to second-degree murder."). These courts have persuasively reasoned that the double jeopardy protection against successive prosecutions is intended "to prevent the government from harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials[,]" and that none of those policy concerns are implicated by vacating a plea prior to sentencing. Angel, 132 N.M. at 505, 51 P.3d 1155 (quoting State v. Lujan, 103 N.M. 667, 671, 712 P.2d 13, 17 (Ct.

App. 1985); see also, Santiago Soto, 825 F.2d at 619-20 ("The mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence[.]"). Further, jeopardy cannot attach in the context of a guilty plea if the plea is invalid. Massie, 19 Cal. 4th at 563, 967 P.3d 1155; Cox v. State, 412 So. 2d 354, 355-56 (Fla. 1982); Bayless v. United States, 147 F.2d 169, 170 (8th Cir. 1945); Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495 (1971) (Douglas, J. concurring).

Other courts have found that, even if jeopardy attaches upon acceptance of a guilty plea, a court can nevertheless vacate the plea prior to sentencing and order trial without offending the Double Jeopardy Clause. State v. Kay, 717 P.2d 1294, 1302-06 (Utah 1986). The Kay Court analogized vacating a previously accepted plea to granting a motion for a mistrial and held that a court may do so "where obvious reversible error has been committed in connection with the terms or the acceptance of the plea agreement and no undue prejudice to the defendant is apparent." Id. at 1305. The Court also noted a plea could be vacated when it is based on fraud or deception by one party as well as other circumstances "where the balancing of the interests and legitimate expectations of the defendant and the public will also warrant a misplea[.]" Id. See also, State v. Moss, 921 P.2d 1021, 1023 (Utah Ct. App. 1996) (holding the court's ability to declare a "misplea" does not require contemporaneous objection by the State).

Here, jeopardy did not attach because Righetti's plea was invalid and he has not yet been sentenced. As demonstrated supra, Righetti's plea was unknowing and so invalid *ab initio*. Further, because Righetti has not yet been sentenced or even began his penalty hearing, none of the underlying protections intended by the Double Jeopardy Clause are present. Righetti is not facing successive prosecutions or any form of overreaching by the State. Instead, the State's desire is to exercise "its right to one full and fair opportunity to convict those who have violated its laws." Ohio v. Johnson, 467 U.S. 493, 502, 104 S. Ct. 2536, 2542 (1984) (*citing* Arizona v. Washington, 434 U.S. 497, 509, 98 S. Ct. 497 (1978)) (finding the court's acceptance of a defendant's guilty plea to lesser-included offenses did not prohibit the State's continued prosecution of the greater offenses under the Double Jeopardy Clause). Righetti has also not received the "finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence" as the jury has yet to hear any evidence and Righetti's sentence is still undecided. Because none of the underlying policies underlying the Double Jeopardy Clause are present in the context of a guilty plea, and are especially non-existent in this case, double jeopardy does not prohibit the vacating of Righetti's plea or re-setting the matter for a guilt phase jury trial.

Additionally, even if this Court believes jeopardy attached at the time Righetti's plea was accepted, it should nonetheless find it was properly vacated and that the Double Jeopardy Clause does not prohibit the matter from moving forward.

A finding that jeopardy attached is the beginning, not the end, of the analysis. Like the Kay Court, this Court should find the District Court properly found Righetti's plea was improperly entered and that balancing the interests of Righetti and the State warrants the vacating of the plea and re-setting the matter for trial. Righetti's plea was unknowing as it was based on a misunderstanding of applicable legal principles.

Further, vacating the plea places the parties in the exact same position as they were prior to the plea. See State v. Horrocks, 17 P.3d 1145 (Utah Ct. App. 2001) (finding vacating a previously accepted plea does not prohibit subsequent prosecution when the defendant is simply placed in the same position as they were prior to the guilty plea). If Righetti truly does wish to accept responsibility and avoid putting his family as well as the family of the victim through the guilt phase of a trial, he is free to plead guilty with the correct understanding that he is pleading guilty under all three charged theories. Alternatively, if Righetti believes he is not guilty of premeditated, willful and deliberate murder, he is now able to pursue the matter at trial and challenge the evidence. Indeed, nothing is stopping Righetti from conceding guilt of felony murder and torture murder to a guilt phase jury and solely focusing on challenging the evidence as it relates to premeditated, willful and deliberate murder. Because Righetti's plea was invalid, and because vacating the plea places the parties in the exact same position as they were, this Court should find

the District Court's actions proper.[5]

CONCLUSION

Based on the foregoing, the State respectfully requests that Righetti's Petition be DENIED.

/ / /

[5] In the event this Court finds Righetti's plea was proper and that he only pleaded guilty to felony murder and torture murder, it should also find the State can proceed to trial on the remaining theory of premeditated, willful and deliberate murder. It is anticipated that Righetti will respond to this request by arguing that allowing a trial for a charge of premeditated, willful, and deliberate murder would violate the Double Jeopardy Clause because he already pleaded guilty to murder. However, this argument contradicts Righetti's implicit position that the State's alleged theories in Count 10 are interchangeable and distinct and that a guilty plea under one of the theories can be separated from the other charged theories. Either the premeditated, willful, and deliberate theory is part and parcel of Count 10 such that a guilty plea to the charge is a guilty plea to the theory or it is not, in which case the theory remains if a defendant is able to plead around it. Further, Righetti's presumed argument highlights the State's position that allowing a defendant to enter a guilty plea to an offense but limit their plea to select facts or theories effectively gives a defendant the power to amend the charging document. Such a finding would also allow Righetti to improperly use double jeopardy as both a shield and a sword. See Johnson, 467 U.S. at 502, 104 S. Ct. at 2542 (finding a defendant cannot use double jeopardy protection as a sword to thwart a prosecution). If this Court finds Righetti can carve out a theory the State has alleged by pleading guilty, then it must also uphold the State's ability to file charges by recognizing that the theory of prosecution remains and may be pursued at a subsequent guilt phase trial. If a jury finds Righetti guilty of the remaining theory of premediated, willful and deliberate murder, that finding would be consolidated into his guilty plea of felony murder and torture murder. Thus, Righetti would not be penalized for a separate murder, but instead under a separate theory which, according to Righetti's argument, remained after his guilty plea. Similarly, if this Court finds Righetti's guilty plea was proper, it should also find any claim by Righetti during a penalty hearing that he "accepted responsibility" can be met with rebuttal evidence and argument relating to Righetti's plea to only two of the three theories.

Dated this 11th day of October, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 11, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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CB//ed