In the Supreme Court of the State of Nevada

David Coil,

Appellant,

v.

The State of Nevada,

Respondent.

Supreme Court Case No.: 74949

Appeal from Judgment of Conviction of Eighth Judicial District Court, Clark County, in Case No.: C318335

Appellant David Coil's Addendum to Opening Brief

/s/ Todd M. Leventhal

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Introduction

This direct appeal challenges a conviction from a guilty plea entered mid-way through a jury trial for which David Coil received a life sentence with parole eligibility after eleven years. On November 5, 2018, Coil filed an opening brief arguing that his actual conduct did not satisfy the elements of the two most serious charges to which he pleaded guilty: sex trafficking of a minor and attempted sex trafficking or a minor, rendering his guilty plea to those counts invalid. OB at 6.

After the state filed its answering brief, Coil retained undersigned to represent him on this appeal. On January 14, 2019, this Court granted Coil's motion to extend time to file either an addendum to the opening brief or a reply brief. This addendum timely follows.

Statement of Issues

I. Can this Court review the validity of Coil's guilty plea where he failed to file a motion to withdraw the plea below?

II. Did the trial court deprive Coil of the right to self-representation when Coil repeatedly and timely asserted that right?

III. Was Coil's plea knowingly made where the district court entirely failed to ensure he understood the true nature of the charges, and advised Coil of the Constitutional rights he was giving up only *after* it accepted his guilty plea?

Statement of the Case

A. The allegations

In September of 2016, the state filed a seven-count information charging Coil with: one count of sex trafficking of a minor and three counts of soliciting prostitution (counts one–five); and pandering and attempted sex trafficking of a minor (counts six–seven). AA 001–02. Counts one–five were based on Coil's alleged conduct with then-minor I.P. (she was 17 years old when she reported the matter to police and 18 by the time of trial, AA 113) and counts six and seven were based on Coil's conversations with an undercover Metro officer posing as a 17-year old named "Tiff." AA 001–02. Coil remained in custody pending trial and unconditionally waived his right to a preliminary hearing but invoked his right to a speedy trial, which was scheduled for November 28, 2016. AA 007, 011.

B. First trial setting and competency evaluation

The parties appeared for the first trial setting but represented that the state had just disclosed additional discovery, including four additional witness interviews and a disc containing electronic evidence extracted from Coil's cell phone and other electronic devices, which defense counsel would need to view at the prosecutor's office. AA 014–15. Defense counsel indicated that Coil would need to waive his right to a speedy trial to allow additional time to review the discovery and acknowledged that, per the court clerk, the next available date was

some three months away. AA 016. The court asked Coil if he understood "what [was] going on? You're going to have to waive your speedy trial right, is that correct?" AA 016. Coil responded that this was "against [his] will" but that he did not "see an option." AA The court reset the trial for February 21, 2017. AA 019.

On January 18, 2017, and on defense motion, the court referred Coil for a competency evaluation and vacated the February calendar call and trial dates. AA 022. In February, Coil was found competent to stand trial, and the district court reset calendar call and trial in the "ordinary course" for July 24th and July 31st, respectively. AA 025.

C. First motion to dismiss counsel and first request for self-representation

About two weeks before trial was set to begin, the court held a hearing on Coil's pro se motions to dismiss the information for pretrial delay and to dismiss counsel. AA 027. The court summarily denied Coil's motion to dismiss the information as a fugitive document and explained to Coil that, because he was represented by counsel, he could not file motions on his own behalf. AA 028–029. Coil explained that he was disheartened by defense counsel's failure to obtain his cell phone records and to locate and interview certain witnesses that he believed would be helpful to his defense, and with the lack of communication he had with his lawyer. AA 031–40. The court vouched for Coil's lawyer and explained to

Coil that his lawyer was very busy as he had "hundreds" of clients. AA 036. Also, that Coil was housed in North Valley, which made in-person even more difficult. AA 042–45. The court denied Coil's motion to dismiss counsel. AA 041.

At the July 24th calendar call, the parties represented that they were ready to proceed on the 31st. AA 048. Coil interjected that he was still dissatisfied with defense counsel's performance and asked if he had a right to "fire" him. AA 049. The court responded that Coil did not have the right to fire his counsel "because you don't pay him" and asked if Coil would instead like to represent himself. AA 049. Coil responded that he would. AA 049. The court properly warned Coil that he would be held to the same standard as a lawyer, including following the rules of evidence and criminal procedure. AA 051–52. The court then asked Coil a series of questions about whether he knew the elements of the charges he faced, the possible defenses, and the possible punishments. AA 054–55. But rather than explain to Coil the answers to these questions, none of which he knew, to see if he could understand, the court simply continued down the list until he gave up:

> The court: You understand that the Court is going to order punishment for you if you are convicted of these charges? . . . And you have no idea what that is? . . . What the punishments are?
>
> Coil: No
>
> The court: You understand the Court could order those sentences to run consecutively or concurrently, do you know what that means?

Coil: No.

The court: You don't know what concurrent means?

Coil: No.

The court: You don't know what consecutive means?

Coil: No.

AA 055.

Coil eventually asked if he could retract his request, which the court latched on to: "So now you don't want to represent yourself? All right. I think that's very smart so you're going to go forward" with current defense counsel. AA 056. Coil did not affirmatively respond, and the hearing promptly ended. AA 056–57.

D. Second request for self-representation

At the third trial setting, the attorneys represented that some additional discovery had come to light during pre-trials and requested an additional continuance. AA 059. The record does not reveal what these additional discovery issues were. AA 059 ("I did meet with the parties and they explained to me exactly what the discovery issues were, and I believe that it's a basis for a continuance so the continuance will be granted"). The court reset calendar call and trial for September 18, and 25, 2018.

At the September 18th calendar call, counsel for the state represented that both prosecutors were currently in another trial and so would seek to continue the

trial date; defense counsel assured the court: "I think we can be mutual, Your Honor. There's no objection from the defense." AA 063. Coil interjected that he had not discussed or agreed to the continuance with his lawyer and that he had another motion to dismiss counsel to present to the court. AA 063. He "apologize[d] it's so late" but explained that "commissary is not delivering envelopes, so I had to deliver it myself." AA 064. The state reminded the court that Coil had failed the previous *Faretta* canvass "miserably," and now represented that it was in fact ready to go to trial as scheduled. AA 064. The court declined to canvass Coil at that time and set the *Faretta* hearing for the morning before trial.

At the *Faretta* hearing, Coil stated that he was "certain" he wished to proceed without a lawyer; denied any competency or physical issues; acknowledged his right to have an attorney, his responsibility to follow court rules even in the absence of an attorney, and that a jury may view his self-representation negatively; and he explained that he had previously successfully represented himself and his wife in a bankruptcy action and had completed some college and vocational school. AA 069–070. After this exchange, Coil indicated that he would need some time to "get [his] witnesses and documents together." AA 072.

> The court: Well, you're set for trial tomorrow. We are going to trial tomorrow on this case.
>
> Coil: So, there's no way I can have a fair trial?

> The court: You can have a fair trial. [Defense counsel] is ready to go . . . if you represent yourself like we've been talking about, you're going to be held to the same standard as [defense counsel]. I'm going to make him go to trial tomorrow at 1:30, so you're going to trial tomorrow at 1:30.
>
> Coil: With no witnesses and no documents that I need?
>
> The Court: Sir, you wanted to represent yourself. You brought this to my attention last Wednesday . . . your counsel's ready to go to trial. So your trial date is tomorrow, tomorrow at 1:30.
>
> Coil: Okay. I cannot have a fair trial. I'm at the mercy of the Court. That means I withdraw my motion. He's now in charge because I can't proceed without my witnesses, without my documents, to represent my innocence.

AA 073.

After Coil "withdrew" his motion, the court recessed until the following afternoon.

E. Jury trial

On the morning of trial, the state filed an amended information swapping the order of counts six and seven (the attempt sex trafficking and pandering counts pertaining to the undercover officer) and revising its theory as to count one (sex trafficking as to I.P.) to include "inducing, causing, recruiting, or maintaining" I.P. to "enter any place . . . in which prostitution is practiced, encouraged[,] or allowed for the purpose of sexual conduct or prostitution." AA 076. Defense counsel did not object to these revisions. AA 079–80.

The crux of the state's theory at trial was that Coil ran an illegal naked massage parlor out of his home and that, although sex was strictly prohibited and Coil did not make any proceeds—the women kept all the money—he encouraged the women to perform "hand jobs" and other sex acts as part of the naked "body rubs." AA 086–89. The state theorized that the women "paid" Coil by walking around his house naked and showing him the money that they made, giving him bragging rights. AA 088. Also, that Coil recruited the women and advertised their services via Craigslist, and was sometimes a paying customer himself. AA 089.

The state's first witness was an unobjected-to expert in "pimp and prostitution subculture," who testified generally about pimping and prostitution. AA 104–109. The state next called I.P., who recalled meeting Coil at a fast food restaurant to discuss the Craigslist ad in October of 2015. AA 118–19. She testified that she and another woman interviewed with Coil in his home later that day and discussed the house rules: the women were to be naked while in the house; they were required to show Coil the money they made; and no sex with clients was permitted. AA 121. She could not recall if Coil told her how to perform a "body rub" or what body parts to touch. AA 122. I.P. stated that she eventually began working in the home doing body rubs several nights per week on different customers. She estimated that she performed approximately two–three body rubs on Coil during which she touched his penis, but she could not remember if Coil

asked her to touch his penis. AA 127, 135–36. I.P. testified that in the summer/fall of 2016, she elected not to return to Coil's home and she told a former teacher and ultimately police about what had taken place. AA 154–56. After I.P.'s direct testimony and before cross-examination, the court recessed for the evening. Trial would resume at 11:00 a.m. the next day.

F. Guilty plea and sentencing

At some point before trial resumed the next day, defense counsel notified the court that Coil wished to enter a guilty plea. AA 162. The court conducted a short plea colloquy covering just twelve pages of transcript. AA 162–74. There is no written plea agreement, and there was no negotiation with the state. The court asked Coil whether he was pleading freely and voluntarily; whether he understood he was giving up "certain" constitutional and appellate rights; and it informed Coil of the maximum penalties and that sentencing was solely up to the judge. AA 164–67. After that, the court read Coil each count in the amended information and asked Coil if he admitted them to which he responded "yes." AA 167–169. The court then found Coil's plea freely and voluntarily made and formally accepted it. AA 169–70.

After the court accepted the plea, defense counsel reminded that court that Coil may be giving up some additional rights. AA 170. The court then admonished Coil that he was also giving up his jury trial rights and certain

appellate rights but not post-conviction remedies; when Coil asked "What does that mean?" defense counsel interjected that he would explain "in the back" what Coil's post-conviction remedies would be. AA 173–174. The court did not attempt to clarify for Coil what appellate or post-conviction rights he would keep following his guilty plea. Finally, the court told Coil that the state would have the full right to argue for consecutive or concurrent time, which Coil acknowledged. AA 175. Although Coil previously expressed that he did not understand the difference between concurrent and consecutive time, AA 055, the court did not explain these terms or ask defense counsel if he had.

On November 8, 2017, Coil appeared for sentencing and "apologized for his actions." AB at 8. The court, noting that "the testimony [it] heard is that sexual favors [ ] were being given to" Coil imposed an aggregate sentence of life with the possibility of parole after 132 months. This reflected a sentence of five to life on the sex trafficking of a minor count related to I.P. and a consecutive six- to fifteen-year term for the attempted sex trafficking count related to the undercover officer Coil met with to discuss the Craigslist ad. AA 195.

G. Appeal

In January of 2018, Coil filed in this Court a pro se notice of appeal and request for appellate counsel, explaining that he felt like he had been "ignored and forced through the system" below. Docs. 18-03468, 04177. This Court remanded

the case for the limited purpose of appointment of appellate counsel. Doc. 18-05055. The district court soon appointed counsel for Coil and issued a briefing schedule. Doc. 18-08950. In August of 2018, Coil moved to dismiss counsel on the basis that they had only one communication and the transcripts had not yet been received; this Court denied the motion, noting that the court recorder had received an extension to file the transcripts. Docs. 18-30476, 31730.

In November of 2018, appointed counsel filed an opening brief arguing that Coil's actual conduct in this case was limited to *facilitating* sex trafficking, rather than actual (or attempted) participation in sex trafficking. OB 12–15. Coil arranged for the women to be present in his home and provided the space and basic equipment needed for a legal massage, and he received no tangible benefit from their activities. OB 14. By entering a plea to charges beyond the scope of his actual conduct—and which doubled his sentencing exposure—Coil's plea to those counts (counts one and six) was not knowingly and intelligently made.[1] OB 16–17.

[1] These were the only two counts for which Coil received prison time. The court imposed a 12–30 month suspended sentence on counts two-five (the soliciting prostitution counts) with three years of probation, the only condition being 364 days in the Clark County Detention Center, all concurrent to count one. Count seven (pandering as to undercover officer) was dismissed as a lesser included offense of count six (attempt sex trafficking as to undercover officer). AA 193–95.

The state responds that Coil waived his ability to challenge his guilty plea on direct appeal because he failed to move to withdraw his guilty plea below. AB 9–10. Should this Court address the validity of Coil's plea, the state argues that it is presumptively valid because it was entered with the assistance of counsel. AB 10–11. The state argues that Coil "admitted" to committing sex trafficking during the plea canvas. AB 13.

On the heels of the state's response, Coil retained undersigned to pursue this appeal. On January 14, 2019, this Court granted Coil's motion to extend time to file either an addendum to the opening brief or a reply brief. This addendum timely follows. Coil incorporates the arguments made in the opening brief and will respond to the arguments made in the state's answering brief in a streamlined reply brief once the state answers the new claims contained in this addendum, unless this Court orders otherwise.

Addendum

Summary of Argument

At the outset, this Court can review the validity of Coil's guilty plea because the errors that occurred during his *Faretta* canvasses and the plea colloquy clearly appear from the record, and these errors rest on legal, rather than factual, allegations. First, the district court denied Coil the right to self-representation even though he repeatedly and timely asserted that right. This is per se reversible error,

which here resulted in an involuntary guilty plea entered midway through trial and with no benefit. Second, the district court entirely failed to ensure that Coil understood the elements of the charges to which he pleaded guilty and advised him of the bulk of the Constitutional rights he was giving up only *after* it had already accepted his guilty plea. This resulted in an unknowing guilty plea that exceeded his actual conduct. Coil thus asks this Court to vacate his conviction and sentence.

Argument

I. This court can review the validity of Coil's guilty plea on direct appeal.

This Court will generally not review a plea-validity challenge that is raised for the first time on direct appeal unless: (1) the error clearly appears from the record, or (2) the challenge rests on legal rather than factual allegations. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (Nev. 1986), *superseded by statute on other grounds as stated in Hart v. State*, 116 Nev. 558, 562, 1 P.3d 969, 971 (2000); *Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 60 n.1 (1994).

The deficiencies in the district court's handling of Coil's request for self-representation and the plea canvass itself clearly appear from the record before this court and rest on legal, rather than factual allegations. For these reasons, this Court may review Coil's claims that his guilty plea is invalid because (1) he was deprived of his right to self-representation; and (2) the district court entirely failed to ensure that Coil understood the elements of the charges to which he pleaded

guilty and advised him of the bulk of the rights he was giving up only *after* accepting his plea, rendering his guilty plea unknowing.[3]

II. The trial court deprived Coil of the right to self-representation when Coil repeatedly and timely asserted that right.

A. Legal standard

"A criminal defendant has an 'unqualified right' to represent himself at trial so long as his waiver of counsel is intelligent and voluntary." *Tanksley v. State*, 113 Nev. 997, 1000, 946 P.2d 148, 150 (1997). "Denial of that right is per se reversible error." *Hymon v. State*, 121 Nev. 200, 212, 111 P.3d 1092, 1101 (2005) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S.Ct. 944 (1984)). To ensure that the defendant is competent and that the waiver of counsel is knowing, intelligent, and voluntary, the court "should conduct a *Faretta* canvass to apprise the defendant fully of the risks of self-representation and of the nature of the charged crime so that the defendant's decision is made with a clear comprehension of the attendant risks." *Id.* (internal citations and quotations omitted). A district court may deny a request for self-representation where the request is untimely, the request is equivocal, the request is made solely for the purpose of delay, the defendant abuses his right by disrupting the judicial process, or the defendant is

[3] This appeal obviously leaves open the issue of whether ineffective assistance of counsel forced Coil to request self-representation or to enter a guilty plea.

incompetent to waive his right to counsel. *Tanksley*, 113 Nev. at 1001, 946 P.2d at 150.

B. Analysis

Here, the district court violated Coil's right to self-representation by coercing him to "withdraw" both of his pre-trial requests to represent himself. When Coil first invoked his right to self-representation at the July 24th calendar call, rather than explain to Coil the consequences of self-representation, the elements of the charges against him, and the possible penalties, the Court simply asked Coil whether he knew the answers to those questions until he answered enough "no's" to become discouraged enough to ask if he could withdraw his request. AA 054–55. The court seized the moment: "So now you don't want to represent yourself? All right. I think that's very smart so you're going to go forward" with current defense counsel. AA 056. Coil did not affirmatively respond, and the hearing promptly ended. AA 056–57. The court did not tell Coil that his request, made one week before trial, was untimely.

Coil requested to represent himself a second time at the continued September 18th calendar call, at which time he apologized to the court for not having brought the motion sooner, explaining that "commissary is not delivering envelopes, so I had to deliver it myself." AA 064. Though trial was still a week away—and although the lawyers had previously agreed to three trial continuances

and had been discussing a fourth continuance to accommodate the state's schedule only moments before—the court declined to hold the *Faretta* canvas until the day before trial. AA 063–64. After a smooth start during which Coil affirmed that he was "certain" he wished to proceed without a lawyer, AA 068, the September 25th canvas abruptly ended when Coil indicated that he would need "time" to "get [his] witnesses and documents together." AA 072.

> The court: Well, you're set for trial tomorrow. We are going to trial tomorrow on this case.
>
> Coil: So, there's no way I can have a fair trial?
>
> The court: You can have a fair trial. [Defense counsel] is ready to go . . . if you represent yourself like we've been talking about, you're going to be held to the same standard as [defense counsel]. I'm going to make him go to trial tomorrow at 1:30, so you're going to trial tomorrow at 1:30.
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> Coil: With no witnesses and no documents that I need?
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> The Court: Sir, you wanted to represent yourself. You brought this to my attention last Wednesday . . . your counsel's ready to go to trial. So your trial date is tomorrow, tomorrow at 1:30.
>
> Coil: Okay. I cannot have a fair trial. I'm at the mercy of the Court. That means I withdraw my motion. He's now in charge because I can't proceed without my witnesses, without my documents, to represent my innocence.

AA 073.

The district court's denial of even a short continuance so that Coil could prepare to represent himself left him with no "choice" but to "withdraw" his request for self-representation. The district court erred by denying outright Coil's request for a continuance and thus his right to self-representation. *See Lyons v. State*, 106 Nev. 438, 796 P.2d 210 (1990) (examining denial of defendant's request for a trial continuance so that he could represent himself as a denial of the right to self-representation).

Coil twice asserted his right to self-representation, and stated that he was "certain" he wished to do so. The record reveals that Coil was polite and cooperative in court and at no time disruptive. *See, e.g.*, AA 016–17, 036, 041. He initially invoked his right to a speedy trial but waived it at the first trial setting (in November 2016) "against [his] will" because he did not "see an option" in light of the belatedly disclosed discovery. AA 016. He diligently prepared for trial and notified the court as early as July 2017 that he did not have certain documents necessary to his defense. AA 031–40. At that time, he was told that because he was represented by counsel, decisions about what investigation to conduct and what evidence to present at trial rested with his lawyer. AA 038–40. He sought to represent himself shortly after his request to dismiss counsel and have new counsel appointed was denied, and only after it became apparent that his relationship with

his current lawyer would not improve, which suggests that this was the true basis for his request, not a desire to further delay his trial.

The district court's denial of a short continuance so that Coil could represent himself is particularly unreasonable when cast against the fact that, only moments before Coil moved to represent himself for the second time, counsel for the state and the defense were discussing a fourth trial continuance to accommodate the state's trial schedule—something the court seemed to have no problem with. AA 062–63. Additionally, that the trial had been continued multiple times due to repeat discovery issues—something over which Coil had no control and continuously voiced his objection to. AA 016, 059.

Finally, Coil made his second request a full week before trial was set to begin. Coil had no reason to believe that this request was untimely because the court did not tell him that his prior request, which was also made one week before trial at the previous calendar call, was tardy. Regardless, Coil provided good cause for waiting until calendar call to personally deliver the motion: commissary was not delivering envelopes. AA 064. The timing and nature of Coil's request combined with his cooperative courtroom demeanor, the circumstances surrounding the request, and his prior conduct in this case makes this case distinguishable from this Court's decisions in *Vanisi* and *Lyons*, which affirmed

the denial of self-representation based on intentional delay and timeliness concerns.

In *Vanisi*, this Court upheld the denial of Vanisi's motion for self-representation made approximately one month before trial, concluding that the district court acted within its discretion in finding that Vanisi was making the request as a delay tactic and that he had shown himself to be unable or unwilling to abide by courtroom protocol. *Vanisi v. State*, 117 Nev. 330, 339–41, 22 P.3d 1164, 1171 (2001). The court reasoned that, although Vanisi did not explicitly request a continuance, his previous behavior, including a personal request for a continuance, motion to appoint new counsel and subsequent refusal to cooperate with new counsel, and the consequent need for a competency evaluation showed that he harbored an intent to delay the proceedings. *Id.* The Court also found that Vanisi's prior behavior of interrupting hearings, blurting out statements in a loud voice, talking over others, standing up and engaging in "unsettling rocking motions," and repeating himself over and over supported the district court's finding that Vanisi had shown himself unable or unwilling to abide by court rules and protocol, which provided a second basis to deny his request for self-representation. *Id.*

Unlike *Vanisi* where the defendant's prior behavior revealed that he wished to delay the trial and could or would not follow court rules, Coil's behavior speaks

exactly the opposite. Coil's self-representation requests were prompted after his motion to dismiss counsel was denied and that relationship failed to improve. Coil did not seek the appointment of multiple different lawyers, and he made every effort to cooperate and communicate with his attorney and to prepare for and proceed to trial in a timely fashion. Unlike Vanisi, Coil's past behavior showed that his intentions were sincere and that he could and would comply with court rules and protocols.

This case is also distinguishable from *Lyons v. State*, where this Court affirmed the denial of self-representation for both timeliness and because the trial was especially complex. 106 Nev. at 446, 796 P.2d at 215. The portion of *Lyons* affirming the denial of self-representation based solely on the complexity of the case has been overruled and is irrelevant here, so this brief addresses only the timeliness portion of that opinion. *Vanisi*, 117 Nev. at 341, 222 P.3d at 1172.

In *Lyons*, on "the first day of trial and immediately before scheduled *voir dire*," Lyons moved for postponement of trial and to represent himself or have new counsel appointed. *Lyons*, 106 Nev. at 442, 796 P.2d at 212. By that time, Lyons had been represented by several lawyers, the trial had previously been continued at least once to allow Lyons to retain a lawyer of his choosing, and the case had been pending for more than two and a half years. *Id.* On these facts, this Court held that the district court's denial of Lyons's day-of-trial request was justified, noting that

the record did not indicate "good cause justifying the lateness of the request." *Id.* at 446, 215.

Unlike in *Lyons*, where a jury panel had already been assembled, here, Coil made his second request seven days before the trial was set to begin and the jurors were summoned to appear. No jury pool would have been wasted. Also unlike Lyons, Coil had not been through several lawyers, nor had he personally requested several continuances. Indeed, Coil's trial began just 364 days after the original information was filed and ten months after the first trial setting, a far cry from the 31-month delay in *Lyon*s. AA 001, 075. Additionally, unlike in *Lyons* where the inconvenience to the court, the state, and its "many" witnesses would have been great because the trial was slated to last at least ten days, here the trial was expected to last only three–four partial court days and consist of only a handful of witnesses. AA 048. Finally, unlike Lyons, even if Coil's second request were tardy, he provided good cause for the delay because he was forced to hand deliver the motion.

For all of these reasons, the district court erred in denying Coil's request for a continuance so that he could represent himself. Coil's past behavior combined with the circumstances surrounding the request show that it was not made for purposes of delay or for any improper purpose and was timely and would not have unduly inconvenienced the state or the district court. This Court should vacate

Coil's conviction and sentence so that he can exercise his right to self-representation.

III. Coil's guilty plea was not knowingly made where the district court failed to ensure that he understood the true nature of the charges he pleaded guilty to or the Constitutional rights he was giving up by entering a guilty plea.

A. Legal standard

In determining whether a guilty plea is knowingly and voluntarily entered, courts must "review the entire record to determine whether the plea was valid, either by reason of the plea canvass itself or under a totality of the circumstances approach." *Bryant*, 102 Nev. at 272, 721 P.2d at 368. The trial must personally address a defendant at the time he enters his plea to determine whether he understands the nature of the charges to which he is pleading guilty. *Id.*

Under the totality of the circumstances approach, determining whether a plea was knowingly and voluntarily entered is not contingent on the plea canvass alone, although the plea canvass and written plea agreement are the most significant factors. *See State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); *Hudson v. Warden*, 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001).

B. Analysis

There is no written plea agreement in this case, and the totality of the circumstances show that Coil's plea was not knowingly made because he lacked

basic knowledge about the elements of the offenses to which he pleaded guilty. Although this Court has backed away from a formally structured analysis of the plea canvass, this Court must nonetheless review the record as a whole to ensure that Coil "understood the true nature of the charge against him," the consequences of his guilty plea, and the rights he was giving up. *Woods v. State*, 114 Nev. 468, 475, 958 P.2d 91, 96 (1998).

Before accepting Coil's guilty plea, the court asked him whether he knew what charges he was facing and then read each charge in the amended information, after which Coil responded "yes," he admitted to each. AA 0167. At no point did either counsel or the court state the elements of the offense on the record, nor did the court inquire whether Coil knew or understood them.

The totality of the record shows that Coil did not understand the elements of the charges. The court did not ask Coil if he understood the elements or the nature of the offenses he was charged with at the second *Faretta* canvass the day before trial, and at the first canvass approximately two months before trial the below exchange took place:

> The court: Do you understand that you are charged with the following crimes? You are charged with sex trafficking of a child under 18 years of age, soliciting prostitution, pandering and attempt sex trafficking of a child under the age of 18.
>
> Coil: Yes, I've read the charges.

> The court: Do you know the elements of those charges?
>
> Coil: No.
>
> The court: You don't know the elements of any of those charges?
>
> Coil: No.

AA 054–55.

The total circumstances thus show that, before entering his guilty plea, Coil did not know the essential elements of the offenses to which he pleaded guilty, i.e., the facts that the state would need to prove beyond a reasonable doubt to convict him at trial. This is bolstered by the fact that the state broadened the elements it intended to prove as to count one the morning of trial to include "inducing, causing, recruiting, or maintaining" I.P. to "enter any place . . . in which prostitution is practiced, encouraged[,] or allowed for the purpose of sexual conduct or prostitution." AA 076. It's unclear from the record whether Coil knew of or understood this change:

> The court: Sir, have you received a copy of the Amended Information in your case?
>
> Coil: Is that what it was?
>
> Defense counsel: Yeah.
>
> The court: so do you know the charges that you're facing in this case?
>
> Coil: Yes, ma'am.

AA 164.

And it is even more egregious in light of the argument raised in the opening brief: Coil's actual conduct did not meet the elements of the two most serious charges to which he pleaded guilty, and the only two charges for which he received prison time. OB 11–17.

This case is thus distinguishable from both *Woods* and *Freese*. The defendant in *Freese* argued that his guilty plea was invalid because the district court failed to question him about the rights he was giving up and to review the elements of the crime to which he pleaded guilty. *Freese*, 116 Nev. at 1107, 13 P.3d at 448–49. This Court rejected those arguments, reasoning that Freese signed a written plea agreement describing the rights that he was waiving and adequately advising him of the element of the charges and Freese acknowledged that he read and understood the agreement. *Id.*

This Court also rejected a similar challenge in *Woods*, where the defendant argued that his counsel's representation that he had reviewed with Woods the elements of the crime and that Woods understood them was insufficient. In rejecting that challenge, this Court reasoned that the plea canvass showed that "the district court personally engaged Woods regarding the elements of the offenses with which he was charged." *Woods*, 114 Nev. at 476, 957 P.2d at 96. Unlike in *Freese* and in *Woods*, here there was no written plea agreement setting forth the

elements of the charged crimes, nor did the district court personally engage Coil regarding the elements of these offense or even ask defense counsel if had reviewed the elements with Coil or if he understood them. And, as explained above, rather than show that Coil did in fact understand these crimes, the prior proceedings show that he did not even in the months and days leading up to trial. AA 054–55.

To make matters worse, the court did not advise Coil of the bulk of the jury trial rights he was giving up (or even if he had discussed those rights with counsel) until *after* it had formally accepted Coil's plea. AA 162–67 (portion of plea canvass before court formally accepts plea). Even if Coil disagreed with something that came after that, it's unlikely he would have believed he had any right to withdraw his plea and continue with trial. It was not until after the court accepted Coil's guilty plea, deeming it both knowing and voluntary, that it advised Coil of: any appellate rights he might be giving up, that he was waiving his right to self-incrimination, that the state would not be able to comment on his decision to remain silent at trial, the right to a trial free of excessive pre-trial publicity and before an impartial jury, the right to cross-examine the state's witnesses and to subpoena his own witnesses, and the right to testify in his own defense if he so chose. AA 171–75. This deficiency alone, and particularly when combined with the court's complete failure to ensure that Coil understood the elements of the

crimes despite previously having been made aware that Coil did not know them, renders Coil's guilty plea invalid.

Viewing the record as a whole and particularly the guilty plea canvass, this Court should conclude that Coil did not knowingly, voluntarily, and intelligently enter his guilty plea and vacate his conviction and sentence.

Conclusion

Coil's guilty plea is invalid because the court denied his right to self-representation and failed to ensure that Coil understood the true nature of the charges against him or the rights that he would be giving up by pleading guilty. Coil thus asks this Court to vacate his conviction and sentence.

Dated this 5th day of February, 2019

/s/ Todd M. Leventhal

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1. **I certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements or NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman Font, Size 14.

2. **I certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has typeface of 14 points or more, and contains 7,141 words spanning 27 pages.

3. **I certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions if this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of February, 2019

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Certificate of Service

I hereby certify and affirm that on February 5, 2019, this document was filed electronically with the Clerk of the Supreme Court of the State of Nevada, using Eflex their electronic filing system, causing notice of such filing to be served upon all parties' counsel of record.

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