IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN POWELL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 79037

RESPONDENT'S ANSWERING BRIEF

Appeal From Order Denying Appellant's Motion to Withdraw Guilty Plea
Eighth Judicial District Court, Clark County

MONIQUE MCNEILL, ESQ.
Nevada Bar #009862
P. O. Box 2451
Las Vegas, Nevada 89125
(702) 497-9734

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page Number:

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN POWELL, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 79037

RESPONDENT'S ANSWERING BRIEF

Appeal from Order Denying Appellant's Motion to Withdraw Guilty Plea
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because it relates to a conviction for Category A and B felonies. NRAP 17(b)(2).

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not abuse its discretion in not holding an evidentiary hearing on Appellant's Motion to Withdraw Guilty Plea.
2. Whether the district court did not abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea.

STATEMENT OF THE CASE

On November 8, 2017, Adrian Powell (hereinafter "Appellant") and his co-defendant were charged by way of Information with: Counts 1 and 8 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Counts 2 and 9 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS

205.060); Counts 3, 10 and 14 – First Degree Kidnapping With Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165); and Counts 4-7, 11-12 and 15 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165). AA 000001-10.

On July 30, 2018, the State filed an Amended Indictment charging Appellant and his co-defendant with: Counts 1 and 8 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Counts 2 and 9 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060); Counts 3 and 13 – First Degree Kidnapping With Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165); and Counts 4-7, 10-11 and 14 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165). Id. at 000011-17.

Jury trial commenced on July 30, 2018. RA 000198. On July 31, 2018, Appellant, pursuant to Guilty Plea Agreement, pled guilty to the charges in the Amended Indictment. AA 000018-25. On October 31, 2018, the time set for sentencing, Appellant expressed his concerns about the plea agreement, counsel was withdrawn, and new counsel was appointed to address the status of Appellant's plea. RA 000221.

On January 14, 2019, Appellant filed his Motion to Withdraw Guilty Plea. AA 000033-48. The State filed its Opposition on February 5, 2019. Id. at 000049-

70. On February 27, 2019, the district court held a hearing on Appellant's motion. Id. at 000071. Appellant's motion was denied. Id. at 000079.

On May 22, 2019, Appellant was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – twelve (12) to forty-eight (48) months; as to Count 2 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 1; as to Count 3 – five (5) to fifteen (15) years with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 2; as to Count 4 – thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 3; as to Count 5 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 4; as to Count 6 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 5; as to Count 7 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 6; as to Count 8 – twelve (12) to forty-eight (48) months concurrent with Count 7; as to Count 9 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 8; as to Count 10 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96)

months for use of a deadly weapon concurrent with Count 9; as to Count 11 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 10; as to Count 13 - five (5) to fifteen (15) years with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon consecutive to Count 3; and as to Count 14 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 13 for an aggregate total of sixteen (16) to forty-six (46) years. Id. at 000091, 000112-14. The Judgment of Conviction was filed on May 24, 2019. Id. at 000115-18.

On June 24, 2019, Appellant filed a Notice of Appeal. Id. at 000119-21. On October 18, 2019, Appellant filed his Opening Brief.

STATEMENT OF THE FACTS

The evidence in this case was overwhelming. The following is a summary of the victims' testimony from the Grand Jury presentation, as well as a summary of the forensic evidence and the circumstantial evidence that would have been presented at trial.

A. Testimony of Jose Chavarria

Jose Alfredo Chavarria Valenzuela was working as a cook at Pepe's Tacos located at 2490 Fremont Street, Las Vegas, Nevada on September 28, 2017. RA

000032-33. At approximately 2:40 AM, Chavarria was in kitchen area when two gunmen entered the restaurant. Id. at 000035. Chavarria ran toward the back refrigerator where his co-worker was located, when one of the gunman jumped the counter, followed Chavarria and pointed a gun at him. Id. The gunman told Chavarria to get on the ground and that he "wanted the money." Id. The gunman then forced Chavarria at gunpoint from the back of the store to the front cash registers. Id. at 000035-36. At the cash registers, the gunman began jabbing Chavarria in his side, but Chavarria was unable to open the till because he did not have the correct passcode. Id. at 000036. The second gunman then retrieved Chavarria's coworker from the back of the store and forced her to open the cash registers at the front of the store. Id. at 000037. One of the gunmen then took Chavarria to the second cash register, threw him on the ground, and pointed a gun to Chavarria's head. Id. The gunmen took the money from the cash registers, but did not take any property from Chavarria. Id. at 000037-38.

B. Testimony of Yenir Hessing

Yenir Hessing works as the shift lead at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada. Id. 000007. On September 28, 2017, Hessing was working the graveyard shift with four other Walgreens employees when, at approximately 4:05 AM, two masked gunmen entered the store. Id. at 000008-10. Hessing was stocking the shelves in the food aisle when one of the gunmen pointed

a gun to her stomach, demanded she move to the front of the store. Id. at 000010. The food aisle is located near the store's photo section, away from the registers and store entrance. Id. at 000014. While pushing her to the front of the store, the gunman told Hessing to go to the cash registers in the front of the store, passing the cash register in the photo section. Id. As gunman pushed Hessing, he told her this is "not a game and I'm going to kill you." Id. at 000010.

At the front of the store, the gunman told her to open the three cash registers, which Hessing did. Id. At that moment, another Walgreens employee, Tifnie Bobbitt was returning from lunch and, upon seeing Bobbitt, the gunman ordered her the front of the store too. Id. Hessing testified that the gunman was "swearing and saying like really bad things … grabbed both of us and he asked me where is the big money, where is the safe, and I tell him it was in the office." Id. The gunman then used the gun to again push Hessing, this time toward the office located at the back of the store. Id.

While the gunman pushed Hessing toward the back of the store, Hessing saw down an aisle that the Walgreen's pharmacist, Darlene Orat, was being held up by another gunman in the pharmacy. Id. at 000009-12. As the gunman pushed Hessing toward the back office at gunpoint, he told Hessing "I'm going to kill you." Id. at 000014. Hessing responded to the gunman, telling him "please don't hurt me, I'm nine weeks pregnant, don't do anything to me." Id. at 000015-17. To which the

gunman responded, “I don't give a [fuck] I'm going to kill you if you do the wrong code or … try to call [police].” Id. at 000014.

Upon reaching the back office, which is behind two doors that each have a different pin code, Hessing entered the code and the gunman forced Hessing and Bobbitt into the office. Id. at 000015-16. The door to the office closed behind them, leaving Hessing, Bobbitt and the gunman isolated from the rest of the store. Id. at 000017-18. In the office, the gunman began hitting Hessing in the ribs with the gun and demanding that she open the safe. Id. at 000017. Hessing opened the first of two safes and the gunman grabbed everything. Id. The gunman then demanded Hessing open the second safe, which she did. Id. The gunman grabbed the contents from the second safe and fled from the office. Id.

C. Testimony of Tifnie Bobbitt

Tifnie Bobbit was working as a cashier at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada, on September 28, 2017. Id. at 000098. Around 4:00 AM, Bobbitt was headed to breakroom to take her lunch break when she heard a man “say the F word.” Id. at 000099-100. Bobbitt looked over to see the man crouching and walking behind Tenir Hessing. Id. at 000100. Bobbitt entered the code to the breakroom, entered the room and approached the seconded code-locked door to the office, which she knocked on to alert the Walgreen’s manager. Id. at 000100-01. Bobbitt’s manager left and did not return, so Bobbitt, thinking the situation was

taken care of, walked out of the breakroom into the store. Id. at 000101. At that moment, the gunman saw her and yelled at her "Where the fuck do you think you're going, bitch?" Id. The gunman then ordered Bobbitt to the front of the store where Hessing was opening the cash registers for the gunman. Id. at 000103. From there, the gunman forced Bobbit and Hessing from the front of the store to the back office, pushing Bobbitt while telling the women they were walking too slowly. Id. at 000103-04. At the breakroom door, they enter the code and enter the breakroom. Id. at 000104. From there, Hessing entered the code to the office door and the gunman forced the women into the office. Id. at 000104-05. In the office, the gunman "kept jabbing the gun" into Hessing's side as he was forcing her to open the safes. Id. at 000105. Once the safes were open, the gunman took the money from the safes and fled. Id.

D. Evidence in addition to Grand Jury Testimony

Both of these armed robberies were captured on video surveillance. Id. at 000135-36. In addition, the Defendants used Mr. Pinkey's girlfriend's vehicle. Id. at 000056. After the Walgreen's event, they crashed the vehicle while fleeing. Id. at 000061, 000149. Defendants Pinkney and Powell fled the wrecked vehicle on foot, leaving a trail of US Currency, a mask, and the proceeds of the robberies in their wake. Id. at 000122-26, 000139-41, 000156-58. Mr. Powell's and Mr. Pinkney's fingerprints were on the abandoned vehicle and Mr. Pinkney's fingerprints were on

the prescription bottles from the Walgreen's robbery. Id. at 000130-32, 000160-64. They were apprehended a short time later wearing the same clothing they wore during the robberies. Id. at 000117, 000141-46, 000153-56.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea. Appellant's plea was knowingly and voluntarily entered and he has not established a substantial reason warranting withdrawal of his plea. Further, Appellant's counsel was effective and gave him sound advice prior to his entry of plea. Indeed, the district court found that Appellant's claims were mere speculation and that he had not demonstrated trial counsel was ineffective. Additionally, Appellant cannot demonstrate prejudice. Therefore, Appellant's claims fail.

The district court did not abuse its discretion by not holding an evidentiary hearing on Appellant's Motion to Withdraw Plea. Here, the district court determined that it could rule on Appellant's Motion to Withdraw Guilty Plea without expanding the record. Based on the plea canvass and the surrounding facts and circumstances, the district court found Appellant's claims lack merit and, therefore, an evidentiary hearing was unnecessary. Thus, the district court did not abuse its discretion by denying Appellant's request for an evidentiary hearing and Appellant's claim fails.

//

ARGUMENT

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA.

A. Appellant's plea was knowingly and voluntarily entered and he has not established a substantial reason warranting withdrawal of his plea.

The district court did not abuse its discretion by denying Appellant's Motion to Withdraw Guilty Plea because Appellant's claims lack merit. The district court may grant a motion to withdraw made prior to sentencing or adjudication of guilty for any substantial reason that is fair and just. State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969). "On appeal from a district court's denial of a motion to withdraw a guilty plea, this Court 'will presume that the lower court correctly assessed the validity of the plea, and [] will not reverse the lower court's determination absent a clear showing of an abuse of discretion.'" Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)).

A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The defendant has the burden of proving that the plea was not entered knowingly or voluntarily. Bryant, 102 Nev. at 272, 721 P.2d at 368; Wynn v. State,

96 Nev. 673, 615 P.2d 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985).

In determining whether a Defendant has "advanced a substantial, fair, and just reason to withdraw a [guilty] plea, the District Court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently." Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001); see also Bryant, 102 Nev. at 271, 721 P.2d at 367. A Court "has a duty to review the entire record to determine whether the plea was valid ... [and] may not simply review the plea canvass in a vacuum." Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993). Nonetheless, a defendant has no right to withdraw his plea simply because he makes his motion prior to sentencing or because the State failed to establish actual prejudice. See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

This standard requires the court accepting the plea to personally address the defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 367. A court may not rely simply on a written plea agreement without some verbal interaction with a defendant. Id. Thus, a "colloquy" is constitutionally mandated and a "colloquy" is but a conversation in a formal setting, such as that occurring between an official sitting in judgment of an accused at plea. See id. However, the court need

not conduct a ritualistic oral canvass. State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000). The guidelines for voluntariness of guilty pleas "do not require the articulation of talismanic phrases," but only that the record demonstrates a defendant entered his guilty plea understandingly and voluntarily. Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973); see also Brady v. United States, 397 U.S. 742, 747-48, 90 S. Ct. 1463, 1470 (1970).

Specifically, the record must affirmatively show the following: 1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime. Higby v. Sheriff, 86 Nev. 774, 781, 476 P.2d 950, 963 (1970). Consequently, in applying the "totality of circumstances" test, the most significant factors for review include the plea canvass and the written guilty plea agreement. See Hudson v. Warden, 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001). The presence and advice of counsel is a significant factor in determining the voluntariness of a plea of guilty. Patton v. Warden, 91 Nev. 1, 2, 530 P.2d 107, 107 (1975).

In Stevenson v. State, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015), this Court found that none of the reasons presented warranted the withdrawal of

defendant's guilty plea, including allegations that the members of his defense team lied about the existence of the video in order to induce him to plead guilty. This Court found similarly unconvincing defendant's contention that he was coerced into pleading guilty based on the compounded pressures of the district court's evidentiary ruling, standby counsel's pressure to negotiate a plea, and time constraints. Id. As this Court noted, undue coercion occurs when a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act. Id. (quoting Doe v. Woodford, 508 F. 3d 563, 570 (9th Cir. 2007)).

This Court also rejected defendant's implied contention that withdrawal was warranted because he made an impulsive decision to plead guilty without knowing definitively whether the video could be viewed. Id. at 605, 354 P.3d at 1281. Defendant did not move to withdraw his plea for several months, which contradicted his claim of temporary confusion. Id. This Court made clear that one of the goals of the fair and just analysis is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. Id. at 605, 354 P.3d at 1281-82 (quoting United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991)). This Court found that considering the totality of the circumstances, there was no difficulty in concluding that defendant failed to present a sufficient reason to permit withdrawal

of his plea. Id. at 605, 354 P.3d at 1282. Permitting him to withdraw his plea under the circumstances would allow the solemn entry of a guilty plea to become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim, which the Court cannot allow. Id. (quoting United States v. Barker, 514 F.2d 208, 222 (D.C. Cir. 1975)).

In the instant case, Appellant signed a written Guilty Plea Agreement, wherein he acknowledged that he fully understood the entirety of the agreement, had all of his questions answered, and was knowingly and voluntarily entering his guilty pleas. AA 000018-25. Appellant further acknowledged in his signed Guilty Plea Agreement all of the rights he was giving up by entering the agreement:

> I understand that I am waiving and forever giving up the following rights and privileges: 1. The constitutional privilege against self-incrimination…2. The constitutional right to a speedy and public trial by an impartial jury…3. The constitutional right to confront and cross-examine any witnesses who would testify against me…I have discussed the elements of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me…. I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor… All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney. I believe that pleading guilty and accepting this plea bargain is in my best interest, and that trial would be contrary to my best interest. I am signing this agreement voluntarily…and I am not acting under duress or coercion or by virtue of any promise of leniency, except for those set forth in this agreement…My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

Id. at 000023-24.

In addition to the actual GPA, the district court discussed the terms of the agreement with both Appellant and his co-defendant extensively on the second day of trial. RA 000200-20. Specifically, on Monday, July 30, 2018, the district court and the State began the voir dire process. Id. at 000198. The following morning on Tuesday, July 31, 2018, the State and defense attorneys negotiated the case before voir dire resumed. Id. at 000199, 000201. Pursuant to the guilty plea agreements, both Appellant and co-defendant essentially "pled to the sheet," and in exchange, the State agreed to not seek Life in prison, and agreed to not file charges on ten (10) additional robbery events. Id. 000201-02. Because the jury trial had already commenced, the district court conducted an extremely thorough plea canvass on both Appellant and his co-defendant, and ultimately accepted their guilty pleas as freely, knowingly, and voluntarily entered. Id. at 000200-20.

After the plea canvass of the co-defendant, the district court then went on to thoroughly canvass Appellant:

> THE COURT: … Mr. Powell, how old are you?
> DEFENDANT POWELL: I'm 23 years old. I'll be 24 on Thursday.
> THE COURT: How far did you go in school?
> DEFENDANT POWELL: I graduated high school.
> THE COURT: And do you have any learning disability?
> DEFENDANT POWELL: No, Your Honor.
> THE COURT: Do you read, write, and understand the English language?
> DEFENDANT POWELL: Yes, Your Honor.
> THE COURT: And is English your primary language?
> DEFENDANT POWELL: Yes, Your Honor?

THE COURT: Have you been treated recently for any mental illness or addiction of any kind?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Has anyone ever suggested you should be treated for mental health?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Are you currently under the influence of any drug, medication, or alcohol?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Have you been on any medication during your stay in jail?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: What medication?
DEFENDANT POWELL: Remeron.
THE COURT: What is – what type of medication is that?
DEFENDANT POWELL: It treats depression.
THE COURT: How do you feel today?
DEFENDANT POWELL: I feel excellent, Your Honor.
THE COURT: Do you understand what's happening?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Does the medication affect your ability to understand what's going on today?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Are you under any other effects of the medication?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Have you received a copy of the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Did you read the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Did you understand everything in the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Have you discussed this case with your attorney?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Are you satisfied with the representation and advice given to you by your attorney?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: As to the charges in the guilty plea agreement, how do you plead?
DEFENDANT POWELL: I plead guilty, Your Honor.

THE COURT: [Are you] making this plea freely and voluntarily?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Has anyone forced or threatened you or anyone close to you to get you to enter this plea?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Has anyone made any promises other than what's in the guilty plea agreement to get you to enter this plea?
DEFENDANT POWELL: No, Your Honor.
THE COURT: I have before me the guilty plea agreement, and I'm going to hold this up, on page 7, is this your signature?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Did you understand everything contained in the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And do you understand that as part of the guilty plea agreement, although you are not pleading guilty to these alleged offenses, the State will be allowed to argue them at the time of sentencing?
DEFENDANT POWELL: Yes, Your Honor.
… [Court lists ten additional robberies by date, location, and event number.]
THE COURT: So I don't know if I asked you, before you signed this plea agreement, did you read it and discuss it with your attorney?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Did you understand everything contained in this agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: You understand that there are certain constitutional rights that you're giving up by entering the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: You understand that you have a right to appeal on reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And again, do you understand the range of punishment?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Well, we're going to go through and put these on the record, so it's clear.
… [Parties recite penalty range for each and every count to which Defendant pled.]

THE COURT: Do you understand the range for each of those counts?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Do you understand sentencing is entirely up to me?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And do you understand that, again, it's up to me as to whether any or whether all of those counts run consecutively or concurrently?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And no one is in a position to promise you leniency or special treatment of any kind?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: [] What is it that you did on the 28th of September to cause you to plead guilty?
DEFENDANT POWELL: I went into two establishments, Your Honor, and I committed the armed robbery.
…
THE COURT: You went into those establishments and committed armed robberies?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And do you have any questions you'd like to ask me or your attorney before I accept this plea?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Anything I left out?
MR. GIORDANI: No.
THE COURT: Okay. And also for the record, you had approximately two hours to discuss all of this – maybe longer than that now – with your attorney before accepting this?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And without telling me what they were, your attorney answered all your questions regarding the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Okay. The Court finds the Defendant's plea of guilty is freely and voluntarily made and the Defendant understands the nature and consequences of his plea and, therefore, accepts the plea of guilty.

Id. at 000213-19.

As this Court can see, there is absolutely no basis to allow Appellant to withdraw his guilty plea. The district court conducted an extremely thorough plea

canvass of both Appellant and his co-defendant, and they both responded appropriately and intelligently throughout. Appellant responded appropriately to all questions, indicated he had ample time to talk to his lawyer, and went so far as to say he felt "excellent" during his plea canvass. Id. That's because he knew he was getting a beneficial deal when he avoided ten additional robbery cases for pleading guilty to the charges he would have been convicted of by a jury anyway.

At the time this deal was entered into, a jury was in the hallway, and the State was entirely prepared to complete the trial. In fact, the trial had already begun, as the pleas were entered on the second day of jury selection. Id. at 000199, 000201. Appellant begged for negotiations, and, notwithstanding the fact that the State was confident in the outcome if the case proceeded to trial, the State entered into the negotiation. AA 000074. Appellant received a large benefit that incentivized him to take the deal. Specifically, he avoided being charged with dozens of additional counts – many of which included potential Life sentences. Id. at 000074-75; RA 000216-17. Those charges were discussed in detail, and Appellant never once raised a concern or objection to those charges being referenced. Id. The reason for that is simple. Appellant himself knew he committed the crimes, understood his exposure, and chose to avoid it. Then, after the jury was discharged, the State released all its witnesses from subpoena, halted any investigation into the additional offenses, and

sent the files to P&P for PSI's to be completed, the Appellant claimed his plea was not knowingly and voluntarily entered. AA 000033-38; RA 000221.

At the time of the plea canvass, the district court found Appellant's plea was knowingly and voluntarily entered into. RA 000219. Further, at the time of the hearing on Appellant's motion, the district court made similar findings:

> And I, well, I didn't recall, but I did review the actual canvas where your client said that, I believe, I don't want to go – take the time to go to the page, but he says something about I'm excellent. And we – I inquired extensively, the best I could that he was knowingly and voluntarily making this plea and that he was aware of all the consequences, not the least which he signed the guilty plea agreement that sets forth everything.

AA 000079. "On appeal from a district court's denial of a motion to withdraw a guilty plea, this Court 'will presume that the lower court correctly assessed the validity of the plea, and [] will not reverse the lower court's determination absent a clear showing of an abuse of discretion.'" Riker, 111 Nev. at 1322, 905 P.2d at 710 (quoting Bryant, 102 Nev. at 272, 721 P.2d at 368). The record completely contradicts Appellant's claim, and therefore the district court did not abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea.

Appellant has not set forth any valid basis whatsoever to withdraw his plea. Appellant's Motion rested upon three general claims: 1) the evidence in the ten additional cases was not tested in court, 2) the Appellant did not have an opportunity to review discovery on the ten related cases, and 3) trial counsel was ineffective in

advising Appellant to take the plea. AA 000034-35. Clearly, these claims do not provide a substantial reason that is both fair and just warranting withdrawal of a guilty plea – for several reasons. First, the State notes that the ineffective assistance of counsel claim will be addressed in section B, infra. As to the first two claims – that the ten related robberies had not been litigated and that they did not review discovery – those claims are nonsensical. Everyone in the room knew that those charges had not been filed, but that they could have been filed after the jury's verdict on the instant charges. AA 000018-19, 000074-75; RA 000201-02, 000216-17. That was the entire nature of the agreement. Trial counsel could not have known whether Appellant and his co-defendant committed those ten additional events – only Appellant and his co-defendant themselves knew whether they did. However, since they took the instant plea deal – they at least sought to limit their liability. The alternative for them would have been to complete the trial, run the risk of getting convicted of all counts in the instant case anyway, and then have more exposure on the back end when the State proceeded on the ten additional events. Clearly, Appellant wanted to limit his exposure and chose to avoid the chance of being convicted on dozens of additional charges. Based upon the plea canvass and the GPA itself, he chose to do so strategically. Appellant cannot now withdraw his pleas on a whim. Nor can Appellant withdraw his pleas based on a second opinion from a different attorney, or even cold feet. The legal standard for withdrawal of a guilty

plea is a "substantial reason that is both fair and just" – not "cold feet" or "a second opinion."

While the State need not set forth actual prejudice, Hubbard, 110 Nev. at 675-76, 877 P.2d at 521, the State would take this opportunity to address the broader implications of allowing Appellant to withdraw his plea based on nothing more than a whim. As this Court can see, there are no issues with the Guilty Plea Agreement, no issues with the plea canvass, and absolutely no reason to believe that anything else was going on behind the scenes that may render this guilty plea questionable. As such, allowing Appellant to withdraw his plea would render plea agreements and plea canvasses meaningless. If those things are done perfectly, and there is nothing outside those records that creates a question as to the voluntary and knowing nature of the guilty plea, why would any party – State or Defense – ever enter into a guilty plea, knowing it can be withdrawn for no good reason? When the guilty pleas were entered in this case, the district court discharged the jury, the State released dozens of witnesses from subpoena, did not file additional charges related to the ten robbery events (per the agreement), and sent its file to Parole & Probation for a PSI. In a perfect world with unlimited prosecutorial resources, the State would continue to investigate and build the strength of their case up until the moment the defendant is sentenced, but as this Court is aware, that is simply not possible in the real world. Allowing defendants to withdraw their pleas on a whim would change the entire

fabric of the justice system. That is why the law requires a substantial reason that is both fair and just before Appellant is allowed to withdraw his plea. No such reason was given here.

As to Appellant's claim that he had not received discovery on the ten additional cases, that claim fails as well. Most importantly, there is no right to pre-indictment discovery, so there was no "discovery" to begin with. In addition, as outlined thoroughly above, Appellant himself knew whether he was involved in the ten additional events, and the strength of the evidence in those cases is irrelevant. Appellant chose to take a negotiation which ensured him the least exposure. While Appellant's counsel may personally believe that the evidence in the additional cases was not as strong as the evidence in the underlying case, that is not a basis to allow Appellant to withdraw his guilty plea. Appellant pled guilty to the charges in the instant case, not the ten additional unfiled cases. Again, this is not a substantial reason that is both fair and just. Allowing the Appellant to withdraw his plea would be unfair and unjust.

B. Appellant's counsel was effective, and gave him sound advice prior to his entry of plea.

A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, a district court's factual findings will be

given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64; see also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the

inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

To the extent that a motion to withdraw plea is premised upon an allegation of ineffective assistance of counsel, to succeed Appellant must establish that: (1) counsel's performance was deficient because it fell below an objective standard of reasonableness measured by prevailing professional norms; and, (2) counsel's deficient performance prejudiced Appellant. Strickland, 466 U.S. at 687-88; Riley, 110 Nev. at 646, 878 P.2d at 277-78. This Court may consider both prongs in any order and need not consider them both when a defendant's showing on either prong is insufficient. Kirksey, 112 Nev. at 987, 923 P.2d at 1107. Appellant demonstrates that counsel's performance was deficient when he can establish that counsel made errors so grave that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. To satisfy the prejudice prong of the Strickland standard, Appellant must establish a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Reeves v. State, 113 Nev. 959, 960, 944 P.2d 795, 796 (1997). A reasonable probability means a probability sufficient to undermine confidence in the outcome of the proceeding. Kirksey, 112 Nev. at 988.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the

evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Moreover, counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. "Strategic choices made by counsel after thoroughly

investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Kirksey, 112 Nev. at 987-988 (*citing* Strickland, 466 U.S. at 689). Moreover, "[t]he role of a court presented with allegations of ineffective counsel 'is not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance…'" Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (*citing* Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In the instant case, trial counsel's performance was not deficient, nor did it prejudice Appellant in any way. In fact, the district court concluded that Appellant's claims were merely speculative and he could not sustain a claim under Strickland:

> Okay, well, first, for ineffective we need to look at Strickland, and the burden is on the defendant must substantiate the claim that there was ineffective assistance. And it's not – is, you seem to be arguing, well, it's not the best thing, it's not what I would have done, et cetera. It's basically, for lack of better, what a reasonable defense attorney would do. And I see no grounds, if you will, under Strickland to substantiate the ineffective assistance. The fact that, certainly, even in court we discuss those cases weren't filed. It was only that they wouldn't be.
>
> So I don't see, other than mere speculation, that somehow that would affect the decision and the voluntariness, and that's what we're here about, whether the voluntary and knowingly entered into the plea.

> And I, well, I didn't recall, but I did review the actual canvas where your client said that, I believe, I don't want to go – take the time to go to the page, but he says something about I'm excellent. And we – I inquired extensively, the best I could that he was knowingly and voluntarily making this plea and that he was aware of all the consequences, not the least which he signed the guilty plea agreement that sets forth everything.

AA 000078-79.

While appellate counsel may have done things differently, or sought a different outcome, the reality of the situation was simple – trial counsel knew his client was going to be convicted if the trial was completed, knew there were ten additional events that could be filed thereafter, and he sought a negotiation at Appellant's request. AA 000074-75. The State was inclined to finish the trial, but relented and agreed to the negotiation. Id. Trial counsel's performance was entirely reasonable. Indeed, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Kirksey, 112 Nev. at 987-988 (*citing* Strickland, 466 U.S. at 689). In fact, the alternative would have been to proceed to verdict on the instant charges, and take their chances with the dozens of additional charges. Out of those two options, any reasonable attorney would have advised their client to limit their exposure, as trial counsel did here. Indeed, the district court found that Appellant's claims were mere speculation and that he had not demonstrated trial

counsel was ineffective. AA 000078-79. As to the prejudice prong of the Strickland analysis, the same reasoning applies. Appellant did not suffer any prejudice based upon his counsel's performance, he simply had two options, and took the better of the two.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY NOT HOLDING AN EVIDENTIARY HEARING ON APPELLANT'S MOTION TO WITHDRAW PLEA.

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

This Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d

at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Here, the district court determined that it could rule on Appellant's Motion to Withdraw Guilty Plea without expanding the record:

> And although, yes, I certainly have allowed for a hearing, I don't think either the Supreme Court or the State Supreme Court requires that in every case we do this when a defendant decides that, oh, they're no longer satisfied with their plea. And I think that the overall, and I forget how the State Supreme Court worded this, the overall circumstances show that the plea was entered knowingly and voluntarily.
> And therefore I'm denying the motion for Mr. Powell to withdraw his guilty plea.

AA 000079. The district court judge has sat for the beginning of voir dire, was familiar with the facts and circumstances of the case, and performed the plea canvass of Appellant and his co-defendant. RA 000198-220. The district court was aware that the parties took hours to come to a negotiation and that the ten additional charges

were discussed at length in the negotiation. AA 000074-75. The district court was also aware of the other benefits Appellant would receive as a part of the negotiation. Id. at 000075. Finally, based on the plea canvass and the surrounding facts and circumstances, the district court found Appellant's claims lack merit and, therefore, an evidentiary hearing was unnecessary. See NRS 34.770; Marshall, 110 Nev. 1328, 885 P.2d 603; Mann, 118 Nev. at 356, 46 P.3d at 1231. Thus, the district court did not abuse its discretion by denying Appellant's request for an evidentiary hearing and Appellant's claim fails.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the district court's denial of Appellant's Motion to Withdraw Guilty Plea.

Dated this 6th day of November, 2019.

Respectfully submitted,

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

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 7,919 words.
3. **Finally, I hereby 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 a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of November, 2019.

Respectfully submitted

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

BY */s/ Taleen Pandukht*

TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 6, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

MONIQUE MCNEILL, ESQ.
Counsel for Appellant

TALEEN PANDUKHT
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

TP/Skylar Sullivan/ed