IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN SUNSERI, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 81551

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

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

STATEMENT OF THE ISSUE(S)

1. Whether Appellant's claims under Doggett v. United States were waived under the terms of his Guilty Plea Agreement.
2. Whether the district court did not abuse its discretion when it denied Appellant's Motion to Dismiss because there was no violation of Doggett v. United States.

3. Whether the district court did not abuse its discretion when it denied Appellant's Motion to Withdraw Guilty Plea.

STATEMENT OF THE CASE

On September 14, 2018, Kevin Sunseri (hereinafter "Appellant") was charged by way of Information with: Count 1 – Robbery (Category B Felony – NRS 200.380); and Count 2 – Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360). 1 AA 014-15.

On September 21, 2018, Appellant, pursuant to a Guilty Plea Agreement ("GPA"), pled guilty to the charges contained in the Information. Id. at 008-13.

On December 11, 2018, Appellant appeared for sentencing and his counsel requested a competency evaluation. Id. at 018, 020-21. Appellant was referred to competency court and his case was stayed pending evaluation. Id.

On January 9, 2019, the district court filed an Order of Commitment wherein Appellant was found incompetent and the district court ordered his case was suspended until such time he was found competent. Id. at 022-24.

On March 5, 2019, Appellant was returned from competency court after being found competent to stand trial. Id. at 025. Counsel at that time noted that she was trying to get Appellant accepted into the Mental Health Court program and his case was continued. Id. On April 16, 2019, Appellant was again before the district court and his bail was reinstated. Id. at 029-31.

On May 30, 2019, Appellant had new counsel substitute in on his case. Id. at 033. At this time, new counsel represented that he believed that there was a basis for Appellant to withdraw his plea and the matter was continued. Id. at 033-34.

On June 3, 2019, Appellant filed a Motion to Withdraw Guilty Plea. Id. at 036-71. The State filed its Opposition on July 10, 2019. Id. at 077-084. On July 25, 2019, Appellant's motion came before the district court for argument and an evidentiary hearing was set. Id. at 090, 092-106. An evidentiary hearing was held on November 20, 2019, at which time the district court took the matter under advisement. Id. at 125; 2 AA 127-89. On January 9, 2020, Appellant filed a Supplement in Support of Motion to Withdraw Guilty Plea. 2 AA 190-212. On January 19, 2020, Appellant filed an Amended Supplement in Support of Motion to Withdraw Guilty Plea[] and Motion to Dismiss. Id. at 217-24. The State filed its Response to Appellant's Supplements on January 27, 2020. Id. at 225; 3 AA 226-34. Appellant filed his Reply to the State's Response on February 6, 2020. 3 AA 235-38. On February 27, 2020, the district court issued a minute order wherein Appellant's Motion to Withdraw Guilty Plea was denied. Id. at 239-40. The district court issued its Findings of Fact, Conclusions of Law and Order denying Appellant's Motion on April 1, 2020. Id. at 256-65.

On March 25, 2020, Appellant filed a Motion to Dismiss Pursuant to Doggett v. United States. Id. at 241-55. The State filed its Opposition on April 3, 2020. Id. at

266-71. On May 26, 2020, the district court issued a minute order wherein it denied Appellant's Motion to Dismiss. Id. at 272-73. The district court issued its Order Denying [Appellant]'s Motion to Dismiss on June 1, 2020. Id. at 274-76.

On June 30, 2020, Appellant was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – sixty-six (66) to one hundred eighty (180) months; and as to Count 2 – twenty-four (24) to sixty (60) months concurrent with Count 1. Id. at 281, 299. The Judgment of Conviction was filed on July 1, 2020. Id. at 301-02.

On July 26, 2020, Appellant filed a Notice of Appeal. Id. at 303-04.

STATEMENT OF THE FACTS

The district court relied on the following facts at sentencing:

> On December 10, 2015, the victim was sitting inside of a local bar when he was approached by [Appellant]. [Appellant] engaged in a conversation with the victim and introduced the victim to an unknown female acquaintance. [Appellant] and the unidentified woman invited the victim to look at their cars in the parking lot. As the victim was looking at the speakers in the truck of [Appellant]'s vehicle, [Appellant] went to the driver side of the vehicle and increased the volume. [Appellant] returned to the trunk of the vehicle and held a semi-automatic firearm against the victim's neck and stated, "Give me your money." As the victim gave [Appellant] a portion of his money, [Appellant] stated, "l know you have more, you better give me the rest. Your life is worth more than money." The victim complied and gave [Appellant] over $2,200.00.
>
> [Appellant] instructed the victim to enter the vehicle stating, "Get in the car and I won't hurt you, I'll just drop

> you off down the street." The victim was placed into the back passenger seat as [Appellant] sat in the front passenger seat and the unidentified woman drove the vehicle. The victim found the door was locked and [Appellant] made the victim hold his right hand so he would not be able to leave. Once they reached another location, [Appellant] demanded the victim's phone and instructed the victim to get out of the vehicle. [Appellant] and unidentified woman drove off and left the victim.
>
> On January 23, 2016, the victim provided further description of the vehicle to a detective. The vehicle had a large speaker in the trunk and an aftermarket stereo. It was discovered that the vehicle from the instant offense was believed to have been towed as it was abandoned in a local casino parking lot. A records check of that vehicle returned under [Appellant]'s name. A search of the vehicle revealed a large speaker in the trunk and an aftermarket stereo system

Presentence Investigation Report ("PSI") at 12.[1]

SUMMARY OF THE ARGUMENT

As an initial matter, Appellant's claims are waived because Appellant cannot raise constitutional claims that occurred prior to his guilty plea. Even if Appellant's claims are not waived, the district court did not abuse its discretion when it denied Appellant's Motion to Dismiss Pursuant to Doggett v. United States because Appellant's rights were not violated. Further, even if Appellant's claims are not waived, the district court did not abuse its discretion when it denied Appellant's

[1] The State has filed a contemporaneous Motion to Transmit the Presentence Investigation Report with the Instant Response.

Motion to Withdraw Guilty Plea because Appellant's plea was knowingly and voluntarily entered into.

ARGUMENT

I. APPELLANT'S CLAIMS ARE WAIVED BECAUSE APPELLANT CANNOT RAISE CONSTITUTIONAL CLAIMS THAT OCCURRED PRIOR TO HIS GUILTY PLEA.

Appellant's overall claim is that he should be permitted to withdraw his plea and have this Court dismiss his case because his speedy trial rights were violated. See generally, Appellant's Opening Brief ("AOB"). However, Appellant's claim is meritless because he waived any constitutional claims by nature of his guilty plea.

A defendant cannot enter a guilty plea then later raise independent claims alleging a deprivation of his rights before entry of the plea. State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)). Generally, the entry of a guilty plea waives any right to appeal from events occurring prior to the entry of the plea. See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975). "'[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. . . . [A defendant] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" Id. (quoting Tollett, 411 U.S. at 267).

Appellant entered his plea on September 21, 2018. The district court denied his Motion to Withdraw Guilty Plea and Motion to Dismiss on February 27, 2020,

and May 26, 2020, respectively. Appellant waived his right to a speedy trial by pleading guilty. As this Court clearly laid out in Webb, Nevada law does not permit a defendant, after willingly pleading guilty, to "thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" 91 Nev. 469, 538 P.2d 164 (quoting Tollett, 411 U.S. at 267). That is precisely what was done in the instant matter. Consequently, this argument should be denied as it has been waived.

II. EVEN IF APPELLANT'S CLAIMS ARE NOT WAIVED, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO DISMISS.

Appellant claims that the district court erred when it denied Appellant's Motion to Dismiss pursuant to Doggett v. United States, 505 U.S. 650, 112 S. Ct. 2686 (1992). AOB at 16-28. This Court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 188 P.3d 51 (2008); McNelton v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999).

NRS 178.556(1) grants the district court discretion to dismiss a case if it is not brought to trial within 60 days due to unreasonable delay. Dismissal is only mandatory where there is not good cause for delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 2690-91 (1992). Delays are not

presumptively prejudicial until one year or more has passed. Id. at 651-52 fn. 1, 112 S. Ct. at 2690-91 fn. 1; see also Byford v. State, 116 Nev. 215, 230, 994 P.2d 700, 711 (2000). The Doggett Court justified the imposition of this threshold requirement noting that "by definition he cannot complain that the government has denied him a 'speedy trial' if it has, in fact, prosecuted the case with customary promptness." Doggett, 505 U.S. at 651-52, 112 S. Ct. at 2690-91.

If this hurdle is overcome, a court determines if a constitutional speedy trial violation has occurred by applying the four-part test laid out in Barker v. Wingo, which examines the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002) (quoting Barker, 406 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972)). The Barker factors must be considered collectively as no single element is necessary or sufficient. Moore v. Arizona, 414 U.S. 25, 26, 94 S. Ct. 188, 189 (1973) (quoting Barker, 407 U.S. at 533, 92 S. Ct. at 2193). However, to warrant relief the prejudice shown must be attributable to the delay. Anderson, 86 Nev. at 833, 477 P.2d at 598.

Appellant cites to Doggett in support of his contention that the district court should have dismissed his case. AOB at 16. In Doggett, the defendant was indicted in 1980 in federal court on drug charges but had left for Colombia prior to his arrest. 505 U.S. at 648-49, 112 S. Ct. at 2689. Over a year later, the DEA agent in charge

learned that Doggett was in custody on drug charges in Panama and simply asked that he be returned to the United States. Id. at 649, 112 S. Ct. at 2689. The American Embassy in Panama then informed the State Department that Doggett had been released and was permitted to go back to Colombia. Id. However, the DEA agent in charge was unaware of his release until 1985, but made no efforts to locate Doggett at that time. Id. at 650, 112 S. Ct. at 2689. In 1982, Doggett returned to the United States and was not located until 1988 after a credit check found where he lived and worked. Id. at 649-50, 112 S. Ct. at 2689. Doggett was arrested approximately eight (8) and a half years after the indictment. Id. at 650, 112 S. Ct. at 2690.

Doggett moved to dismiss the indictment based on the Government's failure to prosecute. Id. The federal district court denied Doggett's motion and entered a conditional guilty plea *expressly reserving his right to appeal on the speedy trial violation*. Id. at 650-51, 112 S. Ct. at 2690. The United States Supreme Court found that, because the defendant specifically reserved his right to appeal on the speedy trial violation, the Government's negligence which caused a delay six (6) times longer than that generally sufficient to trigger review warranted relief because the Government failed to demonstrate that his ability to defend himself was unimpaired. Id. at 657-68, 112 S. Ct. at 2694.

Appellant also cites to State v. Inzunza, 135 Nev. 513, 454 P.3d 727 (2019), in support on his claims. AOB at 17. In Inzunza, the defendant was charged in 2014

with sexually assaulting a nine-year-old six (6) years prior. 135 Nev. at 514, 454 P.3d at 729-30. During an interview, and prior to charges being filed, the minor's mother informed North Las Vegas Police Department ("NLVPD") detectives that Inzunza had moved to New Jersey and provided printouts from his Facebook page depicting his car, New Jersey license plate, and his employer's work truck with the business's name and number. Id. The detective issued an arrest warrant but made no other efforts to follow up on the mother's information. Id. at 514-15, 454 P.3d at 730. Approximately two (2) years later, Inzunza was arrested in New Jersey and extradited to Nevada. Id. Inzunza moved to dismiss the case and the district court granted the motion, stating that the State had been grossly negligent in pursuing prosecution. Id. at 515, 454 P.3d at 730. This Court upheld the district court's decision, finding that the State had failed to provide any rebuttal evidence that the defendant was prejudiced by the delay. Id. at 522, 454 P.3d at 735.

Appellant's reliance on Inzunza is misguided. In fact, the district court found that Inzunza was inapplicable in Appellant's case and those factual findings shall be given deference by this Court. 3 AA 275; see also Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Here, Appellant acknowledged his guilt and waived his Sixth Amendment speedy trial rights. This case bears no resemblance to Inzunza because Appellant's Sixth Amendment speedy trial right is not at issue since he pled guilty and waived any right to a trial. Further, unlike in Doggett, Appellant did not

conditionally accept his plea or expressly reserve the right to appeal the alleged speedy trial violation. Thus, Appellant's claim fails.

Further, applying Barker's four-part test, the reasons for the delay weigh against Appellant. Appellant never asserted his right to a speedy trial, in fact, Appellant waived that right when he entered his guilty plea at his arraignment on September 21, 2018. 1 AA 011. Appellant also acknowledged at the evidentiary hearing that he had waived his speedy trial right under the agreement. 2 AA 176. Therefore, Appellant cannot claim that his speedy trial rights were violated because he never invoked that right. Further, any delay was reasonable because the delays were the result of Appellant's incarceration on other charges. Appellant presented no evidence to this Court that police were aware of Appellant's location at any time after the arrest warrant issued. In fact, Las Vegas Metropolitan Police Department ("LVMPD") Law Enforcement Support Technician Amy Colin testified that notes regarding attempts to locate a defendant would only be in the system if the detective put the notes in the P1 system, which does not always occur. Id. at 155-56. So, Appellant provided no definitive proof to the district court that detectives knew where Appellant was and made no effort to execute the arrest warrant. Thus, unlike Doggett and Inzunza, Appellant has demonstrated no negligence on the part of the State. Therefore, because the delay was reasonable, Appellant's speedy trial rights were not violated and his argument is without merit. Moreover, Appellant does not

even attempt to demonstrate how he was prejudiced. The only evidence in support of Appellant's contention that he was unaware of the arrest warrant are his own self-serving statements. Id. at 161-62. Therefore, Appellant's claims are nothing more than bare and naked assertions only appropriate for summary denial. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Thus, the district court did not abuse its discretion when it denied Appellant's Motion to Dismiss and Appellant's claim fails.

III. EVEN IF APPELLANT'S CLAIMS ARE NOT WAIVED, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA.

Appellant claims that the district court erred when it denied his Motion to Withdraw Guilty Plea because the violation of his speedy trial rights was a "fair and just" reason to withdraw his plea. AOB at 28-33. 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). "However, the district court must also look to the totality of the circumstances and the entire record." Woods v. State, 114 Nev. 468, 469, 958 P.2d 91, 91 (1998); See State v. Second Judicial Dist. Court (Bernardelli), 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)). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Deference must be given to factual findings made by the district court in the course of a motion to withdraw a guilty plea. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

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 into voluntarily Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); 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 guilty plea is knowingly and voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. The proper standard set forth in Bryant requires the trial court to personally address a 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. Id. at 271; State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The guidelines for voluntariness of pleas "do not require the articulation of talismanic phrases." Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d

1403, 1404 (1973). It requires only "that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747-48, 90 S. Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir. 1973).

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).

This Court recently decided Stevenson v. State, 131 Nev. Adv. Op. 61, (Aug. 13, 2015), holding that the statement in Crawford v. State, 117 Nev. 718, 30 P.3d 1123 (2001), which focuses the "fair and just" analysis solely upon whether the plea was knowing, voluntary, and intelligent is more narrow than contemplated by NRS 176.165. This Court therefore disavowed Crawford's exclusive focus on the validity of the plea and affirmed that the district court must consider the totality of the

circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just. However, the Court also held that the defendant had failed to present a fair and just reason favoring withdrawal of his plea and therefore affirmed his judgment of conviction. Stevenson, 131 Nev. Adv. Op. (Aug. 13, 2015).

In Stevenson, this Court found that none of the reasons presented warranted the withdrawal of Stevenson'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. The Court similarly found unconvincing Stevenson'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. As the 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. at 9 (quoting Doe v. Woodford, 508 F.3d 563, 570 (9th Cir. 2007).

This Court also rejected Stevenson'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. Stevenson did not move to withdraw his plea for several months. The 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 10 (quoting United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991). The Court found that, considering the totality of the circumstances, they had no difficulty in concluding that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. 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. at 11 (quoting United States v. Barker, 514 F.2d 208, 222 (D.C. Cir. 1975).

As an initial matter, Appellant has declined to provide this Court with his plea canvass from September 21, 2018. Therefore, this Court cannot consider Appellant's argument as the plea canvass would demonstrate whether Appellant's plea was knowingly and voluntarily entered into. See generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court)." NRAP 28(a)(9) states that an appellant's brief must contain argument with "citations to the authorities and ***parts of the record"*** on which the appellant's contentions rely." (emphasis added). Failure to do so may result in this Court's decision not to consider the argument. Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) (This court need not consider the contentions of an

appellant where the appellant's opening brief fails to cite to the record on appeal) (citing Skinner v. State, 83 Nev. 380, 384, 432 P.2d 675, 677 (1967)). Thus, as Appellant has failed to provide this Court with the transcript of his plea canvass, this Court should decline to consider Appellant's claim.

Should this Court be inclined to consider Appellant's claim on the merits, Appellant's claim similarly fails. In this case, just as in Stevenson, considering the totality of the circumstances, Appellant failed to present a sufficient reason to permit withdrawal of his guilty plea. Here, by signing his GPA, Appellant represented that he was fully aware of the plea agreement in this case:

> My decision to plead guilty is based upon the plea agreement in this case which is as follows: The State retains the right to argue.

1 AA 008.

Appellant also acknowledged that he did not enter his plea pursuant to any promises made to him:

> I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute. I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

Id. at 010.

Appellant also acknowledged that he was waiving various rights pursuant to the agreement he entered into with the State. Id. at 011. Moreover, Appellant acknowledged that the following statements are true:

> I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
>
> I understand that the State would have to prove each element of the charge(s) against me at trial.
>
> 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 a trial would be contrary to my best interest.
>
> I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.
>
> I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.
>
> 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 012.

Finally, Appellant's attorney executed a "Certificate of Counsel" as an officer of the court affirming the following:

> 1. I have fully explained to [Appellant] the allegations contained in the charge(s) to which guilty pleas are being entered.
> 2. I have advised [Appellant] of the penalties for each charge and the restitution that [Appellant] may be ordered to pay.
> …
> 4. All pleas of guilty offered by [Appellant] pursuant to this agreement are consistent with the facts known to me and are made with my advice to [Appellant].
> 5. To the best of my knowledge and belief, [Appellant]:
> a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement,
> b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily, and
> c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with [Appellant] as certified in paragraphs 1 and 2 above.

Id. at 013.

Based on Appellant's representations on the record, the district court found Appellant's plea was freely and voluntarily entered into and accepted Appellant's plea. In reviewing the totality of circumstances, it is clear that: 1) Appellant 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) Appellant understood the

consequences of his plea and the range of punishment; and 4) Appellant understood the nature of the charge, i.e., the elements of the crime.

Appellant entered his plea on September 21, 2018, but waited almost *one year* before filing a Motion to Withdraw Guilty Plea. Appellant claims that he should have been able to withdraw his plea based on the failure of prior counsel to litigate the timeliness of the State's prosecution against him. The contention this was a hastily entered plea, and not a strategic decision by Appellant and his counsel is belied by the record.

Appellant made the decision to plead guilty, and by doing so waived any right to file any pretrial motions or claims. The scope of what issues can be raised in a Motion to Withdraw Guilty Plea is extremely narrow. Appellant's claim is outside of the limited scope of whether the plea was knowingly and voluntarily entered through looking at the totality of the circumstances. Higby, 86 Nev. at 781, 476 P.2d at 963. Moreover, to the extent Appellant is alleging that his counsel was ineffective in not advising him of certain legal remedies, that claim is also improperly before this Court. An ineffective assistance of counsel claim can only be brought in a post-conviction Petition for Writ of Habeas Corpus. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994). Thus, the district court properly denied Appellant's Motion to Withdraw Guilty Plea and Appellant's claim fails.

/ / /

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Appellant's Judgment of Conviction.

Dated this 15th day of December, 2020.

Respectfully submitted,

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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 2003 in 14 point font of the Times New Roman style.
2. **I further 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 a typeface of 14 points of more, contains 4,924 words and 21 pages.
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 15th day of December, 2020.

Respectfully submitted

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BY */s/ John T. Niman*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 15th day of December, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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